CAPITAL CASE

No.

IN THE
Supreme Court of the United States

JESSIE DOTSON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TENNESSEE SUPREME COURT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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673 S.W.3d 204
Supreme Court of Tennessee,
AT JACKSON.

Jessie DOTSON
v.
STATE of Tennessee

No. W2019-01059-SC-R11-PD
|
April 5, 2023 Session
|
FILED July 7, 2023

Synopsis

Background: After affirmance, 450 S.W.3d 1, of petitioner's convictions and death sentence for six counts of premeditated first-degree murder, petitioner sought post-conviction relief and funding, as indigent capital post-conviction petitioner, to hire expert witnesses to assist in establishing his claims of ineffective assistance of counsel. The Criminal Court, Shelby County, James C. Beasley, Jr., Special Judge, authorized the funds, but the Director of the Administrative Office of the Courts (AOC) and the Chief Justice, on administrative review, reduced the hourly rate for one expert and denied funding requests for remaining three experts, and the petition was denied after evidentiary hearing at which petitioner proceeded without assistance from those expert witnesses. Petitioner appealed. The Court of Criminal Appeals, 2022 WL 860414, affirmed. Appeal was by permission.

Holdings: The Supreme Court, Lee, J., held that:

[1] administrative review by AOC's Director and the Chief Justice does not violate constitutional separation of powers;

[2] petitioner lacked a property interest, protected by procedural due process, in funding for expert witnesses;

[3] administrative funding decision of Chief Justice was not reviewable as part of post-conviction court's final judgment;

[4] petitioner's constitutional challenges to Supreme Court Rule were not reviewable by Court of Criminal Appeals;

[5] as a matter of first impression, due process does not require appellate review of administrative funding decisions of AOC's Director and the Chief Justice; and

[6] denial of funding did not violate petitioner's statutory right to full and fair post-conviction hearing.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (25)

[1] **Criminal Law** Review De Novo

Questions of law are reviewed de novo with no presumption of correctness.

[2] **Courts** Construction and application of rules in general

Supreme Court Rules are interpreted using the same rules of construction as when statutes are interpreted. Tenn. Sup. Ct. Rule 1 et seq.

[3] **Courts** Operation and Effect of Rules

As the promulgator of the Supreme Court Rules, the Supreme Court is the primary arbiter of the rules. Tenn. Sup. Ct. Rule 1 et seq.

[4] **Costs, Fees, and Sanctions** Funds for obtaining and presenting evidence

Substantive review in Tennessee, by the Director of the Administrative Office of the Courts (AOC) and the Chief Justice, of a post-conviction court's prior approval of state funding for expert witnesses for an indigent capital post-conviction petitioner, is not authorized under the Supreme Court Rules, and instead, the role of the Director and the Chief Justice under the Rules is to ensure that the prior approval complied with the Rules and to efficiently and fairly manage the limited pool of state funds for indigent non-capital and capital defendants facing trial

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and for indigent petitioners in capital post-conviction cases, after a post-conviction court has given prior approval for funding without being required to consider budgetary concerns. Tenn. Code Ann. § 40-14-207(b); Tenn. Sup. Ct. Rule 13.

[5] **Constitutional Law** Nature and scope in general

Costs, Fees, and Sanctions Funds for obtaining and presenting evidence

Administrative review in Tennessee, by the Director of the Administrative Office of the Courts (AOC) and the Chief Justice, of a post-conviction court's prior approval of state funding for expert witnesses for an indigent capital post-conviction petitioner, does not violate constitutional separation of powers by allegedly vesting in an entity, which is not vested with state's judicial power, the power to substantively review post-conviction court's prior approval; role of Director and Chief Justice under the Supreme Court Rules does not involve substantive review, and instead their role is to ensure that the prior approval complied with Rules and to efficiently and fairly manage limited pool of state funds for indigent non-capital and capital defendants facing trial and for indigent petitioners in capital post-conviction cases. Tenn. Const. art. 2, §§ 1, 2; Tenn. Const. art. 6, §§ 1, 2, 3; Tenn. Code Ann. § 40-14-207(b); Tenn. Sup. Ct. Rule 13.

[6] **Constitutional Law** Procedural due process in general

The procedural due process protections in the United States Constitution and the Tennessee Constitution are essentially the same. U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8.

[7] **Constitutional Law** Procedural due process in general

When considering a procedural due process claim, a court must first determine whether the plaintiff has an interest entitled to due process protection, and if the plaintiff has a protected interest, then the court must determine what process is due, and once the court determines the minimum procedural due process protections to which the plaintiff is entitled, the court must finally determine whether the challenged procedures satisfy these minimum requirements. U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8.

[8] **Constitutional Law** Rights, Interests, Benefits, or Privileges Involved in General

In considering whether a plaintiff has an interest that is entitled to procedural due process protection, a court may look beyond the federal and state Constitutions because state law may create and define the dimensions of constitutionally protected interests. U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8.

[9] **Criminal Law** Nature of Remedy

Post-conviction proceedings are not constitutionally required.

[10] **Constitutional Law** Post-conviction relief

Costs, Fees, and Sanctions Funds for obtaining and presenting evidence

State statute providing indigent capital post-conviction petitioners with access to state funding for expert witnesses for post-conviction proceedings, and Supreme Court Rule establishing a procedural mechanism for implementing the indigent funding statute, do not create an interest in funds that is protected by procedural due process; while a post-conviction court may grant prior approval of funds upon proper showing, post-conviction court has no authority to direct payment of funds, and instead, prior approval lies with the Director of the Administrative Office of the Courts (AOC), and ultimately the Chief Justice, and necessarily hinges on an administrative funding decision. U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8; Tenn. Code Ann. § 40-14-207(b); Tenn. Sup. Ct. R. 13.

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[11] **Criminal Law** Post-conviction relief

A post-conviction court's denial or limitation of prior authorization of state funding for expert witnesses for an indigent capital post-conviction petitioner is reviewed under the abuse of discretion standard. Tenn. Code Ann. § 40-14-207(b); Tenn. R. App. P. 3(b), 9, 10; Tenn. Sup. Ct. Rule 13.

[12] **Criminal Law** On motion to set aside judgment or coram nobis

Administrative funding decision of Chief Justice, denying prior approval, by post-conviction court, of state funding for expert witnesses for indigent capital post-conviction petitioner, was not reviewable as part of post-conviction court's final judgment denying the petition. Tenn. Code Ann. § 40-14-207(b); Tenn. R. App. P. 3(b); Tenn. Sup. Ct. R. 13.

[13] **Criminal Law** On motion to set aside judgment or coram nobis

Indigent capital post-conviction petitioner's constitutional challenges, on appeal to Court of Criminal Appeals from final judgment denying post-conviction relief, to Supreme Court Rule establishing a procedural mechanism for implementing the statute providing indigent capital post-conviction petitioners with access to state funding for expert witnesses for post-conviction proceedings, could lead to invalidation of portions of Rule for which Supreme Court was arbiter, and thus, Court of Criminal Appeals lacked authority to consider constitutional challenges. Tenn. Code Ann. § 40-14-207(b); Tenn. R. App. P. 3(b); Tenn. Sup. Ct. R. 13.

[14] **Constitutional Law** Right to appeal and other proceedings for review

Costs, Fees, and Sanctions Funds for obtaining and presenting evidence

Criminal Law On motion to set aside judgment or coram nobis

Inability of indigent capital post-conviction petitioner to directly appeal from administrative funding decision of Chief Justice, denying prior approval, by post-conviction court, of state funding for expert witnesses for petitioner, did not violate Open Courts Clause of state Constitution; petitioner had open courts, through Supreme Court, to adjudicate his post-conviction challenges to his convictions and/or sentences, including consideration of whether denial of funds deprived him of statutory right to full and fair post-conviction hearing. Tenn. Const. art. 1, § 17; Tenn. Code Ann. §§ 40-14-207(b), 40-30-106(h); Tenn. Sup. Ct. R. 13.

[15] **Constitutional Law** Similarly situated persons; like circumstances

Under state and federal constitutional guarantees of equal protection of the law, all persons similarly circumstanced must be treated alike, and conversely, things which are different in fact or opinion are not required by either Constitution to be treated the same. U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8.

1 Case that cites this headnote

[16] **Constitutional Law** Criminal law

Criminal Law On motion to set aside judgment or coram nobis

Indigent capital post-conviction petitioner was not similarly situated with putative comparators, for equal protection purposes, with respect to availability, after final judgment denying post-conviction relief, of appeal to Court of Criminal Appeals from decision regarding state funding for expert witnesses for post-conviction proceedings; appeal that was unavailable to class that included petitioner involved administrative funding decisions of Director of the Administrative Office of the Courts (AOC) and the Chief Justice, which were based on need to marshal limited funds available for more requests than could be granted, while available appeals for another class of indigent

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capital post-conviction petitioners involved prior authorization decisions of post-conviction courts that were based on substantive review of merits of a petitioner's need for experts. U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8; Tenn. Code Ann. § 40-14-207(b); Tenn. R. App. P. 3(b); Tenn. Sup. Ct. R. 13.

[17] **Constitutional Law** Post-conviction relief

Criminal Law On motion to set aside judgment or coram nobis

Due process does not require appellate review of administrative funding decisions of the Director of the Administrative Office of the Courts (AOC) and the Chief Justice denying a post-conviction court's prior approval of state funding for expert witnesses for an indigent capital post-conviction petitioner; even without appellate review of reasons for administrative funding decisions, which require balancing of overall limitations on available funds for indigent criminal litigants against current pending requests for funds and future requests projected for remainder of fiscal year, effects of those decisions are subject to review, i.e., a petitioner can bring appellate claim alleging denial of statutory right to full and fair post-conviction hearing. U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8; Tenn. Code Ann. § 40-14-207(b); Tenn. R. App. P. 3(b), 11; Tenn. Sup. Ct. R. 13.

[18] **Constitutional Law** Post-conviction relief

Due process in the post-conviction context merely requires that the petitioner have the opportunity to be heard at a meaningful time and in a meaningful manner. U.S. Const. Amend. 14; Tenn. Const. art. 1, § 8.

1 Case that cites this headnote

[19] **Costs, Fees, and Sanctions** Funds for obtaining and presenting evidence

When an indigent capital post-conviction petitioner asserts that the denial of his statutory right to a full and fair post-conviction hearing due to the denial of state funding for expert witnesses, he should identify the grounds for post-conviction relief he was either unable to present or unable to fully and fairly present at the hearing without the assistance of the desired experts; this specificity allows the court to identify the grounds, assess the available evidence relevant to those grounds, and consider whether the absence of the desired expert denied the petitioner a full and fair hearing on those grounds. Tenn. Code Ann. §§ 40-14-207(b), 40-30-106(h).

1 Case that cites this headnote

[20] **Costs, Fees, and Sanctions** Funds for obtaining and presenting evidence

Indigent capital post-conviction petitioner had the burden of establishing by clear and convincing evidence his factual allegations for his claim that he was denied his statutory right to a full and fair post-conviction hearing due to the denial of state funding for expert witnesses. Tenn. Code Ann. §§ 40-14-207(b), 40-30-106(h), 40-30-110(f).

1 Case that cites this headnote

[21] **Criminal Law** Deficient representation in general

Counsel performs deficiently, as element of ineffective assistance of counsel, if counsel's representation falls below an objective standard of reasonableness. U.S. Const. Amend. 6.

[22] **Criminal Law** Prejudice in general

Counsel's deficient performance, alone, does not warrant automatic relief on a claim of ineffective assistance of counsel, and defendant must also show prejudice, i.e., there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and a reasonable probability is a probability sufficient to undermine confidence in the outcome. U.S. Const. Amend. 6.

[23] **Criminal Law** Determination

On a claim of ineffective assistance of counsel, defendant must prove sufficient facts to support both the deficiency and prejudice prongs of the *Strickland* inquiry—or, stated another way, the court need only determine that the defendant's proof is insufficient to support one of the two prongs to deny the claim. U.S. Const. Amend. 6.

[24] Costs, Fees, and Sanctions Funds for obtaining and presenting evidence

Denial of indigent capital post-conviction petitioner's request for state funding for expert witness in psychiatry and neurology, for claims that trial counsel were ineffective at guilt and penalty phases of murder trial in failing to present expert testimony regarding falsity of petitioner's confessions and mitigating factors at penalty phase, did not violate petitioner's statutory right to full and fair post-conviction hearing, where it was unlikely that any testimony from desired expert would have altered post-conviction court's conclusion that counsel investigated possible defenses and mitigation through the expert witnesses and thoughtfully evaluated the results before deciding not to call the witnesses at trial. U.S. Const. Amend. 6; Tenn. Code Ann. §§ 40-14-207(b), 40-30-106(h).

[25] Criminal Law Strategy and tactics in general

Deference to matters of strategy and tactical choices applies, on a claim of ineffective assistance of counsel, only if counsel's choices are informed ones based on adequate preparation. U.S. Const. Amend. 6.

***208 Appeal by Permission from the Court of Criminal Appeals, Criminal Court for Shelby County, No. 08-07688, James C. Beasley, Jr., Special Judge**

Attorneys and Law Firms

Justyna Scalpone, Post-Conviction Defender; and Kelly A. Gleason and Andrew L. Harris, Assistant Post-Conviction Defenders, Nashville, Tennessee, for the appellant, Jessie Dotson.

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David R. Esquivel and Michael C. Tackeff, Nashville, Tennessee, for Amici Curiae, Former Access to Justice Commission Chairs, Tennessee Innocence Project, Choosing Justice Initiative, and Tennessee Association of Criminal Defense Lawyers.

Sharon G. Lee, J., delivered the opinion of the Court, in which Roger A. Page, C.J., and Holly Kirby and Sarah K. Campbell, JJ., joined. Jeffrey S. Bivins, J., not participating. [1]

OPINION

Sharon G. Lee, J.

***209** This appeal involves a capital post-conviction petitioner's expert funding requests under Tennessee Supreme Court Rule 13. A jury convicted the Petitioner, Jessie Dotson, of six counts of premeditated first-degree murder and sentenced him to death. This Court affirmed the jury's verdict. The Petitioner filed for post-conviction relief, alleging several grounds of ineffective assistance of counsel. He requested funds under Tennessee Supreme Court Rule 13 to hire expert witnesses to assist in establishing his claims of ineffective assistance of counsel. The post-conviction court authorized the funds, but the Director of the Administrative Office of the Courts (AOC) and the Chief Justice denied approval for some of the Petitioner's requested experts. After an evidentiary hearing, the post-conviction court denied relief. The Court of Criminal Appeals affirmed the ruling without deciding the Petitioner's Rule 13 constitutional challenges. We granted review to consider the Petitioner's constitutional issues regarding Rule 13. We hold the provisions of Rule 13 are constitutional as applied; the Petitioner was not unconstitutionally denied appellate review of the denial of his request for expert funds; and the Petitioner was not deprived

of a full and fair post-conviction hearing due to the denial of expert funds.

This appeal focuses on Rule 13 and the administration of funds appropriated by the General Assembly for the provision of expert, investigative, or other similar services for indigent post-conviction petitioners in capital cases. Rule 13 establishes the procedures indigent defendants must use to request funds for expert services in the trial court and for the AOC Director and the Chief Justice's administrative review of the trial court's authorization of funds. Tenn. Code Ann. § 40-14-207(b) (2012); Tenn. Sup. Ct. R. 13.

The Petitioner requested funds under Rule 13 to hire expert witnesses to assist in his post-conviction proceedings. In the four instances at issue here, the post-conviction court authorized the funds, but the AOC Director and the Chief Justice either reduced the requested amount or denied approval of the funds. The Petitioner proceeded under protest to the post-conviction evidentiary hearing without the assistance of these witnesses. The post-conviction court denied relief, and the Court of Criminal Appeals affirmed.

We granted the Petitioner's application for permission to appeal under Rule 11 of the Tennessee Rules of Appellate Procedure to consider these issues: whether the provisions of Rule 13 for prior approval review are unconstitutional, as applied; whether the Petitioner has been unconstitutionally denied appellate review of the denial of expert funds; and whether the Petitioner has been deprived of his statutory right to a full and fair post-conviction hearing due to the denial of expert funds. [2]

***210** **[1]** **[2]** **[3]** These issues present questions of law, which we review de novo with no presumption of correctness. *State v. McCoy*, 459 S.W.3d 1, 8 (Tenn. 2014) (citing *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009)); *Pratcher v. Methodist Healthcare Memphis Hosps.*, 407 S.W.3d 727, 734 (Tenn. 2013). We interpret Supreme Court Rules using the same rules of construction as when we interpret statutes. *Thomas v. Oldfield*, 279 S.W.3d 259, 261 (Tenn. 2009) ("In construing the rules of this Court, ... our goal is to ascertain and give effect to this Court's intent in adopting its rules."). As the promulgator of Rule 13, this Court "is the rule's primary arbiter." *In re Gant*, 937 S.W.2d 842, 846 (Tenn. 1996).

Tennessee Supreme Court Rule 13

The Tennessee General Assembly annually appropriates a finite and limited amount of funds for indigent litigants in capital cases. Tennessee Code Annotated section 40-14-207(b) provides for investigative or expert services for indigent defendants:

> (b) In capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, the court in an *ex parte* hearing may, in its discretion, determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected. If that determination is made, the court may grant prior authorization for these necessary services in a reasonable amount to be determined by the court. The authorization shall be evidenced by a signed order of the court. The order shall provide for the reimbursement of reasonable and necessary expenses by the administrative director of the courts as authorized by this part and rules promulgated thereunder by the supreme court.

Tenn. Code Ann. § 40-14-207(b). This Court adopted Rule 13 as the procedural framework for administration of these funds and later amended Rule 13 to include provisions for capital post-conviction cases. [3] Rule 13, section 5 provides:

> **Section 5. Experts, investigators, and other support services.**
>
> (a)(1) In the trial and direct appeal of all criminal cases in which the defendant is entitled to appointed counsel and in the trial *and appeals of post-conviction proceedings in capital cases* involving indigent petitioners, the court, in an *ex parte* hearing, may in its discretion determine that investigative or expert services or other similar services

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are necessary to ensure that the constitutional rights of the defendant are properly protected. If such determination is made, the court may grant prior authorization for these necessary services in a reasonable amount to be determined by the court. The authorization shall be evidenced by a signed order of the court. The order shall provide for the payment ***211** or reimbursement of reasonable and necessary expenses by the director. *See* Tenn. Code Ann. § 40-14-207(b); *State v. Barnett*, 909 S.W.2d 423 (Tenn. 1995); *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995).

....

(b)(1) Every effort shall be made to obtain the services of a person or entity whose primary office of business is within 150 miles of the court where the case is pending. If the person or entity proposed to provide the service is not located within the 150-mile radius, the motion shall explain the efforts made to obtain the services of a provider within the 150-mile radius.

(2) Any motion seeking funding for expert or similar services shall itemize:

(A) the nature of the services requested;

(B) the name, address, qualifications, and licensure status, as evidenced by a curriculum vitae or resume, of the person or entity proposed to provide the services;

(C) the means, date, time, and location at which the services are to be provided; and

(D) a statement of the itemized costs of the services, including the hourly rate, and the amount of any expected additional or incidental costs.

(3) Any motion seeking funding for investigative or other similar services shall itemize:

(A) the type of investigation to be conducted;

(B) the specific facts that suggest the investigation likely will result in admissible evidence;

(C) an itemized list of anticipated expenses for the investigation;

(D) the name and address of the person or entity proposed to provide the services; and

(E) a statement indicating whether the person satisfies the licensure requirement of this rule.

(4) If a motion satisfies these threshold requirements, the trial court must conduct an *ex parte* hearing on the motion and determine if the requested services are necessary to ensure the protection of the defendant's constitutional rights.

(c)(1) Funding shall be *authorized* only if, after conducting a hearing on the motion, the court determines that there is a particularized need for the requested services and that the hourly rate charged for the services is reasonable in that it is comparable to rates charged for similar services.

....

(3) *Particularized need in the context of capital post-conviction proceedings is established when a petitioner shows, by reference to the particular facts and circumstances of the petitioner's case, that the services are necessary to establish a ground for post-conviction relief and that the petitioner will be unable to establish that ground for post-conviction relief by other available evidence. See Owens*, 908 S.W.2d at 928.

(4) Particularized need cannot be established and funding requests should be denied where the motion contains only:

(A) undeveloped or conclusory assertions that such services would be beneficial;

(B) assertions establishing only the mere hope or suspicion that favorable evidence may be obtained;

(C) information indicating that the requested services relate to factual issues or matters within the province and understanding of the jury; or

(D) information indicating that the requested services fall within the capability and expertise of appointed counsel. ***212** *See, e.g.*, *Barnett*, 909 S.W.2d at 430; *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 [105 S.Ct. 2633, 86 L.Ed.2d 231] (1985); *State v. Abraham*, [338 N.C. 315] 451 S.E.2d 131, 149 (1994).

(d)(1) The director and/or the chief justice shall maintain uniformity as to the rates paid individuals or entities for services provided to indigent parties. Appointed counsel shall make every effort to obtain individuals or entities

who are willing to provide services at an hourly rate less than the maximum. Although not an exclusive listing, compensation for individuals or entities providing the following services shall not exceed the following maximum hourly rates:

(A) Accident Reconstruction $115.00

(B) Medical Services/Doctors $250.00

(C) Psychiatrists $250.00

(D) Psychologists $150.00

(E) Investigators (Guilt/Sentencing) $50.00

....

(2) For persons or entities compensated at a rate of one hundred dollars ($100) per hour or more, time spent traveling shall be compensated at no greater than fifty percent (50%) of the approved hourly rate.

....

(4) *In a post-conviction capital case, a trial court shall not authorize more than a total of $20,000 for all investigative services, unless in its sound discretion the trial court determines that extraordinary circumstances exist that have been proven by clear and convincing evidence.*

(5) *In a post-conviction capital case, a trial court shall not authorize more than a total of $25,000 for the services of all experts unless in its sound discretion the trial court determines that extraordinary circumstances exist that have been proven by clear and convincing evidence.*

(6) Expenses shall not be authorized or approved for expert tests or expert services if the results or testimony generated from such tests or services will not be admissible as evidence.

(e)(1) If the requirements of sections 5(c) and (d) are satisfied and the motion is granted, the *authorization* shall be evidenced by a signed order of the court. Unless otherwise indicated in the order, the amount authorized includes both fees and necessary expenses under section 4(a).

(2) The order shall include a finding of particularized need and the specific facts that demonstrate particularized need as well as the information required by section 5(b)(1) or (b)(2).

(3) The court may satisfy the requirements of subsection (2) above by incorporating and attaching that portion of the defense motion that includes the specific facts supporting the finding of particularized need.

(4) Once the services are authorized by the court in which the case is pending, the order and any attachments must be submitted in writing to the director for prior approval. Claims for these services may not be submitted electronically.

(5) If the director denies prior approval of the request, the claim shall also be transmitted to the chief justice for disposition and prior approval. The determination of the chief justice shall be final.

Tenn. Sup. Ct. R. 13, § 5 (emphases added). [4]

***213** Under Rule 13, before a post-conviction court can authorize funds for expert services, the court has to determine there is a particularized need for the requested expert services and that the hourly rate for the services is reasonable. *Id.* §§ 5(c)(1), (3). The petitioner has to show the expert services are necessary to establish a ground for relief and that the ground cannot be established by other available evidence. *Id.* § 5(c)(3). The court cannot authorize more than $25,000 for all expert services unless there is proof by clear and convincing evidence that extraordinary circumstances exist. *Id.* § 5(d)(5). The prior authorization order has to be submitted to the AOC for approval. *Id.* § 5(e)(4). If the AOC Director denies the request, the claim is sent to the Chief Justice for final disposition. *Id.* § 5(e)(5).

This appeal involves four of the Petitioner's requests for Rule 13 funds, one of which was approved but at a lesser hourly rate and the remaining three that the Chief Justice did not approve. [5]

Dr. Bhushan S. Agharkar

In March 2017, the Petitioner filed an *ex parte* motion seeking $17,500 based on an hourly rate of $350 for the expert services of Dr. Bhushan S. Agharkar, a psychiatrist. According to the motion, Dr. Agharkar's services were a necessary component of the Petitioner's claim that trial counsel failed to adequately investigate and present available mental health defenses and mitigating evidence. After an *ex parte* hearing, the post-conviction court found the funds were

necessary and granted prior authorization for the requested amount. The AOC Director approved the funding request at a reduced hourly rate of $250 consistent with the rate schedule in Rule 13. The Chief Justice concurred in the AOC Director's decision.

After receiving notice of the rate reduction, the Petitioner moved the post-conviction court to vacate his death sentences. He claimed Dr. Agharkar did not accept the reduced rate, and the denial of necessary expert services violated the Petitioner's due process rights for expert assistance, his right to a full and fair hearing, and his right not to be subjected to cruel and unusual punishment. The post-conviction court denied the motion, noting that the Petitioner had not been denied all expert assistance. [6]

Dr. James R. Merikangas

In June 2018, the Petitioner filed an *ex parte* motion seeking $10,000 at an hourly rate of $250 plus reasonable expenses to retain Dr. James R. Merikangas, a neurologist. The motion asserted the requested services were a crucial component of the investigation and proof of the Petitioner's claim that trial counsel failed to adequately investigate and present available mental health defenses and mitigation evidence. The motion noted that if all of the requested services were completed, the request for funds could exceed Rule 13's $25,000 limit for all expert services. The post-conviction court granted prior authorization, finding that extraordinary circumstances existed for the funding to exceed the $25,000 cap.

***214** Dr. Richard Leo

In August 2018, the Petitioner filed an *ex parte* motion seeking $9,000 at an hourly rate of $150 plus travel expenses in expert funding for Dr. Richard A. Leo, a false confession expert. The Petitioner explained that trial counsel had previously retained Dr. Leo to assist with their investigation of the case but had not used his services. The Petitioner stated that the services of Dr. Leo were a crucial component of the investigation and proof of the Petitioner's claim that his trial counsel failed to adequately investigate the State's case, failed to consult with the appropriate forensic experts, and failed to prepare a challenge to the State's physical evidence. The post-conviction court found that the funds were necessary, that extraordinary circumstances existed to exceed the cap, and granted prior authorization up to a total of $9,000 at an hourly rate of $150 plus expenses.

Dr. James S. Walker

In September 2018, the Petitioner filed an *ex parte* motion seeking $1,425 at an hourly rate of $150 to hire Dr. James S. Walker, a neuropsychologist. The motion acknowledged that trial counsel had previously retained Dr. Walker but chose not to call him as a witness at trial. The Petitioner characterized Dr. Walker as a fact witness in one sense but noted that his testimony would primarily involve matters of specialized knowledge and opinion about his neuropsychological findings and conclusions. The motion indicated that Dr. Walker's services were necessary to develop and prove the Petitioner's claim that counsel failed to present available mitigating evidence regarding the Petitioner's diagnosed mental diseases and defects. The post-conviction court found the funds were necessary, that extraordinary circumstances existed to exceed the $25,000 cap, and granted prior authorization for $1,425 to retain Dr. Walker.

The Petitioner orally informed the post-conviction court that the AOC Director and the Chief Justice had denied approval for the funding requests for Dr. Merikangas, Dr. Leo, and Dr. Walker.

Constitutional Challenges to Rule 13

The Petitioner asserts that the AOC Director and the Chief Justice interpreted the prior approval review provisions in Rule 13, sections 5(e)(4) and 5(e)(5) as granting them the authority to review the post-conviction court's substantive findings and to "vacate" the post-conviction court's prior authorization orders. He maintains that this substantive review by the AOC Director and the Chief Justice constituted an improper exercise of judicial power in violation of Article II, sections 1 and 2 and Article VI, sections 1, 2, and 3 of the Tennessee Constitution.

Article II, sections 1 and 2 are the separation of powers provisions of the Tennessee Constitution, providing that the powers of the government are divided into Legislative, Executive, and Judicial departments and that no person in one of these departments shall exercise any of the powers belonging to the others. Tenn. Const. art. II, §§ 1–2. Article

VI relates to the Judicial Department, providing in section 1 that the judicial power of this State is "vested in one Supreme Court and in such Circuit, Chancery and other Inferior Courts as the Legislature shall from time to time, ordain and establish." Tenn. Const. art. VI, § 1. Section 2 provides that the Supreme Court shall consist of five judges and that the "concurrence of three of the judges shall in every case be necessary to a decision." Tenn. Const. art. VI, § 2. Finally, section 3 provides that the judges of this Court or any intermediate appellate court shall be appointed by the Governor and confirmed ***215** by the Legislature. Tenn. Const. art. VI, § 3.

The Petitioner submits that under Article VI, section 1, the General Assembly granted the post-conviction court jurisdiction over post-conviction proceedings and vested that court with the state's judicial power. *See* Tenn. Code Ann. §§ 16-10-101, -102 (2009); 40-30-104(a) (2012). The Petitioner asserts that the post-conviction court properly exercised its judicial power when it granted prior authorization of expert funding. According to the Petitioner, only an entity vested with the state's judicial power can substantively review and set aside the post-conviction court's prior authorization orders. Citing Article VI, sections 1, 2, and 3 of the Tennessee Constitution, the Petitioner contends that neither the AOC Director nor the Chief Justice, acting alone, is vested with the state's judicial power and thus had no authority to substantively review and deny prior approval of the post-conviction court's prior authorization orders.

[4] At the heart of the Petitioner's argument is the premise that the AOC Director and the Chief Justice conducted a substantive review. As we will explain, this premise is faulty. No language in Rule 13, including sections 5(e)(4) and 5(e)(5), authorizes substantive review by the AOC Director or the Chief Justice in the prior approval process. As promulgator of Rule 13, it was not the Court's intent to authorize substantive review. *Gant*, 937 S.W.2d at 846.

[5] Under Rule 13, denial of prior approval by the AOC Director and the Chief Justice can be based on a prior authorization order that is noncompliant with Rule 13 or an administrative funding decision. [7] There is no suggestion here that the prior authorization orders did not comply with Rule 13. With no substantive review and no Rule 13 compliance issues, we conclude the AOC Director and the Chief Justice denied prior approval based on an administrative funding decision. This Court, through the AOC Director, has to efficiently and fairly manage the limited pool of funds for indigent non-capital and capital defendants facing trial and for indigent petitioners in capital post-conviction cases. Rule 13, section 6(b)(2) requires the AOC Director to give due consideration to state revenues when deciding compensation and reimbursement claims. The post-conviction court need not consider budgetary concerns. Throughout any fiscal year, the AOC Director receives prior authorization orders for funds from trial courts across the state. If funding for expert assistance was unlimited, then all Rule 13 requests could conceivably be granted. But that is not realistic. Funds are limited, and there has to be a mechanism for regulating the flow of funds. That is the role of the AOC Director and the Chief Justice in Rule 13. A prior authorization order from a post-conviction court is no guarantee or promise of payment. Otherwise, the AOC Director would simply verify compliance with Rule 13 and pay out the authorized funds chronologically until the funds are depleted. Implicit in the General Assembly's statutory authorization of this Court's administration of the finite pool of funds is an expectation that the Court has to make administrative funding decisions based on the amount of requested funds and the available funding resources. With limited funds, not all prior authorization orders can be approved. Because substantive review is not authorized by Rule 13 and because this record contains no indication substantive review occurred, the Petitioner ***216** has failed to establish that the AOC Director and the Chief Justice improperly exercised judicial authority in violation of the Tennessee Constitution.

Next, the Petitioner argues that the prior approval process in sections 5(e)(4) and 5(e)(5) violates his procedural due process rights under Article I, section 8 of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution. He contends the process failed to provide him with notice of the evidence considered by the AOC Director and/or the Chief Justice in their decision to deny the funding requests, and he was denied the ability to contest their decision.

[6] We begin with the applicable constitutional provisions. Article I, section 8 of the Tennessee Constitution states in part that "no man shall be ... deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land." Tenn. Const. art. I, § 8. The Fourteenth Amendment, section 1, provides that the states shall not "deprive any person of life, liberty, or property, without due process of

law." U.S. Const. amend. XIV, § 1. "[T]he procedural due process protections in these two provisions are essentially the same." *Heyne v. Metro. Nashville Bd. of Pub. Educ.*, 380 S.W.3d 715, 731 (Tenn. 2012).

[7] When considering a procedural due process claim, a reviewing court must first determine whether a petitioner has an interest entitled to due process protection. *See id.* (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570–71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Rowe v. Bd. of Educ. of Chattanooga*, 938 S.W.2d 351, 354 (Tenn. 1996)). If the petitioner has a protected interest, "then the court must determine 'what process is due.' " *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)) (citing *Martin v. Sizemore*, 78 S.W.3d 249, 263 (Tenn. Ct. App. 2001)). "Once the court determines [the] minimum procedural due process protections to which the person is entitled, the court must finally determine whether the challenged procedures satisfy these minimum requirements." *Id.*

[8] **[9]** **[10]** In considering whether a petitioner has an interest that is entitled to due process protection, a court may look beyond the federal and state constitutions because state law may create and define the dimensions of constitutionally protected interests. *Id.* (citing *Roth*, 408 U.S. at 577, 92 S.Ct. 2701). The interest asserted by the Petitioner stems from Tennessee Code Annotated section 40-14-207(b), a statute that provides indigent capital litigants access to funds for investigative, expert, or other similar services. *See Owens v. State*, 908 S.W.2d 923, 929 (Tenn. 1995). The Petitioner sought access to these funds for expert assistance during a state post-conviction proceeding, which is a statutory procedural vehicle to collaterally challenge a conviction or sentence as "void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103 (2012); *see also* Tenn. Code Ann. § 40-30-101 to -123 (known as the Post-Conviction Procedure Act). Post-conviction proceedings are not constitutionally required. *See Davis v. State*, 912 S.W.2d 689, 695 (Tenn. 1995). Thus, our narrow focus is whether the state statute that provides access to expert funds during post-conviction proceedings creates a constitutionally protected interest in the funds.

Citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)*Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), the Petitioner compares this indigent fund pool to federal public assistance payments under the Aid to Families with Dependent ***217** Children program. The Petitioner asserts he has a legal entitlement to the indigent funds when he makes the specified showing. However, unlike the financial assistance benefits in *Goldberg*Goldberg, our General Assembly makes a finite appropriation of these indigent funds, requiring administration funding decisions to be made. Neither Tennessee Code Annotated section 40-14-207(b) nor Rule 13 creates any right to the funds, and Rule 13 merely establishes a procedural mechanism for implementing the indigent funding statute. *Owens*, 908 S.W.2d at 928 n.10 (citing *Allen v. McWilliams*, 715 S.W.2d 28, 29 (Tenn. 1986)). Indigent litigants may apply for funds to assist in post-conviction proceedings. Although a post-conviction court may grant prior authorization of funds upon the proper showing, the post-conviction court has no authority to direct payment of the funds. Instead, prior approval lies with the AOC Director, and ultimately with the Chief Justice, and necessarily hinges on an administrative funding decision. *See, e.g.*, *Rosenfield v. Wilkins*, 468 F. Supp. 2d 806, 810–811 (W.D. Va. 2006) (explaining that "a property right cannot emanate from a mere subjective expectancy" and concluding that appointed attorneys have no entitlement under the Criminal Justice Act (CJA) to fee payments they request and no constitutionally protected property interest in any particular level of payment (quoting *Guerra v. Scruggs*, 942 F.2d 270, 278 (4th Cir. 1991))).

Thus, neither *Goldberg*Goldberg nor other cited authority supports the Petitioner's contention he has a constitutionally protected right in the finite pool of indigent funds. Because the Petitioner cannot establish a constitutionally protected right, he cannot establish that the prior approval provisions of Rule 13 deny him procedural due process.

Appellate Remedy

The Petitioner's next series of arguments stems largely from the Court of Criminal Appeals' opinion in its direct review of the post-conviction court's denial of relief. *See Dotson v. State*, No. W2019-01059-CCA-R3-PD, 2022 WL 860414 (Tenn. Crim. App. Mar. 23, 2022). The Petitioner challenged the denial of funding in the Court of Criminal Appeals, raising numerous constitutional challenges to sections 5(e)(4)–(5) and the actions of the AOC Director and the Chief Justice

in denying prior approval under those provisions. The Court of Criminal Appeals explained that when a trial court denies *ex parte* requests for expert funds, a petitioner may seek review through an interlocutory appeal under Tennessee Rule of Appellate Procedure 9, an extraordinary appeal under Rule 10, or when challenged as part of an appeal from a judgment of conviction under Rule 3(b). *Id.* at *64 (citing *State v. Todd*, No. M2006-01940-CCA-R3-CD, 2007 WL 1582661, at *2 (Tenn. Crim. App. May 31, 2007)). The intermediate appellate court noted, however, that the Petitioner was not seeking review of any direct actions of the post-conviction court related to funding as part of his challenge to the post-conviction court's judgment. *Id.* at *65. Instead, the Petitioner directly challenged the determinations of the AOC Director and the Chief Justice in denying prior approval of the expert funding requests under Rule 13. *Id.* Citing Tennessee Rule of Criminal Procedure 37(b), the Court of Criminal Appeals observed that a defendant may appeal any order or judgment in a criminal proceeding when the law provides for such an appeal; however, Rule 13 does not provide for an appeal of the Chief Justice's denial of prior approval of expert funds. *Id.* Additionally, the Court of Criminal Appeals concluded it was without authority to decide constitutional challenges ***218** to Rule 13, sections 5(e)(4)–(5) because this Court has previously held that inferior courts do not have the authority to invalidate a supreme court rule. *Id.* As a result, the Court of Criminal Appeals determined the Petitioner was not entitled to relief on this issue. *Id.*

The Petitioner now asserts that the Court of Criminal Appeals unconstitutionally denied him a forum to review the AOC Director's and the Chief Justice's denial of prior approval of expert services authorized by the post-conviction court. The Petitioner argues the Court of Criminal Appeals erred when it concluded he was not entitled to review of the prior approval decisions under Tennessee Rule of Appellate Procedure 3(b).

[11] **[12]** **[13]** The Post-Conviction Procedure Act authorizes an appeal from a post-conviction court's order denying post-conviction relief "in the manner prescribed by the Tennessee Rules of Appellate Procedure." Tenn. Code Ann. § 40-30-116. Rule 3(b) of the Tennessee Rules of Appellate Procedure identifies the right to appeal the post-conviction court's judgment as an appeal as of right. Tenn. R. App. P. 3(b). But here, the Petitioner was seeking appellate review of the Chief Justice's denial of prior approval, not denial of prior authorization by the post-conviction court. When a post-conviction court denies or limits prior authorization of expert funds, a petitioner may seek interlocutory review of the post-conviction court's actions or omissions under Rules 9 or 10 of the Tennessee Rules of Appellate Procedure, or he may seek review of the court's denial of prior authorization, including the propriety of the reasons for the denial, as part of his appeal of a final judgment denying post-conviction relief under Rule 3(b).[8] Here, the post-conviction court granted prior authorization of the requested expert funds, and the AOC Director and the Chief Justice denied prior approval. Thus, unlike the post-conviction court's reasons for denying prior authorization, which are subject to review as part of the post-conviction court's final judgment, the Chief Justice's Rule 13 administrative reasons for denying prior approval are not subject to further review. *See* Tenn. Sup. Ct. R. 13, § 5(e)(5) ("The determination of the chief justice shall be final."). The Court of Criminal Appeals properly concluded that the Chief Justice's Rule 13 funding decisions were not reviewable as part of the post-conviction court's final judgment under Rule 3. We also agree with the Court of Criminal Appeals that it lacked authority to consider constitutional challenges to the Rule 13 prior approval provisions when its decision could invalidate portions of Rule 13. *Gant*, 937 S.W.2d at 846 (indicating that lower courts have no authority to invalidate a supreme court rule and that "the [s]upreme [c]ourt, as the promulgator of the rule, is the rule's primary arbiter").

[14] The Petitioner argues that he was denied a direct appeal of the funding decision in violation of the Open Courts Clause of the Tennessee Constitution and his state and federal rights to equal protection. The Open Courts Clause provides in part that "all courts shall be open; and every man, for injury done him ... shall have remedy by due course of law ...." Tenn. Const. art. I, § 17. Here, our courts have been open to the Petitioner throughout his trial, his direct appeal of his convictions, and now in his post-conviction collateral challenges to his convictions. The Petitioner cites no authority, and we find none, indicating ***219** the Open Courts Clause requires review of an administrative funding decision within statutory post-conviction proceedings. The Petitioner has "open courts" from the post-conviction court through this Court to adjudicate his post-conviction challenges to his convictions and/or sentences, including consideration of whether the denial of funds deprived him of a full and fair post-conviction hearing. Thus, we find no basis for relief based on the Open Courts Clause.

[15] **[16]** Next, both the state and federal constitutions guarantee equal protection of the law, meaning "all persons similarly circumstanced shall be treated alike." *State v.*

Robinson, 29 S.W.3d 476, 480 (Tenn. 2000) (quoting *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993)); U.S. Const. amend. XIV, § 1; Tenn. Const. art. I, § 8, art. XI, § 8. "Conversely, things which are different in fact or opinion are not required by either constitution to be treated the same." *Tenn. Small Sch. Sys.*, 851 S.W.2d at 153 (quoting *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988)). The Petitioner argues that the Court of Criminal Appeals' refusal to consider the denial of prior approval by the Chief Justice denied him equal protection of the law by creating two separate classes of capital petitioners: (1) a class of petitioners who were denied prior authorization of expert services by the post-conviction court but whose denials of funds were reviewed in a Rule 3 appeal, and (2) a class of petitioners who were denied prior approval by the AOC Director and the Chief Justice but whose denial of funds will not be reviewed in a Rule 3 appeal. We disagree. The two classes are seeking different types of review. The first class seeks review of an authorization for funds by a post-conviction court based on its substantive review of the merits of the petitioner's need for experts. The second class seeks review of an administrative funding decision of the AOC and the Chief Justice, based on the need to marshal limited funds available for more requests than can be granted. Petitioners in each respective class are treated the same. While the end result of both types of review may be the same—denial of funds—the nature of the two types of review are fundamentally different.[9] For these reasons, we conclude the Petitioner's equal protection argument is without merit.

Having concluded the Court of Criminal Appeals correctly declined to review this issue under Rule 3, we focus on the larger question of whether due process requires appellate review of the administrative funding decisions of the Chief Justice. Our review is unique in that the administration of the appropriated indigent defense funds in Tennessee rests solely with this Court and its administrative office. We have a narrow body of caselaw that addresses the denial of prior authorization of funds by trial courts. However, we have no cases in which an indigent capital litigant has sought review of the denial of prior approval after a post-conviction court grants prior authorization. Looking beyond Tennessee law for guidance is not particularly useful because each jurisdiction has a different administrative mechanism for dispersing indigent funds. However, the CJA, which makes funds available to indigent litigants in federal court, is instructive. *See* 18 U.S.C.A. § 3006A.

Through the CJA, Congress appropriates funds for indigent representation and for investigative, expert, or other services necessary for adequate representation. *Id.* In part, the statute provides:

> ***220 (e) Services other than counsel.** –
>
> **(1) Upon request.** – Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate judge if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.
>
> ....
>
> **(3) Maximum amounts.** – Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed $2,400, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.
>
> ....
>
> **(f) Receipt of other payments.** – Whenever the United States magistrate judge or the court finds that *funds are available* for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid ... to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services ....

Id. § 3006A(e), (f) (emphasis added).

Rule 13 does not mirror the CJA, but we find both useful analogies and important distinctions that inform our inquiry. Similar to Rule 13, the CJA allows indigent federal litigants

to request funds for expert services via an ex parte application and ex parte proceeding. *Id.* § 3006A(e)(1). Upon finding that the expert services are necessary, the district court or magistrate judge authorizes the expert services up to the presumptive funding caps set out in the CJA. *Id.* § 3006A(e)(1), (3). A notable difference between the CJA and Rule 13 is that the CJA authorizes the district court, or magistrate, to authorize or direct that the funds be paid to the expert after "find[ing] that funds are available for payment." *Id.* § 3006A(f). In contrast, under Rule 13, the AOC Director and the Chief Justice have the authority to assess the availability of funds and approve payment to the experts. Tenn. Sup. Ct. R. 13, § 5(e). The CJA, like Rule 13, also allows a litigant to seek funds in excess of the cap if the district court or magistrate judge certifies that the additional funds are necessary to provide fair compensation for services of an unusual character or duration and the amount of the excess payment is certified by the chief judge of the circuit. 18 U.S.C.A. § 3006A(e)(3).

Federal courts interpreting the CJA have concluded that an indigent litigant may appeal the district court judge's denial of funds. *See* *United States v. Obasi*, 435 F.3d 847, 852 (8th Cir. 2006). Although the CJA is silent on the availability of review of the decisions of the chief judge to reduce or deny funds in excess of the cap, even when certified by the district court or magistrate, courts have determined that the chief judge acts in an administrative ***221** capacity when reviewing the request rather than performing a judicial function. *Id.* (challenging the chief judge's approval of a sum $5,000 less than the amount of funds certified by the district court for an investigator); [10] *see also* *United States v. Snarr*, 704 F.3d 368, 403–04 (5th Cir. 2013) (challenging the chief judge's reduction and denial of funds certified by the district judge); *In re Marcum, L.L.P.*, 670 F.3d 636, 637–38 (5th Cir. 2012) (challenging the chief judge's order directing the expert to continue work on the case despite approving only partial payment of expert fees). Most importantly, the federal courts have concluded that, based on the statutory authority granted to the chief judge, a determination by the chief judge can only be challenged by seeking reconsideration with the chief judge or by writ of mandamus in the United States Supreme Court. *Obasi*, 435 F.3d at 852 (citing *United States v. D'Andrea*, 612 F.2d 1386, 1387–88 (7th Cir. 1980)); *Snarr*, 704 F.3d at 404 (citing *D'Andrea*, 612 F.2d at 1387–88); *Marcum*, 670 F.3d at 638 (citations omitted). [11]

Even though the federal courts were most often concerned about jurisdiction, these cases show how the federal courts view indigent requests for expert funding under the CJA and the virtual lack of review of the chief judge's administrative decisions. None of the cases cite due process or other constitutional concerns regarding review of the chief judge's decisions. Instead, the federal courts appear to be satisfied with the extraordinary remedy of writ of mandamus in the United States Supreme Court.

[17] From our review, we conclude that due process does not require appellate review of an administrative funding decision of the AOC Director or the Chief Justice. By statute and Rule 13, the administration of the funds is within the discretion of this Court. The statutory authorization to promulgate rules to administer the limited pool of funds implies the Legislature was aware that any rules so promulgated would necessarily consider the availability of state revenues. In instances in which expert or other funds authorized by a post-conviction court are denied by the AOC Director, Rule 13, section 5(e)(5) provides for automatic review of the Director's denial by the Chief Justice. The decision is administrative and budgetary in nature, requiring the balancing of overall limitations on available funds against current pending requests for funds and future requests projected for the remainder of the fiscal year. The Petitioner cites no authority, and we find none, holding that due process requires allowing an "appeal" of an administrative and budgetary decision that necessarily involves multiple competing requests for funds for statutory post-conviction proceedings. We conclude that the Petitioner is not denied his rights to due process by the lack of appellate review of administrative funding decisions.

[18] Even though there is no review of the reasons for the administrative funding decisions, the effects of those decisions are subject to review. [12] Due process in the ***222** post-conviction context merely requires that "the [petitioner] have 'the opportunity to be heard at a meaningful time and in a meaningful manner.' " *Stokes v. State*, 146 S.W.3d 56, 61 (Tenn. 2004) (quoting *House v. State*, 911 S.W.2d 705, 711 (Tenn. 1995)). A full and fair hearing requires only "the opportunity to present proof and argument on the petition for post-conviction relief." *House*, 911 S.W.2d at 714; Tenn. Code Ann. § 40-30-106(h) ("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

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evidence."). Thus, review of the effects of the denial of expert funds affords the petitioner due process consistent with post-conviction proceedings. [13]

Because the Petitioner has had an adequate appellate review of the due process concerns accompanying the denial of expert funds, we deny relief on this issue. [14]

Full and Fair Post-Conviction Hearing

Finally, we consider the Petitioner's claim that the denial of expert funds deprived him of a full and fair post-conviction hearing. Before we consider the adequacy of the evidentiary hearing, we revisit a brief portion of the factual and procedural history summarized in this Court's opinion on direct appeal to place the post-conviction issues in context. *See State v. Dotson*, 450 S.W.3d 1, 12–47 (Tenn. 2014).

A jury found that in March 2008, the Petitioner shot and killed his brother, his brother's fiancé, and their two friends inside his brother's home. *Id.* at 11–12. The Petitioner beat and stabbed five young children in the home because they witnessed the killings. *Id.* at 13–14, 25. Two of the children died, and the other three children survived due to medical intervention. *Id.* at 13, 23. Two of the surviving children identified the Petitioner as the killer. *Id.* at 24, 32. This identification led to the Petitioner's confession to the police and to his mother. *Id.* at 25–26. At trial, the State relied on the children's identifications and the Petitioner's confession along with other corroborating evidence. *Id.* at 20–33.

In his defense, the Petitioner presented evidence suggesting the killings and attempted killings were gang-related. *Id.* at 38. He also presented the testimony of a psychotherapist to cast doubt on the children's statements. *Id.* at 39–40. The Petitioner testified as the final trial witness, telling the jury he was hiding under the bed when unknown assailants committed these killings. *Id.* at 40–41. Upon emerging from under the bed, the Petitioner discovered the victims' bodies and rode away on a bicycle. *Id.* at 41–42. He said he did not contact the police because he is a gang member, adding that gang members "don't call the police." *Id.* at 42.

The jury convicted the Petitioner of six counts of premeditated first-degree murder and three counts of attempted first-degree murder. *Id.* at 44. At the penalty ***223** phase, the State presented additional evidence to support the aggravating circumstances along with victim impact evidence. *Id.* The Petitioner offered the testimony of a mitigation specialist, who detailed the family history and background. *Id.* at 44–46. At the conclusion of the penalty phase, the jury sentenced the Petitioner to death for each of the first-degree murder convictions. *Id.* at 47. Following a separate sentencing hearing, the trial court sentenced the Petitioner as a Range II, multiple offender to forty years for each conviction of attempted first degree murder to be served consecutively to each other and to the death sentences. *Id.* at 47. This Court affirmed his convictions and sentences. *Id.* at 105.

The Petitioner sought post-conviction relief, raising several claims of ineffective assistance of counsel. As noted, he sought funds for expert witnesses to assist him in establishing certain ineffective assistance grounds. Not all of his requests were granted, and the Petitioner proceeded to the post-conviction hearing without the assistance of these experts. At the October 1 through 4, 2018 evidentiary hearing, the Petitioner presented testimony from lead counsel, co-counsel, Rachael Geiser (licensed private investigator), Glori Shettles (mitigation specialist), Dr. Marilyn Miller (expert in crime scene reconstruction, forensic science, and serology), and Deputy Carlos Atkins. The State presented testimony from Deputy Keley Gray and Assistant District Attorney General Ray Lepone. The Petitioner did not testify at the hearing. The post-conviction court denied post-conviction relief in a 109-page order.

[19] Although there was a multi-day hearing, the Petitioner contends he was denied a full and fair evidentiary hearing. A full and fair post-conviction hearing occurs when a petitioner is given the opportunity to present proof and argument on the grounds raised in the petition for post-conviction relief. *See* *House*, 911 S.W.2d at 714. Thus, when a petitioner asserts he has been denied a full and fair hearing due to the denial of expert funds, he should identify the grounds for post-conviction relief he was either unable to present or unable to fully and fairly present at the hearing without the assistance of the desired experts. This specificity allows the court to identify the grounds, assess the available evidence relevant to those grounds, and consider whether the absence of the desired expert denied the petitioner a full and fair hearing on those grounds. [15]

Here, the Petitioner failed to clearly identify and support with argument the post-conviction grounds he was unable to fully and fairly present at the evidentiary hearing without expert assistance. Such failures typically result in waiver.

However, we have chosen as part of our broader review of the post-conviction hearing to examine a particular ground of ineffective assistance of counsel that was raised in the petition and considered by the post-conviction court to which expert testimony from Dr. Merikangas and Dr. Leo could conceivably have been relevant.

[20] **[21]** **[22]** **[23]** As this Court has explained, the Petitioner had the burden of establishing his factual allegations by clear and convincing evidence. *Phillips v. State*, 647 S.W.3d 389, 401 (Tenn. 2022) (citing Tenn. Code Ann. § 40-30-110(f) (2018 & Supp. 2020)). As the Court explained in *Phillips*:

> The post-conviction court, under the guidance of ***224** *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), then analyzes the facts to determine whether counsel's performance was deficient and whether that deficiency prejudiced the petitioner. *Nesbit v. State*, 452 S.W.3d 779, 786–87 (Tenn. 2014). Counsel's representation is deficient if "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Deficiency alone, however, does not warrant automatic relief. *See* *id.* at 692, 104 S.Ct. 2052. A petitioner must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. The petitioner must prove sufficient facts to support both the deficiency and prejudice prongs of the *Strickland* inquiry—or, stated another way, the post-conviction court need only determine the petitioner's proof is insufficient to support one of the two prongs to deny the claim. *Mobley* [*v. State*], 397 S.W.3d [70] at 80 [(Tenn. 2013)].

Id.

In his amended petition, the Petitioner alleged his trial counsel were ineffective for failing to obtain or properly utilize expert assistance in the guilt and penalty phase investigations. This ground focused on trial counsel's choice of mental health experts and false confession expert and was primarily developed through the testimony and cross-examination of lead counsel and co-counsel. The testimony revealed that, after trial counsel learned the Petitioner had certain deficits, they explored whether the deficits could be used to challenge the voluntariness and reliability of his statements or otherwise configure into defense theories. To that end, trial counsel retained Dr. Geraldine Bishop, a psychologist, Dr. Walker, a neuropsychologist, and Dr. Leo, a false confessions expert.

Dr. Bishop conducted a psychological evaluation but could not support a mental health defense. Dr. Walker conducted neuropsychological testing and issued a report finding the Petitioner competent to stand trial and concluding there was no viable insanity defense. Dr. Walker diagnosed the Petitioner under Axis I with adjustment disorder with depressed and anxious mood, alcohol dependence, cannabis dependence, and cognitive disorder not otherwise specified; under Axis II with antisocial personality characteristics; and under Axis IV with current psychosocial stressors of incarceration and legal problems. Dr. Walker also identified several mitigating factors. [16]

The Petitioner's trial counsel did not call Dr. Bishop as a witness and decided against calling Dr. Walker due to his findings of the Petitioner's antisocial personality characteristics. Trial counsel viewed antisocial personality as "one of the more dangerous labels in the criminal justice systems" because this type of diagnosis does not result in as much empathy or sympathy as other more serious mental health diagnoses. Trial counsel felt strongly that such a diagnosis should not be presented to the jury. Likewise, although counsel characterized the mitigation evidence identified by Dr. Walker as helpful, ***225** counsel chose not to present this evidence for the same reasons.

Dr. Leo was retained to assess the voluntariness and reliability of the Petitioner's confessions to the police and to his mother. Dr. Leo's assessments were based on a handwritten version of the events prepared by the Petitioner and on video excerpts of his confession that had been recorded and broadcast as part of *The First 48* television program. [17] Trial counsel was unable to obtain the entire footage recorded by the film crew. Trial counsel described the Petitioner's statement as "bad" but described the available portion of the recorded and broadcast statement as "much worse." Counsel suspected the unedited version of the statement was even worse. As a result, counsel made it a priority to prevent the admission of *The First 48* recordings and convinced the trial court to exclude the recordings in their entirety with the understanding that the recordings could be admissible if counsel opened the door to them through Dr. Leo's testimony. Trial counsel weighed

the value of Dr. Leo's purported testimony and concluded Dr. Leo's opinion was not particularly helpful and could open the door to the admission of the recorded confessions from *The First 48* program. For these reasons, trial counsel decided not to call Dr. Leo as a witness. [18]

As to this ground of ineffective assistance, the post-conviction court accredited the testimony of Petitioner's trial counsel and determined that not using psychological evidence from Dr. Walker due to the antisocial diagnosis was a strategic decision. The court concluded that the Petitioner did not carry his burden of proof on both prongs of his ineffective assistance claim. As to the decision not to utilize Dr. Leo, the court again found that the Petitioner failed to carry his burden of proof on both prongs of ineffective assistance.

[24] **[25]** The Petitioner sought to retain Dr. Merikangas, a psychiatrist, to assist in establishing that trial counsel were ineffective for failing to utilize Dr. Walker and Dr. Leo and for failing to obtain the services of a psychiatrist. The post-conviction court accredited the testimony of trial counsel regarding its tactical reasons for not utilizing Dr. Walker or Dr. Leo. The evidence does not preponderate against those findings. The proof established that trial counsel investigated possible defenses through Dr. Walker and Dr. Leo and thoughtfully evaluated the results before deciding not to call either witness at trial. Giving deference to counsel's strategy, the decision not to use Dr. Walker and Dr. Leo for the reasons explained was sound and well-informed. *See* *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) ("The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based on adequate preparation." (quoting *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996))); *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (noting that "strategic choices made after thorough ***226** investigation of law and facts relevant to plausible options are virtually unchallengeable"). It seems unlikely that any testimony from Dr. Merikangas would alter this conclusion.

As to the additional ineffective assistance ground that trial counsel were ineffective for failing to obtain the services of a psychiatrist, the Petitioner argues that under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), he was constitutionally entitled to the services of a psychiatrist at trial to assist in his defense and to develop mitigation evidence related to mental health. The Petitioner's reliance on *Ake* is misplaced. In *Ake*, the United States Supreme Court held that when a criminal defendant makes a preliminary showing that his sanity at the time of the offense is likely to be a significant factor in his defense *at trial*, due process requires the State to assure the defendant access to a competent psychiatrist to conduct "an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 83, 105 S.Ct. 1087. Here, Dr. Walker specifically determined that the Petitioner did not have a viable insanity defense. Therefore, the *Ake* requirement was never triggered.

Nonetheless, the post-conviction court granted prior authorization for the services of Dr. Merikangas, a psychiatrist. It appears from the ex parte motion that the Petitioner planned to utilize Dr. Merikangas to establish that trial counsel failed to investigate and present available mental health defenses and mitigation evidence. In our view, because the *Ake* requirement is inapplicable, Dr. Merikangas's opinion would have been irrelevant on the issue of whether counsel were ineffective for failing to obtain a psychiatrist. Further, it appears the Petitioner was seeking a second opinion from Dr. Merikangas on available mental health defenses and any related mitigation evidence. As explained, trial counsel retained competent mental health professionals and reasonably relied on the opinions of those experts. Counsel's informed reasons for choosing not to present the defense are virtually unassailable. *See* *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. Thus, we conclude the Petitioner has failed to show that the absence of Dr. Merikangas's testimony denied the Petitioner a full and fair hearing on this ineffective assistance claim. Accordingly, the Petitioner's claim is without merit.

Having reviewed the post-conviction proceedings in their entirety and the opinion of the Court of Criminal Appeals, we conclude the Petitioner was not deprived of a full and fair post-conviction hearing.

CONCLUSION

We hold the provisions of Rule 13 for prior approval review are constitutional, as applied; the Petitioner was not unconstitutionally denied appellate review of the denial of

his request for expert funds; and the Petitioner was not deprived of a full and fair post-conviction hearing due to the denial of expert funds. We affirm the judgments of the post-conviction court and the Court of Criminal Appeals on the separate grounds stated herein. Costs are taxed to the State of Tennessee based on the Petitioner's indigency.

Jeffrey S. Bivins, J., not participating.

All Citations

673 S.W.3d 204

Footnotes

1 On the Petitioner's motion, Justice Bivins, who served as the Chief Justice during the relevant time period, recused from participation in this appeal before any consideration of the Rule 11 application.

2 Citing *State v. Linville*, 647 S.W.3d 344 (Tenn. 2022), the State asserts that the Petitioner's arguments challenging Rule 13 and the authority of the AOC Director and the Chief Justice to deny prior approval of expert funds are waived because these arguments were not stated as questions for review in the Petitioner's Rule 11 application. However, in *Linville*, the defendant raised an issue in his brief that had not been raised in his Rule 11 application. *Id.* at 353 (noting that "the substance of [Linville's] application" contained "no mention of any challenge to mandatory minimum sentencing" and further observing that Linville, "in his brief before the Court of Criminal Appeals, specifically stated that he was 'not raising an issue as to sentencing in this appeal' other than the clerical error"). Here, the Petitioner preserved his arguments relating to these issues below, raised them in his Rule 11 application, and briefed them. Thus, *Linville* is distinguishable and the Petitioner's issues were not waived.

3 *Owens v. State*, 908 S.W.2d 923, 924 (Tenn. 1995) (concluding section 40-14-207(b) applies to capital post-conviction cases).

4 Rule 13, section 5 was amended to apply to juvenile transfer proceedings after the Petitioner filed his expert funding requests.

5 The Petitioner sought and obtained funds for other experts that are not at issue in this appeal.

6 The post-conviction court denied the Petitioner's request for an appeal under Rule 9 of the Tennessee Rules of Appellate Procedure. The Court of Criminal Appeals and this Court denied the Petitioner's applications for an extraordinary appeal under Rule 10. *See Dotson v. State*, No. W2017-02550-CCA-R10-PD (Tenn. Crim. App. Mar. 29, 2018) (order); *Dotson v. State*, No. W2017-02550-SC-R10-PD (Tenn. May 10, 2018) (order).

7 *See, e.g.*, Tenn. Sup. Ct. R. 13, § 6(b)(2) (indicating the director gives "due consideration to state revenues" after auditing claims for compliance with this rule).

8 The post-conviction court's denial or limitation of prior authorization is reviewed under the abuse of discretion standard. *See Reid ex rel. Martiniano v. State*, 396 S.W.3d 478, 517 (Tenn. 2013).

9 As discussed below, ultimately, a petitioner in either class may argue that the denial of funds deprived the petitioner of a full and fair post-conviction hearing.

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10 *Cf.* *Ayestas v. Davis*, —— U.S. ——, 138 S.Ct. 1080, 1090, 200 L.Ed.2d 376 (2018) (describing the *district court's* denial of a petitioner's request for funding as a judicial decision).

11 Marcum unsuccessfully pursued a petition for a writ of mandamus in the United States Supreme Court. *See In re Marcum LLP*, 565 U.S. 1195, 1195, 132 S.Ct. 1608, 182 L.Ed.2d 223 (2012).

12 *See* *Snarr*, 704 F.3d at 404–06 (considering whether, as a result of the chief judge's order reducing or denying expert funds, the defendant lacked the funds necessary to present an adequate defense and was therefore denied due process). Due process considerations are much greater before conviction.

13 The Court of Criminal Appeals may not review the administrative funding decisions of the Chief Justice, but it is appropriate for the intermediate appellate court to review a petitioner's claim that he was denied a full and fair hearing on the stated post-conviction grounds because of the denial of expert funds. The Court of Criminal Appeals' judgment would be subject to review by this Court under Rule 11 of the Tennessee Rules of Appellate Procedure.

14 The Petitioner also generally suggested that the Rule 13 provisions and/or the lack of an appellate remedy violate the state and federal prohibitions against cruel and unusual punishment. However, he has cited no authority supporting this argument.

15 This same specificity is useful in establishing particularized need for funds in the post-conviction court.

16 The mitigating factors included physical abuse suffered by the Petitioner as a child, the violent neighborhood in which he was raised, his brother's violent history and intoxication on the night of the murders, the Petitioner's significant academic difficulties and verbal learning problems, the family's neglect of him as a child, his prior criminal history, his intoxication on the night of the murders, and his chances of being a violent adult based upon genetic testing and the abuse he suffered as a child.

17 The proof established that *The First 48* filmed criminal investigations under a contract with the police. As part of filming the investigation in this case, the crew recorded the Petitioner's confession, which was broadcast on the television program.

18 Dr. Walker's report discussed the Petitioner's claim that his confessions were coerced. Although Dr. Walker identified factors consistent with a false confession claim, Dr. Walker described the Petitioner as not easily led or influenced by others. Counsel decided these remarks provided another reason not to call Dr. Walker.

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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.

Jessie DOTSON
v.
STATE of Tennessee

No. W2019-01059-CCA-R3-PD
|
August 17, 2021 Session
|
FILED 03/23/2022

Appeal from the Criminal Court for Shelby County, No. 08-07688, James C. Beasley, Jr., Special Judge

Attorneys and Law Firms

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Herbert H. Slatery III, Attorney General and Reporter; Andrée Sophia Blumstein, Solicitor General; Courtney N. Orr, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Stephen Jones, Assistant District Attorney General, for the appellee, State of Tennessee.

John Everett Williams, P.J., delivered the opinion of the court, in which D. Kelly Thomas, Jr., and Timothy L. Easter, JJ., joined.

OPINION

John Everett Williams, P.J.

***1** The Petitioner, Jessie Dotson, appeals the post-conviction court's denial of his post-conviction petition, in which he challenged his six convictions for first degree premeditated murder and three convictions for attempted first degree murder and his resulting sentences of death for each of the first degree murder convictions plus 120 years. On appeal, the Petitioner contends that (1) he received ineffective assistance of counsel at trial and on appeal; (2) the Administrative Office of the Courts ("AOC") and the Chief Justice of the Tennessee Supreme Court improperly vacated the post-conviction court's orders granting the Petitioner's request for funding of experts; (3) the convictions and death sentences were the result of juror misconduct; (4) the State and the trial court committed various errors; (5) the Petitioner's convictions and death sentences and Tennessee's execution method are unconstitutional; and (6) cumulative error warrants relief. Upon reviewing the record, the parties' briefs and oral arguments, and the applicable law, we affirm the judgment of the post-conviction court.

FACTUAL AND PROCEDURAL HISTORY

In March of 2008, the Petitioner shot and killed his brother, Mr. Cecil Dotson, Sr.; his brother's fiancé, Ms. Marissa Williams; his brother's friend, Mr. Hollis Seals; and Mr. Seals's girlfriend, Ms. Shindri Roberson, while at his brother's home. The Petitioner then attacked his brother's five children with kitchen knives and wooden boards. Mr. Cecil Dotson's four-year-old son, Cemario, and two-year-old son, Cecil II, died as the result of injuries sustained from the attack. His nine-year-old son, C.J., five-year-old son, Cedrick, and two-month-old daughter, Ceniyah, survived the attack. [1]

A jury convicted the Petitioner of six counts of premeditated first degree murder and three counts of attempted first-degree murder. The jury sentenced the Petitioner to death for each of the first degree murder convictions. Following a separate sentencing hearing, the trial court sentenced the Petitioner as a Range II, multiple offender to forty years for each conviction of attempted first degree murder to be served consecutively to each other and to the death sentences. The Tennessee Supreme Court affirmed the Petitioner's convictions and sentences on direct appeal. *See State v. Dotson*, 450 S.W.3d 1, 11-12 (Tenn. 2014).

The Petitioner timely filed a pro se petition for post-conviction relief. The Office of the Post-Conviction Defender ("OPCD") was appointed to represent the Petitioner and filed an amended petition. Following an evidentiary hearing, the post-conviction court issued a lengthy written order denying relief. This appeal ensued.

Trial Proceedings

We summarize the evidence presented at trial as it relates to the issues raised in the post-conviction proceedings.

A. Guilt Phase

1. Discovery of the Victims

Following the Petitioner's release from prison in August 2007, he began living with his sister, Ms. Nicole Dotson, at her apartment in Memphis, while working with his father, Mr. Jessie Dotson Sr., as a painter. *Id.* at 12. The Petitioner's family referred to him as "Junior." *Id.* Ms. Nicole Dotson testified that the Petitioner held a "grudge" against his family for failing to visit him more often while he was in jail and that the Petitioner expressed his feelings to her on a daily basis. *Id.* at 29. She stated that she was too frightened of the Petitioner to ask him to move out of her apartment. *Id.* The Petitioner's father testified that the Petitioner and Mr. Cecil Dotson had a normal relationship but that it bothered the Petitioner whenever Mr. Cecil Dotson told others that the Petitioner had recently been released from jail. *Id.* at 30.

***2** On Saturday, March 1, 2008, the Petitioner, his father, and his half-brother, Mr. William Waddell, went to Mr. Cecil Dotson's Memphis home, which he shared with Ms. Williams and his children. *Id.* at 12. The Petitioner's father recalled seeing a "powder blue" revolver, which was the type of firearm that did not eject shell casings, on the counter at the home. *Id.* at 30. Mr. Cecil Dotson moved the gun, commenting that the children might mistake it for a toy, and told the Petitioner that he had moved the gun. *Id.* Mr. Waddell stated that the Petitioner had a black and silver gun that evening, instead of the blue revolver that he ordinarily carried. *Id.* at 31. The Petitioner's father left during the early evening, and Mr. Waddell left at 10:30 or 11:00 p.m. *Id.* at 12.

At 10:00 or 10:30 p.m., the Petitioner and Mr. Cecil Dotson went to the home of Ms. Sheila Jones, the Petitioner's girlfriend, but left upon learning that Ms. Jones was not there. *Id.* at 26. Ms. Keaira Jones, Ms. Sheila Jones's daughter, testified that both the Petitioner and Mr. Cecil Dotson appeared intoxicated. *Id.* Between 10:30 and 11:30 p.m., the Petitioner, Mr. Cecil Dotson, and Mr. Seals went to the apartment of Mr. Willie Boyd Hill, Jr. *Id.* at 27. Mr. Hill, Mr. Seals, and Mr. Cecil Dotson were members of the Gangster Disciples, while the Petitioner was a member of the Crips gang. *Id.* Mr. Seals had recently been released from jail and came to retrieve a pistol he had left with Mr. Hill. *Id.* Mr. Seals retrieved a P-232 Sig Sauer, .380-caliber handgun, which could hold up to eight rounds, consisting of seven-rounds in the magazine and a single round in the chamber. *Id.* Mr. Seals took the loaded gun and left with the Petitioner and Mr. Cecil Dotson. *Id.*

At around midnight on March 2, 2008, Mr. Cecil Dotson, the Petitioner, and Mr. Seals went to the home of Ms. Stacey Young, a friend of Mr. Cecil Dotson. *Id.* at 29. Mr. Cecil Dotson told her that he would return after dropping off Mr. Seals and the Petitioner, but Mr. Cecil Dotson never returned. *Id.* At approximately 12:30 a.m., Mr. Cecil Dotson, the Petitioner, and Mr. Seals went to the apartment of Ms. Erika Smith, Cecil II's mother, and Mr. Cecil Dotson spoke to her in the parking lot. *Id.* After the men left, Ms. Smith called Mr. Cecil Dotson multiple times. *Id.* During the last call at approximately 2:00 a.m., Ms. Smith overheard Mr. Cecil Dotson and the Petitioner arguing and using profanity. *Id.*

Between 3:00 a.m. and 4:30 a.m., the Petitioner returned to the home of Ms. Sheila Jones and Ms. Keaira Jones. *Id.* at 26. Ms. Keaira Jones allowed the Petitioner to enter the apartment, and she returned to her bedroom. *Id.* Approximately five minutes later, the Petitioner knocked on her bedroom door and asked to talk to her. *Id.* She was putting her son to sleep and told the Petitioner that she would speak to him shortly. *Id.* She heard water running in the bathroom and fell asleep without speaking to the Petitioner. *Id.* Ms. Sheila Jones returned home at approximately 5:00 a.m. and found the Petitioner lying in her bed. *Id.* at 27. They went to sleep and got up at 10:30 or 11:00 a.m., and she drove the Petitioner to Ms. Nicole Dotson's apartment. *Id.* After the Petitioner and Ms. Sheila Jones left, Ms. Keaira Jones noticed bleach spots on the brown rug in the bathroom. *Id.* at 26. A bottle of Clorox bleach was in the hallway and was not stored in its usual place. *Id.*

The Petitioner's father arrived at Ms. Nicole Dotson's apartment the next morning to pick the Petitioner up for work, but the Petitioner was not there. *Id.* at 12. His father instructed Ms. Nicole Dotson to tell the Petitioner to contact him if he wanted to keep his job. *Id.* Later that evening, the Petitioner called his father and explained that he had not called earlier because his girlfriend had hidden his cell phone during an argument. *Id.* He did not explain why he missed work. *Id.* The Petitioner and Mr. Waddell went to dinner that evening,

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and the Petitioner asked Mr. Waddell if he wanted to pick up Mr. Cecil Dotson. *Id.* at 12-13. Because Mr. Waddell had been unable to reach Mr. Cecil Dotson via telephone numerous times throughout the day, they did not go by Mr. Cecil Dotson's home. *Id.* at 13.

***3** Ms. Smith had not spoken to Mr. Cecil Dotson since the early morning hours of March 2nd, and no one had come to the door of his home when she knocked that afternoon. *Id.* Although the door was partially open and the radio was playing, Ms. Smith did not see anyone or hear the children. *Id.* On the morning of March 3rd, Ms. Smith learned that Mr. Cecil Dotson had not shown up for work and that family members had not heard from him. *Id.* She was unable to reach him by telephone and called the police. *Id.*

Officer Randall Davis, the first officer to arrive, could " 'smell the dead bodies' " as he walked into the front door. *Id.* A firefighter, who arrived later, confirmed that when he approached the house, he " 'could smell the blood in the air' " and described it as " '[a] thick, spoiled smell like it had been there a while.' " *Id.* Officer Davis noted that the storm door was closed and that the interior door was partially open, and he saw a person's foot lying on the floor inside. *Id.* Upon entering the house, he discovered the four adult victims, all of whom appeared to have sustained multiple gunshot wounds and were deceased. *Id.* A paramedic later confirmed that the adult victims were deceased and noted that the blood on the victims appeared to have dried. *Id.* at 14.

Officer Davis and other officers continued to search the house. *Id.* at 13. There was blood throughout the house, but none of it appeared to be fresh. *Id.* Officer Davis discovered C.J. in the bathtub of the hallway bathroom with a knife embedded in his head. *Id.* Initially, Officer Davis believed C.J. was deceased but then noticed C.J.'s eyes twitch. *Id.* A firefighter who attended to C.J. and transported him to an ambulance saw cuts on C.J.'s face and a "sawzall blade" sticking out of the top of his head. *Id.* at 14. The bathroom was " 'a mess,' " with " 'blood everywhere.' " *Id.* An emergency medical technician ("EMT") testified that upon entering the bathroom, C.J. " 'turned his head and the next thing we saw was one of the most horrible things I've seen, it was a knife stuck embedded in his skull and it was just stuck there. And it absolutely is the worst thing I've ever seen in my life.' " *Id.* The EMT noted puncture wounds on C.J.'s abdomen and superficial cuts to his neck. *Id.*

Officer Davis discovered Cemario, who was deceased, in a bedroom on the left side of the hallway ("bedroom two"). *Id.* at 13. He discovered Cecil II and Cedrick, both of whom he believed were deceased, in another bedroom ("bedroom one"). *Id.* Emergency medical personnel determined that Cedrick was still alive and transported him in an ambulance. *Id.* at 14. Another officer discovered Ceniyah, who was still alive, and removed her from the home. *Id.* at 13.

2. Crime Scene Evidence

Sergeant Anthony Mullins of the Memphis Police Department's Homicide Bureau, who was accepted by the trial court as an expert in general crime scene investigation and bloodstain pattern analysis, testified regarding his observations of the crime scene and the collection of evidence by the crime scene processing team. *Id.* at 15. He described the crime scene as horrific and said it was the worst he had ever worked. *Id.* The adult victims sustained multiple gunshot wounds, and all of the adult victims except Mr. Seals sustained at least one gunshot wound to the leg. *Id.* A nine-millimeter firearm and a .380 caliber firearm were used in the shooting, but neither firearm was located at the scene. *Id.* Officers recovered spent bullets throughout the living room and two nine-millimeter and three .380 caliber spent cartridge casings on the living room floor. *Id.* A sealed Ziploc bag containing eleven nine-millimeter and five .380 caliber spent cartridge casings was located underneath a jacket on the love seat, and Sergeant Mullins concluded that the perpetrator or perpetrators collected the shell casings after the shootings in order to remove them from the scene. *Id.*

***4** Special Agent Cervinia Braswell, a forensic scientist with the Tennessee Bureau of Investigation ("TBI"), analyzed the eight .380 caliber cartridge casings and the thirteen nine-millimeter cartridge casings. *Id.* at 37. She concluded that all of the .380 caliber casings were fired from the same gun and that all of the nine-millimeter casings were fired from the same nine-millimeter firearm. *Id.* She noted that a .380 caliber firearm typically holds eight rounds, with seven rounds in the magazine and one round in the gun, and that a nine-millimeter firearm typically told thirteen rounds, with twelve rounds in the magazine and one round in the gun. *Id.* She testified that a single person could have fired all thirteen rounds from the nine-millimeter firearm and all eight rounds from the .380 caliber firearm within a short period of time. *Id.*

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Mr. Cecil Dotson sustained several gunshot wounds, including multiple wounds to the front of his body and to his lower legs and one wound to his neck and to the bottom of his foot. *Id.* at 15. A different gun was used to shoot his legs than the gun used to shoot his neck. *Id.* Sergeant Mullins believed several of the wounds were inflicted close in time to or after Mr. Cecil Dotson's death. *Id.* Officers collected fibers from Mr. Cecil Dotson's chin and mouth that were consistent with a pillow having been placed over his face when he was shot, and officers collected a pillow in the living room through which a bullet had passed. *Id.* Mr. Cecil Dotson was in a kneeling position in front of the sofa with his torso on a sofa cushion and a bag of marijuana in his left hand. *Id.* Sergeant Mullins believed Mr. Cecil Dotson's body had been staged after the shooting. *Id.* at 16. He explained that Mr. Cecil Dotson would not have sustained the gunshot wounds to the front of his body while in the position in which he was discovered, and he likely would have been facing the shooter when the first shot was fired. *Id.* Sergeant Mullins further explained that the bag of marijuana was too large for Mr. Cecil Dotson to close his fingers around and that he would have dropped it had he been holding it during the shooting. *Id.*

Ms. Roberson was "in a seated position on the floor, with her back to the sofa, her legs extended, and her head to the side, between the sofa and the loveseat. Her shirt was pulled up, exposing her breasts, and her pants were pulled down, exposing her lower body from her waist to her knees." *Id.* Sergeant Mullins noted little blood on the floor beneath her body and stated that thick coagulated blood on a nearby sofa cushion was consistent with the type of blood loss from a gunshot wound similar to a wound sustained to Ms. Roberson's leg. *Id.* Sergeant Mullins believed Ms. Roberson had been pulled from the sofa to the floor near the time of or after her death. *Id.* Her pants were "saturated with blood, and bullet holes in her pants corresponded to the location of the gunshot wounds to her legs, indicating that her pants were covering her legs when she was shot and were pulled down afterwards." *Id.* A clear plastic bag containing what appeared to be crack cocaine was found on the outer portion of her vagina, and Sergeant Mullins noted that the bag appeared to have been placed on her body. *Id.*

Ms. Williams was slumped over onto Ms. Roberson on the floor with her legs across Ms. Roberson's legs. *Id.* Sergeant Mullins noted that the carpet was stained with blood on the side opposite the direction in which Ms. Williams was leaning. *Id.* at 17. He stated that based upon the position of Ms. Williams's legs across Ms. Roberson's legs, Ms. Williams's body was staged after Ms. Roberson was positioned on the floor. *Id.*

Mr. Seals was located across the front door and near a door connecting the kitchen and the living room, and his pants were pulled below his knees. *Id.* Sergeant Mullins noted a pool of blood on the carpet near Mr. Seals's body with a "void" area where the carpet was not bloodstained. *Id.* He stated that the "void" indicated that unstained area was covered when the blood pool was formed and that the carpet was stained with blood on the opposite side of Mr. Seals's body. *Id.* "Based on the bloodstains, the distance between them, and the location of Mr. Seals's legs one atop [of] the other, Sergeant Mullins believed that Mr. Seals's body may have originally been lying in the area of the 'void' and may have been rolled from that area when his pants were pulled down and his wallet removed." *Id.*

***5** Officers located a loaded twelve-gauge sawed-off shotgun on a stack of clothing in the living room, a little more than an arm's length away from Mr. Cecil Dotson, and officers found additional live rounds of shotgun ammunition under the sofa. *Id.* at 16. Blood was found on the end of the shotgun barrel, and Ceniyah was a minor contributor to the DNA from the blood. *Id.* Sergeant Mullins testified that the gun was positioned on the clothing after the shooting because no blood spatter was on the clothing beneath the gun and the victim to whom the blood belonged was found in another area of the home. *Id.*

Sergeant Mullins testified that the sharp force and blunt force injuries sustained by the children "were inflicted with kitchen knives and wooden boards the perpetrator found in the home." *Id.* at 17. Officers located five knife blades throughout the home, one of which was lodged into C.J.'s head. *Id.* The word, "Faberware," a brand of kitchen knives, was on one of the blades. *Id.* Officers located an intact knife handle and what appeared to be broken pieces of another knife handle, and "Sergeant Mullins believed the perpetrator removed the knife handles from the blades after the assaults." *Id.* A silverware tray was overturned on the kitchen floor. *Id.* Officers also located bloodstained and broken pieces of wood throughout the house. *Id.* Sergeant Mullins stated that "the perpetrator's use of guns, knives, and boards already present in the home demonstrated the perpetrator's familiarity with the home." *Id.*

Sergeant Mullins offered extensive testimony regarding the large amount of blood spatter throughout the home. *Id.* at 17-19. He stated that "the large amount of blood spatter found

in the bathroom and bedrooms one and two was consistent with a prolonged 'one-on-one struggle' rather than a more rapid execution of the children." *Id.* at 17. He identified numerous areas of cast-off spatter throughout the bathroom, indicating multiple blows with either a wooden board or a knife. *Id.* at 18. He noted dripped blood caused by an actively bleeding victim on the toilet tank and down the toilet bowl. *Id.* He also identified a bloody partial palm print on the tile wall as a transfer stain, and the print was later matched to Cemario. *Id.* at 17-18. Sergeant Mullins believed more than one victim was assaulted in the bathroom based on the dripped blood and Cemario's bloody palm print. *Id.* at 18. Officers recovered three green beads similar to the beads found in Cecil II's hair, which Sergeant Mullins testified could have fallen out during an attack of Cecil II in the bathroom. *Id.*

Cemario was discovered in bedroom one face down on the floor in a pool of blood. *Id.* Officers discovered two wooden boards and broken pieces of braided hair on the floor, which Sergeant Mullins said would have broken off as a result of a forceful blow to Cemario's head. *Id.* at 18-19. Based on the broken braids and the pool of blood beneath Cemario's head, Sergeant Mullins believed Cemario suffered a fatal blow while lying on the floor of bedroom one. *Id.* at 19. Sergeant Mullins believed Cemario also was assaulted in the bathroom, explaining " '[t]he level of violence delivered to [Cemario] couldn't have happened in [bedroom one] without some additional blood evidence. So there has to be some movement after the fact.' " *Id.*

Cecil II and Cedrick were found in bedroom two. *Id.* Sergeant Mullins testified regarding the blood spatter in bedroom two, which he stated indicated that multiple blows were delivered in the room. *Id.* More green hair beads like those in Cecil II's hair were on the floor beneath the bed. *Id.* Officers discovered a knife blade bent into an "S" shape with blood on it inside a pillowcase, and Sergeant Mullins believed the blade was bent when the handle was removed. *Id.* Officers found a second knife blade between the mattress and the wall and a bloodstained wooden board inside the room. *Id.* Sergeant Mullins testified that a perpetrator could have prevented the children from escaping by standing in the doorway of the living room because the children would have been required to travel through the living room to reach an exterior door. *Id.*

***6** Sergeant Mullins believed the perpetrator spent a considerable amount of time staging the crime scene following the murders. *Id.* He stated that the perpetrator was familiar with the home and comfortable enough to remain in the home to alter the scene. *Id.* at 20. He noted that "knowledge of gangs and drug activity would have been useful in staging the crime scene." *Id.* Based on his experience, he did not believe gang members would have gone to the scene unarmed, used weapons found in the home to commit the offenses, and then remained inside the home following the murders. *Id.* He was "unaware of any gang-related homicides in which women were murdered and children were assaulted and killed with knives and boards." *Id.*

Blood samples taken from the scene were sent to the TBI for analysis. *Id.* at 36. Each of the samples matched one of the victims, but none of the samples matched the Petitioner. *Id.* The Petitioner's DNA was not on any of the other items from the crime scene that were collected and analyzed. *Id.* at 37.

3. The Petitioner's Initial Statements and the Investigation into Whether the Offenses Were Gang-Related

Ms. Nicole Dotson, along with the Petitioner and their cousin, Ms. Tammy Randolph, went to the scene on the evening of March 3rd. *Id.* at 30. Ms. Nicole Dotson testified that the Petitioner told her not to speak to the media and that they likely would blame him for the murders due to his criminal history. *Id.* When Mr. Hill and "Trell," another acquaintance, arrived at the scene, the Petitioner became angry and told his sister that he believed the two men committed the murders. *Id.*

On the following day, Sergeant James Terry Max and Sergeant Joe Stark interviewed the Petitioner, who was at that time only considered a possible witness. *Id.* at 20. The Petitioner stated that he was at Mr. Cecil Dotson's home with his family on the evening of March 1st. *Id.* The Petitioner informed the officers of the various places where he, Mr. Cecil Dotson, and Mr. Seals visited after leaving the home. *Id.* at 21. The Petitioner stated that Mr. Cecil Dotson and Mr. Seals dropped him off at his girlfriend's apartment at approximately 2:15 or 2:30 a.m., after which he did not see them again. *Id.*

The officers asked the Petitioner whether Mr. Cecil Dotson had any enemies, and the Petitioner told them about an argument between Mr. Cecil Dotson and Mr. Hill about two weeks prior to the interview. *Id.* The Petitioner stated that the argument began after Mr. Hill's girlfriend called the police from her apartment which she shared with Mr. Hill after seeing Mr. Cecil Dotson slap Ms. Smith. *Id.* When officers arrived, Mr. Cecil Dotson told them that there were drugs

inside the apartment. *Id.* The Petitioner stated that Mr. Cecil Dotson and Mr. Hill were members of the Gangster Disciples and that gang members were prohibited from calling the police on other gang members. *Id.* The Petitioner stated that Mr. Hill wrote up Mr. Cecil Dotson for a violation of the rule through "Doc Holiday" and that Mr. Cecil Dotson failed to attend the meeting held by the gang to determine his guilt. *Id.* The Petitioner also stated that following the murders, Mr. Hill called "Doc Holiday" and asked him what had occurred and who had committed the murders. *Id.* at 22.

***7** The police had not been investigating gang members as possible suspects prior to the Petitioner's statement. *Id.* Sergeant Max subsequently spoke to Mr. Cedric Atkins, who had earlier reported hearing that Mr. Cecil Dotson had stolen $300,000 from a drug dealer. *Id.* Sergeant Max also interviewed a confidential informant, who stated that he heard Mr. Cecil Dotson had stolen $50,000 from "Doc Holiday," a member of the Gangster Disciples. *Id.*

Both Mr. Hill and Ms. Smith confirmed at trial the incident during which Mr. Hill's girlfriend called the police on Mr. Cecil Dotson, who then reported to the officers that marijuana was inside the apartment where Mr. Hill also lived. *Id.* at 27-29. Mr. Hill informed "Cato," who then informed "Doc Holiday," the "coordinator" of the Gangster Disciples over the Orange Mound area in Memphis. *Id.* at 28. Mr. Hill discussed the matter with "Doc" and "Dread," the chief of security over the area, who told Mr. Hill to issue a "write-up" or disciplinary notice to Mr. Cecil Dotson. *Id.* Possible punishments for a write-up included anything from beatings to a "death violation." *Id.* Mr. Hill explained that, generally, a death violation only applied to the individual gang member and not to everyone associated with him. *Id.* He stated that gang members could have gotten Mr. Cecil Dotson alone if they had wanted to kill him and that they would not have waited until 2:00 a.m. to do so. *Id.* Mr. Hill had never heard of gang members involving innocent women and children in the punishments. *Id.* He said that if the gang members had entered a home to kill someone, they would have been armed and would have not run out of bullets. *Id.*

Mr. Hill testified that he never issued a write-up against Mr. Cecil Dotson. *Id.* He stated that "Dread" and "Doc" were close friends with Mr. Cecil Dotson and would not have harmed him. *Id.* Mr. Hill heard that when "Cato" and "Doc" approached Mr. Cecil Dotson about a gang violation, Mr. Cecil Dotson told them to "shove it" and refused to accept the discipline. *Id.* Mr. Hill also heard that "Doc" had slept with Ms. Williams, and Mr. Hill testified that Mr. Cecil Dotson and "Doc" had a disagreement over drywall work that Mr. Cecil Dotson had completed at "Doc's" apartment. *Id.* When Mr. Hill went to the crime scene, he called "Cato" and asked if he and "Doc Holiday" were involved in the murders, and "Cato" denied any involvement. *Id.* at 27.

Prior to his death, Mr. Cecil Dotson told his and the Petitioner's father that he was worried that members of the Gangster Disciples might harm him because he was trying to leave the gang. *Id.* at 30. Mr. Cecil Dotson asked his father to move in with him because he believed gang members would not harm him if his father was living with him. *Id.* His father lived with him for about one month. *Id.* Mr. Cecil Dotson's father moved out after family members advised him that he likely would be killed if he interfered in Mr. Cecil Dotson's situation with other gang members. *Id.*

"Members of the Gangster Disciples reportedly became angry upon learning that the gang had been implicated in the murders of women and children." *Id.* at 22. The mother of the Petitioner, Mr. Cecil Dotson, and Ms. Nicole Dotson discovered that her door had been kicked in by gang members. *Id.* The Petitioner, his mother, Ms. Nicole Dotson, and her children moved in with a cousin. *Id.* Ms. Nicole Dotson contacted the police after she received calls on her cell phone that appeared to originate from her apartment. *Id.* Officers were assigned to protect the home where the Petitioner and his family were staying. *Id.* When the marked police car arrived, the Petitioner "became agitated and 'frantic.' " *Id.* The Petitioner expressed a belief that he was the target of the police investigation and that the police were attempting to " 'pin' " the offenses on him, and he said that he did not intend to go to jail for an offense he did not commit. He declared that "[t]hey should 'just bury [him] with [his] brother.' " *Id.* The Petitioner pointed a gun at his head. *Id.*

***8** The Petitioner's cousin told the two police officers who were outside the home that the Petitioner threatened to commit suicide if the officers entered the home. *Id.* Officer Laneeze Stepney spoke to the Petitioner on a cell phone, after which the Petitioner agreed to allow the officers to enter the home. *Id.* at 22-23. The Petitioner told the officer, " '[E]verybody think[s] I did it. I've been all on the news and the police saying I did it....' " *Id.* at 23. Upon entering the house, Officer Stepney retrieved the gun from the Petitioner and attempted to calm the Petitioner, "who was acting 'real nervous like he had a lot on his mind.' " *Id.* The officers placed

the Petitioner and his family in protective custody and moved them to a safe house. *Id.*

4. The Children's Testimony and the Petitioner's Confession

Memphis Police Department Deputy Director Toney Armstrong, a lieutenant with the Homicide Bureau at the time of the murders, and Lieutenant Walter Davidson, the case coordinator, decided to quarantine the surviving children at the hospital and not release their identities because they had not yet identified the perpetrator and wanted to prevent additional attacks. *Id.* at 14. Family members were not allowed to contact the children from March 3rd through March 8th. *Id.*

C.J., Cedrick, and Ceniyah were transported to LeBonheur Children's Hospital where Dr. Michael Muhlbauer performed surgery on each of them. *Id.* at 23. Dr. Muhlbauer offered the following testimony regarding each of the children's injuries:

> C.J. had trauma and swelling to his forehead, part of a steak knife sticking out of his head, and a six-to-seven-inch laceration in his scalp that extended down his forehead. C.J.'s skull was severely fractured, and large pieces of his skull had been driven inward with a blunt force object. C.J. also had either a "glancing" stab wound or two separate stab wounds on the back of his arm and chest, a superficial laceration across his neck, a laceration on his right hand, and a laceration on his left thumb. Dr. Muhlbauer said that without medical intervention C.J. would not have survived the injuries he sustained.
>
> Dr. Muhlbauer testified that Cedrick exhibited significant facial trauma and was "essentially semicomatose" when he arrived at the hospital. Cedrick had sustained injuries that were, in Dr. Muhlbauer's opinion, consistent with having been beaten with boards, including multiple fractures to his face, mid-face, and the lower portion of his skull, a fractured nose which had been pushed inward, and a small skull fracture with bruising on the back of his brain. In addition, Cedrick sustained stab wounds to one eye, his forehead, and his neck. Dr. Muhlbauer testified that Cedrick would not have survived without medical intervention.
>
> Dr. Muhlbauer testified that Ceniyah arrived at the hospital with significant head trauma, which included a large cut in her scalp that exposed her bone. The right side of Ceniyah's skull had been pushed or crushed in with a blunt object, resulting in an "open-depressed skull fracture." A CT scan revealed that the covering of Ceniyah's brain was "probably cut" and that her brain was mildly bruised. Dr. Muhlbauer testified that Ceniyah's injuries were consistent with being struck with boards. She also had stab wounds to her left lower extremity. Dr. Muhlbauer said that absent medical intervention, Ceniyah would not have survived these injuries.

Id. (footnote omitted).

On March 5, 2008, two days after C.J.'s surgery, Lieutenant Caroline Mason attempted to interview him. *Id.* at 23-24. However, C.J. was " 'in and out' of consciousness, cursing, 'talking crazy,' and screaming out names, including 'Cassandra' and 'Roderick.' " *Id.* at 24. Although Ms. Williams had a sister named Cassandra, officers determined that she was not involved in the offenses. *Id.* On March 7th, Lieutenant Mason interviewed C.J. after a nurse called officers and reported that C.J. was awake and rational. *Id.* C.J. identified "Uncle Junior," the Petitioner, as the perpetrator. *Id.* After listening to the recording of the interview, Deputy Director Armstrong ordered officers to transport the Petitioner to the Homicide Bureau and assigned Lieutenant Mason and Sergeant Max to interview him. *Id.*

***9** The Petitioner, "who was under arrest at that time, was advised of his rights, signed a written waiver, and agreed to speak with the officers." *Id.* He essentially repeated his prior account of the events, varying in only one or two respects. *Id.* Lieutenant Mason testified that during the interview, the Petitioner told her and Sergeant Stark that "he didn't want to talk to us anymore, to get somebody else in there for him to talk to." Lieutenant Mason and Sergeant Max left the interview room, and Deputy Director Armstrong decided to attempt to interview the Petitioner. *Id.*

Deputy Director Armstrong

> watched the [Petitioner's] body language as he talked to the [Petitioner] about how horrific the crimes were. He said the [Petitioner] seemed "really, really tight, like he was doing everything he could not to talk to me." According to Deputy Director Armstrong, the [Petitioner] gave one-or-two-word answers to questions and would not engage in open conversation. Deputy Director Armstrong said that "[m]ost of the time if I asked him a question, he would nod his head or shake his head. But you could tell he was doing everything he could not to engage me in an open

conversation as to where we had open dialogue back and forth with each other."

Deputy Director Armstrong said that, when he entered the interview room, he knew that the [Petitioner] was very familiar with the criminal justice system and that the [Petitioner] had only recently been released from prison. When Deputy Director Armstrong asked the [Petitioner] whether he believed in God and in heaven and hell, the [Petitioner] said that he did. Deputy Director Armstrong stated that the [Petitioner] was "struggling to try to maintain his composure" and at times during the interview leaned forward as if he wanted to make a statement but would then lean back. Deputy Director Armstrong said that he could tell the [Petitioner] was hiding something.

At one point, Deputy Director Armstrong allowed the [Petitioner] to grab his hands, attempting to convey to the [Petitioner] that he knew something was weighing heavily on the [Petitioner's] mind. Although it appeared to Deputy Director Armstrong as if the [Petitioner] were about to speak to him, the [Petitioner] refused to engaged in conversation and asked to go to the restroom. Deputy Director Armstrong allowed him to go. When the interview resumed, Deputy Director Armstrong asked the [Petitioner] what his family called him, and the [Petitioner] replied, "Junior." He asked the [Petitioner] if anyone else in his family was referred to as "Junior," and the [Petitioner] said, "[N]o." In response to questions, the [Petitioner] also told Deputy Director Armstrong that no one else in his family looked like him and no one in the family had ever confused him with someone else in the family. When the [Petitioner] was asked whether a member of his family would be referring to him if the person used the name "Junior," the [Petitioner] said yes.

Deputy Director Armstrong then played the tape recording of C.J. stating that he had been stabbed by his "Uncle Junior." According to Deputy Director Armstrong, the [Petitioner] became visibly upset and appeared as if he were about to cry. The [Petitioner] then told Deputy Director Armstrong that he and Cecil went somewhere to get a gun, began arguing, and continued to argue during the drive back to Cecil's house. The [Petitioner] said that when they returned to Cecil's home, the argument escalated. When Cecil reached for a shotgun, the [Petitioner] began shooting, using both his gun and Ms. Williams's gun. The [Petitioner] said that he then attempted to "get rid" of the children because they had seen him. The [Petitioner] stated that he "stuck them," using the knives from the kitchen drawer.

***10** According to Deputy Director Armstrong, the [Petitioner] began to cry and appeared as if "he had gotten the weight of the world off his shoulders. But it was almost like I'm defeated." Deputy Director Armstrong testified that when he began to question the [Petitioner] in greater detail about what had occurred in the house, using his knowledge of the crime scene to frame the questions, the [Petitioner] asked for an attorney, and the interview ceased. The [Petitioner] also asked to speak with his mother....

Id. at 24-25.

Officers retrieved the Petitioner's mother from the safe house and transported her to the police station, where she spoke to the Petitioner. *Id.* at 25-26. She held the Petitioner's hands and asked him what was happening and whether the police were " 'trying to put it on him.' " *Id.* at 26. The Petitioner initially did not respond but then told her that he " 'did it.' " *Id.* His mother asked him " 'why the babies,' " and the Petitioner responded that they had seen him. *Id.* The Petitioner stated that he and Mr. Cecil Dotson had argued all day and that Mr. Cecil Dotson had a gun. *Id.* Although Mr. Cecil Dotson did not point the gun, he was " 'swinging it.' " *Id.* The Petitioner said he began shooting once Mr. Cecil Dotson put the gun down and that the Petitioner later rode a bicycle away from the scene to his girlfriend's home. *Id.* The Petitioner's mother testified that she " 'asked him [why] the kids and he said they saw me. And I said but the baby, the baby. He didn't say nothing, just shook his head. And I got up and told him I love him and I left.' " *Id.*

Officers subsequently located C.J.'s yellow bicycle in a shed behind Ms. Jones's home. *Id.* Neither the blood of any of the victims nor the Petitioner's DNA was found on the bicycle. *Id.* None of the victims' blood was on the Petitioner's clothing seized following his arrest. *Id.* at 37.

C.J. testified at trial that he was watching television in his sister's bedroom when he heard a gunshot. *Id.* at 31. C.J. said he

> walked out of his sister's room and into the hallway. C.J. recalled peeking into the living room and seeing "my Uncle Junior point a gun toward my daddy," who was not saying anything. C.J. testified that he saw "some smoke and sparks come out [of] the gun" and then looked down on the ground" and "saw [a] dude on the floor[ ]," who was wearing a black shirt and black pants.

C.J. testified that when he heard another gunshot, he "peeked" through the door, walked into the hallway, and saw the [Petitioner] shooting at a woman who was on the arm of the couch. C.J. did not recognize the woman, but he recalled that she was telling the [Petitioner] that she loved him, but the [Petitioner] "just kept on shooting."

C.J. said that he then returned to his sister's room and sat down on the bed. Hearing footsteps coming toward the door, he turned and saw the [Petitioner] holding a "handheld knife," which C.J. described as the type that opens and closes. C.J. said that when the [Petitioner] cut him on his neck, he told the [Petitioner] that he loved him, but the [Petitioner] replied, "[N]o, you don't." C.J. then lay down on the bed, and Cecil II began crying. C.J. heard the [Petitioner] then say to Cecil II, "[D]on't worry about it, you ain't going to get hurt."

C.J. testified that he tried to retrieve the telephone from the hallway to call the police, but before he could do so, he saw the [Petitioner's] feet in the doorway and heard the [Petitioner] ask him what he was doing. When C.J. told the [Petitioner] that he was going to call the police, the [Petitioner] said he would kill C.J.'s parents and Cecil's friends if C.J. did so. C.J. recalled asking the [Petitioner] if he could use the bathroom and noticing that the [Petitioner] had a "kitchen knife" in his hand. C.J. recalled the [Petitioner] allowing him to go to the bathroom, but stated that the [Petitioner] "ma[d]e [him] put [his] head in the tub." When he had done so, the [Petitioner] tried to stab C.J. in the chest, but C.J. put his hand up to block the blow, and the knife went into his head instead.

***11** C.J. recalled seeing his mother, Ms. Williams, in the doorway of the bathroom saying that she did not want to die. The [Petitioner] asked her for Cecil's cellphone and car keys, and Ms. Williams replied that the keys likely were in Cecil's car. C.J. recalled the [Petitioner] then saying to Ms. Williams, "sorry because I ain't let your husband or your husband's friends get away with it and the kids." Then C.J. heard what he described as a "huge fall on the ground."

C.J. testified that he next saw the [Petitioner] walking in the hallway with a garbage bag and another kitchen knife, going into C.J.'s sister's bedroom. C.J. heard someone yelling and heard the [Petitioner] saying "shut up." C.J. then heard Cemario ask to use the bathroom and saw blood dripping from Cemario's head onto the rim of the toilet seat. He said that Cemario asked the [Petitioner] if he could return to his room and the [Petitioner] said that he could. Next, C.J. said, the [Petitioner] went into the kitchen, grabbed another knife, and entered the bedroom of C.J. and his brothers. C.J. said he saw Cemario lying on the bed and the [Petitioner] stab Cemario, who then fell on the floor. C.J. said he heard "rambling" in the hallway near the laundry room, as if the [Petitioner] were attempting to move something out of the way. C.J. then fell asleep in the bathtub and heard nothing more that night.

C.J. testified that when he awoke, he saw firemen in his bedroom looking at Cemario. One of the firemen came into the bathroom and got C.J. out of the bathtub. C.J. was transported to the hospital by ambulance. C.J. said that no one was with the [Petitioner] during the attacks and that the [Petitioner] acted alone. By the time of trial, more than two years had passed since C.J. identified the [Petitioner] as the lone perpetrator of the crimes. During that time, C.J. had not wavered in his identification of the perpetrator.

However, C.J. also testified at trial that he had told "Ms. Pat" in a previous interview that on the same night that the "bad thing" happened, a woman named "Cassandra" knocked on the door and said that she needed to use the bathroom. She and some other people, including a man wearing a mask with "[a] little bit of blood" on it, entered the house. C.J. had never seen the man before, but he recalled Cecil referring to the man as "Roderick." C.J. did not recall who allowed "Roderick" to enter the house, although he acknowledged that he had previously told "Ms. Pat" that Cecil allowed "Roderick" to enter the house and that he was mad at Cecil for doing so. C.J. testified that "Roderick" said something to Cecil about the gang and also told Cecil, "[Y]ou got too big, boy." According to C.J., "Roderick" fired a gun at Cecil and said, "[N]ever stop playing with the gang boy, ... you never know what would happen, boy."

On redirect examination, C.J. again identified the [Petitioner] as the person who stabbed him in the head, shot his parents and their friends, and hurt his brothers and baby sister.

On recross-examination, C.J. testified that he saw a fight in the living room between Cecil and the man in the mask and again maintained that the man was shooting at Cecil. He also agreed that he had met with "Ms. Caroline" and "Ms. Pat" at "Ms. Pat's" office, and had said, when they asked him how he knew some of the things he told them, that his "granny" had told him.

Id. at 31-32.

Cedrick, who was eight years old at the time of trial, testified that the Petitioner "stabbed him on the nose, forehead, and wrist and that no one else was with" the Petitioner. *Id.* at 32. According to Cedrick,

> ***12** the attacks occurred at night but before he had eaten dinner. He did not recall hearing gunshots that night and also did not recall seeing the [Petitioner] shoot anyone. He said that no one had told him that the [Petitioner] shot anyone. Cedrick testified that the [Petitioner] got the knife he used to stab them from his car, but he could not remember the color of the [Petitioner's] car. Cedrick said that, although he had not seen the [Petitioner] stabbing his parents, he recalled that his parents and their friends were stabbed. Cedrick said that when his parents were killed, all of the children, other than one of his brothers and the baby, were locked in his sister's bedroom. Cedrick stated that his brother had told him that Ms. Williams was injured while she was in the living room changing the baby's diaper.
>
> Cedrick testified that he heard Ms. Smith on the telephone calling the police, and he recalled that [Ms.] Nicole [Dotson], whom he referred to as "Auntie Foxy," was also present when they were attacked. Cedrick acknowledged previously telling "Ms. Pat" and C.J. that his father never should have opened the door. Cedrick explained that a fight began after his father opened the door, and he remembered many people fighting that night, and specifically recalled a man, whom he did not know, fighting with his father and his father's friends. Cedrick also remembered C.J. sneaking out of the house after the [Petitioner] had stabbed him and riding on his bicycle to his grandmother's home. Cedrick testified that he had sneaked up on his "Uncle Jessie," got on his own bike, and also rode away to his grandmother's home. Cedrick recalled that when he and C.J. left, everyone was still alive in the house and [they] were talking, singing, and having fun.
>
> On redirect examination, Cedrick said that he had been in his sister's room when the [Petitioner] stabbed him, and he also recalled telling "Ms. Pat" that the [Petitioner] stabbed him. On recross-examination, Cedrick testified that he had talked to "Ms. Pat" after he had been living with his family for a period of time and after he had listened to others discussing the homicides and attacks.

Id. at 32-33.

Dr. Lisa Funte, a Shelby County medical examiner and expert in forensic pathology, performed the autopsies of Ms. Williams, Ms. Roberson, and Cecil II. *Id.* at 33-34. Dr. Miguel Laboy, another medical examiner in the Shelby County Medical Examiner's Office, performed the autopsies of Mr. Seals, Mr. Cecil Dotson, and Cemario. *Id.* at 33-35. Dr. Funte testified at trial regarding the autopsies of all six deceased victims. *Id.*

Mr. Seals died as the result of multiple gunshot wounds, including one to his mouth, one of his midline upper chest area, and one to the side of his chest near his right armpit. *Id.* at 33. Ms. Williams sustained five gunshot wounds: one to the left side of her head, one to the right side of her chest, one to her left leg, one to her right thigh, and one to the left side of her abdomen. *Id.* Ms. Roberson sustained four gunshot wounds: one to her right thigh, one to her left knee, one to her left calf, and one to her left thigh. *Id.* at 34. Dr. Funte testified that based upon the wound pattern on Ms. Roberson's legs on her jeans, she was wearing the jeans when she was shot, and her clothes were rearranged later. *Id.* Mr. Cecil Dotson sustained eight gunshot wounds: one to his head, one to his neck, one to his chest, one to his right thigh, two to his left thigh, one to his left leg, and one to his left foot. *Id.* According to Dr. Funte, "fiber found in the area around the entry of the gunshot wound to Cecil's head was consistent with the shooter placing a fiber-filled pillow over Cecil's face and firing the gun through the pillow." *Id.*

Nine-millimeter and .380 caliber bullets and jackets were recovered from the bodies of the adult victims. *Id.* at 37. No gunshot residue was found on the clothing of Mr. Cecil Dotson, Ms. Roberson, or Ms. Williams. *Id.* at 38. Special Agent Braswell testified that the lack of gunshot residue "meant either that the shooter was far enough away from the victims when the gun was fired that it left no residue, or that an object, such as a pillow, had been placed between the gun and the victim." *Id.* Gunpowder particles were on the bullet holes in Mr. Seals's shirt. *Id.* Special Agent Braswell estimated that the gun was at least two feet and no more than four feet away from Mr. Seals when it was fired. *Id.*

***13** Dr. Funte testified that "Cecil II died of multiple sharp force injuries, including multiple incised and stab wounds to his head, torso, and extremities." *Id.* at 34. Cecil II sustained seven stab wounds that penetrated and fractured his skull, as well as

> a puncture-style stab wound to the right side of his head, two puncture-style stab wounds to his left cheek, two incised wounds on the left side of his face near his eye, an incised wound to his right ear, beginning at the top of his ear and continuing along the inside of the ear, a group of incised wounds of varying lengths and an incised wound leading to a stab wound on his torso, multiple incised and stab wounds on his back, and a mixture of sharp force and blunt force injuries on the left side of his torso.

Id. at 34-35. Cecil II also sustained multiple blunt force injuries resulting in abrasions and contusions, including an abrasion on the right side of his head that almost formed the outline of a rectangle and was consistent with him being struck on the right side of his head with a board. *Id.* at 35. Dr. Funte stated that based on the nature of Cecil II's injuries, he attempted to fend off his attacker. *Id.* Cecil II possibly could have survived had he received medical treatment within an hour of receiving his injuries, although it was not " 'necessarily probable.' " *Id.*

Cemario died of blunt force and sharp force injuries. *Id.* He sustained

> blunt force trauma to his head, with lacerations and bruises, multiple linear depressed fractures of the calvarium and the base of his skull, deep scalp and subarachnoid hemorrhage, and multiple contusions to his brain. Dr. Funte also noted areas of abrasions and lacerations on Cemario's head, as well as an incised wound above his left ear that tore part of his scalp away from his skull.

Id. Cemario also sustained

> incised wounds to his head, neck, and right hand. A stab wound to his chest went all the way through his body, injuring his left lung and hemidiaphragm, as well as his stomach, spleen, and liver. Cemario also sustained linear abrasions and bruises on his left arm, abrasions on his forehead, an abrasion and bruising on his right ear, a gaping incised wound to his neck, abrasions on his right arm, and an incised wound on his ring finger, which was consistent with Cemario having attempted to defend himself by holding up his hand or grabbing the knife.

Id.

5. The Defense Proof

The defense presented the testimony of Mr. Cedric Atkins, who said that approximately one and one-half weeks prior to the murders, Mr. Cecil Dotson told him that he owed about $300,000 to the " 'mob.' " *Id.* at 38. Mr. Atkins testified that he relayed this conversation to a police officer after the murders and maintained that he never demanded money from the officer in exchange for the information. *Id.* Mr. Atkins did not recall asking the officer what was " 'in it for [him].' " *Id.*

Sergeant Stark testified that following the murders, he interviewed Mr. Waddell, who stated that Mr. Hill had told him that the victims were tortured and that Mr. Cecil Dotson's fingers were severed. *Id.* Mr. Waddell also stated that Mr. Cecil Dotson and "Doc" had a " 'falling out.' " *Id.*

Dr. Nancy Aldridge, a psychotherapist and expert in the forensic evaluation of children, testified regarding her concerns about the manner in which the interviews of C.J. and Cedrick were conducted. *Id.* at 39. She noted that C.J. was interviewed on four or five different occasions, including shortly after he was found, and that he gave different statements about what had occurred. *Id.* She also noted that the formal forensic interviews were not held until more than five months after the murders, which increased the potential

that the children had been exposed to information about the crimes from other family members. *Id.* Dr. Aldridge testified that C.J.'s initial account in which he named "Cassandra" was " 'possibly' " reliable because those who observed the interview said C.J. appeared to relive the trauma while giving the statement and the interviewers appropriately used open-ended questions. *Id.* Dr. Aldridge stated that a child's memory becomes less clear with the passage of time and that a child who continues to be questioned after providing an answer may provide a different answer, thinking that the initial answer was unacceptable. *Id.*

***14** Dr. Aldridge stated that C.J. and Cedrick appeared to be prepared for their testimony at trial in that they appeared to know what questions were going to be asked ahead of time and what their answers would be. *Id.* at 40. Dr. Aldridge testified that "although the reliability of C.J.'s testimony was an issue for the jury, she questioned its reliability because C.J. seemed to agree with whatever question was asked of him." *Id.* She noted the potential for contamination of their memories based upon the time period that had elapsed between the murders and the trial. *Id.* She acknowledged on cross-examination that she was unaware of whether C.J.'s identification of the Petitioner as the attacker was incorrect but noted that she had " 'concerns.' " *Id.*

The Petitioner testified that the murders were committed by unknown assailants as he was hiding under the bed in the master bedroom. *Id.* He stated that earlier that night, Mr. Cecil Dotson had argued with a man in a parking lot while Mr. Seals was at Mr. Hill's apartment retrieving a gun. *Id.* The Petitioner stated the argument involved the incident during which Mr. Cecil Dotson reported to police that there was marijuana inside the apartment where Mr. Hill lived. *Id.*

The Petitioner testified that after making several stops, they returned to Mr. Cecil Dotson's home where the Petitioner and the four adult victims gathered in the living room. *Id.* at 40-41. Mr. Cecil Dotson asked Ms. Williams to put clean sheets on the bed in the master bedroom because he planned to allow Ms. Roberson and Mr. Seals, who had recently been released from jail, to use the master bedroom. *Id.* at 41. The Petitioner stated that he volunteered to change the sheets and that he heard two or three gunshots while in the master bedroom. *Id.* Although he had a blue .44 caliber handgun, he hid under the bed when he heard screaming. *Id.* He heard a few gunshots at first, followed by more gunshots seconds later. *Id.* The Petitioner stated that after several minutes, he left his hiding place and returned to the living room where he found the victims' bodies. *Id.* He said he believed everyone in the house, including the children, were deceased, and he rode away on a bicycle that was behind a door in the living room. *Id.* at 41-42. He stated that he rode the bicycle to Ms. Jones's home where he vomited in the bathroom. *Id.* at 42. He then used bleach to clean the vomit from the sink, dropping some of the bleach on the floor. *Id.*

The Petitioner explained that he did not report what he had witnessed to the police because, " 'Y'all done heard testimony about the gangs. I'm in a gang. We don't call the police. It's just that simple. We don't call the police. It's not part of what we do. If I call the police, I'll be just like my brother.' " *Id.* He testified that he did not tell the truth when initially questioned by the police because he " '[doesn't] talk to police.' " *Id.* The Petitioner testified that prior to his interview with Deputy Director Armstrong,

> he had been in the Homicide Bureau for hours and was handcuffed to a table. The [Petitioner] said that Deputy Director Armstrong played a tape recording of C.J. identifying him as the perpetrator but did not play earlier taped interviews of C.J. identifying other individuals. The [Petitioner] stated that after playing the recording, Deputy Director Armstrong began screaming about the [Petitioner's] family and said that he was tired of "playing games." According to the [Petitioner], Deputy Director Armstrong said he knew the [Petitioner] was "bullshitting" and that he was "sick of it." The [Petitioner] said that Deputy Director Armstrong began "pounding" on the table and demanding to have answers "now."

Id.

The Petitioner denied that he was telling the truth to Deputy Director Armstrong and his mother when he admitted to shooting the adult victims and attacking the children. *Id.* He explained that

> ***15** when he was interviewed on March 7th, he had not slept since the homicides were discovered on March 3rd and that he had cried and had been depressed about what had happened. The [Petitioner] stated that he asked to see his mother approximately three times during the interview, but Deputy Director Armstrong told him that he would not be allowed to see anyone until the [Petitioner] told him what he wanted to know. The [Petitioner] said that, earlier on March 7th, he had told other officers that he did not kill the victims. The [Petitioner] insisted that his statement to Deputy Director Armstrong admitting his guilt was not true, and he proclaimed his innocence of the crimes, stating that he did not kill Cecil or any of the other victims.

Id. at 42-43.

On cross-examination, the Petitioner admitted that he did not call 9-1-1 after discovering the victims and that he did not report the crimes to anyone the following day. *Id.* at 43. He also admitted that he had lied to family members about the last time that he had seen Mr. Cecil Dotson. *Id.* He did not attempt to use the cordless phone in the master bedroom to call for help. *Id.* He remained under the bed for approximately thirty minutes and denied hearing the children scream or hearing anyone hitting the children with boards. *Id.* He stated that when he entered the living room, Ms. Roberson was in the position in which she was discovered by police. *Id.* The Petitioner said that he saw C.J. lying in the bathtub but that he did not " 'pay attention' " to the knife in C.J.'s head and did not check to determine whether C.J. was alive. *Id.*

With regard to his confession to Deputy Director Armstrong, the Petitioner testified that

> he was in the interview room with Deputy Director Armstrong for four or five hours, and the [Petitioner] maintained that he had confessed only after Deputy Director Armstrong screamed at him and threatened him. The [Petitioner] explained:
>
> > He didn't pound on the table. It was he asked me when he played the tape and after he played the tape, he played the tape what, [twelve, thirteen] times. And after he played it [twelve] to [thirteen] times, after I still told him I didn't do it, that's when he said I'll kill your mother f***ing ass myself, you cold-hearted murdering killing mother f***er.
>
> According to the [Petitioner], Deputy Director Armstrong then said: "I got something for you. I'm going to throw your ass on that 4th floor and I'm going to let them kill your mother f***ing ass."

Id.

With respect to his meeting with his mother, the Petitioner testified that

> he had leaned across the table and told his mother, "[T]hey trying to put this on [me]." His mother asked for the names of those who were trying to do this so that she could get him help. The [Petitioner] said that he told her he did not know their names and that they were watching him. The [Petitioner] said that he and his mother then grabbed each other's hands, that he told his mother not to worry, and then admitted to committing the offenses. The [Petitioner] acknowledged that he told his mother that he and Cecil began arguing and that, after Cecil put down his gun, he had begun shooting. The [Petitioner] also recalled both his mother asking him how he got away from the house and his response that he rode away on a bicycle. The [Petitioner] agreed that he had told his mother that he killed the children because they saw him. However, the [Petitioner] insisted that he lied to his mother and that his trial testimony was truthful.

Id. at 43-44.

The jury convicted the Petitioner of six counts of premeditated first degree murder for the deaths of Mr. Cecil Dotson, Ms. Williams, Mr. Seals, Ms. Roberson, Cemario, and Cecil II. The jury also convicted the Petitioner of three counts of attempted premediated first degree murder for attacking C.J., Cedrick, and Ceniyah.

B. Penalty Phase

***16** During opening statements in the penalty phase, counsel for the Petitioner argued that based upon the Petitioner's age, he would never be released from prison even if the jury imposed a sentence of less than death. Counsel noted that there were structures in place to help defendants "be better and live lives in prison." Counsel also asked the jury to consider the Petitioner's background in determining an appropriate sentence.

The State relied upon the proof submitted during the guilt phase of the trial and introduced three additional photographs of Cemario and Cecil II as evidence of the heinous, atrocious, and cruel aggravating circumstance. The parties stipulated that the Petitioner previously had been convicted of second degree murder, which qualified as a felony involving the use of violence to the person.

The State presented victim impact evidence through the testimony of Ms. Williams's mother and Mr. Seals's aunt. Ms. Williams's mother testified that she had adopted her surviving grandchildren and was raising them and that, as a result, she had lost her job and was struggling financially. She and her family were in counseling as a result of the offenses. Mr. Seals's aunt testified that Mr. Seals had three children, whom he loved and was supporting at the time of his death. She stated that Mr. Seals's death deeply affected her because he was like a younger brother to her before his mother died and she acted as a mother figure to him following his mother's death.

The defense presented the testimony of Ms. Glori Shettles, a mitigation specialist, regarding the Petitioner's family history and background. She stated that prior to becoming a mitigation specialist, she worked as a parole officer and became familiar with the prison system in Tennessee. She offered testimony regarding the different classifications and tasks that could be assigned to a prisoner based upon the prison where he or she was assigned.

Ms. Shettles testified that she gathered all available records regarding the Petitioner, spent a great deal of time with the Petitioner, who was "open" about his background, and interviewed several family members, who were willing to provide information but were not willing to testify. According to Ms. Shettles, the Petitioner's parents were married in 1972 when his mother was fifteen years old and his father was nineteen years old. Their first child, Ms. Nicole Dotson, was subsequently born. The Petitioner's father joined the Army and was stationed in Florida where the Petitioner was born. At some point, the Petitioner's mother and Ms. Nicole Dotson returned to Memphis, and Ms. Nicole Dotson became very ill, after which the Petitioner's father left his station and returned to Memphis. The Petitioner's father served about three years in the Army and received an honorable discharge. He was unable to find employment in Florida, so he moved his family back to Memphis.

Upon their return to Memphis, the Petitioner's mother began leaving the children at home, and his father became jealous of her. She returned from a church trip to New Orleans with a boyfriend and told the Petitioner's father that she no longer wanted to be married to him. They remained married for a period, during which time the children witnessed their parents arguing and the Petitioner's father being physically abusive to his mother. By this time, Mr. Cecil Dotson, who was three years younger than the Petitioner, was born. The Petitioner's mother saved up money and left with the children without telling the Petitioner's father. She did not contact the Petitioner's father until four or five months later. The Petitioner, who was about six years old, and the other children did not know what had happened to their father. The Petitioner and his siblings had little contact with their father during their childhood. When the Petitioner was nine years old, his mother began a relationship with the father of her next two children. The man treated the Petitioner, his siblings, and his mother well, but the relationship ended.

***17** Ms. Shettles noted a great amount of instability in the family, stating that the family moved often and that the Petitioner attended ten different schools. The Petitioner was diagnosed with a learning disability in reading and math, and he was enrolled in resource classes as a result. He also had disciplinary problems at school and at home. According to school mental health records, the Petitioner received individual counseling and benefited from it. The records also indicated that his mother canceled appointments to meet with school mental health officials or would not be home when home visits were scheduled. The Petitioner repeated the fourth grade twice, not due to poor grades but due to excessive absences. The Petitioner and his siblings were teased at school because they did not have proper clothing, so the Petitioner would not go to school. He was socially promoted in other grades.

The Petitioner became involved in the juvenile court system when he was fifteen years old and was arrested several times. His mother reported being unable to control him, and job corps was recommended but was not followed through.

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His mother attended juvenile court proceedings involving the Petitioner on many occasions. On one occasion, Ms. Nicole Dotson, who was about two years older than the Petitioner, attended a juvenile court proceeding involving both the Petitioner and Mr. Cecil Dotson because their mother was unable to attend.

The Petitioner's mother often was not at home, and Ms. Nicole Dotson cared for her brothers. The food was locked up in the home so that the Petitioner and his siblings did not have access to it. The family often went to the home of the Petitioner's maternal grandmother for Sunday dinner, and the Petitioner and Mr. Cecil Dotson took money from her purse. Ms. Shettles testified that although they did not tell people why they were taking the money, they were doing so in order to purchase food. They were punished severely for taking the money, and the Petitioner's grandmother told his mother that the Petitioner and Mr. Cecil Dotson were no longer welcome in her home.

The Petitioner withdrew from school at the age of sixteen while in the eighth grade. For a three-month period, the Petitioner lived with his cousin and her mother, and several relatives lived nearby. The Petitioner was happy while living there, but his mother asked him to return home to help care for her three young children. The Petitioner worked as a security guard for a very short period of time at the age of eighteen, and Ms. Shettles stated this was the only legitimate job that he ever held.

At the age of nineteen, the Petitioner pleaded guilty to second degree murder and received an eighteen-year sentence. Ms. Shettles detailed the restrictions and various punishments for violating rules in prison. She said that the Petitioner had many write-ups during the first few years, most of which were for non-violent acts, but that he also had one write-up for a violent act. The Petitioner was denied parole on two different occasions before he was granted parole after serving fourteen years in prison. Ms. Shettles detailed the various programs completed by the Petitioner while in prison.

While the Petitioner was in prison, his mother and her husband visited him on one occasion, and no other relatives ever visited him. He spoke to his father "a couple of times" on the telephone. Ms. Shettles noted that the Petitioner has family members who care for him, including a son, a personal friend, and a friend of his grandmother.

On cross-examination, Ms. Shettles acknowledged that when the Petitioner was younger, he often was in trouble at school and at home and that he had been suspended from school so often that the school system refused to allow him to continue his enrollment. She noted that several of the Petitioner's adjudications in juvenile court involved weapons and that his school and juvenile court records referenced problems with his brother. Ms. Shettles was aware that the Petitioner became a member of the Crips gang while in prison. She recalled that while in prison, the Petitioner and four other inmates were accused of cutting another inmate during a gang-related altercation.

***18** On redirect examination, Ms. Shettles testified that the Petitioner also witnessed violence as a child, including physical fights between his parents. When he was seventeen years old, he saw his mother place her baby in scalding hot water. The Department of Children's Services investigated the incident and concluded the matter to be unfounded. The Petitioner maintained that the incident occurred.

During closing arguments, counsel for the Petitioner requested that the jury consider the Petitioner's background, as well as any residual doubt, and to impose a sentence of life without parole. At the conclusion of the closing arguments, the trial court instructed the jury regarding the following mitigating circumstances: (1) any lingering or residual doubt as to the Petitioner's guilt; (2) the Petitioner was raised in a dysfunctional family; (3) he suffered childhood neglect; (4) his parents separated when he was six years old, and his father was not a part of his life; (5) the Petitioner experienced numerous changes of residences and schools throughout early childhood; (6) he was retained twice in the fourth grade due to truancy and was absent from school many times; (7) he was diagnosed with a learning disability; (8) his mother was not compliant with scheduled meetings and failed to appear at juvenile court hearings on several occasions; (9) he witnessed what he believed to be intentional physical abuse of his younger brother by his mother; and (10) any other mitigating facts raised by the evidence.

At the conclusion of the penalty phase, the jury returned sentences of death for each of the first degree murder convictions. With regard to the murder of Mr. Cecil Dotson, the jury found the following three aggravating circumstances set forth in Tennessee Code Annotated section 39-13-204(i): (2) the Petitioner previously was convicted or one or more felonies involving the use of violence; (3) he knowingly created a great risk of death to two

or more people, other than the victim murdered, during the act of murder; and (12) he committed mass murder. With regard to the murders of Ms. Williams, Mr. Seals, and Ms. Roberson, the jury found the same three aggravating circumstances applied to Mr. Cecil Dotson's murder, as well as the following two additional aggravating circumstances: (6) the murder was committed for the purpose of avoiding, interfering with, or preventing the lawful arrest or prosecution of the Petitioner or another; and (7) the murder was knowingly committed while the Petitioner had a substantial role in committing, or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit any first degree murder. *See* T.C.A. § 39-13-204(i)(6), (7). With regard to the murders of two of the minor children, the jury found the same five aggravating circumstances applied to the first degree murders of Ms. Williams, Mr. Seals, and Ms. Roberson, as well as the following two additional aggravating circumstances: (1) the victim was less than twelve years old and the Petitioner was eighteen years or older; and (5) the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. *See* T.C.A. § 39-13-204(i)(1), (5).

During a separate sentencing hearing, the trial court sentenced the Petitioner to forty years as a Range II, multiple offender for each of his convictions for attempted first degree murder to be served consecutively to each other and to the death sentences. The Petitioner appealed to this court, raising twenty-one issues, and this court affirmed the Petitioner's convictions and sentences on direct appeal. *See State v. Jessie Dotson*, No. W2011-00815-CCA-R3-CD, 2013 WL 4728679, at *1 (Tenn. Crim. App. June 25, 2013), *affirmed by State v. Dotson*, 450 S.W.3d 1 (Tenn. 2014). On automatic review, the Tennessee Supreme Court also affirmed the convictions and sentences. *See Dotson*, 450 S.W.3d at 12.

Post-Conviction Proceedings

***19** On August 17, 2015, the Petitioner filed a timely pro se petition for post-conviction relief, alleging ineffective assistance of counsel and errors by both the trial court and the State. Shortly thereafter, the post-conviction court appointed counsel to represent the Petitioner. On May 31, 2017, the Petitioner filed an amended petition. The evidentiary hearing was continued on multiple occasions, and much of the pre-hearing litigation centered on the denial of funding for expert witnesses, the admissibility of testimony of jurors from the Petitioner's trial, and various discovery issues. The evidentiary hearing occurred October 1-4, 2018.

At the evidentiary hearing, co-counsel testified that he and lead counsel were appointed to represent the Petitioner at trial. Co-counsel had been practicing law since 1996 and had attended capital defense training sessions prior to the Petitioner's trial. He had represented defendants in six or seven capital cases prior to the Petitioner's trial. Co-counsel had approximately fifty cases when he was representing the Petitioner, some of which were non-capital homicides.

Co-counsel testified that the defense at trial was that "there [was] no way one person shot two guns, killed all these people and left no trace in there," that "the State's theory [did] not make sense," and that "there was [not] one shred of physical evidence to corroborate the State's theory." Co-counsel stated that he was in charge of preparing for the penalty phase and almost half of the guilt phase and that he spent approximately seven-five percent of his time preparing for the guilt phase.

Trial counsel retained Ms. Rachael Geiser as the guilt/innocence investigator and Ms. Glori Shettles as the mitigation investigator, and trial counsel had worked with both Ms. Geiser and Ms. Shettles in numerous prior cases. Trial counsel provided the investigators with direction, but the investigators also often came to trial counsel about issues. Trial counsel had multiple meetings with the investigators and communicated with them through telephone calls and email. Co-counsel stated that he also spoke to the investigators when he saw them at the courthouse about once a week. Co-counsel did not interview any witnesses at their homes, explaining that the majority of the witnesses were uncooperative.

The trial court granted a limited change of venue and ordered that the jury be selected in Nashville and then transported back to Memphis for the trial. Co-counsel stated that he and lead counsel believed that if the jury convicted the Petitioner of the offenses, the jury would impose the death penalty. As a result, trial counsel chose some jurors, whom trial counsel believed would be favorable to the defense regarding issues of guilt or innocence, even though trial counsel did not believe those jurors would be favorable regarding death penalty issues.

Co-counsel testified that one of the jurors who was chosen for the jury ("Juror 1") stated in his jury questionnaire that he had "no problem with the death penalty as [he] believe[d]

no person has a right to take any person's life under any circumstance." Co-counsel acknowledged that during voir dire, Juror 1 indicated that he could not consider a sentence of less than death for the killing of a child and that it would be difficult to mitigate the murder of a child. Co-counsel acknowledged that some judges would exclude a prospective juror for cause if the juror was unable to consider a sentence of less than death for the killing of a child and that a defense attorney should seek to exclude such a juror for cause unless the attorney wanted the juror "for some other reason." Co-counsel stated that while he generally did not want such a juror on the jury for a capital case, trial counsel chose jurors who were "far less appealing" regarding death penalty decisions because trial counsel wanted jurors who could comprehend the forensic evidence. Co-counsel said that the DNA and hair evidence was more complicated than in a "usual trial" and that, as a result, they chose jurors whom they generally would not have chosen. In response to questioning by the post-conviction court, co-counsel agreed that he and trial counsel were attempting to select jurors who they believed could comprehend the issues during the guilt phase of the trial, even though they did not like the prospective jurors' answers to questions involving the penalty phase. Co-counsel testified that they did not have a strong mitigation case and that residual doubt might have been their strongest argument during the penalty phase.

***20** Co-counsel testified that the parties had possession of the completed juror questionnaires for some time prior to jury selection and that the defense team had a meeting during which they discussed those prospective jurors whom they wanted and did not want on the jury. Co-counsel did not recall whether he and lead counsel had a strategic reason for failing to exhaust all of their peremptory challenges. He explained that in determining whether to exercise a challenge, they had to examine the prospective juror's replacement, utilizing both the questionnaires and their notes about each prospective juror. Co-counsel further explained that he and lead counsel were making complex decisions based upon the prospective juror's replacement and those prospective jurors who they believed would comprehend their experts and the DNA evidence.

Co-counsel testified that he did not have a strategic reason for declining to object to the State's questioning prospective jurors first. He stated that while he had made the objection in prior cases, he had never won the objection or heard of any other defense attorney who had. He said he did not have a strategic reason for declining to question prospective jurors about their attitudes on race other than he did not believe race was an issue that needed to be overcome in the case. Co-counsel stated that he would not question the prospective jurors about implicit bias unless he felt it was necessary based upon a prospective juror's responses to the questionnaire, responses during voir dire, or demeanor. He explained, "I've got to pick a jury that's still going to be able to listen to us and like us the next day. I don't mean in a popularity kind of sense. I mean in a willing-to-give-me-a-fair-shot kind of sense because you win or lose those jurors at the beginning in my opinion."

Co-counsel recalled that there were two to three hundred crime scene photographs and described the photographs as "[h]orrendous." Trial counsel attempted to limit the photographs shown to the jury. Co-counsel stated that he wanted some of the crime scene photographs introduced because they were relevant to the defense's claims regarding the forensic evidence. Once the trial court became aware of the number of photographs, the court ordered the parties to meet and attempt to reach an agreement regarding which photographs should be admitted. Co-counsel believed the State agreed to not enter ten to fifteen of the photographs, but he could not recall the number of photographs to which the trial court had to determine the admissibility due to the parties' inability to reach an agreement. Co-counsel explained that he did not object to the admissibility of every single photograph because "[y]ou lose too much credibility if you can't agree on just the basic start of how do we do business."

Co-counsel did not recall a meeting with the defense team during which they decided that Dr. Funte's testimony regarding three autopsies performed by another forensic examiner was an issue. Co-counsel did not believe that the issue was of particular importance because the defense knew the cause of the victims' deaths. He explained, "I can't think of a time when I've been about to win a murder trial over the cause of death. It could happen. This just wasn't that case."

Co-counsel testified that the defense retained Dr. Aldridge to consult with them about their cross-examination of the children at trial. The defense team decided that co-counsel should cross-examine the children at trial because he appeared "more approachable and less threatening" than lead counsel. The family did not allow the defense to meet with the children prior to trial. Co-counsel recalled that he spent a great deal of time preparing to show the discrepancies between what he believed C.J.'s testimony would be and C.J.'s statements to the police. Co-counsel was not confident that he would

get a single answer that he wanted when he undertook the cross-examination of the children. He stated that, however, the children basically agreed to everything that the prosecutor said on direct examination and then agreed with everything that co-counsel said on cross-examination. Co-counsel also stated that while he had wanted the jury to see C.J.'s video-recorded statements to the police, co-counsel could only present the recordings as impeachment if C.J. disagreed with co-counsel on cross-examination, and C.J. never disagreed with him. Co-counsel said he ended the cross-examination because the defense team felt co-counsel had "gotten the best we could do and we could only mess up after that."

***21** Co-counsel testified that although the defense obtained some of C.J.'s medical records, co-counsel did not recall seeing a report of C.J.'s evaluation from Center of Pediatric Neuropsychology approximately two months after the murders. According to the report, C.J. "displayed relatively intact storage abilities for both verbal and visual memory; however, his ability to consistently recall information appear[ed] compromised." The report stated that C.J. displayed significant impairments in many areas of executive functioning, including "consistent long-term recall from memory." Co-counsel agreed that he would have wanted to use the result of this evaluation to impeach C.J.'s testimony.

When questioned regarding his failure to utilize C.J.'s medical records, which were in the possession of the the defense team prior to trial and which reflected that C.J. had impairments in functioning and had been prescribed medication to treat mental health issues, co-counsel testified that while there was "no question" that C.J. had mental health issues based upon his video-recorded statements to the police, co-counsel was concerned that bringing out such information during cross-examination would offend the jury. Co-counsel explained that the defense team believed they were "walking a narrow line" between trying to get the necessary information from C.J. and doing as little damage as possible in the way of offending the jury. Co-counsel also expressed concern that introducing evidence of C.J.'s mental health issues would give "whoever is the smartest from a medical standpoint person on the jury" a reason to disregard C.J.'s testimony on cross-examination that was favorable to the defense.

Co-counsel acknowledged that he would have wanted to attack the reliability and voluntariness of the Petitioner's confessions to the police and to his mother. The Petitioner's confessions were recorded as part of *The First 48* television production, and an edited portion of the questioning and the Petitioner's statements were included in the episode. Because the entire recording of the Petitioner's statements to the police and his mother was unavailable, the defense convinced the trial court to exclude the portion of the recording that was available. Co-counsel recalled that the Petitioner's statement was "bad," that the available portion of the recording of the statement was "much worse," and that he suspected an unedited recording of the interview would have been "even worse." The trial court found that the State could not present the edited recording of the Petitioner's statements unless the defense opened the door to allow for the admission of such evidence. Co-counsel stated that the defense's "number one strategy was not screwing that up" and that one of the ways in which the defense could open the door was to argue that the Petitioner made other statements during the interview that were edited out of the recording.

Co-counsel testified that he and lead counsel did not believe that grounds existed to file a "generic" motion to suppress the Petitioner's statements. Co-counsel noted that the trial court essentially suppressed some of the statements in excluding the edited video. He also noted that at trial, trial counsel moved to suppress the Petitioner's statements to his mother, arguing that his mother was acting as an agent of the Memphis Police Department when she spoke to him in the interview room. However, the trial court denied the motion. Co-counsel agreed that the Petitioner testified at trial that his statements were coerced and that an officer threatened him.

Co-counsel did not recall having any reason to believe the Petitioner was under the influence of drugs or alcohol when he made statements to the police. Co-counsel testified that the defense team discussed whether the Petitioner's alcohol and marijuana use on the night of the murders affected his mental state as it related to the offenses. The defense team did not retain an expert to explore the theory, but co-counsel did not believe voluntary intoxication was a strong defense.

***22** Co-counsel identified a report from Dr. Robert Parr, a clinical psychologist, regarding a psychological assessment of the Petitioner in October 1991 when the Petitioner was sixteen years old. The assessment reflected that the Petitioner had limited intellectual functioning, was naïve and immature, had simplistic and concrete thought processes, was generally rebellious and negative, and had problems with impulse control, a high potential for acting out and using poor judgment, and feelings of social alienation. The defense team explored whether the Petitioner's deficits had any bearing on the voluntariness and reliability of his statements, and they

retained Dr. Richard Leo, a false confessions expert. Trial counsel had the Petitioner prepare a handwritten statement of what he maintained occurred to Dr. Leo, and trial counsel also provided Dr. Leo with the edited video from *The First 48* to review. Dr. Leo did not provide any substantive opinions to the defense. Co-counsel recalled that the defense team determined that Dr. Leo's testimony was not necessary because they had been able to persuade the trial court to exclude the recording of the Petitioner's statements and they were running the risk of opening the door to the admission of the recording by challenging the confessions as false. Co-counsel stated that abiding by the parameters set forth by the trial court in granting the defense's motion to exclude the edited video was "among our most important priorities." Co-counsel did not recall why Dr. Leo only performed eight hours of work on the case.

Co-counsel testified that he was aware that a company called Granada Entertainment Group ("Granada") filmed the homicide investigation for *The First 48* and that the defense never obtained any footage shot by Granada other than the actual edited episode that was aired. Co-counsel identified a memorandum prepared by Ms. Geiser to trial counsel in which she stated that she reached out to Granada on February 10, 2009. According to the memorandum, Granada asserted protection under the media shield law and stated that they recycle the raw or unused footage after each episode is produced. Co-counsel stated that the defense team did not seek to challenge Granada's assertion of the media shield law since the raw footage did not exist. Co-counsel did not know the reason for waiting until August 10, 2010, to file a request under *Brady* for the State to produce the raw footage. He said that lead counsel questioned an officer on cross-examination at trial regarding the missing footage and that co-counsel questioned officers about the role of *The First 48* and its crew. Co-counsel stated that they were careful to avoid opening the door for the State to introduce the edited recording of the Petitioner, but they wanted the jury to know that the missing footage was a "screw up." Co-counsel testified that the only reason he believed that trial counsel did not request a missing evidence instruction regarding the missing footage was the trial court's warning about the defense opening the door to the admission of the edited footage. Co-counsel did not believe that the defense team interviewed any of the crew members with *The First 48* and stated that they did not have a strategic reason for not doing so.

Due to the "technical" nature of the DNA evidence, the defense team retained Bode Technologies to consult with them and ensure that the testing conducted by the State was adequate and that trial counsel understood the testing and the results. The defense team also retained Ms. Jeanine Barrett as a gang expert in order to explore the defense theories about whether the murders could have been caused by a "gang hit."

Co-counsel testified that trial counsel did not file a motion in limine to prevent improper comments by the prosecution during the closing arguments. He stated that it never occurred to him to address potential problems involving prosecutorial misconduct pretrial unless he had a good faith reason for doing so. He did not know why he did not object to the prosecutor's argument during rebuttal closing arguments in the penalty phase, stating, "And now Jessie is begging for his life. Did Marissa get a jury? What about Shindri? Did she get a jury? Do[es] somebody have to find aggravating circumstances for her to get the death penalty?"

Co-counsel testified that the mitigation strategy during the penalty phase was based upon the significant trauma suffered by the Petitioner as a child. Ms. Shettles prepared numerous memoranda to trial counsel regarding the information that she found relating to the Petitioner's history. She also prepared a mitigation timeline and a document summarizing the Petitioner's significant life events and themes. Co-counsel stated that trial counsel did not call any of the Petitioner's family members as witnesses during the penalty phase because none of them were willing to testify on the Petitioner's behalf. Co-counsel said Ms. Shettles was the only witness called by the defense in mitigation because trial counsel believed they could present all of the pertinent information about the Petitioner through her. Co-counsel believed Ms. Shettles was able to allude to the Petitioner's intellectual impairments during her testimony.

***23** The defense team retained Dr. James S. Walker, a clinical neuropsychologist, to evaluate the Petitioner. Co-counsel said the defense team was aware that the Petitioner had some deficits and that they wanted to explore how the deficits could configure into their defense. Dr. Walker evaluated the Petitioner and issued a report, which was entered as an exhibit during the post-conviction hearing. According to the report, Dr. Walker diagnosed the Petitioner under Axis I with adjustment disorder with depressed and anxious mood, alcohol dependence, cannabis dependence, and cognitive disorder not otherwise specified based upon the Petitioner's verbal learning problems. Dr. Walker diagnosed the Petitioner under Axis II with antisocial personality characteristics and under Axis IV with current psychosocial

stressors of incarceration and legal problems. The Petitioner had a Global Assessment of Functioning score of sixty, which co-counsel acknowledged indicated that the Petitioner had deficiencies. Dr. Walker concluded that the Petitioner was competent to stand trial and did not appear to have a viable insanity defense. Dr. Walker identified several mitigating factors, including physical abuse suffered by the Petitioner as a child, the violent neighborhood in which he was raised, his brother's violent history and intoxication on the night of the murders, the Petitioner's significant academic difficulties and verbal learning problems, the family's neglect of him as a child, his prior criminal history, his intoxication on the night of the murders, and his chances of being a violent adult based upon genetic testing and the abuse he suffered as a child.

Dr. Walker noted that the Petitioner reported that his arrest was the result of a false confession and detailed his conversation with the Petitioner about what occurred on the night of the murders. Dr. Walker noted that factors consistent with a false confession included the absence of a recorded statement, the presence of only the written reports of the officers involved, and the several hours of interrogation prior to the confession. Dr. Walker also noted that the Petitioner had reason to fear for his life if incarcerated after being identified as a child killer. However, Dr. Walker also noted that the Petitioner was not easily led or influence by others and was not unduly suggestible or easily talked into endorsing false information during the "non-threatening context of a psychological evaluation." Dr. Walker stated that the Petitioner's version of the events seemed "unlikely." Dr. Walker explained:

> For example, the autopsy reports describe the victims as being horrifically injured prior to their deaths, for what must have represented a lengthy, and very noisy, set of events. Yet [the Petitioner] did not report hearing the sounds that would accompany such torture, or even suspicion that extreme violence was taking place in the next room. The fact that he admittedly left the severely injured children there without seeking medical assistance also raises concerns regarding his potential involvement.

Co-counsel testified that he had conversations with Dr. Walker about his findings and that the defense team decided against calling Dr. Walker to testify due to his findings of antisocial personality characteristics. At times during his testimony, co-counsel referred to the Petitioner's diagnosis as "antisocial personality disorder." Co-counsel stated that he viewed antisocial personality as "one of the more dangerous labels in the criminal justice system" because such a diagnosis does not result in as much empathy or sympathy as other more serious mental health diagnoses. He recalled that lead counsel strongly felt that such a diagnosis should not be presented to the jury. Co-counsel stated that he and lead counsel believed that the best chance in mitigation was based on residual doubt with "one juror saying 'I went along and made the deal to convict him, but I'm not giving this guy the death penalty.' "

Co-counsel testified that the defense team retained Dr. Geraldine Bishop to conduct a psychological evaluation of the Petitioner. Co-counsel stated that Dr. Bishop expressed reluctance to work on the case once she learned of the facts. He did not recall why Dr. Bishop performed the majority of her work in September and October of 2010, and co-counsel believed that Dr. Bishop had been retained prior to that time. The defense team did not retain a neurologist to evaluate the Petitioner.

Co-counsel testified that during the opening statements of the penalty phase, he told the jury that the case had more aggravating circumstances than he had ever seen in an effort to "buy credibility" with the jury. He stated that he did not object to a jury instruction indicating that jurors could not have any sympathy for the Petitioner because co-counsel believed the instruction was a correct statement of the law.

***24** On cross-examination, co-counsel testified in February 2015, he loaned his file in this case to the OPCD under the agreement that they would make a copy of it and return it to him. Approximately one month prior to the post-conviction hearing, co-counsel contacted the OPCD to obtain a copy of his file as he had been promised, but the OPCD refused to provide a copy of the file. As a result, co-counsel was unable to review his entire file in the OPCD's possession prior to testifying.

Co-counsel testified that the murders occurred in March 2008 and that the trial occurred in September 2010. He believed the case was tried on its third setting and stated that he would have requested a continuance if he felt that it was necessary.

The State had open-file discovery and maintained the physical evidence in a large room in the courthouse.

Co-counsel had no recollection of the Petitioner's wearing stun cuffs at trial. Co-counsel did not recall discussing or litigating the issue. Co-counsel stated that he did not have a strategic reason to refrain from objecting to the trial court's order for the Petitioner to wear stun cuffs if such an order was issued. The State entered as an exhibit an order entered by the trial court on September 17, 2010, requiring the Petitioner to be in stun cuffs during the trial.

Co-counsel stated that in evaluating the prospective jurors, trial counsel used a numbering system in which lead counsel and co-counsel individually rated each prospective juror and then discussed them. Co-counsel testified that he and lead counsel did not feel that a jury would impose a sentence of less than death if the Petitioner was convicted. Rather, they believed they had a stronger defense related to the guilt phase and considered the defense in weighing each prospective juror. Co-counsel stated that he used sticky notes and a juror sheet in evaluating the jurors, all of which would have been maintained in his case file.

Co-counsel noted that Juror 1 had military experience. Co-counsel explained that while he generally did not like to choose jurors with military experience because he believed they would favor the police, he believed Juror 1's knowledge of ballistics and other forensic issues based upon his military experience was valuable to the defense. Juror 1 answered in his questionnaire, "I believe the death penalty is the appropriate form of punishment in some murder cases, and I can return a verdict of death if I believed it was warranted in a particular case, depending on the evidence, the law, and what I learned about the defendant." Co-counsel said this was a common answer by prospective jurors in death penalty cases.

Co-counsel testified that in prior cases, he and Ms. Shettles had interviewed witnesses together but that in this case, only a few lay witnesses were willing to talk to the defense. Co-counsel agreed that during the penalty phase, Ms. Shettles was able to testify about all the information she had discovered during her investigation regardless of whether the evidence constituted hearsay. He stated that although Ms. Shettles was unable to provide a diagnosis or an expert opinion, she was able to present evidence related to the Petitioner's mental health to the jury.

Co-counsel testified that trial counsel retained Mr. Richard Earnest as a crime scene expert, hoping he would challenge the State's theory that one person committed the crimes. However, Mr. Earnest was unable to definitively state that a single person could not have committed the crimes. Co-counsel stated that the defense chose to retain Dr. Aldridge as an expert in interviewing children of trauma over another expert because she had testified for the State more often, which made it more difficult for the State to cross-examine her.

***25** Co-counsel agreed that C.J. made inconsistent statement to the police as to the identity of the perpetrator. Co-counsel believed he played portions of C.J.'s video-recorded statement to the police at trial for impeachment purposes. Later during the post-conviction hearing, the post-conviction court found that according to the trial transcript, co-counsel asked during a jury-out hearing to play portions of C.J.'s video-recorded statement as inconsistent statements and that the State argued that C.J.'s statements were not inconsistent with his testimony on cross-examination. The post-conviction court stated that following a break and before the trial court issued a ruling, trial counsel announced that they did not have any further questions.

Lead counsel testified that at the time of the Petitioner's case, he was in private practice and that approximately ninety percent of his practice was criminal defense. He was appointed to represent the Petitioner in general sessions court approximately one week after the Petitioner was arrested, and lead counsel and co-counsel were appointed to represent him after he was indicted. Lead counsel stated that he worked more on the guilt/innocence aspect of the case, while co-counsel worked more on the mitigation aspect. Lead counsel said they were both familiar with every witness and every aspect of the trial. Approximately two months after the Petitioner's trial, lead counsel left private practice and joined the Shelby County Public Defender's Office. As a result, a portion of his file was incorporated into co-counsel's file, and the other portion of the file was placed into storage and was later destroyed by water damage.

Lead counsel did not recall any discussion with the Petitioner about his wearing stun cuffs while in Nashville for jury selection. Lead counsel did not recall the trial court's entering an order requiring that the Petitioner wear stun cuffs or the Petitioner's wearing stun cuffs at trial. Lead counsel stated that had he been aware that the Petitioner was wearing stun cuffs, he would have strenuously objected.

Lead counsel testified that in selecting a jury in a death penalty case, "the issue is do you want guilt/innocence or mitigation people." He stated that trial counsel sought jurors who they believed would be favorable in the guilt phase of the trial because they believed that due to the number of victims and the Petitioner's prior murder conviction, it would be "extremely difficult" to find a juror who would not vote for the death penalty. Lead counsel said he did not intend to question all of the prospective jurors to ensure that they would be able to return a verdict of life imprisonment in the event that they convicted the Petitioner of the charges. He explained that, generally, if a prospective juror stated that he could not return any sentence less than death under the facts of the case, lead counsel likely would challenge the prospective juror for cause eventually but that he preferred to use the prospective juror to educate the rest of the jury. Lead counsel stated that based upon his experience, there were certain prospective jurors that he liked and did not like based upon their religion, occupation, or sexual orientation and that "a lot of it is just gut feeling, how they look at you, how they look at my client."

Trial counsel had the jury questionnaires one to two weeks before trial, and the parties spent one to two days individually questioning those prospective jurors who the State or the defense believed were problematic based upon their responses to the questionnaires. When questioned about why he did not move to strike Juror 1 for cause, lead counsel explained that he conducted voir dire different from many other attorneys and that he often used jurors with extreme views who would offend other jurors with their answers. He stated that he did not want jurors to get along and tried to choose jurors with personalities that would clash. He said he did not question the prospective jurors about race or implicit bias because he did not believe the case involved racial issues.

***26** Lead counsel testified that he had worked with Ms. Geiser and Ms. Shettles on previous cases and that while they discussed different avenues to pursue, it was not necessary for him to instruct them on which witnesses to interview. Lead counsel said that he did not personally interview the lay witnesses and the officers involved in the case and that he probably interviewed the medical examiner. He stated that he always met with the medical examiner if the medical examiner agreed to do so. He testified that he did not object to Dr. Funte's testimony at trial regarding the autopsies performed by Dr. Laboy as violating the Petitioner's confrontation rights because the defense was not disputing the cause of the victims' deaths. Rather, their defense was that the Petitioner was not the perpetrator. Lead counsel believed that objecting too often at trial could "turn the jury off" and make it appear as if the attorney is trying to hide something.

Lead counsel testified that co-counsel wanted to cross-examine the children at trial and that co-counsel likely believed that lead counsel would frighten the children. Lead counsel explained that co-counsel wanted "treat these kids with kid gloves" and that lead counsel, generally, was more aggressive in cross-examining witnesses. Lead counsel had no independent recollection of ever seeing a report on C.J. from the Center for Pediatric Neuropsychology. Lead counsel did not believe he would have questioned C.J. about his cognitive memory problems from the report. He explained that with any issue involving a jury, he wanted to "walk them down the path" without giving them the final answer, which was "usually pretty obvious," in order to allow the jury to "figure it out and then they would think they'd figured out the whole thing." He stated that "you want the jury to think they're smart and they can figure the crime out because all these people watch *Law and Order* TV shows and crime shows." He also stated that based upon the fact that C.J. had a knife embedded in his skull and the physician's testimony regarding the process required to remove the knife, "[t]here's absolutely no doubt in any juror's mind that child had brain damage."

Lead counsel testified that it was "pretty obvious" that the children did not have an independent recollection of the offenses. He said the children had been around family members and other adults while they were discussing the offenses and that the children were repeating what they had heard. He stated that he wished the jury had believed the children because he did not think the children's testimony was consistent with the State's theory and, instead, created reasonable doubt.

Lead counsel testified that prior to trial, he was aware that the State intended to introduce evidence of confessions made by the Petitioner to the police and to his mother. The defense team retained Dr. Leo as a false confession expert, and lead counsel stated that they used Dr. Leo in part to set up an argument that the State should not be allowed to use any of the edited video of the Petitioner's confession from *The First 48* because the false confession expert did not have access to the entire interview. Lead counsel attempted to obtain the unedited footage and had a telephone conversation with someone from the production company, who stated that the recordings are edited immediately and the unused footage is quickly discarded. Lead counsel stated that the person

confirmed to him that one of the reasons for the procedure was to avoid being "dragged" into litigation.

Lead counsel did not have an independent recollection of the mitigation theory used at trial but testified that the theory was likely based on the value of the Petitioner's life and on residual doubt. He did not recall whether he or co-counsel questioned Ms. Shettles at trial, and he did not have any independent recollection of Dr. Bishop.

On cross-examination, lead counsel testified that he had represented defendants in a "[c]ouple hundred" homicide cases, including fifty capital cases, and had tried over one hundred jury trials. Lead counsel stated that in the Petitioner's case, the State maintained the physical evidence and the State's file in a room on the second floor of the courthouse and that "[i]t was a room full of paper." He said that he and the prosecutor spent "hundreds of hours" together in the room reviewing the material and that the prosecutor provided him with a copy of any document that lead counsel requested. Lead counsel and the prosecutor met about the photographs that the State intended to present at trial, and the trial court held a hearing prior to trial regarding any photographs to which the defense objected.

***27** Lead counsel testified that the defense team did not call Dr. Leo as a witness at trial because the defense team was able to convince the trial court to exclude the edited video recording of the Petitioner's confession and the trial court warned the defense team that they could open the door to the admissibility of the video if they were not careful about what they said or argued. Lead counsel stated that the trial court's ruling was a "huge" win because the video was "terrible" and "damning." He explained that the defense team did not present Dr. Earnest as a witness at trial because he was unable to conclude that one person could not have committed the offenses. Lead counsel said the defense team did not call Dr. Walker as a witness because he gave the Petitioner a diagnosis related to antisocial personality. Lead counsel stated, "To me as a defense lawyer in a homicide case, I cannot think of a worse diagnosis unfortunately than antisocial and that's what I was worried about in this case."

Ms. Rachael Geiser, a licensed private investigator, testified that she had been an investigator since May 1999, had conducted the guilt/innocence investigation in the Petitioner's case, and had worked on capital cases prior to the Petitioner's case. Lead counsel asked Ms. Geiser to be the investigator in the case in March 2008 shortly after he was appointed to represent the Petitioner in the general sessions court. She agreed to work pro bono at that point because the Petitioner had not yet been indicted. In addition to her general duties as an investigator, Ms. Geiser assisted in the coordination of experts related to the fact investigation, discussed trial strategy with the defense team, subpoenaed and coordinated witnesses, and met with the Petitioner and trial counsel to prepare for trial. Ms. Geiser stated that she was in regular contact with trial counsel and that the preparation for trial involved a collaborative effort. She assisted trial counsel in developing the defense theory that the Petitioner did not commit the offenses.

Ms. Geiser agreed that the defense team wanted to attack the reliability and voluntariness of the Petitioner's statements and that the Petitioner testified at trial that the statements were coerced. She testified that once the defense received discovery from the State, she learned that the Petitioner did not provide an official statement to the police and that his statements were summarized in a supplemental police report. The defense also received in discovery the interview of the Petitioner's mother with police during which she detailed the Petitioner's confession to her. The defense team retained Dr. Leo, a false confessions expert from San Francisco, California, with whom Ms. Geiser had worked on prior cases. Ms. Geiser testified that Dr. Leo requested that the Petitioner write out his version of the events and that the Petitioner complied with the request. Dr. Leo also requested the unedited footage from *The First 48*. Ms. Geiser said that the defense team was unable to obtain the unedited footage, which hindered Dr. Leo's ability to determine whether the Petitioner's confessions were false. She sent Dr. Leo the police supplemental report, which summarized the Petitioner's statement, and the edited footage from *The First 48*. Ms. Geiser said Dr. Leo did not issue a report because he was unable to provide any substantive opinions.

Ms. Geiser testified that the episode of *The First 48* aired in July 2008, which was when the defense team first learned how damaging the Petitioner's interview was. The Petitioner was indicted in December 2008, and Ms. Geiser was appointed as the investigator shortly thereafter and then officially had the subpoena power to obtain the footage. She said she issued a subpoena to Granada Entertainment USA, which filmed the footage for *The First 48*, for the unedited footage as quickly as she could in February 2009 and that she believed she also requested the names of the field producers who may have been present during the Petitioner's interview with police. On February 26, 2009, Granada's attorney submitted a letter to

Ms. Geiser, stating that the unedited footage was no longer available, declining to provide the names of any producers, and maintaining that the information she sought to obtain was protected by the media shield law.

***28** Ms. Geiser testified that during the time in which she was attempting to obtain unedited footage from Granada for the Petitioner's case, she also was attempting to obtain unedited footage and the identities of the film crew members on another case. She stated that the second case involved a hearing during which Granada's counsel alleged that the information was protected by the media shield law. During the hearing, a witness testified that no unedited raw footage existed because the editors cut or discarded the footage during the editing process. The witness also testified that an employee would review the footage and type a rough draft of a transcript of what everyone said during the recording. Ms. Geiser stated that a transcript could have existed in the second case, as well as in the Petitioner's case, but the trial court in the second case held that the defense was not entitled to the transcript.

Ms. Geiser was never able to obtain the names of the film crew members other than the name of cameraman listed in discovery as being present at the crime scene. She did not know whether the same cameraman was present during the filming of the Petitioner's interview with police and his conversation with his mother. Ms. Geiser did not interview any of the crew members involved in the Petitioner's case. She testified that when she was working on the second case, she interviewed a field producer from Granada who had worked on cases filmed in Louisiana and who informed her that generally the cameraman sets up the video camera in the police department's homicide office to record an officer's interview with a suspect and then walks away. The field producer was unable to confirm to Ms. Geiser that the cameraman "did it here."

Ms. Geiser testified that the defense team retained Ms. Barrett as a gang expert to consult with them about whether the offenses could have been committed by a gang. Ms. Geiser believed Ms. Barrett opined that the offenses could have been committed by a gang and that it was possible that an Asian gang committed the offenses. Ms. Geiser did not believe Ms. Barrett was asked to prepare a report, and she did not testify at trial.

Ms. Geiser testified that the defense team retained Mr. Ernest, a ballistics expert, to assist in deciphering the crime scene and that one of the primary defense theories was that one person could not have committed the offenses. Ms. Geiser had a telephone conversation with Mr. Ernest during which he opined that one person could have committed the offenses. As a result, the defense team did not have him prepare a report.

Ms. Geiser stated that she sent various reports, case summaries, and other documents to Dr. Walker to assist in his evaluation of the Petitioner. She did not recall why Dr. Walker did not testify. She recalled that Dr. Walker's report included a possible antisocial diagnosis. She testified that based upon her experience in working on death penalty cases, an antisocial diagnosis was damaging because "[j]uries don't respond well to it typically."

On cross-examination, Ms. Geiser testified that she never had any issues in obtaining discovery from the State. She also accompanied one of the trial counsel to view the State's physical evidence on a few occasions. Although she did not attend the jury selection in Nashville, Ms. Geiser sat next to the Petitioner throughout the trial and spoke to him while he was in the holding cell during breaks. She said that she never observed him wearing any type of shocking equipment and that she did not recall the Petitioner or anyone else complaining that he was wearing such equipment.

In response to questioning by the post-conviction court, Ms. Geiser testified that an antisocial diagnosis was not evidence that a defense team would want to present to a jury in a capital case. She said the decision not to present a mental health expert who made such a diagnosis was "[p]retty typical," especially after arguing throughout the guilt phase that the client is innocent.

***29** Ms. Glori Shettles, who had been a mitigation specialist for twenty-five years, was the mitigation specialist on the Petitioner's defense team. She obtained records pertaining to the Petitioner and his family and interviewed multiple witnesses. She prepared a chronological timeline based on those records and a summary of the Petitioner's significant life events and themes based upon the records and interviews and provided the documents to trial counsel. She testified that the significant events included a dysfunctional family from the time of the Petitioner's birth; the abandonment and lack of affection, love, and nurturing by his mother; the neglect and deprivation of food; the witnessing of domestic violence; the use of excessive corporal punishment by both parents; the witnessing of inappropriate sexual behavior by his mother; his retention twice in the fourth grade due to truancy; his

exposure to drug use; his use of drugs with his mother; the recommendation of mental health counseling at the age of fourteen due to many issues including poor impulse control and anger; his witnessing of intentional physical abuse of his younger brother by his mother; his obtaining his GED in prison; his effect on his son; and his good employment history. Ms. Shettles also prepared a list of possible mitigating circumstances, which was provided to defense counsel and to the jury.

Ms. Shettles testified that the Petitioner's mother had a son with Mr. Joseph Shaw, with whom his mother sought to continue to have a relationship. Ms. Shettles stated that at the age of eighteen, the Petitioner witnessed his mother place the child in scalding hot water, injuring him and requiring hospitalization. Ms. Shettles said the likely intended purpose of the Petitioner's mother in injuring the child was to get the attention of Mr. Shaw, and Mr. Shaw went to the hospital to check on the child. The Tennessee Department of Children's Services investigated the child's injuries. The Petitioner's mother claimed that the injuries were accidental and that the child's injuries were caused by bleach and not by hot water.

Ms. Shettles testified that she interviewed a woman who began a relationship with the Petitioner after she watched *The First 48* episode. The woman told her that the Petitioner revealed that he was sexually abused by a family member when he was ten or eleven years old. Ms. Shettles also interviewed Mr. James Hathaway, a prison inmate who had known the Petitioner and his family throughout his life. According to Ms. Shettles's memorandum of the interview, Mr. Hathaway had a prior brain injury, which resulted in memory issues. Mr. Hathaway stated that the Petitioner's mother often left her children home alone with no food; that the Petitioner had anger issues, which caused the Petitioner's family to be afraid of him; that the Petitioner possessed guns as a juvenile; that Mr. Hathaway and the Petitioner were in prison together after the Petitioner was convicted of second degree murder; that the Petitioner made money in prison by selling drugs to inmates; that the Petitioner's family never contacted him while he was in prison; that the Petitioner volunteered to participate in a gang program while in prison, which was contrary to the information that Ms. Shettles received from the Security Threat Group coordinator; and that Mr. Hathaway did not believe the Petitioner committed the murders.

Ms. Shettles testified that she was the only witness presented on behalf of the defense during the penalty phase. She became aware that she might testify approximately two months prior to trial. She did not recall whether she met with trial counsel regarding her testimony before she testified. She stated that co-counsel instructed her "just to talk," which meant "just tell the social history, tell the story."

Ms. Shettles testified that she worked with some mental health experts on the Petitioner's case, but she did not recall working with Dr. Bishop. Ms. Shettles did not recall whether Dr. Bishop had information regarding the Petitioner's mother's scalding her son with hot water. Ms. Shettles identified letters and emails regarding Dr. Bishop and stating that Ms. Shettles was Dr. Bishop's primary contact on the case.

On cross-examination, Ms. Shettles testified that the defense team had a "very good" working relationship, that they had previously worked together on other cases, and that she did not recall any problems amongst the defense team. She stated that dealing with the Petitioner's family was difficult and that whenever she met with members of his family, she believed she had to spend as much time with them as they would allow because she was afraid that she would not have another opportunity to speak with them. Ms. Shettles recalled that the mother of the Petitioner's fourteen-year-old son did not want her son involved in the trial. Ms. Shettles was with the Petitioner during the trial and brought him clothes to wear each day of the trial. She did not recall seeing him wearing stun cuffs.

***30** In response to questioning by the post-conviction court, Ms. Shettles testified that in preparing for her testimony during the penalty phase, she drafted a social history of the Petitioner's life that included information received from the Petitioner, people who she had interviewed, and records that she had obtained. Ms. Shettles stated that the purpose of her testimony at trial was to inform the jury about the Petitioner's life in hopes that that the jury would find something from his childhood or the events in his life that would lead them to impose a sentence less than death. She recalled that she testified about social issues, the traumatic events in the Petitioner's life, his mother's abuse, his problems at school, his issues with incarceration, and his mother's scalding his half-brother. Ms. Shettles noted that Dr. Bishop had emailed her, requesting the hospital records of the Petitioner's half-brother. Ms. Shettles obtained the hospital records and testified at trial regarding the scalding incident. She recalled that following her testimony, the Petitioner's mother became extremely upset with Ms. Shettles and followed her out of the courtroom.

Ms. Shettles agreed that the defense team consulted with many experts, who provided information regarding mitigation themes and the Petitioner's background and that she was able to testify to the information during the penalty phase. She did not recall the prosecutors interrupting her or asking her many questions. She believed that in testifying at sentencing, she had "more free reign" to provide information than an expert because her testimony related to factual information as to what occurred in the Petitioner's life rather than an expert's opinion. She further explained that she believed that the defense team felt that the opinions of the experts with whom they consulted may have been more harmful than helpful to the Petitioner. She agreed that she was able to get information to the jury that would otherwise have come in through expert witnesses without being in "that confrontational mode."

The Petitioner presented Dr. Marilyn Miller, an associate professor in the Department of Forensic Science at Virginia Commonwealth University, as an expert in crime scene reconstruction, forensic science, and serology. She testified that she was asked to review the crime scene investigation performed by the officers and to determine whether reconstruction of the crime scene was possible. She reviewed "a good bit" of the evidence collection methods employed by the officers, the trial testimony, and the trial exhibits.

Dr. Miller testified that at least thirty people were in and out of the crime scene over the course of the investigation and that "at least one" person and possibly more who entered the crime scene were not members of the Memphis Police Department. She criticized the presence of the film crew for *The First 48* at the crime scene, stating, "Why would you run the risk of changing or altering or losing or contaminating evidence that's at a scene?" She noted that the fact that some of the victims survived the attacks also could have affected the crime scene. She stated that it appeared from a photograph that a cameraman at the crime scene was not wearing personal protective equipment and that the failure to wear such equipment creates the potential for contamination of the crime scene. She noted that although Sergeant Mullins testified at trial that he wore booties while at the crime scene, he should have worn other protective clothing.

Dr. Miller identified instances in which evidence was moved at the crime scene. She testified that the toilet seat in the bathroom was lowered, raised, and lowered again; that the boards were shown in different locations in photographs; and that a sweatshirt and a pillow were moved and then photographed. She stated that by moving evidence, "[i]t may change or alter something." She said that moving evidence with blood on it could change the pattern of the blood or force it off of the object, which would affect any conclusions about how the evidence was created.

Dr. Miller testified that in this case, the detectives were responsible for investigating the crime scene and determining what evidence to collect and process. She stated that the search for evidence at a crime scene and the determination of what evidence to collect and process should be performed by crime scene investigators, who understand the nature of the evidence and the use of enhancement methods to find the evidence. She said that in many cases, the detectives are not up-to-date on the investigation methods.

***31** Dr. Miller noted trial testimony that only one perpetrator could have committed the offenses because the crime scene was so small, and she testified that she was unable to reconcile the opinion with the number of people who entered the crime scene in the small area. She agreed that it was "possible" that a sole perpetrator could have committed the offenses. She testified that another reason used at trial to support the claim that the offenses were committed by a sole perpetrator was that the offenses could have been "easily" committed through "a careful sequencing of the events." She said that if a sole perpetrator committed the offenses, she expected that perpetrator to have a great amount of blood on him or her and that a number of blood fingerprints or palm prints and footwear impressions would have been discovered throughout the house with one person responsible for those prints or impressions. Dr. Miller was unable to discern any specific footwear impressions but noted footwear patterns on some of the wooden boards that resulted from a surface that was not stained with blood touching or stepping on the boards. She stated that no examination was performed on the footwear impression transfer patterns on the wooden boards.

Dr. Miller testified that a perpetrator who stabs a victim commonly cuts himself or herself with the knife and that as a result, she reasonably expected to find the perpetrator's blood at the crime scene. She understood that none of the Petitioner's blood was found at the crime scene and that there was only one fingerprint belonging to the Petitioner among the evidence collected from the home. She said no cuts were on the Petitioner's hands at the time of his arrest, which she found to be "highly unusual" due to the number of sharp force trauma wounds inflicted on the victims. She stated that since 2015, crime scene investigators process the handles of weapons for DNA and examine shoe laces of a suspect "if

we're trying to tie a shoe into a particular person because they've touched that area." She said that while these types of investigations were not common at the time of the offenses, they "certainly could be done subsequently."

Dr. Miller testified that the wooden boards could have been used as weapons based upon the blood stain patterns, the infliction of blunt force trauma on some of the victims, and the condition of the broken or splintered boards. She noted that the Petitioner did not have any splinters or any evidence of prior splinters on his hands when he was arrested, which Dr. Miller believed to be unusual given the number of blunt force wounds caused by the wooden boards and the condition of the broken or splintered boards.

Dr. Miller testified that although most blood stain analysts and crime scene reconstruction experts prepare a report of their findings, which will then be subject to peer review, Sergeant Mullins failed to prepare a report. She stated that Sergeant Mullins also improperly relied upon the witness statements of the two surviving children and the Petitioner's statement in reaching his conclusions. She explained that the foundation of crime scene reconstruction is to base the findings on the blood stain patterns and the physical evidence at the scene and that statements from witnesses should not be considered.

On cross-examination, Dr. Miller testified that she did not conclude that one person could not have committed the offenses. She stated that it was "equally possible" that more than one perpetrator committed the offenses due to the amount of bloodshed and the physical evidence. She explained that "based on ... improper investigative techniques, we may or may not be able to know precisely one or the other" and that "[i]t's not a sole perpetrator to the exclusion of the possibility that there were others based on the evidence."

Dr. Miller testified that the methodology used in investigating the crime scene was tainted or flawed in that many of the blood stain patterns possibly could have led to the collection or testing of other evidence. She also testified that the tainted methodology possibly may have changed the evidence or the crime scene and led to erroneous conclusions. She suggested that "there could have been some differences that would have prevented the methodology from being flawed."

***32** On redirect examination, Dr. Miller testified that had she been present in the courtroom when Sergeant Mullins testified, she could have assisted the defense team in developing a cross-examination of Sergeant Mullins regarding the various errors of methodology. On recross examination, Dr. Miller stated that she would have told defense counsel that it was possible that one perpetrator could have committed the offenses but that this conclusion was "not to the exclusion of all of the other possibilities." She did not know whether the perpetrator was wearing gloves while stabbing the victims in order to protect him from cuts. She believed a sufficient time had passed before the offenses were discovered to allow the perpetrator to dispose of his clothing.

In response to questioning by the post-conviction court, Dr. Miller agreed that her testimony was based upon the proper procedures that should be followed by a crime scene reconstructionist and that she was not asked to render an opinion regarding the correctness of the conclusions reached. She testified that Sergeant Mullins misidentified two patterns of impact spatter in one of the bedrooms as castoff stains.

Deputy Carlos Atkins with the Shelby County Sheriff's Department testified that he was the Petitioner's escort officer during the trial and that he was trained and certified in operating stun cuffs. Deputy Atkins identified the trial court's order to have stun cuffs applied to the Petitioner. He did not accompany the Petitioner to Nashville for jury selection. He recalled placing a stun cuff on the Petitioner's left ankle. He stated that during the guilt phase of the trial, the Petitioner was wearing slacks and a long sleeve, button up shirt and that the slacks covered the stun cuff.

Deputy Atkins testified he placed a stun cuff on the Petitioner during the sentencing hearing when the Petitioner was wearing his jail uniform. Deputy Atkins stated that the jury was present during this sentencing hearing. He recalled the Petitioner saying that since the jury already thought that he was a "monster," there was no need for him to wear street clothes and that he would just wear his jail uniform. Deputy Atkins never activated the stun cuff.

On cross-examination, Deputy Atkins testified that he placed the stun cuff on the Petitioner on two separate days, the day in which the Petitioner wore his jail uniform during the trial and the day when the Petitioner returned for a sentencing hearing in order to sign paperwork. The Petitioner was not wearing a stun cuff when he testified at trial. Deputy Atkins stated that before he placed the stun cuff on the Petitioner on the day that he wore his jail uniform, Deputy Atkins told a man and a woman, who were speaking to the Petitioner while he was in the holding cell, that a stun cuff would be placed on

the Petitioner. Deputy Atkins agreed that the two days during which the Petitioner wore a stun cuff were far apart in time.

In response to questioning by the post-conviction court, Deputy Atkins agreed that he placed stun cuffs on the Petitioner on only two occasions. He also agreed that the first time that the Petitioner wore stun cuffs was during the sentencing phase of the trial after the verdict had been returned and when the Petitioner decided to remain in his jail uniform. Deputy Atkins stated that he placed a stun cuff on the Petitioner "that day." Deputy Atkins stated that the second occasion during which the Petitioner wore a stun cuff occurred much later on during another proceeding.

The post-conviction court, which also was the trial court, recalled that there were never any problems with the Petitioner throughout the proceedings. The court stated that the sheriff requested an order allowing stun cuffs to be placed on the Petitioner in the event that "something occurred" such that he believed the stun cuffs were necessary. The court explained that it went ahead and entered the order so that it did not have to stop the proceedings to enter an order in the event stun cuffs became necessary.

***33** The State presented the testimony of Deputy Keley Gray with the Shelby County Sheriff's Department, who worked on the Gang Unit inside the jail. Deputy Gray escorted the Petitioner to Nashville for jury selection and back to Memphis and accompanied the Petitioner throughout the trial. Deputy Gray testified that the Petitioner never wore a stun cuff during the proceedings. Deputy Gray stated that Deputy Atkins would have been responsible for placing the stun cuff on the Petitioner because he was certified to do so but that Deputy Gray would have known if Deputy Atkins had placed the stun cuff on the Petitioner.

On cross-examination, Deputy Gray testified that if the Petitioner was wearing street clothes, the stun cuff would be placed so that it would not have been seen underneath the trouser. Deputy Gray recalled that the Petitioner was wearing street clothes during the guilt phase of the trial and that the Petitioner was wearing a stun cuff on his ankle on the "sentencing date." On redirect examination, Deputy Gray clarified that the "sentencing date" was the day in which the trial court sentenced the Petitioner. Deputy Gray did not believe the jury was present on the day in which the Petitioner wore a stun cuff.

The State also presented the testimony of Assistant District Attorney General Ray Lepone, who was the prosecutor at trial and in charge of the discovery. He testified that he had worked with both trial counsel on numerous homicide cases and always had an open-file policy, which he stated meant "they're going to see everything in my file unless it's something protected by statute where the judge orders that neither one of us can see it or that it's protected." He maintained the State's file in a conference room, and when lead counsel sought to view the file, General Lepone either accompanied lead counsel into the room or left lead counsel and Ms. Geiser in the room alone to view the file.

General Lepone testified that each of the children were evaluated and that the records of their evaluations were placed in separate folders that were labeled and had blue checkmarks, which General Lopone stated he made on the folders to indicate that he was present when lead counsel reviewed the file. He recalled discussing the reports with lead counsel and stated that Dr. Vicki Brewer, who evaluated the children, was on the State's witness list provided to the defense. He also stated that he announced on the record during a hearing that he was turning over the names of those who treated and evaluated the children to the defense and that lead counsel responded that the defense team would issue subpoenas if they believed it was necessary.

General Lepone testified that the children made many different statements and that their forensic interviews were "all over the place." He stated that the defense's cross-examination of the children was "amazing" and that they did a "fabulous job." He noted that co-counsel was able to get C.J. to agree with him on everything and that co-counsel was able to bring out the different suspects whom the children had identified and the inconsistencies in their forensic interviews.

On cross-examination, General Lepone agreed that during the State's rebuttal closing argument in the guilt phase of the trial, he stated that "C.J. knows who put the knife in his head. He knows it and he told you who did it" and that C.J. solved the case. General Lepone also agreed that the prosecutor who gave the initial closing argument referred to C.J. as the "hero of the case" because he survived in a bathtub with a knife in his head for forty hours. General Lepone noted that Lieutenant Davidson also referred to C.J. as a "hero" multiple times during his testimony. General Lepone recalled that the other prosecutor also argued to the jury, "C.J. knows what happened because he was there and he saw [the Petitioner] do it. I wanted you to see C.J. I wanted you to hear C.J."

***34** General Lepone testified that the only defense theory that could have been presented was that the Petitioner was not the perpetrator because the defense did not have a valid argument that the murders were committed in self-defense or constituted second degree murder. The State initially believed that a gang could have committed the offenses. General Lepone stated that as a result, police officers "actually build in a lot of the defense" for the Petitioner because they searched for "the worst of the worst" and interviewed gang members, including members of the Gangster Disciples. Law enforcement sought the assistance of FBI profilers, who stated that a Mexican gang could have committed the murders. Law enforcement identified numerous possible suspects and prepared numerous supplemental reports, all of which were provided to the defense in discovery. General Lepone stated that the defense presented this information to the jury, including evidence that Mr. Cecil Dotson was a Gangster Disciple and had an altercation with another gang member one or two weeks prior to the murders.

General Lepone testified that based upon information from experts regarding the trauma and nature of the injuries suffered by the children, he and the other prosecutors decided early in the case that it would not be prudent to attempt to talk to the children. General Lepone said that when the State called the children as witnesses, the prosecution had "no idea what they were going to say or if they would every say anything" but that the prosecution knew that the jury would want to at least hear from C.J. General Lepone agreed that it was clear from the defense's cross-examination of C.J. that they wanted to call C.J.'s identification of the Petitioner as the perpetrator into question. General Lepone stated that co-counsel "did an amazing job" in cross-examining the children and "pretty much washed the entire direct examination away." He said he did not believe "there's anything else those lawyers could have done with information in our file to attempt to discredit those children after they got up here and pretty much told the jury what they had to tell them."

General Lepone testified that he recalled discussing Dr. Brewer's report of her neuropsychological evaluation with lead counsel. General Lepone did not discuss the report with co-counsel and did not know whether he made a copy of the report or provided it to Ms. Geiser. General Lepone stated that lead counsel told him that the portion of the report regarding C.J.'s memory could be proven through any of the State's evidence. General Lepone noted that C.J. had a knife in his head, lay in a bathtub for forty hours, and underwent brain surgery. He explained, "I don't think it was any secret that somebody could stand up without any of that documentation and start to question the child's memory." He stated that his conversation with lead counsel involved whether C.J.'s long-term memory issues would benefit the State or the defense, and General Lepone believed the child's long-term memory issues benefitted the State at trial. He explained that C.J.'s initial identification of the Petitioner as the perpetrator while at the hospital involved short-term memory and that C.J. was unable to remember the events as well by the time of the trial due to his issues with long-term memory. General Lepone noted that instead of focusing on C.J.'s long-term memory issues, the defense focused on the inconsistent statements made by the children. He stated that at trial, "that was probably the worst day for the State [due to] how effectively they cross-examined those children."

General Lepone testified that the Petitioner testified at trial regarding his entire version of the events and kept saying, "Look at the tape." The State argued that as a result, the edited version of the Petitioner's interview should be admitted, but the trial court denied the request. General Lepone noted that the Petitioner testified that as he was talking to his mother in the interview room, he was also whispering to his mother that he did not commit the offenses. General Lepone stated that while the Petitioner's mother also denied that the Petitioner whispered to her, the edited recording would have established that the Petitioner's claims were untrue.

***35** Following the hearing, the post-conviction court entered digital copies of the files from co-counsel, Ms. Geiser, and Ms. Shettles as late-filed exhibits. The post-conviction court entered an order finding that co-counsel had given the defense's original trial file to the OPCD based upon representations from the OPCD that a copy of the file would be provided to him and that the OPCD then refused to provide a copy to co-counsel in order to allow him to prepare for his testimony at the post-conviction hearing. The post-conviction court found that as a result, co-counsel was unable to recall the reasoning for some of the decisions made regarding the trial when questioned about them at the post-conviction hearing. The post-conviction court also found that the OPCD violated the court's order requiring them to provide to the State a copy of all the materials from the defense team's trial file that were relevant to the issues raised in the petition.

The Petitioner did not testify at the post-conviction hearing. On May 16, 2019, the post-conviction court entered a 109-page order addressing the Petitioner's claims raised in his

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various petitions and denying the Petitioner's request for post-conviction relief. This appeal followed.

ANALYSIS

The Petitioner contends that (1) he received ineffective assistance of counsel at trial and on direct appeal; (2) the AOC and the Chief Justice of the Tennessee Supreme Court improperly vacated the post-conviction court's orders granting the Petitioner's request for funding of experts; (3) the State improperly failed to preserve the videotape of the Petitioner's custodial interrogation by police and his interactions with this mother; (4) the State improperly withheld evidence; (5) the use of a stun cuff during the trial violated the Petitioner's due process rights; (6) a juror's service on the jury violated the Petitioner's constitutional rights; (7) the Petitioner's convictions and death sentences were the result of juror misconduct; (8) the State made improper comments during closing arguments; (9) the Petitioner's convictions and death sentences and Tennessee's execution method are unconstitutional; and (11) cumulative error warrants relief.

The Post-Conviction Procedure Act provides for relief when a petitioner's "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. The burden of proving allegations of fact by clear and convincing evidence falls to the petitioner seeking relief. T.C.A. § 40-30-110(f). The post-conviction court's findings of fact are binding on the appellate court unless the evidence preponderates against them. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). Accordingly, the reviewing court defers to the post-conviction court's findings regarding the credibility of witnesses, the weight and value of witness testimony, and the resolution of factual issues. *Id.* Questions of law and mixed questions of law and fact are reviewed de novo. *Id.*

I. Ineffective Assistance of Counsel

The Petitioner maintains that trial counsel were ineffective in their investigation prior to trial, during jury selection, during both phases of the trial, and on appeal. He asserts that trial counsel were ineffective prior to trial in failing to (1) pursue the suppression of the Petitioner's statements to the police and to his mother; (2) obtain the unedited video recording of the Petitioner's interview with the police and his interactions with his mother; (3) and challenge the State's failure to preserve the unedited video recording. He asserts that trial counsel were ineffective during jury selection in failing to (1) challenge the trial court's death qualification procedures; (2) question prospective jurors about racial and implicit bias; (3) rehabilitate prospective jurors; (4) challenge a juror for cause; and (5) exhaust their peremptory challenges. The Petitioner argues that trial counsel were ineffective during both phases of the trial in failing to (1) object to the use of a stun cuff on the Petitioner; (2) present evidence of C.J.'s long-term memory deficits; (3) object to the introduction of photographs of the crime scene; (4) object to the forensic pathologist's testimony about three autopsies that she did not perform; (5) effectively challenge the testimony of the State's witnesses; (6) object to testimony as inflammatory and irrelevant; (7) prepare the Petitioner for his testimony; (8) present mitigating evidence during the penalty phase; (9) make a proper opening statement during the penalty phase; (10) prevent and/or challenge the State's improper comments during closing arguments; and (11) object to various jury instructions. The Petitioner also asserts that trial counsel were ineffective in failing to raise challenges on direct appeal to an officer's testimony as inflammatory and irrelevant and to the trial court's jury instructions.

***36** Under the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution, the accused is guaranteed the right to effective assistance of counsel. *Moore v. State*, 485 S.W.3d 411, 418 (Tenn. 2016). To prevail on a claim that he was denied his constitutional right to effective assistance of counsel, a petitioner must prove both that counsel's performance was deficient and that the deficient performance caused prejudice to the defense. *Kendrick*, 454 S.W.3d at 457 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). A claim may be denied for failure to establish either deficiency or prejudice, and the reviewing court need not address both components if a petitioner has failed to establish one. *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Each element of a claim of ineffective assistance of counsel is a mixed question of fact and law reviewed de novo. *Kendrick*, 454 S.W.3d at 457.

"Establishing deficient performance requires showing 'that counsel's representation fell below an objective standard of reasonableness,' which standard is measured by 'professional norms' prevailing at the time of the representation." *Garcia*

v. State, 425 S.W.3d 248, 256-57 (Tenn. 2013) (quoting *Strickland*, 466 U.S. at 688). So long as counsel's representation was " 'within the range of competence demanded of attorneys in criminal cases,' " counsel will not be deemed to have performed deficiently. *Felts v. State*, 354 S.W.3d 266, 276 (Tenn. 2011) (quoting *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). Deficient performance requires a showing of 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).

The reviewing court should not second-guess strategic choices or measure counsel's performance by " '20-20 hindsight.' " *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997) (quoting *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)). In reviewing counsel's professional decisions, a " 'fair assessment ... 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.' " *Goad*, 938 S.W.2d at 369 (quoting *Strickland*, 466 U.S. at 689). Strategic decisions based on a thorough investigation of law and relevant facts are virtually unchallengeable. *Felts*, 354 S.W.3d at 277. However, deference is only given to strategic decisions which "are informed ones based upon adequate preparation." *Moore*, 485 S.W.3d at 419.

In determining prejudice, the reviewing court must decide if there is " 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Calvert v. State*, 342 S.W.3d 477, 486 (Tenn. 2011) (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is " 'a probability sufficient to undermine confidence in the outcome.' " *Id.* (quoting *Strickland*, 466 U.S. at 694). The reasonable probability standard "requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011). In evaluating whether a petitioner satisfied the prejudice prong, a court must ask "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (citing *Strickland*, 466 U.S. at 687). In other words, "a petitioner must establish that the deficiency of counsel was of such a degree that it deprived the [petitioner] of a fair trial and called into question the reliability of the outcome." *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). When challenging a death sentence, the petitioner must show that " 'there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death.' " *Henley*, 960 S.W.2d at 579-80 (quoting *Strickland*, 466 U.S. at 695); *see Cullen*, 563 U.S. at 198.

A. Pretrial Investigation

1. Failure to Seek Suppression of the Petitioner's Statements

***37** The Petitioner asserts that trial counsel were ineffective in failing to seek suppression of his statements to Deputy Director Armstrong and to his mother. The Petitioner argues that Deputy Director Armstrong continued questioning him after he invoked his right to remain silent, that his statement to Deputy Director Armstrong was an involuntary product of police coercion, and that his mother elicited his statement to her while she was acting as an agent for the State and after he had invoked his right to counsel. The State responds that the Petitioner has failed to establish that he is entitled to relief. We agree with the State.

"In order to succeed in proving ineffective assistance of counsel with respect to counsel's failure to file a motion to suppress the evidence, [a petitioner] must satisfy both prongs of the *Strickland* test, showing that counsel's failure to file the motion was deficient and that the deficient performance prejudiced the defense." *Vaughn v. State*, 202 S.W.3d 106, 120 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 687), *abrogated on other grounds by Brown v. Jordan*, 563 S.W.3d 196 (Tenn. 2018). To demonstrate prejudice, the petitioner must show a reasonable probability that the motion would have been granted and that the outcome of the proceeding would thereby have been altered. *See Jason Lee Holley v. State*, No. M2017-00510-CCA-R3-PC, 2017 WL 5197295, at *5 (Tenn. Crim. App. Nov. 9, 2017), *perm. app. denied* (Tenn. Feb. 14, 2018). "In essence, the petitioner should incorporate a motion to suppress within the proof presented at the post-conviction hearing." *Terrance Cecil v.*

State, No. M2009-00671-CCA-R3-PC, 2011 WL 4012436, at *8 (Tenn. Crim. App. Sept. 12, 2011).

a. Invocation of the Right to Remain Silent

The Petitioner asserts that trial counsel were ineffective in failing to file a motion to suppress his statement to Deputy Director Armstrong on the basis that the Petitioner invoked his right to remain silent to Lieutenant Mason and Sergeant Stark prior to his interview with Deputy Director Armstrong. Although the Petitioner made a general claim in his pro se post-conviction petition that trial counsel were ineffective in failing to timely file a motion to suppress his confession, he offered no basis in his petition to support the claim and only alleged in his amended petition that Deputy Director Armstrong coerced him into confessing as a basis for seeking suppression of his confession. The post-conviction court did not address the issue of whether trial counsel were ineffective in failing to seek to suppress the confession on the basis that the Petitioner invoked his right to remain silent. Therefore, the issue is waived. *See Holland v. State*, 610 S.W.3d 450, 458 (Tenn. 2020) ("Tennessee appellate courts may only consider issues that were not formally raised in the post-conviction petition if the issue was argued at the post-conviction hearing and decided by the post-conviction court without objection.").

Furthermore, on direct appeal, the Petitioner argued that he had invoked his right to remain silent. *See Dotson*, 450 S.W.3d at 52-53. The Tennessee Supreme Court reviewed the issue for plain error and rejected the Petitioner's argument, concluding that the Petitioner said "he did not wish to speak with Lieutenant Mason and Sergeant [Max] any longer and asked to speak with other officers" and that the Petitioner's "request to speak to officers other than those conducting the interview did not amount to an invocation, ambiguous or unambiguous, of his right to remain silent." *Id.* at 53. Accordingly, the Petitioner has failed to establish deficiency or prejudice.

b. Involuntary Confession

***38** The Petitioner asserts that he confessed only after Deputy Director Armstrong threatened to kill him or place him among Shelby County Jail inmates who would do so. The Petitioner maintains that as a result, his confession was involuntary and that trial counsel were ineffective in failing to file a motion to suppress on that basis.

Grounded in both the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the voluntariness test recognizes that coerced confessions are inherently unreliable. *Dickerson v. United States*, 530 U.S. 428, 433 (2000); *State v. Climer*, 400 S.W.3d 537, 567-68 (Tenn. 2013). Similarly, the use of coerced confessions violates article I, section 9 of the Tennessee Constitution, which states that "in all criminal prosecutions, the accused ... shall not be compelled to give evidence against himself." The test for voluntariness for confessions under this provision of the Tennessee Constitution "is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment." *State v. Smith*, 933 S.W.2d 450, 455 (Tenn. 1996); *see State v. Freeland*, 451 S.W.3d 791, 815 (Tenn. 2014).

The voluntariness test is distinct from the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). *Dickerson*, 530 U.S. at 434-35; *Mincey v. Arizona*, 437 U.S. 385, 397-98 (1978); *Climer*, 400 S.W.3d at 567-68. While *Miranda* questions whether a suspect received certain warnings and knowingly and voluntarily waived his or her rights, "the essential inquiry under the voluntariness tests is whether a suspect's will was overborne so as to render the confession a product of coercion." *Climer*, 400 S.W.3d at 568 (citing *Dickerson*, 530 U.S. at 433-35; *Smith*, 933 S.W.2d at 455). A suspect's subjective perception alone is insufficient to support a conclusion of involuntariness of a confession. *Smith*, 933 S.W.2d at 455 (citing *State v. Brimmer*, 876 S.W.2d 75, 79 (Tenn. 1994)). Rather, "coercive police activity is a necessary predicate to finding that a confession is not voluntary." *Brimmer*, 876 S.W.2d at 79.

In determining the voluntariness of a confession, the court must examine the totality of the circumstances surrounding the statement or confession, including " 'both the characteristics of the accused and the details of the interrogation.' " *Climer*, 400 S.W.3d at 568 (quoting *Dickerson*, 530 U.S. at 434). The circumstances relevant to this determination are:

> "[T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience

with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured[,] intoxicated[,] or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep[,] or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse."

Id. (quoting *State v. Huddleston*, 924 S.W.2d 666, 671 (Tenn. 1996)).

The Petitioner did not testify or otherwise present any evidence during the post-conviction hearing that Deputy Director Armstrong threatened him and, thus, coerced him into confessing. Rather, the Petitioner relies upon his own testimony at trial that after several hours of questioning, he confessed to committing the offenses only after Deputy Director Armstrong threatened to either kill him or house him with Shelby County Jail inmates who would kill him. The Petitioner also testified at trial that when he spoke to his mother, he leaned across the table and told her that "they [were] trying to put this on me" and that they were watching him.

***39** The Petitioner's mother, however, testified at trial that the Petitioner did not say anything about the police when she met with him in the interview room. Rather, she testified that when she entered the interview room, she asked him "were they trying to put it on him, what's going on." She stated that the Petitioner held his head down and did not respond. The post-conviction court relied upon this testimony, which contradicted the Petitioner's testimony, in finding that the Petitioner failed to establish that his confession was coerced.

Deputy Director Armstrong also offered detailed testimony at trial regarding his questioning and conversations with the Petitioner leading up to the Petitioner's confession, which was inconsistent with the Petitioner's testimony regarding the interview. Deputy Director Armstrong's detailed testimony about the interview did not include any threats on the Petitioner's life. Lead counsel questioned Deputy Director Armstrong extensively on cross-examination regarding his questions, comments, and statements during the interview leading up to the Petitioner's confession, and Deputy Director Armstrong never testified that he threatened to kill the Petitioner or to place him with inmates who would kill him.

The question of whether Deputy Director Armstrong threatened and, thus, coerced the Petitioner into confessing is a factual issue that the Petitioner had the burden at the post-conviction hearing of proving by clear and convincing evidence. *See* *Smith v. State*, 357 S.W.3d 322, 335 (Tenn. 2011) (stating that a petitioner seeking post-conviction relief has the burden of proving factual allegations by clear and convincing evidence); *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001) (noting that questions regarding whether the defendant was in custody, interrogated, or confessed of his own volition are primarily factual issues binding on the appellate court, whereas the trial court's application of law to the facts is reviewed de novo). " 'Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.' " *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009) (quoting *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998)). Given the lack of evidence presented by the Petitioner at the post-conviction hearing and the trial testimony of Deputy Director Armstrong and the Petitioner's mother, which contradicted the Petitioner's trial testimony, we conclude that the Petitioner failed to establish by clear and convincing evidence that he was threatened and, thus, coerced into giving his confession. Conflicting trial testimony from witnesses does not amount to clear and convincing evidence. Because the evidence in the record fails to establish that the Petitioner would have been successful had trial counsel filed a motion to suppress, the Petitioner did not demonstrate prejudice.

c. The Petitioner's Statement to His Mother

The Petitioner contends that trial counsel were ineffective in failing to file a pretrial motion to suppress his statement to his mother. He argues that his mother was acting as an agent for the State and elicited the statement from him after he invoked his right to counsel. Although trial counsel did not file a motion to suppress prior to trial, they filed a motion during the trial, challenging the admission of the Petitioner's statement to his mother on this basis. *See Dotson*, 450 S.W.3d at 53-54. The trial court conducted an evidentiary hearing, during which the Petitioner's mother testified, and the trial court denied the motion. *Id.* The Petitioner raised the trial court's denial of the motion as an issue on direct

appeal. *Id.* Reviewing the issue for plain error due to trial counsel's failure to file a motion to suppress prior to trial, the Tennessee Supreme Court held that "[n]othing in the record supports the [Petitioner's] claim that Ms. Shaw was acting as a state agent or that Ms. Shaw's conversation with the [Petitioner] amounted to interrogation." *Id.* at 55. During the post-conviction hearing, the Petitioner did not present any additional proof that he claims trial counsel could have presented had they filed the motion prior to trial. Accordingly, the Petitioner is not entitled to relief regarding this issue.

2. Failure to Obtain the Raw Video Footage of the Petitioner's Statements

***40** The Petitioner challenges trial counsel's failure to obtain *The First 48* raw video footage of his interview with the police and his conversation with his mother. He asserts that lead counsel was deficient in failing to issue a subpoena requiring the production of the unedited video prior to or at the preliminary hearing and, instead, issuing a subpoena at a later date after the raw footage had been destroyed. The Petitioner contends that had lead counsel issued a subpoena sooner, a reasonable probability exists that lead counsel would have been able to prevail against Granada's assertion of protection under the media shield law and that the trial court would have relied upon the raw footage to suppress the Petitioner's statements. The State responds that the evidence fails to establish that trial counsel were deficient or that any deficiency resulted in prejudice. We agree with the State.

As found by the post-conviction court, trial counsel attempted to obtain a copy of the unedited footage, but trial counsel's efforts were unsuccessful. The post-conviction court found that Granada destroyed the unedited footage "sometime before the final cut of the episode which aired on July 15, 2008, just about four months after the Petitioner's arrest." Lead counsel testified that he spoke to someone from the production company, who stated that the recordings were edited immediately and that the unused footage was quickly discarded in order for the production company to avoid being "dragged" into litigation. The Petitioner failed to establish that the unedited recording would have been available had lead counsel sought to obtain the recording prior to the preliminary hearing. Once trial counsel learned that the unedited footage had been destroyed, they filed a motion seeking to preclude the State from presenting the edited recording of the Petitioner's interview with police and his interactions with his mother, and the trial court granted the motion, which lead counsel characterized as a "huge" win. The Petitioner failed to establish that trial counsel were deficient in this regard. *See Aaron Malone v. State*, No. W2016-00666-CCA-R3-PC, 2017 WL 1404374, at *14 (Tenn. Crim. App. Apr. 18, 2017) (concluding that trial counsel was not deficient in failing to seek unedited footage from *The First 48* when he had recently sought similar footage for another defendant and knew that such footage typically was destroyed); *Adrian Deangelo Todd v. State*, No. W2012-00442-CCA-MR3-PC, 2013 WL 1908861, at *10 (Tenn. Crim. App. May 7, 2013) (holding that trial counsel did not perform deficiently "for being unable, despite his best efforts, to procure any additional footage" from *The First 48*).

3. Failure to Challenge the State's Failure to Preserve the Unedited Video Recording

The Petitioner asserts that trial counsel were ineffective in failing to challenge the State's failure to preserve the unedited video recording of his interview with police and his interactions with his mother as violating his due process rights under both the United States and Tennessee Constitutions and pursuant to *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). The Petitioner also asserts that the State acted in bad faith in failing to preserve the evidence in violation of *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). He argues that had trial counsel raised the claims, a reasonable probability exists that the trial court would have granted the motion and would have either dismissed the indictment, precluded the State from introducing the Petitioner's statements into evidence, or instructed the jury that it could infer that the events depicted by the raw footage were unfavorable to the State.

In *State v. Ferguson*, our supreme court held that "the loss or destruction of potentially exculpatory evidence may violate a defendant's right to a fair trial." *State v. Merriman*, 410 S.W.3d 779, 784 (Tenn. 2013) (citing *Ferguson*, 2 S.W.3d at 915-16). Upon determining that the due process clause under the Tennessee Constitution was broader than the due process clause under the United States Constitution, the Tennessee Supreme Court rejected the "bad faith" analysis adopted by the United States Supreme Court which provided that " 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' " *Id.* at 784-85 (quoting *Youngblood*, 488 U.S. at 58).

Rather, the Court in *Ferguson* adopted a balancing approach requiring the trial court to determine " '[w]hether a trial, conducted without the [lost or] destroyed evidence, would be fundamentally fair.' " *Id.* at 785 (quoting *Ferguson*, 2 S.W.3d at 914).

***41** The State argues that the Petitioner waived his claims by failing to raise them in his post-conviction petition. The Petitioner alleged in his amended post-conviction petition that trial counsel were ineffective in failing to request a missing evidence jury instruction in regard to the unedited footage from *The First 48*. He argued that "[s]ince counsel did not seek access to information held by Granada until after it was effectively destroyed, counsel should have at least sought a missing evidence instruction, a remedy available under *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999)." The Petitioner did not argue that the State acted in bad faith in violation of *Arizona v. Youngblood* as it related to his claim of ineffective assistance of counsel, and the post-conviction court did not address the issue in its order. Accordingly, this issue is waived. *See Holland*, 610 S.W.3d at 458. The Petitioner, however, raised in his amended petition trial counsel's failure to assert a *Ferguson* violation, and the post-conviction court addressed the issue as it related to the claim regarding trial counsel's failure to request a missing evidence jury instruction. We conclude the issue of whether trial counsel were ineffective in failing to raise a *Ferguson* claim is properly before this court.

Whenever a *Ferguson* claim is raised, the trial court must first determine "whether the State had a duty to preserve the evidence." *Merriman*, 410 S.W.3d at 785. "[T]he State's duty to preserve evidence is limited to constitutionally material evidence described as 'evidence that might be expected to play a significant role in the suspect's defense.' " *Id.* (quoting *Ferguson*, 2 S.W.3d at 917). To meet the constitutionally material evidence standard, "the evidence must potentially possess exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* (footnote omitted).

If the proof establishes that the State had a duty to preserve the evidence and that the State failed in its duty, the court must conduct a balancing analysis, considering the following factors:

1. The degree of negligence involved;
2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
3. The sufficiency of the other evidence used at trial to support the conviction.

Ferguson, 2 S.W.3d at 917 (footnote omitted). The trial court must balance these factors to determine whether a trial would be fundamentally fair absent the missing evidence. *Merriman*, 410 S.W.3d at 785. If the trial court concludes that a trial would be fundamentally unfair absent the missing evidence, "the trial court may then impose an appropriate remedy to protect the defendant's right to a fair trial, including, but not limited to, dismissing the charges or providing a jury instruction." *Id.* at 786.

Although the Petitioner argues on appeal that the trial court could have dismissed the case, precluded the State from introducing his statements, or provided a jury instruction, the Petitioner only raised a narrow issue in the post-conviction court that trial counsel should have requested a jury instruction on the destroyed evidence, and the post-conviction court only addressed trial court's failure to seek a jury instruction as a remedy for a *Ferguson* violation. Thus, the Petitioner has waived any issue on appeal regarding trial counsel's failure to seek to dismiss the case or preclude the State from introducing his statements due to a *Ferguson* violation, and our analysis is limited to trial counsel's failure to request a missing evidence jury instruction. *See Holland*, 60 S.W.3d at 458.

The only evidence presented at the post-conviction hearing regarding trial counsel's failure to request the jury instruction was co-counsel's testimony that they likely did not request a missing evidence jury instruction due to fear that they would open the door to the introduction of the edited recording of the Petitioner's interview with the police and his interactions with his mother. During the post-conviction hearing, the Petitioner did not present the edited recording that was in trial counsel's possession during the trial proceedings. Co-counsel testified that while the Petitioner's statement was "bad," the available portion of the recording of his statement was "much worse." Lead counsel described the recording as "terrible" and "damning," and the Petitioner did not present the edited version of the recording in the post-conviction court to refute trial counsel's testimony regarding the "damning"

nature of the edited recording. General Lepone stated that the edited recording would have refuted the Petitioner's claims that he also was whispering to his mother while speaking to her in the interview room. The trial court granted trial counsel's motion in limine to exclude the edited recording at trial due to the unavailability of the unedited footage. However, the trial court warned trial counsel of the limitations of its ruling and the possibility that trial counsel could open the door to the introduction of the edited recording. Co-counsel emphasized the importance placed by trial counsel in exercising care to avoid opening the door to the admission of the edited recording. Co-counsel testified that trial counsel's strategy prioritized keeping the jury from viewing the edited footage, and such reasonable strategic decisions are virtually unchallengeable. *Felts*, 354 S.W.3d at 277. Furthermore, the evidence fails to demonstrate that the trial court would have granted a request for a missing evidence instruction while denying the State the opportunity to present the portion of the recording that was available. The Petitioner is not entitled to relief regarding this issue.

B. Jury Selection

1. Failure to Challenge the Trial Court's Death Qualification Procedure

***42** The Petitioner challenges trial counsel's failure to object to the "death qualification" of prospective jurors, arguing that "death qualified" jurors are more likely to convict a defendant of the most serious charged offense. He also argues that when voir dire focuses on the death penalty, the parties and the trial court convey the impression to prospective jurors that they believe the defendant is guilty, that the "real" issue is the appropriate penalty, and that the defendant deserves the death penalty. Tennessee appellate courts have repeatedly rejected federal and state constitutional challenges to the process of "death qualification," including those raised by the Petitioner. *See, e.g., State v. Willis*, 496 S.W.3d 653, 756-57 (Tenn. 2016) (appendix) (rejecting constitutional challenges to the exclusion of jurors who were not "death qualified" and the use of a "death qualified" jury); *State v. Odom*, 137 S.W.3d 572, 601 (Tenn. 2004) (appendix) (rejecting the argument that "the death qualification process skews the make-up of the jury and results in a relatively prosecution-prone guilt-prone jury"); *State v. Reid*, 91 S.W.3d 247, 289-90 (Tenn. 2002) (appendix) (rejecting a state constitutional challenge to the removal of jurors for cause when those jurors opposed the imposition of the death penalty due to "sincerely held" religious, moral, or philosophical beliefs); *State v. Hall*, 958 S.W.2d 679, 717 (Tenn. 1997) (appendix) (rejecting claim that the manner of selecting "death qualified" jurors unconstitutionally results in juries that are prone to conviction); *State v. Jones*, 789 S.W.2d 545, 547 (Tenn. 1990) (rejecting claim that "death qualification" of jury violated the Sixth Amendment by depriving the defendant of a fair and impartial jury). Trial counsel, therefore, were not deficient, and the Petitioner is not entitled to relief.

2. Failure to Question Prospective Jurors About Racial and Implicit Bias

The Petitioner asserts that trial counsel neglected to ensure that he had a fair trial by an impartial jury by failing to question prospective jurors about racial and implicit bias. The post-conviction court credited trial counsel's testimony that they did not consider race to be an issue in this case. Co-counsel testified that he would have asked questions regarding racial bias if he had any indication from a juror's answers or demeanor that he needed to explore the topic. The Petitioner has not pointed to anything in the juror's answers in their questionnaires or during voir dire suggesting that co-counsel should have explored the topic. The Petitioner also has failed to demonstrate that the jury had any actual bias against him. The Petitioner has established neither deficiency nor prejudice.

3. Failure to Rehabilitate Prospective Jurors

The Petitioner maintains that trial counsel were ineffective in failing to rehabilitate six prospective jurors, who were discharged by the trial court after they stated that they could not impose the death penalty. The State responds that the Petitioner did not establish deficient performance or prejudice, noting that the trial court and the State attempted to rehabilitate each of the six prospective jurors to no avail.

Parties are granted " 'an absolute right to examine prospective jurors' " to determine whether they are competent. *State v. Kiser*, 284 S.W.3d 227, 279 (Tenn. 2009) (quoting T.C.A. § 22-3-101). The standard for determining when a prospective juror may be excused for cause due to the juror's views on the death penalty is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in

accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quotation omitted). A juror's biases need not "be proven with 'unmistakable clarity.' " *Id.* The trial court, however, "must have the 'definite impression' that a prospective juror could not follow the law." *State v. Austin*, 87 S.W.3d 447, 473 (Tenn. 2002) (quoting *State v. Hutchison*, 898 S.W.2d 161, 167 (Tenn. 1994)), *abrogated on other grounds by_State v. Urshawn Eric Miller*, No. W2019-00197-SC-DDT-DD, —— S.W.3d ——, 2021 WL 5810574, at *6 (Tenn. Dec. 7, 2021). " 'Clearly, the extremes must be eliminated—i.e., those who, in spite of the evidence, would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence.' " *Morgan v. Illinois*, 504 U.S. 719, 734 n. 7 (1992) (quoting *Smith v. Balkcom*, 660 F.2d 573, 578 (5th Cir. 1981)). "Where attempts to rehabilitate a juror who has refused to impose the death penalty would be futile, refusal to engage in such useless efforts rarely constitutes deficient performance under *Strickland*." *Detrick Cole v. State*, No. W2008-02681-CCA-R3-PD, 2011 WL 1090152, at *9 (Tenn. Crim. App. Mar. 8, 2011) (citing *Simon v. Epps*, 344 Fed. Appx. 69, 84 (5th Cir. 2009)).

***43** The transcript of voir dire reflects that each of these prospective jurors who were excused by the trial court maintained that they were unable to return a sentence of death due to their religious beliefs. They continued to adhere to their position even after the trial court and/or the State further questioned them and explained the law. The trial court excused the prospective jurors as a result. The Petitioner did not question trial counsel during the post-conviction hearing about their decision against attempting to rehabilitate these prospective jurors. Nevertheless, the record reflects that these prospective jurors were adamant and unequivocal in their position that they could not return a sentence of death despite attempts by the trial court and the State to rehabilitate them. Because additional efforts to attempt to rehabilitate these prospective jurors would have been futile, trial counsel's performance was not deficient. *See Detrick Cole*, 2011 WL 1090152, at *10. The Petitioner's claim of prejudice is "speculative because the Petitioner has failed to present any testimony as to whether the prospective jurors could have been rehabilitated." *Id.* (citing *State v. Hale*, 892 N.E.2d 864, 904 (Ohio 2008)).

4. Failure to Challenge Juror 1

The Petitioner asserts that trial counsel were ineffective in failing to challenge Juror 1 for cause or exercise a peremptory challenge to strike the juror, who stated during voir dire that he did not "see that there can be mitigating circumstances to kill a child." The Petitioner argues that Juror 1's views substantially impaired his ability to consider mitigating evidence during the penalty phase. The State responds that the post-conviction court properly found trial counsel made a reasonable strategic decision not to challenge Juror 1 and that the Petitioner has failed to establish prejudice.

Trial counsel is " 'accorded particular deference when conducting *voir dire*,' " and the actions of trial counsel during voir dire " 'are considered to be matters of trial strategy.' " *William Glenn Rogers v. State*, No. M2010-01987-CCA-R3-PD, 2012 WL 3776675, at *36 (Tenn. Crim. App. Aug. 30, 2012) (quoting *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001)). Accordingly, " '[a] strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates that entire trial with obvious unfairness.' " *Id.* (quoting *Hughes*, 258 F.3d at 457).

The post-conviction court credited the testimony of trial counsel that they focused on selecting jurors who they believed could potentially understand the defense and the lack of physical forensic evidence against the Petitioner. Co-counsel explained that they did so because they believed they had a better chance of a favorable outcome during the guilt phase rather than the penalty phase. Co-counsel testified that he likely believed Juror 1 would be favorable to the defense during the guilt phase due to his knowledge of firearms as a result of his prior military experience, and the trial record reflects that lead counsel focused his questions to Juror 1 during voir dire upon his knowledge of firearms. The record supports the post-conviction court's finding that trial counsel made a reasonable strategic decision against seeking to exclude Juror 1 by either challenging him for cause or exercising a peremptory challenge.

5. Failure to Exhaust Peremptory Challenges

The Petitioner maintains that trial counsel were ineffective in failing to exhaust their peremptory challenges, which

hindered their ability to challenge on direct appeal Juror 1's service on the jury. *See* *State v. Schmeiderer*, 319 S.W.3d 607, 633 (Tenn. 2010) ("The failure to correctly excuse a juror for cause is grounds for reversal only if the defendant exhausts all of his peremptory challenges and an incompetent juror is forced upon him."), *abrogated on other grounds by State v. Urshawn Eric Miller*, No. W2019-00197-SC-DDT-DD, —— S.W.3d ——, 2021 WL 5810574, at *6 (Tenn. Dec. 7, 2021). However, as the post-conviction court found and we have concluded, trial counsel made a reasonable strategic decision in selecting the jury and against seeking to exclude Juror 1 as a juror. The Petitioner is not entitled to relief regarding this issue.

C. At Trial

1. Failure to Object to the Use of Stun Cuffs

***44** The Petitioner submits that trial counsel were ineffective in failing to challenge the use of a stun cuff as violating his due process rights. He argues that the post-conviction court's analysis of prejudice was "limited" and based upon an erroneous view of the record and that, as a result, a remand for "further proceedings" is necessary. The State responds that the Petitioner failed to establish that trial counsel were ineffective and that the post-conviction court's prejudice analysis is sufficient to allow this court to properly review the issue.

"It is a well-settled principle of due process that every defendant in a criminal case be afforded the 'physical indicia of innocence.' " *State v. Hall*, 461 S.W.3d 469, 497 (Tenn. 2015) (citing *Kennedy v. Cardwell*, 487 F.2d 101, 104 (6th Cir. 1973); *Mobley v. State*, 397 S.W.3d 70, 100 (Tenn. 2013)). Our supreme court has recognized that "[t]he use of visible restraints undermines the physical indicia of innocence and the related fairness of the fact-finding process." *Mobley*, 397 S.W.3d at 100 (citing *Deck v. Missouri*, 544 U.S. 622, 630 (2005)). There is a legal presumption against the use of visible restraints at trial. *Id.* at 99 (citing *Willocks v. State*, 546 S.W.2d 819, 820-21 (Tenn. Crim. App. 1976)). The use of a restraint that is not visible to the jury, such as a stun belt, does not implicate the concern of the physical indicia of innocence to the extent that a visible restraint does. *Id.* at 100. However, regardless of their visibility, physical restraints can interfere with a defendant's ability to offer testimony in his or her own behalf and to communicate with counsel, and "physical restraints can undermine the symbolic yet concrete objective of maintaining a dignified judicial process." *Id.* (citing *Deck*, 544 U.S. at 631-32).

In February 2013, more than two years after the Petitioner's trial, the Tennessee Supreme Court issued its opinion in *State v. Mobley*, addressing the use of stun belts as physical restraints and concluded that their use is governed by the same principles and procedures that apply to the use of any other in-court physical restraint. *Id.* at 101. Thus, the State has the burden of demonstrating that the physical restraints are necessary and serve a legitimate interest, "such as preventing escape, protecting those present in the courtroom, or maintaining order during trial." *Id.* (citations omitted). In determining whether to require a defendant to wear physical restraints, the trial court should consider all relevant circumstances, including, but not limited to: "(1) the defendant's circumstances, such as record of past behavior, temperament, and desperateness of his or her situation; (2) the state of the courtroom and courthouse; (3) the defendant's physical condition; and (4) whether there is a less onerous but adequate means of providing security." *Id.* (citations omitted). The relevant circumstances should be considered "against the backdrop of affording the defendant the physical indicia of innocence, ensuring the defendant's ability to communicate with counsel, protecting the defendant's ability to participate in his or her defense and offer testimony in his or her own behalf, and maintaining a dignified judicial process." *Id.*

The trial court is required to make particularized findings on the issue. *Id.* "[T]he better practice is to hold a hearing on the issue so that factual disputes may be resolved and evidence surrounding the decision may be adduced and made part of the record." *Id.* (citing *Willocks*, 546 S.W.2d at 822). The decision of whether to require the use of physical restraints is a matter within the discretion of the trial court. *See id.* "The trial court must employ the least drastic security measure necessary to accomplish the objective." *Id.* at 99.

***45** In *Mobley*, both trial counsel and the petitioner offered testimony during the post-conviction hearing regarding the use of a stun belt on the petitioner at trial. *Id.* at 96-98. Trial counsel agreed to a suggestion that a stun belt be placed on the petitioner at trial after the petitioner initially refused to dress out in street clothes for the trial. *Id.* at 95-96. Trial counsel

testified at the post-conviction hearing that he did not believe the use of the stun belt would affect the proceedings because the stun belt was not visible to the jury, and trial counsel did not recall discussing the stun belt's use with the petitioner. *Id.* at 97. The petitioner alleged that the stun belt interfered with his ability to testify because the stun belt was always " 'on his mind.' " *Id.* at 102. The post-conviction court denied relief, finding that trial counsel was not deficient and that any deficiency did not result in prejudice because the stun belt was not visible to the jury. *Id.* at 101-02.

On appeal, our supreme court determined that trial counsel's agreeing to the suggested use of a stun belt without discussing it with the petitioner fell outside the range of competence demanded of trial counsel. *Id.* at 102. The supreme court concluded that the post-conviction court failed to make adequate findings related to prejudice because the court did not address the petitioner's claim that the stun belt was " 'on his mind' " while testifying at trial. *Id.* The supreme court remanded the case to the post-conviction court for a hearing to address the circumstances leading to the decision to require the petitioner to wear a stun belt, whether trial counsel's performance was deficient, whether the use of the stun belt had an adverse effect on his demeanor or his ability to testify at trial, and whether any adverse effect sufficiently undermined the outcome of the trial. *Id.* at 103.

In the present case, the post-conviction court found that on September 17, 2010, prior to the beginning of voir dire, the trial court entered an order providing for the use of stun cuffs for security during trial proceedings. The post-conviction court noted that the record did not include a motion for stun cuffs or a transcript of any discussion related to the use of stun cuffs. The post-conviction court found that no member of the defense team recalled the Petitioner's wearing or complaining about wearing a stun cuff. The post-conviction court credited Deputy Atkins's testimony that the Petitioner did not wear a stun cuff during the guilt phase but wore a stun cuff on his left ankle during the capital sentencing hearing and during the non-jury sentencing hearing before the trial court sometime after the trial. The post-conviction court found that Deputy Atkins testified that the Petitioner was not wearing the stun cuff when he testified during the guilt/innocence phase of the trial but that Deputy Atkins recalled the Petitioner wearing the stun cuff when he chose to wear his jail clothes for the capital sentencing hearing. The post-conviction court stated that according to the trial transcript, the Petitioner changed into his jail clothes for closing arguments during the penalty phase of the trial. The post-conviction court noted that Deputy Atkins testified that the stun cuff was not visible and found that "[t]here has been no evidence presented of any prejudice which resulted from [the] Petitioner having worn the stun cuff for the limited time during the closing arguments of counsel at sentencing and in the non-jury sentencing hearing."

Although the trial court entered an order providing for the use of stun cuffs at trial, the post-conviction court found that none of the members of the defense team recalled the Petitioner's wearing stuff cuffs or complaining about wearing them at trial. The trial record did not include a motion for the use of stun cuffs or a transcript of any discussion regarding the use of stun cuffs. The trial court's order did not include a certificate of service, and the Petitioner did not present any evidence that trial counsel were aware of the order. Trial counsel were not deficient in failing to object to the order or the use of stun cuffs when they had no knowledge of the order or the utilization of the stun cuffs.

***46** The Petitioner asserts that the post-conviction court failed to make sufficient findings for a determination of prejudice. He also asserts that the post-conviction court's finding that he did not wear a stun cuff until closing arguments during the penalty phase is contrary to the evidence presented at the post-conviction hearing. Deputy Atkins testified that he placed a stun cuff on the Petitioner's ankle on "the day" in which the Petitioner declined to change out of his jail uniform during the penalty phase. While the trial record established that the Petitioner appeared before the jury in his jail uniform shortly before closing arguments began during the penalty phase, Deputy Atkins's testimony, although somewhat confusing, does not appear to indicate that Deputy Atkins placed the stun cuff on the Petitioner only after he insisted on wearing his jail uniform while before the jury. Rather, Deputy Atkins's testimony indicates that he placed the stun cuff on the Petitioner at some point on that same day, which was the date in which proof was presented during the penalty phase. Even if the Petitioner wore a stun cuff during the presentation of the proof at the penalty phase, he failed to present clear and convincing evidence of any fact establishing any deficiency that resulted in prejudice.

The post-conviction court found that the stun cuff was not visible. The Petitioner does not challenge this finding but, instead, claims that like the court in *Mobley*, the post-conviction court failed to make any finding regarding the effect of the stun cuff on the Petitioner's ability to testify and to communicate with trial counsel. *See* *Mobley*, 397 S.W.3d at 102-03. While the petitioner in *Mobley* wore a

stun belt when he testified at trial and alleged that the stun belt was "on his mind" when he testified, the Petitioner was not wearing the stun cuff when he testified during the guilt phase, and he did not testify during the penalty phase or during the post-conviction hearing. The Petitioner did not present any other proof that the stun cuff affected his decision not to testify during the penalty phase or affected his ability to communicate with trial counsel. Accordingly, the Petitioner has failed to establish prejudice.

2. Failure to Present Evidence of C.J.'s Long-Term Memory Deficits

The Petitioner challenges trial counsel's failure to present evidence that a neuropsychological evaluation from LeBonheur Children's Medical Center dated approximately two months after the homicides provided that C.J. had long-term memory deficits. He asserts that trial counsel "could have" utilized the report to challenge C.J.'s competency as a witness and his testimony identifying the Petitioner as the perpetrator and to support Dr. Aldridge's testimony.

In rejecting the Petitioner's claim, the post-conviction court found that General Lepone credibly testified that he recalled discussing the evaluation with lead counsel, who indicated that it would be obvious to jurors that C.J. had some brain damage once they viewed the image of his brain with a knife in it and the other evidence presented at trial. The post-conviction court noted lead counsel's testimony that he would not have wanted to use a psychological report to cross-examine the child. The court also noted that trial counsel's file included an evaluation of C.J. performed in November 2009, approximately one and one-half years after the evaluation by LeBonheur, in which it was noted that both C.J.'s long-term and short-term memory was intact. The court found that trial counsel used "very effective strategies" to thoroughly challenge C.J.'s competency and testimony at trial and that the Petitioner did not present any proof establishing otherwise.

In rejecting the Petitioner's separate claim that the State wrongfully withheld the report from the defense, the post-conviction court found that General Lepone and lead counsel both testified that they recalled discussing the evaluation and that General Lepone specifically recalled the details of their discussion. The Petitioner correctly notes that lead counsel never testified to discussing the evaluation with General Lepone. The Petitioner, however, acknowledges that regardless, the evidence does not appear to preponderate against the post-conviction court's finding that the State made the evaluation available to the defense. We agree with the Petitioner's assessment. *See Kendrick*, 454 S.W.3d at 457.

***47** The Petitioner first claims that trial counsel should have utilized the evaluation to challenge C.J.'s competency to testify as a witness at trial. In Tennessee, a witness is presumed competent to testify unless a specific rule or statute provides otherwise. Tenn. R. Evid. 601. "Virtually all witnesses may be permitted to testify: children, mentally incompetent persons, convicted felons." Tenn. R. Evid. 601, Advisory Commission Comment. "Before testifying, every witness shall be required to declare that the witness will testify truthfully by oath or by affirmation, administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." Tenn. R. Evid. 603.

The record reflects that the defense considered whether C.J. had memory deficits. Co-counsel's file includes handwritten notes from a conference call with Dr. Aldridge a few weeks before trial in which co-counsel questioned whether the trauma affected C.J.'s memory. Co-counsel's file also includes records received by Ms. Geiser around the same time period from Youth Villages dated March 2010 indicating that C.J.'s memory was "intact" and from Case Management, Inc. of a psychiatric evaluation in November 2009 stating that his long-term and short-term memory was "intact." Accordingly, these records, dated one and one-half to two years after C.J.'s initial evaluation and less than one year prior to trial, provided that C.J. was no longer suffering from long-term memory deficits. Furthermore, this court has recognized that a witness's inability to remember details does not affect a witness's competency to testify but goes to the weight and value to his or her testimony, which is to be resolved by the trier of fact. *See e.g., State v. Bashan Murchison*, No. E2014-01250-CCA-R3-CD, 2016 WL 659844, at *17 (Tenn. Crim. App. Feb. 12, 2016); *State v. Larry Eugene Culpepper*, No. M2005-00685-CCA-R3-CD, 2006 WL 1896358, at *7 (Tenn. Crim. App. Nov. 20, 2006); *see also* Tenn. R. Evid. 617 (allowing a party to impeach a witness by offering evidence that "a witness suffered from impaired capacity at the time of an occurrence or testimony"). The Petitioner failed to present clear and convincing evidence that C.J. had long-term memory deficits at the time of trial, and, regardless, any such memory impairment did not render him incompetent to testify as a witness. We conclude that the Petitioner has not established deficiency or prejudice.

Although the Petitioner asserts that trial counsel were deficient in failing to utilize the evaluation to impeach or otherwise challenge the reliability of C.J.'s testimony at trial, trial counsel offered extensive testimony regarding their strategy in challenging C.J.'s identification of the Petitioner as the perpetrator. Trial counsel were prepared to impeach C.J. with his recorded statement in which he identified other possible perpetrators. However, both children who testified essentially agreed with everything suggested by co-counsel on cross-examination, and, as a result, there was no testimony on which to impeach using the prior statements. Co-counsel testified that he believed their testimony on cross-examination was beneficial to the defense in creating reasonable doubt as to the Petitioner's identify as the perpetrator. Although co-counsel initially agreed he would have used the evaluation to impeach C.J.'s testimony, he later testified to the difficulties of challenging the children's testimony without alienating the jury and stated that he would not have wanted to present evidence of C.J.'s mental deficiencies due to fear that it would provide jurors with a reason to disregard C.J.'s testimony on cross-examination. Lead counsel likewise testified that he would not have wanted to use the evaluation on the cross-examination of C.J. Trial counsel also presented the testimony of Dr. Aldridge to challenge the reliability of C.J.'s identification of the Petitioner during interviews and the reliability of the testimony of both children on direct examination. We conclude that trial counsel made reasonable strategic decisions in challenging the reliability of the children's identification of the Petitioner as the perpetrator.

***48** The Petitioner failed to demonstrate how evidence that C.J. had long-term memory impairments approximately two months after the offenses affected his statement, made shortly after the offenses occurred, identifying the Petitioner as the perpetrator. The Petitioner also failed to demonstrate how the evidence that C.J. had long-term memory impairments approximately two months after the offenses affected his testimony at trial in light of reports of subsequent evaluations conducted prior to trial indicating that he no longer suffered from such impairments. In light of the shortcomings of the evidence presented by the Petitioner at the post-conviction hearing and trial counsel's efforts to challenge C.J.'s identification of the Petitioner as the perpetrator though their cross-examination of C.J. and the testimony of Dr. Aldridge, we conclude that the Petitioner did not establish that trial counsel's failure to present evidence of the initial evaluation resulted in prejudice.

The Petitioner alleges in a one-sentence footnote that trial counsel also were deficient in failing to challenge C.J.'s testimony with records indicating that he had a "global assessment of functioning level of fifty" and was taking antipsychotic medication. The Petitioner waived this ground for relief by offering no other argument or citation to authorities in support thereof. *See* Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court.").

3. Failure to Object to Crime Scene Photographs

The Petitioner maintains that trial counsel were ineffective in failing to object to crime scene photographs as cumulative to other evidence presented at trial, graphic in nature, and unfairly prejudicial. The State responds that trial counsel were not deficient in limiting their objections to only some of the crime scene photographs and that the Petitioner failed to establish prejudice.

Co-counsel testified that once the trial court learned of the number of photographs in the case, the court ordered the parties to meet in an effort to reach an agreement regarding the admission of some of the photographs. The trial court then ruled upon the admissibility of the photographs upon which the parties were unable to agree. In denying relief, the post-conviction court relied in part on co-counsel's testimony that he did not object to the admission of every photograph of the crime scene because he believed he would lose credibility with the trial court in doing so and that trial counsel wanted some of the crime scene photographs admitted because the photographs supported their defense. The trial court ruled on the admissibility of the photographs challenged by the defense. In the post-conviction court and on appeal, the Petitioner made a general assertion that trial counsel should have objected to all two hundred of the crime scene photographs that were introduced at trial. However, we conclude that trial counsel made a reasonable strategic decision against objecting to every crime scene photograph sought to be admitted by the State.

On appeal, the Petitioner specifically claims that trial counsel were ineffective in failing to object to three crime scene photographs of the child homicide victims. On direct appeal, the Petitioner challenged the admission of the crime scene photographs of the child victims. *See Dotson*, 450 S.W.3d at 92 (appendix). The Tennessee Supreme Court affirmed

this court's determination that the Petitioner waived the issue by failing to object to the admission of the photographs at trial. *Id.* This court also concluded that even if the issue was not waived, the trial court did not err in admitting the photographs, recognizing that the photographs "were relevant to supplement the testimony of the medical examiner and the treating physician regarding the victims' injuries and to support the aggravating circumstances alleged by the State." *Id.* Accordingly, the Petitioner was not prejudiced by trial counsel's failure to object to the admission of these three photographs at trial.

4. Failure to Object to the Forensic Pathologist's Testimony

***49** The Petitioner contends that trial counsel were ineffective in failing to object to Dr. Funte's testimony regarding the autopsies of Mr. Seals, Mr. Cecil Dotson, and one of the child victims when Dr. Funte did not conduct the autopsies. The Petitioner maintains that Dr. Funte's testimony violated his constitutional rights to confrontation, to due process, and to be free from cruel and unusual punishment.

In denying relief, the post-conviction court credited trial counsel's testimony that they did not object to Dr. Funte's testimony because they were not contesting the cause of the victims' deaths as part of their defense. Furthermore, the Petitioner challenged the admission of Dr. Funte's testimony on direct appeal. *See Dotson*, 450 S.W.3d at 70-72. The Tennessee Supreme Court addressed the issue under the plain error doctrine, reviewed the status of the law that the time, and concluded that the admission of Dr. Funte's testimony did not breach a clear and unequivocal rule of law given the uncertainty of the status of the law at the time of the trial and the appeal. *Id.* It was not until the Tennessee Supreme Court released its opinion in *State v. Hutchison*, 482 S.W.3d 893, 908-14 (Tenn. 2016), approximately one and one-half years after the court issued its opinion on the direct appeal in the Petitioner's case, that the supreme court addressed the standard to be employed in determining whether a forensic pathologist's testimony about an autopsy that he or she did not perform violated a defendant's confrontation rights. The Court also concluded that granting relief for the admission of Dr. Funte's testimony was not necessary to do substantial justice, reasoning that the Petitioner "did not contest the causes of the victims' deaths or any other conclusions or information contained in the autopsy reports or in Dr. Funte's testimony. Nor did the autopsy reports or Dr. Funte's testimony implicate the [Petitioner] or tie him to these homicides." *Dotson*, 450 S.W.3d at 72. Accordingly, trial counsel were not deficient in failing to object to Dr. Funte's testimony, and their failure to object did not result in prejudice.

5. Failure to Effectively Challenge the Testimony of the State's Witnesses

The Petitioner contends that trial counsel failed to effectively challenge testimony of some of the State's witnesses through cross-examination. Trial counsel's decision regarding whether to cross-examine a witness regarding an issue "is a strategic or tactical choice, if informed and based on adequate preparation." *Lawrence Warren Pierce v. State*, No. M2005-02565-CCA-R3-PC, 2007 WL 189392, at *7 (Tenn. Crim. App. Jan. 23, 2007) (citing *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)); *see Rachel Kay Bond v. State*, M2018-01324-CCA-R3-PC, 2019 WL 4508351, at *20 (Tenn. Crim. App. Sept. 19, 2019). "[S]trategic decisions during cross-examination are judged from counsel's perspective at the point of time they were made in light of the facts and circumstances at that time." *Johnnie W. Reeves v. State*, No. M2004-02642-CCA-R3-PC, 2006 WL 360380, at *10 (Tenn. Crim. App. Feb. 16, 2006) (citing *Strickland*, 466 U.S. at 690).

The Petitioner asserts that trial counsel were ineffective in failing to question officers about a discrepancy in a police report regarding the date on which the officers interviewed the Petitioner. He argues that a police report incorrectly noted that the interview occurred on March 5, 2008, when the interview actually occurred on March 4th, that trial counsel continued to reference the interview as occurring on March 5th even after an officer acknowledged the error, and that trial counsel failed to question the officers about the error on cross-examination. The Petitioner, however, failed to question trial counsel about this issue at the evidentiary hearing. Rather, the post-conviction court found that the defense team "more than sufficiently investigated the discovery and prepared for trial" and that trial counsel planned their defense around the lack of physical evidence connecting the Petitioner to the offenses and strategically focused on the issues and emphasized the points important to the defense theory. The evidence does not preponderate against the post-conviction court's findings. Additionally, the Petitioner has failed to demonstrate how the failure to emphasize the discrepancy in the date affected the verdict. The Petitioner has established neither deficiency nor prejudice.

***50** The Petitioner next contends that trial counsel were ineffective in their cross-examination of Mr. Willie Hill regarding his Facebook friend, Roderick. While hospitalized, C.J. screamed the names "Roderick" and "Cassandra" prior to identifying the Petitioner as the perpetrator, and at trial, C.J. testified that he had previously stated that "Roderick" and "Cassandra" entered the home and that "Roderick" shot Mr. Cecil Dotson. During cross-examination of Mr. Hill, lead counsel showed Mr. Hill a photograph of Mr. Hill's Facebook friend Roderick, and Mr. Hill denied knowing him. Mr. Hill acknowledged having a sister named Cassandra. Photographs of both Roderick and Cassandra were entered as exhibits at trial. The State then presented the testimony of Roderick, who confirmed that he was depicted in the photograph but denied knowing Mr. Hill. Roderick testified that he was sixteen years old at the time of the trial and was thirteen years old in March of 2008 when the offenses occurred. The Petitioner argues that trial counsel's cross-examination of Mr. Hill about his Facebook friend Roderick led the State to introduce proof about Roderick's age which undermined the theory that Roderick committed the offenses. He contends that trial counsel were deficient in their cross-examination, which "backfired."

The Petitioner did not question trial counsel at the evidentiary hearing regarding their decision to pursue this line of cross-examination. Trial counsel had presented evidence at trial that there was a dispute between Mr. Hill and Mr. Cecil Dotson, and they had presented evidence that someone named "Roderick" may have shot Mr. Cecil Dotson and that someone named "Cassandra" may have been present. During the cross-examination of Mr. Hill, they questioned him regarding his online acquaintance with Roderick and regarding his sister Cassandra. Because cross-examination is regarded as a strategic decision, the testimony of trial counsel is important to determine whether the strategic decision was informed and based on adequate preparation. Under the facts and circumstances of this case, the Petitioner has failed to present clear and convincing evidence that trial counsel's strategic decision was not based on adequate preparation. Furthermore, in light of the evidence presented at trial establishing the Petitioner's guilt, we conclude that the Petitioner has failed to establish a reasonable probability that but for any deficiency in the cross-examination of Mr. Hill, the result of the proceeding would have been different. *See* *Calvert*, 342 S.W.3d at 486. The Petitioner is not entitled to relief regarding this issue.

The Petitioner contends that trial counsel were ineffective in failing to challenge Sergeant Mullins's qualifications as a bloodstain pattern expert. The Petitioner argues that Sergeant Mullins "used incorrect terminology," incorrectly identified several impact spatters as castoff stains, failed to issue a report, improperly relied upon the statements of the surviving victims and the Petitioner in reaching his conclusions, and testified to opinions that were outside his expertise.

At trial, Sergeant Mullins testified that he had been employed with the Memphis Police Department for twenty-two years and had been assigned to the Homicide Bureau for approximately seven years, during which time he had been involved in the investigation of 600 to 700 homicides and went to 500 or more "death scenes," involving suicides, homicides, and deaths from unknown causes. He had attended a basic crime scene investigation school and a "school" on bloodstain pattern analysis "to help in determining blood stain patterns on a crime scene and what that can tell you." He had served as the case officer in murder cases on several occasions and had entered the crime scene in almost all of those occasions. The State tendered Sergeant Mullins as an expert in general crime scene investigation and in bloodstain pattern analysis. The prosecutor informed the trial court, "I have discussed this with the defense." Lead counsel announced that he had no objections, and the trial court accepted Sergeant Mullins as an expert in general crime scene investigation and bloodstain pattern analysis.

Although the trial record reflects that the prosecutors and trial counsel discussed the State's decision to qualify Sergeant Mullins as an expert prior to doing so, the Petitioner never questioned trial counsel or General Lepone regarding this discussion at the post-conviction hearing. The Petitioner also failed to otherwise question trial counsel regarding their decision to not object to Sergeant Mullins's qualifications as an expert. Regardless, the Petitioner has failed to establish that Sergeant Mullins was not qualified to testify as an expert in bloodstain pattern analysis.

***51** Tennessee Rule of Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." When determining the admissibility of expert testimony, the trial court must first determine whether the witness is qualified by knowledge, skill, experience, training, or education to

give an opinion within the limits of the witness's expertise. *State v. Davidson*, 509 S.W.3d 156, 208 (Tenn. 2016); *State v. Stevens*, 78 S.W.3d 817, 834 (Tenn. 2002). The key factor in making this determination is "whether the witness's qualifications authorize him or her to give an informed opinion *on the subject at issue*." *Stevens*, 78 S.W.3d at 834. "The witness may acquire the necessary expertise through formal education or life experiences." *State v. Reid*, 91 S.W.3d 247, 302 (Tenn. 2002) (appendix) (citation omitted). "However, the witness must have such superior skill, experience, training, education, or knowledge within the particular area that his or her degree of expertise is beyond the scope of common knowledge and experience of the average person." *Id.* Testimony regarding blood spatter evidence, generally, must be presented through an expert due to the complexity of the evidence and the predication of the opinion upon specialized knowledge unfamiliar to most lay persons. *State v. Halake*, 102 S.W.3d 661, 670-71 (Tenn. Crim. App. 2001). "Blood spatter analysis is a complicated subject, as the analyst studies the blood spatter and determines what blow created the spatter, thereby recreating the events of the crime." *Id.* at 672 (citations omitted).

The trial court properly accepted Sergeant Mullins as an expert in bloodstain pattern analysis based upon his training and extensive experience. Following the Petitioner's trial, this court issued multiple opinions upholding a trial court's finding that Sergeant Mullins was qualified as an expert in bloodstain pattern analysis. *See State v. William Langston*, No. W2015-02359-CCA-R3-CD, 2017 WL 1968827, at *11 (Tenn. Crim. App. May 12, 2017); *State v. William Lanier*, No. W2011-01626-CCA-R3-CD, 2013 WL 5739793, at *13 (Tenn. Crim. App. Oct. 18, 2013); *State v. Aaron Malone*, No. W2009-02047-CCA-R3-CD, 2011 WL 1005487, at *12 (Tenn. Crim. App. Mar. 22, 2011). The Petitioner's allegations that Sergeant Mullins used incorrect terminology, incorrectly identified some impact spatters as castoff stains, failed to issue a report, and improperly relied upon the statements of the surviving victims and the Petitioner relate to the weight to be afforded to Sergeant Mullins's testimony and not to its admissibility.[2] *See Shipley v. Williams*, 350 S.W.3d 527, 551 (Tenn. 2011) ("Once the minimum requirements are met, any questions the trial court may have about the *extent* of the witness's knowledge, skill, experience, training, or education pertain only to the weight of the testimony, not to its admissibility."). The Petitioner asserts that Sergeant Mullins's testimony that the four adult victims were moved either close to or after their deaths was an opinion "which only a forensic pathologist would hold the expertise to address." The Petitioner, however, waived this argument by failing to cite to any authority in his brief to support his claim. *See* Tenn. Ct. Crim. App. R. 10(b). Rather, we conclude that Sergeant Mullins was properly qualified to testify as an expert in bloodstain pattern analysis and that the Petitioner failed to establish any prejudice resulting from trial counsel's failure to object to Sergeant Mullins's testimony on this basis.

The Petitioner also appears to challenge Sergeant Mullins's qualifications as an expert in crime scene investigation, arguing that Sergeant Mullins incorrectly testified that control samples of carpet were taken to provide examiners visual samples without bloodstains when the samples actually were taken to ensure background substrate was not interfering with tests of bloodstained samples. The Petitioner did not question trial counsel about their decision not to challenge Sergeant Mullins's qualifications as an expert in crime scene investigation and does not otherwise explain how any mistaken belief by Sergeant Mullins regarding the reason for obtaining a controlled sample of carpet rendered him unqualified as a crime scene investigation expert, especially in light of Sergeant Mullins's training and experience in investigating 600 to 700 homicides. The Petitioner established neither deficiency nor prejudice.

***52** Finally, the Petitioner asserts that trial counsel were ineffective in failing to cross-examine Sergeant Mullins on his conclusions and methodology, which Dr. Miller maintained were improper. The Petitioner did not question trial counsel during the evidentiary hearing about their cross-examination of Sergeant Mullins. In rejecting the claim, the post-conviction court found that trial counsel testified that they planned their defense around the lack of physical evidence connecting the Petitioner to the offenses. The court found that trial counsel "strategically focused on the issues which were beneficial to their case and emphasized the points which were important to the defense." The trial record reflects that lead counsel conducted an extensive cross-examination of Sergeant Mullins during which lead counsel took advantage of Sergeant Mullins's designation as an expert in crime scene investigation to question him about the numerous items of evidence collected from the scene, the importance of testing each of the items, and the lack of the Petitioner's DNA or other forensic evidence connecting the Petitioner to each of the items. Lead counsel also utilized his cross-examination of Sergeant Mullins to suggest that multiple perpetrators were involved and that the offenses were gang-related. Given

the extensive nature of lead counsel's cross-examination of Sergeant Mullins, the Petitioner has failed to establish that lead counsel was deficient.

6. Failure to Object to a Police Officer's Testimony Regarding the Crime Scene

The Petitioner faults trial counsel for their failure to challenge Sergeant Walter Davidson's testimony regarding his reaction to the crime scene as irrelevant and inflammatory. The Petitioner specifically contends that trial counsel were ineffective in failing to object to the following exchange between the prosecutor and Sergeant Davidson, who was the case coordinator, on direct examination:

> Q And as the case officer and obviously just ten months experience with homicides but you had some prior experience with robbery, were you aware of any homicide detective on your team, no matter how many years of experience they had, that had ever seen anything like this?
>
> A No, no one. I mean, I would say in the state, never had something where, you know, four adults and two children, I mean, children are rarely victim of homicides. And it was very—I mean, to have a two-month-old child that lives, stabbed in the head, it was, you know, it was a tough thing to handle, I'll just say.
>
> ....
>
> Q After seeing something like this, did you want to get the person or persons who actually did it or where you just looking to solve it and close it?
>
> A No, I wouldn't have rested. I wanted to catch the person responsible.
>
> ....
>
> Q Well, I mean, isn't it fair to say that even as a police officer that you wish you would have never been on duty the night this call came in?
>
> A Right. And, you know, we handled the case and even two and a half years later you kind of start to all right, it's behind —you know, it's behind me. And then preparing for trial, looking at photographs, it's like I told my wife that there were photographs of things that I did as far as one of the child's—his throat was slit and I actually, you know, had the child's head in my hand and moving it in a way where we could take pictures and I had forgotten about that. And, you know, seeing the pictures like oh, God, just kind of brought it all back.

The Petitioner did not question trial counsel during the evidentiary hearing regarding their decision not to object to the testimony. Nevertheless, lead counsel testified that he believed objecting too often at trial could "turn the jury off" and make it appear as if the attorney is trying to hide something. " 'There is no obligation on a lawyer to object at every opportunity.' " *Matthew Whitehair v. State*, No. M2019-00517-CCA-R3-PC, 2020 WL 916061, at *19 (Tenn. Crim. App. Feb. 26, 2020), *perm. app. denied* (Tenn. July 21, 2020) (quoting *State v. Donald Craig*, No. 85-10-III, 1985 WL 3866, at *3 (Tenn. Crim. App. Nov. 27, 1985)). In rejecting the Petitioner's claim, the post-conviction court found that trial counsel planned the defense around the lack of physical evidence connecting the Petitioner to the offenses and focused on those issues important to the defense. Accordingly, the Petitioner has failed to show that trial counsel were deficient in failing to object. Moreover, given the evidence presented at trial regarding the victims' extensive injuries and the brutality of the scene, we cannot conclude that trial counsel's failure to object to Sergeant Davidson's comments regarding his own reaction to the crime scene resulted in prejudice.

7. Failure to Prepare the Petitioner to Testify

***53** The Petitioner argues that trial counsel were ineffective in failing to discuss his potential testimony with him and in allowing him to take the witness stand. The Petitioner, however, did not testify at the evidentiary hearing. *See* T.C.A. § 40-30-110(a) ("The petitioner shall appear and give testimony at the evidentiary hearing if the petition raises substantial questions of fact as to events in which the petitioner participated...."); *Timothy Evans v. State*, No. E2017-00400-CCA-R3-PC, 2018 WL 1433396, at *4 (Tenn. Crim. App. Mar. 22, 2018) (concluding that because the petitioner did not testify at the post-conviction hearing, he did not support the factual allegations regarding his claim that trial counsel failed to adequately prepare him for cross-examination by clear and convincing evidence). The Petitioner also did not question trial counsel at the evidentiary hearing about the steps taken in preparing him to testify at trial. Therefore, he has failed to present clear and convincing evidence that trial counsel did not prepare him to testify.

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8. Failure to Present Mitigating Evidence

The Petitioner asserts that trial counsel failed to meaningfully investigate, develop, and present mitigating evidence during the penalty phase. He faults trial counsel for only presenting one witness during the penalty phase and argues that trial counsel failed to adequately prepare Ms. Shettles to testify and failed to present evidence revealed by Ms. Shettles's investigation. The Petitioner also argues that trial counsel were ineffective in failing to call Dr. Walker and Dr. Bishop during the penalty phase. The State responds that the defense team conducted a meaningful investigation and that trial counsel made reasonable strategic decisions to not present Dr. Walker and Dr. Bishop as witnesses and to present Ms. Shettles as the only witness during the penalty phase. The State further responds that the Petitioner failed to establish that any deficiency resulted in prejudice.

"Capital defendants possess a constitutionally protected right to provide the jury with mitigation evidence that humanizes the defendant and helps the jury accurately gauge the defendant's moral culpability." *Davidson v. State*, 453 S.W.3d 386, 402 (Tenn. 2014) (citing *Porter v. McCollum*, 558 U.S. 30, 41 (2009); *Williams v. Taylor*, 529 U.S. 362, 393 (2000)). Capital defense attorneys are obligated to thoroughly investigate the defendant's background. *Id.* (citing *Williams*, 529 U.S. at 396). "Defense counsel should make an effort to discover all reasonably available mitigating evidence and all evidence to rebut any aggravating evidence that the State might introduce." *Id.* (citing *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)).

Counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes a particular investigation unnecessary. *Strickland*, 466 U.S. at 691; *Davidson*, 453 S.W.3d at 402. In determining whether counsel breached this duty, we must review counsel's performance for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as viewed from counsel's perspective at the time. *See* *Wiggins*, 539 U.S. at 523. "Defense counsel should investigate the defendant's medical history, educational history, employment and training history, family and social history, adult and juvenile correctional experiences, and religious and cultural influences." *Davidson*, 453 S.W.3d at 402 (citing *Wiggins*, 539 U.S. at 524). Counsel, however, "is not required to investigate every conceivable line of mitigating evidence, no matter how unlikely it is to help the defense. Nor must counsel present mitigating evidence in every case." *Id.* Nevertheless, " 'strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitation of the investigation.' " *Id.* (quoting *Wiggins*, 539 U.S. at 533). In determining whether counsel's actions were reasonable, the court should " 'consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.' " *Id.* (quoting *Wiggins*, 539 U.S. at 527).

***54** If counsel was deficient, the prejudice prong "depends on whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* In assessing the probability of a different outcome, the court "should consider the totality of the available mitigation evidence—including evidence known before trial and evidence discovered by post-conviction counsel." *Id.* (citing *Sears v. Upton*, 561 U.S. 945, 955-56 (2010)). The three factors that a reviewing court should consider in determining whether counsel's deficient performance of mitigation evidence prejudice the defendant are:

> (1) the nature and extent of the mitigating evidence that was available but not presented; (2) whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings; and (3) whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination.

Id. at 403 (citing *Nichols v. State*, 90 S.W.3d 576, 598 (Tenn. 2002)).

In denying relief, the post-conviction court found that Ms. Shettles prepared a sixty-eight-page mitigation timeline

covering the time period from the birth of the Petitioner's parents to approximately six weeks after the offenses occurred, a set of witness summaries that spanned multiple pages, and a three-page, bullet point summary of significant life events and themes. The court noted that Ms. Shettles believed she gathered all available records, that she spent a large amount of time with the Petitioner, and that she testified during the penalty phase regarding the Petitioner's background and the mitigating factors in his social history. Ms. Shettles expressed that the case was difficult because the Petitioner and the victims were from the same family and that while many family members agreed to speak to her, they were unwilling to testify on the Petitioner's behalf during the penalty phase. The court found that "[d]espite these hurdles, the defense team was able to gather the social history information available for mitigation."

The post-conviction court found that even though the Petitioner claimed trial counsel were ineffective in presenting Ms. Shettles as the only witness during the penalty phase, the Petitioner did not present family members or any other lay witnesses during the post-conviction hearing, and the Petitioner did not testify at the post-conviction hearing to establish any mitigating evidence that was not provided at trial. The post-conviction court found that although trial counsel recognized that Dr. Walker's report included favorable mitigation evidence, they determined that potential prejudice from the finding of antisocial characteristics outweighed the benefit of pursuing expert psychological testimony, and they made a strategic decision to avoid presenting the Petitioner's diagnosis of antisocial characteristics to the jury. The court recognized that Dr. Walker's report contained other potentially damaging information. For example, although Dr. Walker noted that the Petitioner claimed his confession was coerced, Dr. Walker described the Petitioner as not being "a man who is easily led or influenced by others." Dr. Walker described the Petitioner's version of the events that occurred on the night of the offenses as "unlikely" and noted that the evidence was inconsistent with the Petitioner's claims that he heard no noises indicating that the victims were tortured or suffered horrific injuries prior to their deaths. The court found that "[c]learly, the statements Petitioner made to Dr. Walker about the events on the evening of the offenses had numerous discrepancies with his trial testimony and other statements."

***55** The post-conviction court found that the evidence established that Dr. Bishop was unable to reach any conclusions supporting a mental health defense or any type of post-traumatic stress disorder diagnosis. The court also found that trial counsel made a strategic decision to present the testimony of Ms. Shettles in order to present as much mitigating evidence as possible without subjecting her to "the type of damaging cross-examination that would have occurred with an expert and any accompanying report." The court concluded that the Petitioner failed to carry his burden of proof to establish deficiency or prejudice.

According to the evidence presented at the post-conviction hearing, Ms. Shettles and Ms. Geiser interviewed the Petitioner and family members multiple times. Ms. Shettles also maintained contact with a woman who began a relationship with the Petitioner following the offenses. Ms. Shettles obtained the Petitioner's birth records, school records, juvenile court records, records from the health department, records from his incarceration, records pertaining to his prior second degree murder conviction, and a psychological report of an evaluation of the Petitioner in October 1991. She also obtained Mr. Cecil Dotson's school and juvenile court records and various records related to the Petitioner's parents. She prepared and provided trial counsel with an extensive mitigation timeline, summaries of witness interviews and mitigation themes, a summary of significant life events and themes, and a list of applicable mitigating circumstances.

Trial counsel retained Dr. Walker, a clinical neuropsychologist, to evaluate the Petitioner, and Ms. Shettles provided him with the various records and documents that she had obtained. Dr. Walker diagnosed the Petitioner with adjustment disorder with depressed and anxious mood, alcohol and cannabis dependence, cognitive disorder not otherwise specified based upon the Petitioner's verbal learning problems, antisocial personality characteristics, psychosocial stressors due to his incarceration and legal problems, and a Global Assessment of Functioning Score of sixty. Trial counsel decided against calling Dr. Walker as a witness during the penalty phase due to his diagnosis involving antisocial personality. Both counsel testified that they considered this diagnosis to be one of the worst labels or diagnoses that a criminal defendant can have. Ms. Geiser testified that the decision to not present a mental health expert who made such a diagnosis was "[p]retty typical," especially when the defense theory in the guilt phase was that the client was innocent. Co-counsel stated that the defense team intended to pursue residual doubt as a mitigator during the penalty phase.

The defense also retained Dr. Bishop, a psychologist, who was reluctant to work on the case once she learned of the circumstances of the offenses. Although the record does not include a report prepared by Dr. Bishop, the record includes a letter written by Dr. Bishop to co-counsel following the trial in which she stated that she was unable to conclude that a mental heath defense was justified or that the Petitioner had any "hard signs" of post-traumatic stress disorder. Instead, trial counsel decided to present Ms. Shettles as a witness to testify about the Petitioner's background and information. They acknowledged that Ms. Shettles was able to provide information to the jury about the Petitioner's background without being subjected to the level of cross-examination to which the State would have subjected a mental health expert.

Like the post-conviction court, we conclude that trial counsel made a reasonable strategic decision to call Ms. Shettles as the lone witness during the penalty phase. The Petitioner failed to identify any lay witnesses who he believed trial counsel should have called as witnesses, and he failed to present the testimony of those lay witnesses at the post-conviction hearing. *See* *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) ("When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing."). The Petitioner also failed to present any evidence that Dr. Bishop would have provided favorable testimony for the defense had she been called as a witness.

***56** In challenging trial counsel's decision to not call Dr. Walker as a witness, the Petitioner relies upon letters written by Dr. Walker and Dr. James R. Merikangas in preparation for post-conviction proceedings. Dr. Walker stated that he did not recall meeting with trial counsel after issuing a "draft" report, and Dr. Merikangas stated in part that he believed Dr. Walker's finding of antisocial personality characteristics was incorrect and that antisocial personality characteristics differed from antisocial personality disorder. However, the letters were not entered as substantive proof to support the Petitioner's claims of ineffective assistance of counsel. Rather, the letters were marked as exhibits for identification only as part of the Petitioner's offer of proof in support of his claim regarding the denial of funding to retain Dr. Walker and Dr. Merikangas in furtherance of the Petitioner's post-conviction claims. *See* *State v. Lowe*, 552 S.W.3d 842, 864 (Tenn. 2018) (explaining that in making an offer of proof, the party should have the exhibit marked for identification only and not otherwise introduced). In entering the exhibits for identification purposes, the Petitioner did not request that they be considered as substantive evidence; the post-conviction court did not consider the letters as substantive evidence in analyzing the Petitioner's claim of ineffective assistance of counsel; and we likewise decline to consider the letters as substantive evidence to support the Petitioner's claim, particularly in light of the fact that the statements in the letters were not made under oath and the State was not afforded the opportunity to cross-examine these mental health experts.

Furthermore, the Petitioner has failed to establish that the fact that Dr. Walker found him to have antisocial personality characteristics rather than antisocial personality disorder rendered trial counsel's strategic decision against presenting Dr. Walker as a witness unreasonable. Rather, the testimony of trial counsel and Ms. Geiser established that the problematic language was "antisocial." Furthermore, the fact that the Petitioner located another mental health expert during the pendency of the post-conviction proceedings who disagreed with Dr. Walker's diagnosis did not render trial counsel's strategic decision against presenting Dr. Walker as a witness unreasonable. A defense attorney " 'is not required to question a diagnosis put forth by a professional expert in the field.' " *David Lynn Jordan v. State*, No. W2015-00698-CCA-R3-PD, 2016 WL 6078573, at *61 (Tenn. Crim. App. Oct. 14, 2016) (quoting *Christa Gail Pike v. State*, No. E2009-00016-CCA-R3-PD, 2011 WL 1544207, at *54 (Tenn. Crim. App. Apr. 25, 2011)).

The record reflects that Ms. Shettles, who has many years of experience as a mitigation investigator, conducted a thorough investigation of the Petitioner's background. Each member of the defense team testified that they met regularly to discuss their progress and share ideas. Ms. Shettles's files included numerous emails between the members of the defense team in which they kept everyone apprised of their progress and any issues that arose.

The Petitioner asserts that although Ms. Shettles obtained a large amount of mitigation information, trial counsel failed to present much of the information during the penalty phase. The Petitioner asserts that trial counsel failed to present the following information from the mitigation timeline prepared by Ms. Shettles: the Petitioner was retained once in the first grade and twice in the fourth grade; he was referred to the Memphis City Schools Mental Health Center in late 1988 or early 1989; he was fourteen years old while in

the fifth grade; he was diagnosed with a learning disability in January 1989 and previous testing indicated a full-scale I.Q. of eighty-four; his biological father was physically and verbally abusive to the Petitioner's mother and siblings; his full-scale I.Q. was found to be eighty in January 1989; a treatment plan from the Memphis City Schools Mental Health Center in January 1989 indicated that the Petitioner fell within the mildly intellectually disabled range and had significantly impaired intellectual functioning; the Petitioner qualified for special education services in June 1989; the Petitioner failed all of his classes in the seventh grade, and his mother refused to schedule home visits or to cooperate with the staff of the Memphis City Schools Mental Health Center; the Petitioner left special education services in April 1991 at the request of a parent; he was sixteen years old while in the eighth grade; formal reports of child abuse and neglect in the Dotson household were made; the Petitioner quit school after completing the eighth grade because he believed he was too old for his classmates; a psychological assessment in October 1991 reflected that the Petitioner had limited intellectual functioning; his mother informed police that he needed rehabilitative services; the city schools refused to allow the Petitioner to enroll in school after he was suspended on several occasions; the results of a Standardized Group Intelligence Test taken at the age of twenty-one showed that the Petitioner recognized words at a second grade level, spelled at a third grade level, and had arithmetic abilities at a fourth grade level; a mental health evaluation in December 1994 reflected no indications of well-entrenched patterns of antisocial behavior; and he failed his GED test twice in 1997.

***57** The Petitioner contends that trial counsel failed to present the following information from summaries of witness interviews prepared by Ms. Shettles: during one incident, the Petitioner's mother broke all of the front windows of their apartment and overturned a couch; she never told her children that she loved them or showed them any affection; the Petitioner rarely saw his father following his parents' separation; his mother often left her children alone without adult supervision to spend time with various men; the Dotson family moved on a yearly basis; food was "locked up," and the Dotson children stole money to buy food because they were hungry; his mother often called her father for help due to physical abuse by the Petitioner's father; the Petitioner's grandmother observed that he seemed to have "something wrong with him" from the time that he was a small child; the Petitioner sometimes beat his head against a wall whenever he became angry; his mother used a belt to spank the children, and his sister ran away from home as a result; his family struggled financially when he was young; and he had a difficult time adjusting following his release from prison. The Petitioner asserts that trial counsel failed to present evidence obtained by Ms. Shettles from the Petitioner's then-girlfriend that the Petitioner was sexually abused by a family member when he was ten or eleven years old.

Ms. Shettles, however, testified to the majority of the information about which the Petitioner complains. She testified during the penalty phase about the Petitioner's difficult childhood, his academic struggles, his learning disability, his father's physical abuse of his mother, which he and his siblings witnessed, his family's moving often, his disciplinary problems, his mother's refusal to attend the Petitioner's counseling sessions, his family's financial difficulties, his and his brother's stealing money for food because their food was locked away, and his witnessing his mother's abusing his half-brother. Thus, the Petitioner has failed to establish that trial counsel were deficient in this regard.

Although Ms. Shettles did not specifically testify about the Petitioner's I.Q. scores and specific results of other intelligence testing, the spankings of the Petitioner and his siblings by his mother, the sexual abuse of the Petitioner, or his difficulty in adjusting after his release from prison following his second degree murder conviction, we cannot conclude that any deficiency of trial counsel in failing to present this evidence resulted in prejudice. Ms. Shettles offered extensive testimony at trial regarding the Petitioner's background, as well as testimony about the prison system and life in the prison system in support of trial counsel's argument that life imprisonment or life imprisonment without parole was a more appropriate sentence. She offered substantially similar testimony regarding the Petitioner's learning disability and academic failures. She also testified about instances in which the Petitioner's mother abused him and his siblings by locking up food while leaving them in order to be with other men and about an instance during which the Petitioner witnessed her abuse his half-brother by placing him in scalding water.

The jury applied numerous aggravating circumstances for each first degree murder conviction. With respect to the Petitioner's conviction for the first degree murder of Mr. Cecil Dotson, Sr., the jury applied three aggravating circumstances: the Petitioner has been "previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person"; the

Petitioner knowingly created a great risk of death to two or more persons in the course of murdering Mr. Cecil Dotson, Sr.; and the Petitioner committed "mass murder." *See* T.C.A. §§ 39-13-204(i)(2), (3), (12). With respect to the Petitioner's convictions for the first degree murder of Ms. Williams, Mr. Seals, and Ms. Roberson, the jury applied the same three aggravating circumstances, as well as two additional aggravating circumstances: the murder was committed for the purpose of avoiding, interfering with, or preventing the lawful arrest or prosecution of the Petitioner or another; and the murder was knowingly committed while the Petitioner had a substantial role in committing, or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit any first degree murder. *See* T.C.A. §§ 39-13-204(i)(6), (7). With respect to the Petitioner's convictions for the first degree murders of the two children, the jury applied the same five aggravating circumstances, as well as two additional aggravating circumstances: the victim was less than twelve years old and the Petitioner was eighteen years old or older; and the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. *See* T.C.A. §§ 39-13-204(i)(1), (5).

***58** On direct appeal, the Tennessee Supreme Court reviewed the evidence supporting each aggravating circumstance and determined that the evidence was overwhelming. *See Dotson*, 450 S.W.3d at 78-81. Our supreme court stated that "the murders and assaults the [Petitioner] perpetrated are some of the most horrendous ever committed in Tennessee." *Id.* at 84. Given the overwhelming evidence supporting the aggravating circumstances and the extent of the mitigating evidence presented during the penalty phase, we cannot conclude that there is a reasonable probability that the result of the proceedings would have been different had trial counsel presented the additional mitigating evidence identified by the Petitioner. *See Davidson*, 453 S.W.3d at 402. The Petitioner is not entitled to relief regarding this issue.

The Petitioner also asserts that trial counsel's failure to call Dr. Walker as a witness or present his report during the penalty phase deprived the Petitioner of adequate proportionality review on appeal. The Petitioner did not raise this claim in his post-conviction petition, and the post-conviction court did not address the claim in its order. Therefore, this claimed is waived. *See Holland*, 610 S.W.3d at 458.

9. Improper Comments During Opening Statements

The Petitioner submits that co-counsel was ineffective when he told the jury during the opening statements of the penalty phase that the case had "more aggravating circumstances than [he had] ever seen before," and, thus, essentially acknowledged that the Petitioner deserved the death penalty. The record does not support the Petitioner's claim that co-counsel essentially acknowledged to the jury that the Petitioner deserved the death penalty. Rather, co-counsel told the jury that the case had "more aggravating circumstances than [he had] ever seen before" while explaining to the jury that the number of aggravating or mitigating circumstances, alone, was not determinate of the Petitioner's punishment. He informed the jury that each juror was responsible for weighing the aggravating and mitigating circumstances to each his or her own conclusion regarding the appropriate punishment. Co-counsel explained to the jury that if one juror concluded that the mitigating circumstances justified a sentence of life imprisonment, regardless of the number of aggravating circumstances proven by the State, the death penalty would not be the applicable punishment. *See* T.C.A. § 39-13-204(h) (requiring that a death sentence be unanimously found by the jury); *Mills v. Maryland*, 486 U.S. 367, 374-75 (1988) (providing that jurors need not unanimously agree on mitigating circumstances).

In denying relief, the post-conviction court credited co-counsel's testimony that the defense team believed that obtaining a sentence less than death would be difficult if the Petitioner was convicted at trial and that co-counsel made the statement in an effort to maintain credibility with the jury. We conclude that co-counsel made a reasonable strategic decision to acknowledge the number of aggravating circumstances while explaining the weighing process to the jury and to, instead, focus upon establishing mitigating circumstances. We decline to second-guess this reasonable strategic decision, and we conclude that co-counsel was not deficient during his opening statement. *See Henley*, 960 S.W.2d at 579 (providing that reviewing courts should not second-guess strategic choices).

10. Failure to Object to the State's Comments During Closing Argument

The Petitioner argues that trial counsel were ineffective in failing to file a pretrial motion in limine to prevent the State from making improper closing arguments and in failing to object to several statements made by the State during closing arguments in both phases of the trial. The State responds that the Petitioner failed to question trial counsel during the evidentiary hearing about the majority of the prosecutor's comments and that trial counsel were not otherwise ineffective in failing to object to the comments or in failing to file a pretrial motion in limine. We agree with the State.

***59** " 'The decisions of a trial attorney as to whether to object to opposing counsel's arguments are often primarily tactical decisions.' " *Richard Lloyd Odom v. State*, No. W2015-01742-CCA-R3-PD, 2017 WL 4764908, at *36 (Tenn. Crim. App. Oct. 20, 2017) (quoting *Derek T. Payne v. State*, No. W2008-02784-CCA-R3-PC, 2010 WL 161493, at *15 (Tenn. Crim. App. Jan. 15, 2010)). Trial counsel may decide against objecting for several valid reasons, including not wishing to emphasize the unfavorable statements. *Derek T. Payne*, 2010 WL 161493, at *15 (citing *Gregory Paul Lance v. State*, No. M2005-01765-CCA-R3-PD, 2006 WL 2380619, at *6 (Tenn. Crim. App. Aug. 16, 2006)). "Accordingly, trial counsel must be given the opportunity to explain why they did not object to the allegedly prejudicial remarks." *Richard Lloyd Odom*, 2017 WL 4764908, at *36. " 'Without testimony from trial counsel or some evidence indicating that [their] decision was not a tactical one, we cannot determine that trial counsel provided anything other than effective assistance of counsel.' " *Id.* (quoting *State v. Leroy Sexton*, No. M2004-03076-CCA-R3-CD, 2007 WL 92352, at *5 (Tenn. Crim. App. Jan. 12, 2007)).

In his appellate brief, the Petitioner lists thirty-one statements made by the prosecutor during closing arguments in the guilt phase and one remark during closing arguments in the penalty phase that the Petitioner maintains were improper. During the post-conviction hearing, however, the Petitioner only questioned co-counsel about his failure to object to remarks by the prosecutor during rebuttal closing arguments during the penalty phase Because the Petitioner failed to question trial counsel about the prosecutor's comments during closing arguments of the guilt phase, the Petitioner has not demonstrated how trial counsel's failure to object to the remarks was anything other than a tactical decision. Furthermore, the Petitioner raised many of the challenged statements on direct appeal, and this court concluded that the Petitioner failed to establish plain error. *See Dotson*, 450 S.W.3d at 99-101 (appendix). Accordingly, the Petitioner has established neither deficiency nor prejudice with regard to the prosecutor's comments during closing arguments of the guilt phase.

The Petitioner objects to the following statement from the prosecutor's closing argument on rebuttal in the penalty phase: "And now Jessie is begging for his [life]? Did Marissa get a jury? What about Shindri? Did she get a jury? Did somebody have to find aggravating circumstances for her to get the death penalty?" The Petitioner maintains that the prosecutor's remarks during the rebuttal closing arguments of the penalty phase were improper comments on the Petitioner's exercise of his constitutional right to a jury trial. This court has recognized that a prosecutor's negative comment on a defendant's exercise of his right to a jury trial was improper. *See* *State v. Anthony M. Bond*, No. W2005-01392-CCA-R3-CD, 2006 WL 2689688, at *8-9 (Tenn. Crim. App. Sept. 20, 2006) (holding that the prosecutor's statements blaming the defendant for the lengthy trial and jury sequestration were improper insofar that the prosecutor asked the jury to penalize the defendant for exercising his constitutional right to a jury trial). Other jurisdictions also have recognized that a prosecutor is prohibited from negatively commenting on a defendant's exercise of his constitutional right to a jury trial. *See, e.g.*, *United States v. Ochoa-Zarate*, 540 F.3d 613, 618-19 (7th Cir. 2008); *Burns v. Gammon*, 260 F.3d 892, 896-97 (8th Cir. 2001); *Frazier v. State*, 13 A.3d 83, 95-96 (Md. Ct. Spec. App. 2011); *Barnes v. State*, 408 P.3d 209, 214 (Okla. Crim. App. 2017). We conclude that the prosecutor improperly commented on the Petitioner's exercise of his constitutional right to a jury trial and that trial counsel, therefore, were deficient in failing to object to the comments.

***60** Nevertheless, we conclude that the Petitioner failed to establish prejudice because the prosecutor's improper comments were harmless beyond a reasonable doubt. *See* *State v. Jackson*, 444 S.W.3d 554, 590-92 (Tenn. 2014) (employing a standard of harmless beyond a reasonable doubt to a prosecutor's comments on a defendant's exercise of her constitutional right to remain silent and not testify at trial). In determining whether the prosecutor's comments were harmless beyond a reasonable doubt, we must consider "the nature and extensiveness of the prosecutor's argument, the curative instructions given, if any, and the strength of the evidence of guilt." *Id.* at 591 (citations omitted). The prosecutor's comments were made during rebuttal closing arguments in the penalty phase after the Petitioner had been

convicted of the offenses and while the prosecutor was arguing to the jury about the weighing of the aggravating and mitigating circumstances. Although the trial court did not provide a curative instruction because trial counsel did not object to the comments, the trial court instructed the jury that arguments of counsel do not constitute evidence. The trial court also instructed the jury on the aggravating circumstances that the State was required to prove beyond a reasonable doubt, the applicable mitigating circumstances, and the law regarding the jury's duty to weigh the aggravating and mitigating circumstances. The evidence supporting the applicable aggravating circumstances was overwhelming. Accordingly, we conclude that the prosecutor's comments, although improper, were harmless beyond a reasonable doubt and that the Petitioner failed to establish prejudice.

Finally, the Petitioner argues that trial counsel were deficient in failing to file a motion in limine seeking to preclude the prosecution from making improper comments during closing arguments. Co-counsel testified that he would have filed a motion if he had a good-faith basis to believe such a motion was necessary. As noted by the State, the Petitioner presented no proof demonstrating a good faith basis to anticipate that the State would engage in improper closing arguments. The Petitioner argues that in *State v. Jackson*, 444 S.W.3d at 590 n.49, the Tennessee Supreme Court noted a history of improper closing arguments by prosecutors in Shelby County. However, the opinion in *Jackson* was filed approximately four years after the Petitioner's trial and, thus, did not serve as notice for counsel to file a motion in limine. Furthermore, the Petitioner failed to cite any caselaw establishing that a motion in limine would serve to preserve all objections to any of the prosecutor's comments for purposes of appeal or that based upon the motion in limine, the trial court would have made a blanket ruling prior to trial instead of waiting to rule on each individual objection made by trial counsel during closing arguments. The Petitioner established neither deficiency nor prejudice.

11. Failure to Object or Request Jury Instructions

The Petitioner challenges trial counsel's failure to object to the order of the jury instructions listing first degree murder as the first option and not guilty as the final option and to the requirement in the instruction that the jury unanimously agree that he was not guilty of first degree murder before considering the lesser included offenses. The Petitioner maintains that when lesser included offenses are charged, the highest degree charged should not be the first instruction but that the order must begin with the lesser charges to ensure that the jury reliably considers the defendant's defense. The Petitioner acknowledges that the Tennessee Supreme Court upheld "acquittal-first" jury instructions in *State v. Davis*, 266 S.W.3d 896, 905 (Tenn. 2008), but maintains that *Davis* was "wrongly decided." We are bound by the rulings of the Tennessee Supreme Court, and we conclude that trial counsel were not deficient in failing to raise an objection.

The Petitioner faults trial counsel for failing to object to the portion of the eyewitness identification instruction, which allowed jurors to consider "the degree of certainty expressed by the witness regarding the identification" when evaluating the creditability of the eyewitnesses' identification. However, the Tennessee Supreme Court approved the use of this language in a jury instruction in *State v. Dyle*, 899 S.W.2d 607, 612 (Tenn. 1995). The Petitioner asserts that "research and court opinions" since *Dyle* and prior to the Petitioner's trial "combine to establish flaws in the assumptions underlying the Court's *Dyle* opinion." *Dyle*, however, was and remains the controlling authority for instructing a jury on eyewitness testimony in Tennessee. We are bound by the rulings of the Tennessee Supreme Court, and we conclude that trial counsel were not deficient in failing to raise an objection that is contrary to binding caselaw.

***61** The Petitioner submits that trial counsel were ineffective in failing to object to instructions regarding how the jury should weigh aggravating and mitigating circumstances. He maintains that the instructions were "contradictory" and suggested that jurors had to impose both a sentence of life imprisonment without parole and a death sentence if they unanimously found an aggravating circumstance. The trial court's instructions mirrored the language in Tennessee Code Annotated section 39-13-204(f) through (g). Accordingly, trial counsel were not deficient.

The Petitioner maintains that trial counsel should have requested an instruction explaining the consequences of a hung sentencing jury. However, Tennessee Code Annotated section 39-13-204(h) provides, "The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment." Although the Petitioner maintains that this provision is unconstitutional because jurors could mistakenly believe that their failure to agree

on a sentence may require a new trial, this argument has been repeatedly rejected. *See* *State v. Ivy*, 188 S.W.3d 132, 162 (Tenn. 2006) (appendix) (citing *State v. Stevens*, 78 S.W.3d 817, 850 (Tenn. 2002) (appendix); *State v. Vann*, 976 S.W.2d 93, 118 (Tenn. 1998) (appendix); *State v. Smith*, 893 S.W.2d 908, 926 (Tenn. 1994)). Accordingly, trial counsel were not deficient in failing to request the jury instruction.

The Petitioner argues that trial counsel should have objected to the reasonable doubt instruction given during the penalty phase that reasonable double was not "doubt that may arise from a possibility." On direct appeal, this court rejected Petitioner's challenge under the plain error doctrine to the same language of the reasonable doubt instruction given during the guilt phase, concluding that the instruction was constitutional and that the jury was not reasonably likely to have applied the burden of proof in an unconstitutional way. *Dotson*, 40 S.W.3d at 96 (appendix). Furthermore, the Tennessee Supreme Court has upheld the same language in a jury instruction defining reasonable doubt given during the penalty phase. *See State v. Rimmer*, 250 S.W.3d 12, 30-31 (Tenn. 2008). Therefore, the Petitioner has established neither deficiency nor prejudice.

The Petitioner also argues that trial counsel should have, during both phases of the trial, challenged as unconstitutional the reasonable doubt instruction stating that a conviction required "moral certainty." However, " 'the use of the phrase "moral certainty" by itself is insufficient to invalidate an instruction on the meaning of reasonable doubt.' " *State v. Hall*, 976 S.W.2d 121, 159 (Tenn. 1998) (appendix) (quoting *State v. Nichols*, 877 S.W.2d 722, 734 (Tenn. 1994)); *see Steven Ray Thacker v. State*, No. W2010-01637-CCA-R3-PD, 2012 WL 1020227, at *56 (Tenn. Crim. App. Mar. 23, 2012). Trial counsel were not deficient in this regard.

D. Ineffective Assistance of Appellate Counsel

The Petitioner asserts that he received ineffective assistance of counsel on direct appeal. He maintains that trial counsel should have challenged the admission of Sergeant Davidson's testimony regarding his reaction to the scene as irrelevant and inflammatory. The Petitioner also maintains that appellate counsel should have raised various challenges to the jury instructions addressed above.

To establish ineffective assistance of counsel on appeal, the petitioner must demonstrate that appellate counsel was deficient in failing to adequately pursue or preserve a particular issue on appeal and that, absent appellate counsel's deficient performance, there was a reasonable probability that the issue "would have affected the result of the appeal." *Campbell v. State*, 904 S.W.2d 594, 597 (Tenn. 1995). "Appellate counsel are not constitutionally required to raise every conceivable issue on appeal." *Carpenter v. State*, 126 S.W.3d 879, 887 (Tenn. 2004). "Generally, the determination of which issues to present on appeal is a matter which addresses itself to the professional judgment and sound discretion of appellate counsel." *Campbell*, 904 S.W.2d at 597. A reviewing court gives "considerable deference" to counsel's judgment regarding which issues to raise on appeal, so long as the choices are within the "range of competence required of attorneys in criminal cases." *Carpenter*, 126 S.W.3d at 887. " 'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome,' " although the Tennessee Supreme Court has declined to hold that this is the "*only* way to show" deficiency. *Id.* at 888 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). When a claim of ineffective assistance of counsel is premised on the failure to preserve an issue on appeal, the reviewing court should determine the merits of the omitted issue. *Carpenter*, 126 S.W.3d at 888. "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.* The strength of the omitted issue also has bearing on whether failure to raise the issue resulted in prejudice. *Id.*

***62** We note that co-counsel and another attorney represented the Petitioner on direct appeal. *See Dotson*, 450 S.W.3d at 11. The Petitioner did not call appellate counsel as a witness during the post-conviction hearing, and the Petitioner did not question co-counsel during the hearing about the failure to raise the issues on direct appeal. The record reflects that counsel raised twenty-one issues on direct appeal in this court. *See* *Jessie Dotson v. State*, No. W2011-00815-CCA-R3-DD, 2013 WL 4728679, at *1 (Tenn. Crim. App. June 25, 2013), *affirmed by Dotson*, 450 S.W.3d 1 (Tenn. 2014). The Petitioner has failed to demonstrate that the issues regarding the admission of Sergeant Davidson's testimony and the jury instructions were " 'clearly stronger' " than the issues raised on direct appeal. *Carpenter*, 126 S.W.3d at 888 (quoting *Gray*, 800 F.2d at 646). We have held that the Petitioner's

challenges to the jury instructions were without merit, and, therefore, counsel were not deficient in failing to raise the issues on direct appeal. *See id.* We have also held that the admission of Sergeant Davidson's comments regarding his own reaction to the crime scene did not result in prejudice given the evidence presented at trial regarding the victims' extensive injuries and the brutality of the offenses as depicted in the crime scene. Had trial counsel raised the issue of the admission of Sergeant Davidson's testimony on direct appeal, the Petitioner would not have been entitled to relief because any error in admitting the testimony was harmless. *See* Tenn. R. App. P. 36(b). Accordingly, the Petitioner has established neither deficiency nor prejudice.

II. Denial of Expert Funding

The Petitioner next challenges the denial of funding by the AOC and the Chief Justice of the Tennessee Supreme Court in order to allow the Petitioner to retain certain experts for purposes of the post-conviction hearing. On March 2017, the Petitioner filed a motion in the post-conviction court seeking funding to retain Dr. Bhushan S. Agharkar, a psychiatrist, to evaluate the Petitioner. The Petitioner sought to compensate Dr. Agharkar at a rate of $350 per hour for up to fifty hours of substantive work for a total of $17,500 plus travel expenses. The post-conviction court entered an order granting the motion. In a subsequently-issued letter, an attorney with the AOC informed the Petitioner's counsel that the request for funding had been submitted to the AOC for authorization in accordance with Tennessee Supreme Court Rule 13, section 5. According to the letter, the AOC concluded that counsel had shown that the expert services were necessary to ensure that the Petitioner's constitutional rights were properly protected but that the hourly rate of $350 for the services sought exceeded the hourly rate authorized under Rule 13. The letter stated that AOC Director Deborah Taylor Tate concurred with the recommendation to approve Dr. Agharkar at the hourly rate of $250 as permitted by Rule 13 but not to approve his hourly rate of $350. The letter stated that pursuant to Rule 13, section 5, the Chief Justice of the Tennessee Supreme Court reviewed the materials provided to the AOC and concurred with Director Tate's decision and that "[t]he Chief Justice's decision is final."

In September 2017, the Petitioner filed a motion in the post-conviction court seeking to vacate his death sentences. He maintained that Dr. Agharkar did not agree to provide services at the hourly rate of $250, which the Petitioner contended was below the market rate for forensic psychiatric specialists with experience in capital case assessments. The Petitioner argued that as a result, he was "precluded from accessing expert services necessary to protect his constitutional rights." The post-conviction court subsequently entered an order denying the Petitioner's motion. The Petitioner sought permission to pursue an interlocutory appeal pursuant to Tennessee Rule of Appellate Procedure 9, and the post-conviction court denied the request. The Petitioner filed an application for an extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure in this court, and this court denied the application. *See Jessie Dotson v. State*, No. W2017-02550-CCA-R10-PD (Tenn. Crim. App. Mar. 29, 2018) (order). The Tennessee Supreme Court also denied the Petitioner's application for an extraordinary appeal. *See Jessie Dotson v. State*, No. W2017-02550-SC-R10-PD (Tenn. May 10, 2018) (order).

***63** In June 2018, the Petitioner filed a motion seeking funds to retain the expert services of Dr. James R. Merikangas, a neurologist, at a rate of $250 per hour for substantive work and $125 for travel for a total of $10,000. The post-conviction court granted the motion on the same day. On August 15th, the Petitioner filed, and the post-conviction court granted, a motion seeking funds to retain the expert services of Dr. Richard A. Leo in the field of false confessions at an hourly rate of $150 for a total of $9,000 plus travel expenses. During a status hearing on September 12th, the Petitioner's counsel announced that the AOC had denied funding for the two experts and that the requests had been forwarded to the Chief Justice for his decision. On September 25th, the Petitioner filed, and the post-conviction court granted, a motion for funding the expert services of Dr. James S. Walker, a neuropsychologist, at the rate of $150 per hour for reviewing records and providing testimony for a total of $1,425. In each of the motions requesting funding, the Petitioner's counsel acknowledged that the fulfillment of the request may exceed the $25,000 limit for all expert services set forth in Tennessee Supreme Court Rule 13 but maintained that extraordinary circumstances existed to exceed the limit.

On the first day of the evidentiary hearing, the Petitioner's counsel announced that the AOC and the Chief Justice had denied counsel's requests for funding to retain the services of all three experts. Counsel argued that the denial of funding for these experts, as well as the denial of funding to retain Dr. Agharkar, resulted in a denial of the Petitioner's due process rights, his right to be free from cruel and unusual punishment, and his statutory rights of a fair post-conviction hearing.

Counsel also argued that the denial of funding rendered them incompetent in their representation of the Petitioner and in violation of their ethical and statutory duties. The post-conviction court noted that whenever it approved funding for expert witnesses, it made it "very clear" that the order would be reviewed by the AOC and the Chief Justice and that the court did not receive a copy of their determinations. The court required the Petitioner to proceed with the evidentiary hearing but allowed him to enter letters from Dr. Merikangas, Dr. Walker, and Dr. Leo as exhibits for identification purposes and as an offer of proof to establish that they were available to testify during the scheduled evidentiary hearing.

The Petitioner contends that AOC Director Tate and the Chief Justice improperly vacated the post-conviction court's orders approving funding to retain Dr. Agharkar, Dr. Merikangas, Dr. Walker, and Dr. Leo as expert witnesses. He asserts that the AOC Director and the Chief Justice (1) exercised judicial power in violation of the Tennessee Constitution; (2) violated the due process guarantees of the United States and Tennessee Constitutions by failing to provide the Petitioner with notice of the issues and evidence that they would consider when reviewing the post-conviction court's funding orders; and (3) denied the Petitioner's rights to a full and fair hearing, equal protection, and freedom from cruel and unusual punishment. The State responds that the actions of the AOC Director and the Chief Justice were authorized pursuant to Tennessee Supreme Court Rule 13, section 5, that this court is without jurisdiction to resolve any challenges to Rule 13, and that the Petitioner does not have an appeal as of right from the decision of the AOC Director and the Chief Justice pursuant to Tennessee Rule of Appellate Procedure 3(b). The State also responds that the Petitioner waived his claims regarding the improper exercise of judicial authority and the deprivation of a property right without due process by failing to raise the claims in the post-conviction court, that the appellate record is inadequate to review the Petitioner's claims regarding the funding of three of the experts, and that the Petitioner received a full and fair post-conviction hearing. We conclude that this court is without jurisdiction to address the Petitioner's challenges to Rule 13, section 5.

Tennessee Code Annotated section 40-14-207 provides for the compensation of attorneys appointed to represent indigent defendants in a criminal case, as well as the reimbursement of expenses and the funding of experts in capital cases. Subsection (b) provides:

> ***64** In capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, the court in an *ex parte* hearing may, in its discretion, determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected. If that determination is made, the court may grant prior authorization for these necessary services in a reasonable amount to be determined by the court. The authorization shall be evidenced by a signed order of the court. The order shall provide for the reimbursement of reasonable and necessary expenses by the administrative director of the courts as authorized by this part and rules promulgated thereunder by the supreme court.

Our supreme court has interpreted section 40-14-207(b) as applying to post-conviction cases. *Owens v. State*, 908 S.W.2d 923, 928 (Tenn. 1995). The Court, however, cautioned that the holding "should not be interpreted as a 'blank check' requiring trial courts to hold *ex parte* hearings and authorize funds in every case." *Id.* Rather, Tennessee Supreme Court Rule 13 sets forth the procedure to be followed when a petitioner requests and the post-conviction court rules upon a request for expert or investigative services. *See id.* "Rule 13 does not create rights" but "merely contains the procedural mechanism for implementing" section 40-14-207(b). *Id.* at n.10 (citing *Allen v. McWilliams*, 715 S.W.2d 28, 29 (Tenn. 1986)).

In order to authorize funding for an expert, the trial court must find particularized need for the requested services and that the expert's hourly rate is reasonable. Tenn. Sup. Ct. R. 13, § 5(c)(1). The defendant or petitioner must make every effort to obtain the services of an expert located within 150 miles of the court where the case is pending. Tenn. Sup. Ct. R. 13, § 5(b)(1). Section 5(d)(1) sets forth the

maximum hourly rate for various categories of experts, and section 5(d)(5) provides that in a post-conviction capital case, the post-conviction court "shall not authorize more than *a total of* $25,000 for the services of *all* experts unless in its sound discretion the trial court determines that extraordinary circumstances exist that have been proven by clear and convincing evidence." (Emphasis in original.). "Once the services are authorized by the court in which the case is pending, the order and any attachment must be submitted in writing to the [AOC Director] for prior approval." Tenn. Sup. Ct. R. 13, § 5(e)(4). If the AOC Director denies the prior approval of the funding request, the claim shall be transmitted to the Chief Justice for disposition and prior approval. Tenn. Sup. Ct. R. 13, § 5(e)(5). "The determination of the [C]hief [J]ustice shall be final." *Id.*

The Petitioner raises numerous constitutional challenges to section 5(e)(4)-(5) and the actions of the AOC Director and the Chief Justice pursuant to those provisions. The State responds that the Petitioner does not have a right to appeal the decisions of the AOC Director and the Chief Justice pursuant to Tennessee Rule of Appellate Procedure 3(b). The State relies upon this court's opinion in *State v. Roger Todd*, in which this court held that Rule 3(b) did not provide a defendant an appeal of right from a trial court's order denying the defendant's expert funding requests. No. M2006-01940-CCA-R3-CD, 2007 WL 1582661, at *2 (Tenn. Crim. App. May 31, 2007). This court reasoned that the defendant was only appealing the trial court's order, which was not part of an appeal from a judgment of conviction. *Id.* This court recognized that review of the trial court's denial of funding for expert services may be obtained through an interlocutory appeal pursuant to Rule 9 or an extraordinary appeal pursuant to Rule 10 or when challenged as part of an appeal from a judgment of conviction pursuant to Rule 3(b). *Id.* (citation omitted).

***65** The Petitioner, however, does not seek review of any direct actions taken by the post-conviction court related to funding as part of his challenge to the post-conviction court's judgment. In contrast to the Petitioner's prior application for an extraordinary appeal pursuant to Rule 10 in which he sought review of the post-conviction court's order denying his motion to vacate his death sentences in light of the denial of his expert funding request by the AOC Director and the Chief Justice, the Petitioner does not challenge any actions or omissions by the post-conviction court. *See Jessie Dotson v. State*, No. W2017-02550-CCA-R10-PD (Tenn. Crim. App. Mar. 29, 2018) (order). Rather, the Petitioner directly challenges the actions and determinations of the AOC Director and the Chief Justice in denying the Petitioner's expert funding requests. Tennessee Rule of Criminal Procedure 37(b) provides that "[t]he defendant or the state may appeal any order or judgment in a criminal proceeding when the law provides for such an appeal." Tennessee Supreme Court Rule 13, section 5(e)(5) states that the Chief Justice's determination with respect to requests for funding of expert witnesses "shall be final." Accordingly, the law does not provide an appeal of the Chief Justice's decision to deny the Petitioner's requests for funding of various expert witnesses.

We further conclude that we are without authority to decide the Petitioner's constitutional challenges to Rule 13, section 5(e)(4)-(5). The Tennessee Supreme Court has held that inferior courts do not have the authority to invalidate a Supreme Court Rule. *See Petition of Gant*, 937 S.W.2d 842, 846 (Tenn. 1996); *Petition of Tenn. Bar Ass'n*, 539 S.W.2d 805, 807 (Tenn. 1976); *Barger v. Brock*, 535 S.W.2d 337, 342 (Tenn. 1976); *see also* *Long v. Bd. of Prof'l Responsibility*, 435 S.W.3d 174, 184 (Tenn. 2014) ("Under Tennessee law, only the Tennessee Supreme Court may determine the facial validity of its rules."). "Rather, the Supreme Court, as the promulgator of the rule, is the rule's primary arbiter." *Petition of Gant*, 937 S.W.2d at 846 (citing *Allen v. McWilliams*, 715 S.W.2d 28 (Tenn. 1986)).

The Petitioner asserts that this court has jurisdiction to decide the constitutional challenges because the Tennessee Supreme Court promulgated Rule 13, section 5 pursuant to a legislative delegation of authority provided in Tennessee Code Annotated section 40-14-207(b) rather than pursuant to the Court's inherent constitutional authority to regulate courts. In *Petition of Gant*, the Tennessee Supreme Court held that the trial court did not have the authority to invalidate a provision of Rule 13 governing the hourly rate of attorneys appointed to represent indigent defendants. 937 S.W.3d at 845-46. The Court's reasoning was not that the provisions of the rule were the result of its inherent constitutional authority to regulate the courts. *See id.* Rather, in holding that the trial court lacked the authority to invalidate the Rule, the Court noted that its authority to promulgate rules prescribing compensation for appointed counsel was derived from statute. *Id.* at 845. Thus, the Tennessee Supreme Court's prohibition against inferior courts' invalidating the Rules of the Tennessee Supreme Court applies regardless of the source of the Court's authority to promulgate the Rules.

The Petitioner also argues that inferior courts are not prohibited from ruling on as-applied constitutional challenges to Tennessee Supreme Court Rules. In *Long v. Board of Professional Responsibility*, the Tennessee Supreme Court held that only the Tennessee Supreme Court had the authority to consider facial challenges to its rules. 435 S.W.3d at 184. The appellant made facial challenges to the validity of Tennessee Supreme Court Rule 9 before a hearing panel of the Tennessee Board of Professional Responsibility and the chancery court to which the appellant appealed the panel's decision. *Id.* The Court did not determine whether the panel had the authority to decide as-applied challenges to a Tennessee Supreme Court Rule. *Id.* at n. 8. The Court noted that administrative agencies governed under the Uniform Administrative Procedures Act may rule upon as-applied constitutional challenges raised during hearings before those agencies. *Id.* (citing *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 455 (Tenn. 1995)). The Court further noted that Tennessee Supreme Court Rule 9 allows a trial court to reverse or modify a hearing panel's decision if the panel's decisions are in violation of statutory or constitutional provisions. *Id.* (citing Tenn. Sup. Ct. R. 9, § 1.3). However, the Uniform Administrative Procedures Act does not apply to post-conviction proceedings, and there is no rule granting the post-conviction court or this court authority to grant relief if the decisions of the AOC Director and the Chief Justice pursuant to Rule 13, section 5(e)(4)-(5) violate constitutional provisions. Accordingly, we do not have the authority to decide the Petitioner's constitutional challenges, and, therefore, he is not entitled to relief regarding this issue. [3]

III. Failure to Preserve Evidence

***66** The Petitioner alleges as a stand-alone claim that the State's failure to preserve the video recording of his interview with police officers and his interactions with his mother violated the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 8, 9, and 16 of the Tennessee Constitution. The post-conviction court found that issues related to the footage from *The First 48* were "available at trial" and that trial counsel investigated and litigated many issues related to the footage and successfully challenged the admissibility of the footage at trial. The court concluded that "[t]o the extent any issue overlaps with issues raised at trial, it would be previously determined, and any issues not raised previously would be waived." The Petitioner argues that the post-conviction court failed to make adequate findings of fact and conclusions of law as required by Tennessee Code Annotated section 40-30-111(b). However, we conclude that the post-conviction court's findings were more than sufficient to address the issue raised by the Petitioner. As reflected by the post-conviction court's findings and the record, the issues raised by the Petitioner regarding the State's failure to preserve the raw footage were available to be raised at trial and on direct appeal. Therefore, the issues are waived. *See* T.C.A. § 40-30-106(g).

IV. Withholding of Evidence

The Petitioner maintains that the State wrongfully withheld C.J.'s neuropsychological evaluation at trial. In *Brady v. Maryland*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963); *see* *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001). One of the prerequisites that a defendant must establish to constitute a due process violation under *Brady* is that the State suppressed the information. *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995). However, as we have concluded, the evidence does not preponderate against the post-conviction court's finding that General Lepone made the report available to lead counsel prior to trial and discussed it with him. Because the State did not suppress the report, the Petitioner failed to establish that he is entitled to relief.

V. Use of Stun Cuff

The Petitioner maintains that the State violated his due process rights by attaching a stun cuff to him at trial. The post-conviction court found that the Petitioner waived the issue by failing to present it to the trial court and on direct appeal. The Petitioner contends that such errors require automatic reversal and that the record includes no evidence that he personally, affirmatively, voluntarily, and intelligently decided to forgo his due process stun cuff claim. However, in *Mobley v. State*, the Tennessee Supreme Court, relying on Tennessee Code Annotated section 40-30-106(g), held that the petitioner waived a stand-alone due process challenge to the use of a stun belt at trial raised during post-conviction proceedings when the petitioner did not present the issue to the trial court or on direct appeal. 397 S.W.3d at 104.

The Court concluded that the issue of the use of a stun belt was more properly considered in the context of the petitioner's ineffective assistance of counsel claim. *Id.* Thus, in accordance with our supreme court's decision in *Mobley*, we conclude that the Petitioner's stand-alone due process issue is waived.

VI. Juror Misconduct

The Petitioner contends that members of the jury engaged in misconduct and that, as a result, he did not receive a fair trial. Shortly before the evidentiary hearing, the Petitioner filed a supplemental petition for post-conviction relief, alleging, in part, that his convictions and sentences were the product of premature deliberations, a coerced verdict, and racial animus and that the jurors received extraneous prejudicial information. He also filed a motion in limine regarding the admissibility of the jurors' testimony and attached the affidavits of a juror who served on the jury at the Petitioner's trial ("Juror 2") and an alternate juror.

***67** Juror 2, an African-American man, stated in his affidavit that, initially, the jurors were friendly with each other but that they became less friendly as the trial continued. He stated that he believed at least nine of the jurors were more concerned about returning home than about the trial and the sentencing hearing. He noted that the other jurors paid close attention when the State was presenting its case but paid less attention when the defense presented its proof. Juror 2 stated that while he questioned how the Petitioner could have killed four adults by himself, the testimony of the surviving children led him to find the Petitioner guilty, even though the juror believed the children's testimony was coerced. Juror 2 recalled that during deliberations following the guilt phase, there was little discussion among the jurors and that everyone agreed on the Petitioner's guilt.

Describing the jury's deliberations following the penalty phase as "rushed," Juror 2 stated that he wanted to discuss the evidence that had been presented but that none of the other jurors wanted to have such a discussion. He also stated that he sought to share his perspective on gang violence based upon his prior experience but that none of the other jurors seemed interested in his perspective. He recalled that once he expressed his desire to discuss the issues surrounding sentencing further, the other jurors "came after" him and cursed him. He also recalled one female juror calling him a "bastard" and another female, Caucasian juror yelling at him and telling him to think of the children. He stated that the other jurors were "very vocal about wanting to get the whole thing over with and wanting to go home" and that "[b]ecause of the way the other jurors treated me, I felt pressured to vote to impose a death sentence on [the Petitioner], even though I was not one hundred percent sure that that is how I wanted to cast my vote."

Juror 2 stated that other jurors laughed at him whenever he became sick after eating at restaurants chosen by the other jurors and told him that he was not accustomed to eating "good food." He also stated that the jury foreperson was particularly rude to him and singled him out on multiple occasions, including comments about the Juror 2's clothing. While Juror 2 said he was "not sure," he believed the jury foreperson singled him out because the juror was the only African-American male on the jury. Juror 2 reiterated that he felt pressured to vote to impose a death sentence based on the way that the jury foreperson and the other jurors treated him and that he did not believe the Petitioner received a fair trial "based on the way the jury acted."

Juror 2 stated that while he "can't be sure," he believed another juror was using a cell phone during the course of the trial, even though the jury was sequestered. Juror 2 also stated that he watched television for three days, even though their televisions were supposed to be disconnected. He denied watching the news during those three days. He said he chose to watch television alone instead of with the other jurors because he felt uncomfortable around them.

The alternate juror stated that during breaks throughout the trial, he overheard jurors discussing the case before both sides completed the presentation of their proof. He stated that he rebuffed attempts by other jurors to discuss the case with him, including an attempt by the jury foreperson. The alternate juror said he reported the jurors' conduct to a deputy after which the trial judge warned the jury against discussing the case until deliberations.

The alternate juror stated that after the prosecution had rested its case and before the defense had presented its case, a female juror entered the jury room and proclaimed that she was ready to vote and go home. The alternate juror said that during the jury selection and throughout the trial, the same female juror appeared more concerned about her personal needs than her responsibility to hear the case. The alternate juror recalled that the female juror solicited the other jurors to ask the trial court

to work through the weekend so that she would be able to return home sooner.

***68** The alternate juror stated that following the penalty phase, all of the jurors and the alternate jurors went out to dinner and that he noticed one of the jurors, an African-American man, who seemed uncomfortable. When the alternate juror spoke to the juror in the restroom, the juror said he felt "abused" by the other jurors during the deliberations. The alternate juror stated that the juror told him that other jurors called him names and directed multiple profanities toward him. The juror told the alternate juror that he attempted to persuade the other members of the jury to evaluate and discuss the details of the evidence presented by both the State and the defense but that the other jurors appeared disinterested in doing so and wanted to vote guilty without deliberating further. The alternate juror said the juror told him that due to the pressure and verbal abuse by the other members of the juror, he "just wanted to be out of there."

At the evidentiary hearing, the Petitioner's counsel argued that based upon the affidavits, the jury improperly engaged in premature deliberations and received extraneous prejudicial information and outside influences and that the verdict was coerced. The State responded that the jurors' testimony was inadmissible pursuant to Tennessee Rule of Evidence 606(b). The post-conviction court determined that the testimony of Juror 2 and the alternate juror and their affidavits were inadmissible. The court recognized the policy of protecting the sanctity of jury deliberations absent "some showing of the specific areas of impropriety." The court found that the information in the affidavits failed to show an area of impropriety that would render the testimony of Juror 2 and the alternate juror admissible.

On appeal, the Petitioner maintains that he is entitled to a new trial because the jurors deliberated prematurely, pressured Juror 2 to agree to impose the death penalty, and exhibited racial animus toward Juror 2. The Petitioner also maintains that the jurors were subject to extraneous prejudicial information and outside influences, noting that Juror 2 watched television and believed another juror used a cell phone. The State responds that the Petitioner waived the claims by failing to raise them on direct appeal and that the post-conviction court properly found the affidavits and testimony of Juror 2 and the alternate juror inadmissible pursuant to Tennessee Rule of Evidence 606(b).

Although the State asserts that the Petitioner should have presented the issue on direct appeal, this court has addressed claims of juror misconduct as stand-alone issues in post-conviction proceedings when the basis for the claims were first discovered by the Petitioner and his counsel during the pendency of the post-conviction proceedings. *See, e.g. Hubert Glenn Sexton, Jr. v. State*, No. E2018-01864-CCA-R3-PC, 2019 WL 6320518, at *16-18 (Tenn. Crim. App. Nov. 25, 2019); *Robert Faulkner v. State*, No. W2012-00612-CCA-R3-PD, 2014 WL 4267460, at *76-82 (Tenn. Crim. App. Aug. 29, 2014). No evidence was presented suggesting that trial counsel or the Petitioner was aware of or should have been aware of the conduct upon which the jury misconduct claim was based so as to allow them to raise the issue on direct appeal. Accordingly, we will address the issue on its merits.

Both the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee the right to a trial by an impartial jury. "An unbiased and impartial jury is one that begins the trial with an impartial frame of mind, that is influenced only by the competent evidence admitted during the trial, and that bases its verdict on that evidence." *State v. Smith*, 418 S.W.3d 38, 45 (Tenn. 2013) (citing *State v. Adams*, 405 S.W.3d 641, 650-51 (Tenn. 2013); *Durham v. State*, 188 S.W.2d 555, 558 (Tenn. 1945)).

Tennessee Rule of Evidence 606(b) provides that during an inquiry into the validity of a verdict,

> ***69** a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor

> may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Rule 606(b) is " 'grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for jury testimony relating to extraneous influences.' " *Walsh v. State*, 166 S.W.3d 641, 646 (Tenn. 2005) (quoting *Tanner v. United States*, 483 U.S. 107, 121 (1987)). "The rule promotes full and frank discussion in the privacy of the jury room and protects jurors from harassment by the losing party who might seek to impeach the verdict" and "the overarching purpose" of Rule 606(b) is "to protect the integrity of the jury's deliberative process." *Id.* (citing *Tanner*, 483 U.S. at 108, 119-20; *Caldararo v. Vanderbilt Univ.*, 794 S.W.2d 738, 741 (Tenn. Ct. App. 1990)). Thus, "a juror is not permitted to testify about anything occurring during deliberations, including the juror's own internal thoughts, motivations, or emotions." *Id.* at 647 (citing Tenn. R. Evid. 606(b); *State v. Blackwell*, 664 S.W.2d 686, 688 (Tenn. 1984)). Rule 606(b), however, allows juror testimony "if there has been: (1) extraneous prejudicial information, (2) outside influence, or (3) an antecedent agreement to be bound by a quotient or majority result." *Id.* (citations omitted).

Extraneous prejudicial information is defined as "information in the form of either fact or opinion that was not admitted into evidence but nevertheless bears on a fact at issue in the case." *Adams*, 405 S.W.3d at 650 (citations omitted). "An improper outside influence is any unauthorized 'private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury.' " *Id.* at 650-51 (quoting *Remmer v. United States*, 347 U.S. 227, 229 (1954)). The party challenging the validity of the verdict has the burden of presenting admissible evidence that the jury was exposed to extraneous prejudicial information or to an improper outside influence. *Id.* External influences that may warrant a new trial if prejudicial include: " '(1) exposure to news items about the trial; (2) consideration of facts not admitted in evidence; and (3) communication with non-jurors about the case.' " *Carruthers v. State*, 145 S.W.3d 85, 92 (Tenn. Crim. App. 2003) (quoting *Caldararo*, 794 S.W.2d at 742). Internal influences that do not constitute grounds for relief include: " '(1) discussions among jurors; (2) intimidation or harassment of one juror by another; (3) a juror's personal experiences not directly related to the litigation[;] and (4) a juror's subjective thoughts, fears, and emotions.' " *Id.* (quoting *Caldararo*, 794 S.W.2d at 742). Once the challenging party meets his or her burden of making an initial showing that the jury was exposed to extraneous prejudicial information or an improper outside influence, a rebuttable presumption of prejudice arises, and the burden shifts to the State to explain the conduct or establish that the conduct was harmless. *Adams*, 405 S.W.3d at 651 (citing *Walsh*, 166 S.W.3d at 647).

Although the Petitioner contends the trial court erred in excluding evidence that the jury engaged in premature deliberations, this court has held that "post-verdict inquiries into whether a jury has prematurely deliberated are barred because premature deliberations do not involve extraneous prejudicial information or outside influence." *State v. Leath*, 461 S.W.3d 73, 110 (Tenn. Crim. App. 2013) (citing *State v. Frazier*, 683 S.W.2d 346, 353 (Tenn. Crim. App. 1984)); *see, e.g. Hubert Glenn Sexton, Jr.*, 2019 WL 6320518, at *16; *State v. Steven Malone*, No. W2010-00947-CCA-R3-CD, 2011 WL 3912935, at *11 (Tenn. Crim. App. Sept. 7, 2011). Furthermore, evidence of the jurors' treatment of Juror 2, their hostility toward him during deliberations, and Juror 2's feelings of pressure to impose the death penalty by the other jurors relate to internal influences barred by Rule 606(b). *See Carruthers*, 145 S.W.3d at 92; *Caldararo*, 794 S.W.2d at 742.

***70** Although Juror 2 acknowledged watching television, he denied watching the news, and Juror 2 did not state in his affidavit that he learned of any information about the case while watching television. "Before a new trial will be warranted, the extraneous information must be determined to have been prejudicial." *Leath*, 461 S.W.3d at 111 (citing *David Keen v. State*, No. W2004-02159-CCA-R3-PD, 2006 WL 1540258, at *31 (Tenn. Crim. App. June 5, 2006)). Furthermore, evidence that an unidentified juror may have used a cell phone, alone, is insufficient to meet the definition of "extraneous prejudicial information" or "improper outside influence." *See Adams*, 406 S.W.3d at 650.

The Petitioner argues that evidence that the verdict was the result of racial animus and coercion by other jurors is admissible as an exception to Rule 606(b) as recognized by the United States Supreme Court in *Pena-Rodriguez v.*

Colorado, 137 S. Ct. 855 (2017). Following the verdict in *Pena-Rodriguez*, two jurors alleged that another juror made several remarks that the defendant was guilty of the sexual offenses due to his ethnicity. 137 S. Ct. at 862. The juror was alleged to have told other jurors that he " 'believed the defendant was guilty because, in [the juror's] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women' "; that he believed "Mexican men are physically controlling of women because of their sense of entitlement"; that " 'I think he did it because he's Mexican and Mexican men take whatever they want' "; that " 'nine times out of ten Mexican men were guilty of being aggressive toward women and young girls' "; and that he did not believe the defendant's alibi witness was credible due in part to the fact that the witness was " 'an illegal.' " *Id.* The Colorado state courts concluded that the evidence was inadmissible under Colorado's "no-impeachment rule," which was similar to the "no-impeachment" provisions in Rule 606(b) of the Federal Rules of Evidence and the Tennessee Rules of Evidence. *Id.*

The Supreme Court reversed, holding that the Sixth Amendment requires an exception to the "no-impeachment rule" when "a juror makes a clear statement that indicates that he or she relied on racial stereotypes or animus to convict a criminal defendant." *Id.* at 869. The Court reasoned that, contrary to other types of juror misconduct, "racial bias implicates unique historical, constitutional, and institutional concerns." *Id.* at 868. The Court clarified the narrow scope of its holding, explaining that

> [n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

Id. at 869.

Juror 2, however, never alleged that the other jurors made clear statements exhibiting overt racial bias. While Juror 2 stated that he believed the other jurors engaged in hostile behavior toward him because he was African-American, he acknowledged that he was unsure. Furthermore, the conduct about which Juror 2 complained was directed toward him and not the Petitioner. As the Sixth Circuit recognized in a case in which a juror made derogatory statements about other jurors, "the challenged statement must suggest not just that a juror harbored racial bias, but also that this racial bias played a significant role '*in the juror's vote to convict*' the defendant." *United States v. Brooks*, 987 F.3d 593, 604 (6th Cir. 2021) (quoting *United States v. Robinson*, 872 F.3d 760, 770 (6th Cir. 2017)). While we do not condone the conduct of the other jurors in this case, *Pena-Rodriguez* requires "*express* statements of racial animus, not *neutral* statements that may suggest unexpressed racial bias." *Brooks*, 987 F.3d at 605 (emphasis in original). Accordingly, the Petitioner has failed to establish that the proposed testimony fell within the limited exception to Rule 606(b) set forth in *Pena-Rodriguez*. The Petitioner is not entitled to relief on this issue.

VII. The Prosecutor's Comments During Closing Arguments

***71** The Petitioner cites to thirty-two instances in which he alleged that the prosecutor made improper comments during closing arguments in the guilt phase of the trial, and he claims this was a violation of article I, sections 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The Petitioner also contends that the prosecutor improperly commented on the Petitioner's invocation of his right to a jury trial during rebuttal closing arguments in the penalty phase. In denying relief, the post-conviction court found that the

Petitioner's claims of prosecutorial misconduct were waived and/or previously determined. The Petitioner asserts that the post-conviction court failed to make adequate findings of facts and conclusions of law. We conclude that the post-conviction court's findings are adequate for appellate review.

The Petitioner raised numerous challenges on direct appeal to the prosecutor's statements during closing arguments in both phases of the trial, and this court held that the prosecutor's comments did not rise to the level of plain error. *See Dotson*, 450 S.W.3d at 99-101 (appendix). To the extent that the Petitioner challenges the same statements by the prosecutor as a stand-alone claim, this claim is previously determined and cannot be the basis for post-conviction relief. *See* T.C.A. § 40-30-106(h); *Lemaricus Davidson v. State*, No. E2019-00541-CCA-R3-PD, 2021 WL 3672797, at *43 (Tenn. Crim. App. Aug. 19, 2021), *perm. app. denied* (Tenn. Dec. 8, 2021) (holding that the petitioner's challenge raised in post-conviction proceedings to the trial court's handling of juror questions throughout the trial was previously determined when the petitioner raised the issue on direct appeal). The remaining claims are waived because the Petitioner did not present the specific challenges on direct appeal even though he had the opportunity to do so. *See* T.C.A. § 40-30-106(g); *Richard Lloyd Odom*, 2017 WL 4764908, at *36.

VIII: The Constitutionality of the Death Penalty and the Method of Execution

The Petitioner challenges the proportionality reviewed employed by the Tennessee Supreme Court as violating article I, sections eight and sixteen of the Tennessee Constitutions and the Eighth and Fourteenth Amendments to the United States Constitution. He specifically challenges the Court's limiting the pool of cases considered in the proportionality review to those cases in which a capital sentencing hearing was conducted and argues that "the appropriate sample for proportionality comparison must be every case in which the State charges a crime in which an element is the death of a human being." On direct appeal, the Petitioner challenged the constitutionality of the proportionality review, which limited the pool of cases for comparison to only those cases in which a capital sentencing hearing has been conducted. *Dotson*, 450 S.W.3d at 77-78. The Tennessee Supreme Court addressed the issue on its merits and rejected the Petitioner's claim. *Id.* at 78. Although the Petitioner did not argue on direct appeal that the Tennessee Supreme Court should expand its proportionality review to include not just all first degree murder cases but all homicide offenses, the ground could have been presented on direct appeal, and the Petitioner waived the claim by failing to do so. *See* T.C.A. § 40-30-106(g). Furthermore, the Tennessee Supreme Court has upheld the limitation of the pool of cases for comparison for purposes of proportionality review to those cases in which a capital sentencing hearing has been conducted. *See State v. Clayton*, 535 S.W.3d 829, 852-53 (Tenn. 2017); *State v. Pruitt*, 415 S.W.3d 180, 216-17 (Tenn. 2013).

The Petitioner argues that Tennessee's thirteenth juror rule violates the holding in *Hurst v. Florida*, 577 U.S. 92 (2016), issued after the Petitioner's direct appeal concluded, because the rules require the trial judge to make findings regarding the jury's verdict in the penalty phase of a capital trial. This court, however, has held that "the *Hurst* holding is inapt as a challenge to the thirteenth juror rule." *Lemaricus Davidson*, 2021 WL 3672797, at *50 (citing *Nicholas Todd Sutton v. State*, No. E2018-00877-CCA-R3-PD, 2020 WL 525169, at *7 (Tenn. Crim. App. Jan. 31, 2020)).

***72** The Petitioner asserts that a death sentence violates the fundamental right to life and does not promote any compelling state interest. The Tennessee Supreme Court has rejected this claim. *See, e.g.*, *State v. Sexton*, 368 S.W.3d 371, 427 (Tenn. 2012) (citing *State v. Hester*, 324 S.W.3d 1, 80 (Tenn. 2010); *State v. Bush*, 942 S.W.2d 489, 523 (Tenn. 1997) (appendix)).

The Petitioner maintains that the imposition of the death penalty disregards his rights under various treaties and international law in violation of the Supremacy Clause in Article VI, Clause 2 of the United States Constitution. Our supreme court has concluded that " '[t]he authorities appear to be universal that no customary or international law or international treaty prohibits a state from imposing the death penalty as a punishment for certain crimes.' " *Hester*, 342 S.W.3d at 80 (quoting *State v. Odom*, 137 S.W.3d 572, 599 (Tenn. 2004) (appendix)).

Relying upon the United States Supreme Court opinion in *Bush v. Gore*, the Petitioner argues that Tennessee lacks statewide standards for pursuing the death penalty and provides different treatment of person's fundamental right to life in violation of his right to equal protection. The Tennessee Supreme Court has rejected general challenges to the unlimited discretion to seek the death penalty vested in

prosecutors in this state. *See* *State v. Keen*, 31 S.W.3d 196, 233 (Tenn. 2000) (appendix). This court has concluded that *Bush v. Gore*, a voting rights case, does not apply in the context of a criminal prosecution. *David Lynn Jordan v. State*, W2015-00698-CCA-R3-PD, 2016 WL 6078573, at *85 (Tenn. Crim. App. Oct. 14, 2016) (citing *Robert Faulkner v. State*, No. W2012-00612-CCA-R3-PD, 2014 WL 4267460, at *102 (Tenn. Crim. App. Aug. 29, 2014)).

The Petitioner maintains that his death sentences were imposed in an arbitrary and capricious manner, arguing that (1) no uniform standards or procedures for jury selection existed to ensure open inquiry concerning potentially prejudicial subject matter; (2) the Petitioner was prohibited from addressing each juror's misconceptions about matters relevant to sentencing; (3) the Petitioner was prohibited from presenting a final closing argument in the penalty phase since only the State is permitted a rebuttal argument; (4) the jury was required to agree unanimously to a life verdict in violation of *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), which prohibit a requirement that juries reach unanimous agreement as to the existence of mitigating circumstances; (5) a reasonable likelihood existed that jurors believed they were required to unanimously agree to the existence of the mitigating circumstances; and (6) the jury was not required to make the ultimate determination that death is the appropriate penalty. Each of these claims has been rejected by the courts of this state. *See, e.g., Richard Lloyd Odom*, 2017 WL 4764908, at *55; *David Lynn Jordan*, 2016 WL 6078573, at *85.

Relying upon *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Petitioner argues that his constitutional rights were violated because the aggravating circumstances upon which the State relied to seek the death penalty were not presented to the grand jury or included in the indictment. However, the aggravating circumstances need not be pled in the indictment, and the grand jury review is not constitutionally required for death notices. *David Lynn Jordan*, 2016 WL 6078573, at *85 (citations omitted).

***73** The Petitioner maintains that the Tennessee Supreme Court's proportionality review process violates due process and that the appellate review process was not "meaningful" because (1) "the courts could not reweigh proof due to the absence of written findings concerning mitigating circumstances"; (2) "the information relied upon for comparative review was inadequate and incomplete"; and (3) "the methodology in which only cases where a death sentence was upheld are reviewed is fundamentally flawed." This argument has been rejected. *See id.* at *86 (citing *State v. Banks*, 271 S.W.3d 90, 159 (Tenn. 2008)).

Finally, the Petitioner asserts that Tennessee's methods of execution violate due process and the prohibition against cruel and unusual punishment. He states that while courts have rejected these claims, he raises them to preserve them for further review. *See* *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 625 (Tenn. 2018); *Lemaricus Davidson*, 2021 WL 3672797, at *50. Accordingly, he is not entitled to relief.

IX. Cumulative Error

The Petitioner maintains that he is entitled to relief due to the cumulative effect of the errors he has alleged above. We conclude that prejudice did not result from any single deficiency by trial counsel or the cumulative effect thereof. We have found no single instance where the Petitioner was otherwise denied his constitutional right to a fair and impartial trial. Therefore, there is no basis to conclude that any cumulative error resulted in an unfair trial.

CONCLUSION

We conclude that the Petitioner is not entitled to post-conviction relief, and we affirm the judgment of the post-conviction court.

All Citations

Not Reported in S.W. Rptr., 2022 WL 860414

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Footnotes

1 Consistent with the Tennessee Supreme Court's opinion on direct appeal, we use given names and abbreviated forms of given names when referring to the child victims. *See* *State v. Dotson*, 450 S.W.3d 1, 12 n.2 (Tenn. 2014). The Court noted that the use of the child victims' given names did not compromise their privacy because the record reflected that the surviving children's surnames were changed following the commission of the crimes. *Id.*

2 The Petitioner does not challenge Sergeant Mullins's testimony as unreliable under the standards set forth in *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997).

3 The Petitioner requests that this court reconsider its previous order denying his motion to supplement the appellate record with various documents and communication from AOC personnel regarding the denial of funds for expert witnesses. The Petitioner never presented these items during the post-conviction proceedings, and the post-conviction court denied the Petitioner's request to include the items in the appellate record. *See* Tenn. R. App. P. 24(e) (providing that the determination of the trial court concerning matters includable in the appellate record is conclusive "[a]bsent extraordinary circumstances"). We conclude that the motion to reconsider is not well-taken and is, therefore, denied. We further note that the documents that the Petitioner seeks to include in the appellate record relate to decisions by the Chief Justice and the AOC, which this court is without jurisdiction or authority to overturn. Therefore, inclusion of these documents in the appellate record is meaningless.

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IN THE CRIMINAL COURT FOR SHELBY COUNTY, TENNESSEE
DIVISION 10

Filed 5-16-19
Heidi Kuhn, Clerk
BY [illegible] D.C.

JESSIE DOTSON, PETITIONER,	)	
	)	DEATH PENALTY
VS.	)	POST-CONVICTION
	)	CASE NO. 08-07688
STATE OF TENNESSEE, RESPONDENT.	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

I. INTRODUCTION

On October 11, 2010, Petitioner, Jessie Dotson, was convicted of six counts of first degree murder and three counts of attempted first degree murder. On October 12, 2010, the jury sentenced Petitioner to death on all six counts of first degree murder, and he was later sentenced to three 40-year sentences for the three counts of attempted first degree murder for a total effective sentence of death plus 120 years.

The Tennessee Supreme Court affirmed Mr. Dotson's convictions and sentences. *State v. Dotson*, 450 S.W.3d 1 (Tenn. 2014), *cert. denied*, 135 S. Ct. 1535 (2015).

On August 17, 2015, this Court received Petitioner's *pro se* petition for post-conviction relief from his 2010 convictions. The State filed a Motion to Dismiss For Deficient Pleadings on January 27, 2017, and the Petitioner filed a response on February 14, 2017. The State's Motion to Dismiss was denied. Petitioner's counsel filed his Amended Petition for Post-Conviction Relief on May 26, 2017. The State filed its response to the Amended Petition on June 27, 2017. After various other proceedings, this matter was set for hearing on October 1, 2018. Petitioner filed a Supplemental Petition for Post-Conviction Relief on September 27, 2018, and the State

filed its response the same day seeking dismissal of Petitioner's Claim 45 which alleged jury deliberation issues.[1]

On October 1-4, 2018, this Court held an evidentiary hearing on Petitioner's post-conviction claims.[2] This Court has carefully considered all Petitioner's claims and for the reasons stated below, Mr. Dotson's Petition for Post-Conviction Relief is DENIED.

II. TRIAL[3]

The following is a summary of the evidence presented at trial as found in the direct appeal opinion of the Tennessee Supreme Court:

> ***A. Guilt Phase***
>
> *1. Discovery of the Crime Scene and Initial Investigation*
>
> The proof offered at the guilt phase of the defendant's trial established that in March 2008, thirty-year-old Cecil Dotson, Sr. ("Cecil"), Cecil's five children, ranging in age from nine years to two months, and Marissa Williams, Cecil's twenty-seven-year-old [fiancé] and the mother of four of his children, were living at a home located at 722 Lester Street in Memphis, Tennessee. They had been living in the home for five or six months. Cecil worked as a maintenance man at an apartment complex in Memphis.
>
> The defendant—Cecil's brother—lived with their sister, Nicole Dotson ("Nicole"), in her apartment at Goodwill Village in Memphis and worked with their father, Jessie Dotson Sr. ("Jessie Sr."), as a painter. The defendant had moved in with Nicole in August 2007, upon his release from prison. The defendant's family referred to him as "Junior."
>
> On Saturday, March 1, 2008, Jessie Sr., the defendant, and William Waddell, Cecil's and the defendant's half brother, also known as "Fat," went to Cecil's Lester Street home to watch a televised University of Memphis basketball game with him. Ms. Williams and the five children[, C.J., Cedrick, Cemario, Ceniyah, and Cecil II,] were also present at the home during this time. The group was unable to watch the game

[1] Various discovery motions were filed in the month leading up to and during the evidentiary hearing in this matter. These discovery issues have been addressed by separate order. Just before the hearing, Petitioner also filed a Waiver of Personal Appearance, Motion In Limine Regarding the Admissibility of Jurors' Testimony and Motion for Payment of Expenses for Witness Travel. These issues were addressed on the record at the hearing in October 2018.

[2] Petitioner also argued issues related to the denial of expert assistance for the post-conviction proceedings. This Court previously approved funding for experts which subsequently was not approved by the Administrative Office of the Courts and the Chief Justice of the Tennessee Supreme Court. This Court indicated it was bound by these rulings and would not otherwise address them.

[3] An electronic copy of the appellate record in this case was submitted as Exhibit 53.

because Cecil's television could not receive the broadcast. Jessie Sr. left Cecil's house around 6:00 or 6:30 p.m., and as he was leaving, he saw Cecil on the porch cleaning his grill and preparing to barbecue. He did not see Cecil or the defendant again that night and never again saw Cecil alive. Mr. Waddell left Cecil's home at 10:30 or 11:00 p.m., and when he left, Cecil was still alive.

When Jessie Sr. arrived at Nicole's apartment the next morning, Sunday, March 2, 2008, to pick up the defendant for work, the defendant was not there, and Nicole did not know where he was. Jessie Sr. asked Nicole to tell the defendant to contact him if he wanted to keep his job. Later that evening, the defendant called Jessie Sr. and explained that he had not called because his girlfriend, Sheila Jones, had hidden his cell phone after they argued. The defendant did not explain why he had missed work. When the defendant and Mr. Waddell went to dinner that evening, the defendant asked if Mr. Waddell wanted to pick up Cecil. Mr. Waddell had called Cecil numerous times on March 2nd but had not reached him, so they did not go by the Lester Street home.

The next day, Monday, March 3, 2008, the defendant rode to work with Jessie Sr. around 8:00 a.m., but they stopped working at 11:00 a.m. due to rain. Later that same day, the defendant called Jessie Sr., telling him that Nicole wanted him to drive by Cecil's house because Ms. Smith, the mother of Cecil's two-year-old son Cecil II, feared something was wrong. Ms. Smith had been unable to reach Cecil by telephone since the very early morning hours of Sunday, March 2, 2008, and no one had answered the door at the Lester Street home when she knocked around 3:00 p.m. that day. Ms. Smith said the door was partially open, and the radio was playing, but she did not see anyone or hear the children, although she could see the television just inside the door and the photographs on the wall across from the door. On the morning of March 3rd, Ms. Smith discovered that Cecil had not shown up for work and that his relatives had not heard from him. She still could not reach him by telephone. When she called Mr. Waddell at work numerous times expressing her concerns, he told her to call the police. She took his advice and called the police in the early evening and waited outside the Lester Street home for them to arrive.

Officer Randall Davis arrived first. As he walked in the front door, he could "smell the dead bodies." The storm door was closed, but the interior door was partially open, and he could see a person's foot lying on the floor inside. Entering the front door, Officer Davis discovered four adult bodies, later identified as Cecil, Ms. Williams, Hollis Seals, and twenty-two-year-old Shindri Roberson. All appeared to have sustained multiple gunshot wounds. Officer Davis did not check for vital signs because it was obvious to him that they were deceased.

Officer Davis, along with two other officers, continued through the house, searching for survivors and perpetrators, while another officer secured the front door. Officer Davis noticed blood throughout the house, but none of it appeared to be fresh. Officer Davis saw someone in the hallway bathroom and discovered nine-year-old C.J. in the bathtub with a knife stuck in his head. Officer Davis first believed that C.J. was deceased but then noticed the child's eyes twitch. After alerting others he had found a survivor, Officer Davis continued clearing the home.

In a bedroom on the left side of the hallway ("bedroom two"), Officer Davis discovered four-year-old Cemario, who was deceased. In another bedroom ("bedroom one"), Officer Davis discovered two-year-old Cecil II and five-year-old Cedrick, both of whom appeared deceased to Officer Davis. Meanwhile, another officer located two-month-old Ceniyah, who was still alive, and carried her out of the house. The officers exited just as Memphis Fire Department personnel arrived, and Officer Davis let them know a survivor had been found in the bathroom.

Firefighter Jason Vosburgh testified that he "could smell the blood in the air" when he approached the house, describing it as "[a] thick, spoiled smell like it had been there a while." Firefighter and emergency

medical technician Daniel Moore testified that, although he was instructed to check the adult victims for signs of life, he did not actually touch them because it was obvious to him that they were deceased. Mr. Moore explained that "[j]ust by looking at them and just the horrific scene that was there with all the blood and everything, it was obvious that they had been down for a while." He described the blood as "definitely old."

When Mr. Vosburgh and a paramedic entered bedroom one, they discovered that, although Cecil II was deceased, Cedrick was still alive, so they carried him outside to an ambulance. During this time, Mr. Vosburgh was informed that another deceased victim was in the other bedroom. When he returned inside, Mr. Vosburgh and Mr. Moore were summoned to the bathroom, where firefighter Herbert Henley was attending to C.J. They removed C.J. from the bathtub and transported him to an ambulance outside. Mr. Henley recalled seeing cuts on C.J.'s face and a "sawzall blade" sticking out of the top of his head. He described the bathroom as "a mess" with "blood everywhere." Mr. Moore testified that when he and Mr. Vosburgh entered the bloody bathroom, C.J. "turned his head and the next thing we saw was one of the most horrible things I've ever seen, it was a knife stuck embedded in his skull and it was just stuck there. And it absolutely is the worst thing I've ever seen in my life." In addition to the embedded knife, Mr. Moore observed puncture wounds on C.J.'s abdomen and multiple superficial cuts to his neck.

By the time firefighter and paramedic Patrick McDevitt reached the scene, the surviving victims had already been removed and were on their way to the hospital. Mr. McDevitt and his partner were tasked with confirming that the remaining victims were deceased. To do so, they touched each victim to check for a pulse or other vital signs and ran an ECG, which required them to move clothing and affix ECG strips. They returned the clothing to its original position when they finished. Mr. McDevitt noticed that the blood on each victim appeared to be dry.

Meanwhile, Memphis Police Department Deputy Director Toney Armstrong, a lieutenant with the Homicide Bureau at the time these murders occurred, learned of the homicides. He called Lieutenant Walter Davidson at home, assigned him to serve as case coordinator on the investigation, and instructed him to go to the scene. He told Lieutenant Davidson that six persons had been murdered and that three severely injured children were on their way to the hospital and not expected to survive. Not knowing the identity of the perpetrator and wanting to prevent any further attacks on the family, Deputy Director Armstrong and Lieutenant Davidson decided to quarantine the surviving children at the hospital and not release their identities. Officers of the Tactical Unit were assigned to guard the children, and the quarantine prevented relatives, the media, and everyone other than medical personnel and police personnel approved by Deputy Director Armstrong from having contact with them. No family members were allowed contact with the children from March 3rd through March 8th.

Sergeant Anthony Mullins of the Homicide Bureau was at the scene when Deputy Director Armstrong and Lieutenant Davidson arrived. After he had walked Deputy Director Armstrong through the house and provided an overview of the crime scene, Sergeant Mullins left and obtained a search warrant. When he returned with the warrant later that evening, officers entered the home and began collecting any evidence located in the immediate vicinity of the deceased victims' bodies. By the time this work had been completed, the medical examiner and seven others from the Shelby County Medical Examiner's Office had arrived at the scene. By 2:30 a.m. on March 4, 2008, the deceased victims' bodies had been removed and were en route to the morgue. Sergeant Mullins and the officers assisting him left a short time later, but a uniformed officer remained behind to secure the scene. Sergeant Mullins and the crime scene processing team returned between 10:30 and 11:30 a.m. on March 4th and continued their work.

Testifying at trial as an expert in general crime scene investigation and bloodstain pattern analysis, Sergeant Mullins described the Lester Street crime scene as horrific and the worst he had ever worked. The

living room, into which the front door opened, was very small, with only between five and ten feet of available space around the furniture and the bodies of the four adult victims. The home, he said, was dirty and cluttered. He found evidence indicating that the crime scene had been staged, which further complicated the investigation.

All of the adult victims had sustained multiple gunshot wounds, and all except Mr. Seals had been shot at least once in the leg. Two guns were used in the shooting—a nine-millimeter and a .380 caliber—although neither gun was found at the scene or thereafter. Although the guns were not found, officers located spent bullets in the living room on the sofa cushion, on top of a piece of plastic from a window unit air conditioner, on the floor under Cecil, under the sofa, inside the arm of the sofa, between two sofa seat cushions, in the wall behind the sofa, and in the east wall of the living room.

Shell casings were also found in the living room. Officers recovered two nine-millimeter and three .380 caliber shell casings on the floor. When officers moved a jacket on the love seat, they found a sealed Ziploc bag that contained eleven more nine-millimeter and five more .380 spent shell casings. Sergeant Mullins concluded that the person or persons responsible for the crimes had collected the spent shell casings after the shootings, intending to remove them from the scene.

Sergeant Mullins believed that all of the adult victims' bodies were moved or staged after the shooting. Cecil's body was located in a kneeling position in front of the sofa, with his torso on a sofa cushion near a seam where two cushions met, and a bag of marijuana in his left hand. Cecil had sustained several gunshot wounds including several to the front of his body, one to his neck, one to the bottom of his foot, and several to his lower legs. Fibers collected from Cecil's chin and mouth were consistent with a pillow having been placed over his face when he was shot, and police found a pillow in the living room through which a bullet had passed. The gun used to shoot Cecil's legs differed from the gun used to shoot his neck. Sergeant Mullins could not determine the sequence of the gunshot wounds to Cecil's legs, but he believed that several of them may have been inflicted close to or after Cecil's death.

Sergeant Mullins opined that Cecil's body had been positioned and staged after the shooting. Sergeant Mullins believed that Cecil was likely facing his attacker when the first shot was fired, explaining that Cecil had several gunshot wounds to the front of his body, which he would not have sustained had he been kneeling with his torso resting on the sofa at the time of the shooting. Sergeant Mullins also believed that the bag of marijuana had been placed in Cecil's hand, explaining that the bag was so large that Cecil would have been unable to close his fingers around it and would have dropped it had he been holding it during the shooting or while attempting to flee or defend himself.

A loaded twelve-gauge sawed-off shotgun was found on a stack of clothing in the corner of the living room, a little more than an arm's length from Cecil's body. Five more live rounds of shotgun ammunition were found under the sofa. DNA testing of blood found on the end of the shotgun barrel revealed that two-month-old Ceniyah was a minor contributor of the blood. According to Sergeant Mullins, the blood on the shotgun barrel indicated that the gun was positioned atop the clothing after the shooting, because no blood spatter was found on any of the clothing beneath the gun and the blood on the gun belonged to a victim whose body was found in another part of the home.

Ms. Roberson's body was located in a seated position on the floor, with her back to the sofa, her legs extended, and her head to the side, between the sofa and the loveseat. Her shirt was pulled up, exposing her breasts, and her pants were pulled down, exposing her lower body from her waist to her knees. A clear plastic bag containing what appeared to be between three and five rocks of crack cocaine was found on the outer portion of her vagina. Sergeant Mullins concluded that Ms. Roberson's body also had been staged after the shooting and that she had been pulled from the sofa to the floor near the time of or after her death

and her clothing then altered. Little blood was found on the floor beneath her body, but a nearby sofa cushion was stained with very thick coagulated blood, which Sergeant Mullins described as consistent with the type of blood loss that would occur from a gunshot wound like that Ms. Roberson sustained to her leg. Ms. Roberson's pants were also saturated with blood, and bullet holes in her pants corresponded to the location of the gunshot wounds to her legs, indicating that her pants were covering her legs when she was shot and were pulled down afterwards. The bag of crack cocaine also appeared to be part of the staging, as it was only slightly touching her and appeared to have been placed on her body.

On the floor beneath and around Ms. Roberson's body were items that appeared to Sergeant Mullins to have been emptied from a purse, although he did not locate an empty purse in the room. These items were not collected as evidence, and Sergeant Mullins could not recall seeing any type of identification, although he did recall seeing Ms. Roberson's cell phone and photos among these items. Three hairs were collected from Ms. Roberson's right leg, thigh, and buttocks and sent to the Federal Bureau of Investigation for testing. Considering the dirty condition of the home and the considerable traffic through it during the previous months, Sergeant Mullins did not view the hairs as significant and opined that they could have easily adhered to her body when it was moved.

Sergeant Mullins believed that Ms. Williams's body, too, had been positioned after the shooting. Ms. Williams's body was located on the floor, slumped over onto Ms. Roberson, with her legs positioned across Ms. Roberson's legs. He pointed out, however, that the carpet was bloodstained on the side opposite of the way she was leaning. Additionally, Ms. Williams's legs were lying across Ms. Roberson's legs, indicating that Ms. Williams's body had been staged *after* Ms. Roberson's body had been positioned on the floor.

Sergeant Mullins testified that Mr. Seals's body was located across from the front door and near the door connecting the kitchen and the living room. However, Mr. Seals's body was not visible upon entering the home because a large television blocked the view across the living room. Mr. Seals was wearing a black shirt and black pants. His pants were pulled down to below his knees. A cup and a wallet were found near his body, as was a purse with the contents inside, which was later identified as belonging to Ms. Williams. Inside the kitchen, just beyond Mr. Seals's body, officers discovered a spent projectile under a table and a defect in the kitchen wall, which appeared to have been made by gunfire from the living room.

Although Sergeant Mullins believed that Mr. Seals was shot in the area where he was found, he opined that Mr. Seals's clothing and body were altered after the shooting. He pointed out that a pool of blood on the carpet near Mr. Seals's body had a "void" in it—an area where the carpet was not bloodstained—indicating that something had been covering the unstained area of carpet when the blood pool formed. The carpet was bloodstained on the opposite side of Mr. Seals's body as well. Based on the bloodstains, the distance between them, and the location of Mr. Seals's legs one atop the other, Sergeant Mullins believed that Mr. Seals's body may have originally been lying in the area of the "void" and may have been rolled from that area when his pants were pulled down and his wallet removed.

Sergeant Mullins testified that all of the sharp force and blunt force injuries sustained by the deceased and surviving children were inflicted with kitchen knives and wooden boards the perpetrator found in the home. Sergeant Mullins pointed out that officers discovered a gray plastic silverware tray overturned on the floor of the kitchen but did not recover an intact set of kitchen knives. In total, officers found five knife blades throughout the home, including the blade that was lodged in C.J.'s head. The word "Farberware," a brand of kitchen knives, was printed on one of the two blades recovered from inside the bathtub. Officers also recovered one intact knife handle and what appeared to be broken pieces of another knife handle. Sergeant Mullins believed the perpetrator removed the knife handles from the blades after the assaults. Officers found bloodstained and broken pieces of wood in various places, including the hallway, the bathroom, and

bedrooms. According to Sergeant Mullins, the perpetrator's use of guns, knives, and boards already present in the home demonstrated the perpetrator's familiarity with the home.

Officers found blood spatter throughout the home, and according to Sergeant Mullins, the large amount of blood spatter found in the bathroom and bedrooms one and two was consistent with a prolonged "one-on-one struggle" rather than a more rapid execution of the children. He noted that the bathroom floor, the bath mat, the area around the bathtub, and the outside and inside of the toilet were stained with blood. A substantial amount of blood had pooled inside the bathtub, where C.J. was found. A bloody partial palm print, later matched to Cemario, was found on the tile wall of the bathroom. Sergeant Mullins described the palm print as a transfer stain, which results from a bloody object or body part coming into contact with and transferring blood onto another surface or object.

Sergeant Mullins identified "cast-off" blood stain patterns on the bathroom wall over the toilet tank. This pattern is produced, he explained, when blood that has adhered to an object or weapon used to strike a person multiple times is cast off the object or weapon during the attack and onto a nearby surface or object. Sergeant Mullins stated that the cast-off spatter on the wall above the toilet consisted of three distinct trails, indicative of three different blows. The top trail, which he described as almost horizontal on the wall, indicated that the victim was close to the wall when the blow was administered. Sergeant Mullins stated that because the cast-off was "a fairly wide pattern," he believed it came "from one of the boards" rather than a knife, although he could not definitively identify the weapon that produced the pattern.

On the wall over the bathtub and near where C.J. was found, Sergeant Mullins noted still more cast-off spatter, which could have come from either a knife or a wooden board. On the wall near the soap dish he noted cast-off spatter from a different blow, and he identified still more cast-off spatter on the wall above the bathtub faucet controls, which was indicative of additional blows. He observed a "smeared type" transfer stain farther down inside the bathtub, as well as a thick amount of blood in the corner of the bathtub, all of which had resulted from cast-off. On the wall next to Cemario's bloody palm print, Sergeant Mullins identified even more cast-off spatter, but he could not determine if it was associated with the bloody palm print or if it resulted from a different blow to the same victim or to another victim.

On the top of the toilet tank, Sergeant Mullins identified impact blood spatter, which occurs when an object strikes a bloody surface. Toward the bottom of the toilet, he observed a blood transfer stain. Sergeant Mullins also noticed that blood had dripped down from above, hitting the toilet tank and running down inside the toilet bowl. He testified that this particular pattern was likely produced by an actively bleeding victim positioned above the toilet tank. He testified that the pattern had been dissipated by water or someone wiping through the dripped blood. He also testified that the blood spatter indicated that someone had raised and lowered the toilet seat.

Based on the cast-off patterns, Sergeant Mullins opined that at least one, and up to three, blows were struck in the bathtub. Based on the dripped blood and Cemario's bloody hand print on the wall, he concluded that more than one victim was assaulted in the bathroom. Sergeant Mullins also noted that three green beads similar to those found in Cecil II's hair were recovered in the bathroom next to a large drop of blood. While he acknowledged that the beads could have been on the floor prior to the attack, Sergeant Mullins testified that the beads also could have fallen out during an attack on Cecil II in the bathroom. Sergeant Mullins explained that "[t]here is a lot of movement in the bathroom. There's more than one blow being delivered in the bathroom. You've got several pieces of broken wood that would be indicating at least one good blow, but from the blood evidence there's more than one and there's movement within that scene."

Sergeant Mullins also testified about the blood evidence in bedroom one, where Cemario's body was discovered face down on the floor in a pool of blood. Inside this bedroom, officers found two wooden

boards and broken pieces of braided hair scattered across the floor. Sergeant Mullins testified that a forceful blow to Cemario's head would have broken off the weaker braids. The broken braids scattered across the floor and the pool of blood beneath Cemario's head suggested that the perpetrator struck the fatal blow while Cemario was lying on the floor in bedroom one. Large spots of dripped blood on the carpet suggested to Sergeant Mullins that Cemario may have aspirated blood. However, Sergeant Mullins believed that some portion of the assault on Cemario occurred in the bathroom. He explained that "[t]he level of violence delivered to [Cemario] couldn't have happened in [bedroom one] without some additional blood evidence. So there has to be some movement after the fact."

In bedroom two, where Cecil II and Cedrick were found, investigators found blood stains on the bed, the window blinds, the wall by the bed, the ceiling fan, and the ceiling. Sergeant Mullins testified that the blood spatter was multi-directional, indicating that multiple blows had been delivered in bedroom two. Sergeant Mullins believed that the cast-off blood spatter on the ceiling and ceiling fan resulted from a knife being raised overhead between downward stabbing motions. On the floor beneath the bed, investigators found seventeen more green hair beads like those in Cecil II's hair.

In bedroom two investigators also located a bloodstained wooden board, an intact knife handle lacking a blade, and two knife blades lacking handles. The first knife blade, found inside a pillowcase between the pillow and the pillowcase, had been bent into an "S" shape and had blood on it. Sergeant Mullins believed the blade was bent when the knife handle was removed, and he found no evidence to suggest that the blade had been twisted and damaged during the stabbing of a victim. The second knife blade, found between the mattress and the wall, and almost on top of the box springs, was discovered only after investigators moved the bed.

In the dresser of the master bedroom, investigators located a box with eleven or twelve rounds of nine-millimeter ammunition. Items were stored in the area beneath the bed. Officers collected two cordless telephones from this area, including one from the floor between the dresser and the laundry room and another from farther back in the bedroom.

Sergeant Mullins opined that a perpetrator in the living room could have trapped the children by standing in the doorway of the living room. Although doors leading to the outside of the home were located in the laundry room and the master bedroom, to reach those doors from the hall bathroom or from bedrooms one and two, the children would have been required to walk through the living room. In addition, the door in the laundry room was secured by a tied cord and appeared as if it had not been used in awhile. Most of the windows in the home had bars.

According to Sergeant Mullins, the perpetrator spent considerable time in the house staging the crime scene after the murder. Sergeant Mullins reiterated his opinion that all four adult victims were moved either close to the time of death or after death, and he noted that Ms. Roberson was not petite and that pulling down her pants, as well as those of Mr. Seals, would have taken time. More time would have been required to position Ms. Williams's legs across Ms. Roberson's legs, to place the marijuana in Cecil's hand, and to place the crack cocaine on Ms. Roberson's body. Sergeant Mullins stated that additional time was perhaps spent moving Cemario, if he were indeed assaulted in the bathroom and later moved to bedroom one. Removing the knife handles and hiding the knife blades in the pillowcase and under the mattress would have taken more time, as would collecting and removing from the scene all but one of the knife handles. Sergeant Mullins also pointed out that the guns used in the shooting were removed from the scene, and he believed the loaded shotgun had been positioned atop the clothing after the crimes occurred. Sergeant Mullins also explained that some additional time would have been required to locate, collect, and place sixteen shell casings in the sealed Ziploc bag. According to Sergeant Mullins, "[I]t took enough time to alter things in this scene as opposed to boom, boom, stab, stab, out the door. There's a difference. If you

consider all the movement in the scene after this is done, it's going to take a few minutes but not necessarily hours, I would not think." He opined that the staging of the crime scene indicated that the perpetrator felt familiar with and comfortable enough to remain in the home for the time needed to finish altering the crime scene.

Sergeant Mullins observed that having knowledge of gangs and drug activity would have been useful in staging the crime scene. However, based on his experience investigating more than 100 gang-related homicides, Sergeant Mullins opined that gang members would not have remained inside the home following the murders and would not have gone to the crime scene unarmed and used weapons they found in the home to commit the offenses. Sergeant Mullins was unaware of any gang-related homicides in which women were murdered and children were assaulted and killed with knives and boards. Sergeant Mullins acknowledged that the defendant's DNA was not discovered on any item of physical evidence associated with the investigation; however, Sergeant Mullins testified that the lack of DNA evidence linking the defendant to the crime did not exonerate him.

2. The Defendant's Initial Statements to Police, the Identification of the Defendant as the Assailant, and Defendant's Confessions

While Sergeant Mullins and his team processed the crime scene, sergeants and detectives from the Safe Streets Task Force and the Organized Crime Unit canvassed the area and interviewed neighbors, while other officers questioned family members of the victims. When the police asked Ms. Williams's mother, Ida, if she knew of anyone who would want to harm her daughter or Cecil, Ida named Ms. Smith, Cecil II's mother and the person who called the police, as the couple's worst enemy. She explained that the tension stemmed from Cecil's simultaneous relationships with both Ms. Williams and Ms. Smith.

Two other officers, Sergeant James Terry Max and Sergeant Joe Stark, interviewed the defendant at Lieutenant Armstrong's request. During this initial interview at the police station on March 4, 2008, the defendant was not under arrest and was considered only a possible witness. The defendant described his activities on March 1st, explaining that he and others, including Jessie Sr. and Mr. Waddell, had intended to watch a televised University of Memphis basketball game at Cecil's Lester Street home, but the plan went awry because Cecil's television did not receive the broadcast.

The defendant said he remained at Cecil's house, where Cecil's five children and Ms. Williams were also present, and "E," whom officers subsequently identified as Mr. Seals, arrived later in the evening. Around 10:00 to 10:30 p.m., the defendant, Mr. Seals, and Cecil left the Lester Street home and drove to "Frank's" apartment in the area of Highland Avenue and Spottswood Avenue. Officers later identified "Frank" as Willie Boyd Hill. According to the defendant, Mr. Seals went into Mr. Hill's apartment alone, while the defendant and Cecil waited outside in the car. A short time later, a light complexioned man wearing glasses exited the apartment, and Cecil got out of the car and talked to the man for some time. When Mr. Seals emerged from Mr. Hill's apartment twenty to thirty minutes later, the trio left and picked up Mr. Seals's girlfriend at another nearby apartment complex. From there, the defendant said the group went to the Kimball Cabana Apartments to purchase marijuana, arriving at approximately 11:30 p.m. or midnight. The defendant said that Cecil initially went into a downstairs apartment alone but soon returned to get the defendant. Together they went back inside the same apartment, and Cecil introduced the defendant to four African–American men, telling them that the defendant had just been released from prison. After Cecil had purchased a quarter-ounce bag of marijuana and the defendant had purchased $20 worth of marijuana, they left the apartment, ran into Ms. Smith in the parking lot, and talked with her for a while before leaving. Their next stop, according to the defendant, was at a house located off Lamar Avenue, where they talked to

a woman for approximately thirty minutes. Next, the defendant said, the group proceeded to the Kansas Court housing project to pick up his son. Learning that the defendant's son was not there, they spoke to the child's maternal grandmother for approximately ten minutes, gave her money, and left. The defendant stated that he parted company with Cecil, Mr. Seals, and Mr. Seals's girlfriend at approximately 2:15 or 2:30 a.m. on March 2, 2008, when they dropped him off at his girlfriend's apartment. The defendant stated that his girlfriend, Ms. Sheila Jones, was not home when he arrived, but her daughter, Keaira, and Keaira's boyfriend were there. According to the defendant, he and Keaira argued about Keaira being alone with her boyfriend. The defendant said that he went to bed after the argument and that Sheila returned home at approximately 5:05 a.m. on March 2nd.

When Sergeant Max and Sergeant Stark asked the defendant whether Cecil had any enemies, the defendant told them that Cecil and Mr. Hill had argued about two weeks earlier. The argument began, according to the defendant, when Cecil, Ms. Smith, Mr. Hill, and Mr. Hill's girlfriend returned to Mr. Hill's girlfriend's apartment after drinking at a club. According to the defendant, Mr. Hill's girlfriend called the police after seeing Cecil slap Ms. Smith. When the officers arrived, Cecil told them that there were drugs inside Mr. Hill's girlfriend's apartment. Mr. Hill also lived in the apartment, according to the defendant, and Mr. Hill and Cecil were both members of the Gangster Disciples. The defendant explained that gang members were not permitted to call the police on other gang members. According to the defendant, Mr. Hill wrote Cecil up for a violation of this rule through "Doc Holiday," and the Gangster Disciples were supposed to have held a meeting or a jury trial to determine Cecil's guilt, but Cecil failed to attend.

The defendant told the officers that Cecil always carried a .45 caliber handgun, although the defendant had not seen the gun when he was with Cecil on March 1st and 2nd. According to the defendant, Cecil also kept an AK-47 assault rifle with two magazines under a dresser at home, owned a sawed-off shotgun, and had access to a nine-millimeter handgun that belonged to Ms. Williams. The defendant told the officers that when the murders were discovered, Mr. Waddell asked Mr. Hill to call someone and find out what had happened and that Mr. Hill called "Doc Holiday" and asked him what had happened or who had committed the offenses.

Sergeant Max testified that prior to the defendant's March 4th interview the police had not been investigating the Gangster Disciples for involvement in the homicides. As a result of the interview, however, Sergeant Max was assigned to investigate possible gang involvement. Officers began following leads about the Gangster Disciples, and gang members were interviewed, as were others who were interested in providing information.

As part of this investigation, Sergeant Max spoke with Cedric Atkins, who had earlier reported hearing that Cecil had stolen $300,000 from a drug dealer. In addition, on March 7, 2008, Sergeant Max interviewed a confidential informant, who reported hearing that Cecil had stolen $50,000 in drug money from "Doc Holiday." The confidential informant was shown color copies of photographs taken from Cecil's home to verify his familiarity with the Gangster Disciples. The confidential informant identified Cecil and "Doc Holiday." Based on this identification, the officers discovered a telephone number for "Doc Holiday" and learned that he had been mentioned as the governor of the Gangster Disciples.

Members of the Gangster Disciples reportedly became angry upon learning that the gang had been implicated in the murders of women and children. On either Tuesday, March 4th or Wednesday, March 5th, after Priscilla Shaw—the mother of Cecil, the defendant, and Nicole—discovered that her front door had been kicked in by Gangster Disciples, Ms. Shaw, the defendant, Nicole, and Nicole's children moved in with their cousin, Sharhonda Lane, at her Gayle Street, Memphis home. While there, Nicole received calls on her cell phone, which appeared to have originated from the telephone inside her apartment. The defendant answered one of these calls and told Nicole that the caller sounded like a man disguising his

voice. Becoming "terrified," Nicole went to the police department. A short time later a marked police car, assigned to protect the house, arrived at the scene.

When the defendant learned that the police had arrived outside, he became agitated and "frantic." He said that the officers were there to get him, that the police were trying to "pin" the offenses on him, and that he was not going back to jail for something he did not do. They should "just bury [him] with [his] brother," he declared. The defendant grabbed a gun belonging to Mr. Waddell and pointed it at his own head.

Ms. Lane went outside and told the two officers that the defendant was threatening to commit suicide if they entered the house. One of the officers—Officer Laneeze Stepney—asked Ms. Lane to call the defendant on her cell phone. She did, and Officer Stepney spoke with the defendant for between five and seven minutes and convinced him to allow the officers to enter the house. During this time, the defendant told Officer Stepney, "[E]verybody think[s] I did it. I've been all on the news and the police saying I did it...." Shortly after he entered the residence, Officer Stepney was able to retrieve the gun and attempted to calm the defendant, who was acting "real nervous like he had a lot on his mind." The officers told the defendant that they were not there to arrest him but were there to place him and his family in protective custody. The defendant and his family were moved from the Gayle Street home into a safe house under police protective custody, and the investigation proceeded.

During this time, the surviving children remained hospitalized at LeBonheur Children's Hospital. Dr. Michael Muhlbauer, an expert in the field of adult and pediatric neurosurgery, testified that he performed surgery on C.J., Cedrick, and Ceniyah on March 3, 2008. Dr. Muhlbauer testified that when C.J. arrived at the hospital, he was moaning but was awake, lucid, and able to follow commands. C.J. had trauma and swelling to his forehead, part of a steak knife sticking out of his head, and a six-to-seven-inch laceration in his scalp that extended down his forehead. C.J.'s skull was severely fractured, and large pieces of his skull had been driven inward with a blunt force object. C.J. also had either a "glancing" stab wound or two separate stab wounds on the back of his arm and chest, a superficial laceration across his neck, a laceration on his right hand, and a laceration on his left thumb. Dr. Muhlbauer said that without medical intervention C.J. would not have survived the injuries he sustained.

Dr. Muhlbauer testified that Cedrick exhibited significant facial trauma and was "essentially semicomatose" when he arrived at the hospital. Cedrick had sustained injuries that were, in Dr. Muhlbauer's opinion, consistent with having been beaten with boards, including multiple fractures to his face, mid-face, and the lower portion of his skull, a fractured nose which had been pushed inward, and a small skull fracture with bruising on the back of his brain. In addition, Cedrick sustained stab wounds to one eye, his forehead, and his neck. Dr. Muhlbauer testified that Cedrick would not have survived without medical intervention.

Dr. Muhlbauer testified that Ceniyah arrived at the hospital with significant head trauma, which included a large cut in her scalp that exposed her bone. The right side of Ceniyah's skull had been pushed or crushed in with a blunt object, resulting in an "open-depressed skull fracture." A CT scan revealed that the covering of Ceniyah's brain was "probably cut" and that her brain was mildly bruised. Dr. Muhlbauer testified that Ceniyah's injuries were consistent with being struck with boards. She also had stab wounds to her left lower extremity. Dr. Muhlbauer said that absent medical intervention, Ceniyah would not have survived these injuries.

Deputy Director Armstrong decided to have an officer attempt to speak with C.J. early in the investigation because of the possibility that C.J. might die. The police considered C.J. very important to the investigation because he was familiar with all of his father's associates. On March 5th, two days after they had undergone surgery, then Sergeant (now Lieutenant) Caroline Mason of the Homicide Bureau was assigned

to LeBonheur Children's Hospital and instructed to assess the surviving children and determine what information they could provide. She attempted to interview C.J. that same day, but she found him "in and out" of consciousness, cursing, "talking crazy," and screaming out names, including "Cassandra" and "Roderick." Officers investigated C.J.'s statements and learned that Ms. Williams had a sister named Cassandra, but after further investigation they concluded that she was "obvious[ly]" not involved in the crimes. Lieutenant Davidson said that officers continued to investigate any of C.J.'s statements that made sense. At some point, officers decided to send Pat Lewis of the Child Advocacy Center to the hospital with Lieutenant Mason to talk to C.J.

On March 7, 2008, officers received a telephone call from a nurse at the hospital informing them that C.J. was awake and rational and that the police needed to come talk to him. During the ensuing interview, C.J. reported that "Uncle Junior"—the defendant—was the person responsible for killing C.J.'s parents and their friends and for stabbing and attacking him and his siblings.

Lieutenant Mason called Deputy Director Armstrong and reported that C.J. had implicated the defendant as the perpetrator of the crimes. He instructed her not to tell anyone what she had learned until he had a chance to listen to the tape recording of C.J.'s identification. After listening to the tape, Deputy Director Armstrong ordered the defendant transported from the safe house to the Homicide Bureau, and he assigned Lieutenant Mason and Sergeant Max to interview him.

The defendant, who was under arrest at that time, was advised of his rights, signed a written waiver, and agreed to speak with the officers. Lieutenant Mason told the defendant that they wanted to clear up some things and determine whether he had any information to add to what he had provided in his March 4th interview. She asked the defendant whether he had any gang affiliation, and he replied that he was a Crip in prison. When she asked about his relationship with Cecil, the defendant stated that, on one occasion, Cecil had called the police and falsely reported that the defendant had committed a robbery.

Lieutenant Mason then asked the defendant to tell them again about what he did on March 1st and about the last time that he had seen Cecil alive. According to Lieutenant Mason, the defendant essentially repeated the account he had given during his March 4th interview, varying in only one or two respects. Specifically, he told them that he, Cecil, and Mr. Seals had gone to Mr. Hill's apartment so that Mr. Seals could retrieve a gun. He also told them that when Cecil introduced him to the men in the apartment where they had purchased marijuana, Cecil had referred to the defendant as his "bitch ass brother who just got out of prison." According to Lieutenant Mason, the defendant "frowned" when he recalled this introduction. After purchasing the marijuana, the defendant said that Cecil drove him to an apartment complex to pick up his son, who was not home, and then dropped the defendant off at Ms. Jones's apartment. The defendant maintained that he did not return with Cecil to the Lester Street home.

At some point, the defendant stopped talking to Lieutenant Mason and Sergeant Max. Deputy Director Armstrong, who had been observing the interview, decided to enter the room and continue the interview himself. Deputy Director Armstrong testified that he watched the defendant's body language as he talked to the defendant about how horrific the crimes were. He said the defendant seemed "really, really tight, like he was doing everything he could not to talk to me." According to Deputy Director Armstrong, the defendant gave one-or-two-word answers to questions and would not engage in open conversation. Deputy Director Armstrong said that "[m]ost of the time if I asked him a question, he would nod his head or shake his head. But you could tell he was doing everything he could not to engage me in an open conversation as to where we had open dialogue back and forth with each other."

Deputy Director Armstrong said that, when he entered the interview room, he knew that the defendant was very familiar with the criminal justice system and that the defendant had only recently been released from

prison. When Deputy Director Armstrong asked the defendant whether he believed in God and in heaven and hell, the defendant said that he did. Deputy Director Armstrong stated that the defendant was "struggling to try to maintain his composure" and at times during the interview leaned forward as if he wanted to make a statement but would then lean back. Deputy Director Armstrong said that he could tell the defendant was hiding something.

At one point, Deputy Director Armstrong allowed the defendant to grab his hands, attempting to convey to the defendant that he knew something was weighing heavily on the defendant's mind. Although it appeared to Deputy Director Armstrong as if the defendant were about to speak to him, the defendant refused to engage in conversation and asked to go to the restroom. Deputy Director Armstrong allowed him to go. When the interview resumed, Deputy Director Armstrong asked the defendant what his family called him, and the defendant replied, "Junior." He asked the defendant if anyone else in his family was referred to as "Junior," and the defendant said, "[N]o." In response to questions, the defendant also told Deputy Director Armstrong that no one else in his family looked like him and no one in the family had ever confused him with someone else in the family. When the defendant was asked whether a member of his family would be referring to him if the person used the name "Junior," the defendant said yes.

Deputy Director Armstrong then played the tape recording of C.J. stating that he had been stabbed by his "Uncle Junior." According to Deputy Director Armstrong, the defendant became visibly upset and appeared as if he were about to cry. The defendant then told Deputy Director Armstrong that he and Cecil went somewhere to get a gun, began arguing, and continued to argue during the drive back to Cecil's house. The defendant said that when they returned to Cecil's home, the argument escalated. When Cecil reached for a shotgun, the defendant began shooting, using both his gun and Ms. Williams's gun. The defendant said that he then attempted to "get rid" of the children because they had seen him. The defendant stated that he "stuck them," using the knives from the kitchen drawer.

According to Deputy Director Armstrong, the defendant began to cry and appeared as if "he had gotten the weight of the world off his shoulders. But it was almost like I'm defeated." Deputy Director Armstrong testified that when he began to question the defendant in greater detail about what had occurred in the house, using his knowledge of the crime scene to frame the questions, the defendant asked for an attorney, and the interview ceased. The defendant also asked to speak with his mother, Priscilla Shaw.

During the early morning hours of March 8th, officers went to the safe house where Ms. Shaw was in protective custody with other family members, informed her that the defendant wanted to see her, and drove her to the police department. When she arrived, she went into a room and spoke to the defendant. No one else was in the room with them. She took the defendant's hands and asked him what was happening. She asked if the police were "trying to put it on him." The defendant did not respond at first, but when he looked up, he told Ms. Shaw that he "did it." When she asked him, "why the babies," the defendant said they had seen him. He explained that he and Cecil had been arguing all day and that Cecil had a gun. Ms. Shaw asked the defendant if Cecil had pointed the gun. The defendant said that Cecil did not but was "just talking and swinging it." When Cecil put the gun down, the defendant said that he began shooting. The defendant said that he later rode a bicycle away from the scene to the home of his girlfriend, Ms. Jones. Ms. Shaw testified that she "asked him [why] the kids and he said they saw me. And I said but the baby, the baby. He didn't say nothing, just shook his head. And I got up and told him I love him and I left." The defendant told both Deputy Director Armstrong and his mother that he committed the offenses. He did not indicate that anyone else either assisted him or perpetrated the crimes.

3. Investigation and Testimony Corroborating the Defendant's Confessions

After C.J. identified the defendant as the lone perpetrator and the defendant admitted his guilt to Deputy Director Armstrong, the police investigation into gang involvement ended. The investigation turned to determining whether the crime scene evidence was consistent with and corroborative of the details of the defendant's admissions and his description of how the offenses were committed. Witness testimony at trial reflected the results of this investigation.

Officers located and seized C.J.'s yellow Magna bicycle, which the defendant admitted to riding away from the scene, in a shed behind Ms. Jones's Memphis residence. Although officers hoped to find blood from the victims on the bicycle, only genetic material from an unknown male was found on the bicycle. Neither the victims' blood nor the defendant's DNA was found on it.

Keaira Jones testified at trial that at 10:00 or 10:30 p.m. on March 1, 2008, the defendant and Cecil came to her home and that both appeared to be intoxicated. When she told them her mother was not home, Cecil wanted to leave, but the defendant left only after she allowed him to enter and search the apartment for her mother.

Keaira testified that the defendant returned between 3:00 and 4:30 a.m. She allowed him to enter the apartment, but she returned to her bedroom, closing the door. Approximately five minutes later, he knocked on her bedroom door and asked to talk to her. She was putting her son to sleep and told the defendant that she would speak to him shortly, but she fell asleep and never opened the door. Before falling asleep, she heard water running in the bathroom. Keaira was asleep when her mother came home, and the defendant and her mother left together the next morning. After they left, Keaira noticed bleach spots on the brown rug in the bathroom. She also noticed that a bottle of Clorox bleach was in the hallway and not stored in its usual place. Keaira denied arguing with the defendant about being home alone with her boyfriend.

Ms. Jones testified that she met the defendant through Nicole, with whom she had worked, and that she was aware that the defendant had moved in with Nicole after being released from jail. Ms. Jones testified that when she returned home at approximately 5:00 a.m on March 2nd, the defendant was lying in her bed, which surprised her because he knew she would be out with girlfriends. He told her that "ladies don't come in at five o'clock in the morning," and they went to sleep. They got up at 10:30 or 11:00 a.m. on March 2nd, and she testified that she dropped him off at Nicole's apartment.

On Monday, March 3rd, the defendant asked Ms. Jones to pick him up at Cecil's Lester Street home, but when she arrived, the street was blocked by ambulances, fire trucks, and police cars. The defendant was "kind of upset and shaking" and told her that something had happened to his brother. Ms. Jones testified that the defendant never told her that he knew what had occurred at Cecil's home. After learning that the defendant had been arrested, Ms. Jones called him and visited him in jail. A week or two after his arrest, she asked the defendant why he would not assist the police in their investigation, and he replied that "they got to figure it out." Ms. Jones testified that she had seen the defendant with a gun on one or two occasions, and she described the gun as having a "wheel" and being "blue with a little blue on it."

Willie Boyd Hill, Jr., Cecil's best friend, testified that he had visited Cecil's home on Lester Street on several occasions. Mr. Hill said that he knew "Doc Holiday," "Cato," "Dread," and Mr. Seals because he, Cecil, Mr. Seals and the other men were all members of the Gangster Disciples. He stated that the defendant was a member of the Crips gang.

Mr. Hill testified that on the evening of March 1, 2008, Mr. Seals, Cecil, and the defendant came to his Memphis apartment between 10:30 and 11:30 p.m. Mr. Seals, who had just been released from jail, came to retrieve a pistol he had left with Mr. Hill. The gun, Mr. Hill said, fired .380 caliber bullets, which were loaded by inserting a clip, and he added that the gun ejected shell casings. The parties stipulated at trial that

the gun Mr. Hill returned to Mr. Seals on March 1, 2008, was a P–232 Sig Sauer handgun, a .380 caliber pistol, which could hold up to eight rounds, consisting of a seven-round magazine and a single round in the chamber.

Mr. Hill testified that "Trell," another gang member, went outside to talk to Cecil while Mr. Seals was in Mr. Hill's apartment. Mr. Seals took the loaded gun and left with the defendant and Cecil. Mr. Hill did not see any of them again until the day the homicides were discovered.

Mr. Hill said that he learned of the homicides from Mr. Waddell, who called him on March 3rd and said that something had happened to Cecil's family. Mr. Hill went to the crime scene, and he recalled the defendant being there as well. Upon seeing Mr. Hill, the defendant asked Mr. Waddell why he had called the men who had committed the crimes. Mr. Hill testified that he told the police he had called "Cato" from the crime scene, stated, "[Y]a'll went too far," and asked him directly if he and "Doc Holiday" had something to do with the murders. "Cato" denied any involvement in the murders.

Mr. Hill acknowledged that he and Cecil had a "falling out" on the evening of Valentine's Day, less than a month before the murders. According to Mr. Hill, Cecil, Ms. Williams, Ms. Smith and he had gone out drinking at a club. Afterwards, they went to Mr. Hill's girlfriend's apartment, where Cecil and Ms. Smith began arguing. Mr. Hill testified that, when Ms. Smith ran upstairs into his girlfriend's apartment, Cecil followed her and began beating on the doors and windows and cursing both Ms. Smith and Mr. Hill's girlfriend. Mr. Hill's girlfriend called the police, and when they arrived, Cecil told them of marijuana inside the apartment. Cecil's report to the police angered Mr. Hill because Cecil knew that Mr. Hill also stayed at the apartment and that Gangster Disciples were not supposed to call the police on each other.

Mr. Hill testified that he told "Cato" what had happened and that "Cato," in turn, informed "Doc Holiday." "Doc Holiday," whom Mr. Hill described as the Gangster Disciples' "coordinator" over the Orange Mound area, asked Mr. Hill to explain to "Dread"—the chief of security over the area—what he had reported to "Cato." Later, Mr. Hill was summoned to an apartment on Dwight Street in Memphis, where he, "Doc," and "Dread" discussed the matter, and "Dread" told him to "write [Cecil] up."

Mr. Hill explained that a "write-up" is a disciplinary notice within the gang that results in punishment. Possible punishments for a write-up, he stated, include "[p]unches to the chest, punches to the lip, pumpkin head, three minutes to a DV" or "death violation." Generally, Mr. Hill explained that when a death violation is ordered, it applies only to the individual gang member and not to everyone associated with him. Mr. Hill denied writing Cecil up for a violation of gang rules. He also explained that if the Gangster Disciples had wanted to kill Cecil, they easily would have been able to get him alone and would not have waited until 2:00 a.m. Mr. Hill said that he had never heard of any gang murders involving innocent women and children, and he stated that if the Gangster Disciples had entered a home to kill someone, they would have been armed and would not have run out of bullets. Also, Mr. Hill said that "Dread" and "Doc" would not have harmed Cecil, with whom they were close friends.

Mr. Hill acknowledged that he had heard that "Cato" and "Doc" approached Cecil about his gang violation and that Cecil told them to "shove it" and would not accept the discipline. Mr. Hill also had heard that Cecil had hung up on "Doc" and that "Doc" had slept with Ms. Williams. Mr. Hill also agreed that he and Cecil, whom he described as "outspoken," had argued on occasions other than Valentine's Day 2008, and he said that Cecil and "Doc" had disagreed over drywall work that Cecil performed at "Doc's" apartment.

Mr. Hill testified that until mid-February 2008, the overseer or head of the Gangster Disciples in Memphis was Eric Brown, known as "Big Easy," and that Mr. Brown had been murdered. Mr. Hill was unaware until

his trial testimony that Vernon Motley, whom the police suspected of murdering Mr. Brown, was a member of the Traveling Vice Lords and that Mr. Motley's girlfriend, Tammy Randolph, was Cecil's first cousin.

Nevertheless, Mr. Hill denied being an active gang member at the time of the killings. He said, "None of us was participating in any gang meetings or nothing like that but we still had love for it." He testified that he had contacted the police and cooperated with them and had submitted both a hair and a DNA sample. He said that he did so because Cecil was his friend and Cecil's family was like his own family.

Stacey Young, a friend of Cecil's, testified that at approximately midnight on March 2, 2008, Cecil, the defendant, and Mr. Seals came to her home in Cecil's blue Lincoln. Cecil introduced the defendant to Ms. Young, and they talked "for a minute." Before the three men left, Cecil told Ms. Young that he would return after dropping off Mr. Seals and the defendant. When Ms. Young called Cecil about an hour later, at approximately 1:00 a.m., he told her that he had not "made it off Pendleton" and indicated he still planned to return, but he never did return.

Ms. Smith testified that she had never been a gang member, although Cecil and his friends were Gangster Disciples. She, too, described the Valentine's Day falling out between Cecil and Mr. Hill, and she confirmed that it originated when Cecil informed the police of the marijuana in Mr. Hill's girlfriend's apartment. Ms. Smith also described the dispute between Cecil and "Doc Holiday" over "Doc's" failure to pay Cecil for repair work he had done at "Doc's" apartment.

Ms. Smith also testified that she had seen Cecil, the defendant, and Mr. Seals at approximately 12:30 a.m. on March 2, 2008, at her Kimball Avenue apartment. When she went outside to talk with them, Cecil told her that he would return, but she told him not to come back. After Cecil left, she called him three times. The first time she called, at approximately 1:15 a.m., she spoke to him. The second time she called him, at approximately 1:30 a.m., he did not answer. But when she called him a third time at 2:00 a.m., they spoke. During this last telephone call, Ms. Smith testified that she heard Cecil and the defendant arguing and using profanity. Ms. Smith recounted her attempts to locate Cecil on March 2nd and 3rd and related that she called the police on the afternoon of March 3rd and waited outside the Lester Street home for them to arrive. Ms. Smith confirmed that her son, Cecil II, was one of the children killed in the house.

Charity Wright, an employee of Crickett Wireless, testified about Cecil's cell phone records and the calls he received on March 2, 2008. Ms. Wright testified that Ms. Smith called Cecil's number at 12:59 a.m. and that the call lasted seven minutes and ten seconds. Ms. Young called Cecil's number, through a possible three-way call, at 1:06 a.m., and the call lasted two minutes and ten seconds. Ms. Smith called again at 1:11 a.m., 1:25 a.m., and 1:30 a.m., but the calls were not answered. Ms. Smith called Cecil again at 1:37 a.m., and the call was answered, but it lasted only twenty-eight seconds. Ms. Wright said the next call came at 3:11 a.m. and went to voice mail.

Nicole testified that she was aware that Cecil and Mr. Hill had referred to themselves as Gangster Disciples, but she stated that they did not "mingle" on the streets with gangs or gang members. She was also aware that the defendant was a member of the Kitchen Crips. Nicole testified that the defendant moved in with her after his release from jail and that she had been too frightened of him to ask him to leave. Nicole explained that the defendant had held a "grudge" against his family for not visiting him more often while he was in jail, and she said that the defendant expressed his feelings about this grudge to her daily.

Nicole testified that Cecil and two of his children picked up the defendant from her apartment for a barbecue at Cecil's home in the early evening of March 1st. Nicole did not see the defendant again until approximately 10:00 or 11:00 a.m. the next morning, Sunday, March 2nd, when she saw him outside her apartment in Ms. Jones's car and saw the defendant and Ms. Jones having a "physical altercation" in the

front seat of Ms. Jones's car. According to Nicole, and contrary to Ms. Jones's testimony, the defendant left again with Ms. Jones without coming inside Nicole's apartment and did not return to Nicole's apartment until that evening.

Nicole said that she went to Cecil's house at approximately 6:30 p.m. on March 3rd with the defendant and her cousin Tammy Randolph. Ambulances, fire trucks, and police cars were already at the scene when they arrived, and the police would not allow her to enter the house. Nicole said she did not learn who had died and who had survived at that time. According to Nicole, the defendant instructed her not to talk to the media, explaining that they would likely blame him for the murders because of his criminal background. She also recalled the defendant becoming very angry when Mr. Hill and "Trell" were called to the scene, and she recalled the defendant telling her, while they were still at the scene, that he believed Mr. Hill and "Trell" had committed the homicides. Nicole described Cecil and the defendant as "gun fanatics." She said the defendant never told her that he was at Cecil's home at the time of the homicides or that he rode C.J.'s bicycle away from the scene.

Jessie Sr. testified that when he learned of the killings, he believed they were gang-related because Cecil had told him that he was attempting to leave the Gangster Disciples and was worried that they might harm him. Cecil had asked Jessie Sr. to move in with him, explaining that gang members respect the family of other gang members and would be unlikely to harm Cecil if Jessie Sr. were living with him. Although Jessie Sr. moved in with Cecil, he lived there only about a month because several of his own brothers warned him that he would likely be killed if he interfered in Cecil's situation with other gang members.

Jessie Sr. testified that Cecil and the defendant had a normal relationship, although it bothered the defendant when Cecil told others that the defendant had recently been released from jail. Jessie Sr. said that Cecil's children liked the defendant and that the defendant spoiled them with junk food. Jessie Sr. recalled seeing a gun on the counter at Cecil's home the evening the group gathered to watch the basketball game, which he later learned belonged to the defendant. Jessie Sr. described the gun as "kind of like a powder blue," stated that it was "a revolver, the kind with the thing that turn[s,]" and said that it was the type of gun that does not eject shell casings. Jessie Sr. recalled seeing Cecil move the gun out of reach, commenting that the children might mistake it for a toy. Jessie Sr. said Cecil told the defendant that he had moved his gun.

Jessie Sr. agreed that the defendant never told him what had happened to Cecil prior to the discovery of the bodies. However, he said that the defendant had called him a few days before trial and told him what he knew about what had occurred inside Cecil's house. Jessie Sr. provided no further details about what the defendant told him during this phone call.

Mr. Waddell testified that, on March 1, 2008, he and Cecil visited "Doc Holiday" during the day because "Doc Holiday" wanted Cecil to perform some maintenance work for him. According to Mr. Waddell, the defendant and Cecil were not arguing during the time he spent with them on March 1st. Mr. Waddell recalled seeing the defendant with a black and silver gun that evening, instead of the blue revolver the defendant ordinarily carried.

Two of the child victims also testified. C.J., the oldest surviving victim, was in fifth grade by the time of the trial. He had undergone many surgeries, according to his maternal grandmother, and additional surgeries would be required. C.J. testified that in the Lester Street house he shared a single bedroom with his brothers. He had slept on the top bunk bed and his brothers, Cedrick and Cemario, had slept on the bottom bunk. His older sister used the other bedroom, and his parents' bedroom was in the back of the house. C.J. recalled that, on the night of the attacks, he was watching television in his sister's room because the television in his room was not working. Hearing a gunshot, C.J. walked out of his sister's room and into

the hallway. C.J. recalled peeking into the living room and seeing "my Uncle Junior point a gun toward my daddy," who was not saying anything. C.J. testified that he saw "some smoke and sparks come out [of] the gun" and then looked "down on the ground" and "saw [a] dude on the floor[ ]," who was wearing a black shirt and black pants.

C.J. testified that when he heard another gunshot, he "peeked" through the door, walked into the hallway, and saw the defendant shooting at a woman who was on the arm of the couch. C.J. did not recognize the woman, but he recalled that she was telling the defendant that she loved him, but the defendant "just kept on shooting."

C.J. said that he then returned to his sister's room and sat down on the bed. Hearing footsteps coming toward the door, he turned and saw the defendant holding a "handheld knife," which C.J. described as the type that opens and closes. C.J. said that when the defendant cut him on his neck, he told the defendant that he loved him, but the defendant replied, "[N]o, you don't." C.J. then lay down on the bed, and Cecil II began crying. C.J. heard the defendant then say to Cecil II, "[D]on't worry about it, you ain't going to get hurt."

C.J. testified that he tried to retrieve the telephone from the hallway to call the police, but before he could do so, he saw the defendant's feet in the doorway and heard the defendant ask him what he was doing. When C.J. told the defendant that he was going to call the police, the defendant said he would kill C.J.'s parents and Cecil's friends if C.J. did so. C.J. recalled asking the defendant if he could use the bathroom and noticing that the defendant had a "kitchen knife" in his hand. C.J. recalled the defendant allowing him to go to the bathroom, but stated that the defendant "ma[d]e [him] put [his] head in the tub." When he had done so, the defendant tried to stab C.J. in the chest, but C.J. put his hand up to block the blow, and the knife went into his head instead.

C.J. recalled seeing his mother, Ms. Williams, in the doorway of the bathroom saying that she did not want to die. The defendant asked her for Cecil's cellphone and car keys, and Ms. Williams replied that the keys likely were in Cecil's car. C.J. recalled the defendant then saying to Ms. Williams, "sorry because I ain't let your husband or your husband's friends get away with it and the kids." Then C.J. heard what he described as a "huge fall on the ground."

C.J. testified that he next saw the defendant walking in the hallway with a garbage bag and another kitchen knife, going into C.J.'s sister's bedroom. C.J. heard someone yelling and heard the defendant saying "shut up." C.J. then heard Cemario ask to use the bathroom and saw blood dripping from Cemario's head onto the rim of the toilet seat. He said that Cemario asked the defendant if he could return to his room and the defendant said that he could. Next, C.J. said, the defendant went into the kitchen, grabbed another knife, and entered the bedroom of C.J. and his brothers. C.J. said he saw Cemario lying on the bed and the defendant stab Cemario, who then fell on the floor. C.J. said he heard "rambling" in the hallway near the laundry room, as if the defendant were attempting to move something out of the way. C.J. then fell asleep in the bathtub and heard nothing more that night.

C.J. testified that when he awoke, he saw firemen in his bedroom looking at Cemario. One of the firemen came into the bathroom and got C.J. out of the bathtub. C.J. was transported to the hospital by ambulance. C.J. said that no one was with the defendant during the attacks and that the defendant acted alone. By the time of trial, more than two years had passed since C.J. identified the defendant as the lone perpetrator of the crimes. During that time, C.J. had not wavered in his identification of the perpetrator.

However, C.J. also testified at trial that he had told "Ms. Pat" in a previous interview that on the same night that the "bad thing" happened, a woman named "Cassandra" knocked on the door and said that she needed

to use the bathroom. She and some other people, including a man wearing a mask with "[a] little bit of blood" on it, entered the house. C.J. had never seen the man before, but he recalled Cecil referring to the man as "Roderick." C.J. did not recall who allowed "Roderick" to enter the house, although he acknowledged that he had previously told "Ms. Pat" that Cecil allowed "Roderick" to enter the house and that he was mad at Cecil for doing so. C.J. testified that "Roderick" said something to Cecil about the gang and also told Cecil, "[Y]ou got too big, boy." According to C.J., "Roderick" fired a gun at Cecil and said, "[N]ever stop playing with the gang boy, ... you never know what would happen, boy."

On redirect examination, C.J. again identified the defendant as the person who stabbed him in the head, shot his parents and their friends, and hurt his brothers and baby sister.

On recross-examination, C.J. testified that he saw a fight in the living room between Cecil and the man in the mask and again maintained that the man was shooting at Cecil. He also agreed that he had met with "Ms. Caroline" and "Ms. Pat" at "Ms. Pat's" office, and had said, when they asked him how he knew some of the things he told them, that his "granny" had told him.

Cedrick, who had been five years old at the time of the assaults and murders, testified as well and also identified the defendant as his assailant. By the time of trial, Cedrick was eight years old and in the third grade. Cedrick recalled living on Lester Street with his family. Cedrick said that the defendant had stabbed him on the nose, forehead, and wrist and that no one else was with the defendant.

Cedrick testified that the attacks occurred at night but before he had eaten dinner. He did not recall hearing gunshots that night and also did not recall seeing the defendant shoot anyone. He said that no one had told him that the defendant shot anyone. Cedrick testified that the defendant got the knife he used to stab them from his car, but he could not remember the color of the defendant's car. Cedrick said that, although he had not seen the defendant stabbing his parents, he recalled that his parents and their friends were stabbed. Cedrick said that when his parents were killed, all of the children, other than one of his brothers and the baby, were locked in his sister's bedroom. Cedrick stated that his brother had told him that Ms. Williams was injured while she was in the living room changing the baby's diaper.

Cedrick testified that he heard Ms. Smith on the telephone calling the police, and he recalled that Nicole, whom he referred to as "Auntie Foxy," was also present when they were attacked. Cedrick acknowledged previously telling "Ms. Pat" and C.J. that his father never should have opened the door. Cedrick explained that a fight began after his father opened the door, and he remembered many people fighting that night, and specifically recalled a man, whom he did not know, fighting with his father and his father's friends. Cedrick also remembered C.J. sneaking out of the house after the defendant had stabbed him and riding on his bicycle to his grandmother's home. Cedrick testified that he had sneaked up on his "Uncle Jessie," got on his own bike, and also rode away to his grandmother's home. Cedrick recalled that when he and C.J. left, everyone was still alive in the house and were talking, singing, and having fun.

On redirect examination, Cedrick said that he had been in his sister's room when the defendant stabbed him, and he also recalled telling "Ms. Pat" that the defendant stabbed him. On recross-examination, Cedrick testified that he had talked to "Ms. Pat" after he had been living with his family for a period of time and after he had listened to others discussing the homicides and attacks.

4. The State's Expert Testimony

The prosecution's proof also included the testimony of a medical examiner and forensic experts in hair and DNA analysis, as well as that of an expert in firearms identification. Dr. Lisa Funte, a Shelby County

medical examiner and expert in forensic pathology, testified regarding the victims' autopsies, three of which she had performed herself and three of which were performed by Dr. Miguel Laboy, another medical examiner in the Shelby County Medical Examiner's Office, who did not testify.

Dr. Funte testified that Mr. Seals, whose autopsy had been performed by Dr. Laboy, died as a result of multiple gunshot wounds, including: one to his mouth, which fractured some of his teeth and his jaw and then continued into his neck, fracturing the first and second cervical vertebrae; one to his midline upper chest area, in which the bullet injured his left lung and exited from his back; and one to the side of his chest near his right armpit, in which the bullet traveled through his right chest cavity, injured his right lung, and penetrated into the muscles of his back.

The toxicology report showed that Mr. Seals had marijuana and ethanol in his system. However, Dr. Funte explained that ethanol is produced as the human body decomposes, so she was unable to determine whether the ethanol resulted from alcohol consumption or decomposition, or both.

Dr. Funte testified that Ms. Williams, whose autopsy she had performed, sustained five gunshot wounds: one to the left side of her head that resulted in injuries to the skull and brain; one to the right side of her chest, which entered near her breast and exited on the left side of her back, causing injuries to her lungs and vertebral column; one to her left leg, which injured her muscles, tibia, and fibula; one to her right thigh, which injured the soft tissue and muscle; and one to the left side of her abdomen, which injured soft tissue and muscle. Ms. Williams died of the multiple gunshot wounds she sustained. Ms. Williams's toxicology report indicated the presence of ethanol, but Dr. Funte again could not determine if the ethanol stemmed from alcohol consumption or decomposition, or both.

Dr. Funte testified that Ms. Roberson, whose autopsy she performed, also died of multiple gunshot wounds. Ms. Roberson had four gunshot wounds: one to her right thigh, which injured the soft tissue and muscle of her thigh, traveled through the femoral vein, and continued through the soft tissue and muscle on her right side toward her back; one to her left knee, which injured soft tissue and muscle; one to her left calf, which injured soft tissue and muscle; and one to her left thigh, which again injured soft tissue and muscle. Dr. Funte testified that, judging from the wound pattern on Ms. Roberson's legs and the wound pattern on her jeans, she had been wearing the jeans when she was shot and her clothes had been rearranged later. Dr. Funte testified that the gunshot injury to the femoral vein in Ms. Roberson's right thigh would have resulted in a great deal of blood loss but would not have caused immediate death. Dr. Funte testified that Ms. Roberson could have died as quickly as five or ten minutes after receiving the wound or survived up to twenty or thirty minutes, depending on the circumstances. According to the toxicology report, no drugs or alcohol were present in Ms. Roberson's system.

Dr. Funte testified that Cecil, whose autopsy was performed by Dr. Laboy, also died of multiple gunshot wounds. Cecil sustained eight gunshot wounds: one to his head, which fractured his jaw; one to his neck, in which the bullet traveled through the soft tissues and muscles of his neck before fracturing and penetrating his trachea and larynx; one to his chest, in which the bullet traveled through muscle and soft tissue and into his back; one to his right thigh, in which the bullet perforated through the thigh, injuring soft tissue and muscle; two to his left thigh, in which the bullets injured soft tissue and muscle; one to his left leg, in which the bullet injured soft tissue; and one to his left foot. The toxicology report indicated Cecil also had ethanol in his system, although the source, again, could not be determined. Dr. Funte testified that fiber found in the area around the entry of the gunshot wound to Cecil's head was consistent with the shooter placing a fiber-filled pillow over Cecil's face and firing the gun through the pillow.

Dr. Funte also testified that a black hair and a white hair were collected from Ms. Williams's hand and that hairs were collected from Ms. Roberson's back, buttocks, and right thigh. She further stated that a green

substance that appeared to be marijuana was collected from Cecil's hand, the color of Cecil's skin beneath the green substance was tan or brown, and his hand below the substance was stained with blood.

Dr. Funte also performed the autopsy on one of the child victims, two-year-old Cecil II. She testified that Cecil II died of multiple sharp force injuries, including multiple incised and stab wounds to his head, torso, and extremities. He sustained seven stab wounds that penetrated and fractured his skull and injured the right middle meningeal artery, causing epidural hemorrhage and edema of the brain with herniation. Among other injuries, Cecil II had a puncture-style stab wound to the right side of his head, two puncture-style stab wounds to his left cheek, two incised wounds on the left side of his face near his eye, an incised wound on his right ear, beginning at the top of his ear and continuing along the inside of the ear, a group of incised wounds of varying lengths and an incised wound leading to a stab wound on his torso, multiple incised and stab wounds on his back, and a mixture of sharp force and blunt force injuries on the left side of his torso. Dr. Funte said that incised wounds on Cecil II's back and left wrist were parallel and equally spaced, which indicated that the wounds were inflicted with a serrated knife blade. Cecil II also had an incised wound and a puncture stab wound on the base of his right thumb.

Dr. Funte also identified abrasions and contusions on Cecil II's body, which she described as blunt force injuries. Cecil II had abrasions on the right side of his head, cheek, upper and lower lips, and mouth. Dr. Funte testified that an abrasion on his head almost formed the outline of a rectangle and was consistent with the perpetrator striking Cecil II on the side of the head with a board. Cecil II also had a combination of an abrasion and a bruise on the right side of his neck behind his ear and bruises on the left side of his neck and on his elbow.

Dr. Funte also noted discoloration on Cecil II's right eyelid and cheek, which could have been caused by impact force to his eye or could have been related to the skull fractures and impact to the right side of his head. She stated that the nature of Cecil II's injuries suggested that he attempted to fend off his attacker. She also stated that the wound to his skull would have been fatal without medical intervention. Had Cecil II sustained only that wound, he could have survived from as little as several minutes to as long as one day. Had he received medical treatment within an hour of receiving his injuries, he could possibly have survived, although it was not "necessarily probable."

Dr. Funte testified that four-year-old Cemario, whose autopsy Dr. Laboy performed, also died of blunt force and sharp force injuries. She said Cemario had blunt force trauma to his head, with lacerations and bruises, multiple linear depressed fractures of the calvarium and the base of his skull, deep scalp and subarachnoid hemorrhage, and multiple contusions to his brain. Dr. Funte also noted areas of abrasions and lacerations on Cemario's head, as well as an incised wound above his left ear that tore part of his scalp away from his skull.

In addition, Cemario had incised wounds to his head, neck, and right hand. A stab wound to his chest went all the way through his body, injuring his left lung and hemidiaphragm, as well as his stomach, spleen, and liver. Cemario also sustained linear abrasions and bruises on his left arm, abrasions on his forehead, an abrasion and bruising on his right ear, a gaping incised wound to his neck, abrasions on his right arm, and an incised wound on his ring finger, which was consistent with Cemario having attempted to defend himself by holding up his hand or grabbing the knife.

Dr. Funte testified that the blunt force trauma to Cemario's head alone would have resulted in his death without medical intervention. Had Cemario sustained only this injury, he could have survived from as little as several minutes to as much as many hours, although the blow likely would have rendered him unconscious. The stab wound which passed all the way through Cemario's body also would have resulted in death, Dr. Funte explained.

Dr. Funte testified that Cecil II had incised wounds and that Cemario had lacerations. She said the majority of the incised wounds were superficial and not very deep. She also said the wounds could have resulted from a slashing cut from a knife. Dr. Funte was not able to determine whether a serrated or smooth-edged knife was used in each injury. She identified two injuries that had a unique pattern of equally spaced incised wounds, which was indicative of a serrated blade. Dr. Funte said that while a serrated blade may not always leave such a pattern, it will do so if dragged across the skin.

Linda Otterstatter, a physical scientist forensic examiner in the Trace Evidence Unit of the FBI laboratory in Quantico, Virginia, testified regarding the analysis of hair samples removed from the crime scene. She had compared debris recovered from the crime scene with hair samples from Cecil, Ms. Roberson, Ms. Williams, Cemario, Cecil II, the defendant, and Mr. Hill. No head hair samples were submitted for Mr. Seals, C.J., Cedrick, or Ceniyah. Head hairs recovered from Ms. Roberson's back were consistent with the samples from Ms. Roberson and Cecil II. Three other hairs recovered from Ms. Roberson's back were identified as head hairs, and two of them had Caucasian characteristics, while the third had Mongoloid characteristics. These three head hairs were dissimilar microscopically to the known head hair samples and were submitted for mitochondrial DNA analysis.

Ms. Otterstatter testified that a hair recovered from Ms. Williams's right hand was a head hair similar to that of Ms. Williams, and as a result, was not submitted for further analysis. Although a body hair fragment discovered on the left side of Cemario's left hand was not suitable for microscopic comparison, it was submitted for mitochondrial DNA analysis. Hairs recovered from the northwest area of the bedroom were determined to be head hairs similar to those of Cemario and thus were not submitted for further analysis.

Deborah Polanskey, a forensic examiner in the mitochondrial DNA unit of the FBI laboratory, testified that mitochondrial DNA is inherited from the mother alone and is not individually unique, as siblings with the same mother share the same mitochondrial DNA profile. Hair has thousands of copies of mitochondrial DNA, Ms. Polanskey stated; therefore, mitochondrial DNA analysis of hair is highly effective.

With regard to the Lester Street homicides, Ms. Polanskey conducted mitochondrial DNA testing on four hairs: the three head hairs recovered from Ms. Roberson's body—two with Caucasian characteristics and one with Mongoloid characteristics—and the fragment of a body hair recovered from Cemario's left hand. She received known hair samples from Cecil, Ms. Roberson, Mr. Seals, the defendant, and Mr. Hill, as well as Ms. Smith, the mother of Cecil II, and Ms. Williams, the mother of C.J., Cedrick, Cemario, and Ceniyah.

The two hairs with Caucasian characteristics had the same mitochondrial DNA sequence, but this sequence differed from all the known samples Ms. Polanskey received. The hair with Mongoloid characteristics lacked sufficient mitochondrial DNA to obtain a sequence. The mitochondrial DNA sequence of the hair found on Cemario's hand was concordant with Ms. Williams's mitochondrial DNA sequence, meaning that the hair could have come from Ms. Williams, C.J., Cedrick, Cemario, or Ceniyah. Ms. Polanskey determined conclusively that the defendant could not have been the source of the hair.

Special Agent Lawrence James, a forensic scientist for the Tennessee Bureau of Investigation ("TBI"), testified as an expert in forensic serology and DNA analysis. He analyzed numerous blood samples taken from the house and determined that each of them matched to one of the victims and none matched the defendant. A partial DNA profile he obtained from a bullet fragment recovered from the sofa in the living room was consistent with a male, and Cecil could not be excluded as a contributor. He swabbed all of the green beads recovered at the scene, but the sample produced only a partial profile, consistent with male DNA that did not match that of any of the victims or the defendant.

Special Agent James testified on cross-examination that his analysis of the defendant's pants, which were seized following his arrest, revealed only blood matching the defendant. He found no blood of any of the victims on the defendant's clothing. He also did not find the defendant's DNA on the knife blades, the knife handles, the victims' bodies, the wood boards, the glass, the pillows, the shotgun, the shell casings, or the shoes. He testified that analysis of the scrapings from Ms. Roberson's nails yielded a DNA profile of an unknown female.

TBI Special Agent Forensic Scientist Cervinia Braswell, an expert in firearms and firearms identification, testified regarding evidence found at the crime scene and the nature of the firearms used in the crime. She identified the bullets recovered from the victims and the scene. With respect to Cecil, she explained that a nine-millimeter bullet was recovered from his left thigh, a .380 caliber bullet was recovered from Cecil's right scapula, and a .380 caliber auto bullet jacket fragment was recovered from his oral cavity, which had originally been part of the .380 caliber bullet recovered from his neck. A nine-millimeter bullet jacket fragment was also recovered from Cecil's clothing. A nine-millimeter bullet jacket and fragments were recovered from Ms. Roberson's left thigh. Another nine-millimeter bullet jacket and fragments were recovered from Ms. Williams's left calf muscle. A nine-millimeter bullet jacket and fragments were also recovered from Mr. Seals's C-1 vertebrae, in addition to the .380 caliber bullet recovered from the left side of his back.

According to Special Agent Braswell, a .380 caliber firearm typically holds eight cartridges, with seven cartridges in the magazine and one cartridge in the gun. A nine-millimeter firearm typically holds thirteen rounds, with twelve rounds in the magazine and one round in the gun. Special Agent Braswell testified that she analyzed the eight .380 caliber cartridge casings and the thirteen nine-millimeter cartridge casings recovered from the Lester Street crime scene. From her analysis, she concluded that all of the .380 caliber bullets were fired from the same gun and that the nine-millimeter casings also were all fired from the same nine-millimeter firearm. Special Agent Braswell testified that a single person could have fired all eight bullets from the .380 caliber firearm and all thirteen bullets from the nine-millimeter firearm in a short period of time. However, on cross-examination, Special Agent Braswell acknowledged that she had no means of determining whether one shooter or multiple shooters had perpetrated the Lester Street homicides.

Special Agent Braswell acknowledged that a nine-millimeter firearm is capable of firing .380 caliber rounds, but she opined that the .380 caliber casings recovered from the crime scene were not fired from a nine-millimeter firearm. She explained that a .380 caliber cartridge casing is shorter and has a slightly smaller diameter, causing the casing to bulge when it is fired from a nine-millimeter firearm. Special Agent Braswell found no bulging on the .380 caliber casings recovered at the Lester Street crime scene. She also acknowledged that some nine-millimeter firearms hold only ten cartridges in a magazine and one cartridge in the chamber. She reiterated, however, that the standard nine-millimeter weapon holds twelve rounds in the magazine and one round in the chamber.

Special Agent Braswell found no gunshot residue on the clothing of Cecil, Ms. Roberson, or Ms. Williams. The lack of gunshot residue, she explained, meant either that the shooter was far enough away from the victims when the gun was fired that it left no residue, or that an object, such as a pillow, had been placed between the gun and the victim. Although Special Agent Braswell discovered gunpowder particles on the bullet holes in Mr. Seals's shirt, without testing the gun used, she could only estimate the distance between the shooter and Mr. Seals, stating that the gun was at least two feet and no more than four feet away from Mr. Seals when fired. She was unable to determine which of the bullets recovered from Mr. Seals's body produced the residue.

5. The Defense Proof

After the prosecution rested its case, the defense presented the following proof. Cedric Atkins, whom Sergeant Max had interviewed when the police suspected gang involvement, testified that approximately a week and a half before the murders, he met Cecil and briefly talked with him in a hotel room. According to Mr. Atkins, Cecil said that he owed about $300,000 to the "mob" and advised Mr. Atkins to avoid owing people money. Mr. Atkins understood the "mob" as a reference to a group of people who have money and respect and sell narcotics or "whatever." Mr. Atkins said that after Cecil's murder, he relayed his conversation with Cecil to an officer of the Memphis Police Department to whom he had previously provided information. Mr. Atkins said that he answered the officer's questions truthfully, never demanded money from the officer or anyone else, and was not promised anything in exchange for the information. On cross-examination, Mr. Atkins stated that he did not recall asking the police officer what was "in it for [him]." About a week later, the officer contacted Mr. Atkins and informed him that the information was not useful. Mr. Atkins acknowledged that he had been convicted of theft during the year prior to the defendant's trial, that he had not wanted to testify at trial, and had appeared at trial pursuant to a subpoena.

Sergeant Joseph Stark testified that he interviewed Mr. Waddell on March 4, 2008, at approximately 8:00 p.m. According to Sergeant Stark, Mr. Waddell stated that "Frank"—Mr. Hill—had told him that the victims were tortured and that Cecil's fingers were severed. Sergeant Stark recalled Mr. Waddell telling him about a "falling out" between Cecil and "Doc" and about Cecil and "Frank" being members of the Gangster Disciples.

Thirty-four-year-old Markel Vester, known as "Cato," testified that he had joined the Gangster Disciples in 1997 or 1998 when he was twenty-five or twenty-six years old. Mr. Vester knew "Doc Holiday" and "Frank" but did not know whether "Doc Holiday" held any rank in the Gangster Disciples in March of 2008. He confirmed that Cecil had been a member of the Gangster Disciples and that Cecil performed maintenance duties at the apartment complex where Mr. Vester lived. Mr. Vester testified that "Frank"—Mr. Hill—had called him and told him about what had happened to Cecil and the other victims. Mr. Vester recalled seeing Cecil approximately two or three weeks before his murder, but Mr. Vester could not recall whether he had spoken to Cecil by phone on March 1st or March 2nd, although he also said that Cecil had not called him on the Saturday or Sunday prior to his death. Mr. Vester confirmed that he had cell phone service through Cricket Wireless in March 2008, and he provided his cell phone number.

Ms. Wright, the Cricket Wireless employee who had previously testified for the prosecution, returned to the stand to clarify her prior testimony about Cecil's phone records. Cecil's phone records showed that Ms. Smith called him at 1:30 a.m. on March 2, 2008, and that the call lasted fifty-nine seconds but was not answered. The records also showed Cecil receiving another call from Ms. Smith at 1:37 a.m. on March 2, 2008, and that this second call lasted approximately fifty-six seconds but either was not answered or went to voicemail. Ms. Wright stated that she had been mistaken if she had previously testified that those calls were answered.

Ms. Wright further testified that Cecil had called Mr. Vester's ("Cato's") cell phone number at 12:38 a.m. on March 2nd, with the call lasting seventeen seconds. Ms. Wright said that this call could have been answered, but she had no means of determining whether a conversation actually occurred. Records showed that Cecil called Mr. Vester's number again at 12:39 a.m. and that this second call lasted forty-four seconds. Ms. Wright stated that she could not determine whether the call was answered.

William Carroll, an employee of AT & T, testified that an eight-second call had been made at 11:35 p.m. on March 1, 2008, from the land line telephone inside the Lester Street residence to Mr. Waddell's number. Mr. Carroll was unable to determine whether the call was answered.

Dr. Nancy Aldridge, a psychotherapist and expert in the forensic evaluation of children, explained the protocol for conducting a forensic interview of a child and expressed her concerns about the manner in which C.J. and Cedrick's interviews were conducted. Her concerns included the fact that C.J. was interviewed shortly after being discovered, was interviewed on four or five occasions, and gave different statements as to what had occurred. She also expressed concern that the formal forensic interviews of the children did not occur until August 13, 2008, more than five months after the incident, explaining that, given the time that had passed, the children possibly had been exposed to information other family members had about the crimes.

Dr. Aldridge testified that C.J.'s initial account of the incident, in which he named "Cassandra," was "possibly" reliable, because persons observing the interview described C.J. as appearing to relive the trauma as he gave the statement. Additionally, Dr. Aldridge noted that the initial interviewers had appropriately used open-ended questions. She further explained that, generally, initial interviews of children produce more accurate information about a traumatic event because a child's memory becomes less clear with the passage of time and repetitive interviews, and may become contaminated by information learned from others. Dr. Aldridge also explained that if a child is questioned after having already provided an answer, the child may conclude that the initial answer was unacceptable and provide a different answer.

Dr. Aldridge also emphasized the particular importance of recording, from the beginning, all statements of a child who has been severely traumatized. Recording, she explained, preserves a record of the sequence of the child's memory and how each memory resurfaced. Dr. Aldridge testified that, although some of the records she reviewed in this case referenced interviews of C.J., no transcripts or recordings of those interviews were available, so she was not able to determine who had spoken to C.J., what questions had been asked, or what information C.J. had given prior to the interviews that were actually recorded.

Dr. Aldridge also expressed concerns about C.J.'s and Cedrick's trial testimony, stating, "The concern that I had for these children is they seemed to be very, very clear as to what questions were going to be asked each one of them and what their answers were. So they were very prepared for the testimony." Dr. Aldridge said that, although the reliability of C.J.'s testimony was an issue for the jury, she questioned its reliability because C.J. seemed to agree with whatever question was asked of him. She also noted that, given the two-and-one-half-year period that had elapsed between the crimes and the trial, there was potential for contamination of the children's memories.

On cross-examination, Dr. Aldridge acknowledged that she did not know whether C.J.'s identification of the defendant as the perpetrator was wrong, but she reiterated that she had "concerns."

The defendant testified as the final witness at trial. He provided a detailed account of his activities on March 1, 2008, which was largely consistent with his initial statement to the police. At trial, however, the defendant placed the blame for the murders on unknown assailants and said he had been hiding under the bed in the master bedroom while the crimes were committed. In particular, the defendant recounted going to Cecil's home to watch a basketball game on Saturday, March 1, 2008, along with Ms. Williams, the children, Jessie Sr., Mr. Waddell, and Mr. Seals, who arrived a little later than everyone else. The defendant said that Jessie Sr. had left early in the evening, but the defendant had remained at Cecil's home all evening, grilling, drinking, and smoking with Cecil and Mr. Seals.

The defendant testified that sometime after dark, he, Mr. Seals, and Cecil left in Cecil's vehicle, first visiting "Frank"—Mr. Hill—at the Barclay Apartments so that Mr. Seals could retrieve his gun. The defendant testified that Cecil, Mr. Seals, and "Frank" were members of the Gangster Disciples and that he had joined the Kitchen Crips in the 1990s. When they arrived at Mr. Hill's apartment complex, the defendant stayed in the car, but Mr. Seals and Cecil exited the vehicle. As they walked toward Mr. Hill's

apartment, a man walked down the steps and talked to Mr. Seals and Cecil about the incident that had occurred on February 14th, when Cecil told the police about the marijuana in Mr. Hill's girlfriend's apartment. Mr. Seals eventually proceeded to Mr. Hill's apartment alone, but Cecil remained in the parking lot, arguing with the man who had walked down the steps to talk. The defendant said Cecil often argued with others. The defendant said that the man was attempting to calm Cecil, because Cecil and Mr. Hill were "into it," and Cecil believed that the man should be on his side. Mr. Seals was aware of Cecil's argument with Mr. Hill, the defendant said, and that was why Mr. Seals had gone alone into the apartment to retrieve the gun.

The defendant testified that, when the man attempted to hug Cecil, Cecil asked why, pulled up his shirt, and told the man that he did not have anything on him. Cecil told the man that he wanted to fight Mr. Hill and instructed the man to go get Mr. Hill. When the man instead got into his black Impala, Cecil yelled, "y'all know where I stay at," before returning to his own car. The defendant said that he and Cecil laughed and that he told Cecil that Mr. Hill had tried to call him. When Mr. Hill called again, Cecil answered; however, the caller was actually Mr. Seals, who was asking where they were. Cecil told Mr. Seals they were waiting on him. Cecil also told the defendant that he had "punk'd" the man who had tried to hug him. The defendant told Cecil to go inside and get Mr. Seals, but Cecil refused, so the defendant went to Mr. Hill's apartment. Inside, the defendant saw Mr. Hill, "Trell," "Tammy," and a man whom the defendant did not know. The defendant told Mr. Seals that he and Cecil were ready to leave, and Mr. Seals and the defendant left Mr. Hill's apartment.

The defendant said that he, Cecil, and Mr. Seals then went to Sheila Jones's home. The defendant and Cecil went inside, looking for Sheila, but she was not home. The defendant stated that he caught Keaira's boyfriend in one of the bedrooms with his pants halfway down. When Keaira began cursing him, they left, going next to the home of "Marilyn," the maternal grandmother of the defendant's son, where they stayed for less than five minutes, because the defendant's son was not there.

The defendant testified that they next went to an apartment complex near GE Patterson Church to pick up Ms. Roberson, Mr. Seals's girlfriend. Ms. Roberson asked whether they had any marijuana, and Cecil said that he knew where to purchase some, so they went to an apartment at Kimball Cabanas, where they purchased $45 worth of marijuana. Cecil got out of the car and then returned, telling the defendant that he wanted to introduce him to "his folks." According to the defendant, this term referred to members of the Gangster Disciples. The defendant testified that four people were inside the apartment, and the defendant and Cecil remained for approximately five minutes. As they were leaving, they ran into Ms. Smith in the parking lot, and Cecil talked to her while the defendant proceeded to the car. The defendant later yelled her name, and Ms. Smith came over to the vehicle and spoke to everyone inside. Afterwards, she and Cecil talked in person for five minutes more, before Cecil returned to his car and called Ms. Smith on his cell phone, and drove away.

After leaving the apartment complex, they drove to another woman's home and stayed for thirty or forty minutes, before returning to Cecil's house. According to the defendant, he, Cecil, Mr. Seals, Ms. Williams, and Ms. Roberson were together in the living room, with Ms. Williams drinking a wine cooler, and Ms. Roberson preparing a marijuana cigarette. Cecil asked Ms. Williams to put clean sheets on the bed in the master bedroom, explaining that he planned to allow Mr. Seals and Ms. Roberson to use the master bedroom, because Mr. Seals had just been released from jail.

The defendant said that he volunteered to change the sheets and that he was in the master bedroom, with a quilt in his hand, when he heard two or three gunshots. The defendant acknowledged that he was carrying a blue .44 caliber handgun at the time, but when he heard screaming, he hid beneath the bed. The defendant

claimed to have heard only a few shots at first, followed by more shots just seconds later. The defendant said he did not know whether the shots were fired from the same gun or from different guns.

The defendant said that he remained hidden beneath the bed for several minutes, because he heard other noises, which he later realized were the family dog, but which he initially believed were someone walking around in the bedroom where he was hiding. The defendant said that he was unable to hear what was going on in other areas of the home, so he eventually left his hiding place and went into the living room. The defendant said that he discovered the victims' bodies and believed all in the house, including the children, were dead. He said that the front door was open and that he left the house on a bicycle he found behind a door in the living room.

The defendant recalled riding the bicycle to Ms. Jones's home, where Keaira allowed him to enter. The defendant said that he went immediately into Ms. Jones's bathroom and vomited. Using bleach, the defendant cleaned the vomit from the sink, but he dropped some of the bleach on the floor. After brushing his teeth, the defendant knocked on Keaira's bedroom door, telling her that he needed to talk, but they never talked.

The defendant admitted that he did not report what he had seen to the police, explaining, "Y'all done heard testimony about the gangs. I'm in a gang. We don't call the police. It's just that simple. We don't call the police. It's not part of what we do. If I call the police, I'll be just like my brother." He also admitted that he had not been truthful when he told Lieutenant Mason and Sergeant Stark on March 7th that Cecil had driven him back home after they listened to the basketball game. The defendant reiterated that he did not tell the police the truth about what had occurred when initially questioned because he "[doesn't] talk to police."

The defendant stated that Mr. Waddell had spoken to a woman who said that the defendant was being reported by the media as the killer. The defendant also stated that he and his family saw the news report. The defendant acknowledged that, after seeing his face on a news report, he put a gun to his head and threatened suicide, saying that he was not going back to prison for something he did not do and declaring that he should have died with his brother. The defendant emphasized that the police officers who entered the house after his suicide threat did not offer to take him to a hospital or a mental health facility.

The defendant testified that before Deputy Director Armstrong interviewed him, he had been in the Homicide Bureau for hours and was handcuffed to a table. The defendant said that Deputy Director Armstrong played a tape recording of C.J. identifying him as the perpetrator but did not play earlier taped interviews of C.J. identifying other individuals. The defendant stated that after playing the recording, Deputy Director Armstrong began screaming about the defendant's family and said that he was tired of "playing games." According to the defendant, Deputy Director Armstrong said that he knew the defendant was "bullshitting" and that he was "sick of it." The defendant said that Deputy Director Armstrong began "pounding" on the table and demanding to have answers "now."

The defendant acknowledged telling Deputy Director Armstrong that Cecil had reached for a shotgun and that he had then just started shooting. The defendant also recalled then asking to see his mother. The defendant agreed that he told his mother that Cecil had a gun and that when Cecil put down his gun, the defendant began shooting. He also admitted telling his mother that he "stuck" the children.

The defendant denied these statements at trial, explaining that, when he was interviewed on March 7th, he had not slept since the homicides were discovered on March 3rd and that he had cried and had been depressed about what had happened. The defendant stated that he asked to see his mother approximately three times during the interview, but Deputy Director Armstrong told him that he would not be allowed to

see anyone until the defendant told him what he wanted to know. The defendant said that, earlier on March 7th, he had told other officers that he did not kill the victims. The defendant insisted that his statement to Deputy Director Armstrong admitting his guilt was not true, and he proclaimed his innocence of the crimes, stating that he did not kill Cecil or any of the other victims.

The defendant confirmed that, at the time of the homicides, his cousin, Tammy Randolph, was dating Vernon Motley. At some point prior to the homicides, Ms. Randolph told the defendant that the police were looking for Mr. Motley in connection with a murder charge and gave him a .44 caliber firearm to keep for her. At Ms. Randolph's request, the defendant later gave this gun to another person—Ms. Randolph's cousin "Antonio."

On cross-examination, the defendant admitted that when he left Cecil's house on the bicycle, he believed all nine people inside the Lester Street home were dead. He acknowledged that he did not call 9–1–1 and that instead he went to Sheila's home and went to bed. He admitted that he did not go to work the next day or report the crimes to anyone, although he went to dinner with Mr. Waddell on Sunday, March 2nd. The defendant acknowledged that he also went to work Monday morning with his father but failed to tell either of his parents about what had occurred while he was hidden beneath the master bed at Cecil's home. The defendant admitted also that he had lied to his family about the last time he had seen Cecil.

The defendant further stated on cross-examination that he did not attempt to escape when he heard the first shots fired. Although the master bedroom had a door exiting to the outside of the home, the defendant said that he did not have the key that was needed to open the door. The defendant also admitted that he did not attempt to use the cordless phone in the master bedroom to call for emergency assistance. The defendant said that he remained under the bed for approximately thirty minutes. He denied ever hearing the children scream and claimed that he never heard anyone hitting the children with boards. The defendant said that he remained under the bed while the killers altered the crime scene by gathering the shell casings and pulling down Ms. Roberson's pants. The defendant said that when he entered the living room, Ms. Roberson was positioned in the manner emergency personnel discovered her and as she appeared in the crime scene photographs. The defendant claimed that he saw C.J. lying in the bathtub but said that he did not "pay attention" to the knife in C.J.'s head. The defendant did not check on C.J. to determine whether he was alive and believed that everyone in the house was dead.

The defendant testified that he was in the interview room with Deputy Director Armstrong for four or five hours, and the defendant maintained that he had confessed only after Deputy Director Armstrong screamed at him and threatened him. The defendant explained:

> He didn't pound on the table. It was he asked me when he played the tape and after he played the tape, he played the tape what, [twelve, thirteen] times. And after he played it [twelve] to [thirteen] times, after I still told him I didn't do it, that's when he said I'll kill your mother f* * *ing ass myself, you cold-hearted murdering killing mother f* * *er.

According to the defendant, Deputy Director Armstrong then said: "I got something for you. I'm going to throw your ass on that 4th floor and I'm going to let them kill your mother f* * *ing ass."

The defendant acknowledged that his testimony at trial regarding the events was not consistent with what he had told his mother. The defendant said that he had leaned across the table and told his mother, "[T]hey trying to put this on [me]." His mother asked for the names of those who were trying to do this so that she could get him help. The defendant said that he told her he did not know their names and that they were watching him. The defendant said that he and his mother then grabbed each other's hands, that he told his mother not to worry, and then admitted to committing the offenses. The defendant acknowledged that he

told his mother that he and Cecil began arguing and that, after Cecil put down his gun, he had begun shooting. The defendant also recalled both his mother asking him how he got away from the house and his response that he rode away on a bicycle. The defendant agreed that he had told his mother that he killed the children because they saw him. However, the defendant insisted that he had lied to his mother and that his trial testimony was truthful.

The defense rested after the defendant's testimony, and the prosecution called no rebuttal witnesses.

At the conclusion of the guilt phase, the jury convicted the defendant of six counts of premeditated first degree murder for killing Cecil, Ms. Williams, Mr. Seals, Ms. Roberson, Cemario, and Cecil II. The jury also convicted the defendant of three counts of attempted premeditated first degree murder for the attacks upon C.J., Cedrick, and Ceniyah. The trial then proceeded to the penalty phase on the six first degree murder convictions.

B. Penalty Phase

The prosecution relied upon the proof submitted at the guilt phase of the trial. In addition, the parties stipulated that the defendant had been previously convicted of second degree murder, which qualified as a felony involving the use of violence to the person. The prosecution introduced three additional photographs of Cemario and Cecil II's bodies as proof of the (i)(5) aggravating circumstance.

The State also presented victim impact evidence through the testimony of Ms. Williams's mother, Ida, and Mr. Seals's aunt, Annette Mallory. Ida testified that she had adopted her surviving grandchildren and was raising them. As a result, she had lost her job and was struggling financially. She and her family were in counseling as a result of the homicides. Ms. Mallory testified that at the time of his death, Mr. Seals had three children, whom he loved and supported. She said Mr. Seals's death had "hit [her] hard" because he had been like a younger brother before his mother died and that she had been a mother figure to him after his mother's death.

The defense offered the testimony of Glori Shettles, a mitigation specialist, who described the defendant's family history and background. She said that some of the defendant's family members were willing to provide information about him but others were not willing to testify on his behalf. From her investigation, Ms. Shettles had learned that the defendant's parents were married in 1972, when his mother, Ms. Shaw, was fifteen years old and his father, Jessie Sr., was nineteen years old. They soon had a daughter, Nicole. Jessie Sr. joined the Army and was stationed in Florida, where the defendant was born. At some point, Ms. Shaw and Nicole left Florida and returned to Memphis, where Nicole became so ill that Jessie Sr. left his base and returned to Memphis also. After three years, Jessie Sr. was honorably discharged from the Army. He wanted the family to remain in Florida, but he was unable to obtain employment, so the family returned to Memphis. Cecil, who was three years younger than the defendant, was born in Memphis.

Ms. Shettles testified that Jessie Sr. had been jealous of Ms. Shaw, who went on a church trip to New Orleans, returned with a boyfriend, and told Jessie Sr. that she no longer wanted to be married to him. They remained married for some time after that incident, however. Ms. Shettles learned through her investigation that the defendant's parents argued often. Jessie Sr. was physically abusive to Ms. Shaw on more than one occasion, and the children witnessed the abuse. Ms. Shaw decided to leave Jessie Sr. and saved money to do so. When Jessie Sr. returned home one day, Ms. Shaw and the children were gone. Ms. Shaw did not contact Jessie Sr. until four to five months later. The defendant was six years old at this time, and the children did not know what had happened to their father.

Ms. Shettles testified that the family moved often during the defendant's childhood. Ms. Shettles noted that one of the risk factors for poor performance in school and in life is moving often during childhood. The defendant was diagnosed with a learning disability in reading and math and was enrolled in resource classes. He also had disciplinary problems at school and at home. School mental health records indicated that he was provided with individual counseling. Counselors attempted to meet with Ms. Shaw, but she either cancelled the appointments or did not attend them.

Ms. Shettles testified that the defendant failed fourth grade twice due to excessive absences from school. The defendant missed school, according to Ms. Shettles, because others teased him for not having proper clothing. After repeating fourth grade, the defendant was socially promoted in school. Ms. Shettles believed that the defendant was capable of performing better in school but that his performance was hindered by the excessive absences and tardies. When the defendant left school at age sixteen, he was still in the eighth grade and had attended ten different schools.

Ms. Shettles testified that by age fifteen, the defendant had become involved in the juvenile court system and had several arrests and juvenile adjudications. Ms. Shaw was unable to control him and did not know what to do. She attended juvenile court with the defendant on many occasions, and Nicole attended on Ms. Shaw's behalf when she could not attend.

Ms. Shettles testified that the family did not have much money and that Ms. Shaw was often not home. Although Nicole did her best to care for her brothers, food was locked up, and the children were not able to get to it. When the children visited their maternal grandmother for Sunday dinner, the defendant and Cecil stole money from their grandmother's purse to purchase food. They were severely punished for doing so, and their grandmother eventually told Ms. Shaw that the defendant and Cecil were no longer welcome in her home.

The defendant worked only very little after leaving school. The only legitimate job that the defendant had ever held was as a security guard at the age of eighteen. At age nineteen, the defendant pleaded guilty to second degree murder and was sentenced to eighteen years in prison. When he first entered prison, the defendant received many write-ups for refusing to participate, cursing at an officer, and other offenses that did not involve weapons. He also received write-ups for violent activities. Ms. Shaw and her husband visited the defendant only once while he was incarcerated. No other family members visited him, and the defendant spoke to his father by telephone on only a few occasions. Ms. Shettles said that the defendant participated and "thrived" in a behavioral modification program while in prison. The defendant was twice considered for parole before being released on parole after serving fourteen years of his eighteen-year sentence.

Ms. Shettles testified that some of the defendant's family members value his life but attending his trial and showing support for him had been difficult for them. Ms. Shettles explained that another friend of the defendant had been afraid to appear at trial. Ms. Shettles said that the defendant has an ongoing relationship with his son and that an eighty-one-year-old friend of the defendant's grandmother also cares for the defendant.

On cross-examination, Ms. Shettles testified that the defendant had been suspended from school so many times that the Memphis City Schools refused to allow him to continue to attend. Ms. Shettles further acknowledged that the defendant had more than one juvenile adjudication involving his use of weapons. Ms. Shettles agreed that the school and juvenile records indicated that the defendant fought often and had problems with his brother Cecil. Ms. Shettles was aware that the defendant had joined the Crips gang while

in prison and that he had received a write-up for violence while incarcerated because he and four other inmates cut an inmate who was trying to leave the Crips.[4]

At the conclusion of the penalty phase, the trial judge instructed the jury regarding the aggravating circumstances the State was alleging as to each first degree murder conviction and also instructed the jury as to mitigating circumstances. The jury unanimously found multiple statutory aggravating circumstances applicable to each first degree murder conviction. With regard to Cecil's murder, the jury found the following three aggravating circumstances: (1) the defendant was previously convicted of one or more felonies involving the use of violence; (2) the defendant "knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder"; and (3) the defendant committed mass murder. *See* Tenn.Code Ann. § 39–13–204(i)(2), (3), (12) (2014). Regarding the murders of Ms. Williams, Mr. Seals, and Ms. Roberson, the jury unanimously found five aggravating circumstances, including the same three found to be applicable to Cecil's murder, as well as the following two additional aggravating circumstances: (1) the murder was committed for the purpose of avoiding, interfering with, or preventing the lawful arrest or prosecution of the defendant or another; and (2) the murder was knowingly committed while the defendant had a substantial role in committing, or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit any first degree murder. *See Id.* § 39–13–204(i)(6), (7). Regarding the murders of Cemario and Cecil II, the jury unanimously found seven aggravating circumstances, including the same five that it had found applicable to the first degree murders of Ms. Williams, Mr. Seals, and Ms. Roberson, as well as the following two additional statutory aggravating circumstances: (1) the victim was less than twelve years old and the defendant was eighteen years old or older; and (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. *See Id.* § 39–13–204(i)(1), (5). The jury determined that the aggravating circumstances applicable to each first degree murder conviction outweighed any mitigating circumstances beyond a reasonable doubt and imposed a sentence of death for each of the defendant's six first degree murder convictions. The trial court entered a judgment in accordance with the jury's verdict.

(Footnotes omitted).

III. EVIDENCE PRESENTED AT POST-CONVICTION HEARING

Petitioner's first witness was attorney Marty McAfee, who had been practicing law since 1996. Mr. McAfee stated prior to representing Petitioner he had handled approximately six or seven capital cases and had been to multiple capital case seminars. He also estimated he was handling about fifty cases overall at the time he was representing Petitioner, including some non-capital murder cases. He could not recall if he was working on another capital case at the same time. He stated he was familiar with the ABA guidelines in capital cases and had relied upon

[4] Although not mentioned in the summary, on redirect, Ms. Shettles also testified concerning an incident in which Petitioner stated he saw his mother intentionally place his younger half-brother Pierre in scalding water when Pierre was an infant.

them in motions previously. In preparation for his testimony, he met with the attorneys on both sides of this matter, but was only able to read those portions of his file which the Post-Conviction Defender's Office provided to him.[5] He stated he had read one of Petitioner's pleadings, but he did not know if it was the original or amended petition.

Mr. McAfee testified he, along with lead counsel Gerald Skahan, represented Petitioner both pretrial and at his 2010 trial in this matter. He stated they discussed and made decisions on the case together, but lead counsel generally had the final say on issues. Mr. McAfee testified he did not recall anything about stun cuffs being worn by Petitioner during trial or an order requiring the same, but he reiterated that it had been eight years, and he could not recall everything. He stated, assuming there was an order, he was not aware at this time of a strategic reason for not objecting to stun cuffs. He stated he would not have hesitated to raise an issue if needed. The only security issue Mr. McAfee recalled was one which occurred when they were in Nashville selecting a jury. He recalled the defense was not happy when they saw officers who looked like SWAT in the courthouse. He further stated they had raised an objection with the Court, and this Court had instructed the officers in charge to take care of the situation.

When asked about jury selection in general and when a juror states his or her opposition to the death penalty, Mr. McAfee stated he would try to get the juror to commit that they could be fair despite their opinion and follow the law. He pointed out in this case that there were times

[5] As previously stated, this Court has addressed issues related to pre-hearing discovery by separate order. Prior to the hearing here, the parties conveyed to this Court that Mr. McAfee had provided his file to the Post-Conviction Defender's Office after the filing of the petition, but the office had refused to return a copy of the file to Mr. McAfee when he requested it in September of 2018. One week before the hearing here and after phone conferences on the issue, they provided Mr. McAfee with a copy of only those pages they deemed relevant to the Petition in this case. Exhibit 51 was filed as a disc of what was actually turned over to the State from Mr. McAfee's file. Exhibit 52, which was filed under seal for identification only, was a disc which included the entire file of Mr. McAfee. The State argued Exhibit 52 should have been filed as an open exhibit and should have been provided to the State. As indicated by separate order, this Court agreed with the State's position with certain exceptions. Accordingly, Exhibit 52a was late-filed as an exhibit to the hearing containing the majority of counsel's file.

As stated by separate order, trial counsel should have had access to his entire file well in advance of the hearing in this matter. As a result of not having access to his file, there were many questions to which counsel could not recall the answers because of lack of preparation.

when the defense team did not like jurors on the capital sentencing issue, but they really liked them when it came to the guilt/innocence phase. He explained that he and attorney Skahan believed they had a chance with the guilt/innocence phase of the trial, and it was very difficult for them to imagine any jury that would convict Petitioner of these offenses not giving him the death penalty. He testified they felt the lack of any trace evidence such as DNA, etc. from the Petitioner either at the scene or on other evidence introduced was their best case to focus upon. He stated they believed their best case was a good reasonable doubt case.

He explained they did not "pick" the jury, but rather "picked" the persons they wanted kicked off the jury. He indicated he could not individually recall the strategic decisions for each choice, but the defense team had met ahead of time and knew who they wanted and who they did not want. He specifically stated, while generally he would not prefer a juror like Mr. Ray in a capital case, they wanted people who could listen to all the proof and really understand it. He explained some of the evidence was complicated and they wanted jurors who could understand the experts. He also acknowledged the best mitigation they thought they might have was residual doubt which also related to the guilt/innocence evidence.

When asked why he did not object to the prosecution asking jurors questions first during voir dire, he stated there was no reason generally. He stated he had raised the issue in other cases, but he had never been successful in raising it. He also stated he had never known anyone else who was successful with the motion. On the issue of race, he stated he did not know why they did not ask questions about it, except that he simply did not see race as the real issue to overcome in this specific case. When asked about implicit bias, he stated if he felt a bias existed he would not hesitate to inquire about it. He explained, however, you also have need to focus on

the relevant issues and be careful not to alienate jurors because you want jurors who are willing to give the client and counsel a fair trial after voir dire is complete.

He testified the defense theory raised on Petitioner's behalf was that there was no way one person shot two guns, killed all these people, and left no trace evidence there; therefore, the State's theory did not make sense. Also, there was physical proof someone else was there.

He acknowledged they hired Rachael Geiser as the guilt/innocence investigator and Glori Shettles with Inquisitor Incorporated as the mitigation specialist. He indicated the attorneys gave them direction at times, but he considered both of the investigators to be self-starters who often came to the attorneys to bring up a potential issue and whether it should be followed up. He explained that the defense team had all worked together many times. He stated he could not say exactly how often he spoke with the investigators about the case. He explained the defense team emailed, spoke on the phone, and met in person. He also explained that he would run into each of the investigators at the courthouse probably more often than on a weekly basis. He could not recall if he personally interviewed any witnesses in this case.

He described the crime scene photographs in this case as "horrendous." When asked why he did not object to all the crime scene photos, he explained it was not a good strategy because you lose credibility on the ones you really want out if you object to everything. He stated the Court had instructed the parties to meet and determine which photos they could not agree would or would not come into evidence. He testified the State agreed to not seek to put many of the photos into evidence, and the ones they could not agree upon were taken to the Court for a decision.

He then testified he had not seen cause of death as an issue, therefore, there was no real reason to object to only one medical examiner testifying.

He testified it had been important to challenge CJ's testimony and his competency to testify. He was shown Exhibits 2, 3, and 4; these were an evaluation report on CJ from the Center for Pediatric Neuropsychology, a memo From Rachael Geiser regarding CJ's Case Management records, and a memo from Rachael Geiser about CJ's LeBonheur records, respectively. He stated he did not recall having seen Exhibit 2 before. He stated it was something he would have provided to Dr. Aldridge. He thought he recalled having CJ's LeBonheur records, but he could not say what the records he had seen were without looking at them. He stated he did not currently know exactly what a GAF score of 50 meant; when asked if this indicated a serious impairment in functioning, he stated he felt they had brought this issue out to the jury through the cross-examination of CJ and through other evidence. He stated he thought the cross-examination of CJ went better than they ever thought it could have. He explained how CJ agreed with everything the state asked and then with everything the defense asked. When asked about various medications listed in the Case Management records, Mr. McAfee indicated he did not know what they all were, but he also stated he was not sure they would have wanted to use that for cross-examination of a child and run the risk of offending the jury. He could not recall their specific discussions on these issues, but he stated that the defense team had developed a game plan for the cross-examination of CJ, and if they had thought it best to use this type of information they would have. He pointed out he could not say, in this particular case with this particular witness, that using this type of information would have been a good choice to make.

He testified it was a big win for the defense when they were able to get *The First 48* footage suppressed. He stated the Court had suppressed the video, which he described as much worse than the testimony about the statement; the Court, however, had indicated the defense

could open the door to its admission depending on the evidence presented. He testified they did not think there were legitimate grounds to suppress the statement in its entirety. He recalled they did file a motion to suppress his statement to his mother at trial, but the motion was denied after a hearing.

He testified the defense team had discussed the issue of Petitioner's possible intoxication at the time of the offense, but he did not think it is generally was a good defense. In addition, Attorney McAfee stated he did not think the facts existed to raise intoxication at the time of Petitioner's statements to Lt. Armstrong and his mother. He reviewed Exhibit 5, which was a psychological report of Petitioner when he was 16 years of age. Attorney McAfee further testified the defense team had considered whether Petitioner suffered from deficits which had any bearing on the voluntariness and reliability of his statements. He recalled they hired a false confession expert named Dr. Richard Leo in the case.[6] He could not recall all the details related to Dr. Leo, but did recall the defense was hesitant to use him after they got *The First 48* footage suppressed. Counsel did not want to open the door to its admission.

Attorney McAfee testified to his recollection of *The First 48* program and having seen the episode after he heard about it. He could not recall specific timelines, but recalled Ms. Geiser had attempted to get all the footage, including all edited footage. He testified according to a memo from Ms. Geiser,[7] she attempted to get the footage on February 10, 2009. The memo indicated she had been told all unused footage was recycled after the show was produced. He also recalled Grenada, the media company, had asserted the media shield law privilege. Attorney McAfee stated he thought the defense would have been worse off if the footage had not been destroyed. He could not say why they did not make a *Brady* request for evidence obtained

[6] Exhibit 6 was the order of appointment for Dr. Leo.
[7] The memo was Exhibit 7.

in connection with the interviews filmed for *The First 48* until August 10, 2010. He could not recall whether they received names of crew members for the show or not or whether they were interviewed. He stated if they did it should be in either his or Ms. Geiser's file.[8] When asked why they did not seek a missing evidence instruction, he stated the ruling excluding the video was subject to change if the defense opened the door, so they were careful to not open the door. They thought they pushed the issue as far as they could in the questioning of the various officers involved about why the show's crew had access.

He then testified he never considered filing a motion pretrial to limit the State's potential closing arguments.[9] He was then asked why he did not object to the following closing statement by ADA Lepone at sentencing:

> And now Jessie is begging for his life. Did Marissa get a jury? What about Shindri? Did she get a jury? Did somebody have to find aggravating circumstances for her to get the death penalty?

He also stated he had no reason for why he did not object to this statement.

Next, he testified concerning the defense's use of Mike Cariola, a Bode Techology DNA expert.[10] He stated they had spoken with experts at Bode prior to the email exchange dated August 16, 2010. He stated Mr. Cariola provided consultation to assist them in understanding all the DNA evidence and how to cross-examine witnesses about it. Bode was also available if any evidence was not tested, but they decided not to use them for this because the State indicated it was doing the testing. They did not use anyone from Bode to testify at trial.

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[8] Later in the hearing, a copy of Ms. Geiser's "electronic" files were introduced. Ms. Geiser also referred to her paper files which were not produced as having been more voluminous.

[9] Petitioner's post-conviction counsel asked about Mr. McAfee's knowledge of the Tennessee Supreme Court's opinion in State v. Jackson, 444 S.W.3d 554 (Tenn. 2014), concerning issues of prosecutorial misconduct in argument. This opinion was approximately 4 years after Mr. McAfee's representation of Petitioner at trial.

[10] Exhibits 8, 10, 11 were email exchanges with or about Bode Technology. Exhibit 9 was the order of appointment for Bode Technology, and Exhibit 12 was the invoice from Bode Technology.

Mr. McAfee then testified concerning the fact that they hired a gang expert, Jeanine Barrett.[11] He stated she was hired to discuss the defense team's theories and the evidence regarding whether this could have been caused by a gang hit and to potentially testify. He stated they decided not to use her at trial.

Next, Mr. McAfee identified Exhibit 14 as being a one-page "to do" list from his file dated July 6, 2010. He stated he could not specifically recall why the "alibi notice" was referred to on the list. He essentially testified the defense team discussed many ideas at different times, some with more potential than others.

When asked about what they planned for mitigation at sentencing, he stated they had received memos from Ms. Shettles detailing the different things she had found.[12] He testified to the difficulties they had in this case because Petitioner's family was not supportive either when he was growing up or at trial. He stated they would take an interview any way they could get it in this case, including by phone. When asked why they only presented Ms. Shettles in mitigation, he stated they would have liked to have been able to rely upon other lay witnesses to back her up, but they simply did not have people willing to come on Petitioner's behalf.

He identified a mitigation timeline from Ms. Shettles which was in his file as Exhibit 16 and a document titled "Significant Life Events & Themes" which was introduced as Exhibit 17. Next, he identified a handwritten note from his file as Exhibit 18 which was described as notes from a mitigation meeting.

He identified a note in his file that referred to "MR?" which he referred to as a note questioning whether Petitioner could be mentally retarded. *See* Exhibit 15. He stated he had

[11] Exhibit 13 was the order of appointment for Jeanine Barrett.

[12] Ms. Shettles's electronic files were submitted under seal as part of late filed Exhibit 61. Many of Ms. Shettles's memos were contained in Mr. McAfee's file, some in duplicate. Others were only contained in Ms. Shettles's files which were not turned over to the State originally. However, by separate order, the redacted version of Ms. Shettles electronic files was introduced as evidence in late-filed Exhibit 61a.

concerns about any deficits Petitioner may have.[13] He stated he agreed mental health experts were important in mitigation, and they had hired Dr. Geraldine Bishop and Dr. James Walker. He testified they asked Dr. Walker to perform neuropsychological testing which is evidenced by his preliminary report. *See* Exhibit 19. He stated they knew Petitioner had some deficits, and they were exploring to see how the deficits possibly could configure into the defense theories. He testified two of the disorders Dr. Walker diagnosed Petitioner as having were significant to him: Axis I, cognitive disorder not otherwise specified, and Axis II, antisocial personality characteristics. He testified the Axis I alcohol dependence and cannabis dependence were of very little significance for this trial. He stated the GAF score of 60 was further evidence of Petitioner's deficiencies. He could not state the significance, if any, of the adjustment disorder with depressed and anxious mood on Axis I. He agreed Dr. Walker identified some mitigating factors on page 21 of his report, but stated the team did not call him to testify because of the diagnosis of antisocial personality characteristics. He explained the defense team considered the term "antisocial personality" to be one of the more dangerous labels in the criminal justice system because it does not receive the sympathy or empathy from people like other types of disorders such as bipolar disorder or schizophrenia. He stated he would have liked the report much better if the diagnosis of antisocial personality characteristics had not been in it. He agreed there was good information in the report, but they made a strategic decision not to use it because of the "antisocial" language.

Exhibit 20 was introduced as a letter from Dr. Joseph Angelillo regarding an estimate for his services. Mr. McAfee testified he believed they looked at different people, but, while he considered Dr. Angelillo a good friend, he did not think he had been a good witness in other

[13] Notes in Ms. Shettles files, which were not turned over to the State originally, stated Mr. Skahan had indicated in a team meeting at the end of March 2008 that, based upon the time he had spent with Petitioner, he did not think Petitioner appeared psychotic or mentally retarded.

cases. He recalled they had to convince Dr. Geraldine Bishop[14] to work on the case because of her concerns about the facts and whether the children had been tortured. She worked on the case in the months leading up to the trial, but he could not recall specifics. He agreed they did not retain a neurologist or psychiatrist.

He stated he was honest with the jury about the number of aggravators to maintain credibility with the jury. He stated he did not object to the instruction that the jury could not consider sympathy because it was the law. Exhibit 23 was an email exchange between Mr. McAfee and attorney Jim Simmons. Mr. McAfee stated he probably spent 75% of his time on the guilt/innocence phase and 25% on the sentencing phase.

On cross-examination Mr. McAfee explained how the investigators also worked on mitigation. He indicated it was their job to gather the information and bring it to him and his co-counsel. He further stated it was ultimately the attorneys who made tactical decisions after often discussing issues with the investigators. He indicated approximately 90% of all decisions involved the whole team, with the exception of during trial when the attorneys made more of the decisions. He recalled he and Mr. Skahan, at times, would disagree about witnesses.

He stated if he had been provided his entire file and more time to review it, he could have been better prepared for the post-conviction hearing. He testified he loaned his file to the Post-Conviction Defender's Office under the agreement that they would make a copy of it and return it to him. He testified he provided the file to them in February of 2015. Approximately one month before this post-conviction hearing, he unsuccessfully tried to obtain a copy of his file as he believed had been promised. He stated the post-conviction attorneys took the position that the

[14] Exhibit 21 was the order of appointment for Dr. Bishop, and Exhibit 22 was the invoice for Dr. Bishop.

file belongs to Petitioner, and they were not going to return it or a copy to him. He stated counsel told him it was not their understanding that they had agreed to return a copy of it to him.[15]

He testified the state had open file discovery and kept both the evidence and all the discovery in one room. When asked about the size of the case, he acknowledged, when you take into account the child victims and the bloody scene, he had never seen anything like it.

He stated jury selection was done as a team, and they followed a form like the Colorado method. He stated they individually rated each juror and then would talk and compare what they thought.[16] He testified, unlike in many cases where the penalty phase is the primary issue, here they were sure if convicted petitioner would receive the death penalty due to the number of victims; but they believed they had a good guilt/innocence issue and needed to take it into consideration in selecting jurors. He specifically testified he liked juror Steven Ray's military history because he believed it would help him to understand the ballistics and maybe even some of the other forensic evidence. He stated it was difficult to discuss all the aspects of any particular juror without all the information in front of him the way it was at the time of jury selection.

He again testified the examination of CJ went very well. In his opinion, he thought the biggest problem they had to deal with was Petitioner's confession to his mother. He opined he also thought some jurors might have been slightly put off by the State using a witness who was five years old at the time of the offense and who really did not seem to know that much.

As it related to any type of unraised issue related to Petitioner being under the influence during his statement to the police, Mr. McAfee agreed Petitioner had been in protective custody

[15] Again, this Court addressed this issue in a prior discovery order.
[16] In Rachael Geiser's electronic files which originally were not turned over, there was a list of the jurors with comments and ratings for each. There was also additional juror related documents from Mr. McAfee's files which were not originally turned over to the State.

for some period of time prior to giving his statement to the homicide detectives. He identified a copy of a handwritten statement Petitioner had prepared for the false confession expert they hired. *See* Exhibit 24. He stated one of the most important priorities for the defense was making sure they did not open the door to the admission of *The First 48* footage. He testified he believed if they had used Dr. Leo they would have opened the door because Dr. Leo had considered the footage along with Petitioner's handwritten statement.

He testified Glori Shettles was able to testify at the sentencing phase and get the information to the jury without the same degree of cross-examination other witnesses would have been subjected to. He stated her only limitation was that she was not able to give an expert opinion.

He identified a letter from Dr. Bishop post-trial. *See* Exhibit 25. In the letter she stated she could not justify a mental health defense and she had not seen any signs of PTSD. He recalled hiring various experts, some of whom they used at trial and others whom they did not. He stated he believed Dr. Walker thoroughly examined Petitioner. He recalled using Dr. Aldridge at trial as an expert concerning the interviewing of children of trauma.[17] He recalled they did not use Richard Ernest, the crime scene expert, because he agreed with the State's theory that the crimes could have been committed by one person. They consulted with Bode, Dr. Bishop, and Dr. Leo, but none of them testified. He identified Exhibit 26 as undated notes he took in a meeting when the defense team discussed various types of experts they could consider. Although he was unsure of the times he spoke to Dr. Leo, he specifically recalled he had spoken with Dr. Leo by phone in what he believed was a conference call with the defense team.

[17] He also recalled they looked at another expert on this issue named Dr. Marty Laurie, but they had liked Dr. Aldridge because she had been a State witness previously, and he thought it would be good for her credibility.

He stated there were not a lot of lay witnesses willing to talk to them concerning mitigation. He testified they discussed the case and strategies with Petitioner as they went along in the case. The only thing he could recall that they were not able to do that Petitioner wanted was to get the entire footage from *The First 48*.

Gerald Skahan[18] testified he served as counsel to Petitioner Dotson beginning in General Sessions Court and continuing after indictment in the Criminal Court. After the notice to seek the death penalty was filed, he was designated as lead counsel. From 2008 to 2010, during Petitioner's case, he was a private defense attorney with his practice consisting of over 90% criminal work. He stated both he and Attorney McAfee were familiar with every witness and every aspect of Petitioner's trial, but Mr. McAfee had worked on the mitigation more than he had. He stated they had divided the witnesses as far as examining them at trial. He went to work in the public defender's office after Petitioner's trial and had incorporated part of his file into Mr. McAfee's file at that time. He stated they both had copies of everything but they had organized their files differently. He explained the remainder of his file had gone to storage and eventually was destroyed in a couple of feet of water.

He affirmed he had other cases at the same time as Petitioner's case, but he could not recall any specifics. He acknowledged he read part of the amended petition here and met with the attorneys on both sides of this post-conviction proceeding prior to the hearing.

He testified Petitioner's jury had been selected in Nashville, and it had taken about a week to get the jury. He had no recollection of Petitioner having been concerned about stun cuffs in Nashville, and he did not recall Petitioner wearing stun cuffs in Nashville. He also did not recall an order about stun cuffs. Like Mr. McAfee, he recalled "SWAT-like" officers in

[18] Currently, Gerald Skahan serves as Judge for Division 9 of the Shelby County General Sessions Court. To avoid any confusion, he will be referred to as Mr. Skahan or Attorney Skahan for purposes of this order.

Nashville and that this Court had required them to change their clothes. He did recall increased security during the sentencing phase of the proceedings, but he had no recollection regarding stun cuffs.

When asked what kind of jury he wanted for Petitioner's trial, he stated in a death penalty case he had to ask himself if he wanted a guilt/innocence jury or a sentencing jury. He testified in this case he had wanted a guilt/innocence jury more than he ever had before in a death penalty case. He explained that a lot of picking a juror is "feel." He thought it was important to get a good look at the person you were considering before making a decision. He opined that if convicted it would be difficult to find jurors who would not vote for death with six victims.

He explained his thoughts on jury selection further. He stated that based upon his years of experience, he liked certain types of people and religions better as jurors. He gave examples of general types he liked and did not like as jurors: for example, he liked gay women, people who were Methodist or Jewish, school teachers, but he did not like gay men, people who were Catholic or fundamentalists, and engineers. He indicated he had hundreds of things like this that he took into consideration, but they were not hard and fast rules. He explained that sometimes it was just a gut feeling about a juror. He testified sometimes a look at someone in person can reveal much more than a question. He emphasized how you must look closely before making a final decision as to whether any person should be a juror or not. He recalled they had questionnaires for each of the jurors in this case.

He next explained how he preferred to get jurors who were opposites or "at both extremes" so they would hate each other and not get along. He stated he wanted jurors to clash so it would cause lots of discussion of the issues in the case rather than everyone looking at the issues in one way. He also stated he did not think race was an issue in this case which needed to

be addressed in general jury selection. He further indicated the amount he questioned a juror also depended on the juror's answers in the questionnaire.

Mr. Skahan testified the defense theory was simply that Petitioner did not commit the offenses. He further recalled having stressed that the defense did not have to prove anything and if the jury believed an alternative theory was possible then they must acquit.

He described both Rachael Geiser and Glori Shettles and the very positive working relationship he had with both on many cases. He described Rachael Geiser as the best investigator in the state. He stated he probably interviewed the Medical Examiner and the experts personally pretrial. He testified the defense did not dispute cause of death for any of the victims, so they did not challenge only one medical examiner testifying when two had performed the autopsies.

He recalled when CJ had testified. He stated he had no independent recollection of Exhibit 2, the report on CJ's May 8, 2008, Psychological exam at LeBonheur's Center for Pediatric Neuropsychology. He thought he recalled that Mr. McAfee had cross-examined CJ because he was better with kids. He did not think it was a good idea to cross-examine a 9-year-old from a report such as Exhibit 2 on cognitive problems. He thought it was better to allow the jurors to come to the conclusions on their own through their own observations of the evidence. He explained how the doctor had testified to CJ having a knife in his head which had to be removed, and how the jurors had seen the x-ray of CJ with the knife in his head. He believed the jurors, on their own, would have concluded some brain damage existed. He thought it would have been obvious to jurors that CJ was repeating what he heard around the house from adults over the last couple of years. He also pointed out that what the kids testified to at trial did not make sense.

He agreed to a date discrepancy concerning a police report supplement entered as Exhibit 47.

He then discussed the defense engaging Dr. Richard Leo as a false confession expert. He recalled the contact with Dr. Leo had been by phone. Exhibit 48 was an email between the defense team concerning Dr. Leo. Attorney Skahan stated that the email was setting up the argument to exclude the video because their expert could not view the entire recording. He recalled Dr. Leo did not testify on Mr. Dotson's behalf at trial. Exhibit 49 was Dr. Leo's bill.

Next, attorney Skahan agreed the defense had engaged a DNA expert and a gang expert. but he had no independent recollection of specifics other than Bode Technology was the DNA expert and Jeanine Barrett was the gang expert. He could not recall if he was supposed to handle any of the potential mitigation witnesses. He stated he did not recall any specifics about the mitigation, and he also had no independent recollection of Dr. Bishop.

He recalled Dr. James Walker, a neuropsychologist, having generally been involved in the case.[19]

He said he could not quantify it, but he certainly spent more time on the guilt/innocence phase than he did not the sentencing phase.

On cross, he stated he had handled probably over 50 capital cases and over 100 jury trials.

He testified they did not use Dr. Leo because they won the motion to suppress the video statement of the defendant with the limitation that the defense could open the door to its admission depending on the evidence presented. He described getting the video suppressed as a "huge" win for the defense.

[19] Exhibit 50 was his order of appointment.

He also recalled the defense had engaged a crime scene expert named Richard Ernest who they did not use at trial. He explained they had not used Mr. Ernest because he had not given the defense information they wanted; he did not agree that one person could not have committed the crime.

When asked about discovery, Mr. Skahan described a room on the second floor of the courthouse used by ADA Lepone to house all the evidence and discovery in the case. He said he had never seen anything like it. He indicated he spent hundreds of hours in the room with ADA Lepone looking through everything. He testified ADA Lepone sometimes left him alone in the room. He confirmed he got copies of everything he wanted, and he got a witness list from the State.

Mr. Skahan testified that a lot of issues were handled pretrial with ADA Lepone. He recalled one such issue was photographs. He stated there were thousands of photos and there ended up being only a few that they had to take to this Court for a pretrial ruling.

After reviewing Dr. Walker's preliminary report, he indicated they had not used him as a witness at trial because they were not happy with what his report said. Mr. Skahan explained there are certain things he does not want in front of a jury no matter how good a witness an expert may be. One example of this is the diagnosis of antisocial personality characteristics which Petitioner received on his Axis II diagnosis in Exhibit 19. He testified he would never put an "antisocial" diagnosis in front of a jury.

On redirect, he testified Rachael Geiser, who started working on the case pro bono when it was in General Sessions Court, also worked getting even more records than what were in the State's evidence room. One of the things she checked into was adult victim Cecil Dotson's pending criminal case and phone records.

Rachael Geiser, a licensed private investigator since May of 1999, testified she currently works full time with the Shelby County Public Defender's Office as an investigator on the major cases team, but at the time of Mr. Dotson's trial she worked independently through Geiser Investigative Services, LLC, which she still owns. She specified she is primarily a guilt/innocence investigator and had worked on several capital cases both before and after Petitioner's case.

She stated she had started working on Petitioner's case in March of 2008 on a pro bono basis when it was still in General Sessions Court. She explained she worked pro bono because there was not a way in which she could be appointed to the case prior to indictment. She described her work on Petitioner's case as a fact investigator. She affirmed she had reviewed the amended petition filed here and had spoken with counsel for the State and Petitioner prior to the hearing. She also stated she had reviewed the reports she had maintained electronically in her file, but she had not reviewed the discovery or anything that was in her paper file or her notebooks.[20]

She explained her investigation typically included meeting with the client to find out what they have to say and what they know. She would get the discovery and review it and put together a task list of things that needed to be done. She would meet with the client and the attorneys about the task list and then just start investigating. She indicated in Petitioner's case she also helped coordinate needed experts in DNA, false confession, and the crime scene. She also assisted with trial strategy and meetings with the client, as well as with subpoenaing witnesses and coordinating witnesses. She indicated she worked with both attorneys on the case and was in regular contact with both throughout the investigation of the case. She described her

[20] A disc containing her electronic files only was submitted under seal to this Court, and was made a late-filed exhibit to the hearing. *See* Exhibit 60. Based upon this Court's findings in the separate discovery order, Ms. Geiser's electronic files were filed as evidence in late-filed Exhibit 60a.

work with the attorneys positively and as a collaborative effort. She stated she did not work on mental health issues, as this was in the purview of the mitigation specialist.

She testified she had several phone calls with Dr. Leo to assist him in obtaining the information he required to render an opinion concerning coercion or a potential false confession. Dr. Leo requested the unedited version of the defendant's statement which was not available. She explained she unsuccessfully had attempted to get the unedited footage and the names of the film crew from the production company.[21] She had provided Dr. Leo with the available footage, Petitioner's handwritten statement (Exhibit 24), and the police reports/supplements on his statements. She stated absence of the unedited footage hindered Dr. Leo from being able to issue an opinion about whether it was or was not a false confession; therefore, the defense had not used Dr. Leo at trial.

She specified although she was working on the case beginning in March 2008, the defense team did not know how damaging Petitioner's statements were until they aired in July of 2008. She stated they could not issue subpoenas until after he was indicted in December of 2008, when she was appointed as the investigator. She explained they got the subpoena for the footage from the media company out in February of 2009 and the media company responded on February 26, 2009, indicating the raw footage was destroyed and the raw footage was not sent to the Memphis Police Department.[22] The letter indicated a rough cut and final version of the aired show was all that was sent to the police department.[23]

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[21] She stated they obtained the name of one cameraman who was at the crime scene.

[22] Exhibit 28 was a letter from an attorney for the production company to Ms. Geiser. Exhibit 29 was the contract between the production company and the City of Memphis.

[23] Ms. Geiser explained another case she was working on in Memphis also tried to gain access to footage just like in Petitioner's case. There the media company also claimed they were protected by the shield law. She explained there had been a hearing in that case in which they discovered more about the procedures at the media company. However, the Court in that case ruled the defense was not entitled to the information or footage.

She recalled the defense hired a DNA expert, Mike Cariola, from Bode because the defense team had questions on the DNA evidence and reports which required an expert consultant on the best way to ask questions of experts and interpret reports. She stated Bode was available to do testing as well but had not been required to do any testing for the defense. She testified there were some things they discovered just before trial which were not tested but the defense decided to move ahead without the testing. She stated she had some contact with Mr. Cariola, but Marty McAfee had interacted with him the most on the defense team. She did not recall why he did not prepare a report or testify.

She also recalled Jeanine Barrett was the gang expert hired by the defense to consult on whether or not anything was gang related as it came up during trial or from the discovery. She indicated she was more a consultant and was not asked to prepare a report or testify. She stated Ms. Barrett helped identify things which could support the theory that the murders were committed by a gang.

She also testified the defense hired Richard Ernest[24] as a ballistics/crime scene expert. She stated they needed his help to decipher the crime scene. One of the defense theories put forward was that one person could not have done all these crimes alone. She testified Mr. Ernest did not prepare a report because she had a phone conversation with him in which he stated one person could have committed the crime.

She stated there was a good deal of crossover between potential mitigation witnesses and guilt/innocence witnesses because of the specific facts of this case where the victims and the defendant were in the same family.

She recalled Dr. James Walker was consulted as an expert, but she recalled little about his dealings in the case. She recalled emailing with his office to see if he could potentially speak

[24] Exhibit 30 was the appointment order for Richard Ernest.

to Petitioner's state of mind at the time he made his statements to the police. She also generally recalled a conversation with the defense team about Dr. Walker's reference to Petitioner as "antisocial" in his report and how they did not want this in front of the jury.

Next, she was asked about her review of CJ's medical records. She prepared a memo for counsel of an overview of notations from CJ's medical records from March of 2008[25] at LeBonheur Hospital which was introduced as Exhibit 31.[26] She also prepared memos related to other records she gathered related to CJ. These memos were contained in her electronic files. *See* Exhibit 60a.[27]

On cross, she estimated she had worked on over 200 murder cases. She stated she had retained a copy of any report she provided to counsel. She testified the defense never had any problem getting discovery the state possessed. She recalled Dr. Vicki Brewer of LeBonheur Children's Medical Center, who generated Exhibit 2 on CJ, as being on the State's list of potential witnesses. She verified her billing records as Exhibit 32, but stated it probably did not include everything she did on the case.[28] She identified Dr. Aldridge's report introduced as Exhibit 33 and indicated she had provided all the documents reviewed by Dr. Aldridge. She then identified a memo from September 13, 2010, which was a witness contact information list for trial. *See* Exhibit 34. She recalled various witness lists were prepared and updated throughout the investigation.

She recalled she did not go to Nashville for jury selection, but she sat next to Petitioner through his entire trial and was in the back with him talking at various breaks and lunches. She

[25] Ms. Geiser pointed out a possible typo related to the dates on numbers 9 and 10.
[26] There were other records for CJ which she reviewed and prepared memos on which were included in her electronic files and counsel's files.
[27] Included in these records were the records from Youth Villages and Case Management which she acquired through subpoenas (Memos dated September 3, 2010 and September 13, 2010).
[28] Clearly, any time spent on the case pro bono from March 2008 to December 2008, prior to her appointment, would not be included.

indicated she never observed any type of stun cuff of any kind on Petitioner, and she did not recall him ever complaining of one.

She stated the decision to not put Dr. Walker on as a witness was strategic to avoid the antisocial diagnosis going in front of the jury. She explained this was not the first trial in which this type of issue had come up in a case and this type of decision had been made.

Glori Shettles testified she was the mitigation specialist on Petitioner's defense team.[29] She indicated she currently works in the Shelby County Public Defender's Office, but in 2008-2010, she worked out of Inquisitor Incorporated, a private investigative firm. She testified she has been a mitigation specialist for 25 years, and she had worked with both attorneys McAfee and Skahan prior to Petitioner's case. She described her job generally as meeting with the client, getting background information, collecting records, and interviewing family, friends, teachers, employers, or anyone who has knowledge of the client's background. She explained the records often led to more interviews and more records. She stated the purpose of her investigation was to provide as much information as possible to the attorneys and the experts and to just help with the defense and strategy in general. She stated she also helped with the selection of experts and was familiar with the ABA guidelines for representation in death penalty cases. She agreed mental health was almost always an aspect of capital case mitigation investigation.

She identified Exhibit 16 as a mitigation timeline in chronological order of all the records she received regarding Mr. Dotson and his family, including the sources of the information. She confirmed she provided this timeline to both attorneys McAfee and Skahan. She explained her intent in the timeline and another document (Exhibit 17) was to chronicle

[29] Exhibit 35 was an order for funds for mitigation services in Mr. Dotson's case, and Exhibit 36 was the affidavit of Ron Lax, then president of Inquisitor Incorporated, LLC, in support of a motion for additional funds dated September 10, 2010, close in time to the trial.

significant life events in Petitioner's life.[30] She then read through some of the events listed on the exhibits, including a dysfunctional family, abandonment by his mother, neglect, etc. When asked, she specifically recounted an event when Petitioner was 18 years old, and he had witnessed his mother put his youngest brother in scalding water and burn him. She opined Petitioner's mother had done this so the child's father would come to the hospital, and she could see him. Ms. Shettles stated there was a Department of Children's Services investigation, but Petitioner's mother described the event as an accident, and nothing had been done. Ms. Shettles described this as traumatic to Petitioner.

She then identified Exhibit 37 as a copy of the list of mitigating circumstances she provided to counsel and which counsel submitted to the court for consideration.

Next, she identified a memo regarding an interview on July 21, 2009, of Pam Shelton, a woman who began writing Petitioner after he was arrested and who had developed a relationship with Petitioner pretrial. She confirmed Ms. Shelton had reported to her that Petitioner had told her his sister, Nicole, had made Petitioner and the victim Cecil, Sr. perform sexual acts on her when Petitioner was 10 or 11.

Exhibit 39 was identified by Ms. Shettles as a letter she received from an inmate named James Hathaway who had grown up with Petitioner, and Exhibit 40 was a memo regarding her interview of Mr. Hathaway on July 17, 2009. Ms. Shettles indicated she had been informed Mr. Hathaway's mother, Evelyn Gilmore, and Petitioner's grandmother had been good friends. Exhibit 41 was a memo concerning a telephone interview of Ms. Gilmore on June 24, 2009.

Ms. Shettles stated she was present in Nashville but not actively involved in jury selection in Petitioner's case. She agreed she was the sole witness for Petitioner at his sentencing hearing, and she had known for at least 2 months before trial that she would be

[30] Exhibit 17 was identified as being significant life events and themes in bullet form from records and interviews.

testifying. She said Mr. McAfee had instructed her to just talk and tell the jury Petitioner's social history and story. She could not recall if Dr. Bishop reviewed the "scalding" of Petitioner's younger brother for the team.[31]

On cross, she described the working relationship of the defense team as very good, and she did not recall any problems. As far as dealing with the family for mitigation, she described it as difficult because she was never sure if they would speak to her in the future based upon the fact the defendant and multiple victims were in the same family. She stated Petitioner's son, who was fourteen years old at the time of trial, was not used as a witness because the child's mother did not want him in court or involved in any way.

She identified a document which included the mitigation timeline previously introduced as Exhibit 16, as well as witness summaries, and the significant events exhibit (Exhibit 17) which could be used as mitigating factors for the jury to consider and for experts to consider. She stated it was easier to read together than to read in all the separate memos. This combined document was entered as Exhibit 42.

Next, she identified a letter she wrote to Dr. Bishop, which she did not previously recall, as Exhibit 43. In the letter, she listed various items she sent to her for her review including a case summary from Rachael Geiser, a cd of the interview of CJ, transcripts of interviews conducted by Pat Lewis of CJ and Cedric, numerous Memphis Police Department reports and supplements related to interviews of Petitioner and his family members, and Petitioner's TDOC records. Exhibit 44 was introduced as Ms. Shettles's itemized bill on Petitioner's case from Inquisitor Incorporated. Within her itemized bill, there were multiple references to contact with Dr. Bishop or others concerning Dr. Bishop, including an email exchange from September 24,

[31] However, as previously stated, an email in the files indicates the issue was discussed with and reviewed by Dr. Bishop. *See* Exhibit 46.

2010, introduced as Exhibit 46. In the email, Ms. Shettles discussed Dr. Bishop's review of the incident in which Petitioner saw his younger brother burned with scalding water and the effect this may have had on Petitioner.

She recalled she was present with Petitioner each day of trial and brought his clothes each day. She did not recall him wearing any stun cuffs on either his ankles, arms, or anywhere else.

On redirect, she identified an email exchange with Mr. McAfee, filed as Exhibit 45, concerning filing a motion for additional funds for her work.

She also testified she was allowed to get Petitioner's entire social history in at sentencing through her testimony alone. She stated she thought she was able to get information in front of the jury from the experts whom the team did not call to testify. She indicated the defense team had decided she could testify about the issues without being cross-examined as an expert would have been.

Petitioner also called Dr. Marilyn Miller, an associate professor in the Department of Forensic Science at Virginia Commonwealth University in Richmond, Virginia, as a witness.[32] She discussed her education and background and the Court qualified her as an expert in crime scene reconstruction, forensic science, and serology.[33] She testified she was asked to review the basic crime scene investigation performed in this case, to determine if there was a possibility for crime scene reconstruction in this case, and to review the procedures followed by the Memphis Police Department. She prepared a report, dated August 17, 2018, which was introduced as Exhibit 55. In her report, she summarized her opinions in 3 areas: (1) basic general crime scene investigation, specifically as to potential contamination, cross-contamination, alteration, and loss

[32] Her curriculum vitae was introduced as Exhibit 54.

[33] The State objected to the relevancy of Ms. Miller's testimony as not being material to any issue raised in the Petition. This Court allowed the testimony, but indicated it would not consider anything it found to not be relevant to the pending issues. Petitioner's counsel asserted her testimony was relevant to claims 2 through 6 of the amended petition.

of evidence, (2) the pervasive belief of the MPD that these crimes were done by a sole perpetrator, and (3) the opinions of Sergeant Mullins, specifically with regards to bloodstain pattern analysis and crime scene reconstruction (sequencing of events at the crime scene).

Initially, she said the number of victims was of note, as well as the fact that there was an outside, non-law enforcement agency (crew from *The First 48* television series) that was allowed access to the crime scene. She estimated about 30 people were in and out of the crime scene during the course of the investigation, including those from the Memphis Police Department, Fire Department, First Responders, and *The First 48* Cameraman.[34] She criticized even one person not wearing protective gear into the crime scene. She stated "for us to keep the crime scene intact or pristine, you want to minimize the number of people who are going in there, potentially changing or altering or losing evidence or adding extraneous evidence." She stated the cameraman could have booties on, which is what Sergeant Mullins stated at trial, but she stated she could not tell if this was true from the photographs. Generally, she stated she did not agree with the idea of allowing an entertainment corporation at a crime scene.

She then testified to what she referred to as altered or moved evidence. In her report and testimony, she stated the toilet lid had been raised and lowered, a board (evidence #17) was moved, and a sweatshirt and pillow had been moved. She then speculated that this meant they were not in their original condition, and therefore, it could have changed or altered something.

While she stated she had a hard time reconciling the opinion the crime was committed by a sole perpetrator based on the number of people who were on the scene, she admitted it was possible the offenses were committed by a sole perpetrator. She also criticized the model of

[34] Trial Exhibits 211 and 212 as well as trial transcript pages 496-98 were introduced as Exhibit 56. The photos were of the cameraman from *The First 48*, and the testimony was an excerpt from Sergeant Mullins's testimony at trial.

having detectives, rather than crime scene techs, in charge of an investigation. She stated this could lead to missing evidence a detective did not know to look for at a scene.

She then discussed the "sole perpetrator" theory of the case. She opined the evidence indicated a great amount of violence. She pointed out the lack of fingerprints or DNA belonging to Petitioner at the crime scene, as well as the lack of blood or evidence on Petitioner's clothing or the bike he rode away from the scene. She stated she would have expected the perpetrator to have been covered in blood. She also noted the lack of bloody footprints, palm prints, etc., at the scene. She thought the evidence also could be consistent with multiple offenders.

Lastly, she discussed her review of and opinion of Sergeant Mullins's methodology and training concerning his investigation and testimony in this case. She criticized the fact Sergeant Mullins did not write a report on the blood evidence to be peer reviewed. She stated she thought "in his methodology, he tainted his conclusions very subjectively by relating all of his theories based on what the witnesses were saying, not necessarily on the physical evidence that was present in the room." She further stated "that is not the foundation of crime scene reconstruction work." She said basically that evidence was more reliable than witnesses.

She also stated she found it interesting Petitioner had no cuts or splinters from the stabbings and the boards.

She then stated,

> I'm not saying that one person couldn't have done this. What I am suggesting is this is what the physical evidence shows happened at the crime scene. Is it possible for one person to have done that? I've testified that it is. It is equally possible, given the quantity of bloodshed that has occurred and the evidence, the physical evidence at the crime scene, it could have been more than that. And I am suggesting that based on proper or improper investigative techniques, we may or may not be able to know precisely one or the other....
>
> ... And that's why I didn't do a reconstruction in this case because there's not scientific evidence to show one way or the other.

She indicated the lack of evidence of blood transfer on a suspect or suspects, fingerprints, bloody palm prints, etc. were the reasons she could not say if there was one or more perpetrators and she could not do a crime scene reconstruction. She testified about various parts of the investigation, but she essentially stated she was asked to review and give an opinion about the methodology and testimony of Sergeant Mullins and things that could have been brought out on cross-examination. She was not asked to consider who did it, and she never claimed the state's theory of the case was not possible.

On cross, she admitted she did not know what the person who committed the crime was wearing, such as gloves or having a knife wrapped in a pillowcase. She admitted Petitioner had sufficient time to get rid of any bloody clothes between the time of the offenses and when the bodies were discovered. She also admitted if she had been called on this case she would have told counsel it was possible that only one person did these crimes, but not to the exclusion of all other possibilities.

Petitioner's last witness was Deputy Carlos Atkins of the Shelby County Sheriff's Office. He testified he was Petitioner's escort for security with Officer Keley Gray. He stated he did not go to Nashville, but Officer Gray did. Officer Atkins acknowledged he was trained on the stun cuffs, and he discussed how they work. Officer Atkins indicated he had placed a stun cuff on Petitioner's left ankle on two dates. He testified Petitioner's pants had covered the stun cuff, and Petitioner did not have the stun cuff on when he testified at the trial. He recalled the stun cuff was used at the capital sentencing hearing and again at the other sentencing hearing in front of the judge sometime later. He also recalled Petitioner wore his jail uniform in front of the jury for sentencing. He testified there had been a male and female with Petitioner in the back when he both had taken the stun cuff off and put it on Petitioner multiple times in one day.

The State called Deputy Keley Gray to testify concerning his contact with Petitioner during the trial.[35] He indicated he currently worked on the Gang Unit inside the jail. He stated he accompanied Petitioner to court the entire time both in Nashville and back in Memphis. He noted this included in the lock up area as well. As he recalled, when they traveled, Petitioner was in a car with Gray and Atkins, and they were escorted by four SWAT officers in two other cars. He stated he was not trained in stun cuffs, but his partner, Carlos Atkins, was. He indicated he was not aware of Petitioner having on stun cuffs at any point during the trial or sentencing hearing. He recalled Petitioner wore street clothes for trial, but he could not specifically recall what he had worn for sentencing. He also did not recall Petitioner wearing a stun cuff the day the judge sentenced him on his other charges.

The State's only other witness was Assistant District Attorney Ray Lepone, who prosecuted Petitioner. He testified he had been with the Shelby County District Attorney's Office for about 16 years total, with 2 years of private practice and 2 years as a Juvenile Judicial Magistrate. In 2008 when these offenses occurred, he served as Deputy Chief Prosecutor in the gang unit,[36] and Reggie Henderson was the Chief Prosecutor in the gang unit. He recalled in March of 2008 he had received a call from Sergeant Mullins regarding multiple victims found in a house, and the police had wanted both himself and Mr. Henderson to be aware of it.

ADA Lepone testified he had been in charge of discovery in the case because when the case had started it was in the gang unit, and there were already several boxes. During the pretrial stages of the case, ADA Henderson moved out of the gang unit, so the boxes stayed in ADA Lepone's office. He indicated the decision was made early in the case that he would be in charge of ensuring the defense received all discovery; to accomplish this, he had an open file policy

[35] Deputy Gray was taken out of order and actually testified prior to Officer Atkins.
[36] By the time of trial, he was Chief Prosecutor of the Gang Unit.

with defense counsel. He stated that in order to keep things organized he began by using an old fashioned bates stamp to number documents as he received them. He recalled he would read a document, stamp it, and provide it to the defense. He indicated he dealt exclusively with defense attorney Skahan in order to ensure the defense received a copy of everything. He indicated as soon as he received something he would contact Mr. Skahan, who sometimes sent Rachael Geiser to pick up discovery.

He testified he eventually stopped using the bates stamp and developed a different method of tracking all discovery. He explained how if he needed to show something new to the defense he put the new discovery in a folder and labeled it. After Mr. Skahan looked at the new discovery, he placed a blue check mark at the bottom right of the manilla folder, which he explained meant he was present when the defense opened the file and reviewed the materials in it.

He stated he turned a conference room into the Lester Street Trial Room with the entire file. He estimated 90% of his time in the room was when he was there at the same time as attorney Skahan. He noted there were times when Rachael Geiser, who he described as an amazing investigator, came to look at the file, either alone or with attorney Skahan. He recalled having the Court review some records, such as DCS records prior to disclosure. He also recalled a lengthy courtroom hearing on some of the children's records which resulted in some of the records not being provided to either of the parties. He stated Ms. Geiser sometimes also would ask about other records, which would prompt him to then make inquiries to get those records if possible. He recalled closer to the time of trial he had the defense attorneys come to the Lester Street Room and review the file again to ensure they had all the discovery.

ADA Lepone noted ADA Steve Jones, who was representing the State in these post-conviction proceedings, had not shown him anything from the post-conviction file other than the report from Dr. Marilyn Miller prior to these hearings. He confirmed they had not any substantive discussions about the case other than about whether the defense had seen Exhibit 2 from the post-conviction hearing which was Vicki Brewer's psychological report on CJ from LeBonheur in May of 2008. ADA Lepone also indicated he had reviewed his own trial file to prepare for the post-conviction hearing. He specifically recalled discussing the report of Vicki Brewer, who was on the State's witness list, with attorney Skahan, and the file was marked with a blue check indicating Mr. Skahan had reviewed it in ADA Lepone's presence. He recalled he and Mr. Skahan had been discussing whether the children would be witnesses and CJ's injuries. He even indicated he believed he had brought this up in open court regarding health care providers who had contact with the children.

ADA Lepone testified he thought the defense team's cross-examination of the surviving children had been amazing. He stated they had not planned to call Cedric, but after the cross-examination of CJ, they thought they had to put him on to testify. He recalled CJ had admitted to everything the defense wanted him to say that was on the tape, so the tape had not been admitted as evidence under the rules.[37] The defense brought all the inconsistencies in CJ's statements out in their closing argument, as well as the potential that CJ had been coached concerning his testimony by family members.

On cross, ADA Lepone agreed he had told the jury in closing that CJ knew who put the knife in his head. In addition, he agreed he had told the jury that CJ had solved the case and that

[37] According to the transcript of the trial, this Court had a jury out hearing after the direct, cross-examination, re-direct, and re-cross by each side several times of CJ to determine if the tape was admissible as prior inconsistent statements. Afterwards, this Court took a break to consider the issue. Upon returning to the courtroom, the defense announced it had no more questions of CJ prior to any ruling by this Court.

ADA Henderson and Lt. Walter Davidson had called CJ the hero of the case because he had survived in a tub with a knife in his head for 40 hours. He also agreed ADA Henderson, in his guilt/innocence closing argument, had referred to how CJ had been present at the offenses and had seen Petitioner do it, and how ADA Henderson had explained that CJ had testified, so the jury could see and hear him.

He further agreed ADA Henderson told the jury Petitioner had not been suspect until CJ identified him as the person who had stabbed him. In fact, ADA Lepone testified Petitioner had been treated merely as a family member and had been placed in protective custody with the other family members. He recalled meeting Petitioner and shaking his hand and telling him they would do their absolute best to find out whoever did this to his family. He pointed out that Petitioner had already told the police everyone in the family called him Junior before CJ had said his Uncle Junior did it. He explained how receiving this information from CJ provided them with probable cause to bring Petitioner in for more questioning.

According to ADA Lepone, prior to CJ's statement identifying Petitioner, the police investigation had gone down several avenues. He recalled they had investigated the Gangster Disciples, Mexican gangs, and disputes between the adult male victim and others. He pointed out how the State in fact had provided the defense with a lot of evidence they were able to put in front of the jury concerning other suspects and reasonable doubt about Petitioner.

He was asked again about Exhibit 2, and he specifically recalled attorney Skahan stating, as it related to the part of the report referring to long and short term memory, that the issues related to memory could be shown through anything in the file – a knife in his head, how he had been left injured in a tub for 40 hours, and the fact that he had undergone brain surgery. He recalled the conversation and how they had stated that there was no question that all these things

would make anyone question a child's memory under these conditions. He indicated they had discussed whether long-term or short-term memory would benefit the State or the defense. He testified this was why the defense had focused on the inconsistent statements and had used Dr. Aldridge concerning the proper method of questioning children after a trauma. He could not recall if either attorney Skahan or Rachael Geiser had gotten a copy of Exhibit 2.

He recalled that then District Attorney Williams Gibbons had written a letter, after the Lester Street episode of *The First 48* had aired, to Police Director Larry Godwin urging him not to renew the police department's contract with *The First 48* referring to various court rules on evidence and confessions. He acknowledged on August 5, 2008, less than a month after the episode aired, the contract had been canceled.

Next, ADA Lepone was asked about the decision to seek the death penalty in this case. He stated it was based on the number of aggravating circumstances the State believed were present in this case, including two child victims and a prior murder. He explained the ADAs look at the case and submit a memo to the District Attorney if they believe there are aggravating circumstances which warrant the death penalty. He further explained the District Attorney reviews the case and recommendation and then makes the decision as was done in this case. He recalled no offer was ever made to the defense by the State in this case. He testified that he and attorney Skahan talked about this and about how the children would not have to testify if there was no trial, but no offer was made. He stated when attorney Skahan inquired about an offer, he had told him if he wanted to bring signed papers for life without parole he would submit them to the District Attorney, but that ultimately it was the DA's decision whether to allow a plea or not. He further indicated attorney Skahan had never brought any papers for review. He noted he and

attorney Skahan recently had talked briefly about this subject so he was aware they remembered it differently.

He stated during the investigation he had advised about search warrants and legal issues. He testified he did not give advice about the way to investigate the case or about *The First 48*. He stated this Court had been clear about its concerns with a show for entertainment being involved in the investigation. He testified there were some scenes in the show that were not real; he explained how at times the people filming would have the detectives put their clothes on from another time to shoot footage when Petitioner was not even in the room. He explained this made the show itself not very reliable.

He then stated how another amazing thing the defense team did was to get the entire recording of Petitioner's statement excluded, especially the part where Petitioner was in the room alone with his mother and confessed to her. He explained how the Court had ruled the defense could open the door to the admission of the tape depending on the evidence presented, but that the recording was not admissible otherwise. During the trial, Petitioner testified and stated he had been whispering to his mother that they were making him say he did it. He asserted to the jury they should listen to the whole tape. His mother, however, testified Petitioner did not do this, but had only confessed to her. The State had argued the defense opened the door to the recordings as evidence, but the Court did not allow the recording to be presented to the jury. He explained how it had benefited the defense for Petitioner to testify to his version of things without the tapes coming in at all. When asked if he had advised law enforcement concerning the need to record statements, he indicated he had not advised them on this issue. He recalled the

defense thoroughly put the issue before the jury when Director Armstrong testified concerning his version of events, and then Petitioner testified to his version of what occurred.[38]

IV. POST-CONVICTION STANDARDS GENERALLY

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

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

[38] Following this testimony, the State renewed its motion to introduce the entire trial team defense file into evidence. Again, this issue is part of the separate discovery order.

Tenn. Code Ann. § 40-30-106(g) and (h) (2012); *see* Tenn. S. Ct. R. 28, Section 2(D) and (E).[39] In a post-conviction proceeding, the petitioner has the burden of proving his allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f) (2012) and Tenn. S. Ct. R. 28, Sec. 8(D)(1).

V. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL STANDARDS

In Davidson v. State, 453 S.W.3d 386 (Tenn. 2014), our Tennessee Supreme Court discussed the standards for the effective assistance of counsel in a capital case:

> Article I, section 9 of the Tennessee Constitution establishes that every criminal defendant has "the right to be heard by himself and his counsel." The Sixth Amendment to the United States Constitution likewise guarantees that all criminal defendants "shall enjoy the right ... to have the [a]ssistance of [c]ounsel." These constitutional provisions have been interpreted to guarantee a criminal defendant the right to the "effective assistance of counsel" at trial. *Strickland v. Washington*, 466 U.S. [668,]686, 104 S. Ct. 2052 [1984]; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn.1975).
>
> To prevail on a claim of ineffective assistance of counsel, a petitioner must prove both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. at 687, 104 S. Ct. 2052; *Felts v. State*, 354 S.W.3d 266, 276 (Tenn.2011). A court need not address both prongs if the petitioner fails to demonstrate either one of them. *Strickland v. Washington*, 466 U.S. at 697, 104 S. Ct. 2052; *Garcia v. State*, 425 S.W.3d 248, 257 (Tenn.2013).
>
> Deficient performance means that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. at 688, 104 S. Ct. 2052. To determine reasonableness, a reviewing court must consider the "professional norms" prevailing at the time of the representation. *Strickland v. Washington*, 466 U.S. at 688, 104 S. Ct. 2052; *see also Baxter v. Rose*, 523 S.W.2d at 932–33. Counsel's performance is not deficient if the advice given or the services rendered "are within the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d at 936. In *Strickland v. Washington*, the United States Supreme Court explained that
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> > strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after

[39] No issues here were held pre-hearing to be either previously determined and/or waived. This Court will address waiver and previous determination where appropriate in this order.

> less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland v. Washington, 466 U.S. at 690–91, 104 S. Ct. 2052.

Therefore, we begin our review with the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all strategic and tactical significant decisions. The petitioner bears the burden of overcoming this presumption. *Strickland v. Washington*, 466 U.S. at 690, 104 S. Ct. 2052; *see also Burt v. Titlow*, 571 U.S. [12], [22-23], 134 S. Ct. 10, 17, 187 L.Ed.2d 348 (2013); *State v. Burns*, 6 S.W.3d 453, 462 (Tenn.1999). Reviewing courts should resist the urge to evaluate counsel's performance using "20–20 hindsight." *Mobley v. State*, 397 S.W.3d 70, 80 (Tenn.2013) (quoting *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn.1982)); *see also Strickland v. Washington*, 466 U.S. at 689, 104 S. Ct. 2052 (instructing reviewing courts to try "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").

The second prong of *Strickland* concerns whether counsel's deficient performance "prejudiced" the defendant. The question under this prong is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L.Ed.2d 180 (1993) (citing *Strickland v. Washington*, 466 U.S. at 687, 104 S. Ct. 2052). To prove prejudice, the petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694, 104 S. Ct. 2052. A "reasonable probability" is a lesser burden of proof than "a preponderance of the evidence." *Williams v. Taylor*, 529 U.S. at 405–06, 120 S. Ct. 1495; *Pylant v. State*, 263 S.W.3d 854, 875 (Tenn.2008). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. at 694, 104 S. Ct. 2052; *see also Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn.2006); *Goad v. State*, 938 S.W.2d 363, 370 (Tenn.1996).

In death-penalty cases, the right to effective assistance of counsel extends beyond the guilt-and-innocence phase of the trial. We have said that courts must be

> particularly cautious in preserving a defendant's right to counsel at a capital sentencing hearing. The Eighth and Fourteenth Amendments to the United States Constitution mandate that a death sentence be based on a particularized consideration of relevant aspects of the character and record of each defendant. In this respect, evidence 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. Thus, although there is no requirement that defense counsel present mitigating evidence in the penalty phase of a capital trial, counsel's duty to investigate and prepare for a capital trial encompasses both the guilt and sentencing phases. [Defense attorneys who anticipate a capital sentencing hearing possess a] greater duty of inquiry into a client's mental health ... [C]ounsel may not treat the sentencing phase as nothing more than a mere postscript to the trial.

Goad v. State, 938 S.W.2d at 369–70 (citations, ellipses, and quotation marks omitted). At the sentencing hearing, the jury hears new evidence and new arguments to help the jury determine whether to impose death by execution, lifetime imprisonment without parole, or a life sentence. *See Williams v. Taylor*, 529 U.S. at 393, 120 S. Ct. 1495; Tenn. Code Ann. § 39–13–202 (2014).

Because mitigation evidence is often a critical component in a capital sentencing trial, the United States Supreme Court has held that the Constitution requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Porter v. McCollum*, 558 U.S. 30, 42, 130 S. Ct. 447, 175 L.Ed.2d 398 (2009) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982)). Under the Eighth Amendment's "cruel and unusual punishments" clause, the death penalty is only appropriate for the worst murderers. *Roper v. Simmons*, 543 U.S. 551, 568, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' " (quoting *Atkins v. Virginia*, 536 U.S. 304, 319, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002))). Tennessee law concomitantly requires capital sentencing juries to find beyond a reasonable doubt that the aggravating factors in the case outweigh any mitigating factors. Tenn. Code Ann. § 39–13–204(f)(2).

Mitigation evidence includes facts about the defendant's personal makeup and life history. *See* Tenn. Code Ann. § 39–13–204(j) (listing types of mitigation evidence). This evidence often serves to humanize the defendant and reveals aspects of the defendant's life or inner workings that might affect the jury's assessment of the defendant's moral culpability for the crime. Again, mitigation evidence is critical "because of the belief, long held by this society, 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." *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L.Ed.2d 256 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S. Ct. 837, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)); *see also Zagorski v. State*, 983 S.W.2d 654, 658 (Tenn.1998).

Counsel representing a defendant in a capital case is not required to present mitigating evidence at sentencing in every case or to run down every conceivable line of potentially mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003). However, for counsel's strategic and tactical choices to be entitled to

> deference, they must be "informed ones based upon adequate preparation." *Goad v. State*, 938 S.W.2d at 369. The United States Supreme Court has noted that " 'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.' " *Wiggins v. Smith*, 539 U.S. at 533, 123 S. Ct. 2527 (quoting *Strickland v. Washington*, 466 U.S. at 690–91, 104 S. Ct. 2052). Accordingly, counsel's decision not to investigate or present mitigation evidence "must be directly assessed for reasonableness in all circumstances." *Strickland v. Washington*, 466 U.S. at 691, 104 S. Ct. 2052.
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> Between 2000 and 2010, the United States Supreme Court has had several opportunities to address claims of ineffective assistance of counsel in the context of investigating and presenting mitigating evidence in capital proceedings. The Court noted that presenting some mitigating evidence does not "foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears v. Upton*, 561 U.S. 945, 130 S. Ct. 3259, 3266, 177 L.Ed.2d 1025 (2010). It also stated that its inquiry in these cases called for a "probing and fact-specific analysis" that included consideration of "the totality of the available mitigation evidence—both that adduced at trial and the evidence adduced in the [collateral] proceeding." *Sears v. Upton*, 130 S. Ct. at 3266; *see also Wiggins v. Smith*, 539 U.S. at 527, 123 S. Ct. 2527.

453 S.W.3d at 392-95 (footnote omitted).

VI. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL STANDARDS

"To determine whether appellate counsel was constitutionally effective, we use the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) - the same test that is applied to claims of ineffective assistance of trial counsel asserted under the Sixth Amendment to the United States Constitution." *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004). "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." *Kennath Henderson v. State*, 2005 WL 1541855 (Tenn. Crim. App. 2005)(*citing Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746 (2000)). As explained in *Henderson*:

> 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. 1994). 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. *Id.* at 888. 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.

Henderson, 2005 WL 1541855 at 44. "As *Strickland* states, when assessing an ineffective assistance of counsel claim, the performance inquiry must focus on "*all the circumstances* " in determining whether counsel's assistance was reasonable. 466 U.S. at 688, 104 S. Ct. 2052 (emphasis added)." *Carpenter*, 128 S.W.3d at 888.

VII. CLAIMS RAISED

AUGUST 17, 2015 *PRO SE* PETITION

Petitioner raised numerous claims in his *pro se* petition which consisted of essentially three categories: claims of conviction based upon improperly admitted evidence or a violation of his rights, ineffective assistance of counsel, and other errors.

In the first category he summarily raised the following issues:

> (A) Conviction was based on use of coerced confession;
>
> (B) Conviction was based on the use of evidence gained pursuant to an unconstitutional search and seizure;
>
> (C) Conviction was based on the use of evidence obtained pursuant to an unlawful arrest;
>
> (D) Conviction was based on use of evidence obtained pursuant to an unconstitutional search and seizure;
>
> (E) Conviction was based upon a violation of the privilege against self-incrimination and the right to counsel; and

(F) Conviction was based upon the unconstitutional failure of the prosecution to disclose to defendant evidence favorable to defendant.

These issues have been waived for Petitioner's failure to raise them previously. In addition, Petitioner has not set forth specific facts as to these allegations. If these issues are addressed in issues raised in the amended petition, this Court will address those issues separately.

In the second category, Petitioner raised the issue of ineffective assistance of counsel related to the following issues:

(A) Regarding the use of stun cuffs and the failure to object;

(B) Failure to file a timely motion to suppress statement;

(C) Failure to get his full statement preserved from *The First 48*;

(D) Failure to conduct adequate voir dire;

(E) Failure to exhaust peremptory challenges;

(F) Failure to object to repeated inaccurate statements of the law;

(G) Failure to object to the State being permitted to each potential juror first;

(H) Failure to object to the improper manner of the State's questioning of witnesses (leading, cumulative questions, and asking unnecessary prejudicial information); and

(I) Failure to exercise due diligence re the background and prior statements of many state witnesses, thus they failed to effectively cross them.

Each of these issues has been raised in the amended petition and will be addresses below in this order.

In the third category, Petitioner raised the following issues:

(A) Trial court erred in issuing an order re stun cuffs without a motion, hearing, etc.;

(B) Trial court erred in failing to sua sponte dismiss jurors who could not follow the law;

(C) Trial court erred by repeatedly making inaccurate statements of law;

(D) Trial Court erred in its ruling that the content of a conversation between Linda Steele and Detective Mullins was not admissible;

(E) State failed to preserve a copy of the entire tape of defendant's statement;

(F) State encouraged vindictiveness by asking leading, inflammatory, and irrelevant questions;

(G) Improper reasonable doubt instruction;

(H) Illegal protocols for death penalty; and

(I) Cumulative effect of all constitutional violations and errors.

Many of these claims have been restated by counsel in the amended pleadings. Otherwise, these issues are stated in very general terms without specific facts to support the claims. In addition, these issues were available at trial and have been either previously determined or waived.

Accordingly, this Court will address the issues raised in the amended pleadings in the order raised by counsel. Any issue not specifically addressed in this order, has been deemed by this Court to be too generally plead, and the Petitioner, therefore, has failed to carry his burden of proof on the same.

AMENDED PETITION CLAIMS

Claims Related to Failure to Investigate

Claim 1: Ineffective Assistance of Trial Counsel in the Failure to Investigate Mitigation

Claim 2: Ineffective Assistance of Trial Counsel in the Failure to Obtain or to Properly Utilize Expert Assistance in Regard to the Innocence/Guilt and Penalty Investigation

On the issue of mitigation, Petitioner claims trial counsel failed to conduct a thorough and proper investigation into his life history, and specifically to develop a multigenerational social history. Petitioner claims counsel's mitigation investigation fell short and asserts having only one witness, mitigation specialist Glori Shettles, was insufficient. Petitioner claims counsel failed to investigate the following: cognitive

impairments; childhood exposure to parental violence and substance abuse; family history of mental illness; family history of intellectual disability/low functioning, poor nutrition, poverty, mental illness, neglect and depravation; Petitioner's different attempts to succeed and the circumstances that limited and thwarted him in these attempts; the impact of early substance abuse; the impact of exposure to crime-ridden, poverty-stricken environments in his neighborhoods; and the impact of racial bias in Memphis. Petitioner also claims counsel failed to investigate and collect records substantiating these mitigating circumstances.

At the post-conviction hearing here, Petitioner did not testify. Multiple members of the defense team testified concerning the investigation into potential mitigation for Petitioner's trial. Evidence established Glori Shettles prepared for trial counsel a 68-page mitigation timeline which covered the time from Petitioner's parents' births to April 17, 2008, approximately 6 weeks after the convicted offenses occurred; she also prepared a multi-page set of witness summaries for Petitioner's father (6 pages), mother (5 pages), sister (5 pages), maternal grandmother (4 pages), material cousin (5 pages), and family friend (1 page), and a 3-page bullet point summary of "Significant Life Events & Themes." *See* Exhibit 42.

Glori Shettles testified both at trial and at these proceedings. She recalled here that she testified at his sentencing trial concerning Petitioner's background and the mitigating factors in his social history. She testified she spent a lot of time talking with Petitioner and getting to know him which is also evidenced by her time records and other documents.[40] *See* Exhibit 44. She testified at trial she believed she had gathered all the records that were available. Trial Transcript, page 2486. Her file, which was originally made an exhibit

[40] In her files and in counsel's files, both of which were made exhibits to this hearing, there were numerous documents which demonstrated her investigation into Petitioner's social history.

under seal, was subsequently unsealed as the information all pertained to the mitigation investigation on Petitioner's behalf which was challenged here. *See* Exhibit 61a. It contained additional summaries of witness interviews and other documentation of the investigation which were not otherwise provided.

She explained this had been a difficult case because the defendant and the victims were from the same family. Many family members had agreed to speak to her, but they were not willing to testify on Petitioner's behalf at sentencing. Despite these hurdles, the defense team was able to gather the social history information available for mitigation.[41] The attorneys testified, however, that residual doubt, in their opinion, was the best mitigation they had.

Although counsel is criticized in Petitioner's pleadings for Ms. Shettles being the only witness at the sentencing hearing, no family members or other lay mitigation witnesses testified at the post-conviction hearing. Petitioner also did not testify to establish any mitigating information that was not provided at trial. Counsel and other team members were clear about having made a strategic decision to not place petitioner's "anti-social" diagnosis before the jury. They understood the report from Dr. Walker contained some good information for mitigation, but they determined the prejudice of the "anti-social" characteristics outweighed the benefit of pursuing expert psychological testimony in this case. There was additional information in the report which was also potentially damaging to Petitioner. For example, while Dr. Walker noted Petitioner's claim of a coerced confession and the lack of any written statement, he also described Petitioner as not being "a man who is easily led or influenced by others." He described Petitioner's "story of the events that transpired that night with regard to his thoughts, feelings, and actions at the time [as]

[41] Apparently, there was also a document entitled "Social History" which could not be located in the files.

unlikely." He specifically noted Petitioner stating he had heard no noises to indicate torture or the horrific injuries the victims sustained prior to their deaths and how he did not find this consistent with the evidence from the autopsies. Petitioner also had reported in his statements to Dr. Walker of the children being alive when he left the house, yet he told others he thought the children were dead. Clearly, the statements Petitioner made to Dr. Walker about the events on the evening of the offenses had numerous discrepancies with his trial testimony and other statements.

The evidence also established Dr. Bishop had not been able to support any type of mental health defense or even any type of Post-Traumatic Stress Disorder (PTSD) diagnosis. *See* Exhibit 25. The defense team clearly stated they made the strategic decision to use Ms. Shettles in order to get as much mitigating information before the jury as possible without the type of damaging cross-examination that would have occurred with an expert and any accompanying report.

This Court does not find that Petitioner has carried his burden of proof on either prong concerning the issues raised here about investigation and presentation of mitigation evidence at trial.

Petitioner further claims counsel gathered records which indicated he suffered from cognitive, speech and language impairments, but these facts were not used either in mitigation or to challenge his statements.[42] As previously stated, counsel made a reasonable strategic decision concerning not using evidence of cognitive impairments in mitigation. This Court does not find either prong of ineffective assistance has been met as to not raising these issues in mitigation.

He next claims counsel was ineffective in not developing in mitigation Petitioner's

[42] Ineffective assistance of counsel related to failure to challenge his statements is addressed below within this order.

own substance abuse problems, both growing up and at the time of the offenses. Despite his statements to Dr. Walker concerning his extensive use of alcohol on the night of the offense, Petitioner did not refer to such use in his written version of the events (Exhibit 24) he prepared for Dr. Leo. At trial, he stated he and his brother and others drank and smoked some, but he did not claim he was intoxicated like he did to Dr. Walker. There was trial testimony concerning the victims and Petitioner buying some marijuana earlier in the evening on the date of the offenses, but Petitioner did not testify he had smoked it upon returning to the house on Lester Street. In his classification report with the Department of Corrections when he was 19, Petitioner denied using alcohol but admitted he had used marijuana one time. His timeline of events referred generally to having used drugs with his mother at some point. From 1994 to 2007, Petitioner received only three write-ups for a positive drug screen for which he pled guilty. During his time at Northwest Correctional, he completed classes in anger management, stress management, living skills, alcohol and drug abuse, received his GED after several failed attempts, and completed programs in other areas. He graduated from the Security Threat Group Module which generally required disaffiliation with gang ties while in the Department of Corrections also. While on parole following his release in August of 2007, he admitted to drug use once but passed his next drug screen two weeks later. These records do not support any significant alcohol or drug abuse by Petitioner, and he did not testify on this issue at the post-conviction hearing. Under all the circumstances, Petitioner has failed to carry his burden of proof as to both prongs of ineffective assistance of counsel on these issues.

Petitioner also claims counsel failed to secure expert assistance, specifically a psychiatrist, to assist in developing and presenting these issues. Again, members of the

defense team testified concerning the evaluations performed on Petitioner by Dr. Walker and Dr. Bishop and the strategic decision made to not use any psychological evidence due to the "anti-social" diagnosis which they believed would not be well taken by the jury in mitigation. This was a strategic decision, and Petitioner has failed to carry his burden of proof on both prongs of ineffective assistance on this issue.

Petitioner also claims counsel failed to investigate and challenge the State's proof at trial concerning the theory that the offenses were committed by a single person. As counsel testified here, they did not present a crime scene expert on this issue at trial because their expert, Richard Ernest, opined that it could have been done by a single person. In fact, Petitioner's crime scene expert presented at the post-conviction hearing testified a single person could have committed the offense. Despite not having an expert, the defense placed the issue before the jury through other evidence and cross-examination of witnesses. For these reasons, Petitioner did not present evidence to carry his burden of proof on this claim on either prong of ineffective assistance of counsel.

Petitioner claims counsel failed to retain a qualified pathologist to review and challenge the findings of the state pathologists. No evidence was presented by Petitioner here to challenge the findings of the Pathologist from trial. Counsel testified there was no issue as to cause of death for the victims, and they did not see any issue with the testimony of the pathologist.[43] Again, Petitioner has failed to carry his burden of proof as to both prongs of the claim of ineffective assistance of counsel on this issue.

Petitioner next claims counsel was ineffective by failing to communicate with and effectively utilize their false confession expert, Dr. Leo, to challenge Petitioner's statements

[43] Although not raised in the trial court, Petitioner unsuccessfully challenged the introduction of the autopsies performed by a different pathologist on appeal.

to Director Armstrong and Petitioner's mother. Petitioner claims that counsel did not communicate sufficiently with Dr. Leo, who did not testify and who did not provide any substantive opinions to counsel. By Dr. Leo's own invoice, he spoke with Rachael Geiser on 14 different dates, which included attorney Skahan at least twice. Counsel indicated they had been happy with the exclusion of the recordings of Petitioner's statements and had not wanted to jeopardize this ruling by placing Dr. Leo on the stand. In addition, the defense team testified credibly that they did not have any opinion from Dr. Leo which would have benefited Petitioner concerning the coercion of his statement. Ms. Geiser testified Dr. Leo had indicated to her that he needed the full statement to provide an opinion about whether the statement was coerced. Also, the report from Dr. Walker indicated concern with Petitioner's claim of a coerced confession. Based upon the evidence presented, this Court finds again Petitioner has failed to carry his burden of proof as to both prongs of the claim of ineffective assistance of counsel on this issue.

Claims Related to Pre-Trial Preparation and Motions Practice

Claim 3: Ineffective Assistance of Trial Counsel in the Failure to Object to Imposition of Stun Cuffs

Claim 4: Petitioner's Right to Due Process Was Violated by Imposition of Stun Cuffs Without a Hearing and Findings

Claim 5: Ineffective Assistance of Trial Counsel in Failing to Timely File a Motion to Suppress Petitioner's Alleged Confession

Claim 6: Ineffective Assistance of Trial Counsel in Failing to Timely Investigate and Request The First 48 Footage

Claim 7: Ineffective Assistance of Trial Counsel in the Failure to Challenge The First 48's Production Company's Invocation of the Media Shield Law

Claim 8: Ineffective Assistance of Trial Counsel in the Failure to Develop a Meaningful Relationship with Jessie Dotson

Initially, Petitioner complains that his rights to due process were violated by the imposition of stun cuffs without a hearing and findings, and counsel was ineffective in failing to object to the imposition of stun cuffs. Petitioner submitted a court order dated September 17, 2010, signed just before the beginning of the voir dire proceedings. *See* Exhibit 27. This order provided for stun cuffs for security during trial proceedings. The record does not contain a motion for the stun cuffs, and there is no transcript of any discussion related to or any reference to stun cuffs. Petitioner has alleged he wore the stun cuff in Nashville during voir dire and for the second week of the trial. Petitioner, however, did not take the stand to testify, but rather only stood up in court and stated he had worn the stun cuff in Nashville and in the second week of the trial. As Petitioner did not testify, these statements were not made under oath and were not considered as evidence.

At the hearing here, trial counsel, Ms. Geiser,[44] and Ms. Shettles all testified to their daily contact with Petitioner throughout the trial proceedings, and none had any recollection of Petitioner having worn a stun cuff or having complained about wearing one. Officers Carlos Atkins and Keley Gray testified they were Petitioner's escort officers for the trial proceedings. There was some differences in recollection about whether they were both present in Nashville, but Officer Keley testified he was not trained on the stun cuff and would not have been responsible for its use. He did not recall a stun cuff being used.

Officer Atkins, however, who was trained in the use of the stun cuff, credibly testified Petitioner did not wear the stun cuff during trial, but rather only wore the stun cuff on his left ankle during the capital sentencing hearing and at the non-jury hearing in front of this Court for

[44] Ms. Geiser was not present in Nashville.

sentencing some time later. He explained the cuff was not visible and was taken on and off each time Petitioner left court. He specifically testified Petitioner was not wearing it when he testified during the guilt/innocence phase of the trial. He recalled Petitioner having worn it when he chose to wear his jail clothes for the capital sentencing hearing. According to the trial transcript, Petitioner changed into his jail clothes for closing arguments during the sentencing phase of the trial. Trial transcript, pages 2526-27.

There has been no evidence presented of any prejudice which resulted from Petitioner having worn the stun cuff for the limited time during the closing arguments of counsel at sentencing and in the non-jury sentencing hearing. Accordingly, this Court finds Petitioner has failed to carry his burden of proof as to prejudice on this issue.

Petitioner also claims his right to due process was violated by imposition of stun cuffs without a hearing and findings on the record. This issue was not raised at the trial court or on appeal, and is, therefore waived. No member of the defense team had any recollection of Petitioner wearing a stun cuff or complaining of the same. The evidence established the cuff was not worn until after the close of all the proof at the sentencing hearing and that it was not visible. Petitioner also has failed to carry his burden of proof to establish any prejudice for not raising this issue.

Next, Petitioner argues counsel was ineffective in failing to move pretrial for the suppression of incriminating evidence, specifically his confessions to his mother and Lieutenant Armstrong. Petitioner generally claims the statements were in violation of the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Tennessee Constitution. In support of this argument, Petitioner asserts the statement to Lt. Armstrong was coerced and was in direct response to a threat from Lt. Armstrong to incarcerate

him with rival gang members, thereby threatening his safety. In addition, Petitioner argues he made subtle assurances to his mother that his alleged confession to Lt. Armstrong was the product of coercion. Petitioner argues in support of the issue that his records indicate that "he likely suffers from cognitive deficits related to language and speech" which may have influenced the veracity of his statements. Petitioner claims counsel should have challenged the statements as involuntary.

Petitioner concedes counsel did file an unsuccessful motion to prevent the admission of the statement to Petitioner's mother based upon her being a state agent.[45] Petitioner also unsuccessfully appealed this issue related to his statement to this mother.[46] Petitioner testified at trial concerning his allegations of coercion and that he had told his mother the statement to Lt. Armstrong was coerced. Petitioner's mother testified credibly at trial that Petitioner confessed to her and that he did not claim he was being forced to confess. Neither Petitioner's mother nor Lt. Armstrong was called as witnesses at the post-conviction hearing. Again, Petitioner also did not testify.

Counsel testified they did not think there was a basis for suppression of Petitioner's statements to the police. Counsel for both the defense and the State, however, testified they believed the defense had a major win in being able to keep *The First 48* footage from being used as evidence. In doing so, Petitioner was able to testify concerning his version of events, claim coercion in his statements, and point out the absence of the taped statements to the jury. Petitioner placed himself with the victims on the night of the offenses. Petitioner provided information concerning the bicycle he rode to his girlfriend's house which was not known to the police otherwise.

[45] That motion was denied. Trial transcript, vol. 26, page 1730.
[46] Petitioner also raised issues related to his statements to Lt. Armstrong for the first time on direct appeal. The appellate court found no plain error in these issues.

Petitioner has not demonstrated a likelihood of success on any motions related to his statements. Therefore, Petitioner has failed to carry his burden of proof to establish any prejudice for not challenging the admissibility of his statements.

Next, Petitioner claims counsel was ineffective in failing to timely investigate and request *The First 48* footage, and in failing to challenge *The First 48*'s invocation of the media shield law. Petitioner asserts cameraman Isaac Mathis from *The First 48* was allowed to film inside the house during the investigation because of a contract between the City of Memphis, Division of Police Services, and Granada Entertainment USA,[47] which permitted them to film during *The First 48* hours of a homicide investigation. Petitioner also asserts Granada was permitted to film the interviews of witnesses, family members, and Petitioner, including the alleged confessions to Petitioner's mother and Lt. Armstrong. Petitioner alleges counsel, who was appointed on March 11, 2008, knew the episode aired on July 15, 2008, but did not attempt to obtain the footage until February of 2009. On February 12, 2009, Racheal Geiser unsuccessfully attempted to obtain the footage through a judicial subpoena. Ms. Geiser received a letter from Granada's counsel dated February 26, 2009, which informed the defense team that Granada did not retain/possess raw footage and asserting Tennessee's media shield law found at Tenn. Code Ann. § 24-1-206.[48] Petitioner claims counsel should have filed the necessary actions to divest Granada of its privilege in order to obtain the raw footage.

This is not the first time issues have been raised concerning footage of "*The First 48*". In *Aaron Malone v. State*, 2017 WL 1404374 (Tenn. Crim. App. April 18, 2017), *perm. app. denied*, (Tenn. August 21, 2017), the court addressed ineffective assistance of counsel issues similar to those raised here:

[47] The contract is Exhibit 29.
[48] The letter is Exhibit 28.

> The petitioner next argues that trial counsel was ineffective because he did not attempt to obtain the unedited footage of his arrest and the investigation from "The First 48" television show.
>
> At the post-conviction hearing, trial counsel acknowledged that he did not request the unedited footage of "The First 48" television show that featured the petitioner's case. However, he elaborated that the reason he did not do so was because, in another recent case he had handled, he contacted the producer about getting such footage and was informed that any footage not aired on the show was destroyed. He made this phone call within months of his representation of the petitioner and did not "duplicate" it just to be told again that the producers no longer had the uncut footage. Sergeant Mullins testified at the post-conviction hearing that his understanding from the producers of the "The First 48" television show was that all the footage was shipped to New York and any footage that the producers decided not to use was destroyed. He was aware of other lawyers and courts attempting to get footage from the producers, but he was not aware of any being successful. The petitioner has failed to prove that trial counsel was deficient for failing to needlessly duplicate a phone call.
>
> Moreover, the petitioner has failed to establish prejudice. In order to succeed on a claim that counsel did not properly investigate or call favorable witnesses at trial, a petitioner must generally elicit favorable testimony from those witnesses at the evidentiary hearing, as a post-conviction court may not speculate "on the question of ... what a witness's testimony might have been if introduced" at trial. *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). This court has recently emphasized that the requirements in *Black* are true for witnesses who should have been called and for any evidence the petitioner claims should have been discovered and presented. *See Randall K. Madison v. State*, No. M2014–01942–CCA–R3–PC, 2015 WL 9488951, at *15 (Tenn. Crim. App. Dec. 29, 2015). "Failure to do so requires that the claim be denied since the court may not speculate as to the contents of the missing evidence." *Id.* Therefore, even if trial counsel should have duplicated the phone call to the show's producers, the petitioner has not established prejudice because he did not present the raw footage at the post-conviction hearing. The petitioner "ask[s] that this Court make an exception" to this general rule because of the "strong likelihood that the unedited footage would have been beneficial to his case." However, the petitioner supports this assertion with nothing other than speculation, and "strong likelihood" is not the relevant standard but instead the petitioner must establish his factual allegations by clear and convincing evidence. *See* Tenn. Code Ann. § 40–30–110(f).

See also Adrian Deangelo Todd v. State, 2013 WL 1908861 (Tenn. Crim. App. May 7, 2013), *perm. app. denied*, (Tenn. Sept. 11, 2013). Here, trial counsel did attempt to obtain a copy of the unedited footage, albeit unsuccessfully. The evidence presented indicated the company destroyed the footage sometime before the final cut of the episode which aired on July 15, 2008, just about four months after Petitioner's arrest for the offenses here. In addition, in a portion of

the files provided to the State, Attorney Skahan is quoted in *The Commercial Appeal* on July 28, 2008, as stating he was aware the production company destroyed the unused footage. *See* Exhibit 51, Part 5 of 9, Print Media Folder, pages 361-62 of 500. Despite this knowledge, counsel still pursued the issue. No unedited or edited footage was presented at the post-conviction hearing. Under these circumstances, this Court does not find Petitioner has carried his burden of proof on either prong of his claim of ineffective assistance of counsel as it relates to *The First 48* footage.

The last claim raised under pretrial preparation and motion practice was the failure to develop a meaningful relationship with Petitioner. Petitioner alleges in his pleadings trial counsel did not regularly meet with him in order to develop the type of meaningful relationship with Petitioner and his family necessary to provide effective representation. Petitioner further claims this affected his decision to testify, which he alleges he did without the adequate advice of counsel and without adequate preparation.

These claims, however, are merely allegations as Petitioner did not testify at the post-conviction hearing. Counsel and members of the defense team testified concerning their work on the case as well as their interactions with Petitioner. Billing records and emails between the defense team members also establish that members of the defense team regularly met with and communicated with Petitioner. At times, counsel dealt directly with Petitioner and at other times, Petitioner met with either Rachael Geiser or Glori Shettles regarding ongoing discovery and other issues in the case. In addition, Petitioner was voir dired at trial concerning counsel's advice regarding whether to testify, and Petitioner stated counsel had advised him on the issues. *See* Trial Transcript, pages 2165-66. Emails and memos within the files mention discussing strategies with Petitioner. Petitioner has not carried his burden on either prong of the test for

ineffective assistance of counsel on these issues. Accordingly, these claims also are without merit.

Claims Related to Jury Selection

Claim 9: Ineffective Assistance of Trial Counsel in Failing to Rehabilitate Jurors Who Were Able to Follow the Law

Claim 10: Ineffective Assistance of Trial Counsel in Failing to Challenge Jurors Substantially Impaired in Considering and Imposing Any Sentence but Death

Claim 11: Structural Error; Juror Substantially Impaired in Considering Any Sentence but Death Served, in Violation of the Sixth, Eighth, and Fourteenth Amendments and Should Have Been Dismissed Sua Sponte

Claim 12: Ineffective Assistance of Trial Counsel in Failing to Exhaust Preemptory Challenges

Claim 13: Ineffective Assistance of Trial Counsel in Failing to Object to State Always Questioning Jurors First

Claim 14: Ineffective Assistance of Trial Counsel in Failing to Object to Death Qualification of the Jury

Claim 15: Ineffective Assistance of Trial Counsel in Failing to Voir Dire on Issues of Race and Implicit Bias

Petitioner claims counsel was ineffective in failing to conduct adequate voir dire of the jurors which would have assisted in developing and exercising challenges for cause of potential jurors. Petitioner argues counsel made no attempts to rehabilitate jurors who voiced an opposition to the death penalty, but rather relied almost exclusively on the juror questionnaires. Petitioner alleges counsel was not familiar with appropriate rehabilitation techniques which he claims are essential in any capital case jury selection.

Both trial attorneys in this case testified they understood the issues involved in selecting a jury in a capital case. They also testified to the strategies they used in jury selection in Petitioner's case. Before exercising any peremptory challenge, trial counsel reviewed questionnaires completed by each prospective juror, and conducted individual voir dire of the prospective jurors. A copy of the list of jurors with notes and a rating for each was in both the attorney file and the electronic files for Rachael Geiser. *See* Exhibits 52a and 60a. Here, both attorneys testified they strategically determined the importance of having jurors who could potentially understand the defense and the lack of physical forensic evidence against Petitioner. They each stated they knew they needed to try to win in the guilt/innocence phase of the trial. In addition, in the event of conviction, they wanted jurors who could consider possible residual doubt based upon the lack of evidence. Attorney Skahan testified he wanted jurors who would not necessarily get along and who would challenge each other and the evidence. The attorneys both testified that jury selection was not just about questionnaires or even the answers to questions. They testified to the importance of the one on one interaction with the jurors and personal observations. Attorney Skahan testified that at times a personal look at a juror could be more revealing than a question.

In the files of Ms. Shettles, an email from September 21, 2010, from attorney Skahan also discussed how Petitioner was participating in jury selection and generally shared the opinions of defense counsel about who would be good jurors. The attorneys clearly stated they developed a strategy for jury selection in this case based upon the unique circumstances of this case, and they involved Petitioner in the decisions. This Court will not look at these decisions with 20/20 hindsight. This Court does not find

that Petitioner has carried his burden of proof on either prong of his ineffective assistance claim related to voir dire.

Specifically, Petitioner claims the service of juror Stephen Ray violated his right to a fair and impartial jury, to due process, and to be free from cruel and unusual punishment. This Court finds Petitioner did not raise this issue previously, therefore, it is waived.

Petitioner also claims counsel was ineffective in not striking Juror Ray. The transcript of the voir dire proceedings demonstrates Juror Ray was thoroughly questioned on various topics and was thorough in his answers. In addition, both attorneys testified they had strategic reasons for wanting Juror Ray. This Court finds Petitioner also has failed to carry his burden of proof on both prongs of this issue of ineffective assistance of counsel as it relates to his claims concerning Juror Ray.

Petitioner also claims this Court should have excused juror Stephen Ray sua sponte. This issue also was not raised by Petitioner at trial or on appeal. This issue has been waived.

Petitioner next claims counsel was ineffective in failing to utilize all of his peremptory challenges, which he claims left him unable to challenge the composition of the jury on appeal. Counsel testified that before they exercised any peremptory challenges they reviewed the questionnaires of the jurors, participated in voir dire of the jurors, and considered the juror in relation to the overall jury panel. The attorneys were aware of the jurors who would be seated next during the jury selection process and had been able to carefully consider each juror's questionnaire, in addition to any questioning in court. Attorney McAfee stated they knew which jurors they did not

want on the jury. It is clear, that after utilizing various tools, trial counsel strategically determined the panel that was seated was more favorable to the Petitioner than the prospective jurors remaining in the jury pool. No additional proof was presented by Petitioner on this issue to demonstrate any likelihood of success on any issue allegedly waived due to failure to use all the peremptory challenges. This Court finds Petitioner has failed to carry his burden of proof on both prongs of this ineffective assistance of counsel claim.

Petitioner next claims counsel was ineffective for failing to object to the prosecution always going first in the questioning of jurors. Attorney McAfee testified he did not file a motion related to this issue. However, Petitioner failed to present any evidence of prejudice related to counsel's failure to file such a motion or of the likelihood of success of such a motion. Accordingly, Petitioner has not carried his burden of proof of prejudice on this issue.

Petitioner then claims counsel was ineffective for failing to object to the death qualification of jurors. Trial counsel did not file a motion objecting to the death qualification of jurors. However, motions challenging the death qualification of jurors have been routinely rejected by our courts. *See e.g., State v. Reid*, 91 S.W.3d 247, 289–90 (Tenn.2002) (rejecting state constitutional challenge to removal for cause of prospective jurors who oppose the imposition of the death penalty because of "sincerely held" religious, moral, or philosophical beliefs); *State v. Hall*, 958 S.W.2d 679, 717 (Tenn.1997) (appendix) (rejecting claim that the manner of selecting "death qualified" jurors unconstitutionally results in juries that are prone to conviction); *State v. Jones*, 789 S.W.2d 545, 547 (Tenn.1990) (rejecting claim that "death qualification"

of jury violated the Sixth Amendment by depriving the defendant of a fair and impartial jury). In order to receive post-conviction relief, an omitted issue must be one in which counsel would have prevailed had it been properly presented. Therefore, the petitioner has failed to carry his burden of proof on the issue of prejudice and is not entitled to relief relative to the alleged failure to object to death qualification of the jurors.

On the issues related to jury selection, Petitioner lastly claims counsel was ineffective in failing to question jurors on their views on race and implicit bias. Counsel testified at the hearing that they did not consider race to be an issue in this case as the victims and the defendant were of the same race and members of the same family. Petitioner presented no evidence of prejudice for failure to address these issues. Accordingly, Petitioner has again failed to carry his burden of proof as to any prejudice related to this issue. This issue is without merit.

Claims Related to Conduct of Trial

Claim 16: Ineffective Assistance of Trial Counsel in Failing to Effectively Challenge State Witnesses

Claim 17: Ineffective Assistance of Trial Counsel in Failing to Object to Inflammatory Questions/Answers of State Witnesses

Claim 18: Ineffective Assistance of Trial Counsel in Failing to Object to Introduction of Inflammatory Photographs

Claim 19: Ineffective Assistance of Trial Counsel in Failing to Object to Testimony That Would Otherwise Be Inadmissible and/or Stipulating to State's Evidence

Claim 20: Ineffective Assistance of Trial Counsel in Failing to

Adequately Prepare Mr. Dotson to Testify

Claim 21: Ineffective Assistance of Trial Counsel in Failing to Present Mitigation

Claim 22: Ineffective Assistance of Trial Counsel for Improper, Prejudicial Admission in Closing Argument

Claim 23: Ineffective Assistance of Trial Counsel in Failing to File Motion in Limine and Request a Pretrial Hearing to Prevent Prosecutorial Misconduct in Argument Given the Shelby County District Attorney's Office Pattern of Misconduct in Argument

Claim 24: Ineffective Assistance of Trial Counsel in Failing to Object to Prosecutorial Misconduct in Closing Arguments

Claim 25: Prosecutorial Misconduct in Closing Arguments

Claim 26: Ineffective Assistance of Appellate Counsel in Failing to Raise Claims of Prosecutorial Misconduct in the Sentencing Trial Closing and the Inflammatory and Irrelevant Testimony of Officer Davidson as Plain Error

Petitioner claims counsel was ineffective in failing to properly prepare for cross-examination of witnesses. Petitioner also claims counsel failed to adequately cross-examine police witnesses, and specifically cites to a failure to note a "date" error on a police supplement. Petitioner also claims counsel was ineffective in the failure to object and move to strike as inflammatory and irrelevant testimony from Sergeant Davidson during the State's direct examination of him.[49] He also claims appellate counsel was ineffective in failing to raise the issues on appeal regarding Sergeant Davidson. Petitioner also claims counsel failed to object to Sergeant Mullins' testimony as an expert in bloodstain analysis. Petitioner claims counsel should have objected because Sergeant Mullins had insufficient

[49] Specifically, Petitioner claims counsel failed to object (1) when Sergeant Davidson was asked if he had "ever seen anything like this?" ; (2) when Davidson was asked about his desire to get whoever did this; (3) when he was asked whether he ever wished he had not been on duty; and (4) when he testified to the difficulty of working the case.

qualifications and provided incorrect information both on blood stain analysis and as a crime scene investigator. Petitioner asserts Mullins' testimony should have been limited.

Petitioner presented Marilyn Miller as an expert in crime scene investigation and blood stain analysis. She testified she did not think Sergeant Mullins was sufficiently qualified, that sufficient protocols were not followed, and pointed to several items of evidence which she thought were moved by people at the scene. She did not, however, establish any relevant prejudice related to these claims. She too admitted the offenses could have been committed by a single person. She did not establish specific prejudice to Petitioner's case.

This Court does not agree with Petitioner's assertions regarding counsel's examination of the officers. The records indicate the defense team more than sufficiently investigated the discovery and prepared for trial. The records contained a witness list which cross-referenced many pages of discovery relevant to the witnesses. The attorneys testified they planned the defense around the fact that there was no physical evidence connecting Petitioner to the offenses. They strategically focused on the issues which were beneficial to their case and emphasized the points which were important to the defense. Petitioner simply has failed to carry his burden of proof as to any prejudice related to these issues.

The next witness Petitioner claims counsel was ineffective in cross-examining was Willie Boyd Hill (aka Frank). Petitioner claims counsel's "attempt to discredit him backfired badly and completely undermined defense counsel's theory that Roderick and Casandra – who ... [CJ] had named as suspects – were tied to Willie Hill, who in turn was part of the Gangster Disciples who had motive to kill Cecil Wayne

Dotson." When counsel questioned "Frank" about being Facebook friends with Roderick Hill and about Frank's sister Cassandra, Frank indicated he did not know Roderick and had probably been "friended" by him because of their common last name. Counsel questioned Frank's credibility through questioning. After this occurred, the State located Roderick who was 13 years old at time of the offense and called him as a witness. Roderick indicated he did not know Frank despite being friends on Facebook. Counsel was not questioned about this issue here. The attorneys for both the defense and the State indicated the defense did all they could with the alternative theory issues. By getting CJ to admit to statements about Roderick and Cassandra and other statements from his interview, the defense clearly put the reasonable doubt issues before the jury, especially as it related to CJ's identification of Petitioner and version of events. Petitioner simply has failed to carry his burden of proof as to either prong related to this issue.

Next, Petitioner claims counsel failed to obtain and use relevant medical records related to CJ's competency to testify. He claims counsel should have utilized these records through either voir dire of CJ or through Dr. Aldridge. Petitioner claims the May 8, 2008, neuropsychological evaluation of CJ at LeBonheur Children's Medical Center revealed significant impairment in his long term memory. Petitioner claims counsel did not specifically request the records, and the State should have provided them even without a specific request because of the impeachment character of the evidence.

ADA Lepone credibly testified he specifically recalled discussing the LeBonheur evaluation with Attorney Skahan and how Attorney Skahan indicated it would be obvious to jurors that CJ must have some brain damage when they look at the image of his brain with a

knife in it along with all the other evidence. Attorney Skahan also testified he would not have wanted to use a psychological report to cross-examine an 11-year-old child. In addition, the LeBonheur exam which indicated possible problems with memory occurred only 2 months after the attempted murder of the witness which resulted in brain surgery. The attorneys' records included another evaluation of CJ performed through Youth Village dated November 10, 2009, which was a year and a half later. This evaluation indicated some issues with attention and concentration, but clearly noted both long and short term memory were intact. *See* Exhibit 52a.

The defense team very thoroughly challenged CJ's competency and testimony at trial using very effective strategies. Petitioner has not presented proof which establishes otherwise. Therefore, Petitioner again has failed to carry his burden of proof as to both prongs of ineffective assistance of counsel related to this issue.

Next, Petitioner claims counsel was ineffective in failing to move for the exclusion of photographs. Petitioner admits counsel moved pretrial to exclude photographs of the "alleged victims" before or after death and to limit photographs to black and white prints. Some of the rulings on photographs were challenged on appeal but were deemed waived due to failure to make a record or object at trial. Petitioner claims many of the nearly 200 color photographs of the crime scene were cumulative and graphic and served no probative purpose, but rather unfairly prejudiced Petitioner by inflaming the jury.

The defense attorneys and ADA Lepone testified the State agreed to only seek to enter a portion of the available photos, and the Court ruled on the limited number within that group on which the parties could not agree. The attorneys testified they objected to a limited number because if you object to everything you lose credibility and are less likely to succeed in excluding the photographs you really want excluded. Attorney Skahan testified they were able

to get some excluded that they did not want to be introduced into evidence. Attorney McAfee testified there were definitely photographs the defense wanted the jury to see as well to support their defense. Admittedly, it appears counsel did not make the record regarding certain objections to photographs. However, according to counsel's own testimony, the court ruled upon the contested issues presented. In addition, Petitioner's allegations regarding the photographs are general in nature and no specific photograph is challenged here. Under all the circumstances, this Court does not find Petitioner has carried his burden as to prejudice as it relates to the effectiveness of counsel on the issues related to the photographs.

Next, Petitioner claims counsel was ineffective in failing to object to or otherwise challenge the testimony of Dr. Lisa Funte regarding the three autopsies performed by a different medical examiner in violation of his right to confrontation.[50] However, in *State v. Hutchison*, 482 S.W.3d 893 (Tenn. 2016), the Tennessee Supreme Court held that an autopsy report was not testimonial and, therefore, the confrontation issues raised by Petitioner are without merit. *Hutchison* belies the likelihood of success of such a challenge had counsel made it. In addition, counsel testified that cause of death and other matters related to the autopsies were not contested issues. The autopsies were completed prior to the defendant even becoming a suspect. Accordingly, Petitioner has failed to present any evidence of prejudice related to counsel's failure to file such an objection; therefore, Petitioner has not carried his burden of proof on this issue.

Next, Petitioner claims counsel was ineffective in failing to vigorously challenge the State's case and entering into stipulations concerning the admission of evidence. Specifically, Petitioner refers to the FBI Model of the Lester Street home, the Farberware being a brand of kitchen knives, the chain of custody on the knife removed from C.J., the Magna bike, the

[50] Initially, this Court notes that this issue was raised unsuccessfully on appeal for the first time.

distance between Kimball Cabana Apartments, Lester Street, and 1403 Silver, the manufacturer and caliber of the pistol Willie Boyd Hill gave to Hollis Seals, and the magazine capacity (Trial transcript, Vol. 38, page 18, Vol. 22, pages 990-91, Vol. 27, page 1793, and trial exhibits 461, and 462). Petitioner presented no evidence on these issues, and he has not established a likelihood of success related to the admissibility of the evidence. Therefore, he has failed to carry his burden of proof on both prongs of ineffective assistance of counsel on these issues.

Next, Petitioner claims counsel was ineffective in failing to adequately prepare Petitioner to testify in his own behalf. Petitioner claimed in his pleadings he became hostile and combative during the State's cross-examination of him and that counsel did not adequately prepare him for the cross-examination. These general allegations, however, are not supported by the record, as Petitioner did not testify. Accordingly, Petitioner has failed to carry his burden of proof on both prongs of ineffective assistance on this issue.

Next, Petitioner claims counsel was ineffective in failing to conduct a thorough investigation of and present evidence at sentencing of his background, mental status, and history of substance abuse. This issue has been addressed previously in this order. Again, Petitioner has not carried his burden of proof on either prong of ineffective assistance on this issue.

Next, Petitioner claims prosecutorial misconduct in closing arguments. Petitioner claims the statements by the prosecution listed below violated his rights to due process and a fair trial. As for Petitioner's claim of prosecutorial misconduct, these claims have been waived and/or previously determined.

Petitioner also claims ineffective assistance of counsel in failing to file a motion in limine to prevent improper argument from the State in closing, especially based upon what Petitioner claims is a "substantial history of improper prosecutorial argument by Shelby County

prosecutors." Petitioner claims the following specific closing arguments during the guilt/innocence phase of the trial were prosecutorial misconduct and that counsel was ineffective in failing to object:

> (1) "C.J. knows what happened because he was there and he saw Jessie Dotson do it." Trial transcript, page 2304-05 (claims this is a personal belief regarding a witness's testimony, vouching);
>
> (2) Defense expert Dr. Aldridge testified regarding interviewing children (not cross-examination of children), that one should ask open-ended questions. Regarding defense counsel not asking C.J. and Cedrick the open ended question: "who did this to you?", the prosecutor asserted, "So why? Why wouldn't they ask him? Because they didn't want the answer." Id., at 2307 (claims a comment on defense strategy);
>
> (3) The prosecutor continued along these lines, contrasting his strategy of asking C.J. open-ended questions with the defense's approach. "Never once, not once did they say C.J., can you tell me what happened and describe." Id. (claims a comment on defense strategy);
>
> (4) Regarding the Gangster Disciples, "Right out there with his siblings, his family members, yeah, the GDs did this. Lie after lie after lie ... " Id., at 2310 (claims a comment of personal belief regarding a witness's testimony);
>
> (5) "[W]e know who the killer is." Id., at 2313 (claims a comment of personal belief);
>
> (6) Cecil was "[t]urned face over in his own house with his pants pulled down." Id., at 2362 (claims a fact not in evidence, factually inaccurate);
>
> (7) "The defense doesn't have to put on any proof, but they still get to do some things. And they did them in this trial. Smoke and mirrors." Id., at 2363-64 (claims a comment on defense strategy);
>
> (8) "There's so much smoke in this courtroom right now I'm surprised you can even see Jessie Dotson sitting over there, taking your attention off of the facts and the proof in this case and putting it on everyone else." Id., at 2364 (claims a comment on defense strategy);[51]
>
> (9) "Using confusion and mere possibility to make you think there's reasonable doubt in this case." Id. (claims a comment on defense strategy);

[51] Items 7 and 8 are actually uninterrupted comments. Between items 8 and 9, the prosecutor stated, "Not talking about what the State of Tennessee does have, talking about what we don't have. Do you get that? That's common sense. That's common sense."

(10) "And it's interesting to me how the defense can stand up here and talk about Vernon Motley and the Gangster Disciples and all these things with some gusto and then when they talk about his confession, oh, you need to throw that out." Id., at 2864-65 (claims a comment on defense strategy);

(11) Regarding Roderick: "We've got to pull him out of school." Id., at 2366 (claims a fact not in evidence);[52]

(12) "The women would have been in shock." Id., at 2369 (claims a fact not in evidence);

(13) "As soon as he shot Cecil, [Shindri] was jumping up to the back. That's why she's up on the chair. She's like oh, my God. She's in shock." Id., at 2369-70 (claims these are facts not in evidence);

(14) "What do you think the women are going to do? They don't have a gun. They just saw two men murdered in front of them. You don't think they're going to be scared to death and maybe hoping, hoping he would stop there and not kill women. They might have believed in their hearts that they wouldn't die. What are they going to do?" Id., at 2371 (claims these are facts not in evidence);

(15) "And I don't care what gang members and we're not here defending gang members. That's ridiculous." Id., at 2374 (claims a comment on defense strategy);

(16) "Cecil Dotson, Senior's, pants were pulled down. If you look at the blood, Jessie turned him and then pulled his pants down. What's the purpose of that?" Id., at 2376 (claims facts not in evidence and incorrect);

(17) "You want to bring in experts and confuse kids? Fine. You want to sit a chair here in front of that poor kid and lead him through things so he says yes, sir, which their expert told them not to do, fine. But don't not believe that kid. Because he took courage to come in here and he survived this for a reason." Id., at 2382 (claims a comment on defense strategy, personal belief, and vouching);

(18) "[W]hat do you have to do to somebody to make them confess to that? I don't think that exists. I don't think there is anything a human being could do to another human being to make them confess to slicing up kids, sorry." Id. (claims a personal belief and vouching);

(19) "Why did [Skahan] leave ["a doubt that may arise from possibility"] out? Because that's exactly all they've done in this case, is try to throw possibilities at you, try to take your focus away from Jessie Dotson." Id., at 2386 (claims a comment on defense strategy);

[52] On October 8, 2010, Witness Roderick Hill testified he was 16 years old and a student.

(20) "Now when there is no defense in a case, this.is the kind of stuff you're going to see. You judge whether or not you've seen this in this trial. You judge it. Bash the victim. Well that's not hard, right, because Cecil was a gang member." Id., at 2888 (claims a comment on defense strategy);

(21) "The big one, attack the police. That's defense 101. If they've got a strong case, if they've got a strong case, go after the police because they're a bunch of big, bad mean people that don't care about anybody. Really?" Id., at 2389 (claims a comment on defense strategy);

(22) "They're getting blamed for a case they didn't solve. C.J. solved it." Id. (claims a comment on defense strategy, personal belief, vouching);[53]

(23) "The rabbit did it theory. I came up with that one because these hairs, no pun intended. Think about it. They found a rabbit hair clutched in one of the women's hands. Does that mean the rabbit did it? And I'm not trying to insult your intelligence. What I'm trying to show you is how ridiculous it is what they're throwing up on the wall and trying to get you to grab." Id., at 2390-91 (claims a comment on defense strategy);

(24) "Wow. I lost count, ladies and gentlemen. I think we had the Asian heroin cartel, Mexican drug cartel, Craig Petties, Vernon Motley, Roderick and Cassandra, guy in a bloody mask and I'm not sure if that's Roderick. ... Every bit of that was to take your focus off the guy sitting over there." Id., at 2392 (claims a comment on defense strategy);

(25) "Because [Jessie Dotson] lied to you and you know he did [in his testimony)." Id. at 2393 (claims a personal belief regarding a witness's testimony);[54]

(26) "The first thing you need to look at and I don't think it's dispositive, I don't think he could have fit under [the bed]." Id. (claims a personal belief);[55]

(27) "So [Jessie's] lying .... But see, when you're going to get up on the witness stand and lie in a case like this, you're going to get caught." Id., at 2394 (claims a personal belief regarding a witness's testimony);

(28) "The bleach explanation is ridiculous. The coerced statement is ridiculous." Id., at 2395 (claims a personal belief regarding a witness's testimony and a comment on defense strategy);

[53] The following is between the language in items 21 and 22: "These are the same police officers who had to go inside and look at what he left behind and then work around the clock for hours away from their families to solve this case. And they didn't even solve it."
[54] Following this language, the prosecutor stated, "What he told you is not plausible. It's not possible."
[55] Following this language, the prosecutor stated, "But maybe he could. Take a look at it."

(29) "Did you see the cross of his mother? He didn't touch her. A couple questions and sat down. Why? Because truth that strong you can't touch, not even with good lawyering skills." Id. (claims a personal belief regarding a witness's testimony and a comment on defense strategy);[56]

(30) "And his mother did something that she had to do. She had to tell you the truth. Just like Jessie told her the truth." Id. (claims a personal belief regarding a witness's testimony);

(31) "And any other verdict than guilty just tells those boys they survived for nothing." Id., at 2897 (claims inflammatory); and

(32) "It's time. It's time for everybody to get out of this house. It's time for every victim to leave this house. And there's only one way, justice. It's the only way. It's the only way. Id., at 2897 (claims inflammatory).[57]

Petitioner claims counsel was ineffective in failing to object and move for a mistrial. This Court has carefully reviewed the challenged arguments by the State and does not find error in the arguments. This Court does not find that counsel was interjecting his own opinion, but rather he was attacking the credibility of the defendant's testimony based upon the evidence presented at trial and the inferences drawn from the evidence. The arguments and statements made were reasonable inferences from the proof, when viewed in the context in which they were made. The prosecutor made arguments based upon an analysis of the evidence and the conclusions supported by the evidence as well as in response to both the argument of opposing counsel and evidence presented by the defense.

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[56] The following language was between the language in items 29 and 30:
You think Priscilla Shaw got up here and had a good time? She's a mother and she loves Jessie. Why in the world would she come in and testify for the State of Tennessee? Even if he confessed to her, why help us? Because of what he did. This is something that even a mother can't excuse.
I submit to you that if he would have killed Cecil in an argument and stopped there, his mother probably could have dealt with that as horrible as that would be. But brothers fight. It's life. It happens. But Jessie didn't stop there. He went too far.

[57] The following language followed the language in item 32:
It's time for C.J. and Cedrick to move on with their lives and for Ceniyah to grow up and go to college. Jessie Dotson has got to pay for what he did. We're not asking you to hate him. We're asking you to apply the law to the facts. The law is there. The facts are there.

Accordingly, as for any claim of ineffective assistance of counsel either at trial or on appeal, Petitioner has failed to establish the likelihood of success of such a challenge had counsel made it. Therefore, Petitioner has failed to carry his burden of proof as to prejudice on these issues.

Petitioner also claims, in addition to the multiple improper comments previously raised on direct appeal and reviewed under plain error analysis, counsel was ineffective for failing to object to the following closing argument during the sentencing phase of the trial:

> And now Jessie is begging for his [life]? Did Marissa get a jury? What about Shindri? Did she get a jury? Did somebody have to find aggravating circumstances for her to get the death penalty?

Trial transcript, page 2547.[58]

Again, any claim of prosecutorial misconduct has been waived and/or previously determined. This Court also finds Petitioner has failed to carry his burden of proof as to prejudice on this issue.

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[58] The following statements occurred just prior to the language challenged:

> Yes, Jessie Dotson is a human being. Absolutely he is. Of course he is. We're not up here to say he's not. But it's time to answer for it. He spent 14 years in prison. He gets out of prison and does this. He had his shot at prison. Really?
>
> Think about what the adults went through. See, we've got the death of children so we can forget about the adults. But we can't. We can't. Those women, you know they were terrified when he had control of that house. You know they screamed and you know they begged for their lives.

The following statements from the prosecutor followed the challenged language to end his sentencing closing argument:

> Jessie gave it to her no problem. Gave it to Cecil his own brother. And I'll say something. Mr. McAfee said yeah, I'm going to say it. I'll say it. Do I think Jessie Dotson regrets killing his brother? Maybe he does. Do you really think that -- this whole trial wasn't about that. It's about answering for what you did on March 2nd, 2008. And as a society we have to, we have to look at it. And we have to apply the law.
>
> The law guides you. And that phrase just like Jessie Dotson said the penalty shall be death, he gave it to those people. And look at the proof. ... We're not asking anything of you but to follow the law. And the law does give you your verdict in this case, shall be death.

Next, Petitioner claims counsel was ineffective in making an improper statement during his opening statement of the sentencing phase of the trial that Petitioner's case had more aggravating circumstances than he had ever seen in a case before. This Court will not judge counsel's decisions with 20/20 hindsight. Counsel testified they knew if convicted it would be difficult to win at sentencing. Counsel testified concerning the need to keep credibility with the jury and to deny the actual number of factors would have cut into the defense team's credibility on the issue of sentencing. Counsel also testified to the fact that they believed residual doubt was a strong mitigator for Petitioner because of the lack of forensic evidence. Under all the circumstances, this Court does not find that Petitioner has carried his burden of proof on either prong on this issue.

Claims Related to Jury Instructions

Claim 27: Ineffective Assistance of Trial Counsel in Failing to Object to Anti-Sympathy Instruction as Violative of the Eighth and Fourteenth Amendments and Article I, § 6, Tennessee Constitution

Claim 28: The Anti-Sympathy Instruction Violates the Eighth and Fourteenth Amendments and Article I,§ 6, Tennessee Constitution, under the Circumstances of this Case

Claim 29: Ineffective Assistance of Trial Counsel in Failing to Object to Order of Instructions as Violative of the Eighth and Fourteenth Amendments and Article I, § 6, Tennessee Constitution

Claim 30: Ineffective Assistance of Trial Counsel in the Failure to Object to Confusing Sentencing Unanimity Instructions/Failure to Request an Instruction Concerning the Consequences of Failure to Agree at Penalty as Violative of the Eighth and Fourteenth Amendments and Article I, §6, Tennessee Constitution

Claim 31: Ineffective Assistance of Trial Counsel in Failing to Challenge Reference to Moral Certainty in Reasonable Doubt Instructions as Violative of the Eighth and Fourteenth Amendments and Article I, § 6, Tennessee Constitution

Claim 32: Ineffective Assistance of Trial Counsel in the Failure to Object to Dyle Instruction

Claim 33: Ineffective Assistance of Trial Counsel in the Failure to Request a Missing Evidence Instruction Regarding The First 48 Footage

Claim 34: Ineffective Assistance of Appellate Counsel in the Failure to Raise These Instruction Claims on Appeal

Petitioner claims trial and appellate counsel were ineffective in failing to challenge various alleged unconstitutional jury instructions.

First, Petitioner claims counsel was ineffective in failing to object to the jury receiving an anti-sympathy instruction which it claims, when read with other instructions such as the victim impact charge, misled the jury into believing they could not extend mercy in sentencing.[59] Our supreme court has upheld the "anti-sympathy" instruction against constitutional attack on numerous occasions. *See State v. Cazes*, 875 S.W.2d 253, 268 (Tenn. 1994), *cert. denied*, 513 U.S. 1086 (1995); *State v. Smith*, 857 S.W.2d 1, 21 (Tenn. 1992), *cert. denied*, 510 U.S. 996 (1993). In order to receive post-conviction relief, an omitted issue must be one in which counsel would have prevailed had it been properly presented. Therefore, the petitioner has failed to carry his burden of proof on

[59] This Court notes the issue of a sympathy charge was discussed at length during voir dire with jurors. In addition, the victim impact instruction specifies a jury may not consider victim impact evidence unless they have already determined an aggravating circumstance or circumstances has been proven beyond a reasonable doubt and that the aggravating circumstance(s) outweighs any mitigating circumstances beyond a reasonable doubt. This instruction does not create a conflict with the anti-sympathy instruction.

the issue of prejudice and is not entitled to relief relative to the alleged failure to object. There is no merit to this issue.

Next, Petitioner claims counsel was ineffective for failing to challenge the order of the instructions which listed first degree murder as the first option and not guilty as the final option. Petitioner claims the lesser offenses should be charged first to ensure any defense is reliably considered by the jurors. This, however, is contrary to Tennessee law and this Court is not persuaded by Petitioner's argument. *State v. Davis*, 266 S.W.3d 896, 901-05 (Tenn. 2008), *cert. denied*, 557 U.S. 906 (2009). Accordingly, Petitioner has not carried his burden of proof on either prong on this issue.

Next, Petitioner claims counsel was ineffective in failing to object to the confusing nature of the sentencing phase jury instructions regarding the emphasis in those instructions on jury unanimity, which he claims misleadingly created the impression that jury unanimity was required in the sentencing decision and a non-unanimous verdict could affect the guilt verdict. Petitioner cites to *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990). This case, however, stands for the principle that any requirement that the jury find a mitigating circumstance unanimously before it can be considered in sentencing is unconstitutional. Our courts have repeatedly held this issue as raised by Petitioner to be without merit. *See e.g. State v. Ivy*, 188 S.W.3d 132 (Tenn.) (appendix), *cert. denied*, 549 U.S. 914 (2006). Accordingly, counsel was not ineffective in failing to raise the issue under either prong.

Next, Petitioner claims counsel was ineffective in failing to challenge the "moral certainty" language in the reasonable doubt jury instruction in both the guilt/innocence and sentencing phases of the trial. Petitioner cites to *Cage v. Louisiana*, 498 U.S. 39 (1990) in support of his position. Again, our courts have repeatedly held such language to not be violative

of the constitution. Accordingly, counsel was not ineffective in failing to raise the issue under either prong.

Next, Petitioner claims counsel was ineffective in failing to object to the eyewitness identification instruction given to the jurors in the guilt/innocence phase of the trial. Petitioner claims the instruction in *State v. Dyle*, 899 S.W.2d 607 (Tenn. 1995), as given here, is now outdated and was harmful to the defense here. *Dyle*, however, is still the applicable law in Tennessee. Accordingly, counsel was not ineffective in failing to raise the issue under either prong.

Petitioner claims counsel was ineffective in failing to seek a missing evidence instruction in regard to the footage shot by *The First 48*. *See State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). However, in order to make such a finding, this Court would be required to determine that the State had a duty to collect the raw footage from the private party "The First 48" television show, which duty the State did not have. *See Malone, supra.* The State was never in possession of the raw footage, and there was no duty for the State to confiscate it. *Id.* Accordingly, counsel was not ineffective in failing to raise the issue under either prong.

Lastly, Petitioner claims counsel was ineffective on appeal in failing to raise all these objections to instructions. This Court has not found Petitioner has carried his burden to establish trial counsel was ineffective in failing to raise these objections or issues; therefore, this Court also does not find Petitioner has carried his burden on these issues as to appellate counsel.

Claims Related to State Misconduct

Claim 35: State Misconduct in the Failure to Preserve The First 48 Raw Footage

Claim 36: State Misconduct in Withholding Cecil Dotson, Jr., Medical Records Which Contained Information Favorable to the Defense, In Violation of Brady

Issues related to *The First 48* footage were available at trial. In fact, many issues related to the footage were litigated and investigated by counsel. Counsel successfully challenged the admissibility of the edited footage at trial. To the extent any issue overlaps with issues raised at trial, it would be previously determined and any issue not raised previously would be waived.

As for any claim of State misconduct related to CJ's May 8, 2008, neuropsychological evaluation at LeBonheur Children's Medical Center (Exhibit 2), initially, this issue is waived for not having been previously raised. In addition, even if not waived, Petitioner has failed to carry his burden of proof on this issue. Petitioner claims this evaluation was not provided to his defense team. However, lead counsel Gerald Skahan and ADA Lepone both testified they recalled discussing the evaluation. ADA Lepone specifically recalled details of their discussion about the evaluation. The facts simply do not support Petitioner's claim on this issue.[60]

[60] In addition, counsel was not ineffective in failing to raise these issues. Again, in order to receive post-conviction relief, an omitted issue must be one in which counsel would have prevailed had it been properly raised. That is not the situation here. The evidence established the evaluation was not withheld, and the defense team members testified to the efforts made to obtain a copy of the raw footage.

Claims Related to Mr. Dotson's Death Sentences and Tennessee's Death Sentencing Scheme

Claim 37: Death is Disproportionate

Claim 38: Tennessee's Death Penalty Scheme is Fraught with Multiple Structural Defects that Violated Mr. Dotson's Rights Under the Tennessee and United States Constitutions

Claim 39: Tennessee's Execution Methods of Lethal Injection and Electrocution Are Unconstitutional

Claim 40: Mr. Dotson's Death Sentences Were Imposed in Violation of International Law

Claim 41: Mr. Dotson's Death Sentences Were Imposed in Violation of Hurst v. Florida

Petitioner raises numerous challenges to the death penalty in Tennessee, including arguments that it is disproportionate, has multiple structural defects, its method of execution is unconstitutional, it violates international law, and it violates the United States Supreme Court's holding in *Hurst v. Florida*, _____ U.S. _____, 136 S. Ct. 616 (2016).

Initially, this Court finds Petitioner has waived these issues by failing to raise them at trial. In addition to being waived, our courts have systematically rejected these challenges to our death penalty statute. *See Abdur' Rahman v. Parker*, 558 S.W.3d 606 (Tenn. 2018); *State v. Odom*, 137 S.W.3d 572, 600 (Tenn.2004); *State v. Hines*, 919 S.W.2d 573, 582 (Tenn.1995); *State v. Brimmer*, 876 S.W.2d 75, 87 (Tenn.1994); *State v. Cazes*, 875 S.W.2d 253, 268–69 (Tenn.1994); *State v. Smith*, 857 S.W.2d 1, 23 (Tenn.1993); *State v. Howell*, 868 S.W.2d 238 (Tenn.1993); *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn.1992); *Sims v. State*, 2011 WL 334 285 (Tenn. Crim. App. January 28,

2011); *see also David Lynn Jordan v. State*, No. M2017-00921-CCA-R28-PD, order at 3 (Tenn. Crim. App. Sept. 11, 2017) (regarding *Hurst v. Florida*); *Jonathan Stephenson v. State*, No. E2017-01067-CCA-R28-PD (Tenn. Crim. App. Sept. 19, 2017) (regarding *Hurst v. Florida*); *Dennis Wade Suttles v. State*, No. E2017-00840-CCA-R28-PD (Tenn. Crim. App. Sept. 18, 2017) (regarding *Hurst v. Florida*); *Gary W. Sutton v. State*, No. E2017-01394-CCA-R28-PD (Tenn. Crim. App. Sept. 13, 2017) (regarding *Hurst v. Florida*). The petitioner is not entitled to relief on these issues.

This Court also finds counsel was not ineffective in failing to raise these issues. Again, in order to receive post-conviction relief, an omitted issue must be one in which counsel would have prevailed had it been properly raised. As stated above, these issues have been systematically rejected by our courts, and, therefore, were not issues on which counsel would have prevailed.

Cumulative Error

Claim 42: The Cumulative Effect of Ineffective Assistance of Counsel Requires that Mr. Dotson's Convictions and Death Sentences Be Vacated

Claim 43: The Cumulative Effect of Prosecutorial Misconduct Requires that Mr. Dotson's Convictions and Death Sentences Be Vacated

Claim 44: The Cumulative Effect of All Errors Requires that Mr. Dotson's Convictions and Death Sentences Be Vacated

Petitioner claims the combined effects of the alleged errors claimed in his pleadings should be evaluated and warrant relief as a violation of his constitutional rights. This Court has carefully reviewed all the claims in this matter and has found

them to be without merit. In addition, this Court finds no merit to any claim related to cumulative error.

SUPPLEMENTAL PETITION CLAIMS

Claim 45: Mr. Dotson's Convictions and Death Sentences Are the Product of Premature Deliberations and a Coerced Verdict Targeting the Sole Black Male Juror

Claim 46: Mr. Dotson's Death Sentence Violates His Fundamental Right to Life Guaranteed by the United States Constitution and the Constitution of Tennessee

Petitioner alleges premature deliberations, a coerced verdict, and racial animus in the jury deliberation. Petitioner attempted to present an alternate and regular juror from this case to testify on this claim of a coerced verdict and premature deliberations. This Court considered the issue prior to the hearing and determined the testimony would not be allowed under the applicable law. This Court relies upon its in court ruling on this issue.

In addition, Petitioner claims he was offered a sentence of life without the possibility of parole prior to trial and that the death sentence here violates Petitioner's Right to Life. Initially, this issue is waived for failure to raise it previously.

As to the legal argument asserted, our courts have rejected similar arguments presented. *See e.g. State v. Mann*, 959 S.W.2d 503 (Tenn. 1997). Regardless of the legal argument asserted, the evidence does not establish that an offer was ever made. ADA Lepone credibly testified there was no offer made by the State. He understood he and defense counsel may have had different recollections concerning the issue, however, he stated as in all cases he would have taken any offer from the defense to his superior but

none was made. He was emphatic that the State made no offer in this case. Petitioner has failed to carry his burden and is not entitled to relief on this issue.

VIII. CONCLUSION

For the reasons set forth above, the relief sought in the Petition for Post-Conviction Relief, the Amended Petition, and the Supplemental Petition is DENIED and this matter is hereby DISMISSED. The Petitioner being indigent, costs are taxed to the State.

ENTERED THIS 16 DAY OF May, 2019.

James C Beasley Jr.

Judge James C. Beasley, Jr.

CERTIFICATE OF SERVICE

I, Christina Mac, Clerk, hereby certify that I have mailed a true and exact copy of same to Counsel of Record for the Petitioner, and the State this the 16 day of May, 2019.

135 S.Ct. 1535
Supreme Court of the United States

Jessie DOTSON, petitioner,
v.
TENNESSEE.

No. 14–7868.
|
March 9, 2015.

Synopsis
Case below, 450 S.W.3d 1.

Opinion
Petition for writ of certiorari to the Supreme Court of Tennessee, Western Division, denied.

All Citations

575 U.S. 906, 135 S.Ct. 1535 (Mem), 191 L.Ed.2d 565, 83 USLW 3718

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450 S.W.3d 1
Supreme Court of Tennessee, at Jackson.

STATE of Tennessee
v.
Jessie DOTSON.

No. W2011–00815–SC–DDT–DD
|
April 9, 2014 Session.
|
Sept. 30, 2014.

Synopsis

Background: Defendant was convicted in the Criminal Court, Shelby County, James C. Beasley, Jr., J., of six counts of premeditated first-degree murder and three counts of attempted first-degree murder. Defendant appealed. The Court of Criminal Appeals, 2013 WL 4728679, affirmed.

Holdings: On automatic appeal, the Supreme Court, Cornelia A. Clark, J., held that:

[1] defendant's failure to file motion to suppress did not preclude plain error review of claims raised for first time on appeal challenging legality of arrest and admission of custodial statements;

[2] police officers had probable cause to make warrantless arrest;

[3] defendant did not unambiguously invoke right to remain silent;

[4] defendant's confession to mother was not result of improper "custodial interrogation" after he had invoked his *Miranda* right to remain silent;

[5] police witnesses did not improperly comment on defendant's right to counsel and to remain silent;

[6] defendant's right of confrontation was not violated;

[7] deputy director's reference to defendant's prior incarceration was not improper character evidence of other crimes;

[8] evidence supported jury's findings of aggravating circumstances; and

[9] death sentences were not disproportionate to sentences imposed in other cases.

Affirmed.

William C. Koch, Jr. and Sharon G. Lee, JJ., filed concurring opinion.

West Headnotes (62)

[1] Criminal Law Wrongfully obtained evidence, admission of

Defendant's failure to file motion to suppress did not preclude plain error review of claims raised for first time on appeal challenging admissibility of custodial statements made during allegedly illegal warrantless arrest and after he had invoked his right to remain silent, in trial for capital murder, given statutory obligation of Supreme Court to automatically review conviction and death sentence. U.S.C.A. Const.Amends. 4, 5; West's T.C.A. Const. Art. 1, §§ 7, 9; West's T.C.A. § 39–13–206(a)(1).

[2] Criminal Law Wrongfully obtained evidence

When suppression issues are raised for the first time on appeal in capital cases, the appellate court will continue to apply plain error review. West's T.C.A. § 39–13–206.

1 Case that cites this headnote

[3] Criminal Law Necessity of Objections in General

When conducting plain error review, the appellate court will grant relief only when the following five prerequisites are satisfied: (1) the record clearly establishes what occurred in the trial court; (2) a clear and unequivocal rule of law was breached; (3) a substantial right of the

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accused was adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is necessary to do substantial justice.

8 Cases that cite this headnote

[4] **Criminal Law** Burden of showing error

On plain error review, the defendant bears the burden of persuading an appellate court that plain error exists.

4 Cases that cite this headnote

[5] **Searches and Seizures** Fourth Amendment and reasonableness in general

Searches and Seizures Necessity of and preference for warrant, and exceptions in general

Searches and Seizures Probable or Reasonable Cause

The Fourth Amendment and the Tennessee constitution prohibit unreasonable searches and seizures, and require generally that searches and seizures be conducted pursuant to a warrant that is issued after a judicial determination of probable cause. U.S.C.A. Const.Amend. 4; West's T.C.A. Const. Art. 1, § 7.

[6] **Criminal Law** Searches, seizures, and arrests

Searches and Seizures Necessity of and preference for warrant, and exceptions in general

A warrantless search or seizure is presumed unreasonable and evidence seized thereby is subject to suppression, unless the State establishes one of the recognized exceptions to the warrant requirement. U.S.C.A. Const.Amend. 4; West's T.C.A. Const. Art. 1, § 7; West's T.C.A. § 40–7–103(a)(3).

1 Case that cites this headnote

[7] **Arrest** Grounds for warrantless arrest in general

An arrest supported by probable cause is one of the exceptions to the warrant requirement. U.S.C.A. Const.Amend. 4; West's T.C.A. Const. Art. 1, § 7; West's T.C.A. § 40–7–103(a)(3).

[8] **Arrest** What constitutes such cause in general

Arrest Suspicion or rumor

Probable cause to make a warrantless arrest is more than a mere suspicion, but it is not absolute certainty; the strength of the evidence necessary to establish probable cause is significantly less than the strength of evidence necessary to find a defendant guilty beyond a reasonable doubt. U.S.C.A. Const.Amend. 4; West's T.C.A. Const. Art. 1, § 7; West's T.C.A. § 40–7–103(a)(3).

1 Case that cites this headnote

[9] **Arrest** What constitutes such cause in general

The standard for probable cause to make a warrantless arrest is a practical, nontechnical one which focuses upon the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act, and thus, probable cause exists when at the time of the arrest, the facts and circumstances within the knowledge of the officers, and of which they had reasonably trustworthy information, are sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense. U.S.C.A. Const.Amend. 4; West's T.C.A. Const. Art. 1, § 7; West's T.C.A. § 40–7–103(a)(3).

11 Cases that cite this headnote

[10] **Criminal Law** Evidence wrongfully obtained

When determining whether probable cause existed to support a warrantless arrest, a reviewing court considers the entire record, including the proof adduced at any suppression hearing and the evidence presented at trial. U.S.C.A. Const.Amend. 4; West's T.C.A. Const. Art. 1, § 7; West's T.C.A. § 40–7–103(a)(3).

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[11] **Arrest** Time of existence; after-acquired information

Arrest Other officers or official information

When determining whether probable cause existed to support a warrantless arrest, a reviewing court considers the collective knowledge that law enforcement possessed at the time of the arrest, provided that a sufficient nexus of communication existed between the arresting officer and any other officer or officers who possessed relevant information, and such a nexus exists when the officers are relaying information or when one officer directs another officer to act. U.S.C.A. Const.Amend. 4; West's T.C.A. Const. Art. 1, § 7; West's T.C.A. § 40–7–103(a)(3).

[12] **Arrest** Reliability of informer

Arrest Anonymous or unidentified informers

If the source of information that is relied upon to establish probable cause to make a warrantless arrest is a person (1) who is known to the police, (2) who is not part of the criminal milieu, and (3) whose motivation is to aid the police without any expectation of remuneration, then the information is deemed reliable and is sufficient to provide probable cause for arrest; on the other hand, when the information is provided (1) by a professional informant who gives tips for money or favors, (2) by a person from the criminal milieu who may have an ax to grind, or (3) by an anonymous informant, the information is presumptively suspect, and the State must establish its credibility. U.S.C.A. Const.Amend. 4; West's T.C.A. Const. Art. 1, § 7; West's T.C.A. § 40–7–103(a)(3).

[13] **Arrest** Identification or description of offender or vehicle

Arrest Appearance, acts, and statements of persons arrested

Police officers had probable cause to make warrantless arrest for murder of six persons and attempted murder of three others; defendant's nephew, whom defendant had brutally beaten and stabbed, identified defendant as person he saw shooting victims and who had beaten and/or stabbed him and his siblings, defendant, who was close relative of three of six murder victims and child victims, had spent time in home and was familiar with it, defendant was one of last persons to see two of murder victims alive, and defendant had been previously convicted of murder and had only recently been released from prison. U.S.C.A. Const.Amend. 4; West's T.C.A. Const. Art. 1, § 7; West's T.C.A. § 40–7–103(a)(3).

[14] **Arrest** Reliability of informer

Information provided by child victim, who was defendant's nephew, as citizen informant, identifying defendant as sole perpetrator of murders and attempted murders, was presumed reliable, in determining whether police had probable cause to make warrantless arrest, and State was not required to prove that victim was solely motivated by sense of civic duty, and that he had no ulterior motive for identifying defendant as perpetrator, in order for presumption of reliability to attach. U.S.C.A. Const.Amend. 4; West's T.C.A. Const. Art. 1, § 7; West's T.C.A. § 40–7–103(a)(3).

[15] **Arrest** Reliability of informer

Information provided by a citizen/bystander witness known to the police is presumed to be reliable, in determining whether there was probable cause to support a warrantless arrest, and the prosecution is not required to establish either the credibility of the informant or the reliability of his information. U.S.C.A. Const.Amend. 4; West's T.C.A. Const. Art. 1, § 7; West's T.C.A. § 40–7–103(a)(3).

3 Cases that cite this headnote

[16] **Searches and Seizures** Anonymous or confidential informants

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When the source of the information that is used to establish probable cause is an unnamed citizen informant, the reliability of the source and the information must be judged from all the circumstances and from the entirety of the warrant affidavit. U.S.C.A. Const.Amend. 4; West's T.C.A. Const. Art. 1, § 7; West's T.C.A. § 40–7–103(a)(3).

[17] **Arrest** Reliability of informer

The rationale for applying the presumption of reliability to information provided by citizen informants, in determining whether there was probable cause to make a warrantless arrest, is two-fold: first, citizen informants, whether they be victims or witnesses, have necessarily gained their information through first-hand experience; and second, the criminal informant provides information in exchange for some consideration —whether it be monetary or the granting of some exemption or privilege—while the citizen informant acts in the interest of society or personal safety. U.S.C.A. Const.Amend. 4; West's T.C.A. Const. Art. 1, § 7; West's T.C.A. § 40–7–103(a)(3).

3 Cases that cite this headnote

[18] **Arrest** Reliability of informer

In determining whether a warrantless arrest was supported by probable cause, the presumption of reliability of information obtained by a citizen informant applies if the prosecution establishes simply that the information was provided by a known citizen informant. U.S.C.A. Const.Amend. 4; West's T.C.A. Const. Art. 1, § 7; West's T.C.A. § 40–7–103(a)(3).

3 Cases that cite this headnote

[19] **Criminal Law** Particular cases

Defendant did not unambiguously invoke right to remain silent when he told police lieutenant and sergeant that he did not wish to speak with them anymore and asked to speak with other officers. U.S.C.A. Const.Amend. 5; West's T.C.A. Const. Art. 1, § 9.

3 Cases that cite this headnote

[20] **Criminal Law** Right to Remain Silent

Self-Incrimination Criminal Proceedings

The privilege against self-incrimination guaranteed by both the Fifth Amendment and the Tennessee Constitution affords criminal defendants the right to remain silent. U.S.C.A. Const.Amend. 5; West's T.C.A. Const. Art. 1, § 9.

4 Cases that cite this headnote

[21] **Criminal Law** Right to Remain Silent

An accused who wishes to rely on the constitutional right to remain silent must unambiguously invoke it. U.S.C.A. Const.Amend. 5; West's T.C.A. Const. Art. 1, § 9.

5 Cases that cite this headnote

[22] **Criminal Law** Right to remain silent

Defendant's mother was not acting as agent for State, and thus, defendant's confession to her to murders and attempted murders was not result of improper "custodial interrogation" after he had invoked his *Miranda* right to remain silent; after he invoked *Miranda* and deputy director terminated defendant's interview, defendant asked to speak with his mother, neither deputy director nor any other officer asked mother to obtain information from defendant for them, no one told her what to say to defendant, and no one instructed her to question him. U.S.C.A. Const.Amend. 5; West's T.C.A. Const. Art. 1, § 9.

1 Case that cites this headnote

[23] **Criminal Law** Warnings

In deciding whether particular police conduct is "interrogation," for *Miranda* purposes, the court must remember the purpose is preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained

environment. U.S.C.A. Const.Amend. 5; West's T.C.A. Const. Art. 1, § 9.

[24] **Criminal Law** Conduct of Interrogation

Criminal Law Right to remain silent

Police departments need not adopt inflexible rules barring suspects from speaking with their spouses after the suspect has invoked his or her *Miranda* right to counsel, nor must they ignore legitimate security concerns by allowing spouses to meet in private. U.S.C.A. Const.Amend. 5; West's T.C.A. Const. Art. 1, § 9.

[25] **Criminal Law** Statements asserting constitutional rights

Criminal Law Silence during or subsequent to arrest

The rule in *Doyle v. Ohio* that a defendant's post-*Miranda* silence may not be used to impeach him at trial does not impose a prima facie bar against any mention whatsoever of a defendant's post-arrest right to request counsel, but instead, *Doyle* guards against the exploitation of the defendant's constitutional right to remain silent by the prosecutor. U.S.C.A. Const.Amend. 5; West's T.C.A. Const. Art. 1, § 9.

4 Cases that cite this headnote

[26] **Criminal Law** Statements asserting constitutional rights

Deputy director's testimony that he went into interview room where sergeants were interviewing defendant to conduct interview himself after defendant "shut down on them and didn't want to talk to the two of them anymore," and that defendant was struggling to maintain his composure and doing everything he could not to engage director in open-ended conversation, did not constitute improper comment on defendant's invocation of right to remain silent, in trial for capital murder and other offenses; defendant never unambiguously invoked right to remain silent, and director's testimony merely informed jury of reason for initiating interview with defendant and described defendant's demeanor. U.S.C.A. Const.Amend. 5; West's T.C.A. Const. Art. 1, § 9.

4 Cases that cite this headnote

[27] **Criminal Law** Statements asserting constitutional rights

Sergeant's two isolated references to defendant's invocation of right to counsel during interrogation, which references were made in course of lengthy, multi-day testimony, did not constitute improper comments on right to counsel, in trial on six counts of capital murder and other crimes; rather, references were responsive to broad questions that defense counsel posed on cross examination as to whether sergeant would have written down and followed up on any important information that defendant might have provided relating to murders if sergeant had been able to interview him. U.S.C.A. Const.Amend. 5; West's T.C.A. Const. Art. 1, § 9.

[28] **Criminal Law** Statements asserting constitutional rights

Criminal Law Examination of Witnesses Other Than Accused

Deputy director's testimony during direct examination that during interview with defendant, when he tried to ask defendant for more details about specific aspects of crime scene, defendant asked for attorney, and that he was unable to get formal written statement from defendant because defendant stopped interview, were not improper comments on defendant's invocation of right to counsel, in trial for capital murder and other crimes; prosecutor's questions that elicited such testimony were fair attempt to rebut defense counsel's strategy throughout trial of attacking adequacy and competency of police investigation, defense counsel had repeatedly questioned police witnesses about lack of detailed, formal, and recorded statement from defendant, prosecutor never asked deputy about defendant's invocation of right to counsel, and trial court provided appropriate instruction limiting jury's consideration of deputy's

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testimony regarding defendant's invocation of right to counsel. U.S.C.A. Const.Amend. 5; West's T.C.A. Const. Art. 1, § 9.

2 Cases that cite this headnote

[29] **Criminal Law** Silence during or subsequent to arrest

Prosecutor's comment during rebuttal closing argument that defendant could have "cleared it all up" when he was brought to police station, "but he didn't" was not improper comment on defendant's right to remain silent, in trial for capital murder and other crimes; rather, comment reminded jury about contents of defendant's confession to his mother, and purpose of prosecutor's statement was to highlight discrepancies between defendant's post-arrest confession and admissions and his testimony at trial. U.S.C.A. Const.Amend. 5; West's T.C.A. Const. Art. 1, § 9.

2 Cases that cite this headnote

[30] **Criminal Law** Admissions, declarations, and hearsay; confessions

Any possible error in admission of deputy director's testimony during direct examination that during interview with defendant, when he tried to ask defendant for more details about specific aspects of crime scene, defendant asked for attorney, and that he was unable to get formal written statement from defendant because defendant stopped interview, in alleged violation of defendant's right to counsel, was harmless beyond reasonable doubt, in trial for capital murder and other crimes, where defense had already elicited testimony about defendant's request for attorney during interrogation with sergeant, and defendant did not object to that testimony. U.S.C.A. Const.Amend. 5; West's T.C.A. Const. Art. 1, § 9.

[31] **Criminal Law** Out-of-court statements and hearsay in general

Criminal Law Availability of declarant

Testimonial statements are inadmissible under the Confrontation Clauses of the Sixth Amendment and the Tennessee Constitution unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

10 Cases that cite this headnote

[32] **Criminal Law** Out-of-court statements and hearsay in general

The threshold question in every case where the Confrontation Clause is relied upon as a bar to the admission of an out-of-court statement is whether the challenged statement is testimonial. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

24 Cases that cite this headnote

[33] **Criminal Law** Out-of-court statements and hearsay in general

When determining the primary purpose of a statement made during a police encounter, i.e., whether the statement was made in the context of a response to an emergency, so that the statement is nontestimonial, for Confrontation Clause purposes, or was made under circumstances objectively indicating that there was no ongoing emergency but was to establish or prove past events potentially relevant to a criminal prosecution, and therefore, is testimonial, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular police encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

8 Cases that cite this headnote

[34] **Courts** Number of judges concurring in opinion, and opinion by divided court

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The United States Supreme Court's fractured decision in *Williams v. Illinois* that a report of a DNA profile of a defendant created by a private laboratory from vaginal swabs taken from the victim's rape kit was not testimonial, and thus, that the state DNA analyst's testimony that the defendant's DNA profile in the report matched the defendant's profile in the State's DNA database entered in an unrelated case did not violate the defendant's right of confrontation, provides little guidance and is of uncertain precedential value in determining whether statements contained in a laboratory report relied upon by the State are testimonial or nontestimonial, because no rationale for the decision—not one of the three proffered tests for determining whether an extrajudicial statement is testimonial—garnered the support of a majority of the Court. U.S.C.A. Const.Amend. 6.

9 Cases that cite this headnote

[35] **Courts** Number of judges concurring in opinion, and opinion by divided court

When a fragmented United States Supreme Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

3 Cases that cite this headnote

[36] **Courts** Number of judges concurring in opinion, and opinion by divided court

The *Marks* rule that when a fragmented United States Supreme Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds, presupposes that the narrowest concurrence will represent a "common denominator" rationale; however, if one opinion does not fit entirely within a broader circle drawn by the others, the *Marks* approach ceases to function as it was intended, and adhering to it in such circumstances would turn a single opinion to which eight of nine Justices do not subscribe into law.

3 Cases that cite this headnote

[37] **Criminal Law** Reception of evidence

Admission of three autopsy reports through testimony of medical examiner who did not perform autopsies did not breach any clear and unequivocal rule of law, and thus, did not rise to level of plain error warranting relief to do substantial justice, in trial on six counts of capital murder and other crimes; neither *Crawford v. Washington* nor its progeny had decided specific question whether autopsy reports were testimonial statements implicating Confrontation Clause, and courts were split on issue, and thus, issue remained unsettled at time of defendant's trial, defendant did not object to medical examiner's qualification as expert nor contest causes of victims' deaths, and none of autopsies tied defendant to crimes. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

6 Cases that cite this headnote

[38] **Criminal Law** Identity

Testimony of police witnesses that child victim of attempted murder had identified defendant, his uncle, as perpetrator of six murders and three attempted murders, came within exception to rule against hearsay for statements of identification of person made after perceiving person, where victim testified at trial and was subject to cross-examination concerning his statement to police. Rules of Evid., Rule 803(1.1).

[39] **Criminal Law** Availability of declarant

Police witnesses' testimony that child victim had identified defendant, his uncle, as perpetrator of murders and attempted murders did not violate defendant's right of confrontation, where victim testified at trial about his prior identification of defendant to police and was subject to cross-

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examination. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

1 Case that cites this headnote

[40] **Criminal Law** Availability of declarant

There is no constraint under the Sixth Amendment's Confrontation Clause on the use of prior testimonial statements when a declarant appears at trial and is subject to cross-examination, and the same is true of the right protected under the Tennessee Constitution. U.S.C.A. Const.Amend. 6; West's T.C.A. Const. Art. 1, § 9.

28 Cases that cite this headnote

[41] **Criminal Law** Other Particular Theories of Admissibility

Deputy director's reference to defendant's prior incarceration was not evidence of prior crimes offered for impermissible purpose of showing defendant's bad character and propensity to commit crimes charged, in violation of order in limine prohibiting evidence that defendant had been incarcerated for second-degree murder, in trial for capital murder and other crimes, where testimony was offered to show defendant's familiarity with criminal justice system so that jury could better evaluate integrity of defendant's confession. Rules of Evid., Rule 404(b).

1 Case that cites this headnote

[42] **Criminal Law** Showing bad character or criminal propensity in general

Evidence of other crimes easily results in a jury improperly convicting a defendant for his or her bad character or apparent propensity or disposition to commit a crime regardless of the strength of the evidence concerning the offense on trial. Rules of Evid., Rule 404(b).

3 Cases that cite this headnote

[43] **Criminal Law** Prejudicial effect and probative value

The risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance. Rules of Evid., Rule 404(b).

1 Case that cites this headnote

[44] **Criminal Law** Decision or order

When considering the admissibility of other-crimes evidence, the criteria for admission—in particular, the existence of a material issue at trial and the balancing of the probative value and unfair prejudice—require consideration of the evidence presented at trial; thus, trial courts must be cognizant that if pretrial evidentiary rulings are made, they may need to be reconsidered or revised based on the evidence presented at trial. Rules of Evid., Rule 404(b).

10 Cases that cite this headnote

[45] **Criminal Law** Other offenses and character of accused

Criminal Law Other offenses and character of accused

Criminal Law Evidence of other offenses and misconduct

Any possible error in admission of deputy director's testimony in which he referenced defendant's prior incarceration, as evidence of other crimes, was harmless beyond reasonable doubt, in trial for capital murder and other crimes, where director never informed jury of crime for which defendant had been incarcerated nor implied that jury should consider defendant's prior incarceration as evidence of guilt on charged crimes, trial court gave appropriate limiting instruction which cautioned jury not to consider evidence of defendant's prior incarceration as evidence of guilt, and testimony was cumulative of testimony from at least seven other witnesses who referenced defendant's prior incarceration. Rules of Evid., Rule 404(b).

[46] **Sentencing and Punishment** Review

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Provision of capital sentencing scheme mandating proportionality review of death sentences imposed on six counts of capital murder with "similar cases" in which capital sentencing hearing was held was not fatally flawed, and thus, did not result in arbitrary imposition of death penalty, based on defendant's claim that "similar cases" did not include death sentences imposed in other jurisdictions, especially since capital sentencing statutes differed from state to state, and therefore, cases from other jurisdictions were not "similar." West's T.C.A. § 39–13–206(c)(1)(D).

2 Cases that cite this headnote

[47] **Sentencing and Punishment** Presumptions

Sentencing and Punishment Questions of fact

In determining whether the evidence supports the jury's findings of statutory aggravating circumstances, in sentencing for capital murder, the relevant inquiry is whether a rational trier of fact, taking the evidence in the light most favorable to the prosecution, could have found the existence of the aggravating circumstances beyond a reasonable doubt.

8 Cases that cite this headnote

[48] **Sentencing and Punishment** Endangering or creating risk to others

Sentencing and Punishment More than one killing in same transaction or scheme

Sentencing and Punishment Nature, degree, or seriousness of other offense

Evidence supported jury's findings of three aggravating circumstances with respect to defendant's murder of his brother, in sentencing for capital murder, namely, prior felony conviction for crime of violence, that defendant knowingly created great risk of death to two or more persons when he killed brother, and that defendant killed brother in course of mass murder; defendant stipulated to prior conviction for second-degree murder, he fired numerous shots at brother who was sitting in living while three other adults were present in living room, and defendant also killed other adults in living room and two small children who were in their bedrooms. West's T.C.A. § 39–13–204(i)(2, 3, 12).

3 Cases that cite this headnote

[49] **Sentencing and Punishment** Endangering or creating risk to others

In sentencing for capital murder, the statutory aggravating circumstance that the defendant knowingly created a great risk of death to two or more persons in the course of murdering the victim 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. West's T.C.A. § 39–13–204(i)(3).

2 Cases that cite this headnote

[50] **Sentencing and Punishment** Escape or other obstruction of justice

Evidence supported jury's finding of statutory aggravating circumstance that defendant killed three of six victims for purpose of avoiding, interfering with, or preventing lawful arrest or prosecution for murder of another, in sentencing for capital murder, where he fatally shot his brother following argument in living room of home where three other victims were also present, jury heard evidence that defendant, who had just been released from prison for second-degree murder, desperately wanted to avoid returning to prison, and all three victims would have been able to identify defendant as murderer of his brother. West's T.C.A. § 39–13–201(i)(6).

[51] **Sentencing and Punishment** Escape or other obstruction of justice

In sentencing for capital murder, the statutory aggravating circumstance that the murder was committed for the purpose of avoiding, interfering with, or preventing the lawful arrest or prosecution of the defendant or another may

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be applied when the proof shows that avoiding arrest was one motivation for the killing, and its application is not limited to only those killings which are solely or predominantly motivated by a desire to avoid arrest or prosecution. West's T.C.A. § 39–13–201(i)(6).

[52] **Sentencing and Punishment** Killing while committing other offense or in course of criminal conduct

Evidence supported jury's finding that defendant knowingly committed murders of three of six victims while he had substantial role in committing or attempting to commit first degree murder, in sentencing for capital murder, where he murdered three victims during course of killing his brother. West's T.C.A. § 39–13–204(i)(7).

[53] **Sentencing and Punishment** Age

Sentencing and Punishment Age

Evidence supported jury's finding of statutory aggravating circumstance that two victims were less than 12 years old and that defendant was 18 years or older, in sentencing for capital murder, where child victims were two and four years old when they were killed, and defendant was older than 18 years of age. West's T.C.A. § 39–13–204(i)(1).

[54] **Sentencing and Punishment** Vileness, heinousness, or atrocity

Defendant's murder of two- and four-year-old victims was especially heinous, atrocious, or cruel, for purposes of sentencing for capital murder; medical examiner testified to multiple extensive injuries inflicted upon each victim and explained that each child sustained more than one injury that was capable of causing their deaths, each victim was stabbed repeatedly and severely beaten, and physical abuse was beyond that necessary to cause death. West's T.C.A. § 39–13–204(i)(5).

[55] **Sentencing and Punishment** More than one killing in same transaction or scheme

Sentencing and Punishment Vileness, heinousness, or atrocity

Sentencing and Punishment Age

Sentences of death on six counts of capital murder were neither excessive nor disproportionate to penalty imposed in other first-degree murder cases, when considering nature of crime and defendant; defendant shot his brother and three other adult victims in home multiple times, he repeatedly beat and/or stabbed five young children in home, two of whom died from their injuries, while other three miraculously survived potentially fatal injuries, unprovoked attacks on children were cruel and brutal, he told mother he murdered children only because they had seen him shoot adults, and death sentences were upheld in other similar cases involving mass murder, including murder of children in which jury found same aggravating circumstances. West's T.C.A. § 39–13–206(c)(1)(D).

4 Cases that cite this headnote

[56] **Sentencing and Punishment** Proportionality in general

A death sentence is "disproportionate" to sentences imposed in other cases, considering the nature of the crime and the defendant, only if the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed. West's T.C.A. § 39–13–206(c)(1)(D).

3 Cases that cite this headnote

[57] **Sentencing and Punishment** Proportionality in general

A death sentence is not "disproportionate" to sentences imposed in other cases, considering both the nature of the crime and the defendant, merely because the circumstances of the offense are similar to those of another offense for which

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the defendant received a life sentence. West's T.C.A. § 39–13–206(c)(1)(D).

[58] **Sentencing and Punishment** Proportionality

An appellate court, when conducting proportionality review of a death sentence does not function as a "super jury," nor does the appellate court assure that a sentence less than death was never imposed in a case with similar characteristics; instead, its role in comparative proportionality review is to assure that no aberrant death sentence is affirmed. West's T.C.A. § 39–13–206(c)(1)(D).

[59] **Sentencing and Punishment** Proportionality

An appellate court has no mathematical or scientific formula for fulfilling the role of proportionality review of a death sentence; rather, the court uses the precedent-seeking method of comparative proportionality review in which it compares the case before it with other cases involving similar defendants and similar crimes, which requires an examination and comparison of the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating circumstances involved in the case under review, with other similar cases. West's T.C.A. § 39–13–206(c)(1)(D).

1 Case that cites this headnote

[60] **Sentencing and Punishment** Proportionality

In conducting the comparison between the death sentence imposed in the case that is subject to proportionality review with sentences imposed in other cases, the court considers the following factors, which focus on the nature of the crime: (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victim's circumstances, including age, physical and mental conditions, and the victim's treatment during the killing; (6) the absence or presence of provocation; (7) the absence or presence of justification; and (8) the injury to and effects on non-decedent victims. West's T.C.A. § 39–13–206(c)(1)(D).

[61] **Sentencing and Punishment** Proportionality

When reviewing the characteristics of the defendant in the context of conducting proportionality review of a death sentence, the court considers: (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 the helplessness of the victim(s); and (8) the defendant's capacity for rehabilitation. West's T.C.A. § 39–13–206(c)(1)(D).

1 Case that cites this headnote

[62] **Sentencing and Punishment** Proportionality

In conducting proportionality review of a defendant's death sentence by comparing it to sentences imposed in other capital murder cases, the court selects from the pool of cases in which a capital sentencing hearing was actually conducted to determine whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death. West's T.C.A. § 39–13–206(c)(1)(D).

Attorneys and Law Firms

***11** Kathleen Morris, Nashville, Tennessee, and Marty Brett McAfee, Memphis, Tennessee, for the appellant, Jessie Dotson.

Robert E. Cooper, Jr., Attorney General and Reporter; Joseph F. Whalen, Acting Solicitor General; Jeffrey Dean

Zentner, Assistant Attorney General; Amy P. Weirich, District Attorney General; Damon Griffin, Reginald Henderson, and Raymond Lepone, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

CORNELIA A. CLARK, J., delivered the opinion of the Court, in which GARY R. WADE, C.J., and JANICE M. HOLDER, J., joined.

Opinion

A jury convicted the defendant, Jessie Dotson, of six counts of premeditated first degree murder for killing his brother, three other adults, and two of his brother's minor sons at their Memphis, Tennessee home. The jury also convicted the defendant of three counts of attempted first degree murder for attacking with kitchen knives and wooden boards three more of his brother's minor children who were also present in the home. At the conclusion of the penalty phase of the trial, the jury imposed death sentences for the six first degree murder convictions, finding that the multiple aggravating circumstances applicable to each conviction outweighed the mitigating circumstances beyond a reasonable doubt. At a separate sentencing hearing on the attempted first degree murder convictions, the trial court classified the defendant as a Range II multiple offender, imposed a forty-year sentence for each conviction, and ordered these sentences served consecutively to each other and to the death sentences. The defendant appealed, and the Court of Criminal Appeals affirmed his convictions and sentences. After the case was docketed in this Court, we entered an order identifying five issues for oral argument,[1] in addition to the mandatory review Tennessee Code Annotated section 39–13–206(c)(1) (2014) requires this Court to perform. We now hold that: (1) admission of the defendant's custodial statements does not constitute plain error; (2) admission of testimony regarding the defendant's invocation of his right to counsel did not deprive the defendant of a fair trial or violate his right to due process; (3) admission of testimony about a surviving victim's statements to third parties did not violate the defendant's state and federal constitutional right to confront the witnesses against him; (4) admission of testimony regarding the defendant's history of imprisonment did not violate his right to a fair trial; and (5) admission of the pathologist's testimony about autopsies another pathologist performed did not violate the defendant's federal and state constitutional right to confront the witnesses against him. We also hold, in accordance with section 39–13–206(c)(1), that: (1) the sentences of death were not imposed in any arbitrary fashion; (2) the evidence supports the jury's findings that the aggravating circumstances were proven beyond a reasonable doubt; (3) the evidence supports the jury's findings that as to each first degree murder conviction the aggravating circumstances ***12** outweighed mitigating circumstances beyond a reasonable doubt; and (4) the sentences of death are neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the nature of the crimes and the defendant. Accordingly, the judgments of the trial court and the Court of Criminal Appeals upholding the defendant's convictions of first degree murder and attempted first degree murder and sentences of death and forty years are affirmed. With respect to issues not specifically addressed herein, we affirm the decision of the Court of Criminal Appeals and include relevant portions thereof in an appendix to this opinion.

I. Factual Background

A. Guilt Phase

1. Discovery of the Crime Scene and Initial Investigation

The proof offered at the guilt phase of the defendant's trial established that in March 2008, thirty-year-old Cecil Dotson, Sr. ("Cecil"),[2] Cecil's five children, ranging in age from nine years to two months, and Marissa Williams, Cecil's twenty-seven-year-old fiancee and the mother of four of his children, were living at a home located at 722 Lester Street in Memphis, Tennessee. They had been living in the home for five or six months. Cecil worked as a maintenance man at an apartment complex in Memphis.

The defendant—Cecil's brother—lived with their sister, Nicole Dotson ("Nicole"), in her apartment at Goodwill Village in Memphis and worked with their father, Jessie Dotson Sr. ("Jessie Sr."), as a painter. The defendant had moved in with Nicole in August 2007, upon his release from prison. The defendant's family referred to him as "Junior."

On Saturday, March 1, 2008, Jessie Sr., the defendant, and William Waddell, Cecil's and the defendant's half brother, also known as "Fat," went to Cecil's Lester Street home to watch a televised University of Memphis basketball game with him.[3] Ms. Williams and the five children were also

present at the home during this time.[4] The group was unable to watch the game because Cecil's television could not receive the broadcast. Jessie Sr. left Cecil's house around 6:00 or 6:30 p.m., and as he was leaving, he saw Cecil on the porch cleaning his grill and preparing to barbecue. He did not see Cecil or the defendant again that night and never again saw Cecil alive. Mr. Waddell left Cecil's home at 10:30 or 11:00 p.m., and when he left, Cecil was still alive.

When Jessie Sr. arrived at Nicole's apartment the next morning, Sunday, March 2, 2008, to pick up the defendant for work, the defendant was not there, and Nicole did not know where he was. Jessie Sr. asked Nicole to tell the defendant to contact him if he wanted to keep his job. Later that evening, the defendant called Jessie Sr. and explained that he had not called because his girlfriend, Sheila Jones, had hidden his cell phone after they argued. The defendant did not explain why he had missed work. When the defendant ***13** and Mr. Waddell went to dinner that evening, the defendant asked if Mr. Waddell wanted to pick up Cecil. Mr. Waddell had called Cecil numerous times on March 2nd but had not reached him, so they did not go by the Lester Street home.

The next day, Monday, March 3, 2008, the defendant rode to work with Jessie Sr. around 8:00 a.m., but they stopped working at 11:00 a.m. due to rain. Later that same day, the defendant called Jessie Sr., telling him that Nicole wanted him to drive by Cecil's house because Ms. Smith, the mother of Cecil's two-year-old son Cecil II, feared something was wrong. Ms. Smith had been unable to reach Cecil by telephone since the very early morning hours of Sunday, March 2, 2008, and no one had answered the door at the Lester Street home when she knocked around 3:00 p.m. that day. Ms. Smith said the door was partially open, and the radio was playing, but she did not see anyone or hear the children, although she could see the television just inside the door and the photographs on the wall across from the door. On the morning of March 3rd, Ms. Smith discovered that Cecil had not shown up for work and that his relatives had not heard from him. She still could not reach him by telephone. When she called Mr. Waddell at work numerous times expressing her concerns, he told her to call the police. She took his advice and called the police in the early evening and waited outside the Lester Street home for them to arrive.

Officer Randall Davis arrived first. As he walked in the front door, he could "smell the dead bodies." The storm door was closed, but the interior door was partially open, and he could see a person's foot lying on the floor inside. Entering the front door, Officer Davis discovered four adult bodies, later identified as Cecil, Ms. Williams, Hollis Seals, and twenty-two-year-old Shindri Roberson. All appeared to have sustained multiple gunshot wounds. Officer Davis did not check for vital signs because it was obvious to him that they were deceased.

Officer Davis, along with two other officers, continued through the house, searching for survivors and perpetrators, while another officer secured the front door. Officer Davis noticed blood throughout the house, but none of it appeared to be fresh. Officer Davis saw someone in the hallway bathroom and discovered nine-year-old C.J. in the bathtub with a knife stuck in his head. Officer Davis first believed that C.J. was deceased but then noticed the child's eyes twitch. After alerting others he had found a survivor, Officer Davis continued clearing the home.

In a bedroom on the left side of the hallway ("bedroom two"), Officer Davis discovered four-year-old Cemario, who was deceased. In another bedroom ("bedroom one"), Officer Davis discovered two-year-old Cecil II and five-year-old Cedrick, both of whom appeared deceased to Officer Davis. Meanwhile, another officer located two-month-old Ceniyah, who was still alive, and carried her out of the house.[5] The officers exited just as Memphis Fire Department personnel arrived, and Officer Davis let them know a survivor had been found in the bathroom.

Firefighter Jason Vosburgh testified that he "could smell the blood in the air" when he approached the house, describing it as "[a] thick, spoiled smell like it had been there a while." Firefighter and emergency medical technician Daniel Moore testified that, although he was instructed to check the adult victims for signs of life, he did not actually touch them because it was obvious to him that they ***14** were deceased. Mr. Moore explained that "[j]ust by looking at them and just the horrific scene that was there with all the blood and everything, it was obvious that they had been down for a while." He described the blood as "definitely old."

When Mr. Vosburgh and a paramedic entered bedroom one, they discovered that, although Cecil II was deceased, Cedrick was still alive, so they carried him outside to an ambulance. During this time, Mr. Vosburgh was informed that another deceased victim was in the other bedroom. When he returned inside, Mr. Vosburgh and Mr. Moore were summoned to the bathroom, where firefighter Herbert Henley was attending to C.J. They removed C.J. from the bathtub and transported

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him to an ambulance outside. Mr. Henley recalled seeing cuts on C.J.'s face and a "sawzall blade" sticking out of the top of his head. He described the bathroom as "a mess" with "blood everywhere." Mr. Moore testified that when he and Mr. Vosburgh entered the bloody bathroom, C.J. "turned his head and the next thing we saw was one of the most horrible things I've ever seen, it was a knife stuck embedded in his skull and it was just stuck there. And it absolutely is the worst thing I've ever seen in my life." In addition to the embedded knife, Mr. Moore observed puncture wounds on C.J.'s abdomen and multiple superficial cuts to his neck.

By the time firefighter and paramedic Patrick McDevitt reached the scene, the surviving victims had already been removed and were on their way to the hospital. Mr. McDevitt and his partner were tasked with confirming that the remaining victims were deceased. To do so, they touched each victim to check for a pulse or other vital signs and ran an ECG, which required them to move clothing and affix ECG strips. They returned the clothing to its original position when they finished. Mr. McDevitt noticed that the blood on each victim appeared to be dry.

Meanwhile, Memphis Police Department Deputy Director Toney Armstrong, a lieutenant with the Homicide Bureau at the time these murders occurred, learned of the homicides. He called Lieutenant Walter Davidson [6] at home, assigned him to serve as case coordinator on the investigation, and instructed him to go to the scene. He told Lieutenant Davidson that six persons had been murdered and that three severely injured children were on their way to the hospital and not expected to survive. Not knowing the identity of the perpetrator and wanting to prevent any further attacks on the family, Deputy Director Armstrong and Lieutenant Davidson decided to quarantine the surviving children at the hospital and not release their identities. Officers of the Tactical Unit were assigned to guard the children, and the quarantine prevented relatives, the media, and everyone other than medical personnel and police personnel approved by Deputy Director Armstrong from having contact with them. No family members were allowed contact with the children from March 3rd through March 8th.

Sergeant Anthony Mullins of the Homicide Bureau was at the scene when Deputy Director Armstrong and Lieutenant Davidson arrived. [7] After he had walked ***15** Deputy Director Armstrong through the house and provided an overview of the crime scene, Sergeant Mullins left and obtained a search warrant. When he returned with the warrant later that evening, officers entered the home and began collecting any evidence located in the immediate vicinity of the deceased victims' bodies. By the time this work had been completed, the medical examiner and seven others from the Shelby County Medical Examiner's Office had arrived at the scene. By 2:30 a.m. on March 4, 2008, the deceased victims' bodies had been removed and were en route to the morgue. Sergeant Mullins and the officers assisting him left a short time later, but a uniformed officer remained behind to secure the scene. Sergeant Mullins and the crime scene processing team returned between 10:30 and 11:30 a.m. on March 4th and continued their work.

Testifying at trial as an expert in general crime scene investigation and bloodstain pattern analysis, Sergeant Mullins described the Lester Street crime scene as horrific and the worst he had ever worked. The living room, into which the front door opened, was very small, with only between five and ten feet of available space around the furniture and the bodies of the four adult victims. The home, he said, was dirty and cluttered. He found evidence indicating that the crime scene had been staged, which further complicated the investigation.

All of the adult victims had sustained multiple gunshot wounds, and all except Mr. Seals had been shot at least once in the leg. Two guns were used in the shooting—a nine-millimeter and a .380 caliber—although neither gun was found at the scene or thereafter. Although the guns were not found, officers located spent bullets in the living room on the sofa cushion, on top of a piece of plastic from a window unit air conditioner, on the floor under Cecil, under the sofa, inside the arm of the sofa, between two sofa seat cushions, in the wall behind the sofa, and in the east wall of the living room.

Shell casings were also found in the living room. Officers recovered two nine-millimeter and three .380 caliber shell casings on the floor. When officers moved a jacket on the love seat, they found a sealed Ziploc bag that contained eleven more nine-millimeter and five more .380 spent shell casings. Sergeant Mullins concluded that the person or persons responsible for the crimes had collected the spent shell casings after the shootings, intending to remove them from the scene.

Sergeant Mullins believed that all of the adult victims' bodies were moved or staged after the shooting. Cecil's body was located in a kneeling position in front of the sofa, with his torso on a sofa cushion near a seam where two cushions met, and a bag of marijuana in his left hand. Cecil had sustained

several gunshot wounds including several to the front of his body, one to his neck, one to the bottom of his foot, and several to his lower legs. Fibers collected from Cecil's chin and mouth were consistent with a pillow having been placed over his face when he was shot, and police found a pillow in the living room through which a bullet had passed. The gun used to shoot Cecil's legs differed from the gun used to shoot his neck. Sergeant Mullins could not determine the sequence of the gunshot wounds to Cecil's legs, but he believed that several of them may have been inflicted close to or after Cecil's death.

***16** Sergeant Mullins opined that Cecil's body had been positioned and staged after the shooting. Sergeant Mullins believed that Cecil was likely facing his attacker when the first shot was fired, explaining that Cecil had several gunshot wounds to the front of his body, which he would not have sustained had he been kneeling with his torso resting on the sofa at the time of the shooting. Sergeant Mullins also believed that the bag of marijuana had been placed in Cecil's hand, explaining that the bag was so large that Cecil would have been unable to close his fingers around it and would have dropped it had he been holding it during the shooting or while attempting to flee or defend himself.

A loaded twelve-gauge sawed-off shotgun was found on a stack of clothing in the corner of the living room, a little more than an arm's length from Cecil's body. Five more live rounds of shotgun ammunition were found under the sofa. DNA testing of blood found on the end of the shotgun barrel revealed that two-month-old Ceniyah was a minor contributor of the blood. According to Sergeant Mullins, the blood on the shotgun barrel indicated that the gun was positioned atop the clothing after the shooting, because no blood spatter was found on any of the clothing beneath the gun and the blood on the gun belonged to a victim whose body was found in another part of the home.

Ms. Roberson's body was located in a seated position on the floor, with her back to the sofa, her legs extended, and her head to the side, between the sofa and the loveseat. Her shirt was pulled up, exposing her breasts, and her pants were pulled down, exposing her lower body from her waist to her knees. A clear plastic bag containing what appeared to be between three and five rocks of crack cocaine was found on the outer portion of her vagina. Sergeant Mullins concluded that Ms. Roberson's body also had been staged after the shooting and that she had been pulled from the sofa to the floor near the time of or after her death and her clothing then altered. Little blood was found on the floor beneath her body, but a nearby sofa cushion was stained with very thick coagulated blood, which Sergeant Mullins described as consistent with the type of blood loss that would occur from a gunshot wound like that Ms. Roberson sustained to her leg. Ms. Roberson's pants were also saturated with blood, and bullet holes in her pants corresponded to the location of the gunshot wounds to her legs, indicating that her pants were covering her legs when she was shot and were pulled down afterwards. The bag of crack cocaine also appeared to be part of the staging, as it was only slightly touching her and appeared to have been placed on her body.

On the floor beneath and around Ms. Roberson's body were items that appeared to Sergeant Mullins to have been emptied from a purse, although he did not locate an empty purse in the room. These items were not collected as evidence, and Sergeant Mullins could not recall seeing any type of identification, although he did recall seeing Ms. Roberson's cell phone and photos among these items. Three hairs were collected from Ms. Roberson's right leg, thigh, and buttocks and sent to the Federal Bureau of Investigation for testing. Considering the dirty condition of the home and the considerable traffic through it during the previous months, Sergeant Mullins did not view the hairs as significant and opined that they could have easily adhered to her body when it was moved.

Sergeant Mullins believed that Ms. Williams's body, too, had been positioned after the shooting. Ms. Williams's body was located on the floor, slumped over onto Ms. Roberson, with her legs positioned across Ms. Roberson's legs. He ***17** pointed out, however, that the carpet was bloodstained on the side opposite of the way she was leaning. Additionally, Ms. Williams's legs were lying across Ms. Roberson's legs, indicating that Ms. Williams's body had been staged *after* Ms. Roberson's body had been positioned on the floor.

Sergeant Mullins testified that Mr. Seals's body was located across from the front door and near the door connecting the kitchen and the living room. However, Mr. Seals's body was not visible upon entering the home because a large television blocked the view across the living room. Mr. Seals was wearing a black shirt and black pants. His pants were pulled down to below his knees. A cup and a wallet were found near his body, as was a purse with the contents inside, which was later identified as belonging to Ms. Williams. Inside the kitchen, just beyond Mr. Seals's body, officers discovered a spent projectile under a table and a defect in the kitchen wall,

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which appeared to have been made by gunfire from the living room.

Although Sergeant Mullins believed that Mr. Seals was shot in the area where he was found, he opined that Mr. Seals's clothing and body were altered after the shooting. He pointed out that a pool of blood on the carpet near Mr. Seals's body had a "void" in it—an area where the carpet was not bloodstained—indicating that something had been covering the unstained area of carpet when the blood pool formed. The carpet was bloodstained on the opposite side of Mr. Seals's body as well. Based on the bloodstains, the distance between them, and the location of Mr. Seals's legs one atop the other, Sergeant Mullins believed that Mr. Seals's body may have originally been lying in the area of the "void" and may have been rolled from that area when his pants were pulled down and his wallet removed.

Sergeant Mullins testified that all of the sharp force and blunt force injuries sustained by the deceased and surviving children were inflicted with kitchen knives and wooden boards the perpetrator found in the home. Sergeant Mullins pointed out that officers discovered a gray plastic silverware tray overturned on the floor of the kitchen but did not recover an intact set of kitchen knives. In total, officers found five knife blades throughout the home, including the blade that was lodged in C.J.'s head. The word "Farberware," a brand of kitchen knives, was printed on one of the two blades recovered from inside the bathtub. Officers also recovered one intact knife handle and what appeared to be broken pieces of another knife handle. Sergeant Mullins believed the perpetrator removed the knife handles from the blades after the assaults. Officers found bloodstained and broken pieces of wood in various places, including the hallway, the bathroom, and bedrooms. According to Sergeant Mullins, the perpetrator's use of guns, knives, and boards already present in the home demonstrated the perpetrator's familiarity with the home.

Officers found blood spatter throughout the home, and according to Sergeant Mullins, the large amount of blood spatter found in the bathroom and bedrooms one and two was consistent with a prolonged "one-on-one struggle" rather than a more rapid execution of the children. He noted that the bathroom floor, the bath mat, the area around the bathtub, and the outside and inside of the toilet were stained with blood. A substantial amount of blood had pooled inside the bathtub, where C.J. was found. A bloody partial palm print, later matched to Cemario, was found on the tile wall of the bathroom. Sergeant Mullins described the palm print as a transfer stain, which results from a bloody object or body part coming into contact with and ***18** transferring blood onto another surface or object.

Sergeant Mullins identified "cast-off" blood stain patterns on the bathroom wall over the toilet tank. This pattern is produced, he explained, when blood that has adhered to an object or weapon used to strike a person multiple times is cast off the object or weapon during the attack and onto a nearby surface or object. Sergeant Mullins stated that the cast-off spatter on the wall above the toilet consisted of three distinct trails, indicative of three different blows. The top trail, which he described as almost horizontal on the wall, indicated that the victim was close to the wall when the blow was administered. Sergeant Mullins stated that because the cast-off was "a fairly wide pattern," he believed it came "from one of the boards" rather than a knife, although he could not definitively identify the weapon that produced the pattern.

On the wall over the bathtub and near where C.J. was found, Sergeant Mullins noted still more cast-off spatter, which could have come from either a knife or a wooden board. On the wall near the soap dish he noted cast-off spatter from a different blow, and he identified still more cast-off spatter on the wall above the bathtub faucet controls, which was indicative of additional blows. He observed a "smeared type" transfer stain farther down inside the bathtub, as well as a thick amount of blood in the corner of the bathtub, all of which had resulted from cast-off. On the wall next to Cemario's bloody palm print, Sergeant Mullins identified even more cast-off spatter, but he could not determine if it was associated with the bloody palm print or if it resulted from a different blow to the same victim or to another victim.

On the top of the toilet tank, Sergeant Mullins identified impact blood spatter, which occurs when an object strikes a bloody surface. Toward the bottom of the toilet, he observed a blood transfer stain. Sergeant Mullins also noticed that blood had dripped down from above, hitting the toilet tank and running down inside the toilet bowl. He testified that this particular pattern was likely produced by an actively bleeding victim positioned above the toilet tank. He testified that the pattern had been dissipated by water or someone wiping through the dripped blood. He also testified that the blood spatter indicated that someone had raised and lowered the toilet seat.

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Based on the cast-off patterns, Sergeant Mullins opined that at least one, and up to three, blows were struck in the bathtub. Based on the dripped blood and Cemario's bloody hand print on the wall, he concluded that more than one victim was assaulted in the bathroom. Sergeant Mullins also noted that three green beads similar to those found in Cecil II's hair were recovered in the bathroom next to a large drop of blood. While he acknowledged that the beads could have been on the floor prior to the attack, Sergeant Mullins testified that the beads also could have fallen out during an attack on Cecil II in the bathroom. Sergeant Mullins explained that "[t]here is a lot of movement in the bathroom. There's more than one blow being delivered in the bathroom. You've got several pieces of broken wood that would be indicating at least one good blow, but from the blood evidence there's more than one and there's movement within that scene."

Sergeant Mullins also testified about the blood evidence in bedroom one, where Cemario's body was discovered face down on the floor in a pool of blood. Inside this bedroom, officers found two wooden boards and broken pieces of braided hair scattered across the floor. Sergeant Mullins testified that a forceful blow to Cemario's ***19** head would have broken off the weaker braids. The broken braids scattered across the floor and the pool of blood beneath Cemario's head suggested that the perpetrator struck the fatal blow while Cemario was lying on the floor in bedroom one. Large spots of dripped blood on the carpet suggested to Sergeant Mullins that Cemario may have aspirated blood. However, Sergeant Mullins believed that some portion of the assault on Cemario occurred in the bathroom. He explained that "[t]he level of violence delivered to [Cemario] couldn't have happened in [bedroom one] without some additional blood evidence. So there has to be some movement after the fact."

In bedroom two, where Cecil II and Cedrick were found, investigators found blood stains on the bed, the window blinds, the wall by the bed, the ceiling fan, and the ceiling. Sergeant Mullins testified that the blood spatter was multi-directional, indicating that multiple blows had been delivered in bedroom two. Sergeant Mullins believed that the cast-off blood spatter on the ceiling and ceiling fan resulted from a knife being raised overhead between downward stabbing motions. On the floor beneath the bed, investigators found seventeen more green hair beads like those in Cecil II's hair.

In bedroom two investigators also located a bloodstained wooden board, an intact knife handle lacking a blade, and two knife blades lacking handles. The first knife blade, found inside a pillowcase between the pillow and the pillowcase, had been bent into an "S" shape and had blood on it. Sergeant Mullins believed the blade was bent when the knife handle was removed, and he found no evidence to suggest that the blade had been twisted and damaged during the stabbing of a victim. The second knife blade, found between the mattress and the wall, and almost on top of the box springs, was discovered only after investigators moved the bed.

In the dresser of the master bedroom, investigators located a box with eleven or twelve rounds of nine-millimeter ammunition. Items were stored in the area beneath the bed. Officers collected two cordless telephones from this area, including one from the floor between the dresser and the laundry room and another from farther back in the bedroom.

Sergeant Mullins opined that a perpetrator in the living room could have trapped the children by standing in the doorway of the living room. Although doors leading to the outside of the home were located in the laundry room and the master bedroom, to reach those doors from the hall bathroom or from bedrooms one and two, the children would have been required to walk through the living room. In addition, the door in the laundry room was secured by a tied cord and appeared as if it had not been used in awhile. Most of the windows in the home had bars.

According to Sergeant Mullins, the perpetrator spent considerable time in the house staging the crime scene after the murder. Sergeant Mullins reiterated his opinion that all four adult victims were moved either close to the time of death or after death, and he noted that Ms. Roberson was not petite and that pulling down her pants, as well as those of Mr. Seals, would have taken time. More time would have been required to position Ms. Williams's legs across Ms. Roberson's legs, to place the marijuana in Cecil's hand, and to place the crack cocaine on Ms. Roberson's body. Sergeant Mullins stated that additional time was perhaps spent moving Cemario, if he were indeed assaulted in the bathroom and later moved to bedroom one. Removing the knife handles and hiding the knife blades in the pillowcase and under the mattress would have taken more ***20** time, as would collecting and removing from the scene all but one of the knife handles. Sergeant Mullins also pointed out that the guns used in the shooting were removed from the scene, and he believed the loaded shotgun had been positioned atop the clothing after the crimes occurred. Sergeant Mullins also explained that some additional time would have been required to locate, collect, and place sixteen

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shell casings in the sealed Ziploc bag. According to Sergeant Mullins, "[I]t took enough time to alter things in this scene as opposed to boom, boom, stab, stab, out the door. There's a difference. If you consider all the movement in the scene after this is done, it's going to take a few minutes but not necessarily hours, I would not think." He opined that the staging of the crime scene indicated that the perpetrator felt familiar with and comfortable enough to remain in the home for the time needed to finish altering the crime scene.

Sergeant Mullins observed that having knowledge of gangs and drug activity would have been useful in staging the crime scene. However, based on his experience investigating more than 100 gang-related homicides, Sergeant Mullins opined that gang members would not have remained inside the home following the murders and would not have gone to the crime scene unarmed and used weapons they found in the home to commit the offenses. Sergeant Mullins was unaware of any gang-related homicides in which women were murdered and children were assaulted and killed with knives and boards. Sergeant Mullins acknowledged that the defendant's DNA was not discovered on any item of physical evidence associated with the investigation; however, Sergeant Mullins testified that the lack of DNA evidence linking the defendant to the crime did not exonerate him.

2. The Defendant's Initial Statements to Police, the Identification of the Defendant as the Assailant, and Defendant's Confessions

While Sergeant Mullins and his team processed the crime scene, sergeants and detectives from the Safe Streets Task Force and the Organized Crime Unit canvassed the area and interviewed neighbors, while other officers questioned family members of the victims. When the police asked Ms. Williams's mother, Ida,[8] if she knew of anyone who would want to harm her daughter or Cecil, Ida named Ms. Smith, Cecil II's mother and the person who called the police, as the couple's worst enemy. She explained that the tension stemmed from Cecil's simultaneous relationships with both Ms. Williams and Ms. Smith.

Two other officers, Sergeant James Terry Max and Sergeant Joe Stark, interviewed the defendant at Lieutenant Armstrong's request. During this initial interview at the police station on March 4, 2008, the defendant was not under arrest and was considered only a possible witness. The defendant described his activities on March 1st, explaining that he and others, including Jessie Sr. and Mr. Waddell, had intended to watch a televised University of Memphis basketball game at Cecil's Lester Street home, but the plan went awry because Cecil's television did not receive the broadcast.

The defendant said he remained at Cecil's house, where Cecil's five children and Ms. Williams were also present, and "E," whom officers subsequently identified as ***21** Mr. Seals, arrived later in the evening. Around 10:00 to 10:30 p.m., the defendant, Mr. Seals, and Cecil left the Lester Street home and drove to "Frank's" apartment in the area of Highland Avenue and Spottswood Avenue. Officers later identified "Frank" as Willie Boyd Hill. According to the defendant, Mr. Seals went into Mr. Hill's apartment alone, while the defendant and Cecil waited outside in the car. A short time later, a light complexioned man wearing glasses exited the apartment, and Cecil got out of the car and talked to the man for some time. When Mr. Seals emerged from Mr. Hill's apartment twenty to thirty minutes later, the trio left and picked up Mr. Seals's girlfriend at another nearby apartment complex. From there, the defendant said the group went to the Kimball Cabana Apartments to purchase marijuana, arriving at approximately 11:30 p.m. or midnight. The defendant said that Cecil initially went into a downstairs apartment alone but soon returned to get the defendant. Together they went back inside the same apartment, and Cecil introduced the defendant to four African–American men, telling them that the defendant had just been released from prison. After Cecil had purchased a quarter-ounce bag of marijuana and the defendant had purchased $20 worth of marijuana, they left the apartment, ran into Ms. Smith in the parking lot, and talked with her for a while before leaving. Their next stop, according to the defendant, was at a house located off Lamar Avenue, where they talked to a woman for approximately thirty minutes. Next, the defendant said, the group proceeded to the Kansas Court housing project to pick up his son. Learning that the defendant's son was not there, they spoke to the child's maternal grandmother for approximately ten minutes, gave her money, and left. The defendant stated that he parted company with Cecil, Mr. Seals, and Mr. Seals's girlfriend at approximately 2:15 or 2:30 a.m. on March 2, 2008, when they dropped him off at his girlfriend's apartment. The defendant stated that his girlfriend, Ms. Sheila Jones, was not home when he arrived, but her daughter, Keaira, and Keaira's boyfriend were there. According to the defendant, he and Keaira argued about Keaira being alone with her boyfriend. The defendant said that he went to bed after the argument and that Sheila returned home at approximately 5:05 a.m. on March 2nd.

When Sergeant Max and Sergeant Stark asked the defendant whether Cecil had any enemies, the defendant told them that Cecil and Mr. Hill had argued about two weeks earlier. The argument began, according to the defendant, when Cecil, Ms. Smith, Mr. Hill, and Mr. Hill's girlfriend returned to Mr. Hill's girlfriend's apartment after drinking at a club. According to the defendant, Mr. Hill's girlfriend called the police after seeing Cecil slap Ms. Smith. When the officers arrived, Cecil told them that there were drugs inside Mr. Hill's girlfriend's apartment. Mr. Hill also lived in the apartment, according to the defendant, and Mr. Hill and Cecil were both members of the Gangster Disciples. The defendant explained that gang members were not permitted to call the police on other gang members. According to the defendant, Mr. Hill wrote Cecil up for a violation of this rule through "Doc Holiday," and the Gangster Disciples were supposed to have held a meeting or a jury trial to determine Cecil's guilt, but Cecil failed to attend.

The defendant told the officers that Cecil always carried a .45 caliber handgun, although the defendant had not seen the gun when he was with Cecil on March 1st and 2nd. According to the defendant, Cecil also kept an AK–47 assault rifle with two magazines under a dresser at home, owned a sawed-off shotgun, and had access ***22** to a nine-millimeter handgun that belonged to Ms. Williams. The defendant told the officers that when the murders were discovered, Mr. Waddell asked Mr. Hill to call someone and find out what had happened and that Mr. Hill called "Doc Holiday" and asked him what had happened or who had committed the offenses.

Sergeant Max testified that prior to the defendant's March 4th interview the police had not been investigating the Gangster Disciples for involvement in the homicides. As a result of the interview, however, Sergeant Max was assigned to investigate possible gang involvement. Officers began following leads about the Gangster Disciples, and gang members were interviewed, as were others who were interested in providing information. [9]

As part of this investigation, Sergeant Max spoke with Cedric Atkins, who had earlier reported hearing that Cecil had stolen $300,000 from a drug dealer. In addition, on March 7, 2008, Sergeant Max interviewed a confidential informant, who reported hearing that Cecil had stolen $50,000 in drug money from "Doc Holiday." The confidential informant was shown color copies of photographs taken from Cecil's home to verify his familiarity with the Gangster Disciples. The confidential informant identified Cecil and "Doc Holiday." Based on this identification, the officers discovered a telephone number for "Doc Holiday" and learned that he had been mentioned as the governor of the Gangster Disciples.

Members of the Gangster Disciples reportedly became angry upon learning that the gang had been implicated in the murders of women and children. On either Tuesday, March 4th or Wednesday, March 5th, after Priscilla Shaw—the mother of Cecil, the defendant, and Nicole—discovered that her front door had been kicked in by Gangster Disciples, Ms. Shaw, the defendant, Nicole, and Nicole's children moved in with their cousin, Sharhonda Lane, at her Gayle Street, Memphis home. While there, Nicole received calls on her cell phone, which appeared to have originated from the telephone inside her apartment. The defendant answered one of these calls and told Nicole that the caller sounded like a man disguising his voice. Becoming "terrified," Nicole went to the police department. A short time later a marked police car, assigned to protect the house, arrived at the scene.

When the defendant learned that the police had arrived outside, he became agitated and "frantic." He said that the officers were there to get him, that the police were trying to "pin" the offenses on him, and that he was not going back to jail for something he did not do. They should "just bury [him] with [his] brother," he declared. The defendant grabbed a gun belonging to Mr. Waddell and pointed it at his own head. [10]

Ms. Lane went outside and told the two officers that the defendant was threatening to commit suicide if they entered the house. One of the officers—Officer Laneeze Stepney—asked Ms. Lane to call the defendant on her cell phone. She did, and Officer Stepney spoke with the defendant for between five and seven minutes and convinced him to allow the officers to enter ***23** the house. During this time, the defendant told Officer Stepney, "[E]verybody think[s] I did it. I've been all on the news and the police saying I did it...." [11] Shortly after he entered the residence, Officer Stepney was able to retrieve the gun and attempted to calm the defendant, who was acting "real nervous like he had a lot on his mind." The officers told the defendant that they were not there to arrest him but were there to place him and his family in protective custody. The defendant and his family were moved from the Gayle Street home into a safe house under police protective custody, and the investigation proceeded.

During this time, the surviving children remained hospitalized at LeBonheur Children's Hospital. Dr. Michael Muhlbauer, an expert in the field of adult and pediatric neurosurgery,

testified that he performed surgery on C.J., Cedrick, and Ceniyah on March 3, 2008. Dr. Muhlbauer testified that when C.J. arrived at the hospital, he was moaning but was awake, lucid, and able to follow commands. C.J. had trauma and swelling to his forehead, part of a steak knife sticking out of his head, and a six-to-seven-inch laceration in his scalp that extended down his forehead. C.J.'s skull was severely fractured, and large pieces of his skull had been driven inward with a blunt force object. C.J. also had either a "glancing" stab wound or two separate stab wounds on the back of his arm and chest, a superficial laceration across his neck, a laceration on his right hand, and a laceration on his left thumb. Dr. Muhlbauer said that without medical intervention C.J. would not have survived the injuries he sustained. [12]

Dr. Muhlbauer testified that Cedrick exhibited significant facial trauma and was "essentially semicomatose" when he arrived at the hospital. Cedrick had sustained injuries that were, in Dr. Muhlbauer's opinion, consistent with having been beaten with boards, including multiple fractures to his face, mid-face, and the lower portion of his skull, a fractured nose which had been pushed inward, and a small skull fracture with bruising on the back of his brain. In addition, Cedrick sustained stab wounds to one eye, his forehead, and his neck. Dr. Muhlbauer testified that Cedrick would not have survived without medical intervention.

Dr. Muhlbauer testified that Ceniyah arrived at the hospital with significant head trauma, which included a large cut in her scalp that exposed her bone. The right side of Ceniyah's skull had been pushed or crushed in with a blunt object, resulting in an "open-depressed skull fracture." A CT scan revealed that the covering of Ceniyah's brain was "probably cut" and that her brain was mildly bruised. Dr. Muhlbauer testified that Ceniyah's injuries were consistent with being struck with boards. She also had stab wounds to her left lower extremity. Dr. Muhlbauer said that absent medical intervention, Ceniyah would not have survived these injuries.

Deputy Director Armstrong decided to have an officer attempt to speak with C.J. early in the investigation because of the possibility that C.J. might die. The police considered C.J. very important to the investigation because he was familiar with all of his father's associates. On March 5th, two days after they had undergone surgery, then Sergeant (now Lieutenant) ***24** Caroline Mason of the Homicide Bureau was assigned to LeBonheur Children's Hospital and instructed to assess the surviving children and determine what information they could provide. She attempted to interview C.J. that same day, but she found him "in and out" of consciousness, cursing, "talking crazy," and screaming out names, including "Cassandra" and "Roderick." Officers investigated C.J.'s statements and learned that Ms. Williams had a sister named Cassandra, but after further investigation they concluded that she was "obvious[ly]" not involved in the crimes. Lieutenant Davidson said that officers continued to investigate any of C.J.'s statements that made sense. At some point, officers decided to send Pat Lewis of the Child Advocacy Center to the hospital with Lieutenant Mason to talk to C.J.

On March 7, 2008, officers received a telephone call from a nurse at the hospital informing them that C.J. was awake and rational and that the police needed to come talk to him. During the ensuing interview, C.J. reported that "Uncle Junior"—the defendant—was the person responsible for killing C.J.'s parents and their friends and for stabbing and attacking him and his siblings.

Lieutenant Mason called Deputy Director Armstrong and reported that C.J. had implicated the defendant as the perpetrator of the crimes. He instructed her not to tell anyone what she had learned until he had a chance to listen to the tape recording of C.J.'s identification. After listening to the tape, Deputy Director Armstrong ordered the defendant transported from the safe house to the Homicide Bureau, and he assigned Lieutenant Mason and Sergeant Max to interview him.

The defendant, who was under arrest at that time, was advised of his rights, signed a written waiver, and agreed to speak with the officers. Lieutenant Mason told the defendant that they wanted to clear up some things and determine whether he had any information to add to what he had provided in his March 4th interview. She asked the defendant whether he had any gang affiliation, and he replied that he was a Crip in prison. When she asked about his relationship with Cecil, the defendant stated that, on one occasion, Cecil had called the police and falsely reported that the defendant had committed a robbery.

Lieutenant Mason then asked the defendant to tell them again about what he did on March 1st and about the last time that he had seen Cecil alive. According to Lieutenant Mason, the defendant essentially repeated the account he had given during his March 4th interview, varying in only one or two respects. Specifically, he told them that he, Cecil, and Mr. Seals had gone to Mr. Hill's apartment so that Mr. Seals could retrieve a gun. He also told them that when Cecil

introduced him to the men in the apartment where they had purchased marijuana, Cecil had referred to the defendant as his "bitch ass brother who just got out of prison." According to Lieutenant Mason, the defendant "frowned" when he recalled this introduction. After purchasing the marijuana, the defendant said that Cecil drove him to an apartment complex to pick up his son, who was not home, and then dropped the defendant off at Ms. Jones's apartment. The defendant maintained that he did not return with Cecil to the Lester Street home.

At some point, the defendant stopped talking to Lieutenant Mason and Sergeant Max. Deputy Director Armstrong, who had been observing the interview, decided to enter the room and continue the interview himself. Deputy Director Armstrong testified that he watched the defendant's body language as he talked to the defendant about how horrific the crimes were. He said the defendant seemed "really, ***25** really tight, like he was doing everything he could not to talk to me." According to Deputy Director Armstrong, the defendant gave one-or-two-word answers to questions and would not engage in open conversation. Deputy Director Armstrong said that "[m]ost of the time if I asked him a question, he would nod his head or shake his head. But you could tell he was doing everything he could not to engage me in an open conversation as to where we had open dialogue back and forth with each other."

Deputy Director Armstrong said that, when he entered the interview room, he knew that the defendant was very familiar with the criminal justice system and that the defendant had only recently been released from prison. When Deputy Director Armstrong asked the defendant whether he believed in God and in heaven and hell, the defendant said that he did. Deputy Director Armstrong stated that the defendant was "struggling to try to maintain his composure" and at times during the interview leaned forward as if he wanted to make a statement but would then lean back. Deputy Director Armstrong said that he could tell the defendant was hiding something.

At one point, Deputy Director Armstrong allowed the defendant to grab his hands, attempting to convey to the defendant that he knew something was weighing heavily on the defendant's mind. Although it appeared to Deputy Director Armstrong as if the defendant were about to speak to him, the defendant refused to engage in conversation and asked to go to the restroom. Deputy Director Armstrong allowed him to go. When the interview resumed, Deputy Director Armstrong asked the defendant what his family called him, and the defendant replied, "Junior." He asked the defendant if anyone else in his family was referred to as "Junior," and the defendant said, "[N]o." In response to questions, the defendant also told Deputy Director Armstrong that no one else in his family looked like him and no one in the family had ever confused him with someone else in the family. When the defendant was asked whether a member of his family would be referring to him if the person used the name "Junior," the defendant said yes.

Deputy Director Armstrong then played the tape recording of C.J. stating that he had been stabbed by his "Uncle Junior." According to Deputy Director Armstrong, the defendant became visibly upset and appeared as if he were about to cry. The defendant then told Deputy Director Armstrong that he and Cecil went somewhere to get a gun, began arguing, and continued to argue during the drive back to Cecil's house. The defendant said that when they returned to Cecil's home, the argument escalated. When Cecil reached for a shotgun, the defendant began shooting, using both his gun and Ms. Williams's gun. The defendant said that he then attempted to "get rid" of the children because they had seen him. The defendant stated that he "stuck them," using the knives from the kitchen drawer.

According to Deputy Director Armstrong, the defendant began to cry and appeared as if "he had gotten the weight of the world off his shoulders. But it was almost like I'm defeated." Deputy Director Armstrong testified that when he began to question the defendant in greater detail about what had occurred in the house, using his knowledge of the crime scene to frame the questions, the defendant asked for an attorney, and the interview ceased. The defendant also asked to speak with his mother, Priscilla Shaw.

During the early morning hours of March 8th, officers went to the safe house where Ms. Shaw was in protective custody ***26** with other family members, informed her that the defendant wanted to see her, and drove her to the police department. When she arrived, she went into a room and spoke to the defendant. No one else was in the room with them. She took the defendant's hands and asked him what was happening. She asked if the police were "trying to put it on him." The defendant did not respond at first, but when he looked up, he told Ms. Shaw that he "did it." When she asked him, "why the babies," the defendant said they had seen him. He explained that he and Cecil had been arguing all day and that Cecil had a gun. Ms. Shaw asked the defendant if

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Cecil had pointed the gun. The defendant said that Cecil did not but was "just talking and swinging it." When Cecil put the gun down, the defendant said that he began shooting. The defendant said that he later rode a bicycle away from the scene to the home of his girlfriend, Ms. Jones. Ms. Shaw testified that she "asked him [why] the kids and he said they saw me. And I said but the baby, the baby. He didn't say nothing, just shook his head. And I got up and told him I love him and I left." The defendant told both Deputy Director Armstrong and his mother that he committed the offenses. He did not indicate that anyone else either assisted him or perpetrated the crimes.

3. Investigation and Testimony Corroborating the Defendant's Confessions

After C.J. identified the defendant as the lone perpetrator and the defendant admitted his guilt to Deputy Director Armstrong, the police investigation into gang involvement ended. The investigation turned to determining whether the crime scene evidence was consistent with and corroborative of the details of the defendant's admissions and his description of how the offenses were committed. Witness testimony at trial reflected the results of this investigation.

Officers located and seized C.J.'s yellow Magna bicycle, which the defendant admitted to riding away from the scene, in a shed behind Ms. Jones's Memphis residence. Although officers hoped to find blood from the victims on the bicycle, only genetic material from an unknown male was found on the bicycle. Neither the victims' blood nor the defendant's DNA was found on it.

Keaira Jones testified at trial that at 10:00 or 10:30 p.m. on March 1, 2008, the defendant and Cecil came to her home and that both appeared to be intoxicated. When she told them her mother was not home, Cecil wanted to leave, but the defendant left only after she allowed him to enter and search the apartment for her mother.

Keaira testified that the defendant returned between 3:00 and 4:30 a.m. She allowed him to enter the apartment, but she returned to her bedroom, closing the door. Approximately five minutes later, he knocked on her bedroom door and asked to talk to her. She was putting her son to sleep and told the defendant that she would speak to him shortly, but she fell asleep and never opened the door. Before falling asleep, she heard water running in the bathroom. Keaira was asleep when her mother came home, and the defendant and her mother left together the next morning. After they left, Keaira noticed bleach spots on the brown rug in the bathroom. She also noticed that a bottle of Clorox bleach was in the hallway and not stored in its usual place. Keaira denied arguing with the defendant about being home alone with her boyfriend.

Ms. Jones testified that she met the defendant through Nicole, with whom she had worked, and that she was aware that ***27** the defendant had moved in with Nicole after being released from jail. Ms. Jones testified that when she returned home at approximately 5:00 a.m on March 2nd, the defendant was lying in her bed, which surprised her because he knew she would be out with girlfriends. He told her that "ladies don't come in at five o'clock in the morning," and they went to sleep. They got up at 10:30 or 11:00 a.m. on March 2nd, and she testified that she dropped him off at Nicole's apartment.

On Monday, March 3rd, the defendant asked Ms. Jones to pick him up at Cecil's Lester Street home, but when she arrived, the street was blocked by ambulances, fire trucks, and police cars. The defendant was "kind of upset and shaking" and told her that something had happened to his brother. Ms. Jones testified that the defendant never told her that he knew what had occurred at Cecil's home. After learning that the defendant had been arrested, Ms. Jones called him and visited him in jail. A week or two after his arrest, she asked the defendant why he would not assist the police in their investigation, and he replied that "they got to figure it out." Ms. Jones testified that she had seen the defendant with a gun on one or two occasions, and she described the gun as having a "wheel" and being "blue with a little blue on it."

Willie Boyd Hill, Jr., Cecil's best friend, testified that he had visited Cecil's home on Lester Street on several occasions. Mr. Hill said that he knew "Doc Holiday," "Cato," "Dread," and Mr. Seals because he, Cecil, Mr. Seals and the other men were all members of the Gangster Disciples. He stated that the defendant was a member of the Crips gang.

Mr. Hill testified that on the evening of March 1, 2008, Mr. Seals, Cecil, and the defendant came to his Memphis apartment between 10:30 and 11:30 p.m. Mr. Seals, who had just been released from jail, came to retrieve a pistol he had left with Mr. Hill. The gun, Mr. Hill said, fired .380 caliber bullets, which were loaded by inserting a clip, and he added that the gun ejected shell casings. The parties stipulated at trial that the gun Mr. Hill returned to Mr. Seals on March 1, 2008, was a P–232 Sig Sauer handgun, a .380 caliber pistol,

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which could hold up to eight rounds, consisting of a seven-round magazine and a single round in the chamber.

Mr. Hill testified that "Trell," another gang member, went outside to talk to Cecil while Mr. Seals was in Mr. Hill's apartment. Mr. Seals took the loaded gun and left with the defendant and Cecil. Mr. Hill did not see any of them again until the day the homicides were discovered.

Mr. Hill said that he learned of the homicides from Mr. Waddell, who called him on March 3rd and said that something had happened to Cecil's family. Mr. Hill went to the crime scene, and he recalled the defendant being there as well. Upon seeing Mr. Hill, the defendant asked Mr. Waddell why he had called the men who had committed the crimes. Mr. Hill testified that he told the police he had called "Cato" [13] from the crime scene, stated, "[Y]a'll went too far," and asked him directly if he and "Doc Holiday" had something to do with the murders. "Cato" denied any involvement in the murders.

Mr. Hill acknowledged that he and Cecil had a "falling out" on the evening of Valentine's Day, less than a month before the ***28** murders. According to Mr. Hill, Cecil, Ms. Williams, Ms. Smith and he had gone out drinking at a club. Afterwards, they went to Mr. Hill's girlfriend's apartment, where Cecil and Ms. Smith began arguing. Mr. Hill testified that, when Ms. Smith ran upstairs into his girlfriend's apartment, Cecil followed her and began beating on the doors and windows and cursing both Ms. Smith and Mr. Hill's girlfriend. Mr. Hill's girlfriend called the police, and when they arrived, Cecil told them of marijuana inside the apartment. Cecil's report to the police angered Mr. Hill because Cecil knew that Mr. Hill also stayed at the apartment and that Gangster Disciples were not supposed to call the police on each other.

Mr. Hill testified that he told "Cato" what had happened and that "Cato," in turn, informed "Doc Holiday." "Doc Holiday," whom Mr. Hill described as the Gangster Disciples' "coordinator" over the Orange Mound area, asked Mr. Hill to explain to "Dread"—the chief of security over the area—what he had reported to "Cato." Later, Mr. Hill was summoned to an apartment on Dwight Street in Memphis, where he, "Doc," and "Dread" discussed the matter, and "Dread" told him to "write [Cecil] up."

Mr. Hill explained that a "write-up" is a disciplinary notice within the gang that results in punishment. Possible punishments for a write-up, he stated, include "[p]unches to the chest, punches to the lip, pumpkin head, three minutes to a DV" or "death violation." Generally, Mr. Hill explained that when a death violation is ordered, it applies only to the individual gang member and not to everyone associated with him. Mr. Hill denied writing Cecil up for a violation of gang rules. He also explained that if the Gangster Disciples had wanted to kill Cecil, they easily would have been able to get him alone and would not have waited until 2:00 a.m. Mr. Hill said that he had never heard of any gang murders involving innocent women and children, and he stated that if the Gangster Disciples had entered a home to kill someone, they would have been armed and would not have run out of bullets. Also, Mr. Hill said that "Dread" and "Doc" would not have harmed Cecil, with whom they were close friends.

Mr. Hill acknowledged that he had heard that "Cato" and "Doc" approached Cecil about his gang violation and that Cecil told them to "shove it" and would not accept the discipline. Mr. Hill also had heard that Cecil had hung up on "Doc" and that "Doc" had slept with Ms. Williams. Mr. Hill also agreed that he and Cecil, whom he described as "outspoken," had argued on occasions other than Valentine's Day 2008, and he said that Cecil and "Doc" had disagreed over drywall work that Cecil performed at "Doc's" apartment.

Mr. Hill testified that until mid-February 2008, the overseer or head of the Gangster Disciples in Memphis was Eric Brown, known as "Big Easy," and that Mr. Brown had been murdered. Mr. Hill was unaware until his trial testimony that Vernon Motley, whom the police suspected of murdering Mr. Brown, was a member of the Traveling Vice Lords and that Mr. Motley's girlfriend, Tammy Randolph, was Cecil's first cousin.

Nevertheless, Mr. Hill denied being an active gang member at the time of the killings. [14] He said, "None of us was participating in any gang meetings or nothing ***29** like that but we still had love for it." He testified that he had contacted the police and cooperated with them and had submitted both a hair and a DNA sample. He said that he did so because Cecil was his friend and Cecil's family was like his own family.

Stacey Young, a friend of Cecil's, testified that at approximately midnight on March 2, 2008, Cecil, the defendant, and Mr. Seals came to her home in Cecil's blue Lincoln. Cecil introduced the defendant to Ms. Young, and they talked "for a minute." Before the three men left, Cecil told Ms. Young that he would return after dropping off Mr. Seals and the defendant. When Ms. Young called Cecil about an hour later, at approximately 1:00 a.m., he told her that he

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had not "made it off Pendleton" and indicated he still planned to return, but he never did return.

Ms. Smith testified that she had never been a gang member, although Cecil and his friends were Gangster Disciples. She, too, described the Valentine's Day falling out between Cecil and Mr. Hill, and she confirmed that it originated when Cecil informed the police of the marijuana in Mr. Hill's girlfriend's apartment. Ms. Smith also described the dispute between Cecil and "Doc Holiday" over "Doc's" failure to pay Cecil for repair work he had done at "Doc's" apartment.

Ms. Smith also testified that she had seen Cecil, the defendant, and Mr. Seals at approximately 12:30 a.m. on March 2, 2008, at her Kimball Avenue apartment. When she went outside to talk with them, Cecil told her that he would return, but she told him not to come back. After Cecil left, she called him three times. The first time she called, at approximately 1:15 a.m., she spoke to him. The second time she called him, at approximately 1:30 a.m., he did not answer. But when she called him a third time at 2:00 a.m., they spoke. During this last telephone call, Ms. Smith testified that she heard Cecil and the defendant arguing and using profanity. Ms. Smith recounted her attempts to locate Cecil on March 2nd and 3rd and related that she called the police on the afternoon of March 3rd and waited outside the Lester Street home for them to arrive. Ms. Smith confirmed that her son, Cecil II, was one of the children killed in the house.

Charity Wright, an employee of Crickett Wireless, testified about Cecil's cell phone records and the calls he received on March 2, 2008. Ms. Wright testified that Ms. Smith called Cecil's number at 12:59 a.m. and that the call lasted seven minutes and ten seconds. Ms. Young called Cecil's number, through a possible three-way call, at 1:06 a.m., and the call lasted two minutes and ten seconds. Ms. Smith called again at 1:11 a.m., 1:25 a.m., and 1:30 a.m., but the calls were not answered. Ms. Smith called Cecil again at 1:37 a.m., and the call was answered, but it lasted only twenty-eight seconds. Ms. Wright said the next call came at 3:11 a.m. and went to voice mail.

Nicole testified that she was aware that Cecil and Mr. Hill had referred to themselves as Gangster Disciples, but she stated that they did not "mingle" on the streets with gangs or gang members. She was also aware that the defendant was a member of the Kitchen Crips. Nicole testified that the defendant moved in with her after his release from jail and that she had been too frightened of him to ask him to leave. Nicole explained that the defendant had held a "grudge" against his family for not visiting him more often while he was in jail, and she said that the defendant expressed his feelings about this grudge to her daily.

Nicole testified that Cecil and two of his children picked up the defendant from her apartment for a barbecue at Cecil's home ***30** in the early evening of March 1st. Nicole did not see the defendant again until approximately 10:00 or 11:00 a.m. the next morning, Sunday, March 2nd, when she saw him outside her apartment in Ms. Jones's car and saw the defendant and Ms. Jones having a "physical altercation" in the front seat of Ms. Jones's car. According to Nicole, and contrary to Ms. Jones's testimony, the defendant left again with Ms. Jones without coming inside Nicole's apartment and did not return to Nicole's apartment until that evening.

Nicole said that she went to Cecil's house at approximately 6:30 p.m. on March 3rd with the defendant and her cousin Tammy Randolph. Ambulances, fire trucks, and police cars were already at the scene when they arrived, and the police would not allow her to enter the house. Nicole said she did not learn who had died and who had survived at that time. According to Nicole, the defendant instructed her not to talk to the media, explaining that they would likely blame him for the murders because of his criminal background. She also recalled the defendant becoming very angry when Mr. Hill and "Trell" were called to the scene, and she recalled the defendant telling her, while they were still at the scene, that he believed Mr. Hill and "Trell" had committed the homicides. Nicole described Cecil and the defendant as "gun fanatics." She said the defendant never told her that he was at Cecil's home at the time of the homicides or that he rode C.J.'s bicycle away from the scene.

Jessie Sr. testified that when he learned of the killings, he believed they were gang-related because Cecil had told him that he was attempting to leave the Gangster Disciples and was worried that they might harm him. Cecil had asked Jessie Sr. to move in with him, explaining that gang members respect the family of other gang members and would be unlikely to harm Cecil if Jessie Sr. were living with him. Although Jessie Sr. moved in with Cecil, he lived there only about a month because several of his own brothers warned him that he would likely be killed if he interfered in Cecil's situation with other gang members.

Jessie Sr. testified that Cecil and the defendant had a normal relationship, although it bothered the defendant when Cecil

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told others that the defendant had recently been released from jail. Jessie Sr. said that Cecil's children liked the defendant and that the defendant spoiled them with junk food. Jessie Sr. recalled seeing a gun on the counter at Cecil's home the evening the group gathered to watch the basketball game, which he later learned belonged to the defendant. Jessie Sr. described the gun as "kind of like a powder blue," stated that it was "a revolver, the kind with the thing that turn[s,]" and said that it was the type of gun that does not eject shell casings. Jessie Sr. recalled seeing Cecil move the gun out of reach, commenting that the children might mistake it for a toy. Jessie Sr. said Cecil told the defendant that he had moved his gun.

Jessie Sr. agreed that the defendant never told him what had happened to Cecil prior to the discovery of the bodies. However, he said that the defendant had called him a few days before trial and told him what he knew about what had occurred inside Cecil's house. Jessie Sr. provided no further details about what the defendant told him during this phone call.

Mr. Waddell testified that, on March 1, 2008, he and Cecil visited "Doc Holiday" during the day because "Doc Holiday" wanted Cecil to perform some maintenance work for him. According to Mr. Waddell, the defendant and Cecil were not arguing during the time he spent with ***31** them on March 1st. Mr. Waddell recalled seeing the defendant with a black and silver gun that evening, instead of the blue revolver the defendant ordinarily carried.

Two of the child victims also testified. C.J., the oldest surviving victim, was in fifth grade by the time of the trial. He had undergone many surgeries, according to his maternal grandmother, and additional surgeries would be required. C.J. testified that in the Lester Street house he shared a single bedroom with his brothers. He had slept on the top bunk bed and his brothers, Cedrick and Cemario, had slept on the bottom bunk. His older sister used the other bedroom, [15] and his parents' bedroom was in the back of the house. C.J. recalled that, on the night of the attacks, he was watching television in his sister's room because the television in his room was not working. Hearing a gunshot, C.J. walked out of his sister's room and into the hallway. C.J. recalled peeking into the living room and seeing "my Uncle Junior point a gun toward my daddy," who was not saying anything. C.J. testified that he saw "some smoke and sparks come out [of] the gun" and then looked "down on the ground" and "saw [a] dude on the floor[ ]," who was wearing a black shirt and black pants.

C.J. testified that when he heard another gunshot, he "peeked" through the door, walked into the hallway, and saw the defendant shooting at a woman who was on the arm of the couch. C.J. did not recognize the woman, but he recalled that she was telling the defendant that she loved him, but the defendant "just kept on shooting."

C.J. said that he then returned to his sister's room and sat down on the bed. Hearing footsteps coming toward the door, he turned and saw the defendant holding a "handheld knife," which C.J. described as the type that opens and closes. C.J. said that when the defendant cut him on his neck, he told the defendant that he loved him, but the defendant replied, "[N]o, you don't." C.J. then lay down on the bed, and Cecil II began crying. C.J. heard the defendant then say to Cecil II, "[D]on't worry about it, you ain't going to get hurt."

C.J. testified that he tried to retrieve the telephone from the hallway to call the police, but before he could do so, he saw the defendant's feet in the doorway and heard the defendant ask him what he was doing. When C.J. told the defendant that he was going to call the police, the defendant said he would kill C.J.'s parents and Cecil's friends if C.J. did so. C.J. recalled asking the defendant if he could use the bathroom and noticing that the defendant had a "kitchen knife" in his hand. C.J. recalled the defendant allowing him to go to the bathroom, but stated that the defendant "ma[d]e [him] put [his] head in the tub." When he had done so, the defendant tried to stab C.J. in the chest, but C.J. put his hand up to block the blow, and the knife went into his head instead.

C.J. recalled seeing his mother, Ms. Williams, in the doorway of the bathroom saying that she did not want to die. The defendant asked her for Cecil's cellphone and car keys, and Ms. Williams replied that the keys likely were in Cecil's car. C.J. recalled the defendant then saying to Ms. Williams, "sorry because I ain't let your husband or your husband's friends get away with it and the kids." Then C.J. heard what he described as a "huge fall on the ground."

C.J. testified that he next saw the defendant walking in the hallway with a garbage bag and another kitchen knife, going into ***32** C.J.'s sister's bedroom. C.J. heard someone yelling and heard the defendant saying "shut up." C.J. then heard Cemario ask to use the bathroom and saw blood dripping from Cemario's head onto the rim of the toilet seat. He said that Cemario asked the defendant if he could return to his room and the defendant said that he could. Next, C.J. said, the

defendant went into the kitchen, grabbed another knife, and entered the bedroom of C.J. and his brothers. C.J. said he saw Cemario lying on the bed and the defendant stab Cemario, who then fell on the floor. C.J. said he heard "rambling" in the hallway near the laundry room, as if the defendant were attempting to move something out of the way. C.J. then fell asleep in the bathtub and heard nothing more that night.

C.J. testified that when he awoke, he saw firemen in his bedroom looking at Cemario. One of the firemen came into the bathroom and got C.J. out of the bathtub. C.J. was transported to the hospital by ambulance. C.J. said that no one was with the defendant during the attacks and that the defendant acted alone. By the time of trial, more than two years had passed since C.J. identified the defendant as the lone perpetrator of the crimes. During that time, C.J. had not wavered in his identification of the perpetrator.

However, C.J. also testified at trial that he had told "Ms. Pat" in a previous interview that on the same night that the "bad thing" happened, a woman named "Cassandra" knocked on the door and said that she needed to use the bathroom. She and some other people, including a man wearing a mask with "[a] little bit of blood" on it, entered the house. C.J. had never seen the man before, but he recalled Cecil referring to the man as "Roderick." C.J. did not recall who allowed "Roderick" to enter the house, although he acknowledged that he had previously told "Ms. Pat" that Cecil allowed "Roderick" to enter the house and that he was mad at Cecil for doing so. C.J. testified that "Roderick" said something to Cecil about the gang and also told Cecil, "[Y]ou got too big, boy." According to C.J., "Roderick" fired a gun at Cecil and said, "[N]ever stop playing with the gang boy, ... you never know what would happen, boy."

On redirect examination, C.J. again identified the defendant as the person who stabbed him in the head, shot his parents and their friends, and hurt his brothers and baby sister.

On recross-examination, C.J. testified that he saw a fight in the living room between Cecil and the man in the mask and again maintained that the man was shooting at Cecil. He also agreed that he had met with "Ms. Caroline" and "Ms. Pat" at "Ms. Pat's" office, and had said, when they asked him how he knew some of the things he told them, that his "granny" had told him.

Cedrick, who had been five years old at the time of the assaults and murders, testified as well and also identified the defendant as his assailant. By the time of trial, Cedrick was eight years old and in the third grade. Cedrick recalled living on Lester Street with his family. Cedrick said that the defendant had stabbed him on the nose, forehead, and wrist and that no one else was with the defendant.

Cedrick testified that the attacks occurred at night but before he had eaten dinner. He did not recall hearing gunshots that night and also did not recall seeing the defendant shoot anyone. He said that no one had told him that the defendant shot anyone. Cedrick testified that the defendant got the knife he used to stab them from his car, but he could not remember the color of the defendant's car. Cedrick said that, although he had not seen the defendant stabbing his parents, ***33** he recalled that his parents and their friends were stabbed. Cedrick said that when his parents were killed, all of the children, other than one of his brothers and the baby, were locked in his sister's bedroom. Cedrick stated that his brother had told him that Ms. Williams was injured while she was in the living room changing the baby's diaper.

Cedrick testified that he heard Ms. Smith on the telephone calling the police, and he recalled that Nicole, whom he referred to as "Auntie Foxy," was also present when they were attacked. Cedrick acknowledged previously telling "Ms. Pat" and C.J. that his father never should have opened the door. Cedrick explained that a fight began after his father opened the door, and he remembered many people fighting that night, and specifically recalled a man, whom he did not know, fighting with his father and his father's friends. Cedrick also remembered C.J. sneaking out of the house after the defendant had stabbed him and riding on his bicycle to his grandmother's home. Cedrick testified that he had sneaked up on his "Uncle Jessie," got on his own bike, and also rode away to his grandmother's home. Cedrick recalled that when he and C.J. left, everyone was still alive in the house and were talking, singing, and having fun.

On redirect examination, Cedrick said that he had been in his sister's room when the defendant stabbed him, and he also recalled telling "Ms. Pat" that the defendant stabbed him. On recross-examination, Cedrick testified that he had talked to "Ms. Pat" after he had been living with his family for a period of time and after he had listened to others discussing the homicides and attacks.

4. The State's Expert Testimony

The prosecution's proof also included the testimony of a medical examiner and forensic experts in hair and DNA analysis, as well as that of an expert in firearms identification. Dr. Lisa Funte, a Shelby County medical examiner and expert in forensic pathology, testified regarding the victims' autopsies, three of which she had performed herself and three of which were performed by Dr. Miguel Laboy, another medical examiner in the Shelby County Medical Examiner's Office, who did not testify.

Dr. Funte testified that Mr. Seals, whose autopsy had been performed by Dr. Laboy, died as a result of multiple gunshot wounds, including: one to his mouth, which fractured some of his teeth and his jaw and then continued into his neck, fracturing the first and second cervical vertebrae; one to his midline upper chest area, in which the bullet injured his left lung and exited from his back; and one to the side of his chest near his right armpit, in which the bullet traveled through his right chest cavity, injured his right lung, and penetrated into the muscles of his back.

The toxicology report showed that Mr. Seals had marijuana and ethanol in his system. However, Dr. Funte explained that ethanol is produced as the human body decomposes, so she was unable to determine whether the ethanol resulted from alcohol consumption or decomposition, or both.

Dr. Funte testified that Ms. Williams, whose autopsy she had performed, sustained five gunshot wounds: one to the left side of her head that resulted in injuries to the skull and brain; one to the right side of her chest, which entered near her breast and exited on the left side of her back, causing injuries to her lungs and vertebral column; one to her left leg, which injured her muscles, tibia, and fibula; one to her right thigh, which injured the soft tissue and muscle; and one to the left side of her abdomen, which injured ***34** soft tissue and muscle. Ms. Williams died of the multiple gunshot wounds she sustained. Ms. Williams's toxicology report indicated the presence of ethanol, but Dr. Funte again could not determine if the ethanol stemmed from alcohol consumption or decomposition, or both.

Dr. Funte testified that Ms. Roberson, whose autopsy she performed, also died of multiple gunshot wounds. Ms. Roberson had four gunshot wounds: one to her right thigh, which injured the soft tissue and muscle of her thigh, traveled through the femoral vein, and continued through the soft tissue and muscle on her right side toward her back; one to her left knee, which injured soft tissue and muscle; one to her left calf, which injured soft tissue and muscle; and one to her left thigh, which again injured soft tissue and muscle. Dr. Funte testified that, judging from the wound pattern on Ms. Roberson's legs and the wound pattern on her jeans, she had been wearing the jeans when she was shot and her clothes had been rearranged later. Dr. Funte testified that the gunshot injury to the femoral vein in Ms. Roberson's right thigh would have resulted in a great deal of blood loss but would not have caused immediate death. Dr. Funte testified that Ms. Roberson could have died as quickly as five or ten minutes after receiving the wound or survived up to twenty or thirty minutes, depending on the circumstances. According to the toxicology report, no drugs or alcohol were present in Ms. Roberson's system.

Dr. Funte testified that Cecil, whose autopsy was performed by Dr. Laboy, also died of multiple gunshot wounds. Cecil sustained eight gunshot wounds: one to his head, which fractured his jaw; one to his neck, in which the bullet traveled through the soft tissues and muscles of his neck before fracturing and penetrating his trachea and larynx; one to his chest, in which the bullet traveled through muscle and soft tissue and into his back; one to his right thigh, in which the bullet perforated through the thigh, injuring soft tissue and muscle; two to his left thigh, in which the bullets injured soft tissue and muscle; one to his left leg, in which the bullet injured soft tissue; and one to his left foot. The toxicology report indicated Cecil also had ethanol in his system, although the source, again, could not be determined. Dr. Funte testified that fiber found in the area around the entry of the gunshot wound to Cecil's head was consistent with the shooter placing a fiber-filled pillow over Cecil's face and firing the gun through the pillow.

Dr. Funte also testified that a black hair and a white hair were collected from Ms. Williams's hand and that hairs were collected from Ms. Roberson's back, buttocks, and right thigh. She further stated that a green substance that appeared to be marijuana was collected from Cecil's hand, the color of Cecil's skin beneath the green substance was tan or brown, and his hand below the substance was stained with blood.

Dr. Funte also performed the autopsy on one of the child victims, two-year-old Cecil II. She testified that Cecil II died of multiple sharp force injuries, including multiple incised and stab wounds to his head, torso, and extremities. He sustained seven stab wounds that penetrated and fractured his skull and injured the right middle meningeal artery, causing epidural hemorrhage and edema of the brain with herniation.

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Among other injuries, Cecil II had a puncture-style stab wound to the right side of his head, two puncture-style stab wounds to his left cheek, two incised wounds on the left side of his face near his eye, an incised wound on his right ear, beginning at the top of his ear and continuing along the inside of the ear, a ***35** group of incised wounds of varying lengths and an incised wound leading to a stab wound on his torso, multiple incised and stab wounds on his back, and a mixture of sharp force and blunt force injuries on the left side of his torso. Dr. Funte said that incised wounds on Cecil II's back and left wrist were parallel and equally spaced, which indicated that the wounds were inflicted with a serrated knife blade. Cecil II also had an incised wound and a puncture stab wound on the base of his right thumb.

Dr. Funte also identified abrasions and contusions on Cecil II's body, which she described as blunt force injuries. Cecil II had abrasions on the right side of his head, cheek, upper and lower lips, and mouth. Dr. Funte testified that an abrasion on his head almost formed the outline of a rectangle and was consistent with the perpetrator striking Cecil II on the side of the head with a board. Cecil II also had a combination of an abrasion and a bruise on the right side of his neck behind his ear and bruises on the left side of his neck and on his elbow.

Dr. Funte also noted discoloration on Cecil II's right eyelid and cheek, which could have been caused by impact force to his eye or could have been related to the skull fractures and impact to the right side of his head. She stated that the nature of Cecil II's injuries suggested that he attempted to fend off his attacker. She also stated that the wound to his skull would have been fatal without medical intervention. Had Cecil II sustained only that wound, he could have survived from as little as several minutes to as long as one day. Had he received medical treatment within an hour of receiving his injuries, he could possibly have survived, although it was not "necessarily probable."

Dr. Funte testified that four-year-old Cemario, whose autopsy Dr. Laboy performed, also died of blunt force and sharp force injuries. She said Cemario had blunt force trauma to his head, with lacerations and bruises, multiple linear depressed fractures of the calvarium and the base of his skull, deep scalp and subarachnoid hemorrhage, and multiple contusions to his brain. Dr. Funte also noted areas of abrasions and lacerations on Cemario's head, as well as an incised wound above his left ear that tore part of his scalp away from his skull.

In addition, Cemario had incised wounds to his head, neck, and right hand. A stab wound to his chest went all the way through his body, injuring his left lung and hemidiaphragm, as well as his stomach, spleen, and liver. Cemario also sustained linear abrasions and bruises on his left arm, abrasions on his forehead, an abrasion and bruising on his right ear, a gaping incised wound to his neck, abrasions on his right arm, and an incised wound on his ring finger, which was consistent with Cemario having attempted to defend himself by holding up his hand or grabbing the knife.

Dr. Funte testified that the blunt force trauma to Cemario's head alone would have resulted in his death without medical intervention. Had Cemario sustained only this injury, he could have survived from as little as several minutes to as much as many hours, although the blow likely would have rendered him unconscious. The stab wound which passed all the way through Cemario's body also would have resulted in death, Dr. Funte explained.

Dr. Funte testified that Cecil II had incised wounds and that Cemario had lacerations. She said the majority of the incised wounds were superficial and not very deep. She also said the wounds could have resulted from a slashing cut from a knife. Dr. Funte was not able to determine whether a serrated or smooth-edged ***36** knife was used in each injury. She identified two injuries that had a unique pattern of equally spaced incised wounds, which was indicative of a serrated blade. Dr. Funte said that while a serrated blade may not always leave such a pattern, it will do so if dragged across the skin.

Linda Otterstatter, a physical scientist forensic examiner in the Trace Evidence Unit of the FBI laboratory in Quantico, Virginia, testified regarding the analysis of hair samples removed from the crime scene. She had compared debris recovered from the crime scene with hair samples from Cecil, Ms. Roberson, Ms. Williams, Cemario, Cecil II, the defendant, and Mr. Hill. No head hair samples were submitted for Mr. Seals, C.J., Cedrick, or Ceniyah. Head hairs recovered from Ms. Roberson's back were consistent with the samples from Ms. Roberson and Cecil II. Three other hairs recovered from Ms. Roberson's back were identified as head hairs, and two of them had Caucasian characteristics, while the third had Mongoloid characteristics. These three head hairs were dissimilar microscopically to the known head hair samples and were submitted for mitochondrial DNA analysis.

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Ms. Otterstatter testified that a hair recovered from Ms. Williams's right hand was a head hair similar to that of Ms. Williams, and as a result, was not submitted for further analysis. Although a body hair fragment discovered on the left side of Cemario's left hand was not suitable for microscopic comparison, it was submitted for mitochondrial DNA analysis. Hairs recovered from the northwest area of the bedroom were determined to be head hairs similar to those of Cemario and thus were not submitted for further analysis.

Deborah Polanskey, a forensic examiner in the mitochondrial DNA unit of the FBI laboratory, testified that mitochondrial DNA is inherited from the mother alone and is not individually unique, as siblings with the same mother share the same mitochondrial DNA profile. Hair has thousands of copies of mitochondrial DNA, Ms. Polanskey stated; therefore, mitochondrial DNA analysis of hair is highly effective.

With regard to the Lester Street homicides, Ms. Polanskey conducted mitochondrial DNA testing on four hairs: the three head hairs recovered from Ms. Roberson's body—two with Caucasian characteristics and one with Mongoloid characteristics—and the fragment of a body hair recovered from Cemario's left hand. She received known hair samples from Cecil, Ms. Roberson, Mr. Seals, the defendant, and Mr. Hill, as well as Ms. Smith, the mother of Cecil II, and Ms. Williams, the mother of C.J., Cedrick, Cemario, and Ceniyah.

The two hairs with Caucasian characteristics had the same mitochondrial DNA sequence, but this sequence differed from all the known samples Ms. Polanskey received. The hair with Mongoloid characteristics lacked sufficient mitochondrial DNA to obtain a sequence. The mitochondrial DNA sequence of the hair found on Cemario's hand was concordant with Ms. Williams's mitochondrial DNA sequence, meaning that the hair could have come from Ms. Williams, C.J., Cedrick, Cemario, or Ceniyah. Ms. Polanskey determined conclusively that the defendant could not have been the source of the hair.

Special Agent Lawrence James, a forensic scientist for the Tennessee Bureau of Investigation (“TBI”), testified as an expert in forensic serology and DNA analysis. He analyzed numerous blood samples taken from the house and determined that each of them matched to one of the victims and none matched the defendant. A partial DNA profile he obtained from a bullet fragment recovered from the sofa in the living room was consistent with a male, and Cecil could not be excluded as a contributor. ***37** He swabbed all of the green beads recovered at the scene, but the sample produced only a partial profile, consistent with male DNA that did not match that of any of the victims or the defendant.

Special Agent James testified on cross-examination that his analysis of the defendant's pants, which were seized following his arrest, revealed only blood matching the defendant. He found no blood of any of the victims on the defendant's clothing. He also did not find the defendant's DNA on the knife blades, the knife handles, the victims' bodies, the wood boards, the glass, the pillows, the shotgun, the shell casings, or the shoes. He testified that analysis of the scrapings from Ms. Roberson's nails yielded a DNA profile of an unknown female.

TBI Special Agent Forensic Scientist Cervinia Braswell, an expert in firearms and firearms identification, testified regarding evidence found at the crime scene and the nature of the firearms used in the crime. She identified the bullets recovered from the victims and the scene. With respect to Cecil, she explained that a nine-millimeter bullet was recovered from his left thigh, a .380 caliber bullet was recovered from Cecil's right scapula, and a .380 caliber auto bullet jacket fragment was recovered from his oral cavity, which had originally been part of the .380 caliber bullet recovered from his neck. A nine-millimeter bullet jacket fragment was also recovered from Cecil's clothing. A nine-millimeter bullet jacket and fragments were recovered from Ms. Roberson's left thigh. Another nine-millimeter bullet jacket and fragments were recovered from Ms. Williams's left calf muscle. A nine-millimeter bullet jacket and fragments were also recovered from Mr. Seals's C-l vertebrae, in addition to the .380 caliber bullet recovered from the left side of his back.

According to Special Agent Braswell, a .380 caliber firearm typically holds eight cartridges, with seven cartridges in the magazine and one cartridge in the gun. A nine-millimeter firearm typically holds thirteen rounds, with twelve rounds in the magazine and one round in the gun. Special Agent Braswell testified that she analyzed the eight .380 caliber cartridge casings and the thirteen nine-millimeter cartridge casings recovered from the Lester Street crime scene. From her analysis, she concluded that all of the .380 caliber bullets were fired from the same gun and that the nine-millimeter casings also were all fired from the same nine-millimeter firearm. Special Agent Braswell testified that a single person could have fired all eight bullets from the .380 caliber firearm

and all thirteen bullets from the nine-millimeter firearm in a short period of time. However, on cross-examination, Special Agent Braswell acknowledged that she had no means of determining whether one shooter or multiple shooters had perpetrated the Lester Street homicides.

Special Agent Braswell acknowledged that a nine-millimeter firearm is capable of firing .380 caliber rounds, but she opined that the .380 caliber casings recovered from the crime scene were not fired from a nine-millimeter firearm. She explained that a .380 caliber cartridge casing is shorter and has a slightly smaller diameter, causing the casing to bulge when it is fired from a nine-millimeter firearm. Special Agent Braswell found no bulging on the .380 caliber casings recovered at the Lester Street crime scene. She also acknowledged that some nine-millimeter firearms hold only ten cartridges in a magazine and one cartridge in the chamber. She reiterated, however, that the standard nine-millimeter weapon holds twelve ***38** rounds in the magazine and one round in the chamber.

Special Agent Braswell found no gunshot residue on the clothing of Cecil, Ms. Roberson, or Ms. Williams. The lack of gunshot residue, she explained, meant either that the shooter was far enough away from the victims when the gun was fired that it left no residue, or that an object, such as a pillow, had been placed between the gun and the victim. Although Special Agent Braswell discovered gunpowder particles on the bullet holes in Mr. Seals's shirt, without testing the gun used, she could only estimate the distance between the shooter and Mr. Seals, stating that the gun was at least two feet and no more than four feet away from Mr. Seals when fired. She was unable to determine which of the bullets recovered from Mr. Seals's body produced the residue.

5. The Defense Proof

After the prosecution rested its case, the defense presented the following proof. Cedric Atkins, whom Sergeant Max had interviewed when the police suspected gang involvement, testified that approximately a week and a half before the murders, he met Cecil and briefly talked with him in a hotel room. According to Mr. Atkins, Cecil said that he owed about $300,000 to the "mob" and advised Mr. Atkins to avoid owing people money. Mr. Atkins understood the "mob" as a reference to a group of people who have money and respect and sell narcotics or "whatever." Mr. Atkins said that after Cecil's murder, he relayed his conversation with Cecil to an officer of the Memphis Police Department to whom he had previously provided information. Mr. Atkins said that he answered the officer's questions truthfully, never demanded money from the officer or anyone else, and was not promised anything in exchange for the information. On cross-examination, Mr. Atkins stated that he did not recall asking the police officer what was "in it for [him]." About a week later, the officer contacted Mr. Atkins and informed him that the information was not useful. Mr. Atkins acknowledged that he had been convicted of theft during the year prior to the defendant's trial, that he had not wanted to testify at trial, and had appeared at trial pursuant to a subpoena.

Sergeant Joseph Stark testified that he interviewed Mr. Waddell on March 4, 2008, at approximately 8:00 p.m. According to Sergeant Stark, Mr. Waddell stated that "Frank"—Mr. Hill—had told him that the victims were tortured and that Cecil's fingers were severed. Sergeant Stark recalled Mr. Waddell telling him about a "falling out" between Cecil and "Doc" and about Cecil and "Frank" being members of the Gangster Disciples.

Thirty-four-year-old Markel Vester, known as "Cato," testified that he had joined the Gangster Disciples in 1997 or 1998 when he was twenty-five or twenty-six years old. Mr. Vester knew "Doc Holiday" and "Frank" but did not know whether "Doc Holiday" held any rank in the Gangster Disciples in March of 2008. He confirmed that Cecil had been a member of the Gangster Disciples and that Cecil performed maintenance duties at the apartment complex where Mr. Vester lived. Mr. Vester testified that "Frank"—Mr. Hill—had called him and told him about what had happened to Cecil and the other victims. Mr. Vester recalled seeing Cecil approximately two or three weeks before his murder, but Mr. Vester could not recall whether he had spoken to Cecil by phone on March 1st or March 2nd, although he also said that Cecil had not called him on the Saturday or Sunday prior to his death. Mr. Vester confirmed that he had cell phone service through ***39** Cricket Wireless in March 2008, and he provided his cell phone number.

Ms. Wright, the Cricket Wireless employee who had previously testified for the prosecution, returned to the stand to clarify her prior testimony about Cecil's phone records. Cecil's phone records showed that Ms. Smith called him at 1:30 a.m. on March 2, 2008, and that the call lasted fifty-nine seconds but was not answered. The records also showed Cecil receiving another call from Ms. Smith at 1:37 a.m. on March 2, 2008, and that this second call lasted approximately fifty-six seconds but either was not answered or went to voicemail.

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Ms. Wright stated that she had been mistaken if she had previously testified that those calls were answered.

Ms. Wright further testified that Cecil had called Mr. Vester's ("Cato's") cell phone number at 12:38 a.m. on March 2nd, with the call lasting seventeen seconds. Ms. Wright said that this call could have been answered, but she had no means of determining whether a conversation actually occurred. Records showed that Cecil called Mr. Vester's number again at 12:39 a.m. and that this second call lasted forty-four seconds. Ms. Wright stated that she could not determine whether the call was answered.

William Carroll, an employee of AT & T, testified that an eight-second call had been made at 11:35 p.m. on March 1, 2008, from the land line telephone inside the Lester Street residence to Mr. Waddell's number. Mr. Carroll was unable to determine whether the call was answered.

Dr. Nancy Aldridge, a psychotherapist and expert in the forensic evaluation of children, explained the protocol for conducting a forensic interview of a child and expressed her concerns about the manner in which C.J. and Cedrick's interviews were conducted. Her concerns included the fact that C.J. was interviewed shortly after being discovered, was interviewed on four or five occasions, and gave different statements as to what had occurred. She also expressed concern that the formal forensic interviews of the children did not occur until August 13, 2008, more than five months after the incident, explaining that, given the time that had passed, the children possibly had been exposed to information other family members had about the crimes.

Dr. Aldridge testified that C.J.'s initial account of the incident, in which he named "Cassandra," was "possibly" reliable, because persons observing the interview described C.J. as appearing to relive the trauma as he gave the statement. Additionally, Dr. Aldridge noted that the initial interviewers had appropriately used open-ended questions. She further explained that, generally, initial interviews of children produce more accurate information about a traumatic event because a child's memory becomes less clear with the passage of time and repetitive interviews, and may become contaminated by information learned from others. Dr. Aldridge also explained that if a child is questioned after having already provided an answer, the child may conclude that the initial answer was unacceptable and provide a different answer.

Dr. Aldridge also emphasized the particular importance of recording, from the beginning, all statements of a child who has been severely traumatized. Recording, she explained, preserves a record of the sequence of the child's memory and how each memory resurfaced. Dr. Aldridge testified that, although some of the records she reviewed in this case referenced interviews of C.J., no transcripts or recordings of those interviews were available, so she was not able to determine who had spoken to C.J., what questions had been asked, or ***40** what information C.J. had given prior to the interviews that were actually recorded.

Dr. Aldridge also expressed concerns about C.J.'s and Cedrick's trial testimony, stating, "The concern that I had for these children is they seemed to be very, very clear as to what questions were going to be asked each one of them and what their answers were. So they were very prepared for the testimony." Dr. Aldridge said that, although the reliability of C.J.'s testimony was an issue for the jury, she questioned its reliability because C.J. seemed to agree with whatever question was asked of him. She also noted that, given the two-and-one-half-year period that had elapsed between the crimes and the trial, there was potential for contamination of the children's memories.

On cross-examination, Dr. Aldridge acknowledged that she did not know whether C.J.'s identification of the defendant as the perpetrator was wrong, but she reiterated that she had "concerns."

The defendant testified as the final witness at trial. He provided a detailed account of his activities on March 1, 2008, which was largely consistent with his initial statement to the police. At trial, however, the defendant placed the blame for the murders on unknown assailants and said he had been hiding under the bed in the master bedroom while the crimes were committed. In particular, the defendant recounted going to Cecil's home to watch a basketball game on Saturday, March 1, 2008, along with Ms. Williams, the children, Jessie Sr., Mr. Waddell, and Mr. Seals, who arrived a little later than everyone else. The defendant said that Jessie Sr. had left early in the evening, but the defendant had remained at Cecil's home all evening, grilling, drinking, and smoking with Cecil and Mr. Seals.

The defendant testified that sometime after dark, he, Mr. Seals, and Cecil left in Cecil's vehicle, first visiting "Frank"—Mr. Hill—at the Barclay Apartments so that Mr. Seals could retrieve his gun. The defendant testified that Cecil, Mr. Seals,

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and "Frank" were members of the Gangster Disciples and that he had joined the Kitchen Crips in the 1990s. When they arrived at Mr. Hill's apartment complex, the defendant stayed in the car, but Mr. Seals and Cecil exited the vehicle. As they walked toward Mr. Hill's apartment, a man walked down the steps and talked to Mr. Seals and Cecil about the incident that had occurred on February 14th, when Cecil told the police about the marijuana in Mr. Hill's girlfriend's apartment. Mr. Seals eventually proceeded to Mr. Hill's apartment alone, but Cecil remained in the parking lot, arguing with the man who had walked down the steps to talk. The defendant said Cecil often argued with others. The defendant said that the man was attempting to calm Cecil, because Cecil and Mr. Hill were "into it," and Cecil believed that the man should be on his side. Mr. Seals was aware of Cecil's argument with Mr. Hill, the defendant said, and that was why Mr. Seals had gone alone into the apartment to retrieve the gun.

The defendant testified that, when the man attempted to hug Cecil, Cecil asked why, pulled up his shirt, and told the man that he did not have anything on him. Cecil told the man that he wanted to fight Mr. Hill and instructed the man to go get Mr. Hill. When the man instead got into his black Impala, Cecil yelled, "y'all know where I stay at," before returning to his own car. The defendant said that he and Cecil laughed and that he told Cecil that Mr. Hill had tried to call him. When Mr. Hill called again, Cecil answered; however, the caller was actually Mr. Seals, who was asking where they were. Cecil told Mr. Seals they were waiting on him. Cecil also told the defendant that he had ***41** "punk'd" the man who had tried to hug him. The defendant told Cecil to go inside and get Mr. Seals, but Cecil refused, so the defendant went to Mr. Hill's apartment. Inside, the defendant saw Mr. Hill, "Trell," "Tammy," and a man whom the defendant did not know. The defendant told Mr. Seals that he and Cecil were ready to leave, and Mr. Seals and the defendant left Mr. Hill's apartment.

The defendant said that he, Cecil, and Mr. Seals then went to Sheila Jones's home. The defendant and Cecil went inside, looking for Sheila, but she was not home. The defendant stated that he caught Keaira's boyfriend in one of the bedrooms with his pants halfway down. When Keaira began cursing him, they left, going next to the home of "Marilyn," the maternal grandmother of the defendant's son, where they stayed for less than five minutes, because the defendant's son was not there.

The defendant testified that they next went to an apartment complex near GE Patterson Church to pick up Ms. Roberson, Mr. Seals's girlfriend. Ms. Roberson asked whether they had any marijuana, and Cecil said that he knew where to purchase some, so they went to an apartment at Kimball Cabanas, where they purchased $45 worth of marijuana. Cecil got out of the car and then returned, telling the defendant that he wanted to introduce him to "his folks." According to the defendant, this term referred to members of the Gangster Disciples. The defendant testified that four people were inside the apartment, and the defendant and Cecil remained for approximately five minutes. As they were leaving, they ran into Ms. Smith in the parking lot, and Cecil talked to her while the defendant proceeded to the car. The defendant later yelled her name, and Ms. Smith came over to the vehicle and spoke to everyone inside. Afterwards, she and Cecil talked in person for five minutes more, before Cecil returned to his car and called Ms. Smith on his cell phone, and drove away.

After leaving the apartment complex, they drove to another woman's home and stayed for thirty or forty minutes, before returning to Cecil's house. According to the defendant, he, Cecil, Mr. Seals, Ms. Williams, and Ms. Roberson were together in the living room, with Ms. Williams drinking a wine cooler, and Ms. Roberson preparing a marijuana cigarette. Cecil asked Ms. Williams to put clean sheets on the bed in the master bedroom, explaining that he planned to allow Mr. Seals and Ms. Roberson to use the master bedroom, because Mr. Seals had just been released from jail.

The defendant said that he volunteered to change the sheets and that he was in the master bedroom, with a quilt in his hand, when he heard two or three gunshots. The defendant acknowledged that he was carrying a blue .44 caliber handgun at the time, but when he heard screaming, he hid beneath the bed. The defendant claimed to have heard only a few shots at first, followed by more shots just seconds later. The defendant said he did not know whether the shots were fired from the same gun or from different guns.

The defendant said that he remained hidden beneath the bed for several minutes, because he heard other noises, which he later realized were the family dog, but which he initially believed were someone walking around in the bedroom where he was hiding. The defendant said that he was unable to hear what was going on in other areas of the home, so he eventually left his hiding place and went into the living room. The defendant said that he discovered the victims' bodies and believed all in the house, including the children, were dead. He said that the front door ***42** was open and that he left the house on a bicycle he found behind a door in the living room.

The defendant recalled riding the bicycle to Ms. Jones's home, where Keaira allowed him to enter. The defendant said that he went immediately into Ms. Jones's bathroom and vomited. Using bleach, the defendant cleaned the vomit from the sink, but he dropped some of the bleach on the floor. After brushing his teeth, the defendant knocked on Keaira's bedroom door, telling her that he needed to talk, but they never talked.

The defendant admitted that he did not report what he had seen to the police, explaining, "Y'all done heard testimony about the gangs. I'm in a gang. We don't call the police. It's just that simple. We don't call the police. It's not part of what we do. If I call the police, I'll be just like my brother." He also admitted that he had not been truthful when he told Lieutenant Mason and Sergeant Stark on March 7th that Cecil had driven him back home after they listened to the basketball game. The defendant reiterated that he did not tell the police the truth about what had occurred when initially questioned because he "[doesn't] talk to police."

The defendant stated that Mr. Waddell had spoken to a woman who said that the defendant was being reported by the media as the killer. The defendant also stated that he and his family saw the news report. The defendant acknowledged that, after seeing his face on a news report, he put a gun to his head and threatened suicide, saying that he was not going back to prison for something he did not do and declaring that he should have died with his brother. The defendant emphasized that the police officers who entered the house after his suicide threat did not offer to take him to a hospital or a mental health facility.

The defendant testified that before Deputy Director Armstrong interviewed him, he had been in the Homicide Bureau for hours and was handcuffed to a table. The defendant said that Deputy Director Armstrong played a tape recording of C.J. identifying him as the perpetrator but did not play earlier taped interviews of C.J. identifying other individuals. The defendant stated that after playing the recording, Deputy Director Armstrong began screaming about the defendant's family and said that he was tired of "playing games." According to the defendant, Deputy Director Armstrong said that he knew the defendant was "bullshitting" and that he was "sick of it." The defendant said that Deputy Director Armstrong began "pounding" on the table and demanding to have answers "now."

The defendant acknowledged telling Deputy Director Armstrong that Cecil had reached for a shotgun and that he had then just started shooting. The defendant also recalled then asking to see his mother. The defendant agreed that he told his mother that Cecil had a gun and that when Cecil put down his gun, the defendant began shooting. He also admitted telling his mother that he "stuck" the children.

The defendant denied these statements at trial, explaining that, when he was interviewed on March 7th, he had not slept since the homicides were discovered on March 3rd and that he had cried and had been depressed about what had happened. The defendant stated that he asked to see his mother approximately three times during the interview, but Deputy Director Armstrong told him that he would not be allowed to see anyone until the defendant told him what he wanted to know. The defendant said that, earlier on March 7th, he had told other officers that he did not kill the victims. The defendant insisted that his statement to Deputy Director ***43** Armstrong admitting his guilt was not true, and he proclaimed his innocence of the crimes, stating that he did not kill Cecil or any of the other victims.

The defendant confirmed that, at the time of the homicides, his cousin, Tammy Randolph, was dating Vernon Motley. At some point prior to the homicides, Ms. Randolph told the defendant that the police were looking for Mr. Motley in connection with a murder charge and gave him a .44 caliber firearm to keep for her. At Ms. Randolph's request, the defendant later gave this gun to another person—Ms. Randolph's cousin "Antonio."

On cross-examination, the defendant admitted that when he left Cecil's house on the bicycle, he believed all nine people inside the Lester Street home were dead. He acknowledged that he did not call 9–1–1 and that instead he went to Sheila's home and went to bed. He admitted that he did not go to work the next day or report the crimes to anyone, although he went to dinner with Mr. Waddell on Sunday, March 2nd. The defendant acknowledged that he also went to work Monday morning with his father but failed to tell either of his parents about what had occurred while he was hidden beneath the master bed at Cecil's home. The defendant admitted also that he had lied to his family about the last time he had seen Cecil.

The defendant further stated on cross-examination that he did not attempt to escape when he heard the first shots fired. Although the master bedroom had a door exiting to the outside of the home, the defendant said that he did

not have the key that was needed to open the door. The defendant also admitted that he did not attempt to use the cordless phone in the master bedroom to call for emergency assistance. The defendant said that he remained under the bed for approximately thirty minutes. He denied ever hearing the children scream and claimed that he never heard anyone hitting the children with boards. The defendant said that he remained under the bed while the killers altered the crime scene by gathering the shell casings and pulling down Ms. Roberson's pants. The defendant said that when he entered the living room, Ms. Roberson was positioned in the manner emergency personnel discovered her and as she appeared in the crime scene photographs. The defendant claimed that he saw C.J. lying in the bathtub but said that he did not "pay attention" to the knife in C.J.'s head. The defendant did not check on C.J. to determine whether he was alive and believed that everyone in the house was dead.

The defendant testified that he was in the interview room with Deputy Director Armstrong for four or five hours, and the defendant maintained that he had confessed only after Deputy Director Armstrong screamed at him and threatened him. The defendant explained:

> He didn't pound on the table. It was he asked me when he played the tape and after he played the tape, he played the tape what, [twelve, thirteen] times. And after he played it [twelve] to [thirteen] times, after I still told him I didn't do it, that's when he said I'll kill your mother f* * *ing ass myself, you cold-hearted murdering killing mother f* * *er.

According to the defendant, Deputy Director Armstrong then said: "I got something for you. I'm going to throw your ass on that 4th floor and I'm going to let them kill your mother f* * *ing ass."

The defendant acknowledged that his testimony at trial regarding the events was not consistent with what he had told his mother. The defendant said that he had leaned across the table and told his mother, ***44** "[T]hey trying to put this on [me]." His mother asked for the names of those who were trying to do this so that she could get him help. The defendant said that he told her he did not know their names and that they were watching him. The defendant said that he and his mother then grabbed each other's hands, that he told his mother not to worry, and then admitted to committing the offenses. The defendant acknowledged that he told his mother that he and Cecil began arguing and that, after Cecil put down his gun, he had begun shooting. The defendant also recalled both his mother asking him how he got away from the house and his response that he rode away on a bicycle. The defendant agreed that he had told his mother that he killed the children because they saw him. However, the defendant insisted that he had lied to his mother and that his trial testimony was truthful.

The defense rested after the defendant's testimony, and the prosecution called no rebuttal witnesses.

At the conclusion of the guilt phase, the jury convicted the defendant of six counts of premeditated first degree murder for killing Cecil, Ms. Williams, Mr. Seals, Ms. Roberson, Cemario, and Cecil II. The jury also convicted the defendant of three counts of attempted premeditated first degree murder for the attacks upon C.J., Cedrick, and Ceniyah. The trial then proceeded to the penalty phase on the six first degree murder convictions.

B. Penalty Phase

The prosecution relied upon the proof submitted at the guilt phase of the trial. In addition, the parties stipulated that the defendant had been previously convicted of second degree murder, which qualified as a felony involving the use of violence to the person. The prosecution introduced three additional photographs of Cemario and Cecil II's bodies as proof of the (i)(5) aggravating circumstance.

The State also presented victim impact evidence through the testimony of Ms. Williams's mother, Ida, and Mr. Seals's aunt, Annette Mallory. Ida testified that she had adopted her surviving grandchildren and was raising them. As a result, she had lost her job and was struggling financially. She and her family were in counseling as a result of the homicides. Ms. Mallory testified that at the time of his death, Mr. Seals had three children, whom he loved and supported. She said Mr. Seals's death had "hit [her] hard" because he had been like a younger brother before his mother died and that she had been a mother figure to him after his mother's death.

The defense offered the testimony of Glori Shettles, a mitigation specialist, who described the defendant's family

history and background. She said that some of the defendant's family members were willing to provide information about him but others were not willing to testify on his behalf. From her investigation, Ms. Shettles had learned that the defendant's parents were married in 1972, when his mother, Ms. Shaw, was fifteen years old and his father, Jessie Sr., was nineteen years old. They soon had a daughter, Nicole. Jessie Sr. joined the Army and was stationed in Florida, where the defendant was born. At some point, Ms. Shaw and Nicole left Florida and returned to Memphis, where Nicole became so ill that Jessie Sr. left his base and returned to Memphis also. [16] After three years, Jessie Sr. was honorably ***45** discharged from the Army. He wanted the family to remain in Florida, but he was unable to obtain employment, so the family returned to Memphis. Cecil, who was three years younger than the defendant, was born in Memphis.

Ms. Shettles testified that Jessie Sr. had been jealous of Ms. Shaw, who went on a church trip to New Orleans, returned with a boyfriend, and told Jessie Sr. that she no longer wanted to be married to him. They remained married for some time after that incident, however. Ms. Shettles learned through her investigation that the defendant's parents argued often. Jessie Sr. was physically abusive to Ms. Shaw on more than one occasion, and the children witnessed the abuse. Ms. Shaw decided to leave Jessie Sr. and saved money to do so. When Jessie Sr. returned home one day, Ms. Shaw and the children were gone. Ms. Shaw did not contact Jessie Sr. until four to five months later. The defendant was six years old at this time, and the children did not know what had happened to their father.

Ms. Shettles testified that the family moved often during the defendant's childhood. Ms. Shettles noted that one of the risk factors for poor performance in school and in life is moving often during childhood. The defendant was diagnosed with a learning disability in reading and math and was enrolled in resource classes. He also had disciplinary problems at school and at home. School mental health records indicated that he was provided with individual counseling. Counselors attempted to meet with Ms. Shaw, but she either cancelled the appointments or did not attend them.

Ms. Shettles testified that the defendant failed fourth grade twice due to excessive absences from school. The defendant missed school, according to Ms. Shettles, because others teased him for not having proper clothing. After repeating fourth grade, the defendant was socially promoted in school. Ms. Shettles believed that the defendant was capable of performing better in school but that his performance was hindered by the excessive absences and tardies. When the defendant left school at age sixteen, he was still in the eighth grade and had attended ten different schools.

Ms. Shettles testified that by age fifteen, the defendant had become involved in the juvenile court system and had several arrests and juvenile adjudications. Ms. Shaw was unable to control him and did not know what to do. She attended juvenile court with the defendant on many occasions, and Nicole attended on Ms. Shaw's behalf when she could not attend.

Ms. Shettles testified that the family did not have much money and that Ms. Shaw was often not home. Although Nicole did her best to care for her brothers, food was locked up, and the children were not able to get to it. When the children visited their maternal grandmother for Sunday dinner, the defendant and Cecil stole money from their grandmother's purse to purchase food. They were severely punished for doing so, and their grandmother eventually told Ms. Shaw that the defendant and Cecil were no longer welcome in her home.

The defendant worked only very little after leaving school. The only legitimate job that the defendant had ever held was as a security guard at the age of eighteen. At age nineteen, the defendant pleaded guilty to second degree murder and was sentenced to eighteen years in prison. When he first entered prison, the defendant received many write-ups for refusing to participate, cursing at an officer, and other offenses that did not involve weapons. He also received write-ups for violent activities. Ms. Shaw and her husband ***46** visited the defendant only once while he was incarcerated. No other family members visited him, and the defendant spoke to his father by telephone on only a few occasions. Ms. Shettles said that the defendant participated and "thrived" in a behavioral modification program while in prison. The defendant was twice considered for parole before being released on parole after serving fourteen years of his eighteen-year sentence.

Ms. Shettles testified that some of the defendant's family members value his life but attending his trial and showing support for him had been difficult for them. Ms. Shettles explained that another friend of the defendant had been afraid to appear at trial. Ms. Shettles said that the defendant has an ongoing relationship with his son and that an eighty-one-year-old friend of the defendant's grandmother also cares for the defendant.

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On cross-examination, Ms. Shettles testified that the defendant had been suspended from school so many times that the Memphis City Schools refused to allow him to continue to attend. Ms. Shettles further acknowledged that the defendant had more than one juvenile adjudication involving his use of weapons. Ms. Shettles agreed that the school and juvenile records indicated that the defendant fought often and had problems with his brother Cecil. Ms. Shettles was aware that the defendant had joined the Crips gang while in prison and that he had received a write-up for violence while incarcerated because he and four other inmates cut an inmate who was trying to leave the Crips.

At the conclusion of the penalty phase, the trial judge instructed the jury regarding the aggravating circumstances the State was alleging as to each first degree murder conviction and also instructed the jury as to mitigating circumstances. The jury unanimously found multiple statutory aggravating circumstances applicable to each first degree murder conviction. With regard to Cecil's murder, the jury found the following three aggravating circumstances: (1) the defendant was previously convicted of one or more felonies involving the use of violence; (2) the defendant "knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder"; and (3) the defendant committed mass murder. *See* Tenn.Code Ann. § 39–13–204(i)(2), (3), (12) (2014).[17] Regarding the murders of Ms. Williams, Mr. Seals, and Ms. Roberson, the jury unanimously found five aggravating circumstances, including the same three found to be applicable to Cecil's murder, as well as the following two additional aggravating circumstances: (1) the murder was committed for the purpose of avoiding, interfering with, or preventing the lawful arrest or prosecution of the defendant or another; and (2) the murder was knowingly committed while the defendant had a substantial role in committing, or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit any first degree murder. *See* *Id.* § 39–13–204(i)(6), (7). Regarding the murders of Cemario and Cecil II, the jury unanimously found seven aggravating circumstances, including the same five that it had found applicable to the first degree murders of Ms. Williams, Mr. Seals, and Ms. Roberson, as well as the following two additional statutory aggravating circumstances: (1) the victim was less than twelve years old and the defendant was eighteen years old or ***47** older; and (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. *See* *Id.* § 39–13–204(i)(1), (5). The jury determined that the aggravating circumstances applicable to each first degree murder conviction outweighed any mitigating circumstances beyond a reasonable doubt and imposed a sentence of death for each of the defendant's six first degree murder convictions. The trial court entered a judgment in accordance with the jury's verdict.

At a separate sentencing hearing on the defendant's three attempted first degree murder convictions, the trial court classified the defendant as a Range II multiple offender, imposed a forty-year sentence for each conviction, and ordered these sentences served consecutively to each other and to the death sentences. The defendant appealed, and the Court of Criminal Appeals affirmed the defendant's convictions and sentences. The defendant's appeal was then automatically docketed in this Court. *See* Tenn.Code Ann. § 39–13–206(a)(1).

II. Analysis

A. Admission of the Defendant's Confessions

The defendant contends that the admission of his custodial statements violated his rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 9 of the Tennessee Constitution. In particular, the defendant claims that: (a) his warrantless arrest was not supported by probable cause; (b) his confession to police officers was the fruit of his illegal arrest; (c) his confession to police officers was coerced after he had invoked his right to remain silent; and (d) his confession to his mother should have been suppressed because she was acting as an agent of the police. The defendant concedes both that he did not file a pretrial motion to suppress and that he did not raise any of these issues in his motion for new trial.

The State argues that the defendant forfeited his right to appellate review of these issues by failing to raise them in a pretrial motion to suppress, as required by Tennessee Rule of Criminal Procedure 12(b)(2)(C), which states that "a motion to suppress evidence" is among those motions that "must be raised before trial." The State says that not even plain error review applies when a defendant fails to file a pretrial suppression motion. As support for this argument the State relies on federal decisions construing the identical

language of Federal Rule of Criminal Procedure 12(b)(3)(C) as precluding even plain error review on appeal when a defendant fails to make a pretrial motion to suppress. *See, e.g.,* *United States v. Burke,* 633 F.3d 984, 987–88 (10th Cir.2011); *United States v. Yousef,* 327 F.3d 56, 125 (2d Cir.2003); *United States v. Chavez–Valencia,* 116 F.3d 127, 129–134 (5th Cir.1997). Among other things, the State argues that unless a defendant files a pretrial motion to suppress, the State may not have an opportunity to establish that the challenged evidence was seized lawfully because the evidence relevant to the suppression issue may not be admissible and relevant to an issue at trial.

1. Failure to File Pretrial Motions to Suppress in Capital Cases

[1] This Court has previously faced the issue of whether appellate review in a capital case extends to suppression issues raised for the first time on appeal. In *State v. Duncan,* 698 S.W.2d 63 (Tenn.1985), Mr. Duncan "never moved to suppress" his "statements, fingerprints, blood and saliva tests obtained as the result of ***48** [his] detention." *Id.* at 68. When he challenged the admission of this evidence for the first time on appeal, the State argued that review was foreclosed because the issue had been waived. *Id.* at 67–68. This Court disagreed, stating that where a "defendant is under sentence of death, this [C]ourt is under the duty to 'automatically' review the sentence." *Id.* (quoting Tenn.Code Ann. § 39–2–205(a) (currently codified at Tenn.Code Ann. § 39–13–206(a)(1) (2010))). As a result, the *Duncan* Court explained that "there is no waiver of error directed to the admissibility of evidence when the defendant is under sentence of death." *Duncan,* 698 S.W.2d at 68; *see also* *State v. Nesbit,* 978 S.W.2d 872, 880–81 (Tenn.1998) (holding that, given the statutory mandate directing this Court to review capital convictions and sentences, a defendant's failure to file a motion for new trial does not deprive this Court of jurisdiction to review issues that should have been raised in a motion for new trial). The *Duncan* Court cautioned, however, that "review of an alleged error is handicapped at times by the failure of trial counsel to object to the introduction of evidence, as his failure too often deprives the opposing party of the opportunity to remove any question as to the competency and relevancy of questioned evidence." *Duncan,* 698 S.W.2d at 68. Because Mr. Duncan had failed to make a pretrial motion or trial objection either challenging the admissibility of the evidence as fruit of an illegal arrest or arguing that Mr. Duncan's statements were obtained in violation of his constitutional rights, the *Duncan* Court determined that proof had not been "directed by either party so as to delineate fully the circumstances surrounding [Mr. Duncan's] detention, arrest, and interrogation." *Id.* Consequently, the Court concluded that "nothing in the record" supported Mr. Duncan's contentions. *Id.*

Nine years later, this Court applied *Duncan* in another capital case in which a defendant challenged for the first time on appeal the admission of his statements on the basis that the statements were obtained in violation of his constitutional rights. *State v. Bigbee,* 885 S.W.2d 797 (Tenn.1994), *superseded by statute on other grounds as stated in* *State v. Odom,* 137 S.W.3d 572, 580–81 (Tenn.2004). Mr. Bigbee had failed to make a motion to suppress, failed to object to the admission of the statements at trial, and failed to raise the issue in his motion for new trial. However, relying on *Duncan,* Mr. Bigbee argued that "the appellate review mandated by [statute] require[d] this Court to consider any alleged error, whether called to the trial court's attention or not." *Bigbee,* 885 S.W.2d at 805. This Court addressed Mr. Bigbee's argument as follows:

> [W]e have reviewed the record in this case in light of the defendant's complaint and conclude that here, as in [*Duncan*], there is nothing in the record to support the contentions of [Mr. Bigbee]. In the absence of an objection or motion challenging the evidence on the grounds now asserted, the proof was not focused by either party so as to delineate fully the critical issue....

Id.

[2] The statute obligating this Court to review automatically a defendant's conviction of first degree murder and sentence of death has not changed since our decisions in *Duncan* and *Bigbee. See* Tenn.Code Ann. § 39–13–206 (2010). Not only is

this Court still obligated to conduct such a review, the statute now also obligates the Court of Criminal Appeals to review capital cases. *Id.* Thus, with respect to capital cases, the State has presented no basis for reconsidering our prior decisions, which held that a defendant in a capital case does not entirely forfeit appellate review by failing ***49** to make a pretrial motion to suppress.[18] When suppression issues are raised for the first time on appeal in capital cases, we will continue to apply plain error review, as the Court of Criminal Appeals did in this case.[19] As *Duncan* and *Bigbee* illustrate, however, a defendant who fails to file a pretrial motion to suppress and make a record in the trial court will have difficulty prevailing on appeal when plain error review is applied.

2. Plain Error Review

[3] **[4]** When conducting plain error review, this Court will grant relief only when the following five prerequisites are satisfied:

> (1) the record clearly establishes what occurred in the trial court; (2) a clear and unequivocal rule of law was breached; (3) a substantial right of the accused was adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is necessary to do substantial justice.

State v. Gomez, 239 S.W.3d 733, 737 (Tenn.2007) (internal citations and quotation marks omitted). The defendant bears the burden of persuading an appellate court that plain error exists. *State v. Bledsoe,* 226 S.W.3d 349, 355 (Tenn.2007). We evaluate each of the defendant's claims of error using these principles.

3. Legality of the Arrest

The defendant first argues that his warrantless arrest was illegal because it was not supported by probable cause. The defendant says all of his custodial statements were fruit of his illegal arrest, and as such, should have been excluded from evidence at trial. The State counters that the defendant's warrantless arrest was legal as it was based on probable cause.

[5] The defendant's warrantless arrest implicates the protections of the Fourth Amendment to the United States Constitution[20] and article I, section 7 of the Tennessee Constitution.[21] These constitutional provisions prohibit unreasonable searches and seizures, *State v. Day,* 263 S.W.3d 891, 900–01 (Tenn.2008), and require generally that searches and seizures be conducted pursuant to a warrant that is ***50** issued after a judicial determination of probable cause. *State v. Bishop,* 431 S.W.3d 22, 36 (Tenn.2014).

[6] **[7]** A warrantless search or seizure is presumed unreasonable and evidence seized thereby is subject to suppression, unless the State establishes one of the recognized exceptions to the warrant requirement. *Id.* An arrest supported by probable cause is one of the exceptions to the warrant requirement. *State v. Echols,* 382 S.W.3d 266, 277–78 (Tenn.2012). This exception is codified at Tennessee Code Annotated section 40–7–103(a)(3) (2012), which states that a warrantless arrest is permissible when "a felony has in fact been committed, and the officer has reasonable cause[22] for believing the person arrested has committed the felony." *Id.*

[8] As the United States Supreme Court has recognized, "[a]rticulating precisely what ... 'probable cause' mean[s] is not possible." *Ornelas v. United States,* 517 U.S. 690, 695, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). Probable cause is "more than a mere suspicion," *State v. Lawrence,* 154 S.W.3d 71, 76 (Tenn.2005), but it is not absolute certainty, *State v. Melson,* 638 S.W.2d 342, 350 (Tenn.1982). Moreover, "the strength of the evidence necessary to establish probable cause to arrest is significantly less than the strength of evidence necessary to find a defendant guilty beyond a reasonable doubt." *Bishop,* 431 S.W.3d at 41.

[9] As the very name implies, "the probable-cause standard is ... a practical, nontechnical" concept, *State v. Jacumin,* 778 S.W.2d 430, 432 (Tenn.1989) (citations and internal quotation marks omitted), which focuses upon "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," *Draper v. United States,* 358 U.S. 307, 313, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959) (quoting *Brinegar v. United States,* 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879

(1949)); *see also* *Echols,* 382 S.W.3d at 278; *Melson,* 638 S.W.2d at 351. Thus, probable cause exists when "at the time of the arrest, the facts and circumstances within the knowledge of the officers, and of which they had reasonably trustworthy information, are sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense." *Echols,* 382 S.W.3d at 277–78 (citations, alterations, and internal quotation marks omitted).

[10] **[11]** **[12]** When determining whether probable cause existed to support a warrantless arrest, a reviewing court considers the entire record, including the proof adduced at any suppression hearing and the evidence presented at trial. *State v. Henning,* 975 S.W.2d 290, 299 (Tenn.1998). Additionally, a reviewing court considers

> the collective knowledge that law enforcement possessed at the time of the arrest, provided that a sufficient nexus of communication existed between the arresting officer and any other officer or officers who possessed relevant information. Such a nexus exists when the officers are relaying information or when one officer directs another officer to act.

Bishop, 431 S.W.3d at 36.

> [I]f the source of the information is a person (1) who is known to the police, (2) who is not part of the "criminal milieu," and (3) whose motivation is to aid the police without any expectation of remuneration, then the information is deemed reliable and is sufficient to provide probable cause for arrest. On the other ***51** hand, when the information is provided (1) by a professional informant who gives tips for money or favors, (2) by a person from the "criminal milieu" who may have an ax to grind, or (3) by an anonymous informant, the information is presumptively suspect, and the State must establish its credibility.

Id. at 37.

[13] The record on appeal in this case establishes that at the time of the defendant's arrest, the police knew that: (1) C.J., a citizen informant, and an eyewitness to and victim of the crime, as well as a nephew of the defendant, had identified the defendant as the perpetrator of the homicides and assaults; (2) the crime scene had been altered; (3) the murders and assaults were accomplished with weapons found inside the home; (4) the defendant, a close relative of three of the six murder victims and three of the assault victims, had spent time in the home on Lester Street and was familiar with it; (5) the defendant was one of the last persons to see Cecil and Mr. Seals alive; and (6) the defendant had been previously convicted of murder and only recently released from incarceration. Based on the foregoing facts, we conclude that "at the time of the arrest, the facts and circumstances within the knowledge of the officers, and of which they had reasonably trustworthy information, [were] sufficient to warrant a prudent person in believing" that the defendant had committed the Lester Street homicides and assaults. *Echols,* 382 S.W.3d at 277–78 (citations omitted) (alterations and internal quotation marks omitted).

[14] **[15]** **[16]** **[17]** **[18]** In arguing that the police lacked probable cause, the defendant asserts that C.J.'s identification of the defendant is not entitled to the presumption of reliability ordinarily accorded information from citizen informants because the prosecution failed to show that C.J. was "motivated solely by a sense of civic duty." This argument is without merit. "Information provided by a citizen/bystander witness known to the [police] is presumed to be reliable, and the prosecution is not required to establish either the credibility of the informant or the reliability of his information." *State v. Cauley,* 863 S.W.2d 411, 417 (Tenn.1993) (citing *Melson,* 638 S.W.2d at 354–55); *see also* *State v. Day,* 263 S.W.3d 891, 904 (Tenn.2008) ("We acknowledge that information from a known citizen informant is presumed reliable and not subject to the same level of scrutiny applied to a compensated informant."). [23] The rationale for applying the presumption of reliability in these circumstances is two-fold. First, "[c]itizen informants, whether they be victims or witnesses, have necessarily gained their information through first-

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hand experience." *State v. Luke,* 995 S.W.2d 630, 636–37 (Tenn.Crim.App.1998) (citing *Melson,* 638 S.W.2d at 354–56). Second, "[t]he criminal informant provides information in exchange for some consideration—whether it be monetary or the granting of some exemption or privilege —*while the citizen informant acts in the interest of society or personal safety.*" *Id.* (citing *State v. Smith,* 867 S.W.2d 343, 347 (Tenn.Crim.App.1993) (emphasis added)); *see also Day,* 263 S.W.3d at 904 (citing *Luke* with approval). Thus, although Tennessee decisions have recognized the interests that typically motivate citizen informants and justify the presumption of reliability, no Tennessee decision ***52** has conditioned application of the presumption of reliability upon a showing that the citizen informant was in fact motivated by one or both of these interests. The presumption of reliability applies if the prosecution establishes simply that the information was provided by a known citizen informant. [24]

Equally without merit for the same reason is the defendant's argument that the presumption of reliability does not apply to the information C.J. provided because "investigators did not consider whether this young boy's implication of his uncle could have been instead motivated by some fact or circumstance entirely unrelated to the crime." A rule requiring the police to delay arresting a person the crime victim has identified as the perpetrator until the police confirm that the crime victim had no ulterior motivation for making the identification would be untenable. Such a rule would require the police to expend resources delving into a crime victim's motives rather than investigating the crime and apprehending the perpetrator. Moreover, even if we were inclined to adopt such a rule, it would have no bearing on this appeal. C.J. testified at trial, and the defendant had an opportunity to question him on cross-examination about his motivations for identifying the defendant as the perpetrator. The record contains no evidence that C.J. had any ulterior motive for identifying his uncle, the defendant, as the perpetrator of these crimes.

The defendant's warrantless arrest was supported by probable cause. Thus, the defendant has failed to establish either a breach of a clear and unequivocal rule of law or any error adversely affecting a substantial right. Thus, the defendant is not entitled to relief under the plain error doctrine.

4. Right to Remain Silent

[19] The defendant next argues that his confession to Deputy Director Armstrong should not have been admitted into evidence because Deputy Director Armstrong obtained the confession by continuing to question him after he had invoked his constitutional right to remain silent. The defendant does not deny that he received *Miranda* [25] warnings, nor does he deny that he executed a written waiver of his constitutional rights after receiving these warnings. Instead, the defendant asserts that he subsequently invoked his right to remain silent when he told Lieutenant Mason and Sergeant Stark that he did not want to talk to them any longer. The record on appeal does not support the defendant's claim that he invoked his constitutional right to remain silent.

[20] **[21]** It is certainly true that the privilege against self-incrimination guaranteed by both the Fifth Amendment to the United States Constitution [26] and article I, section 9 of the Tennessee Constitution, [27] affords criminal defendants the right to remain silent. *State v. Climer,* 400 S.W.3d 537, 556–57 (Tenn.2013); ***53** *State v. Blackstock,* 19 S.W.3d 200, 207 (Tenn.2000); *State v. Crump,* 834 S.W.2d 265, 268 (Tenn.1992). However, an accused who wishes to rely on the constitutional right to remain silent must unambiguously invoke it. *Berghuis v. Thompkins,* 560 U.S. 370, 381–82, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010) (holding that the defendant's prolonged silence in the face of police questioning did not amount to an unambiguous invocation of the right to remain silent); *accord Climer,* 400 S.W.3d at 562 (holding that " 'the standard for a valid invocation of the right to counsel is the same under both article I, section 9 and the Fifth Amendment.' ") (quoting *State v. Saylor,* 117 S.W.3d 239, 246 (Tenn.2003)).

The record on appeal does not establish that the defendant invoked his constitutional right to remain silent. Instead, the defendant said that he did not wish to speak with Lieutenant Mason and Sergeant Stark any longer and asked to speak with other officers. The defendant's request to speak to officers other than those conducting the interview did not amount to an invocation, ambiguous or unambiguous, of his right to remain silent. Because the defendant has again failed to establish any violation of a clear and unequivocal rule of law, the defendant

is not entitled to relief on this claim under the plain error doctrine.

5. State Agent

[22] The defendant's next argument is that his confession to his mother, Ms. Shaw, should not have been admitted into evidence at trial. The defendant points out correctly that he had invoked his right to counsel prior to speaking with his mother. The defendant contends that Ms. Shaw was acting as a state agent when she talked with him; thus, his confession to her was obtained in violation of his previously invoked right to counsel, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by article I, section 9 of the Tennessee Constitution.[28] Again, the record on appeal does not support the defendant's claim.

During the trial, Deputy Director Armstrong testified that after invoking his right to counsel, *the defendant asked to speak with his mother.* As a result, Deputy Director Armstrong arranged to have Ms. Shaw transported from protective custody to the police department. Just before Ms. Shaw testified at trial, the defendant moved to suppress the confession he gave her, arguing that she had been acting as an agent of the State when she solicited his confession. Although the defendant's motion to suppress had not been timely filed before trial as Tennessee Rule of Criminal Procedure 12(b)(2)(C) requires, the trial court nonetheless held a hearing on the motion outside the jury's presence.

At this hearing, Ms. Shaw testified that, while she, the defendant, and other family members were at a safe house in protective custody, officers came and took the defendant away. She recalled that officers returned either later that same evening or during the early morning hours of the following day and informed her that the defendant had requested to see her. Ms. Shaw stated that neither Deputy Director Armstrong nor any other officer asked her to obtain information from the defendant for them, told her what to say to the defendant, or instructed her to question him. Ms. Shaw said that no one else was in the room when she spoke with her son. At the conclusion of Ms. Shaw's testimony, ***54** the trial court denied the defendant's motion to suppress.

Because the defendant failed to file his suppression motion prior to trial, as Rule 12(b)(2)(C) requires, and also failed to raise the issue in his motion for new trial, plain error review applies to this issue. Our review is less hampered than when no motion to suppress at all is filed because, in this case, the trial court conducted a hearing on the defendant's late-filed motion to suppress and allowed both parties to make a record. Still, the existing record is simply devoid of any evidence to show, or even to suggest, that the defendant's mother was acting as a state agent when she spoke with him. The defendant initiated the contact with his mother by asking to see her *after* Deputy Director Armstrong had properly ceased the interrogation in response to the defendant's invocation of his right to counsel. In *Arizona v. Mauro,* 481 U.S. 520, 526, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987), the United States Supreme Court indicated that a private third party's questioning of a person in police custody may perhaps constitute the functional equivalent of police interrogation if certain circumstances are present. But none of those circumstances are present in this case.

In *Mauro,* the defendant told the police that he had killed his son and then directed them to the child's body. *Id.* at 522–23, 107 S.Ct. 1931. After being advised of his *Miranda* rights, the defendant invoked his right to counsel. *Id.* at 523, 107 S.Ct. 1931. The police then allowed the defendant to meet with his wife but only in the presence of an officer, who tape-recorded the conversation. *Id.* Despite the officer's presence and the fact that the conversation had been recorded, the *Mauro* Court held that the wife's questioning of the defendant did not constitute police "interrogation." *Id.* at 527–28, 107 S.Ct. 1931. The Court reasoned that no evidence showed that the police sent the defendant's wife in to meet with him for the purpose of eliciting incriminating statements. *Id.* at 528, 107 S.Ct. 1931. The Court considered the situation from the defendant's perspective and concluded that it was unlikely the defendant would have felt "that he was being coerced to incriminate himself" by his wife's presence. *Id.* As a result, the Court concluded that the decision to allow the defendant's wife to see him was not "the kind of psychological ploy that properly could be treated as the functional equivalent of interrogation." *Id.* at 527, 107 S.Ct. 1931 (footnote omitted). Thus, in the absence of "compelling influences, psychological ploys, or direct questioning," the *Mauro* Court concluded that the "possibility" that an accused will incriminate himself or an officer's subjective "hope" that he will do so is not the functional equivalent of interrogation. *Id.* at 528–29, 107 S.Ct. 1931.

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[23] **[24]** In the present case, there was no evidence at all suggesting that the police brought Ms. Shaw to see the defendant "for the purpose of eliciting incriminating statements," *see* *id.* at 528, 107 S.Ct. 1931, or that the officers asked, directed, induced, or threatened her to obtain information from the defendant. According to Ms. Shaw's own testimony, the officers escorted her to the interview room, where she and the defendant were allowed to speak to each other unsupervised. Ms. Shaw said that the officers did not instruct her on what to say to or ask of the defendant. As the United States Supreme Court emphasized in *Mauro:*

> In deciding whether particular police conduct is interrogation, we must remember the purpose behind our decisions ... [was] preventing government officials from using the coercive nature of confinement to extract confessions ***55** that would not be given in an unrestrained environment.... *Police departments need not adopt inflexible rules barring suspects from speaking with their spouses, nor must they ignore legitimate security concerns by allowing spouses to meet in private.*

Id. at 529–30, 107 S.Ct. 1931 (emphasis added).

The record in this case demonstrates only that the police granted the defendant's request to talk with his mother, Ms. Shaw. Nothing in the record supports the defendant's claim that Ms. Shaw was acting as a state agent or that Ms. Shaw's conversation with the defendant amounted to interrogation. *See* *State v. Smith,* 933 S.W.2d 450, 453 (Tenn.1996); *State v. Johnson,* No. M2011–00792–CCA–R3–CD, 2012 WL 3731699, at *12–15 (Tenn.Crim.App. Aug. 29, 2012). Again, the defendant has failed to establish any breach of a clear rule of law and is not entitled to relief on this issue under the plain error doctrine.

B. Testimony Regarding Invocation of Constitutional Rights

The defendant next argues that the State's introduction of evidence in its case-in-chief about his invocation of his federal and state constitutional rights to remain silent and to an attorney amounted to constitutional error. He asserts that the error was not harmless and entitles him to a new trial. The State responds that the testimony about which the defendant complains was properly introduced in response to defense cross-examination of prosecution witnesses about why the police failed to obtain a formal statement from the defendant or to ask him more specific questions about the crime scene. The State says the prosecution did not rely upon or ask the jury to consider the defendant's invocation of his right to counsel as evidence of guilt.

1. Evidence of Defendant's Invocation of Constitutional Rights

In *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court announced procedural safeguards to protect a defendant's Fifth Amendment rights during custodial interrogation. *Dickerson v. United States,* 530 U.S. 428, 444, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (holding that *Miranda* announced a binding "constitutional rule" under the Fifth Amendment). Ten years later, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment forbids impeachment of a defendant at trial for choosing to exercise his Fifth Amendment right to remain silent after receiving *Miranda* warnings. *Doyle v. Ohio,* 426 U.S. 610, 619–20, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *State v. Frasier,* 914 S.W.2d 467, 471 (Tenn.1996). [29]

In *Doyle,* the defendants remained silent upon arrest, and the Supreme Court held that using a defendant's post-*Miranda* silence to impeach the defendant at trial violates the Due Process Clause of the Fourteenth Amendment. *Doyle,* 426 U.S. at 619, 96 S.Ct. 2240; *see also* *State v. Flanagan,* 223 Tenn. 134, 443 S.W.2d 25, 26 (1969) (holding that proof of a defendant's silence or assertion of a right to remain silent during questioning about participation in criminal acts is not admissible as evidence from which an inference of guilt may be drawn). The *Doyle* Court reasoned that "it would be fundamentally unfair and a deprivation of [D]ue [P]rocess ***56** to allow [an] arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Doyle,* 426 U.S. at 618, 96 S.Ct. 2240.

Subsequently, in *Wainwright v. Greenfield,* 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986), the Supreme Court revisited *Doyle* and again condemned a "breach[ ] [of] the implied assurance of the *Miranda* warnings [as] an affront to the fundamental fairness that the Due Process [C]lause requires." *Id.* at 291, 106 S.Ct. 634. In *Greenfield,* after the defendant entered a plea of "not guilty by reason of insanity," the prosecution was permitted to introduce evidence that he had "exercised his right to remain silent and ... expressed a desire to consult counsel before answering any questions." *Id.* at 287, 106 S.Ct. 634. Later in closing argument and over the objection of defense counsel, the prosecutor reminded the jury of the defendant's silence and "suggested that [his] repeated refusals to answer questions without first consulting an attorney demonstrated a degree of comprehension ... inconsistent with ... insanity." *Id.* at 287, 106 S.Ct. 634.

In reversing the conviction, the Supreme Court in *Greenfield* emphasized that "[t]he point of ... *Doyle* ... is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter ... us[e] the silence to impeach [him]" or otherwise "make use of the ... exercise of those rights in obtaining his conviction." *Id.* at 292, 106 S.Ct. 634. Thus, the Court declared that "[w]hat is impermissible is the *evidentiary use* of an individual's exercise of his constitutional rights after the ... assurance" of *Miranda.* *Id.* at 295, 106 S.Ct. 634 (emphasis added). The Court also noted that, "[w]ith respect to post-*Miranda* warnings ... [the term] silence does not mean only muteness; it includes the statement ... of a desire to remain silent until an attorney has been consulted." *Id.* at 295 n. 13, 106 S.Ct. 634; *see also* *State v. Hines,* 919 S.W.2d 573, 580–81 (Tenn.1995) (recognizing that a prosecutor may not use a defendant's exercise of his constitutional right to counsel to penalize the defendant at trial).

[25] Within a year of *Greenfield,* the Supreme Court was, once more, confronted with a *Doyle* issue. In *Greer v. Miller,* 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987), the appeal resulted from a prosecutorial question to a witness which "touched upon [the defendant's] postarrest silence." *Id.* at 764, 107 S.Ct. 3102. Unlike in *Doyle* and *Greenfield,* however, the trial court sustained Miller's prompt objection to the question, instructed the jury to "ignore" it, and allowed no "further questioning or argument with respect to [the defendant's] silence[.]" *Id.* at 759, 764, 107 S.Ct. 3102. In applying *Doyle,* the Supreme Court deemed it "significant that in each of the cases in which [the] Court ha[d previously] applied *Doyle,* the trial court ... permitted specific inquiry or argument respecting the defendant's post-*Miranda* silence." *Id.* at 764, 107 S.Ct. 3102. Because "Miller's post-arrest silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference," the Court determined that "no *Doyle* violation occurred." *Id.* at 764–65, 107 S.Ct. 3102. *Greer* thus teaches that "*Doyle* does not impose a prima facie bar against any mention whatsoever of a defendant's right to request counsel, but instead guards against the exploitation of that constitutional right by the prosecutor." *Lindgren v. Lane,* 925 F.2d 198, 202 (7th Cir.1991).

The Seventh Circuit in *Lindgren* was confronted with a record that very much resembles the record in this appeal. There, a police officer made mention of ***57** Mr. Lindgren's request for counsel during direct examination by the prosecutor, and the trial court denied defendant's ensuing motion for a mistrial. *Id.* at 202. In affirming the trial court, the Seventh Circuit reiterated that a *Doyle* inquiry "center[s] ... around the particular use to which the post-arrest silence is being put[ ]" and, therefore, requires consideration of the particular circumstances of each case. *Id.* The Seventh Circuit concluded that because the officer's testimony regarding Mr. Lindgren's request for counsel was inadvertent and because the prosecutor did not *use* the testimony to impeach the defendant or argue his guilt to the jury, there was no violation of *Greenfield* and *Doyle. Id.* at 202; *see also Noland v. French,* 134 F.3d 208, 216 (4th Cir.1998) (holding that there was no*Greenfield* or *Doyle* error where the prosecution twice elicited testimony from police officers that the defendant understood his *Miranda* rights and exercised them, pointing out that the defense did not object to the testimony at trial and that the prosecutor's questions did not draw attention to the defendant's silence or invocation of his right to counsel); *Jones v. Stotts,* 59 F.3d 143, 146 (10th Cir.1995) (holding that "it is the prosecutor's exploitation of a defendant's exercise of his right to silence which is prohibited"); *United States v. Stubbs,* 944 F.2d 828, 834–35 (11th Cir.1991) (finding no *Greenfield* or *Doyle* violation "when the government does not specifically and expressly attempt to use ... the improper comment to impeach the defendant"); *Cook v. State,* 544 N.E.2d 1359, 1363 (Ind.1989) (holding that testimony by a federal agent that there was no further contact with

the defendant at a certain point because he "had made a request to speak to an attorney" did not constitute a *Doyle* violation); *State v. Baccam,* 476 N.W.2d 884, 886–87 (Iowa Ct.App.1991) (finding no abuse of discretion in the trial court's refusal to grant a mistrial on the basis of a single comment related to the defendant's post-*Miranda* silence where the trial court gave a curative instruction and the silence was not used against the defendant); *Pulley v. Commonwealth,* 31 Va.App. 600, 525 S.E.2d 51, 54 (2000) (holding that there was no *Doyle* violation from a police officer's nonresponsive comment that the defendant invoked his right to counsel because the prosecution did not exploit the issue). As explained below, we likewise conclude that there was no violation of *Greenfield* or *Doyle* in this case.

2. Right to Remain Silent

[26] Defendant first claims that Deputy Director Armstrong improperly commented upon his invocation of his right to remain silent. We have already concluded that the defendant did not invoke his right to remain silent, so this claim necessarily fails. Deputy Director Armstrong's challenged testimony [30] merely informed the ***58** jury of the circumstances that caused him to conduct the defendant's interview. He also described the defendant's demeanor during the interview. The defendant did not object to this testimony at trial and did not raise this issue in his motion for new trial. The defendant is again limited to seeking relief via plain error review and is not entitled to relief because he has failed to establish that a clear and unequivocal rule of law was breached. *Johnson,* 743 S.W.2d at 158 ("[W]here the answers to questions are admissible, the demeanor and behavior of the person giving the statement may be commented upon by witnesses who were present.").

3. Right to Counsel

a. Sergeant Mullins's Testimony

[27] We also reject the defendant's argument that Sergeant Mullins's testimony and that of Deputy Director Armstrong about the defendant's invocation of his right to counsel was improper and deprived him of a fair trial.

The defendant challenges a very minor portion of Sergeant Mullins's lengthy, multi-day testimony, and the portion he challenges was provided on cross-examination in response to defense counsel's questions regarding issues about the importance of the defendant's statement to the police; the importance of documenting the defendant's responses; the Memphis Police Department's practice of not recording statements; the lack of a typewritten formal statement; the questions that should have been asked the defendant regarding the crime scene; and the questions that Sergeant Mullins would have asked the defendant about the crime scene had Sergeant Mullins interviewed the defendant. The relevant portion of the testimony is reproduced below:

Q. If you were interviewing [the defendant] in this case and he told you where the knives and the guns went, would that have been important enough for you to write down?

A. Yes, sir. Again, if he told us where anything was, any evidence from this crime scene, just like the bicycle, we would have followed up. I ***59** don't see why anybody would not have. We followed up on everything that I know of that he said as far as his actions afterwards.

...

Q. If you were interviewing [the defendant] and you asked him about grabbing hair or ripping beads out, would you have asked him that question and recorded his answer on paper? Would you have documented what was asked and what was said?

A. If I was able to interview [the defendant], I would have asked a lot of questions before he asked for his attorney. Now how many questions he was asked before he asked for an attorney, I couldn't tell you. I would have asked a lot of questions before such time.

...

Q. So you would have specifically after looking at the crime scene, you would have asked some questions about like holes in the cushion and you would have documented your question and your answer?

A. Yes, sir. See, again, realize how this investigation went. The crime scene was kind of my job. And I did not at any point between the original call-out and the interview, arrest and interview of [the defendant], have a chance to sit down with anybody and say okay, here's what I found in this room, in this room and in this room. I didn't hardly stop in those four or five days. If I had been able to interview [the defendant], I would have had

> very different questions than anybody else on this case because I had more knowledge about that [the crime scene] than any of them did and did they know about certain things, yes, but specific small details, I know more about that than anybody else on the team.

As he did in the Court of Criminal Appeals, the defendant argues that Sergeant Mullins's testimony was not responsive to defense counsel's questions and that Sergeant Mullins improperly interjected references about the defendant's invocation of his right to counsel. We disagree. Again, the defendant did not object to Sergeant Mullins's testimony at trial on any basis and did not raise this issue in his motion for new trial. Therefore, we again apply plain error review to the defendant's claim and again conclude that the defendant has failed to show that a clear rule of law was breached.

Sergeant Mullins's isolated references to the defendant's invocation of his right to counsel were responsive to the broad questions defense counsel posed to Sergeant Mullins on cross-examination. Moreover, even if Sergeant Mullins's testimony was not responsive, the two isolated references to the defendant's invocation of his right to counsel do not violate *Doyle* and *Greenfield* because the prosecution did not make any evidentiary use of the testimony or attempt to penalize the defendant for exercising his constitutional right. *See Pulley,* 525 S.E.2d at 54 (holding that there was no *Doyle* violation from a police officer's nonresponsive comment that the defendant invoked his right to counsel where the prosecution did not exploit the issue).

b. Deputy Director Armstrong's Testimony

[28] During the State's direct examination of Deputy Director Armstrong, the following exchange occurred:

> Q. Did you make any attempts to go into greater detail with [the defendant] about what occurred in that ***60** house based on what you knew from the crime scene?
>
> A. I did. From the crime scene I could tell some of the women's clothing had been altered and I asked him about that. And as I tried to ask him additional questions about that, he asked for an attorney.
>
> Q. He asked for a lawyer?
>
> A. Yes, he did.

The defendant objected to this testimony and requested a mistrial. The trial court denied the request for a mistrial, finding that the testimony was relevant "in light of the line of questioning that's been going on" and "in light of all the issues with regard to recorded statements, formal statements." The trial court then instructed the jury as follows:

> Ladies and gentlemen, before we go any further, let me just say this to you. Under our laws and under the Constitution of the United States, every person is entitled to have representation. People are advised and in this case a person is advised of their rights. They are advised that they have the right to talk to an attorney at any time. Once they request the permission to talk to an attorney, all questions cease, okay. There's no more questioning after that point. Everybody has a right to that. That is a right that is entitled to all of us as citizens of the United States. You are to draw no conclusions from that, other than all questions cease at the point somebody says they want to talk to an attorney. Does everybody understand that? That's the only conclusion you may draw from that, all questions cease at that point.

The State then questioned Deputy Director Armstrong as follows:

> Q. And on that note, ... you weren't [ ]able to get a formal written statement from [the defendant] because he stopped the interview?
>
> A. He did stop.

Deputy Director Armstrong also mentioned the defendant's request for counsel during cross-examination in the following exchange with defense counsel:

> Q. When I asked you about the comment [the defendant] made to you that you lied to me, would that be something important enough to put into your supplement, Deputy Director Armstrong?

A. I don't see where it's relevant, no, sir.

Q. So it's not important?

A. I don't see where it's relevant as far as what if you decide —no, sir. At that point when he decided that he wanted an attorney, we ceased the interview.

When defense counsel later questioned Deputy Director Armstrong about the lack of details in the defendant's confession, the following exchange occurred:

Q. Okay. What did [the defendant] tell you he did with the boards that were in the house?

A. The only weapons that we ever discussed were pistols and the knives. Again, we did not get a chance to get into specifics where I was able to sit down and ask him specific questions to get specific answers from him because by the time we got to that point, he requested an attorney and I ceased the interview.

The defendant submits that the trial court erred in denying his motion for a mistrial because Deputy Director Armstrong's testimony violated *Doyle* and *Greenfield.* We disagree.

As the trial court stated when overruling the defense motion for a mistrial, the defense ***61** had attacked the police investigation as incompetent and incomplete throughout the trial. The defense had repeatedly questioned police witnesses about the lack of a detailed, formal, and recorded statement from the defendant. These questions were phrased in a manner that implied the lack of detail in the defendant's confession stemmed from police incompetence or police negligence in failing to record the defendant's responses accurately. Deputy Director Armstrong was one of the last police witnesses to testify in the prosecution's case-in-chief. The prosecutor, having heard the defense's cross-examination of each prior police witness, did not err by asking Deputy Director Armstrong on direct examination whether he made any attempts to obtain a more detailed statement from the defendant. The prosecutor did not directly ask Deputy Director Armstrong about the defendant's invocation of his right to counsel. The question that was asked was a fair response to the defense theory and questioning throughout the trial to that point. The trial court provided an appropriate instruction limiting the jury's consideration of Deputy Director Armstrong's mention of the defendant's invocation of his right to counsel, which we must presume the jury followed. *State v. Young,* 196 S.W.3d 85, 111 (Tenn.2006). The prosecution's use of the testimony regarding the defendant's request for counsel was appropriately limited to rebutting the defense theory at trial. *See United States v. Robinson,* 485 U.S. 25, 32, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988) (holding that prosecutors are not prohibited from commenting upon a defendant's decision not to testify at trial so long as the prosecutorial comment is simply a "fair response" to defense claims and the prosecutorial comment does not treat the defendant's silence as "substantive evidence of guilt"); *State v. Cazes,* 875 S.W.2d 253, 267 (Tenn.1994) (applying *Robinson* to reject a *Griffin* claim). The prosecution attempted neither to create an inference of guilt from the defendant's request for counsel nor to use the defendant's request for counsel to impeach his trial testimony. Considering all the relevant circumstances, we conclude that Deputy Director Armstrong's testimony did not violate the *Doyle* and *Greenfield* constitutional rules. *See Parks v. State,* 543 S.W.2d 855, 857 (Tenn.Crim.App.1976) ("declining to find a *Doyle* violation where the officer's statement about the defendant's refusal to respond to police questioning was merely a comment on the scope of the defendant's statements and not a reference to the refusal of the defendant to make any statement at all").

[29] The defendant also challenges the State's comment during rebuttal closing argument that "[w]hen [the defendant] was brought down to the police department, he could have cleared it all up[,] [b]ut he didn't" as a comment on the defendant's exercise of his right to remain silent. Again, we disagree. Rather than a comment on the defendant's exercise of his right to remain silent, the prosecutor's statement reminded the jury of the contents of the defendant's post-arrest confession to Deputy Director Armstrong and the defendant's admissions to his mother. The purpose of the prosecutor's statement was to highlight the discrepancies between the defendant's post-arrest confession and admissions and his testimony at trial. The prosecutor was not commenting upon the defendant's exercise of his constitutional rights. The prosecutor's statement did not violate *Doyle* or its progeny. *Morgan v. State,* 755 N.E.2d 1070, 1075 (Ind.2001) ("Although evidence of a defendant's post-*Miranda* silence is generally not admissible, the defendant may open the door to its admission").

***62** **[30]** Finally, we agree with the Court of Criminal Appeals that, even if Deputy Director Armstrong's testimony regarding the defendant's request for counsel was

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constitutionally improper, the error was harmless beyond a reasonable doubt. The defense had already elicited testimony about the defendant's request for an attorney during Sergeant Mullins's cross-examination. The defense did not object to or move to strike Sergeant Mullins's testimony. Deputy Director Armstrong's testimony was merely cumulative to the proof already elicited by the defense. *See Johnson,* 743 S.W.2d at 158–59 (finding that any error in the police officer's brief references to the defendant asking to consult with counsel while making a statement was harmless beyond a reasonable doubt).

C. Confrontation Clause Claims

The defendant argues that the admission of testimony from several police officer witnesses and the admission of autopsy reports prepared by a medical examiner who did not testify, as well as the admission of expert testimony about those autopsies, violated his state and federal constitutional right to confront the witnesses against him. Alternatively, the defendant argues that the testimony from the police officers amounted to hearsay and violated the Tennessee Rules of Evidence. The State argues that the defendant's failure to object on constitutional grounds limits this Court to conducting plain error review and that the defendant is not entitled to relief because the testimony and autopsy reports were properly admitted. We will first summarize the governing legal principles and then apply those principles to each of the defendant's claims.

1. Right of Confrontation

The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, *Pointer v. Texas,* 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), directs that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. Article I, section 9 of the Tennessee Constitution similarly provides "[t]hat in all criminal prosecutions, the accused hath the right ... to meet the witnesses face to face." Tenn. Const. art. I, § 9. The phrasing of the state constitutional provision differs from the text of the Sixth Amendment and has been described as imposing "a higher right than that found in the federal constitution." *State v. Deuter,* 839 S.W.2d 391, 395 (Tenn.1992). However, when deciding claims based on the right of confrontation provided in article I, section 9, we have expressly adopted and applied the same analysis used to evaluate claims based on the Confrontation Clause of the Sixth Amendment. *State v. Parker,* 350 S.W.3d 883, 898 (Tenn.2011); *State v. Franklin,* 308 S.W.3d 799, 809–10 (Tenn.2010); *State v. Cannon,* 254 S.W.3d 287, 301 (Tenn.2008); *State v. Lewis,* 235 S.W.3d 136, 145 (Tenn.2007).[31] Thus, we will unitarily analyze the defendant's federal and state constitutional claims, as the same standards govern both.

[31] Any discussion of current Confrontation Clause jurisprudence necessarily begins with *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), in which the Supreme Court abrogated the test that had been used for twenty-five years[32] and announced a new ***63** mode of analysis. After examining the historical underpinnings of the Confrontation Clause, *id.* at 43–50, 124 S.Ct. 1354, the *Crawford* Court described "the principal evil at which the Confrontation Clause was directed" as "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50, 124 S.Ct. 1354. The text of the Confrontation Clause reflects this concern, the *Crawford* Court said, by focusing on " 'witnesses' " against the accused —in other words, those who " 'bear testimony' " against an accused. *Id.* at 51, 124 S.Ct. 1354 (quoting 2 Noah Webster, *An American Dictionary of the English Language* (1828)). " 'Testimony,' " the Supreme Court explained, " 'is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." ' " *Id.* (quoting 2 Noah Webster, *An American Dictionary of the English Language* (1828)). Thus, the Supreme Court concluded that the Confrontation Clause precludes the admission of "[t]estimonial statements of witnesses absent from trial," unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Id.* at 59, 124 S.Ct. 1354. The Court held:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the

> States flexibility in their development of hearsay law.... Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

Id. at 68, 124 S.Ct. 1354. *Crawford* thus instructs that testimonial statements are "inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Melendez–Diaz v. Massachusetts,* 557 U.S. 305, 309, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (citing *Crawford,* 541 U.S. at 54, 124 S.Ct. 1354).

[32] Two years after *Crawford,* the Supreme Court held that the Confrontation Clause applies only to testimonial hearsay and does not apply to nontestimonial hearsay. *Davis v. Washington,* 547 U.S. 813, 823–24, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); *see also Whorton v. Bockting,* 549 U.S. 406, 420, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007) (stating that the Confrontation Clause has "no application" to nontestimonial hearsay). Thus, the threshold question in every case where the Confrontation Clause is relied upon as a bar to the admission of an out-of-court statement is whether the challenged statement is testimonial. *Cannon,* 254 S.W.3d at 301.

The *Crawford* Court declined to "spell out a comprehensive definition of 'testimonial[,]' " *Crawford,* 541 U.S. at 51, 124 S.Ct. 1354, providing instead the following illustrative list of the "core class of 'testimonial' statements" to which the Confrontation Clause applies:

> [(1)] [E]x parte in-court testimony or its functional equivalent —that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially ...; [(2)] extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions ...; [and (3)] statements that were made under circumstances which would lead an objective witness reasonably ***64** to believe that the statement would be available for use at a later trial.

Id. at 51–52, 124 S.Ct. 1354 (citations and quotation marks omitted).

The *Crawford* Court also identified certain types of statements that "by their nature [are] not testimonial—for example, business records or statements in furtherance of a conspiracy," which therefore do not implicate the Confrontation Clause. *Id.* at 56, 124 S.Ct. 1354. The *Crawford* Court emphasized also that the Confrontation Clause places "no constraints at all" on the use of prior testimonial statements of a declarant who is present and available on cross-examination to defend or explain prior testimonial statements. *Id.* at 59 n. 9, 124 S.Ct. 1354 (citations omitted); *accord State v. Banks,* 271 S.W.3d 90, 118–19 (Tenn.2008) (interpreting article I, section 9 as not applying to testimonial statements when a declarant appears for cross-examination at trial). Furthermore, the *Crawford* Court explained that the Confrontation Clause is not violated when testimonial statements are admitted for purposes other than establishing the truth of the matter asserted. *Crawford,* 541 U.S. at 59 n. 9, 124 S.Ct. 1354; *accord State v. Franklin,* 308 S.W.3d at 808–811 (citing state and federal decisions which found no Confrontation Clause violation where the out-of-court statement—whether testimonial or not—was admitted for some purpose other than the truth of the matter asserted).

[33] Since *Crawford,* the Supreme Court has still not "attempt[ed] to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial...." *Davis,* 547 U.S. at 822, 126 S.Ct. 2266. However, in *Davis* the Supreme Court instructed that the "primary purpose" of a statement marks the relevant dividing line between the two categories, explaining:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances *objectively indicate* that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. (emphasis added). When determining a statement's primary purpose, "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Michigan v. Bryant,* 562 U.S. 344, 131 S.Ct. 1143, 1156, 179 L.Ed.2d 93 (2011) (holding that, under the circumstances, the police interrogation of a shooting victim had the primary purpose of responding to the emergency of a roaming gunman and, thus, the elicited statements were not testimonial).

Neither *Crawford* nor *Davis* nor *Bryant* involved expert proof, but three more recent Supreme Court decisions address such proof and are pertinent to our analysis of the issues the defendant has raised in this appeal. *Williams,* 567 U.S. ——, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012); *Bullcoming v. New Mexico,* —— U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011); *Melendez–Diaz v. Massachusetts,* 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). We begin with the first decision in the series.

***65** In *Melendez–Diaz,* the Supreme Court applied the primary purpose test to the notarized "certificates of analysis" that described the results of forensic testing performed by analysts of the Massachusetts State Laboratory Institute. 557 U.S. at 308–09, 129 S.Ct. 2527. The fact at issue in the criminal trial was whether the substance the defendant possessed was cocaine, and the certificates stated that the substance was in fact cocaine. Thus, the Court held that the "certificates of analysis" were "quite plainly affidavits [,]" which fell within the "core class of testimonial statements" described in *Crawford.* *Melendez–Diaz,* 557 U.S. at 310–11, 129 S.Ct. 2527 (citations and internal quotation marks omitted). The notarized certificates, the Court said, amounted to a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 310, 129 S.Ct. 2527 (citing *Crawford,* 541 U.S. at 51, 124 S.Ct. 1354). The Court also reasoned that the affidavits were made for "the sole purpose" of providing "prima facie evidence of the composition, quality, and the net weight of the analyzed substance." *Id.* at 311, 124 S.Ct. 1354 (citations omitted). The Supreme Court concluded that the certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' " *Id.* (quoting *Davis,* 547 U.S. at 830, 126 S.Ct. 2266 (emphasis omitted)). As a result, the certificates "were testimonial statements, and the analysts were 'witnesses' for the purposes of the Sixth Amendment." *Id.* at 311, 129 S.Ct. 2527. Thus, the Supreme Court held that, "[a]bsent a showing that the analysts were unavailable to testify at trial and that [the defendant] had a prior opportunity to cross-examine them, [the defendant] was entitled to 'be confronted with' the analysts at trial." *Id.*

Observing that "[c]onfrontation is one means of assuring accurate forensic analysis," and, indeed, the only means constitutionally guaranteed, the Supreme Court held that "[f]orensic evidence is not uniquely immune from the risk of manipulation." *Id.* at 318, 129 S.Ct. 2527. Because many labs are administered by law enforcement agencies, "[a] forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive —to alter the evidence in a manner favorable to the prosecution." *Id.*

The Supreme Court noted that the analysts' affidavits merely identified the substance as cocaine and provided no information about "what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." *Id.* at 320, 129 S.Ct. 2527. The Supreme Court explained that "[a]t least some of that methodology [the analysts used] require[d] the exercise of judgment and present[ed] a risk of error that

might be explored on cross-examination." *Id.* Thus, the Court found "little reason to believe that confrontation [would] be useless in testing [the] analysts' honesty, proficiency, and methodology—the features that are commonly the focus in the cross-examination of experts." *Id.* at 321, 129 S.Ct. 2527.

The Supreme Court returned to the subject of the Confrontation Clause and forensic reports in *Bullcoming v. New Mexico.* There, the police arrested the defendant on charges of driving while intoxicated. 131 S.Ct. at 2709. The prosecution submitted a forensic laboratory report certifying Bullcoming's blood-alcohol concentration as a business record. *Id.* at 2712. Instead of calling the analyst who signed the certification, who was on unpaid leave ***66** for undisclosed reasons, the prosecution "called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample." *Id.* at 2709. The testifying analyst and the certifying analyst both worked for the New Mexico Department of Health's Scientific Laboratory Division. *Id.* at 2710, 2712. The Supreme Court rejected the argument that substitute testimony satisfied the constitutional requirement because the tests themselves were reliable, explaining that "the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.' " *Id.* at 2715 (quoting *Melendez–Diaz,* 557 U.S. at 319 n. 6, 129 S.Ct. 2527). The Supreme Court declared that the Confrontation Clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Id.* at 2716. The Court noted that "the formalities attending the 'report of blood alcohol analysis' [were] more than adequate to qualify [the certifying analyst's] assertions as testimonial." *Id.* at 2717.

As part of its analysis in *Bullcoming,* the Supreme Court pointed out that operating the machine used to conduct the test required "specialized knowledge and training" and that human error can occur at several points during the testing process. *Id.* at 2711. Furthermore, the testifying analyst "could not convey what the [certifying analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." *Id.* at 2715 (footnotes omitted). On the other hand, the certifying analyst's "testimony under oath would have enabled Bullcoming's counsel to raise before [the] jury questions concerning [the certifying analyst's] proficiency, the care he took in performing his work, and his veracity." *Id.* at 2715 n. 7.

Justice Sotomayor, who provided the fifth vote for the majority opinion in *Bullcoming,* wrote a separate opinion to clarify her view that the report was testimonial because its primary purpose was evidentiary and "to emphasize the limited reach of the Court's opinion." *Id.* at 2719 (Sotomayor, J., concurring). She noted that the surrogate analyst was not "a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." *Id.* at 2722. She opined that "[i]t would [have been] a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results." *Id.* She noted that the lead opinion in *Bullcoming* had not addressed the "degree of involvement" that would be sufficient to allow a supervisor to testify because the surrogate analyst who testified "had no involvement whatsoever in the relevant test and report." *Id.* Justice Sotomayor also noted that *Bullcoming* was "not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence," *id.,* which she viewed also as a "different question." *Id.*

Most recently, in *Williams v. Illinois,* 567 U.S. ——, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012), the Supreme Court considered whether *Crawford* bars an expert from expressing an opinion based on facts gleaned from a laboratory report, when the expert lacks firsthand knowledge regarding the preparation of the report. The hearsay evidence at issue in *Williams* was a DNA profile prepared by an outside ***67** laboratory, Cellmark, using vaginal swabs collected from the crime victim's rape kit. *Id.* at 2227. A state police DNA analyst searched the state's DNA database and matched the profile Cellmark prepared to a profile of the defendant's DNA taken upon his earlier arrest on an unrelated matter. *Id.* at 2229. At trial, over a defense Confrontation Clause objection, the police DNA analyst was permitted to testify that the

defendant's DNA profile in the state database matched the male DNA profile Cellmark had developed from semen on the victim's vaginal swabs. *Id.* at 2230. Cellmark's written report, on which the state police DNA analyst based her testimony, was not itself introduced in evidence. *Id.* at 2231. No witness having personal knowledge of Cellmark's development of the DNA profile from the vaginal swab testified at trial. *Id.* at 2229–31.

Justice Alito authored a plurality opinion in *Williams,* which Chief Justice Roberts and Justices Kennedy and Breyer joined. The plurality reasoned that the Cellmark report was not testimonial because it did not have "the primary purpose of accusing a targeted individual." *Id.* at 2243. The plurality explained that, because no one had been identified as a suspect when the report was prepared, the primary purpose of Cellmark's DNA testing was not "to accuse petitioner or to create evidence for use at trial" but, rather, "to catch a dangerous rapist who was still at large." *Id.* The plurality thus viewed Cellmark's report as analogous to statements made "to enable police assistance to meet an ongoing emergency" or "to bring an end to an ongoing threat," which the Court previously had held not to be testimonial. *Id.* Given their non-accusatory role, the plurality reasoned that the Cellmark scientists had "no incentive to produce anything other than a scientifically sound and reliable profile." *Id.* at 2244.

Justice Thomas provided the fifth vote in support of the *Williams* judgment. Justice Thomas actually rejected what he called the plurality's "new primary purpose test," under which, he said, even a statement with a primarily evidentiary purpose is testimonial only if it is meant to incriminate a particular known individual, as "lack[ing] any grounding in constitutional text, in history, or in logic." *Id.* at 2262 (Thomas, J., concurring in the judgment). Among other things, Justice Thomas argued that the targeted-accusation requirement made "little sense" because "[a] statement that is not facially inculpatory may turn out to be highly probative of a defendant's guilt when considered with other evidence." *Id.* at 2263. Nonetheless, Justice Thomas concurred with the plurality's conclusion that the Cellmark report was not testimonial. While he "agree[d] that, for a statement to be testimonial within the meaning of the Confrontation Clause, the declarant must primarily intend to establish some fact with the understanding that his statement may be used in a criminal prosecution," Justice Thomas deemed that to be only one "necessary criterion," not the "sufficient" one. *Id.* at 2261. Justice Thomas explained that to be testimonial, a statement must satisfy the additional requirement of possessing sufficient " 'indicia of solemnity,' " *id.* at 2259 (quoting *Davis,* 547 U.S. at 836–37, 126 S.Ct. 2266), which the Cellmark report failed to do. According to Justice Thomas, only " 'formalized testimonial materials,' such as depositions, affidavits, and prior testimony, or statements resulting from 'formalized dialogue,' such as custodial interrogation," satisfy that additional necessary criterion. *Id.* at 2260 (internal quotation marks omitted). The Cellmark report, Justice Thomas concluded, was "neither a sworn nor a certified declaration of fact," and "although the report was produced at the request of law ***68** enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation." *Id.*

Justice Kagan, in an opinion joined by Justices Scalia, Ginsburg, and Sotomayor, dissented. *Williams,* 132 S.Ct. at 2264 (Kagan, J., dissenting). The dissenters joined Justice Thomas in rejecting the plurality's targeted " 'accusation' " test on multiple grounds, which means that a majority of the Court, consisting of Justice Thomas and the *Williams* dissenters, rejected that test. *Id.* at 2274. Among other things, the dissenters observed that for purposes of the Confrontation Clause "it makes not a whit of difference whether, at the time of the laboratory test, the police already have a suspect" because "the typical problem with laboratory analyses—and the typical focus of cross-examination—has to do with careless or incompetent work, rather than with personal vendettas" or a particular analyst's dishonesty. *Id.* Unlike the plurality, the dissenters did not view the analysis Cellmark performed as necessary "to catch a dangerous rapist who was still at large" and analogous to the statements *Davis* and *Bryant* held to be nontestimonial. *Id.* The dissenters argued that comparing the Cellmark analysis to those statements stretched the ongoing emergency test and the facts of *Williams* "beyond all recognition." *Id.*

The dissenters also rejected Justice Thomas's formality criterion, describing it as granting "constitutional significance to minutia, in a way that can only undermine the Confrontation Clause's protections" by enabling prosecutors to evade the constitutional imperative "by using the right kind of forms with the right kind of language," so that no forensic report would be formal enough to constitute a testimonial

statement. *Id.* at 2276 ("It would not take long to devise the magic words and rules—principally, never call anything a 'certificate.' ").

The dissenters viewed *Williams* as an "an open-and-shut case," *id.* at 2265, if the Court "adher[ed] to the simple rule" established in earlier Confrontation Clause precedents. *Id.* at 2265. The dissenters concluded that the Cellmark report was testimonial because it was made to establish " 'some fact' in a criminal proceeding," specifically the identity of the rapist. *Id.* at 2266 (quoting *Bullcoming,* 131 S.Ct. at 2716). The dissenters concluded that allowing an expert who had no knowledge of the report to testify at Williams's trial violated his Sixth Amendment right to confront the witnesses against him. *Id.* at 2268.

[34] The Supreme Court's fractured decision in *Williams* provides little guidance and is of uncertain precedential value because no rationale for the decision—not one of the three proffered tests for determining whether an extrajudicial statement is testimonial—garnered the support of a majority of the Court. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 66, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (stating that a decision is "of questionable precedential value" when "a majority of the Court expressly disagree[s] with the rationale of the plurality"); *United States v. Pink,* 315 U.S. 203, 216, 62 S.Ct. 552, 86 L.Ed. 796 (1942) (stating that while a decision which merely affirms a judgment "by an equally divided court" is "conclusive and binding upon the parties as respects that controversy" the lack of majority agreement "on the principles of law involved prevents it from being an authoritative determination for other cases").

[35] **[36]** It is true that typically "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that ***69** position taken by those Members who concurred in the judgments on the narrowest grounds....' " *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (quoting *Gregg v. Georgia,* 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). The *Marks* rule presupposes, however, that the narrowest concurrence will represent a "common denominator" rationale. *King v. Palmer,* 950 F.2d 771, 781 (D.C.Cir.1991). If one opinion "does not fit entirely within a broader circle drawn by the others," the *Marks* approach ceases to function as it was intended, and adhering to it in such circumstances would "turn a single opinion" to which "eight of nine Justices do not subscribe" into law. *King,* 950 F.2d at 782.

The *Marks* rule ceases to function as it was intended where *Williams* is concerned because the two opinions that resulted in the judgment share no common denominator rationale. Neither the plurality's rationale nor Justice Thomas's rationale is subsumed within the other, nor is one rationale narrower than the other in any relevant way that we can discern. For example, a statement could be made for the purpose of accusing a targeted individual, and therefore be testimonial under the plurality's test, but not be sufficiently formal to qualify as a testimonial statement under Justice Thomas's test. Conversely, a statement could be sufficiently formal to satisfy Justice Thomas's test but not be sufficiently targeted to satisfy the plurality's test.

Regardless of our inability to apply *Marks,* we agree with the District of Columbia Court of Appeals's reading of *Williams:*

> By analogy to *Marks,* it can be argued that while [the plurality's] rationale and Justice Thomas's rationale may not be includible within each other, the different tests they utilize to determine whether a statement is testimonial are subsumed within and narrower than the dissenters' test. That is so because [the plurality] and Justice Thomas each added an additional requirement to the basic "evidentiary purpose" test espoused by [the dissenters]. If the four-Justice plurality would deem a statement testimonial under the targeted accusation test, the four dissenting Justices surely would deem it testimonial under the broader evidentiary purpose test. Similarly, if Justice Thomas would deem a statement testimonial employing his formality criterion along with the evidentiary purpose test, the four dissenting Justices necessarily would deem it testimonial using the evidentiary purpose test alone. It

> therefore is logically coherent and faithful to the Justices' expressed views to understand *Williams* as establishing—at a minimum—a sufficient, if not a necessary, criterion: a statement is testimonial at least when it passes the basic evidentiary purpose test plus either the plurality's targeted accusation requirement or Justice Thomas's formality criterion. Otherwise put, if *Williams* does have precedential value ... an out-of-court statement is testimonial under that precedent if its primary purpose is evidentiary and it is either a targeted accusation or sufficiently formal in character.

Young v. United States, 63 A.3d 1033, 1043–44 (D.C.2013); *see also* *State v. Michaels,* 219 N.J. 1, 95 A.3d 648, 666 (2014) ("In short, each of those three opinions in *Williams* embraces a different approach to determining whether the use of forensic evidence violates the Confrontation Clause, and there is no narrow rule that would have the support of a majority of the Supreme Court that we can discern from the opinions in *Williams.* Further, *Williams* advances a wholly new approach to when a ***70** forensic document will be deemed testimonial, and that approach diverges from the primary purpose test that had been applied previously. We find *Williams's* force, as precedent, at best unclear."). Having summarized the law related to Confrontation Clause claims, we turn to the facts of this case.

2. Autopsy Reports and Testimony about the Autopsy Reports

[37] Relying primarily upon *Melendez–Diaz,* the defendant contends that the admission of three autopsy reports prepared by a medical examiner who did not testify and Dr. Funte's testimony about those reports violated his state and federal right to confront the witnesses against him.

The State first points outs that the defendant failed to object to the admission of the autopsy reports and also failed to raise the issue in his motion for new trial. The State is correct, and we are again constrained to utilize plain error review when considering this issue. The State contends that the defendant is not entitled to relief via the plain error doctrine because no clear rule of law was breached. The State points out that the law was unsettled at the time of the defendant's trial and remains unsettled as to the question of whether autopsy reports are or are not testimonial. We agree.

This case was tried in September 2010, after *Melendez–Diaz,* but prior to *Bullcoming,* and *Williams.*[33] As already noted, neither *Crawford* nor its progeny provided a comprehensive listing of statements that qualify as "testimonial." Furthermore, *Melendez–Diaz* did not decide the specific question of whether autopsy reports should be considered testimonial. The majority opinion's only reference to autopsy reports appeared in a footnote and was in response to the dissent's suggestion that the Confrontation Clause is not designed to detect errors in scientific tests, and that other methods such as a new test might better serve that purpose. The majority simply cited autopsies as an example of a forensic test that cannot be repeated. *See* *Melendez–Diaz,* 557 U.S. at 318 & n. 5, 129 S.Ct. 2527; *see also* *id.* at 337, 129 S.Ct. 2527 (Kennedy, J., dissenting). The Supreme Court neither explicitly nor implicitly indicated whether autopsy reports are (or are not) testimonial in nature.[34] Thus, the issue remained unsettled. *See, e.g., Nardi v. Pepe,* 662 F.3d 107, 111 (1st Cir.2011) ("[A]n autopsy report can be distinguished from, or assimilated to, the sworn documents in *Melendez–Diaz.*"); *id.* at 112 ("[N]o one can be certain just what the Supreme Court would say about ***71** that issue today."); *United States v. McGhee,* 627 F.3d 454, 459 (1st Cir.2010) (noting that the *Melendez–Diaz* Supreme Court was "sharply divided" and that the Court's "new slant on the Confrontation Clause is likely to be contested territory for some years"), *vacated on reh'g on other grounds,* 651 F.3d 153 (1st Cir.2011); *Martin v. State,* 60 A.3d 1100, 1102 (Del.Supr.2013) ("We recognize that substantial uncertainty exists about whether a particular statement is 'testimonial' or otherwise triggers the Confrontation Clause.").

Courts continue to be divided on the question of whether autopsy reports are testimonial statements or not. On the one hand, some courts have concluded that autopsy reports are not testimonial. *See, e.g.,* *United States v. James,* 712 F.3d 79, 99 (2nd Cir.2013) (deciding that the autopsy report at issue "was not testimonial because it was not prepared primarily to create a record for use at a criminal trial"); *People v.*

Dungo, 55 Cal.4th 608, 147 Cal.Rptr.3d 527, 286 P.3d 442, 450 (2012) (finding that even though California's statutory scheme requires the reporting of suspicious autopsy findings to law enforcement, an autopsy serves several purposes and the "autopsy report itself was simply an official explanation of an unusual death, and such official records are ordinarily not testimonial"); *People v. Leach,* 366 Ill.Dec. 477, 980 N.E.2d 570, 592 (Ill.2012) (holding that autopsy reports are not testimonial and explaining that an autopsy report is prepared in the normal course of operation of the medical examiner's office, to determine the cause and manner of death, and is not prepared for the primary purpose of accusing "a targeted individual of engaging in criminal conduct" or providing "evidence in a criminal trial" (citations and internal quotation marks omitted)); *State v. Maxwell,* 9 N.E.3d 930, 950 (Ohio 2014) ("Autopsy reports are not intended to serve as an out-of-court substitute for trial testimony. Instead, they are created for the primary purpose of documenting cause of death for public records and public health." (citations and internal quotation marks omitted)).

Other courts have found that autopsy reports are testimonial statements which implicate Confrontation Clause protections. *See, e.g., United States v. Ignasiak,* 667 F.3d 1217, 1231 (11th Cir.2012) (holding that, applying the logic of *Crawford, Melendez–Diaz*, and *Bullcoming,* the autopsy reports at issue were testimonial); *Cuesta–Rodriguez v. State,* 241 P.3d 214, 228 (Okla.Crim.App.2010) (holding that, in light of Oklahoma's statutory scheme relative to the medical examiner's duty in the case of a suspicious death, an autopsy report in such cases would be testimonial); *State v. Kennedy,* 229 W.Va. 756, 735 S.E.2d 905, 917–18 (2012) (holding, based partially on West Virginia's statutory scheme, that autopsy reports are under all circumstances testimonial).

Moreover, some courts have ruled since *Melendez–Diaz* and *Bullcoming* that the Confrontation Clause does not preclude experts from offering their own opinions, regardless of the independent admissibility of the material they relied upon in forming those opinions. *See Nardi,* 662 F.3d at 112 (citing cases). The Court of Criminal Appeals has so held. *Freeman,* 2012 WL 1656975, at *14 (recognizing that the testifying doctor placed some of his nontestifying colleague's findings before the jury while relating his own opinion about the cause of the victim's death but holding that such testimony "was well within" the doctor's field of expertise and that the autopsy report prepared by his colleague was "of a type reasonably relied upon by experts" in his field (internal quotation marks omitted)).

***72** We need not decide in this case whether autopsy reports are testimonial or whether a medical examiner may testify about an autopsy report produced by another pathologist who does not testify at trial. Instead we hold only that no clear rule of law was breached in this case by the admission of the autopsy reports or Dr. Funte's testimony about them. [35] Given the uncertainty that has existed in Confrontation Clause jurisprudence since *Crawford,* and in particular the lack of clarity regarding expert reports and testimony, which was actually exacerbated by the splintered decision in *Williams,* we conclude that the defendant has failed to establish that a clear and unequivocal rule of law was breached.

Furthermore, we also conclude, as did the Court of Criminal Appeals, that granting relief by way of the plain error doctrine is not " 'necessary to do substantial justice.' " *Smith,* 24 S.W.3d at 283 (quoting *Adkisson,* 899 S.W.2d at 641–42). Dr. Funte testified as an expert without any objection from the defendant. The defendant did not contest the causes of the victims' deaths or any other conclusions or information contained in the autopsy reports or in Dr. Funte's testimony. Nor did the autopsy reports or Dr. Funte's testimony implicate the defendant or tie him to these homicides. Under these circumstances, granting relief is not necessary to do substantial justice. *See Freeman,* 2012 WL 1656975, at *13 (concluding that granting relief was not necessary to do substantial justice even though the autopsy report was testimonial and should not have been admitted because the defendant "did not contend that the victim's death was anything other than a homicide," and challenged only his identity as the perpetrator of the victim's murder, an issue upon which neither the autopsy report nor the pathologist's testimony "shed much light"); *State v. Flack,* 232 W.Va. 708, 753 S.E.2d 761, 769 (2013) (concluding that the admission of the state medical examiner's testimony about an autopsy report prepared by another pathologist was not plain error because the state medical examiner's testimony merely confirmed that the victim's death was a homicide caused by a gunshot wound and did not implicate the defendant or link the defendant to the homicide); *State v. Blevins,* 231 W.Va. 135, 744 S.E.2d 245, 268 (2013) (per curiam) (concluding that the erroneous admission of the medical examiner's testimony regarding an autopsy report prepared by another pathologist was harmless beyond a reasonable doubt).

Thus, both because no clear rule of law was breached and because granting relief is not necessary to do substantial justice, the defendant is not entitled to relief under the plain error doctrine.

3. Admission of Police Testimony Regarding C.J.'s Statements

The defendant also argues that the trial court violated his constitutional right to confront the witnesses against him by allowing Sergeant Mullins, Lieutenant Davidson, and Sergeant Max to testify regarding C.J.'s statement identifying the ***73** defendant as the perpetrator. The State responds that the defendant failed to preserve the constitutional issue he now raises, pointing out that the defendant did not object at all to Sergeant Mullins and Lieutenant Davidson testifying about C.J.'s statement and objected to Sergeant Max's testimony only on the basis of hearsay. The defendant also failed to raise this constitutional issue in his motion for new trial, but he relied upon it in the Court of Criminal Appeals.

In this Court, the defendant also argues that the challenged testimony was inadmissible hearsay admitted in violation of the Tennessee Rules of Evidence. The defendant concedes that he did not raise this issue in his motion for new trial or in the Court of Criminal Appeals, but he argues that admission of this evidence amounted to plain error. We conclude that the defendant is not entitled to relief because he has failed to establish that admission of the challenged testimony breached a clear and unequivocal rule of law.

[38] First, even assuming the statements were hearsay, [36] the Tennessee Rules of Evidence recognize an exception for hearsay "statement[s] of identification of a person made after perceiving the person if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement." Tenn. R. Evid. 803(1.1). In this case, C.J.'s out-of-court identification satisfied the Rule 803(1.1) criteria for admission. C.J. testified at trial and was subject to cross-examination concerning the statement. Indeed, defense counsel thoroughly cross-examined C.J. at trial.

[39] **[40]** Second, as for any Confrontation Clause violation, there is no constraint on the use of prior testimonial statements when a declarant appears at trial and is subject to cross-examination. *Crawford,* 541 U.S. at 59 n. 9, 124 S.Ct. 1354 ("[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of [the declarant's] prior testimonial statements.") (citing *California v. Green,* 399 U.S. 149, 162, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970)). The same is true of the right to confrontation protected by article I, section 9 of the Tennessee Constitution. *Banks,* 271 S.W.3d at 118–19.

The defendant's reliance upon *California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) for a contrary rule is misplaced. In *Green,* the Supreme Court overruled California decisions and held that "where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of [the] out-of-court statements does not create a confrontation problem." *Id.* at 162, 90 S.Ct. 1930. Thus, under both *Green* and *Crawford,* when a declarant appears for cross-examination at trial, "the Confrontation Clause places no constraints at all on the use of [the declarant's] prior testimonial statements." *Crawford,* 541 U.S. at 59 n. 9, 124 S.Ct. 1354; *see also People v. Argomaniz–Ramirez,* 102 P.3d 1015, 1018. ("Because the hearsay declarants will testify at trial and will be subject to cross-examination, admission of their out-of-court statements does not violate the Confrontation Clause"); *Clark v. State,* 808 N.E.2d 1183, 1189 n. 2 (Ind.2004) (stating that the Supreme Court expressly noted in *Green* ***74** that, "where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem"); *State v. Gorman,* 854 A.2d 1164, 1178 (Me.2004) (stating that, according to *Crawford,* the Confrontation Clause was satisfied when the defendant "was given the opportunity to examine and cross-examine his mother before the jury regarding what she did and did not recall and the reasons for her failure of recollection"); *Cooley v. State,* 157 Md.App. 101, 849 A.2d 1026, 1031 (2004) (holding that "*Crawford* did not overrule the unbroken line of cases holding that the Confrontation Clause does not operate to exclude pretrial statements made by a witness who actually testifies at trial"); *State v. Tate,* 682 N.W.2d 169, 176 n. 1 (Minn.Ct.App.2004) (stating that because the declarant testified at trial and was subject to cross-examination, the Confrontation Clause did not apply to invalidate the hearsay exception); *State v. Carothers,* 692 N.W.2d 544, 547–49 (S.D.2005); *Crawford*

v. State, 139 S.W.3d 462, 464 (Tex.App.2004) (stating that "[a] careful reading of the *Crawford* opinion reveals that its holding applies only when the extrajudicial testimonial statements of a witness *who does not testify at trial* are sought to be admitted" (italics in original)).

In this case, C.J. testified at trial and was cross-examined thoroughly about his prior statements of identification and his identification of the defendant at trial. Defense counsel ably questioned him about his statements identifying or implicating others as the perpetrators and about his ability to perceive what was happening at the time of the events. We agree with the Court of Criminal Appeals that there is simply no merit to the defendant's arguments that admission of these statements was error, much less plain error. *Dotson,* 2013 WL 4728679, at *49.

D. Admission of Evidence Regarding the Defendant's Imprisonment

[41] Prior to trial, the defendant filed a motion in limine seeking to prevent the prosecution from introducing evidence of his prior incarceration for second degree murder. Applying the guidelines provided in Tennessee Rule of Evidence 404(a) and (b), the trial court denied the motion. The trial court found that the defendant's prior incarceration had been proven by clear and convincing evidence. The trial court emphasized that the prosecution had no intention of informing the jury of the crime for which the defendant was incarcerated. The trial court further found that statements about the defendant's and Cecil's relationship, which mentioned the defendant's prior incarceration, as well as statements the defendant made to the police and family members after the murders regarding his unwillingness to return to prison, were "highly probative as to the defendant's intent, motive and state of mind at the time of the commission of the offense[s] and outweighed any prejudicial effect to the defendant." *Dotson,* 2013 WL 4728679, at *59. However, the trial court refused to allow the prosecution unlimited use of evidence regarding the defendant's prior incarceration, stating that "the mere fact that a witness'[s] knowledge of the defendant was in part or fully conditioned upon defendant's incarceration" was "simply insufficient to warrant the witness divulging this fact to the jury." *Id.*

The defendant contends that the prosecution violated the trial court's ruling on the motion in limine by eliciting testimony from Deputy Director Armstrong that he knew of the defendant's prior incarceration when he went into the room to question the defendant. In the pertinent exchange, ***75** Deputy Director Armstrong stated, "Before going in that interview room, I knew that [the defendant] was very familiar with the criminal justice system because he had recently been released from prison." Defense counsel objected, relying on the trial court's ruling on the motion in limine. The trial court overruled the objection, stated that the testimony was not inappropriate, and pointed out that numerous witnesses had already testified to the defendant's prior incarceration.

The State then asked Deputy Director Armstrong why having background information before conducting an interview was important. Deputy Director Armstrong responded:

> You try to get as much information about a person as you can. Before you interview them, you want to know how many times they've been arrested. You want to know if they're familiar with the criminal justice system. You want to know if it's the first time they've ever been arrested and you want to know have they ever been arrested of anything, a violent crime.... So it helps in an interview to know as much as you can about a person before you proceed with it.

The trial court then instructed the jury as follows:

> Before we go any further, ladies and gentlemen, there has been testimony in this case about whether or not [the defendant] had been in jail. There's been some testimony with regard to the fact that he's been in jail. I want you to understand the fact that he has been in jail has no bearing whatsoever on your decision in this case. You're to decide this case based upon the facts that are presented in this case. The only reason that issue has even come before you is it plays into certain parts of the proof.

> That's the only thing you're to consider that for. Does everybody understand that? Thank you.

On appeal to the Court of Criminal Appeals, the defendant challenged Deputy Director Armstrong's testimony and argued that the trial court erred by overruling the defense objection and finding it admissible. The Court of Criminal Appeals concluded that Deputy Director Armstrong's testimony regarding the defendant's past incarceration was not related to one of the categories of information the trial court described as permissible in the order denying the defense motion in limine. *Dotson,* 2013 WL 4728679, at *61. The intermediate appellate court also concluded that, because Deputy Director Armstrong had failed to explain why knowing about an interview subject's prior criminal history was important, it could not conclude that his testimony was relevant to "the integrity of the defendant's confession—that the defendant knew his rights, had experience with police, and would not be easily coerced into confessing to a heinous crime he did not commit," as the State argued. *Id.* (internal quotation marks omitted). Nonetheless, the intermediate appellate court concluded that any error was harmless because: (1) by the time "Deputy Director Armstrong testified, multiple other witnesses had testified to the defendant's prior incarceration within the bounds set forth by the trial court in its pretrial order"; (2) "Deputy Director Armstrong did not state the length or reason for the defendant's incarceration"; and (3) "[t]he trial court also gave a limiting instruction, which the jury is presumed to have followed." *Id.*

In this Court, the defendant argues that the Court of Criminal Appeals erred in concluding that admission of the testimony was harmless error. He says that Deputy Director Armstrong's testimony implied that the defendant had been recently released ***76** from prison for committing a violent crime and placed "virtual shackles" on the defendant. The defendant says that the trial court compounded, rather than cured, the error by first instructing the jury to disregard the defendant's history of incarceration and by then stating that the prior incarceration was relevant to certain parts of the proof.

The State responds that the trial court did not abuse its discretion in overruling the defense objection to Deputy Director Armstrong's testimony because the testimony was not offered to show the defendant's propensity for criminal activity but to show his familiarity with the criminal justice system, and thus aid the jury in assessing the integrity of the defendant's confession. Even if the Court agrees with the Court of Criminal Appeals' conclusion that the objection should have been sustained, the State argues that the error was harmless.

Tennessee Rule of Evidence 404(b) provides, in relevant part, as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
>
> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

[42] **[43]** We have cautioned that trial courts should take a "restrictive approach" when admitting Rule 404(b) evidence because it " 'carries a significant potential for unfairly influencing a jury.' " *State v. Dotson,* 254 S.W.3d 378, 387 (Tenn.2008) (quoting *State v. Bordis,* 905 S.W.2d 214, 227 (Tenn.Crim.App.1995) (internal quotation marks omitted)). "[S]uch evidence easily results in a jury improperly convicting a defendant for his or her bad character or apparent propensity or disposition to commit a crime regardless of the strength of the evidence concerning the offense on trial." *Id.* at 387 n. 7 (quoting *State v. Rickman,* 876 S.W.2d 824, 828 (Tenn.1994)); *State v. Mallard,* 40 S.W.3d 473, 488 (Tenn.2001). " '[T]he risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.' " *State v. Sexton,* 368 S.W.3d 371, 403 (Tenn.2012) (quoting *Old Chief v. United*

States, 519 U.S. 172, 181, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)).

[44] However, as we have previously observed in another context:

> the Rule 404(b) criteria—in particular, the existence of a material issue at trial and the balancing of the probative value and unfair prejudice—require consideration of the evidence presented at trial. Thus, trial courts must be cognizant that if pretrial evidentiary rulings are made, they may need to be reconsidered or revised based on the evidence presented at trial.

State v. Gilley, 173 S.W.3d 1, 6 (Tenn.2005). Finally, we have explained that if a trial court substantially complies with the ***77** procedures set out in Rule 404(b) for evaluating the admissibility of evidence, the court's decision will be given great deference on appeal and will be reversed only if the trial court abused its discretion. *State v. DuBose,* 953 S.W.2d 649, 652 (Tenn.1997).

Here the trial court substantially complied with the procedure set out in Rule 404(b), both at the pretrial hearing on the motion in limine and when considering the defense objection to Deputy Director Armstrong's testimony. Unlike the Court of Criminal Appeals, we are unable to conclude that the trial court abused its discretion by overruling the defense objection to Deputy Director Armstrong's testimony. The testimony was offered for a purpose other than showing action in conformity with character. Specifically, the testimony was intended to inform the jury, as the State asserts, of the defendant's familiarity with the criminal justice system so that the jury could better evaluate the integrity of the defendant's confession. Deputy Director Armstrong did not mention the crime, or discuss how long the defendant had been incarcerated, or disclose when the defendant was released from incarceration. As we pointed out in *Gilley,* a trial court must reconsider pretrial rulings in light of the proof offered at trial, and that is precisely what the trial court in this case did. In overruling the objection, the trial court pointed out that numerous witnesses—seven according to a statement by defense counsel—had already testified about the defendant's prior incarceration. The record simply does not indicate that the trial court abused its discretion in overruling the motion.

[45] We do agree with the Court of Criminal Appeals, however, that, even assuming the testimony was admitted in error, the error was harmless. *See State v. Caughron,* 855 S.W.2d 526, 538 (Tenn.1993). Deputy Director Armstrong neither informed the jury of the crime for which the defendant had been incarcerated nor implied that the jury should consider the defendant's prior incarceration as evidence of guilt. The trial court gave a limiting instruction, which cautioned the jury not to consider the defendant's prior incarceration as evidence of guilt, and the testimony was at most cumulative to evidence already properly admitted from multiple prior witnesses. The defendant is not entitled to relief on this issue.

E. Mandatory Review

As to each of the defendant's six death sentences, this Court is required to determine: (1) whether the sentence "was imposed in any arbitrary fashion"; (2) whether the evidence supports the jury's findings that the prosecution proved aggravating circumstances beyond a reasonable doubt; (3) whether the evidence supports the jury's determination that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt; and (4) whether the sentence of death "is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." Tenn.Code Ann. § 39–13–206(c)(1).

1. Arbitrary Imposition of the Death Sentence

[46] The defendant submits that Tennessee's death penalty scheme includes a "fatally flawed proportionality review" which "inherently results in an arbitrary imposition of the death penalty," because only those cases in which a capital sentencing hearing was held are included in the universe for comparison. He also says that Tennessee's proportionality system is flawed because it fails to compare death sentences imposed in this State to those ***78** imposed in other jurisdictions. He asks this Court to adopt the position espoused by the separate opinion in *State v. Chalmers,* 28 S.W.3d 913, 921–925 (Tenn.2000) (Birch, J., concurring and dissenting).

This Court has repeatedly rejected these arguments. Recently, a majority of this Court exhaustively re-examined the propriety of including in the pool for comparison only those similar cases in which a capital sentencing hearing has been conducted, and we held that this limitation is appropriate and does not render Tennessee's capital sentencing scheme arbitrary. *State v. Pruitt,* 415 S.W.3d 180, 217 (Tenn.2013); *see also* *State v. Godsey,* 60 S.W.3d 759, 783–86 (Tenn.2001); *State v. Bland,* 958 S.W.2d 651, 666–67 (Tenn.1997). We expressly re-affirmed the analysis adopted in *Bland*. *Pruitt,* 415 S.W.3d at 215–17. As for the defendant's argument that capital cases from other jurisdictions should be included in the pool for comparison, it is sufficient to quote from a prior decision of this Court explaining why this argument lacks merit:

> In Tennessee, comparative proportionality review is a duty imposed upon this Court and the Court of Criminal Appeals by a statute that is part of the Tennessee capital sentencing scheme. Nothing in the statute indicates that the General Assembly intended the term "similar cases" to include out-of-state cases. In addition, given that capital sentencing statutes differ from state to state, cases from other jurisdictions are likely not "similar" for purposes of comparative proportionality review.

Godsey, 60 S.W.3d at 786. For these reasons, we reject the defendant's assertion that his sentence, and Tennessee's system of proportionality review, is arbitrary.

Our review of the record also otherwise confirms that the defendant received a full and fair trial, which was conducted in accordance with the applicable statutes and procedural rules. Thus, we conclude that the defendant's sentence was not imposed in an arbitrary fashion.

2. Evidence of Aggravating Circumstances

[47] In determining whether the evidence supports the jury's findings of statutory aggravating circumstances, the relevant inquiry is whether a rational trier of fact, taking the evidence in the light most favorable to the prosecution, could have found the existence of the aggravating circumstances beyond a reasonable doubt. *State v. Jordan,* 325 S.W.3d 1, 66–67 (Tenn.2010); *State v. Rollins,* 188 S.W.3d 553, 571 (Tenn.2006).

a. Cecil Dotson, Sr.

[48] The jury applied three aggravating circumstances when imposing the death sentence for the defendant's conviction of first degree murder of Cecil, and the evidence is abundantly sufficient to support the jury's findings. First, during the penalty phase of the trial, the parties stipulated that the defendant had previously been convicted of second degree murder and that this felony conviction was a crime of violence. This stipulation thus established that the defendant had been "previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person." Tenn.Code Ann. § 39–13–204(i)(2).

[49] Second, the jury found that the defendant knowingly created a great risk of death to two or more persons in the course of murdering Cecil. *See* Tenn.Code Ann. § 39–13–204(i)(3). 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 ***79** is based.' " *Johnson v. State,* 38 S.W.3d 52, 60 (Tenn.2001) (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.' " *Id.* (quoting *State v. Henderson,* 24 S.W.3d 307, 314 (Tenn.2000)). The (i)(3) aggravating circumstance has been applied where the proof showed a defendant "fired random shots with others present or nearby," or the defendant engaged in a shootout with others, "or the defendant actually shot people in addition to the murder victim." *Id.* at 60–61 (footnotes omitted). The proof in this case showed that three others were present in the living room where Cecil was shot multiple times. The evidence is sufficient to support the jury's finding of the (i)(3) aggravating circumstance.

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The third aggravating circumstance the jury relied upon is " 'mass murder,' which is defined as the murder of three (3) or more persons, whether committed during a single criminal episode or at different times within a forty-eight-month period." Tenn.Code Ann. § 39–13–204(i)(12). This Court has interpreted the mass murder aggravating circumstance as requiring proof that the defendant has been *convicted* of three or more murders in Tennessee within a period of forty-eight (48) months prior to the sentencing hearing at which the murders are used to establish the aggravating circumstance. *State v. Reid,* 213 S.W.3d 792, 819 (Tenn.2006); *State v. Black,* 815 S.W.2d 166, 183–184 (Tenn.1991); *State v. Bobo,* 727 S.W.2d 945, 955 (Tenn.1987). In the instant case, the defendant had been convicted prior to his capital sentencing hearing of murdering six persons in the same criminal episode. This proof is overwhelmingly sufficient to support application of the mass murder aggravating circumstance.

b. Ms. Williams, Mr. Seals, and Ms. Roberson

In sentencing the defendant to death for his convictions of first degree murders for killing Ms. Williams, Mr. Seals, and Ms. Roberson, the jury applied the three aggravating circumstances already discussed, as well as the following two additional aggravating circumstances: (1) the murder was committed for the purpose of avoiding, interfering with, or preventing the lawful arrest or prosecution of the defendant or another; and (2) the murder was knowingly committed while the defendant had a substantial role in committing, or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit any first degree murder. *See* Tenn.Code Ann. § 39–13–204(i)(6), (7).

We have already determined that the evidence is sufficient to support the jury's findings: (1) that the defendant had been "previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person[ ];" Tenn.Code Ann. § 39–13–204(i)(2); (2) that the defendant "knowingly created a great risk of death to two (2) or more persons, other than the victim murdered[ ];" *see* Tenn.Code Ann. § 39–13–204(i)(3); and (3) that the defendant committed mass murder, *see* Tenn.Code Ann. § 39–13–204(i)(12). We next consider whether the proof is sufficient to support the jury's findings of the two additional aggravating circumstances.

[50] **[51]** The (i)(6) aggravating circumstance requires proof that "[t]he murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another." ***80** Tenn.Code Ann. § 39–13–201(i)(6). This aggravating circumstance "may be applied when the proof shows that avoiding arrest was one motivation for the killing." *State v. Hartman,* 42 S.W.3d 44, 58 (Tenn.2001). Its application is "not limited to only those killings which are solely or predominantly motivated by a desire to avoid arrest or prosecution." *Id.; see also State v. Bush,* 942 S.W.2d 489, 504–05 (Tenn.1997). The evidence in this case showed that the defendant desperately wanted to avoid returning to jail. He admitted shooting Cecil during an argument. Ms. Williams, Mr. Seals, and Ms. Roberson, who were present at the home and in the vicinity of the living room —although Mr. Seals may have been in the kitchen—would have been able to identify the defendant as the perpetrator of Cecil's murder. By his own admission, the defendant left the home believing that all inside were dead, although he denied perpetrating the murders at trial. The defendant told his mother that he killed the children because they could identify him. All of this proof is sufficient to support the jury's finding that the murders of Ms. Williams, Mr. Seals, and Ms. Roberson were motivated by and committed, at least in part, to avoid arrest and prosecution. Tenn.Code Ann. § 39–13–204(i)(6).

[52] The proof also supports the jury's finding that the defendant knowingly committed the murders of Ms. Williams, Mr. Seals, and Ms. Roberson while he had a substantial role in committing or attempting to commit first degree murder. *See* Tenn.Code Ann. § 39–13–204(i)(7). Indeed, the defendant murdered Ms. Williams, Mr. Seals, and Ms. Roberson, during the course of murdering Cecil.

c. Cemario and Cecil II

In sentencing the defendant to death for the premeditated first degree murders of Cemario and Cecil II, the jury applied the same five aggravating circumstances that it had applied with regard to the first degree murders of Ms. Williams, Mr. Seals, and Ms. Roberson, as well as two additional aggravating circumstances: (1) the victim was less than twelve years old

and the defendant was eighteen years old or older; and (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. *See* Tenn.Code Ann. § 39–13–204(i)(1), (5).

We have already concluded that the evidence is sufficient to support five of the seven aggravating circumstances that the jury applied to impose the death sentences for the defendant's first degree murder convictions of Cemario and Cecil II. We also conclude that the proof is sufficient to support the jury's findings of the two additional aggravating circumstances that were applied only to the murders of Cemario and Cecil II.

[53] First, the record overwhelmingly supports the jury's findings that Cemario and Cecil II were less than twelve years old and the defendant was eighteen years old or older. *See* Tenn.Code Ann. § 39–13–204(i)(1). The evidence established that Cemario and Cecil II were four years old and two years old, respectively, when they were killed and that the defendant was over the age of eighteen.

[54] The proof also supports the jury's findings that Cemario's and Cecil II's murders were "especially heinous, atrocious, or cruel, in that [they] involved torture or serious physical abuse beyond that necessary to produce death." Tenn.Code Ann. § 39–13–204(i)(5). The medical examiner testified to the multiple extensive injuries that were inflicted upon each of these victims and explained that the children sustained more than one injury that was capable ***81** of causing their deaths. The proof established that each victim was stabbed repeatedly and severely beaten and that the physical abuse was beyond that necessary to cause death. The proof is more than sufficient to support the jury's finding of this aggravating circumstance.

3. Weighing Aggravating and Mitigating Circumstances

The evidence also supports the jury's finding that the aggravating circumstances applicable to each first degree murder conviction outweighed any mitigating circumstances beyond a reasonable doubt. Tenn.Code Ann. § 39–13–206(c)(1)(C). The trial court instructed the jury as to the following mitigating circumstances: (1) any lingering or residual doubt regarding the defendant's guilt; (2) the defendant was raised in a dysfunctional family since birth; (3) the defendant suffered childhood neglect; (4) the defendant's parents separated when he was six years old, and his father was not part of his life; (5) the defendant changed residences and schools on multiple occasions throughout early childhood; (6) the defendant was retained in the fourth grade twice due to truancy and was absent from school many times as a child; (7) the defendant was diagnosed with a learning disability; (8) the defendant's mother did not attend scheduled meetings and did not appear at juvenile court hearings on multiple occasions; (9) at the age of eighteen, the defendant witnessed what he believed to be intentional physical abuse of his younger brother by his mother; and (10) any other mitigating factor raised by the evidence produced by either the prosecution or defense in the guilt or sentencing hearing. The State presented evidence aimed at countering the mitigating circumstances on which the defendant relied.

Having thoroughly reviewed the record, we conclude that a rational juror could have concluded that the aggravating circumstances established by the State beyond a reasonable doubt as to each of the murders outweighed any mitigating circumstances and justified imposition of the death penalty for the first degree murders of Cecil, Ms. Williams, Mr. Seals, Ms. Roberson, Cemario, and Cecil II.

4. Proportionality Review

[55] **[56]** **[57]** **[58]** We next consider whether the sentences imposed in this case are excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant. Tenn.Code Ann. § 39–13–206(c)(1)(D). A death sentence is disproportionate only if "the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed." *Bland,* 958 S.W.2d at 665. A death sentence is not disproportionate merely because the circumstances of the offense are similar to those of another offense for which the defendant received a life sentence. *Id.* An appellate court does not function as a "super jury," *Godsey,* 60 S.W.3d at 782, nor does an appellate court assure "that a sentence less than death was never imposed in a case with similar characteristics," *Bland,* 958 S.W.2d at 665. Instead, our role in comparative proportionality review is to "assure that no aberrant death sentence is affirmed." *Id.*

[59] We have no mathematical or scientific formula for fulfilling this role. *Id.* at 668. Rather, this Court uses "the precedent-seeking method of comparative proportionality review in which we compare the case before us with other cases involving similar defendants and similar crimes." ***82** *State v. Davis,* 141 S.W.3d 600, 619–20 (Tenn.2004). This method requires an examination and comparison of "the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating circumstances involved" in the case under review, with other similar cases. *State v. Stevens,* 78 S.W.3d 817, 842 (Tenn.2002).

[60] In conducting this comparison, we consider the following factors, which focus on the nature of the crime: (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victim's circumstances, including age, physical and mental conditions, and the victim's treatment during the killing; (6) the absence or presence of provocation; (7) the absence or presence of justification; and (8) the injury to and effects on non-decedent victims. *Bland,* 958 S.W.2d at 667.

[61] **[62]** When reviewing the characteristics of the defendant, we consider: (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 the helplessness of the victim(s); and (8) the defendant's capacity for rehabilitation. *Id.* Moreover in conducting this review, " 'we select from the pool of cases in which a capital sentencing hearing was actually conducted to determine whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death.' " *State v. Holton,* 126 S.W.3d 845, 866 (Tenn.2004) (quoting *State v. Carruthers,* 35 S.W.3d 516, 570 (Tenn.2000)).

The sentences of death in the present case are neither excessive nor disproportionate to the penalty imposed in similar cases. The proof shows that on March 2, 2008, the defendant shot and killed his brother, Cecil, Ms. Williams, Mr. Seals, and Ms. Roberson. The defendant then stabbed and beat with wooden boards his four nephews and his niece, who ranged in age from nine years to two months old. Four-year-old Cemario and two-year-old Cecil II did not survive the brutal attacks, and the other children's survival was extraordinary, considering that the defendant left them in the home unattended and seriously injured for nearly forty hours. Cecil, Ms. Williams, Mr. Seals, and Ms. Roberson sustained multiple gunshot wounds. The children, Cemario and Cecil II, suffered multiple, indeed, innumerable blunt force and sharp force injuries. The unprovoked attacks on the children were both cruel and brutal. The defendant never attempted to render aid or summon help, but instead he left the scene, spent the remainder of the night and the next day with his girlfriend, and went to a restaurant for dinner later that day with his brother and a friend. He also reported for work on the Monday following the weekend killings and crime spree. The defendant admitted to the crimes only after he was confronted with a tape recording of one of his surviving nephews identifying him as the perpetrator. Although he then confessed to committing the crimes to the police and told his mother that he had murdered the children because they saw him shoot the adults, at trial he denied any involvement in the crimes and claimed that he had hidden beneath a bed while other unknown persons murdered and assaulted the victims.

In mitigation, the defendant offered proof that his family life was less than ***83** ideal. His parents married at a very young age, argued often, and engaged in physical altercations. As a child and youth, the defendant witnessed his father physically abuse his mother and his mother tear out windows in an apartment complex and place her baby in a bathtub of what the defendant perceived to be scalding water. When the defendant was six years old, his mother left his father, taking the defendant and his siblings with her and not contacting the defendant's father for four or five months. The defendant's family lived in poverty, and his mother was often away from home, leaving the defendant's sister, Nicole, to care for the defendant and Cecil. The children often had little food to eat, and the defendant and Cecil sometimes went hungry and other times stole money from their grandmother to buy food. Eventually, when the stealing persisted, their grandmother would no longer allow them to visit her home.

As for educational ability, the defendant was diagnosed with a learning disability in reading and math, was enrolled in resource classes, failed the fourth grade twice due to excessive absences, was socially promoted, was teased by other children for not having proper school clothing, and left school at age sixteen, while still only in the eighth grade, having attended ten different schools and having been suspended so often that the school system refused to allow him to continue to attend.

The defendant had disciplinary problems both at school and at home and was provided with individual counseling. His mother either failed to show up for or cancelled appointments with counselors. By age fifteen, the defendant had become involved in the juvenile court system and had several arrests and juvenile adjudications, and one of these incidents involved the use of weapons. The defendant was often involved in fights, and school and juvenile records referenced the defendant's fights, his hostility toward his brother, Cecil, and his mother's fear of him. The defendant's mother attended juvenile court with him on many occasions, and when she was unable to attend, his sister Nicole attended on her behalf.

The only legitimate job that the defendant ever held was as a security guard at the age of eighteen. At the age of nineteen, he pled guilty to second degree murder and was sentenced to eighteen years in prison. He joined the Crips gang while in prison and was written up for refusing to participate, for cursing an officer, and for cutting an inmate who was trying to leave the Crips. The defendant served fourteen years of his eighteen-year sentence before being released on parole. The defendant's mother and her husband visited him only once during his fourteen years in prison. No other family members visited him, although the defendant spoke with his father by telephone a few times.

Considering the record in this case in light of the relevant factors, we conclude that the defendant's death sentences are not excessive or disproportionate to the penalty imposed in similar cases. While no two capital cases and no two defendants are alike, the following cases and defendants share several similarities with this case and this defendant. *State v. Jordan,* 325 S.W.3d 1 (Tenn.2010) (upholding the death sentence where the defendant shot and killed his estranged wife and two men at his wife's work place and the jury found five aggravating circumstances); *State v. Holton,* 126 S.W.3d 845 (Tenn.2004) (upholding the death sentence where the defendant shot and killed his four children and the jury found the mass murder aggravating ***84** circumstance and, as to three victims, the under-age-twelve aggravating circumstance); *State v. Carruthers,* 35 S.W.3d 516 (Tenn.2000) (upholding the death penalty where the defendant shot two men, strangled the mother of one of the men, and buried all three victims alive and the jury found four aggravating circumstances, including prior violent felony, heinous, atrocious, or cruel, felony murder, and mass murder); *State v. Smith,* 868 S.W.2d 561 (Tenn.1993) (upholding the death penalty where the defendant shot and stabbed his wife and two stepsons and the jury found four aggravating circumstances, including heinous, atrocious, or cruel, murder to avoid apprehension, felony murder, and mass murder); *State v. Payne,* 791 S.W.2d 10 (Tenn.1990) (upholding the death sentence where the defendant stabbed his girlfriend's neighbor and the neighbor's two-year-old daughter and the jury found three of the same aggravating circumstances as those applied in this case).

This case is not identical to these earlier capital cases primarily because the murders and assaults the defendant perpetrated are some of the most horrendous ever committed in Tennessee. However, taken as a whole, this case is by no means "plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed." *Bland,* 958 S.W.2d at 665. Thus, we conclude that the sentences of death are not excessive or disproportionate to the penalties imposed in similar cases.

III. Conclusion

We have considered the entire record in this case and find that the sentences of death were not imposed in any arbitrary fashion, that the sentences of death are not excessive or disproportionate, that as to each death sentence the evidence supports the jury's findings of the statutory aggravating circumstances and the jury's finding that these aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. We have also considered all of the defendant's assignments of error and conclude that none has merit. As to the issues raised in this Court but not addressed in this opinion, we affirm the decision of the Court of Criminal Appeals. Relevant portions of that opinion are published hereafter as an appendix. The defendant's convictions and sentences are affirmed. The sentences of death shall be carried out as provided by law on the 17th day of November, 2015, unless otherwise ordered by this Court or other proper authority. It appearing that the defendant is indigent, costs of this appeal are taxed to the State of Tennessee.

WILLIAM C. KOCH, JR., J., and SHARON G. LEE, J., filed a separate concurring opinion.

WILLIAM C. KOCH, JR., and SHARON G. LEE, JJ., concurring.

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We concur fully with all of the Court's opinion except for Section II(E)(4) containing the proportionality analysis. After conducting our own independent proportionality analysis, we concur with the majority's conclusion that Mr. Dotson's death sentences are not disproportionate to the sentences imposed on other similar offenders who have committed similar crimes.

In 1997, the Court narrowed the scope of the proportionality review required by Tenn.Code Ann. § 39–13–206(c)(1)(D) (2010) by limiting its consideration to only those cases in which the death penalty had been sought. ***85** *State v. Bland,* 958 S.W.2d 651, 666 (Tenn.1997). The Court recently reaffirmed this truncated proportionality approach in *State v. Pruitt,* 415 S.W.3d 180, 217 (Tenn.2013). We dissented from the Court's decision to continue following the *State v. Bland* approach because it narrows the proportionality analysis required by Tenn.Code Ann. § 39–13–206(c)(1)(D). *State v. Pruitt,* 415 S.W.3d at 230 (Koch and Lee, JJ., concurring and dissenting). In place of the *State v. Bland* analysis, we determined that the Court should return to its pre-*Bland* proportionality analysis that considered "all first degree murder cases in which life imprisonment or a sentence of death has been imposed" [1] and that focused on whether the case under review more closely resembled cases that have resulted in the imposition of the death penalty than those that have not. *State v. Pruitt,* 415 S.W.3d at 230–31 (Koch and Lee, JJ., concurring and dissenting).

We have undertaken the broader analysis that we deem to be more consistent with Tenn.Code Ann. § 39–13–206(c)(1)(D). Based on our review of all similar first-degree murder cases, including those in which the death penalty was not sought, we have concluded that Mr. Dotson's personal background and the nature of the capital crimes he committed closely resemble the personal backgrounds and the crimes committed by other persons who have received a death sentence. Accordingly, based on the facts in this record, we have concluded, as required by Tenn.Code Ann. § 39–13–206(c)(1)(D), that Mr. Dotson's death sentences are "[neither] excessive [n]or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant."

Appendix

(Excerpts from the Decision of
the Court of Criminal Appeals)

IN THE COURT OF CRIMINAL
APPEALS OF TENNESSEE

AT JACKSON

April 9, 2013 Session

STATE OF TENNESSEE v. JESSIE DOTSON

Appeal from the Criminal Court for Shelby County

No. 0807688 James C. Beasley, Jr., Judge

No. W2011–00815–CCA–R3–DD

Alan E. Glenn, J., delivered the opinion of the Court, in which John Everett Williams and Jeffrey S. Bivins, JJ., joined.

Kathleen Morris, Nashville, Tennessee, and Marty Brett McAfee, Memphis, Tennessee, for the appellant, Jessie Dotson.

Robert E. Cooper, Jr., Attorney General and Reporter; Jeffrey Dean Zentner, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Damon Griffin, Reginald Henderson, and Raymond Lepone, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

[Analysis]

I. Sufficiency of the Evidence

The defendant contends that the evidence is insufficient to support his convictions, saying that it is insufficient to establish premeditation and his identity as the perpetrator and that the physical facts rule requires the reversal of his convictions.

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***86** Once a jury finds a defendant guilty, his presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans,* 838 S.W.2d 185, 191 (Tenn.1992). On appeal, the convicted defendant has the burden of demonstrating to this court why the evidence does not support the jury's verdict. *State v. Carruthers,* 35 S.W.3d 516, 557–58 (Tenn.2000); *State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn.1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Evans,* 108 S.W.3d 231, 236 (Tenn.2003); Tenn. R.App. P. 13(e). In contrast, the jury's verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. *State v. Harris,* 839 S.W.2d 54, 75 (Tenn.1992). The State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers,* 35 S.W.3d at 558; *Tuggle,* 639 S.W.2d at 914. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland,* 958 S.W.2d 651, 659 (Tenn.1997). We do not attempt to reweigh or reevaluate the evidence. *State v. Reid,* 91 S.W.3d 247, 277 (Tenn.2002); *Bland,* 958 S.W.2d at 659. Likewise, we do not replace the jury inferences drawn from the circumstantial evidence with our own inferences. *See State v. Elkins,* 102 S.W.3d 578, 582 (Tenn.2003); *Reid,* 91 S.W.3d at 277.

First degree murder is defined as the "premeditated and intentional killing of another." Tenn.Code Ann. § 39–13–202(a)(1). An intentional act requires that the person have the desire to engage in conduct or cause the result. *Id.* § 39–11–106(a)(18). A premeditated killing is one "done after the exercise of reflection and judgment." *Id.* § 39–13–202(d). Premeditation means that

> the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id.

Whether premeditation is present is a question of fact for the jury, and it may be determined from the circumstances surrounding the killing. *Bland,* 958 S.W.2d at 660; *State v. Anderson,* 835 S.W.2d 600, 605 (Tenn.Crim.App.1992). Circumstances that may be indicative of premeditation include declarations of the intent to kill, procurement of a weapon, the use of a deadly weapon upon an unarmed victim, the fact that the killing was particularly cruel, infliction of multiple wounds, the making of preparations before the killing for the purpose of concealing the crime, destruction or secretion of evidence, and calmness immediately after the killing. *State v. Jackson,* 173 S.W.3d 401, 409 (Tenn.2005); *State v. Nichols,* 24 S.W.3d 297, 302 (Tenn.2000). A defendant's failure to render aid to a victim can also indicate the existence of premeditation. *State v. Lewis,* 36 S.W.3d 88, 96 (Tenn.Crim.App.2000).

In cases where a defendant has been charged with the attempted commission of a crime, there must be evidence that the defendant acted "with the kind of culpability ***87** otherwise required for the offense" and acted "with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part." Tenn.Code Ann. § 39–12–101(a)(2). Criminal attempt also occurs when the defendant "[a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense." *Id.* § 39–12–101(a)(3).

A. Premeditation

The defendant argues that the evidence at trial established that he committed the crimes while in a state of excitement and passion. In support, he points to his statement to police

in which he related how he and Cecil were arguing and that Cecil was waving a gun around when the defendant grabbed his own gun and started shooting. The defendant argues that there is no evidence that he was "sufficiently free of that 'excitement and passion' before the children were assaulted, some of them fatally." We respectfully disagree.

Viewed in the light most favorable to the State, the evidence established that the defendant shot the adult victims multiple times and then repeatedly stabbed and beat the young children, moving from room to room to do so. Although the defendant told police that he first began shooting after Cecil reached for a shotgun, he told his mother that he began shooting after Cecil laid down his gun and that he attacked the children because they had seen him. We note that Sergeant Mullins testified that the shotgun appeared to have been placed in the corner near Cecil, the position in which police discovered it, as part of the staging of the scene.

Moreover, the killings and attempted killings were particularly cruel. Seals was shot in the face and chest, and the gun was close enough to Seals's face that it left stippling on his face when fired. Williams was shot in the head, chest, leg, thigh, and abdomen. Roberson was shot in both thighs and the left knee twice. Cecil had eight gunshot wounds, including to the head, neck, chest, thigh, and foot, and there was material on his face consistent with a pillow having been placed over his face and a gun fired through the pillow. The children were repeatedly and violently stabbed with knives and beaten with wooden boards, and C.D.1. was left in the bathtub with a knife sticking out of his head. In addition, the defendant talked to some of the victims, rejecting their claims that they loved him and continuing with his violent attacks.

The defendant altered the scene to make it appear as if the murders were drug or gang-related, moved bodies, disposed of or hid kitchen knives and handles, and collected the cartridge casings. He escaped on a bicycle and hid it in his girlfriend's shed. Instead of attempting to render aid or summon help, he went to a restaurant for dinner the next night and reported to work on the Monday following the attacks, without telling anyone about the crimes. He also lied to his family about the last time he had seen Cecil. This evidence was more than sufficient to establish the element of premeditation in the defendant's convictions for first degree murder and attempted first degree murder.

B. Physical Facts Rule

The defendant also contends that the evidence against him was largely based on the testimony of C.D.1, portions of which were negated by the "physical facts rule," ***88** requiring reversal of his convictions. We, again, respectfully disagree.

The physical facts rule is " 'the accepted proposition that in cases where the testimony of a witness is entirely irreconcilable with the physical evidence, the testimony can be disregarded.' " *State v. Allen,* 259 S.W.3d 671, 679 (Tenn.2008) (quoting *State v. Hornsby,* 858 S.W.2d 892, 894 (Tenn.1993)). When a witness's testimony "cannot possibly be true, is inherently unbelievable, or is opposed to natural laws, courts can declare the testimony incredible as a matter of law and decline to consider it." *Id.* (quotation omitted). For the physical facts rule to apply, the testimony "must be unbelievable on its face, i.e., testimony as to facts or events that the witness physically could not have possibly observed or events that could not have occurred under the laws of nature." *Id.* at 680. For example, testimony that a witness "saw the sun set in the east" could be disregarded. *Id.*

The physical facts rule, however, is a power "that should be used sparingly." *Hornsby,* 858 S.W.2d at 895. When the testimony "is capable of different interpretations, the matter should be left for the jury to decide as the sole arbiter of credibility." *Id.* The determination of whether there are inconsistencies in testimony, the reconciliation of conflicts in testimony, and the determination of how this might affect a witness's credibility, are within the province of the jury. *Id.* "[T]he improbability of the truth of the testimony, which justifies rejection under the physical facts rule, cannot rest upon any theory involving the consideration of the comparative credibility of the witnesses." *Id.* at 896 (quotations omitted). The physical facts rule may not be invoked "where its application depends upon assumptions or calculations based upon estimates as to speed, distance, time, and other such uncertain matters in the movement of objects." *Allen,* 259 S.W.3d at 680 (quotations omitted).

The defendant asserts that although C.D.1 testified that he saw the defendant attacking his siblings and speaking to Williams while C.D.1 was in the bathtub, "it would have been impossible to see inside the bedroom from his vantage point in the tub." The defendant also asserts that C.D.1's testimony

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that he was stabbed in the neck while lying on the bed in his sister's room was contradicted by the lack of his blood on that bed.

C.D.1 did not, however, testify that the defendant "stabbed" him in the neck, but instead that the defendant "cut" his neck. We note that Dr. Muhlbauer confirmed that C.D.1 had a superficial laceration across his neck and that no evidence was presented regarding what amount of blood, if any, such a superficial laceration would have produced. Regardless, we cannot conclude that C.D.1's testimony regarding the attack violated the physical facts rule. As this court has previously noted, "the fact that a witness testifies and that testimony ends up being inconsistent with other testimony raised at trial, ... even if [it is] scientific testimony, does not make it inadmissible testimony." *Lemar Brooks v. State,* No. M2010–02451–CCA–R3–PC, 2012 WL 112554, at *16 (Tenn.Crim.App. Jan. 11, 2012), *perm. app. denied* (Tenn. May 16, 2012) (quotations omitted). Throughout his testimony, C.D.1 identified the defendant as the perpetrator. The jury could have resolved any conflicts and discrepancies in his testimony by attributing them to his youth, his head injury, or the extreme trauma he must have experienced by witnessing and experiencing the horrific attacks against him and his family members. We conclude, therefore, that this issue is without merit.

***89 C. Identity**

Lastly, the defendant contends that the evidence is insufficient to establish his identity as the perpetrator. Specifically, he argues that his statement was inconsistent with the physical evidence and that the forensic evidence excluded him as the perpetrator. However, he confessed that he was the perpetrator, both in a statement to police and during his conversation with his mother. In addition, two of the child victims identified him as their attacker. By convicting the defendant of the indicted crimes, the jury obviously rejected the defendant's trial testimony in which he claimed to have been hiding under the bed while the murders and attempted murders were perpetrated by others. We conclude, therefore, that the evidence is more than sufficient to sustain the defendant's convictions.

* * *

VI. Trial Court's Treatment of Defense Counsel

The defendant next contends that the trial court's reprimand of defense counsel in open court prejudiced his right to a fair trial. The exchange about which the defendant complains occurred after defense counsel first questioned Sergeant Mullins about the presence at the crime scene and during the defendant's police interview of a camera crew from the television show, *The First 48,* and then asked Sergeant Mullins the following question about a cameraman who was recording the trial:

> Q. .... That guy is from A and E, isn't he, *The First 48* ? We're still continuing the story, aren't we?
>
> A. As far as I know, yes, sir.
>
> Q. We're filming the rest of the show; right?

Before Sergeant Mullins answered the question, the trial court interrupted, stating:

> THE COURT: [F]or the record, the Supreme Court of the State of Tennessee has authorized cameras in the courtroom. This Court allows one camera in the courtroom and all media outlets feed off of the one camera. That camera and the TV station associated with that is the lead camera that's in the courtroom. Every media outlet and every channel is peeling off of one camera. That is one that has been authorized by the Supreme Court to be here.
>
> [DEFENSE COUNSEL]: I understand.
>
> THE COURT: This Court is not authorizing a television show or to be part of a television show. They are following the rules that the Supreme Court says. So let's make sure the record is clear that this is not a TV show and this is not being produced as a TV show and it's not being edited as a TV show. This is a trial.
>
> [DEFENSE COUNSEL]: Can I ask him who the producer that's running the camera works for?
>
> THE COURT: No, sir.
>
> [PROSECUTOR]: I'm going to object to relevance.
>
> THE COURT: That camera is in this courtroom and you know that camera is in this courtroom under the rules of the Supreme Court of Tennessee. They are one of a party of media outlets that are using that feed. So let's don't

talk about this being part of a TV show. You want to ask questions, let's ask relevant questions.

[DEFENSE COUNSEL]: I am asking questions about this.

THE COURT: This is not apart [sic] of a television show.... Let's move on to something that's relevant.

***90** Defense counsel continued by questioning Sergeant Mullins about the presence of a camera and the crew from *The First 48* during the time the defendant was interviewed by police. The trial court again interrupted, informing defense counsel that it believed Sergeant Mullins had previously answered that question. The State requested a bench conference, and the trial court denied the request:

> That he was not present when that interview was conducted so let's move into areas that he's aware of, okay. I've allowed this to go for a long way, and I know where you're going and I understand why you're going there. He's already testified he wasn't present when that interview was conducted. He doesn't know who was in there.

During a subsequent jury-out hearing, co-counsel objected to the trial court's "calling down" defense counsel when he was questioning a witness. The trial court explained that defense counsel had accused the court of being part of a television show. The court stated, "And that's when I said enough. This is not part of a TV show. This is a court of law." The trial court agreed that in the future, it would not "call [defense counsel] down" in the jury's presence but would call them to the bench instead. The court thereafter apologized to defense counsel "for losing [its] temper." When the jury returned, the trial court then offered the following apology to the jury:

> All right. Ladies and gentlemen, first, let me apologize to you for losing my temper. I've already apologized to the lawyers. You need to understand that—and I know you do, this is an adversarial proceeding. But within that adversarial proceeding there [are] certain rules of decorum that we all must operate under, me included. I've worked with these lawyers for many years.
>
> Sometimes I lose my temper and it's inappropriate. I should not do that. I should not do it in the manner in which I sometimes lose my temper. So I've apologized to them. I apologize to you. I will say to you, you cannot, should not, nor would it be proper for you to in any way hold [the defendant] or anybody else responsible for my lack of being able to maintain my own cool. So I say that to you with all d[ue] respect. I hope you accept my apology.

"[A]ll litigants are entitled to the 'cold neutrality of an impartial court' and have a right to have their cases heard by fair and impartial judges." *Wright v. Pate,* 117 S.W.3d 774, 778 (Tenn.Ct.App.2002) (quoting *Kinard v. Kinard,* 986 S.W.2d 220, 227 (Tenn.Ct.App.1998)). Cannon 3(A) of the Code of Judicial Conduct provides that a trial judge should be "patient, dignified, and courteous to the litigants, jurors, witnesses and lawyers" during the course of a trial, and instructs the trial judge to perform his or her judicial duties without bias or prejudice. Tenn. Sup.Ct. R. 10. [1] While the trial judge is extended broad discretion in controlling the course and conduct of the trial, the trial judge must refrain from expressing "any thought that might lead the jury to infer that the judge is in favor of or against the defendant in a criminal trial." *State v. Cazes,* 875 S.W.2d 253, 260 (Tenn.1994); *State v. Harris,* 839 S.W.2d 54, 66 (Tenn.1992).

It is apparent that defense counsel's cross-examination of Sergeant Mullins about the presence of the camera crew and ***91** the fact that the trial was being filmed for possible use in a future television show came across to the trial court as an attack on the integrity and formality of the trial process, which led to the court's reprimand to counsel. While we can understand and sympathize with the trial court's frustration, we agree that the court should have avoided reprimanding defense counsel in the presence of the jury.

We do not, however, believe that the trial court's remarks, when viewed in the context of the entire trial, deprived the defendant of his constitutional right to a fair trial. The remarks constituted a brief portion of a multi-week trial; the trial court apologized to both defense counsel and the jury for the remarks; and the trial court appropriately instructed the jury that it was not to consider its comments against the defendant. We, therefore, conclude that, considering the record in its entirety, the error was harmless beyond a reasonable doubt. *See* *State v. John D. Joslin,* No. 03C01–9510–CR–00299, 1997 WL 583071, at *42–43 (Tenn.Crim.App. Sept. 22, 1997), *perm. app. denied* (Tenn. Nov. 9, 1998) (holding that

while the trial court's remark was improper, the error was "harmless beyond a reasonable doubt").

The defendant also complains that his right to a fair trial was violated by the fact that the trial court continued to interject during defense counsel's cross-examination of Sergeant Mullins, instructing defense counsel to repeat or rephrase questions and refusing to allow defense counsel to ask certain questions. The record, however, demonstrates that the trial court merely asked defense counsel to repeat or rephrase questions that were unclear and refused to allow counsel to repeatedly ask the same questions. By doing so, the trial court was fulfilling its duty to ensure that the proceedings "move[d] along in an orderly and systematical manner." *State v. Evans,* 838 S.W.2d 185, 195 (Tenn.1992). We conclude, therefore, that the defendant is not entitled to relief regarding this issue.

* * *

VIII. Admission of Photographs

The defendant contends that the trial court erred in denying his motion to prohibit the display of photographs of the victims after death. The admissibility of relevant photographs of victims and the crime scene is within the sound discretion of the trial court, and the court's ruling on admissibility will not be disturbed on appeal absent a showing of an abuse of that discretion. *State v. Carruthers,* 35 S.W.3d 516, 576–77 (Tenn.2000); *State v. Van Tran,* 864 S.W.2d 465, 477 (Tenn.1993); *State v. Banks,* 564 S.W.2d 947, 949 (Tenn.1978). As our supreme court stated in *Carruthers,* the modern trend is to vest more discretion in the trial court's rulings on admissibility. 35 S.W.3d at 577 (citing *Banks,* 564 S.W.2d at 949).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Tenn. R. Evid. 403. The court must determine the relevance of the visual evidence and weigh its probative value against any undue prejudice. *Id.* The term "unfair prejudice" has been defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Banks,* 564 S.W.2d at 950–51.

In *Banks,* our supreme court provided trial courts with guidance for determining ***92** the admissibility of relevant photographic evidence. The trial court should consider: the accuracy and clarity of the picture and its value as evidence; whether the picture depicts the body as it was found; the adequacy of testimonial evidence in relating the facts to the jury; and the need for the evidence to establish a prima facie case of guilt or to rebut the defendant's contentions. *Id.* at 951.

The defendant argues that the trial court erred in admitting photographs of the victims' facial injuries and crime scene photographs of the three child victims. We note, however, that the defendant raised no objections to the admission of the photographs at trial and at a pretrial hearing objected only to six photographs that depicted the children's injuries, which were taken at the hospital. At the conclusion of the hearing, the trial court ruled that five of the six photographs were relevant and admissible to show the extent and nature of the injuries in order for the State to prove premeditation. The court reserved its ruling on the sixth photograph in order for the State to determine whether it depicted a bloody bandage on a victim's head, or a portion of the child's scalp, stating that if it were a bandage, it would admit the photograph. The defendant has, thus, waived review of this issue.

Even if not waived, we would conclude that the trial court did not err in admitting the photographs. Photographs of a corpse are admissible in murder prosecutions if they are relevant to the issues at trial, notwithstanding their gruesome and horrifying character. *See Banks,* 564 S.W.2d at 950–51. The photographs admitted by the trial court were relevant to supplement the testimony of the medical examiner and the treating physician regarding the victims' injuries and to support the aggravating circumstances alleged by the State. *See, generally, State v. Cole,* 155 S.W.3d 885, 913 (Tenn.2005) (Appendix). We conclude, therefore, that the probative value of the photographs was not outweighed by their prejudicial effect, and the trial court did not abuse its discretion in admitting them.

IX. Denial of Motion to Provide DNA Analysis

The defendant next contends that the trial court erred in denying his second amended motion to provide DNA analysis for all those who were in contact with the crime scene. The defendant filed his initial motion on May 13, 2010, stating that the purpose of the request was to eliminate law enforcement, medical, and other personnel who were present at the crime scene from physical evidence at the scene that did not match the defendant or the victims. During a hearing, defense counsel informed the trial court that the motion was filed in response to a report from the FBI crime laboratory which stated that two Caucasian or Asian Mongoloid hairs that were discovered mixed in the blood on the buttocks and thigh region of Roberson's body could not be identified as belonging to the defendant or the victims. The trial court ordered the State to determine those of Caucasian or Asian Mongoloid descent who had contact with the victim's body in investigating the crime scene.

During a subsequent hearing, the State informed the trial court that five individuals had direct contact with the victim's body: the medical examiner, the medical examiner's assistant, an emergency response officer, and two people from the private corpse removal service that the medical examiner's office used to transport the victims' bodies. The trial court denied the defendant's motion to require those five people to provide DNA samples for comparison with the unidentified hairs, observing that it was unaware of any authority ***93** that would permit it to compel private citizens who were not suspected of a crime to provide DNA samples to the court for testing by a criminal defendant. The court also noted that even if DNA testing were to exclude those five individuals as contributors, such evidence would not, alone, exculpate the defendant.

The trial court further noted that the defendant could request that those five people voluntarily provide a DNA sample and that defense counsel could, during trial: (1) question the State's experts regarding the availability of DNA testing and their decision not to perform such tests in order to eliminate investigators and medical personnel as contributors of the hairs; (2) question law enforcement and medical witnesses regarding the protocols they followed in preserving the evidence and avoiding scene contamination; and (3) argue that the hairs possibly belonged to an unknown perpetrator or an additional perpetrator. The defendant also could employ his own expert to review and potentially refute the State's findings upon a showing of particularized need for funding. Finally, the trial court prohibited the State from unfairly benefitting from its ruling by either claiming or inferring that the unidentified hairs conclusively belonged to one of those five individuals, or other individuals, who had entered the crime scene. The only inference that the trial court allowed the State to draw was that the hairs remained unidentified and could have been left by someone other than an unknown perpetrator.

Shortly thereafter, the defendant filed amended motions in which he argued that the testing was necessary in order to protect his rights to confront witnesses, compulsory process of the law, and present a third party defense. The defendant asserted that the trial court could enter a protective order prohibiting disclosure of the testing absent court order. The trial court, however, once again denied the request.

The defendant acknowledges there is no Tennessee precedent for court-ordered DNA testing of law enforcement and medical personnel. *See, e.g.,* *Bartlett v. Hamwi,* 626 So.2d 1040, 1042–43 (Fla.Dist.Ct.App.1993) (upholding the trial court's denial of the defendant's motion to obtain a hair sample from a prosecution witness based upon the absence of a rule or statute authorizing such discovery, as well as a consideration of the witness's constitutional rights); *State v. McKinney,* 273 Neb. 346, 730 N.W.2d 74, 89–90 (2007) (applying the analysis in *Bartlett* in upholding the denial of the defendant's motion to obtain DNA samples from witnesses). The defendant argues, however, that such DNA testing is similar to law enforcement officers requesting "elimination fingerprints" when investigating a crime. We note, however, that in *State v. Dailey,* 273 S.W.3d 94, 97 (Tenn.2009), the case upon which the defendant relies, the trial court did not order the fingerprinting, but individuals were instead asked to voluntarily provide elimination fingerprints. *Id.*

Moreover, the withdrawal of blood for testing "infringes an expectation of privacy" and is subject to the constraints of the Fourth Amendment. *Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *State v. Scarborough,* 201 S.W.3d 607, 616 (Tenn.2006). Although we recognize that it is possible to "extract DNA by applying a sticky patch to the skin on an individual's forearm for a moment to acquire epidermal cells without puncturing the skin surface," *Scarborough,* 201 S.W.3d at 619 (quotations omitted), DNA analysis performed after the collection of a biological specimen "is a separate and distinct search ***94** which 'is potentially a far greater intrusion than the initial extraction of DNA, since the state analyzes DNA for information and maintains DNA records

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indefinitely.' " *Id.* (quoting *Nicholas v. Goord,* 430 F.3d 652, 670 (2d Cir.2005)).

"[A] witness, who is not a suspect, defendant or victim, should have no *less* protection against bodily intrusion than defendants or suspects in criminal cases." *Bartlett,* 626 So.2d at 1042 (footnote omitted). While the present case involves the defendant's request for evidence, a witness continues to be protected under the Fourth Amendment and the constitutional rights to privacy guaranteed by the United States Constitution. *See id.* at 1042–43. Thus, we must balance the constitutional rights of those third parties from whom the defendant sought to compel DNA samples against any rights that the defendant might have in presenting his defense. *See McKinney,* 730 N.W.2d at 90. In so doing, we agree with the trial court's observation that the exclusion of the personnel who came into contact with Roberson's body as the contributors of the hairs would not have exculpated the defendant, especially given the testimony at trial about the amount of traffic at the home during the five months in which Cecil lived there. After balancing these competing rights, we conclude that "[t]he circumstances presented here do not constitute a 'rare instance' where justice may require an invasion of a witness' privacy rights or an invasion of [a third party's] Fourth Amendment rights." *Bartlett,* 626 So.2d at 1043.

X. Denial of Motion for Production of Statements of Those Not Called as Witnesses

The defendant next contends that the trial court erred in denying his motion for production of statements of those not called as witnesses by the State and that the State was required to disclose those statements pursuant to *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S.Ct. 1194. In order to establish a *Brady* violation, a defendant must show that he or she requested the information, the State suppressed the information, the information was favorable to his or her defense, and the information was material. *State v. Edgin,* 902 S.W.2d 387, 389 (Tenn.1995). Evidence is "material" only if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). "Materiality" has been further explained as follows:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worth of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (quoting *Bagley,* 473 U.S. at 678, 105 S.Ct. 3375). The burden of proving a *Brady* violation rests with the defendant, and the violation must be proven by a preponderance of the evidence. *Edgin,* 902 S.W.2d at 389.

***95** First, the defendant has failed to establish that the State suppressed the information or that the information was favorable to the defense. During the pretrial hearing on the motion, defense counsel acknowledged that the State provided open-file discovery. The prosecutor also commented that "anything that's in the possession of the Memphis Police Department has to be turned over to the Defense." The defendant identifies testimony from various officers at trial that they received numerous tips regarding problems that Cecil was having with a gang and money that he allegedly took. The defendant, however, was able to present evidence through cross-examination of the State's witnesses, as well as through witnesses that he called to testify, that Cecil was in trouble with the Gangster Disciples for committing a gang violation and that Cecil owed $300,000 to "the mob." The defendant does not state what additional information he alleges that the State failed to disclose.

Moreover, the defendant has failed to show that the information was material. Evidence of the defendant's guilt was overwhelming. The jury heard and rejected evidence suggesting that Cecil might have been killed due to his debt with "the mob," in retaliation for the shooting death of a member of a rival gang, or as the result of committing a violation against one of his fellow gang members. The defendant fails to establish a reasonable probability that the result of the proceedings would have been different had

such additional evidence been disclosed to the defense. We conclude, therefore, that the defendant is not entitled to relief on the basis of this issue.

XI. Improper Jury Instructions

The defendant challenges as prejudicially improper multiple jury instructions given during the guilt phase of his trial. Because the defendant did not object to the instructions at trial or raise the issues in his motion for new trial, the issues are waived, and our review is limited to plain error. *Faulkner,* 154 S.W.3d at 58; *see also* Tenn. R.App. P. 3(e); Tenn. R.App. P. 36(a); Tenn. R.Crim. P. 52(b).

We must review jury instructions in their entirety, and we may not examine phrases in isolation. *State v. Rimmer,* 250 S.W.3d 12, 31 (Tenn.2008). In determining whether a defendant is harmed by an ambiguous, erroneous instruction, we must consider " 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.' " *Id.* (quoting *Cupp v. Naughten,* 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)). The significant question is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Id.* (quotations omitted). An ambiguous term does not necessarily constitute error. *Id.*

> [J]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id. (quotations omitted).

The defendant first asserts that the trial court's instruction defining "reasonable doubt" at the close of proof in the guilt phase improperly reduced the State's burden of proof. The trial court instructed the jury as follows:

> The law presumes that the defendant is innocent of the charges against him, therefore, you as the jury, must enter ***96** upon this investigation with the presumption that the defendant is not guilty of any crime and this presumption stands as a witness for him unless it is rebutted and overturned by competent and credible proof. It is, therefore, incumbent upon the State, before you can convict the defendant, to establish to your satisfaction, beyond a reasonable doubt, that the crime charged in the indictment has been committed; that the same was committed in Shelby County, Tennessee, before the indictment was returned and that the defendant on trial committed the crime in such a manner that would make him guilty under the law as it has been defined and explained to you.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden never shifts but it remains on the State throughout the trial of the case. The defendant is not required to prove his innocence. The State must have proven beyond a reasonable doubt all of the elements of the crime charged and that it was committed before the finding and returning of the indictment in this case.
>
> A reasonable doubt is that doubt created by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every element of proof requisite to constitute the offense.

The defendant takes issue with the statement, "Reasonable doubt does not mean a doubt that may arise from possibility." This issue was addressed by the Tennessee Supreme Court in *Rimmer,* 250 S.W.3d at 30–31. The court stated that a fair interpretation of the phrase is that "reasonable doubt does not mean a doubt that may arise from mere possibility no matter how improbable." *Id.* at 31. The court concluded that the jury instruction did not result in the denial of due process and that there was not a reasonable likelihood that the jury applied the burden of proof in an unconstitutional way. *Id.*

The defendant attempts to distinguish *Rimmer* from the present case because the instruction in *Rimmer* was given in the penalty phase, rather than the guilt phase as in the present case. The defendant does not cite any authority holding that the meaning of "reasonable doubt" differs between the guilt

and penalty phases. Under the circumstances of this case, we cannot conclude that the jury was reasonably likely to have applied the burden of proof in an unconstitutional way. While further use of this instruction is discouraged, *see id.,* the instruction is not unconstitutional.

The defendant also takes issue with the trial court's instruction during the guilt phase that "[t]here are nine counts in this indictment. You will have a packet of *sentencing* forms for each count as to each victim." (emphasis added). According to the defendant, the instruction indicated that "guilt was a foregone conclusion and the jury was charged with sentencing." Given that the trial court repeatedly instructed the jury that the defendant was innocent until proven guilty, we cannot conclude that the instruction affected a substantial right as to rise to the level of plain error.

The defendant next argues that the trial court improperly combined each of the six counts of first degree murder and each of the three counts of attempted first degree murder into one instruction. According to ***97** the defendant, the instruction suggested that all of the murder counts should have one verdict and all of the attempted murder counts should have one verdict. The trial court instructed the jury that it was to return a verdict on each of the nine counts, and the jury did as instructed. The defendant is not entitled to relief on this issue.

The defendant also complains about the following statement the trial court made after instructing the jury regarding the definitions of "intentionally," "knowingly," "recklessly," and "criminal negligence":

> These definitions apply to the offenses of Murder in the First Degree, Murder in the Second Degree, Voluntary Manslaughter, Reckless Homicide and Criminally Negligent Homicide. They also apply to the offenses of Attempted Murder in the First Degree, Attempted Murder in the Second Degree and Attempted Voluntary Manslaughter.

The defendant argues that through this instruction, the jury was told to apply the mental states of "recklessly" and "negligently" to the first degree murder charge. The trial court, however, then defined each of the offenses, which included the mental state applicable for each offense. The trial court specifically instructed the jury that in order to convict the defendant of premeditated first degree murder, it must find that the defendant acted "intentionally." Because the trial court's instruction for first degree and attempted first degree murder specifically limited their applications to an intentional mental state, we cannot conclude that the jury was told to apply and that the jury did apply the mental states of "recklessly" or "negligently" to the first degree and attempted first degree murder charges.

The defendant next asserts that the trial court's instruction to "[t]ake the case, consider all of the facts and circumstances fairly and impartially and return to the court with the verdict that TRUTH dictates and JUSTICE demands" informed the jury that if it believed that the defendant committed the offenses as alleged, it could render a verdict of guilt regardless of whether the State proved its allegations beyond a reasonable doubt. The trial court, however, repeatedly instructed the jury that the defendant was innocent until proven guilty. Thus, we cannot conclude that the instruction affected a substantial right of the defendant such as to rise to the level of plain error.

XII. Failure to Instruct Facilitation as a Lesser–Included Offense

The defendant next contends that the trial court erred in failing to instruct the jury on facilitation as a lesser-included offense of premeditated first degree murder and attempted first degree murder. Whether a particular instruction regarding a lesser-included offense should have been given is a mixed question of law and fact. *State v. Hatfield,* 130 S.W.3d 40, 41 (Tenn.2004). We review mixed questions of law and fact *de novo* with no presumption of correctness. *Carpenter v. State,* 126 S.W.3d 879, 892 (Tenn.2004).

Facilitation of the charged offense is a lesser-included offense under the test established in *State v. Burns,* 6 S.W.3d 453, 466–67 (Tenn.1999). The issue is whether the evidence presented at trial was sufficient to support an instruction for facilitation. A two-step analysis is necessary to determine if an instruction on a lesser-included offense is supported by the evidence. First, we must determine if any evidence exists that "reasonable minds could accept as to the lesser-included offense." *State v. Richmond,* 90 S.W.3d 648, 660 (Tenn.2002). Second, we must determine "if the evidence,

when viewed liberally ***98** in the light most favorable to the existence of a lesser-included offense, is legally sufficient to support a conviction for the lesser-included offense." *Id.*

The theory presented by the State at trial was that the defendant acted alone in shooting the adults and stabbing and beating the children. The theory presented by the defense was that someone else attacked the victims while the defendant hid in a bedroom under the bed. Neither of these theories support a facilitation instruction. We conclude, therefore, that the trial court properly declined to instruct the jury on facilitation as a lesser-included offense of premeditated first degree murder and attempted first degree murder.

XIII. Denial of Motion to Strike Aggravating Circumstances

The defendant next contends that the trial court erred in denying his motion to strike the (i)(3) and (i)(12) aggravating circumstances as duplicitous. The (i)(3) aggravating circumstance provides that the defendant "knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder." Tenn.Code Ann. § 39–13–204(i)(3). The (i)(12) aggravating circumstance provides that the defendant "committed 'mass murder,' which is defined as the murder of three (3) or more persons, whether committed during a single criminal episode or at different times within a forty-eight-month period." *Id.* at (i)(12). The defendant argues that these aggravating circumstances are duplicitous "[i]nasmuch as the risk of death factor in this case is inclusive in the mass murder factor."

Our supreme court has, however, already rejected the claim that the (i)(3) and (i)(12) aggravating circumstances are duplicitous, finding that each of these aggravating circumstances relies upon different policy justifications for rendering a defendant eligible for the death penalty. *State v. Jordan,* 325 S.W.3d 1, 74 (Tenn.2010). The court recognized that the fact that "the same conduct may satisfy certain elements of different aggravating circumstances does not contaminate the jury's sentencing process, or invalidate its weighing process." *Id.* The court, thus, declined to hold as unconstitutional the use of the same evidence to satisfy elements of different but valid aggravating circumstances. *Id.* The defendant, therefore, is not entitled to relief on this issue.

XIV. Denial of Motion for Probable Cause Finding that Aggravating Circumstances Existed

The defendant next contends that the decision to charge a capital offense must be made by the grand jury and not the prosecutor. He further argues that the failure to allege any aggravating circumstances in the indictment violated his Fifth Amendment right to an indictment by grand jury. The Tennessee Supreme Court has, however, rejected this argument. *See* *State v. Thomas,* 158 S.W.3d 361, 406 (Tenn.2005). The defendant is not, therefore, entitled to relief on the basis of this issue.

XV. Denial of Motion for Disclosure of Information Regarding Proportionality Review

The defendant next contends that the trial court erred in denying his motion for disclosure of information regarding proportionality review so that he may challenge the constitutionality of comparative proportionality review. Our supreme court has, however, rejected other similar challenges to the meaningfulness of comparative proportionality review. *See, e.g.,* ***99** *State v. Bland,* 958 S.W.2d 651, 663 (Tenn.1997); *State v. Brimmer,* 876 S.W.2d 75, 87 (Tenn.1994). Moreover, as fully discussed below, we conclude that the defendant's death sentences are proportionate to the penalty imposed in similar cases. This issue is, therefore, without merit.

XVI. Admission of Victim Impact Evidence

The defendant next contends that the trial court erred in admitting victim impact evidence in the penalty phase of the trial. The defendant does not identify specific testimony that he claims was erroneously admitted, but instead urges this court to adopt Justice Stevens' dissent in *Payne v. Tennessee,* 501 U.S. 808, 859–60, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), in which he opines that victim impact evidence is improper in any capital case. Our supreme court has, however, recognized the admissibility of victim impact evidence during the penalty phase of a capital case even after Justice Stevens' dissent in *Payne. See* *State v. Nesbit,* 978 S.W.2d 872, 899–90 (Tenn.1998) (finding no federal or state

constitutional barriers to victim impact evidence at capital sentencing). This issue is, therefore, without merit.

XVII. Denial of Motion to Argue Last

The defendant next contends that the trial court erred in denying his motion to argue last during the penalty phase. Tennessee Code Annotated section 39–13–204(d) provides that during the penalty phase, "the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing." The practice of allowing the State to argue last at sentencing has been held to be constitutional. *See* *State v. Melson,* 638 S.W.2d 342, 368 (Tenn.1982). This issue is without merit.

XVIII. Prosecutorial Misconduct

The defendant contends that the State committed prosecutorial misconduct during the rebuttal closing arguments in both the guilt and penalty phases of the trial. The defendant did not object to all the portions of the State's argument at trial that he claims are improper or raise the issue of prosecutorial misconduct in his motion for new trial. Therefore, the issue is waived, and our review is limited to plain error. *Faulkner,* 154 S.W.3d at 58; *see also* Tenn. R.App. P. 3(e); Tenn. R.App. P. 36(a); Tenn. R.Crim. P. 52(b).

Closing arguments are a "valuable privilege" and should not be unduly restricted. *Terry v. State,* 46 S.W.3d 147, 156 (Tenn.2001). "Consequently, attorneys are given greater leeway in arguing their positions before the jury, and the trial court has significant discretion in controlling these arguments, to be reversed only upon a showing of an abuse of that discretion." *Id.* We have explained that "arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *State v. Goltz,* 111 S.W.3d 1, 5 (Tenn.Crim.App.2003).

The generally recognized areas of prosecutorial misconduct in closing arguments occur when the prosecutor intentionally misstates the evidence or misleads the jury on the inferences it may draw from the evidence; expresses his or her personal opinion on the evidence of the defendant's guilt; uses arguments calculated to inflame the passions or prejudices of the jury; diverts the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions on the consequences of the jury's verdict; and intentionally refers to or argues facts outside ***100** the record, other than those that are matters of common public knowledge. *Id.* at 6.

The defendant first argues that the State denigrated the defense by referring to alternate theories as "smoke and mirrors," "ridiculous," and "insane" and by referring to defense counsel as a "tricky lawyer." A review of the record reveals that the prosecutor used the phrase "smoke and mirrors" to refer to the defense's attempts to divert attention from the issues and not as a suggestion that evidence was fabricated by the defense. The prosecutor used the phrase "ridiculous" to rebut the defense's argument that the murders were committed by gang members who then remained at the crime scene to rearrange the scene, and to rebut defense counsel's argument that the defendant's behavior following the murders could not be explained. The prosecutor described defense counsel's attempts to use evidence that the State believed to be irrelevant to argue reasonable doubt as "ridiculous" and "insane." When viewed in their context, we cannot conclude that the prosecutor's comments violated a clear rule of law. Moreover, even if the arguments were improper, the error was harmless in light of the strong evidence of guilt. Thus, the defendant also has failed to establish that the issue involves a substantial right. Accordingly, the issue does not rise to the level of plain error.

The defendant also complains about the prosecutor's rebuttal argument in the guilt phase of the trial that the jury should not discredit the testimony of two of the surviving children "because of some tricky lawyer or expert." When viewed in its context, we cannot conclude that the prosecutor's comment was an attack on defense counsel's credibility. Rather, the comment was an attempt by the prosecutor to persuade the jurors to focus on their own views of the credibility of these witnesses and the evidence.

The defendant also complains of the following statement by the prosecutor:

> And you want to talk about this tape and the five hours? Sure. The defense has a golden nugget because *The First 48* when they were editing their television show only played certain parts on TV and the rest they destroyed the raw

> footage. That wasn't in the Memphis Police Department's control. Remember that please because they're getting blamed for it.
>
> So now [the defendant] can say whatever he wants. Oh, that five hours that you don't get to see, this is what I was doing.

At the conclusion of the prosecutor's argument, defense counsel objected, asserting that evidence was never presented that employees from *The First 48* destroyed the tape recording of the officers' interrogation of the defendant. The defendant, however, does not make this argument on appeal. Rather, the defendant argues that the prosecutor interjected his own opinion by arguing that the defendant can "say whatever he wants." Based upon our review of the record, we conclude that the prosecutor was not interjecting his own opinion but was attacking the credibility of the defendant's testimony based upon the evidence presented at trial and the inferences drawn from the evidence.

The defendant also argues that the prosecutor testified when he stated the following:

> Prosecution witnesses are coached. That's another thing they're going to throw out at you. What proof do they have? Did they put me on the stand? Did they ask me hey, did you coach him last night? Because I would have given you an answer. These children wanted ***101** to come in here and tell you what happened to them the best they could.

We agree that the prosecutor's comment suggesting that defense counsel could have and should have called him to testify was improper. While the prosecutor's argument that the children who testified were not coached was not artfully made, we cannot conclude that the prosecutor's statement that "[t]hese children wanted to come in here and tell you want happened to them the best they could" constituted testimony from the prosecutor. After making the statement, the prosecutor discussed the trauma that the children suffered and the difficulties that the children experienced recalling details. Thus, the statement was consistent with the evidence presented at trial. The prosecutor's argument does not rise to the level of plain error.

The defendant also contends that the prosecutor injected his own opinion during closing arguments in the guilt phase by telling the jury that the defendant's testimony was "not believable" and that the defendant was "lying." The prosecutor did not offer his opinion. Rather, he argued that based on the evidence, the defendant's testimony was not believable and that he was lying. This argument was proper.

According to the defendant, the prosecutor encouraged the jury to experience the victims' fear during rebuttal argument in the penalty phase. The prosecutor's references to the fear that the victims must have felt related to the "nature and circumstances" of the offenses and, therefore, were proper. *See State v. Odom,* 336 S.W.3d 541, 562 (Tenn.2011).

The defendant contends that the prosecutor misrepresented the weighing procedure for aggravating and mitigating circumstances. While true, the prosecutor later corrected himself and stated the appropriate burden of proof. The trial court also instructed the jury on the correct burden of proof. This issue is, therefore, without merit.

Finally, the defendant complains of the prosecutor's comment that the defendant "stamped them out like they were insects in a two-hour period," as well as the following argument:

> What's going to stop him? You. You. And how are you going to do it? With the law, with the law. We're not asking anything of you but to follow the law. And the law does give you your verdict in this case, shall be death.

The defendant argues that by such language, the prosecutor urged the jurors to exact their personal retribution. When viewed in the context of the prosecutor's argument, these comments were not an effort to urge the jurors to exact their personal retribution but were an attempt to persuade the jury to impose the punishment afforded by the law. The prosecutor did not violate a clear rule of law in making such an argument. Thus, the issue does not rise to the level of plain error, and the defendant is not entitled to relief.

XIX. Allowing Death Verdicts to Stand

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The defendant next challenges the constitutionality of Tennessee's murder and death penalty statutes, arguing that the death penalty statute is unconstitutional because it limits the jury's discretion to exercise mercy by requiring the jury to impose a sentence of death if aggravating factors outweigh mitigating factors. The defendant also asserts that the statute does not require the jury to make the ultimate determination that the appropriate punishment is death, in violations of the Fifth, Sixth, Eighth, and Fourteenth ***102** Amendments to the United States Constitution. The Tennessee Supreme Court has, however, rejected this argument. *See* *State v. Smith,* 857 S.W.2d 1, 22 (Tenn.1993); *State v. Boyd,* 797 S.W.2d 589, 596 (Tenn.1990).

The defendant next argues that Tennessee's murder and death penalty statutes violate the equal protection clauses of the state and federal constitutions because they do not provide uniform standards for qualifying jurors for service on capital cases. This challenge, however, was rejected in *State v. Reid,* 91 S.W.3d 247, 313 (Tenn.2002).

The defendant also argues that the statutes are unconstitutional because they invest prosecutors with unlimited discretion to seek the death penalty. This argument has also been rejected. *See* *State v. Hines,* 919 S.W.2d 573, 582 (Tenn.1995).

The defendant next argues that the "heinous, atrocious, or cruel" aggravating factor is vague and overbroad. This argument likewise has been rejected. *See* *State v. Middlebrooks,* 995 S.W.2d 550, 556–57 (Tenn.1999).

According to the defendant, the language in the "mass murder" aggravating circumstance is too reminiscent of terrorism. The defendant does not cite to any authority in support of his claim. "Mass murder" is defined as "the murder of three (3) or more persons, whether committed during a single criminal episode or at different times within a forty-eight-month period." Tenn.Code Ann. § 39–13–204(i)(12). We conclude that the plain language of this statute does not imply terrorism. Moreover, the Tennessee Supreme Court has upheld the application of this aggravating circumstance in other capital cases. *See, e.g., Jordan,* 325 S.W.3d at 70. The defendant is not entitled to relief regarding this issue.

The defendant next contends that Tennessee's death penalty statute is unconstitutional because it permitted evidence of his prior conviction for second degree murder. Tennessee Code Annotated section 39–13–204, which permits the admission of the conviction and the facts and circumstances underlying the conviction, has been upheld as constitutional. *See Reid,* 91 S.W.3d at 312.

The defendant contends that Tennessee's death penalty statute violates state and federal constitutions because it does not give the jury unlimited discretion not to impose the death penalty. This argument is similar to the argument that the defendant made above and has been rejected. *See* *Smith,* 857 S.W.2d at 22; *Boyd,* 797 S.W.2d at 596. The defendant also contends that the death penalty is capriciously and arbitrarily imposed. This argument likewise has been rejected. *See Reid,* 91 S.W.3d at 312–13.

* * *

XXI. Sentencing for Non–Capital Offenses

The defendant challenges the trial court's order imposing forty-year consecutive sentences for each of the three attempted first degree murder convictions and also challenges the reasonableness of the sentencing hearing.

In determining an appropriate sentence, a trial court must consider the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on mitigating and enhancement factors; (6) any statistical ***103** information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement the defendant makes on his own behalf as to sentencing; and (8) the potential for rehabilitation. Tenn.Code Ann. §§ 40–35–103(5), –113, –114, –210(b). "The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed." Tenn.Code Ann. § 40–35–103(4).

Pursuant to the 2005 amendments, the Sentencing Act abandoned the statutory minimum sentence and rendered enhancement factors advisory only. *See* Tenn.Code Ann. §§ 40–35–114, 40–35–210(c). The 2005 amendments

set forth certain "advisory sentencing guidelines" that are not binding on the trial court; however, the trial court must consider them. Tenn.Code Ann. § 40–35–210(c). Although the application of the factors is advisory, the court shall consider "[e]vidence and information offered by the parties on the mitigating and enhancement factors in §§ 40–35–113 and 40–35–114." Tenn.Code Ann. § 40–35–210(b)(5). The trial court also must place on the record "what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing." Tenn.Code Ann. § 40–35–210(e). The weighing of mitigating and enhancing factors is left to the sound discretion of the trial court. *State v. Carter,* 254 S.W.3d 335, 345 (Tenn.2008). The trial court's weighing of the various enhancement and mitigating factors is not grounds for reversal under the revised Sentencing Act. *Id.* (citations omitted).

When a defendant challenges the length and manner of service of a sentence, this court reviews the trial court's sentencing determination under an abuse of discretion standard accompanied by a presumption of reasonableness. *State v. Bise,* 380 S.W.3d 682, 708 (Tenn.2012). If a trial court misapplies an enhancing or mitigating factor, the error will not remove the presumption of reasonableness from its sentencing determination. *Id.* at 709. This court will uphold the trial court's sentencing decision "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Id.* at 709–10. Moreover, under such circumstances, we may not disturb the sentence even if we had preferred a different result. *See Carter,* 254 S.W.3d at 346. The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn.Code Ann. § 40–35–401, Sentencing Comm'n Cmts.; *State v. Ashby,* 823 S.W.2d 166, 169 (Tenn.1991).

In sentencing the defendant, the trial court considered the purposes of sentencing set forth in Tennessee Code Annotated sections 40–35–102 and 40–35–103. The court found that based upon the defendant's prior conviction for second degree murder, he was a Range II, multiple offender.

The trial court applied seven enhancement factors to each of the three convictions for attempted first degree murder. The court found the following enhancement factors applied:

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
>
> (2) A victim of the offense was particularly vulnerable because of age or physical or mental disability;
>
> (3) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;
>
> ***104** (4) The personal injuries inflicted upon, or the amount of damage to property, sustained by or taken from the victim was particularly great;
>
> (5) The defendant possessed or employed a firearm, explosive device, or other deadly weapon during the commission of the offense;
>
> (6) The felony resulted in death or serious bodily injury or involved the threat of death of serious bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or serious bodily injury; and
>
> (7) During the commission of the felony, the defendant intentionally inflicted serious bodily injury upon another person, or the actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim.

Tenn.Code Ann. § 40–35–114(1), (4), (5), (6), (9), (11), (12). The trial court placed little weight on the prior criminal history enhancement factor and no weight on the serious bodily injury during the commission of a felony enhancement factor. *See id.* (1), (12). With regard to the defendant's conviction for the attempted first degree murder of C.D.1, the trial court placed little weight on the particularly vulnerable victim enhancement factor. *See id.* (4). The trial court found that no mitigating factors applied. The court sentenced the defendant to forty years for each conviction of attempted first degree murder. The court also found that the defendant was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high. *See* Tenn.Code Ann. § 40–35–

114(b)(5). The court ordered the defendant to serve his three convictions for attempted first degree murder consecutively to each other and to his death sentences.

A. Reasonableness of Sentencing Hearing

The defendant challenges the reasonableness of the sentencing hearing and argues that the trial court did not allow defense counsel to respond to the State's argument before imposing the sentences. The trial court asked defense counsel whether they wished to present any evidence and whether the defendant wished to make a statement. Defense counsel declined both offers. Defense counsel did not object or request that they be allowed to respond to the State's argument. This issue is without merit.

B. Reasonableness of Sentences

The defendant contends that the forty-year sentences were unreasonable. The defendant does not challenge the trial court's application of the seven enhancement factors. Rather, the defendant contends that the trial court erred in not considering evidence of non-statutory mitigating factors presented during the penalty phase.

As a Range II, multiple offender convicted of a Class A felony, the defendant was subject to a sentence of twenty-five to forty years. *See* Tenn.Code Ann. §§ 39–11–117, 40–35–112(b)(1). The trial court imposed the maximum sentence within the range. Upon a challenge to the sentence imposed, it is the duty of this court to analyze the issues under "an abuse of discretion standard of review, granting a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act." *Bise,* 380 S.W.3d at 707. Because the application of enhancement and mitigating factors ***105** to adjust a sentence was rendered advisory by the 2005 amendments, the trial court may set a sentence anywhere within the applicable range so long as the sentence is consistent with the principles and purposes of the Act, regardless of the presence or absence of mitigating and enhancement factors. The trial court in this case thoroughly considered the purposes and principles of the Sentencing Act in rendering its decision. The trial court did not abuse its discretion in imposing the maximum sentence within the applicable range.

C. Consecutive Sentences

The defendant asserts that the trial court erred in ordering that he serve his sentences for attempted first degree murder consecutively to each other and to his death sentences. In ordering consecutive sentences, the trial court found that the defendant is a "dangerous offender whose behavior indicates little or no regard to human life and no hesitation about committing a crime in which the risk to human life is high." Tenn.Code Ann. § 40–35–115(b)(4). "[W]hen a trial court uses the 'dangerous offender' factor, it must also decide whether consecutive sentences (1) reasonably relate to the severity of the offenses committed; (2) serve to protect the public from further criminal conduct by the offender; and (3) are congruent with general principles of sentencing." *State v. Alder,* 71 S.W.3d 299, 307 (Tenn.Crim.App.2001).

The trial court found that the circumstances of the offenses were "aggravated," stating, "I don't know of anything that I can think of is more aggravated than this." The court further found that consecutive sentences were reasonably related to the severity of the offenses and were necessary to protect the public from the defendant and his "reserve to criminal activity." The record fully supports these findings. We conclude, therefore, that the trial court properly imposed consecutive sentences based on its classification of the defendant as a dangerous offender.

XXII. Cumulative Error

The defendant asserts that the cumulative effect of the errors at trial rendered both the guilt, penalty, and sentencing phases of his trial fundamentally unfair. As explained above, any errors, when considered both individually and cumulatively, did not result in prejudice. The defendant is not, therefore, entitled to relief on the basis of this issue.

CONCLUSION

After review of the record and the applicable law, we affirm the defendant's convictions and sentences.

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All Citations

450 S.W.3d 1

Footnotes

1 "Prior to the setting of oral argument, the Court shall review the record and briefs and consider *all* errors assigned. The Court may enter an order designating those issues it wishes addressed at oral argument." Tenn. Sup.Ct. R. 12.2.

2 For clarity, we use given names, or abbreviated forms of given names, when referring to victims and witnesses who share the same surname with other victims and witnesses and/or the defendant. Use of the child victims' given names does not compromise their privacy because the record reflects that the surviving children's surnames were changed after these crimes were committed.

3 Mr. Waddell had the same mother as the defendant and Cecil.

4 The five children included Ms. Williams's four children with Cecil—C.J., Cedrick, Cemario and Ceniyah—as well as Cecil II, Erica Smith's child with Cecil.

5 The record does not indicate in which part of the house Ceniyah was found.

6 At the time of the investigation, Lieutenant Davidson was a sergeant in the Homicide Bureau of the Memphis Police Department.

7 When Deputy Director Armstrong and Lieutenant Davidson arrived at the scene between 6:30 and 7:30 p.m., a film crew from the television show, *The First 48,* was already on site. Both of these officers testified that they would have preferred not to allow the film crew access to the scene; however, they had no authority to do so, nor did they have authority to tell the film crew when to film or how to dispose of the film footage. Deputy Director Armstrong explained that "[t]he City [had] approved for the *The First 48* to have all of the access and privileges to go out on all homicides with us."

8 We omit Ida's surname to protect the privacy of the surviving children, whom she has adopted.

9 Lieutenant Davidson said that officers received numerous leads from Crime Stoppers tips, including some from "crackpots" and "psychics" telling them "ridiculous things." Deputy Director Armstrong testified that some of the Crime Stoppers tips indicated that the murders were gang-related, and both officers testified that many of these tips implicated the defendant in the crimes.

10 Ballistics testing of this nine-millimeter gun showed that it was not used in the Lester Street homicides.

11 Ms. Lane testified that the media had been discussing the defendant's background on television for "hours" and that at the time he threatened suicide the television news was showing a story profiling him.

12 Dr. Muhlbauer noted that he did not treat the external lacerations C.J. and Ceniyah sustained and that a general surgeon would have treated these injuries.

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13 The person known by this nickname, Markel Lester, testified for the defense at trial and spelled the nickname as “K–A–D–O–E.” The nickname is spelled “Cato” in the record on appeal and in the Court of Criminal Appeals's opinion, and we utilize this spelling as well.

14 Mr. Hill acknowledged having prior convictions for manufacturing, delivering, and selling a controlled substance; possession of cocaine with the intent to manufacture, sell, or deliver; possession of marijuana; and felon in possession of a handgun. Mr. Hill was on probation at the time of the defendant's trial.

15 C.J.'s older sister, Cierra, was not at home at the time these crimes were committed.

16 Jessie Sr. apparently left his base without permission, for which he was disciplined at the time.

17 The text of the relevant statutes has not changed since the time of trial; thus, citations are to the current statute.

18 Our holding in this regard is limited to capital cases. We note that in non-capital cases, to which the statutory duty of automatic review does not apply, the Court of Criminal Appeals has held that trial courts should not entertain motions to suppress that are not filed prior to trial. *See, e.g.,* *State v. Randolph,* 692 S.W.2d 37, 40 (Tenn.Crim.App.1985); *State v. Wilson,* 611 S.W.2d 843, 846–47 (Tenn.Crim.App.1980); *Feagins v. State,* 596 S.W.2d 108, 109–110 (Tenn.Crim.App.1979). We express no opinion on this separate issue.

19 Indeed, the State asked the Court of Criminal Appeals to review the suppression issues for plain error. The State changed its position in this Court and argued for the first time that the defendant forfeited all appellate review of suppression issues by failing to make a pretrial suppression motion.

20 The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

21 Article I, section 7 states:

> That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

22 We have previously held that “reasonable cause” and “probable cause” are synonymous. *Echols,* 382 S.W.3d at 278. We use “probable cause” in this opinion.

23 “When the source of the information is an unnamed citizen informant, ‘the reliability of the source and the information must be judged from all the circumstances and from the entirety of the affidavit.’ ” *Cauley,* 863 S.W.2d at 417 (quoting *Melson* 638 S.W.2d at 356);

24 Although no such showing is required, we note that the record on appeal establishes that C.J.'s identification of the defendant was motivated only by his interest in personal safety and in identifying the person who assaulted him and assaulted and murdered his siblings and parents.

25 *Miranda v. Arizona,* 384 U.S. 436, 444–45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

26 This portion of the United States Constitution guarantees that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

27 Article I, section 9 states that "in all criminal prosecutions, the accused ... shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9.

28 The defendant had not been charged with a criminal offense at the time he invoked his right to counsel; thus, the defendant's right to counsel under the Sixth Amendment to the United States Constitution had not attached. *Climer,* 400 S.W.3d at 566 n. 15.

29 The Supreme Court has since held, however, that introducing evidence of a defendant's pre-custodial, pre-*Miranda* silence does not violate the Fifth Amendment where the defendant did not expressly invoke the right to remain silent as the reason for his silence. *Salinas v. Texas,* —— U.S. ——, 133 S.Ct. 2174, 2181–82, 186 L.Ed.2d 376 (2013).

30 Deputy Director Armstrong testified on direct examination:

> Q. If you would, explain to the jury how you ended up coming into contact personally with [the defendant]?
>
> A. I watched the interview of Sergeant Mason and Sergeant Max's interview with [the defendant], during which he shut down on them and didn't want to talk to the two of them anymore. I then made a decision that I would go in and conduct the investigation—conduct the interview myself.
>
> ...
>
> Q. Tell the jury what you did when you walked into the room with [the defendant] and take them through kind of how you talked to him and what he was telling you.
>
> A. I walked in and I introduced myself. I told him I was Lieutenant Armstrong. I actually pulled up another chair and put my feet up in it and kind of leaned back and we just talked. We talked about how horrific this crime was. I watched his body language. At that point he seemed as if he was really, really tight, like he was doing everything he could not to talk to me. If I asked him a question, his answers were one-word answers, maybe one-or-two-word answers. He wouldn't engage me in open conversation. Most of the time if I asked him a question, he would nod his head or shake his head. But you could tell he was doing everything he could not to engage me in an open conversation as to where we had open dialogue back and forth with each other.

The State later questioned Deputy Director Armstrong as follows:

> Q. So you had this background information and then you went to talk to [the defendant]. Explain to the jury how the interview went, some of the things that you continued to say and what you talked about with [the defendant].
>
> A. Like I said, I walked into the interview room. I introduced myself. I pulled up a chair. I propped up my feet and we basically started talking and I asked Jessie to tell me some of the things that are important to you. He said my family. We talked about religion. I asked him whether or not he believed in God. He told me that he did. I asked him whether or not he believed in heaven and hell. He told me that he did. I could tell that he was almost like he was struggling to try to maintain his composure. There [were] several times that we talked it was almost—he leaned forward as if I want to tell you something but he'd get his self [sic] together and he'd lean back. So I could tell he was hiding something. I could

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tell he was doing everything he could, like I said, not to engage me in open conversation because he was trying to keep—limit his words to the least as he could.

31 The defendant has not argued that the Tennessee Constitution affords greater protection or that a different standard governs our analysis of his state constitutional claim.

32 Before *Crawford,* Confrontation Clause challenges to the admissibility of out-of-court statements of an unavailable witness were governed by *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

33 The defendant's trial also occurred before the Court of Criminal Appeals rendered its decision in *State v. Freeman,* No. M2011–00184–CCA–R3–CD, 2012 WL 1656975, at *10–13 (Tenn.Crim.App. May 9, 2012), which concluded that the autopsy report introduced into evidence at Mr. Freeman's trial was testimonial. *Freeman* was decided after *Melendez–Diaz* and *Bullcoming* but before *Williams.* Nonetheless, the autopsy report in *Freeman* qualified as testimonial under the test adopted by the plurality in *Williams* because, "[b]y the time the victim's autopsy was conducted, authorities had already concluded that she had been murdered *and had begun to build their case against [Freeman] as the perpetrator.*" *Id.* at *13 (emphasis added). It also qualified as "testimonial" under the primary purpose test preferred by the dissenters in *Williams* because the intermediate appellate court in *Freeman* could not "say that the autopsy ... had as its primary purpose anything other than use in a criminal trial." *Id.*

34 After *Crawford,* and before *Melendez–Diaz,* courts had held that autopsy reports were not testimonial. *See, e.g., United States v. De La Cruz,* 514 F.3d 121, 133 (1st Cir.2008) (holding that an autopsy report is a non-testimonial business record); *United States v. Feliz,* 467 F.3d 227, 236 (2nd Cir.2006) (same).

35 We note, however, that unlike the autopsy report at issue in *Freeman,* the autopsy reports in this case were prepared on March 4, 2008, *before* the defendant was identified as a suspect. Thus, the autopsy reports here do not satisfy the *Williams's* plurality's test for determining whether a statement is testimonial. Furthermore, the primary purpose of these autopsy reports was to identify the victims, locate and document their injuries, and determine the causes of their deaths. Thus, it is not at all clear that these autopsy reports would be classified as testimonial under the test espoused by the dissenters in *Williams.* Nor is it clear that these autopsy reports would satisfy Justice Thomas's formality criterion.

36 " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c).

1 *State v. Barber,* 753 S.W.2d 659, 666 (Tenn.1988).

1 The Code of Judicial Conduct was revised, effective July 1, 2012. Because the trial occurred prior to the effective date of the revisions, we refer to the Code that was in effect at the time of the trial.

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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.

STATE of Tennessee
v.
Jessie DOTSON.

No. W2011–00815–CCA–R3–DD.
|
April 9, 2013 Session.
|
June 25, 2013.

Appeal from the Criminal Court for Shelby County, No. 0807688; James C. Beasley, Jr., Judge.

Attorneys and Law Firms

Kathleen Morris, Nashville, Tennessee, and Marty Brett McAfee, Memphis, Tennessee, for the appellant, Jessie Dotson.

Robert E. Cooper, Jr., Attorney General and Reporter; Jeffrey Dean Zentner, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Damon Griffin, Reginald Henderson, and Raymond Lepone, Assistant District Attorneys General, for the appellee, State of Tennessee.

ALAN E. GLENN, J., delivered the opinion of the Court, in which JOHN EVERETT WILLIAMS and JEFFREY S. BIVINS, JJ., joined.

OPINION

ALAN E. GLENN, J.

***1** A Shelby County jury convicted the defendant, Jessie Dotson, of six counts of premeditated first degree murder and three counts of attempted first degree murder. The jury sentenced the defendant to death for each conviction of first degree murder. Following a separate sentencing hearing, the trial court sentenced the defendant as a Range II, multiple offender to forty years for each conviction for attempted first degree murder, to be served consecutively to each other and to the first degree murder sentences. On appeal, the defendant contends that: (1) the evidence is insufficient to support his convictions; (2) testimony regarding one of the victims' statement to police was hearsay and its admission violated the United States and Tennessee Constitutions; (3) the admission of the defendant's custodial statements violated his rights under the United States and Tennessee Constitutions; (4) the admission of testimony that the defendant invoked his right to counsel violated his due process rights; (5) the admission of testimony regarding the defendant's history of imprisonment violated his right to a fair trial; (6) the trial court's treatment of defense counsel in the jury's presence violated his right to a fair trial; (7) the admission of the pathologist's testimony regarding autopsies that she did not perform violated the defendant's confrontation rights; (8) the trial court erred in admitting photographs of the victims; (9) the trial court erred in denying the defendant's motion to provide DNA analysis of all those who came in contact with the crime scene; (10) the trial court erred in denying the defendant's motion for production of the statements of those not to be called as witnesses for the State; (11) the trial court improperly defined "reasonable doubt" in instructing the jury; (12) the trial court erred in refusing to instruct the jury on facilitation of first degree murder as a lesser included offense; (13) the trial court erred in denying the defendant's motion to strike aggravating circumstances; (14) the trial court erred in denying the defendant's motion for a probable cause finding regarding the aggravating circumstances; (15) the trial court erred in denying the defendant's motion for disclosure of information regarding the proportionality review; (16) the admission of victim impact evidence was improper; (17) the trial court erred in denying the defendant's motion to argue last during the penalty phase; (18) the State committed prosecutorial misconduct during its argument to the jury; (19) the trial court erred in allowing the death verdicts to stand; (20) the defendant's sentences for his three convictions for attempted first degree murder were excessive; and (21) cumulative error requires reversal. Based upon our review of the record and the applicable law, we affirm the judgments of the trial court.

FACTS

The defendant was convicted of six counts of premeditated first degree murder for the deaths of his brother, Cecil Dotson, Sr. ("Cecil");[1] Cecil's fiancée, Marissa Williams; Hollis Seals; Shindri Roberson; and two of Cecil's sons. The defendant also was convicted of three counts of attempted first degree murder of two of Cecil's sons and his daughter. The evidence presented at trial established that during the early morning hours of March 2, 2008, while at Cecil's home on Lester Street in Memphis, the defendant shot Cecil, Williams, Seals, and Roberson multiple times, killing them. He then repeatedly stabbed and beat Cecil's four sons, C.D.1, age nine; C.D.2, age five; C.D.3, age four; and C.D.4, age two, and Cecil's daughter, C.D.5, age two months.[2] C.D.3 and C.D.4 were killed, and C.D.1, C.D.2, and C.D.5 were severely injured but survived.

GUILT PHASE—STATE'S PROOF

***2** The victims were discovered during the evening hours of March 3, 2008, when Officer Randall Davis of the Memphis Police Department responded to a call to check on the welfare of the residents at the Lester Street address. Officer Davis testified that when he and another officer arrived and approached the house, he saw that the front door was open. Upon entering the house, Officer Davis saw the body of an adult male lying beside a television. As he rounded the corner, he saw three more adult bodies beside a couch. All four adults were deceased.

Officer Davis testified that he and two other officers cleared the house while one officer secured the door. Officer Davis said he entered a bathroom, saw someone in the bathtub, and pulled back the shower curtain to find a male child, later identified as C.D.1, with a knife stuck in his head. Officer Davis testified that he initially believed that C.D.1 was dead but then saw his eyes twitch. He alerted other officers and continued clearing the house.

Officer Davis testified he next walked down a hallway to a bedroom on the left where he saw a small child who was deceased. He then entered another bedroom where he saw two children but found no signs of life in either child. Meanwhile, another officer had located an infant, later identified as C.D.5. Officer Davis testified that there was blood throughout the house but that none of the blood appeared to be fresh. The firefighters arrived as Officer Davis was returning from the back bedroom, and he alerted them to C.D.1 in the bathtub and continued to secure the area.

On cross-examination, Officer Davis testified that when he approached the house, he detected the odor of deceased bodies. He looked into the house through the front door, saw someone's foot on the floor, and entered the house. Officer Davis did not check the adult victims for vital signs because it was obvious to him that they were deceased. However, he touched the children to see if any were still alive.

Herbert Henley, a firefighter with the Memphis Fire Department, testified that he entered the house and saw the body of a male adult kneeling facedown on the couch. He also saw two adult female bodies, one sitting on the floor against the sofa and the other propped up on the sofa leaning toward the first female. After an officer informed him that someone was in there, he entered the bathroom, pulled back the shower curtain, and saw C.D.1 in the bathtub. He realized C.D.1 was alive after seeing him move his hand, told his fellow firefighters that the child was alive, and obtained the assistance of Daniel Moore and Jason Vosburgh in transporting C.D.1 to an ambulance. Henley observed cuts on C.D.1's face and a "sawzall blade" sticking out of the top of his head. He described the bathroom as "a mess" with "blood everywhere."

Daniel Moore, a firefighter/EMT with the Memphis Fire Department, testified that he was instructed to check on the adults in the front room. It was obvious, however, that the adults were dead, so he did not physically check each adult victim. He said that the victim lying by the television appeared to have been there for some time, explaining, "Just by looking at them and just the horrific scene that was there with all the blood and everything, it was obvious that they had been down for a while." The blood was "definitely old."

***3** Moore testified that he and Vosburgh next entered the bloody bathroom where Henley had discovered C.D.1. As they looked in the bathtub, they saw C.D.1 turn his head and look at them, exposing a knife stuck in his head. Moore described the horrific scene: "He turned his head and the next thing we saw was one of the most horrible things I've ever seen, it was a knife stuck embedded in his skull and it was just stuck there. And it absolutely is the worst thing I've ever seen in my life." In addition to the knife embedded in C.D.1's skull,

Moore observed puncture wounds on the child's abdomen and multiple superficial cuts to his neck.

Jason Vosburgh, a firefighter with the Memphis Fire Department, testified he responded to a call of possibly seven dead individuals at a residence on Lester Street. Based upon the call, Vosburgh initially believed that the deaths could have been the result of carbon monoxide poisoning, so he put on his protective gear. However, upon arriving at the house, he knew immediately that he did not need the protective equipment, explaining, "You could smell the blood in the air. It was [a] thick, spoiled smell like it had been there a while."

Vosburgh testified that when he approached the porch, he saw an officer to the right of the door holding C.D.5. He walked inside and saw the bodies of the four adult victims to his right. He and a paramedic then entered the back bedroom, where they saw the bodies of two children. One of them was dead, while the other, C.D.2, was alive. Vosburgh stated that as he and the paramedic were carrying C .D.2 down the hallway, someone informed him that another deceased victim, whose throat had been cut, was in the front bedroom.

Vosburgh testified that as he and the paramedic were placing C.D.2 onto a stretcher, someone told Henley that another deceased victim was in the bathroom. Henley checked on that victim, C.D.1, and reported that he was alive. Vosburgh and Moore then entered the bathroom and saw C.D.1, who had a knife embedded in the right side of his head, roll over and look at them.

Patrick McDevitt, a firefighter/paramedic with the Memphis Fire Department, testified he was in one of the last ambulances to arrive and that surviving victims had been removed from the house by the time he reached the scene. He and his partner were instructed to confirm the deaths of the victims who remained inside the home, so they ran an ECG strip and touched each victim to confirm the absence of a pulse or other vital signs.

McDevitt testified he and his partner first confirmed the deaths of the children in the bedrooms. They moved the children's clothing to expose their skin in order to place the ECG strips on the children. They then moved the clothing back to its original position. McDevitt stated that he noted the absence of fresh blood and that the blood on each victim with which he came into contact appeared to be dry.

Annette Mallory, Seals's aunt, testified she last saw him a few days before his death. Rosie Puryear, Roberson's mother, testified that Roberson was twenty-two years old when she was killed and that she had last seen her approximately one month before her death.

***4** Ida Anderson, Williams' mother, testified that Williams and Cecil were engaged and had four children, C.D.1, C.D.2, C.D.3, and C.D.5. She said that the mother of C.D.4 was Erica Smith, and Williams and Smith had tension as a result of their relationships with Cecil. According to Anderson, in March 2008, Cecil, Williams, the five children, and Cecil's other daughter had been living at the Lester Street address for four or five months. Anderson stated that Williams was twenty-seven years old and that C.D.3 was four years old when they were killed.

Anderson testified that C.D.1 has undergone many surgeries and that additional surgeries would be required. He and C.D.2 were in school. At the time of trial, C.D.5 was almost three years old and doing "exceptionally well."

Jessie Dotson, Sr. ("Jessie Sr."), the father of Cecil and the defendant, testified that in March 2008, he and the defendant were employed as painters, while Cecil performed maintenance duties for various apartment complexes. Their family referred to the defendant as "Junior." The defendant was living with his sister, Nicole Dotson ("Nicole"), in an apartment at Goodwill Village in Memphis. On Saturday, March 1, 2008, Jessie Sr. and the defendant left work early because Jessie Sr. wanted to watch the University of Memphis basketball game on television at Cecil's house. Jessie Sr. arrived at Cecil's house at approximately 3:30 or 4:00 p.m. When he arrived, Cecil, the defendant, C.D.1, C.D.2, and C.D.4 were there. Jessie Sr. was not able to watch the game because Cecil did not subscribe to cable television. Instead, he went outside to his truck and listened to the game on the radio.

Jessie Sr. testified that he saw a gun while at Cecil's house and learned that it belonged to the defendant. He described the gun as "kind of like a powder blue I guess you could say a revolver, the kind with the thing that turn." He said the gun did not eject shell casings. Jessie Sr. stated that Cecil moved the gun from the top of the counter, commenting that the children might think it was a toy. After moving the weapon, Cecil told the defendant that he had moved his gun. Jessie Sr. said he left Cecil's house around 6:00 or 6:30 p.m. and, as he was leaving, saw Cecil on the porch cleaning his grill and preparing to

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barbecue. He did not see Cecil or the defendant again that night.

Jessie Sr. testified that when he arrived at Nicole's apartment to pick up the defendant for work the next day, he was not there, and Nicole did not know where he was. The defendant had not told Jessie Sr. that he was not coming to work, which surprised Jessie Sr. because they had planned to complete the job on which they had been working. Jessie Sr. stated that he instructed Nicole to tell the defendant to contact him if he wanted to continue his employment. Later that evening, the defendant called him and said that his girlfriend had hidden his cell phone following an argument. The defendant did not, however, tell him why he had not come to work and never mentioned that anything had happened at Cecil's home.

***5** The next day, March 3, 2008, Jessie Sr. picked up the defendant for work just before 8:00 a.m., and they worked until 11:00 a.m. when they stopped due to rain. During that time period, the defendant never mentioned that something had happened to Cecil and the other people in his house. Later that same day, the defendant called Jessie Sr. and told him that Nicole wanted him to drive by Cecil's house because Erica Smith had been there to pick up her son, discovered that the door was not closed, and was afraid that something was wrong.

When Jessie Sr. arrived at Cecil's house, he saw one or two police cars parked in the front and walked up to the door, but the officers turned him away. While he was there, a neighbor told him that she had not seen Cecil and his family all weekend and that she had been feeding the dog. He then went to his brother's house, where he learned from a newscast what had occurred at the house.

Jessie Sr. testified that the defendant later called him and said that he and other family members were in protective custody. The defendant never told him what happened to Cecil. A few days before trial, however, the defendant called and told him that he knew what had occurred inside Cecil's house.

Jessie Sr. said that Cecil was thirty years old, C.D.3 was four years old, and C.D.4 was two years old when they died. He had heard that Cecil was a member of the Gangster Disciples, and when he learned of the killings, he believed they were gang-related. Jessie Sr. said that Cecil told him that he was attempting to leave the Gangster Disciples and was worried about it to such an extent that he asked Jessie Sr. to live with him for a period of time. He said that Cecil explained to him that gang members respected each other's families and that they were unlikely to bother Cecil because of their respect for Jessie Sr. Jessie Sr. testified that, notwithstanding Cecil's assurances of his safety, several of Jessie Sr.'s brothers warned him that he would be killed by being in the midst of the trouble between Cecil and the gang members, and they talked him into moving out of Cecil's apartment after about a month.

William Waddell, the brother of the defendant and Cecil, testified he was with Cecil during the day on March 1, 2008. They visited "Doc Holiday," who wanted Cecil to perform some maintenance tasks for him. They then returned to Cecil's house where they watched a sports game and, later, picked up the defendant at Nicole's apartment and returned to Cecil's house. Waddell, Cecil, the defendant, Jessie Sr., Williams, and the children watched the University of Memphis basketball game.

Waddell testified that at some point that evening, he saw the defendant with a black and silver gun. He said the defendant generally carried a blue revolver, but he was unsure whether he saw the defendant with the gun that day. Waddell called Cecil numerous times on March 2, but he did not answer. Waddell said he first heard that something had happened to Cecil on March 3 at approximately 7:30 p.m. while he was at work. Smith had been calling him all day and said she believed that something was wrong, so he told her to call the police. Waddell went to the crime scene and met the defendant there. The defendant told him that Cecil had driven him to his girlfriend's apartment.

***6** Willie Boyd Hill, Jr., Cecil's best friend, testified that he had visited Cecil's home on Lester Street on several occasions. Hill said he knew "Doc Holiday," "Cato," "Dread," and Seals because he, Cecil, and those men were all members of the Gangster Disciples. He stated that the defendant was a member of the Crips gang.

Hill testified that on March 1, 2008, Seals, Cecil, and the defendant came to his apartment, located on Southern Avenue in Memphis, between 10:30 and 11:30 p.m. because Seals, who had just been released from jail, had left a pistol in Hill's care and wanted to retrieve the gun. Hill described it as a "German P2 something" that said "9 millimeter" on the outside of it and said it took .380 caliber bullets. He said he had loaded the bullets into the gun, which was the "kind you put a clip in" and which ejected shell casings. Seals, the defendant, and Cecil left his apartment with Seals saying that they were going to visit his girlfriend. Seals took the loaded

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gun with him, and Hill did not see any of the men after they left the apartment.

Hill testified that on March 3, he received a call from Waddell, who told him that something had happened to Cecil's family which he heard was a gas leak. Hill said he went to the crime scene where he saw several police cars, news crews, and family members, and he believed that the defendant also was there. When he saw the crime tape, he knew that it likely was not a gas leak. Hill testified that he later heard that the Gangster Disciples were involved in Cecil's death and therefore called "Cato," who denied the allegation.

Hill testified that he had a "falling out" with Cecil prior to his death and described how on the evening of February 14, 2008, he, his girlfriend, Cecil, Williams, and Smith had gone out drinking at a club before returning to Hill's girlfriend's apartment, where Cecil and Smith began arguing. He said Smith ran upstairs and went into his girlfriend's apartment, and Cecil went after her and began beating on the doors and windows, cursing both Smith and Hill's girlfriend. Hill's girlfriend called the police and when they arrived, Cecil told them that marijuana was inside the apartment. Hill was angered by this because Cecil knew that Hill also stayed at the apartment and that Gangster Disciples were not supposed to call the police on each other.

Hill testified that he told "Cato" what had happened, and that "Cato," in turn, informed "Doc Holiday." Hill then received a call from "Doc Holiday." "Doc," the "coordinator" over the Orange Mound area, told Hill to explain to "Dread," the chief of security over the area, what he had reported to "Cato." Hill was then summoned to an apartment on Dwight Street in Memphis, where he, "Doc," and "Dread" discussed the matter, and "Dread" told him to "write [Cecil] up."

Hill explained that a "write-up" is a disciplinary notice within the gang that results in punishment. Possible punishments included "[p]unches to the chest, punches to the lip, pumpkin head, three minutes to a DV" or "death violation." He said that a death violation generally was ordered only on that individual and not everyone associated with him. He did not write Cecil up, and if the Gangster Disciples had wanted to kill Cecil, they easily would have been able to get him alone and would not have waited until 2:00 a.m. Hill said that he had never heard of gangs killing innocent women and children and that if the Gangster Disciples were entering a home to kill someone, they would be armed and would not run out of bullets. Also, because "Dread" and "Doc" were close friends with Cecil, Hill did not believe they harmed him.

***7** Hill acknowledged that he had heard that, when Cecil was contacted about his discipline from the gang, he declined to accept the discipline. He also had heard that Cecil had hung up on "Doc" and that "Doc" had slept with Williams. He further acknowledged that he and Cecil, whom he described as "outspoken" and "arrogant," had argued on other occasions besides the Valentine's Day incident and that Cecil and "Doc" had a disagreement over drywall work that Cecil performed at "Doc's" apartment.

Hill denied being a member of a gang at the time of the killings. He said, "None of us was participating in any gang meetings or nothing like that but we still had love for it." He testified that he had contacted the police and cooperated with them, submitting both a hair and a swab sample. He cooperated because Cecil was his friend, and Cecil's family was like his own.

Hill testified that until mid-February 2008, the overseer or head of the Gangster Disciples in Memphis was "Big Easy," or Eric Brown, and he was then murdered. Hill did not know that Vernon Motley, whom the police believed had murdered Brown, was a Traveling Vice Lord or that Motley's girlfriend was Cecil's first cousin.

Hill acknowledged he had prior convictions for manufacturing, delivering, and selling a controlled substance, possession of cocaine with the intent to manufacture, sell, or deliver, possession of marijuana, and being a convicted felon in possession of a handgun and was on probation at the time of the defendant's trial.

The parties stipulated that the gun that Hill gave Seals on March 1, 2008, was a P–232 Sig Sauer handgun, a .380 caliber pistol with a seven-round magazine capacity, which could hold up to eight rounds if one round was in the chamber.

Stacey Young, a friend of Cecil, testified that at approximately midnight on March 2, 2008, Cecil, the defendant, and Seals came to her home in Cecil's blue Lincoln. Cecil introduced the defendant to Young, they talked "for a minute," and then the three men left. Cecil told Young that he was going to drop Seals and the defendant off and return. Young called Cecil at approximately 1:00 a.m., and he said that he had not "made it off Pendleton" and that he would return. He never returned, however.

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Erica Smith, C.D.4's mother, testified that although Cecil and his friends were Gangster Disciples, she had never been a member of a gang. Smith described the Valentine's Day argument and conflict and the falling out between Cecil and Hill caused by Cecil's having informed the police that marijuana was in Hill's girlfriend's apartment. Smith also described the dispute between Cecil and "Doc Holiday" over Cecil's repair work at "Doc's" apartment and "Doc's" failure to pay him.

Smith testified that at approximately 12:30 a.m. on March 2, 2008, Cecil, the defendant, Seals, and Roberson came to her apartment located at 2848 Kimball Avenue, and she went outside to talk to them. Cecil told her that he would return, but she told him not to do so. She called Cecil at approximately 1:15 a.m. and spoke to him, called him again at 1:30 a.m. but he did not answer, called a third time at 2:00 a.m. and again spoke to him. During that last telephone call, she heard Cecil and the defendant arguing and using profanity.

***8** Smith testified that because she and Cecil were supposed to attend church together on Sunday morning, March 2, she called him at 7:00 a.m., but he did not answer. After continuing to call and receiving no answer, she went to his house at approximately 3:00 p.m ., blew the horn, exited her car, and knocked on the storm door. The wood door was cracked open and the radio was playing, but she did not hear any of the children. She left without entering the house.

Smith testified that she continued calling Cecil throughout the day and into the next day, to no avail. She knew something was wrong when she went to his place of employment and learned that he was not there, explaining that he never missed work. She began calling Cecil's relatives and, after learning that none of them had heard from him, returned to Cecil's house, calling the police en route. When she got there, she parked and waited for the police. Smith said that the officers entered the house and then came outside, bringing with them a baby with her neck cut and asking her if she was the baby's mother. Smith testified that her son, C.D.4, was killed in the house.

Charity Wright, an employee of Crickett Wireless, identified from Cecil's cell phone records the phone numbers of Cecil, Stacey Young, and Erica Smith. Wright testified that Smith called Cecil's number on March 2, 2008, at 12:59 a.m. and that the call lasted seven minutes and ten seconds. Young called Cecil through a possible three-way call at 1:06 a.m., and the call lasted two minutes and ten seconds. Smith called again at 1:11 a.m., but Cecil did not answer. She also called at 1:25 a.m., 1:30 a.m., and 1:37 a.m., but Cecil did not answer. Smith called Cecil again at 1:37 a.m.; the call was answered and lasted twenty-eight seconds. The next call came in at 3:11 a.m. and was sent to voicemail.

Keaira Jones ("Keaira"), the daughter of Sheila Jones ("Sheila"), whom the defendant was dating in March of 2008, testified that, at that time, she was living with her mother at 1403 Silver Street. On Saturday, March 1, 2008, at 10:00 or 10:30 p.m., the defendant and Cecil came to her home, and both appeared to be intoxicated. The defendant was looking for Sheila, and Keaira told him that she had left earlier with her aunt. Cecil said that he wanted to leave, but the defendant said he wanted to come inside. The defendant entered the apartment and looked through the rooms and closets.

Keaira testified that the defendant returned at approximately 4:00 or 4:30 a.m., and she allowed him to enter. Approximately five minutes later, he knocked on her bedroom door and asked to talk to her. She was putting her son to sleep and told the defendant that she would speak to him shortly. She fell asleep and never opened the door. Before falling asleep, she heard water running in the bathroom. Keaira was asleep when her mother came home. The defendant left the next morning.

Keaira testified that after the defendant and her mother left, she noticed bleach spots on the brown rug in the bathroom. She also saw a bottle of Clorox bleach in the closet, which was not where it was usually stored.

***9** Sheila Jones testified she met the defendant through Nicole, with whom she had worked. She knew that the defendant had been living with Nicole and had been released from jail. On Saturday night, March 1, 2008, Sheila and a friend had a "ladies night out." When Sheila returned at approximately 5:00 a.m., she found the defendant lying in her bed, which surprised her because she had told him that she planned a ladies night out that evening. He told her that "ladies don't come in at five o'clock in the morning." She and the defendant got up at approximately 10:30 or 11:00 a.m. on March 2, and she did not know whether the defendant was supposed to be at work that morning.

On Monday, March 3, the defendant asked Sheila to pick him up at "Foxy's" house, but she explained to him that she had to take her grandson somewhere first and would pick

him up later wherever he was. When the defendant told her the Lester Street address, she headed there, only to find that the street was blocked by ambulances, fire trucks, and police cars. Sheila said the defendant, who was "kind of upset and shaking," told her that something had happened to his brother.

Sheila testified that the defendant never told her that he knew what had occurred on Lester Street. After she learned that the defendant had been arrested, she spoke to him by telephone and visited him. Approximately one to two weeks later, Sheila asked the defendant why he would not assist the police in their investigation, and he replied that "they got to figure it out." Sheila said that she had seen the defendant with a gun on one or two occasions. She said the gun had "a little blue on it" and a "wheel."

Nicole Dotson, the sister of the defendant and Cecil, testified that Cecil and his family had been living at the house for five or six months prior to their deaths. She considered both Williams and Smith to be her sisters-in-law and referred to Hill as her brother. At one point, Cecil and Hill had referred to themselves as Gangster Disciples but did not "mingle" on the streets with gangs or gang members. The defendant was a member of the Kitchen Crips.

Nicole testified that the defendant moved in with her in August 2007 after he was released from jail. She said that the defendant held a "grudge" against their family because he believed they should have visited more often while he was in jail. According to Nicole, the defendant expressed those feelings to her daily.

Nicole testified that on March 1, 2008, Cecil came to her apartment to pick up the defendant for a barbecue at Cecil's house, but the defendant had not yet returned from work. Once the defendant returned from work, Cecil and two of his sons returned to the apartment to pick up the defendant and drive him to the barbecue, which she did not attend. She next saw the defendant on Sunday morning at approximately 10:00 or 11:00 a.m., after hearing a car drive up and looking out the window to witness the defendant having a physical altercation with his girlfriend, Sheila, in the front seat of Sheila's car. Nicole did not see the defendant again until he returned home Sunday night.

***10** Nicole said that on March 3 at 6:30 p.m., she went to Cecil's house with the defendant and Tammy Randolph, their cousin. Ambulances, fire trucks, and police cars were at the scene and the police would not allow her to enter the house. Nicole said she did not know who had died and who had survived. She stated that the defendant instructed her not to talk to the media because they would blame him due to his criminal background. He also told her, while still at the scene, that he believed Hill and "Trell" had committed the homicides and became angry when their family called those men to the scene.

Sometime after March 3, Nicole, her mother, her four children, her three brothers, and her niece went to the home of Nicole's sister, Christina Hill Waddell, and her cousin, Sharhonda Lane, on Gayle Street in Memphis. While at their house, Nicole received two calls on her cell phone from her telephone at her apartment. The defendant brought her cell phone to her and asked if someone was in her apartment because the telephone number for her apartment appeared when someone called her cell phone. The defendant told her that the person who called sounded like a man but was disguising his voice. While the defendant was explaining this to Nicole, the person called the cell phone again, and the defendant answered. Nicole said she was "[t]errified" and called the police.

Nicole said that following the calls, she and Waddell drove to the police department. At some point, she received a call from her sister's house during which the caller related that something was wrong and that it involved the defendant. Nicole then spoke to the defendant. The defendant was "frantic" and said that "they going to put this on me. Just bury me and put me with my brother."

Nicole testified that she and the rest of the family were placed in protective custody. During that time, police officers came to talk to the defendant and took him away in handcuffs. Nicole said the defendant never told her that he was at Cecil's home at the time of the homicides or that he rode C.D.1's bicycle away from the scene. Nicole said that Cecil and the defendant were "gun fanatics."

Sharhonda Lane, the cousin of the defendant and Cecil, testified that on either Tuesday, March 4, or Wednesday, March 5, her family came to stay at her house. The next morning, Nicole and Waddell went to the police department. While they were gone, Lane was awakened by a "commotion" and the defendant threatening suicide. The defendant, who held a gun belonging to Waddell to his head, said that he did not want to return to jail, that they were trying to "pin" the offenses on him, and that he was not going to jail for something he did not do. Lane said that during that time,

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the news on television was showing a story profiling the defendant. A police car pulled up outside the house, and the defendant believed that the officers were coming for him. Lane said she went outside to speak to the officers and gave them her cell phone so they could speak to the defendant. The officers told the defendant that they were not there to arrest him but were placing the family in protective custody. On cross-examination, Lane testified that, prior to the defendant's threatening to commit suicide, the media had been discussing his background on television for "hours."

***11** Officer Laneeze Stepney of the Memphis Police Department testified that on March 6, 2008, he and his partner arrived in a marked police car and parked one house down from an address on Gayle Street, with instructions to watch the house and not to let anyone enter or leave. Officer Stepney said that he first spoke to a woman who eventually came outside and reported that the defendant said that if the officers entered the house, he was going to commit suicide. Officer Stepney then had the woman call the defendant, and he spoke with him on her cell phone for five to seven minutes until he was able to convince him to allow the officers to enter the house. Inside the home, the defendant told Officer Stepney, "[E]verybody think[s] I did it. I've been all on the news and the police saying I did it." Officer Stepney said he tried to calm the defendant, who was acting "real nervous like he had a lot on his mind."

C.D.1 testified that, at the time of trial, he was in the fifth grade. He said that in his bedroom he slept on the top bunk bed and his brothers, C.D.2 and C.D.3, slept on the bottom bunk. His older sister had the other bedroom, and his parents' bedroom was in the back of the house. C.D.1 said that on the night of the attacks, he was watching television in his sister's room because the television in his room was not working. C.D.1 heard a gunshot and walked out of his sister's room and into the hallway. C.D.1 said he "peeked" into the living room and saw the defendant pointing a gun at Cecil. He saw "some smoke and sparks come out the gun." The defendant was pointing the gun at Cecil's face, who did not say anything. C.D.1 testified, "I was looking and when I saw sparks out of the gun, I looked down on the ground and I saw dude on the floor." C.D .1 said "dude" was wearing a black shirt and black pants.

C.D.1 testified that he heard another gunshot and "peeked" through the door. He walked into the hallway and saw the defendant shooting at a woman who was on the arm of the couch. He did not know who the woman was. The woman told the defendant that she loved him, but he "just kept on shooting."

C.D.1 said he then returned to his sister's room and sat down on the bed. He heard footsteps coming toward the door, turned, and saw the defendant holding a "handheld knife." C.D.1 described the knife as the type that opens and closes. He said the defendant cut him on the neck, and he told the defendant he loved him, but the defendant replied, "[N]o, you don't." C.D.1 then lay down on the bed, and C.D.4 began crying. The defendant told C.D.4, "[D]on't worry about it, you ain't going to get hurt."

C.D.1 testified that he tried to retrieve the telephone from the hallway to call the police. He saw the defendant's feet in the doorway, and the defendant asked him what he was doing. When he said that he was going to call the police, the defendant said that if he did, he would kill C.D.1's parents and Cecil's friends. C.D.1 said he asked the defendant if he could use the restroom and noticed that the defendant had a "kitchen knife" in his hand. He said the defendant "ma[d]e [him] put [his] head in the tub." The defendant then tried to stab him in the chest, but he put his hand up to block the blow and the knife went into his head instead.

***12** C.D.1 said he saw his mother, Williams, in the doorway saying that she did not want to die. The defendant asked her for Cecil's cell phone and car keys, and Williams replied that the keys likely were in Cecil's car. The defendant then said, "[S]orry because I ain't let your husband or your husband's friends get away with it and the kids." C.D.1 then heard a "huge fall on the ground."

C.D.1 testified that he next saw the defendant walking in the hallway with a garbage bag and another kitchen knife. The defendant went into the bedroom of C.D.1's sister, and C.D.1 heard someone yelling and the defendant saying "shut up." C.D.1 then heard C.D.3 ask to use the restroom and saw blood dripping from C.D.3's head onto the rim of the toilet seat. He said C.D.3 asked the defendant if he could return to his room, and the defendant said that he could. Next, the defendant went into the kitchen, grabbed another knife, and entered the bedroom of C.D.1 and his brothers. C.D.1 said he saw C.D.3 lying on the bed and the defendant stab C.D.3, who then fell on the floor. C.D.1 said he heard "rambling" in the hallway near the laundry room as if the defendant was attempting to move something out of the way. C.D.1 said he then fell asleep in the bathtub.

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C.D.1 testified that when he awoke, he saw firemen in his bedroom looking at C.D.3. One of the firemen came into the bathroom and got C.D.1 out of the bathtub. C.D.1 was transported to the hospital by ambulance. He said no one was with the defendant during the attacks and the defendant acted alone.

C.D.1 testified that on the same night that the "bad thing" happened, a woman named "Cassandra" knocked on the door and said that she needed to use the restroom. She and some other people, including a man with a mask with "[a] little bit of blood" on it, entered the house. C.D.1 had never seen the man before and said that Cecil called him "Roderick." C.D.1 did not recall who allowed "Roderick" to enter the house. He acknowledged, however, that he told "Ms. Pat" that Cecil allowed "Roderick" to enter the house and that he was mad at Cecil for doing so. C.D.1 testified that "Roderick" said something to Cecil about the gang and also told Cecil, "[Y]ou got too big, boy." "Roderick" fired a gun at Cecil and said, "[N]ever stop playing with the gang boy, ... you never know what would happen, boy."

On redirect examination, C.D.1 identified the defendant as the person who stabbed him in the head, shot his parents and their friends, and hurt his brothers and baby sister.

On recross-examination, C.D.1 testified that he saw a fight in the living room between Cecil and the man in the mask and that the man was shooting at Cecil. He later met with "Ms. Caroline" and "Ms. Pat" at "Ms. Pat's" office. When they asked him how he knew some of the things he told them, he replied that his "granny" had told him.

C.D.2 testified that, at the time of trial, he was eight years old and in the third grade. He recalled living on Lester Street with his parents, brothers, and sister and said that he was six years old when he moved there. He said that the defendant stabbed him on the nose, forehead, and wrist and that no one else was with the defendant.

***13** C.D.2 testified that the attacks occurred at night but before he had eaten dinner. He did not recall hearing gunshots that night. He did not see the defendant shoot anyone, and no one told him that the defendant shot anyone. C.D.2 said the defendant got the knife from his car, but he could not remember the color of the defendant's car. C.D.2 said that while he did not see the defendant stabbing his parents, he recalled that his parents and their friends were stabbed. C.D.2 said that when his parents were killed, all of the children, other than one of his brothers and the baby, were locked in his sister's bedroom. His brother told him that Williams was injured while she was in the living room changing the baby's diaper.

C.D.2 testified that he heard Smith on the telephone calling the police. "Auntie Foxy" also was present when they were attacked. C .D.2 acknowledged that he told "Ms. Pat" that his father never should have opened the door. He also discussed this with C.D.1. He said the fight began after his father opened the door. C.D.2 also said that there were many people fighting that night and that a man, whom he did not know, was fighting his father and his father's friends.

C.D.2 stated that after the defendant stabbed C.D.1, C.D.1 snuck out of the house, got on his bicycle, and rode to his grandmother's house. He said that when C.D.1 left, everyone was still alive in the house and that they were talking, singing, and having fun.

On redirect examination, C.D.2 testified that he was in his sister's room when the defendant stabbed him. He told "Ms. Pat" that the defendant stabbed him. On recross-examination, C.D.2 testified that he talked to "Ms. Pat" after he had been living with his family for a period of time. People had discussed the events, and C.D.2 had listened to their discussions.

Lieutenant Walter Davidson of the Memphis Police Department, who was assigned as the case coordinator, testified that on March 3, 2008, he received a call at his home from Lieutenant Toney Armstrong instructing him to go to the scene where four adults and two children were dead. Lieutenant Armstrong also reported that three children were being transported to the hospital and were not expected to survive.

Lieutenant Davidson testified that he remained at the crime scene until the medical examiners removed the victims' bodies and transported them to the morgue and that when he left in the early morning hours of March 4, a uniformed officer remained behind on the scene. Lieutenant Davidson said he was aware that a cameraman from the television show, *The First 48,* was at the scene.

Lieutenant Davidson testified that he and Lieutenant Armstrong decided to quarantine the children in the hospital to prevent contact with relatives, the media, or anyone other than medical personnel. They did not know the identity of the

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perpetrator and wanted to ensure that the perpetrator would not attempt to injure the children in the hospital. The identities of the surviving children were not released. He said that the officers had information regarding possible gang involvement and that Sergeant Terry Max was assigned to investigate any possible gang involvement. Sergeants and detectives from the Safe Streets Task Force and the Organized Crime Unit assisted in canvassing the neighborhood and interviewing neighbors. Gang members were interviewed, as well as others who wanted to provide information. Lieutenant Davidson said officers received numerous leads from CrimeStoppers tips, including some from "crackpots" and "psychics" telling them "ridiculous things."

***14** Lieutenant Davidson testified that when he learned that C.D.1 was awake, he sent Sergeant Caroline Mason to the hospital to talk to him. He explained that officers decided to attempt to speak with C.D.1 in the hospital early into the investigation due to the possibility that C.D.1 might die. Sergeant Mason reported back to him that C.D.1 was "in and out" of consciousness and was cursing, "talking crazy," and screaming out names. C.D.1 mentioned Cassandra, Williams' sister, but she was interviewed and it was "obvious" that she was not involved. At some point, officers decided to send Pat Lewis with the Child Advocacy Center to the hospital with Sergeant Mason to talk to C.D.1. Lieutenant Davidson said that if C.D.1 said something that made sense, they attempted to investigate that lead.

Lieutenant Davidson said that on March 7, 2008, officers received a telephone call from a nurse at the hospital informing them that C.D. 1 was now awake and rational, so he sent Sergeant Mason back to talk to him. During that interview, C.D.1 reported that "Uncle Junior," whom officers identified as the defendant, was responsible for killing his family and stabbing him and his siblings. In response, officers from the Tactical Unit retrieved the defendant, who was in a safe house with the rest of his family.

Lieutenant Davidson explained that the victims' family, including the defendant, was in protective custody because members of the Gangster Disciples had learned that officers were searching for them in connection with the case, were angry that they were being implicated in the killing of children, and had reportedly kicked in the door of the house of one of the victims' relatives. Lieutenant Davidson testified: "We had a trillion Crime Stoppers tips saying that we needed to look at [the defendant] but from my standpoint, he was a family member, he wasn't a suspect" until C.D.1 implicated him.

Lieutenant Davidson testified that the defendant was interviewed and remained in custody for several hours. After Lieutenant Armstrong played the recording of C.D.1's interview during which he implicated the defendant, he confessed to shooting the adult victims and stabbing the children. The defendant then asked for his mother. Officers retrieved his mother from the safe house, and he confessed to her also. After the defendant confessed, officers investigated whether the offenses could have occurred as stated by him. Lieutenant Davidson said that the evidence was consistent with the information that the defendant provided in his confession. He told his mother that following the homicides, he rode C.D.1's bicycle to 1403 Silver Street, the home of his girlfriend, Sheila Jones. Sergeant Dave Parks and Sergeant Joe Stark went to that address, where they located C.D.1's yellow bicycle. The defendant told Lieutenant Armstrong that he committed the offenses alone and told his mother, "I did it," not that "we did it."

On redirect examination, Lieutenant Davidson testified that on March 7, 2008, C.D.1 told officers who committed the homicides, and the person whom he identified confessed. He said that as a result, "the gang issue was out" and that he considered the case to be solved. Since March 7, C.D.1 has identified only the defendant as the perpetrator.

***15** Sergeant James Terry Max of the Memphis Police Department testified that on March 4, 2008, Lieutenant Davidson requested that he and Sergeant Stark interview the defendant, who had been brought into the office and placed in an interview room. Sergeant Max said the defendant was not under arrest but was considered a possible witness at that point. During that initial interview, the defendant told the officers that he left work at approximately 3:00 p.m. on March 1 and went to Nicole's apartment. Cecil arrived in his Lincoln, along with two of his children. Cecil drove the defendant to Cecil's house on Lester Street, arriving at approximately 4:15 p.m., and found Williams, Cecil, Waddell, and Cecil's five children there. They had planned to watch a basketball game between the University of Memphis and Southern Mississippi State University on television. Cecil's television, however, did not receive the channel on which the game was broadcast.

The defendant told officers that he, Cecil, and "E," who had arrived later in the evening, left Cecil's house between 10:00 and 10:30 p.m. Sergeant Max testified that "E" was later

identified as Seals. The defendant said they went to "Frank's" apartment in the area of Highland Avenue and Spottswood Avenue. Officers later identified "Frank" as Willie Boyd Hill. The defendant said that Seals went into Hill's apartment. Shortly thereafter, a man with a light complexion and wearing glasses exited Hill's apartment, and Cecil got out of the car and talked to the man for some time. Twenty to thirty minutes later, Seals exited Hill's apartment, and Seals, Cecil, and the defendant left.

The defendant further told the officers that he, Seals, and Cecil next went to an apartment complex by the Clayborne Homes housing project to pick up Seals's girlfriend. The defendant, Cecil, Seals, and Seals's girlfriend then went to the Kimball Cabana Apartments to purchase marijuana, arriving there at approximately 11:30 p.m. or midnight. Cecil then went into a downstairs apartment. When he came out, he went to the car and got the defendant, and they went into the same apartment where there were four black men whom the defendant did not know. Cecil introduced the defendant to the men as his brother and told them that the defendant had just been released from prison. Cecil purchased a quarter-ounce bag of marijuana, and the defendant purchased $20 worth of marijuana. After they left the apartment, they saw Erica Smith in the parking lot and spoke with her. The defendant said they then stopped at a woman's house located off Lamar Avenue, talked to her for approximately thirty minutes, and then left.

The defendant told officers that they next went to the Kansas Court housing project to pick up his son. His son was not there, and they spoke to his son's grandmother. They remained there for approximately ten minutes, gave her money, and left. The defendant said Cecil then dropped him off at Sheila's apartment at approximately 2:15 or 2:30 a.m. Cecil, Seals, and Seals's girlfriend left. The defendant stated that Sheila was not at the apartment. Keaira and her boyfriend were there. The defendant said he and Keaira argued because Keaira was alone with her boyfriend. The defendant said that he went to bed and that Sheila returned at approximately 5:05 a.m.

***16** Sergeant Max testified that when the officers asked the defendant whether Cecil had any enemies, the defendant related the conflict between Seals and Cecil that had occurred approximately two weeks prior to Cecil's death when Cecil, Smith, Seals, and Seals's girlfriend had returned to Seals's apartment following a visit to a club, Seals's girlfriend had called the police after Cecil slapped Smith, and Cecil had informed the responding officers that there were drugs in Seals's apartment. The defendant told the officers that Seals had written Cecil up for a violation through "Doc Holiday," and that a meeting or jury trial with the Gangster Disciples was supposed to have been held to determine Cecil's guilt, but Cecil never attended the meeting or trial.

Sergeant Max testified the defendant told officers that Cecil always carried a .45 caliber handgun, but he did not see it when he was with Cecil on March 1 and during the early morning hours of March 2. Cecil also had an AK–47 assault rifle with two magazines that he kept under a dresser, a sawed-off shotgun, and a nine-millimeter handgun that he believed Williams had purchased recently. The defendant did not say that there had been an altercation at Seals's apartment on March 1 and did not provide a reason for going to Seals's apartment that night.

Sergeant Max testified that, up until that point, he had not been investigating any involvement by the Gangster Disciples but that officers then began following leads regarding the Gangster Disciples. Officers, however, later learned that one of the surviving children had identified the shooter, and they then arrested the defendant and brought him back to the homicide office, where he confessed to the attacks.

On cross-examination, Sergeant Max testified that he was unaware that C.D.1 told the police that a man named "Roderick" committed the offenses. He said he was not present when C.D.1 told officers that his "daddy opened the door, my daddy shouldn't have opened the door." Sergeant Max stated that the defendant told them that, following the murders, Waddell asked Seals to call someone and find out what had happened and that Seals called "Doc Holiday" and asked him what had happened or who committed the offenses.

Sergeant Max testified that, during the course of his investigation, he also spoke to Cedric Atkins about information he had received about Cecil's having stolen $300,000 from a drug dealer. In addition, on March 7, 2008, Lieutenant Armstrong instructed him to meet with Deputy Bartlett of the Shelby County Sheriff's Department to interview a confidential informant, who told the officers that he had heard that Cecil had taken $50,000 in drug money from "Doc Holiday." Sergeant Max showed the informant colored copies of photographs taken from Cecil's home to determine whether the informant could identify "Doc Holiday" and Cecil in order to verify that the informant knew fellow Gangster Disciples. The informant was able to make such an identification. At that point in the investigation, officers believed that they had identified "Doc Holiday." They were

able to obtain a telephone number for him, and his name was mentioned as the governor of the Gangster Disciples.

***17** Lieutenant Caroline Mason of the Memphis Police Department testified that in March 2008, she was a sergeant in the Homicide Bureau. On Wednesday, March 5, she was assigned to LeBonheur Children's Hospital with instructions to assess the surviving children and determine what information they could provide. She said C.D.1 was badly injured and in "pretty bad condition" but improved every day. C.D.1 was "saying things," and Lieutenant Mason relayed those statements to Lieutenant Armstrong.

On March 7, Lieutenant Armstrong instructed Lieutenant Mason and Sergeant Stark to speak to the defendant. The defendant, who was under arrest at that time, waived his rights and agreed to speak with them. Lieutenant Mason testified that she explained to him that they wanted to clear up some things and determine whether he wanted to add any information to what he provided in his March 4 interview. She asked the defendant whether he had any affiliation with a gang, and he replied that he was a Crip in prison. She then asked the defendant whether he had any problems with Cecil and questioned him regarding their relationship. The defendant stated that on one occasion, Cecil had called the police and falsely reported that the defendant had committed a robbery.

Lieutenant Mason testified that she asked the defendant to tell them again about what he did on March 1 and the last time that he saw Cecil alive. He then essentially repeated the same account he had provided during the March 4 interview, with one or two differences. Among those were that he, Cecil, and Seals had gone to Hill's apartment for Seals to retrieve a gun from Hill. The defendant also said that when Cecil called him into the home in which he had purchased marijuana, he introduced the defendant to those inside the apartment as his "bitch ass brother who just got out of prison." Lieutenant Mason said that when the defendant recalled this introduction, he "frowned." The defendant told them that, after purchasing marijuana, they went to pick up the defendant's son, but he was not home. Cecil then dropped him off at Sheila's home, and he did not see Cecil again.

Memphis Police Department Deputy Director Toney Armstrong, who was a lieutenant with the Homicide Bureau at the time of the murders, testified that, on March 3, 2008, he received a call from the felony response lieutenant, who informed him of six deceased victims inside a house on Lester Street and of three surviving children who had been transported to the hospital. Upon arriving at the scene at approximately 6:30 or 7:00 p.m., he was briefed by Sergeant Anthony Mullins, obtained a search warrant, and then entered the house, which presented "probably one of the most bizarre scenes [he] had ever seen," containing the bodies of four adults in the front of the home and the bodies of two children in adjacent bedrooms in the back of the home.

Deputy Director Armstrong testified that a film crew from the television show, *The First 48,* was at the crime scene when he arrived and that, while he did not approve of their presence, he had no authority to limit their access or instruct them when to film. He explained that "[t]he City approved for *The First 48* to have all of the access and privileges to go out on all homicides with us."

***18** Deputy Director Armstrong testified that because he did not know who committed the crimes, he ordered that the children in the hospital be taken into protective custody and guarded by officers in the Tactical Unit, with instructions that no one other than police personnel approved by him be allowed access to them. To the best of his knowledge, no family members were allowed contact with the children from March 3 through March 8. He then dispatched Lieutenant Mason to the hospital to obtain any information that the children might be able to provide.

Deputy Director Armstrong said that, in the meantime, officers were investigating potential leads in the case, including tips from CrimeStoppers, some of which reported that the killings were gang-related and many of which identified the defendant as a potential suspect. He stated that Larry Godwin, who was then the Director of Police Services, arranged for him to meet with the heads of the Drug Enforcement Administration, the Federal Bureau of Investigation (FBI), and other law enforcement entities in the city. Prior to the meeting, Lieutenant Mason called him to report that C.D.1 had implicated the defendant as the perpetrator. He instructed Lieutenant Mason not to tell anyone of what she had learned until his meeting was completed, because he wanted to listen to the tape recording of C.D.1's identification before informing other officers.

Deputy Director Armstrong testified that after listening to the tape recording of C.D.1's identification of the defendant as the perpetrator, he had the defendant transported to the Homicide Bureau and assigned Lieutenant Mason and Sergeant Max to interview him. At some point during that interview, however,

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the defendant refused to talk further with those two officers, so he, therefore, decided to conduct the interview with the defendant himself.

Deputy Director Armstrong testified that he talked to the defendant about how horrific the crimes were and watched the defendant's body language. He said the defendant seemed "really, really tight, like he was doing everything he could not to talk to me." The defendant gave one- or two-word answers to questions and would not engage in open conversation. Deputy Director Armstrong said, "Most of the time if I asked him a question, he would nod his head or shake his head. But you could tell he was doing everything he could not to engage me in an open conversation as to where we had open dialogue back and forth with each other."

Deputy Director Armstrong said he knew that the defendant was very familiar with the criminal justice system because he recently had been released from prison. He asked the defendant whether he believed in God, and the defendant said that he did. He also asked him whether he believed in heaven and hell, and the defendant said that he did. Deputy Director Armstrong stated that the defendant was "struggling to try to maintain his composure." There were times in which the defendant leaned forward as if he wanted to make a statement, but then he would lean back. Deputy Director Armstrong said he could tell that the defendant was hiding something.

***19** At one point, Deputy Director Armstrong allowed the defendant to grab his hands. He explained that by doing so, he was telling the defendant that he knew something was weighing heavily on the defendant's mind. He said that it appeared that the defendant was about to speak to him, but the defendant then refused to engage in conversation. The defendant asked to use the restroom, and Deputy Director Armstrong allowed him to do so. When the interview resumed, Deputy Director Armstrong asked the defendant what his family called him, and the defendant replied, "Junior." He asked the defendant if anyone else in his family was referred to as "Junior," and the defendant said, "[N]o." Deputy Director Armstrong asked the defendant if anyone else in his family looked like him or if anyone in the family had ever confused him with someone else, and the defendant answered in the negative to both questions. He then asked whether someone in his family would be referring to him if the person said "Junior," and the defendant said he or she would.

Deputy Director Armstrong testified that he then played the tape recording of C.D.1 stating that he had been stabbed by his "Uncle Junior," and the defendant became visibly upset to the point that he appeared to be about to cry. The defendant told Deputy Director Armstrong that he and Cecil went somewhere to get a gun, began arguing, and continued to argue during the drive back to Cecil's house. When they returned to Cecil's home, the argument escalated, Cecil reached for a shotgun, and the defendant began shooting using both his gun and Williams' gun. The defendant said that he then attempted to "get rid" of the children because they had seen him. The defendant stated that he "stuck them," using the knives from the kitchen drawer. Deputy Director Armstrong said that a silverware container was found turned over in the kitchen.

Deputy Director Armstrong testified that the defendant began to cry and appeared relieved because "he had gotten the weight of the world off his shoulders. But it was almost like I'm defeated." Deputy Director Armstrong testified that he questioned the defendant in greater detail about what had occurred in the house based upon what the deputy director knew from the crime scene. He said he noted that some of the women's clothing had been altered, but the defendant, at that point, stopped the interview and asked for an attorney and to speak to his mother. The defendant's mother was still in protective custody with other family members and was brought to the police department.

Priscilla Shaw, the mother of Cecil and the defendant, testified that when the police discovered the victims' bodies, her nephew drove her to the scene. When she arrived, several people were at the scene, including Nicole and the defendant. Nicole told her that three of the children were alive but that the remaining victims were dead. Shaw did not know until later which children had survived.

***20** Shaw testified that while she and other family members were staying at a home on Gayle Street, Nicole received a call on her cell phone from the telephone number of her apartment. The defendant told Nicole that someone was calling from her home. Nicole became frightened and called the police. Nicole and Waddell then went to the police department to show officers the cell phone. Nicole called and said that a police officer was being sent to the house to watch over them.

Shaw said that when someone announced that the officer had arrived, the defendant began acting "real crazy." The defendant said that the officers were there to get him and that they were "going to put this on me, they going to put this on me." The defendant believed that Nicole and Waddell were

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at Nicole's home and not at the jail as Nicole claimed when she called. At one point, the defendant stated, "[J]ust bury me with my brother." He pointed a gun at his head and entered the bathroom. Shaw gathered her grandchildren and ran into another bathroom. She said they came out when they did not hear a gunshot.

Shaw said that while they were in protective custody, officers took the defendant away in handcuffs. During the early morning hours of March 8, officers drove Shaw to the homicide office after they informed her that the defendant wanted to see her. Upon arriving, she went into a room where she spoke to the defendant. No one else was in the room with them. She took the defendant's hands and asked him what was happening. She asked if the police were "trying to put it on him." The defendant did not respond and held his head down. When he looked up, he told Shaw that he "did it." Shaw asked him, "[W]hy the babies?" The defendant said they saw him. He stated that he and Cecil had been arguing all day and that Cecil had a gun. Shaw asked the defendant if Cecil had pointed the gun. The defendant said Cecil did not but was "just talking and swinging it." When Cecil laid down the gun, the defendant began shooting and later rode the bicycle away from the scene. Shaw testified, "I asked him [why] the kids and he said they saw me. And I said but the baby, the baby. He didn't say nothing, just shook his head. And I got up and told him I love him and left."

Sergeant Anthony Mullins, a homicide investigator with the Memphis Police Department who was admitted by the trial court as an expert in general crime scene investigation and bloodstain pattern analysis, testified that when he arrived at the scene, he and two felony response investigators walked through the house to ensure that no one else was inside the home. Lieutenant Armstrong arrived, and Sergeant Mullins walked him through the front rooms of the house to show him where the victims were found and to provide an overview of the crime scene. They decided to obtain a search warrant for the property in order to collect evidence, and Sergeant Mullins returned to the homicide office and prepared a search warrant, which a judge later signed.

***21** Sergeant Mullins testified that after obtaining the search warrant, he, Sergeants Davidson and Parks, Lieutenant Armstrong, and two crime scene officers began processing the scene. After they had completed their documentation that first night, eight people from the Shelby County Medical Examiner's Office arrived, including the medical examiner, two death investigators, and several technicians who removed the victims' bodies. By 2:30 a.m. on March 4, 2008, all of the victims' bodies had been transported to the morgue.

Sergeant Mullins testified that he and other officers returned to the secured scene at around 10:30 or 11:30 a.m. on March 4 to continue their work. He described the living room as very small with only five to ten feet of space available around the furniture and the bodies of the four adult victims. He said Cecil was found in a kneeling position on the sofa, with his upper body on the sofa cushion near the seam where the two cushions met. Roberson was seated on the floor with her legs extended out and her head to the side between the sofa and the loveseat. Williams was slumped over toward Roberson, and Seals was on the other side of a large televison and could not be seen upon entering the room.

Sergeant Mullins testified that a plastic baggy with what appeared to be three to five rocks of crack cocaine was found on the outer portion of Roberson's vagina and a bag of marijuana was found in Cecil's left hand. He noted very thick coagulated blood, which he described as arterial blood from a wound with extensive bleeding, on a sofa cushion near the air conditioner and near the area where Roberson's body had been found. Sergeant Mullins stated that this area of blood was consistent with the wound that Roberson received on her leg. There was not much blood on the floor where Roberson was found sitting, however. He stated that Roberson's pants were pulled down to the knees and were saturated with blood, which was consistent with blood from an arterial wound as the blood was "gushing" out with every heartbeat. Roberson also had holes in her pants corresponding to her wounds.

Sergeant Mullins testified that the crime scene appeared to have been staged, noting that the position in which some of the victims' bodies were found did not match their wounds and some of the blood evidence. Based upon the blood and other physical evidence, he believed that Roberson was shot on the couch and that her body was then moved and her pants pulled down following the shooting. He said the bag of crack cocaine was slightly touching Roberson and seemed to have been placed there. Williams was lying on Roberson, but there were bloodstains on the carpet on the other side of Williams. Based upon this evidence, he believed that Williams had also been moved.

Sergeant Mullins noted that Seals's pants were pulled down below his knees to his ankles and that a wallet was beside him. The officer stated that there was a pool of blood near Seals's body, with a "void" in it where no blood was on the carpet,

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indicating that there had been an object had in the area that the blood had gone around. Based upon the blood pools, Sergeant Mullins did not believe that Seals moved on his own.

***22** Sergeant Mullins testified that while Cecil's pants were pulled down, his pants were more in line with the style in which he saw other men wear their pants. Cecil received numerous gunshot wounds, including one to the bottom of his foot and several to his lower legs. Once Cecil's body was moved, officers found two spent projectiles underneath him. Sergeant Mullins stated that Cecil also received several wounds to the front of his body, which he could not have received had his body been in the position in which it was found. Sergeant Mullins stated the wounds to the front of Cecil's body were fatal. He explained that he thought the bag of marijuana was placed in Cecil's hand and that the bag was so large that Cecil would have been unable to close his fingers around it. Sergeant Mullins said that the bag would have come out of Cecil's hand while he was being shot and that he would not have been holding the drugs if he had been attempting to flee or defend himself.

Sergeant Mullins testified that spent projectiles were found on the sofa cushion, on top of a piece of plastic from a window unit air conditioner, on the floor under Cecil, under the sofa, inside the arm of the sofa, between two sofa seat cushions, from a wall behind the sofa, and from the east wall of the living room. A total of eight spent shell casings from a .380 caliber firearm and thirteen spent shell casings from a nine-millimeter firearm were recovered in the living room. .380 caliber spent shell casings were recovered between the seat cushion and back of the sofa, under the coffee table, under the sofa, and near a large amount of clothing stacked in a corner. One nine-millimeter spent shell casing was recovered on the floor near Cecil's leg, and another nine-millimeter spent shell casing was recovered under the coffee table near a. 380 caliber spent shell casing. A sealed Ziploc bag was found on the north end of the loveseat underneath a black jacket. The Ziploc bag contained a total of sixteen spent shell casings, eleven of which were nine-millimeter spent shell casings and five of which were .380 caliber spent shell casings.

Sergeant Mullins further testified that a 12–gauge, sawed-off shotgun, which was loaded with four live rounds, was found on a stack of clothing in the corner of the living room. Cecil's body was found a little more than an arm's length from the shotgun. Five more live rounds of shotgun ammunition were found just under the sofa. A pellet gun air rifle was recovered underneath the clothes, and containers of pellets were on the nearby coffee table.

Sergeant Mullins testified that the quickest exit from the bathroom or the bedrooms was through the living room and the front door. There were also exit doors in the laundry room and the master bedroom, but to reach those doors from the bathroom or bedrooms required walking through the living room. The door in the laundry room had a cord tied from the outer storm door to the doorknob on the other side of the door, and it appeared it had not been used for some time. Sergeant Mullins said that the door in the master bedroom, however, was operable. He testified that if the children were in the bedrooms watching television when the shots were fired, they would have had to go through the living room to reach an exit. Most of the windows in the home had bars. If the perpetrator was standing in the doorway, the children were trapped. Sergeant Mullins stated that of the more than 100 homicides involving gangs that he had investigated, none of them also involved killing women and then killing children with knives.

***23** Two pieces of broken wood were found in the hallway near a gas heater that was affixed to the wall, and two larger pieces of wood that were broken were found inside the bathroom next to the toilet. Three small pieces of broken wood were also found in the bathroom. Two knife blades with the handles broken off were recovered from the bathtub where C.D.1 was found. One of the knives had “Farberware” written on it. Two small pieces of black plastic that appeared to be kitchen knife handles also were recovered from the bathtub. There were bloodstains on the floor and bath mat and around the bathtub and toilet. A bloody partial palm print on the tile wall was determined to belong to C.D.3. Three green hair beads were recovered from the bathroom, two in the door jamb and one against the wall east of the door. C.D.4 had been found wearing green beads in his hair.

Sergeant Mullins said that C.D.3's body was discovered facedown on the floor in what he designated as bedroom one. From the bedroom, officers also recovered two wooden boards. Broken pieces of braided hair were scattered around the bedroom floor.

Sergeant Mullins testified that C.D.4's body was in what he designated as bedroom two. Officers also recovered seventeen green hair beads similar to those worn by C.D.4 scattered under the bed and against the wall. A wooden board and two knife blades were located inside the bedroom. The

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wooden board appeared to have blood on it. One knife blade was between a pillow and pillowcase, and the other blade was between the mattress and the corner of the wall and almost on top of the box springs. Officers had to move the bed in order to locate the second knife blade. Neither blade had a handle. A knife handle was recovered from bedroom two. Sergeant Mullins noted blood on the bed, the window blinds, the wall by the bed, and on the ceiling near the ceiling fan.

In the kitchen, officers discovered a gray plastic silverware tray overturned on the floor, a spent projectile under a table, and a defect in the wall that appeared to have come from the direction of the living room. A box with eleven or twelve rounds of nine-millimeter ammunition was found in the dresser in the master bedroom. Officers collected a cordless telephone that was on the floor between the dresser and the laundry room and another cordless telephone that was further back in the bedroom.

Sergeant Mullins testified that a photograph of blood spatter on the bathroom wall over the toilet tank showed "cast-off," which is generated when the blood from a blunt force object, a sharp object, or another weapon comes off the weapon during an attack and strikes a nearby object. He stated that the photograph showed three distinct trails indicative of three different blows. The top trail was almost horizontal on the wall, indicating that the victim was close to the wall when struck. He was unable to determine whether a knife or a wooden board was used on the victim resulting in the cast-off but said that because the cast-off was "a fairly wide pattern," his impression was that it was "from one of the boards."

***24** Sergeant Mullins identified impact spatter on top of the toilet tank and explained that impact spatter results when a bloody object strikes another object. He also identified a transfer stain toward the bottom of the toilet and explained that a transfer stain results when a bloody object hits a second object leaving a stain on the second object. He stated that a body part could have struck the toilet, resulting in the transfer stain, and that the blood from the impact could have hit the top of the toilet tank, resulting in the impact spatter.

Sergeant Mullins noted a cast-off pattern on the wall over the bathtub and close to where C.D.1 was found. He said either a knife or a board could have made the cast-off pattern. Another cast-off pattern from a different blow was on the wall near the soap dish. A "smeared type" transfer stain was further down in the bathtub.

Sergeant Mullins identified cast-off spatter on the bathroom wall next to C.D.3's bloody palm print. He stated the cast-off was not necessarily associated with the bloody palm print. Rather, the cast-off could have been the result of a different blow or from the blood of a different victim. Sergeant Mullins noted cast-off spatter on the wall above the handles of the bathtub.

Sergeant Mullins testified that blood had dropped down the toilet tank and run down the toilet bowl. He said the blood was from a victim who had been actively bleeding. He also said that based upon the location and pattern on the dripped blood, someone had raised up the toilet seat and put it down at some point.

Sergeant Mullins testified that in bedroom one, where C.D.3 was found, there was a pool of blood where he was lying and numerous broken pieces of braided hair. He said the force of a blow to the head would have broken off the weaker braids. Sergeant Mullins noted large spots of dripped blood on the carpet indicating that C.D .3 may have aspirated some blood. He explained, "I would expect to see more if that were the case but because it's carpet and it soaks up so much, it's hard to say. But this indicates to me especially with the broken pieces of braid that [C.D.3] may have received a blow while he's laying on this carpet."

Sergeant Mullins found multiple patterns of cast-off and impact spatter in bedroom two where C.D.2 and C.D.4 were found. The patterns were in multiple directions, indicating multiple blows. Sergeant Mullins also found overhead cast-off on the ceiling, which he believed resulted from the use of a knife to stab in an overhead motion.

Sergeant Mullins testified that the blood spatter at the scene was consistent with a "one-on-one struggle" rather than a "quick in-and-out execution" of the children. In the bathroom, there were multiple blows and movement. C.D.1 was found in the bathtub in which quite a bit of blood was pooled. Sergeant Mullins stated that based upon the cast-off, at least one and up to three blows were delivered in the bathtub. Noting the dripped blood and C.D.3's bloody handprint in the bathroom, he stated that some of the blood in the bathroom could have been from another victim. Sergeant Mullins also noted a large drop of blood on the bathroom floor next to two green beads similar to those that C.D.4 had in his hair. While acknowledging that the beads could have been on the floor prior to the attack, the officer said that the beads also could have fallen out of C.D.4's hair during the attack as they

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were found next to the blood on the floor. Sergeant Mullins said, "There is a lot of movement in the bathroom. There's more than one blow being delivered in the bathroom. You've got several pieces of broken wood that would be indicating at least one good blow, but from the blood evidence there's more than one and there's movement within that scene."

***25** Sergeant Mullins testified that more than one assault occurred or more than one blow was delivered in bedroom two. He noted the large amount of impact spatter on the wall, the cast-off spatter on the ceiling, and the blood all over the bed. Sergeant Mullins did not believe that the assault of C.D.3 occurred solely in bedroom one. He testified that "because the wounds he had I would expect if he was assaulted in this room, there would be more blood in this room instead of the pooling blood from where he laid." Sergeant Mullins also noted evidence that C.D.3 was in the bathroom at some point during the attacks.

Sergeant Mullins testified that officers did not recover a .380 caliber handgun or a nine-millimeter handgun from the crime scene but that they collected five knife blades, including the blade that was in C.D.1's head. They also collected one knife handle and broken pieces from another knife handle. Officers did not find the other three handles, nor did they find any other set of intact kitchen knives at the scene.

Sergeant Mullins noted that paperwork, a telephone, lipstick or lip balm, a wrapped condom, and business cards were on the living room floor. He said it appeared as if someone had emptied the contents of a purse on the floor, but he did not locate a purse that he could match with the contents. Officers located a purse next to Seals's body with the contents inside, which they later identified as belonging to Williams.

Sergeant Mullins testified that the knife blade found in the pillowcase in bedroom two had blood on it and was bent. He found no evidence indicating that the blade had been broken off inside a victim. He did not know if any of the victims had wounds indicative of the assailant sticking the knife blade in the victim and then moving it back and forth to remove the handle. Rather, he believed the handle of the knife had been removed following the attacks. Officers had to move items around in order to discover the knife blades recovered from bedroom two. Shell casings were gathered and placed in a Ziploc bag.

Sergeant Mullins said C.D.3 may have been moved from one room, placed in bedroom one, and then received the final strike. He explained, "The level of violence delivered to [C.D.3] couldn't have happened in that room without some additional blood evidence. So there has to be some movement after the fact." Sergeant Mullins testified that the person or persons responsible for the murders spent some time in the house following the murders. He explained that Roberson was not petite and that it would have taken time to pull tight pants off anyone who is deceased or nearly deceased. Once Roberson was pulled to the floor, Williams' legs were pulled across Roberson's legs. The drugs were then placed on Roberson and Cecil. He said that locating the sixteen shell casings that were found in the Ziploc bag also would have taken some time.

Sergeant Mullins testified that officers collected fabric from Cecil's chin and mouth and from his left hand. He said the fabric from Cecil's chin and mouth was possibly from a pillow that had been placed over Cecil's face when he was shot in an attempt to muffle the sound. He stated that three hairs were collected from Roberson's right leg, thigh, and buttocks and sent to the FBI laboratory for testing. The hairs did not belong to the defendant or anyone in the house. Sergeant Mullins did not, however, believe that the hairs were significant due to their location on Roberson's body. Roberson's pants had been pulled down, and the hairs were found in blood on her body.

***26** Sergeant Mullins also said he was not surprised by any hair found in the house due to the amount of traffic at the home during the five months in which Cecil lived there. He said that because the defendant had been in Cecil's home on prior occasions, he would not have been surprised to have found the defendant's DNA in the home. He stated that one of the hairs found on Roberson was an Asian hair and explained his decision not to test the Asian hair found against known heroin dealers:

> After [the defendant] was identified by a surviving witness and confesses to the crime and gives corroborating evidence to the crime scene and we work on what he says and verified the things that he says, and continue our investigation and what he says and what the witness says match, no sir, I'm not going to go chase down heroin drug dealers to see if they could have

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> been in this house five weeks before this happened[.]

Sergeant Mullins testified that the same nine-millimeter handgun was used to shoot Roberson and Seals and to shoot Cecil in the left thigh and Williams in the left calf. Bullets from a .380 caliber handgun were recovered from Cecil's scapula and neck and Seals's back. A .380 caliber bullet was also found at a house located behind 722 Lester Street. Testing was insufficient to determine whether the .380 caliber bullet from that house and the .380 caliber bullets recovered from the Lester Street house were fired from the same handgun.

Sergeant Mullins said that all of the adult victims except Seals were shot in the legs at least once. He stated that Cecil likely was shot in the front first but acknowledged that he could not make that determination based solely on the physical evidence. The gun used to shoot Cecil in the leg was different from the gun used to shoot him in the neck. He could not determine whether the adult victims were sitting or standing when the shots were fired.

Sergeant Mullins testified that officers seized a Magna bicycle that the defendant had ridden from Cecil's house on the night of the murders. They had hoped to find blood from the victims on the bicycle to establish that the defendant had come into contact with the victims' blood and transferred it to the bicycle. Sergeant Mullins did not believe that any blood from the victims was found on the bicycle. Genetic material from an unknown male was found on the bicycle.

Sergeant Mullins testified that the position of the shotgun at the scene as it related to the position of the blood reinforced his opinion that the scene was altered and that the shotgun had been moved to the location where the officers found it. He explained that, according to the defendant's statement, Cecil kept the shotgun in the position in which it was found and grabbed it at the time the defendant started shooting. Sergeant Mullins found the defendant's statement difficult to believe because blood was found at the end of the barrel of the shotgun with C.D.5 as a minor contributor. The barrel would not have been exposed to any blood spatter in the position in which it was found, and blood spatter was not on any of the items on which the shotgun was found. Sergeant Mullins also noted that Cecil was found holding a bag of marijuana and would not have attempted to shoot the shotgun while holding the marijuana.

***27** Sergeant Mullins believed the four adult victims were moved either close to death or after death. The knife blades that were recovered had been placed where they were found. Only one knife handle was located, and Sergeant Mullins did not know whether the handle matched any of the knives that were used. Officers did not recover the handguns used; the shotgun had been moved; the boards may have been placed in the location in which they were discovered; and sixteen shell casings had been gathered and placed in a Ziploc bag. Sergeant Mullins believed the two deceased children may have been moved either after death or close to death. He also believed that C.D.3 may have been assaulted in another room and that the fatal blow may have been delivered in the room where he was discovered.

Sergeant Mullins believed Seals was found in the same area in which he was shot. He said Seals's body was rolled from one side to the other because there were two different blood pools on the floor near his body with a distinct distance between them. He also said Seals's body possibly was rolled to the other side when his pants were pulled down and his wallet was removed.

Sergeant Mullins said blood evidence did not support a theory that Roberson was shot in the legs and was then mobile for some time. He explained that a direct wound could have resulted in arterial gushing, which is a distinct pattern. He believed that near or after Roberson's death, the perpetrator pulled her down onto the floor from the sofa, pulled down her pants, and pulled up her shirt.

Sergeant Mullins testified that most of the assault of C.D.3 occurred in the bathroom and that C.D.3 also may have been assaulted in the bedroom in which he was found. Sergeant Mullins did not know if C.D.3's body was moved. He said C.D.3 possibly could have been placed in the bedroom before he died. Based upon the blood evidence in the bedroom, Sergeant Mullins believed C.D.3 may have received a blow in the area in which his body was found.

Sergeant Mullins said that the altering of the crime scene could have been completed "fairly quickly" if the perpetrator was moving quickly. Collecting the evidence would not have taken long if the perpetrator knew where it was. Regardless, Sergeant Mullins believed someone spent considerable time at the scene. He explained, "My opinion is it took enough time to alter things in this scene as opposed to boom, boom, stab, stab, out the door. There's a difference. If you consider all the

movement in the scene after this is done, it's going to take a few minutes but not necessarily hours, I would not think."

Sergeant Mullins acknowledged that the defendant's DNA was not found on any of the physical evidence tested, including the bicycle, although it had been ridden by a man who, in his opinion, moved six bodies that had fresh blood on them.

Sergeant Mullins acknowledged that if the perpetrator shot Williams first in the thigh, Cecil likely would have taken some action to prevent the perpetrator from shooting the next person. He also acknowledged that Cecil might not have reacted if another perpetrator was pointing a .380 caliber handgun at Cecil while the first perpetrator was shooting the women in the legs with a nine-millimeter handgun. Sergeant Mullins testified that the location of the bullet wounds was not consistent with the theory of multiple gunmen shooting Cecil's legs to obtain information. He did not know the sequence of the shots to Cecil's legs. He believed that several of the gunshot wounds may have been made post-mortem or close to Cecil's death.

***28** On redirect examination, Sergeant Mullins testified that the theory of the offenses was developed from interviews with C.D.1 and the defendant. In his view, the TBI report of the results of testing of the physical evidence did not exonerate the defendant, and there was no evidence at the crime scene that was inconsistent with the defendant's admission to the police regarding the offenses.

Sergeant Mullins testified that the weapons used came from inside the home. During the course of the investigation, officers were able to place a nine-millimeter handgun belonging to Cecil and Williams and a .380 caliber handgun belonging to Seals inside the home. The knives were retrieved from the kitchen, and there was no evidence that the boards were from any location other than the home. Sergeant Mullins said the person who committed the offenses was familiar with the home and was comfortable enough to remain in the home long enough to alter the crime scene. He also said that based upon his experience, gang members would not have remained inside the home following the murders and would not have arrived at the house unarmed. Sergeant Mullins believed the crime scene was more consistent with the account provided by the defendant than with a "gang hit."

Sergeant Mullins testified that four weeks prior to the attacks, Cecil called the police on the defendant and threatened to have him sent back to jail. The defendant was a member of the Kitchen Crips gang. Sergeant Mullins said that knowledge of gangs and drug activity would be useful in staging a crime scene in the way in which this crime scene was staged.

Officer Ruth Horne of the Memphis Police Department testified that she was assigned to the Crime Scene Investigation Unit in March of 2008 and was asked to go to 1403 Silver Street to tag a bicycle, a rug, and a bottle of bleach. She said she found the bicycle, which the parties stipulated belonged to C.D.1, in a shed behind the house.

Linda Otterstatter, a physical scientist forensic examiner in the Trace Evidence Unit of the FBI laboratory in Quantico, Virginia, testified that she compared debris recovered from the crime scene with hair samples from Cecil, Roberson, Williams, C.D.3, C.D.4, the defendant, and Willie Boyd Hill, Jr. No head hair samples were submitted for Seals, C.D.1, C.D.2, or C.D.5. She testified that head hairs similar to those of Roberson and C.D.4 were recovered from Roberson's back. She also identified two head hairs with Caucasian characteristics and one hair with Mongoloid characteristics that were on Roberson's back. The hairs were dissimilar microscopically to the known head hair samples she received. These hairs were submitted for mitochondrial DNA analysis.

Otterstatter testified that she identified debris recovered from Williams' right hand as a head hair similar to those of Williams. One body hair fragment was discovered on the left side of C.D.3's left hand. The hair was not suitable for microscopic comparison purposes and was submitted for mitochondrial DNA analysis. Otterstatter identified hairs recovered from the northwest bedroom as head hairs similar to those of C.D.3.

***29** On cross-examination, Otterstatter explained that the hairs found on Williams were not submitted for mitochondrial DNA analysis because she did not feel that such analysis was important to the case as she would expect to find the victim's hairs on the victim. Otterstatter also said that she could not cannot "say for certain that that hair came from that person to the exclusion of all others." She compared head hair and pubic hair and was unable to conduct a comparison of body hair. Otterstatter did not believe that such a conclusion could be reached through mitochondrial DNA analysis either. She acknowledged that mitochondrial DNA is passed through the mother from generation to generation. Otterstatter testified that while nuclear DNA analysis results in an identification of the donor, the root of the hair and the tissue on that root

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are required for such an analysis. She said that some of the hairs that she analyzed had roots on them but that she did not submit those hairs for nuclear DNA analysis because she "would not submit hairs that were similar to the victims that were collected from the victims."

Deborah Polanskey, a forensic mitochondrial DNA examiner in the mitochondrial DNA unit of the FBI laboratory, testified that two types of DNA are found in the cells of the human body: nuclear DNA and mitochondrial DNA. Nuclear DNA is inherited from both parents and is unique to each individual except in cases of identical twins. Mitochondrial DNA is inherited maternally and is not unique to an individual, as siblings with the same mother share the same mitochondrial DNA type. She stated that the gender of the person supplying the DNA cannot be determined through mitochondrial DNA analysis.

Polanskey testified that hair has little or no nuclear DNA but has thousands of copies of mitochondrial DNA. Thus, a result is more likely to be obtained in analyzing mitochondrial DNA than in analyzing nuclear DNA. Polanskey explained that when she receives multiple reference samples from a maternal line such as a mother and her children, she need not test each sample. Rather, she can test the sample from the mother, and the result represents the mitochondrial DNA type of her children.

Polanskey conducted mitochondrial DNA testing on four hairs: two hairs with Caucasian characteristics and one hair with Mongoloid characteristics recovered from Roberson's back and a fragment of a body hair recovered from C.D.3's left hand. She had known samples from Cecil, Roberson, Seals, the defendant, and Willie Boyd Hill, Jr. She also had known samples from Erica Smith, the mother of C.D.4, and Williams, the mother of C.D.1, C.D.2, C.D.3, and C.D.5.

The mitochondrial DNA sequence for the two hairs with Caucasian characteristics were the same. Thus, Polanskey could not exclude the two hairs as coming from the same source. The DNA sequence of the two hairs differed from the known samples that she received. The hair with Mongoloid characteristics did not include sufficient mitochondrial DNA to obtain a result. The mitochondrial DNA sequence from the hair found on C.D.3's hand was concordant with the mitochondrial DNA sequence of Williams. As a result, Polanskey could not exclude Williams, C.D.1, C.D.2, C.D.3, and C.D.5 as the source. She was able to exclude the defendant as the source.

***30** Special Agent Lawrence James, a forensic scientist for the TBI who was allowed by the trial court to testify as an expert in the field of forensic serology and DNA analysis, testified at length regarding the numerous blood samples throughout the house that he analyzed, all of which were matched to one of the victims. He said he obtained a partial DNA profile from a bullet fragment recovered from the sofa in the living room. The gender marker was consistent with a male, and Cecil could not be excluded as a contributor to the DNA profile. He also analyzed the hair beads recovered from the crime scene, swabbing all of the beads as one sample in the hope that the DNA obtained would be sufficient to result in a DNA profile. He was able to obtain only a partial profile indicating that a male's DNA was present on the sample that he collected from all of the beads. After comparing that partial profile with the DNA profile of the victims and the defendant, he concluded that none of those individuals contributed to the DNA on the beads.

On cross-examination, Special Agent James testified that he analyzed clothing but was unsure whether the clothing belonged to the defendant. He determined that the defendant's blood was on the pants. He did not find any of the victims' blood on the clothing. Special Agent James also did not find any of the victims' blood on the bicycle. He did not find the defendant's DNA on the knife blades, the knife handles, the victims' bodies, the wood boards, the glass, the pillows, the shotgun, the shell casings, or the shoes. Roberson's nail scrappings revealed the DNA profile of an unknown female.

TBI Special Agent Forensic Scientist Cervinia Braswell, an expert in firearms and firearms identification, testified that the following bullets were recovered from Cecil's body: a nine-millimeter bullet from the left thigh, a .380 caliber bullet from the right scapula, and a .380 caliber auto bullet jacket fragment from the oral cavity which was part of the .380 caliber bullet recovered from his neck. She also analyzed a nine-millimeter bullet jacket fragment recovered from Cecil's clothes. A nine-millimeter bullet jacket and fragments were recovered from Roberson's left thigh, and a nine-millimeter bullet jacket and fragments were recovered from Williams' left calf muscle. A nine-millimeter bullet jacket and fragments were recovered from Seals's C–1 vertebra, and a .380 caliber bullet was recovered from the left side of his back.

Special Agent Braswell testified that she received a nine-millimeter pistol recovered from an address at 1985 Gayle and that she determined that the nine-millimeter bullets from the

crime scene were not fired from that pistol. She also analyzed a .45 automatic cartridge case. Dirt was on the inside and outside of the cartridge case. Special Agent Braswell stated that because dirt was caked on the cartridge case, it had been at the location where it was recovered "for a little while." She also concluded that the .380 caliber casings recovered from the 719 Carpenter address were not fired from the same gun from which the other .380 caliber casings were fired.

***31** Special Agent Braswell said a .380 caliber firearm typically holds eight cartridges, with seven cartridges in the magazine and one cartridge in the gun. A nine-millimeter firearm typically holds thirteen rounds with twelve rounds in the magazine and one round in the gun. The agent said she analyzed a total of thirteen nine-millimeter cartridge casings and eight .380 caliber cartridge casings. She concluded that the nine-millimeter casings were fired from the same nine-millimeter firearm and that the .380 caliber bullets were fired from the same gun. Special Agent Braswell testified it was possible for a single person to fire a .380 caliber firearm in the living room, unload the firearm, fire a nine-millimeter firearm, and unload the firearm in a quick amount of time.

On cross-examination, Special Agent Braswell acknowledged that she could not determine whether there was one shooter or multiple shooters. She said a total of six .380 caliber bullets, nine nine-millimeter bullets, and ten .380 caliber cartridge casings were submitted for testing. She tested two .380 caliber cartridge casings recovered from 719 Carpenter. She determined that the two casings were fired from an automatic weapon but were not fired from the same weapon that fired the casings recovered in the living room of the crime scene.

Special Agent Braswell testified that while a nine-millimeter firearm can fire .380 caliber rounds, she would be able to determine whether this occurred by examining the cartridge case. She explained that a .380 caliber cartridge casing is shorter and has a slightly smaller diameter so that when it is shot using a nine-millimeter firearm, the cartridge casing will bulge out. Special Agent Braswell said that the .380 caliber casings recovered were not fired using a nine-millimeter firearm.

Special Agent Braswell said a nine-millimeter firearm could hold fewer than twelve cartridges in a magazine. Some nine-millimeter firearms only hold ten cartridges and one cartridge in the chamber. A standard sized nine-millimeter firearm holds twelve rounds in the magazine and one round in the chamber. The agent said .380 caliber firearms do not vary as much as nine-millimeter firearms.

Special Agent Braswell testified that she did not find any gunshot residue on the clothing of Cecil, Roberson, or Williams but found gunpowder particles on the holes of Seals's shirt. She said the lack of gunshot residue on the clothing of Cecil, Williams, and Roberson meant either that the shooter fired the gun outside the maximum range in which the gun would leave residue or that an intermediate object, such as a pillow, was between the gun and the victim. Special Agent Braswell said that in cases of contact residue, tearing of the clothing, singeing around the hole, and dark areas of soot and smoke are present. Contact gunshot residue generally does not result when the firearm is fired more than eighteen inches away. The agent acknowledged that she would be unable to provide an accurate measure of the distance from which the gun was fired without testing the shooting patterns of the actual gun used. Absent the gun used in shooting Seals, she could only estimate that the gun was fired at a distance of at least two feet and no more than four feet away. She could not determine the distance of the shooter from Cecil, Williams, and Roberson. She also could not determine which of the two bullets recovered from Seals left the residue on his clothing.

***32** Dr. Michael Muhlbauer, an expert in the field of adult and pediatric neurosurgery, testified that he performed surgery on C.D.1, C.D.2, and C.D.5 on March 3, 2008. He said that when C.D.1 arrived at LeBonheur Children's Hospital, he was awake and moaning. C.D.1 had trauma and swelling to his forehead and part of a steak knife sticking out of his head. Dr. Muhlbauer noted C.D.1 had a laceration in his scalp that was six or seven inches long and extended down his forehead. C.D.1's skull was severely fractured, and large pieces of his skull had been driven inward. C.D.1 also had either a "glancing" stab wound or two separate stab wounds on the back of his arm and chest, a superficial laceration across his neck, and a laceration on his left thumb. Dr. Muhlbauer said that C .D.1 would not have survived the injuries absent medical intervention.

Dr. Muhlbauer testified that when C.D.2 arrived at the hospital, he was "essentially semicomatose." C.D.2 had injuries that were, in Dr. Muhlbauer' opinion, consistent with having been beaten with boards, including multiple fractures to his face, mid-face, and lower portion of his skull, a fractured nose, and a small skull fracture with bruising on the back of his brain. In addition, he had stab wounds on one of his

eyes, his forehead, and his neck. Dr. Muhlbauer testified that C.D.2 would not have survived without medical intervention.

Dr. Muhlbauer testified that C.D.5 arrived at the hospital with significant head trauma, which included a large cut in her scalp that exposed her bone. He said that the right side of C.D.5's skull had been pushed or crushed in with a blunt object resulting in an "open-depressed skull fracture." He stated that the CT scan revealed that the covering of her brain was "probably cut" and that her brain was mildly bruised. Dr. Muhlbauer testified that C.D .5's injuries were consistent with being struck with boards. She also had stab wounds to her left lower extremity. Dr. Muhlbauer said that absent medical intervention, C.D.5 would not have survived.

Dr. Lisa Funte, a Shelby County medical examiner who was admitted by the trial court as an expert in forensic pathology, testified regarding the victims' autopsies, three of which she had performed herself and three of which had been performed by another medical examiner in the Shelby County Medial Examiner's Office, Dr. Miguel Laboy.

Dr. Funte testified that Seals, whose autopsy had been performed by Dr. Laboy, died as a result of multiple gunshot wounds. Seals had three gunshot wounds: one to the mouth, in which the bullet fractured some of the teeth and the jaw and then continued into the neck, fracturing the first and second cervical vertebrae; one to the midline upper chest area, in which the bullet injured the left lung and exited from the back; and one to the side of the chest near the right armpit, in which the bullet traveled through the right chest cavity, injuring the right lung, and penetrated into the muscles of the back.

***33** According to the toxicology report, Seals had marijuana and ethanol or alcohol in his system. Dr. Funte testified that one of the products of decomposition is ethanol and that she, therefore, was unable to determine whether the ethanol was the result of alcohol consumption, a product of decomposition, or both.

Dr. Funte testified that Williams, whose autopsy she had performed, also died of multiple gunshot wounds. Williams had five gunshot wounds: one to the left side of the head that resulted in injuries to the skull and brain; one in which the bullet entered the right side of the chest near the breast and exited the left side of the back, in the process causing injuries to the lungs and vertebral column; one to the left leg, which resulted in injuries to the muscles, tibia, and fibula; one to the right thigh, which resulted in injuries to the soft tissue and muscle; and one to the left side of the abdomen, which resulted in soft tissue and muscle injuries. The toxicology report indicated the presence of ethanol in Williams' body.

Dr. Funte testified that Roberson, whose autopsy she performed, also died of multiple gunshot wounds. Roberson had four gunshot wounds: one to the right thigh, in which the bullet injured the soft tissue and muscle of the thigh, traveled through the femoral vein, and continued through the soft tissue and muscle on the right side toward her back; one to the left knee, in which the bullet injured soft tissue and muscle; one to the left calf in which the bullet injured soft tissue and muscle; and one to the left thigh, which again injured soft tissue and muscle. Dr. Funte testified that the gunshot wound to Roberson's right thigh in which the bullet passed through her femoral artery would have resulted in a great deal of blood loss but would not have caused an immediate loss of life, as an individual with such an injury could die in as little as five to ten minutes or survive up to twenty to thirty minutes, depending on the circumstances. According to the toxicology report, no drugs or volatile alcohol were present in Roberson's system.

Dr. Funte testified that Cecil, whose autopsy was performed by Dr. Laboy, also died of multiple gunshot wounds. Cecil had eight gunshot wounds: one to the head that fractured his jaw; one to the neck, in which the bullet traveled through the soft tissues and muscles of the neck and fractured and penetrated through cartilages in the trachea and larynx; one to the chest, in which the bullet traveled through the muscle and soft tissue and into the back; one to the right thigh, in which the bullet perforated through the thigh, injuring soft tissue and muscle; two to the left thigh, in which the bullets injured soft tissue and muscle; one to the left leg, in which the bullet injured soft tissue; and one to the left foot. Toxicology results showed ethanol in Cecil's system. Dr. Funte testified that fiber was found in the area around the entry of the gunshot wound to Cecil's head, consistent with a shooter putting a fiber-filled pillow over Cecil's face and firing the gun through the pillow.

***34** Dr. Funte testified that two-year-old C.D.4, whose autopsy she performed, died of multiple sharp force injuries. C.D.4 had multiple incised and stab wounds to the head, torso, and extremities, including seven stab wounds that resulted in penetration of the skull with associated skull fractures, injury of the right middle meningeal artery with epidural hemorrhage, and edema of the brain with herniation. Among other injuries, C.D.4 had a puncture-style stab wound to the right side of his head, two puncture-style stab wounds to the

left cheek, two incised wounds on the left side of his face near his eye, an incised wound on his right ear beginning at the top of the ear and traveling along the inside of the orifice of the ear, a group of incised wounds of varying lengths and an incised wound leading to a stab wound on his torso, multiple incised and stab wounds on his back, and a mixture of sharp force and blunt force injuries on the left side of his torso. Dr. Funte said that incised wounds on C.D.4's back and left wrist were parallel and equally spaced and were suggestive of a serrated knife blade. C.D.4 also had an incised wound and a puncture stab wound on the base of his right thumb.

Dr. Funte also identified abrasions and contusions on C.D.4's body that she categorized as blunt force injuries. C.D.4 had abrasions on the right side of his chin, the right side of his lower lip, his cheek, the right side of his mouth, the right side of the upper lip, and the right side of the head. Dr. Funte said the shape of the abrasion on the head almost formed the outline of a rectangle, and was possibly consistent with the use of a board to strike C.D.4 on the side of the head. C.D.4 also had a combination of an abrasion and a bruise on the right side of his neck behind his ear and bruises on the left side of his neck and on his elbow.

Dr. Funte also noted discoloration on C.D.4's right eyelid and right cheek, which could have been caused by impact to the eye or could have been related to the skull fractures and impact to the right side of his head. She stated that the nature of C.D.4's injuries was not suggestive of the possibility that C.D.4 attempted to fend off his attacker and that the initial head injury she described would have been fatal without medical intervention. Had C.D.4 sustained only that wound, he could have survived for several minutes and up to one day. Had he received medical treatment within an hour of receiving his injuries, he could possibly have survived although it was not "necessarily probable."

Dr. Funte testified that four-year-old C.D.3, whose autopsy was performed by Dr. Laboy, died of blunt force and sharp force injuries. She said C.D.3 had blunt force trauma to his head with lacerations and bruises, multiple linear depressed fractures of the calvarium and base of his skull, deep scalp hemorrhage, multiple contusions to the brain, and subarachnoid hemorrhage. Dr. Funte also noted that C.D.3's head had areas of abrasions and lacerations and an incised wound above his left ear that tore part of the scalp away from his skull and reflected it over his ear.

***35** In addition, C.D.3 had incisions to the head, neck, and right hand; a stab wound to the chest in which the knife blade went all the way through his body, injuring the left lung, the left hemidiaphragm, the stomach, spleen, and liver; linear abrasions and bruises on his left arm; abrasions on his forehead; an abrasion and bruising on his right ear; a gaping incised wound to his neck; abrasions on his right arm; a contusion and abrasions on his left arm; and an incised wound on his ring finger that was possibly consistent with his having either held his hand up to stop the attacker from stabbing him or with his having attempted to grab the knife.

Dr. Funte testified that the injury resulting from blunt force trauma to the head alone would have resulted in C.D.3's death without medical intervention. Had C.D.3 sustained only this injury, he could have survived several minutes to many hours. Dr. Funte said that after C.D.3 was hit in the head, he likely would have been rendered unconscious. The stab wound to C.D.3's chest also would have resulted in death.

On cross-examination, Dr. Funte acknowledged that she could not determine the order in which the wounds on each victim occurred. Several of the adult victims had wounds below the belt and in their knees and legs. She said that a leg wound can be fatal. Roberson had a wound to the right thigh that severed the femoral vein. Dr. Funte could not determine exactly how long Roberson would have lived following the injury. She said that the wound was fatal and that Roberson possibly could have lived thirty to forty minutes after sustaining the injury.

Dr. Funte testified that C.D.4 had incised wounds and that C.D.3 had lacerations. She said the majority of the incised wounds were superficial and not very deep. She also said the wounds could have resulted from a slashing cut from a knife. Dr. Funte was not able to determine whether a serrated or smooth-edged knife was used in each injury. She identified two injuries that had a unique pattern of equally spaced incised wounds, which was indicative of a serrated blade. Dr. Funte said that while a serrated blade may not always leave such a pattern, it will do so if dragged across the skin.

Dr. Funte testified that a black hair and a white hair were collected from Williams' hand and that hairs were collected from Roberson's back. A white substance was collected between Roberson's labia and vulva. Dr. Funte could not determine whether Roberson was carrying the substance there to hide it or whether the substance was placed there by someone else. A green substance was collected from Cecil's

hand. The color of Cecil's skin on his hand just below where the green substance was found was tan or brown. Blood was below the area of the hand.

On redirect examination, Dr. Funte testified that the hairs recovered on Roberson were bilaterally on her buttocks and right thigh. On recross examination, she said Roberson's clothing was not removed at the scene. Her pants had been pulled down, and her shirt was in disarray. Dr. Funte stated that it appeared from the wound pattern on Roberson's legs and the wound pattern on her jeans that she was wearing the jeans when she was shot.

GUILT PHASE—DEFENSE PROOF

***36** Cedric Atkins testified that approximately one and one-half weeks before Cecil was killed, he and Cecil had a conversation in a hotel room in which Cecil told Atkins that he owed money to the "mob." Atkins said the "mob" was a group of people who have money and respect and sell narcotics or "whatever." Atkins testified that following Cecil's death, he contacted an officer with the Memphis Police Department with whom he had previously served as an informant and told him about his conversation with Cecil. Atkins said he answered the officer's questions truthfully, never demanded money from the officer or anyone else, and was not promised anything in exchange for the information. Approximately one week later, the officer contacted Atkins and informed him that the information he provided was not useful. Atkins acknowledged that he had been convicted of theft during the year prior to the defendant's trial and that he did not want to testify and was doing so only pursuant to a subpoena.

On cross-examination, Atkins testified that he did not recall asking the police what was "in it for [him]." He told the officer that he had just met Cecil on the night in which he and Cecil had the conversation and that that night was the first time he had an extended conversation with Cecil. Atkins testified that he told the officer that he ran into Cecil at a hotel and that Cecil told him that he owed $300,000 and that he should avoid owing people money.

Sergeant Joseph Stark testified that he interviewed Waddell on March 4, 2008, at approximately 8:00 p.m. Waddell stated that "Frank" had told him that those inside the residence were tortured and that Cecil's fingers were cut off. Waddell also stated that Cecil and "Doc" had a "falling out." Sergeant Stark said that Waddell informed him that Cecil and "Frank" were Gangster Disciples.

William Carroll, an employee of AT & T, testified that an eight-second call was made from the Lester Street residence on March 1, 2008 at 11:35 p.m. to number 8xx-xxxx. Carroll was unable to determine whether anyone answered that call. He said that the next activity on the telephone was on March 3 from a 589 number, which could have been a telemarketer.

Thirty-four-year-old Markel Vester testified that he joined the Gangster Disciples in 1997 or 1998 when he was twenty-five or twenty-six years old. He knew "Doc Holiday" and "Frank" but did not know whether "Doc Holiday" held any rank in the Gangster Disciples in March of 2008. He stated that Cecil was a member of the Gangster Disciples when he met him and that Cecil performed maintenance duties at the apartment complex where he lived. Vester testified that "Frank" called him and told him about what had happened to Cecil and the other victims. Vester said he last spoke to Cecil approximately two to three weeks before his death. He did not recall whether he spoke to Cecil over the telephone on March 1 or March 2. He said Cecil did not call him on the Saturday or Sunday prior to his death. Vester stated that in March of 2008, his cell service was through Cricket Wireless and that his cell phone number was 2xx-xxxx.

***37** Charity Wright, who was recalled to testify regarding Cecil's cell phone records from Crickett Wireless, testified that the records showed that Smith called Cecil on March 2, 2008, at 1:37 a.m. and that the call lasted approximately fifty-six seconds. She said the call either was not answered or went to voicemail. She stated that Smith also called Cecil at 1:30 a.m. and that the call lasted fifty-nine seconds but was not answered. Wright said that she was mistaken if she had earlier testified that those calls had been answered.

Wright further testified that Cecil called Markel Vester's number at 12:38 a.m., with the call lasting for seventeen seconds. Wright said that the call could have been answered but that there was no way of determining whether a conversation occurred. She stated that Cecil called the same number again at 12:39 a.m., and the call lasted forty-four seconds. Wright said that it was difficult to determine whether the call was answered.

Dr. Nancy Aldridge, a psychotherapist who was admitted by the trial court as an expert in the forensic evaluation of children, explained the protocol for conducting a forensic

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interview of a child and expressed her concern about the manner in which the interviews of C.D.1 and C.D. 2 had been conducted, including the fact that C.D.1 was interviewed shortly after being discovered, was interviewed on four or five occasions, and gave different statements as to what had occurred. She also expressed concern at the fact that the forensic interviews of the children did not occur until August 13, 2008, more than five months after the incident.

Dr. Aldridge testified that she believed that the initial account provided by C.D.1 was "possibly" reliable because C.D.1 appeared to have been reliving the trauma that he experienced while providing that initial statement and was appropriately asked open-ended questions by the interviewers. She explained that what actually occurred generally is discovered during the initial interview of a child, as the child's memories become more unclear as he or she is repeatedly interviewed and is contaminated by information from others. She elaborated that when a person continues to question a child after the child has provided an answer, the child may believe that the initial answer was not acceptable and provide a different answer.

Dr. Aldridge noted the importance of recording all statements from the beginning, particularly when the child is severely traumatized, to learn the sequence of the child's memory and how the memory resurfaced. She said that some of the records she reviewed referenced interviews where no transcripts or recordings existed, which meant that she did not know who had spoken to C.D.1 or what C.D.1 was asked or told prior to the recorded interviews.

Dr. Aldridge testified that she had concerns regarding the reliability of the information obtained from the children during the August 2008 interview due to the length of time that had elapsed and the fact that the children might have been exposed to other information about the crimes from family members. The manner in which the children testified at trial also gave her pause: "The concern that I had for these children is they seemed to be very, very clear as to what questions were going to be asked each one of them and what their answers were. So they were very prepared for the testimony." Dr. Aldridge said that although the reliability of C.D.1's testimony was an issue for the jury, she could reason that C .D.1 would agree with whatever question was asked of him. She also noted the potential for contamination of the children's memories during the two-and-one-half-year period that elapsed from the time of the attacks to the trial.

***38** On cross-examination, Dr. Aldridge acknowledged that she did not know whether C.D.1's identification of the defendant as the perpetrator was wrong but reiterated that she had "concerns."

The defendant testified that after he had completed work on Saturday, March 1, 2008, Cecil and two of Cecil's sons picked him up at the home of his sister, Nicole, to take him to Cecil's house on Lester Street for a barbecue, stopping en route from Nicole's to Cecil's house to purchase some liquor. He said that his father, Waddell, and Seals arrived at Cecil's house a little later, where Williams and the other children were already assembled, and that they listened to the basketball game on the radio. His father left after the game concluded, but the defendant remained at Cecil's house all evening where he, Cecil, and Seals drank, smoked, and grilled. The defendant stated that Seals and Cecil discussed the gun that "Frank" was holding for Seals and that Cecil told Seals to retrieve it. Seals asked Cecil for clothes because he had just been released from jail. Cecil said that he had clothes for him, and Seals said that he would clean up later.

The defendant testified that after dark, he, Seals, and Cecil left the house in Cecil's Lincoln, going first to visit "Frank" at the Barclay Apartments. The defendant said that Cecil, Seals, and "Frank" were members of the Gangster Disciples and that he had joined the Kitchen Crips in the 1990's. At "Frank's" apartment complex, both Seals and Cecil exited the vehicle, and a man walked down the steps. They discussed "Frank" and the incident that occurred on February 14 while the defendant remained inside the vehicle. Seals then walked up to "Frank's" apartment where he remained for thirty to forty minutes before the defendant went to the apartment to get him. The defendant stated that Cecil remained in the parking lot where he was arguing with the man who had walked down to talk to him. The defendant said the man was attempting to calm Cecil. He explained that at that time, Cecil and "Frank" were "into it." The defendant said Cecil believed that the man should be on his side. Cecil also had stated this to Seals, which was why Seals went to retrieve the gun from "Frank." The defendant stated Cecil commonly argued with others.

The defendant testified that the man attempted to hug Cecil and that Cecil asked him why he was doing so. Cecil said he did not have anything on him and pulled up his shirt. Cecil told the man that he wanted to fight "Frank" and instructed the man to get "Frank." Instead, the man got into his black Impala. Cecil yelled, "[Y]'all know where I stay at" and returned to

his car. The defendant said that he and Cecil laughed and that he told Cecil that "Frank" had tried to call him. "Frank" called again, and Cecil answered the call. However, it was Seals on the other end of the call asking them where they were, and the defendant told him they were waiting on him. Cecil then told the defendant that he had "punk'd" the man. The defendant said he told Cecil to get Seals, but Cecil refused. The defendant then went to the door of "Frank's" apartment and knocked. "Frank," "Trell," "Tammy," and a man whom the defendant did not know were there. The defendant told Seals that they were ready to leave, and they left.

***39** The defendant said he, Cecil, and Seals then went to the home of his girlfriend, Sheila Jones. The defendant and Cecil entered the home looking for Sheila, but she was not there. The defendant stated he caught the boyfriend of Sheila's daughter in one of the bedrooms with his pants halfway down. He said Sheila's daughter began cursing him, and they left. They next went to the home of "Marilyn," the grandmother of the defendant's son. They were there for less than five minutes because his son was not there.

The defendant testified that they then went to an apartment complex near GE Patterson to pick up Roberson, Seals's girlfriend. Roberson asked whether they had any marijuana, and Cecil said that he knew where to purchase some so they went to an apartment at Kimball Cabanas where they purchased $45 worth of marijuana. Cecil got out of the car and then returned, telling the defendant that he wanted to introduce him to "his folks." The defendant explained that "folks" referred to Gangster Disciples. Four people were inside the apartment, and the defendant and Cecil remained for approximately five minutes. They also saw Smith in the apartment complex. Cecil talked to her while the defendant remained inside the vehicle. The defendant yelled out her name, and she came to the vehicle and spoke to everyone inside. She and Cecil then continued to talk for approximately five minutes. When Cecil returned to the vehicle, he was talking to Smith on his cell phone.

The defendant said that after they left the apartment complex, they went to another woman's home and stayed for thirty to forty minutes. They then returned to Cecil's house where Williams and the children were. The defendant stated he, Cecil, Seals, Williams, and Roberson were in the living room. Williams was drinking a wine cooler while Roberson was preparing a marijuana cigarette. According to the defendant, Cecil asked Williams to put sheets on their bed. Cecil told Williams that he planned to allow Seals and Roberson to sleep in their bedroom located in the back of the house and that he and Williams would sleep in the living room.

The defendant said that he volunteered to put the sheets on the bed and that he was beside the bed with a quilt in his hand when he heard two or three gunshots. He acknowledged that he was carrying a blue .44 caliber handgun on him at the time. He said he heard screaming and hid under the bed. He heard more noise which he later determined to be the family's dog that was in a nearby cage. The defendant said he heard a few shots followed by other shots seconds later. He could not determine whether the shots came from the same gun or different guns.

The defendant said he hid under the bed for several minutes. Based upon the sound the dog was making, it appeared as if someone was walking around in the same bedroom where he was hiding. He was unable to hear noise from other areas of the home and eventually came out from under the bed and went into the living room. He asserted that he believed all of the victims, including the children, were dead. The front door was open, and he left the house riding a bicycle he found behind a door in the living room.

***40** The defendant testified that he went to Sheila's home where Keaira allowed him to enter. He said he went into Sheila's bedroom and then to the bathroom where he vomited. The defendant stated he then cleaned the sink with bleach and brushed his teeth. He then knocked on Keaira's bedroom door, telling her that he needed to talk to her, but they never had any conversation.

The defendant explained why he did not call the police: "Y'all done heard testimony about the gangs. I'm in a gang. We don't call the police. It's just that simple. We don't call the police. It's not part of what we do. If I call the police, I'll be just like my brother."

The defendant testified that officers interviewed him on March 5, 2008, and that the interview was videotaped. He said that when he was interviewed by Lieutenant Mason and Sergeant Stark on March 7, he told them that he worked from 8:00 a.m. until 3:00 p.m., that Cecil picked him up and drove him to Cecil's house, that they watched a game, and that Cecil drove him back home. The defendant acknowledged that his statement that Cecil drove him back home was untrue. The defendant said he did not tell the police what had occurred when questioned on March 5 because "I don't talk to police ."

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The defendant testified that he spoke to Waddell, who had informed the defendant of his conversation with "Frank." The defendant said he asked Waddell if he knew "Doc's" actual name. The defendant stated that Waddell had spoken to a woman who said that the defendant was being reported by the media as the killer. The defendant also stated he and his family saw the news report. The defendant acknowledged that after seeing his face on a news report, he put a gun to his head and threatened suicide, saying that he was not going to return to prison for something he did not do and that he should have died with his brother. He said that when the police officers came following his threats, they did not offer to take him to a hospital or a mental health facility.

The defendant testified that before Lieutenant Armstrong interviewed him, he had been in the Homicide Bureau for hours and was handcuffed. He said that Lieutenant Armstrong played a tape recording of the defendant's nephew identifying him, but did not play the portion of the tape in which his nephew identified others. The defendant testified that after playing the recording, Lieutenant Armstrong began screaming about the defendant's family and said that he was tired of "playing games." According to the defendant, Lieutenant Armstrong said he knew that the defendant was "bullshitting" and that he was "sick of it." The defendant said that Lieutenant Armstrong stated he wanted answers now and that he began "pounding" on the table.

The defendant testified that he then told Lieutenant Armstrong that Cecil had reached for a shotgun and that the defendant just started shooting. The defendant then asked for his mother. He told his mother that he had a gun and that when Cecil sat his gun down, the defendant began shooting. He also told her that he "stuck" the children.

***41** The defendant testified that from the time his family was discovered until the interview, he had not slept, had cried about what had happened, and was depressed. He stated he requested to see his mother on approximately three occasions during the interview, but Lieutenant Armstrong told him that he would not be allowed to see anyone until he told the officer what he wanted to know. He said that, earlier on March 7, he had told different officers that he did not kill the victims. He insisted that his statement to Lieutenant Armstrong that he shot Cecil was not true, and he maintained that he did not kill Cecil or any of the other victims.

The defendant testified that at the time the victims were killed, his cousin, Tammy Randolph, was dating Vernon Motley. At some point prior to the deaths of the victims, Randolph told the defendant that the police were looking for Motley for a charge of murder. She gave the defendant a .44 caliber firearm to hold. At some point, Randolph also told the defendant to give the gun to her other cousin, "Antonio."

On cross-examination, the defendant testified that when he left Cecil's house on the bicycle, he believed nine people were dead inside the house. He acknowledged that he did not call 9–1–1 for his family and that he went to Sheila's home and went to bed. The next day, he did not go to work or call anyone about the offenses and went to dinner with Waddell. He also went to work Monday morning with his father but did not tell either of his parents about what had occurred. The defendant acknowledged that he lied to his family about the last time he saw Cecil.

The defendant said that he did not escape through the back door of the house because a key was needed to do so. He also did not use the cordless telephone in the bedroom to call 9–1–1. The defendant said he remained under the bed for approximately thirty minutes. He never heard the children screaming or anyone hitting the children with boards. He remained under the bed while the killers gathered the shell casings and pulled down Roberson's pants. The defendant said that when he entered the living room, Roberson was in the position that she appeared in photographs of the crime scene. He saw C.D.1 lying in the bathtub but did not "pay attention" to the knife in C.D.1's head. He did not check on C.D.1 to determine whether he was alive and believed that everyone in the house was dead.

The defendant testified that he was in the interview room with Lieutenant Armstrong for four to five hours, and he maintained he had confessed only after Lieutenant Armstrong screamed at him and threatened him:

> He didn't pound on the table. It was he asked me when he played the tape and after he played the tape, he played the tape what, 12, 13 times. And after he played it 12 to 13 times, after I still told him I didn't do it, that's when he said I'll kill your mother f* * *ing ass myself, you cold-hearted murdering killing mother f* * *er.

***42** According to the defendant, Lieutenant Armstrong then said, "I got something for you. I'm going to throw your ass on that 4th floor and I'm going to let them kill your mother f* * *ing ass."

The defendant acknowledged that his testimony at trial regarding the events was not consistent with what he had told his mother. The defendant said he leaned across the table and told his mother, "[T]hey trying to put this on [me]." His mother asked for the names of those who were trying to do this so that she could get him help. The defendant said that he told her he did not know their names and that they were watching him. He and his mother then grabbed each other's hands, and he told his mother not to worry and that he had committed the offenses. The defendant acknowledged that he told his mother that he and Cecil began arguing and that, after Cecil put down his gun, the defendant began shooting. His mother asked how he got away from the house, and the defendant told her that he rode a bicycle. The defendant believed he told his mother that he killed the children because they saw him. The defendant insisted, however, that he lied to his mother and that his trial testimony was the truth.

At the conclusion of the guilt phase, the jury convicted the defendant of six counts of premeditated first degree murder for the deaths of Cecil, Williams, Seals, Roberson, C.D.3, and C.D.4. The jury also convicted the defendant of three counts of attempted premeditated first degree murder of C.D.1, C.D.2, and C.D.5. The trial then proceeded to the penalty phase with regard to the defendant's six first degree murder convictions.

PENALTY PHASE

During the penalty phase, the parties stipulated that the defendant previously had been convicted of second degree murder, which was a violent felony. The State also presented the victim impact testimony of Ida Anderson, Williams' mother, and Annette Mallory, Seals's aunt.

Anderson testified that she was raising her grandchildren and, as a result, had lost her job and was struggling financially. Her family also was in counseling as a result of the offenses. Mallory testified that at the time of his death, Seals had three children whom he loved and supported. She said Seals's death "hit [her] hard." He was like a younger brother to her until his mother died, and then she became a mother figure to him.

Glori Shettles, a mitigation specialist, testified on the defendant's behalf regarding his family history and background. She said some of the defendant's family members were willing to provide information about him but were unwilling to testify on his behalf. From her investigation, she learned the following about his history. The defendant's parents were married in 1972 when his mother, Priscilla Shaw, was fifteen years old and his father, Jessie Dotson Sr., was nineteen years old. They soon had a daughter, Nicole. Jessie Sr. joined the Army and was stationed in Florida where the defendant was born. At some point, Shaw and Nicole returned to Memphis where Nicole became so ill that Jessie Sr. left his base and returned to Memphis. Jessie Sr. was honorably discharged from the Army. He wanted to keep his family in Florida but was unable to obtain employment, so the family returned to Memphis.

***43** Shettles testified that Jessie Sr. was jealous of Shaw, who went on a church trip to New Orleans, returned with a boyfriend, and told Jessie Sr. that she no longer wanted to be married to him. They remained married for some time after that incident, however. The defendant's parents argued often, and Jessie Sr. was physically abusive to Shaw on more than one occasion, with the children witnessing the abuse. By this time, Cecil, who was three years younger than the defendant, was born. Shaw wanted to leave Jessie Sr. and saved money to do so, with the result that Jessie Sr. returned home one day to find Shaw and the children gone. Shaw did not contact Jessie Sr. until four to five months later. The defendant was six years old at this time, and the children did not know what had happened to their father.

Shettles testified that the family moved often during the defendant's childhood. The defendant left school at the age of sixteen while in the eighth grade. By that time, he had attended ten different schools. Shettles noted that a large number of moves was often one of the risk factors for poor performance in school and in life. The defendant was diagnosed with a learning disability in reading and math and was enrolled in resource classes. He also had disciplinary problems at school and at home. School mental health records indicated that he was provided with individual counseling. Counselors attempted to meet with Shaw, but she either cancelled the appointments or did not attend them.

Shettles testified the defendant failed the fourth grade twice due to his large number of absences from school. The defendant was teased for not having proper clothing and

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did not attend school as a result. Thereafter, the defendant was socially promoted in school. Shettles believed that the defendant was capable of performing better in school but did not do so due to the number of absences and tardies. After the defendant left school, he was employed for a brief period. Shettles said the only legitimate job that the defendant ever held was as a security guard at the age of eighteen.

Shettles testified that by the time the defendant was fifteen years old, he became involved in the juvenile court system and had several arrests and juvenile adjudications. Shaw could not control the defendant and did not know what to do. She attended juvenile court with the defendant on many occasions and when she could not attend, Nicole attended on her behalf.

Shettles testified that the family did not have much money and that Shaw was not home often. As a result, Nicole cared for her brothers. The food was locked up, and they were not able to get to it. When the family went to the maternal grandmother's house for Sunday dinner, money went missing from their grandmother's purse. Shettles said the defendant and Cecil were taking the money to purchase food and were severely punished as a result. In addition, their grandmother told Shaw that the defendant and Cecil were no longer welcome in her home.

***44** Shettles testified that at the age of nineteen, the defendant pled guilty to second degree murder and was sentenced to eighteen years in prison. The defendant received many write-ups when he first entered prison for refusing to participate, cursing at an officer, and other offenses that did not involve weapons. He also received write-ups for violent activities. The defendant completed fourteen of his eighteen-year sentence in prison. He was considered for parole on two occasions before he actually made parole. The defendant's mother and her husband only visited him once while he was in prison, and he spoke to his father on a few occasions by telephone. Shettles said that while in prison, the defendant participated in a behavioral modification program and "thrived" in the program.

Shettles testified that the defendant has family who value his life but that it had been difficult for them to attend trial and show their support. The defendant also had a son with whom he was continuing a relationship. The defendant had a friend who was afraid to appear at trial and a friend of his grandmother who was eighty-one years old and cared for him.

On cross-examination, Shettles testified that the defendant was suspended from school so many times that the Memphis City Schools refused to allow him to continue to attend. He had more than one juvenile adjudication that involved the use of weapons. The defendant fought often, and his school and juvenile records referenced problems with his brother. Shettles was aware that the defendant joined the Crips gang while in prison and that he received a violent write-up after he and four other inmates cut an inmate who was trying to leave the Crips.

At the conclusion of the penalty phase, the jury unanimously found the presence of the following three statutory aggravating circumstances with regard to the defendant's conviction for the first degree murder of Cecil Dotson, Sr.: (1) the defendant was previously convicted of one or more felonies involving the use of violence; (2) the defendant "knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder"; and (3) the defendant committed mass murder. *See* Tenn.Code Ann. § 39–13–204(i)(2), (3), (12) (2006). The jury unanimously found the presence of the same three statutory aggravating circumstances with regard to each of the defendant's three convictions for the first degree murders of Williams, Seals, and Roberson, as well as two additional statutory aggravating circumstances: (1) the murder was committed for the purpose of avoiding, interfering with, or preventing the lawful arrest or prosecution of the defendant or another; and (2) the murder was knowingly committed while the defendant had a substantial role in committing, or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit any first degree murder. *Id.* at (i)(6), (7). Regarding the defendant's two convictions for the first degree murders of C.D.3 and C.D.4, the jury unanimously found the presence of the same five aggravating circumstances that it found for the first degree murders of Williams, Seals, and Roberson, as well as two additional statutory aggravating circumstances: (1) the victim was less than twelve years old and the defendant was eighteen years old or older; and (2) the murder was especially heinous, atrocious, or cruel. *Id.* at (i)(1), (5). The jury determined that these aggravating circumstances outweighed any mitigating circumstances and imposed a sentence of death for all six convictions.

SENTENCING HEARING

***45** During the separate sentencing hearing to determine the defendant's sentences for his three attempted first degree murder convictions, Ida Anderson testified that she adopted her grandchildren and now cares for them. She said that the children were "devastated," that the attacks "wrecked us, completely," and that the entire family has been in counseling. She stated that C.D.1 had undergone multiple surgeries and would require an additional surgery. C.D.2 also had undergone multiple surgeries and had scarring. His eye was not "even," and he would also require an additional surgery. C.D.5 also had scarring on her leg that needed surgery. Anderson had been terminated from her job because she missed so much work following the attacks, and both she and the children received social security benefits. In addition, other family members, as well as some friends, had contributed financially. Anderson stated that her daughter had to give up her house and move in with her to help and that she was not in a position to care for the children by herself.

At the conclusion of the sentencing hearing, the trial court sentenced the defendant to forty years for each of the attempted first degree murder convictions to be served as a Range II multiple offender. The trial court ordered that each sentence run consecutively to each other, as well as the death sentences, for an effective sentence of death plus 120 years.

ANALYSIS

We will review the issues raised on appeal by the defendant.

I. Sufficiency of the Evidence

The defendant contends that the evidence is insufficient to support his convictions, saying that it is insufficient to establish premeditation and his identity as the perpetrator and that the physical facts rule requires the reversal of his convictions.

Once a jury finds a defendant guilty, his presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans,* 838 S.W.2d 185, 191 (Tenn.1992). On appeal, the convicted defendant has the burden of demonstrating to this court why the evidence does not support the jury's verdict. *State v. Carruthers,* 35 S.W.3d 516, 557–58 (Tenn.2000); *State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn.1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *State v. Evans,* 108 S.W.3d 231, 236 (Tenn.2003); Tenn. R.App. P. 13(e). In contrast, the jury's verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. *State v. Harris,* 839 S.W.2d 54, 75 (Tenn.1992). The State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers,* 35 S.W.3d at 558; *Tuggle,* 639 S.W.2d at 914. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland,* 958 S.W.2d 651, 659 (Tenn.1997). We do not attempt to reweigh or reevaluate the evidence. *State v. Reid,* 91 S.W.3d 247, 277 (Tenn.2002); *Bland,* 958 S.W.2d at 659. Likewise, we do not replace the jury inferences drawn from the circumstantial evidence with our own inferences. *See State v. Elkins,* 102 S.w.3d 578, 582 (Tenn.2003); *Reid,* 91 S.W.3d at 277.

***46** First degree murder is defined as the "premeditated and intentional killing of another." Tenn.Code Ann. § 39–13–202(a)(1). An intentional act requires that the person have the desire to engage in conduct or cause the result. *Id.* § 39–11–106(a)(18). A premeditated killing is one "done after the exercise of reflection and judgment." *Id.* § 39–13–202(d). Premeditation means that

> the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id.

Whether premeditation is present is a question of fact for the jury, and it may be determined from the circumstances surrounding the killing. *Bland,* 958 S.W.2d at 660; *State v. Anderson,* 835 S.W.2d 600, 605 (Tenn.Crim.App.1992). Circumstances that may be indicative of premeditation include declarations of the intent to kill, procurement of a weapon, the use of a deadly weapon upon an unarmed victim, the fact that the killing was particularly cruel, infliction of multiple wounds, the making of preparations before the killing for the purpose of concealing the crime, destruction or secretion of evidence, and calmness immediately after the killing. *State v. Jackson,* 173 S.W.3d 401, 409 (Tenn.2005); *State v. Nichols,* 24 S.W.3d 297, 302 (Tenn.2000). A defendant's failure to render aid to a victim can also indicate the existence of premeditation. *State v. Lewis,* 36 s.W.3d 88, 96 (Tenn.Crim.App.2000).

In cases where a defendant has been charged with the attempted commission of a crime, there must be evidence that the defendant acted "with the kind of culpability otherwise required for the offense" and acted "with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part." Tenn.Code Ann. § 39–12–101(a)(2). Criminal attempt also occurs when the defendant "[a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense." *Id.* § 39–12–101(a)(3).

A. Premeditation

The defendant argues that the evidence at trial established that he committed the crimes while in a state of excitement and passion. In support, he points to his statement to police in which he related how he and Cecil were arguing and that Cecil was waving a gun around when the defendant grabbed his own gun and started shooting. The defendant argues that there is no evidence that he was "sufficiently free of that 'excitement and passion' before the children were assaulted, some of them fatally." We respectfully disagree.

***47** Viewed in the light most favorable to the State, the evidence established that the defendant shot the adult victims multiple times and then repeatedly stabbed and beat the young children, moving from room to room to do so. Although the defendant told police that he first began shooting after Cecil reached for a shotgun, he told his mother that he began shooting after Cecil laid down his gun and that he attacked the children because they had seen him. We note that Sergeant Mullins testified that the shotgun appeared to have been placed in the corner near Cecil, the position in which police discovered it, as part of the staging of the scene.

Moreover, the killings and attempted killings were particularly cruel. Seals was shot in the face and chest, and the gun was close enough to Seals's face that it left stippling on his face when fired. Williams was shot in the head, chest, leg, thigh, and abdomen. Roberson was shot in both thighs and the left knee twice. Cecil had eight gunshot wounds, including to the head, neck, chest, thigh, and foot, and there was material on his face consistent with a pillow having been placed over his face and a gun fired through the pillow. The children were repeatedly and violently stabbed with knives and beaten with wooden boards, and C.D.1. was left in the bathtub with a knife sticking out of his head. In addition, the defendant talked to some of the victims, rejecting their claims that they loved him and continuing with his violent attacks.

The defendant altered the scene to make it appear as if the murders were drug or gang-related, moved bodies, disposed of or hid kitchen knives and handles, and collected the cartridge casings. He escaped on a bicycle and hid it in his girlfriend's shed. Instead of attempting to render aid or summon help, he went to a restaurant for dinner the next night and reported to work on the Monday following the attacks, without telling anyone about the crimes. He also lied to his family about the last time he had seen Cecil. This evidence was more than sufficient to establish the element of premeditation in the defendant's convictions for first degree murder and attempted first degree murder.

B. Physical Facts Rule

The defendant also contends that the evidence against him was largely based on the testimony of C.D.1, portions of which were negated by the "physical facts rule," requiring reversal of his convictions. We, again, respectfully disagree.

The physical facts rule is " 'the accepted proposition that in cases where the testimony of a witness is entirely irreconcilable with the physical evidence, the testimony can be disregarded.' " *State v. Allen,* 259 S.W.3d 671, 679 (Tenn.2008) (quoting *State v. Hornsby,* 858 S.W.2d 892, 894 (Tenn.1993)). When a witness's testimony "cannot possibly be true, is inherently unbelievable, or is opposed to natural laws, courts can declare the testimony incredible as a matter of law and decline to consider it." *Id.* (quotation omitted). For the physical facts rule to apply, the testimony "must be unbelievable on its face, i.e., testimony as to facts or events that the witness physically could not have possibly observed or events that could not have occurred under the laws of nature." *Id.* at 680. For example, testimony that a witness "saw the sun set in the east" could be disregarded. *Id.*

***48** The physical facts rule, however, is a power "that should be used sparingly." *Hornsby,* 858 S.W.2d at 895. When the testimony "is capable of different interpretations, the matter should be left for the jury to decide as the sole arbiter of credibility." *Id.* The determination of whether there are inconsistencies in testimony, the reconciliation of conflicts in testimony, and the determination of how this might affect a witness's credibility, are within the province of the jury. *Id.* "[T]he improbability of the truth of the testimony, which justifies rejection under the physical facts rule, cannot rest upon any theory involving the consideration of the comparative credibility of the witnesses." *Id.* at 896 (quotations omitted). The physical facts rule may not be invoked "where its application depends upon assumptions or calculations based upon estimates as to speed, distance, time, and other such uncertain matters in the movement of objects." *Allen,* 259 S.W.3d at 680 (quotations omitted).

The defendant asserts that although C.D.1 testified that he saw the defendant attacking his siblings and speaking to Williams while C.D.1 was in the bathtub, "it would have been impossible to see inside the bedroom from his vantage point in the tub." The defendant also asserts that C.D.1's testimony that he was stabbed in the neck while lying on the bed in his sister's room was contradicted by the lack of his blood on that bed.

C.D.1 did not, however, testify that the defendant "stabbed" him in the neck, but instead that the defendant "cut" his neck. We note that Dr. Muhlbauer confirmed that C.D.1 had a superficial laceration across his neck and that no evidence was presented regarding what amount of blood, if any, such a superficial laceration would have produced. Regardless, we cannot conclude that C.D.1's testimony regarding the attack violated the physical facts rule. As this court has previously noted, "the fact that a witness testifies and that testimony ends up being inconsistent with other testimony raised at trial, ... even if [it is] scientific testimony, does not make it inadmissible testimony." *Lemar Brooks v. State,* No. M2010–02451–CCA–R3–PC, 2012 WL 112554, at *16 (Tenn.Crim.App. Jan. 11, 2012), *perm. app. denied* (Tenn. May 16, 2012) (quotations omitted). Throughout his testimony, C.D.1 identified the defendant as the perpetrator. The jury could have resolved any conflicts and discrepancies in his testimony by attributing them to his youth, his head injury, or the extreme trauma he must have experienced by witnessing and experiencing the horrific attacks against him and his family members. We conclude, therefore, that this issue is without merit.

C. Identity

Lastly, the defendant contends that the evidence is insufficient to establish his identity as the perpetrator. Specifically, he argues that his statement was inconsistent with the physical evidence and that the forensic evidence excluded him as the perpetrator. However, he confessed that he was the perpetrator, both in a statement to police and during his conversation with his mother. In addition, two of the child victims identified him as their attacker. By convicting the defendant of the indicted crimes, the jury obviously rejected the defendant's trial testimony in which he claimed to have been hiding under the bed while the murders and attempted murders were perpetrated by others. We conclude, therefore, that the evidence is more than sufficient to sustain the defendant's convictions.

II. Admission of C.D.1's Statement Identifying the Defendant

***49** The defendant contends that testimony of various witnesses that C .D.1 identified the defendant as the perpetrator violated his right to confront witnesses under the United States and Tennessee Constitutions. The defendant specifically complains of testimony offered by Sergeant Mullins on cross and redirect examination, Lieutenant Davidson on direct and redirect examination, and Sergeant Max on direct examination. The State responds that the defendant failed to object at trial to the testimony based upon

a violation of his confrontation rights and that the admission of the testimony does not rise to the level of plain error. We agree with the State.

The defendant did not object to the testimony of Sergeant Mullins and Lieutenant Davidson and only objected to Sergeant Max's testimony on the basis of hearsay. The defendant also failed to raise the issue in either his initial or amended motion for new trial. When a defendant raises an issue for the first time on appeal, the issue will generally be deemed waived and will be considered only within the limited parameters of an appellate court's discretionary plain error review. *State v. Faulkner,* 154 S.W.3d 48, 58 (Tenn.2005); *see also* Tenn. R.App. P. 3(e); Tenn. R.App. P. 36(a); Tenn. R.Crim. P. 52(b). The defendant bears the burden of persuading the appellate court that the trial court committed plain error and that the error was of sufficient magnitude that it probably changed the outcome of the trial. *State v. Bledsoe,* 226 S.W.3d 349, 354–55 (Tenn.2007).

Under plain error review, relief will only be granted when five prerequisites are met: (1) the record clearly establishes what occurred in the trial court, (2) a clear and unequivocal rule of law was breached, (3) a substantial right of the accused was adversely affected, (4) the accused did not waive the issue for tactical reasons, and (5) consideration of the error is necessary to do substantial justice. *State v. Gomez,* 239 S.W.3d 733, 737 (Tenn.2007).

We cannot conclude that the admission of the testimony breached a clear and unequivocal rule of law. Interpreting the Sixth Amendment, the United States Supreme Court noted in *Crawford v. Washington,* 541 U.S. 36, 59 n. 9 (2004), that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." The Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Id.* Our supreme court has reached the same conclusion under article I, section 9 of the Tennessee Constitution. *State v. Banks,* 271 S.W.3d 90, 118–19 (Tenn.2008). C.D.1 testified at trial and was cross-examined by the defendant "face to face." We conclude, therefore, that the defendant was not deprived of his right to confront C.D.1, and he is not entitled to relief regarding this issue.

III. Admission of the Defendant's Confessions

***50** The defendant contends that the trial court erred in admitting his confessions to Deputy Director Armstrong and to Shaw, asserting that he was arrested without probable cause, that Deputy Director Armstrong obtained his confession in violation of his assertion of his right to remain silent, and that Shaw was acting as an agent for the State and obtained his confession in violation of his assertion of his right to counsel. The defendant acknowledges that he failed to seek suppression of the confessions based upon an illegal arrest and failed to seek suppression of his confession to Deputy Director Armstrong based upon his invocation of his right to remain silent. Nonetheless, he urges this court to review the issues under a plain error analysis.

Rule 12(b)(3) of the Tennessee Rules of Criminal Procedure requires that all motions to suppress be presented prior to trial. Failure to make the motion before trial results in waiver, although a court may grant relief from the waiver for good cause shown. Tenn. R.Crim. P. 12(f). The defendant did not seek suppression of his statements prior to trial and did not object at trial to the admission of Deputy Director Armstrong's testimony regarding his confession. Instead, he filed a motion to suppress his statements to Shaw on October 6, 2010, during the trial, arguing that he had previously asserted his right to counsel and that Shaw was acting as an agent for the State. Prior to Shaw's trial testimony, the trial court held an evidentiary hearing on the issue outside the jury's presence, at the conclusion of which it denied the motion. Thereafter, the defendant failed to raise any of these issues in either his initial or amended motion for new trial. Thus, we agree with the State that the defendant waived the issues, *see* Tenn. R.Crim. P. 12(b)(3), (f); Tenn. R.App. P. 36(a), and that our review is limited to plain error.

A. Legality of the Arrest

The defendant first argues that his statements should have been suppressed because they were the fruit of his illegal seizure, *i.e* . his warrantless arrest. Both the United States and Tennessee Constitutions offer protection from unreasonable searches and seizures. *See* U.S. Const. amend. IV; Tenn. Const. art. I, § 7. "[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject

only to a few specifically established and well-delineated exceptions.' " *Coolidge v. New Hampshire,* 403 U.S. 443, 454–55 (1971) (quoting *Katz v. United States,* 389 U.S. 347, 357 (1967)); *see* *State v. Bridges,* 963 S.W.2d 487, 490 (Tenn.1997). An officer may arrest a person without a warrant when the officer has probable cause for believing that the person has committed a felony. *See* Tenn.Code Ann. § 40–7–103(a)(3); *State v. Melson,* 638 S.W.2d 342, 350 (Tenn.1982). For probable cause to exist, the facts and circumstances as they are known to the officer at the time of the arrest must be " 'sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense.' " *Bridges,* 963 S.W.2d at 491 (quoting *Beck v. Ohio,* 379 U.S. 89, 91 (1964)).

***51** Relying upon this court's opinion in *State v. Courtney Bishop,* No. W2010–01207–CCA–R3–CD, 2012 WL 938969 (Tenn.Crim.App. Mar. 14, 2012), *perm. app. granted* (Tenn. Aug. 15, 2012), the defendant asserts that he was arrested for investigative purposes and without probable cause in violation of both the state and federal constitutions. As the State correctly notes, however, *Courtney Bishop* does not stand for the proposition that an officer may not arrest a suspect based upon probable cause and then seek to obtain a confession. Rather, this court concluded in that case that the practice of arresting a suspect without probable cause and then conducting an investigation in an effort to find probable cause justifying the arrest was unconstitutional. *Id.* at *7–12.

Before the defendant was arrested, C.D.1 identified him to the police as the perpetrator. As a victim in the case, C.D.1 was a citizen informant whose statement is presumed to be reliable. *See* *State v. Yeomans,* 10 S.W.3d 293, 296 (Tenn.Crim.App.1999); *see also* *Melson,* 638 S.W.2d at 354 (defining a citizen informant as including the victim of the crime). The evidence presented at trial establishes that the officers had probable cause when they arrested the defendant. We conclude, therefore, that the defendant is not entitled to relief regarding this issue.

B. Admission of the Defendant's Confession to Deputy Director Armstrong

The defendant next argues that his confession to Deputy Director Armstrong should have been suppressed because he invoked his right to remain silent, and Deputy Director Armstrong refused to honor the invocation of this right. The defendant does not deny that he initially waived his rights after a valid *Miranda* warning but instead asserts that he invoked his right to remain silent when he informed Lieutenant Mason and Sergeant Stark that he no longer wished to speak to them. Generally, the Fifth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution provide a privilege against self-incrimination to those accused of criminal activity. As our supreme court has explained:

> In *Miranda v. Arizona,* 384 U.S. 436, 444 (1966), the United States Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The procedural safeguards must include warnings prior to any custodial questioning that an accused has the right to remain silent, that any statement he makes may be used against him, and that he has the right to an attorney.

State v. Blackstock, 19 S.W.3d 200, 207 (Tenn.2000).

The defendant, however, misconstrues the evidence presented at trial. While Lieutenant Mason testified that the defendant stated he no longer wished to speak to her and Sergeant Stark, she also testified that the defendant instructed them that he wished to speak to other officers. An accused who wishes to invoke his or her right to remain silent must do so unambiguously. *Berghuis v. Thompkins,* 560 U.S. 370 (2010). We cannot conclude that the defendant made an unambiguous invocation of his right to remain silent by his request to speak to officers other than the ones who were interviewing him at the time. Because no clear and unequivocal rule of law was violated, the admission of the defendant's confession to Deputy Director Armstrong did not rise to the level of plain error.

C. Admission of the Defendant's Confession to Shaw

***52** The defendant next argues that his confession to Shaw was obtained in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 9 of the Tennessee Constitution because

Shaw was acting as an agent for the State and obtained the confession in violation of his previously invoked right to counsel. We disagree.

At trial, Deputy Director Armstrong testified that during his interview with the defendant, the defendant requested an attorney and asked to speak to his mother. As a result, Deputy Director Armstrong arranged to have Shaw transported from protective custody to the police department. Shaw, during the jury-out hearing on the motion to suppress, testified that while she, the defendant, and other family members were in protective custody, officers came and took the defendant away. Either later that evening or during the early morning hours, officers returned and informed Shaw that the defendant had requested to see her. Shaw denied that Deputy Director Armstrong or any other officer asked her to obtain any information from the defendant for them. She said that when she spoke to the defendant, no one else was in the room with them. At the conclusion of Shaw's testimony, the trial court denied the defendant's motion to suppress.

On review, an appellate court may consider the evidence presented at the suppression hearing as well as at trial in determining whether the trial court properly denied a motion to suppress. *State v. Henning,* 975 S.W.2d 290, 297–99 (Tenn.1998). When the trial court "makes findings of fact in the course of ruling upon a motion to suppress, those findings are binding on appeal unless the evidence in the record preponderates against them." *State v. Meeks,* 262 S.W.3d 710, 722 (Tenn.2008). A trial court's conclusions of law and application of the law to the facts are reviewed de novo without any presumption of correctness. *Id.* The State, as the prevailing party, "is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." *State v. Talley,* 307 S.W.3d 723, 729 (Tenn.2010) (quotations omitted). Questions regarding the assessment of a witness's credibility, the weight and value of the evidence, and the resolution of evidentiary conflicts are entrusted to the trial court as the trier of fact. *Meeks,* 262 S.W.3d at 722.

In *Rhode Island v. Innis,* 446 U.S. 291, 300–01 (1980), the United States Supreme Court held that the rationale of the *Miranda* decision prohibited both express questioning by the police and its "functional equivalent." The Court explained that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301 (footnotes omitted). According to the Court, "[t]he latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Id.*

***53** In *Arizona v. Mauro,* 481 U.S. 520 (1987), the United States Supreme Court addressed the circumstances under which questioning by a private third party constitutes the functional equivalent of interrogation. In *Mauro,* the defendant admitted to officers that he had killed his son and directed them to the child's body. After being advised of his *Miranda* rights, the defendant invoked his right to counsel. The defendant's wife was then allowed to meet with him in the presence of an officer who tape-recorded the conversation.

The Court held that the questioning of the defendant by his wife did not constitute an "interrogation." *Id.* at 528. The Court reasoned that there was no evidence that the police sent in the defendant's wife for the purpose of eliciting incriminating statements. *Id.* The Court considered the situation from the defendant's perspective and concluded that it was unlikely that the defendant would have felt "that he was being coerced to incriminate himself" by his wife's presence. *Id.* Finally, the Court concluded that the decision to allow the defendant's wife to see him was not "the kind of psychological ploy that properly could be treated as the functional equivalent of interrogation." *Id.* at 527 (footnote omitted). Thus, in the absence of "compelling influences, psychological ploys, or direct questioning," the "possibility" that an accused will incriminate himself or the officer's subjective "hope" that he will do so is not the functional equivalent of interrogation. *Id.* at 528–29.

In the present case, there was no evidence that Shaw was sent by the police to see the defendant "for the purpose of eliciting incriminating statements," *see id.* at 528, or that the officers asked, directed, induced, or threatened her to obtain information from the defendant. According to Shaw's testimony, she was escorted to the interview room, where she and the defendant were allowed to speak to each other unsupervised, and the officers did not provide any instructions on what questions to ask the defendant. Accordingly, we conclude that Shaw was not acting as a "state agent." *See State v. Smith,* 933 S.W.2d 450, 453 (Tenn.1996); *State v. Kendall Edward Johnson,* No. M2011–00792–CCA–R3–

CD, 2012 WL 3731699, at *11–14 (Tenn.Crim.App. Aug. 29, 2012), *perm. app. denied* (Tenn. Jan. 14, 2013).

We also cannot conclude that the defendant was coerced to incriminate himself by Shaw's visit. As noted in *Mauro:*

> In deciding whether particular police conduct is interrogation, we must remember the purpose behind our decisions in *Miranda* and *Edwards [v. Arizona,* 451 U.S. 477 (1981)]: preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment.... Police departments need not adopt inflexible rules barring suspects from speaking with their spouses, nor must they ignore legitimate security concerns by allowing spouses to meet in private.

***54** 481 U.S. at 529–30.

The evidence in the present case does not establish that the police used the coercive nature of the defendant's confinement to extract an inculpatory statement from him that he would not have otherwise made to his mother in an unrestrained environment. We, therefore, conclude that the trial court properly denied the defendant's motion to suppress evidence of his confession to his mother.

IV. Admission of Testimony that the Defendant Invoked his Right to Counsel

The defendant also contends that the State presented evidence in its case-in-chief that he invoked his right to remain silent and his right to counsel in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 8 and 9 of the Tennessee Constitution.

A. Right to Remain Silent

The defendant first asserts that Deputy Director Armstrong improperly commented about the invocation of his right to remain silent. The defendant complains about the following testimony during the State's direct examination of Deputy Director Armstrong:

> Q. If you would, explain to the jury how you ended up coming into contact personally with [the defendant]?
>
> A. I watched the interview of Sergeant Mason and Sergeant Max's interview with [the defendant], during which he shut down on them and didn't want to talk to the two of them anymore. I then made a decision that I would go in and conduct the investigation—conduct the interview myself.
>
> ....
>
> Q. Tell the jury what you did when you walked into the room with [the defendant] and take them through kind of how you talked to him and what he was telling you.
>
> A. I walked in and I introduced myself. I told him I was Lieutenant Armstrong. I actually pulled up another chair and put my feet up in it and kind of leaned back and we just talked. We talked about how horrific this crime was. I watched his body language. At that point he seemed as if he was really, really tight, like he was doing everything he could not to talk to me. If I asked him a question, his answers were one-word answers, maybe one- or two-word answers. He wouldn't engage me in open conversation. Most of the time if I asked him a question, he would nod his head or shake his head. But you could tell he was doing everything he could not to engage me in an open conversation as to where we had open dialogue back and forth with each other.

The State later questioned Deputy Director Armstrong as follows:

> Q. So you had this background information and then you went to talk to [the defendant]. Explain to the jury how the interview went, some of the things that you continued to say and what you talked about with [the defendant].
>
> A. Like I said, I walked into the interview room. I introduced myself. I pulled up a chair. I propped up my feet and we basically started talking and I asked Jessie to tell me some of the things that are important to you. He said my family. We talked about religion. I asked him whether or not he believed in God. He told me that he

did. I asked him whether or not he believed in heaven and hell. He told me that he did. I could tell that he was almost like he was struggling to try to maintain his composure. There [were] several times that we talked it was almost—he leaned forward as if I want to tell you something but he'd get his self [sic] together and he'd lean back. So I could tell he was hiding something. I could tell he was doing everything he could, like I said, not to engage me in open conversation because he was trying to keep—limit his words to the least as he could.

***55** The defendant did not object to the testimony at trial and did not raise the issue in his motion for new trial. Accordingly, this issue is waived. Furthermore, the issue does not rise to the level of plain error. The evidence established that the defendant was under arrest when Lieutenant Mason and Sergeant Stark interviewed him, that they informed him of his *Miranda* rights, and that he waived his rights and agreed to talk to them. Thereafter, the defendant did not exercise any of his *Miranda* rights until he requested counsel during his interview with Deputy Director Armstrong after which all questioning ceased.

Deputy Director Armstrong's testimony regarding the defendant's interview with Lieutenant Mason was not a reference to the invocation of his right to remain silent. As we have previously stated, the evidence presented at trial establishes that the defendant did not invoke his right to remain silent during the interview with Lieutenant Mason. Rather, the defendant told Lieutenant Mason and Sergeant Stark that he wished to speak to a different officer.

The defendant also contends that Deputy Director Armstrong's testimony regarding the defendant's reluctance to answer questions was an impermissible comment on the invocation of his right to remain silent. Silence for a period of time is insufficient to invoke the right to remain silent. *Berghuis,* 560 U.S. at ——. Rather, "an accused who wants to invoke his or her right to remain silent [must] do so unambiguously." *Id.* Because the defendant's reluctance to answer questions does not amount to an invocation of his right to remain silent, Deputy Director Armstrong's testimony regarding such reluctance was not improper. Accordingly, we conclude that a clear and unequivocal rule of law was not breached, and the issue does not rise to the level of plain error.

B. Right to Counsel

The defendant next contends that testimony regarding his invocation of his right to counsel was improperly admitted. According to the defendant, such testimony was improperly presented during defense counsel's cross-examination of Sergeant Mullins and later during the State's direct examination of Deputy Director Armstrong.

1. Sergeant Mullins

Defense counsel questioned Sergeant Mullins on cross-examination regarding the importance of the defendant's statement to police and the non-existence of a typewritten statement. Defense counsel also questioned Sergeant Mullins regarding what questions he would have asked the defendant and what information he would have documented. The following exchange occurred:

Q. If you were interviewing [the defendant] in this case and he told you where the knives and the guns went, would that have been important enough for you to write down?

A. Yes, sir. Again, if he told us where anything was, any evidence from this crime scene, just like the bicycle, we would have followed up. I don't see why anybody would not have. We followed up on everything that I know of that he said as far as his actions afterwards.

***56** ....

Q. If you were interviewing [the defendant] and you asked him about grabbing hair or ripping beads out, would you have asked him that question and recorded his answer on paper? Would you have documented what was asked and what was said?

A. If I was able to interview [the defendant], I would have asked a lot of questions before he asked for his attorney. Now how many questions he was asked before he asked for an attorney, I couldn't tell you. I would have asked a lot of questions before such time.

....

Q. So you would have specifically after looking at the crime scene, you would have asked some questions about like holes in the cushion and you would have documented your question and your answer?

A. Yes, sir. See, again, realize how this investigation went. The crime scene was kind of my job. And I did not at

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> any point between the original call-out and the interview, arrest and interview of [the defendant], have a chance to sit down with anybody and say okay, here's what I found in this room, in this room and in this room. I didn't hardly stop in those four or five days. If I had been able to interview [the defendant], I would have had very different questions than anybody else on this case because I had more knowledge about that than any of them did and did they know about certain things, yes, but specific small details, I know more about that than anybody else on the team.

The defendant did not object to the testimony at trial. Therefore, the issue is waived. Moreover, the issue does not rise to the level of plain error. Defense counsel's cross-examination of Sergeant Mullins essentially was an attack on the method employed by the officers who interviewed the defendant and the officers' failure to ask certain questions and document those answers. Sergeant Mullins responded in part by explaining that the defendant had requested counsel and that he was unaware of what questions were asked before counsel was requested. Through this method of cross-examination, the defendant opened the door to Sergeant Mullins' testimony. "[A] litigant is not 'permitted to take advantage of errors which he himself committed, or invited, or induced the trial [c]ourt to commit.' " *State v. Sexton,* 368 S.W.3d 371, 410 (Tenn.2012) (quoting *Norris v. Richards,* 246 S.W .2d 81, 85 (Tenn.1952)). We conclude, therefore that the defendant is not entitled to relief regarding this issue.

2. Deputy Director Armstrong

During the State's direct examination of Deputy Director Armstrong, the following exchange occurred:

> Q. Did you make any attempts to go into greater detail with [the defendant] about what occurred in that house based on what you knew from the crime scene?
>
> A. I did. From the crime scene I could tell some of the women's clothing had been altered and I asked him about that. And as I tried to ask him additional questions about that, he asked for an attorney.
>
> Q. He asked for a lawyer?
>
> ***57** A. Yes, he did.

The defendant objected to the testimony and requested a mistrial. The trial court denied the request for a mistrial, finding that the testimony was relevant "in light of the line of questioning that's been going on" and "in light of all the issues with regard to recorded statements, formal statements." The trial court then instructed the jury as follows:

> Ladies and gentlemen, before we go any further, let me just say this to you. Under our laws and under the Constitution of the United States, every person is entitled to have representation. People are advised and in this case a person is advised of their rights. They are advised that they have the right to talk to an attorney at any time. Once they request the permission to talk to an attorney, all questions cease, okay. There's no more questioning after that point. Everybody has a right to that. That is a right that is entitled to all of us as citizens of the United States. You are to draw no conclusions from that, other than all questions cease at the point somebody says they want to talk to an attorney. Does everybody understand that? That's the only conclusion you may draw from that, all questions cease at that point.

The State then questioned Deputy Director Armstrong as follows:

> Q. And on that note, ... you weren't unable to get a formal written statement from [the defendant] because he stopped the interview?
>
> A. He did stop.

Deputy Director Armstrong mentioned the defendant's request for counsel during cross-examination in the following exchange with defense counsel:

> Q. When I asked you about the comment [the defendant] made to you that you lied to me, would that be something

important enough to put into your supplement, Deputy Director Armstrong?

A. I don't see where it's relevant, no, sir.

Q. So it's not important?

A. I don't see where it's relevant as far as what if you decide —no, sir. At that point when he decided that he wanted an attorney, we ceased the interview.

Defense counsel later questioned Deputy Director Armstrong regarding the lack of detail of the offenses in the defendant's confession. The following exchange occurred:

Q. Okay. What did [the defendant] tell you he did with the boards that were in the house?

A. The only weapons that we ever discussed were pistols and the knives. Again, we did not get a chance to get into specifics where I was able to sit down and ask him specific questions to get specific answers from him because by the time we got to that point, he requested an attorney and I ceased the interview.

The defendant submits that the trial court erred in denying his motion for a mistrial. We respectfully disagree. A mistrial should be declared in criminal cases only in the event that a manifest necessity requires such action. *State v. Middlebrooks,* 819 S.W.2d 441, 443 (Tenn.Crim.App.1991). A mistrial is an appropriate remedy when a trial cannot continue or a miscarriage of justice would result if it did. *State v. McPherson,* 882 S.W.2d 365, 370 (Tenn.Crim.App.1994). The decision to grant a mistrial lies within the sound discretion of the trial court, and this court will not interfere with the exercise of that discretion absent clear abuse appearing on the face of the record. *See State v. Hall,* 976 S.W .2d 121, 147 (Tenn.1998). Moreover, the burden of establishing the necessity for mistrial lies with the party seeking it. *State v. Williams,* 929 S.W.2d 385, 388 (Tenn.Crim.App.1996).

***58** A defendant may not be penalized at trial for the exercise of his constitutional right to remain silent after arrest. *Doyle v. Ohio,* 426 U.S. 610, 618 (1976); *Braden v. State,* 534 S.W.2d 657, 661 (Tenn.1976). Generally, the prosecution may not comment at trial that a defendant invoked the right to remain silent in the face of accusation. *Braden,* 534 S.W.2d at 660; *Ware v. State,* 565 S.W.2d 906, 908 (Tenn.Crim.App.1978). Tennessee courts have held that a prosecutor's improper comment regarding a defendant's privilege against self-incrimination is not reversible error if it can be established that the error is harmless beyond a reasonable doubt. *See, e.g., State v. Deangelo Davis,* No. W2008–00992–CCA–R3–CD, 2009 WL 1841725, at *4–5 (Tenn.Crim.App. June 26, 2009) (holding that the officer's comment regarding the defendant's post-arrest silence was improper but did not rise to the level of reversible error), *perm. app. denied* (Tenn. Oct. 19, 2009); *State v. Jonathan D. Rosenbalm,* No. E2002–00324–CCA–R3–CD, 2002 WL 31746708, at *5–6 (Tenn.Crim.App. Dec. 9, 2002) (holding that any error in questioning the defendant regarding his post-arrest, post-*Miranda* silence was harmless beyond a reasonable doubt), *perm. app. denied* (Tenn. May 27, 2003).

We conclude that even if Deputy Director Armstrong's comment regarding the defendant's request for counsel were improper, any error was harmless beyond a reasonable doubt and did not create a "manifest necessity" for a mistrial. The jury previously had heard that the defendant had requested counsel when the defendant opened the door to such testimony during the cross-examination of Sergeant Mullins. Furthermore, the record does not reflect that the prosecutor deliberately elicited the testimony in order to create an inference of guilt on the part of the defense. Rather, as the trial court found, the testimony was relevant to address the questions posed by defense counsel throughout trial regarding the officers' failure to question the defendant regarding certain details of the offenses and the officers' failure to obtain a recorded statement from the defendant. In addition, the trial court gave a curative instruction to the jury, which we must presume that the jury followed. *See State v. Young,* 196 S.W.3d 85, 111 (Tenn.2006). Finally, the State's case against the defendant was strong such that the jury would have convicted the defendant in the absence of the improper testimony.

The defendant asserts that the error was compounded by Deputy Director Armstrong's testimony on cross-examination and the State's mention of the testimony in closing arguments. We note, however, that, similar to the cross-examination of Sergeant Mullins, Deputy Director Armstrong's mention of the defendant's request for counsel occurred as he attempted to respond to defense counsel's questions as to why he failed to obtain details about the murders from the defendant, and thus, was a response elicited, at least in part, by defense counsel. Moreover, in our view, the State's comment during rebuttal closing arguments that "[w]hen [the defendant] was

brought down to the police department, he could have cleared it all up[,][b]ut he didn't" was not a reference to the defendant's request for counsel, but instead a comment on the discrepancies between the defendant's statements and his trial testimony. We conclude, therefore, that the defendant is not entitled to relief regarding this issue.

V. Admission of Evidence Regarding the Defendant's Prior Imprisonment

***59** Prior to trial, the defendant filed a motion in limine seeking to prohibit the State from introducing evidence of his prior incarceration for second degree murder. Following a hearing, the trial court entered an order denying the defendant's motion. The court analyzed the issue under Tennessee Rule of Evidence 404(a) and (b). The court noted the prosecution's statement that it did not intend to reveal to the jury the nature of the charges for which the defendant had been incarcerated. The court further noted:

> [T]he State essentially set forth three categories of statements from the defendant and witnesses regarding the defendant's prior incarceration: (1) [s]tatements made by the defendant to family members relating to the relationship between the defendant and his brother and victim, Cecil Dotson, which include references to the defendant's incarceration and which the State argues are relevant to intent and motive; (2) statements made, after the commission of the crimes in question, by the defendant to family and to the police relating to [the] defendant's unwillingness to return to jail or concern over returning to jail, which the State argues are relevant to demonstrate motive and state of mind; and (3) statements of witness[es] who the State contends only relationship with the defendant is based upon his former incarceration and which the State contends cannot be presented without reference to that fact.

The trial court found that the statements regarding the relationship between the defendant and Cecil that referenced the defendant's prior incarceration and the defendant's statements following the murders regarding his unwillingness to return to prison were "highly probative as to the defendant's intent, motive and state of mind at the time of the commission of the offense[s] and outweighed any prejudicial effect to the defendant." The court also found clear and convincing evidence of the defendant's prior incarceration. The court limited the State's use of evidence of the defendant's prior incarceration, finding that "the mere fact that a witness' [s] knowledge of the defendant was in part or fully conditioned upon defendant's incarceration was simply insufficient to warrant the witness divulging this fact to the jury." The court instructed the State to "limit these types of witnesses' references to the fact that the defendant was previously incarcerated."

During trial, the State asked Deputy Director Armstrong what information he had about the defendant before interviewing him. Deputy Director Armstrong responded, "Before going in that interview room, I knew that [the defendant] was very familiar with the criminal justice system because he had recently been released from prison." Defense counsel objected, arguing that Deputy Director Armstrong's testimony violated the trial court's order. The trial court found that the testimony was not inappropriate and noted that multiple witnesses already had testified to the defendant's prior incarceration.

***60** The State then asked Deputy Director Armstrong why background information was important before conducting an interview. Deputy Director Armstrong responded:

> You try to get as much information about a person as you can. Before you interview them, you want to know how many times they've been arrested. You want to know if they're familiar with the criminal justice system. You want to know if it's the first time they've ever been arrested and you want to know have they ever been arrested of anything, a violent crime, age. So it

> helps in an interview to know as much as you can about a person before you proceed with it.

The trial court then instructed the jury as follows:

> Before we go any further, ladies and gentlemen, there has been testimony in this case about whether or not [the defendant] had been in jail. There's been some testimony with regard to the fact that he's been in jail. I want you to understand the fact that he has been in jail has no bearing whatsoever on your decision in this case. You're to decide this case based upon the facts that are presented in this case. The only reason that issue has even come before you is it plays into certain parts of the proof. That's the only thing you're to consider that for. Does everybody understand that? Thank you.

The defendant contends that Deputy Director Armstrong's testimony violated the trial court's order on the motion in limine, as well as Rule 404(b) of the Tennessee Rules of Evidence. Rule 404(b), Tennessee Rules of Evidence, provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
>
> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

The rationale behind the general rule of inadmissibility in Rule 404(b) is that the admission of evidence of other wrongs poses a substantial risk that the trier of fact may convict the defendant based upon the defendant's bad character or propensity to commit criminal offenses, rather than upon the strength of the evidence of guilt on the specific offense for which the defendant is on trial. *State v. Dotson,* 254 S.W.3d 378, 387 (Tenn.2008); *State v. James,* 81 S.W.3d 751, 758 (Tenn.2002).

Evidence of other crimes, wrongs, or acts may be admitted as relevant to issues of "identity (including motive and common scheme or plan), intent, or rebuttal of accident or mistake." Tenn. R. Evid. 404(b), Advisory Comm'n Cmts.; *see* *Burch v. State,* 605 S.W .2d 227, 229 (Tenn.1980). To minimize the risk of unfair prejudice in the introduction of evidence of other acts, however, Rule 404(b) establishes protective procedures that must be followed before the evidence is admissible. *See* Tenn. R. Evid. 404(b); *James,* 81 S.W.3d at 758. Upon request, the trial court must hold a hearing outside the jury's presence to determine whether the evidence of the other acts is relevant to prove a material issue other than the character of the defendant. *James,* 81 S.W.3d at 758. The trial court must state on the record the specific issue to which the evidence is relevant and find the evidence of the other crime or act to be clear and convincing. *Id.* If the trial court substantially follows the procedures in Rule 404(b), the court's decision will be given great deference on appeal and will be reversed only if the trial court abused its discretion. *Id.*

***61** The State acknowledges that Deputy Director Armstrong's testimony regarding the defendant's past incarceration did not involve one of the permissible purposes set forth in the trial court's order on the motion in limine. It argues, however, that the trial court's order did not specifically prohibit the testimony and that the testimony was relevant to assist the jury in assessing "the integrity of the defendant's confession—that the defendant knew his rights, had experience with police, and would not be easily coerced into confessing to a heinous crime he did not commit." We note, however, that while Deputy Director Armstrong testified that he would want to know whether an accused had a criminal history before an interview, he never testified why knowledge of a prior criminal history was important.

Thus, we cannot conclude that Deputy Director Armstrong's testimony was relevant for the purposes asserted by the State.

We conclude, however, that any error in admitting the testimony was harmless. By the time that Deputy Director Armstrong testified, multiple other witnesses had testified to the defendant's prior incarceration within the bounds set forth by the trial court in its pretrial order. Deputy Director Armstrong did not state the length or reason for the defendant's incarceration. The trial court also gave a limiting instruction, which the jury is presumed to have followed. *See* *Young,* 196 S.W.3d at 111. Accordingly, the defendant is not entitled to relief regarding this issue.

VI. Trial Court's Treatment of Defense Counsel

The defendant next contends that the trial court's reprimand of defense counsel in open court prejudiced his right to a fair trial. The exchange about which the defendant complains occurred after defense counsel first questioned Sergeant Mullins about the presence at the crime scene and during the defendant's police interview of a camera crew from the television show, *The First 48,* and then asked Sergeant Mullins the following question about a cameraman who was recording the trial:

> Q. ... That guy is from A and E, isn't he, *The First 48?* We're still continuing the story, aren't we?
>
> A. As far as I know, yes, sir.
>
> Q. We're filming the rest of the show; right?

Before Sergeant Mullins answered the question, the trial court interrupted, stating:

> THE COURT: [F]or the record, the Supreme Court of the State of Tennessee has authorized cameras in the courtroom. This Court allows one camera in the courtroom and all media outlets feed off of the one camera. That camera and the TV station associated with that is the lead camera that's in the courtroom. Every media outlet and every channel is peeling off of one camera. That is one that has been authorized by the Supreme Court to be here.
>
> [DEFENSE COUNSEL]: I understand.
>
> THE COURT: This Court is not authorizing a television show or to be part of a television show. They are following the rules that the Supreme Court says. So let's make sure the record is clear that this is not a TV show and this is not being produced as a TV show and it's not being edited as a TV show. This is a trial.
>
> ***62** [DEFENSE COUNSEL]: Can I ask him who the producer that's running the camera works for?
>
> THE COURT: No, sir.
>
> [PROSECUTOR]: I'm going to object to relevance.
>
> THE COURT: That camera is in this courtroom and you know that camera is in this courtroom under the rules of the Supreme Court of Tennessee. They are one of a party of media outlets that are using that feed. So let's don't talk about this being part of a TV show. You want to ask questions, let's ask relevant questions.
>
> [DEFENSE COUNSEL]: I am asking questions about this.
>
> THE COURT: This is not apart [sic] of a television show .... Let's move on to something that's relevant.

Defense counsel continued by questioning Sergeant Mullins about the presence of a camera and the crew from *The First 48* during the time the defendant was interviewed by police. The trial court again interrupted, informing defense counsel that it believed Sergeant Mullins had previously answered that question. The State requested a bench conference, and the trial court denied the request:

> That he was not present when that interview was conducted so let's move into areas that he's aware of, okay. I've allowed this to go for a long way, and I know where you're going and I understand why you're going there. He's already testified he wasn't present when that interview was conducted. He doesn't know who was in there.

During a subsequent jury-out hearing, co-counsel objected to the trial court's "calling down" defense counsel when he was questioning a witness. The trial court explained that defense counsel had accused the court of being part of a television show. The court stated, "And that's when I said enough. This is not part of a TV show. This is a court of law." The trial court agreed that in the future, it would not "call [defense

counsel] down" in the jury's presence but would call them to the bench instead. The court thereafter apologized to defense counsel "for losing [its] temper." When the jury returned, the trial court then offered the following apology to the jury:

> All right. Ladies and gentlemen, first, let me apologize to you for losing my temper. I've already apologized to the lawyers. You need to understand that—and I know you do, this is an adversarial proceeding. But within that adversarial proceeding there [are] certain rules of decorum that we all must operate under, me included. I've worked with these lawyers for many years.
>
> Sometimes I lose my temper and it's inappropriate. I should not do that. I should not do it in the manner in which I sometimes lose my temper. So I've apologized to them. I apologize to you. I will say to you, you cannot, should not, nor would it be proper for you to in any way hold [the defendant] or anybody else responsible for my lack of being able to maintain my own cool. So I say that to you with all d[ue] respect. I hope you accept my apology.

"[A]ll litigants are entitled to the 'cold neutrality of an impartial court' and have a right to have their cases heard by fair and impartial judges." *Wright v. Pate,* 117 S.W.3d 774, 778 (Tenn.Ct.App.2002) (quoting *Kinard v. Kinard,* 986 S.W.2d 220, 227 (Tenn.Ct.App.1998)). Cannon 3(A) of the Code of Judicial Conduct provides that a trial judge should be "patient, dignified, and courteous to the litigants, jurors, witnesses and lawyers" during the course of a trial, and instructs the trial judge to perform his or her judicial duties without bias or prejudice. Tenn. Sup.Ct. R. 10. [3] While the trial judge is extended broad discretion in controlling the course and conduct of the trial, the trial judge must refrain from expressing "any thought that might lead the jury to infer that the judge is in favor of or against the defendant in a criminal trial." *State v. Cazes,* 875 S.W.2d 253, 260 (Tenn.1994); *State v. Harris,* 839 S.W.2d 54, 66 (Tenn.1992).

***63** It is apparent that defense counsel's cross-examination of Sergeant Mullins about the presence of the camera crew and the fact that the trial was being filmed for possible use in a future television show came across to the trial court as an attack on the integrity and formality of the trial process, which led to the court's reprimand to counsel. While we can understand and sympathize with the trial court's frustration, we agree that the court should have avoided reprimanding defense counsel in the presence of the jury.

We do not, however, believe that the trial court's remarks, when viewed in the context of the entire trial, deprived the defendant of his constitutional right to a fair trial. The remarks constituted a brief portion of a multi-week trial; the trial court apologized to both defense counsel and the jury for the remarks; and the trial court appropriately instructed the jury that it was not to consider its comments against the defendant. We, therefore, conclude that, considering the record in its entirety, the error was harmless beyond a reasonable doubt. *See State v. John D. Joslin,* No. 03C01–9510–CR–00299, 1997 WL 583071, at *42–43 (Tenn.Crim.App. Sept. 22, 1997), *perm. app. denied* (Tenn. Nov. 9, 1998) (holding that while the trial court's remark was improper, the error was "harmless beyond a reasonable doubt").

The defendant also complains that his right to a fair trial was violated by the fact that the trial court continued to interject during defense counsel's cross-examination of Sergeant Mullins, instructing defense counsel to repeat or rephrase questions and refusing to allow defense counsel to ask certain questions. The record, however, demonstrates that the trial court merely asked defense counsel to repeat or rephrase questions that were unclear and refused to allow counsel to repeatedly ask the same questions. By doing so, the trial court was fulfilling its duty to ensure that the proceedings "move[d] along in an orderly and systematical manner." *State v. Evans,* 838 S.W.2d 185, 195 (Tenn.1992). We conclude, therefore, that the defendant is not entitled to relief regarding this issue.

VII. Admission of Autopsy Reports and Dr. Funte's Testimony

The defendant contends that the admission of the autopsy reports of Cecil, Seals, and C.D.3 that were prepared by Dr. Miguel Laboy and Dr. Funte's testimony regarding those autopsies violated his right to confront witnesses under the United States and Tennessee Constitutions. The defendant failed to object to the admission of those reports and Dr. Funte's testimony at trial and failed to raise the issue in his motion for new trial. Therefore, our review is limited to plain error.

A. Admission of Reports of
Autopsies Not Performed by Witness

In *Crawford v. Washington,* 541 U.S. 36, 68 (2004), the United States Supreme Court held that "[w]here testimonial evidence is at issue ... the Sixth Amendment demands ... unavailability and a prior opportunity for cross-examination." "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." *Id.* The Court adopted what came to be known as "the primary purpose test" for distinguishing testimonial statements from nontestimonial statements, concluding:

> ***64** Statements are nontestimonial when made in the course of police investigation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822 (2006). Objective evaluation of "the circumstances in which the encounter occurs and the statements and actions of the parties" is necessary to determine whether a statement is testimonial or nontestimonial. *Michigan v. Bryant,* —— U.S. ——, 131 S.Ct. 1143, 1156 (2011).

In *Melendez–Diaz v. Massachusetts,* 557 U.S. 305, 307 (2009), the Court concluded that "affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine" were testimonial and subject to exclusion as violating the confrontation clause. The Court concluded that "the affidavits 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial' " and that "under Massachusetts law the *sole purpose* of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance." *Id.* at 311 (citations omitted). The Court held that absent a showing that the analysts were unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine them, the defendant was entitled to confront the analysts at trial. *Id.* The Court concluded that live confrontation of the witness by the defendant was the only constitutionally permissible way "to challenge or verify the results of a forensic test" and observed that confrontation would "weed out" fraudulent and incompetent forensic analysis. *Id.* at 318–19. The Court rejected the argument that reports of forensic testing were admissible as business records and that business records were exempted from the ruling in *Crawford. Id.* at 321–24.

In *Bullcoming v. New Mexico,* —— U.S. ——, 131 S.Ct. 2705, 2709 (2011), the prosecutor introduced the results of forensic testing through the testimony of a forensic analyst who was familiar with the laboratory's testing procedures but did not participate or observe the test on the defendant's blood sample. The Court held that the defendant's confrontation rights were violated, noting that "if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront the witness." *Id.* at 2713. The Court rejected the argument that substitute testimony satisfied the constitutional requirement based upon the reliable nature of the tests themselves, explaining that "the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.' " *Id.* at 2715 (quoting *Melendez–Diaz,* 557 U.S. at 319 n. 6). The Court concluded that the Confrontation Clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Id.* at 2716.

***65** Based upon the holdings of *Melendez–Diaz* and *Bullcoming,* this court recently held that an autopsy report is testimonial and that the admission of its contents absent the presence for cross-examination of the pathologist who conducted the autopsy violated the defendant's right to

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confront the witnesses against him. *State v. James Drew Freeman, Jr.,* No. M2011–00184–CCA–R3–CD, 2012 WL 1656975, at *10–13 (Tenn.Crim.App. May 9, 2012), *perm. app. denied* (Tenn. Oct. 17, 2012).

More than one month after this court released the *Freeman* opinion, however, the United States Supreme Court released its opinion in *Williams v. Illinois,* —— U.S. ——, 132 S.Ct. 2221 (2012). *Williams* involved a bench trial in a rape case during which a forensic specialist from the Illinois state laboratory testified that she matched a DNA profile produced by an outside laboratory from a vaginal swab taken from the victim to a profile that the state laboratory obtained using a sample of the defendant's blood. In a plurality opinion, the Court concluded that the testimony did not violate the Confrontation Clause. *Id.* at 2240. The Court noted that while the report from the independent laboratory was not introduced into evidence, the admission of the report would not have violated the Confrontation Clause even if the report had been introduced for its truth. *Id.* at 2242.

The Court stated that the "Confrontation Clause refers to testimony by 'witnesses against' an accused." *Id.* The Court explained:

> The abuses that the Court has identified as prompting the adoption of the Confrontation Clause shared the following two characteristics: (a) they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions.

Id. The Court noted that while it held that the forensic reports at issue in *Melendez–Diaz* and *Bullcoming* qualified as testimonial statements, "the Court did not hold that all forensic reports fall into the same category." *Id.* at 2243. Rather, the introduction of the reports, which reported an elevated blood-alcohol level and the presence of an illegal drug, violated the Confrontation Clause "because they were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial." *Id.* There was no ongoing emergency, as both suspects had already been captured, and the tests were "relatively simple" and generally could be performed by a single analyst. *Id.* The Court also noted that the technicians who prepared the reports must have realized that the contents of the reports would be incriminating. *Id.* The Court also noted earlier in its opinion that the forensic reports in *Melendez–Diaz* and *Bullcoming* included a testimonial certification, made in order to prove a fact in a criminal trial. *Id.*

***66** The Court explained that an objective test is to be applied in determining the primary purpose of an out-of-court statement. *Id.* "We look for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances." *Id.* The Court concluded that the primary purpose of the report from the independent laboratory in *Williams* was not to accuse the defendant or to create evidence for use at trial. *Id.* Rather, the primary purpose of the report was to "catch a dangerous rapist who was still at large." *Id.*

The United States Supreme Court's opinion appears to have effectively abrogated this court's holding in *James Drew Freeman, Jr.* that the admission of an autopsy report prepared by a pathologist who does not testify at trial violates the Confrontation Clause. As Justice Breyer recognized in his concurring opinion in *Williams,* "[a]utopsies, like the DNA report in this case, are often conducted when it is not yet clear whether there is a particular suspect or whether the facts found in the autopsy will ultimately prove relevant in a criminal trial." 132 S.Ct. at 2251 (Breyer, J. concurring). In this case, the autopsy reports were created on March 4, 2008, before the defendant was identified as a suspect, and their primary purpose was not to target the defendant as the perpetrator but instead to identify the injuries sustained by the victims and their causes of death. Accordingly, we conclude that the defendant has failed to establish that a clear and unequivocal rule of law has been breached, necessary for plain error review.

We further conclude that review of the issue for plain error is not " 'necessary to do substantial justice,' " *Smith,* 24 S.W.3d at 283 (quoting *Adkisson,* 899 S.W.2d at 641–42), because even if the autopsy reports were admitted in error, the error was harmless beyond a reasonable doubt. *See Coy v. Iowa,* 487 U.S. 1012, 1021 (1988); *James Drew Freeman, Jr.,* 2012 WL 1656975, at *13. The defendant did

not contend that the victims' deaths were the result of anything other than homicide, but instead challenged his identity as the perpetrator. Moreover, the evidence at trial, as we have previously reviewed, was more than sufficient to sustain the defendant's convictions.

B. Dr. Funte's Testimony Regarding Autopsies She Did Not Perform

The defendant also contends that the admission of Dr. Funte's testimony regarding the autopsies that she did not perform violated his right to confront witnesses. We disagree. The testimony was well within Dr. Funte's field of expertise, and the autopsy reports prepared by Dr. Laboy were "of a type reasonably relied upon by experts." *See* Tenn. R. Evid. 703; *James Drew Freeman, Jr.,* 2012 WL 1656975, at *14. The autopsy reports were admitted into evidence without objection by the defendant, and, thus, Dr. Funte could properly provide testimony from the reports and reveal some of the contents of the reports to the jury. The defendant also had the opportunity to cross-examine Dr. Funte regarding her conclusions of the victims' causes of death and to identify limitations placed upon Dr. Funte's testimony due to her failure to participate in the autopsies. This court has held that "the Confrontation Clause does not limit experts offering their own opinion regardless of the independent admissibility of the material relied upon." *Id.* (citations omitted). Accordingly, the defendant has failed to establish that a clear and unequivocal rule of law has been breached or that review of the issue for plain error is " 'necessary to do substantial justice.' " *Smith,* 24 S.W.3d at 283 (quoting *Adkisson,* 899 S.W.2d at 641–42).

VIII. Admission of Photographs

***67** The defendant contends that the trial court erred in denying his motion to prohibit the display of photographs of the victims after death. The admissibility of relevant photographs of victims and the crime scene is within the sound discretion of the trial court, and the court's ruling on admissibility will not be disturbed on appeal absent a showing of an abuse of that discretion. *State v. Carruthers,* 35 S.W.3d 516, 576–77 (Tenn.2000); *State v. Van Tran,* 864 S.W.2d 465, 477 (Tenn.1993); *State v. Banks,* 564 S.W .2d 947, 949 (Tenn.1978). As our supreme court stated in *Carruthers,* the modern trend is to vest more discretion in the trial court's rulings on admissibility. 35 S.W.3d at 577 (citing *Banks,* 564 S.W.2d at 949).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Tenn. R. Evid. 403. The court must determine the relevance of the visual evidence and weigh its probative value against any undue prejudice. *Id.* The term "unfair prejudice" has been defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Banks,* 564 S.W.2d at 950–51.

In *Banks,* our supreme court provided trial courts with guidance for determining the admissibility of relevant photographic evidence. The trial court should consider: the accuracy and clarity of the picture and its value as evidence; whether the picture depicts the body as it was found; the adequacy of testimonial evidence in relating the facts to the jury; and the need for the evidence to establish a prima facie case of guilt or to rebut the defendant's contentions. *Id.* at 951.

The defendant argues that the trial court erred in admitting photographs of the victims' facial injuries and crime scene photographs of the three child victims. We note, however, that the defendant raised no objections to the admission of the photographs at trial and at a pretrial hearing objected only to six photographs that depicted the children's injuries, which were taken at the hospital. At the conclusion of the hearing, the trial court ruled that five of the six photographs were relevant and admissible to show the extent and nature of the injuries in order for the State to prove premeditation. The court reserved its ruling on the sixth photograph in order for the State to determine whether it depicted a bloody bandage on a victim's head, or a portion of the child's scalp, stating that if it were a bandage, it would admit the photograph. The defendant has, thus, waived review of this issue.

Even if not waived, we would conclude that the trial court did not err in admitting the photographs. Photographs of a corpse are admissible in murder prosecutions if they are relevant to the issues at trial, notwithstanding their gruesome

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and horrifying character. *See* *Banks,* 564 S.W.2d at 950–51. The photographs admitted by the trial court were relevant to supplement the testimony of the medical examiner and the treating physician regarding the victims' injuries and to support the aggravating circumstances alleged by the State. *See, generally, State v. Cole,* 155 S.W.3d 885, 913 (Tenn .2005) (Appendix). We conclude, therefore, that the probative value of the photographs was not outweighed by their prejudicial effect, and the trial court did not abuse its discretion in admitting them.

IX. Denial of Motion to Provide DNA Analysis

***68** The defendant next contends that the trial court erred in denying his second amended motion to provide DNA analysis for all those who were in contact with the crime scene. The defendant filed his initial motion on May 13, 2010, stating that the purpose of the request was to eliminate law enforcement, medical, and other personnel who were present at the crime scene from physical evidence at the scene that did not match the defendant or the victims. During a hearing, defense counsel informed the trial court that the motion was filed in response to a report from the FBI crime laboratory which stated that two Caucasian or Asian Mongoloid hairs that were discovered mixed in the blood on the buttocks and thigh region of Roberson's body could not be identified as belonging to the defendant or the victims. The trial court ordered the State to determine those of Caucasian or Asian Mongoloid descent who had contact with the victim's body in investigating the crime scene.

During a subsequent hearing, the State informed the trial court that five individuals had direct contact with the victim's body: the medical examiner, the medical examiner's assistant, an emergency response officer, and two people from the private corpse removal service that the medical examiner's office used to transport the victims' bodies. The trial court denied the defendant's motion to require those five people to provide DNA samples for comparison with the unidentified hairs, observing that it was unaware of any authority that would permit it to compel private citizens who were not suspected of a crime to provide DNA samples to the court for testing by a criminal defendant. The court also noted that even if DNA testing were to exclude those five individuals as contributors, such evidence would not, alone, exculpate the defendant.

The trial court further noted that the defendant could request that those five people voluntarily provide a DNA sample and that defense counsel could, during trial: (1) question the State's experts regarding the availability of DNA testing and their decision not to perform such tests in order to eliminate investigators and medical personnel as contributors of the hairs; (2) question law enforcement and medical witnesses regarding the protocols they followed in preserving the evidence and avoiding scene contamination; and (3) argue that the hairs possibly belonged to an unknown perpetrator or an additional perpetrator. The defendant also could employ his own expert to review and potentially refute the State's findings upon a showing of particularized need for funding. Finally, the trial court prohibited the State from unfairly benefitting from its ruling by either claiming or inferring that the unidentified hairs conclusively belonged to one of those five individuals, or other individuals, who had entered the crime scene. The only inference that the trial court allowed the State to draw was that the hairs remained unidentified and could have been left by someone other than an unknown perpetrator.

***69** Shortly thereafter, the defendant filed amended motions in which he argued that the testing was necessary in order to protect his rights to confront witnesses, compulsory process of the law, and present a third party defense. The defendant asserted that the trial court could enter a protective order prohibiting disclosure of the testing absent court order. The trial court, however, once again denied the request.

The defendant acknowledges there is no Tennessee precedent for court-ordered DNA testing of law enforcement and medical personnel. *See, e.g.,* *Bartlett v. Hamwi,* 626 So.2d 1040, 1042–43 (Fla.Dist.Ct.App.1993) (upholding the trial court's denial of the defendant's motion to obtain a hair sample from a prosecution witness based upon the absence of a rule or statute authorizing such discovery, as well as a consideration of the witness's constitutional rights); *State v. McKinney,* 730 N.W.2d 74, 89–90 (Neb.2007) (applying the analysis in *Bartlett* in upholding the denial of the defendant's motion to obtain DNA samples from witnesses). The defendant argues, however, that such DNA testing is similar to law enforcement officers requesting "elimination fingerprints" when investigating a crime. We note, however, that in *State v. Dailey,* 273 S.W.3d 94, 97 (Tenn.2009), the case upon which the defendant relies, the trial court did not order the fingerprinting, but individuals were instead asked to voluntarily provide elimination fingerprints. *Id.*

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Moreover, the withdrawal of blood for testing "infringes an expectation of privacy" and is subject to the constraints of the Fourth Amendment. *Skinner v. Ry. Labor Executives' Ass'n,* 489 U .S. 602, 616 (1989); *State v. Scarborough,* 201 S.W.3d 607, 616 (Tenn.2006). Although we recognize that it is possible to "extract DNA by applying a sticky patch to the skin on an individual's forearm for a moment to acquire epidermal cells without puncturing the skin surface," *Scarborough,* 201 S.W.3d at 619 (quotations omitted), DNA analysis performed after the collection of a biological specimen "is a separate and distinct search which 'is potentially a far greater intrusion than the initial extraction of DNA, since the state analyzes DNA for information and maintains DNA records indefinitely.' " *Id.* (quoting *Nicholas v. Goord,* 430 F.3d 652, 670 (2d Cir.2005)).

"[A] witness, who is not a suspect, defendant or victim, should have no *less* protection against bodily intrusion than defendants or suspects in criminal cases." *Bartlett,* 626 So.2d at 1042 (footnote omitted). While the present case involves the defendant's request for evidence, a witness continues to be protected under the Fourth Amendment and the constitutional rights to privacy guaranteed by the United States Constitution. *See id.* at 1042–43. Thus, we must balance the constitutional rights of those third parties from whom the defendant sought to compel DNA samples against any rights that the defendant might have in presenting his defense. *See McKinney,* 730 N.W.2d at 90. In so doing, we agree with the trial court's observation that the exclusion of the personnel who came into contact with Roberson's body as the contributors of the hairs would not have exculpated the defendant, especially given the testimony at trial about the amount of traffic at the home during the five months in which Cecil lived there. After balancing these competing rights, we conclude that "[t]he circumstances presented here do not constitute a 'rare instance' where justice may require an invasion of a witness' privacy rights or an invasion of [a third party's] Fourth Amendment rights." *Bartlett,* 626 So.2d at 1043.

X. Denial of Motion for Production of Statements of Those Not Called as Witnesses

***70** The defendant next contends that the trial court erred in denying his motion for production of statements of those not called as witnesses by the State and that the State was required to disclose those statements pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963).

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. In order to establish a *Brady* violation, a defendant must show that he or she requested the information, the State suppressed the information, the information was favorable to his or her defense, and the information was material. *State v. Edgin,* 902 S.W.2d 387, 389 (Tenn.1995). Evidence is "material" only if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. *United States v. Bagley,* 473 U.S. 667, 682 (1985). "Materiality" has been further explained as follows:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worth of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles v. Whitley, 514 U.S. 419, 434 (1995) (quoting *Bagley,* 473 U.S. at 678). The burden of proving a *Brady* violation rests with the defendant, and the violation must be proven by a preponderance of the evidence. *Edgin,* 902 S.W.2d at 389.

First, the defendant has failed to establish that the State suppressed the information or that the information was favorable to the defense. During the pretrial hearing on the motion, defense counsel acknowledged that the State provided open-file discovery. The prosecutor also commented that "anything that's in the possession of the Memphis Police Department has to be turned over to the Defense." The defendant identifies testimony from various officers at trial that they received numerous tips regarding problems that Cecil was having with a gang and money that he allegedly took. The defendant, however, was able to present evidence through cross-examination of the State's witnesses, as well as through witnesses that he called to testify, that Cecil was in trouble with the Gangster Disciples for committing a gang violation and that Cecil owed $300,000 to "the mob."

The defendant does not state what additional information he alleges that the State failed to disclose.

Moreover, the defendant has failed to show that the information was material. Evidence of the defendant's guilt was overwhelming. The jury heard and rejected evidence suggesting that Cecil might have been killed due to his debt with "the mob," in retaliation for the shooting death of a member of a rival gang, or as the result of committing a violation against one of his fellow gang members. The defendant fails to establish a reasonable probability that the result of the proceedings would have been different had such additional evidence been disclosed to the defense. We conclude, therefore, that the defendant is not entitled to relief on the basis of this issue.

XI. Improper Jury Instructions

***71** The defendant challenges as prejudicially improper multiple jury instructions given during the guilt phase of his trial. Because the defendant did not object to the instructions at trial or raise the issues in his motion for new trial, the issues are waived, and our review is limited to plain error. *Faulkner,* 154 S.W.3d at 58; *see also* Tenn. R.App. P. 3(e); Tenn. R.App. P. 36(a); Tenn. R.Crim. P. 52(b).

We must review jury instructions in their entirety, and we may not examine phrases in isolation. *State v. Rimmer,* 250 S.W.3d 12, 31 (Tenn.2008). In determining whether a defendant is harmed by an ambiguous, erroneous instruction, we must consider " 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.' " *Id.* (quoting *Cupp v. Naughten,* 414 U.S. 141, 147 (1973)). The significant question is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Id.* (quotations omitted). An ambiguous term does not necessarily constitute error. *Id.*

> [J]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id. (quotations omitted).

The defendant first asserts that the trial court's instruction defining "reasonable doubt" at the close of proof in the guilt phase improperly reduced the State's burden of proof. The trial court instructed the jury as follows:

> The law presumes that the defendant is innocent of the charges against him, therefore, you as the jury, must enter upon this investigation with the presumption that the defendant is not guilty of any crime and this presumption stands as a witness for him unless it is rebutted and overturned by competent and credible proof. It is, therefore, incumbent upon the State, before you can convict the defendant, to establish to your satisfaction, beyond a reasonable doubt, that the crime charged in the indictment has been committed; that the same was committed in Shelby County, Tennessee, before the indictment was returned and that the defendant on trial committed the crime in such a manner that would make him guilty under the law as it has been defined and explained to you.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden never shifts but it remains on the State throughout the trial of the case. The defendant is not required to prove his innocence. The State must have proven beyond a reasonable doubt all of the elements of the crime charged and that it was committed before the finding and returning of the indictment in this case.
>
> ***72** A reasonable doubt is that doubt created by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every element of proof requisite to constitute the offense.

The defendant takes issue with the statement, "Reasonable doubt does not mean a doubt that may arise from possibility." This issue was addressed by the Tennessee Supreme Court

in *Rimmer,* 250 S.W.3d at 30–31. The court stated that a fair interpretation of the phrase is that "reasonable doubt does not mean a doubt that may arise from mere possibility no matter how improbable." *Id.* at 31. The court concluded that the jury instruction did not result in the denial of due process and that there was not a reasonable likelihood that the jury applied the burden of proof in an unconstitutional way. *Id.*

The defendant attempts to distinguish *Rimmer* from the present case because the instruction in *Rimmer* was given in the penalty phase, rather than the guilt phase as in the present case. The defendant does not cite any authority holding that the meaning of "reasonable doubt" differs between the guilt and penalty phases. Under the circumstances of this case, we cannot conclude that the jury was reasonably likely to have applied the burden of proof in an unconstitutional way. While further use of this instruction is discouraged, *see id.,* the instruction is not unconstitutional.

The defendant also takes issue with the trial court's instruction during the guilt phase that "[t]here are nine counts in this indictment. You will have a packet of *sentencing* forms for each count as to each victim." (emphasis added). According to the defendant, the instruction indicated that "guilt was a foregone conclusion and the jury was charged with sentencing." Given that the trial court repeatedly instructed the jury that the defendant was innocent until proven guilty, we cannot conclude that the instruction affected a substantial right as to rise to the level of plain error.

The defendant next argues that the trial court improperly combined each of the six counts of first degree murder and each of the three counts of attempted first degree murder into one instruction. According to the defendant, the instruction suggested that all of the murder counts should have one verdict and all of the attempted murder counts should have one verdict. The trial court instructed the jury that it was to return a verdict on each of the nine counts, and the jury did as instructed. The defendant is not entitled to relief on this issue.

The defendant also complains about the following statement the trial court made after instructing the jury regarding the definitions of "intentionally," "knowingly," "recklessly," and "criminal negligence":

> ***73** These definitions apply to the offenses of Murder in the First Degree, Murder in the Second Degree, Voluntary Manslaughter, Reckless Homicide and Criminally Negligent Homicide. They also apply to the offenses of Attempted Murder in the First Degree, Attempted Murder in the Second Degree and Attempted Voluntary Manslaughter.

The defendant argues that through this instruction, the jury was told to apply the mental states of "recklessly" and "negligently" to the first degree murder charge. The trial court, however, then defined each of the offenses, which included the mental state applicable for each offense. The trial court specifically instructed the jury that in order to convict the defendant of premeditated first degree murder, it must find that the defendant acted "intentionally." Because the trial court's instruction for first degree and attempted first degree murder specifically limited their applications to an intentional mental state, we cannot conclude that the jury was told to apply and that the jury did apply the mental states of "recklessly" or "negligently" to the first degree and attempted first degree murder charges.

The defendant next asserts that the trial court's instruction to "[t]ake the case, consider all of the facts and circumstances fairly and impartially and return to the court with the verdict that TRUTH dictates and JUSTICE demands" informed the jury that if it believed that the defendant committed the offenses as alleged, it could render a verdict of guilt regardless of whether the State proved its allegations beyond a reasonable doubt. The trial court, however, repeatedly instructed the jury that the defendant was innocent until proven guilty. Thus, we cannot conclude that the instruction affected a substantial right of the defendant such as to rise to the level of plain error.

XII. Failure to Instruct Facilitation as a Lesser–Included Offense

The defendant next contends that the trial court erred in failing to instruct the jury on facilitation as a lesser-included offense of premeditated first degree murder and attempted first degree murder. Whether a particular instruction regarding a lesser-included offense should have been given is a mixed question of law and fact. *State v. Hatfield,* 130 S.W.3d 40, 41 (Tenn.2004). We review mixed questions of law and fact *de*

novo with no presumption of correctness. *Carpenter v. State,* 126 S.W.3d 879, 892 (Tenn.2004).

Facilitation of the charged offense is a lesser-included offense under the test established in *State v. Burns,* 6 S.W.3d 453, 466–67 (Tenn.1999). The issue is whether the evidence presented at trial was sufficient to support an instruction for facilitation. A two-step analysis is necessary to determine if an instruction on a lesser-included offense is supported by the evidence. First, we must determine if any evidence exists that "reasonable minds could accept as to the lesser-included offense." *State v. Richmond,* 90 S.W.3d 648, 660 (Tenn.2002). Second, we must determine "if the evidence, when viewed liberally in the light most favorable to the existence of a lesser-included offense, is legally sufficient to support a conviction for the lesser-included offense." *Id.*

***74** The theory presented by the State at trial was that the defendant acted alone in shooting the adults and stabbing and beating the children. The theory presented by the defense was that someone else attacked the victims while the defendant hid in a bedroom under the bed. Neither of these theories support a facilitation instruction. We conclude, therefore, that the trial court properly declined to instruct the jury on facilitation as a lesser-included offense of premeditated first degree murder and attempted first degree murder.

XIII. Denial of Motion to Strike Aggravating Circumstances

The defendant next contends that the trial court erred in denying his motion to strike the (i)(3) and (i)(12) aggravating circumstances as duplicitous. The (i)(3) aggravating circumstance provides that the defendant "knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder." Tenn.Code Ann. § 39–13–204(i)(3). The (i)(12) aggravating circumstance provides that the defendant "committed 'mass murder,' which is defined as the murder of three (3) or more persons, whether committed during a single criminal episode or at different times within a forty-eight-month period." *Id.* at (i)(12). The defendant argues that these aggravating circumstances are duplicitous "[i]nasmuch as the risk of death factor in this case is inclusive in the mass murder factor."

Our supreme court has, however, already rejected the claim that the (i)(3) and (i)(12) aggravating circumstances are duplicitous, finding that each of these aggravating circumstances relies upon different policy justifications for rendering a defendant eligible for the death penalty. *State v. Jordan,* 325 S.W.3d 1, 74 (Tenn.2010). The court recognized that the fact that "the same conduct may satisfy certain elements of different aggravating circumstances does not contaminate the jury's sentencing process, or invalidate its weighing process." *Id.* The court, thus, declined to hold as unconstitutional the use of the same evidence to satisfy elements of different but valid aggravating circumstances. *Id.* The defendant, therefore, is not entitled to relief on this issue.

XIV. Denial of Motion for Probable Cause Finding that Aggravating Circumstances Existed

The defendant next contends that the decision to charge a capital offense must be made by the grand jury and not the prosecutor. He further argues that the failure to allege any aggravating circumstances in the indictment violated his Fifth Amendment right to an indictment by grand jury. The Tennessee Supreme Court has, however, rejected this argument. *See* *State v. Thomas,* 158 S.W.3d 361, 406 (Tenn.2005). The defendant is not, therefore, entitled to relief on the basis of this issue.

XV. Denial of Motion for Disclosure of Information Regarding Proportionality Review

The defendant next contends that the trial court erred in denying his motion for disclosure of information regarding proportionality review so that he may challenge the constitutionality of comparative proportionality review. Our supreme court has, however, rejected other similar challenges to the meaningfulness of comparative proportionality review. *See, e.g.,* *State v. Bland,* 958 S.W.2d 651, 663 (Tenn.1997); *State v. Brimmer,* 876 S.W.2d 75, 87 (Tenn.1994). Moreover, as fully discussed below, we conclude that the defendant's death sentences are proportionate to the penalty imposed in similar cases. This issue is, therefore, without merit.

XVI. Admission of Victim Impact Evidence

***75** The defendant next contends that the trial court erred in admitting victim impact evidence in the penalty phase of the trial. The defendant does not identify specific testimony that he claims was erroneously admitted, but instead urges this court to adopt Justice Stevens' dissent in *Payne v. Tennessee,* 501 U.S. 808, 859–60 (1991), in which he opines that victim impact evidence is improper in any capital case. Our supreme court has, however, recognized the admissibility of victim impact evidence during the penalty phase of a capital case even after Justice Stevens' dissent in *Payne. See State v. Nesbitt,* 978 S.W.2d 872, 899–90 (Tenn.1998) (finding no federal or state constitutional barriers to victim impact evidence at capital sentencing). This issue is, therefore, without merit.

XVII. Denial of Motion to Argue Last

The defendant next contends that the trial court erred in denying his motion to argue last during the penalty phase. Tennessee Code Annotated section 39–13–204(d) provides that during the penalty phase, "the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing." The practice of allowing the State to argue last at sentencing has been held to be constitutional. *See State v. Melson,* 638 S.W.2d 342, 368 (Tenn.1982). This issue is without merit.

XVIII. Prosecutorial Misconduct

The defendant contends that the State committed prosecutorial misconduct during the rebuttal closing arguments in both the guilt and penalty phases of the trial. The defendant did not object to all the portions of the State's argument at trial that he claims are improper or raise the issue of prosecutorial misconduct in his motion for new trial. Therefore, the issue is waived, and our review is limited to plain error. *Faulkner,* 154 S.W.3d at 58; *see also* Tenn. R.App. P. 3(e); Tenn. R.App. P. 36(a); Tenn. R.Crim. P. 52(b).

Closing arguments are a "valuable privilege" and should not be unduly restricted. *Terry v. State,* 46 S.W.3d 147, 156 (Tenn.2001). "Consequently, attorneys are given greater leeway in arguing their positions before the jury, and the trial court has significant discretion in controlling these arguments, to be reversed only upon a showing of an abuse of that discretion." *Id* . We have explained that "arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *State v. Goltz,* 111 S.W.3d 1, 5 (Tenn.Crim.App.2003).

The generally recognized areas of prosecutorial misconduct in closing arguments occur when the prosecutor intentionally misstates the evidence or misleads the jury on the inferences it may draw from the evidence; expresses his or her personal opinion on the evidence of the defendant's guilt; uses arguments calculated to inflame the passions or prejudices of the jury; diverts the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions on the consequences of the jury's verdict; and intentionally refers to or argues facts outside the record, other than those that are matters of common public knowledge. *Id.* at 6.

***76** The defendant first argues that the State denigrated the defense by referring to alternate theories as "smoke and mirrors," "ridiculous," and "insane" and by referring to defense counsel as a "tricky lawyer." A review of the record reveals that the prosecutor used the phrase "smoke and mirrors" to refer to the defense's attempts to divert attention from the issues and not as a suggestion that evidence was fabricated by the defense. The prosecutor used the phrase "ridiculous" to rebut the defense's argument that the murders were committed by gang members who then remained at the crime scene to rearrange the scene, and to rebut defense counsel's argument that the defendant's behavior following the murders could not be explained. The prosecutor described defense counsel's attempts to use evidence that the State believed to be irrelevant to argue reasonable doubt as "ridiculous" and "insane." When viewed in their context, we cannot conclude that the prosecutor's comments violated a clear rule of law. Moreover, even if the arguments were improper, the error was harmless in light of the strong evidence of guilt. Thus, the defendant also has failed to establish that the issue involves a substantial right. Accordingly, the issue does not rise to the level of plain error.

The defendant also complains about the prosecutor's rebuttal argument in the guilt phase of the trial that the jury should not discredit the testimony of two of the surviving children "because of some tricky lawyer or expert." When viewed in

its context, we cannot conclude that the prosecutor's comment was an attack on defense counsel's credibility. Rather, the comment was an attempt by the prosecutor to persuade the jurors to focus on their own views of the credibility of these witnesses and the evidence.

The defendant also complains of the following statement by the prosecutor:

> And you want to talk about this tape and the five hours? Sure. The defense has a golden nugget because *The First 48* when they were editing their television show only played certain parts on TV and the rest they destroyed the raw footage. That wasn't in the Memphis Police Department's control. Remember that please because they're getting blamed for it.
>
> So now [the defendant] can say whatever he wants. Oh, that five hours that you don't get to see, this is what I was doing.

At the conclusion of the prosecutor's argument, defense counsel objected, asserting that evidence was never presented that employees from *The First 48* destroyed the tape recording of the officers' interrogation of the defendant. The defendant, however, does not make this argument on appeal. Rather, the defendant argues that the prosecutor interjected his own opinion by arguing that the defendant can "say whatever he wants." Based upon our review of the record, we conclude that the prosecutor was not interjecting his own opinion but was attacking the credibility of the defendant's testimony based upon the evidence presented at trial and the inferences drawn from the evidence.

***77** The defendant also argues that the prosecutor testified when he stated the following:

> Prosecution witnesses are coached. That's another thing they're going to throw out at you. What proof do they have? Did they put me on the stand? Did they ask me hey, did you coach him last night? Because I would have given you an answer. These children wanted to come in here and tell you what happened to them the best they could.

We agree that the prosecutor's comment suggesting that defense counsel could have and should have called him to testify was improper. While the prosecutor's argument that the children who testified were not coached was not artfully made, we cannot conclude that the prosecutor's statement that "[t]hese children wanted to come in here and tell you want happened to them the best they could" constituted testimony from the prosecutor. After making the statement, the prosecutor discussed the trauma that the children suffered and the difficulties that the children experienced recalling details. Thus, the statement was consistent with the evidence presented at trial. The prosecutor's argument does not rise to the level of plain error.

The defendant also contends that the prosecutor injected his own opinion during closing arguments in the guilt phase by telling the jury that the defendant's testimony was "not believable" and that the defendant was "lying." The prosecutor did not offer his opinion. Rather, he argued that based on the evidence, the defendant's testimony was not believable and that he was lying. This argument was proper.

According to the defendant, the prosecutor encouraged the jury to experience the victims' fear during rebuttal argument in the penalty phase. The prosecutor's references to the fear that the victims must have felt related to the "nature and circumstances" of the offenses and, therefore, were proper. *See State v. Odom,* 336 S.W.3d 541, 562 (Tenn.2011).

The defendant contends that the prosecutor misrepresented the weighing procedure for aggravating and mitigating circumstances. While true, the prosecutor later corrected himself and stated the appropriate burden of proof. The trial court also instructed the jury on the correct burden of proof. This issue is, therefore, without merit.

Finally, the defendant complains of the prosecutor's comment that the defendant "stamped them out like they were insects in a two-hour period," as well as the following argument:

> What's going to stop him? You. You. And how are you going to do it? With the law, with the law. We're not asking anything of you but to follow the law. And the law does give you your verdict in this case, shall be death.

The defendant argues that by such language, the prosecutor urged the jurors to exact their personal retribution. When viewed in the context of the prosecutor's argument, these comments were not an effort to urge the jurors to exact their personal retribution but were an attempt to persuade the jury to impose the punishment afforded by the law. The prosecutor did not violate a clear rule of law in making such an argument. Thus, the issue does not rise to the level of plain error, and the defendant is not entitled to relief.

XIX. Allowing Death Verdicts to Stand

***78** The defendant next challenges the constitutionality of Tennessee's murder and death penalty statutes, arguing that the death penalty statute is unconstitutional because it limits the jury's discretion to exercise mercy by requiring the jury to impose a sentence of death if aggravating factors outweigh mitigating factors. The defendant also asserts that the statute does not require the jury to make the ultimate determination that the appropriate punishment is death, in violations of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The Tennessee Supreme Court has, however, rejected this argument. *See* *State v. Smith,* 857 S.W.2d 1, 22 (Tenn.1993); *State v. Boyd,* 797 S.W.2d 589, 596 (Tenn.1990).

The defendant next argues that Tennessee's murder and death penalty statutes violate the equal protection clauses of the state and federal constitutions because they do not provide uniform standards for qualifying jurors for service on capital cases. This challenge, however, was rejected in *State v. Reid,* 91 S.W.3d 247, 313 (Tenn.2002).

The defendant also argues that the statutes are unconstitutional because they invest prosecutors with unlimited discretion to seek the death penalty. This argument has also been rejected. *See* *State v. Hines,* 919 S.W.2d 573, 582 (Tenn.1995).

The defendant next argues that the "heinous, atrocious, or cruel" aggravating factor is vague and overbroad. This argument likewise has been rejected. *See* *State v. Middlebrooks,* 995 S.W.2d 550, 556–57 (Tenn.1999).

According to the defendant, the language in the "mass murder" aggravating circumstance is too reminiscent of terrorism. The defendant does not cite to any authority in support of his claim. "Mass murder" is defined as "the murder of three (3) or more persons, whether committed during a single criminal episode or at different times within a forty-eight-month period." Tenn.Code Ann. § 39–13–204(i)(12). We conclude that the plain language of this statute does not imply terrorism. Moreover, the Tennessee Supreme Court has upheld the application of this aggravating circumstance in other capital cases. *See, e.g., Jordan,* 325 S.W.3d at 70. The defendant is not entitled to relief regarding this issue.

The defendant next contends that Tennessee's death penalty statute is unconstitutional because it permitted evidence of his prior conviction for second degree murder. Tennessee Code Annotated section 39–13–204, which permits the admission of the conviction and the facts and circumstances underlying the conviction, has been upheld as constitutional. *See Reid,* 91 S.W.3d at 312.

The defendant contends that Tennessee's death penalty statute violates state and federal constitutions because it does not give the jury unlimited discretion not to impose the death penalty. This argument is similar to the argument that the defendant made above and has been rejected. *See* *Smith,* 857 S.W.2d at 22; *Boyd,* 797 S.W.2d at 596. The defendant also contends that the death penalty is capriciously and arbitrarily imposed. This argument likewise has been rejected. *See Reid,* 91 S.W.3d at 312–13.

XX. Mandatory Review

***79** When reviewing a conviction for first degree murder and an accompanying sentence of death, Tennessee Code Annotated section 39–13–206(c)(1) requires this court to review the record to determine whether:

(A) The sentence of death was imposed in any arbitrary fashion;

(B) The evidence supports the jury's finding of statutory aggravating circumstance or circumstances;

(C) The evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and

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(D) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

A. Manner in Which Death Sentences Were Imposed

In accordance with the trial court's instructions, the jury unanimously determined that the State proved beyond a reasonable doubt that several aggravating circumstances applied to each of the murders committed by the defendant and that these aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. The record reveals that the sentencing hearing was conducted pursuant to the applicable statutory provisions and the rules of criminal procedure. We conclude that the defendant's sentences of death were not imposed in an arbitrary fashion.

B. Evidence Supporting Aggravating Circumstances

In determining whether the evidence supports the jury's findings of statutory aggravating circumstances, we must determine, after viewing the evidence in the light most favorable to the State, whether a rational trier of fact could have found the existence of the aggravating circumstances beyond a reasonable doubt. *State v. Rollins,* 188 S.W.3d 553, 571 (Tenn.2006).

1. Cecil Dotson, Sr.

In sentencing the defendant to death for the first degree murder of Cecil Dotson, Sr., the jury applied three aggravating circumstances. We will address the proof supporting each circumstance.

a. (i)(2): Prior Violent Felony Conviction

During the penalty phase, the parties stipulated that the defendant had previously been convicted of second degree murder and that the felony conviction was a crime of violence against the person. This stipulation is sufficient to establish that the defendant "was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person." Tenn.Code Ann. § 39–13–204(i)(2).

b. (i)(3): Great Risk of Death to Two or More Persons

The jury also found that the defendant knowingly created a great risk of death to two or more persons in the course of murdering Cecil. *See* Tenn.Code Ann. § 39–13–204(i)(3). 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.' " *Johnson v. State,* 38 S.W.3d 52, 60 (Tenn.2001) (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.' " *Id.* (quoting *State v. Henderson,* 24 S.W.3d 307, 314 (Tenn.2000)). "In 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." *Id.* at 60–61 (footnotes omitted). We conclude that the evidence was more than sufficient to support this application of the (i)(3) aggravating circumstance.

c. (i)(12): Mass Murder

***80** In *State v. Reid,* 213 S.W.3d 792, 819 (Tenn.2006), our supreme court acknowledged that for this factor to apply, " 'the State must show beyond a reasonable doubt (1) that the defendant had been *convicted* of three or more murders, including the one for which he has just been tried, (2) within the State of Tennessee, (3) within a period of forty-eight (48) months, (4) perpetrated in a similar fashion, and (5) in a common scheme or plan.' " *Id.* (quoting *Black,* 815 S.W.2d at 183). As the court further acknowledged, the application of this aggravating circumstance has been approved in a case where the defendant shot his four children in the garage of his residence, *see State v. Holton,* 126 S.W.3d 845, 865 (Tenn.2004); in a case where the defendant stabbed, shot, and disemboweled his estranged wife and two children, *see Smith,* 868 S.W.2d at 582; in a case where the defendant

killed his girlfriend and her children, *see Black,* 815 S.W.2d at 184; in a case where the defendant killed three people during the robbery of a restaurant, *see* State v. Van Tran, 864 S.W.2d 465, 478 (Tenn.1993); and in a sentence of life without parole where the defendants killed three members of the same family at a rest stop, *see State v. Howell,* 34 S.W.3d 484, 509 (Tenn.Crim.App.2000). In the instant case, the defendant killed Cecil, Williams, Roberson, Seals, C.D.3, and C.D.4. The proof satisfies the application of the mass murder aggravating circumstance.

2. Williams, Seals, and Roberson

In sentencing the defendant to death for the premeditated first degree murders of Williams, Seals, and Roberson, the jury applied five aggravating circumstances. The jury applied the same three aggravating circumstances that it had applied with regard to the first degree murder of Cecil, as well as two additional aggravating circumstances: (1) the murder was committed for the purpose of avoiding, interfering with, or preventing the lawful arrest or prosecution of the defendant or another; and (2) the murder was knowingly committed while the defendant had a substantial role in committing, or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit any first degree murder. *See* Tenn.Code Ann. § 39–13–204(i)(6), (7).

a. (i)(2): Prior Violent Felony Conviction

The parties' stipulation that the defendant had previously been convicted of second degree murder and that the felony conviction involved the use of violence was sufficient to support the application of the (i)(2) aggravating circumstance.

b. (i)(3): Great Risk of Death to Two or More Persons

The jury found that the defendant knowingly created a great risk of death to two or more persons in the course of murdering Williams, Seals, and Roberson. *See* Tenn.Code Ann. § 39–13–204(i)(3). Upon reviewing the evidence, we conclude that the evidence is more than sufficient to support the (i)(3) factor.

c. (i)(6): Murder Committed to Avoid Arrest

***81** The jury also found that the State had established that the defendant killed Williams, Seals, and Roberson in order to avoid his arrest and prosecution. *See* Tenn.Code Ann. § 39–13–204(i)(6). This aggravating circumstance focuses upon a defendant's motives in killing the victim. *Reid,* 164 S.W.3d at 315; *Terry v. State,* 64 S.W.3d 147, 162 (Tenn.2001). Although there must be some "particular proof" supporting this aggravating circumstance, *State v. Hartman,* 42 S.W.3d 44, 58 (Tenn.2001), the State need not prove that the defendant's desire to avoid prosecution was his sole motive in murdering the victim. *Terry,* 46 S.W.3d at 162. The evidence in the present case establishes that the defendant killed or attempted to kill everyone who was in the residence that night. The defendant acknowledged at trial that when he left the house, he believed that everyone else was dead. He informed Deputy Director Armstrong that the shooting began following an argument between him and Cecil. The defendant informed the officer and his mother that he killed the children because they had seen his face. The defendant fled on a bicycle, and evidence was presented that the defendant made some attempt to clean up following the attacks. We conclude that this evidence is sufficient to establish that the defendant killed Williams, Seals, and Roberson, in part, to avoid arrest and prosecution.

d. (i)(7): Felony Murder

The jury found that the defendant knowingly committed the murders of Williams, Seals, and Roberson while he had a substantial role in committing or attempting to commit first degree murder. *See* Tenn.Code Ann. § 39–13–204(i)(7). The evidence at trial clearly establishes that Williams, Seals, and Roberson were killed while the defendant was committing other murders.

e. (i)(12): Mass Murder

In the instant case, the defendant killed Cecil, Williams, Roberson, Seals, C.D.3, and C.D.4 on the same night. The proof satisfies the application of the mass murder aggravating circumstance.

3. C.D.3 and C.D.4

In sentencing the defendant to death for the premeditated first degree murders of C.D.3 and C.D.4, the jury applied the same five aggravating circumstances that it had applied with regard to the first degree murders of Williams, Seals, and Roberson, as well as two additional aggravating circumstances: (1) the victim was less than twelve years old and the defendant was eighteen years old or older; and (2) the murder was especially heinous, atrocious, or cruel. *See* Tenn.Code Ann. § 39–13–204(i)(1), (5).

a. (i)(1): Victim Less Than Twelve Years Old

The jury found that C.D.3 and C.D.4 were less than twelve years old and that the defendant was eighteen years old or older. *See* Tenn.Code Ann. § 39–13–204(i)(1). The evidence established that C.D.3 and C.D.4 were four years old and two years old, respectively, when they were killed and that the defendant was over the age of eighteen. This is sufficient to establish the application of the (i)(1) aggravating factor.

b. (i)(2): Prior Violent Felony Conviction

***82** The parties' stipulation that the defendant had previously been convicted of second degree murder and that the felony conviction involved the use of violence was sufficient to support the application of the (i)(2) aggravating circumstance.

c. (i)(3): Great Risk of Death to Two or More Persons

The jury found that the defendant knowingly created a great risk of death to two or more persons in the course of murdering C.D.3 and C.D.4. *See* Tenn.Code Ann. § 39–13–204(i)(3). Upon reviewing the evidence, we conclude that the evidence is more than sufficient to support the (i)(3) factor.

d. (i)(5): Heinous, Atrocious, or Cruel

The jury found that the murders of C.D.3 and C.D.4 were "especially heinous, atrocious, or cruel, in that [they] involved torture or serious physical abuse beyond that necessary to produce death." Tenn.Code Ann. § 39–13–204(i)(5). This aggravating circumstance may be applied if the evidence is sufficient to support *either* torture *or* serious physical abuse beyond that necessary to produce death. The evidence established that C.D.3 and C.D.4 were stabbed repeatedly and severely beaten and that the number of wounds was more than necessary to cause death. The proof is more than sufficient to support the jury's finding of this aggravating circumstance.

e. (i)(6): Murder Committed to Avoid Arrest

The jury also found that the State had established that the defendant killed C.D.3 and C.D.4 in order to avoid his arrest and prosecution. *See* Tenn.Code Ann. § 39–13–204(i)(6). The defendant told both Deputy Director Armstrong and his mother that he killed the children because they saw his face. This evidence is sufficient to establish this aggravating circumstance.

f. (i)(7): Felony Murder

The jury found that the defendant knowingly committed the murders of C.D.3 and C.D.4 while he had a substantial role in committing or attempting to commit first degree murder. *See* Tenn.Code Ann. § 39–13–204(i)(7). The evidence submitted at trial clearly establishes that C.D.3 and C.D. 4 were killed while the defendant was committing other murders.

g. (i)(12): Mass Murder

The defendant's killing Cecil, Williams, Roberson, Seals, C.D.3, and C.D.4 on the same night satisfies the application of the mass murder aggravating circumstance.

C. Weighing Each Victim

We next turn to our inquiry of whether a reasonable jury could find beyond a reasonable doubt that the aggravated circumstances proved by the State with respect to each victim's murder outweigh the mitigating circumstances. The proof supporting the aggravating circumstances is set

forth above. Mitigating circumstances instructed to the jury included: (1) any lingering or residual doubt regarding the defendant's guilt; (2) the defendant was raised in a dysfunctional family since birth; (3) the defendant suffered childhood neglect; (4) the defendant's parents separated when he was six years old, and his father was not part of his life; (5) the defendant changed residences and schools on multiple occasions throughout early childhood; (6) the defendant was retained in the fourth grade twice due to truancy and was absent from school many times as a child; (7) the defendant was diagnosed with a learning disability; (8) the defendant's mother did not attend scheduled meetings and did not appear at juvenile court hearings on multiple occasions; (9) at the age of eighteen, the defendant witnessed what he believed to be intentional physical abuse of his younger brother by his mother; and (10) any other mitigating factor raised by the evidence produced by either the prosecution or defense in the guilt or sentencing hearing.

***83** In addition to proving aggravating circumstances, the State presented evidence contradicting the defendant's mitigation evidence. We conclude that a rational juror could have found that the three aggravating circumstances established by the State regarding the first degree murder of Cecil Dotson, Sr. outweighed the mitigating circumstances, that the five aggravating circumstances established by the State regarding the first degree murders of Williams, Seals, and Roberson outweighed the mitigating circumstances, and that the seven aggravating circumstances established by the State regarding the first degree murders of C.D.3 and C.D.4 outweighed the mitigating circumstances.

D. Proportionality Review

When this court conducts the proportionality review required by Tennessee Code Annotated section 39–13–206(c)(1)(D), we do not function as a "super jury" that substitutes our judgment for the judgment of the sentencing jury. *See* *State v. Godsey,* 60 S.W.3d 759, 782 (Tenn.2001). Rather, we must take a broader perspective than the jurors to determine whether the defendant's sentences are " 'disproportionate to the sentences imposed for similar crimes and similar defendants.' " *State v. Thacker,* 164 S.W.3d 208, 232 (Tenn.2005) (quoting *Bland,* 958 S.W.2d at 664). The pool of cases upon which we draw in conducting this analysis are "first degree murder cases in which the State sought the death penalty, a capital sentencing hearing was held, and the jury determined whether the sentence should be life imprisonment, life imprisonment without possibility of parole, or death." *State v. Rice,* 184 S.W.3d 646, 679 (Tenn.2006).

The purpose of our review of other capital cases is not to identify cases that correspond precisely with the particulars of the case being analyzed. *State v. Copeland,* 226 S.W.3d 287, 306 (Tenn.2007); *Thacker,* 164 S.W.3d at 233. Rather, our task is to "identify and invalidate the aberrant death sentence." *Thacker,* 164 S.W.3d at 233. A sentence is not disproportionate because other defendants have received a life sentence under similar circumstances. *Carruthers,* 35 S.W.3d at 569. A death sentence is excessive or disproportionate where "the case taken as a whole is plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed." *Thacker,* 164 S.W.3d at 233 (quoting *Bland,* 958 S.W.2d at 668).

This court uses " 'the precedent-seeking method of comparative proportionality review, in which we compare a case with cases involving similar defendants and similar crimes.' " *Copeland,* 226 S.W.3d at 305 (quoting *State v. Davis,* 141 S.W.3d 600, 619–20 (Tenn.2004)). We examine "the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating circumstances involved, and we compare this case with other cases in which the defendants were convicted of the same or similar crimes." *State v. Stevens,* 78 S.W.3d 817, 842 (Tenn.2002).

***84** In conducting this comparison with regard to the nature of the crime, we generally consider

> (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the victim's age, physical condition, and psychological condition; (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 effect upon non-decedent victims.

State v. Rimmer, 250 S.W.3d 12, 35 (Tenn.2008); *see Rollins,* 188 S.W.3d at 575. We also compare the defendant's "(1) prior criminal record, if any; (2) age, race, and gender; (3) mental, emotional, and physical condition; (4) role in the murder; (5) cooperation with authorities; (6) level of remorse; (7) knowledge of the victim's helplessness; and (8) potential for rehabilitation." *Rimmer,* 250 S.W.3d at 35; *Rollins,* 188 S.W.3d at 575.

In the present case, the evidence established that on March 2, 2008, the defendant shot and killed his brother, Cecil; Williams; Seals; and Roberson. The defendant then stabbed and beat with wooden boards his four nephews and his niece, who ranged in ages from nine years old to two months old. C.D.3, who was four years old, and C.D .4, who was two years old, died as a result of the attacks. Cecil had eight gunshot wounds, including wounds to his head, neck, chest, thigh, leg, and foot. Williams had five gunshot wounds, including wounds to her head, chest, leg, thigh, and abdomen. Seals had three gunshot wounds, including one to his mouth and two to his chest. Roberson had four gunshot wounds, including wounds to her thigh and knee. C.D.3 suffered blunt force injuries to his head, hand, and arm and sharp force injuries to his head, neck, hand, and chest. C.D.4 suffered multiple sharp force injuries to his head, torso, and extremities and blunt force injuries to his face, head, neck, and elbow.

The defendant admitted to the police and his mother that he killed the victims and told his mother that he attacked the children because they saw him shoot the adults. C.D.1 and C.D.2 identified the defendant at trial as their attacker.

The defendant altered the scene to make it appear as if the murders were drug-related or gang-related, moved bodies, disposed of or hid kitchen knives and handles, and collected the cartridge casings. He escaped on a bicycle, hid it in his girlfriend's shed, and used bleach in an attempt to clean up while at his girlfriend's home. The defendant never attempted to render aid or summon help, but instead went to a restaurant for dinner the next night with his brother and a friend. He also reported for work on the Monday following the weekend killings and attempted killings. The defendant admittedly lied to his family about the last time that he had seen Cecil.

The defendant came from a dysfunctional family in which his parents married at a very young age, argued often, and physically fought. As a child and youth, the defendant witnessed his father physically abuse his mother and his mother tear out windows in an apartment complex and place her baby in a bathtub of scalding water. When the defendant was six years old, his mother left his father, taking the defendant and his siblings with her and not contacting the defendant's father until four or five months later. The defendant's family was poor, and his mother was not home often, leaving the defendant's sister, Nicole, to care for the defendant and Cecil. As children, the defendant and Cecil sometimes went hungry and were discovered taking money from their grandmother to purchase food. As a result, they were no longer welcome in their grandmother's home.

***85** The defendant was diagnosed with a learning disability in reading and math, was enrolled in resource classes, failed the fourth grade twice due to excessive absences, was socially promoted, was teased for not having the proper clothing, and left school at the age of sixteen while still only in the eighth grade, having attended ten different schools and been suspended so often that the school system refused to allow him to continue to attend.

The defendant had disciplinary problems both at school and at home and was provided with individual counseling. Counselors attempted to meet with his mother, but she either cancelled the appointments or did not attend them. By the time that the defendant was fifteen years old, he became involved in the juvenile court system and had several arrests and juvenile adjudications. One such juvenile adjudication involved the use of weapons. The defendant fought often, and school and juvenile records referenced problems with his brother. The defendant's mother attended juvenile court with him on many occasions. When she could not attend, Nicole attended on her behalf.

The only legitimate job that the defendant ever held was as a security guard at the age of eighteen. At the age of nineteen, he pled guilty to second degree murder and was sentenced to eighteen years in prison. He joined the Crips gang while in prison and was written up for refusing to participate, for cursing an officer, and for cutting an inmate who was trying to leave the Crips. The defendant was denied parole twice before it was ultimately granted, which meant that he had completed fourteen years of his eighteen-year sentence in prison. The defendant's mother and her husband only visited him once while he was in prison, and he spoke to his father on only a few occasions over the telephone.

The sentence of death has been upheld in numerous cases in which the defendant committed mass murder. *See, e.g., State v. Jordan,* 325 S.W.3d 1 (Tenn.2010) (defendant shot

and killed his estranged wife and two men at his wife's place of employment; risk of death to two or more, felony murder, and mass murder aggravators to the two men, same three aggravators and heinous, atrocious, or cruel, and mutilation of body aggravators as to wife); *State v. Holton,* 126 S.W.3d 845 (Tenn.2004) (defendant shot and killed his four children; mass murder and, as to three victims, under-twelve-years-old aggravators); *State v. Carruthers,* 35 S.W .3d 516 (Tenn.2000) (defendants shot two men, strangled the mother of one of the men, and buried all three victims alive; prior violent felony, heinous, atrocious, or cruel, felony murder, and mass murder aggravators); *State v. Smith,* 868 S.W.2d 561 (Tenn.1993) (defendant shot and stabbed his wife and two stepsons; heinous, atrocious, or cruel, murder to avoid apprehension, felony murder, and mass murder aggravators).

The sentence of death has also been upheld in numerous cases in which the victim was a young child who was either well-acquainted with the defendant or related to the defendant. *See, e.g., Holton,* 126 S.W.3d at 868–69; *State v. Keen,* 31 S.W.3d 196 (Tenn.2000) (upholding sentence of death where defendant raped and choked his girlfriend's eight-year-old daughter and threw her into a river while she was still alive; age of victim and heinous, atrocious, or cruel aggravators); *Smith,* 868 S.W.2d at 582–83; *State v. Black,* 815 S.W.2d 166 (Tenn.1991) (upholding death sentence where defendant shot and killed his girlfriend and her two daughters, ages nine and six; five aggravators including the young ages of the victims and mass murder); *State v. Payne,* 791 S.W.2d 10 (Tenn.1990) (upholding death sentence in case where defendant stabbed his girlfriend's neighbor and the neighbor's two-year-old daughter; age of victim, risk of death to two or more, and heinous, atrocious, or cruel aggravators as to the child).

***86** In completing our review, we need not conclude that this case is exactly like prior cases in every respect or determine that this case is "more or less" like other death penalty cases. *State v. Thomas,* 158 S.W.3d 361, 383 (Tenn.2005). Rather, we need only identify aberrant death sentences by analyzing whether a capital case plainly lacks circumstances similar to those cases in the pool of cases in which a death sentence has been upheld. Based on our review, we conclude that the penalty imposed by the jury in the present case is clearly not disproportionate to the penalty imposed for similar crimes.

XXI. Sentencing for Non–Capital Offenses

The defendant challenges the trial court's order imposing forty-year consecutive sentences for each of the three attempted first degree murder convictions and also challenges the reasonableness of the sentencing hearing.

In determining an appropriate sentence, a trial court must consider the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on mitigating and enhancement factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement the defendant makes on his own behalf as to sentencing; and (8) the potential for rehabilitation. Tenn.Code Ann. §§ 40–35–103(5), –113, –114, –210(b). "The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed." Tenn.Code Ann. § 40–35–103(4).

Pursuant to the 2005 amendments, the Sentencing Act abandoned the statutory minimum sentence and rendered enhancement factors advisory only. *See* Tenn.Code Ann. §§ 40–35–114, 40–35–210(c). The 2005 amendments set forth certain "advisory sentencing guidelines" that are not binding on the trial court; however, the trial court must consider them. Tenn.Code Ann. § 40–35–210(c). Although the application of the factors is advisory, the court shall consider "[e]vidence and information offered by the parties on the mitigating and enhancement factors in §§ 40–35–113 and 40–35–114." Tenn.Code Ann. § 40–35–210(b)(5). The trial court also must place on the record "what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing." Tenn.Code Ann. § 40–35–210(e). The weighing of mitigating and enhancing factors is left to the sound discretion of the trial court. *State v. Carter,* 254 S.W.3d 335, 345 (Tenn.2008). The trial court's weighing of the various enhancement and mitigating factors is not grounds for reversal under the revised Sentencing Act. *Id.* (citations omitted).

***87** When a defendant challenges the length and manner of service of a sentence, this court reviews the trial court's sentencing determination under an abuse of discretion standard accompanied by a presumption of reasonableness. *State v. Bise,* 380 S.W.3d 682, 708 (Tenn.2012). If a trial court misapplies an enhancing or mitigating factor, the error will not remove the presumption of reasonableness from its sentencing determination. *Id.* at 709. This court will uphold the trial court's sentencing decision "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Id.* at 709–10. Moreover, under such circumstances, we may not disturb the sentence even if we had preferred a different result. *See Carter,* 254 S.W.3d at 346. The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn.Code Ann. § 40–35–401, Sentencing Comm'n Cmts.; *State v. Ashby,* 823 S.W.2d 166, 169 (Tenn.1991).

In sentencing the defendant, the trial court considered the purposes of sentencing set forth in Tennessee Code Annotated sections 40–35–102 and 40–35–103. The court found that based upon the defendant's prior conviction for second degree murder, he was a Range II, multiple offender.

The trial court applied seven enhancement factors to each of the three convictions for attempted first degree murder. The court found the following enhancement factors applied:

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
>
> (2) A victim of the offense was particularly vulnerable because of age or physical or mental disability;
>
> (3) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;
>
> (4) The personal injuries inflicted upon, or the amount of damage to property, sustained by or taken from the victim was particularly great;
>
> (5) The defendant possessed or employed a firearm, explosive device, or other deadly weapon during the commission of the offense;
>
> (6) The felony resulted in death or serious bodily injury or involved the threat of death of serious bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or serious bodily injury; and
>
> (7) During the commission of the felony, the defendant intentionally inflicted serious bodily injury upon another person, or the actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim.

Tenn.Code Ann. § 40–35–114(1), (4), (5), (6), (9), (11), (12). The trial court placed little weight on the prior criminal history enhancement factor and no weight on the serious bodily injury during the commission of a felony enhancement factor. *See id.* (1), (12). With regard to the defendant's conviction for the attempted first degree murder of C.D.1, the trial court placed little weight on the particularly vulnerable victim enhancement factor. *See id.* (4). The trial court found that no mitigating factors applied. The court sentenced the defendant to forty years for each conviction of attempted first degree murder. The court also found that the defendant was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high. *See* Tenn.Code Ann. § 40–35–114(b)(5). The court ordered the defendant to serve his three convictions for attempted first degree murder consecutively to each other and to his death sentences.

A. Reasonableness of Sentencing Hearing

***88** The defendant challenges the reasonableness of the sentencing hearing and argues that the trial court did not allow defense counsel to respond to the State's argument before imposing the sentences. The trial court asked defense counsel whether they wished to present any evidence and whether the defendant wished to make a statement. Defense counsel declined both offers. Defense counsel did not object or request that they be allowed to respond to the State's argument. This issue is without merit.

B. Reasonableness of Sentences

The defendant contends that the forty-year sentences were unreasonable. The defendant does not challenge the trial court's application of the seven enhancement factors. Rather, the defendant contends that the trial court erred in not considering evidence of non-statutory mitigating factors presented during the penalty phase.

As a Range II, multiple offender convicted of a Class A felony, the defendant was subject to a sentence of twenty-five to forty years. *See* Tenn.Code Ann. §§ 39–11–117, 40–35–112(b)(1). The trial court imposed the maximum sentence within the range. Upon a challenge to the sentence imposed, it is the duty of this court to analyze the issues under "an abuse of discretion standard of review, granting a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act." *Bise,* 380 S.W.3d 707. Because the application of enhancement and mitigating factors to adjust a sentence was rendered advisory by the 2005 amendments, the trial court may set a sentence anywhere within the applicable range so long as the sentence is consistent with the principles and purposes of the Act, regardless of the presence or absence of mitigating and enhancement factors. The trial court in this case thoroughly considered the purposes and principles of the Sentencing Act in rendering its decision. The trial court did not abuse its discretion in imposing the maximum sentence within the applicable range.

C. Consecutive Sentences

The defendant asserts that the trial court erred in ordering that he serve his sentences for attempted first degree murder consecutively to each other and to his death sentences. In ordering consecutive sentences, the trial court found that the defendant is a "dangerous offender whose behavior indicates little or no regard to human life and no hesitation about committing a crime in which the risk to human life is high." Tenn.Code Ann. § 40–35–115(b)(4). "[W]hen a trial court uses the 'dangerous offender' factor, it must also decide whether consecutive sentences (1) reasonably relate to the severity of the offenses committed; (2) serve to protect the public from further criminal conduct by the offender; and (3) are congruent with general principles of sentencing." *State v. Alder,* 71 S.W.3d 299, 307 (Tenn.Crim.App.2001).

The trial court found that the circumstances of the offenses were "aggravated," stating, "I don't know of anything that I can think of is more aggravated than this." The court further found that consecutive sentences were reasonably related to the severity of the offenses and were necessary to protect the public from the defendant and his "reserve to criminal activity." The record fully supports these findings. We conclude, therefore, that the trial court properly imposed consecutive sentences based on its classification of the defendant as a dangerous offender.

XXII. Cumulative Error

***89** The defendant asserts that the cumulative effect of the errors at trial rendered both the guilt, penalty, and sentencing phases of his trial fundamentally unfair. As explained above, any errors, when considered both individually and cumulatively, did not result in prejudice. The defendant is not, therefore, entitled to relief on the basis of this issue.

CONCLUSION

After review of the record and the applicable law, we affirm the defendant's convictions and sentences.

All Citations

Not Reported in S.W.3d, 2013 WL 4728679

Footnotes

1 Because Cecil Dotson, Sr. and some witnesses who testified at trial share the same last name, we will utilize their first names in referring to them. We intend no disrespect by this procedure but do so to avoid continually repeating the full names of Cecil Dotson, Sr. and these witnesses.

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2 As is the policy of this court, we will refrain from identifying the child victims by their full names.

3 The Code of Judicial Conduct was revised, effective July 1, 2012. Because the trial occurred prior to the effective date of the revisions, we refer to the Code that was in effect at the time of the trial.

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