NO. 23-6174

IN THE
SUPREME COURT OF THE UNITED STATES

JESSIE DOTSON,
Petitioner,

v.

TENNESSEE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Appendix A

IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION X

JESSIE DOTSON *

*

*

vs. * **No. 08-07688**

Filed 9-29-17 * **capital post-conviction**

Richard DeSaussure, Clerk

BY _____ D.C.

STATE OF TENNESSEE *

*

ORDER DENYING PETITIONER'S AUGUST 31, 2017 MOTION TO VACATE DEATH SENTENCES

This matter comes before the Court upon Petitioner's motion to vacate death sentences. The Court having considered the motion and the state's response to the motion, hereby DENIES the motion to vacate death sentences.

This Court approved, ex parte, Petitioner's request for funds in the amount requested to employ the specific psychiatrist at issue. However, the Administrative Office of the Courts, by letter dated March 21, 2017, denied the request indicating in part:

> After a complete and thorough review of the submitted material, this Office concluded that counsel has made the necessary showing of facts and circumstances supporting counsel's position that the services are necessary to ensure that the constitutional rights of Mr. Dotson are properly protected. However, Tenn. Sup. Ct. R. 13 does not authorize the $350 per hour rate for services sought by [the requested psychiatrist].
>
> The order authorizing funds together with this recommendation were forwarded to AOC Director Deborah Taylor Tate for review. Director Tate concurred with the recommendation to approve [the requested psychiatrist] at the rate of $250 per hour as permitted in Tenn. Sup. Ct. R. 13 but not to approve [the requested psychiatrist's] stated rate of $350 per hour. In accordance with the procedures for further review set out in Tenn. Sup. Ct. R. 13, Section 5(e)(5), the Chief Justice reviewed all materials provided to the AOC concerning this matter and concurred with Director Tate's decision. The Chief Justice's decision is final.

Because petitioner has not been denied the request of all expert assistance in the area of psychiatry, Petitioner's constitutional rights are not violated. As such, Petitioner's Motion To Vacate Death Sentences is hereby, DENIED.

IT IS SO ORDERED this 29 day of September, 2017.

James C. Beasley, Jr.

Judge James C. Beasley, Jr.
Div.10
Shelby County Criminal Court

Appendix B

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

JESSIE DOTSON v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. 08-07688

No. W2017-02550-CCA-R10-PD

ORDER

This matter is before the Court upon the Defendant's "application for permission to appeal, pursuant to T.R.A.P. 10, the post-conviction court's denial of his motion to vacate death sentences." The State has filed a response in opposition to the application.

The Defendant was convicted of six counts of premeditated first degree murder and three counts of attempted first degree murder. After conviction, 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 conviction and sentences were affirmed by this Court and by our Supreme Court. The Defendant has now filed a petition for post-conviction relief. During the pursuit of that matter, he alleged that the assistance of expert witnesses was necessary. Upon motion, the post-conviction court granted the request of the Defendant to employ an expert in the amount of $350.00 per hour. However, even after approval of the post-conviction court, the Administrative Office of the Courts later denied the request of the Defendant and limited expert compensation to $250.00 per hour as established by the Rules of the Supreme Court of the State of Tennessee. After the limitation of funding by the Administrative Office of the Courts, the Defendant filed a motion to vacate death sentences alleging that he had been denied access to expert services. The post-conviction court denied the motion to vacate death sentences and the Defendant has sought permission to appeal from this Court.

Tennessee Rules of Appellate Procedure 10(a) provides, "An extraordinary appeal may be sought on application and in the discretion of the appellate court alone of interlocutory orders of a lower court from which an appeal lies to the Supreme Court, Court of Appeals[,] or Court of Criminal Appeals. . . ." Extraordinary appeals are appropriate only "(1) if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or (2) if necessary for complete determination of the action on appeal as otherwise provided in [the Rules of Appellate Procedure]." Tenn. R. App. P. 10(a). As explained in the Advisory Commission Comment to Rule 10, "[t]he circumstances in which review is available . . . are very narrowly circumscribed to those situations in which the trial court or the intermediate appellate court has acted in an arbitrary fashion, or as may be necessary to permit complete appellate review on a later appeal."

The Tennessee Supreme Court has stated:

> An appellate court should grant a Rule 10 extraordinary appeal only when the challenged ruling represents a fundamental illegality, fails to proceed according to the essential requirements of the law, is tantamount to the denial of a party's day in court, is without legal authority, is a plain or palpable abuse of discretion, or results in either party losing a right to interest that may never be recaptured.

Gilbert v. Wessels, 458 S.W.3d 895, 898 (Tenn. 2014) (citing *State v. McKim*, 215 S.W.3d 781, 791 (Tenn. 2007); *State v. Willoughby*, 594 S.W.2d 388, 392 (Tenn. 1980)). Appeals pursuant to Rule 10 "are reserved only for *extraordinary* departures from the accepted and usual course of judicial proceedings." *Id.* (emphasis in original).

In this matter, the Defendant seeks review of the post-conviction court's decision not to vacate the death penalty of the Defendant. As stated earlier, the motion to vacate was not based on an alleged failure by the trial court but upon actions taken by the Administrative Office of the Courts. From a review of the pleadings presented, we cannot find that the refusal to vacate the death sentences of the Defendant extraordinarily departs from the accepted and usual course of judicial proceedings in such a manner that would allow for the granting of a Rule 10 appeal. We do not reach the issue of whether the trial court's ruling was proper. Rather, we conclude that the trial court's ruling and actions did not so depart from the accepted and usual course of conduct to rise to the level contemplated by the high standards of a Rule 10 extraordinary appeal. This ruling does not preclude future review of this decision and even with this ruling the Petitioner retains the right to address this issue on appeal following the entry of any final judgment of the trial court. Tenn. R. Crim. P. 38(b)(2). As such, this Court cannot find that the necessary tenets of Rule 10 of the Tennessee Rules of Appellate Procedure have been met to grant the application of the Defendant and to allow the appeal of this matter.

IT IS HEREBY ORDERED that the Defendant's application for an extraordinary

appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure is DENIED. The costs of this appeal are taxed to the Defendant.

PER CURIAM

ALAN E. GLENN, JUDGE
CAMILLE R. MCMULLEN, JUDGE
J. ROSS DYER, JUDGE

Appendix C

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

JESSIE DOTSON v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. 08-07688

No. W2017-02550-SC-R10-PD

ORDER

Upon consideration of the Rule 10 application for extraordinary appeal of the defendant, Jessie Dotson, and the record before us, the application is denied. Costs are taxed to the State of Tennessee.

PER CURIAM

Appendix D

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
WESTERN DIVISION
AT JACKSON

JESSIE DOTSON,	)	
	)	No. W2019-01059-CCA-R3-PD
Appellant,	)	
	)	Shelby County Criminal Court
v.	)	No. 08-07688
	)	
STATE OF TENNESSEE,	)	CAPITAL CASE
	)	POST-CONVICTION
	)	
Appellee.	)	

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CITATIONS TO THE RECORD

Mr. Dotson will cite the technical record and the transcript of the evidence at trial "Trial Vol. [#], [page number]."

Mr. Dotson will cite the trial exhibits "Trial Ex. [#]."

Mr. Dotson will cite the technical record and transcript of the evidence at the post-conviction proceeding "PC Vol. [#], [page number]."

Mr. Dotson will cite the post-conviction exhibits "PC Ex. [#]."

ISSUES PRESENTED FOR REVIEW

1. Whether trial counsel rendered ineffective assistance when they failed to pursue suppression of Mr. Dotson's statements.

2. Whether trial counsel rendered ineffective assistance when they failed to obtain videotape of Mr. Dotson's custodial interrogation and police interactions with Priscilla Shaw.

3. Whether trial counsel rendered ineffective assistance when they failed to challenge the State's failure to preserve videotape of Mr. Dotson's custodial interrogation and police interactions with Priscilla Shaw.

4. Whether the State violated due process when it failed to preserve videotape of Mr. Dotson's custodial interrogation and police interactions with Priscilla Shaw.

5(a). Whether trial counsel rendered ineffective assistance when they failed to present evidence that a State witness's neuropsychological evaluation reported that he had long-term memory deficits.

5(b). Whether the State violated due process when it withheld evidence that a State witness's neuropsychological evaluation reported that he had long-term memory deficits.

6. Whether trial counsel rendered ineffective assistance when they failed to object to the introduction into evidence of inflammatory photographs.

7. Whether trial counsel rendered ineffective assistance when they failed to prepare Mr. Dotson for his testimony.

8. Whether trial counsel rendered ineffective assistance when they failed to present mitigating evidence at Mr. Dotson's sentencing hearing.

9. Whether the cumulative impact of trial counsel's deficient performances renders Mr. Dotson's convictions and/or death sentences unconstitutional.

10. Whether the Administrative Office of the Courts Director and Tennessee Supreme Court Chief Justice improperly vacated the post-conviction court's expert funding orders.

11(a). Whether trial counsel rendered ineffective assistance when they failed to object when the State attached a stun cuff to Mr. Dotson.

11(b). Whether the State violated due process when it attached a stun cuff to Mr. Dotson.

12. Whether the post-conviction court erred when it denied Mr. Dotson relief on his jury selection issues.

13. Whether trial counsel rendered ineffective assistance when they failed to object to inadmissible testimony and stipulated to specified evidence.

14. Whether trial counsel rendered ineffective assistance when they failed to challenge effectively the testimony of State witnesses.

15. Whether trial counsel rendered ineffective assistance when they failed to object to inflammatory and irrelevant testimony.

16. Whether trial counsel rendered ineffective assistance when they made improper comments during opening statement at the sentencing hearing.

17. Whether trial counsel rendered ineffective assistance when they failed to prevent and/or challenge the prosecution's improper closing argument.

18. Whether the prosecution violated due process when it made improper remarks during closing argument.

19. Whether trial counsel rendered ineffective assistance when they failed to challenge/request jury instructions.

20. Whether Mr. Dotson's convictions and death sentences are the product of a coerced verdict, racial animus, extraneous prejudicial information, outside influences, and premature deliberations.

21. Whether the Tennessee Supreme Court's proportionality review violated due process.

22. Whether Mr. Dotson's death sentences violate his right to a jury trial because the judge made factual findings necessary to impose the death penalty.

23. Whether Mr. Dotson's death sentences violate his fundamental right to life.

24. Whether Mr. Dotson's convictions and death sentences violate international law.

25. Whether Tennessee's death penalty scheme is unconstitutional.

26. Whether Tennessee's execution methods constitute cruel and unusual punishment.

27. Whether cumulative error invalidates Mr. Dotson's convictions and/or sentences.

STATEMENT OF THE CASE

On August 17, 2015, Appellant Jessie Dotson filed his *Pro Se* Petition For Relief From Conviction And Sentence. (PC Vol. 1, 29). On May 31, 2017, Mr. Dotson filed an Amended Petition for Post-Conviction Relief (PC Vol. 1, 90), and the State responded. (PC Vol. 1, 163). On October 1, 2018, Mr. Dotson filed a Supplemental Petition For Post-Conviction Relief (PC Vol. 2, 266), to which the State also responded. (PC Vol. 2, 254).

The lower court held an evidentiary hearing (*see* PC Vol. 2, 281-83), and on May 16, 2019, it filed its Findings of Facts and Conclusions of Law denying Mr. Dotson post-conviction relief. (PC Vol. 2, 289). On June 14, 2019, Mr. Dotson filed a Notice of Appeal. (PC Vol. 2, 458).

STATEMENT OF THE FACTS

I. After Cecil Dotson, Jr. ("C.J.")[1] told police "Uncle Junior" *or others* committed the Lester Street attacks, police confined Mr. Dotson in an interrogation room.

During the evening of March 3, 2008, a woman called Memphis police and expressed concern for family members who lived at 722 Lester Street. She explained that for days Cecil Dotson, Sr., the father of her two-year-old son, had not answered her telephone calls, and when she went to the Lester Street address no one answered the door when she knocked. (Trial Vol. 25, 1354-59). Memphis police responded and met the concerned mother outside the Lester Street house. (Trial Vol. 25, 1360).

When the initial arriving police officer went inside the house, he saw four dead bodies in the entryway. (Trial Vol. 18, 111, 113-14; *see id.* at 138, 143). Going further into the house, police officers came upon (1) nine-year-old C.J., alive in a bathtub with a knife in his head (Trial Vol. 18, 112, 120-21, 134); (2) two-month-old Ceniyah, alive in a bedroom (Trial Vol. 18, 117); and (3) three children who appeared deceased. (Trial Vol. 18, 112; *see id.* at 154-55). A firefighter and a paramedic subsequently determined that one of these three latter children, five-year-old Cedrick, was alive. (Trial Vol. 18, 126-27,148). Emergency responders rushed C.J., Cedrick, and Ceniyah to the hospital. (Trial Vol. 18, 135, 145, 149, 152; *see* Trial Vol. 26, 1657; Trial Vol. 27, 1911-12).

Surgeons removed the knife from C.J.'s head and addressed other injuries to his head and brain. (Trial Vol. 18, 1918-26). When authorities interviewed C.J. days later, he told two different stories.

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[1] As the Tennessee Supreme Court did on direct appeal, Mr. Dotson uses 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 Mr. Dotson. Use of the child victims' given names does not compromise their privacy because the record reflects that the surviving children's surnames have been changed. *See State v. Dotson*, 450 S.W.3d 1, 103 n.2 (Tenn. 2014).

In one story, C.J. said that a woman named Cassandra had knocked on the front door and asked to use the bathroom. (Trial Vol. 26, 1596). C.J. continued that Cassandra, a masked man he knew as Roderick, and others entered the house. (Trial Vol. 26, 1596-97). The masked man said something to Cecil, Sr. about a gang, told Cecil, Sr. that "[Y]ou got too big boy," and fired a gun at Cecil, Sr. while saying "[N]ever stop playing with the gang boy, ... you never know what would happen, boy." (Trial Vol. 26, 1599).

In another story, C.J. said that "Uncle Junior" was responsible for the attacks. (Trial Vol. 26, 1667; PC Vol. 12, 312). Because Mr. Dotson was related to the victims, and he was known in the family as "Uncle Junior," police transported him downtown and confined him in an interrogation room. (Trial Vol. 25, 1494; Trial Vol. 26, 1666-68, 1698-99).

II. A First 48 camera videotaped Mr. Dotson's custodial interrogation and police interactions with Priscilla Shaw.

In 2005, the Memphis Police Department and Granada Entertainment entered into an agreement providing that Granada could videotape police activities and broadcast the tape as part of a television program titled "The First 48." (PC Ex. 29). The agreement provided that (1) Granada "shall own all right, title and interest in and to (The First 48) Program and all elements thereof and relating thereto" (PC Exhibit 29 at § 1.04); and (2) the Memphis Police Department and Granada could amend their agreement at any time. (PC Ex. 29 at § 6.04).

When Granada chose to chronicle a Memphis Police Department investigation, First 48 cameras followed the police wherever the investigation took them. (Trial Vol. 26, 1664; *see* PC Ex. 29 at § 1.03). On March 7, 2008, the Lester Street investigation brought a First 48 camera into the interrogation room holding Mr. Dotson.

At 7:00 p.m., police chained one of Mr. Dotson's ankles to an interrogation room bench. (*See* Trial Vol. 25, 1494; Trial Vol. 26, 1698-99). Lieutenant Toney Armstrong instructed

Sergeants Caroline Mason and Joe Stark to question him. (Trial Vol. 25, 1494). A First 48 camera videotaped Mr. Dotson's subsequent six and a half hour custodial interrogation. (Trial Vol. 26, 1697; PC Vol. 10, 81).

Sergeant Mason advised Mr. Dotson of his Miranda rights, specifically informing him of his right to remain silent. (Trial Vol. 25, 1496; Trial Ex. 265). At Mr. Dotson's trial, Sergeant Mason testified that, at some point during her and Stark's interrogation, Mr. Dotson informed them that "he didn't want to talk to us anymore, to get somebody else in there for him to talk to." (Trial Vol. 25, 1502). Lieutenant Armstrong, who was watching the Mason/Stark interrogation, described the conclusion of it a bit differently. At Mr. Dotson's trial he testified that "During (the interrogation) he shut down on them and didn't want to talk to the two of them anymore." (Trial Vol. 26, 1669). Lieutenant Armstrong made no mention that Mr. Dotson expressed a willingness to continue being interrogated as long as police officers other than Mason and Stark questioned him. (*Id.*).

After Mr. Dotson "shut down" on Sergeants Mason and Stark, Lieutenant Armstrong questioned him. (Trial Vol. 26, 1669). At trial, Lieutenant Armstrong repeatedly testified that when he did so, Mr. Dotson "was doing everything he could not to talk to me." (Trial Vol. 26, 1669; *see also id.* ("you could tell he was doing everything he could not to engage me in an open conversation"); *id.* at 1673-74 ("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"); *id.* at 1674 ("he would not engage me in open conversation"). Mr. Dotson testified that during this time, Lieutenant Armstrong repeatedly rebuffed his requests to see his mother Priscilla Shaw, telling Mr. Dotson he was not going to see anybody until he said what Armstrong wanted to know. (Trial Vol. 29, 2175).

At approximately 1:30 a.m., Lieutenant Armstrong repeatedly played a tape recording of C.J. saying his Uncle Junior stabbed him. (Trial Vol. 26, 1674-75; Trial Vol. 29, 2175, 2225). When Mr. Dotson maintained his innocence, Lieutenant Armstrong yelled. (Trial Vol. 26, 1675; Trial Vol. 29, 2174-75, 2225). At trial, Mr. Dotson testified that Lieutenant Armstrong's verbal assault included a death threat.

> That's when he said I'll kill your mother fucking ass myself, you cold-hearted murdering killing mother fucker. … [H]e said I got something for you. I'm going to throw your ass on that 4th floor (of the Shelby County Jail) and I'm going to let them (inmates) kill your mother fucking ass.

(Trial Vol. 29, 2225). Lieutenant Armstrong did not deny threatening Mr. Dotson's life, the prosecution presented no evidence contradicting Mr. Dotson's death threat testimony, and the State presented no evidence contradicting that testimony at the post-conviction evidentiary hearing.

Immediately after Lieutenant Armstrong's death threat, Mr. Dotson gave a statement implicating himself in the Lester Street attacks. (Armstrong Statement). (Trial Vol. 26, 1675-76; Trial Vol. 29, 2225). Mr. Dotson said a disagreement between his brother Cecil, Sr. and him escalated, Cecil, Sr. grabbed a gun, and he shot Cecil, Sr. and killed the others because they saw him shoot his brother. (Trial Vol. 26, 1675).

After Lieutenant Armstrong obtained Mr. Dotson's statement, Mr. Dotson requested a lawyer's assistance. (Trial Vol. 26, 1676-77, 1687). In addition to asking for a lawyer, Mr. Dotson asked again to see his mother. (Trial Vol. 26, 1682; Trial Vol. 29, 2175). Having heard what he wanted Mr. Dotson to say, Lieutenant Armstrong arranged for Priscilla Shaw to visit her son. A First 48 camera videotaped the subsequent interactions police had with Ms. Shaw. (*See* PC Vol. 1, 81; Trial Vol. 26, 1664; PC Ex. 29 § 1.03).

Police picked up Ms. Shaw, brought her to the police station, and took her to the interrogation room holding Mr. Dotson. (Trial Vol. 26, 1739). At trial, Ms. Shaw testified that "when I first went in, he was sitting at a table and I got his hands and I was asking him what's going on." (Trial Vol. 26, 1740). Mr. Dotson testified that he first told his mother that "they trying to put this on me." (Trial Vol. 29, 2226). Mr. Dotson then testified, "I told her don't worry about it. I said I did it. She said you did it? I said yeah. She said what you do? And I told her the same thing I told Armstrong." (Shaw Statement). (Trial Vol. 29, 2227; Trial Vol. 26, 1740-41).

III. After trial counsel neglected to subpoena to the preliminary hearing the First 48 videotape of Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw, Granada Entertainment destroyed it.

Granada Entertainment produced a First 48 episode titled "The Lester Street Murders" which it aired in July 2008. (PC Vol. 11, 184). While First 48 episodes focused on the necessity of solving a crime within forty-eight hours of it happening, and while Lieutenant Armstrong's custodial interrogation of Mr. Dotson purportedly did that, Granada Entertainment included just a brief clip of Armstrong's interrogation in the Lester Street episode. Furthermore, the episode does not contain any tape of police interactions with Ms. Shaw before the Shaw Statement was elicited. Videotape of those events largely ended up on the cutting room floor with the rest of the tape Granada left out of the Lester Street episode ("raw footage"). (*See* PC Vol. 10, 81; PC Vol. 11, 183-86).

Within one week of Mr. Dotson's March 7, 2008, arrest, the Shelby County General Sessions court appointed Gerald Skahan to represent him. (PCR Vol. 11, 253).[2] At that time and for the months that followed, the First 48 raw footage remained intact. (*See* PC Vol. 11, 184-86, 277; PC Ex. 7; PC Ex. 28). During those months, Mr. Skahan did not subpoena the raw footage

[2] Although Mr. Skahan is now a Shelby County General Sessions Court Judge, for the purposes of this brief, Mr. Dotson refers to him as "Mr. Skahan," reflecting his status as one of Mr. Dotson's trial lawyers.

to Mr. Dotson's preliminary hearing or file any motions requesting the preservation of it. (PC Vol. 10, 83-86; PC Vol. 11, 184-86, 277; PC Ex. 7; PC Ex. 28).

On December 4, 2008, the State indicted Mr. Dotson on six counts of premeditated murder, three counts of attempted premeditated murder, and one count of felony in possession of a handgun. (Trial Vol. 1, 2-11). On December 12, 2008, the trial court appointed Mr. Skahan to continue representing Mr. Dotson and Marty McAfee to assist Mr. Skahan. (Trial Vol. 1, 15-16).

In February 2009, trial counsel served a subpoena on Granada demanding production of the raw footage. (PC Vol. 11, 184-86, 277; PC Ex. 7; PC Ex. 28 at 2). By that time Granada had produced the Lester Street episode and destroyed the raw footage. (PC Vol. 10, 81, 85; PC Vol. 11, 184-86, 277; PC Ex. 7; PC Ex. 28).

IV. The trial – guilt stage

A. Trial counsel did not file pre-trial motions seeking suppression of Mr. Dotson's statements.

Before police obtained his statements, Mr. Dotson said he did not want to talk to them and did everything he could not to talk. (Trial Vol. 25, 1502; Trial Vol. 26, 1669; *see also* id. at 1669, 1673-74). Lieutenant Armstrong obtained Mr. Dotson's statements after threatening his life. (Trial Vol. 29, 2175, 2225; *see* Trial Vol. 26, 1675). These undisputed facts supported claims that before police took Mr. Dotson's statements they violated his right to remain silent, Mr. Dotson's statements were the product of police coercion, and, as a result, the trial court must suppress them. While trial counsel recognized that Mr. Dotson's statements were a key part of the State's case against him, (PC Vol. 10, 71), counsel failed to pursue suppression of them prior to trial.

B. Trial counsel were unaware that a neuropsychological evaluation of C.J. reported that he has significant impairments in long-term memory recall.

Prior to trial, Mr. Dotson moved the court to order the State to provide him, among other things, any reports of a State witness's mental or physical infirmity which would affect the witness's ability to recall events. (*See* Trial Vol. 1, 30; Trial Vol. 2, 236). The trial court granted Mr. Dotson's motion. (Trial Vol. 4, 482-84).

A May 8, 2008, Le Bonheur Children's Medical Center neuropsychological evaluation revealed, among other things, that C.J. "evidenced deficits in long-term (memory) recall," (PC Ex. 2 at 2), and he "displayed significant impairments in many areas of executive functioning, including ... consistent long-term recall from memory." (PC Ex. 2 at 5). While the prosecution had C.J.'s evaluation in its file, trial counsel's file does not contain it, (*see* PC Ex. 51), and neither Mr. Skahan nor Mr. McAfee remembered seeing it prior to the post-conviction proceeding. (PC Vol. 10, 59; PC Vol. 11, 269).

At the post-conviction evidentiary hearing, prosecutor Ray Lepone testified that he had an open file policy, and that meant the defense had an opportunity to see everything in the prosecution's file. (PC Vol. 12, 301). Mr. Lepone identified markings indicating that he had made C.J.'s evaluation available to the defense, (PC Vol. 12, 307), and he recalled having a conversation with Mr. Skahan about the evaluation. (*Id.*). The trial court credited Mr. Lepone's testimony. (PC Vol. 2, 363 & n.60). But irrespective of whether Mr. Lepone did or did not make C.J.'s evaluation available to the defense, the reality remains that prior to trial Mr. Dotson's counsel did not know about it.

C. The prosecution presented jurors nearly 200 graphic crime scene photographs.

At trial, Memphis Police Sergeant Anthony Mullins testified that he took charge of documenting the condition of the dead bodies in the Lester Street house. (Trial Vol. 18, 169). Through Sergeant Mullins the prosecution entered into evidence nearly 200 color photographs of the bloody interior of the Lester Street house, including color photographs of bloodied adult and child corpses. (*See* Trial Vol. 18, 185-203; Trial Vol. 19, 287-94, 301-25, 328-41; Trial Vol. 20, 384-419).

Trial counsel recognized that the crime scene photographs were "horrendous." (PC Vol. 10, 56). Despite recognizing the shocking effect the crime scene photographs would have on jurors, trial counsel did not object to the vast majority of them. Counsel based their decision not to do so on an untested belief that the court was going to allow the crime scene photographs into evidence anyway, (PC Vol. 10, 57), a reason counsel recognizes was not a good one. (*Id.* at 56).

D. Trial counsel waited until the middle of the trial to make a passing challenge to the Shaw Statement.

On the day Ms. Shaw testified, trial counsel filed a motion to suppress the Shaw Statement. While trial counsel had not spoken to Ms. Shaw about her interactions with police (Trial Vol. 26, 1717), the motion nonetheless asserted that Ms. Shaw acted on their behalf when she elicited the Shaw Statement. (Trial Vol. 4, 585). At a hastily called suppression hearing, Ms. Shaw answered "No, sir," when a prosecutor asked, "did any officer, Lieutenant Armstrong or anybody, come to get you and ask you to try to get information from Jessie Dotson?" (*See* Trial Vol. 26, 1729). Trial counsel immediately abandoned their suppression motion without asking Ms. Shaw, or any other witness, a single question. (Trial Vol. 26, 1730).

E. The State's case consisted of Mr. Dotson's statements and the unreliable testimony of C.J. and his younger brother Cedrick.

No physical evidence connected Mr. Dotson to the Lester Street attacks (*see* PC Vol. 10, 53, PC Vol. 12, 383-84), and DNA evidence linked unidentified persons to the blood pool of one victim and to the hair beads of another. (PC Vol. 10, 91-92; PC Ex. 23). Other than Mr. Dotson's statements, the only evidence the State had connecting Mr. Dotson to the attacks was the testimony of C.J. and his younger brother Cedrick.

While C.J. testified that Mr. Dotson was responsible for the Lester Street attacks, (Trial Vol. 26, 1577-91), he also acknowledged that when police interviewed him days after the attacks, he identified a masked man he knew as Roderick and others as the perpetrators. (Trial Vol. 26, 1596-99). C.J. confirmed his story that before the masked man shot Cecil, Sr. he said, "never stop playing with the gang, boy, you don't know … you never know what would happen, boy." (Trial Vol. 26, 1599). C.J. thereafter admitted that after he told police Roderick and others committed the attacks, his "granny" told him what she thought happened, and he based his memory of the incident on what she told him. (Trial Vol. 26, 1608). Because counsel were unaware of the neuropsychological evaluation reporting that C.J.'s long-term memory was suspect, jurors did not hear medical evidence demonstrating that they could not trust C.J.'s testimony one way or another.

Like C.J., Cedrick first testified that Mr. Dotson assaulted him. (Trial Vol. 26, 1633-35). But like C.J., Cedrick then acknowledged that he had previously told authorities that a fight involving many persons started inside the Lester Street house when Cecil, Sr. opened the front door. (Trial Vol. 26, 1646-48). Cedrick further devalued his testimony implicating Mr. Dotson by telling jurors that C.J. and he rode bicycles to his grandmother's house after C.J. was stabbed, (Trial Vol. 26, 1651), an event that everyone agrees did not occur. (*See* Trial Vol. 27, 1911-12).

F. Jurors rejected defense counsel's "gang hit" alternative theory and Mr. Dotson's testimony about what he did during the attacks.

Counsel centered Mr. Dotson's defense on a theory that one person could not have single-handedly carried out the Lester Street attacks. (PC Vol. 10, 45, 53, 162). Counsel envisioned an alternative theory proposing that a "gang hit" was responsible for those attacks. (PC Vol. 11, 190).

Counsel waited until ten days before trial to engage a gang expert. (PC Vol. 10, 98-99; PC Ex. 13). While the expert promptly opined "it definitely could have been a gang hit," (PC Vol. 11, 191), counsel did not present the expert's testimony at Mr. Dotson's trial. (*Id.*). Without the expert's testimony, counsel relied on the testimony of two gang members and a Memphis police officer for their gang hit theory.

Counsel's lay witnesses related that Cecil, Sr. was a Gangster Disciple gang member. (Trial Vol. 28, 2055, 2065). Cecil, Sr. had a falling out with a fellow gang member named Doc Holiday (Trial Vol. 28, 2052-53, 2065), and one and a half weeks before the attacks Cecil, Sr. lamented that he could not pay back gang members $300,000 he had borrowed. (Trial Vol. 28, 2032-34, 2041). Immediately after the attacks, a Gangster Disciple gang member was at the scene, and he called another gang member to tell him "what was going on." (Trial Vol. 28, 2058). While counsel's gang hit evidence was sparse, it meshed with C.J.'s testimony that, before a masked man shot Cecil, Sr. the man said, "[Y]ou got too big boy .... [N]ever stop playing with the gang, boy, you don't know ... you never know what would happen, boy." (Trial Vol. 26, 1597-99).

Faced with the reality that jurors heard testimony about the Armstrong and Shaw Statements, Mr. Dotson took the witness stand. He testified that Lieutenant Armstrong's death threat coerced him to give the Armstrong Statement (Trial Vol. 29, 2225), and when he

subsequently talked to his mother, he simply repeated what he had told Armstrong. (*Id.* at 2226-27).

As to the attacks, Mr. Dotson testified that he was in the master bedroom when the incident began, he hid under a bed as the events unfolded, and he left the Lester Street house after the assailants fled. (Trial Vol. 29, 2196-2203). On cross-examination, Mr. Dotson acknowledged that during the incident he did not attempt to use a cordless telephone in the master bedroom to call for emergency assistance. (Trial Vol. 29, 2216-17). He further acknowledged that while he thought all inside the Lester Street house were dead, he did not call 911 after he left the house, and in the days that followed he did not tell anyone about the incident. (Trial Vol. 29, 2210-11).

The jury found Mr. Dotson guilty of six counts of first degree premediated murder and three counts of attempted first degree premeditated murder. (Trial Vol. 30, 2409-10).

V. At Mr. Dotson's sentencing hearing, trial counsel presented little evidence respecting Mr. Dotson's traumatic life history, and they presented no expert mental health testimony.

Trial counsel engaged Inquisitor, Inc., to investigate Mr. Dotson's life history. (PC Vol. 10, 54). They engaged neuropsychologist James Walker to investigate Mr. Dotson's mental health. (PC Vol. 10, 107). While these engagements produced valuable mitigating evidence, counsel presented little of it to Mr. Dotson's sentencing jurors.

Glori Shettles performed the mitigation investigation for Inquisitor. At the conclusion of her work, Ms. Shettles provided trial counsel a 104 page document which included a timeline of Mr. Dotson's troubled life history and summaries of her mitigation witness interviews. (PC Vol. 10, 54-55; PC Vol. 11, 214; PC Ex 42). Those documents revealed a wealth of mitigating evidence respecting Mr. Dotson's mental illnesses, cognitive impairments, learning disabilities,

physical abuse, emotional abuse, parental neglect and abandonment, exposure to domestic violence, poor nutrition, poverty, polysubstance abuse, and deprivation. (*See* Ex. 42).

Dr. Walker interviewed Mr. Dotson and conducted a forensic psychological evaluation, which included neuropsychological testing. (PC Exs. 19, 57). Dr. Walker provided trial counsel a draft report informing counsel, among other things, that (1) as a child Mr. Dotson suffered severe physical abuse at the hands of his mother and father; (2) Mr. Dotson's childhood environment subjected him to violence and the constant threat of violence; (3) Mr. Dotson was intoxicated at the time of the offense; (4) Mr. Dotson suffered from significant mental health disorders, including cognitive disorder not otherwise specified; and (5) Mr. Dotson expressed antisocial characteristics. (PC Ex. 19; *see* 9/25/18 Petitioner's Sealed, *Ex Parte* Motion for Reimbursement of Neuropsychologist James S. Walker for Rendering Professional Services at 6).

At the sentencing hearing, trial counsel presented no evidence other than Ms. Shettles's testimony. Counsel prepared Ms. Shettles for her testimony by doing nothing more than telling her to "just talk." (PC Vol. 11, 228). As a result, counsel's case for life consisted of thirty-six transcript pages in which Ms. Shettles barely scratched the surface of the mitigating information she had previously provided counsel. (Trial Vol. 31, 2477-2514, 2520-21). There were no exhibits. There was no expert mental health testimony.

At the post-conviction hearing, trial counsel testified that they refrained from presenting Dr. Walker's testimony because he had noted in his report that Mr. Dotson expressed antisocial characteristics. (PC Vol. 10, 110, 115; PC Vol. 11, 286-87). Yet counsel never discussed that aspect of Dr. Walker's draft report, or anything else, with Dr. Walker or any other expert. (*See* PC Ex. 57; PC Vol.10, 110). Had counsel done so they would have learned that Dr. Walker's observation did not amount to an antisocial personality disorder diagnosis, and records precluded

Dr. Walker from making such a diagnosis. (*See* PC Ex. 59; PC Vol. 10, 111-13; PC Ex. 42 at 31). Rather, Dr. Walker's observation supported a diagnosis that Mr. Dotson suffers from organic brain damage, one of the most effective mitigating circumstances. (*See* PC Ex. 59 at 3).

It took jurors less than two hours to retire from the courtroom, deliberate, and report that they had sentenced Mr. Dotson to death on all first degree murder counts. (Trial Vol. 31, 2565-66).

VI. Mr. Dotson's direct appeal challenges to his statements foundered for a lack of evidence.

On direct appeal, Mr. Dotson asserted that, before Lieutenant Armstrong obtained the Armstrong Statement, police violated his right to remain silent. After the Tennessee Supreme recognized it could only perform plain error review because counsel failed to raise this issue in the trial court, the Court concluded that:

> [t]he 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 (Sergeant) 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.

Dotson, 450 S.W.3d at 53.

The Court went on to consider Mr. Dotson's argument that the State violated the State and federal constitutions when Ms. Shaw elicited from him the Shaw Statement. After again noting that trial counsel's failure to raise the issue below limited it to plain error review, the Court concluded that:

> [t]he existing record is simply devoid of any evidence to show, or even suggest, that the defendant's mother was acting as a state agent when she spoke with him ....[T]here was no evidence at all suggesting that the police brought Ms. Shaw to see the defendant 'for the purpose of eliciting incriminating statements,' or that the officers asked, directed, induced, or threatened her to obtain information from the defendant.

Id. at 54.

The Tennessee Supreme Court affirmed Mr. Dotson's convictions and sentences, and his case proceeded to post-conviction.

VII. The Administrative Office of the Courts Director and Tennessee Supreme Court Chief Justice vacated the post-conviction court's expert funding orders.

Prior to the post-conviction evidentiary hearing, Mr. Dotson moved the court to authorize the services of Bhushan S. Agharkar, M.D. (psychiatrist); James R. Merikangas, M.D. (psychiatrist/neurologist); Richard Leo, Ph.D., J.D. (false confession expert); and Dr. Walker. Pursuant to Tenn. Code Ann. § 40-30-207(b) and Tennessee Supreme Court Rule 13, the post-conviction court found these services necessary to protect Mr. Dotson's constitutional rights, and it therefore authorized funding for those experts. But when Mr. Dotson submitted the trial court's funding orders for approval pursuant to Tennessee Supreme Court Rule 13 § 5(e)(4)-(5), the Administrative Office of the Courts (AOC) Director and Tennessee Supreme Court Chief Justice vacated them.

A. The AOC Director and Chief Justice vacated the post-conviction court's order authorizing funds for the services of Bhushan S. Agharkar, M.D. (psychiatrist).

In his amended post-conviction petition, Mr. Dotson asserted that his trial counsel provided ineffective assistance when they failed to utilize mental health experts to investigate Mr. Dotson's neurological, psychiatric, and cognitive impairments. (*Id.* at 92-97). Mr. Dotson alleged that, as a result, trial counsel failed to present evidence that challenged the reliability and voluntariness of Mr. Dotson's statements and mitigated his culpability for the crimes charged. (*Id.* at 97-100).

To establish his allegations, Mr. Dotson moved the trial court to authorize funding for the services of Bhushan S. Agharkar, M.D., a forensic psychiatrist specializing in the areas of traumatic brain injury and post-traumatic stress disorder. (*See* 3/8/17 Sealed, *Ex Parte* Motion

for Expert Services of Bhushan S. Agharkar, M.D. at 2). Mr. Dotson explained that trial counsel did not present expert mental health testimony, and he required Dr. Agharkar's services to present his claim that as a result of counsel's lapse, jurors did not hear evidence regarding his mental health disorders, traumatic childhood, and cognitive impairments. (*Id.* at 4–15).

The trial court concluded that fifty hours of Dr. Agharkar's services were necessary to protect Mr. Dotson's constitutional rights. (*See* 3/8/17 Sealed, *Ex Parte* Order at 1). While Dr. Agharkar's $350 hourly rate was higher than Rule 13 § 5(d)(1)(c)'s $250 maximum hourly rate, the trial court found Dr. Agharkar's rate "reasonable, within the range charged by similar experts [and] justified given Dr. Agharkar's particularized background, experience, and expertise and the circumstances of this case." (*Id.* at 1–2). As a result, the trial court authorized $17,500 plus travel expenses for Dr. Agharkar's work. (*Id.* at 2).

Complying with the Tennessee Supreme Court Rule 13 § 5(e)(4)-(5) review process (AOC Review Process), counsel forwarded the trial court's funding order to the AOC Director. AOC Assistant General Counsel Lacy Wilber sent counsel a letter stating that

> The [AOC] has received a request for the expert services of Dr. Bhushan Agharkar in the [Dotson case] . . . After a complete and thorough review of the submitted material, this Office concluded that counsel has made the necessary showing of facts and circumstances supporting counsel's position that the services are necessary to ensure the constitutional rights of Mr. Dotson are properly protected. However, Tenn. Sup. Ct. R. 13 does not authorize the $350 per hour rate of the services sought by Dr. Agharkar .... [T]he Office of the Post-Conviction Defender is authorized to employ Dr. Agharkar at $250 per hour for professional services for a total of 50 hours. The total expenditure for these services is not to exceed $12,500, plus expenses.

(3/21/17 Letter from Wilber to Gleason at 1–2). Counsel Wilber's letter also stated that

> In accordance with the procedures for further review set out in Tenn. Sup. Ct. R. 13, Section 5(e)(5), the Chief Justice reviewed all materials provided by the AOC concerning this matter and concurred with [the AOC Director's] decision.

(*Id.* at 2).

Dr. Agharkar declined Mr. Dotson's offer to work for $250 an hour. (*See* PC Vol. 10, 30).

B. The AOC Director and Chief Justice vacated the post-conviction court's order authorizing funds for the services of James R. Merikangas, M.D. (psychiatrist/ neurologist).

After the AOC Director and the Chief Justice vacated the post-conviction court's order authorizing funds for Dr. Agharkar's services, Mr. Dotson moved the court to authorize funding for the services of James R. Merikangas, M.D. (*See* 6/26/18 Sealed, *Ex Parte* Motion for Expert Services of James R. Merikangas, M.D.). Mr. Dotson reiterated that he was presenting claims that involved trial counsel's failure to investigate and present mental state and mental health evidence. (*Id.* at 3–5). Mr. Dotson informed the court that Dr. Merikangas was qualified to provide counsel an expert opinion respecting Mr. Dotson's mental state at the time of the offense and any mental health disorders that may afflict him. (*Id.* at 8–9). Dr. Merikangas was willing to work for the "State rate" of $250 hour. (*Id.* at 9).

The post-conviction court concluded that Dr. Merikangas's services were necessary to protect Mr. Dotson's constitutional rights. (*See* 6/26/18 Sealed, *Ex Parte* Order, 1). While the court recognized that it would exceed Tennessee Supreme Court Rule 13 § 5(d)(5)'s $25,000 limit by authorizing funds for Dr. Merikangas's services, it also recognized that the Rule authorized courts to exercise discretion to exceed that limit. Following the strictures of Rule 13, the court exercised its discretion to exceed the Rule's limit by finding by clear and convincing evidence that extraordinary circumstances existed. (*Id.* at 1–2). As a result, the court authorized $10,000 plus travel expenses for Dr. Merikangas. (*Id.* at 2).

Complying with the AOC review process, post-conviction counsel forwarded the post-conviction court's funding order to the AOC Director. Ms. Wilber subsequently informed

counsel that the AOC Director and Chief Justice vacated the court's funding order. (*See* PC Vol. 10, 31).

C. The AOC Director and Chief Justice vacated the post-conviction court's order authorizing funds for the services of Richard Leo, Ph.D., J.D. (false confession expert).

Trial counsel hired Richard Leo, Ph.D., J.D., to investigate whether authorities had coerced Mr. Dotson into making false statements against himself. (*See* 8/15/18 Sealed, *Ex Parte* Order for Expert Services of Richard A. Leo, Ph.D., J.D. at 4.). Mr. Dotson informed the post-conviction court that after hiring Dr. Leo, trial counsel barely spoke to him, provided him minimal materials, and did not ask him for an expert opinion about the reliability and voluntariness of Mr. Dotson's statements. (*Id.* at 4). Mr. Dotson asserted that given Dr. Leo's education, training, and experience, as well as his experience with Mr. Dotson's trial counsel, Dr. Leo's services were necessary to present a claim that trial counsel were ineffective for failing to investigate and present evidence challenging Mr. Dotson's statements. (*Id.* at 8). Dr. Leo was willing to work for a reduced rate of $150 an hour. (*Id.*).

The post-conviction court concluded that Dr. Leo's services were necessary to protect Mr. Dotson's constitutional rights. (*See* 8/15/18 Sealed, *Ex Parte* Order at 1). While the court recognized that it would exceed Rule 13 § 5(d)(5)'s $25,000 limit by authorizing funds for Dr. Leo's services, it exercised the discretion authorized by the Rule to find by clear and convincing evidence that extraordinary circumstances existed to exceed the limit. (*Id.* at 1–2). As a result, the court authorized $9,000 plus travel expenses for Dr. Leo. (*Id.* at 2).

Complying with the AOC review process, counsel forwarded the post-conviction court's funding order to the AOC Director. Ms. Wilber subsequently informed counsel that the Chief Justice vacated the trial court's order. (*See* PC Vol. 10, 31–32).

D. The AOC Director and Chief Justice vacated the post-conviction court's order authorizing funds for the services of Dr. James Walker.

Unlike Dr. Leo, Dr. Walker performed the services for which trial counsel engaged him. After interviewing Mr. Dotson, administering tests, and reviewing documents, Dr. Walker concluded, among other things, that Mr. Dotson experienced a traumatic childhood and suffered from significant mental health disorders. (*See* PC Ex. 19 at 19; 9/25/18 Petitioner's Sealed, *Ex Parte* Motion for Reimbursement of Neuropsychologist James S. Walker for Rendering Professional Services at 6).

Mr. Dotson informed the post-conviction court that while Dr. Walker had arrived at helpful conclusions, trial counsel did not present Dr. Walker's testimony, and counsel required Dr. Walker's testimony to establish Mr. Dotson's ineffective assistance of counsel claim. (*Id.*). While Mr. Dotson acknowledged that Dr. Walker was in one sense a fact witness, he asserted that Dr. Walker's testimony would primarily involve matters of specialized knowledge and opinion. (*Id.* at 2, 10). As a result, Mr. Dotson asked the court to authorize $1,425 for Dr. Walker's work at a rate of $150 an hour. (*Id.* at 10).

The post-conviction court concluded that Dr. Walker's services were necessary to protect Mr. Dotson's constitutional rights. (*See* 9/25/18 Sealed, *Ex Parte* Order, 1–2). While the court recognized that it would exceed Rule 13 § 5(d)(5)'s $25,000 limit by authorizing funds for Dr. Walker's services, it exercised its discretion to do so by finding that extraordinary circumstances existed. (*Id.* at 2). As a result, the court authorized $1,425 plus travel expenses for Dr. Walker's services. (*Id.*).

Complying with the AOC review process, counsel forwarded the post-conviction court's funding order to the AOC Director. Mr. Dotson received a voicemail notification that the AOC Director and Chief Justice had vacated the trial court's order. (*See* PC Vol. 1, 32-33).

VIII. The post-conviction court ruled that Mr. Dotson had not presented adequate evidence on his claim that he received ineffective assistance of counsel at his sentencing hearing.

At the post-conviction hearing, Mr. Dotson presented, among other things: (1) the 104 page document Ms. Shettles had provided defense counsel setting out in detail Mr. Dotson's traumatic and troubled life history (PC Ex. 42);

(2) Dr. Walker's draft report concluding, among other things, that Mr. Dotson suffered from severe mental health disorders and expressed antisocial characteristics (PC Ex. 19);

(3) an offer of proof letter from Dr. Walker reporting that no member of Mr. Dotson's defense team talked to him about his evaluation of Mr. Dotson or his draft report (PC Ex. 57);

(4) an offer of proof letter from Dr. Merikangas providing that Mr. Dotson does not meet the diagnostic criteria for antisocial personality disorder or antisocial personality characteristics and detailing that organic brain damage provided an explanation for any "antisocial" characteristics Mr. Dotson expressed (PC Ex. 59 at 3); and

(5) trial counsel's testimony that he did not know the diagnostic criteria for antisocial personality disorder (PC Vol. 10, 110-11), and he recognized that expressing antisocial characteristics was "probably not" the same thing as an antisocial personality disorder diagnosis. (PC Vol. 10, 110-11).

Without mentioning Ms. Shettles's 104 page life history, the court ruled that Mr. Dotson had not presented evidence establishing any mitigating evidence that jurors did not hear. (PC Vol. 2, 362-63). Without recognizing that Dr. Walker did not diagnose Mr. Dotson with antisocial personality disorder, and without acknowledging Dr. Merikangas's opinion that organic brain damage explained any "antisocial" characteristics Mr. Dotson expressed, the court

found counsel's decision not to call Dr. Walker reasonable because his draft report mentioned that Mr. Dotson expressed such characteristics. (Trial Vol. 2, 362-65).

STANDARDS OF REVIEW

This Court reviews *de novo* the post-conviction court's application of law to its factual findings. *Fields v. State,* 40 S.W.3d 450, 457-58 (Tenn. 2001); *Williamson v. State,* 476 S.W.3d 405, 417 (Tenn. Crim. App. 2015); *see State v. Merriman*, 410 S.W.3d 779, 790 (Tenn. 2013); *State v. White*, 362 S.W.3d 559, 565 (Tenn. 2012); *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008).

This Court reviews *de novo* Mr. Dotson's ineffective assistance of counsel claims with no presumption of correctness afforded to the post-conviction court. *Davidson v. State*, 453 S.W.3d 386, 392 (Tenn. 2014).

While this Court also reviews *de novo* the post-conviction court's factual findings, in doing so it affords those findings a presumption of correctness which is overcome when the preponderance of evidence is contrary to them. *Fields*, 40 S.W.3d at 456.

Finally, this Court reviews *de novo* the post-conviction court's conclusion that under Tennessee Code Annotated § 40-30-106(g) Mr. Dotson waived a claim. *Jones v. State,* 2007 WL 1174899 at *5 (Tenn. Crim. App. 2007).

ARGUMENT

I. Trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to pursue suppression of Mr. Dotson's statements.

To establish a claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate (1) his trial counsel performed deficiently; and (2) prejudice arising from counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Davidson*, 453 S.W.3d at 393. For the following reasons, trial counsel rendered ineffective assistance when they failed to pursue suppression of Mr. Dotson's statements.

A. Because arguable grounds existed to seek suppression of the Armstrong and Shaw statements, trial counsel performed deficiently when they failed to pursue suppression of them.

Trial counsel performs deficiently if he fails to seek suppression of a defendant's incriminating statement when arguable grounds exist to do so. *Bellafant v. State*, 1998 WL 242449 at *6 (Tenn. Crim. App. 1998); *see also Giddens v. State*, 2008 WL 271967 at *5-*6 (Tenn. Crim. App. 2008) (involving failure to seek suppression of evidence discovered on the defendant's person); *State v. Montgomery*, 2007 WL 595599 at *8 (Tenn. Crim. App. 2007) (involving failure to seek suppression of evidence seized at the scene of a suspect drug sale).

As Section B, below, demonstrates (1) violation of Mr. Dotson's right against self-incrimination and Lieutenant Armstrong's death threat provided arguable grounds for suppression of the Armstrong Statement; (2) the circumstances surrounding the Shaw Statement provided arguable grounds for counsel to pursue their last-minute request that the trial court suppress it; and (3) trial counsel not only had arguable grounds to pursue suppression of Mr. Dotson's statements, their failure to do so prejudiced him. Thus, trial counsel performed deficiently when they failed to pursue suppression of Mr. Dotson's statements.

B. Had trial counsel pursued suppression of the Armstrong and Shaw Statements, a reasonable probability exists that the result of the proceeding against Mr. Dotson would have been different.

A post-conviction petitioner establishes prejudice arising from counsel's deficient performance by showing a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Davidson*, 453 S.W.3d at 393–94.

1. A reasonable probability exists that the trial court would have suppressed the Armstrong Statement based on a violation of Mr. Dotson's right against self-incrimination.

Pursuant to Article I, § 9 of the Tennessee Constitution and the Fifth Amendment to the United States Constitution, custodial interrogation must cease when a suspect invokes his right to remain silent. *State v. Huskey*, 177 S.W.3d 868, 878 (Tenn. 2005); *State v. Crump*, 834 S.W.2d 265, 269 (Tenn. 1992). To do so, a suspect need not expressly state "I invoke my constitutional right to remain silent." Rather, a suspect invokes that right when he indicates in any manner that he wishes to cut off questioning. *Huskey*, 177 S.W.3d at 878.

Tennessee courts recognize that a suspect indicates he wishes to invoke his right to remain silent when the suspect says:

"I don't have anything to say," *Crump*, 834 S.W.2d at 269; *State v. Turner*, 2003 WL 22970970 at *2 (Tenn. Crim. App. 2003);

"Well, then I ain't got nothing else to say 'cause I done told you whatever I know," *State v. Lalone*, 2017 WL 2297653 at *12-13 (Tenn. Crim. App. 2017);

"I really do want to tell you (about the crime), but I just know better," *State v. Hukowicz*, 2000 WL 1246430 at *3 (Tenn. Crim. App. 2000);

He is tired of answering questions about a crime he did not commit, *State v. Boykin*, 2007 WL 836807 at *9 (Tenn. Crim. App. 2007). Even a simple refusal to talk to police officers can indicate a suspect's desire to remain silent, *see State v. Weeks*, 2000 WL 1473851 at *5-*8 (Tenn. Crim. App. 2000), as can a suspect's non-verbal actions. *See State v. Cauthern*, 778 S.W.2d 39, 46 (Tenn. 1989) (suspect who attempted to turn off tape recorder invoked right to remain silent).

When police ignore a suspect's invocation of his right against self-incrimination and continue questioning him, courts suppress a statement the police thereafter obtain. *Huskey*, 177 S.W.3d at 878. A reasonable probability exists that the trial court would have suppressed the Armstrong Statement had trial counsel asserted police violated Mr. Dotson's right to remain silent before they obtained it.

Sergeant Mason told Mr. Dotson that he had a right to remain silent. (Trial Vol. 25, 1496; Trial Ex. 265). Given his status as a person "very familiar with the criminal justice system," (Trial Vol. 26, 1670), Mr. Dotson knew that he could end any interrogation by indicating that he was invoking that right. Thus, it makes little sense that after Mr. Dotson terminated the Mason/Stark interrogation by saying "he didn't want to talk to (Mason and Stark) anymore," (Trial Vol. 25, 1502), he invited other officers to pick up where Mason and Stark left off. (*See id.*). It is far more reasonable to believe that Mr. Dotson terminated the Mason/Stark interrogation by doing something police told him, and he knew, would terminate his interrogation: he invoked his right to remain silent. A reasonable probability exists that had counsel pursued pre-trial suppression of the Armstrong Statement, they would have developed evidence establishing that fact.

Lieutenant Armstrong repeatedly testified that when he picked up where Mason and Stark left off, Mr. Dotson "was doing everything he could not to talk to me." (Trial Vol. 26, 1669; *see also* id. at 1669, 1673-74). Lieutenant Armstrong's testimony demonstrates not only a reasonable probability, but a virtual certainty, that Mr. Dotson indicated that he wished to discontinue his interrogation. For it makes no sense to believe that Mr. Dotson did nothing to indicate in any manner that he wanted to cut off questioning when (1) police told him he had a right to remain silent; (2) he knew from his familiarity with the criminal justice system that police would have to cease interrogating him if he invoked that right; and (3) he was doing "everything he could" to avoid further interrogation. It's far more reasonable to believe that in doing "everything he could not to talk," Mr. Dotson indicated that he wished to cut off Lieutenant Armstrong's questions. A reasonable probability exists that had counsel pursued pre-trial suppression of the Armstrong Statement, the trial court would have found this fact. *See Crump*, 834 S.W.2d at 269 (suspect invoked right to remain silent when he said "I don't have anything to say"); *Turner*, 2003 WL 22970970 at *2 (same).

Mr. Dotson told police officers "he didn't want to talk to (them) anymore," and he was doing "everything he could not to talk." A reasonable probability exists that had trial counsel sought suppression of the Armstrong Statement based on the violation of Mr. Dotson's right to remain silent, the trial court would have suppressed it.

2. A reasonable probability exists that the trial court would have suppressed the Armstrong Statement based on a conclusion that it was the involuntary product of police coercion.

Police violate due process when they coerce a suspect to give an involuntary statement. *Schneckloth v. Bustamonte,* 412 U.S. 218, 223-24 (1973). Courts suppress statements that are a product of such coercion. *See State v. Climer*, 400 S.W.3d 537, 567 (Tenn. 2013).

The voluntariness of a statement hinges on the totality of the circumstances including, among other things, the length and nature of the questioning; whether police respected the suspect's constitutional rights; whether police threatened the suspect; and the suspect's education, intelligence, and mental health. *State v. Huddleston,* 924 S.W.2d 666, 671 (Tenn. 1996). In weighing these factors, courts recognize that a credible threat of physical violence is *per se* coercive.

For example, in *Arizona v. Fulminate*, Fulminate was "starting to get some tough treatment and whatnot" from fellow inmates who suspected him of committing a child murder. A State agent offered Fulminate protection, but only if Fulminate confessed to the crime. Fulminate did so, the State entered Fulminate's statement into evidence against him, and a jury convicted him of the murder.

The United States Supreme Court held that the State had unconstitutionally coerced Fulminate's statement. It concluded that Fulminate faced a credible threat of violence, and the State expressed its intent to subject Fulminate to that threat unless he gave an inculpatory statement. The Court concluded that by bringing these circumstances to bear on Fulminate, the State overbore his will in such a way as to render his statement the product of coercion. *Arizona v. Fulminate*, 499 U.S. 279, 285-88 (1991); *see also Payne v. Arkansas*, 356 U.S. 560, 564-65 (1958) (statement coerced when officer told suspect he would protect the suspect from an angry mob outside the jail if the suspect confessed); *State v. Smith,* 42 S.W.3d 101, 109 (Tenn. Crim. App. 2000) (a suspect's incriminatory statement "must not be extracted by 'any sort of threats or violence ....'").

Fulminate demonstrates a reasonable probability that the trial court would have suppressed the Armstrong Statement had trial counsel asserted that police coerced Mr. Dotson to give it.

Police interrogated Mr. Dotson from 7:00 p.m., March 7, 2008, to 1:30 a.m. the next day. (Trial Vol. 29, 2170, 2174, 2223–24). Mr. Dotson steadfastly maintained his innocence, (*see id.* at 2175, 2225), while doing "everything he could not to talk." (Trial Vol. 26, 1669, 1673-74). Despite Mr. Dotson's invocation of his right to remain silent, police continued interrogating him into the night. As Mr. Dotson's interrogation passed the six-hour mark, Lieutenant Armstrong yelled that if Mr. Dotson continued to insist that he did not kill women and children, Armstrong would either personally kill Mr. Dotson or place him among Shelby County Jail inmates who would do so. (Trial Vol. 26, 1675; Trial Vol. 29, 2175, 2225). Mr. Dotson gave the Armstrong Statement immediately after Lieutenant Armstrong's death threat. (Trial Vol. 26, 1675-76; Trial Vol. 29, 2225).

As in *Fulminate*, Lieutenant Armstrong invoked a credible threat of physical violence to coerce the Armstrong Statement. Unlike *Fulminate*, Lieutenant Armstrong obtained Mr. Dotson's statement after extended custodial interrogation during which police disregarded Mr. Dotson's right against self-incrimination. And unlike Fulminate, Mr. Dotson suffers from severe mental health disorders. (*See* PC Ex. 19 at 19; PC Ex. 59 at 1-2). These additional circumstances, in conjunction with Lieutenant Armstrong's death threat, establish a reasonable probability that had trial counsel argued at a suppression hearing that the Armstrong Statement was the involuntary product of police coercion, the trial court would have suppressed it.

3. A reasonable probability exists that the trial court would have suppressed the Shaw Statement based on a finding that Ms. Shaw acted on behalf of police when she elicited it.

In their motion seeking suppression of the Shaw Statement, trial counsel asserted that Mr. Dotson had invoked his right to counsel, and Ms. Shaw thereafter acted on behalf of the State when she elicited the Shaw Statement. (Trial Vol. 4, 586). While the trial court agreed to hear defense counsel's late-filed motion prior to Ms. Shaw's testimony, counsel gave up on it when Ms. Shaw testified that nobody expressly asked her to try and get information from Mr. Dotson. (Trial Vol. 26, 1729-30). Counsel failed to recognize, however, that Ms. Shaw's testimony did not foreclose the possibility that she nonetheless acted as a State agent.

While the State creates an agency relationship when it expressly asks a person to elicit another's statement, the State can create an agency relationship through implication as well. *United States v. Henry*, 447 U.S. 264, 274 (1980);
State v. Willis, 2015 WL 1207859 at *64 (Tenn. Crim. App. 2015). A reasonable probability exists that had counsel pursued their suppression motion, they would have developed evidence establishing that police implicitly created an agency relationship with Ms. Shaw.

At the time of Mr. Dotson's interrogation, officers Armstrong and Mason had over forty years' experience between them. (*See* Trial Vol. 26, 1656; Trial Vol. 25, 1490-91). These experienced officers no doubt recognized that, for the reasons set out in Section 1 and 2, above, the Armstrong Statement was vulnerable to a challenge that police obtained it in violation of Mr. Dotson's constitutional rights. Upon discerning this reality, the officers would recognize the need for another statement free from any legal foibles. Ms. Shaw's visit with Mr. Dotson provided them the opportunity to obtain such an insurance statement. Ms. Shaw's conduct suggests that the officers took advantage of this opportunity.

As soon as Ms. Shaw entered the interrogation room, she took hold of Mr. Dotson's hands and asked, "What's going on?" (PC Vol. 26, 1740). Ms. Shaw's conduct was likely to elicit, and did elicit, Mr. Dotson's second statement.

The above realities give rise to a reasonable probability that had counsel pursued their motion seeking suppression of the Shaw Statement, they would have developed evidence establishing that Ms. Shaw acted on behalf of the State when she elicited it. Given that Mr. Dotson had previously invoked his right to counsel, a reasonable probability exists that upon doing so the trial court would have suppressed the Shaw Statement. *See Climer*, 400 S.W.3d at 567-68.

4. A reasonable probability exists that the result of a trial without Mr. Dotson's statements would have been different.

Without Mr. Dotson's statements, the State's case that Mr. Dotson perpetrated the Lester Street attacks would have rested on the unreliable testimony of two children.

While C.J. and Cedrick testified that Mr. Dotson was responsible for the Lester Street attacks, (Trial Vol. 26, 1577-91, 1633-35), they also testified that other persons committed those attacks. (Trial Vol. 26, 1596-99, 1646-48). C.J. testified these persons included a man who said something to Cecil, Sr. about a gang, told Cecil, Sr. that "[Y]ou got too big boy," and fired a gun at Cecil, Sr. while saying, "[N]ever stop playing with the gang boy, … you never know what would happen, boy." (Trial Vol. 26, 1597-99). This testimony supported defense counsel's gang hit theory, and it gave jurors reason to credit that theory and question C.J.'s testimony implicating Mr. Dotson.

C.J. furthered devalued his testimony implicating Mr. Dotson by acknowledging that he based his knowledge of what happened on what his "granny" had told him. (Trial Vol. 26, 1608). Similarly, Cedrick further devalued his testimony implicating Mr. Dotson by telling jurors that

C.J. and he rode bicycles to his grandmother's house after C.J. was stabbed, (Trial Vol. 26, 1651) an event that everyone agrees did not occur. (Trial Vol. 27, 1911-12).

Given the unreliability of C.J. and Cedrick's testimony, the prosecution and the Tennessee Supreme Court believed that Mr. Dotson's statements provided the basis for the jury's finding that Mr. Dotson perpetrated the Lester Street attacks.

In closing argument, the prosecution repeatedly turned to Mr. Dotson's statements to support its assertion that Mr. Dotson committed the Lester Street attacks. (*See, e.g.,* Trial Vol. 30, 2364) ("We didn't come up with a theory. He did. He did. Where do you think we got our theory from? That we just created it? Jessie Dotson told us what he did. That's where it came from."); *see also id.* at 2296, 2298-99, 2302-03, 2309, 2312-13, 2314, 2364-69, 2382-85, 2387, 2392). Indeed, the prosecution told jurors that with Mr. Dotson's statements "[t]here's enough to convict Jessie Dotson well beyond a reasonable doubt without C.J. and Cedrick. There is. You have everything you need to convict him." (Trial Vol. 30, 2395-96).

When the Tennessee Supreme Court reviewed on direct appeal the sufficiency of the evidence identifying Mr. Dotson as the perpetrator of the Lester Street attacks, it relied on Mr. Dotson's statements to find the evidence sufficient. *See Dotson*, 450 S.W.3d at 89. The Court recognized that without those statements, the only evidence the State presented was the testimony of two small children. *Id.* Given the inherent unreliability of statements identifying two different persons as perpetrators of a crime, Mr. Dotson's statements provided the basis for the Court's conclusion that sufficient evidence supported Mr. Dotson's convictions.

The prosecution and the Tennessee Supreme Court recognized that Mr. Dotson's statements provided the foundation for Mr. Dotson's convictions and death sentences. Without them, jurors would have been left with (1) C.J. and Cedrick's testimony that Mr. Dotson *or*

others committed the murders; (2) C.J.'s testimony that the man who shot Cecil, Sr. told him you never know what might happen when you play with the gang; and (3) the testimony of Mr. Dotson's defense witnesses that Cecil, Sr. owed gang members $300,000, and a week and a half before the attacks he and a fellow gang member had a falling out. Given this reality, a reasonable probability exists that had the court suppressed Mr. Dotson's statements at least one juror would have concluded that (1) the State had not proved beyond a reasonable doubt that Mr. Dotson was guilty of the Lester Street attacks; or (2) residual doubt about Mr. Dotson's guilt called for sentences less than death. See *Tice v. Johnson*, 647 F.3d 87 108-111 (4th Cir. 2011) (given divergent witness accounts and the inconclusive physical evidence, defense counsel's deficient performance in failing to move for suppression of defendant's statement prejudiced him); *see also United States v. McGrew*, 397 F. App'x 87, 94–95 (5th Cir. 2010); *Smith v. Wainwright*, 777 F.2d 609, 617 (11th Cir. 1985).

C. The post-conviction court erroneously denied relief.

In denying relief, the post-conviction court noted that counsel testified they did not think there was a basis to suppress Mr. Dotson's statements. (PC Vol. 2, 369; PC Vol. 10, 73). But as demonstrated above, that belief evinces basic misunderstandings of the facts, the law, or both, and hence is unreasonable. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 395 (2000) (finding deficient performance where counsel failed to investigate records "because they incorrectly thought that state law barred access to such records"). Pursuing suppression of Mr. Dotson's statements would have been consistent with counsel's strategy to keep those statements out of evidence, and there was no risk involved in attempting to do so. The post-conviction court thus erred when it denied relief.

II. Mr. Dotson's counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to obtain videotape of Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw.

To the extent there were any questions about what happened during Mr. Dotson's confinement in the interrogation room, trial counsel had available incomparable evidence to settle any uncertainties. The First 48 raw footage included videotape of Mr. Dotson's custodial interrogation (*see* Trial Vol. 26, 1697; PC Vol. 10, 81), as well as videotape of police interactions with Ms. Shaw. (*See* PC Vol. 10, 81; Trial Vol. 26, 1664; *see* PC Ex. 29 at § 1.03). Trial counsel rendered ineffective assistance when they failed to obtain that tape and use it to establish that the trial court should suppress Mr. Dotson's statements.

A. Trial counsel performed deficiently when he failed to subpoena the First 48 raw footage to Mr. Dotson's preliminary hearing.

For the reasons discussed above, a reasonable probability exists that during Mr. Dotson's custodial interrogation police (1) violated Mr. Dotson's constitutional rights when they obtained the Armstrong Statement; and (2) created an agency relationship with Ms. Shaw before she elicited the Shaw Statement. Because First 48 cameras videotaped Mr. Dotson's custodial interrogation and police witness interviews, (Trial Vol. 26, 1664, 1697; PC Vol. 10, 81), a reasonable probability exists that the First 48 raw footage contained depictions of these events. Yet trial counsel waited until February 2009—almost one year after being appointed to represent Mr. Dotson—to serve a subpoena for the raw footage. By that time Granada Entertainment had destroyed it. (*See* PC Ex. 28 at 2).

At the post-conviction hearing, Mr. McAfee testified that there was no strategic reason for waiting until February 2009 to subpoena the raw footage. (PC Vol. 10, 85). Mr. Skahan acknowledged that if counsel could have secured the raw footage before Granada destroyed it,

they should have done so. (PC Vol. 11, 288-89). But at the time the raw footage existed, Mr. Skahan had the tools necessary to do just that.

Upon his mid-March 2008 General Session court appointment, Mr. Skahan could have issued a subpoena commanding the custodian of the raw footage to produce it at or before Mr. Dotson's preliminary hearing. Tennessee Rule of Criminal Procedure 17, governing subpoenas, applies to preliminary hearing proceedings, *see* Tenn. R. Crim. P. 1 (b)(3) & (4), and Criminal Rule 17(d)(1) provides that a defendant may include in his subpoena a command that a person produce objects the subpoena designates.

This Court confirms what the Criminal Rules establish. In *State v. Womack* this Court recognized that at a preliminary hearing, a defendant has "the unlimited right of subpoena limited only by ... a showing ... that the witness has no information material to the issues or that the evidence sought is equally immaterial." *State v. Womack*, 591 S.W.2d 437, 445 (Tenn. Crim. App. 1979); *see id.* at 443-46. Because the raw footage contained depictions relevant to whether the State unconstitutionally obtained Mr. Dotson's statements, it would have been material to deciding whether the General Sessions court could consider those statements at the preliminary hearing, an inquiry Tennessee Criminal Rule 5.1(a)(1) specifically authorizes. Given the videotape's materiality, Mr. Dotson had the "unlimited right" to subpoena it.

Mr. Skahan did not subpoena the First 48 raw footage to Mr. Dotson's preliminary hearing. He waited to subpoena it until after his December 12, 2008, Criminal Court appointment. By then Granada had destroyed it. (PC Vol. 10, 81, 83-86; PC Vol. 11, 184-86, 277; PC Ex. 7; PC Ex. 28). By failing to issue a subpoena for the raw footage when it existed and could be produced, Mr. Skahan performed deficiently. *See Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting 1 ABA Standards for Criminal Justice 4–4.1 (2d ed. 1982 Supp.) ("It is the duty

of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction"); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (courts look to ABA Standards relating to the Administration of Criminal Justice when accessing competence of trial counsel's representation); *State v. Ellis*, 273 So.3d 1126, 1129 (Fla. App. 2019) (trial counsel rendered ineffective by destruction of potentially helpful videotape prior to their appointment); *Lassiter v. State*, 180 So.2d 311, 311-12 (Fla. App. 2016) (recognizing that failure to subpoena potentially helpful videotape constitutes a deficient performance).

B. Trial counsel's deficient performance prejudiced Mr. Dotson.

To establish that counsel's deficient performance prejudiced him, Mr. Dotson must show that, had counsel subpoenaed the First 48 raw footage to the preliminary hearing, a reasonable probability exists that (1) counsel could have overcome Granada's inevitable invocation of Tennessee's media shield statute; (2) after watching videotape of Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw the trial court would have suppressed his statements; and (3) as a result, Mr. Dotson would not have been convicted of first degree murder and/or sentenced to death. *See Strickland*, 466 U.S. at 694; *Davidson*, 453 S.W.3d at 393–94.

1. A reasonable probability exists that trial counsel could have overcome Granada's invocation of Tennessee's media shield statute.

Mr. Dotson recognizes that, just as Granada invoked Tennessee's media shield statute to counsel's untimely subpoena for the First 48 raw footage, (*see* PC Ex. 28), it no doubt would have invoked that law to contest an earlier subpoena. But a reasonable probability exists that trial counsel could have overcome Granada's invocation of that privilege (1) under the terms of the media shield statute; and/or (2) by asserting Mr. Dotson's constitutional right to present a defense.

a. A reasonable probability exists that trial counsel could have overcome Granada's invocation of the media shield statute under the terms of that statute.

When an entity invokes Tennessee's media shield law, the person seeking information can apply for an order divesting the entity of the statute's protection. Tenn. Code Ann. § 24-1-208 (c)(1). A court will order access to the requested information upon a clear and convincing showing that (1) there is probable cause to believe that the entity possesses information clearly relevant to a probable violation of law, Tenn. Code Ann. § 24-1-208(c)(2)(A); (2) the person seeking the information cannot reasonably obtain it from other means, *id.* at § 24-1-208(c)(2)(B); and; (3) the public has an interest in having the information disclosed. *Id.* at § 24-1-208(c)(2)(C). A reasonable probability exists that trial counsel could have made these showings.

As discussed above, a reasonable probability exists that the raw footage contained depictions demonstrating that police violated Mr. Dotson's constitution rights when they took the Armstrong Statement and when Ms. Shaw elicited the Shaw Statement. A reasonable probability therefore exists that trial counsel could have fulfilled the Section 208(c)(2)(A) requirement. *See State v. Clark*, 2017 WL 564888 at *3-*4, *6 (Tenn. Crim. App. 2017).

Because no one other than Mr. Dotson and authorities were privy to the events in the interrogation room, (*see* PC Vol. 11, 187), Mr. Dotson could not have reasonably obtained from any other source information that police violated his constitutional rights when they obtained his statements. A reasonable probability therefore exists that trial counsel could have fulfilled the Section 208(c)(2)(B) requirement. *Compare State ex rel. Gerbitz v. Curriden*, 1986 WL 15576 at *2 (Tenn. 1986) (police could have obtained information known to reporter through their own investigation); *Clark*, 2017 WL 564888 at *6-*9 (if a person cannot describe the information he believes the media harbors, he cannot show that the information is not otherwise available).

Finally, the public has a compelling interest in the constitutionality of capital punishment proceedings. *See Garrett v. Estelle*, 556 F.2d 1274, 1279 (5th Cir. 1977) (recognizing that the death penalty is a matter of wide public interest); *In re Ross,* 866 A.2d 554, 581 (Conn. 2005) (citizens share an interest in a constitutionally administered system of capital punishment); *People v. Dunlap*, 975 P.2d 723, 765 (Colo. 1999) (en banc). A reasonable probability therefore exists that trial counsel could have fulfilled the Section 208(c)(2)(C) requirement.

A reasonable probability exists that upon making the Tennessee Code Annotated § 24-1-208(c)(2) showings, the trial court would order Granada Entertainment to comply with Mr. Dotson's subpoena for the First 48 raw footage.

b. A reasonable probability exists that trial counsel could have overcome Granada's invocation of the media shield statute by invoking Mr. Dotson's constitutional right to present a defense.

Article I, §§ 9 and 16 of the Tennessee Constitution and the Sixth and Fourteenth Amendments to the United States Constitution guaranty criminal defendants a right to present a defense. When invocation of an evidentiary rule or privilege contravenes that guaranty, the State and federal constitutions require courts to disregard the rule or privilege. *State v. Brown*, 29 S.W.3d 427, 432-33 (Tenn. 2000); *Crane v. Kentucky,* 476 U.S. 683, 690-91 (1986); *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973).

In determining whether exclusion of evidence would violate a defendant's right to present a defense a court considers whether (1) the evidence is critical to the defense; (2) the evidence bears sufficient indicia of reliability; and (3) the court would contravene a substantially important interest if it ordered the evidence's production. *Brown*, 29 S.W.3d at 433-34. Consideration of these factors demonstrates that counsel could have relied on Mr. Dotson's right to present a defense to overcome Granada's invocation of Tennessee's media shield statute.

As to the first factor, the First 48 raw footage contained depictions critical to demonstrating that police unconstitutionally obtained Mr. Dotson's statements, and, as a result, the court should suppress them. Because Mr. Dotson's statements were a key part of the State's case against him, *see Dotson*, 450 S.W.3d at 89, the First 48 raw footage of Mr. Dotson's custodial interrogation was critical to Mr. Dotson's defense.

As to the second factor, the First 48 raw footage contained depictions of events that transpired. Given its nature, the raw footage was inherently reliable.

As to the third factor, media shield laws seek to foster the full and free flow of information to the public. *See Branzburg v. Hayes*, 408 U.S. 665, 725–26 (1972) (Stewart, J., dissenting); *Funk v. Scripps Media, Inc.*, 570 S.W.3d 205, 219 n.6 (Tenn. 2019) (noting that Justice Stewart's *Branzburg* dissent provided the impetus and foundation for Tennessee's media shield statute). Mr. Dotson's case does not involve a news organization independently gathering information from confidential sources and disseminating it to an otherwise uninformed public. Rather, at the invitation of police an entertainment company (1) set up a camera in an interrogation room, pushed record, and walked away (PC Vol. 11, 187); and (2) tagged along as police talked to potential witnesses. (*See* PC Vol. 10, 81). Recognizing that the media shield privilege must yield under these circumstances would do little to dampen the enthusiasm of confidential sources from providing news persons information or otherwise chill the ability of news people to gather information.

Had Mr. Dotson's counsel timely served a subpoena for the First 48 raw footage, a reasonable probability exists that his counsel could have invoked his constitutional right to present a defense to overcome Granada Entertainment's assertion of the media shield privilege.

2. A reasonable probability exists that had counsel obtained videotape of Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw, the result of the proceeding against Mr. Dotson would have been different.

As discussed above, a reasonable probability exists that the raw footage contained depictions of police ignoring Mr. Dotson's indications that he wished to cut off his interrogation and thereafter threatening his life to obtain the Armstrong Statement. A reasonable probability exists that upon seeing these depictions the trial judge would have suppressed the Armstrong Statement. *See Arizona v. Fulminante*, 499 U.S. at 287-88; *Michigan v. Mosley*, 423 U.S. 96, 103–04 (1975); *Smith*, 42 S.W.3d at 109; *Crump*, 834 S.W.2d at 269-70.

As discussed above, police concern that they may have unconstitutionally obtained the Armstrong Statement, coupled with Ms. Shaw's conduct in the interrogation room, gives rise to a reasonable probability that police indicated to Ms. Shaw that they wanted her to elicit an incriminating statement from Mr. Dotson. Because the raw footage contained depictions of police interactions with witnesses such as Ms. Shaw, (*see* PC Vol. 10, 81; Trial Vol. 26, 1664), a reasonable probability exists that it contained evidence demonstrating that police encouraged Ms. Shaw to elicit a statement from Mr. Dotson. A reasonable probability exists that upon seeing such depictions the trial judge would have suppressed the Shaw Statement. *Climer*, 400 S.W.3d at 567-68.

As discussed in Section I.B.4, above, a reasonable probability exists that, had the trial court suppressed Mr. Dotson's statements, at least one juror would have concluded that (1) the State had not proved beyond a reasonable doubt that Mr. Dotson committed the Lester Street attacks; or (2) residual doubt about Mr. Dotson's guilt called for sentences less than death.

D. The post-conviction court erroneously denied relief.

The post-conviction court based its denial of relief on a finding that counsel attempted to obtain the raw footage, but those efforts failed because Granada had destroyed it. (PC Vol. 2, 371). But Mr. Dotson asserts that Mr. Skahan did not secure the raw footage at a time when it existed. That defense counsel made efforts to obtain the raw footage after Granada destroyed it does not detract from, but supports, a conclusion that Mr. Skahan performed deficiently when he failed to obtain the raw footage when it existed.

In addition, the court noted that post-conviction counsel did not present the raw footage at the post-conviction hearing. (PC Vol. 2, 372). But we know from uncontested testimony that the raw footage contained depictions of (1) police informing Mr. Dotson of his right to remain silent; (2) Mr. Dotson thereafter "doing everything he could not to talk;" and (3) police thereafter threatening Mr. Dotson's life to obtain the Armstrong Statement. In addition, a reasonable probability exists that the raw footage contained depictions of police implicitly creating an agency relationship with Ms. Shaw. That Mr. Dotson did not present the destroyed raw footage at the evidentiary hearing does nothing to detract from the reality that, while no one can now watch it, we can nonetheless posit a reasonable probability about depictions the raw footage contained.

III. Trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to challenge the State's failure to preserve videotape of Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw.

Even though Mr. Skahan failed to subpoena timely the First 48 raw footage, trial counsel still could have challenged the destruction of videotape depicting Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw. For the following reasons, trial counsel

performed deficiently when they failed to do so, and that deficient performance prejudiced Mr. Dotson.

A. Trial counsel performed deficiently when they failed to argue that the State violated due process by failing to preserve evidence it knew was helpful to the defense.

Trial counsel performed deficiently when they failed to argue that the destruction of the First 48 raw footage violated Mr. Dotson's constitutional rights because (1) videotape of Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw possessed an exculpatory value that was apparent before it was destroyed; (2) Mr. Dotson was unable to obtain comparable evidence; and (3) the State's agreement with Granada Entertainment did not relieve the State of its duty to preserve evidence helpful to Mr. Dotson's defense. *See California v. Trombetta*, 467 U.S. 479, 488-89 (1984).

1. The exculpatory value of videotape depicting Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw was apparent before it was lost.

Because police participated in the events the First 48 raw footage chronicled, they knew the content of that footage. As a result, when police failed to take any action to preserve videotape of Mr. Dotson's custodial interrogation and their interactions with Ms. Shaw, they knew their inaction allowed the destruction of evidence that Mr. Dotson could have used to seek suppression of his statements. *See United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000); *Nuckols v. Gibson*, 233 F.3d 1261, 1266-67 (10th Cir. 2000).

2. The videotape contained incomparable evidence reflecting events surrounding Mr. Dotson's statements.

A video recording of events provides incomparable evidence of what occurred during those events. Mr. Dotson had no access to any other source that could provide him any evidence

remotely as compelling as the videotape of his custodial interrogation and police interactions with Ms. Shaw.

3. The State's agreement with Granada Entertainment did not relieve the State of its duty to preserve evidence helpful to Mr. Dotson's defense.

Mr. Dotson acknowledges that the agreement between the Memphis Police Department and Granada Entertainment provided that Granada "shall own all right, title and interest in and to (The First 48) Program and all elements thereof and relating thereto." (PC Ex. 29 at § 1.04). But trial counsel could have overcome the State's inevitable attempt to rely on this provision to shirk its constitutional duty of preserving evidence by demonstrating that (1) Granada's conduct of recording Mr. Dotson's interrogation, recording police interactions with Ms. Shaw, and destroying videotape of those events was fairly attributable to the State; and (2) the Memphis Police Department and Granada agreed that they could amend the agreement's provisions at any time.

a. Granada Entertainment's conduct was fairly attributable to the State.

A nominally private entity's conduct that violates a person's constitutional rights is attributable to a State if (1) the deprivation results from a right or privilege the State created; and (2) the party charged with the deprivation may be fairly characterized as acting in a State capacity. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Trial counsel could have demonstrated that such was the case here.

(i). The creation of the videotape resulted from the agreement the police entered into with Granada Entertainment.

Without the Memphis Police Department's consent, Granada Entertainment could not have recorded the events that occurred during Mr. Dotson's custodial interrogation. Those events

occurred (1) inside an interrogation room, a place traditionally closed off from outside access; and (2) during the planning and carrying out of a police investigation, events police traditionally shield from the public while they are on-going. Granada was able to record events surrounding Mr. Dotson's statements only because the State granted Granada a contractual right to do so. As a result, a State-created right provided the basis for Granada's recording of Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw. *See West v. Atkins*, 487 U.S. 42, 49-50, 54–57 (1988) (private doctor's medical care to state prisoners, provided pursuant to a contract between the doctor and the State, is fairly attributable to the State).

(ii). Transcribing a police interrogation and witness interview are fairly characterized as the work of a State actor.

When a State agrees that a nominally private party can perform a traditional government function, courts characterize the party as a State actor. The State's inability to avoid its responsibilities by having a private party perform its tasks provides the basis for this government function doctrine. *See Georgia v. McCollum*, 505 U.S. 42, 51-53 (1992); *Friedmann v. Correction Corporation of America,* 310 S.W.3d 366, 375 (Tenn. Ct. App. 2009) (nominally private entity operating a State prison performs a government function and must comply with the public records act).

Investigating crime and prosecuting perpetrators is a traditional government function. *Horton v. Flenory*, 889 F.2d 454, 458 (3d Cir. 1989); *Ridings v. Lane County, Ore*gon, 862 F.2d 231, 235 (9th Cir. 1988). As Mr. Dotson's case demonstrates, criminal investigations include interrogating suspects and creating a record of events occurring during the interrogation. (*See* Trial Ex. 265; Trial Vol. 26, 1665) (at the conclusion of an interrogation, a transcriptionist records a question and answer session with the suspect); *id.* at 1705 (investigators take notes

when they interrogate suspects); *id.* at 1707 (Lieutenant Armstrong recorded events respecting Mr. Dotson's interrogation in a report); *see also Miranda v. Arizona*, 384 U.S. 436, 440 (1966); *State v. Young*, 196 S.W.3d 85, 122-27 (Tenn. 2006). It cannot be disputed that when a transcriptionist records questions police ask an arrested suspect and the answers the suspect gives, the transcriptionist performs a government function. *See State v. Johnson*, 2009 WL 55918 at *8 (Tenn. Crim. App. 2009). Because Granada did exactly that when it created a contemporaneous record of the events that occurred during Mr. Dotson's custodial interrogation, it performed a traditional government function.

While Granada recorded events on videotape, and while the State did not have a duty to make a video recording of Mr. Dotson's custodial interrogation, that does not erase the State's duty to preserve the videotape of it. Even when a State performs a discretionary act, it must comply with constitutional dictates. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985). Once the State made the discretionary decision that allowed Granada to videotape Mr. Dotson's custodial interrogation, and once Granada videotaped violations of Mr. Dotson's constitutional rights, the State and federal constitutions imposed a unique and constitutionally compelled duty on the State to preserve the videotape. The State could not avoid its constitutional responsibility to do so by claiming that only Granada had access to the videotape. *See West v. Atkins*, 487 U.S. at 56 (State cannot avoid its constitutional responsibility of providing persons in its custody adequate medical treatment by contracting out prison medical care).

In addition, when investigating crime, authorities regularly seek assistance from the public and create a record of their efforts doing so. As a result, when Granada recorded police interactions with Ms. Shaw it again performed a government function. As with the videotape of Mr. Dotson's custodial interrogation, the State cannot avoid its responsibility to preserve

portions of the raw footage that are helpful to Mr. Dotson's challenges to the Shaw Statement. *See West v. Atkins*, 487 U.S. at 56.

Mr. Dotson does not argue that every video recording of police activity by a private citizen will constitute State action. But Granada's role in Mr. Dotson's interrogation was unique and required the State to preserve videotape pertaining to it. Police and Granada entered into a written contract that (1) gave Granada access to the interrogation room and the carrying out of a police investigation, a place and events traditionally closed off from outside access; and (2) enabled Granada to record Mr. Dotson's custodial interrogation, an event that only a government could lawfully institute. The contract between the Memphis Police Department and Granada thus elevates Granada's conduct from simple recording of police activity to action carrying the State's imprimatur. *See West v. Atkins*, 487 U.S. at 56-57; *Lugar* 457 U.S. at 937.

The State, whether traveling under the name Memphis Police Department or Granada Entertainment, recorded constitutional violations that occurred during Mr. Dotson's custodial interrogation. The State and federal constitutions required the State to preserve any footage containing depictions helpful to Mr. Dotson's defense. The State cannot avoid this responsibility by claiming that when it videotaped events and thereafter destroyed the tape it was acting through a private entity.

b. The Memphis Police Department and Granada Entertainment agreed they could amend the provisions of their agreement.

Even if Granada Entertainment was not performing a government function when it videotaped constitutional violations that occurred during Mr. Dotson's custodial interrogation, trial counsel could have nonetheless demonstrated that the State failed to take available action aimed at preserving the videotape. The agreement between the State and Granada provided that the parties could amend it at any time. (PC Ex. 29 at § 6.04). As discussed above, because police

participated in the events the First 48 cameras recorded, they knew the raw footage contained depictions helpful to Mr. Dotson's defense, and the State therefore had a duty to take steps to preserve that footage. Such steps could have included asking Granada if it would modify its agreement with the police department so the State could fulfill its constitutional duty of providing Mr. Dotson evidence helpful to his defense. The State took no such action and, as a result, it failed to make any attempt at preserving evidence helpful to Mr. Dotson.

As the above sections demonstrate, the State allowed the destruction of evidence it knew was helpful to Mr. Dotson's defense. Trial counsel made no effort to establish that by doing so the State violated Mr. Dotson's State and federal constitutional rights. By failing to do so, counsel performed deficiently.

B. Trial counsel performed deficiently when they failed to argue that the State violated due process by failing to preserve evidence potentially helpful to the defense.

Any doubt about the events the raw footage depicted does not detract from the fact that it contained, at the very least, evidence that could play a significant role in Mr. Dotson's defense. Counsel had available two constitutional challenges addressing the State's failure to preserve such evidence, one based on the State Constitution, the other based on the federal constitution. Trial counsel performed deficiently when they failed to present these constitutional challenges.

1. Trial counsel performed deficiently when they failed to argue that the State violated Article I, § 8 of the Tennessee Constitution by failing to preserve videotape of Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw.

A defendant establishes a violation of Article I, § 8 of the Tennessee Constitution for the destruction of potentially helpful evidence by first showing that the State had a duty to preserve the evidence. Upon making that showing, Tennessee courts consider three factors when determining whether the State's failure to do so violated the Tennessee Constitution's law of the

land clause: (1) the degree of negligence involved in the loss of the evidence; (2) the significance of the lost evidence; and (3) the sufficiency of other evidence used at trial to support the conviction. *State v. Ferguson*, 2 S.W.2d 912, 917 (Tenn. 1999). Trial counsel performed deficiently when they failed to demonstrate that consideration of these factors established the State violated Article I, § 8 when it failed to preserve videotape of Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw.

a. The State had a duty to preserve the videotape.

The Tennessee Constitution imposes on the State a duty to preserve evidence that could play a significant role in an accused's defense. *State v. Merriman*, 410 S.W.3d 779, 792 (Tenn. 2013). As discussed above, videotape of Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw contained depictions that were, at the very least, potentially helpful to Mr. Dotson's constitutional challenges to his statements. As a result, the State had a duty to preserve the videotape.

b. The State made no effort to preserve the videotape.

Because the State knew what the videotape depicted, its failure to preserve it sounds more in intent than negligence. As discussed above, any State attempt to excuse that failure by claiming only Granada had access to the tape fails because (1) Granada Entertainment's conduct was fairly attributable to the State; and (2) the agreement between the State and Granada permitted the State to ask Granada for access to the videotape.

c. The videotape provided uniquely compelling evidence that could have resulted in the suppression of Mr. Dotson's statements.

As discussed above, (1) a video recording of events provides incomparable evidence of what occurred during those events; (2) Mr. Dotson could have used the videotape to demonstrate

that police violated the State and federal constitution when they took his statements; and (3) had he done so, the trial court would have suppressed his statements. The videotape was significant evidence.

d. Without Mr. Dotson's statements, the State's case rested on the unreliable testimony of two children.

When the Tennessee Supreme Court reviewed on direct appeal the sufficiency of the evidence identifying Mr. Dotson as the perpetrator of the Lester Street attacks, it relied on Mr. Dotson's statements to find the evidence sufficient. *See Dotson*, 450 S.W.3d at 89. Without those statements, the State had only the unreliable testimony of C.J. and Cedrick to connect Mr. Dotson to the Lester Street attacks. That testimony alone supports neither Mr. Dotson's convictions nor his death sentences.

Mr. Dotson's counsel failed to argue that when police took no steps to preserve the First 48 videotape of Mr. Dotson's custodial interrogation and their interactions with Ms. Shaw, the State violated the Tennessee Constitution's law of the land clause. Counsel failed to argue that in doing so the State violated the federal constitution's due process clause as well.

2. Trial counsel performed deficiently when they failed to argue that the State violated the Fourteenth Amendment to the United States Constitution by failing to preserve videotape of Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw.

A State's failure to preserve potentially useful evidence violates the federal constitution's due process clause if the State acted in bad faith when it failed to preserve the evidence. *Arizona v. Youngblood,* 488 U.S. 51, 58 (1988).[3] Trial counsel performed deficiently when they failed to

[3] In concurring with the United States Supreme Court's decision to impose a bad faith requirement for a State's destruction of potentially useful evidence, Justice Stevens believed it was unlikely that the State's failure to preserve semen samples prejudiced Youngblood. *Youngblood,* 488 U.S. at 59 (Stevens, J., concurring). Twelve years later authorities tested remaining evidence using newly available DNA technology. The results exonerated Mr. Youngblood. The State released him from prison in August 2000. Mr. Youngblood died in 2007 without receiving any compensation for spending fifteen years incarcerated for a crime he did not commit. *See* https://www.innocenceproject.org/cases/larry-youngblood/

demonstrate that the terms of the contract between the Memphis Police Department and Granada Entertainment, coupled with the failure of police to take any action attempting to preserve the raw footage, established the State's bad faith.

The contract between the Memphis Police Department and Granada Entertainment provided no compensation to the police department. (*See* PC Ex. 29). The police department thus gained nothing from the contract except an opportunity for its employees to appear on television. The department therefore had little incentive to accept risks arising from Granada's tagging along on its investigations, and it would require a limitation of those risks before giving Granada the right to film its activities.

From the police department's point of view, any Granada recording of police activities carried a risk that a camera would record police misconduct and/or events helpful to a criminal defendant. The State has a duty to provide a criminal defendant any recording capturing any such event, and the department would not want to find itself in a situation where it had to give a defendant evidence impugning its investigation or otherwise helpful to him. The department thus had incentive to negotiate a contract term that would limit the possibility that a suspect would receive helpful evidence resulting from the recording of police activities. Section 1.04 of the Memphis Police Department/Granada Entertainment contract gave the police department the assurance it required.

By providing that Granada "shall own all right, title and interest in and to (the First 48) Program and all elements thereof and relating thereto," (*see* PC Ex. 29 at § 1.04), Section 1.04 of the contract attempts to protect the police department from having to provide a criminal defendant helpful evidence. This provision allows the State to claim that it never possessed any videotape Granada recorded, and, as a result, it cannot be held responsible if a criminal defendant

does not receive a First 48 tape that would help his defense. To date, the contract provision has served the police department well. *See Malone v. State*, 2017 WL 1404374 at *15 (Tenn. Crim. App. 2017); (*see also* PC Vol. 2, 392). The police department's intentional decision to include a contract term limiting its duty to provide a defendant helpful evidence evinces the department's bad faith.

The police department's failure to take any steps to preserve the First 48 raw footage confirms that the department acted in bad faith. While its contract with Granada Entertainment contained Section 1.04, it also contained a provision that allowed the parties to amend their contract at any time. (PC Ex. 29 at § 6.04). Recognizing that Granada's cameras had recorded events helpful to Mr. Dotson's defense, the police department could have asked Granada to amend their contract so the State could comply with its constitutional duty of providing Mr. Dotson with evidence that could play a significant role in his defense. The police department made no effort to do so, and this failure further evinces the State's bad faith. The police department was content with the position it negotiated, allowing its officers to appear on television, while insulating the State from having to comply with its constitutional duty of providing a criminal defendant exculpatory evidence. The police department's failure to take any steps aimed at preserving videotape of Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw thus confirms that the State acted in bad faith when it failed to take any steps to preserve the videotape.

As the above sections demonstrate, the State allowed the destruction of evidence that was, at the very least, potentially helpful to Mr. Dotson's defense. While trial counsel had available means of challenging the State's failure to preserve the potentially helpful evidence, trial counsel made no effort to pursue them. By failing to do so, counsel performed deficiently.

C. Counsel's deficient performances prejudiced Mr. Dotson.

Had trial counsel pursued the above arguments, a reasonable probability exists that the trial court would have concluded that the State violated the State and/or federal constitutions when it failed to preserve videotape of Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw. *See Youngblood*, 488 U.S. at 58; *Trombetta*, 467 U.S. at 488-89; *Ferguson*, 2 S.W.2d at 917. Upon doing so, the trial court would have had discretion to craft a remedy it deemed appropriate for the violation. *Merriman*, 410 S.W.3d at 796-97. Such remedies could include dismissing the indictment, precluding the State from introducing Mr. Dotson's statements into evidence, or instructing the jury that it could infer that events the First 48 raw footage depicted were unfavorable to the State. *See id.*; *Ferguson*, 2 S.W.3d at 917 & 917 n.11; *Richardson v. Miller*, 44 S.W.3d 1, 28 (Tenn. Ct. App. 2000). A reasonable probability exists that, had the trial court ordered any of these remedies, Mr. Dotson would not have been convicted of first degree murder and/or sentenced to death.

If the trial court dismissed the indictment against Mr. Dotson, it is certain that the result of the criminal proceeding against him would have been different.

If the trial court precluded the State from introducing Mr. Dotson's statements into evidence, the State would have presented only the unreliable identification testimony of two children, C.J. and Cedrick, some of which supported Mr. Dotson's gang hit alternative theory. Thus, as discussed above, if the trial court had precluded the State from presenting Mr. Dotson's statements, a reasonable probability exists that at least one juror would have concluded (1) the State had not proved beyond a reasonable doubt that Mr. Dotson was guilty of the Lester Street attacks; or (2) residual doubt about Mr. Dotson's guilt called for sentences less than death.

If the trial court gave jurors a missing evidence instruction, a reasonable probability exists that at least one juror would have concluded that (1) the Armstrong Statement was unreliable because Lieutenant Armstrong violated Mr. Dotson's constitutional rights and threatened his life to obtain it; and/or (2) the Shaw Statement was the product of police manipulation of an overborne will. Turning to the remaining evidence the State presented, the juror would find only the unreliable testimony of C.J. and Cedrick, part of which supported Mr. Dotson's gang hit alternative theory. As discussed above, under these circumstances a reasonable probability exists that at least one juror would have concluded (1) the State had not proved beyond a reasonable doubt that Mr. Dotson was guilty of the Lester Street attacks; or (2) residual doubt about Mr. Dotson's guilt called for sentences less than death.

D. The post-conviction court erroneously denied relief.

The post-conviction court cited *Malone v. State*, 2017 WL 1404374 at *15 (Tenn. Crim. App. 2017), in support of a belief that the State was never in possession of the First 48 raw footage. (PC Vol. 2, 392). But as discussed above, trial counsel could have established that the actions of Granada Entertainment were fairly attributable to the State and, as a result, the State had a duty to provide Mr. Dotson videotape of his custodial interrogation and police interactions with Ms. Shaw. As also discussed above, trial counsel could have established a due process violation by showing that the State had a duty to seek preservation of that videotape, yet it failed to take any action aimed at preserving the tape, including asking Granada to amend its contract with the police. *Malone* did not address these issues, *see Malone,* 2017 WL 1404374 at *15, and the post-conviction court therefore erred when it relied on *Malone* to deny relief.

IV. The State violated Article I §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when it failed to preserve videotape of Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw.

For the reasons discussed above, the State's failure to preserve videotape of Mr. Dotson's custodial interrogation and police interactions with Ms. Shaw violated Mr. Dotson's State and federal constitutional rights.

The trial court denied Mr. Dotson relief by stating "To the extent any issue (Mr. Dotson presents) overlaps with issues raised at trial, it would be previously determined and any issue not raised previously would be waived." (PC Vol. 2, 393). The court's cursory statement does not comply with the Post-Conviction Procedures Act. Section 40-30-111(b), Tennessee Code Annotated, required the lower court to state its findings of facts and conclusions of law with regard to each ground Mr. Dotson raised in his petition. As to Mr. Dotson's misconduct claim, the lower court's cursory order does not do so. The order does not identify which portions of Mr. Dotson's misconduct claim the court believed were waived. Nor does it identify those portions the court believed previously determined. Nor does it find facts or set out legal conclusions as to any portion of Mr. Dotson's misconduct claim. As a result, the lower court's cursory "waived and/or previously determined" ruling provides no basis for denying Mr. Dotson relief. *See Nance v. State*, 2006 WL 1575110 at *3 (Tenn. Crim. App. 2006).

V. Trial counsel rendered ineffective assistance when they failed to present evidence that a neuropsychological evaluation of C.J. reported that he had long-term memory deficits, and the State wrongly withheld the C.J. evaluation.

Jurors did not learn that a neuropsychological evaluation reported that C.J. had long-term memory impairment. In the post-conviction court, Mr. Dotson asserted two claims based on this lack of knowledge. First, Mr. Dotson asserted that trial counsel was ineffective for failing to obtain C.J.'s neuropsychological evaluation and use it to challenge his testimony. (PC Vol. 1,

118-19). Second, Mr. Dotson asserted that the State withheld C.J.'s evaluation from the defense. (*Id.* at 141-42). Mr. Dotson addresses the post-conviction court's denial of relief on these claims in turn.

A. Trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to present evidence that a neuropsychological evaluation reported that C.J. had long-term memory impairments.

1. The post-conviction court found that the prosecution made C.J.'s evaluation available to the defense.

At the post-conviction hearing, Mr. Dotson presented evidence that (1) while the prosecutor's file contains C.J.'s evaluation, defense counsel's file does not (*see* PC Ex. 51); and (2) neither Mr. Skahan nor Mr. McAfee recalled seeing the evaluation prior to the post-conviction hearing. (PC Vol. 10, 59; PC Vol. 11, 269). The State, on the other hand, presented prosecuting attorney Ray Lepone's testimony that (1) marks on the folder containing C.J.'s evaluation established that he made it available to the defense (PC Vol. 12, 301, 307); and (2) he recalled having conversations with Mr. Skahan about the evaluation. (*Id.*). The post-conviction court resolved this apparently conflicting evidence by finding that Mr. Lepone and Mr. Skahan had discussed the evaluation, and the prosecution had made it available to the defense. (PC Vol. 2, 393 & n.60).[4]

[4] The trial court based its finding, in part, on a misstatement of the post-conviction evidence. In finding that Messrs. Lepone and Skahan discussed C.J.'s evaluation, the post-conviction court states "lead counsel Gerald Skahan and ADA Lepone both testified they recalled discussing this evaluation." (PC Vol. 2, 393). But Mr. Skahan provided no such testimony. (*See* PC Vol. 11, 252-90). Yet upon removing the post-conviction court's error from consideration, the evidence does not appear to preponderate against the post-conviction court's finding that the prosecution made C.J.'s evaluation available to the defense. *See Fields*, 40 S.W.3d at 456. To the extent it does, that conclusion would support the withheld evidence claim that Mr. Dotson presents in Section B, below.

2. Trial counsel performed deficiently when they failed to challenge C.J.'s testimony with his evaluation.

At the post-conviction hearing, trial counsel testified that they knew that C.J.'s identification would be a component of the State's case, (PC Vol. 10, 58), and they recognized that it was important to challenge C.J.'s competency to testify and his identification of Mr. Dotson. (*Id.* at 58–59). Counsel could have used C.J.'s evaluation three different ways to pursue such challenges.

First, counsel could have used C.J.'s evaluation to challenge C.J.'s competence as a witness. While Tennessee Rule of Evidence 602 permits a witness to testify if he has personal knowledge of relevant matters and swears to testify truthfully, *see State v. Samuel*, 243 S.W.3d 592, 601 (Tenn. Crim. App. 2007), the trial court retains discretion to preclude the witness from testifying if he is unable to recollect facts. *Id.* (*citing State v. Garland*, 617 S.W.2d 176 (Tenn. Crim. App. 1981). Had trial counsel presented C.J.'s evaluation to the trial court, it would have provided a basis for the court to conclude C.J.'s impairment in long-term memory recall rendered him incompetent to testify. *See State v. Carroll,* 36 S.W.3d 854, 866 (Tenn. Crim. App. 1999).

Second, counsel could have introduced C.J.'s evaluation into evidence so that when jurors considered his identification testimony they would have an additional reason to suspect its accuracy. *See* Tenn. R. Evid. 617; *State v. Barnes,* 703 S.W.2d 611, 617-18 (Tenn. 1985); *State v. Graham,* 2016 WL 892013 at *13 (Tenn. Crim. App. 2016).

Third, counsel presented testimony from Dr. Aldridge, an expert in the forensic evaluation of children, (Trial Vol. 28, 2073-74), raising questions about the reliability of C.J.'s testimony identifying Mr. Dotson as the perpetrator of the Lester Street attacks. (*Id.* at 2075-76). C.J.'s evaluation would have provided additional support for Dr. Aldridge's expert testimony.

Because Mr. Dotson's counsel overlooked and/or neglected C.J.'s evaluation, they lost an opportunity to mute further the effect of C.J.'s claim that he saw Mr. Dotson commit the Lester Street attacks. By frittering away that opportunity, counsel performed deficiently. *See McCormick v. State,* 1999 WL 394935 at *13 (Tenn. Crim. App. 1999) (failure to use readily available information to impeach a key witness constitutes deficient performance).[5]

3. Trial counsel's deficient performance prejudiced Mr. Dotson.

C.J.'s testimony that Mr. Dotson *or others* perpetrated the Lester Street attacks was inherently suspect. If the trial court concluded that C.J.'s neuropsychological evaluation demonstrated that C.J. was incompetent to testify, jurors would not have heard it. But even if the court allowed C.J. to testify, the evaluation and Dr. Aldridge's consideration of it would have given jurors a compelling basis to disregard C.J.'s testimony. Either way, C.J.'s testimony would have been absent from the jurors' consideration at both the guilt and sentencing stages. A reasonable probability exists that, without C.J.'s testimony, at least one juror would have concluded (1) the State had not proved beyond a reasonable doubt that Mr. Dotson was guilty of the Lester Street attacks; or (2) residual doubt about Mr. Dotson's guilt called for sentences less than death. *See State v. Hartman,* 42 S.W.3d 44, 53-58 (Tenn. 2001).

4. The post-conviction court erroneously denied relief.

The post-conviction court opined that the defense "very thoroughly challenged C.J.'s competency and testimony at trial using very effective strategies." (PC Vol. 2, 381). The lower court further noted that Mr. Skahan testified that it would have been obvious to the jury that C.J. was brain damaged and that he would not want to use a psychological report to cross-examine an eleven-year-old boy. (PC Vol. 2, 380–81; PC Vol. 11, 270–71). But the post-conviction court

[5] Trial counsel was also deficient for failing to challenge C.J.'s testimony with records that indicated he has a global assessment of functioning (GAF) level of 50 and was taking antipsychotic medication. (PC Vol. 10, 61, 64–68)

overlooked the fact that Mr. Skahan's actual testimony was that he did not know how to cross-examine C.J. with the report and that trial counsel decided that Mr. McAfee would handle C.J.'s cross-examination because he was "better with kids." (PC Vol. 11, 269–70). Furthermore, Mr. McAfee, who cross-examined C.J., acknowledged the importance of the evaluation and testified that, had he known of its existence, he would have (1) used it to challenge C.J.'s testimony and identification; and (2) provided it to Dr. Aldridge. (PC Vol. 10, 60). Even assuming *arguendo* that trial counsel did not want to use C.J.'s evaluation to cross-examine him, the document could have been provided to Dr. Aldridge to aid her testimony and been used to argue to the trial court that C.J. was not competent to testify. Thus, counsel had no strategic or tactical reasons for failing to obtain and utilize C.J.'s evaluation to undermine his identification testimony.

B. The State violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when it withheld C.J.'s neuropsychological evaluation.

1. The prosecution withheld favorable material evidence.

A defendant shows a due process violation for failure to disclose exculpatory evidence by establishing (1) the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not); (2) the State withheld the information; (3) the information is favorable to the accused; and (4) the information is material. *State v. Johnson,* 38 S.W.3d 52, 56 (Tenn. 2001).

Defense counsel specifically requested the prosecution to provide them any report of a State witness's mental or physical infirmity which would affect the witness's ability to recall events. (*See* Trial Vol. 1, 30; Trial Vol. 2, 236). This specific request encompasses C.J.'s neuropsychological evaluation.

To the extent this Court concludes that the evidence preponderates against the post-conviction court's finding that the prosecution made C.J.'s evaluation available to the defense, *see* footnote 4, *supra,* the State withheld it.

Because C.J.'s evaluation provides information questioning his long-term memory recall, it contains favorable evidence. *State v. Jackson*, 444 S.W.3d 554, 593 (Tenn. 2014).

The materiality standard for a withheld evidence claim is the same as the prejudice standard for an ineffective assistance of counsel claim. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Cauthern v. State*, 145 S.W.3d 571, 598-99 (Tenn. Crim. App. 2004). For the reasons discussed in Section A.3, above, C.J.'s evaluation constituted material evidence, and the State's withholding of it violated the State and federal Constitutions.

2. The post-conviction court erroneously denied relief.

The post-conviction court concluded that "this issue is waived for not having been previously raised." (PC Vol. 2, 393). But should this Court conclude that the evidence preponderates against the lower court's finding that the State made C.J.'s evaluation available to defense counsel, that evaluation did not become available to Mr. Dotson until the post-conviction proceeding. Given this reality, Mr. Dotson's claim was not available during prior proceedings, and it was therefore not subject to a waiver determination. *See* Tenn. Code Ann. § 40-30-106 (g) (a ground for relief is waived only if the petitioner did not present it in a proceeding in which the ground could have been presented).

VI. Trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to object to the introduction into evidence of inflammatory photographs.

Trial counsel filed pretrial motions to prohibit photographs of the victims before or after death and to limit photographs to black and white prints. (Trial Vol. 2, 273–75, 278–79). Prior to trial, however, the parties announced they had reached an agreement regarding which photos

would be presented. (Trial Vol. 38, 14). On appeal, the issue of admission of *some* of the photographs was raised but the issue of the photographs of the victims' facial injuries and crime scene photographs of the three child victims was waived due to trial counsel's failure to object at trial. *Dotson*, 450 S.W.3d at 92.

There were nearly 200 color photographs of the crime scene entered as exhibits at Mr. Dotson's trial. Many of these photos depicted the same evidence and were therefore cumulative. These duplicative photos, many graphic in nature, served no probative purpose and were instead highly and unfairly prejudicial as they did little more than rally the passions of the jurors. While this Court need not tarry over every photograph to comprehend the images' prejudicial effect, Mr. Dotson asks this Court to look at the following three to understand their shocking effect: Trial Ex. 147 (Photograph of Cemario Dotson) (Trial Vol. 20, 385, 388–89); Trial Ex. 466 (Photograph of Cemario Dotson) (Trial Vol. 31, 2455, 2472); and Trial Ex. 468 (Photograph of Cecil Dotson II) (Trial Vol. 31, 2455, 2472).

Photos that are not relevant to proving some part of the prosecution's case may not be admitted for the purpose of inflaming the jury and prejudicing them against the defendant. *State v. Banks,* 564 S.W.2d 947, 951 (Tenn. 1978) (internal citations omitted). Moreover, where testimony adequately describes the degree or extent of an injury, gruesome and graphic photographs should not be admitted. *State v. Duncan,* 698 S.W.2d 63, 69 (Tenn. 1985). In fact, even relevant evidence must be precluded if its prejudicial effect outweighs its probative value. *Banks,* 564 S.W.2d at 951; Tenn. R. Evid. 403. The more gruesome the photographs, the more difficult it is to establish that their probative value and relevance outweigh their prejudicial effect. *See State v. Harper*, 2015 WL 6736747 at *16 (Tenn. Crim. App. 2015) (the introduction of fifty crime scene and autopsy photographs, many of which were gruesome, graphic, or

horrifying, deprived defendant of a fair trial by inflaming the passions of the jury). Trial counsel erred in failing to move that at least some of the duplicative photos be precluded. Mr. Dotson was prejudiced by this failure.

The information allegedly conveyed by the photographs–the location of the victims' bodies, the manner in which the murders were committed, the nature and extent of the victims' wounds–was completely addressed by trial testimony and the autopsy reports. This Court has made clear that, in such instances, the probative value of crime scene photographs is marginal, at best. *State v. Goss*, 955 S.W.2d 617, 627–28 (Tenn. Crim. App. 1999).

There was extensive testimony throughout the trial about the extent of the victims' injuries. The nearly 200 color photographs of the crime scene do not add anything to the testimonial descriptions of the injuries and trial counsel should have moved to exclude most, if not all, of them. *Banks,* 564 S.W.2d at 951. The facts concerning the injuries and the cause and manner of death were adequately established and explained by the trial testimony of Dr. Lisa Funte, the pathologist who spoke at length about the injuries suffered by the decedents and their autopsies (Trial Vol. 27, 1793–1905; Trial Vol. 28, 1967–85, 1988–2025); Dr. Michael Muhlbauer, the neurosurgeon who operated on the surviving victims (Trial Vol. 27, 1910–29); and several law enforcement officers and other witnesses who described the crime scene (Daniel Moore, Trial Vol. 18, 141–45; Jason Vosburgh, *id.* at 146–50; Patrick McDevitt, *id.* at 51–56; Sergeant Anthony Mullins, *id.* at 159–204, Trial Vol. 19, 243–344, Trial Vol. 20, 382–541, Trial Vol. 21, 579–692, Trial Vol. 22, 733–813; and Sergeant Walter Davidson, Trial Vol. 23, 1032–65, Trial Vol. 24, 1104–66). This testimony, in particular that of Drs. Funte and Muhlbauer, gave a far better description of the nature and extent of wounds inflicted on the victims than the pictures did.

When photographs are merely cumulative a court must assess whether the photographs are so gruesome or graphic so as to cause "undue prejudice" to the defendant. *State v. Collins*, 986 S.W.2d 13, 20 (Tenn. Crim. App. 1998). Any photograph which only "appeal[s] to sympathies, creates a sense of horror, or engenders an instinct to punish should be excluded." *Id.* The State is not given "carte blanche to introduce every piece of admissible evidence if the cumulative effective of such evidence is inflammatory and unnecessary." *Id.*

In Mr. Dotson's case the photographs were undeniably graphic and gruesome. Shocking and horrifying jurors does not assist them in making a reasoned determination of whether Mr. Dotson was guilty or whether he deserved the death penalty. It is precisely because of the danger that jurors will wrongfully convict or inflict excessive punishment that unnecessarily inflammatory evidence is kept from them. *Banks,* 564 S.W.2d at 952. The marginal evidentiary value of these photographs only served to cause "undue prejudice" in this case.

The post-conviction court found that trial counsel did not make a record regarding "certain objections to photographs" but that the trial judge "ruled upon the contested issues presented" and thus, Mr. Dotson has not established prejudice. (PC Vol. 2, 381–82). The lower court's reasoning is incorrect. The fact that counsel objected to a small number of photographs, which the trial court ruled on, does not excuse the defense from failing to make "certain objections" to other photographs.

Trial counsel testified that the crime scene photographs were "horrendous," "some tough stuff," and "were that bad," but they did not object to all of them based on a belief that a "good bit of them were coming in" and they were afraid they would lose credibility if they objected to the majority of the photographs. (PC Vol. 10, 56–57). That testimony is seemingly contracted by the defense's motion in limine asking for a hearing to challenge the introduction of most, if not

all, of the photographs. (Trial Vol. 2, 273–75). In short, either counsel's strategy was unreasonable, or counsel did not implement the strategy they planned. *See Affinito v. Hendricks*, 366 F.3d 252, 260 (3d Cir. 2004) ("This was not a trial tactic–it was gross incompetence. Even assuming [counsel's] decision was deliberate, it satisfies the first prong of *Strickland*."); *United States v. Tucker*, 716 F.2d 576, 589 (9th Cir. 1983) (stating that some strategies may be so ill-chosen that they may render counsel's overall representation constitutionally deficient).

Mr. Dotson was prejudiced. The introduction of nearly 200 color photographs of the crime scene served no purpose but to inflame the jury and tip the scales in favor of convictions and death sentences. Trial counsel should have moved to limit the number of crime scene photographs introduced into evidence. If they had done so, highly and unfairly prejudicial evidence which were unnecessary to the State's proof would have been excluded. Thus, there is a reasonable likelihood that the outcome of the trial would have been different, had counsel taken the appropriate action.

VII. Trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to prepare Mr. Dotson for his testimony.

Had trial counsel properly prepared Mr. Dotson for his testimony, they would have recognized that if he testified more harm than good would result. (*See* Trial Vol. 29, 2196-2203, 2210-11, 2216-17). And had trial counsel kept Mr. Dotson's statements out of evidence and obtained C.J.'s neuropsychological evaluation, they would have recognized that the defense did not need Mr. Dotson's testimony to establish a reasonable doubt about whether he perpetrated the Lester Street attacks. Thus, trial counsel rendered ineffective assistance when they failed to discuss with Mr. Dotson his potential testimony and allowed him to take the witness stand. *See Brooks v. Tennessee,* 406 U.S. 605, 612-13 (1972) (exercise of right to testify involves exercise

of a defense counsel's professional judgment); *Rousan v. State*, 48 S.W.3d 576, 585 (Mo. 2001) (en banc) (while the decision to testify solely rests with a defendant, the defendant is entitled to receive reasonably competent advice on whether to do so).

VIII. Trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to present mitigating evidence at Mr. Dotson's capital sentencing hearing.

Trial counsel failed to present at the penalty phase powerful evidence of Mr. Dotson's tortured life history marked by mental illness, cognitive impairments, learning disabilities, speech and language impediments, physical abuse, emotional abuse, parental neglect and abandonment, exposure to domestic violence, poor nutrition, poverty, polysubstance abuse, and deprivation. Not only did trial counsel fail to present readily available mitigating evidence, they also failed to present the testimony of a mental health expert. Counsel's paltry penalty phase presentation was limited to one lay witness. As a result, the jury did not hear any of the mitigating evidence detailed below.

Had counsel presented the wealth of mitigation evidence available to them and testimony from a mental health expert, counsel could have made out a powerful case for life. Counsel's failure to do so constitutes a deficient performance from which Mr. Dotson suffered prejudice. *Sears v. Upton*, 561 U.S. 945 (2010); *Porter v. McCollum*, 558 U.S. 30 (2009); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984).

A. Counsel has a duty to prepare for the sentencing phase.

The State and federal constitutions require that a capital sentencing jury render an individualized decision that takes into consideration the diverse frailties and assets that make the defendant a unique human being. *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987); *Woodson v.*

North Carolina, 428 U.S. 280, 304 (1976); *Gregg v. Georgia*, 428 U.S. 153, 206 (1976); *Goad v. State,* 938 S.W.2d 363, 369 (Tenn. 1996). As a result, the importance of mitigating evidence in capital sentencing proceedings is a fundamental tenet of death penalty jurisprudence. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 110–12 (1982); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Goad,* 938 S.W.2d at 389-90.

The State and federal constitutions preclude counsel from treating a capital trial's sentencing phase as "nothing more than a mere postscript to the trial." *Goad*, 938 S.W.2d at 370 (*quoting Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir.1989)). They impose on counsel a duty to investigate and prepare for a defendant's capital sentencing hearing, *id.* at 369, which includes an "obligation to conduct a thorough investigation of the defendant's background" for "all reasonably available mitigating evidence." *Wiggins,* 539 U.S. at 522, 524 (quoting *Williams*, 529 U.S. at 396). This obligation includes an inquiry into the defendant's mental health independent of any such inquiry relevant to the guilt stage. *Cooper v. State*, 847 S.W.2d 521, 529 (Tenn. Crim. App. 1992). In short, at a capital sentencing hearing, 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).

The *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) ("*ABA Guidelines*") state that "[c]ounsel needs to explore":

> (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);
>
> (2) Family and social history (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment

> and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);
>
> (3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;
>
> (4) Military service (including length and type of service, conduct, special training, combat exposure, health and mental health services);
>
> (5) Employment and training history (including skills and performance, and barriers to employability);
>
> (6) Prior juvenile and adult correctional experience[6] (including conduct while under supervision, in institutions of education or training, and regarding clinical services) . . . .

Id., Commentary to ABA Guideline 10.7. The Commentary also specifies who must be interviewed . . .

> It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others.

. . . and the importance of obtaining multigenerational records—from the client, his family members, and significant caretakers:

> Records—from courts, government agencies, the military, employers, etc.—can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, and corroborating witnesses' recollections. Records should be requested concerning not only the client, but also his parents, grandparents, siblings, and children. A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. The collection of corroborating information from multiple sources—a time-

[6] This was an area that was important to investigate since Mr. Dotson's prior offense at age 19 was introduced as an aggravating circumstance. Counsel should have investigated and presented evidence regarding Mr. Dotson's diminished culpability for conduct as a young man.

> consuming task—is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.

Id.

Furthermore, the Guidelines provide that "mental health experts are essential to defending capital cases. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses." Commentary to ABA Guideline 4.1. "In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that '[i]t must be assumed that the client is emotionally and intellectually impaired.'" Commentary to Guideline 10.5. Creating a competent and reliable mental health evaluation thus is of critical importance. "Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary." Commentary to Guideline 4.1. Capital defense attorneys are specifically charged with developing mental health defenses with the assistance of appropriate experts:

> [E]xpert testimony may explain the permanent neurological damage caused by fetal alcohol syndrome or childhood abuse, or the hereditary nature of mental illness, and the effects of these impairments on the client's judgment and impulse control. Counsel should choose experts who are tailored specifically to the needs of the case, rather than relying on an "all-purpose" expert who may have insufficient knowledge or experience to testify persuasively. In order to prepare effectively for trial, and to choose the best experts, counsel should take advantage of training materials and seminars and remain current on developments in fields such as neurology and psychology, which often have important implications for understanding clients' behavior.

Id.

Here, trial counsel failed in their duty to investigate, develop, and present mitigating evidence, and Mr. Dotson's capital sentencing jurors did not hear the wealth of mitigating evidence that was readily available.

A defendant's constitutional right to the effective assistance of counsel is violated when there is a reasonable probability that but for counsel's deficient performance the result of the proceeding may have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* A "reasonable probability is a lesser burden of proof than "a preponderance of the evidence." *Davidson*, 453 S.W.3d at 394. Indeed, "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Pylant v. State*, 263 S.W.3d 854, 875 (Tenn. 2008) (quoting *Strickland*).

At a capital sentencing proceeding in a weighing jurisdiction such as Tennessee, the prejudice inquiry focuses on the probable effect of counsel's errors and omissions on a *single juror*. *Williams*, 529 U.S. at 393–95 (ratifying effect on a single juror standard applied by the trial court); *Davidson*, 453 S.W.3d at 405 ("At least one member of the jury could have decided that Mr. Davidson was less morally blameworthy" if the uninvestigated mitigating evidence had been presented).

Mr. Dotson was prejudiced because had counsel presented neglected mitigating evidence there is a reasonable probability that at least one juror would have voted for sentences less than death. In the context of counsel's failure to investigate and present mitigating evidence, prejudice is established if the introduction of the mitigating evidence "might well have influenced the jury's appraisal of [the defendant's] moral culpability." *Williams*, 529 U.S. at 398. As the Supreme Court explained in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) "evidence about the defendant's background and character is relevant 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 or mental problems, may be less culpable than defendants who have no such excuse." Mr. Dotson's early years of abuse, abandonment, and neglect, coupled with his serious mental health issues, might have caused at least one member of the jury to see sufficient grounds to spare his life. *See Williams*, 529 U.S. at 398 (mitigating evidence satisfies prejudice requirement because it helps show that "violent behavior was compulsive reaction rather than cold-blooded premeditation").

In case after case, courts have found counsel ineffective for failing to investigate, develop, and introduce mitigating evidence that is similar to the evidence in Mr. Dotson's case. *See, e.g., Sears*, 561 U.S. at 946 (counsel ineffective for failing to investigate and present evidence of "significant frontal lobe brain damage Sears suffered as a child, as well as drug and alcohol abuse in his teens"); *Porter*, 558 U.S. at 36 (counsel ineffective for failing to investigate and present neuropsychological evidence that "Porter suffered from brain damage that could manifest in impulsive, violent behavior" that "substantially impaired . . . his ability to conform his conduct to the law" and constituted "an extreme mental or emotional disturbance" as a result of this brain damage); *Rompilla*, 545 U.S. at 392 (counsel ineffective for failing to investigate and present evidence that defendant "suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions"); *Jells v. Mitchell*, 538 F.3d 478, 500–01 (6th Cir. 2008) (finding trial counsel deficient for failing to investigate defendant's learning disabilities "which caused him great frustration and led to increasingly aggressive behavioral responses" and finding this failure prejudicial because "this evidence provides a more nuanced understanding of Jells's psychological background and presents a more sympathetic picture of Jells"); *Hamblin v. Mitchell,* 354 F.3d 482, 490–94 (6th Cir. 2003) (counsel ineffective for failing to investigate and present evidence of defendant's unstable and

deprive childhood, mental illness and brain damage); *Frazier v. Huffman*, 343 F.3d 780, 794 (6th Cir. 2003) (counsel ineffective where "no rational trial strategy that would justify the failure of [defense] counsel to investigate and present evidence of his brain impairment . . . ."); *Carter v. Bell*, 218 F.3d 581, 600 (6th Cir. 2000) (counsel ineffective for failing to present evidence of poverty, parental neglect, family violence and instability during childhood, poor education, and mental disorders); *Glenn v. Tate,* 71 F.3d 1204, 1207 (6th Cir. 1996) (trial counsel ineffective where jury did not hear of defendant's troubled background and brain damage); *Davidson*, 453 S.W.3d at 405 (counsel ineffective for failing to investigate and present evidence of cerebral atrophy, schizophrenia, and frontal lobe dysfunction); *Cole v. State,* 2011 WL 1090152 (Tenn. Crim. App. 2011) (counsel ineffective for failing to investigate and present mitigating evidence of defendant's cognitive and educational limitations and brain dysfunction; his post-traumatic stress disorder and depression; and scientific evidence related to defendant's youth and cognitive development at the time of his offenses); *Cribbs v. State*, 2009 WL 1905454 at *51–52 (Tenn. Crim. App. 2009) (counsel ineffective for failing to investigate and present mitigating evidence of defendant's brain damage and impairments in functioning). Mr. Dotson's case is not different, and he is likewise entitled to relief.

B. Trial counsel failed to meaningfully investigate, develop, and present evidence of Mr. Dotson's traumatic and troubled life history.

Trial counsel failed to prepare for sentencing. Mr. McAfee was the counsel responsible for the penalty phase presentation. (PC Vol. 10, 124). Despite his role as Mr. Dotson's sentencing phase counsel, he conceded at the post-conviction hearing that he had no game plan if the case preceded to a penalty phase. He stated, "it was very difficult for us to imagine any jury that convicted Jessie Dotson of these killings not giving him the death penalty." (*Id.* at 45). Thus, trial counsel believed that the only way to save Mr. Dotson's life was by getting him acquitted.

Thus, despite his role as sentencing phase counsel, Mr. McAfee devoted the overwhelming majority of his time ("[w]ell over 75 percent") to preparing for the guilt-innocence phase of the trial. (*Id.* at 124).

As a result, trial counsel in this case did a cursory mitigation investigation and presented only one witness—their mitigation investigator, Glori Shettles—at the penalty phase. Despite the obvious importance of Ms. Shettles's penalty phase testimony, Ms. Shettles does not recall meeting with Mr. McAfee about her testimony prior to testifying at Mr. Dotson's trial. (PC Vol. 11, 228). Instead of preparing his sole penalty phase witness to testify, Mr. McAfee simply instructed Ms. Shettles to "just talk." (*Id*). Ms. Shettles's entire penalty phase testimony comprises forty-four pages of the trial transcript, much of which discusses her background and what life is like in prison. (Trial Vol. 31, 2477–2520).

While Ms. Shettles mentioned that Mr. Dotson suffered physical abuse and parental neglect, that he had a learning disability and disciplinary problems in school, and had several juvenile adjudications, Ms. Shettles made only passing references to these themes and failed to describe Mr. Dotson's background in any detail. (*Id.* at 2489–91, 2494). Thus, the trial transcript itself demonstrates that counsel's performance failed to meet the constitutional standard of objective reasonableness. Counsel presented no more than a hollow shell of the testimony necessary for a "particularized consideration of relevant aspects of the character and record of [a] convicted defendant before the imposition upon him of a sentence of death." *Woodson*, 428 U.S. at 303.

Mr. McAfee testified that, while he believed that Mr. Dotson suffered "some pretty significant trauma as a child" and wanted to present the trauma to the jury in an attempt to

persuade them to spare Mr. Dotson's life, there "just wasn't [a lot] there." (PC Vol. 10, 100).[7] A review of trial counsel's file, however, belies Mr. McAfee's recollection. Numerous documents in counsel's file raised red flags pointing to the need for further investigation and factual development, and they set out mitigating evidence that counsel could have, and should have, presented at the penalty phase.

Although trial counsel failed to supervise Ms. Shettles's life history investigation and did not personally interview any mitigation witnesses, Ms. Shettles prepared a mitigation timeline, attaching witness summaries as exhibits, totaling 104 pages, which she provided to trial counsel. (PC Vol. 10, 54–55; PC Vol. 11, 214; PC Ex. 42). The timeline contained a wealth of mitigating evidence, little of which was presented at trial. If trial counsel had prepared Ms. Shettles to testify, the jury would have had before it a plethora of mitigating evidence making the case for life.

Ms. Shettles's timeline details a history of cognitive impairments; mental illness; learning disabilities; speech and language impairments; physical abuse; emotional abuse; parental neglect and abandonment; childhood exposure to parental and domestic violence; poor nutrition; poverty; and deprivation:

- Mr. Dotson was retained once in first grade and twice in fourth grade. It took Mr. Dotson three years to complete the fourth grade (PC Ex. 42 at 3–4, 6);
- In late 1988/early 1989, Mr. Dotson was referred to the Memphis City Schools Mental Health Center (*id.* at 5);
- Mr. Dotson was 14 years old while in the fifth grade (*id.* at 5);
- In January 1989, Mr. Dotson was diagnosed with a "specific learning disability" and previous testing indicated a Full-Scale IQ of 84 (*id.* at 5);

[7] Mr. Skahan assumed that the defense team's mitigation theory was "[p]robably Jessie's life has value," and he made a vague reference to "residual doubt." (PC Vol. 11, 280). He clarified, however, "I mean, those would be what I would speculate from my first thoughts as to what we might have thrown together, but I don't have any independent recollection as to what [our mitigation theory] was." (*Id*).

- Mr. Dotson's biological father was psychically and verbally abusive to Mr. Dotson, his mother, and his siblings (*id.* at 6; Exhibit B at 1, Exhibit F at 1);

- In January 1989, results of testing noted that Mr. Dotson had a Full-Scale IQ of 80 (*id.* at 6);

- A January 31, 1989 Memphis City Schools Mental Health Center treatment plan indicated that Mr. Dotson falls within the mildly retarded range and has significantly impaired intellectual functioning (*id.* at 7);

- A June 25, 1989 Memphis City Schools Mental Health Center treatment plan indicated that Mr. Dotson qualified for Special Education Services. In the seventh grade, Mr. Dotson failed all of his classes and Mr. Dotson's mother refused to schedule home visits. Mr. Dotson's mother refused to maintain contact with and cooperate with Memphis City Schools Mental Health Center staff (*id.* at 9–12, 16);

- On or about April 25, 1991, Mr. Dotson left Special Education at the request of a parent (*id.* at 16);

- Mr. Dotson was 16 years old while in the eighth grade (*id.* at 17);

- There were formal reports made of child abuse and neglect in the Dotson household (*id.* at 20, 25);

- Mr. Dotson dropped out of school after completing the eighth grade (*id.* at 20);

- An October 8, 1991, psychological assessment reflected limited intellectual functioning (*id.* at 21);

- On October 1, 1992, Mr. Dotson's mother informed police that Mr. Dotson needed "some type of rehabilitative services" (*id.* at 24);

- Mr. Dotson was suspended from school on several occasions and the city schools would not take him back (*id.*);

- Mr. Dotson dropped out of school after attending resource classes believing he was too old for his classmates (*id. at* 29);

- In December 1994, when he was twenty-years-old, the results of a Standardized Group Intelligence Test showed that Mr. Dotson recognized words at a second grade level, spelled at a third grade level, and that his arithmetic abilities were at a fourth grade level (*id.* at 30);

- A December 9, 1994, mental health evaluation reflected no indications of well entrenched patterns of antisocial behavior (*id.* at 31);

- In 1997, Mr. Dotson failed his GED test twice (*id.* at 47).

Ms. Shettles's memoranda respecting witness interviews likewise set out valuable mitigating evidence:

- There was an incident where Mr. Dotson's mother broke all of the front windows of their apartment and overturned a couch (Ex. 42 at Exhibit A, page 3);

- Mr. Dotson's mother never told her children that she loved them or showed them any affection (*id.* at Exhibit A, page 3);

- Mr. Dotson saw little of his father after his parents separated (*id.* at Exhibit B, page 1);

- Growing up, Mr. Dotson and his siblings were often left alone at home without any adult supervision. Mr. Dotson's mother spent a lot of time away from the home with various men (*id.* at Exhibit B, pages 1–2);

- The Dotson family moved every year (*id.* at Exhibit B, page 1);

- The Dotson children were given food, but little else in terms of material items. Their food, however, was "locked up" and there were times where the children stole money to buy food because they were hungry (*id.* at Exhibit B, page 2; Exhibit E, page 2);

- Mr. Dotson's mother would often call her father for help due to the psychical abuse she suffered at the hands of Mr. Dotson's father (*id.* at Exhibit D, page 2);

- Mr. Dotson's grandmother observed that he seemed to have "something wrong with him" from the time he was a small child (*id.* at Exhibit D, page 3);

- When Mr. Dotson would get angry, he would sometimes beat his head against a wall—even a concrete wall—until he calmed down (*id.* at Exhibit E, page 2);

- Mr. Dotson's mother used a belt to whip the children. Mr. Dotson's sister ran away from home because of the beatings (*id.* at Exhibit E, page 2; Exhibit F, page 3);

- Mr. Dotson's family struggled with financial problems when he was growing up (*id.* at Exhibit E, page 3); and

- Mr. Dotson had a hard time adjusting to life after he was released from prison (*id.* at Exhibit E, page 4).

Trial counsel's file also included a three page document entitled, "Significant Life Events & Themes." (PC Vol. 10, 105–06; PC Ex. 17). This document summarized a list of mitigation themes, including, but not limited to, family dysfunction; mental illness; domestic violence; physical abuse; chaotic home environment; parental neglect and abandonment; deprivation of food and medical care; inappropriate sexual behavior by mother; transience of residences and schools; and exposure to community violence, criminal activity, and drug use, including Mr. Dotson's mother using drugs with him. Again, little, if any, of the themes included on this list were presented in the penalty phase, and to the extent they were, it was just a passing reference made by Ms. Shettles in her brief testimony.[8]

Ms. Shettles also interviewed Pam Shelton, Mr. Dotson's then-girlfriend, who told her that when Mr. Dotson was ten or eleven years old, his sister, Nicole, initiated sexual activity with him and made Mr. Dotson and his brother perform sexual acts on her. (PC Vol. 11, 218; PC Ex. 38, at 2). Ms. Shettles failed to testify about these details during her sentencing phase testimony.

Trial counsel's file also included an October 8, 1991, psychological evaluation of Mr. Dotson by Robert M. Parr, Ph.D. (PC Vol. 10, 76–77; PC Ex. 5). The evaluation "largely reflect[ed] limited intellectual functioning" and psychological testing revealed "moderate mental retardation range of functioning." (PC Ex. 5 at 2). Dr. Parr's conclusions were also not presented at trial.[9]

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[8] Ms. Shettles also prepared and provided to trial counsel a list of mitigating circumstances which included these themes. (PC Vol. 11, 216–17; PC Ex. 37).

[9] Despite testing from childhood indicating that Mr. Dotson was functioning within the mild mental retardation or borderline intelligence ranges, (*see also* Trial Vol. 34, 12), trial counsel never apprised the trial court of Mr. Dotson's intellectual limitations. As a result, the Rule 12 report indicates that Mr. Dotson's intelligence level is "not known." (Trial Vol. 36, 7).

Mr. McAfee testified that Ms. Shettles was the only witness he called in the penalty phase because, "I think we felt like we could get [all] the information out through her." (PC Vol. 10, 102). Comparing and contrasting Ms. Shettles's trial testimony with the information that was available to trial counsel and contained in their file indicates that Mr. McAfee was wrong. Furthermore, a September 8, 2010, handwritten note in trial counsel's file entitled "Mitigation Meeting re: Themes" indicated that counsel were scrambling to put together their mitigation case just twelve days before the start of jury selection. (PC Vol. 10, 106–07; PC Ex. 18).

Furthermore, although the trial court approved Inquisitor, Inc. (Ms. Shettles's employer) to provide mitigation investigative services on December 16, 2008, Ms. Shettles's billing records demonstrate that as the trial approached—and even after the trial began— she was performing tasks that should have been completed well in advance of the trial. *See* PC Ex. 35; PC Ex. 44. For example, 9/1/10 – Continue reports, summaries, timeline; Continue client information, childhood, abuse, and trauma; 9/2/10 – Continue themes; Continued expert request for additional records; significant life issues report; Continued issues report; Continue childhood trauma report; Initiated compilation of additional records, per expert; 9/3/10 – Continue sig. events report; Continue report themes; 9/8/10 – Compiled research for expert; 9/9/10 – Continue social history; Prepared for client/expert meeting; 9/10/10 – Assisted expert w/client at jail; 9/16/10 – Continue additional themes; 9/17/10 – Review of false confession study information; 9/24/10 – Updated timeline; Request for P. Shaw medical records; 9/27/10 – Issue subpoena re: med. records for P. Dotson/P. Shaw; 10/5/10 – Travel to the MED for medical records; Reviewed The MED medical records; 10/6/10 – Traveled to Le Bonheur, pick up records; 10/7/10 – Travel to 201 Poplar for records; Travel to mental health expert's office. (PC Ex. 44).

This lack of planning and preparation for the penalty phase comes as no surprise in light of the fact that Mr. McAfee, the defense counsel responsible for the penalty phase presentation, did not supervise or direct the mitigation investigation, and devoted "[w]ell over 75 percent" of his time to preparing for the guilt-innocence phase of the trial. (PC Vol. 10, 54–55, 124).

As a result of counsel's failings, in sentencing Mr. Dotson to death, the jury had very little mitigating evidence before it. Because trial counsel did not prepare Ms. Shettles to testify and failed to present the wealth of mitigating evidence contained in their file, the so-called case for life fell far short of the minimum expected of capital defense attorneys. The mere fact that counsel presented some evidence of Mr. Dotson's background does not render counsel effective. That is especially true in this case given the significance of the evidence that was omitted and the reasonable likelihood that the totality of the available mitigating evidence might have led to a different result. *See Williams*, 529 U.S. at 368 (trial counsel ineffective and defendant prejudiced even though counsel presented testimony from defendant's mother, two neighbors, and a psychiatrist at sentencing).

In Mr. Dotson's case, readily available mitigating evidence was there for the taking. Mr. Dotson had the right to present any aspect of his character or record as a basis for a sentence of less than death. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). That did not happen here. Mr. McAfee made clear that he wanted to present the "significant trauma" that Mr. Dotson suffered in making out the case for life. (PC Vol. 1, 100). Accordingly, counsel could not have had any tactical or strategic reason for failing to develop and present the mitigating evidence outlined above. Doing so would have been consistent with what little penalty phase strategy they formulated.

The unreasonableness of trial counsel's actions becomes all the more apparent when one considers trial counsel's opening statement in the penalty phase in which Mr. McAfee told the jury that Mr. Dotson's case had more aggravating circumstances than he had ever seen. (Trial Vol. 31, 2470). Counsel's admission that Mr. Dotson's actions warranted the death penalty were obviously prejudicial as the lawyers charged with saving his life were seemingly in agreement with the prosecutors about the circumstances fitting into a category where death was the most appropriate option. *See Lindstadt v. Keane*, 239 F.3d 191, 203 (2d Cir. 2001) (ineffective assistance found where counsel's "inept opening statement" admitted that the prosecution had made its case); *Kubat v. Thieret*, 867 F.2d 351, 368 (7th Cir. 1989) (ineffective assistance found where counsel's argument "may actually have strengthened the jury's resolve to impose a death sentence"). Mr. McAfee testified at the post-conviction hearing that he told the jury how aggravating Mr. Dotson's case was in an attempt to "buy credibility." (PC Vol. 10, 123). Counsel's stated reason evinces a basic misunderstanding of the law and trial advocacy, and is unreasonable. In essence, counsel's statement solidified in the minds of the jurors that Mr. Dotson was truly the "worst of the worst" and therefore, deserving of the death penalty.

Mr. Dotson's case is no different than *Wiggins* where the United States Supreme Court found prejudicial ineffective assistance where trial counsel failed to investigate the defendant's troubled background including the physical abuse he suffered as a child, parental neglect, and his diminished mental capacities. *Wiggins,* 539 U.S. at 535. As is the case here, "[h]ad the jury been able to place [the defendant's] excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 537. The evidence unpresented by Mr. Dotson's trial counsel reveals "the kind of troubled history [the Supreme Court has] declared relevant to assessing a defendant's moral culpability."

Id.; *see also Penry*, 492 U.S. at 319. Thus, trial counsel's failure to meaningfully investigate, develop, and present evidence of Mr. Dotson's traumatic and troubled life history constitutes a deficient performance resulting in prejudice to Mr. Dotson.[10]

C. Trial counsel failed to present a mental health expert.

Counsel in a capital case have a duty to retain a mental health expert, secure a thorough mental health evaluation, provide records and information to those experts, and make an informed decision about the presentation of expert mental health testimony. (Commentary to ABA Guideline 4.1). Although Mr. McAfee, the defense counsel responsible for the penalty phase presentation, does not know what the ABA Guidelines say about mental health experts, he agreed that a mental health expert is essential to defending a capital case. (PC Vol. 10, 107). Counsel were aware of strong indications of mental illness in this case and accordingly retained two mental health experts—James S. Walker, Ph.D., a neuropsychologist and Geraldine Bishop, Ph.D., a psychologist to evaluate Mr. Dotson.[11] But counsel failed to make effective use of those experts and presented no expert testimony at the penalty phase.[12]

On July 13, 2009, trial counsel filed a motion for the expert services of Dr. Walker. (*See* 7/1/09 *Ex Parte*, Under Seal, Motion for Approval of Expert Services of Forensic Psychologist.

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[10] Juries have made clear that mitigating evidence can make a difference regardless of the facts of the underlying offense. *See* Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 Hofstra L. Rev. 1161, 1229–47 (2018) (identifying nearly 200 highly aggravated death penalty cases which went to trial—cases with child victims, law enforcement victims, or multiple victims—where juries did not impose death sentences). For example, in 2013 in Lincoln County, Tennessee, a man convicted of killing six people—including an unborn child and a toddler—was sentenced to six consecutive life terms. WAFF 48 Digital Staff, *Judge sentences mass murderer to 6 life terms,* Jan. 21, 2014, https://www.waff.com/story/24504627/convicted-murderer-sentenced-6-life-sentences/.

[11] Before retaining Dr. Bishop, trial counsel reached out to another psychologist, Joseph C. Angelillo, Ph.D., about the possibility of conducting a forensic assessment of Mr. Dotson. (PC Ex. 20). Mr. McAfee could not remember why the defense team did not retain Dr. Angelillo, but conceded, "I don't consider him a great witness." (PC Vol. 1, 117).

[12] Counsel conceded that Ms. Shettles is not qualified to make a mental health diagnosis. (PC Vol. 1, 122, 141).

(PC Ex. 51). Counsel provided an affidavit from Dr. Walker in support of the motion which stated that Mr. Dotson "has a long history of psychological problems," "possible serious mental illness," and that Dr. Walker had been asked to evaluate Mr. Dotson for, *inter alia*, "any potentially mitigating factors." (Affidavit of James S. Walker, Ph.D. at ¶ 4. (PC Ex. 51). The trial court approved the motion for Dr. Walker's services that same day. (PC Ex. 50). Accordingly, Dr. Walker interviewed and conducted a forensic psychological evaluation—including neuropsychological testing—of Mr. Dotson during the week of October 4, 2009. (PC Exs. 19, 57). Dr. Walker provided a draft report to trial counsel which indicated that Mr. Dotson is a severely impaired individual who suffers from cognitive disorder not otherwise specified, adjustment disorder with depressed and anxious mood, alcohol dependence, cannabis dependence, and has a GAF level of 60. (PC Ex. 19 at 19-20). While Dr. Walker's report provided that Mr. Dotson has "antisocial personality characteristics," Dr. Walker did not diagnosis him with antisocial personality disorder. (*Id.*).

After Dr. Walker provided counsel his draft report, counsel never followed up with him, never discussed the results of his testing, never discussed his conclusions, never asked him to finalize his report, and did not call him to testify on Mr. Dotson's behalf. (*See* PC Ex. 57).[13] In an offer of proof letter, Dr. Walker informed:

> I do not recall ever having a substantive conversation about Mr. Dotson with any member of his trial team. The only discussions I know I had with the trial team involved retaining my services and obtaining records I wanted to review. I do not recall ever having any conversation with any member of Mr. Dotson's trial team about the results of my evaluation and testing; I believe I simply provided a draft report and had no further contact. I reviewed my billing records which appear to confirm that I never spoke with or met with members of Mr. Dotson's trial team. Any substantive conversations should have been recorded in my billing records.

[13] Because trial counsel never apprised the trial court of Dr. Walker's conclusions, the Rule 12 report indicates that a psychiatric or psychological evaluation was performed and "no mental disease or defect or significant mental health or neurological impairments were found." (Trial Vol. 36, 8).

Id.

Dr. Walker went on to add:

> I was willing and able to consult with Mr. Dotson's trial team. Is it highly unusual, especially in a capital case, for trial counsel to not have a substantive conversation with me regarding the results of my evaluation and testing, and whether I could provide helpful testimony regarding significant mental disorders and mitigating factors – which I could have provided if called to testify at Mr. Dotson's trial.

Id.

In these post-conviction proceedings, Mr. Dotson moved the lower court to authorize funding for the services of James R. Merikangas, M.D., a psychiatrist and neurologist. (*See* 6/26/18 Sealed, *Ex Parte* Motion for Expert Services of James R. Merikangas, M.D.).[14] As discussed in Section VII of Mr. Dotson's Statement of the Facts, *supra*, and Issue X, *infra*, the trial court authorized funding for Dr. Merikangas, but when Mr. Dotson submitted the trial court's funding order for approval pursuant to Tennessee Supreme Court Rule 13, the AOC Director and the Chief Justice vacated it.

In an offer of proof letter, Dr. Merikangas related that Dr. Walker's draft report provides "significant mitigating evidence" that could have been presented during the sentencing phase of Mr. Dotson's trial. (PC Ex. 59). Dr. Merikangas explained:

> Dr. Walker's forensic neuropsychological assessment of Jessie Dotson shows that he suffers from cognitive disorder not otherwise specified, more commonly known as organic brain damage. As a result of his brain damage, Mr. Dotson struggles with multiple cognitive deficits. Cognitive impairments interfere with a person's capacity to process information, exercise reason, reflect on various behavioral options and respond to situations in adaptive ways. The problems caused by Mr. Dotson's cognitive deficits have and will continue to adversely affect his mental health functioning.
>
> I have concerns about how Mr. Dotson's brain processes information that would severely limit his ability to understand and appreciate how ideas,

[14] Trial counsel did not retain a psychiatrist or a neurologist to evaluate Mr. Dotson. (PC Vol. 1, 120).

perceptions, and memories work together to guide our problem solving, decisions, judgments, and modify our future actions and choices. Accordingly, given these concerns and the numerous indicators of serious cognitive impairments, I would want to perform a neurological examination of Jessie Dotson. This evaluation would examine the neurological basis of Mr. Dotson's behavior, cognition, emotion and memory, and the impact of neurological damage and disease upon these functions.

The essential feature of an adjustment disorder is a psychological response to identifiable stressors that results in the development of clinically significant emotional or behavioral symptoms. Dr. Walker found that the specifiers which best characterize the predominant symptoms of Mr. Dotson's adjustment disorder are depression and anxiety. This disorder affects a person's functioning level and compromises his emotional controls. Dr. Walker noted that Mr. Dotson "suffered from severe physical abuse perpetrated by his mother and father as a young child" and "was subjected to terrifying events in his neighborhood on a regular basis, including the constant presence of the threat of violence." Accordingly, the diagnosis of an adjustment disorder is not surprising in light of the fact that individuals from disadvantaged life circumstances, like Mr. Dotson, experience a high rate of stressors and may be at increased risk for adjustment disorders.

Mr. Dotson also has a history of alcohol and cannabis dependence that is now in remission due to his incarceration. As Dr. Walker noted, he began abusing alcohol and marijuana at a very young age, presumably to alleviate the depression and panic he was experiencing in his childhood and adolescence. Mr. Dotson would drink to "get wasted" and his cannabis consumption escalated to smoking an ounce or two of marijuana a day. It is not unusual for people with dysfunctional upbringings to try to ease emotional pain by turning to alcohol and marijuana. The same is true of people with mental illness, including those who are brain damaged and suffering from an adjustment disorder. Mr. Dotson's abuse of alcohol and marijuana was yet another factor that impaired his judgment and decision-making ability. His substance abuse would have intensified the effects of and dysfunction caused by his other mental disorders.

The global assessment of functioning or "GAF" score measures an individual's overall psychosocial impairment – psychological, social and occupational functioning – caused by mental illness. The numeric score represents the severity of a person's psychological symptoms and daily functioning. This means how well a person can perform everyday activities. The GAF scoring systems works on a numeric scale from 0-100, broken down into groups of ten. Dr. Walker assigned Mr. Dotson a GAF score of 60 which indicates moderate symptoms or moderate difficulty in social or occupational functioning. This is a high level of global impairment as individuals with a GAF score of 50 (the next lowest group)

have serious impairments and would likely require inpatient or residential psychiatric care.

Id.

Dr. Merikangas concluded:

> Although I was unable to conduct a forensic psychiatric and neurological examination of Mr. Dotson, based upon my review of Dr. Walker's report, it is my opinion, to a reasonable degree of medical certainty, that Mr. Dotson's severe deficiencies, especially his organic brain damage, support valuable mitigating factors which could have been presented to the jury during the sentencing phase of his trial.

Id.

At the post-conviction hearing, Mr. McAfee testified that Dr. Walker's mention of "antisocial personality characteristics" prompted counsel's decision not to present Dr. Walker's testimony. (*See* PC Vol. 10, 110 ("we decided that the antisocial personality disorder worried us enough not to (call Dr. Walker))." Although Mr. McAfee testified that he spoke with Dr. Walker about his findings, he conceded that there is nothing in defense counsel's file that reflects he had any conversations with Dr. Walker. (*Id.*). Mr. McAfee then acknowledged that Dr. Walker's diagnosis was antisocial personality characteristics which is "probably not . . . the same thing as antisocial personality disorder," and he was unable to list the criteria for a diagnosis of that disorder. (*Id.* at 110–11).

In his offer of proof letter, Dr. Merikangas explained the difference between antisocial personality characteristics and antisocial personality disorder, and he took issue with any type of antisocial diagnosis in this case.

> Dr. Walker also indicated that Mr. Dotson possesses antisocial personality characteristics. This is not the same as diagnosing Mr. Dotson with antisocial personality disorder. Personality disorders have clusters of characteristics that share common themes or elements. A person who qualifies for an antisocial personality disorder diagnosis will exhibit most characteristics of the disorder and

> those characteristics will be persistent and cause significant functional impairment or distress. Dr. Walker did not find this to be the case. Furthermore, Dr. Walker stated that while Mr. Dotson admitted to a wide range of antisocial behavior on the Minnesota Multiphasic Personality Inventory II, his profile was not valid for interpretation.
>
> I believe it is wrong, however, to even diagnosis Mr. Dotson with antisocial personality characteristics because he does not meet the diagnostic criteria. In order to diagnose an individual as antisocial, there must be evidence of a conduct disorder with onset *before* the age of 15. I see nothing in Dr. Walker's report that allows him to make a conduct disorder diagnosis by that age. There is little or no information in Dr. Walker's report concerning Mr. Dotson's conduct prior to the age of 15. Thus, the failure to meet that criterion eliminates antisocial as a diagnosis. Moreover, a person who has organic brain damage cannot be diagnosed as antisocial because the evaluator must rule out organicities in order to render that diagnosis. Accordingly, antisocial is not an appropriate diagnosis for someone with brain damage like Mr. Dotson.

(PC Ex. 59 at 3).

Mr. McAfee testified that he did not know the significance of a conduct disorder before the age of fifteen and conceded that the term "conduct disorder" does not appear anywhere in Dr. Walker's draft report. (PC Vol. 10, 111–12). Nor did Mr. McAfee know Dr. Walker's basis for the conclusion of antisocial personality characteristics—which comes as no surprise because he never had a substantive conversation with Dr. Walker—and he wrongly believed that a brain damaged individual can be diagnosed as antisocial. (*Id.* at 112–13).[15] Furthermore, if Mr. McAfee was familiar with the mitigation timeline, he should have known that a December 9, 1994, mental health evaluation of Mr. Dotson when he was nineteen years old reported that Mr. Dotson did not exhibit a pattern of antisocial behavior. (PC Ex. 42 at 31).

In order for Mr. Dotson's trial to proceed to a sentencing phase, the jury had to convict him of a least one count of first degree murder. The jury convicted him of six counts of first degree murder and three counts of attempted first degree murder. Therefore, assuming *arguendo*

[15] Mr. McAfee's misunderstanding of mental health issues is further exemplified by his unfamiliarity with the GAF scale. (PC Vol. 1, 61).

that a diagnosis of antisocial personality characteristics was proper—and as Dr. Merikangas explained, it was not—Mr. McAfee admitted that it would not surprise him or a jury that someone convicted of these offenses might possess antisocial personality characteristics. (PC Vol. 10, 114). As a result, Mr. McAfee conceded that in light of the guilty verdicts, no new harmful information comes into evidence during the penalty phase with the finding of antisocial personality characteristics. (*Id*). As a result, Mr. McAfee was "not really sure that our analysis" and decision not to present Dr. Walker in the penalty phase was "on point" and further acknowledged there was "a lot of helpful information" and "a lot of value" in Dr. Walker's draft report. (*Id.* at 114–16). Mr. McAfee recalled that the defense may have decided not to present Dr. Walker's testimony before the conclusion of the guilt-innocence phase of the trial because they thought there was a chance that Mr. Dotson would be acquitted and—despite the lengthy mitigation timeline prepared by Ms. Shettles and their list of significant life events and mitigation themes—they did not believe that they had "a lot of themes for mitigation." (*Id.* at 116).

Although Mr. McAfee was the counsel responsible for the penalty phase presentation, he testified that Mr. Skahan "felt stronger about the [diagnosis of antisocial personality characteristics and] that he didn't want that in front of the jury." (*Id.* at 115). Mr. Skahan testified that they did not use Dr. Walker because "I didn't like what he told me," "I can't think of a worse diagnosis unfortunately than antisocial and that's what I was worried about in this case," and "[i]t's not anything I would ever put in front of a jury, antisocial." (PC Vol. 11, 286–87). For several reasons Mr. Skahan's post-conviction testimony does not detract from a conclusion that counsel performed deficiently when they failed to present sentencing jurors mental health evidence.

First, Mr. Skahan was not the attorney responsible for the penalty phase presentation.

Second, Dr. Walker did not recall having a substantive conservation with Mr. Skahan or any member of Mr. Dotson's defense team about his conclusions, and trial counsel's file does not indicate that any conversation of that type took place. Third, Mr. Skahan's practice was to talk to an expert on the telephone about his conclusions before asking the expert to draft a report. Mr. Skahan engaged in this practice because he wanted to know what the expert's report was going to say and, if it was going to say something unhelpful, he did not want a report drafted. (PC Vol. 11, 286-87). In light of the fact that Dr. Walker drafted a report, Mr. Skahan either neglected his practice or was not troubled by Dr. Walker's mention of antisocial personality characteristics.

Counsel's decision not to present Dr. Walker's testimony in the sentencing phase—without fully exploring what mental health testimony he could provide—was unreasonable. Dr. Walker's forensic psychological evaluation and neuropsychological testing revealed significant psychopathology. (PC Exs. 19, 59). Dr. Walker's evaluation indicated that Mr. Dotson is brain damaged and suffers from an adjustment disorder with depressed and anxious mood, alcohol dependence, cannabis dependence, and has a GAF level of 60. These are significant mental health disorders which would have provided compelling mitigating evidence during the sentencing phase of Mr. Dotson's trial, and they support a finding of prejudice resulting from counsel's deficient performance. *See, e.g.*, *Rompilla*, 545 U.S. at 393 (finding prejudice resulting in part from counsel's failure to discover and present evidence of defendant's organic brain damage); *Wiggins*, 537 U.S. at 535 (defendant prejudiced by counsel's failure to present evidence of severe privation, abuse and "diminished mental capacities"); *Williams*, 529 U.S. at 396 (defendant prejudiced by failure to present evidence he was "borderline mentally retarded");

Kenley v. Armontrout, 937 F.2d 1298, 1308 (8th Cir. 1991) (prejudice shown where counsel failed to present mitigating evidence of defendant's impaired mental health).

As Mr. Dotson's trial approached, counsel apparently recognized that without Dr. Walker they had no mental health defense. On July 28, 2010, less than two months before the start of jury selection, counsel filed a motion for the expert services of Dr. Geraldine Bishop. (*See* 7/28/10 *Ex Parte*, Under Seal, Motion for Approval of Expert Services of Psychologist. (PC Ex. 51). Counsel indicated that Dr. Bishop had been asked to evaluate Mr. Dotson for, *inter alia*, "mitigation evidence relevant to this case." (*Id.* at 2). The trial court approved the motion for Dr. Bishop's services that same day. (PC Ex. 21).

Dr. Bishop's invoice indicates that she began working on Mr. Dotson's case on August 31, 2010, just twenty-one days before the start of jury selection, and in those three weeks she devoted just twelve hours to the case—3.5 hours reviewing records and 1.8 hours interviewing Mr. Dotson. (PC Ex. 22). Dr. Bishop's work was so perfunctory that at the post-conviction hearing Mr. Skahan testified that, while he has heard the name Geri Bishop, he could not recall whether she worked on Mr. Dotson's case and thought that she was a man. (PC Vol. 11, 280).

Mr. McAfee assumed that Dr. Bishop had been retained earlier in the course of Mr. Dotson's representation, had only a vague recollection of her work on the case, and believed that she was reluctant to work on the case because the crimes involved child victims and allegations of torture. (PC Vol. 10, 118–19). After reviewing Dr. Bishop's invoice, Mr. McAfee could offer no explanation as to why Dr. Bishop got involved in Mr. Dotson's case at such a late date. (*Id.* at 119). Although Dr. Bishop consulted with the defense team on October 11, 2010, the day the jury found Mr. Dotson guilty and the day before the penalty phase, trial counsel could not recall the details of that conversation. (*Id.* at 120; PC Ex. 22). Although a September 24, 2010, e-mail

from Glori Shettles to trial counsel indicated that Dr. Bishop concluded that Mr. Dotson suffered childhood trauma and that she is expected to testify at a potential penalty phase, Dr. Bishop was not called to testify at sentencing. (PC Ex. 46).

Trial counsel's decision not to present Dr. Bishop's testimony at sentencing without discerning what she could offer was unreasonable. Despite Dr. Bishop seeing evidence of childhood trauma, trial counsel did not appear to have a substantive conversation with Dr. Bishop about her conclusions. Dr. Bishop was retained less than two months before the start of jury selection and was given little to no guidance from trial counsel. Mr. Skahan did not even recall that she worked on the case. The bulk of the minimal time that Dr. Bishop spent on Mr. Dotson's case was devoted to reviewing the crime facts, which had little to nothing to do with mitigation. (PC Exs. 22, 43). This is further proof of counsel's failure to adequately prepare for sentencing and scrambling to put together a mitigation case at the last minute because of trial counsel's focus on the guilt-innocence phase of the trial and their hope that Mr. Dotson would be acquitted. *See Greer v. Mitchell*, 264 F.3d 663, 676–78 (6th Cir. 2001) ("Under circumstances where a finding of guilty cannot come as a surprise, failure to anticipate such a finding so as to adequately prepare for the sentencing phase is constitutionally impermissible").

Counsel performed deficiently when they neglected to present Dr. Walker's testimony. They performed deficiently when they waited until two months before trial to engage Dr. Bishop. As a result of counsel's blunders, jurors heard no evidence about Mr. Dotson's mental health disorders, including organic brain damage, adjustment disorder, and polysubstance dependence. A reasonable probability exists that, had jurors heard such evidence in conjunction with the neglected life history evidence discussed in Section B, above, at least one would have voted for sentences less than death.

D. The post-conviction court erroneously denied relief.

The post-conviction court stated that trial counsel testified that "residual doubt, in their opinion, was the best mitigation they had." (PC Vol. 2, 362). But the court overlooks that Mr. McAfee—the counsel responsible for the penalty phase presentation—testified that he wanted to present evidence of Mr. Dotson's significant trauma to the jury in an attempt to persuade them to spare his life. (PC Vol. 10, 100). Moreover, assuming *arguendo* that counsel's mitigation theory was residual doubt, their presentation at sentencing hardly reflected that strategy as Ms. Shettles's testimony, counsel's seven page opening argument, and nine page closing argument did not focus on residual doubt. (*See, e.g.*, Trial Vol. 31, 2465–72, 2535–44).

The post-conviction court faulted Mr. Dotson for failing to present mitigation witnesses at the post-conviction hearing. (PC Vol. 2, 362). In so ruling the court overlooks the reality that Ms. Shettles's life history timeline, witness interview memoranda, and mitigation themes document, coupled with Dr. Walker's draft report, contains the evidence necessary to establish Mr. Dotson's ineffective assistance of counsel claim. And to the extent this Court believes otherwise, as discussed in Section VII of Mr. Dotson's Statement of the Facts, *supra*, and Issue X, *infra*, Mr. Dotson attempted to present the testimony of three mental health experts—Drs. Walker, Merikangas, and Agharkar—at the post-conviction evidentiary hearing. The post-conviction court found that Mr. Dotson established that the funding for these three mental health experts was necessary to ensure the protection of his constitutional rights. The AOC Director and Chief Justice, however, vacated the trial court's funding orders, and as a result, through no fault of his own, Mr. Dotson was precluded from presenting mitigation witnesses at the post-conviction hearing.

The lower court also concluded that trial counsel made a strategic decision to forego Dr. Walker's testimony based on a belief that his mention of antisocial personality characteristics outweighed any potential benefit from his testimony. (PC Vol. 2, 362, 364–65). Trial counsel, however, made that decision without having any conversation with Dr. Walker, or anyone else, about his testing, evaluation, and draft report. Had they done so they would have discovered that Dr. Walker did not diagnose Mr. Dotson with antisocial personality disorder, and his reference to antisocial personality characteristics was actually mitigating because it supported a conclusion that Mr. Dotson suffered from organic brain damage, one of the most compelling mitigating circumstances. (*See* PC Ex. 59). Because counsel failed to follow up with Dr. Walker, or anyone else, on the meaning of his report, they were not in a position to make a reasonable strategic decision about whether to present Dr. Walker's testimony. *Wiggins*, 538 U.S. at 536.

The lower court also assumed that trial counsel chose not to present Dr. Walker's testimony because Mr. Dotson made statements to Dr. Walker about the night in question which conflicted with Mr. Dotson's trial testimony and other statements, and that those statements were potentially damaging. (PC Vol. 2, 362–63). But the lower court overlooks the fact that at no point during the post-conviction hearing did either of Mr. Dotson's trial counsel cite that as a reason for not calling Dr. Walker. Moreover, assuming *arguendo* that Dr. Walker testified at sentencing, at that point the jury would have already convicted Mr. Dotson of six counts of first degree murder and three counts of attempted first degree murder. Thus, any potential harm caused by statements that Mr. Dotson made to Dr. Walker about the night in question would not outweigh the benefits of the compelling mental health testimony that Dr. Walker could have provided. The failure to introduce considerable evidence that could have been helpful to Mr.

Dotson is not justified by a belief, without an adequate investigation and consideration, that the net result of any presentation would be negative.

The lower court concluded that the evidence established that Dr. Bishop could not support any type of mental health defense. (PC Vol. 2, 363). But as explained above, Dr. Bishop spent only twelve hours working on the case, most of which involved reviewing the crime facts. As with Dr. Walker, trial counsel did not appear to have a substantive conversation with Dr. Bishop about what she could offer at sentencing. Moreover, an e-mail from Glori Shettles to trial counsel, sent after jury selection had already begun, indicated that Dr. Bishop found that Mr. Dotson suffered childhood trauma and that she was expected to testify at sentencing. (PC Ex. 46).

The lower court also opined that the defense team "clearly stated that they made the strategic reason to use Ms. Shettles in order to get as much mitigation information before the jury as possible without the type of damaging cross-examination that would have occurred with an expert and any accompanying report." (PC Vol. 2, 363). While Mr. McAfee testified that counsel believed they could get mitigating information to jurors through Ms. Shettles's testimony (PC Vol. 10, 102), nowhere did Messrs. McAfee or Skahan mention damaging expert cross-examination as the basis for calling only her to the witness stand. And even if they so testified, that testimony would not excuse counsel's failure to prepare Ms. Shettles for her sentencing testimony or their failure to present available mitigating evidence during her testimony.

The lower court's analysis fails to recognize the impact that a more detailed and complete presentation of Mr. Dotson's background could have had on the jury's weighing process. The Supreme Court has held in *Williams, Wiggins, Rompilla* and their progeny that even when *some* mitigating evidence is presented, the omission of significant mitigation evidence is prejudicial to

the defendant. The contrast between what was presented and what could have been presented is particularly stark and compelling where the absent evidence includes, as here, severe mental illness and brain damage. Here, just because some mitigating evidence was introduced to the jury, it does not follow that jurors were provided a comprehensive understanding of Mr. Dotson's brain damage, mental health impairments, and troubled background. On the contrary, jurors heard just a fraction of the powerful mitigation that was available and could be found throughout trial counsel's file.

IX. The cumulative impact of trial counsel's deficient performances renders Mr. Dotson's convictions and/or death sentences unconstitutional.

To the extent this Court concludes that Mr. Dotson has not established prejudice arising from two or more of the deficient performances Mr. Dotson sets out in Issues I-III and V-VIII, above, it must consider whether their combined effect meets the prejudice standard. *See State v. Sexton*, 368 S.W.3d 371, 429-31 (Tenn. 2012); *McKinney v. State,* 2010 WL 796939 at *37 (Tenn. Crim. App. 2010). Doing so establishes that Mr. Dotson received the ineffective assistance of counsel.

Mr. Dotson's above ineffective assistance of counsel claims assert that had counsel not performed deficiently (1) jurors would not have heard Mr. Dotson's statements; (2) jurors would have heard that C.J. suffers from significant long-term memory impairment; (3) the prosecution would not have inundated jurors with gruesome pictures of bloodied adult and child corpses; and (4) Mr. Dotson would not have testified. The only evidence connecting Mr. Dotson to the Lester Street attacks would have been the testimony of C.J. and Cedrick that either Mr. Dotson *or others* committed the attacks, a portion of which supported Mr. Dotson's gang hit alternative theory. Under these circumstances, a reasonable probability exists that at least one juror would have had a reasonable doubt about Mr. Dotson's guilt, and the jury would not have convicted

him of first degree murder.[16] *Compare McKinney*, 2010 WL 796939 at *35-*37; *State v. Coleman*, 865 N.W.2d 190, 201-03 (Wis. 2015); *Harris By & Through Ramseyer v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995) (finding cumulative prejudice resulting from, among other errors, counsel's failure to challenge the admissibility of the petitioner's statement and his decision to call the petitioner to testify).

In addition, even if the jury convicted Mr. Dotson of first degree murder, a reasonable probability exists that at least one juror would have recognized that the State's paucity of evidence gave rise to the residual doubt mitigating factor. Coupling that factor with the mitigating evidence trial counsel neglected to present at Mr. Dotson's sentencing hearing, and removing from the jurors' calculus the inflammatory photographs of the adult and child victims, a reasonable probability exists that at least one juror would have voted for sentences less than death. *See Sexton,* 368 S.W.3d at 429-31; *Harris v. Sharp,* 941 F.3d 962, 1010-11 (10th Cir. 2019); *Bemore v. Chappell*, 788 F.3d 1151, 1175-76 (9th Cir. 2015); Affidavit of Juror Gerald Copeland, ¶¶ 5–7, 12; Affidavit of Alternate Juror James Brown, ¶ 2. (Sealed Offers of Proof).

X. The AOC Director and Chief Justice improperly vacated the post-conviction court's expert funding orders.

Should this Court conclude that the record does not establish that Mr. Dotson received the ineffective assistance of counsel, it must remand this case for further proceedings.

The post-conviction court authorized funds so that Mr. Dotson could present expert testimony in support of his ineffective assistance of counsel claims. Specifically, the court authorized funds for three mental health experts, Drs. Agharkar, Merikangas, and Walker, and

[16] Alternate Juror James Brown described the problems he had about the State's case based upon what was presented at trial: "I was very attentive during the trial and took extensive notes. I particularly remember details and concerns I had about the lack of incriminating physical evidence presented by the prosecution." Affidavit of Alternate Juror James Brown, ¶ 2. (Sealed Offer of Proof).

one false confession expert, Dr. Leo. When the AOC Director and Chief Justice vacated the post-conviction court's funding orders for these experts, they improperly exercised judicial power, violated due process, and violated Mr. Dotson's right to a full and fair post-conviction proceeding. Because their improper actions are responsible for any lack of evidence supporting Mr. Dotson's ineffective assistance of counsel claims, if this Court concludes that the record does not establish those claims, it must remand his case for further proceedings where he can access the expert assistance ordered by the trial court.

Mr. Dotson first sets out below a brief summary of the Tennessee Supreme Court Rule § 5(e)(4)-(5) AOC review process. After doing so, Mr. Dotson demonstrates that when the AOC Director and Chief Justice engaged in an opaque substantive review of the post-conviction court's funding orders and vacated them, they (1) unconstitutionally exercised judicial power; (2) violated State and federal due process guaranties; and (3) denied Mr. Dotson his rights to a full and fair hearing, equal protection, and freedom from cruel and unusual punishment.

A. The AOC review process requires death-sentenced petitioners to obtain AOC approval of post-conviction court funding orders.

Tennessee Code Annotated § 40-14-207(b) provides post-conviction courts authority to authorize funds for expert services in capital cases. *Owens v. State*, 908 S.W.2d 923, 928 (Tenn. 1995). Pursuant to Section 207(b), the Tennessee Supreme Court promulgated Tennessee Supreme Court Rule 13, which, among other things, (1) sets a $25,000 limit for all expert services in capital post-conviction cases, unless the trial court determines that extraordinary circumstances exist to exceed that limit; Tenn. Sup. Ct. R. 13, § 5(d)(5); and (2) establishes maximum hourly rates for specified expert services. *Id.* at § 5(d)(1).

In 2004, the Tennessee Supreme Court amended Rule 13, adding sections 5(e)(4) & (e)(5) to create an AOC review process. This process requires the indigent to provide the AOC

Director with the post-conviction court's funding order, and the indigent must receive "prior approval" of that order from the Director before he can access the funds the post-conviction court authorized. Tenn. Sup. Ct. R. 13, § 5(e)(4). If the Director does not approve the order, the Chief Justice of the Tennessee Supreme Court reviews it. *Id.* at § 5I(5). If the Chief Justice does not approve the post-conviction court's funding order, Rule 13 §§ 5(e)(4) and (e)(5) foreclose an indigent from accessing the funds the post-conviction court found necessary to protect the indigent's constitutional rights. *Id.*

B. The actions the AOC Director and Chief Justice took pursuant to the AOC review process are invalid.

This Court possesses authority to consider challenges to the actions the AOC Director and Chief Justice took during the AOC review process. *See Long v. Board of Professional Responsibility*, 435 S.W.3d 174, 184 & 184 n.8 (Tenn. 2014).

1. By engaging in a substantive review of the post-conviction court's funding orders and vacating them, the AOC Director and Chief Justice violated Articles II, §§ 1 & 2 and VI §§ 1, 2 & 3 of the Tennessee Constitution.

Mr. Dotson does not dispute that pursuant to Supreme Court Rule 13 § 5(e)(4) and (e)(5), the AOC Director and Chief Justice could perform administrative tasks associated with the post-conviction court's funding orders. *See State v. Garrad*, 693 S.W.2d 921, 922 (Tenn. Crim. App. 1985) (Chief Justice acting alone has authority to perform purely administrative functions in post-conviction cases). Such tasks could involve, for example, establishing and monitoring the procedure through which the AOC makes payments to authorized experts. *See Shelby County v. Blanton*, 595 S.W.2d 72, 80 (Tenn. App. 1978) (signing payment authorizations is an administrative function). But the AOC Director and Chief Justice interpreted the AOC review process as giving them authority (1) to review the post-conviction court's substantive

determination that the authorized funds were necessary to protect Mr. Dotson's constitutional rights; and (2) to vacate the post-conviction court's orders. By doing so, the AOC Director and Chief Justice unconstitutionally aggregated to themselves a judicial function.

The Tennessee Constitution vests the State's judicial power in the Tennessee Supreme Court and inferior courts that the General Assembly establishes. Tennessee Constitution, Art. VI, § 1. The General Assembly established the post-conviction court. Tenn. Code Ann. §§ 16–10–101, 102. Once it did so, the Tennessee Constitution vested that court with the State's judicial power. *See McCulley v. State*, 53 S.W. 134, 180 (Tenn. 1899).

The General Assembly gave the post-conviction court jurisdiction over post-conviction proceedings. *See* Tenn. Code Ann. § 40–30–104(a). By doing so, the General Assembly authorized that court to exercise the State's judicial power in Mr. Dotson's case. As a result, when the post-conviction court granted Mr. Dotson's expert funding motions, it exercised the judicial power Article VI and the General Assembly gave it.

The AOC Director and Chief Justice applied Rule 13 § 5(e)(4) and (e)(5) in a manner that gave them authority to review the funding orders the post-conviction court entered pursuant to the State's judicial power. But under Article VI of the Tennessee Constitution, only an entity vested with the State's judicial power could vacate those orders. Given this reality, the AOC Director and Chief Justice must meet the State constitutional requirements for exercising judicial power before either of them could review and vacate the post-conviction court's funding orders. *See State ex rel. Newsom v. Biggers,* 911 S.W.2d 715, 717 (Tenn. 1995); *Town of South Carthage v. Barrett*, 840 S.W.2d 895, 898–900 (Tenn. 1992). Neither the AOC Director nor the Chief Justice meets those constitutional requirements.

Pursuant to Article VI, § 3 of the Tennessee Constitution, the Governor must appoint, and the General Assembly must confirm, a person who exercises the judicial power of an intermediate appellate court. The Governor did not appoint, nor did the General Assembly confirm, the AOC Director. As a result, when the AOC Director purported to assume jurisdiction to review the post-conviction court's funding orders, she violated Articles II, §§ 1 & 2 and VI §§ 1 & 3 of the Tennessee Constitution.

Similarly, the Chief Justice interpreted Rule 13 § 5(e)(5) as giving him power to review substantively and vacate the post-conviction court's funding orders. But Article VI, § 1 of the Tennessee Constitution vests the State's judicial power, including the power to review inferior court decisions, in the Tennessee Supreme Court, not in any single Supreme Court judge or justice. Article VI, § 2 provides that the Supreme Court shall consist of five judges, one of whom shall preside as Chief Justice, and the concurrence of three judges is necessary for the exercise of the State's judicial power. As a result, when the Chief Justice substantively reviewed the post-conviction court's funding orders and vacated them, he violated Articles II, §§ 1 & 2 and VI §§ 1 & 2 of the Tennessee Constitution. Acting alone, the Chief Justice could not exercise the State's judicial power, and his decisions vacating the post-conviction court's funding orders are therefore invalid. *See Pierce v. Tharp*, 461 S.W.2d 950, 955 (Tenn. 1970); *Radford Trust Co. v. East Tennessee Lumber Co.*, 21 S.W. 329, 331 (Tenn. 1893).

2. Because the AOC Director and Chief Justice failed to provide Mr. Dotson notice of the issues and evidence they would consider, they violated Article I, § 8 of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution.

a. The post-conviction court's funding orders created property interests that due process protects against arbitrary deprivation.

Due process protects a person's legitimate entitlement to a benefit. *Board of Regents v. Roth,* 408 U.S. 564, 576–77 (1972). In determining whether a person has such an entitlement, courts look to, among other things, understandings stemming from State law sources. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 538 (1985).

For example, in *Goldberg v. Kelly*, the United States Supreme Court concluded that persons qualifying to receive welfare benefits had a legitimate entitlement to them. A State statute provided that a person could obtain such benefits by making a specified showing, and once a social services official concluded that a person made that showing, the official established a legitimate entitlement to the benefits that due process protected against arbitrary deprivation. *Goldberg v. Kelly,* 397 U.S. 254, 261–62 (1970).

As in *Goldberg*, Tennessee Code Annotated § 40–30–207(b) establishes a benefit that Mr. Dotson was entitled to receive upon making a specified showing. Specifically, that statute provided that Mr. Dotson could receive authorization for expert funding upon a showing that the funding was necessary to ensure the protection of his constitutional rights. Tenn. Code Ann. § 40-30-207(b). Four separate times the post-conviction court concluded that Mr. Dotson made this showing, and it authorized funding for the services of Drs. Agharkar, Merikangas, Walker, and Leo. While the post-conviction court noted that Dr. Agharkar's hourly rate exceeded Rule 13 § 5(d)(1)'s maximum rate, it found Dr. Agharkar's rate "reasonable, within the range charged by similar experts (and) justified given Dr. Agharkar's particularized background, experience, and expertise and the circumstances of this case." (*Id.* at 1-2). And while the post-conviction court recognized that authorizing funds for Drs. Merikangas, Walker, and Leo would exceed Rule 13 § 5(d)(5)'s $25,000 limit for the services of all experts, it concluded that extraordinary circumstances warranted doing so. (6/26/18 Sealed, *Ex Parte* Order (Merikangas), at 1-2;

8/15/18 Sealed, *Ex Parte* Order (Leo), at 1-2; 9/25/18 Sealed, *Ex Parte* Order (Walker), at 2). As a result, the post-conviction court entered orders authorizing funding for the services of the four experts in specific amounts. (3/8/17 Sealed, *Ex Parte* Order (Agharkar), at 2; (6/26/18 Sealed, *Ex Parte* Order (Merikangas), at 2; 8/15/18 Sealed, *Ex Parte* Order (Leo), at 2; 9/25/18 Sealed, *Ex Parte* Order (Walker), at 2).

As in *Goldberg*, a State statute offered Mr. Dotson a benefit, and a State actor determined that he had made the necessary showing to access that benefit. Like the welfare recipients in *Goldberg*, Mr. Dotson's legitimate entitlement to the expert funding the post-conviction court authorized created for him Property rights that due process protected.

b. The AOC Director and Chief Justice violated due process when they failed to provide Mr. Dotson notice of the issues and evidence they would consider during their review of the post-conviction court's funding orders.

Before a State actor can deprive a person of a protected interest, he must give the person notice of the proposed deprivation and an opportunity to contest it. *Loudermill*, 470 U.S. at 546; *In re Oliver*, 333 U.S. 257, 273 (1948). Notice includes (1) informing the property holder of the specific issues he must address; and (2) disclosing to him the material that the State actor will consider in making her decision. *Lankford v. Idaho*, 500 U.S. 110, 120–22 (1991); *Gardner v. Florida*, 430 U.S. 349, 362 (1977); *Bowman Transportation, Inc. v. Arkansas–Best Freight System, Inc.* 419 U.S. 281, 288 n.4 (1974); *In re Gault*, 387 U.S. 1, 33–34 (1967). If the State actor fails to provide the property holder this basic information, she violates due process when she deprives him of a protected property right. *See Lankford*, 500 U.S. at 127; *Gardner*, 430 U.S. at 362.

The actions of the AOC Director and Chief Justice failed to provide Mr. Dotson notice of the issues or evidence they would consider when they reviewed the post-conviction court's

funding orders. As a result, when Mr. Dotson submitted those orders for review, he did not know what issues or evidence the AOC Director or Chief Justice would consider in reviewing the trial court's findings that Dr. Agharkar's hourly rate was reasonable and extraordinary circumstances required expert funding in excess of $25,000.

No state interest supports the failure of the AOC Director and Chief Justice to provide Mr. Dotson notice of the issues and evidence they would consider in reviewing the post-conviction court's funding orders. While a State actor may summarily deprive a person of a protected property right when exigent circumstances exist, *see Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 299–301 (1981), no such circumstances existed here. And even if such circumstances existed, due process required that Mr. Dotson receive a post-deprivation hearing and notice of the issues that hearing would address. *See Hodel*, 452 U.S. at 303. Mr. Dotson never received any notice, pre-deprivation or post-deprivation, about the issues and evidence the AOC Director and Chief Justice considered in vacating the post-conviction court's funding orders. As a result, the decisions of the AOC Director and Chief Justice summarily depriving Mr. Dotson of the property rights the post-conviction court's funding decisions created violated due process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433–34 (1982); *Parratt v. Taylor*, 451 U.S. 527 (1981); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

At its most basic level, due process means fundamental fairness. *See White*, 362 S.W.3d at 566. Such fairness "can rarely be obtained by secret, one-sided determination of facts decisive of rights." *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951)

(Frankfurter, J., concurring). Because the AOC Director and Chief Justice engaged in an opaque, one-sided review of the post-conviction court's funding orders, they violated due process.[17]

3. The AOC Director and Chief Justice's decisions vacating the post-conviction court's funding orders violated Mr. Dotson's right to a full and fair hearing on his ineffective assistance of counsel claims and violated Article I, §§ 8 & 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Dotson was entitled at trial to have access to a "competent psychiatrist" to "conduct an appropriate examination," and to "assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (defendant's rights to due process in death penalty trial were violated by denial of access to a psychiatrist); *see also McWilliams v. Dunn*, 137 S.Ct. 1790 (2017) (Alabama failed to meet its obligations under *Ake* to provide defendant in death penalty prosecution with access to an independent mental health expert to assist in evaluation, preparation and presentation of his defense); *Hinton v. Alabama*, 571 U.S. 263 (2014) (defense counsel's performance constitutionally deficient in a death penalty case where he failed to seek additional funds to replace an inadequate expert).

Mr. Dotson did not receive necessary expert assistance at trial because his attorneys failed to retain a psychiatrist, in violation of his right to the effective assistance of counsel. These two important constitutional rights—the right to competent expert assistance and to competent legal representation—were both abridged by the denial of constitutionally necessary expert assistance in this post-conviction case.

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[17] As the post-conviction judge explained during the evidentiary hearing, "I do not or have not received any orders from the Administrative Office of the Court or the Supreme Court as to granting or denying. I have been advised through telephone conversations about the denial but I don't have any reasons. I haven't been given any reasons so I can't speak to the Chief Justice's opinions on why he grants or doesn't grant these things." PC Vol. 12, 425.

Access to expert assistance, particularly in a capital case, is a fundamental necessity to protect a defendant's constitutional rights. *See Ake*, 470 U.S. at 77 ("The private interest in the accuracy of a criminal proceeding that places an individual's liberty or life at risk is almost uniquely compelling."). The State, as well as a post-conviction petitioner, "has a profound interest in assuring that its ultimate sanction is not erroneously imposed, and we do not see why monetary considerations should be more persuasive in this context than at trial." *Id.* at 83–84 (right to expert assistance in capital sentencing phase of trial). Tennessee capital post-conviction petitioners are entitled to experts where protection of constitutional rights is at stake. *See Owens v. State,* 908 S.W.2d at 928.

As a matter of clearly established constitutional law, Mr. Dotson's right to be heard in a meaningful manner includes the right to obtain and present the testimony of experts. Indeed, the Supreme Court in *Ake* found this principle to be "grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, [and] derive[d] from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Id.* at 76. *See also State v. Barnett*, 909 S.W.2d 423, 426 (Tenn. 1995) (citing *Ake*).

"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). Evidence of psychiatric conditions is extremely important and powerful mitigating evidence. *See Davidson*, 453 S.W.3d at 405 (counsel ineffective for failing to investigate and present evidence of cerebral atrophy, schizophrenia, and frontal lobe dysfunction; granting sentencing relief based in large part on mental health expert testimony of a psychiatrist and neuropsychologist developed

in post–conviction); *Sears v. Upton*, 561 U.S. 945, 946 (2010) (counsel was ineffective for failing to investigate and present evidence of "significant frontal lobe brain damage Sears suffered as a child, as well as drug and alcohol abuse in his teens"); *Porter v. McCollum*, 558 U.S. 30, 36 (2009) (counsel was ineffective for failing to investigate and present neuropsychological evidence that "Porter suffered from brain damage that could manifest in impulsive, violent behavior" that "substantially impaired . . . his ability to conform his conduct to the law" and constituted "an extreme mental or emotional disturbance" as a result of this brain damage); *Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (evidence in post-conviction established that defendant "suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions"); *Harries v. Bell*, 417 F.3d 631 (6th Cir. 2005) (granting relief where defendant "suffered damage to the frontal lobe of his brain . . . [which] can result from head injuries and can interfere with a person's judgment and decrease a person's ability to control impulses"); *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003) (granting relief where jury did not hear of defendant's brain damage from a severe blow to the head during childhood); *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1996) (granting relief where jury did not hear of defendant's brain damage).

Moreover, Tennessee's capital post-conviction scheme specifically encompasses a petitioner's right to present expert testimony in support of claims for relief. *See* Tenn. Code Ann. § 40–14–207(b); Tenn. Sup. Ct. R. 13 § 5(b). Because the AOC Director and Chief Justice precluded Mr. Dotson from accessing constitutionally necessary expert assistance, Mr. Dotson was unable to access the tools required to establish ineffective assistance of counsel in failing to investigate and present mental health mitigation. Therefore, he was denied the right to due process and a full and fair hearing. *See* U.S. Const. Amends. 6, 8, and 14; Tenn. Const. Art. I §§

8, 9 and 16, and Art. XI §§ 8 and 16; *Ake v. Oklahoma*, 470 U.S. 68 (1985); *McWilliams v. Dunn*, 137 S.Ct. 1790 (2017); *Evitts v. Lucey,* 469 U.S. 387 (1985); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); and *Griffin v. Illinois*, 351 U.S. 12 (1956).

Mr. Dotson was entitled to a "full and fair hearing." 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 evidence."). Due process requires the "opportunity to be heard 'at a meaningful time in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Tennessee recognizes this fundamental concept as well. *See Burford v. State*, 845 S.W.2d 204, 208 (Tenn. 1992) (concluding that in Tennessee post-conviction cases, due process is a paramount concern); *Whitehead v. State*, 402 S.W.3d 615, 627 (Tenn. 2013) ("[P]ost-conviction proceedings, unlike other ordinary civil proceedings, warrant heightened due process protections."); *Mills v. Wong*, 155 S.W.3d 916, 924–25 (Tenn. 2005); *Howell v. State*, 151 S.W.3d 450, 461 (Tenn. 2004) ("The fundamental right of due process is . . . an over-arching issue that has been recognized as a concern in post-conviction proceedings.").

The Tennessee Supreme Court also has consistently acknowledged that due process "embodies the concept of fundamental fairness." *See, e.g., Howell*, 151 S.W.3d at 461 (internal quotation omitted). The need for courts to adhere to the concept of fundamental fairness is particularly acute in capital post-conviction cases. *Van Tran v. State*, 66 S.W.3d 790, 807 (Tenn. 2001) ("As it has long been recognized, the penalty of death is qualitatively different from any other sentence and this qualitative difference between death and other penalties calls for a greater degree of reliance when the death sentence is imposed."); *Woodson v. North Carolina*, 428 U.S.

280, 305 (1976) (same). Yet, Mr. Dotson was denied access to the tools needed to ensure that his post-conviction hearing comported with due process and fundamental fairness.

In addition to these constitutional protections, Tennessee's death-sentenced post-conviction petitioners also have a statutory right to expert assistance. *See* Tenn. Code Ann. § 40–14–207(b); *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995). Pursuant to Tenn. Sup. Ct. R. 13, § 5(c)(1), funding for expert services is available based upon a showing of a "particularized need" for the requested services. "Particularized need" may be shown when an "appellant shows by reference to the particular facts and circumstances that the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the defense at trial and that the requested services are necessary to protect the appellant's right to a fair trial." Tenn. Sup. Ct. R. 13 § 5(c)(2); *see also State v. Barnett*, 909 S.W.2d 423, 430 (Tenn. 1995). As discussed above, the trial court found that Mr. Dotson established particularized need for the services of Drs. Agharkar, Merikangas, Leo, and Walker.

The post-conviction court found that Mr. Dotson was entitled to necessary, reasonable psychiatric expert services in post-conviction, and that the cost of those services could exceed the $25,000 cap due to extraordinary circumstances. The AOC Director and Chief Justice took Mr. Dotson's right to those services away by vacating the post-conviction court's orders without providing Mr. Dotson with a basis for their decisions or even the opportunity to advocate that the post-conviction court's orders were proper. Mr. Dotson's rights to due process in the litigation of his post-conviction claims, specifically the claims of ineffective assistance of counsel, as well as his state and federal constitutional rights to be free from cruel and unusual punishment were thereby violated. Without the services of a constitutionally necessary expert, Mr. Dotson was

precluded from developing mental health mitigation that should and could have been presented to the jury.

C. This Court must remand Mr. Dotson's case to the post-conviction court for further proceedings.

When an appellate court determines that an indigent person was wrongly denied expert services, it must remand the case for further proceedings unless it concludes beyond a reasonable doubt that the denial of expert assistance had no appreciable effect on the outcome of the proceedings. *State v. Scott,* 33 S.W.3d 746, 755-56 (Tenn. 2000). The record precludes this Court from reaching that conclusion in this case.

In his post-conviction petition, Mr. Dotson asserted that trial counsel rendered ineffective assistance when they failed to challenge the voluntariness and reliability of his statements. (PC Vol. 1, 97-100, 102-04). Mr. Dotson asserted that, while trial counsel hired Dr. Richard Leo to investigate his statements, counsel neglected Dr. Leo and, as a result, counsel failed to present evidence that Mr. Dotson's statements were neither voluntary nor reliable. (*See id.*).

In denying relief on his ineffective assistance of counsel claim, the post-conviction court cited Mr. McAfee's post-conviction testimony that trial counsel did not feel they had grounds to seek suppression of Mr. Dotson's statements. (PC Vol. 2, 369; PC Vol. 10, 73). But in an offer of proof letter submitted to the post-conviction court, Dr. Leo informed that Mr. Dotson's counsel barely spoke to him, and they never asked if he could offer any opinion about the reliability and voluntariness of Mr. Dotson's statements. (PC Ex 58 at 1). Indeed, defense counsel's contact with Dr. Leo was so cursory that Dr. Leo never even had an opportunity to explain how he might assist Mr. Dotson's defense and the material he would need to review Mr. Dotson's case. (*Id.*).[18]

[18] Although the trial court approved $18,750 (125 hours at $150 an hour) for Dr. Leo's services, he only billed for $1,200 (or 8 hours) of work. PC Exs. 6, 49. Trial counsel's contact with Dr. Leo was so limited that Dr. Leo had to learn about the verdict in the case "from the newspaper (no one had informed me)." PC Ex. 57.

Given the undisputed evidence that Lieutenant Armstrong threatened Mr. Dotson's life before he obtained the Armstrong Statement, and given Dr. Walker's draft report setting out Mr. Dotson's mental health disorders, there was ample material for Dr. Leo to review. *See Huddleston*, 924 S.W.2d at 671. But when the AOC Director and Chief Justice vacated the post-conviction court's funding order for Dr. Leo's services, they precluded post-conviction counsel from having Dr. Leo perform that review and offer an opinion on whether Mr. Dotson's statements were involuntary and/or unreliable. As a result, this Court cannot conclude, beyond a reasonable doubt, that the AOC Director and Chief Justice had no appreciable effect on the post-conviction proceeding when they vacated the post-conviction court's funding order for Dr. Leo's services.

The post-conviction court credited trial counsel's testimony that they did not present expert mental health testimony because Dr. Walker had reported Mr. Dotson expressed antisocial characteristics. (PC Vol. 2, 364-65). But had the AOC Director and Chief Justice not vacated the post-conviction court's order authorizing funds for Drs. Agharkar, Merikangas, and/or Walker, Mr. Dotson would have presented evidence demonstrating the error of counsel's reasoning.

In an offer of proof letter, Dr. Merikangas informed the post-conviction court that when Dr. Walker reported that Mr. Dotson possessed antisocial personality characteristics, Dr. Walker did not diagnose him with antisocial personality disorder. (PC Ex. 59 at 2). Dr. Merikangas thereafter expressed why such a diagnosis would be inappropriate and why brain damage, not antisocial personality disorder, provided a likely explanation for Mr. Dotson's behavior. (PC Ex. 59 at 2-3). Dr. Merikangas concluded

> Although I was unable to conduct a forensic psychiatric and neurological examination of Mr. Dotson, based upon my review of Dr. Walker's report, it is my opinion ... that Mr. Dotson's severe deficiencies, especially his organic brain

> damage, support valuable mitigating factors which could have been presented to a jury during the sentencing phase of the trial.

(PC Ex. 59 at 3).

Dr. Walker confirmed that neglect, not an informed decision, was responsible for counsel's failure to present expert mental health testimony. In an offer of proof letter Dr. Walker related that he recalled no substantive conversation about Mr. Dotson with any member of his trial team. (PC Ex. 57). Defense counsel simply gave Dr. Walker materials to review, and after Dr. Walker furnished them his draft report, he never heard from them again. (*Id.*).

The offer of proof letters from Drs. Merikangas, Walker, and Leo demonstrate that this Court cannot conclude, beyond a reasonable doubt, that the AOC Director and Chief Justice had no appreciable effect on the outcome of Mr. Dotson's post-conviction proceeding when they vacated the post-conviction court's funding orders. As a result, if this Court believes that the record does not entitle Mr. Dotson to post-conviction relief, it must remand his case for further proceedings where he can access the expert services he was wrongly denied.

XI. Trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to object when the State attached a stun cuff to Mr. Dotson; the State violated due process when it attached the stun cuff.

A. This court must remand Mr. Dotson's claim that trial counsel rendered ineffective assistance when they failed to object to the imposition of the stun cuff.

Because the post-conviction court based its finding of no *Strickland* prejudice on an erroneous view of the post-conviction record, and because the court improperly limited its prejudice inquiry, this Court must remand Mr. Dotson's ineffective assistance of counsel claim for further proceedings.

1. Trial counsel performed deficiently when they failed to assert that due process precluded the State from attaching a stun cuff to Mr. Dotson.

Placing physical restraints on a criminal defendant during his trial undermines the defendant's right to a physical indicia of innocence, interferes with the defendant's ability to consult with counsel, interferes with the defendant's ability to testify on his own behalf, and undermines the objective of maintaining a dignified judicial process. *Mobley v. State*, 397 S.W.3d 70, 100 (Tenn. 2013); *Deck v. Missouri*, 544 U.S. 622, 630-32 (2005). Given these effects, before the State can attach a shocking mechanism underneath a criminal defendant's clothing (1) the State must demonstrate that a legitimate state interest necessitates doing so; and (2) the court must make particularized findings that such is the case. *Mobley*, 397 S.W.3d at 101. Attaching a shocking mechanism without such process violates a defendant's due process rights. *Id.*; *see Deck*, 544 U.S. at 629; *Willocks v. State*, 546 S.W.2d 819, 821-22 (Tenn. Crim. App. 1976).

On the eve of Mr. Dotson's trial, the court entered an order mandating "that the Shelby County Sheriff's Department shall place 'Stun Cuffs' on the defendant any time he is attending Court proceedings." (PC Ex. 27). The State had not requested the court's stun cuff order, and the court did not make any finding that a legitimate State interest necessitated its order. Indeed, at the post-conviction hearing the trial judge recognized that Mr. Dotson's behavior before, during, and after the trial would refute any such finding. (PC Vol. 12, 421) ("I never had any problems with Mr. Dotson throughout all the proceedings leading up to the trial, during trial, and frankly post trial").

The State attached a stun cuff to Mr. Dotson's ankle during his sentencing hearing. (PC Vol. 12, 414-15). Given that the State did so without first demonstrating that a State interest necessitated the restraint, and given that the trial court did not make a particularized finding of

such a necessity, the State violated Mr. Dotson's due process rights when it put the stun cuff on him. *Mobley*, 397 S.W.3d at 101; *see Deck*, 544 U.S. at 632.

Despite having grounds to challenge the State's imposition of the stun cuff, Mr. Dotson's counsel did nothing about it. (*See* PC Vol. 10, 131; PC Vol. 11, 258). In failing to assert that Mr. Dotson's right to due process precluded the State from attaching the stun cuff to him, counsel performed deficiently. *See Mobley*, 397 S.W.3d at 102.

2. This Court must remand for further proceedings on the *Strickland* prejudice inquiry.

Like the case before this Court, *Mobley* involved a post-conviction petitioner's claim that his counsel rendered ineffective assistance by failing to object to imposition of a shocking device underneath his clothing. After concluding that counsel performed deficiently by failing to do so, *Mobley* turned to the *Strickland* prejudice inquiry.

The *Mobley* Court noted that the lower court's consideration of prejudice consisted solely of a finding that the shocking mechanism was not visible to the jury. *Mobley*, 397 S.W.3d at 102. While the Court recognized that finding militated against a prejudice finding, the Court concluded it did not end the prejudice inquiry. *Id.* at 102. The Court reiterated that imposition of a shocking restraint implicates additional concerns, including the effect the restraint has on a defendant's mental faculties and his ability to testify on his own behalf. *Mobley*, 397 S.W.3d at 102. The Court remanded Mobley's case for further proceedings that would consider, among other things, whether requiring Mobley to wear the shocking restraint adversely affected his demeanor or his ability to testify. *Mobley*, 397 S.W.3d at 103.

As in *Mobley*, the record in Mr. Dotson's case necessitates a remand for further inquiry into *Strickland* prejudice.

The post-conviction court found no prejudice upon a mistaken belief that the State attached the stun cuff to Mr. Dotson only for sentencing hearing closing arguments. (PC Vol. 2, 368). The preponderance of the post-conviction evidence, however, refutes the lower's court finding.

The Sheriff's Deputy who attached the stun cuff to Mr. Dotson testified that Mr. Dotson began wearing the stun cuff at the start of the sentencing proceeding, not at the start of sentencing closing arguments. (PC Vol. 12, 414) ("he had it applied before he came into the courtroom that day"). The deputy bolstered his testimony by recounting that, during court breaks throughout the day, he removed the stun cuff when Mr. Dotson left the courtroom and reattached it before Mr. Dotson went back inside. (PC Vol. 12, 414-15). The post-conviction record therefore preponderates against the trial court's finding that the State attached the stun cuff to Mr. Dotson only for sentencing closing arguments.

In addition, the post-conviction court's finding of no *Strickland* prejudice is, in the words of *Mobley*, limited. *See* Mobley, 397 S.W.3d at 102. Other than its erroneous finding that the State first attached the stun cuff to Mr. Dotson for sentencing closing arguments, the lower court found only that the stun cuff was not visible. (PC Vol. 2, 368). But *Mobley* teaches that such a finding is not conclusive, and courts must consider other effects the stun cuff may have had. *Mobley*, 397 S.W.3d at 102.

The lower court failed to consider the effect the stun cuff had on Mr. Dotson's demeanor before jurors and his ability to testify on his own behalf at the sentencing hearing. (*Id.*); *see Mobley*, 397 S.W.3d at 102. The record before the court warranted such consideration, establishing that when the State attached the stun cuff Mr. Dotson stopped changing into civilian

clothes and chose to appear before the jury in jail clothing. (*See* PC Vol. 12, 412). As the Sheriff's Deputy who attached the stun cuff to Mr. Dotson related,

> I remember him saying that they already think that he's a monster so there was no need for him to wear any other, I guess, regular attire and that he could just keep wearing his jail uniform.

(*Id.*).

The lower court's finding of no *Strickland* prejudice was limited, and the court based it on an erroneous view of what the post-conviction record established. *Mobley* demonstrates that given these foibles, this Court must remand Mr. Dotson's ineffective assistance of counsel claim to the lower court for further proceedings on the *Strickland* prejudice inquiry.

B. Mr. Dotson is entitled to relief on his claim that the State violated due process when it attached a stun cuff to him.

For the reasons discussed above, the State violated due process when it attached a stun cuff to Mr. Dotson.

The lower court held that Mr. Dotson waived his due process stun cuff claim because he did not raise it at trial or on appeal. (PC Vol. 2, 368). But Mr. Dotson's stun cuff claim asserts an error that compromised the integrity of his trial, rendering it a fundamentally unfair, unreliable vehicle for determining whether he was guilty of the crimes charged and subject to the death penalty. *See State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008); *State v. Bowman*, 327 S.W.3d 69, 91 (Tenn. Crim. App. 2009). Because such errors require automatic reversal, *Rodriguez*, 254 S.W.3d at 371, before a court can find Mr. Dotson waived his due process stun cuff claim, it must first find that he made a personal, affirmative, voluntary, and intelligent decision to forego it. *Gonzalez v. United States*, 553 U.S. 242, 248 (2008); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938). The record contains no evidence that Mr. Dotson personally, affirmatively, voluntarily, and intelligently made a decision to forego his due process stun cuff

claim. As a result, the post-conviction court erred when it ruled that Mr. Dotson waived his due process stun cuff claim.

XII. The post-conviction court erred when it denied Mr. Dotson relief on his jury selection issues.

A. Trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to challenge the trial court's death qualification procedures.

Death qualification of prospective jurors produces a jury that tends to favor the State, distrust the defendant, disregard the presumption of innocence, and make adverse judgments against minority groups. *See Grigsby v. Mabry*, 569 F. Supp. 1273, 1293 (E.D. Ark. 1983), *aff'd as modified*, 758 F.2d 226 (8th Cir. 1985), *rev'd sub nom.*; *Lockhart v. McCree*, 476 U.S. 162 (1986). As a result, death-qualified jurors are more likely than non-death qualified jurors to convict a defendant of the most serious crime charged. *Id.*, 569 F. Supp. at 1294, 1302. Despite these realities, trial counsel made no objection to the trial court's death qualification procedures during voir dire.

In addition, when voir dire focuses a prospective juror's attention on the penalty before the trial begins, the judge, prosecution, and defense convey the impressions that they believe the defendant is guilty, the "real" issue is the appropriate penalty, and the defendant deserves the death penalty. *Id.*, 564 F. Supp. at 1303-04. In Mr. Dotson's case, the voir dire process did exactly that. After the trial court asked whether the prospective jurors had a hardship that would prevent them from being sequestered, the prosecution questioned them. Prosecutors took that opportunity to immediately focus the prospective jurors' attentions on the death penalty. (*See, e.g.,* Trial Vol. 2, 135-43; Trial Vol. 13, 270-74; Trial Vol. 14, 413-18, 448-49; Trial Vol. 15, 631-34). Because defense counsel did not contest the prosecution's questioning of prospective

jurors first, prosecutors faced no impediment to focusing the prospective jurors' first impressions on what penalty Mr. Dotson should receive before he was even tried.

Mr. Dotson acknowledges that the Tennessee Supreme Court has rejected similar challenges to a trial court's death qualification process during voir dire, *see State v. Jones,* 789 S.W.2d 545, 547 (Tenn. 1990), and that precedent troubles his ineffective assistance of counsel claim. He nonetheless raises this issue to preserve it for further review.

B. Trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to question prospective jurors about racial and implicit biases.

Mr. Dotson is an African-American man who was on trial for his life. Despite the robust body of social science research establishing the pervasive reality of the impact of racial prejudices—both implicit and explicit—on psychological decision-making in our society and legal system, counsel made no attempt to address racial bias during jury selection.

"Stark racial disparities define America's relationship with the death penalty." Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States,* 89 N.Y.U. L. Rev. 513, 515 (2014). The Tennessee criminal justice system's history of racially biased imposition of the death penalty is deeply rooted and continues today.[19] In 1994, the Tennessee Supreme Court created the Commission on Racial and Ethnic Fairness ("Commission") to "provide a fair and balanced assessment of how race and ethnicity affect Tennessee's system of justice and how the system addresses those issues." American Bar Association, *Evaluating Fairness and Accuracy in State Death Sentencing*

[19] The Tennessee Department of Correction maintains a list of all executions from July 1916 through February 20, 2020, available at https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions html (last visited November 18, 2020). In that time frame, 86 of those executed were African-American and 52 were White.

Systems: The Tennessee Death Penalty Assessment Report (2007), xxxi.[20] In 1997, the Commission concluded in its final report that while no "explicit manifestations of racial bias abound [in the Tennessee judicial system] . . . , institutionalized bias is relentlessly at work." *Final Report of the Tennessee Commission on Racial and Ethnic Fairness to the Supreme Court of Tennessee* (1997), 5.[21] Earlier this year, the Tennessee Supreme Court issued a statement on its commitment to equal justice noting, "[r]acism still exists and has not place in our society . . . it is our moral obligation and our sworn duty to ensure that the people of Tennessee receive equal protection of its laws. Justice must be for all."[22]

Empirical research has shown that, in addition to explicit biases people harbor implicit biases—"attitudes or stereotypes that affect our understanding, decision-making, and behavior, without our even realizing it." Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124–26 (2012). This research finds that "racism persists in the United States because people discriminate due to nonconscious stereotypes regarding persons of color." Darren L. Hutchinson, *"Continually Reminded of Their Inferior Position:" Social Dominance, Implicit Bias, Criminality, and Race*, 46 Wash. U. J.L. & Pol'y 23, 27 (2014). Because of the automatic nature of these biases, people are often unaware of them or how they affect their judgments. The Sixth Circuit has recognized "the proven impact of implicit biases on individuals' behavior and decision-making. Socials scientists have examined extensively the theory of implicit bias in recent decades, especially as it relates to racial bias." *United States v. Ray*, 803 F.3d 244, 259

[20] Available at: http://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/tennessee-finalreport.pdf (last visited November 18, 2020).

[21] Available at: http://www.tsc.state.tn.us/sites/default/files/docs/report_from_commission_on_racial__ethnic_fairness.pdf (last visited November 18, 2020).

[22] Available at: https://www.tncourts.gov/press/2020/06/25/tennessee-supreme-court-issues-statement-commitment-equal-justice (last visited November 18, 2020).

(6th Cir. 2015). The Tennessee Supreme Court—in its recent statement on its commitment to equal justice—acknowledged that "[t]o do our part, we have provided training to Tennessee judges on implicit bias, and we will continue to do so."[23]

Research demonstrates that implicit bias infects capital sentencing. One recent study determined that:

- Death jury-eligible citizens implicitly associate whites with "worth" and blacks with "worthless;"
- Death-qualified jurors hold stronger implicit and self-reported biases than do jury-eligible citizens generally;
- The exclusion of non-white jurors accounts for the differing levels of implicit racial bias between death-qualified and non-death-qualified jurors; and
- Implicit racial bias predicts race-of-defendant effects and explicit racial bias predicts race-of-victim effects.

Levinson et al., *Devaluing Death*, *supra* at 573.

In light of this backdrop of overwhelming evidence of racial bias in capital sentencing, counsel should have questioned jurors regarding their attitudes on race. Mr. Dotson was constitutionally entitled to ask voir dire questions on racial attitudes due to the unique risk of racial prejudice infecting his trial.

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether [Mr. Dotson's] crime involved the aggravating factors specified under [Tennessee] law. Such a juror might also be less favorably inclined toward [Mr. Dotson's] evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent

[23] *Id.*

> facts of [Mr. Dotson's] crime, might incline a juror to favor the death penalty.

Turner v. Murray, 476 U.S. 28, 35 (1986) (footnote omitted); *see also Mu'min v. Virginia*, 500 U.S. 415, 424 (1991); *Butler v. State*, 1988 WL 63526 at *3 (Tenn. Crim. App. 1988), *aff'd on reh'g*, 1988 WL 93001 (Tenn. Crim. App. 1988), *rev'd on other grounds*, 789 S.W.2d 898 (Tenn. 1990).

Mr. Dotson's rights pursuant to Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to United States Constitution entitled him to due process and a fair and impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 726 (1992). Thus, a verdict reached by a jury in a criminal prosecution *must* be based solely on evidence and argument presented in court—not racial bias, outside influences, or other preconceptions. *Patton v. Yount*, 467 U.S. 1025, 1037; *Irvin v. Dowd*, 366 U.S. 717, 721–23 (1961) The United States Supreme Court has stated that the one "touchstone of a fair trial is an impartial trial of fact—a jury capable and willing to decide the case solely on the evidence before it." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1994) (internal quotation marks and citation omitted).

Trial counsel failed to take the necessary steps to guarantee Mr. Dotson a fair trial before an impartial jury. Counsel's failure to investigate whether any jurors harbored beliefs or attitudes regarding race that would interfere with their ability to be impartial was unreasonable. Counsel knew or should have known that race was an important area of inquiry. Trial counsel, however, posed not one such question to the jurors who convicted Mr. Dotson and sentenced him to death.

Mr. Skahan acknowledged that we all harbor implicit biases. (PC Vol. 11, 264). Despite not being familiar with the term implicit bias, once it was explained to him, Mr. McAfee conceded that implicit bias is something that he would want to explore during jury selection, and

he had no strategic reason for failing to do so in this case. (PC Vol. 10, 53). Mr. Skahan voiced concerns about selecting a jury in a criminal case where the defendant is African-American and noted the need to consider how prospective jurors viewed his client. (PC Vol. 11, 260–261). "You know, being a black man sitting in a court full of white people, how do they look at him." (*Id.* at 261). Thus, trial counsel had no reasonable or strategic basis for their inaction.

Mr. Skahan did testify that he was not concerned about racial bias in this case because most of the people involved in the case were African-American, so "there wasn't really a black/white issue. . . ." (PC Vol. 11, 264). Mr. McAfee also stated that he did not see race as "the real issue to overcome in this case." (PC Vol. 1, 52). The fact that the defendant, the victims, and some of the police witnesses were African-American did not absolve counsel from exploring whether prospective jurors were biased. That is particularly true here, where Gerald Copeland, the only black male who served on Mr. Dotson's jury was subjected to racial harassment and treated rudely by the white foreman. *See* Issue XX, *infra*, and Affidavit of Juror Gerald Copeland, ¶9. (Sealed Offer of Proof). Mr. Copeland may not have been subjected to this harassment if the jury selection process had explored potential racial and implicit biases.

The lower court appears to rely on trial counsel's evidentiary hearing testimony in denying this claim. (PC Vol. 2, 377). Assuming *arguendo* that is the reason why counsel failed to question jurors regarding their views on race and implicit bias—and based upon Mr. McAfee's testimony, it was not and counsel had no strategic reason for their inaction—counsel's approach to jury selection was premised on a fundamental misunderstanding of the law and social science which rendered them ineffective. Thus, the evidence clearly preponderates against any finding—assuming such a finding was made—by the post-conviction court. *Fields v. State*, 40 S.W.3d at 456.

The remedy for either actual or implied bias by a prospective juror is exclusion from the jury. *United States v. Nelson*, 277 F.3d 164, 202 (2d Cir. 2002). Thus, if trial counsel had questioned prospective jurors regarding their views on race and implicit bias, they could have succeeded in removing any members of the panel whose decision-making would be influenced by racial bias. In doing so, trial counsel could have prevented racial prejudice from creeping into the jury's decision-making process and impacting the verdicts. Furthermore, it would have instilled a consciousness of implicit bias in white jury members that would have curbed activation of their bias, as evinced in the mistreatment of Mr. Copeland. Accordingly, trial counsel's error prejudiced Mr. Dotson and requires reversal.

C. Trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to rehabilitate prospective jurors.

1. Trial counsel performed deficiently when they failed to rehabilitate prospective jurors.

Under Tennessee's death penalty scheme, a death sentence requires jurors to agree unanimously that the State has proven beyond a reasonable doubt (1) the existence of at least one aggravating circumstance; and (2) that the aggravating circumstances outweigh the mitigating circumstances. Tenn. Code Ann. § 39-13-203(g)(1). Thus, if one juror concludes that the State has not carried either of these burdens, the jury cannot sentence the defendant to death.

Given the power one juror has to prevent the imposition of a capital sentence, a capital defendant wants on his jury any person who might hesitate to vote for a death sentence. A trial court cannot exclude such a prospective juror unless the juror harbors views that would "prevent or substantially impair the performance of his duty as a juror in accordance with his instructions and oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Witherspoon v. Illinois*, 391 U.S. 510 (1968). When a prospective juror indicates he harbors a view that might impair his ability to vote

for the death penalty, counsel have an affirmative duty to try and "rehabilitate" the juror so he can remain available for jury selection. *See* ABA Guidelines §1.1 Commentary ("Trial attorneys in death penalty cases must attempt[] rehabilitation of venire members who initially state opposition to the death penalty"); 2003 ABA Guidelines § 10.10.2.B.

At voir dire, six prospective jurors initially indicated that they harbored views that would impair their duties as jurors. (*See* Trial Vol. 15, 628-29) (prospective juror Jackson); Trial Vol. 15, 630-34 (prospective juror Green); Trial Vol. 13, 269-74 (prospective juror Walker); Trial Vol. 12, 135-43 (prospective juror Hooper); Trial Vol. 14, 412-18 (prospective juror Tiller); Trial Vol. 14, 447-49 (prospective juror Venrov). Trial counsel made no effort to rehabilitate these prospective jurors after they initially expressed their opposition to the death penalty. (*Id*). By failing to do so, counsel performed deficiently. *See Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (courts look to ABA Standards relating to the Administration of Criminal Justice when accessing competence of trial counsel's representation); *Strickland*, 466 U.S. at 688 (ABA Guidelines reflect prevailing professional norms); 1989 ABA Guidelines §1.1 Commentary; 2003 ABA Guidelines § 10.10.2.B.

2. Trial counsel's failure to rehabilitate prospective jurors prejudiced Mr. Dotson's defense.

To establish prejudice resulting from counsel's failure to rehabilitate the prospective jurors, Mr. Dotson must show there is a reasonable probability that the outcome would have been different had counsel attempted rehabilitation. The United States Supreme Court instructs courts to presume the outcome would have been different when a trial court improperly excludes a prospective juror under *Witherspoon* and *Witt. Gray v. Mississippi*, 481 U.S. 648, 668 (1987). Thus, if Mr. Dotson can show a reasonable probability that his trial counsel could have

rehabilitated just one prospective juror, he establishes the prejudice necessary for his ineffective assistance of counsel claim.

At voir dire, when the prosecution questioned prospective juror Tiller about her ability to follow Tennessee's capital punishment law, Ms. Tiller repeatedly expressed ambivalence. (*See* Trial Vol. 14, 413 (prosecutor notes that Ms. Tiller wrote on a questionnaire "I'm not sure how I feel about the death penalty. I know I'm more against it than for it"); 414 (Q: "[W]ill you be able to return a verdict of death?" A: "I don't know. That would be very hard for [me]. This whole thing has been very hard for me."); 415 (Q: " [W]ould you be able to return a verdict of death?" A: "I don't – I don't – I don't really feel like I could. I don't really – I don't know. I don't think I could. I don't know. I'm sorry. That's the best answer I can give you at this point.")). After Ms. Tiller expressed her uncertainty, the trial court asked her, "Do you think you could follow the law?" (Trial Vol. 14, 418). Ms. Tiller responded, "I don't – I mean, I don't know. What do y'all want me to say?" (Trial Vol. 14, 418). The trial court rephrased its question, "You don't believe you could follow the law?" (Trial Vol. 14, 418). Ms. Tiller gave a one word answer to the court's leading question - "No." (Trial Vol. 14, 418). The trial court immediately excused her without any objection or attempted rehabilitation from Mr. Dotson's trial counsel. (Trial Vol. 14, 418).

In addition, while prospective jurors Jackson, Green, Walker, and Venrov indicated that they harbored religious beliefs against the death penalty. *See* Trial Vol. 15, 628-29 (prospective juror Jackson); *id.* at 634 (prospective juror Green); Trial Vol. 13, 271-74 (prospective juror Walker); Trial Vol. 14, 449 (prospective juror Venrov)), Assistant District Attorney Lepone acknowledged that "a lot of people who say they can't do it for religious reasons can be rehabilitated." (Trial Vol. 15, 628). And while prospective juror Hooper indicated she grounded her opposition to capital punishment in a belief that it did not deter murder, (Trial Vol. 12, 139),

trial counsel made no effort to rehabilitate Ms. Hooper by asking whether she could set aside that belief and simply apply the law. (Trial Vol. 12, 139-43).

Under *Witherspoon/Witt,* before the trial court could exclude prospective jurors Tiller, Jackson, Green, Walker, Venrov, and Hooper, they had to maintain views that would prevent or substantially impair their ability to consider the death penalty as a possible punishment. *Gray*, 481 U.S. at 658. Given Ms. Tiller's equivocal responses to the questions the prosecution and court posed, a reasonable probability exists that trial counsel could have elicited from Ms. Tiller testimony demonstrating she did not harbor views that would have prevented or substantially impaired her ability to serve as a juror. Similarly, given that Assistant District Attorney Lepone acknowledged that "a lot" of persons who initially express a religious compunction against capital punishment can be rehabilitated, a reasonable probability exists that trial counsel could have elicited from prospective jurors Jackson, Green, Walker, and Venrov testimony demonstrating they did not harbor views that would prevent or substantially impair their ability to consider the death penalty as a possible punishment. Finally, had trial counsel asked whether Ms. Hooper could set aside her belief that the death penalty does not deter crime and simply apply the law, a reasonable probability exists that trial counsel could have elicited from Ms. Hooper testimony demonstrating she did not harbor views that would prevent or substantially impair her ability to consider the death penalty as a possible punishment. These reasonable probabilities, individually and together, establish the prejudice necessary for Mr. Dotson's ineffective assistance of counsel claim.

Other than stating, "This Court does not find that Petitioner has carried his burden of proof on either prong of his ineffective assistance of counsel claim related to voir dire," (PC Vol. 2, 375), the post-conviction court did not address Mr. Dotson's ineffective assistance of counsel

claim. (*See id.* at 373-77). Because the lower court's perfunctory treatment of Mr. Dotson's claim does not comply with the Post-Conviction Procedures Act, it provides no basis for the court's denial of relief.

Tennessee Code Annotated § 40-30-111(b) required the lower court to state its findings of facts and conclusions of law with regard to each ground Mr. Dotson raised in his petition. The lower court's order offers nothing more than a bald conclusion that Mr. Dotson failed to prove "either prong of his ineffective assistance of counsel claim." Because the court's order provides no findings or legal analysis in support of that broad brush conclusion, it provides no basis for denying Mr. Dotson relief. *See Nance*, 2006 WL 1575110 at *3. And even if it did, as Mr. Dotson demonstrates above, the lower court's conclusion is wrong.

D. Trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to challenge for cause a juror whose views substantially impaired his ability to consider mitigating evidence at the sentencing hearing.

A capital defendant can challenge for cause a juror who harbors "a belief that death should be imposed *ipso facto* upon conviction of a capital offense." *Morgan v. Illinois*, 504 U.S. 719, 735 (1992); *see Adams v. Texas*, 448 U.S. 38, 45 (1980). In Mr. Dotson's case, during voir dire prospective juror Ray, who later became the jury foreman, expressed such a view. But because trial counsel failed to move the court to strike Mr. Ray for cause, and because counsel failed to exercise an available peremptory challenge to remove Mr. Ray from the jury panel, Mr. Ray served on Mr. Dotson's jury as its leader. By allowing Mr. Ray to do so, trial counsel rendered ineffective assistance.

1. Trial counsel performed deficiently when they failed to remove juror Ray from the jury panel.

During voir dire, juror Ray told defense counsel and the court he would find it very difficult to find any evidence that would mitigate the killing of a child, (Trial Vol. 13, 217), and he did not see how any such evidence could exist. (Trial Vol. 13, 218-19). Despite Mr. Ray's statement that he would automatically vote for the death penalty upon a jury verdict that Mr. Dotson killed children, trial counsel did not challenge him for cause. (*See* Trial Vol. 13, 219). Nor did counsel use a peremptory challenge to preclude Mr. Ray from serving on Mr. Dotson's jury. (*See id.*). As a result, Mr. Ray sat on the jury that sentenced Mr. Dotson to death. The failure of Mr. Dotson's counsel to keep Mr. Ray from doing so constitutes a deficient performance. *See Miller v. Webb,* 385 F.3d 666, 675 (6th Cir. 2004).

The post-conviction court recounted that Mr. Dotson's trial attorneys testified that they had a strategic reason for wanting Mr. Ray to serve on Mr. Dotson's jury, and that testimony scuttled Mr. Dotson's ineffective assistance of counsel claim. (PC Vol. 2, 375). While Mr. Dotson acknowledges that a legitimate "strategic decision" to keep Mr. Ray on the jury would preclude a court from concluding that counsel performed deficiently, the record demonstrates that counsel made no such decision.

At the post-conviction hearing, Mr. McAfee testified that if he was defending a person accused of a child's first degree murder, he would not want a person on the jury who could not consider a sentence of less than death for a child killing. (PC Vol. 10, 45). Mr. McAfee recalled that at voir dire Mr. Ray testified that he could not consider a sentence less than death for the killing of a child (PC Vol. 10, 49), and Mr. Ray repeatedly expressed an inability to give weight and effect to mitigating evidence if the crime involved such a killing. (*Id.*). While the post-conviction court helped Mr. McAfee suggest that trial counsel nonetheless decided to keep Mr.

Ray on the jury due to a belief that he would understand evidence relevant to Mr. Dotson's guilt stage defense, (PC Vol. 10, 46, 52, 133), lead counsel Skahan had no memory of any such decision. (PC Vol. 11, 262). Mr. Skahan further testified that, as a general matter, when he conducted voir dire in a capital case he challenged automatic death penalty jurors for cause. (PC Vol. 11, 261).

The conflicting testimonies of Messrs. McAfee and Skahan, coupled with Mr. Skahan's lack of a "strategic decision" memory, demonstrate that counsel had no reason, strategic or otherwise, for letting Mr. Ray serve on Mr. Dotson's jury. *See Wiggins v. Smith,* 539 U.S. 510, 526–27 (2003). But even if counsel made a decision to keep Mr. Ray on the jury hoping he would understand Mr. Dotson's guilt stage defense, that would not thwart Mr. Dotson's ineffective assistance of counsel claim. As Mr. Dotson demonstrates above, counsel rendered ineffective assistance in pursuing Mr. Dotson's guilt stage defense when they, among other things, (1) failed to have the trial court suppress his statements; (2) failed to challenge C.J.'s identification testimony with a neuropsychological evaluation reporting that C.J. had long-term memory deficits; and (3) failed to prepare Mr. Dotson for his trial testimony. Because counsel's negligence scuttled their guilt stage defense, any decision aimed at furthering it cannot qualify as a legitimate strategic decision. *See Wood v. Allen,* 558 U.S. 290, 304 (2010) (emphasizing the distinction between the issue of whether counsel made a strategic decision and whether a strategic decision is a reasonable exercise of professional judgment under *Strickland*).

2. Trial counsel's failure to remove prospective juror Ray from the jury panel prejudiced Mr. Dotson's defense.

To establish prejudice resulting from counsel's failure to keep Mr. Ray off of Mr. Dotson's jury, Mr. Dotson must show the existence of a reasonable probability that the outcome of his sentencing hearing would have been different had Mr. Ray not served on his jury. The

United States Supreme Court instructs courts to presume the outcome would have been different had an automatic death penalty juror not sat on a capital sentencing jury that rendered a death sentence. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *see Hughes v. United States*, 258 F.3d 453, 463 (6th Cir.2001). Thus, by demonstrating above that Mr. Ray held a view that Mr. Dotson's conviction would *ipso facto* cause him to vote for a death sentence, Mr. Dotson establishes the prejudice necessary for his ineffective assistance of counsel claim. *See Miller v. Webb,* 385 666, 676 (6th Cir. 2004).

E. Juror Ray's service on Mr. Dotson's sentencing jury violated Article I, §§ 8 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

Irrespective of whether Mr. Dotson's counsel moved to strike Mr. Ray, the trial court had an independent duty to dismiss him for cause. *Frazier v. United States*, 335 U.S. 497, 511 (1948). The trial court's failure to do so, and juror Ray's resulting service on Mr. Dotson's sentencing jury, violated Mr. Dotson's constitutional rights. *Morgan,* 504 U.S. at 729.

The post-conviction court denied relief on Mr. Dotson's biased juror claim based on its belief that that Mr. Dotson had waived it by not presenting it during prior proceedings. (PC Vol. 2, 375). But Mr. Dotson's claim asserts a structural error that compromised the integrity of his sentencing hearing, rendering it a fundamentally unfair, unreliable, vehicle for determining whether he should receive the death penalty. *See State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008); *State v. Bowman*, 327 S.W.3d 69, 91 (Tenn. Crim. App. 2009) (quoting *Neder v. United States*, 527 U.S. 1, 9 (1999)). Because such structural errors require automatic reversal, *Rodriguez*, 254 S.W.3d at 371, before a court can find Mr. Dotson waived his claim it must first find that Mr. Dotson made a personal, affirmative, voluntary, and intelligent decision to forego it. *Gonzalez v. United States*, 553 U.S. 242, 248 (2008); *Johnson v. Zerbst*, 304 U.S. 458, 464-65

(1938). The record contains no evidence that Mr. Dotson personally, affirmatively, voluntarily, and intelligently made a decision to forego his claim that juror Ray's presence on his jury violated his constitutional rights. As a result, the lower court erred when it concluded that Mr. Dotson had waived it.

F. Trial counsel rendered ineffective assistance when they failed to exhaust their peremptory challenges.

Trial counsel only utilized eight of their fifteen peremptory strikes. As a result, the jury that ultimately sentenced Mr. Dotson to death included Mr. Ray, a man who had admitted an inability to imagine any evidence that would mitigate the killing of a child. Yet because trial counsel did not exhaust their peremptory challenges, Tennessee law hindered counsel's ability to challenge on appeal Mr. Ray's service on Mr. Dotson's jury. *See State v. Reid,* 91 S.W.3d 247, 290-91, 290 n.3 (2002); *Preswood v. State*, 50 Tenn. 468, 470 (1871). As demonstrated above, juror Ray's service violated Mr. Dotson's constitutional rights, and counsel's failure to preserve and pursue that claim constituted ineffective assistance.

XIII. Trial counsel violated Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when they failed to object to inadmissible testimony.

Trial counsel failed to object to the testimony of Dr. Lisa Funte, the State's pathologist, regarding three autopsies that she did not conduct, in violation of Mr. Dotson's constitutional rights to confrontation, to due process, and to be free from cruel and unusual punishment as guaranteed by Article I, §§ 8, 9, and 16 of the Tennessee Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to United States Constitution. *See Crawford v. Washington*, 541 U.S. 36, 53–55 (2004); *State v. McCoy*, 459 S.W.3d 1, 13–14 (Tenn. 2014).

Dr. Funte performed the autopsies on Marissa Williams, Shindri Roberson, and Cecil Dotson II. (Trial Exs. 327, 358, 439). The autopsies of Hollis Seals, Cecil Dotson, Sr., and

Cemario Dotson, however, were conducted by Dr. Miguel Laboy who did not testify at trial. (Trial Exs. 298, 384, 458). The three autopsy reports prepared by Dr. Laboy and photographs that were taken during those autopsies were admitted into evidence through Dr. Funte who also testified about Dr. Laboy's work and conclusions. (Trial Vol. 27, 1793–1905; Trial Vol. 28, 1967–85, 1988–2025). Accordingly, Mr. Dotson did not have the opportunity to cross-examine Dr. Laboy.

In *Crawford*, the United State Supreme Court departed from decades long precedent and held that Sixth Amendment bars the admission of testimonial statements of a witness who does not testify at trial unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine that witness. *Crawford*, 541 U.S. at 68. The *Crawford* prohibition encompasses documents created for an evidentiary purpose and made in support of a police investigation. *Williams v. Illinois*, 567 U.S. 50, 82–83 (2012) (plurality opinion). Consistent with this principle, when testimonial forensic reports are presented as evidence against a defendant, the right to confrontation guarantees the defendant the opportunity to test, through cross-examination, the honesty, proficiency, and methodology of the analyst who actually performed the forensic analysis. *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 308–11 (2009) (scientific report could not be used as evidence against the defendant unless the analyst who prepared and certified the report was subject to confrontation); *Bullcoming v. New Mexico*, 564 US. 647, 661–62 (2011) (same).

The introduction of the three autopsy reports prepared by Dr. Laboy without subjecting him to cross-examination violated Mr. Dotson's constitutional rights to confrontation because the reports were functionally identical to live, in-court testimony, doing "precisely what a witness does on direct examination." *Davis v. Washington*, 547 U.S. 813, 830 (2006). The autopsy

reports were prepared as part of a homicide investigation to establish or prove past events relevant to a later criminal prosecution. The autopsy reports and Dr. Laboy's work were key components of the prosecution's case as evidenced by the amount of time Dr. Funte spent testifying about the reports and the cause and manner of death of the victims. Thus, the reports, photographs, and Dr. Funte's discussion of Dr. Laboy's work were inherently testimonial and should not have been used in evidence against Mr. Dotson without affording him the opportunity to cross-examine Dr. Laboy.

Because trial counsel failed to object, when this issue was raised on direct appeal, the Tennessee Supreme Court chose to utilize plain error review when considering the issue. *Dotson*, 450 S.W.3d at 70. Under plain error doctrine, Mr. Dotson was not entitled to relief from this serious constitutional error unless a "clear rule of law was breached." *Id.* Ultimately, the Supreme Court concluded that there was uncertainty in United States Supreme Court jurisprudence, so no clear rule of law was violated. *Id.* at 72. Further, the Court concluded that relief was not necessary to "do substantial justice . . . ." *Id.*

Trial counsel rendered ineffective assistance of counsel by not challenging Dr. Funte's testimony regarding the three autopsies. As appellate counsel noted, "the most horrific and gruesome photographs admitted at trial were the autopsy photos of those three victims," and they would have been excluded but for counsel's failure to object. (Brief of the Appellant in the Supreme Court of Tennessee, 90). Mr. Dotson was prejudiced because this serious error was reviewed under a limited plain error analysis instead of *de novo* review which would have been the standard had trial counsel objected. *See State v. White*, 362 S.W.3d 559, 565 (Tenn. 2012) (questions of a constitutional dimension are reviewed *de novo* with no presumption of correctness).