

No. 20-3865

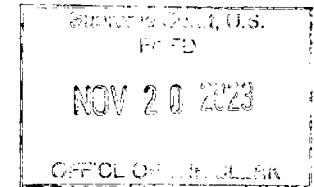
20-3865

IN THE  
SUPREME COURT OF THE UNITED STATES

**JUSTUS G. ONYIEGO** --- PETITIONER

(Your Name)

vs.



**STATE OF TENNESSEE** --- RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

**SUPREME COURT OF TENNESSEE**

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

**PETITION FOR WRIT OF CERTIORARI**

**JUSTUS G. ONYIEGO**

(Your Name)

**HARDEMAN COUNTY CORRECTIONAL FACILITY, P.O. BOX 549**

(Address)

**WHITEVILLE, TENNESSEE 38075**

(City, State, Zip Code)

**N/A**

(Phone Number)

## **QUESTION(S) PRESENTED**

- I. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO REQUEST LESSER INCLUDED OFFENSE INSTRUCTIONS FOR THE OFFENSE OF AGGRAVATED RAPE CAUSING BODILY INJURY?**
- II. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO EXPLAIN THE PROS OF TESTIFYING TO PETITIONER AND FOR ADVISING PETITIONER NOT TO TESTIFY AT TRIAL?**
- III. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO SUBPOENA THE VICTIM'S MEDICAL RECORDS FROM THE REGIONAL MEDICAL CENTER AT MEMPHIS?**
- IV. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT WHEN THE PROSECUTOR WORE A ST. JUDE EMBLEM ON HIS LAPEL DURING THE SECOND DAY OF TRIAL?**
- V. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE STATES IMPROPER CLOSING ARGUMENT?**
- VI. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO RETAIN A DNA EXPERT?**
- VII. WAS TRIAL COUNSEL INEFFECTIVE FOR TELLING THE JURY IN OPENING STATEMENT THAT THE PROOF WAS MUCH MORE CONSISTENT WITH A CONSENSUAL ENCOUNTER?**
- VIII. WHETHER THE CUMULATIVE EFFECT OF TRIAL COUNSEL'S ERRORS WARRANTS POST-CONVICTION RELIEF.**
- IX. WAS APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO CITE TO TRIAL EXHIBIT 23 IN HIS MOTION FOR NEW TRIAL AND IN HIS BRIEF TO APPEAL?**

**X. DID THE POST-CONVICTION COURT ERR IN DENYING  
PETITIONER'S REQUEST FOR FUNDING FOR AN INVESTIGATOR  
AND FOR A DNA EXPERT?**

## **LIST OF PARTIES**

[  ] All parties appear in the caption of the case on the cover page.

[  ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## **TABLE OF CONTENTS**

OPINIONS BELOW.....	8
JURISDICTION.....	9
CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED.....	10
STATEMENT OF THE CASE.....	11
REASONS FOR GRANTING THE WRIT.....	13
CONCLUSION.....	41
PROOF OF SERVICE .....	42

## **INDEX TO APPENDICES**

**APPENDIX A - SUPREME COURT OF TENNESSEE**

**APPENDIX B - COURT OF CRIMINAL APPEALS OF TENNESSEE**

**APPENDIX C**

**APPENDIX D**

**APPENDIX E**

**APPENDIX F**

## TABLE OF AUTHORITIES CITED

### PUBLISHED FEDERAL CASES

*Matthews v. Eldridge*, 424 U.S. 319 (1976) ..... 40

*Strickland v. Washington*, 466 U.S. 668 (1984) ..... 22, 23, 31

### PUBLISHED TENNESSEE CASES

*Bates v. State*, 973 S.W.2d 615 (Tenn. Crim. App. 1997) ..... 20

*Black v. State*, 794 S.W.2d 752 (Tenn. Crim. App. 1990) ..... 39

*Calvert v. State*, 342 S.W.3d 477 (Tenn. 2011) ..... 10

*Davis v. State*, 912 S.W.2d 689 (Tenn. 1995) ..... 39

*Dellinger v. State*, 279 S.W.3d 282 (Tenn. 2009) ..... 10

*Durham v. State*, 188 S.W.2d 555 (Tenn. 1945) ..... 26

*Finch v. State*, 226 S.W.3d 307 (Tenn. 2007) ..... 10

*Grindstaff v. State*, 297 S.W.3d 2008 (Tenn. 2009) ..... 10

*House v. State*, 911 S.W.2d 705 (Tenn. 1995) ..... 40

*Kendrick v. State*, 454 S.W.3d 450 (Tenn. 2015) ..... 31

*Mobley v. State*, 397 S.W.3d 70 (Tenn. 2013) ..... 10

*Momon v. State*, 18 S.W.3d 152 (Tenn. 1999) ..... 10

*Moore v. State*, 485 S.W.3d 411 (Tenn. 2016) ..... 14

*Pylant v. State*, 263 S.W.3d 854 (Tenn. 2008) ..... 14

*State v. Allen*, 69 S.W.3d 181 (Tenn. 2002) ..... 14

*State v. Barnes*, 703 S.W.2d 611 (Tenn. 1985) ..... 23

*State v. Carruthers*, 35 S.W.3d 516 (Tenn. 2000) ..... 26

*State v. Davidson*, 509 S.W.3d 156 (Tenn. 2016) ..... 26

<i>State v. Goltz</i> , 111 S.W.3d 1 (Tenn. Crim. App. 2003) .....	26
<i>State v. Hester</i> , 324 S.W.3d 1 (Tenn. 2010) .....	34
<i>State v. Honeycutt</i> , 54 S.W.3d 762 (Tenn. 2001) .....	10
<i>State v. Middlebrooks</i> , 840 S.W.2d 317 (Tenn. 1992) .....	23
<i>State v. Zimmerman</i> , 823 S.W.2d 220 (Tenn. Crim. App. 1991) .....	14, 33
<i>Stokes v. State</i> , 146 S.W.3d 56 (Tenn. 2004) .....	40
<i>Vaughn v. State</i> , 202 S.W.3d 106 (Tenn. 2006) .....	10

## **UNPUBLISHED TENNESSEE CASES**

<i>State v. Justus Onyiego</i> , No. W2017-00217-CCA-R3-CD, 2018 WL 2175819 (Tenn. Crim. App. May 10, 2018) .....	11, 12
---	--------

## **TENNESSEE STATUTES/RULES**

Tenn. R. Evid. 617 .....	23
Tenn. R. Evid. 609 .....	19
Tenn. Code Ann § 39-13-503 .....	15
Tenn. Code Ann § 39-13-502 .....	15
Tenn. Code Ann § 39-13-501 .....	15
Tenn. Sup. Ct. R. 13 .....	39, 40

## **CONSTITUTIONS**

U.S. CONST. amend. 14 .....	40
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## **OTHER SOURCES**

McCloskey, <i>Criminal Law Desk Book</i> , § 1506(3)(O) (Matthew Bender, 1990) .....	33
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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix        to the petition and is

reported at N/A; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix        to the petition and is

reported at N/A; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at *Justus G. Onyiego v. State, No. W2022-00629-SC-R11-PC (Tenn. (Aug. 8, 2023 Order)*; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the Court of the Criminal Appeals court appears at Appendix B to the petition and is

reported at *Justus G. Onyiego v. State, No. W2022-00629-CCA-R3-PC (Tenn. Crim. App. Mar. 2, 2023)*; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was N/A.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. N/A A           .

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was August 8, 2023.  
A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. N/A A           .

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A “claim for post-conviction relief based on alleged ineffective assistance of counsel present[s] mixed questions of law and fact.” *Mobley v. State*, 397 S.W.3d 70, 79 (Tenn. 2013)(citing *Calvert v. State*, 342 S.W.3d 477, 485 (Tenn. 2011)(citing *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009); *State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001)). A post-conviction court's factual findings “are conclusive on appeal, unless the evidence in the record preponderates against them.” *Id.* (citing *Dellinger v. State*, 279 S.W.3d 282, 294 (Tenn. 2009); *Vaughn v. State*, 202 S.W.3d 106, 115 (Tenn. 2006)). Thus, an appellate court “generally defer[s] to a post-conviction court's findings with respect to witness credibility, the weight and value of witness testimony, and the resolution of factual issues presented by the evidence.” *Id.* (citing *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999)). In contrast, an appellate court “review[s] de novo a post-conviction court's application of the law to its factual findings and accord[s] no presumption of correctness to the court's conclusions of law.” *Id.* (citing *Grindstaff*, 297 S.W.3d at 216; *Finch v. State*, 226 S.W.3d 307, 315 (Tenn. 2007); *Vaughn*, 202 S.W.3d at 115).

## STATEMENT OF THE CASE

### **MAY IT PLEASE THE COURT:**

In January 2015, a Shelby County Grand Jury indicted Petitioner on two counts of aggravated rape based upon alternative theories. See *State v. Justus Onyiego*, No. W2017-00217-CCA-R3-CD, 2018 WL 2175819, at \*1 (Tenn. Crim. App. May 10, 2018), *perm.app.denied* (Tenn. Aug. 8, 2018). The indictment alleged that the rape occurred in September 2004. *Id.* The jury convicted Petitioner “as charged of one count of aggravated rape accomplished by the use of force or coercion and while armed with a weapon and one count of aggravated rape causing bodily injury to the victim.” *Id.* at 3.

At the sentencing hearing, the trial court merged the two counts and sentenced Petitioner to seventeen years in prison. *Id.* On direct appeal, the Court of Criminal Appeals affirmed Petitioner's convictions. *Id.* at \*10. On August 8, 2018, the Supreme Court of Tennessee denied Petitioner's application for permission to appeal. See *State v. Onyiego*, W2017-00217-SC-R11-CD (Tenn.)(Aug. 8, 2018 Order).

On February 22, 2019, Petitioner filed a timely *pro se* petition for post-conviction relief. On April 18, 2019, counsel was appointed to represent Petitioner. On that same date, the State filed its response. On May 3, 2019, Petitioner filed an amended *pro se* petition for post-conviction relief. On November 19, 2020, counsel filed an amended petition for post-conviction relief.

A post-conviction hearing was conducted in front of the Honorable Glenn I. Wright (hereinafter “post-conviction court”) on July 15, 2021; July 23, 2021; July 27, 2021; and October 11, 2021. On April 14, 2022, the post-conviction court entered a written order granting relief in part and denying relief in part. In particular, the post-conviction court concluded that trial counsel was ineffective for failing to ask for lesser included offenses for aggravated rape causing bodily injury and for aggravated rape while armed with a deadly weapon.

On May 13, 2022, counsel was re-appointed to represent Petitioner on appeal. The State filed a timely notice of appeal on May 16, 2022. Counsel filed a timely notice of appeal on that same day.

On March 3, 2023, the Tennessee Court of Criminal Appeals reversed “the post-conviction court’s granting relief for the Petitioner’s conviction of aggravated rape causing bodily injury,” but affirmed the judgment in all other respects. *Justus G. Onyiego v. State*, No. W2022-00629-CCA-R3-PC (Tenn. Crim. App. Mar. 2, 2023)(copy attached). No petition for rehearing was filed. Counsel filed a timely notice of appeal.

On August 8, 2023, the State’s Supreme Court denied Petitioner’s application for permission to appeal. See *Justus G. Onyiego v. State*, No. W2022-00629-SC-R11-PC. (Tenn.)(Aug. 8, 2023 Order).

## REASONS FOR GRANTING THE PETITION

### **I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST LESSER INCLUDED OFFENSE INSTRUCTIONS FOR THE OFFENSE OF AGGRAVATED RAPE CAUSING BODILY INJURY.**

Petitioner submits that the Tennessee Court of Criminal Appeals erred when it concluded that Petitioner suffered no prejudice from trial counsel's deficient performance in failing to request lesser included offenses for the charge of aggravated rape causing bodily injury. In concluding that there was no prejudice, the Court of Criminal Appeals stated as follows:

Applying the prejudice analysis to the Petitioner's conviction of aggravated rape in count two, the element of "causes bodily injury to the victim" distinguishes aggravated rape from rape, and the element of "sexual penetration" distinguishes rape from sexual battery and misdemeanor assault. The Petitioner never contested that he sexually penetrated the victim or that she suffered bodily injury. Instead, he asserted through his cross-examination of the victim that she became angry when he would not pay her for sex, that she started fighting him, and that her injuries resulted from the fight. However, the victim testified that the Petitioner choked her with his hands, and she demonstrated his hands as claw-like for the jury. Police officers testified that the victim had been battered and beaten and that she had redness and ligature marks on her neck. A nurse testified that the victim had three lacerations on the front of her neck, a laceration on her left arm, a laceration on her right arm, and swelling and redness to her left eye.

We have looked at photographs of the victim's injuries, and they show extensive red marks around her neck and what appear to be bloody scratches or small lacerations on the front of her neck. Although the Petitioner testified at the evidentiary hearing that he and the victim "tussled" over the wallet and that he tried to "fend her off," the Petitioner chose not to testify at trial. Therefore, the jury never heard his explanation for the victim's injuries. In any event, the Petitioner's explanation does not account for the severity of her injuries, especially her neck injuries. Therefore, we conclude that even if trial counsel had requested instructions on lesser-included offenses of aggravated rape causing bodily injury, no reasonable jury would have found the Petitioner guilty of a lesser-included offense. Therefore, the post-conviction court erred by finding that the Petitioner suffered prejudice for trial counsel's failure to instruct the jury on any lesser-included offenses of aggravated rape causing bodily injury.

*Onyiego*, No. W2022-00629-CCA-R3-PC, at p. 27.

The Tennessee Supreme Court has stated that “[f]or ineffective assistance of counsel claims arising from the failure to properly request lesser-included offense instructions, the prejudice inquiry assesses whether a reasonable probability exists that a properly instructed jury would have convicted the petitioner of the lesser-included offense instead of the charged offense.” *Moore v. State*, 485 S.W.3d 411, 420-21 (Tenn. 2016)(citing *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008)(citing *State v. Zimmerman*, 823 S.W.2d 220, 224 (Tenn. Crim. App. 1991)). This inquiry “mirrors the harmless error inquiry on direct appeal,” and a conviction will not be set aside when the error is harmless beyond a reasonable doubt. *Id.* at 421, 426.

If a jury was not instructed on any lesser included offenses, “courts should apply the harmless error analysis adopted in” *State v. Allen*, 69 S.W.3d 181 (Tenn. 2002). *Moore*, 485 S.W.3d at 422. Under the *Allen* test, “a reviewing court should conduct a thorough examination of the record,” that takes into account “the evidence presented at trial” and “the defendant's theory of defense.”<sup>1</sup> 69 S.W.3d at 191. In reviewing the evidence presented at trial, “the harmless error analysis focuses on the distinguishing element between the greater and lesser offenses, the strength of the evidence of the distinguishing element, and the existence of contradicting evidence of the distinguishing element.” *Moore*, 485 S.W.3d at 422.

In the present case, the post-conviction court properly stated that under the *Allen* test it had to consider “the evidence at trial and the defense theory of the case.” The post-conviction court noted that the defense theory of the case was that a “consensual sexual encounter occurred.” The post-conviction court further noted that the defense argued that “there was dispute about the money to be exchanged”

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<sup>1</sup> Allen also states that a reviewing court should consider the jury's verdict; however, this factor is not applicable when the jury is “given no option to convict [a defendant] of any lesser-included offense.” *Moore*, 485 S.W.3d at 423.

and that “the victim and the defendant were involved in a physical fight that did not involve a weapon.”

The post-conviction court also explained as follows:

The victim's inconsistent testimony concerning the weapon that was involved in the alleged rape is somewhat troubling. The victim of an assault should remember whether the perpetrator had a knife or a gun during the attack. No weapon was recovered from the vehicle by the police department after this incident. Because of this, the jury should have been given an option to consider a lesser - included offense.

Petitioner submits that had the jury been instructed on lesser included offenses of aggravated rape causing bodily injury, there is a reasonable probability that the jury would have convicted him of a lesser included offense. Aggravated rape is defined as the “unlawful sexual penetration of a victim by the defendant ... accompanied by ...[t]he defendant caus[ing] bodily injury to the victim.” Tenn. Code Ann. § 39-13-502(a)(2). “Sexual penetration” means “sexual intercourse ... or any other intrusion, however slight, of any part of a person's body ... into the genital or anal openings of the victim's ... body.” Tenn. Code Ann. § 39-13-501(7). The distinguishing element between this theory of aggravated rape causing bodily injury and rape is the “caus[ing] bodily injury to the victim” language. *Compare* Tenn. Code Ann. § 39-13-502(a)(1) with Tenn. Code Ann. § 39-13-503(a)(1).

Petitioner first submits that there is a reasonable probability that the jury would have convicted him of Class A misdemeanor assault or Class B misdemeanor assault had it been instructed on those offenses. The defense theory in this case was that the victim engaged in consensual sex with Petitioner and that she began to fight him when he would not pay her. In her opening statement trial counsel told the jury, “[Y]ou will see the proof in this case is much more consistent with the consensual encounter of having sex than it is with rape.” In her closing argument trial counsel stated, “On that day, [the victim] did indeed agree to have sex with [Petitioner]. And she did indeed need that money. There was an argument over that money and a fight in that car. She called it rape, ladies and gentlemen.” A little later in her closing argument trial counsel stated, “Ladies and gentlemen, [the victim] finally admitted

12 years later to exactly what this was, sex for money. And when she didn't get that money, that's when they started fighting. Not before."

A large part of this defense theory involved attacking the victim's credibility. Indeed, the victim had serious credibility issues in this case. First, at trial the victim testified that she first encountered Petitioner while she was at her apartment sitting on the steps; however, in 2004 she told the police that she was walking home from a night of smoking crack and partying when Petitioner pulled up in his car and picked her up. See *Onyiego*, 2018 WL 2175819 at \*1-2. The victim also told the nurse at the Rape Crisis Center that she "had been walking home when the [Petitioner] pulled up beside her and asked if she needed a ride." See *Onyiego*, 2018 WL 2175819 at \*3.

Second, at trial the victim testified that Petitioner was holding a knife when he raped her, but in 2004 the victim told the police that Petitioner was holding a gun when he raped her. See *Onyiego*, 2019 WL 2175819 at \*1-2. The victim also told the nurse at the Rape Crises Center that Petitioner hit her in the head with the gun prior to raping her. See *Onyiego*, 2018 WL 2175819 at \*3.

Third, the police did not find any weapons on Petitioner or at the crime scene. See *Onyiego*, 2018 WL 2175819 at \*2-3.

Fourth, the victim did not tell the police on the scene or the nurse at the Rape Crisis Center that she was working as a prostitute when she had the encounter with Petitioner. See *Onyiego*, 2018 WL 2175819 at \*2.

Fifth, the victim acknowledged that she was addicted to crack cocaine at the time of the rape and that she had used crack cocaine and "X" the day before the rape. See *Onyiego*, 2018 WI 2175819 at \*2.

Sixth, the victim lost contact with the police immediately after the incident and did not have further contact with the police until over a decade later when the police reached out to her. See *Onyiego*, 2018 WL 2175819 at \*2-3. During closing argument trial counsel stated, "[I]n this case the

issue is [the victim's] credibility. That's the issue."

Based on the proof presented at trial and the defense theory of the case, there is a reasonable probability that the jury would have concluded that Petitioner and the victim had consensual sex, but that the victim subsequently received her injuries when fighting with Petitioner over the money. Thus, there is a reasonable probability that the jury would have convicted Petitioner of Class A or Class B misdemeanor assault if given the opportunity in this case. Trial counsel's failure to ask for an instruction on misdemeanor assault prejudiced the outcome of Petitioner's case.

Assuming, *arguendo*, that the jury concluded that Petitioner's penetration of the victim was non-consensual, there is a reasonable probability that the jury would have convicted Petitioner of the lesser included offense of rape if given the opportunity. This is because there is a reasonable probability that the jury would have concluded that the victim's injuries came from a source other than Petitioner. The victim testified that just before Petitioner pulled up to her apartment, she had "got up that morning arguing with [her] boyfriend, so [she] was sitting on the steps." A reasonable juror would have questioned whether the victim received her injuries while arguing with her boyfriend.

Moreover, the jury heard that in 2004 the victim had told the police that she had been out smoking crack cocaine and partying all night. See *Onyiego*, 2018 WL 2175819 at \*2. A reasonable juror would have questioned whether the victim received her injuries while out partying and doing drugs that night. Thus, there is a reasonable probability that the jury would have convicted Petitioner of rape if given the opportunity in this case. Trial counsel's failure to ask for an instruction on rape prejudiced the outcome of Petitioner's case.

Lastly, based on all of the victim's inconsistencies, there is a reasonable probability that the jury would have convicted Petitioner of the lesser included offenses of aggravated sexual battery, sexual battery, attempted aggravated rape, or attempted rape if given the opportunity. This is because there is a reasonable probability that the jury would have questioned the victim's claim that Petitioner

penetrated her. Importantly, the nurse at the Rape Crisis Center testified that the victim had no vaginal or anal injuries. See *Onyiego*, 2018 WL 2175819 at \*3. Thus, there is a reasonable probability that the jury would have convicted Petitioner of aggravated sexual battery, sexual battery, attempted aggravated rape, or attempted rape if given the opportunity in this case. Trial counsel's failure to ask for an instruction on these lesser included offenses prejudiced the outcome of Petitioner's case.

Review is needed in order to address this important legal issue. Trial counsel was clearly deficient in her handling of the lesser included offense issue. Currently, there is no requirement in Tennessee that a defendant be questioned on the record about his or her decision to waive lesser included offenses. This case would give this Court the opportunity to set forth some type of requirement that ensures that the defendant is knowingly and intelligently waiving his or her right to lesser included offenses. Had such a requirement been in place at the time of the present trial, the unfortunate result in this case could have been avoided.

This case also provides this Court with the opportunity to apply the prejudice test set forth in Tennessee's Supreme Court's decision in *Moore*. Petitioner maintains that he was prejudiced by trial counsel's failure to request lesser included offenses for the charge of aggravated rape causing bodily injury. Petitioner's not receiving lesser included offenses cannot be deemed harmless beyond a reasonable doubt. Petitioner asks this Court to analyze whether or not he was prejudiced by trial counsel's performance.

## **II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO EXPLAIN THE PROS OF TESTIFYING TO PETITIONER AND FOR ADVISING PETITIONER NOT TO TESTIFY AT TRIAL.**

Petitioner submits that the Tennessee Court of Criminal Appeals erred when it concluded that trial counsel was not ineffective in her advice to Petitioner regarding testifying at trial. In denying relief as to this issue, the Tennessee Court of Criminal Appeals stated as follows:

In its order, the post-conviction accredited trial counsel's testimony that she explained the potential benefits and consequences of testifying to the Petitioner, that she told him that he could open the door to uncharged offenses, and that she never explicitly told him that she should not testify. The Petitioner himself testified that he lied to the police and that trial counsel did not want the jury to hear any inconsistencies in his story. It was reasonable for trial counsel to be concerned that the Petitioner would give testimony inconsistent with his police statement and that he could open the door to other offenses. Therefore, the evidence does not preponderate against the post-conviction court's conclusion that Petitioner failed to show deficient performance by trial counsel.

*Onyiego*, No. W2022-00629-CCA-R3-PC, at p. 28.

#### **A. Trial Counsel Failed To Explain The Pros Of Testifying.**

At the post-conviction hearing trial counsel testified that she explained the pros of testifying to Petitioner, i.e., that the jury would want to hear his side and that he had no impeachable convictions under Tennessee Rule of Evidence 609. Petitioner, in contrast, testified that trial counsel never explained the pros of testifying to him. The post-conviction court concluded that trial counsel did explain the pros of testifying to Petitioner. Petitioner submits that the evidence preponderates against this finding. Petitioner submits that his testimony was more credible than trial counsel's testimony on this issue. Trial counsel was deficient for failing to explain the pros of testifying to Petitioner.

Petitioner further submits that trial counsel's deficient performance adversely affected the outcome of his case. Petitioner testified that had trial counsel advised him of the advantages of testifying, he would have testified. Had Petitioner testified, he would have explained to the jury that he had consensual sex with the victim and that the fight occurred only after the victim tried to steal his wallet. Had the jury heard Petitioner's testimony, there is a reasonable probability that the jury would have acquitted him on both counts of the indictment.

Review is needed in order to address this important legal issue. It is critical that an attorney

explain both the pros and cons of testifying to the defendant. In the present case, Petitioner maintains that the pros were not explained to him. In a case, such as the present case, where it is the victim's word against the defendant's word it is even more critical for a defense attorney to explain the pros of testifying to the defendant. Trial counsel's failure to do so prejudiced the outcome of Petitioner's case.

## **B. Trial Counsel Advised Petitioner Not To Testify.**

The Tennessee Court of Criminal Appeals has previously stated that “[t]he following factors tend to indicate whether the failure of a defense attorney to call the defendant to testify constitutes ineffective assistance” of counsel:

- (1) only the victim and the defendant were present when the offense was committed;
- (2) only the defendant could present a “full version of [his] theory of facts”;
- (3) the defendant's testimony could not be impeached by prior criminal convictions;
- (4) the defendant could give an account of the relationship with the victim; and
- (5) the attorney had let in objectionable, prejudicial testimony with the intention of clarifying it with the testimony of the defendant.

*Bates v. State*, 973 S.W.2d 615, 636 (Tenn. Crim. App. 1997). The court in *Bates* stated that “[t]here is a strong presumption that counsel's assistance falls within the wide range of reasonable professional assistance.” *Id.*

At the post-conviction hearing trial counsel testified that she could not recall giving Petitioner any definitive answer as to whether or not he should testify at trial. Trial counsel testified that she told Petitioner that it was his decision. Trial counsel testified that she never told Petitioner, “I don't think ... we need your testimony.” Petitioner, in contrast, testified that trial counsel told him that she did not think he needed to testify because she “had the case in the bag.” Petitioner testified that he wanted to testify, but followed trial counsel's advice. Co-counsel testified that he believes that trial counsel

advised Petitioner *not* to testify.

Petitioner submits that the evidence preponderates against the post-conviction court's finding that the trial counsel did not advise Petitioner not to testify at trial. Petitioner gave credible testimony that trial counsel advised him not to testify, and co-counsel testified that he believes that trial counsel advised Petitioner not to testify. Petitioner submits that a fair reading of the record supports a finding that the trial counsel advised Petitioner not to testify.

Trial counsel acted in a deficient manner when she advised Petitioner not to testify in this case. In applying the *Bates* factors to the present case, three of the five factors weigh in favor of advising Petitioner to testify. In particular, “only the victim and [Petitioner] were present when the offenses was committed,” only Petitioner could present ““a full version of [his] theory of the facts,”” and Petitioner's testimony could not be impeached by prior criminal convictions.” *Bates*, 973 S.W.2d at 636. Petitioner recognizes that he would have been impeached with his 2004 statement to police in which he said that the victim was his girlfriend and that they were fighting over money; however, at the post-conviction hearing Petitioner explained that he said this because he did not want to be charged with patronizing prostitution. Petitioner submits that the jury would have found his explanation to be reasonable. Trial counsel should have recognized that, in order to have any chance of an acquittal in this case, Petitioner needed to testify. Advising Petitioner not to testify in this particular case was clearly deficient performance.<sup>2</sup>

Trial counsel's deficient performance adversely affected the outcome of Petitioner's case. Petitioner testified that he would have testified had trial counsel advised him to testify. Had Petitioner

<sup>2</sup>

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2 Petitioner further recognizes that trial counsel had concerns that Petitioner would open the door to other uncharged rapes. Petitioner testified that trial counsel never told him this. Petitioner submits that even if opening the door was one of the trial counsel's concerns, she could have avoided this problem by simply properly advising Petitioner not to make sweeping claims about his character and past history while testifying.

testified, he would have explained to the jury that he had consensual sex with the victim and that the fight occurred only after the victim tried to steal his wallet. Had the jury heard Petitioner's testimony, there is reasonable probability that the jury would have acquitted him on both counts of the indictment.

Review is needed in order to address this important legal issue. Petitioner maintains that it is critical for a defendant to testify in a case, such as the present case, where it is the defendant's word against the victim's word. This is especially true when the defendant's DNA is found in the victim's vagina. Trial counsel's deficient advice to Petitioner prejudiced the outcome of his case.

### **III. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO SUBPOENA THE VICTIM'S MEDICAL RECORDS FROM THE REGIONAL MEDICAL CENTER AT MEMPHIS.**

Petitioner submits that the Tennessee Court of Criminal Appeals erred when it concluded that the post-conviction court "properly found that the Petitioner failed to show he was prejudiced by trial counsel's not subpoenaing the victim's medical records." *Onyiego*, No. W2022-00629-CCA-R3-PC, at p. 29. In denying relief as to this issue, the Court of Criminal Appeals stated as follows:

According to the police report, the police officer spoke with a Regional Medical Center nurse on the morning of September 7, and she advised him that the victim was being treated for cocaine addiction and "other problems" but that the victim was not being treated for injuries related to the September 5 sexual assault. In any event, the post-conviction court, which also presided over the Petitioner's trial, reviewed the records and determined that they did not contain exculpatory evidence. Therefore, we conclude that the post-conviction court properly found that the Petitioner failed to show he was prejudiced by trial counsel's not subpoenaing the victim's medical records. ***Moreover, we decline the Petitioner's request to review the records.***

*Onyiego*, No. W2022-00629-CCA-R3-PC, at p. 29 (emphasis added).

"“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”” Burns, 6 S.W.3d at 462 (quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984)). ““In any ineffectiveness case, a particular decision not to

investigate must be directly assessed for reasonableness ... applying a heavy measure of deference to counsel's judgments.”” *Id.* (quoting Strickland, 466 U.S. at 691).

Tennessee law allows a defense attorney to subpoena a victim's medical records to the trial court for an *in camera* inspection. In *State v. Barnes*, 703 S.W.2d 611 (Tenn. 1985), the Tennessee Supreme Court stated that the defense is permitted to cross-examine a key prosecution witness about his mental instability near the time of the offense or near the time of his testimony. *Id.* at 617-18; see also *State v. Middlebrooks*, 840 S.W.2d 317, 333 (Tenn. 1992)(stating that the trial court erred in denying the defendant's request to conduct an *in camera* inspection of the witness's psychiatric records since those records pertained “to the mental stability of a witness that existed within a reasonable time before the testimony was given, which is relevant in determining veracity”)(citing *Barnes*, 703 S.W.2d at 617-18); see generally Tenn. R. Evid. 617 (stating that “[a] party may offer evidence that a witness suffered from impaired capacity at the time of an occurrence or testimony”).

In the present case, trial counsel was deficient for failing to subpoena the victim's medical records to the trial court for an *in camera* inspection. Trial counsel acknowledged that she reviewed the discovery materials in this case. Within the discovery was a police supplement written by Detective D.W. Parris, which stated as follows:

09-05-04 0906 hrs. I called the victim in order to arrange for a statement. I was told by several young f/b's that the victim had gone by ambulance to the Med last night for an anxiety attack. She was throwing up and having shortness of breath. I asked if she had been doing cocaine again and they said not since the night before. That would be Sunday night, night of the attack, that these girls had first hand knowledge of the victim doing cocaine.

...

09-07-04 0740 hrs. I spoke with Lot Supervisor Neeley and removed the hold on the defendant's car. Tow charges will hold.

0744 hrs. I called in an attempt to talk to the Victim so she could come down and give a statement. I spoke with Aquariust Bogard, victim's sister.

She said that the victim has been admitted to the hospital due to extreme dehydration and constant throwing up. She does not know how long the victim will be in the hospital. Again I left my name and phone number for her to call me when she got out.

0802 hrs. I called Med and spoke with LPN. Martin. She said the victim was not in life [-]threatening condition and that she would be held for perhaps up to 4 more days. She said that the victim is not being treated for injuries that she may have received during her sexual assault. The victim is being treated for cocaine addiction as well as other problems that the nurse would not commit [sic] about. The victim was sedated and not able to give a statement.

Based on this police supplement, trial counsel should have realized that due diligence required for her to further investigate the victim's condition at the time she was admitted to the hospital. In fact, it appears that the victim was admitted to the hospital on the same day as the alleged rape. Trial counsel should have asked the trial court to look through these records in order to determine whether there was exculpatory information in the records. For example, the records could have shown that the victim made inconsistent statements regarding the alleged rape. The records also could have shed light on the victim's physical and mental condition, which could have potentially been used by trial counsel to further discredit the victim's credibility. In particular, the records would have revealed what the "other problems" were that the nurse would not comment about to Detective Parris. These "other problems" could have potentially been used to further discredit the victim.

The post-conviction court in the present case reviewed the victim's medical records and concluded that they would not have been helpful to the defense. Petitioner asked the Court of Criminal Appeals to conduct a review of the victim's medical records in order to determine whether the records contained exculpatory information. As noted above, the Court of Criminal appeals declined this request. Petitioner submits that it was error for the Court of Criminal Appeals not to review the victim's medical records. Without actually looking at the victim's medical records, it would be impossible for the Court of Criminal Appeals to conclude that no prejudice was established. Petitioner

asks that the case be remanded to the Tennessee Court of Criminal Appeals so that the Court of Criminal Appeals can review the medical records.

Review is needed in order to address this important legal issue. Petitioner maintains that defense attorneys have a duty to reasonably investigate a victim's medical records. In the present case, the discovery materials would have put trial counsel on notice that she needed to subpoena the victim's medical records to the trial court for an *in camera* inspection. Trial counsel simply failed to exercise due diligence in the present case. The Court of Criminal Appeals concluded that there was no prejudice; however, the Court of Criminal Appeals did not review the victim's medical records. Petitioner respectfully submits that the Court of Criminal Appeals erred by not conducting an independent review of the victim's medical records. Petitioner submits that before an appellate court concludes that no prejudice has been shown, the appellate court must first view the records at issue. Petitioner asks that this Court address this important legal issue.

#### **IV. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT WHEN THE PROSECUTOR WORE A ST. JUDE EMBLEM ON HIS LAPEL DURING THE SECOND DAY OF TRIAL.**

Petitioner submits that the Tennessee Court of Criminal Appeals erred when it concluded that he was not prejudiced by the Prosecutor's wearing a St. Jude emblem on his suit jacket lapel during the trial. In denying relief as to this issue, the Court of Criminal Appeals stated as follows:

In its order, the post-conviction court found that even if General Winnig wore the St. Jude pin, the Petitioner was not prejudiced because “[t]here was nothing in this case about St. Jude and, therefore, the wearing of an emblem is not significant.” The evidence presented at the post-conviction hearing does not preponderate against the post-conviction court’s finding. Therefore, the Petitioner is not entitled to relief on this issue.

*Onyiego*, No. W2022-00629-CCA-R3-PC, at p. 29.

A defendant's “right to a trial by an impartial jury is guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, section 9 of the Tennessee

Constitution.” *State v Davidson*, 509 S.W.3d 156, 193 (Tenn. 2016)(citing *State v. Carruthers*, 35 S.W.3d 516, 559 (Tenn. 2000)). An impartial jury is a jury that “is of impartial frame of mind at the beginning of trial, is influenced only by legal and competent evidence produced during trial, and bases its verdict upon evidence connecting defendant with the commission of the crime charged.” *Id.* (quoting *Durham v State*, 188 S.W.2d 555, 558(Tenn. 1945)).

Petitioner has been unable to find a Tennessee case addressing a Prosecutor's wearing of an emblem during trial. Petitioner, however, has found legal authority that he submits is helpful in addressing this issue. First, it is well-established that during closing argument a Prosecutor is prohibited from using “arguments calculated to inflame the passions or prejudices of the jury.” *State v. Goltz*, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003). Second, Tennessee Supreme Court in *Davidson* held that a trial court has the discretion to allow members of the audience to wear buttons during the trial. *Davidson*, 509 S.W.3d at 196. The Court in *Davidson* explained,

Under this framework, trial courts should consider the totality of the circumstances and decide the issue on a case-by-case basis. Factors to be considered include the size and appearance of the buttons; by whom, when, and where they are worn; and whether the buttons display only a photograph of the deceased or contain a message suggesting or advocating guilt or innocence. A trial court should not allow buttons to be worn if they are so inherently prejudicial as to pose an unacceptable threat to the defendant's right to a fair trial or when the defendant establishes actual prejudice.

*Id.*

In the present case, trial counsel was deficient for failing to object to Mr. Winnig's wearing of the St. Jude emblem during the second day of trial. Petitioner submits that his testimony that Mr. Winnig was, indeed, wearing the St. Jude emblem was credible. Petitioner further submits that his testimony that he brought this issue to trial counsel's attention was credible. Trial counsel, co-counsel, and Mr. Winnig never denied that Mr. Winnig was wearing the St. Jude emblem. Instead, they simply

could not recall whether he was. For the foregoing reasons, trial counsel should have objected to Mr. Winnig's wearing the St. Jude emblem.

Trial counsel's deficient performance adversely affected the outcome of Petitioner's case. The jury would have been more inclined to side with the State upon seeing Mr. Winnig's St. Jude emblem. This is especially true considering that several members of the jury were in the medical field or had a spouse in the medical field. In particular, Juror Myers worked as a nurse and her husband worked as a nurse also. Juror Hodges was retired from pharmaceutical sales. *Id.* at 22. Juror Coplon worked as a healthcare executive and his wife was a nurse practitioner. *Id.* at 23. Had the jury not seen Mr. Winnig wearing the St. Jude emblem, there is a reasonable probability that the jury would have acquitted Petitioner.

Review is needed in order to address this important legal issue. As stated above, Petitioner has been unable to find any Tennessee case law addressing a Prosecutor wearing a decorative emblem during a jury trial. The present case presents this Court with an Opportunity to address this important legal issue. Petitioner maintains that a Prosecutor's wearing of such emblems can be prejudicial to the defense. Considering the composition of the jury in the present case coupled with the lack of credible proof against Petitioner, the wearing of the emblem was prejudicial to Petitioner.

## **V. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATES IMPROPER CLOSING ARGUMENT.**

Petitioner submits that the Tennessee Court of Criminal Appeals erred when it concluded that he was not entitled to relief based on the State's closing argument in this case. As to the State's closing argument that Petitioner knew he did not have money, the Court of Criminal Appeals stated that he failed to show prejudice since, on direct appeal, the Court of Criminal Appeals declined to find plain error. See *Onyiego*, No. W2022-00629-CCA-R3-PC, at p. 30.

As to the State's closing argument that "the State cares and that's why you all should care," the

Court of Criminal Appeals stated as follows:

The recurrent theme in this case was that the victim, a prostitute and a drug addict, was not credible. In his rebuttal closing argument, the prosecutor asserted that the Petitioner carefully targeted a prostitute and drug addict because he was counting on the victim not reporting the rape to the police and, if she did, the police not taking her seriously. The prosecutor then stated as follows:

[W]ho cares about a prostitute who is addicted to drugs? The State of Tennessee cares. That's why in the indictment that I read yesterday, at the start of this trial, it says this aggravated rape is a crime not just against [the victim], but against the peace and dignity of the State of Tennessee. So the State cares and that's why you all should care.

While the prosecutor may have made the statement at issue to appeal to the jury's emotions, in the context of the prosecutor's entire argument that the Petitioner targeted the victim because she was a prostitute and drug addict, we cannot say that the statement was so inflammatory as to have changed the verdict. Therefore, we agree with the post-conviction court that the Petitioner is not entitled to relief on this issue.

*Onyiego*, No. W2022-00629-CCA-R3-PC, at p. 31.

#### **A. Comment That Petitioner Knew He Did Not Have Money.**

The Prosecutor in the present case made the following comments during her closing argument:

And when [the victim] said, Well, how much money do you have? And he said \$40, what can I get for \$40. And she told him. They made an agreement. He made that agreement with her in front of her house on McLemore, *knowing he didn't have a dime to his name.*

(emphasis added).

Petitioner submits that trial counsel was deficient for failing to object to the Prosecutor's comment that Petitioner knew he did not "have a dime to his name." Trial counsel testified that she reviewed the discovery materials in this case. The discovery materials indicated that a twenty dollar bill was found in the Petitioner's wallet. In addition, Trial Exhibit 23 shows what appears to be a bill in

Petitioner's wallet. Petitioner offered credible testimony that he got co-counsel's attention when this comment was made and told co-counsel that he did have money. For all of these reasons, trial counsel should have objected to the Prosecutor's comment that Petitioner knew he did not "have a dime to his name." Trial counsel also should have requested a curative instruction.

Trial counsel's deficient performance prejudiced the outcome of Petitioner's case. The Prosecutor's comment was extremely damaging to Petitioner's case because it misled the jury into believing that Petitioner had no money at all. This would have caused the jury to believe that Petitioner's intent, from the very beginning, was to rape the victim. Since there was never an objection, there were no curative measures taken by the trial court or the Prosecutor. When coupled with the improper closing argument discussed in the next subsection, the Prosecutor's closing argument here had an even bigger impact on the jury. Lastly, the proof against Petitioner was not strong. As discussed above in Section I, the victim's testimony was filled with numerous inconsistencies.

Had trial counsel objected to this particular closing argument and asked for a curative instruction, there is a reasonable probability that Petitioner would have been acquitted. Petitioner acknowledges that on direct appeal the Court of Criminal Appeals declined to find plain error regarding this particular closing argument. The Court of Criminal Appeals on direct appeal stated:

*Here, no evidence was presented at trial as to whether the Appellant possessed any money when he picked up the victim. However, the victim testified that the Appellant refused to give her any money before they had sex. As a result, the victim logically concluded that he did not have any money. Therefore, we cannot say that the prosecutor intentionally misled the jury or misstated the evidence.*

*Onyiego*, 2018 WL 2175819 at \*10 (emphasis added). As noted above, Trial Exhibit 23 shows what appears to be a bill in Petitioner's wallet. Thus, the Court of Criminal Appeals on direct appeal was incorrect when it stated that no evidence was presented at trial showing that Petitioner had money when he picked up the victim. As such, Petitioner submits that this Court can still consider this issue despite

the fact that it was addressed as plain error on direct appeal.

## **B. Comment That The State Cares So The Jury Should Care.**

The Prosecutor in the present case made the following comments during his rebuttal closing argument:

It's like when Ms. Wallace says, who cares about a prostitute who is addicted to drugs? The State of Tennessee cares. That's why in the indictment that I read yesterday, at the start of this trial, it says this aggravated rape is a crime not just against [the victim], but against the peace and dignity of the State of Tennessee. *So the State cares and that's why you all should care.*

(emphasis added). The Tennessee Court of Criminal Appeals has stated that “[t]he prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.” *Goltz*, 111 S.W.3d at 6. As noted above, the Court of Criminal Appeals in the present case stated that the Prosecutor “may have made the statement at issue to appeal to the jury's emotions.” *Onyiego*, No. W2022-00629-CCA-R3-PC, at p. 31. Petitioner maintains that the Prosecutor's comment that “the State cares and that's why you all should care” was an argument calculated to inflame the passions of the jury. As such, trial counsel should have objected and asked for a curative instruction.

Trial counsel's deficient performance prejudiced the outcome of Petitioner's case. The Prosecutor's comment was extremely damaging to Petitioner's case because it played on the jury's emotions and would have caused the jury to side with the State. Since there was never an objection, there were no curative measures taken by the trial court or the Prosecutor. When coupled with the improper closing argument discussed in the previous subsection, the Prosecutor's closing argument here had an even bigger impact on the jury. Lastly, the proof against Petitioner was not strong since the victim's testimony was filled with numerous inconsistencies. Had trial counsel objected to this particular closing argument and asked for a curative instruction, there is a reasonable probability that Petitioner would have been acquitted.

Review is needed in order to address this important legal issue. Petitioner maintains that both of the above-noted closing arguments were improper. The present case would give this Court the opportunity to remind the State that it has to be careful when presenting its closing argument to the jury. Considering the weaknesses in the State's proof, the closing arguments cannot be deemed harmless error in the present case.

## **VI. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RETAIN A DNA EXPERT.**

Petitioner submits that the Court of Criminal Appeals erred when it concluded that trial counsel was not ineffective for failing to retain a DNA expert. In denying relief as to this issue, the Court of Criminal Appeals stated as follows:

In addressing this issue in its order, the post-conviction court recalled trial counsel's testimony that she did not hire an independent DNA expert because the Petitioner always maintained that he had sex with the victim. The post-conviction court then found that the Petitioner failed to present evidence as to how he was prejudiced by trial counsel's failure to obtain DNA evidence. On appeal, the Petitioner has failed to explain, and we fail to see, how an expert's not finding the Petitioner's DNA in the victim's vagina could have helped his case when his entire defense was based on his claim that he had consensual sex with the victim. Accordingly, nothing preponderates against the post-conviction court's finding that the Petitioner failed to show prejudice

*Onyiego*, No. 2022-00629-CCA-R3-PC, at p. 31

In *Kendrick v State*, 454 S.W.3d 450 (Tenn. 2015), this Court stated that “[i]n most cases ... the decision to select an expert, or which expert to select, constitutes one of the the 'strategic' defense decisions that *Strickland v Washington* shields from scrutiny.” *Id.* at 475. “In many cases, cross-examining the prosecution's expert will be just as effective as, and less risky than, utilizing a rebuttal expert.” *Id.* Indeed, “[e]ach case must stand on its own facts.” *Id.*

Trial counsel was deficient for failing to retain DNA expert in this case. Had a DNA expert concluded that Petitioner's DNA was not present in the victim's vagina, the whole complexion of this

case would have changed. Trial counsel may have, indeed, taken a different approach at trial. In this particular case, Petitioner maintains that due diligence required trial counsel to have the DNA independently tested by an expert. Petitioner maintains that it was deficient to simply rely on the T.B.I.'s results. Petitioner acknowledges that he did not establish prejudice at the post-conviction hearing since he failed to present testimony from a DNA expert. As argued below in section X, Petitioner submits that the post-conviction court erred in denying his request for state funding for a DNA expert.

Review is needed in order to address this important legal issue. In *Kendrick* Tennessee Supreme Court addressed the standard for determining whether counsel was ineffective for failing to hire an expert. This case provides this Court with an opportunity to further discuss counsel's obligations in retaining expert assistance for trial.

## **VII. TRIAL COUNSEL WAS INEFFECTIVE FOR TELLING THE JURY IN OPENING STATEMENT THAT THE PROOF WAS MUCH MORE CONSISTENT WITH A CONSENSUAL ENCOUNTER.**

Petitioner submits that the Tennessee Court of Criminal Appeals erred when it concluded that trial counsel was not ineffective for telling the jury during opening statement that the proof in this case was much more consistent with a consensual encounter. In denying relief as to this issue, the Court of Criminal Appeals stated as follows:

At the post-conviction evidentiary hearing, trial counsel testified that she made the statement because the Petitioner's defense was that he and the victim had consensual sex. In its order, the post-conviction court accredited trial counsel's testimony and found that her opening statement was an informed tactical decision that would not be second-guessed by the post-conviction court.

The Petitioner testified at the evidentiary hearing that he told trial counsel during their first meeting that he had consensual sex with the victim. Although the Petitioner did not testify at trial, trial counsel vigorously attacked the victim's credibility on cross-examination in an attempt to show that the victim and the Petitioner had consensual sex. Therefore, trial counsel's decision to tell the jury

opening statement that the Petitioner had consensual sex with the victim was a reasonable tactical decision that will not provide a basis for post-conviction relief....

*Onyiego*, No. W2022-00629-CCA-R3-PC, at p. 32.

In *State v. Zimmerman*, 823 S.W.2d 220 (Tenn. Crim. App. 1991), the Court of Criminal Appeals stated, “The trial attorney should only inform the jury of the evidence that he is sure he can prove....His failure to keep [a] promise [to the jury] impairs his personal credibility. The jury may view unsupported claims as an outright attempt at misrepresentation.” *Id.* at 225 (quoting McCloskey, *Criminal Law Desk Book*, § 1506 (3)(O) (Matthew Bender, 1990)).

In the present case, trial counsel made the following comment in her opening statement: “And I submit to you, ladies and gentlemen, after you listen to the State's witness, to all of their testimony, listen to the differences, that you will see the proof in this case is much more consistent with the consensual encounter of having sex than it is with rape.”

At the post-conviction hearing, trial counsel explained that she made this comment because consent was her theory of the case and she attempted to establish her theory through vigorous cross-examination of the victim regarding her inconsistencies. Trial counsel acknowledged that at the time she made her opening statement she did not know whether Petitioner was going to testify. In denying relief as to this issue, the post-conviction court concluded that trial counsel's opening statement was “an informed tactical decision which will not be second-guessed by [the post-conviction court].”

Trial counsel was deficient for making this comment during her opening statement. Since Petitioner did not testify, the jury never heard proof of a consensual sexual encounter. Trial counsel's comment likely damaged her credibility in the eyes of the jury. This deficient performance adversely affected the outcome of Petitioner's case. Had trial counsel not made this comment in her opening statement, there is a reasonable probability that Petitioner would have been acquitted at trial.

Review is needed in order to address this important legal issue. Petitioner maintains that

defense counsel should not make these types of sweeping claims in an opening statement when defense counsel is not sure whether the defendant is going to testify. Making this claim in opening statement in the present case prejudiced the outcome of Petitioner's case.

## **VIII. THE CUMULATIVE EFFECT OF TRIAL COUNSEL'S ERRORS WARRANTS POST-CONVICTION RELIEF.**

Petitioner submits that the Tennessee Court of Criminal Appeals erred when it concluded that he was not entitled to relief under the cumulative error doctrine. In denying relief as to this issue, the Court of Criminal Appeals stated as follows:

In this case, the Petitioner has demonstrated that he is entitled to relief for one of his convictions of aggravated [rape] based on trial counsel's failure to advise him about waiving the statute of limitations and her failure to request jury instructions on certain lesser-included offenses. However, he has not demonstrated other multiple instances of deficient performance. Therefore, he is not entitled to relief under the cumulative error doctrine.

*Onyiego*, No. W-2022-00629-CCA-R3-PC. At p. 32.

“The cumulative error doctrine is a judicial recognition that there may be multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial.” *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). The post-conviction court in the present case failed to address the cumulative error doctrine.

Trial counsel in the present case engaged in a number of serious missteps that, in the aggregate, deprived Petitioner of a fair trial. To briefly summarize, trial counsel: (A) failed to request any lesser included offenses; (B) failed to advise Petitioner of the advantages of testifying; (C) advised Petitioner not to testify at trial; (D) failed to subpoena the victim's medical records to the trial court for an *in camera* inspection; (E) failed to object to Mr. Winnig's wearing the St. Jude emblem on his lapel; (F) failed to object to improper closing arguments made by the State; (G) failed to retain DNA expert; and

(H) told the jury in opening statement that the proof was much more consistent with a consensual encounter. All of these missteps worked together to deprive Petitioner of a fair trial in this case. Therefore, Petitioner is entitled to a new trial under the cumulative error doctrine.

Review is needed in order to address this important legal issue. As noted above, the Court of Criminal Appeals in the present case concluded that trial counsel was deficient in handling the lesser included offense issue pertaining to one of the counts of aggravated rape. The Court of Criminal Appeals, in addressing the closing argument issue, also stated that the Prosecutor “may have made the statement at issue to appeal to the jury’s emotions.” *Onyiego*, No. W2022-00629-CCA-R3-PC, at p. 31. Petitioner maintains that trial counsel was deficient in the other areas discussed above as well. Petitioner asks that this Court accept this case in order to analyze whether he is entitled to relief under the cumulative error doctrine.

## **IX. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CITE TO TRIAL EXHIBIT 23 IN HIS MOTION FOR NEW TRIAL AND IN HIS BRIEF TO APPEAL.**

Petitioner submits that the Tennessee Court of Criminal Appeals erred when it concluded that appellate counsel was not ineffective when he failed to refer to Exhibit 23 in his motion for new trial and in his brief on appeal. In denying relief as to this issue, the Court of Criminal Appeals in the present case stated as follows:

In its order, the post-conviction court found that appellate counsel’s “decisions” not to refer to exhibit 23 in the motion or the appellate brief “were both strategic and tactical in nature.” The post-conviction court also inherently accredited appellate counsel’s testimony that he still supported the argument with documents from discovery.

At the post-conviction evidentiary hearing, appellate counsel testified that he did not refer to exhibit 23 in the motion for new trial or in the appellate brief because he did not notice the exhibit when he reviewed the discovery materials. Therefore, the evidence preponderates against the post-conviction court’s finding that appellate counsel made a strategic decision not to refer to the exhibit. Regardless, our review of the record on direct appeal of the Petitioner’s

convictions confirms that appellate counsel introduced documentation at the motion for new trial hearing, showing that the Petitioner's wallet contained twenty dollars when he was arrested on September 5, 2004. Moreover, as this court noted in its direct appeal opinion, appellate counsel advised the trial court about the documents at the hearing. Appellate counsel also referred to the documents in the Petitioner's appellate brief. Therefore, the trial court and this court were aware of evidence that the Petitioner's wallet contained twenty dollars. Accordingly, even if [appellate counsel] did not refer to exhibit 23, the Petitioner has failed to demonstrate that he was prejudiced by appellate counsel's failure.

*Onyiego*, No. W2022-00629-CCA-R3-PC, at p. 33.

Appellate counsel argued in the motion for new trial and in his brief in the Court of Criminal Appeals that the Prosecutor's closing argument stating that Petitioner did not have money on the day of the crime constituted plain error. See *Onyiego*, 2018 WL 2175819 at \*8. In particular, appellate counsel's complaint was about the following portion of the State's closing argument:

He didn't have any money. I'll give it to you later. I'll give it to you after.  
...

So what evidence did you hear of force or coercion and the use of a weapon? Well, [the victim] told you she wanted to leave. She had that right. She agreed to have sex for \$40. She wanted to go to one location. He told her, If you don't like it, we'll leave. They got there, she didn't like it, he didn't leave. And then he didn't have the money.

...  
And when he said, Well, how much money do you have? And he said \$40, what can I get for \$40. And she told him. They made an agreement. He made that agreement with her in front of her house on McLemore *knowing he didn't have a dime to his name*.

*Id.* (emphasis added).

At the motion for new trial hearing, appellate counsel "advised the trial court that according to the MPD's Crime Scene Narrative form, the MPD's Property Release form, and MPD's Evidence Permanent Assignment Receipt form, the Appellant's wallet contained one twenty-dollar bill at the time of his arrest." *Id.* at \*9. Appellate counsel "argued that although the State did not introduce the forms into evidence at trial, the State provided the forms during discovery; therefore, the prosecutor's claim that the Appellate did not have any money was 'not correct.'"<sup>33</sup> *Id.*

In its decision on direct appeal, the Court of Criminal Appeals noted that the issue was waived since trial counsel failed to object to the closing argument at trial. *Id.* The Court of Criminal Appeals on direct appeal declined to find plain error, stating as follows:

*Here, no evidence was presented at trial as to whether the Appellant possessed any money when he picked up the victim. However, the victim testified that the Appellant refused to give her any money before they had sex. As a result, the victim logically concluded that he did not have any money. Therefore, we cannot say that the prosecutor intentionally misled the jury or misstated the evidence.*

*Id.* at \*10 (emphasis added).

At the post-conviction hearing, appellate counsel conceded that he never cited to Trial Exhibit 23 in his motion for new trial or appellate brief. Appellate counsel explained that he did not cite to Trial Exhibit 23 because he did not know about Trial Exhibit 23.

Appellate counsel was deficient for failing to cite to Trial Exhibit 23 in his motion for new trial and in his appellate brief. Trial Exhibit 23 shows what appears to be a bill in Petitioner's wallet. Appellate counsel should have reviewed Trial Exhibit 23 and cited to it in his motion for new trial and brief. Had appellate counsel cited to Trial Exhibit 23, there is a reasonable probability that the trial court would have granted a new trial at the motion for new trial hearing. This is because Trial Exhibit 23 shows what appears to be a bill in Petitioner's wallet, which means that the Prosecutor's closing argument was a misstatement of *the evidence*. The documents that appellate counsel introduced into evidence at the motion for new trial were not introduced into evidence at trial. Thus, the jury never considered those documents.

Assuming that the trial court did not grant a new trial, there is a reasonable probability that the Court of Criminal Appeals would have found the Prosecutor's closing argument to be plain error on appeal had appellate counsel cited to Trial Exhibit 23 in his brief. As noted above, in its decision on direct appeal, the Court of Criminal Appeals found that "no evidence was presented at trial as to

whether the Appellant possessed any money when he picked up the victim.” *Onyeigo*, 2018 WL 2175819 at \*10. The Court of Criminal Appeals relied on this fact when it found no merit to Petitioner’s arguments that the State made an improper closing argument. Had appellate counsel referred to Exhibit 23, there is a reasonable probability that the outcome of the appeal would have been different because the Court of Criminal Appeals would have seen that there was, indeed, *evidence* in the record that Petitioner had money.

Review is needed in order to address this important legal issue. Petitioner submits that appellate counsel has a duty to study the appellate record before filing a motion for new trial and before filing a brief. In the present case, appellate counsel conceded that he was unaware of Trial Exhibit 23. Thus, he failed to cite Trial Exhibit 23 in his motion for new trial and brief. On Petitioner’s direct appeal, the Court of Criminal Appeals noted that there was no evidence in the record that Petitioner had money on him. Had appellate counsel cited to Exhibit 23 in his brief, there is a reasonable probability that the Court of Criminal Appeals would have concluded that the Prosecutor’s closing argument was plain error since there would have been evidence in the record that Petitioner had money on him.

The Court of Criminal Appeals in the present case places much emphasis on the discovery documents that showed that Petitioner had money. *Onyeigo*, No. W2022-00629-CCA-R3-PC, at p. 33. This is unusual considering that on direct appeal the Court of Criminal Appeals dismissed the importance of those discovery documents since they were never placed into evidence before the jury. See *Onyeigo*, 2018 WL 2175819 at \*10. Petitioner asks that this Court review this issue in order to determine whether appellate counsel’s deficient performance affected the outcome of the appeal.

## **X. THE POST-CONVICTION COURT ERRED IN DENYING PETITIONER’S REQUEST FOR FUNDING FOR AN INVESTIGATOR AND FOR A DNA EXPERT.**

The Tennessee Court of Criminal Appeals concluded that Petitioner was not entitled to state

funding for an investigator and a DNA expert. See *Onyiego* No. W2022-00629-CCA-R3-PC, at p. 34.

In denying relief as to this issue, the Court of Criminal Appeals stated:

This court is bound by the decisions of the Tennessee Supreme Court. *Wesley Jones v. State*, No. W2022-00629-CCA-R3-PC, 2016 WL 4357422, at \*22 (Tenn. Crim. App. Aug 11, 2016). Therefore, while we can appreciate the Petitioner's argument, we must conclude that he was not entitled to funds for an expert or an investigator.

*Onyiego*, No. W2022-00629-CCA-R3-PC, at p. 34.

On February 10, 2021, Petitioner filed a motion seeking state funding for a DNA expert. On that same date the post-conviction court entered an order denying this motion. On May 6, 2021, Petitioner filed a motion seeking state funding for an investigator. On that same date the post-conviction court entered an order denying this motion. Petitioner submits that the post-conviction court erred when it denied his request for state funding for a DNA expert and for an investigator.

Petitioner acknowledges that Tennessee Supreme Court Rule 13, § 5(a)(2) states that “[i]n non-capital post-conviction proceedings, funding for investigative, expert, or other similar services shall not be authorized or approved.” Tenn. Sup. Ct. R. 13, § 5(a)(2)(citing *Davis v. State*, Tennessee Supreme Court concluded that indigent non-capital post-conviction petitioners are not constitutionally entitled to funding for expert services. 912 S.W.2d at 6969-97.

While acknowledging this adverse authority, Petitioner maintains that Tennessee Supreme Court Rule 13, § 5(a)(2) violates his federal and state constitutional rights to due process. In order to establish prejudice in a post-conviction proceeding, a petitioner is required to present at the post-conviction hearing the witness he claims should have been presented in the trial court. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990)(stating that “[w]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing”).

In the present case, Petitioner needed to present a DNA expert at the post-conviction hearing in

order to prove prejudice in his claim that trial counsel was ineffective for failing to retain a DNA expert. Petitioner needed an investigator in order to locate the victim since one of Petitioner's claims in his *pro se* petition was that trial counsel failed to interview the victim. Petitioner submits that it is not fair to provide funding for expert witnesses to a defendant at the trial level, but to deny funding to that same defendant when he is attempting to prove prejudice at the post-conviction level. Moreover, it is unfair to deny an indigent petitioner the right to obtain evidence of ineffective assistance that would be accessible to a similarly situated petitioner with greater financial means. Tennessee Supreme Court Rule 13, §5(a)(2) acts as a barrier to indigent petitioners who are trying earnestly to prove prejudice in their post-conviction case. This barrier violates a petitioner's federal and state rights to due process of law. See U.S. Const. amend 14; Const. art. I, § 8.

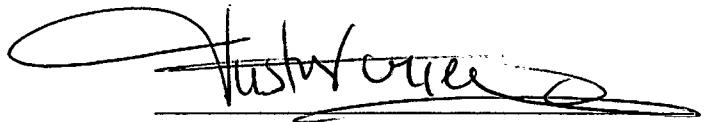
The Tennessee Supreme Court has stated that “[a]ll that due process requires in the post-conviction setting is that the defendant have “the *opportunity* to be heard at a meaningful time and in a meaningful manner.”” *Stokes v. State*, 146 S.W.3d 56, 61 (Tenn. 2004)(quoting *House v. State*, 911 S.W.2d 705, 711 (Tenn 1995)(quoting *Matthew v. Eldridge*, 424 U.S. 319, 333 (1976)))(emphasis added in *House*). When a petitioner is denied the funding he needs to get witnesses to the courtroom and simultaneously is required to present these witnesses, he is denied the opportunity to be heard in a meaningful manner. Tennessee Supreme Court Rule 13, § 5(a)(2), by denying State funding to petitioners for needed services, denies petitioners a meaningful post-conviction hearing in Tennessee.

Review is needed in order to address this important legal issue. As argued above, Petitioner submits that post-conviction petitioners should be entitled to funding for investigators and experts. Without such funding it is virtually impossible for petitioners to prove their claims on certain issues. This case gives this Court the opportunity to address this critical issue.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Honorable Court that the petition for a writ of certiorari should be granted.

Respectfully submitted,



Justus G. Onyiego

*pro se*

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