IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, TENNESSEE
AT CLARKSVILLE

STATE OF TENNESSEE	)	
	)	
vs.	)	No. 33971
	)	
COURTNEY B. MATHEWS,	)	
Defendant	)	

ORDER DENYING MOTION FOR NEW TRIAL

I. Introduction

This matter came before the Court May 9-10, 2022, for a hearing on Mr. Mathews' motion for new trial. After reviewing the motion, the evidence presented at the hearing, the record in this case, and the relevant authorities, the Court concludes the Defendant has not established he is entitled to relief. Accordingly, the motion for new trial is DENIED.

II. Procedural History

A. Trial and Direct Appeal[1]

Mr. Mathews was indicted for the January 1994 robbery of a Clarksville Taco Bell and the killings of Kevin Campbell, Angela Wyatt, Patricia Price, and Marsha Klopp, who were employees at the store. Following a 1996 jury trial, he was convicted of four counts of first degree murder and one count of especially aggravated robbery. The State sought the death penalty based upon two potential statutory aggravating factors:

> (i)(5) The murder was especially heinous, atrocious, or cruel, in that it involved torture or serious physical abuse beyond that necessary to produce death; and,

[1] The Hon. John H. Gasaway, III, presided over Defendant's trial. The undersigned judge presided over the subsequent post-conviction proceedings.

> (i)(12) The defendant committed "mass murder," which is defined as the murder of three (3) or more persons, whether committed during a single criminal episode or at different times within a forty-eight month period

Tenn. Code Ann. § 39-13-204(i)(5) and (12) (supp. 1993).

The jury found the State had proven the (i)(5) heinous, atrocious, or cruel aggravating factor beyond a reasonable doubt on all four counts and sentenced the Defendant to four sentences of life without parole for the murder convictions. The trial court imposed a twenty-five-year sentence for the especially aggravated robbery conviction and ordered all sentences to be served consecutively. The Defendant filed a timely motion for new trial in 1996, but no hearing was held on the motion. The trial court denied the initial motion for new trial in March 2005.

The Court of Criminal Appeals affirmed the Defendant's convictions and sentences. *See State v. Courtney B. Matthews*, No. M2005-00843-CCA-R3-CD, 2008 WL 2662450 (Tenn. Crim. App. July 8, 2008) ("Mathews direct appeal opinion"). Mr. Mathews did not file a Rule 11 application for permission to appeal to the Tennessee Supreme Court before the 60-day limitations period expired.

B. Post-Conviction

For reasons explored elsewhere, the hearing on Mr. Mathews' post-conviction matter was not held until May 30-31, 2017. On August 7, 2017, this Court issued a written order denying Mr. Mathews post-conviction relief. The Defendant appealed and on direct appeal the Court of Criminal Appeals granted Mr. Mathews partial relief. The Court left the Defendant's convictions and sentences in place but granted him a delayed motion for new trial and the right to an appeal this Court's order if warranted. *Courtney B. Mathews v. State*, No. M2017-01802-CCA-R3-PC, 2019 WL 7212603 (Tenn. Crim. App. Dec. 27,

2019) ("Mathews post-conviction opinion"). Neither party sought permission to appeal following the Court of Criminal Appeals' opinion.

C. Motion for New Trial

On April 1, 2020, this Court appointed attorney Luke Evans, who has represented Defendant in a "hybrid" arrangement on post-conviction, to represent Mr. Mathews during the new trial proceedings. Mr. Mathews filed a 271-page, pro se motion for new trial on June 22, 2020. Following a June 30, 2020 hearing, this Court ordered counsel to file an amended new trial motion no later than January 1, 2021, and set a hearing for April 12-14, 2021. However, numerous delays ensued based in part on the Tennessee Department of Correction (TDOC)'s limits on attorney visitation during the COVID pandemic. The Court filed several orders granting Defendant's motions for continuances and/or extensions to file the amended motion for new trial:

1. December 18, 2020: The Court entered an order resetting the amended motion filing deadline for April 1, 2021.
2. March 30, 2021: The Court entered an order resetting the filing deadline for July 1, 2021, and the hearing date for November 29-December 2, 2021.
3. July 13, 2021: The Court entered an order resetting the filing deadline for September 1, 2021, and the hearing date for April 11-14, 2022.
4. August 19, 2021: The Court entered an order continuing the hearing date to May 9-12, 2022.
5. August 24, 2021: The Court entered an order extending the filing deadline to December 1, 2021, with the hearing date remaining May 9-12, 2022.

6. November 22, 2021: The Court entered an order extending the filing deadline to March 1, 2022, and keeping the hearing date of May 9-12, 2022.
7. February 24, 2022: The Court entered an order extending the filing deadline to March 18, 2022, and keeping the May 2022 hearing date.

On March 17, 2022, the Defendant filed another motion to continue the new trial hearing and extend the filing deadline for the amended new trial motion. Two weeks later, this Court filed an order setting a hearing on the continuance motion the morning of May 9, 2022—the first day of the scheduled hearing on the motion for new trial. The Court's March 17th order added, "In the event the Court does not grant the Defendant's Seventh Motion to Extend Deadline and to Continue Hearing, Counsel for both sides need to be prepared to argue on the currently-filed Motion for New Trial (filed on or around June 16, 2020)[.]"

On May 9, 2022, as scheduled, the Court held a hearing on the Defendant's most recent continuance motion. The Court denied the motion, and the new trial hearing proceeded with Mr. Mathews being the only witness. During the new trial hearing the Defendant filed an amended motion for new trial; like the initial pro se motion, this motion, also filed pro se, contained over 270 pages of listed issues and supporting arguments. After the hearing, the Defendant filed an application for an extraordinary appeal, pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure, challenging this Court's denial of the continuance motion. The Court of Criminal Appeals denied the Defendant's motion. *State v. Courtney B. Mathews*, No. M2022-00734-CCA-R10-CO (Tenn. Crim. App. June 8, 2022) (order denying petition for extraordinary appeal).

III. Evidence Presented at Trial

On direct appeal, the Court of Criminal Appeals summarized the evidence presented at the Defendant's trial:

> The convictions resulted from the 1994 robbery of a Clarksville Taco Bell restaurant and the slayings of four restaurant employees, Kevin Campbell, Angela Wyatt, Patricia Price, and Marsha Klopp. The evidence at trial established that in the early morning hours of January 30, 1994, the four employees were executed during a robbery of the restaurant. The defendant and David Housler were separately convicted of the murders and of especially aggravated robbery. *See State v. Housler*, 193 S.W.3d 476 (Tenn. 2006).
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> At trial, the defendant's roommate and fellow service member, Carl Ward, testified on January 29, 1994, he held a barbecue for a friend at the duplex he and the defendant shared. He recalled the defendant, who had taken a job at Taco Bell to earn money to pay for damages to a friend's car, worked on this evening and arrived at the duplex sometime between 8:30 and 9:30 p.m. The defendant went straight to his room, and Mr. Ward followed shortly thereafter. Mr. Ward recalled the defendant, who was already wearing a "jogging suit," donned black denim pants, a white shirt, a tie, and a black denim, three-quarter length jacket over the other clothes. As he did so, the defendant remarked, "Pay attention people, you won't be seeing these clothes no more [sic]." After changing clothes, the defendant packed his nine millimeter handgun, a shotgun, and ammunition into a black book bag and told Ward he was planning to take the guns to Nashville to sell them. Mr. Ward recalled the defendant wore white surgical gloves as he loaded and packed the weapons. Just prior to leaving, the defendant removed his driver's license, bank card, and "other papers" from his wallet. The defendant then grabbed his bowling bag and said, "Just in case the cops stop me, just in case the police stop me, I'm going bowling."
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> On the following day, the defendant told Mr. Ward a "Sargent Johnson" had telephoned to inform him about the Taco Bell murders. Mr. Ward recalled the defendant then "broke down crying" and told him "[t]hat somebody had broke in and they hid in the ceiling." The defendant also stated 30 shots had been fired from the same gun. When Mr. Ward inquired about the scratches on the defendant's face and the gasoline and grass stains on his shirt, the defendant said he lost his weapons, jacket, and wallet during a "scuffle" with three unknown assailants at a gas station. Mr. Ward identified a black jacket, bowling bag, shotgun and carrying bag, and a .25 caliber handgun as those the defendant possessed when he left their apartment on January 29, 1994.
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> On February 1, 1994, Mr. Ward returned home from work to find the defendant "very depressed." The defendant went to his room after giving Mr. Ward "a very emotional hug." Shortly thereafter, Mr. Ward called the defendant's name

and when the defendant did not respond, went into the defendant's room. The defendant had attempted suicide by slitting his wrists with a box cutter. He told Mr. Ward, "I don't deserve to live. I ain't shit." As Mr. Ward tried to bandage his wounds, the defendant said "he hurt four people, he killed four people."

Mr. Ward recalled both he and the defendant had ejected shells from the nine millimeter handgun inside the apartment. He also recalled an incident when the defendant had fired several rounds into his bedroom floor. Mr. Ward remembered the serial numbers had been scratched off the nine millimeter handgun and the shotgun.

Shawntea Ward, Mr. Ward's wife, testified at the time of the crimes she lived with her husband, the defendant, and the defendant's girlfriend, Kendra Corley. Ms. Ward recalled the defendant possessed a nine millimeter handgun, a .25 caliber handgun, and a shotgun at the time of the offenses. She stated the defendant carried the nine millimeter "[a]lmost every time he left the house." She confirmed the serial numbers had been obliterated. Ms. Ward testified, shortly before the offenses, the defendant had a fight with his wife, Yessica, who was visiting from New York. She stated the defendant fired three shots into the bedroom floor with the nine millimeter.

Ms. Ward testified on January 29, 1994, the defendant arrived home from work at approximately 9:00 p.m. and went to his room. Later, he asked to borrow her black bag, and she agreed. The defendant left the apartment approximately 45 minutes later, and Ms. Ward did not see him until the following morning. She remembered the defendant got up at 9:00 a.m. and told her "his squad leader had just called and said Taco Bell got robbed last night. He was going to see if Pat was alright." Ms. Ward said she had not heard the telephone ring prior to the defendant making the statement. The defendant returned an hour and a half later and asked to speak to Ms. Ward. He apologized for not returning her book bag and explained he had been robbed in Nashville on the previous evening. The defendant told her his bag, guns, jacket, and wallet had been taken in the robbery. As the two discussed the robbery of the Taco Bell, the defendant said, "Well, whoever did it, they went into Taco Bell before it closed and they went to the men's restroom and got up in the ceiling." When Ms. Ward expressed doubt about whether the ceiling would hold that much weight, the defendant responded, "[I]f you get along the wall area it would hold the weight of a person being up there." The defendant also told Ms. Ward the two victims had been found in the kitchen and two in the storage area. In addition, he stated $700 to $800 had been taken and the money in the drop box had not been taken. The defendant told Ms. Ward the safe had been shot open with a shotgun and the perpetrator "had gotten out through the back door because it doesn't have a key lock. It just latches." The defendant also stated a nine millimeter and a shotgun had been used during the robbery and some 30 rounds had been fired.

Ms. Ward recalled, after watching a televised press conference about the crimes, she confronted the defendant with her suspicion regarding his involvement.

In response, the defendant laughed and said, "If I would have did it [sic] I would have took all the money. I wouldn't have left any." The defendant also told Ms. Ward the victims "would give up the money without any resistance" and the panic buttons for the security system were not functioning at the time of the offenses. Ms. Ward remembered, two days later, she went to the mall with Ms. Corley and Ms. Corley paid several bills and made numerous purchases with cash.

Clarksville Police Department Lieutenant Richard Hinkle arrived at the Taco Bell at approximately 8:00 a.m. on January 30, 1994. He observed four victims, three female and one male, in the employee-only area of the restaurant and noted the "safe and office had been ransacked." In addition, a ceiling panel had "been broken and hanging down" in the women's restroom and a ceiling panel in the men's restroom "had been pushed back up over the rest of the panels" revealing an "opening in the ceiling." Lieutenant Hinkle recovered a heater or fan vent cover which had once been in the ceiling of the men's restroom and sent it to the Tennessee Bureau of Investigation (TBI) for forensic analysis. Lieutenant Hinkle testified once he and other Clarksville officers realized the magnitude of the crime, they handed over the gathering and testing of evidence functions to the TBI. Lieutenant Hinkle estimated 10 to 20 rounds had been fired inside the restaurant. He stated he had not shared this information with anyone but other law enforcement officers.

Taco Bell shift manager John Arthur Ballard, Jr., testified, although he was not scheduled to work on the night of the offenses, he went to the restaurant at approximately 1:45 a.m. to check on Ms. Klopp because it was only her second time to work as closing manager. Mr. Ballard recalled he went through the drive-thru and spoke to Ms. Klopp, who said everything was okay but they were running behind and it would likely be 3:30 or 4:00 a.m. before they were able to leave. Mr. Ballard also recalled seeing Ms. Price cleaning. On the following morning, Mr. Ballard arrived to open the Taco Bell at 7:25 a.m. and saw a cardboard box in the drive-thru window. He also noticed all of the employees' cars were still in the lot. When he went inside, he saw a body lying behind "the second employee door towards the rear of the building." Mr. Ballard stated he ran out of the restaurant, locked the door behind him, and telephoned 911. Mr. Ballard let officers into the restaurant when they arrived, and then traveled to the police station to give a statement. Mr. Ballard stated he had not shared his observations with anyone but law enforcement officers and Taco Bell management.

Shawn Joseph Depto testified in September of 1993 he loaned the defendant a shotgun he had received from his father. Mr. Depto's father testified he had given the gun to his son and it had been used primarily for hunting. He identified the shotgun recovered from behind the defendant's residence as the same one he had given to his son.

Fitz Dickson testified he purchased a Taurus nine millimeter handgun for the defendant on December 22, 1993. Mr. Dickson recalled the defendant wanted

the weapon for home security and, after acquiring the weapon, the defendant carried it with him often. According to Mr. Dickson, he saw the defendant on January 30, 1994, and the defendant, who was crying, told Mr. Dickson he was depressed because a friend had been murdered at the Taco Bell.

Taco Bell assistant manager Deann Marie Kellett testified she hired the defendant on January 19, 1994. She recalled, as she gave the defendant a tour of the restaurant, the defendant asked a number of questions about the structure, the after-hours procedures regarding off-duty employees, and the closing procedure. The defendant also requested a key to exit the door opposite the door used by other employees and asked if there were security cameras inside the restaurant. Additionally, the defendant questioned Ms. Kellet regarding the accessibility to the roof and asked what, if anything, was kept inside the drop ceiling. Ms. Kellet recalled she answered each of the defendant's questions and provided him with the key he requested.

Shawn Peghee, who was in the defendant's Army unit, testified he and the defendant worked together in the mail room at Fort Campbell. Mr. Peghee recalled, on the Friday before the offenses, the defendant, who was carrying a nine millimeter handgun, came to the mail room on his day off and asked to examine the safe. The defendant asked about ways to access the safe and specifically asked whether one could access the safe by shooting the dial with a shotgun. As they left the room containing the safe, the defendant told Mr. Peghee "something big was going to happen" on this weekend. Mr. Peghee testified he spent the weekend in Nashville with his girlfriend and when he returned to Fort Campbell on Monday morning, he heard about the murders at the Taco Bell. Mr. Peghee stated, "[I]t clicked in my mind that it was probably [the defendant] that may have done the Taco Bell murders."

Patrick Cooper, who attended a party on January 30, 1994 at the residence shared by the defendant and Mr. Ward, testified the defendant arrived at the residence sometime between 8:00 and 8:30 p.m. and went to his room. Shortly thereafter, Mr. Cooper and Mr. Ward went to the defendant's room. Mr. Cooper recalled there being a nine millimeter handgun and a shotgun, along with a black book bag, on the defendant's bed. The defendant was wearing a "Miami Hurricanes" sweat suit and white surgical gloves as he wiped the fingerprints from the guns and placed them into the bag. He then put on black jeans, black boots, black gloves, and a black jacket over the sweat suit. The defendant told Mr. Cooper and Mr. Ward he was taking the weapons to Nashville to sell them. The defendant explained the change of clothes was in case "he got into trouble with the guns." The defendant also told them they would never see those clothes again.

James Bowen testified he attended a party at the Hillcrest Trailer Park on January 21, 1994. At this party, Mr. Bowen overheard the defendant say "he was out looking for a good place to rob" and "the easiest place to rob would be the Taco Bell." According to Mr. Bowen, the defendant said "it would be easy because

nobody else would be around, it's open late at night, and he knew some of the people there and maybe they would let him in." Mr. Bowen recalled Kevin Tween, David Housler, and an individual he knew only as "Box Train" participated in the conversation about robbing the Taco Bell.

Jelain Walker, who worked the 7:00 p.m. to midnight shift at the Taco Bell on January 29, 1994, recalled when she clocked out shortly after midnight on January 30, the dining room was closed, the doors were locked, and there were no customers inside the restaurant. She stated the defendant had worked earlier in the evening and she remembered seeing him squatting near the trash cans after he had clocked out. When she said, "I thought you were gone," the defendant responded, "I am gone. You don't see me." Ms. Walker stated she never actually saw the defendant leave the Taco Bell.

Yowanda Maurizzio testified she drove by the Taco Bell at approximately 1:10 a.m. on January 30, 1994, and saw a light-skinned black woman and a black male wearing Taco Bell uniforms sitting at a table in the dining area of the restaurant. Frankie Sanford testified he placed an order at the drive-thru at 1:30 a.m. He recalled, Mr. Campbell, with whom he was acquainted, took his order. He also recalled seeing three female employees and a black male, whom he identified as the defendant, standing near the counter. Mr. Sanford stated the employees did not appear to be in any distress. Allen Ceruti testified at approximately 4:25 a.m., he passed the Taco Bell on his way to work and saw a black male appear briefly at the back door of the restaurant. James Phinnesse testified he and the defendant were the only black males employed at the Taco Bell at the time of the offenses and he did not work on January 29 or 30, 1994.

A black hooded jacket identified as belonging to the defendant and a pair of white surgical gloves were found on the bank of the Red River. TBI forensic scientist Deane Johnson examined the jacket and testified the stains on the coat tested positive for blood. Forensic DNA analyst Richard Guerrieri performed Polymerase Chain Reaction testing on the cutting from the black jacket. The testing established the blood on the jacket belonged to Mr. Campbell.

TBI forensic scientist Larry Hall lifted fingerprints from the door facing and the exhaust fan cover in the men's restroom of the Taco Bell. Agent Hall testified the print on the exhaust fan cover matched the left middle finger of the defendant. TBI forensic scientist Hoyt Phillips testified he matched latent prints on the vent cover and door facing with the defendant.

TBI microanalysis forensic scientist Sandra Evans compared black plastic fragments taken from the front of the safe area inside the Taco Bell with black plastic fragments taken from the defendant's black jacket. Ms. Evans testified the fragments came from the same object. Additionally, Ms. Evans examined the bowling ball bag found in the backseat of the defendant's car and found $2,576 under a panel in the bottom of the bag. The bag also contained bowling-related

items.

Sharie Underwood, Team Unit Manager for Taco Bell at the time of the offenses, testified in January 1994 only two black males were employed at the Riverside Taco Bell. She confirmed $2,967.68 was taken during the robbery and $754 was left in the front register drop box. Ms. Underwood testified only managers had keys to the drop box. Ms. Underwood recalled, on the day before the murders, the defendant asked her whether exiting through the back door would set off an alarm, and she told him no.

David Lee Rose worked a 3:00 a.m. to noon shift at the McDonald's located near the Taco Bell on January 30, 1994. He recalled, shortly after daybreak, he went to empty the trash cans in the parking lot. As he emptied one of the cans, the bottom of the bag burst, and shotgun shells and nine millimeter shells fell to the ground. He also found a black wallet, black glove, and several coin wrappers. Mr. Rose stated he originally gave the nine millimeter shells to a coworker and kept the shotgun shells for himself. When he heard about the crimes at the Taco Bell, he turned the ammunition over to his supervisor, who then turned it over to the police.

TBI firearms examiner Daniel Royse testified he arrived at the Taco Bell on January 30, 1994, and spent more than 17 hours on the scene. During this time, Agent Royse recovered "eight fired bullets that were all nine millimeter lugers. Forty bullet projectile fragments. Twenty-four nine millimeter cartridge cases, and one fired .12 gauge shot shell case and one live .12 gauge shotshell." The markings on the fired bullets and cartridge cases were consistent with a 1992 model Taurus or Beretta nine millimeter and indicated they had been fired from the same weapon. Two of the bullets recovered from the Taco Bell matched bullet fragments recovered from the defendant's bedroom floor. A cartridge casing found in the defendant's room matched the twenty-four casings found at the Taco Bell. A bullet recovered from the neck of Mr. Campbell and a bullet fragment recovered from the body of Ms. Klopp had been fired from the same gun as those discovered in the defendant's apartment. Agent Royse testified a rifle slug shotgun shell had been used to shoot the dial on the Taco Bell safe and the shell and shell case recovered from the Taco Bell bore the same mechanism marks as those found at McDonald's. Agent Royse explained they had been loaded and chambered in the same shotgun. The mechanism marks were attributed to the shotgun given to the defendant by Mr. Depto and recovered under an old sofa behind the defendant's residence.

Doctor Charles Harlan performed the autopsies of the victims. Doctor Harlan testified Mr. Campbell died of multiple gunshot wounds. He explained Mr. Campbell suffered a "tight contact gunshot wound" just above the right ear which passed through the brain causing immediate loss of consciousness and nearly instant death. A second gunshot wound struck Mr. Campbell on the right side of the face slightly above the jaw line; this wound did not cause unconsciousness and was not fatal. Doctor Harlan testified the gunshot wounds to Mr. Campbell's chest, upper arm, and hand were not fatal. He classified the wounds to Mr. Campbell's

arms and hand as defensive wounds.

Ms. Wyatt suffered gunshot wounds to the head, face, shoulder, and leg. Doctor Harlan testified the gunshot wound to Ms. Wyatt's head was fired from a distance of four to six inches, passed through the brain, and was fatal. Gunshot wounds to her cheek, shoulder, and leg were fired from greater than 24 inches. The cause of Ms. Wyatt's death was a "near gunshot wound to the head, secondary to multiple gunshot wounds."

Ms. Price suffered two gunshot wounds to her head, one to the "right side of the head below the right ear," and one to the back of the head that exited to the left of her mouth. Doctor Harlan classified these wounds as "tight," meaning "the muzzle of the gun [was] pressed tightly against the skin's surface." Another gunshot struck her left forearm, passed through the arm, grazed the upper arm, entered the chest, passed through the lung, and exited below the shoulder blade. Doctor Harlan testified this wound, which he classified as a defensive wound, would have caused death within three to five minutes. A gunshot to her upper right arm passed through the right side of her chest. Other gunshot wounds to her left hip and left inner thigh were not fatal. Doctor Harlan explained the cause of death was "multiple gunshot wounds to include a tight contact wound to the head and a gunshot wound to the chest."

Ms. Klopp suffered a "through and through" gunshot wound to her right forearm and a gunshot wound to the "outside portion of the right breast" which exited through her back. She also suffered a gunshot to the upper right breast which passed "through the aorta and esophagus and the right lung" before exiting through the shoulder. According to Doctor Harlan, this wound would have caused death in three to 15 minutes. A gunshot wound to her left inner thigh was not fatal.

Denise Foley testified, on behalf of the defendant, she attended a party at the Hillcrest Trailer Park on January 21, 1994, and the defendant was not there. Similarly, Shane Box testified he had never attended a party at the Hillcrest Trailer Park with the defendant. The defendant's work records from the Taco Bell established he worked from 6:23 p.m. to 3:14 a.m. on January 21, 1994.

Jacqueline Dickinson testified for the defense she was driving by the Taco Bell at approximately 2:00 a.m. on January 30, 1994, when she saw the lights come on inside the restaurant. Ms. Dickinson stated she looked inside the restaurant and saw a white male "around . . . five nine to six foot. He had a short hairstyle . . . like a military cut. . . . [H]e was a middle sized man." She said the man was standing at the counter but did not appear to be a Taco Bell employee.

The defense also entered into evidence a "charge agreement" signed by the State and David Housler which established Mr. Housler had agreed to plead guilty to conspiracy to commit the murder of the Taco Bell victims.

> In rebuttal, the State called Kimberly Pellino and Hector Ortiz, each of whom testified the defendant attended a party at the Hillcrest Trailer Park prior to the murders at the Taco Bell. Deronda King positively identified the black jacket recovered near the Red River and tested by the TBI as one belonging to the defendant.
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> The Honorable Charles Bush, General Sessions Court judge, testified he had been the lead prosecutor in the Taco Bell murders, prior to taking the bench. Judge Bush stated the agreement between Mr. Housler and the State was terminated as a result of Mr. Housler's implicating an innocent person in the crimes. Judge Bush also stated, at the time the State entered into the agreement, the State "believed . . . that Housler was not the shooter involved." He testified "the State never had any evidence placing David Housler inside the Taco Bell shooting anyone."
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> At the conclusion of the guilt phase of the trial, the jury found the defendant guilty as charged of the felony murders of Mr. Campbell, Ms. Klopp, Ms. Price, and Ms. Wyatt. The jury also convicted him of especially aggravated robbery.
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> During the penalty phase of the trial, family members of the victims testified as to the effect of the victims' deaths on the lives of their respective families. The defendant's sister, pastor, and several friends testified about the defendant's childhood and general good character.
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> At the conclusion of the penalty phase, the jury declined to impose the death penalty and instead imposed four sentences of life without parole on the basis of its findings the murders were especially heinous, atrocious, or cruel because they involved serious physical abuse beyond that necessary to produce death.

Mathews direct appeal opinion, 2008 WL 2662450, at **1-9.

IV. Evidence Presented at New Trial Hearing

As stated above, Mr. Mathews was the only witness who testified at the new trial hearing. The Defendant's testimony largely consisted of him summarizing the arguments raised in his amended motion for new trial. Mr. Mathews also introduced a handful of exhibits during the hearing.

The Court will not summarize the testimony here, but the Court has given the Defendant's testimony due consideration in filing this Order. The Court notes the

Defendant's testimony was consistent with the arguments raised in his amended motion. However, considering the relative lack of proof introduced at trial to support several of Defendant's assertions—and considering Mr. Mathews presented little evidence at the new trial hearing, despite having over two years to prepare and present his case—the Court finds the Defendant's credibility to be limited.

V. Review of Defendant's Claims

A. Defendant's Assertions Regarding Alleged Judicial Misconduct and Counsel's Alleged Conflict of Interest

Throughout his motion for new trial, the Defendant asserts he is entitled to relief on several grounds based on the purported conflict of interest maintained by his trial attorneys, Isaiah Gant and Jim Simmons. Defendant claims his trial attorneys were conflicted for several reasons, among which were trial counsel's letting counsel for codefendant David Housler review Mr. Gant and Mr. Simmons' files (including, unintentionally, privileged files) and counsel's supposed belief Mr. Mathews was guilty and the codefendant was innocent. Certainly Mr. Mathews was entitled to conflict-free counsel before, during, and after trial, but this Court concludes Mr. Mathews has not established his trial attorneys were conflicted before and during trial. The Court notes during the new trial hearing Mr. Mathews abandoned his claims regarding counsel's ineffective assistance, so the conflict of interest claims may well be abandoned as well. Furthermore, Mr. Mathews raised the conflict of interest claims as part of his post-conviction proceedings. The Court of Criminal Appeals concluded the conflict claims were without merit, at least during the period before and during trial, which is the time at issue in the new trial motion. *See* Mathews post-conviction opinion, 2019 WL 7212603, at **21-27. The Defendant has offered no

additional proof to substantiate his allegations regarding his attorneys' conflict of interest other than his own self-serving testimony. Furthermore, Defendant has pointed this Court to no authority stating a conflict of interest results from an attorney's belief a client is guilty.

Similarly, the Defendant argues the trial judge could not preside over Defendant's trial based on what Mr. Mathews deems judicial misconduct. During the new trial hearing, the Defendant acknowledged the incidents which he asserts were most indicative of judicial misconduct—the trial judge's post-trial ex parte meeting with Mr. Gant and Mr. Simmons, the judge's failure to inform Mr. Mathews of the meeting, the judge's remaining on the case after the meeting, and the judge's allowing counsel to remain on the case after the meeting—occurred after trial. Nevertheless, the Defendant asserts the nature and extent of the trial judge's misconduct after trial could lead one to reasonably conclude the trial judge also exhibited misconduct before and during trial as well. However, on post-conviction the Defendant raised claims regarding the trial judge's purported misconduct, and the Court of Criminal Appeals found these claims to be without merit. *See id.* at **27-32. The Defendant has presented no evidence, apart from his own self-serving testimony, which would lead this Court to set aside the reasoning of the appellate courts. Thus, as with the Defendant's conflict of interest assertion, this Court finds the Defendant's judicial misconduct claim to be without merit.

B. Ineffective Assistance of Counsel Claims

Throughout the new trial motion, Mr. Mathews asserts his trial attorneys, Isaiah Gant and Jim Simmons, were ineffective for several reasons. At the new trial hearing, the Defendant asserted he was withdrawing his ineffective assistance of counsel claims and

preserving them for later post-conviction review. Thus, the ineffective assistance of counsel claims will not be reviewed here. Furthermore, the Court is of the impression the time for Defendant to raise any claims regarding the ineffectiveness of his trial attorneys was his previous post-conviction proceedings. *See* Tenn. Code Ann. § 40-30-102(c) ("This part contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment"). Should the Defendant's convictions and sentences withstand appellate review, the Court believes any ineffective assistance of counsel claims to be raised in the subsequent post-conviction proceedings could relate only to Mr. Mathews' current attorney, Luke Evans. *See* Tenn. Sup. Ct. R. 28, § 9(D)(3)(a) ("Where a delayed appeal is granted and the petitioner is unsuccessful on appeal, and *new issues* cognizable in a post-conviction proceeding result from *the handling of the delayed appeal*, the petitioner may amend the original post-conviction petition to include such *new issues*.") (emphasis added)

C. Defendant's Specific Claims

Claims 1-2: Insufficient Evidence to Establish Property was Taken "From the Person" of All Four Victims[2]

The count of the indictment charging Mr. Mathews with especially aggravated robbery stated, in relevant part,

> in the State and County aforesaid, the said COURTNEY B. MATTHEWS [sic] unlawfully, knowingly and violently did use deadly weapons, to-wit: 9 mm pistol and 12 ga. Shotgun, to take approximately $1,527.66[3] from the persons of Kevin Campbell, Angela Wyatt, Patricia Price and Marsha Klopp, which said monies were owned by Taco Bell, Inc. but in possession of said victims, as a result of which said victims suffered serious bodily injury, to-wit: death, and by the use of said deadly weapons, to-wit: 9 mm pistol and 12 ga. Shotgun, did take from the persons of said

[2] Claim 2 addressed trial counsel's supposed ineffectiveness in failing to address this issue at trial. As stated above, at the new trial hearing the Defendant abandoned issues related to his attorneys' alleged ineffectiveness.
[3] The amended indictment adjusted this figure to $2,968.78.

victims property of a value of over $ 1,000.00, in violation of TCA 39-13-403 and against the peace and dignity of the State of Tennessee.

In his first of several claims related to the especially aggravated robbery conviction, the Defendant argues the State failed to prove the essential elements of especially aggravated robbery. Specifically, the Defendant argues a conviction for especially aggravated robbery required the State to establish beyond a reasonable doubt Mr. Mathews took the money from all four victims, but only Ms. Klopp, the store manager, could have had either actual or constructive possession of money taken from the store. The Defendant also argues there was no proof the money was taken from the persons of, or in the presence of, the victims other than Ms. Klopp. Thus, the Defendant claims his conviction for this offense must be reversed.

The Defendant has pointed this Court to no authority which stands directly for Mr. Mathews' proposition—i.e., when several victims are listed in an indictment for theft, robbery, or related offenses, a conviction requires the State to prove property was taken from the possession of all listed victims. Even if this argument were true, the Defendant's assertions regarding the other three victims not being in possession of the money taken are without merit. Tennessee appellate courts have upheld robbery convictions in cases where the courts have concluded employees of a business are in constructive possession of property taken from a business. *See Moorman v. State*, 577 S.W.2d 473, 475 (Tenn. Crim. App. 1978) (pharmacist intern named as victim in indictment "had joint possession of the drugs and cash," along with owner of pharmacy, taken in pharmacy robbery); *State v. Joel Christian Parker*, M2001-00773-CCA-R3-CD, 2002 WL 31852850, at *2 (Tenn. Crim. App. Dec. 18, 2002) (employees of robbed pawn shop "were clearly 'owners' within the meaning of" relevant statutes). Furthermore, the Court of Criminal Appeals has stated,

"The theft of property located in essentially the same building as the victim is located, is sufficient to be 'from the person' of the victim." *State v. John David Palmer*, No. W1999-01310-CCA-R3-CD, 2001 WL 124527, at *6 (Tenn. Crim. App. Feb. 7, 2001) (citing *Morgan v. State*, 415 S.W.2d 879, 881 (Tenn. 1967), *Jones v. State*, 383 S.W.2d 20, 24 (Tenn. 1964), and *State v. Edwards*, 868 S.W.2d 682, 699-700 (Tenn. Crim. App. 1993)).

Thus, even if the State was required to prove beyond a reasonable doubt the property was taken from all four listed victims, the victims' work as Taco Bell employees inside the store from which the money was taken was sufficient to meet the "taking" element of the offense, even if the money was not taken from the immediate presence of all four victims. The Defendant is not entitled to relief on this issue.

Claims 3 and 4: Insufficient Evidence to Establish Serious Bodily Injury Occurred Before or Contemporaneously with Taking of Property

Citing to the Tennessee Supreme Court's opinion in *State v. Henderson*, 531 S.W.3d 687, 694 (Tenn. 2017), the Defendant argues in Claim 3 the evidence is insufficient to support his especially aggravated robbery conviction because there is no proof the victims suffered serious bodily injury before the taking of the money from Taco Bell was complete. Because the evidence was insufficient to support a conviction for especially aggravated robbery or the lesser offenses of aggravated robbery or theft, the Defendant argues, his convictions for felony murder (murder in the perpetration of robbery) must also be vacated.

Similarly, in Claim 4 the Defendant argues the trial judge, in the order denying Defendant's original new trial motion, erred in relying on the "continuous offense theory" in concluding the evidence was sufficient to support the conviction. However, the Court of Criminal Appeals' grant of a delayed appeal renders Claim 4 moot.

In *Henderson*, the Tennessee Supreme Court concluded "the victim of an especially aggravated robbery must suffer his or her serious bodily injury during the commission of the underlying theft, i.e., before the accused has completed the theft of property." 531 S.W.3d at 694. The Court's conclusion in *Henderson* essentially restated the rule established in *State v. Owens*, 20 S.W.3d 634, 641 (Tenn. 2000), in which the Tennessee Supreme Court held "the use of violence of fear must precede or be contemporaneous with the taking of the property from the person to constitute the offense of robbery under Tenn. Code Ann. § 39-13-401."

In *Henderson*, the Tennessee Supreme Court made the following observation which is also relevant to this Court's current determination: "This conclusion [serious bodily injury must precede or be concurrent with taking], however, simply posits another question: at what point is the theft underlying a robbery complete?" *Henderson*, 531 S.W.3d at 694. As the Defendant argues, the Tennessee Supreme Court in *Owens* rejected the "continuous offense theory," under which a robbery could be accomplished "not only if the perpetrator uses force or intimidation to take possession of the property, but also if force or intimidation is used to retain possession immediately after the taking, or to carry away the property, or to facilitate escape." *Owens*, 20 S.W.3d at 639 (internal quotations omitted).

Tennessee case law suggests the taking of items from a business is *not* complete when the suspect leaves the store, but instead when the suspect "has completed his theft of all the property he intended to steal." *Henderson*, 531 S.W.3d 687. In *State v. Swift*, a jury convicted a defendant of aggravated robbery after he took two boxes containing video game cartridges from their cases at a Best Buy store, shoved the boxes down his pants, and upon exiting the store several minutes later swung a knife at two employees who attempted

to restrain him. 308 S.W.3d 827, 829 (Tenn. 2010). The Court of Criminal Appeals affirmed Mr. Swift's conviction, but the Tennessee Supreme Court, citing to *Owens*' rejection of the "continuous offense theory," reversed the conviction, concluding,

> the taking was complete when Mr. Swift removed the games from their cases and concealed them in his pants, evincing his intent to deprive Best Buy of the property." *See* Tenn. Code Ann. § 39-14-103.
>
> Mr. Swift's use of violence and fear did not precede or occur contemporaneously with the removal and concealment of the games. Mr. Swift walked toward the exit and swung a knife at the Best Buy employees several minutes after the taking was complete. We therefore hold that the evidence is insufficient to support Mr. Swift's conviction for aggravated robbery.

Swift, 308 S.W.3d at 831 (footnote omitted).

Thus. for the Defendant's conviction for especially aggravated robbery to stand, the Defendant would have had to shoot the victims before taking the store's money—or at the same time as taking the store's money. In this case, the evidence is entirely circumstantial, but in viewing the evidence in the light most favorable to the State there is sufficient proof to conclude the Defendant shot the victims before or contemporaneously with taking the money from the Taco Bell safe. The Defendant's suggestion whereby the perpetrator took the money before killing the victims makes little sense considering the evidence and reasonable inferences taken therefrom. The evidence strongly suggests the Defendant blew open the safe with a shotgun blast. Had the Defendant blasted open the safe before killing the victims, it is likely the victims would have heard the loud noise coming from the office and would have contacted the police, fled the store, gone to the office to discover the source of the noise, or hid. The victims' bodies were not found in positions suggesting they were heading to the office or hiding, and the police were not contacted before or during the offenses. The victims were found with multiple wounds and/or wounds which were

inflicted from a short distance, suggesting the Defendant removed any threat of being discovered by killing the victims before taking the money. Had the Defendant killed the victims after taking the store's money, it is unlikely the victims would have been found where they were located, but instead they likely would have been found near the rear door, with the Defendant firing upon the victims as he was leaving the store from the back door. Of note, the Defendant had asked the store manager about the door before the killings to ensure the door was not alarmed. Additionally, gunfire from a fleeing perpetrator would not have left contact wounds on the victims.

The Defendant suggests the State's bill of particulars regarding the "avoiding arrest" statutory aggravating circumstance makes clear the State proceeded under the theory the victims were killed after the money was taken. The bill of particulars is dated October 10, 1995; it did not appear in the record on appeal, but Mr. Mathews included this document as an exhibit to the current new trial hearing. The bill of particulars states, in its entirety:

> The State of Tennessee moves to amend its Bill Of Particulars to include proof of the defendant's employment relationship with Taco Bell Restaurant and his potential identification by the victims as a motive for each of the murders as the said motives relate to murders committed to interfere with, avoid, or prevent the lawful arrest or prosecution of the defendant or another.

However, at the capital sentencing hearing the jury was not instructed on the "avoiding arrest" statutory aggravating circumstance—only the "mass murder" and "heinous, atrocious, or cruel" aggravating circumstance. Even if the State proceeded during the guilt/innocence phase under the theory the perpetrator killed the victims to avoid arrest, the facts referenced above make it reasonable to conclude the Defendant's best opportunity to avoid arrest came through killing the victims *before* blasting open the Taco Bell safe. The language of the bill of particulars does not specifically allege the Defendant killed the

victims after taking the store's money. Additionally, it is reasonable to presume a perpetrator wishing to avoid arrest can kill witnesses or potential witnesses to a robbery *either* before or after the robbery and achieve the same goal.

For these reasons, the Court concludes the evidence was sufficient for the jury to conclude, beyond a reasonable doubt, the Defendant killed the victims before taking money from the Taco Bell safe. Thus, the Defendant's contention his convictions for especially aggravated robbery and felony murder must be reversed is without merit.

Claim 5 and 6: Improper Constructive Amendment of Indictment[4]

As provided above, the count of the indictment charging Mr. Mathews with especially aggravated robbery alleged Mr. Mathews "unlawfully, *knowingly*, and violently" committed the act, while the trial court's jury instructions reflected the language of the statute, permitting the jury to convict the Defendant if he acted "intentionally or knowingly." The Defendant argues the inclusion of the "intentional" mental state during the jury charge when the intentional mental state was not listed in the indictment impermissibly allowed the jury to convict him under a theory and set of facts different from those charged in the indictment. The Court disagrees.

The Defendant's contention about charging a different theory or set of facts based on the charging of a mental state which differs from the one provided in statute is not supported by the relevant case law. The Tennessee Supreme Court has concluded an indictment need not list the mens rea if "the required mental state may be inferred from the nature of the criminal conduct alleged." *State v. Hill*, 954 S.W.2d 725, 729 (Tenn. 1997).

[4] Claim 6 addressed trial counsel's supposed ineffectiveness in failing to address this issue at trial. As stated above, at the new trial hearing the Defendant abandoned issues related to his attorneys' supposed ineffectiveness.

"[A]n indictment which references the statute defining the offense is sufficient and satisfies the constitutional and statutory requirements for a charging instrument." *State v. Duncan*, 505 S.W.3d 480, 488 (Tenn. 2016) (internal quotations omitted). "In other words, citing the statute in the indictment provides the defendant with notice regarding the mens rea of the offense, gives notice regarding the offense upon which to enter judgment, and protects against future prosecution for the same offense." *State v. Smith*, 492 S.W.3d 224, 239 (Tenn. 2016).

Citing to the principles announced in *Hill* (and restated in the later cases cited above), the appellate courts have upheld convictions in which the culpable mental state was not listed in the charging instrument. *See, e.g.*, *State v. Demon L. Smith*, No. 2021 WL 2100447, at **3-5 (Tenn. Crim. App. May 25, 2021) (indictment for introducing contraband into penal institution included both "intentional" and "knowing" mental states, when only knowing behavior required; reference to statute sufficient); *State v. Mario D. Frederick*, No. M2016-00737-CCA-R3-CD, 2017 WL 2117026, at *8 (Tenn. Crim. App. May 15, 2017) (indictment charging sexual exploitation of minor included "knowing" mental state, while statute required "intentional" mental state; indictment referenced statute and jury was instructed on "intentional" requirement); *State v. Tyrone Sain*, No. 02C01-9710-CC-00379,1998 WL 999905, at **3-4 (Tenn. Crim. App. Dec. 24, 1998) (conviction for evading arrest upheld even though indictment did not include culpable mental state of "intentional," as provided in statute; reference to statute sufficient to put defendant on notice).

Similarly, the indictment in this case, which referenced the appropriate statute for especially aggravated robbery, was sufficient to put Mr. Mathews on notice of the offense for which he was tried in the relevant count. Furthermore, this Court notes especially

aggravated robbery can be accomplished either intentionally *or* knowingly, so an indictment charging the Defendant with the knowing mental state was sufficient. Additionally, the trial judge's instructing the jury on both the intentional and knowing mental state also was proper because "[w]hen acting knowingly suffices to establish an element, that element is also established if a person acts intentionally." Tenn. Code Ann. § 39-11-301(a)(2). Thus, the Defendant's claim is without merit.

Claim 7: Improper Constructive Amendment of Felony Murder Count

Similarly, the Defendant argues. "Since the Trial court illegally amended the robbery count of the indictment by charging the greater level mental element of intentionally, it also constructively amended Counts 1-4 of the felony murder counts of the indictment."[5]

The felony murder counts of the indictment stated,

> And the Grand Jurors aforesaid, upon their oath aforesaid, do further present and say that on the date aforesaid, and in the State and County aforesaid, the said COURTNEY B. MATTHEWS unlawfully, feloniously, knowingly and recklessly did kill [name of victim], committed in the perpetration of a felony, to-wit: Robbery, in violation of TCA 39-13-202 and against the peace and dignity of the State of Tennessee.

As stated above, however, the counts' reference to the first degree murder statute was sufficient to place the Defendant on notice for the offenses with which he was charged. Thus, any issues which may have resulted from the language concerning the required mental state did not prejudice Mr. Mathews. Defendant is not entitled to relief on this issue.

[5] Amended motion for new trial, at 39.

Claims 8 and 9: Failure to Require Election for Especially Aggravated Robbery[6]

The Defendant asserts evidence was presented during his trial which could have "satisfied the elements of especially aggravated robbery for two separate victims, involving separate and distinct property being taken, in two separate and distinct criminal offenses[.]"[7] Specifically, the Defendant asserts the proof would have supported convictions for robbery of both Taco Bell's money and Marsha Klopp's keys. Thus, the Defendant asserts, the State should have elected which property was "taken" for purposes of the especially aggravated robbery count.

While, conceivably, the State could have charged two counts of especially aggravated robbery—one count for the restaurant's money and one count for the victim's keys—the State only charged the Defendant with one count, for taking money from Taco Bell. There is no evidence suggesting the Defendant's jury returned a guilty verdict based on the Defendant's taking of the victim's keys. The store's money was the only property referenced in the indictment, and the evidence produced at trial focused exclusively on the Defendant's plans to take the store's money. The language of the especially aggravated robbery count, provided above, could have been clearer, but a reading of the indictment is sufficient to establish the State charged the Defendant with taking Taco Bell's money—and only the money. A jury could not have convicted the Defendant of the taking of other property, as no other property was referenced in the indictment. The Defendant claims the jury was "confused" about the language of the indictment, but he has presented no evidence, apart from his own self-serving testimony, to support this claim. Mr. Mathews is not entitled to relief on this issue.

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[6] Claim 9 addressed trial counsel's supposed ineffectiveness in failing to address this issue at trial. As stated above, at the new trial hearing the Defendant abandoned issues related to his attorneys' supposed ineffectiveness.

[7] Amended motion for new trial at 11, ¶ 81.

Claims 10-14: Admitting Evidence of Money Found in Defendant's Bowling Bag[8]

The Defendant asserts the trial court erred by admitting evidence relating to money found in the Defendant's bowling bag; the State argued at trial the money was taken from Taco Bell, while the Defendant claims the funds came from legitimate sources. Mr. Mathews takes issue with a Taco Bell manager's trial testimony as to the amount taken from the Taco Bell differing from the testimony she offered at the preliminary hearing. The Defendant asserts this differing testimony was therefore subject to the "cancellation rule" and was inadmissible at trial. The Defendant also claims evidence concerning the amount taken was inadmissible because the State neglected or failed to file what he claims was a required action to confiscate the money under T.C.A. section 40-17-118. Finally, the Defendant takes issue with the State's referencing, during closing argument, the money found in the Defendant's bowling bag, as the Defendant claims the State did so knowing such testimony was false.

A. Sharrie Underwood Testimony and the "Cancellation Rule"

At the preliminary hearing, Ms. Underwood, the "Team Unit Manager" for Taco Bell at the time of the offenses, testified she reviewed the cash register receipts from the store on the morning of the offenses, and, based on the receipts and the regular amount of money kept in the store safe, she determined $1,527.66 was "missing" from the store following the robbery.[9] On cross-examination, she explained how she reached this amount.[10] At trial, she testified the amount "taken" from the store was $2,967.68.[11] She

[8] Claims 10 and 12 addressed trial counsel's supposed ineffectiveness in failing to address this issue at trial. As stated above, at the new trial hearing the Defendant abandoned issues related to his attorneys' supposed ineffectiveness.

[9] Preliminary hearing transcript at 18.
[10] *Id.* at 19-25.
[11] Trial transcript of June 13, 1996, at 95.

also said approximately $754 was left at the restaurant in various drop boxes.[12] Defense counsel did not cross-examine Ms. Underwood in depth at trial regarding her computation of these figures.

In explaining the "cancellation rule," the Court of Criminal Appeals has explained,

> It is a rule of law in Tennessee that contradictory statements by a witness in connection with the same fact cancel each other. *Taylor v. Nashville Banner Pub. Co.*, 573 S.W.2d 476, 482 (Tenn.Ct.App.1978). In *Johnston v. Cincinnati N.O. & T.P. Ry. Co.*, our Supreme Court stated:\
>
> > The question here is not one of the credibility of a witness or of the weight of evidence; but it is whether there is any evidence at all to prove the fact. If two witnesses contradict each other, there is proof on both sides, and it is for the jury to say where the truth lies. But if the proof of the fact lies wholly with one witness, and he both affirms and denies it, and there is no explanation, it cannot stand otherwise than unproven. For his testimony to prove it is no stronger than his testimony to disprove it, and it would be mere caprice in a jury upon such evidence to decide it either way.
>
> 146 Tenn. 135, 240 S.W. 429, 436 (1922).
>
> This rule of cancellation applies only when inconsistency in a witness' testimony is unexplained and when neither version of his testimony is corroborated by other evidence. *Taylor*, 573 S.W.2d at 483.

State v. Matthews, 888 S.W.2d 446, 449-50 (Tenn. Crim. App. 1993). Generally, a witness's testimony will be disregarded only if the testimony "is not of a cogent and conclusive nature, and if it is so indefinite, contradictory or unreliable that it would be unsafe to rest a conviction thereon." *Letner v. State*, 512 S.W.2d 643, 649 (Tenn. Crim. App. 1974) (internal quotations omitted).

The Defendant asserts Ms. Underwood's testimony is subject to the cancellation rule because she changed her testimony between the preliminary hearing and trial "with no

[12] *Id.* at 96.

credible explanation" as to the difference.[13] The Court disagrees. While the amount referenced in Ms. Underwood's testimony at trial differed from the amount referenced at the preliminary hearing, the jury was only made aware of the amount referenced in Ms. Underwood's trial testimony. At a pretrial motion hearing to amend the indictment to reflect the increased amount, the State asserted the increased amount reflected a mathematical error in the initial computation.[14] Mr. Gant did not object to this reasoning,[15] and the Defendant has offered no testimony, apart from his self-serving assertions, to cause this Court to doubt this reasoning. Furthermore, even if the trial court had disallowed testimony regarding the *amount* of money taken from Taco Bell, testimony concerning the *fact* of missing money from Taco Bell still would have been admissible. As the Defendant correctly asserts, the amount of money taken is not an element of robbery and its related offenses, and even if the amount taken from the restaurant was missing from the record the jury could have reasonably concluded the large amount of money found in Mr. Mathews' bowling bag contained, at least in part, money taken from Taco Bell. Thus, the Defendant is not entitled to relief on this issue.

B. "Violation" of T.C.A. Section 40-17-118

Tennessee Code Annotated section 40-17-118 states,

> (a) Personal property confiscated as stolen property by a lawful officer of the state, a county or a municipality of the state to be held as evidence of a crime shall be promptly appraised, catalogued and photographed by the law enforcement agency retaining custody of the property.
>
> (b) The lawful officer of the state, county or municipality, in order to detain the property from the lawful owner, for whatever reason, more than thirty (30) days,

[13] Amended motion for new trial, at 56.
[14] Transcript of pretrial motion hearing held Apr. 3, 1995, at 106.
[15] *Id.*

> shall show cause to the judge having jurisdiction over the property by petition filed by the district attorney general upon five (5) days' notice to the property owner why the property should be further detained. The court may grant or refuse the requested impounding order upon the terms and conditions as are adjudged to be proper.
>
> (c) The state, county or municipal authority holding the property shall be responsible for the return of the property to the lawful owner and shall be liable in damages to the owner of the property in the event of damage or destruction occasioned by the delay in the return of the property.

The Defendant argues this statute required the State to hold a hearing to retain the money found in the Defendant's bowling bag, and he also asserts the State's failure to do so was an admission the money found in the bowling bag was not stolen from Taco Bell.

The Defendant asserts this case should be reversed based on the holding of the unreported Court of Criminal Appeals decision involving Shelby County defendant Milton Simpson. *Simpson* dealt with a Defendant who entered a guilty plea to receiving stolen property; the trial court ordered the "$684.71 found on Simpson when he was arrested be transferred to the Criminal Court Clerk's Office to be used to defray the costs of the appellant's representation" pursuant to Tennessee Code Annotated section 40-14-202(e)." *Milton Leon Simpson v. State*, No Number in Original, 1984 Tenn. Crim. App. LEXIS 2319, at *2 (Tenn. Crim. App. Feb. 9, 1984).[16] The Court of Criminal Appeals concluded the trial court should have held a hearing—presumably under section 40-17-118—to determine if any of the funds found on Simpson belonged to the victims. *Id.* The trial court then held a hearing and concluded none of the money belonged to the victims. *Id.* Thus, the trial court ordered the money found on Mr. Simpson at his arrest to be used to defray the cost of Simpson's representation. *Id.*

[16] No Westlaw citation is available for this unpublished opinion.

Obviously, the *Simpson* case is inapplicable to Mr. Mathews' case. *Simpson* resulted from a guilty plea, and thus the appellate courts did not address whether a hearing under section 40-17-118 is required before evidence of supposedly stolen property can be admitted at trial. Nor did *Simpson* conclude the State's failure to pursue an action under section 40-17-118 means the State concedes property found on a defendant at the defendant's arrest is not stolen.

This Court is unaware of any authority interpreting the above-referenced statute in the manner suggested by the Defendant. And even if such a hearing should have been held, the Defendant has presented no proof at the new trial hearing—apart from his own self-serving testimony—suggesting a pretrial hearing regarding the source of the funds would have led the trial court to determine the money found in the bowling bag belonged to the Defendant. Thus, the Defendant is not entitled to relief on this issue.

C. Improper Closing Argument

The Defendant argues the State committed prosecutorial misconduct by arguing the money found in the Defendant's bag was taken from Taco Bell when the State knew the money in the bag belonged to Mr. Mathews. However, because none of the Defendant's other arguments concerning the purported impropriety of this evidence entitle the Defendant to relief, this Court also concludes the State's arguments concerning the money were permissible. The Defendant is not entitled to relief on this issue.

Claim 15: Admitting Evidence of Black Denim Jacket

The Defendant argues the trial court erred in admitting into evidence the black denim coat (or jacket) found on the river bank after the offense; this coat was identified as belonging to Mr. Mathews. The trial court held a pretrial hearing regarding the chain of custody issue as part of the Defendant's motion to exclude DNA evidence from the hearing; after the hearing, the trial court concluded the State had sufficiently established chain of custody.[17] The Defendant asserts the evidence should have been excluded because the State failed to establish chain of custody for the jacket.

A. Testimony Regarding Chain of Custody

In this case, Sergeant J.W. Hunt of the Clarksville Police Department testified—both at trial and in a pretrial hearing held March 19, 1996—he was part of a law enforcement contingent which searched the banks of the Red River on February 4, 1994, looking for evidence related to the Taco Bell homicides. Hunt located a black, ¾ length, denim coat on the river bank. According to Sgt. Hunt, a TBI agent picked up the coat, which Sgt. Hunt claimed had one sleeve rolled up, while Hunt held open a large brown paper bag; the agent then placed the coat into the bag. Hunt testified he sealed the bag by stapling it. Hunt transported the bag to the Clarksville Police Department's Criminal Justice Center. He said he placed his initials on the sealed bag, stapled a property receipt to the bag, and placed into a chute which dropped the evidence into a lock box in the property room. Sergeant Hunt testified he did not see the jacket again after placing it in the chute, at least not until the March 1996 pretrial hearing.

[17] Transcript of pretrial motion hearings held Mar. 21 and 28, 1996, at 55-56.

At the pretrial hearing, Sgt. Hunt testified, while at the Criminal Justice Center but before placing the evidence he collected into the evidence bin, then-Assistant District Attorney Charles Bush instructed him (Hunt) to remove the black jacket from the bag. The jacket was then displayed—by placing it atop a garbage bag which had been placed on a table—to a Black woman whose identity Hunt did not know. Hunt said Bush and the woman spoke while the jacket was being displayed, but the content of their conversation was not entered into the record. After the conversation ended, Sgt. Hunt placed the jacket back into the bag upon Bush's instructions.

The evidence shows Jon Holloway, who supervised the Clarksville Police Department property room at the time of the offenses, retrieved a bag containing the jacket on February 7, 1994 (the Monday after Sgt. Hunt deposited the jacket and other evidence at the Criminal Justice Center). He and TBI Special Agent Robert Fortner transported the bags containing the jacket and other evidence to the TBI Crime Lab, where they were then transferred to TBI evidence technician Libby Huffman. Several facts surrounding the events following Sgt. Hunt's depositing the evidence form the basis of Mr. Mathews' claim.

At trial, Holloway did not recall if the bag containing the jacket was sealed, but he claimed he had no reason to believe it was not. He testified he opened the various evidence bags to check if the items in the bags matched the items listed on the respective evidence sheets, but he asserted he did not remove the items from the bags before transferring them to TBI. He also did not recall Agent Fortner removing items from the bags. Finally, Holloway testified he did not discard any bag in which evidence may have been placed.

At the March 1996 hearing, however, Holloway's testimony differed from his trial testimony in several respects, and Mr. Gant impeached Holloway at trial based on these

inconsistencies. Holloway began his pretrial hearing testimony by stating he did not remove the evidence from the bag—he merely opened the bag to see what was inside. Holloway acknowledged he did not see his initials on the paper bag introduced at the hearing. Later in the pretrial hearing, Holloway testified, after removing the brown paper evidence bag from the lock box, he opened it to discover several items were inside, not just the black coat. At some point—on cross-examination, Holloway said it was after he and Agent Fortner arrived at the TBI Crime Lab—Holloway removed the jacket from the brown bag "[b]ecause that coat was going to the crime lab, and not the other items that were in it."[18] Holloway added, "To the best of my knowledge we removed that coat from the bag and put it into another paper bag,"[19] which Agent Fortner sealed. Holloway identified the initial "F" on the brown bag at the pretrial hearing. Holloway said Agent Fortner likely had the original bag from which the evidence was taken.

At the pretrial hearing, Holloway reviewed a form regarding chain of custody for the jacket. At the time of the jacket's collection, Hunt completed a section indicating he obtained the property on February 4, 1994, and deposited it in the lock box. Holloway then completed a section of the form reflecting he received the evidence on February 4, 1994, even though he did not open the lock box to retrieve the items until the following Monday, February 7. Holloway listed the February 4 date on the form because in his view, once the evidence was placed in the evidence chute which dropped into the lock box, the evidence was in his (Holloway's) possession. Holloway said only one other individual had a key to the lock box inside the property room: Holloway's "alternate," who could open the box only in emergencies or if Holloway was unavailable. Holloway testified at the hearing he

[18] Transcript of motion hearing held Mar. 19, 1996 (DNA motion / testimony of Holloway), at 56.
[19] *Id.*

did not believe his alternate at the time of the offenses went into the property room or opened the lock box between Hunt's dropping the evidence into the chute and Holloway's retrieving the evidence.

Both at trial and at the March 1996 hearing, Agent Fortner testified he and Holloway transported the bags containing evidence from the Clarksville Police Department to the TBI Crime Lab, but Agent Fortner denied removing any evidence from the evidence bags before transferring the bags to Libby Huffman. Agent Fortner also denied looking inside the bags to see what they contained before transferring the bags. At the pretrial hearing he testified Ms. Huffman placed orange tape on the bag once she received it; Fortner initialed this tape.

Ms. Huffman, who did not testify at trial, testified at the March 1996 hearing the bag containing the jacket was sealed at the time Agent Fortner gave it to her. She denied opening the bags before transferring the bags to TBI Special Agent Deane Johnson.

Agent Johnson, who cut blood stains from the jacket and sent the cuttings away for DNA testing, testified the brown bag containing the jacket was sealed when she received it from Ms. Huffman, and the jacket was the only item in the bag. Johnson recalled when she removed the jacket from the bag both sleeves were rolled up (rather than one sleeve, as Sgt. Hunt claimed). She did not know where the brown bag containing the jacket was as of trial, and she did not recall whether the sealed brown bag from which she retrieved the jacket had any initials on it. Curiously, at a pretrial hearing held March 28, 1996, Agent Johnson testified upon opening the sealed brown bag at the TBI Crime Lab in February 1994, she discovered a black plastic bag which in turn contained the black jacket. Johnson did not mention this black plastic bag at a March 20, 1996 hearing, nor did she mention the bag during her trial testimony.

At trial, Carl Ward testified he saw the Defendant wearing a black, ¾ length denim jacket on January 29, 1994. The sleeves of the jacket were rolled up at the time, the jacket had buttons, and it also had a drawstring around the waist. Mr. Ward claimed he heard the Defendant exclaim, "Pay attention people, you won't be seeing these clothes no more."[20] When shown the black coat at issue in this case, Mr. Ward acknowledged the jacket "look[ed] identical" to the one the Defendant wore.[21] At trial, Shawn Peghee testified he saw Mr. Mathews wearing a black coat often,[22] and when showed the black coat at issue in this case, Mr. Peghee acknowledged the coat was the same type of coat he saw the Defendant wearing.[23] Patrick Cooper also testified he saw the Defendant wearing a black "jean jacket"-like coat, ¾ length with cuffs on the sleeves, the night before the offenses.[24] Mr. Cooper said the Defendant wore a black jacket often, and Mr. Cooper also stated he heard the Defendant say the clothes he (Mathews) was wearing would not be seen again after the evening in question.[25] When shown the black jacket at issue in this case, Mr. Cooper said it "look[ed] like the one that Courtney had whenever he left the house that night."[26] When asked whether he had any doubt the jacket at issue was the same one he saw Mr. Mathews wearing the night before the offenses, Mr. Cooper replied. "No, I don't."[27]

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[20] Trial transcript of June 10, 1996, at 71.
[21] *Id.* at 108.
[22] Trial transcript of June 12, 1996, at 115.
[23] *Id.* at 116.
[24] *Id.* at 188-89.
[25] *Id.* at 191.
[26] *Id.* at 195.
[27] *Id.*

B. Defendant's Arguments

Mr. Mathews identifies Mr. Holloway's testimony as the "point wherein the chain of custody for the [black j]acket was broken[.]"[28] Mathews takes issue with Holloway's testimony regarding (1) the brown paper bag he retrieved from the property chute on February 7, 1994, which the Defendant asserts was not marked with Sgt. Hunt's initials; (2) Agent Fortner's removing the black jacket from one brown paper bag and placing it in another, when Fortner testified he did not open any of the evidence bags he retrieved from the Clarksville Police; and (3) the inconsistencies between Holloway's testimony at trial and at the March 1996 pretrial hearing. The Defendant asserts Holloway's testimony at the March 1996 hearing was false, and given the inconsistencies Holloway's testimony is subject to the cancellation rule, as examined earlier in this order.

The Defendant takes particular issue with Sgt. Hunt's initials being missing from the brown paper bag from which Agent Johnson removed the jacket at the TBI Crime Lab. He also notes Agent Johnson testified both sleeves were rolled up when she examined the jacket, as opposed to Sgt. Hunt's testimony claiming only one sleeve was rolled up. Considering these and other inconsistencies, the Defendant argues Holloway's testimony regarding the jacket violated the "physical facts rule" and should have been stricken from the record.

C. Applicable Case Law

In explaining the chain of custody requirement, the Tennessee Supreme Court stated,

[28] Amended new trial motion at 79.

Tennessee Rule of Evidence 901(a) provides: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." As we have previously recognized, it is "'well-established that as a condition precedent to the introduction of tangible evidence, a witness must be able to identify the evidence or establish an unbroken chain of custody.'" *Scott*, 33 S.W.3d at 760[29] (quoting *State v. Holbrooks*, 983 S.W.2d 697, 700 (Tenn. Crim. App. 1998)). This evidentiary rule is designed to insure "that there has been no tampering, loss, substitution, or mistake with respect to the evidence." *Id.* (quoting *State v. Braden*, 867 S.W.2d 750, 759 (Tenn. Crim. App. 1993)).

Professor Neil Cohen and his colleagues have aptly summarized the rule:

> The concept of a "chain" of custody recognizes that real evidence may be handled by more than one person between the time it is obtained and the time it is either introduced into evidence or subjected to scientific analysis. Obviously, any of these persons might have the opportunity to tamper with, confuse, misplace, damage, substitute, lose and replace, or otherwise alter the evidence or to observe another doing so. Each person who has custody or control of the evidence during this time is a "link" in the chain of custody. In theory at least, testimony from each link is needed to verify the authenticity of the evidence and to show that it is what it purports to be. Each link in the chain testifies about when, where, and how possession or control of the evidence was obtained; its condition upon receipt; where the item was kept; how it was safeguarded, if at all; any changes in its condition during possession; and when, where and how it left the witness's possession.

Neil P. Cohen et al., *Tennessee Law of Evidence* § 9.01[13][c] (5th ed. 2005) (footnotes omitted). Even though each link in the chain of custody should be sufficiently established, this rule does not require that the identity of tangible evidence be proven beyond all possibility of doubt; nor should the State be required to establish facts which exclude every possibility of tampering. *Scott*, 33 S.W.3d at 760. An item is not necessarily precluded from admission as evidence if the State fails to call all of the witnesses who handled the item. *See State v. Johnson*, 673 S.W.2d 877, 881 (Tenn. Crim. App. 1984). Accordingly, when the facts and circumstances that surround tangible evidence reasonably establish the identity and integrity of the evidence, the trial court should admit the item into evidence. On the other hand, if the State fails to offer sufficient proof of the chain of custody, the "evidence should not be admitted . . . unless both identity and integrity can be demonstrated by other appropriate means." *Scott*, 33 S.W.3d at 760 (quoting Cohen et. al., *Tennessee Law of Evidence* § 901.12, at 624 (3d ed.1995)).

[29] *State v. Scott*, 33 S.W.3d 746, 760 (Tenn. 2000).

State v. Cannon, 254 S.W.3d 287, 296 (Tenn. 2008) (footnote added).

The Tennessee Supreme Court has described the physical facts rule as follows:

> The physical facts rule may be applied in criminal cases. *State v. Hornsby*, 858 S.W.2d 892, 893 (Tenn.1993). In *Hornsby*, this Court recognized that
>
> > [t]he so-called "physical facts rule" is the accepted proposition that in cases where the testimony of a witness is entirely irreconcilable with the physical evidence, the testimony can be disregarded. That is, where the testimony of a witness "cannot possibly be true, is inherently unbelievable, or is opposed to natural laws," courts can declare the testimony incredible as a matter of law and decline to consider it. *United States v. Narciso*, 446 F. Supp. 252, 282 (E.D.Mich.1977). As stated by the Court in *Wood v. United States*, 342 F.2d 708, 713 (8th Cir.1965), "where undisputed physical facts are entirely inconsistent with and opposed to testimony . . . the physical facts must control. No jury can be allowed to return a verdict based upon oral testimony which is flatly opposed to physical facts, the existence of which is incontrovertibly established." Courts have made it clear that in order for testimony to be considered incredible as a matter of law, it must be unbelievable on its face, i.e., testimony as to facts or events that the witness physically could not have possibly observed or events that could not have occurred under the laws of nature. Thus, for example, if a witness was to testify that he saw the sun set in the east, the court would be free to declare such testimony incredible as a matter of law and disregard it.
>
> *Id.* at 894 (citations omitted). When determining the sufficiency of the evidence, then, an appellate court is not bound to consider a witness' testimony if it is impossible to reconcile with physical evidence. *Id.*
>
> The physical facts rule may be applied to negate testimony only where the physical facts at issue are "'well-established and universally recognized physical laws.'" *Id.* at 895 (quoting *Nelms v. Tenn. Farmers Mut. Ins. Co.*, 613 S.W.2d 481, 483 (Tenn. Ct. App.1978)). Significantly, "the rule may not be invoked 'where its application depends upon assumptions or calculations based upon estimates as to speed, distance, time, and other such uncertain matters in the movement of [objects].'" *Id.* (quoting *Waller v. Morgan*, 23 Tenn. App. 355, 133 S.W.2d 614, 616 (1939)).
>
> [. . . .]
>
> This Court stressed in *Hornsby* that

> the power to disregard oral testimony because of its inherent lack of believability is one that should be used sparingly. Only when the testimony is inherently improbable and impossible of belief should courts intervene to declare it incredible as a matter of law. When the testimony is capable of different interpretations, the matter should be left for the jury to decide as the sole arbiter of credibility.

Id. at 895 (citations omitted).

State v. Allen, 259 S.W.3d 671, 679-81 (Tenn. 2008). The "cancellation rule" is examined in the Court's review of issues 10-14 (regarding testimony concerning the amount of money taken from Taco Bell) above.

Mr. Mathews argues his case is analogous to two Tennessee Supreme Court opinions in which the court reversed a defendant's convictions after concluding the State failed to establish chain of custody. In *State v. Scott*, 33 S.W.3d 746, 760 (Tenn. 2000), hairs taken as part of a rape kit were placed into an envelope by a nurse practitioner; the rape kit was then collected by a police detective who in turn sent the hairs to the TBI crime lab. When TBI returned the rape kit to the detective after testing, only two hairs remained. *Id.* The detective then sent the hairs to the FBI for testing; when the FBI sent the hairs back, they were mounted on glass slides. *Id.* The detective sent the hairs to a private lab, which acknowledged the hairs were mounted on the slides when the hairs reached the private lab. *Id.*

On direct appeal, the Tennessee Supreme Court concluded,

> We agree with the appellant that the trial court erred in finding that the hair samples were properly authenticated. The hairs were not identified by a witness with knowledge that the mounted hair samples were the same hairs as the ones originally taken from the victim. Further, we can find no evidence whatsoever to show how the hairs came to be mounted on the slides. We also can find no evidence to show who mounted the hairs on the slides or whether the hairs were mounted in a manner sufficiently free of contamination or alteration. Although the hairs were apparently mounted on glass slides by someone with the FBI, no one was able to establish this important "link" in the chain of custody. Without this knowledge, it

> is impossible to know whether anyone tampered with the evidence, or whether anyone had the opportunity to "confuse, misplace, damage, substitute, lose, [or] replace" the hairs at issue. *Cf.* Cohen, et al., *Tennessee Law of Evidence* at 623–24. Because reasonable people cannot disagree that the State failed to establish this important "link" in the chain, we find that the trial court erred in admitting the analysis of the hair samples without reasonably establishing their identity and integrity. *See* Tenn. R. Evid. 901(a).

Scott, 33 S.W.3d at 760-61. The Supreme Court did not review whether the issue constituted harmless error because the court reversed the Defendant's convictions on other grounds. *See id.* at 761.

In *State v. Cannon*, the Tennessee Supreme Court concluded the trial court erred in admitting pantyhose allegedly belonging to a rape victim based on the lack of proof establishing the undergarments belonged to the victim. A nurse attempted to testify the pantyhose must have belonged to the victim because the hose were contained in a pile of clothes once the nurse arrived in the already-disrobed victim's room, and because the victim told the nurse they belonged to her, but the trial court refused this testimony on hearsay grounds. *State v. Cannon*, 254 S.W.3d 287, 297 (Tenn. 2008). A doctor at the hospital which examined the victim testified normally a suspected rape victim's clothes were kept separated and secure to preserve evidence for investigators, but the doctor did not know if this protocol was followed in this victim's case. *Id.* Furthermore, the reports of both the investigating detective and the treating nurse did not mention pantyhose; the detective testified the victim used the term "underwear" in her statement, rather than "pantyhose." *Id.* Furthermore, the pantyhose did not appear in a photograph the detective took of the victim's clothes. *Id.*

Considering *Scott*, the Tennessee Supreme Court concluded the trial court erred in admitting the pantyhose—and, accordingly, evidence of the defendant's DNA found on semen stains contained on the pantyhose— "because the pantyhose were not sufficiently

identified as belonging to the victim by a witness with knowledge." *Id.* at 298. The court also took issue with the nurse's remaining in the courtroom while the doctor testified about protocols; after the doctor's testimony the nurse was recalled as a witness and only then testified about her retrieving the hose from a bag. *Id.* The Supreme Court concluded the error in admitting the hose and evidence derived therefrom was not harmless because the "*only* tangible evidence linking Defendant in any way to [the victim] was the DNA analysis derived from the semen found on the pantyhose. Neither [the victim] nor anyone else identified Defendant as the assailant. Significantly both [the victim] and her neighbors previously identified another person as the assailant." *Id.* at 299 (emphasis in original, alterations added).

D. Application to Current Case

In this case, the black jacket was important evidence for the State's case because it contained perhaps the only two pieces of evidence linking the wearer of the jacket to the crime scene—drops of one victim's blood and black plastic fragments consistent with the safe dial blown apart during the robbery. This Court also finds the number of inconsistencies between Mr. Holloway's pretrial testimony and his trial testimony troubling, especially considering the relatively short time frame (about three months) between the two episodes. Finally, if in fact Sgt. Hunt saw the jacket with only one sleeve rolled up and Agent Johnson saw both sleeves rolled up—and there is no proof in the record suggesting either witness lacked credibility—there is no clear explanation how the second sleeve became rolled, as none of the three persons who had possession of the jacket between Hunt and Johnson testified they manipulated the sleeves or any other part of the jacket.

However, despite these difficulties, this Court concludes, as did the trial court, the chain of custody was established sufficiently. This Court takes notice of case law which provides excluding evidence based on the physical facts rule and testimony based on the cancellation rule is to be done sparingly. The inconsistencies in Holloway's testimony are not so egregious as to render his testimony unbelievable and the jacket inadmissible. These inconsistencies, which Mr. Gant exposed during his examination of Holloway at trial, went to the weight of the evidence, not its admissibility.

The evidence in the record was satisfactory to establish the jacket was obtained by Sgt. Hunt on the riverbank the afternoon of February 4, 1994, placed in the evidence chute, and retrieved by Holloway the morning of February 7. Holloway and TBI Agent Fortner took the bag containing the jacket to the TBI Crime Lab, where it was retained by crime lab technician Libby Huffman, who in turn submitted it to Agent Johnson, who cut bloody sections from the jacket and retained the jacket until the March 1996 hearing. After the pretrial hearing the court clerk retained the jacket until trial, and given the cuttings from the jacket which were observed at trial, one can reasonably conclude the jacket shown at trial was the same one retrieved from the river bank. While the chain of custody was not established perfectly and the possibility for tampering conceivably existed, not all possibility of tampering need be excluded in establishing chain of custody.

Furthermore, while the State's case would have been damaged had the trial court excluded the jacket and evidence of the blood and plastic fragments found on and in the jacket, such exclusion would not have been fatal to the State's case. Unlike *Cannon*, in which DNA resulting from semen stains was the *only* evidence linking Mr. Cannon to the victim's rape, in this case other evidence—albeit largely circumstantial evidence—linked

Mr. Mathews to the offenses. As the Court of Criminal Appeals stated in addressing the sufficiency issue on direct appeal:

> Both Carl and Shawntea Ward testified the defendant knew details of the Taco Bell murder otherwise known only to law enforcement officers, including the manner in which the perpetrator had entered and exited the restaurant, where the victims' bodies were located, how many shots had been fired, and the type of weapons used. Mr. Ward and Mr. Cooper saw the defendant load the shotgun and nine millimeter handgun before wiping his fingerprints from the weapons and placing them into a black book bag. During this time, the defendant wore white surgical gloves. The defendant also donned black clothing over a Miami Hurricanes sweat suit and told them they would "never see" the black clothing again. Just a day prior to the murders, the defendant asked Mr. Peghee to allow him to examine the safe in the Ft. Campbell mail room and specifically asked Mr. Peghee if one could access the safe by shooting the dial with a shotgun. On the same day, the defendant asked Ms. Underwood if exiting the rear door of the Taco Bell would activate an alarm. The defendant's jacket was found on the bank of the Red River a short distance from the Taco Bell. [. . .] Nine millimeter cartridge casings found at the scene and bullets recovered from the bodies of Mr. Campbell and Ms. Klopp matched casings and bullets found in the defendant's residence. Shotgun shells recovered from the scene matched those found at the defendant's residence and bore the same mechanism marks as the shotgun recovered from the defendant's residence. A bowling ball bag found in the defendant's car contained $2576 hidden under a bottom panel. Finally, the defendant's fingerprints were found on the door facing and ceiling vent cover in the men's restroom of the Taco Bell.

Mathews direct appeal opinion, 2008 WL 2662450, at *16 (omission added). Thus, while it is a close case, the Court concludes any error in admitting the jacket and the resulting forensic evidence was harmless.

Accordingly, the Defendant is not entitled to relief on this issue.

Claims 16-17: Failure to Give Instruction on Identity as Material Issue[30]

The Defendant asserts the issue of his identity as the person who committed the offenses was a material issue at his trial, and therefore the trial court erred in failing to give the instruction promulgated in *State v. Dyle*, 899 S.W.2d 607 (Tenn. 1995), which the

[30] Claim 17 relates to counsel's ineffective assistance for not raising the identity instruction issue on direct appeal. As stated elsewhere in the order, the Defendant abandoned ineffective assistance counsel claims in this proceeding.

Tennessee Supreme Court deemed necessary in such cases. For reasons unclear to this Court, the trial judge did not give the jury *any* instruction on identity during the guilt/innocence phase.

In *Dyle*, filed May 15, 1995 (over a year before Defendant's trial began), the Tennessee Supreme Court stated,

> We begin by acknowledging that accuracy of eyewitness testimony is affectable by the usual universal fallibilities of human sense perception and memory. This phenomenon, which could obviously affect other forms of evidence also, is potentialized by the fact that this testimony is prone to many outside influences (police interrogations, line-ups, etc.) and is often decisive. [(citation omitted)
>
> In light of this acknowledgment, we find that the pattern identity instruction traditionally given in Tennessee is not adequate in cases where identity is a material issue[. . . .]
>
> Thus, we promulgate the follow instruction:
>
> One of the issues in this case is the identification of the defendant as the person who committed the crime. The state has the burden of proving identity beyond a reasonable doubt. Identification testimony is an expression of belief or impression by the witness, and its value may depend upon your consideration of several factors. Some of the factors which you may consider are:
>
> (1) The witness' capacity and opportunity to observe the offender. This includes, among other things, the length of time available for observation, the distance from which the witness observed, the lighting, and whether the person who committed the crime was a prior acquaintance of the witness;
>
> (2) The degree of certainty expressed by the witness regarding the identification and the circumstances under which it was made, including whether it is the product of the witness' own recollection;
>
> (3) The occasions, if any, on which the witness failed to make an identification of the defendant, or made an identification that was inconsistent with the identification at trial; and

> (4) The occasions, if any, on which the witness made an identification that was consistent with the identification at trial, and the circumstances surrounding such identifications.
>
> Again, the state has the burden of proving every element of the crime charged, and this burden specifically includes the identity of the defendant as the person who committed the crime for which he or she is on trial. If after considering the identification testimony in light of all the proof you have a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.
>
> We conclude that this instruction must be given when identification is a material issue and it is requested by defendant's counsel. Failure to give this instruction under these circumstances will be plain error. If identification is a material issue and the defendant does not request the instructions, failure to give it will be reviewable under a Rule 52 harmless error standard. This ruling is applicable to cases now on appeal and to those cases tried after the release of this opinion.

Id. at 612 (alterations added, footnote omitted). The Court added, "Identity will be a material issue when the defendant puts it at issue or the eyewitness testimony is uncorroborated by circumstantial evidence." *Id.* at 612 n.4.

The Defendant states the *Dyle* instruction was necessary based on the testimony of Frankie Sanford, who at trial testified he looked through the Taco Bell drive-through window around 1:30 a.m. on January 30, 1994, and saw three women and a Black man working inside the restaurant.[31] At trial, Mr. Sanford identified the Defendant as the Black man he saw working the morning of January 30th.[32] On cross-examination, Mr. Sanford acknowledged he visited the Clarksville Police Department shortly after the incident and was shown a single photograph of the Defendant.[33] The witness also stated he and the Defendant "made eye contact that night. He looked right at me and I looked right at him. I didn't know who he was, but then I seen him on TV and I heard his name was Courtney

[31] Trial transcript of June 13, 1996, at 75, 78-79.
[32] *Id.* at 79.
[33] *Id.* at 85-86.

Mathews."[34] Mr. Gant's cross-examination of Mr. Sanford included several other questions regarding the circumstances surrounding Mr. Sanford's observation of the Taco Bell employees and the witness's identification of the Defendant.[35] Despite Mr. Gant's cross-examination, defense counsel did not move for an identity instruction.

Given Mr. Gant's cross-examination of Mr. Sanford, it was evident defense counsel raised the Defendant's identity as perpetrator as a material issue in this case. Thus, the trial court should have given the *Dyle* instruction. However, this Court concludes the failure to give the instruction did not prejudice the Defendant to the extent a new trial is required.

Mr. Sanford had sufficient opportunity to observe the person he identified as the Defendant at the Taco Bell the morning of the offense, and Mr. Sanford was certain in his identification at trial. However, the record does not contain other instances in which the witness gave sworn testimony identifying the Defendant as the Black man he saw the morning in question, and the strength of Mr. Sanford's identifications of the Defendant were somewhat undermined by the witness's confirming the Defendant's identity at the police station by viewing a single photograph rather than selecting the Defendant's photo from an array, as well as by seeing Mr. Mathews' picture and hearing the Defendant's name on television.

Despite these facts, Mr. Sanford's identification was far from the only evidence connecting Mr. Mathews to these offenses. The Court notes the Court of Criminal Appeals conclusion the evidence was sufficient to convict the Defendant did not mention Mr. Sanford's identification:

> Both Carl and Shawntea Ward testified that the defendant knew details of the Taco Bell murder otherwise known only to law enforcement officers, including

[34] *Id.* at 82.
[35] *See id.* at 79-88.

> the manner in which the perpetrator had entered and exited the restaurant, where the victims' bodies were located, how many shots had been fired, and the type of weapons used. Mr. Ward and Mr. Cooper saw the defendant load the shotgun and nine millimeter handgun before wiping his fingerprints from the weapons and placing them into a black book bag. During that time, the defendant wore white surgical gloves. The defendant also donned black clothing over a Miami Hurricanes sweat suit and told them that they would "never see" the black clothing again. Just a day prior to the murders, the defendant asked Mr. Peghee to allow him to examine the safe in the Ft. Campbell mail room and specifically asked Mr. Peghee if one could access the safe by shooting the dial with a shotgun. On that same day, the defendant asked Ms. Underwood if exiting the rear door of the Taco Bell would activate an alarm. The defendant's jacket was found on the bank of the Red River a short distance from the Taco Bell. Stains on the jacket tested positive as the blood of Mr. Campbell, and black plastic fragments found in the pocket matched black fragments from the dial of the safe in the Taco Bell. Nine millimeter cartridge casings found at the scene and bullets recovered from the bodies of Mr. Campbell and Ms. Klopp matched casings and bullets found in the defendant's residence. Shotgun shells recovered from the scene matched those found at the defendant's residence and bore the same mechanism marks as the shotgun recovered from the defendant's residence. A bowling ball bag found in the defendant's car contained $2576 hidden under a bottom panel. Finally, the defendant's fingerprints were found on the door facing and ceiling vent cover in the men's restroom of the Taco Bell. Under these circumstances, the evidence was more than sufficient to support the convictions under either theory of guilt. *See State v. Lemacks*, 996 S.W.2d 166, 171 (Tenn.1999) (holding that where there are separate theories of the defendant's guilt for a single offense based upon either direct or vicarious liability and the evidence is sufficient to support a finding of guilt under either theory, a general guilty verdict is sufficient).

Mathews direct appeal opinion, 2008 WL 2662450, at *16. The Defendant has introduced no proof which would lead this Court to discount the appellate court's reasoning.

Accordingly, while the trial court erred in not giving the *Dyle* instruction, this error was harmless beyond a reasonable doubt. Mr. Mathews is not entitled to relief on this issue.

Claims 18 through 21: Trial Court's Refusal to Permit Additional Argument After Issuing Supplemental Instruction on Criminal Responsibility[36]

The Defendant asserts the trial court erred in denying defense counsel's request to reopen closing arguments after the Court issued its supplemental instruction on criminal responsibility. Mr. Mathews asserts the trial court's actions denied him the right to a complete closing argument. As Mr. Gant argued at trial, the Defendant asserts the trial court's instruction "was literally a prosecutorial theory that was given uncontested and with no elaboration by the defense;" in other words, the trial court's supplemental instruction "was, and had the effect of constituting," a de facto second and successive closing argument in support of the state's case[.]"[37]

A. Circumstances Surrounding Trial Court's Giving Supplemental Instruction

Although the record does not contain a transcript of a charge conference or an order memorializing such a conference, Mr. Mathews suggests the State moved for a criminal responsibility instruction during a charge conference held June 20, 1996 (the day before the trial court issued jury instructions). This Court's review of its order addressing the Defendant's post-conviction petition suggests during the post-conviction hearing the trial judge testified neither side requested an instruction on criminal responsibility before deliberations began. However, the lead prosecutor at the Defendant's trial testified the State did seek a criminal responsibility instruction before the charge was given, but the trial court denied the request. At any rate, at 9:00 a.m. on June 21, 1996, the trial court issued its jury instructions without an instruction on criminal responsibility. At 9:45 a.m. the same morning, the jury began its deliberations.

[36] Claim 19 addressed trial counsel's supposed ineffectiveness in failing to address this issue at trial. As stated above, at the new trial hearing the Defendant abandoned issues related to his attorneys' supposed ineffectiveness.
[37] Amended motion for new trial at 93, ¶¶ 233-34.

At 11:55 the morning of June 21, the jury reentered the courtroom after submitting a question to the trial court. Specifically, the jury asked to visit the crime scene; the trial court denied this request. At some point later on June 21, while the jury was on its lunch break, the trial court announced its intention to issue a supplemental instruction on criminal responsibility. Mr. Simmons briefly objected to the instruction based on what he saw as a lack of proof from which "a jury could find that Mr. Mathews would be responsible for the conduct of another,"[38] but the trial court overruled the defense objection. The jury was called back into the courtroom and given the supplemental criminal responsibility instruction. After the jury left the courtroom, Mr. Gant offered the following argument:

> With regard to that supplemental instruction, I am going to ask Your Honor, and I don't know how you can do this, but the Court will recall this instruction addresses two comments made by the Prosecution during their closing argument. Mr. Garrett, twice during his closing argument, made the suggestion or the comment to the jury that there were two or alternative or possibly alternative theories that could be argued on behalf of the Prosecution. I objected both times. The Court sustained the objection and told Mr. Garrett to move on.
>
> This supplemental instruction number 2 in essence lends credence to what it is that he argued. As I understand the Tennessee Rule of Criminal Procedure, 29.1 on jury argument, specifically 29.1 (d) Purpose of the Rule. "It is the purpose of this rule to assure that all arguments be waived only upon the consent of both sides, that the defendant shall be permitted to waive all remaining argument after the State opens; and that while the State having the burden of proof shall have the right to open and close the argument, this right shall not be exercised in such a way as to deprive the defendant of the opportunity to fully answer all State arguments."
>
> It is the position of the Defense that we didn't get a chance to answer that argument made by the Prosecution, that argument which has now been in our opinion, given some credence by the submission to the jury of Supplemental Instruction Number 2. For that reason, we are asking the Court to allow the Defense to address this jury on this issue. We feel that we haven't been given an opportunity to argue this issue. Or in the alternative, to grant a mistrial.[39]

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[38] Trial transcript of June 21, 1996, at 9.
[39] *Id.* at 11-12.

In response, Mr. Garrett said the portions of the State's closing argument which led to Mr. Gant's objections did not represent the State's "making reference to the Criminal Responsibility for the Acts of Others."[40] Rather, "The State was simply trying to re-emphasize, point again to its theory . . . that the defendant was *the* shooter or *a* shooter of these employees[.]"[41] Although this Court is of the belief an argument Mr. Mathews was "*a* shooter" *would* relate to a theory under which Mr. Mathews was criminally responsible for the acts of others (specifically, for another shooter of the victims, be it David Housler or someone else), Mr. Garrett reiterated Mr. Mathews' being *the* shooter or *a* shooter did not "necessarily encompass the concept of criminal responsibility."[42] Mr. Gant responded,

> I want an opportunity to argue to this jury this -- pardon me, to present the Defense's argument to this theory of culpability or in the alternative because of (1), the argument made by counsel and the subsequent sustaining of the objection suggested -- pardon me, the argument suggested that two people were involved. I don't care how you slice it. If you say Courtney Mathews was either the shooter or a shooter, implicit in that notion, the shooter or a shooter is the possibility that someone else was a shooter. Given that argument, to submit to the jury the supplemental instruction lent credence to the argument. The Defense, not having had an opportunity to address that argument, I suggest to Your Honor, has a right to according to 29-1 (d). We didn't have that 24 opportunity, so we want an opportunity to argue to the jury. In the absence of that, then we would move for a mistrial.[43]

Upon questioning by the Court, Mr. Gant acknowledged he was unaware of any authority permitting the reopening of argument following the issuance of a supplemental instruction. However, he reiterated his belief the defense was entitled to supplement its argument because the trial court's instructing the jury on criminal responsibility after the trial judge rebuffed the State's attempts to introduce the theory to the jury during closing argument was tantamount to approval of the State's criminal responsibility theory.

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[40] *Id.* at 12.
[41] *Id.* at 13.
[42] *Id.* at 14.
[43] *Id.*

The trial court rejected the Defendant's argument about the instruction being equivalent to a prosecution argument, concluding,

> I think the entire record will reflect that the subject matter or theory of the criminal responsibility of another has been broached many times. In fact, I can't tell you when or what date, but the -- there have been several discussions about criminal responsibility of another. I just don't see how it is a surprise to the Defense that this would be a part of the Court's instruction[.] I don't know of any authority to open up argument after a jury has retired[.][44]

B. Prior Appellate Review of Issue

On direct appeal, the Defendant raised the issue of the propriety of the supplemental instruction. The Court of Criminal Appeals rejected the argument, which does not appear to have been presented to the appellate court adequately:

> The defendant also contends that the trial court erred by interrupting the jury's deliberations to provide an instruction on criminal responsibility for the conduct of another. He argues that the evidence was insufficient to support the instruction and that the manner in which the instruction was given led to confusion. He also asserts that the trial court should have allowed the parties to provide further argument to explain how the instruction fit with their respective theories of the case. However, the defendant has failed to cite any authority to support his claims. Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b); Ct. Crim. App. R. 10(b). Therefore, the defendant waived this issue.
>
> Moreover, the record establishes that evidence introduced by the defendant resulted in the instruction. After the defendant objected to the instruction, the trial court observed that "the Defense introduced proof that gave rise to" the criminal responsibility instruction. The trial court stated, "The Defense put on all of the evidence that is in this record of Mr. Housler's involvement. The State did not put on any evidence that Mr. Housler was involved. . . ." We agree with this assessment. The trial court has a duty "to give a complete charge of the law applicable to the facts of a case." *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn.1986) (citing *State v. Thompson*, 519 S.W.2d 789, 792 (Tenn.1975); *see* Tenn. R. Crim. P. 30. This duty extends to every issue fairly raised by the evidence. *See Lester v. State*, 370 S.W.2d 405, 409 (Tenn.1963). Here, the defendant put on evidence, including the "charge agreement," that raised the issue of Mr. Housler's involvement in the offenses. Once the issue was raised, the trial court was required to provide an

[44] *Id.* at 19 (alterations added).

> instruction on criminal responsibility. Accordingly, the defendant cannot now be heard to complain about any error regarding the criminal responsibility instruction. *See also* Tenn. R. App. P. 36(a).
>
> As to the timing of the instruction, we discern no error. Although the trial court's timing was not ideal, we cannot say that it caused the jury to place undue emphasis on the instruction. The record establishes that the jury had been deliberating only a short time when the trial court called the parties to the courtroom and indicated that it had "inadvertently omitted" an instruction on criminal responsibility. The trial court specifically informed the jury that the omission of the instruction in the earlier charge was unintentional and twice warned the jury not to place undue emphasis on the instruction. The jury is presumed to follow the instructions of the trial court. *State v. Smith*, 893 S.W.2d 908, 914 (Tenn.1994). Accordingly, we reject the defendant's claims on this issue.

Mathews direct appeal opinion, 2008 WL 2662450, at *18.

C. Current Issue

Among the cases Defendant cites in asserting he is entitled to relief is *Wallis v. State*, 546 S.W.2d 244 (Tenn. Crim. App. 1976), in which the appellate court concluded the trial court prejudiced the Defendant by not permitting him to respond to the prosecution's closing argument. However, the facts of *Wallis* can be distinguished from those of the current case. In *Wallis*, the prosecution's closing argument was "short . . . generally explaining to [the jury] their duties and responsibilities; however, [the State] did not comment on the facts of the case." *Wallis*, 546 S.W.2d at 246. Defense counsel then announced the Defendant "would stand on the proof." *Id.* The trial judge then announced his intent to let the State "close the arguments," at which point defense counsel expressed his intent to respond to the State's argument. *Id.* The trial judge stated he would let defense counsel reconsider his choice to waive closing argument, but "if he waived argument, the State could still present a closing argument, and . . . [defense] counsel would 'have nothing to say to the jury' after the State's argument." *Id.* The State then offered an extensive

closing argument which addressed the facts of the case. *Id.* Defense counsel's additional request for a rebuttal argument was denied by the trial court. *Id.*

In *Wallis*, the Court of Criminal Appeals concluded the trial court erred in refusing to permit defense counsel to respond to the State's second argument, stating,

> [I]t is in the discretion of the trial court whether a defendant's counsel should be allowed to rebut the closing argument of the attorney general. In our opinion, it would be only in exceptional circumstances where the defendant's right to rebut the State's closing argument would accrue; however, we think those exceptional circumstances are present here. After the appellant waived his right to respond to the Attorney General's opening argument, we think it was error for the trial court to permit the Attorney General to present a second argument in which he introduced an entirely new line of argument. The error was further magnified when the trial court refused to permit the appellant's counsel to respond to the only real argument made by the Attorney General.
>
> The right to be heard by counsel is basic to the rights of any defendant, and such right is guaranteed by both the Federal and State Constitutions. Article I, Section 9, Constitution of Tennessee; 6th Amendment, United States Constitution. In the present case, we think the appellant's right to be heard by counsel has been abridged, and in our opinion, the appellant was prejudiced thereby.

Wallis, 546 S.W.2d at 248.

In the current case, however, this Court agrees with the trial court's conclusion the supplemental instruction on criminal responsibility did not reflect the "argument" of a prosecutorial theory. The record reflects the trial court did not issue the supplemental instruction following a request by the State; the supplemental instruction appears to have been given sua sponte. Thus, *Wallis* does not support Mr. Mathews' argument.

The Defendant also asserts the trial judge's supplemental instruction violated Rule 30(a) of the Tennessee Rules of Criminal Procedure, which requires the trial judge to "inform counsel of its proposed action on" both "requests for jury instructions" and "any other portion of the instructions concerning which inquiries are made" before the attorneys

make closing arguments. *See* Tenn. R. Crim. P. 30(a)(3)(A)-(B).[45] In the Defendant's view, the trial court's actions constituted "a false assurance to Mr. Mathews that the court was not going to give an instruction for criminal responsibility," which led trial counsel to give "inadequate closing arguments" which did not address the criminal responsibility issue.[46] In this Court's view it appears Mr. Mathews is arguing the trial judge deceived the attorneys by holding off on instructing the jury on criminal responsibility until after the jury began deliberating, thus denying the Defendant an opportunity to rebut the theory. However, Mr. Mathews has presented no proof to substantiate his theory apart from the generalized argument the trial judge was possessed by animus toward the Defendant throughout the trial and thus committed misconduct by ruling against the Defendant at every turn. Such unsubstantiated theories are not enough to entitle the Defendant to relief. Taken to an extreme, the Defendant's argument suggests a trial judge would never be able to issue a supplemental instruction to the jury, even if the supplemental instruction arose from a jury question or a situation which the judge could not have foreseen before closing arguments.

These conclusions are not to say Defendant's claim is without merit. As the Tennessee Supreme Court has observed,

> Closing arguments have special importance in the adversarial process. Their purpose is to sharpen and to clarify the issues that must be resolved in a criminal case. *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L.Ed.2d 593 (1975). They accomplish this purpose by enabling the opposing lawyers to present their theory of the case and to point out the strengths and weaknesses in the evidence to the jury. *Christian v. State*, 555 S.W.2d 863, 866 (Tenn.1977); 11 David L. Raybin, *Tennessee Practice: Criminal Practice and Procedure* § 29.01, at 72 (1985). Thus, both the State and the defendant have an ancient right to make closing arguments. *See* Tenn. R. Crim. P. 29.

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[45] The form of Rule 30(a) may have undergone some alterations between the time of Defendant's trial and the present day. However, because the substance of the Rule is the same now as it was at the time of Defendant's trial, this Court cites to the rule in its current form.

[46] Amended motion for new trial at 95, ¶ 242.

State v. Banks, 27 S.W.3 90, 130 (Tenn. 2008) (footnote and internal citation omitted). The Fifth Circuit Court of Appeals, in an opinion which like *Banks* cites to *Herring v. New York* (cited extensively in Defendant's motion), states,

> The Sixth Amendment guarantees a defendant in a criminal trial, whether before a jury or the bench, the right to present closing argument, regardless of the complexity or the strength of the case. *Herring v. New York*, 422 U.S. 853, 95 S. Ct. 2550, 45 L.Ed.2d 593 (1975); *see also* Fed. R. Crim. P. 29.1. The *Herring* Court reasoned that "a total denial of the opportunity for final argument in a ... criminal trial is a denial of the basic right of the accused to make his defense.... [C]losing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt". *Id.* at 859, 862, 95 S. Ct. at 2554, 2555. Given the difficulty of determining the prejudicial impact of the failure to afford summation, the denial of a request for it is reversible error *per se*. *Id.* at 864, 95 S. Ct. at 2556. Likewise, absent waiver, "the failure to allow a closing argument constitutes plain error". *United States v. Martinez*, 974 F.2d 589, 591 (5th Cir.1992).

United States v. Davis, 993 F.2d 62, 63-64 (5th Cir. 1993).

The Defendant asserts the trial court's failure to allow Mr. Gant to argue following the supplemental jury instruction was a denial of his rights under the Sixth Amendment and therefore constitutes reversible error per se. Mr. Gant was not denied the complete opportunity to argue on behalf of the Defendant, but counsel did not have the opportunity to argue against the criminal responsibility theory, which counsel did not believe would be instructed at the time of closing arguments.

Tennessee's appellate courts have yet to address the issue raised by Mr. Mathews. However, some courts have adopted the view of the Fourth Circuit Court of Appeals, which stated, "[W]here a new theory is presented to the jury in a supplemental instruction after closing argument, the court generally should give counsel time for additional argument." *United States v. Horton*, 921 F.2d 540, 547 (4th Cir. 1990). The court in *Horton* wrote, "adequate additional argument can cure any prejudice experienced as a result of

supplemental instructions. While limitations on the scope or extent of argument are plainly within the discretion of the trial judge, an abuse of discretion may be found when the contested limitations on argument prevent defense counsel from making a point essential to the defense." *Id.* (internal citations and quotation omitted).

In a case which preceded *Horton*, the Ninth Circuit Court of Appeals reversed the convictions of a defendant found guilty of possessing and manufacturing methamphetamine based on the trial court's refusal to permit defense counsel to argue the "aiding and abetting" theory—largely similar to the criminal responsibility theory in Tennessee—after the trial court gave a supplemental instruction on the theory. *United States v. Gaskins*, 849 F.2d 454, 455 (9th Cir. 1988). The prosecution in *Gaskins* moved for an instruction on aiding and abetting, but after additional discussion the court and parties agreed no aiding and abetting instruction would be given. *Id.* at 456. During jury deliberations, however, after the jury sent a note to the trial judge the judge gave an aiding and abetting instruction. *Id.* As in Mr. Mathews' case, Mr. Gaskin's[47] attorney requested the trial court reopen closing argument so the defense could address the aiding and abetting theory, but the trial court denied the request. *Id.* at 457. After the judge gave the supplemental instruction (which included an instruction establishing a defendant's "mere presence" at a crime scene was insufficient to convict the defendant), the jury convicted Mr. Gaskin. *Id.*

On appeal, the Ninth Circuit concluded the trial court's refusal to permit defense counsel to argue the aiding and abetting theory to the jury prejudiced the defendant and required a new trial:

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[47] Although the style of the case spelled the defendant's name "Gaskins," the text of the opinion spells the defendant's name as "Gaskin."

[A]rguments based on convicting a defendant as a principal or convicting a defendant as an aider and abettor are based on two conceptually different theories. *See United States v. Companion*, 508 F.2d 1021, 1022 (9th Cir.1974) (per curiam); *see also Short*, 493 F.2d at 1171. The difference in theories becomes apparent when one analyzes the elements necessary to convict a defendant under a given theory. The elements necessary to convict an individual under an aiding and abetting theory are (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense. *See United States v. McDaniel*, 545 F.2d 642, 644 (9th Cir.1976) ("A defendant to be an aider and abetter must know that the activity condemned by the law is actually occurring and must intend to help the perpetrator."); *Short*, 493 F.2d at 1172 ("It is the aider and abettor's state of mind, rather than the state of mind of the principal, that determines the former's liability. . . . Thus the jury must be told that it must find that [the aider and abettor] knew that [the principal] was armed and intended to use the weapon and intended to aid him in that respect."); *see also United States v. Raper*, 676 F.2d 841, 849 (D.C.Cir.1982) (discussing the four factors); W. LaFave & A. Scott, 2 Substantive Criminal Law, § 6.7, at 141-45 (1986) (discussing the mental state necessary for conviction as an aider and abettor and concluding that an aider and abettor must have the intent to aid or encourage another to commit what he knows to be criminal conduct as well as the mental state necessary for the underlying substantive offense). On the other hand, the elements necessary to convict an individual under the theory that he was the principal simply are (1) that he committed all of the acts as defined in the underlying substantive offense, and (2) that he committed these acts while possessing the requisite mental state. Thus, the government's argument that an aider and abettor is a principal does not provide an answer to the issue before us because the argument ignores the different elements the government must prove under the two theories and ignores the different arguments that the defense may make concerning the elements of the theory involved.

[. . . .]

The government contends that there was no prejudice because Gaskin's counsel argued against an aiding and abetting theory during closing argument. We have read the transcript of her argument and disagree. Gaskin's counsel did not address the question whether providing a location for the laboratory, without more, would constitute aiding and abetting the manufacture of methamphetamine. Instead, her argument focused on the question whether her client had directly participated in the manufacturing process. Moreover, she did not argue the facts as they would relate to the principle that "mere presence" at the scene of a crime and knowledge that a crime is being committed is not sufficient to establish that an accused aided and abetted, unless the prosecution proves beyond a reasonable doubt that the defendant was a participant, and not merely a knowing spectator. In

> addition, she could have argued that merely because the drugs were found in Gaskin's house does not mean that he possessed them or possessed them with the intent to distribute them and also does not necessarily mean that he aided Sanders' possession of the drugs. As in *Harvill*, "we cannot conclude that 'the effectiveness of counsel's argument and hence of appellant's defense' was not impaired by counsel's inaccurate information regarding the court's charge." 501 F.2d at 297, *quoting Wright v. United States*, 339 F.2d 578, 580 (9th Cir.1964). We hold, therefore, that instructing the jury that it could convict Gaskin as an aider or abettor without allowing additional argument to address this theory requires reversal of both counts.-

Gaskins, 849 F.2d at 459-60.

In this case, the better course of action would have been for the trial court to permit Mr. Mathews' attorneys to argue the criminal responsibility issue after this theory, which the trial court had excluded from closing arguments, was presented to the jury through the supplemental instruction. The procedural posture of this case is like *Gaskins*—in both cases, the trial court issued a supplemental instruction on criminal responsibility/aiding and abetting after refusing to instruct on this theory in the initial jury charge, and in both cases the trial court refused the defendant's motion to argue the new theory to the jury. However, the facts of Mr. Mathews' case can be distinguished from those of *Gaskins*, and thus this Court must conclude the trial court's failure to reopen closing argument did not prejudice Mr. Mathews.

In *Gaskins*, the evidence established the meth lab was found in Mr. Gaskin's residence[48] and receipts were produced showing Mr. Gaskin purchased chemicals and equipment commonly used in meth labs.[49] In a statement to police, Mr. Gaskin acknowledged he was aware of his brother-in-law's meth-making but did not notify the police because the brother-in-law "had assured him that 'good fortune' would come Gaskin's way 'if he did not see anything or say anything.'"[50] Conversely, in this case Mr.

[48] 849 F.2d at 455-56.
[49] *Id.* at 456.
[50] *Id.*

Mathews' attorneys refuted what little evidence was presented which could have connected the Defendant to David Housler and other potentially-involved persons. During trial the Defendant did introduce evidence concerning Mr. Housler's potential involvement in these offenses—and Housler's attempts to enter a guilty plea—but Mr. Mathews did so to suggest Mr. Housler was an alternate suspect. Mr. Gant and Mr. Simmons presented evidence suggesting Mr. Mathews had no connection to Mr. Housler (i.e., evidence which suggests Mr. Mathews was not present at the January 21 trailer party at which Mr. Housler and others discussed robbing the Taco Bell), and the defense also presented proof suggesting a group of white men were present inside the restaurant the morning of the attack, a fact which would exclude the Black Defendant as a perpetrator.

Thus, while Mr. Gant's closing argument was spent mainly refuting the State's evidence allegedly placing the Defendant inside the Taco Bell as the sole perpetrator of these offenses, Mr. Gant's argument was sufficient to make the jury aware, even before the supplemental instruction, of the Defendant's theory under which Mr. Housler committed these offenses and had no connection to Mr. Mathews in doing so. In defense counsel's view, if Mr. Housler was involved in a conspiracy to rob the store and kill its employees, such conspiracy did not involve Mr. Mathews. While the trial court should have given Mr. Mathews' attorneys the opportunity to make this explicit argument to the jury, the essence of the argument was nonetheless presented to the jury. Thus, the Defendant is not entitled to relief on this issue.

Claims 22 and 23: *Beck v. Alabama* Claim[51]

Citing to *Beck v. Alabama*, 447 US. 625, 637-38 (1980), the Defendant asserts he is entitled to a new trial on his felony murder convictions because *Beck* required the trial judge to charge the jury with lesser offenses of first degree murder in his capital murder trial. This Court disagrees.

Beck dealt with an Alabama capital sentencing statute which prevented the trial judge from instructing the jury on lesser offenses of first degree murder. *See Beck*, 447 U.S. at 628-29 (jury had "the choice of either convicting the defendant of the capital crime, in which case it [was] required to impose the death penalty, or acquitting him, thus allowing him to escape all penalties for his alleged participation in the crime"). The Supreme Court concluded a sentence of death could not be constitutionally imposed "when the jury was not permitted to consider a verdict of guilt on a lesser included non-capital offense, and when the evidence would have supported such a verdict[.]" *Id.* at 627. Unlike *Beck*, Tennessee's capital sentencing statutes do not preclude the trial judge from issuing instructions on lesser included offenses. Furthermore, Mr. Mathews was not sentenced to death, so the *Beck* holding is not implicated in Mr. Mathews' case.

The lesser offenses issue was addressed on post-conviction, both in this Court and on appeal. The Court of Criminal Appeals concluded while the trial court should have instructed on lesser offenses of felony murder, Mr. Mathews did not suffer prejudice from the trial court's failure to charge such offenses or trial counsel's failure to seek such instructions. Mathews post-conviction opinion, 2019 WL 7212603, at **32-36. Mr.

[51] Claim 23 addressed trial counsel's supposed ineffectiveness in failing to address this issue at trial. As stated above, at the new trial hearing the Defendant abandoned issues related to his attorneys' supposed ineffectiveness.

Mathews has presented no argument or evidence which would lead this Court to contravene this earlier reasoning. Thus, he has failed to prove he is entitled to relief on this issue.

Claims 24-28: Ineffective Assistance of Counsel / Conflicted Counsel Issues

In these claims, the Defendant raises various ineffective assistance of counsel and conflicted counsel claims. As stated elsewhere in this order, at the hearing the Defendant abandoned his ineffective assistance and conflicted counsel claims, and this Court also concludes the time for Defendant to raise these issues was at his post-conviction hearing. Furthermore, the substantive issues behind these counsel-based claims are raised elsewhere in Mr. Mathews' motion and addressed by the Court elsewhere in this Order. Accordingly, the Court will not address the counsel-based claims here.

Claims 29-32: Enhancement of Defendant's Especially Aggravated Robbery Conviction[52]

Mr. Mathews argues the trial court improperly imposed a 25-year sentence for the Defendant's especially aggravated robbery conviction. The Defendant asserts the aggravating factor the trial court used to enhance the sentence was not supported by the evidence, and he also argues the aggravating circumstance was improperly applied based on the United States Supreme Court's opinion in *Blakely v. Washington*, 542 U.S. 296 (2004), and related cases.

The transcript of the sentencing hearing at which the trial court imposed the Defendant's especially aggravated robbery sentence is not included in the record. The

[52] Claims 31 and 32 addressed trial counsel's supposed ineffectiveness in failing to address this issue at trial. As stated above, at the new trial hearing the Defendant abandoned issues related to his attorneys' supposed ineffectiveness.

record reflects on July 11, 1996, the State filed notice of its intent to seek a sentence about the statutory minimum based on the following statutory aggravating factors (all citations are to statutes as they existed at time of offense):

> T.C.A. § 40-35-114(2): The defendant was a leader in the commission of an offense involving two (2) or more criminal actors;
> T.C.A. § 40-35-114(3): The offense involved more than one (1) victim;
> T.C.A. § 40-35-114(5): The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;
> T.C.A. § 40-35-114(9): The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense.
> T.C.A. § 40-35-114(10): The defendant had no hesitation about committing a crime when the risk to human life was high;
> T.C.A. § 40-35-114(11): The felony resulted in death or bodily injury or involved the threat of death or bodily injury to another person and the

The trial court imposed a sentence of twenty-five years for the especially aggravated robbery conviction, the maximum within the range.

Because the sentencing hearing transcript does not appear in the record, this Court is unable to review the trial court's application of enhancement factors and mitigating factors. However, the Court agrees with the Defendant concerning the *Blakely* issue.

The Defendant was convicted of a Class A felony. At the time of the offense (as now), the sentencing range for a Class A felony committed by a Range I, standard offender was fifteen to twenty-five years. Tenn. Code Ann. § 40-35-112(a)(1) (1994). Under the law as it existed at the time of the offenses, "The presumptive sentence for a Class A felony [was] the midpoint of the range if there [were] no enhancement or mitigating factors." Tenn. Code Ann. § 40-35-210(c). Per Tennessee's pre-2005 sentencing act, the trial court was to increase the sentence within the range based on the existence of enhancement factors and reduce the sentence as appropriate for any mitigating factors. *Id.* at (d), (e).

Interpreting *Blakely*, the Tennessee Supreme Court concluded the pre-2005 sentencing act's allowing a trial court to enhance a defendant's sentence based on factors

not found by a jury beyond a reasonable doubt violated a defendant's Sixth Amendment right to a jury trial. *State v. Gomez*, 239 S.W.3d 733, 740 (Tenn. 2007) (citing *Cunningham v. California*, 549 U.S. 270 (2007)); *see also Blakely*, 542 U.S. at 301. Specifically, in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court stated, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

The Defendant had no prior criminal record before these offenses, and the statutory enhancement factors submitted by the State ran afoul of *Blakely*, *Apprendi*, *Gomez*, and related cases. Thus, this Court concludes the Defendant's twenty-five-year sentence for especially aggravated robbery must be modified. The Court imposes a sentence of twenty years, the presumptive sentence under the former act, as twenty years represents the midpoint of the applicable sentencing range.

Claims 33 and 34: Judicial Misconduct Claims[53]

The Defendant asserts his due process rights were violated by what he views as the trial judge's extensive judicial misconduct. Most of the facts Mr. Mathews cites relate to the trial judge's ex parte meeting with trial counsel after trial, his exposure to privileged information, and his refusal to recuse himself after learning of such information. While acknowledging these events occurred after trial, the Defendant asserts such actions raise an "intolerable likelihood of [the trial judge's] personal bias and hostility" against Mr. Mathews.[54]

[53] Claim 34 addressed trial counsel's supposed ineffectiveness in failing to address this issue at trial. As stated above, at the new trial hearing the Defendant abandoned issues related to his attorneys' supposed ineffectiveness.
[54] Amended new trial motion at 189.

This Court observes Mr. Mathews raised the issues concerning the trial judge's supposed misconduct and incompetency to preside over Defendant's trial during the post-conviction hearing, both in this Court and on appeal. The Court of Criminal Appeals, affirming this Court, stated the Defendant's judicial misconduct claims were without merit. *See* Mathews post-conviction opinion, 2019 WL 7212603, at **27-32. The Defendant has not produced argument or evidence at the current hearing which would lead this Court to reconsider these earlier conclusions.

This Court also notes the Court of Criminal Appeals' grant of a new appeal process (beginning with this amended motion for new trial) renders moot the Defendant's claims regarding the trial judge's actions in the prior motion for new trial hearing. Additionally, in one prominent case in which an opiate-addicted trial judge committed several acts which violated the rules of judicial ethics—even during the time the judge presided over a death penalty trial (but outside the courtroom)—the Tennessee Supreme Court concluded absent proof the judge's misconduct affected the trial, the petitioners were not entitled to relief. *See State v. Letalvis Cobbins, Lemaricus Davidson, and George Thomas*, No. E2012-00448-SC-R10-DD, slip op. at 3 (Tenn. May 24, 2012) (order). Similarly, absent specific proof the trial judge's actions affected Mr. Mathews' trial, this Court cannot presume the trial judge's improper post-trial actions necessarily meant the trial judge was disqualified from presiding over the Defendant's trial.

These issues are without merit.

Claims 35 through 39: Camera in Courtroom During Jury Deliberations[55]

The Defendant raises several claims related to the trial court's hearing regarding the media's alleged "intrusion into jury deliberations" and denial of Defendant's motion for a mistrial related to this issue. Generally, these issues can be restated as follows: (1) the trial judge was incompetent to hear the Defendant's motion based on the judge's "misconduct" (as explored elsewhere in the amended new trial motion) and his status as a "witness" during the hearing; (2) one witness perjured himself during the hearing; and (3) the trial court applied the wrong standard in concluding the presence of the video camera in the courtroom during the jury's deliberations inside the courtroom did not create a permissible outside influence requiring a new trial.

On direct appeal, the Court of Criminal Appeals addressed the presence of the courtroom camera during deliberations:

> The defendant also argues that he is entitled to a new trial because the camera "invaded the sanctity" of jury deliberations. In its order denying the motion for new trial, the trial court explained that the jury was permitted to use the courtroom for deliberations because of the large number of exhibits. The trial court ordered that the single, ceiling-mounted camera that was providing video feed for the media be pointed at the state seal. At some point, the court learned that a different image was on the camera. Defense counsel sought a mistrial claiming that, pursuant to Tennessee Rule of Appellate Procedure 36(b) the camera's recording images in the courtroom during jury deliberations resulted "in prejudice to the judicial process" and that relief was warranted without the showing of prejudice.
>
> The trial court conducted an extensive hearing on the matter, during which several members of the media testified. In general, the testimony showed that during jury deliberations from approximately 9:30 a.m. until approximately 3:00 p.m., the courtroom camera was focused upon the wall above the judge's chair. This image, which was not accompanied by any sound, was fed to monitors located in the courthouse media room and in at least two media trucks on the site. At some point, members of the media who were gathered in the media room wondered whether proceedings had resumed in the courtroom, and using a control device from

[55] Claim 36 addressed trial counsel's supposed ineffectiveness in failing to address this issue at trial. As stated above, at the new trial hearing the Defendant abandoned issues related to his attorneys' supposed ineffectiveness.

> the media room, the camera operator lowered the focal point of the camera approximately five feet to the judge's chair to determine that the judge had not returned to the courtroom. No one saw any jurors, exhibits, or any movement on the monitor. The camera operator testified that there was "no chance of seeing any movement in the center area or any part of the area except if someone sits in the Judge's chair." Testimony indicated that, although the downward pan of the camera could be observed by anyone watching the camera, the downward camera movement could not be heard. No one testified that any member of the jury was in the courtroom when the camera moved or that anyone in the courtroom was aware that the camera's focal point had been altered.
>
> At the conclusion of the hearing, the trial judge found that no evidence showed that the media's action "actually intruded into the deliberative function of the jury."
>
> The record supports the trial court's conclusion that no intrusion occurred, and thus we are not obliged to determine whether the defendant bore a burden to show prejudice. No evidence established that any member of the jury was even aware of the incident. The evidence did not show that camera movements within the courtroom during deliberation impaired the jurors' ability to decide the case only on the evidence or that the trial was adversely affected by the impact of media coverage on one or more of the participants." *State v. Harries*, 657 S.W.2d 414, 419 (Tenn.1983) (citing *Chandler v. Florida*, 449 U.S. 560, 581–82, 101 S.Ct. 802, 813 (1981)). Thus, the defendant is not entitled to relief on this issue.

Mathews direct appeal opinion, 2008 WL 2662450, at *12.

This Court is at a disadvantage, as it did not preside over the hearing on this issue and thus is unable to make credibility determinations regarding the witnesses who testified on this issue. However, after reviewing the transcript of the hearing and other portions of the record related to this issue, this Court concludes it has been presented with no evidence which would lead it to overturn the earlier rulings of the trial and appellate courts on this issue. The Defendant did not present any testimony from the witnesses at the June 1996 hearing or the jurors who were supposedly affected by the camera, so this Court has no evidence before it which would call the trial court's factual and credibility findings into question. Regarding the trial judge's supposed incompetence to preside over these proceedings, the trial judge's observations which prompted him to conduct the hearing and

his recounting those observations at the start of the hearing did not render him a "witness" and did not disqualify him from presiding over the hearing. The Defendant's other assertions regarding the judge's supposed incompetence to conduct the hearing are related to Mr. Mathews' generalized claims concerning the trial judge's supposed "misconduct" and animus toward the Defendant. As explored elsewhere in this order, these generalized claims, without more, do not entitle Mr. Mathews to relief.

In sum, the Defendant has failed to establish he is entitled to relief on this issue.

Claim 40: Inconsistent Prosecutorial Theories at Codefendants' Trials

The Defendant asserts his due process rights were violated by the State's pursuing inconsistent and "irreconcilable" theories at the trials of Mr. Mathews and his codefendant, David Housler. Specifically, the Defendant claims the State proceeded at Mr. Mathews' trial under the theory Mr. Housler committed the offenses and Mr. Mathews was criminally responsible for Mr. Housler's actions, while at Mr. Housler's trial the State proceeded under the theory Mr. Housler was criminally responsible for Mr. Mathews' actions.

The Court notes the Defendant argued on post-conviction Mr. Gant and Mr. Simmons were ineffective for not raising the inconsistent theories issue in the original motion for new trial. *See* post-conviction order at 78. This Court rejected Mr. Mathews' assertion. *See id.* at 78-80. In so doing, this Court cited to the Tennessee Supreme Court's opinion in *State v. Housler*, 193 S.W.3d 476, 491-93 (Tenn. 2006), in which the Tennessee Supreme Court rejected Mr. Housler's contention his due process rights were violated by the State's pursuing different prosecutorial theories in the codefendants' trials. This Court again cites to the Tennessee Supreme Court's *Housler* opinion in concluding this issue is without merit.

Claims 41 and 42: Prosecutorial Misconduct / Withholding *Brady* Material Regarding Dr. Charles Harlan[56]

The Defendant argues the State "committed a series" of violations of the rule in *Brady v. Maryland*, 373 U.S. 83 (1967), by "knowingly suppressing favorable evidence," "suborning perjury," and "presenting inherently false and untrustworthy testimony to the jury, with regard to the qualifications and credibility of disgraced Medical Examiner Dr. Charles Harlan, who due to his rank incompetence and criminal malfeasance, could not lawfully and credibly testify."[57]

This Court notes the Defendant raised the issue of the State's alleged *Brady* violations regarding Dr. Harlan—and of trial counsel's ineffectiveness in their handling of issues concerning the pathologist—on post-conviction. This Court found these issues to be without merit. *See* post-conviction order at 55-60. The Court incorporates those post-conviction findings of fact and conclusions of law into this Order by reference. The Defendant has presented no new evidence, apart from his own self-serving testimony, which would lead the Court to reconsider its earlier conclusions. Thus, the Defendant has failed to establish he is entitled to relief on this issue.

Claim 43: New Scientific Evidence Regarding Ballistics Evidence

The Defendant argues "the current body of science" renders the opinion testimony of TBI Special Agent Dan Royse, who testified regarding toolmark evidence, unreliable and misleading to the jury. However, at the new trial hearing the Defendant offered no

[56] Claim 42 addressed trial counsel's supposed ineffectiveness in failing to address this issue at trial. As stated above, at the new trial hearing the Defendant abandoned issues related to his attorneys' supposed ineffectiveness.

[57] Amended motion for new trial at 258, ¶ 719.

proof to refute toolmark analysis generally and Agent Royse's findings in particular. Accordingly, the Defendant has failed to establish he is entitled to relief on this issue.

Claim 44: New Scientific Evidence Regarding Fingerprint Evidence

The Defendant asserts the "Analysis, Comparison, Evaluation, and Verification" (ACE-V) method used to identify Defendant's fingerprints in this case have been "debunked" by modern scientific developments and research. He asserts the pattern jury instruction issued in this case, T.P.I. (Crim.) 42.17, which stated no two sets of fingerprints were alike,[58] has been discredited by the current scientific developments and research.

In *State v. Davidson*, 509 S.W.3d 156, 209-12 (Tenn. 2016), a capital defendant raised similar arguments regarding what he perceived to be the ACE-V method's scientific unreliability and overly subjective nature. The Tennessee Supreme Court rejected Davidson's arguments, stating, "While there may be disagreement among experts in the field, this does not establish the inherent unreliability of the ACE-V methodology that would render fingerprint evidence inadmissible." *Id.* at 211. Between this precedent and the Defendant's failure to present evidence to refute the ACE-V methodology generally and the fingerprint analyst's findings in this case in particular, this Court concludes the Defendant is not entitled to relief based on "new scientific evidence" as to this issue.

The Court acknowledges in *Johnny Rutherford v. State*, No. E1999-00932-CCA-R3-PC, 2000 WL 246411, at *15 (Tenn. Crim. App. Mar. 6, 2000), a panel of the Court of Criminal Appeals stated the pattern instruction's language stating no two sets of fingerprints are alike "is a statement of fact that improperly intrudes upon the province of

[58] This instruction is still part of Tennessee's Pattern Jury Instructions. *See* T.P.I. (Crim.) 42.17 ("There are no two sets of fingerprints exactly alike") and 42.17(a) ("There are no two people who have fingerprints exactly alike") (25th ed. 2021).

the jury." However, the Court of Criminal Appeals concluded the instruction did not prejudice Rutherford given the fingerprint expert's uncontradicted testimony and the other evidence in the case. *Id.* at *16. As stated above, in Mr. Mathews' case the Defendant has presented no proof to refute the findings of the fingerprint expert. Thus, the Court concludes this issue is without merit.

Claim 45: New Scientific Evidence Regarding Cross-Racial Identification

Mr. Mathews argues, "Since the time of [his] original 1996 trial there has been an emergence in the field of forensic psychology which has developed a body of science governing eyewitness accuracy and cross racial identification."[59] However, the Defendant presented no evidence at the new trial hearing regarding these purported developments, nor did he present any evidence, apart from his own self-serving testimony, to establish Mr. Sanford's identification of Mr. Mathews was flawed. Accordingly, the Defendant has failed to establish he is entitled to relief on this issue.

Claim 46: Cumulative Error

The Defendant argues he is entitled to relief based on the cumulative effect of the errors alleged throughout his new trial motion. However, the Court has examined the Defendant's motion and concluded he is not entitled to relief on any of the issues individually, other than the length of his sentence for the especially aggravated robbery conviction. The sentencing issue does not relate to any of the other issues Mr. Mathews raises in the new trial motion. Thus, he is not entitled to relief based on cumulative error.

[59] Amended new trial motion at 274, ¶ 771.

VI. Conclusion

As stated above, the Court hereby ORDERS the Defendant's sentence for his especially aggravated robbery conviction to be reduced to twenty years. In all other respects, the motion for new trial is DENIED.

IT IS SO ORDERED this 15 day of August, 2022.

Don R. Ash
Senior Judge

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing Order has been served upon the following by U.S. Mail and email on this, the 15 day of August, 2022:

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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 16, 2019

COURTNEY B. MATHEWS v. STATE OF TENNESSEE

Appeal from the Circuit Court for Montgomery County
No. 63CC1-2015-CR-343 Don R. Ash, Senior Judge

No. M2017-01802-CCA-R3-PC

The Petitioner, Courtney B. Mathews, appeals from the denial of his petition for post-conviction relief, wherein he challenged his jury convictions for four counts of first-degree felony murder and one count of especially aggravated robbery. On appeal, the Petitioner's issues center around (1) an ex parte communication between the trial judge and trial counsel that took place at the trial judge's residence; (2) trial counsels' inadvertent disclosure of the unredacted timeline to the co-defendant's defense team that contained attorney-client privileged information; (3) the lack of any jury instructions on lesser-included offenses for the felony murder counts; (4) the Petitioner's alleged absence during the issuance of the supplemental jury instruction on criminal responsibility and when the trial judge answered jury questions; and (5) cumulative error. After a thorough review of the record, we reverse the judgment of the post-conviction court. We conclude that due to trial counsels' various deficiencies, there has been a complete breakdown in the adversarial process during the Petitioner's motion for new trial proceedings. While the Petitioner's convictions remain intact, the case is remanded for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Case Remanded

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and CAMILLE R. MCMULLEN, JJ., joined.

Courtney B. Mathews (on appeal), Pro Se, Clifton, Tennessee; and Luke A. Evans and Rose Parker (at post-conviction hearing), Murfreesboro, Tennessee, for the appellant, Courtney B. Mathews.

Herbert H. Slatery III, Attorney General and Reporter; Zachary T. Hinkle, Assistant Attorney General; John W. Carney, Jr., District Attorney General; and Arthur F. Bieber, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

In June 1996, a Montgomery County jury convicted the Petitioner of four counts first-degree felony murder and one count of especially aggravated robbery. The Petitioner's convictions stem from the 1994 robbery of a Clarksville Taco Bell and the slaying of four of its employees. See State v. Courtney B. Matthews,[1] No. M2005-00843-CCA-R3-CD, 2008 WL 2662450, at *1 (Tenn. Crim. App. July 8, 2008), perm. app. denied (Tenn. Apr. 10, 2015). The evidence at trial established that in the early morning hours of January 30, 1994, four employees were executed during a robbery of the restaurant. Each of the four victims suffered multiple gunshot wounds. Officers also discovered that a safe in the business office of the restaurant had been blown open by a shotgun blast and emptied of nearly $3,000 in cash and coins. The State sought the death penalty, but the jury imposed a sentence of life in prison without the possibility of parole for each felony murder conviction. The trial court sentenced the Petitioner to twenty-five years for the especially aggravated robbery conviction and ordered that all sentences be served consecutively. Judgments were filed on August 15, 1996.

In addition, David Housler, the co-defendant, was tried separately for the murders, and his trial was held in November 1997. See State v. Housler, 193 S.W.3d 476 (Tenn. 2006). He was not tried for especially aggravated robbery. The State's strategy at the co-defendant's trial

> was (1) to establish [the Petitioner's] guilt in committing the Taco Bell robbery and murders by using many of the same witnesses and much of the same evidence that the prosecution used at [the Petitioner's] trial and (2) to establish [the co-defendant's] guilt in the same crimes by using his written statement, which placed him with [the Petitioner] as a lookout on the night of the killings, and with the testimony of several corroborating witnesses.

Id. at 484. Following the conclusion of the evidence, the jury found the co-defendant guilty of four counts of felony murder and imposed a punishment of life imprisonment. The trial court ordered that those life sentences be served consecutively to one another.[2]

The Petitioner's case languished in the trial court for over nine years before the motion for new trial was adjudicated in March 2005. Accordingly, we feel a review of

[1] This court on direct appeal believed that the Petitioner's surname was spelled "Mathews" but, consistent with custom, used the spelling of "Matthews" as set forth in the charging instrument.

[2] The co-defendant was ultimately granted post-conviction relief from his convictions. See David G. Housler, Jr. v. State, No. M2010-02183-CCA-R3-PC, 2013 WL 5232344 (Tenn. Crim. App. Sept. 17, 2013).

the procedural history post-trial is in order. On September 12, 1996, the Petitioner's motion for new trial, in which he alleged seventeen grounds for relief, was filed. The issues were bare allegations contained in one sentence, without argument, and without citation to any legal authority. Filed contemporaneously with the motion for new trial were motions to stay the proceedings until a trial transcript could be prepared and for leave to allow amendments to the motion for new trial after preparation of the transcript. The trial court ordered that "a complete transcript of all pretrial, jury selection and trial proceedings be prepared" and granted the Petitioner's motion for leave to amend. A hearing was originally scheduled on October 17, 1996, but the trial court's docket on that day showed that the motion was "stri[c]ken." A notation in the trial court's docket next to the October 17, 1996 entry, states, "ordered transcript 11-6-03."

In October 2000, associate counsel[3] filed a motion to withdraw, wherein he noted that the Administrative Office of the Courts ("AOC") would no longer pay for two attorneys to represent the Petitioner because it was "no longer a capital case," before stating that lead counsel had "returned to the United States" and could represent the Petitioner's "interests regarding the pending motion for new trial and any appeal that might follow." Associate counsel was granted permission to withdraw on October 23, 2000. No new counsel was appointed, and lead counsel remained counsel of record. Throughout this time, no attempts were made to revive or otherwise pursue the Petitioner's motion for new trial.

On April 29, 2003, associate counsel was "reappointed to represent the [Petitioner] to the conclusion of all trial court matters." On October 9, 2003, a joint motion between associate counsel and the Petitioner was prepared and served on the State "to reschedule" the motion for new trial hearing, which was set, according to the motion, for October 16, 2003. The hearing was rescheduled for December 11, 2003; on that day, it was reset for January 13, 2004, in order to allow the State time to file a response and the Petitioner to amend the motion for new trial.

Thereafter, the Petitioner filed an amended motion for new trial on January 8, 2004, which added five additional grounds for relief. Again, the issues were merely bare allegations of one sentence each without legal argument or citation to authority. Moreover, three of the five were merely restatements of issues raised in the original 1996 motion for new trial. The two new issues raised in the amended motion were sufficiency of the evidence and the trial court's sua sponte issuance of a jury instruction on criminal responsibility after the jury had already begun deliberations. Also, on January 8, 2004, a waiver from the Petitioner was filed. In the document, the Petitioner waived the following:

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[3] For the purpose of clarity, we will refer to the Petitioner's trial attorneys collectively as "trial counsel" and individually as "lead counsel" or "associate counsel."

> [T]he [Petitioner] has been advised he has the right to be transported . . . for the purpose of attending the [m]otion for [n]ew [t]rial which has previously been filed on his behalf. Having been advised of this right, [the Petitioner] waives his right to be present, and requests the [m]otion be heard in his absence.

The State's response to the Petitioner's amended motion for new trial, which included detailed legal argument, was filed on January 12, 2004. In the State's response, it was argued that the trial court had lost jurisdiction to hear the Petitioner's motion for new trial when it was stricken on October 17, 1996, and that the Petitioner had abandoned any timely pursuit of said motion. On January 23, 2004, the Petitioner's "response to the State's petition" that the trial court was "without jurisdiction to hear" the amended motion for new trial was filed. The next document in the record was a March 24, 2004 order designating the case as extended and complex for purposes of Rule 13, Tennessee Rules of the Supreme Court. Thereafter, almost another entire year elapsed before the trial court's order denying the Petitioner's motion for new trial was filed on March 15, 2005.

In the order, the trial court stated that the "matter was submitted on briefs in December 2003." The trial court included a footnote in the order indicating that the status of preparation of the transcript in the Petitioner's case was still unknown to the trial court. The trial court noted, "It appears the co-defendant . . . pursued his appeal and[,] in so doing[,] raised issues of collateral estoppel with reference to the [Petitioner's] case. At that time, [the co-defendant's] counsel obtained a transcript of [the Petitioner's] trial proceedings. Shortly thereafter, the amended motion for new trial was filed." The trial court then went on to restate the seventeen grounds listed in the Petitioner's motion for new trial and the five grounds added in the amended motion for new trial. The order was detailed and contained findings of fact and conclusions of law. The trial court found that the Petitioner's grounds did not entitle him to relief. Specifically, the trial court determined that the Petitioner's convictions were supported by sufficient evidence, reasoning that the

> evidence was more than sufficient for the jury to conclude that the [Petitioner] gained access to the Taco Bell upon a false premise; that he retrieved items he previously placed in the ceiling of the men's restroom; that he blew open the safe and took money belonging to Taco Bell; that [the] killings recklessly occurred during the robbery with a deadly weapon; and that the victims suffered great injury (death)[.]

On July 11, 2005, associate counsel filed a motion to withdraw from further representation of the Petitioner. In the motion, associate counsel noted that the co-defendant's attorneys had obtained a "timeline" from associate counsel's office and that

the trial court had "ruled that this constituted a waiver of the attorney-client privilege[.]" Associate counsel averred, "Based upon the [c]ourt's prior ruling, it is apparent that [the Petitioner's] counsel will be called as a material witness at future proceedings regarding the [co-defendant's] case, both state and federal. This will create a direct conflict with maintaining the confidentiality between attorney and client." Associate counsel also indicated that lead counsel was then employed with the United States Government and, thus, prohibited from representing the Petitioner. Thereafter, on August 10, 2005, the trial court entered an order allowing "trial counsel," being "unable to represent the [Petitioner] in his direct appeal[,]" to withdraw. The trial court appointed new counsel at that time. That lawyer was later removed due to a conflict of interest because the Petitioner had acted as a "jailhouse lawyer for" one of the lawyer's former clients by drafting the inmate's petition for post-conviction relief which alleged ineffective assistance of counsel therein. Another lawyer was appointed, who represented the Petitioner during his direct appeal proceedings ("appellate counsel").

After the denial of his motion for new trial, the Petitioner filed a timely notice of appeal. On direct appeal, the Petitioner argued the following:

> (1) that he was denied due process in the delay of the preparation of his trial transcript and of the hearing on the motion for new trial; (2) that the trial court erred in not reopening the hearing on the motion for new trial; (3) that the trial court erred by permitting cameras in the courtroom during the trial; (4) that the cameras "invaded" the deliberations of the jury; (5) that the trial court should have changed venue due to the influence of pretrial publicity; (6) that the trial court erred by admitting photographs of the victims; (7) that the trial court erred by admitting DNA evidence; (8) that the trial court erred by certifying a [S]tate witness as an expert in DNA analysis; (9) that the trial court erred by admitting the testimony of the medical examiner; (10) that the trial court erred by permitting the medical examiner to utilize demonstrative aids during his testimony; (11) that the evidence was insufficient to support his convictions under a theory of criminal responsibility for the conduct of another; (12) that the evidence was insufficient to support his convictions under a theory of direct liability; (13) that the trial court violated his due process rights by "forcing" the [S]tate to proceed on inconsistent theories at his trial and the trial of his co-defendant; (14) that the trial court erred by interrupting jury deliberations to provide an instruction on criminal responsibility for conduct of another; (15) that the convictions for especially aggravated robbery and felony murder violate double jeopardy principles; (16) that the evidence was insufficient to support the finding that the murders were heinous, atrocious, or cruel; (17) that the trial court erred by failing to instruct the jury on certain non-

statutory mitigating factors; and (18) that the trial court erred by imposing consecutive sentencing.

Matthews, 2008 WL 2662450, at *1. Ultimately, this court affirmed the Petitioner's convictions in an opinion issued on July 8, 2008. In discussing the Petitioner's issue concerning the timeliness of the motion for new trial, although not condoning the length of the delay, we determined that Petitioner's due process rights were not violated by the delay, relying on the fact that he had failed to establish prejudice from the delay. Id. at *10. No permission to appeal to the Tennessee Supreme Court was filed at that time. See Tenn. R. App. P. 11.

On November 27, 2013, the Montgomery County Circuit Court Clerk's Office received a pro so filing from the Petitioner entitled "Motion for Determination of Status of Pending Post-Conviction Petition or[,] in the alternative[,] Motion for an Evidentiary Hearing to Determine why the Original Post-Conviction Petition Filed on July 23rd, 2009 had not been Properly Adjudicated." The motion contained, as an attachment, a copy of the Petitioner's purported pro se July 2009 petition, although no such petition was ever received by the Montgomery County Circuit Court Clerk. A hearing was held on September 9, 2014, which dealt with the timeliness of the Petitioner's petition for post-conviction relief. The trial court entered an order on October 8, 2014, finding that due process tolled the one-year post-conviction statute of limitations. The order also granted the Petitioner a partial delayed appeal, permitting him to file a delayed petition to rehear in this court or a delayed Rule 11 application with the Tennessee Supreme Court. No petition to rehear was ever filed in this court; however, the Petitioner did file an untimely Rule 11 application with the Tennessee Supreme Court. After our supreme court ordered the Petitioner to show cause why the filing deadline should be waived,[4] the court ultimately denied the Petitioner's Rule 11 application on April 10, 2015.

The post-conviction court, upon conclusion of the delayed appeal, allowed the post-conviction proceedings to continue. The post-conviction court permitted a "hybrid representation" during the post-conviction proceedings, allowing the Petitioner to operate as co-counsel with appointed counsel and requiring both the Petitioner and counsel to sign all pleadings. Several petitions and amended petitions appear in the record. Besides the July 2009 petition, additional petitions were filed in December 2013, July 2016, and February 2017. The post-conviction court addressed the issues as presented in the final amended petition that was prepared by counsel and filed on February 1, 2017.[5] In the amended petition, the Petitioner raised the following claims:[6]

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[4] No disposition of this show cause order is apparent from our supreme court's records.

[5] The Petitioner presented evidence at the post-conviction hearing in keeping with this amended petition.

(1) "Claims related to the thirteenth juror rule," arguing (a) that "the trial judge was not competent to sit as thirteenth juror due to his exposure to the ex parte information provided by trial counsel" and (b) that appellate counsel provided ineffective assistance by "fail[ing] to argue on appeal that the failure of a competent judge to rule as [thirteenth] juror rendered the judgment void";

(2) "Claims related to trial counsel's conflict of interest," specifically that trial counsel was ineffective (a) because an "actual conflict of interest existed" based upon a "breach of attorney-client confidentiality" and (b) because trial counsel failed "to adequately represent [the P]etitioner in post-trial motions due to the conflict of interest";

(3) "Claims related to [the Petitioner's] absence during portions of trial," specifically (a) that trial counsel rendered ineffective assistance by "fail[ing] to object and demand [the Petitioner's] presence at trial" and by "fail[ing] to raise [the Petitioner's] absence as an issue in the motion for new trial," and (b) that appellate counsel also provided ineffective assistance by "fail[ing] to raise [the Petitioner's] absence as an issue on direct appeal";

(4) "Claims relating to jury instructions," arguing (a) that trial counsel was ineffective for "fail[ing] to request a jury instruction on facilitation" or

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[6] The Petitioner also raised additional claims in the February 1, 2017 petition regarding trial counsel's failure to adequately cross-examine the medical examiner; trial counsel's failure to call witnesses to contradict testimony from the State's eyewitnesses and to present evidence to refute motive; trial counsel's failure to call Larry Underhill during the sentencing phase to testify in mitigation regarding the co-defendant's being the actual shooter; trial counsel's failure to include the inconsistent theory argument in the motion for new trial; trial counsel's failure to preserve the issue of Frankie Sanford's identification; appellate counsel's failure to raise the issue related to Frankie Sanford on appeal; the State's Brady violations for failing to disclose Larry Underhill's statement and for failing to disclose information regarding investigations into the medical examiner; the State's violation of the Petitioner's due process rights by presenting and allowing false testimony to go uncorrected; and claims raised by the Petitioner in his role as co-counsel, which included trial counsels' failure "to put on evidence or otherwise investigate matters to refute motive and opportunity" and failure "to properly argue the legal standard set forth in State v. Odom to show the inapplicability of T[ennessee] C[ode] A[nnotated] [section] 39-13-204(i)(5)," as well as appellate counsel's failure to argue Odom on appeal. However, although the Petitioner raised these grounds for relief in his petition, they have been abandoned on appeal. Therefore, these additional issues are considered waived. See Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."); see also State v. Dellinger, 79 S.W.3d 458, 488 (Tenn. 2002) (refusing to address issues raised in the trial court but abandoned on appeal). We will focus our review to those issues that are the subject of this appeal.

"request a lesser-included jury instruction for second-degree murder," and (b) that appellate counsel was ineffective for "fail[ing] to adequately cite to authority to support [the Petitioner's] claim that [the] supplemental jury instruction was given in error"; and

(5) "The cumulative effect of all error at trial and on appeal violated [the Petitioner's] constitutional rights."

At the May 2017 post-conviction hearing,[7] the Petitioner's sister, Veronica Randolph testified that she attended the Petitioner's 1996 trial. According to Ms. Randolph, the Petitioner was not present in the courtroom "[f]or part of the time" during closing arguments. Ms. Randolph explained that she was "wondering" where the Petitioner was because "the judge was giving the jurors instructions and everybody else was in the court[room]." When she asked the Petitioner later why he was absent, the Petitioner "said he didn't know." The Petitioner's cousin, Lolita Chenise Randolph, also testified that the Petitioner was absent from the courtroom during "the part when the judge was giving directions to the jury."

Lead counsel testified that he was appointed, along with associate counsel and multiple investigators, to represent the Petitioner on these murder charges and that over the course of his representation, he met with the Petitioner "many" times. According to lead counsel, other members of the defense team were sometimes present for the meetings as well. Lead counsel indicated that "the base of operations" was at associate counsel's office and that the Petitioner's discovery and investigation materials were kept there. Lead counsel relayed that his "primary obligation" at trial was to "handle the witnesses" and make the opening and closing statements. He also conveyed his familiarity with the discovery and investigation materials in the Petitioner's case.

Lead counsel recalled that while the jury was deliberating, he left and "drove back to the city" to take care of something. Upon his return, associate counsel informed him that the trial judge had issued a supplemental instruction on criminal responsibility during his absence. Lead counsel lodged an objection and asked that he be permitted additional closing argument to address the supplemental instruction. However, the trial judge denied his request. Lead counsel believed that the Petitioner was present in the courtroom when he lodged the objection.

Lead counsel affirmed that a timeline of events had been prepared in preparation for the Petitioner's trial and that the timeline referenced statements that were directly

[7] A substantial portion of the evidence presented at the post-conviction hearing concerned many of the issues that the pro se Petitioner has now abandoned on appeal. We will limit our recount to evidence relevant to the Petitioner's claims properly presented for appellate review.

attributable to the Petitioner from interviews with him. Lead counsel maintained that prior to the Petitioner's trial, he did not share any information he learned during his representation of the Petitioner with the co-defendant's attorneys, Michael Terry and Stephanie Gore. When asked if he ever authorized the co-defendant's attorneys to come to the "war room" in associate counsel's office and "review[] the investigative materials that [they] had gleaned during the investigation," lead counsel replied, "Setting aside the timeline, I don't recall extending an invitation to either of the two to come to the war room. . . . I think I recall saying . . . you can review the statements of witnesses that we had. I'm confident that we made that available to them." Lead counsel averred that the Petitioner never consented to allowing the co-defendant's lawyers access to the witnesses' statements or any other portions of "his client file," and lead counsel affirmed that the Petitioner was likely never asked.

Lead counsel did not recall "personally" making any decision to redact the timeline nor did he remember ever disclosing the redacted timeline to the co-defendant's lawyers. He claimed that he was not even "aware that there was a redacted timeline." He explained that these events may have occurred after his departure to Cambodia in November 1996 to "train defense lawyers." According to lead counsel, he thought that he was out of the country "when this timeline thing developed"; however, he was made "aware that it was an issue." Lead counsel also believed that he discussed the inadvertent disclosure with the Petitioner.

Lead counsel acknowledged that sometime around 2008, he "answered some interrogatories" in the co-defendant's post-conviction case. In those interrogatories, lead counsel described "the circumstances of how the unredacted timeline was obtained" by the co-defendant's attorneys: "A member of the [co-defendant's] defense team was given access to a redacted copy, which was in our office. While there the defense team member discovered the unredacted copy, photocopied it without permission and then left with it." Lead counsel further stated therein that he "was shocked that [the co-defendant's lawyer] had engaged in this conduct." Lead counsel did not recall "tak[ing] any steps to retrieve" the unredacted timeline, despite being certain that the timeline "was a privileged document." Moreover, lead counsel did not take any steps to report the co-defendant's lawyer's conduct to the Board of Professional Responsibility.

When asked if he agreed "that regardless of whether [he] w[as] still acting as attorney of record when [he] became aware of . . . the disclosure of the timeline to the [co-defendant's] defense team that [he] had an obligation to still take efforts to protect that privilege," lead counsel replied, "Theoretically yes. If I had been here, yes." Lead counsel confirmed that "some effort should have been made to get it" returned. Lead counsel also noted that associate counsel hired outside counsel to represent them regarding the inadvertent disclosure.

Lead counsel further testified that in the interrogatories from the co-defendant's case, he acknowledged engaging in two conversations with the co-defendant's "defense team," during which he expressed his belief that the co-defendant was innocent of these charges. Lead counsel indicated that these conversations took place after the Petitioner's trial, and he confirmed that he never told the Petitioner about these discussions.

Lead counsel was then asked to describe the details surrounding his ex parte communication with the trial judge, which consisted of his telling the trial judge that he believed the co-defendant was innocent. Lead counsel testified that either he or associate counsel called the trial judge's office and relayed their desire to speak with him. According to lead counsel, they then agreed on a date, place, and time to meet. Lead counsel said that they were initially supposed to meet in the "judge's chambers or somewhere at the courthouse." However, the location "got changed because [the judge] had like childcare problems or something," and they "ended up meeting at [the judge's] house as a result of some kind of a conflict[.]" Lead counsel recalled that they followed the trial judge from the courthouse to his home, and lead counsel averred that he did not find this meeting "odd" in any way. According to lead counsel, after his disclosure to the trial judge, the judge "was just saying okay, get it off of you if that's what you want to do," but the trial judge never stopped him or cautioned him about divulging attorney-client privileged information. Lead counsel said that his comments about the co-defendant were "very brief" and that the topic of their conversation then turned to other things. According to lead counsel, although associate counsel was present, he was very quiet during the portion of the conversation concerning the co-defendant. Additionally, lead counsel opined that this conversation likely took place on one of his return trips from Cambodia.

Lead counsel affirmed that he never told the Petitioner of his intention to speak with the trial judge, nor did he tell the Petitioner afterwards. Lead counsel explained that he felt he "had an obligation to do something because[,] . . . based upon [his] investigation of the case, . . . [the co-defendant] had nothing to do with" the Taco Bell crimes, and the co-defendant was facing the death penalty. When asked what he thought the trial judge "was going to do," lead counsel responded, "You know, . . . I wasn't sure. I really wasn't sure. But I thought if there was somebody who could do something it would be [the trial judge]. And I felt that somebody had to do something." Lead counsel was then asked "where, as a lawyer, did [lead counsel] come up with that" as a solution, and lead counsel explained, "As a lawyer my obligation is to protect my client. My client had already been found guilty."

Lead counsel affirmed, however, that his "investigation included statements that [he] knew [the Petitioner] had given . . . privately," that he had just told the trial judge that the co-defendant was innocent based upon his investigation of the Petitioner's case,

and that the Petitioner's motion for new trial was still pending in front of the trial judge at that time. Lead counsel said he "now" saw the error of his ways, but he "was afraid that an individual who [he] knew had nothing to do with this could die." Lead counsel further explained his decision as follows:

> [A]ll I know is this: If I believed that what I said was going to [a]ffect [the Petitioner] in such a way that it would be detrimental to [the Petitioner,] I wouldn't have done it; however, if I had to choose to either say nothing or at least say something, to do something for [the co-defendant], even though [the co-defendant] was not my client, I–I couldn't do nothing . . . . That was the problem. I couldn't just sit and do nothing at all.

Lead counsel agreed that the trial judge, at that time, still had "the obligation to sit as the [thirteenth] juror in ruling on [the Petitioner's] motion for new trial." According to lead counsel, after the ex parte communication, he believed that associate counsel would handle the motion for new trial because lead counsel intended to return to Cambodia. Lead counsel opined that despite the information contained in the unredacted timeline and the ex parte communication, there "was still enough to deny the new trial motion on the weight of the evidence[.]"

Lead counsel confirmed that after the meeting with the trial judge, he did not file a motion seeking to withdraw from the Petitioner's case, nor did he file anything to have the trial judge recused based upon the information lead counsel had conveyed to him. Lead counsel was unsure of how he was ultimately relieved from representing the Petitioner, and he did "not remember seeing any kind of order granting [him] leave to withdraw."

When asked about the delay in having the Petitioner's motion for new trial adjudicated, lead counsel said that he felt he needed to have the transcript prepared in order to adequately address all potential issues. Lead counsel averred that while the motion for new trial was pending, he spoke with the Petitioner "on a regular basis." He could not remember whether he specifically advised the Petitioner about "the next steps in the case, the time periods in which those steps had to occur[,]" although he thought he would have done so. Lead counsel also said his normal practice was to discuss with the client what issues were to be raised in the motion for new trial, but he could not recall, due to the passage of time, whether he did so in the Petitioner's case.

Associate counsel testified that he was appointed to the represent the Petitioner in 1995 and that he and lead counsel divided responsibilities. Associate counsel maintained that his "primary role" in the Petitioner's case was to obtain a change of venue and have the case moved out of Montgomery County. According to associate counsel, "[o]ur goal was to achieve the best possible outcome under the facts as they were presented[,]" and

included in that calculation was the possibility of four death penalty sentences. Associate counsel was ultimately successful in receiving a change of venue. Moreover, the Petitioner received four sentences of life without the possibility of parole instead of the death penalty.

Associate counsel testified that he did not perform an "in depth discovery" review in the Petitioner's case, indicating that such was unnecessary for his primary responsibility. Moreover, associate counsel indicated that he "had some client meetings with" the Petitioner but that he "was not present for all client meetings." According to associate counsel, the Petitioner met mostly with lead counsel and Mr. Ron Lax, one of the investigators. Regarding the specific defense set forth on the Petitioner's behalf, associate counsel affirmed that "it involve[d] other people['s] being inside the Taco Bell restaurant." Associate counsel noted that the co-defendant was called as a witness at the Petitioner's trial and that the co defendant invoked the Fifth Amendment.

Associate counsel stated that he was present in the courtroom when the court charged the jury in the Petitioner's case. Associate counsel also recalled the trial judge issuing a sua sponte instruction on criminal responsibility. However, associate counsel "had no independent recollection of whether [the Petitioner] was present or not present" for the criminal responsibility instruction. Associate counsel affirmed that his "normal procedure" would have been to object if the Petitioner was absent. Associate counsel was able to recall that lead counsel was not present when the additional instruction was given because lead counsel "had gone to take care of some business." Associate counsel acquiesced that the Petitioner was entitled to the representation of two attorneys at that time.

Associate counsel relayed the details surrounding the ex parte communication with the trial judge that took place "within months" after the Petitioner's trial had concluded. He testified that towards the ends of a day, he and lead counsel went to Springfield where the trial judge was holding court and indicated to the trial judge that "there was something [they] needed to discuss with him." Associate counsel continued, "There was nothing there, and he invited us to come to his residence, which we did."

When asked what was the purpose of their trip to visit the trial judge, associate counsel explained that he and lead counsel "had concerns[,] because based upon [their] investigation of the case[, the co-defendant] had nothing to do with this situation" and "he was facing the death penalty." Associate counsel said that lead counsel "decided that [they] needed to tell the judge that based upon our investigation that [the co-defendant] was innocent." Associate counsel maintained that they made "a moral and ethical decision" to inform the trial judge, and he asserted, "I think we were very clear that we did not reveal any attorney-client information." According to associate counsel, the conversation at the trial judge's residence lasted between thirty minutes to an hour.

Associate counsel affirmed that he did not seek the Petitioner's permission to speak with the trial judge, nor did he tell the Petitioner about the meeting until he withdrew many years later. Associate counsel averred that he and lead counsel did what they thought "was appropriate" given the situation, but associate counsel did not consider withdrawing from the Petitioner's representation at that time.

Finally, associate counsel confirmed that the trial judge disclosed the ex parte communication on the record at the co-defendant's motion for new trial hearing in 2000. The co-defendant's motion for new trial transcript, which was read, reflected that the trial judge stated the following: "And it was that their investigation led them to conclude that [the co-defendant] was not at the Taco Bell, and that that was based upon information that they had received, in part, directly from [the Petitioner]." Associate counsel disagreed with trial judge's assessment.

Associate counsel confirmed that his office had been used for "trial prep" and that there was a "war room" at his office, which housed items related to the Petitioner's case. Associate counsel maintained that there was no "joint defense agreement with the [co-defendant's] defense team" and that he did not purposefully share any privileged information with the co-defendant's attorneys. Nonetheless, according to associate counsel, the same investigating firm that had represented the Petitioner was going to represent the co-defendant, so, after the Petitioner's trial, the co-defendant's lawyers were given access to the war room in order to review "the interview notes that they had previously taken of witnesses." No objection was lodged to the investigators' working both cases; a decision for which associate counsel could not provide an explanation. Associate counsel averred that "nothing dealing with [the Petitioner] was going to be shared[,]" and he claimed it was never his "intent directly, indirectly or any other way to reveal or release any privileged information to anyone."

Specifically, regarding the unredacted timeline, associate counsel stated that it "was months after" the co-defendant's trial before he became aware that the timeline had been removed from the war room. Associate counsel indicated that he and lead counsel, who had returned from Cambodia at that time, were told during a meeting with the co-defendant's attorneys. According to associate counsel, "the timeline [was] redacted for the sole purpose of being able to provide it" to the co-defendant's lawyers. In associate counsel's opinion, it "was very clear that the reason for redaction was that there should be no attorney-client information contained in that document."

When asked if he had "authorized either Ms. Gore or Mr. Terry access to [the Petitioner's] materials" held in his office, associate counsel replied as follows: "They were authorized to have access to certain materials, which consisted of witness statements that did not pertain [to] anything of [the Petitioner's that] was attorney-client, and they were authorized access to a redacted timeline, which everything had been

redacted regarding anything pertaining to attorney-client information." Additionally, associate counsel indicated that Ms. Gore was the one who most often came to his office to review the records and averred that she was told there were "limits to what [she] could look at" in the war room. Associate counsel affirmed that Ms. Gore was left alone in the war room. However, in associate counsel's opinion, "it was clearly understood and explained that there were certain statements that [Ms. Gore] could copy and there was a redacted timeline, and that was the limitation of the information that [they] were providing to [the co-defendant's] defense team." According to associate counsel, Ms. Gore was never given unfettered access to everything in the war room.

After being informed by the co-defendant's attorneys that they had the unredacted timeline in their possession, associate and lead counsel "initiated a letter to Ms. Gore and Mr. Terry to return the information and make no copies." According to associate counsel, they also had a meeting with the co-defendant's lawyers and requested that the document be returned, to no avail. Associate counsel indicated that he was "surprised" by Ms. Gore's behavior, but he acknowledged that no ethical complaint based upon her behavior was ever filed.

Associate and lead counsel also obtained independent counsel to represent them regarding the inadvertent disclosure. Nonetheless, associate counsel acknowledged that he did not take any steps to withdraw from the Petitioner's case upon learning of the disclosure or retaining his own counsel. In addition, associate counsel did not recall ever informing the Petitioner about the inadvertent disclosure of the unredacted timeline to the co-defendant's attorneys, which included the Petitioner's incriminating statements.

Associate counsel affirmed that he testified at the co-defendant's motion for new trial hearing in 2000 and that at that time, he testified "at least, partially, about the disclosure of this [unredacted] timeline." Associate counsel indicated that he did not get authorization from the Petitioner "to share any of his client file with anyone," much less ever seek or obtain a waiver from the Petitioner to testify about privileged information. When asked if he remembered "working with Ms. Gore to draft an affidavit that was . . . intended to be signed by [the Petitioner] in support of" the co-defendant, associate counsel responded that he had "a vague recollection of something to that [e]ffect." Associate counsel was able to recall that the Petitioner never signed any affidavit, though.

Associate counsel affirmed that he represented the Petitioner through the completion of the motion for new trial proceedings. When asked if he met with the Petitioner following the Petitioner's jury trial until the motion for new trial was adjudicated, associate counsel replied that he had met with the Petitioner "either once or twice at Turney Center"[8] and possibly "met with him at one of these facilities in west

[8] Turney Center Industrial Complex is a state prison in Hickman County.

Tennessee." Associate counsel acknowledged writing a March 17, 2005 letter to the Petitioner, advising the Petitioner that the Petitioner's motion for new trial had been denied, enclosing a copy of the order, advising the Petitioner that a notice of appeal must be filed within thirty days, and enclosing a pro se notice of appeal, along with a self-addressed, stamped envelope. Associate counsel indicated that at the time he wrote the letter, he had not been granted permission to withdraw from the Petitioner's case. In addition, associate counsel acknowledged that he had an obligation to file a notice of appeal on behalf of an indigent defendant he had been appointed to represent.

Associate counsel identified a motion to withdraw he ultimately filed on July 11, 2005, in which he noted that the co-defendant's attorneys had obtained the unredacted timeline from his office and that the trial court had ruled that this constituted a waiver of the attorney-client privilege. Associate counsel further stated in the motion to withdraw that it was now a "direct conflict" of interest for him to further represent the Petitioner because he would be called as a material witness in the future regarding the co-defendant's case. Associate counsel then agreed that "the reason of the timeline existed as early as before the [co-defendant's] trial in 1997" and that he testified as "a material witness[] as early as the year 2000[.]" Associate counsel could not provide any explanation for why he had not chosen to withdraw earlier.

When asked about why the motion for new trial proceedings lingered, associate counsel explained, "I think, if I remember correctly, there was real issues in Montgomery County at the time when they had a tornado, and also with the transcripts and the record." Associate counsel could not recall if the motion for new trial was submitted on briefs or whether a hearing took place.

Michael Terry testified that he, along with his law partner, Stephanie Gore, represented David Housler, the Petitioner's co-defendant, on charges relating to the Taco Bell robbery and murders. Mr. Terry stated that they spoke with the Petitioner's lawyers about "strategies that were being . . . deployed" on the Petitioner's behalf, but Mr. Terry did not recall having any "formal joint defense agreement" with trial counsel. Mr. Terry explained, "We both—to a certain extent before their trial and to maybe a larger extent afterwards they shared information with us, and we discussed—we discussed the case with them." Specifically, Mr. Terry recalled a conversation with trial counsel where they told Mr. Terry and Ms. Gore that the co-defendant was innocent. According to Mr. Terry, when Ms. Gore asked "how do [they] know that," trial counsel "said nothing." Mr. Terry surmised that trial counsel were legally prohibited from sharing any additional information they had obtained from their client in that regard. According to Mr. Terry, "there were other meetings and other information exchanged" as well. Mr. Terry also conveyed that he and Ms. Gore had access to the Petitioner's "defense team war room," which housed "[b]oxes and boxes of investigation" and "there were files all over." Mr.

Terry opined that trial counsel were "excellent lawyers," who had conducted "a thorough investigation."

At some point, Mr. Terry became aware of both a redacted and an unredacted timeline covering the relevant events surrounding the Taco Bell murders and robbery that had been prepared for the Petitioner's defense. Trial counsel had provided them with a copy of the redacted timeline, but Ms. Gore later acquired a copy of the unredacted timeline. According to Mr. Terry, he was on a trip when he spoke with Ms. Gore, who informed him of the following:

> [S]he told me that she had gone to this room where this information was. And [associate counsel] had directed her to certain boxes that she was—she could have access to and that she had gone beyond his direction and gone to other boxes and she had found the unredacted timeline; and it was there. And she said it—it confirms what they told us that [the co-defendant] didn't have anything to do with Taco Bell, what should we do with it? And, again, whether it was in that conversation or in a second conversation, whether she had taken it or we agreed on that conversation to take [it], I cannot recall today, but we—we agreed to take it, or she had taken it, and we acquired the unredacted timeline in that way.

Mr. Terry confirmed that trial counsel did not give them permission to take the unredacted timeline. Furthermore, Mr. Terry believed that they told trial counsel they possessed the unredacted timeline sometime prior to the co-defendant's November 1997 trial, and he agreed that trial counsel ultimately obtained their own representation regarding the inadvertent disclosure of the document.

Additionally, prior to the co-defendant's trial, Mr. Terry became aware that trial counsel had engaged in an ex parte communication with the trial judge after the completion of the Petitioner's trial. Mr. Terry recalled, "And the information that was given to me was that [the trial judge] had those two lawyers for dinner after the [Petitioner's] trial and that they told him after dinner that—that [the co-defendant] was innocent, that [the co-defendant] did not commit the Taco Bell murders." Mr. Terry believed that trial counsel called him and informed him of this meeting with the trial judge. According to Mr. Terry, the parties discussed, prior to the co-defendant's trial, the "the issue of recusal" of the trial judge, and all parties agreed to the trial judge's remaining on the case.

Ms. Gore likewise testified that she and Mr. Terry had meetings with trial counsel, although she did not remember there being "any kind of written joint defense agreement in place between the two defense teams[.]" Ms. Gore also recalled meeting the investigator who had worked on the Petitioner's case.

Ms. Gore confirmed that she was granted access to the Petitioner's "defense team war room," which was located in associate counsel's law office. Ms. Gore described it as "a small library which contained all of the [Petitioner's] files that [she] was aware of." According to Ms. Gore, on one occasion while she was in the war room, associate counsel provided her a copy of the redacted timeline. Ms. Gore indicated that when associate counsel gave her the timeline, he said; "I don't know why [lead counsel] redacted this; I don't know what good it's going to really do you; I wish I could give you the unredacted timeline."

Furthermore, Ms. Gore relayed that there were no "ground rules" for her while she looked through the Petitioner's files and that associate counsel told her that she "could copy anything in that room that [she] found would be helpful to" the co-defendant. Ms. Gore described that she was alone in the war room "looking through" "a stack of a lot of different timelines" when she discovered the unredacted timeline:

> Most of the timelines that I saw, some of them had redaction, but I just remember opening up a timeline and going to critical portions, specific days, and I just remember reading something that I had not read before and it was actually about [the Petitioner's] being up in the ceiling. And when I read that I knew that I had not read that before. And I reread it, and—and then I looked at my timeline and realized that it was redacted, and I kept reading it and realized it was an interview of [the Petitioner]. I believe that Gloria Shettles[9] may have conducted that interview, but I can't say for certainty today.

When asked what "did [she] do with the unredacted timeline at that point," Ms. Gore replied,

> My law partner, who was lead counsel at that time, was unavailable, I could not reach him; no one was in the law office at that time, I was by myself, and I did what I thought was in the best interest of my client and I copied the timeline. And I did as I always did after I finished going through materials, I put everything back exactly as I'd found it and I left.

Ms. Gore said that she later informed Mr. Terry that she had taken the timeline, though she could not remember if that conversation was by phone or when Mr. Terry returned from his trip.

Ms. Gore explained that the difference between the copy she had previously been provided by associate counsel and the one she found that day was that "it now had

[9] Ms. Shettles was another investigator who worked on the Petitioner's case.

statements in it that were previously redacted that were attributed to [the Petitioner.]" Specifically, Ms. Gore explained that the redacted timeline did not include the statement by the Petitioner about coming out of the bathroom ceiling around 2:30 a.m. Ms. Gore agreed that the information contained in the unredacted timeline was "privileged communications." Nonetheless, according to Ms. Gore, she did not "feel that she was doing anything wrong" by copying the timeline because she "had authority to look at anything and copy anything in that office." Ms. Gore indicated that they did not inform trial counsel that they possessed the timeline until sometime after the co-defendant's trial was over. Ms. Gore confirmed that trial counsel then hired legal counsel to represent them concerning the inadvertent disclosure of the document.

Regarding trial counsels' ex parte communication with the trial judge, Ms. Gore believed that she was told of the meeting by Mr. Terry, who had heard the details from lead counsel. Ms. Gore recalled being informed that the meeting occurred at the trial judge's home and that the trial judge was told that the co-defendant was innocent. Ms. Gore recollected that before the co-defendant's trial, she was present during a meeting with the parties where the trial judge's recusal from the co-defendant's case was discussed due to the fact that trial judge had been told the co-defendant was innocent, though she could not recall for certain if this discussion referenced the ex parte meeting specifically. Regardless, she and Mr. Terry wanted the trial judge to remain on the case because they thought it was in the co-defendant's "best interest," specifically because the trial judge had heard the proof at the Petitioner's trial, had been told the co-defendant was innocent, and "had some indication that there was exculpatory evidence in possession of [the Petitioner.]" In addition, Ms. Gore remembered the trial judge's sua sponte disclosing on the record this ex parte communication during the April 2000 hearing on the co-defendant's motion for new trial. Ms. Gore believed that this was the first time such information was put into the record.

Ms. Gore also remembered a meeting where she and Mr. Terry met with trial counsel, who told them that the co-defendant was innocent. Being new to the practice of law at that time, she "couldn't wrap her head around" such an affirmation. When she inquired "how do you know," "[Lead counsel] didn't say anything, just looked at [her], and [Mr. Terry] turned to [her] and said he knows because his client told him."

Ms. Gore recalled "a discussion that [she] had back and forth with [associate counsel] regarding a proposed affidavit that [she was] wanting [the Petitioner] to sign for the benefit" of the co-defendant. Ms. Gore believed that this back-and-forth discussion took place after the Petitioner's trial but before the co-defendant's trial. According to Ms. Gore, the nature of the affidavit was essentially to have the Petitioner aver "that he did not know [the co-defendant]; he'd never seen [the co-defendant;] . . . [h]e had a brief visit with him, . . . in lockup or something[.]" Ms. Gore confirmed that associate counsel

would have obtained the information in the affidavit exonerating the co-defendant directly from the Petitioner. Nonetheless, the Petitioner refused to sign such an affidavit.

The trial judge testified that he was a judge in Montgomery County for twenty-five years and four months and presided over the Petitioner's trial and motion for new trial. He also presided over the co-defendant's trial, motion for new trial, and post-conviction proceedings.

The trial judge confirmed that he sua sponte reassembled the Petitioner's jury while they were in deliberations and issued a jury instruction on criminal responsibility, despite the fact that neither side had requested such an instruction. When asked "what precipitated [his] giving that charge," the trial judge replied,

> In his closing argument [lead counsel] said . . . in several ways that [the Petitioner] didn't do this. You know, he said—he would look at the jury and say, words to the effect, [the Petitioner] didn't do this. And the clear impression that I got was that he was trying to introduce, in his argument, that this was done by somebody else that [the Petitioner] may have known . . . .
>
> So the [S]tate rebutted, didn't say anything about it; and they retired; I retired; and I got to thinking that he had introduced enough to satisfy me that I thought that criminal responsibility for the conduct of another should be . . . instructed, so I reassembled the jury and gave them that instruction, along with an instruction that they shouldn't consider that instruction—give it any greater weight than they would any other instruction that I had given and sent them back in.

Due to the passage of time, the trial judge could not remember whether he also gave an instruction on facilitation, if anyone requested an instruction on facilitation, or provide an explanation why he chose not to do so.

In addition, the trial judge could not recall specifically if the Petitioner was present in the courtroom when he issued the instruction on criminal responsibility, but he explained, "I know my habits and my custom and my tradition and I would not have taken the bench until [the Petitioner] was in the courtroom much less given an instruction in his absence. That never happened." When asked if it was his normal practice "to announce on the record at the start of the court convening, . . . something to the effect of 'let the record reflect that . . . the defendant . . . is now present in the courtroom[,]'" the trial judge responded that he "probably did more times than [he] d[idn't] do it," but he had no recollection of whether that occurred in this instance.

The trial judge was then asked about the ex parte meeting with trial counsel. The trial judge explained that he presided in two counties, Montgomery and Robertson, and that day he was in Robertson County. According to the trial judge, it was Friday, towards the end of a "a nonjury day[]," when trial counsel appeared in his courtroom and sat "down in the back pew." After finishing the docket, he asked trial counsel if they needed to see him, "and one of them indicated that they did." The trial judge testified that he asked whether a representative for the State would be joining them for the meeting and that trial counsel informed him that a State representative was unnecessary because it did not "have anything to do with the [S]tate." The trial judge agreed to speak with them in his office, although he cautioned trial counsel that the conversation "may be short lived" depending upon the subject matter. He initially believed that trial counsel was seeking "approval of fees and things."

Once in the office, the trial judge, seeing as it was "approaching" 5:00 p.m., informed trial counsel that he had dinner plans with his wife when he returned home to Clarksville. The trial judge inquired about how long the conversation was going to last given that it was a forty-five-minute drive home for him, and trial counsel said that they just needed to tell him something and that it would not take "very long." The trial judge assented, "I'll let you say what you came here to say until I decide nothing else should be said."

Despite being given permission to discuss the matter, trial counsel offered to drive back to Clarksville to continue the conversation in order to assist the trial judge in keeping his commitments. The trial judge decided that this would "be easier on [him]" to return to Clarksville first, so they got in their respective vehicles and drove towards Clarksville. The plan was to meet "somewhere in a parking lot" to continue the discussion. However, after they arrived in the parking lot, the trial judge felt the logistics were not "conducive to hav[ing] a meaningful conversation," and he "wasn't comfortable" with the situation. As a result of the trial judge's discomfort, he invited trial counsel to come to his home instead, and they proceeded to his house. Once inside, the trial judge invited trial counsel to sit down and asked them what they wanted to talk about. According to the trial judge, lead counsel then said it was about the co-defendant's case that was proceeding to trial soon. Lead counsel conveyed their belief that the co-defendant was innocent, and they explained that it had been on their conscience and that they could not "sit back and let it happen without telling somebody." However, the trial judge told them that the co-defendant's innocence was "for a jury to decide." He also let trial counsel know that the details of their talk would not be kept secret and that he was going to relay the details of their conversation to the other attorneys involved.

The meeting, which lasted about thirty minutes total in the trial judge's estimation, continued. The trial judge described the following:

> And [lead counsel] went on to say a couple of things that I guess was trying to, I don't know, illustrate why he felt why he said what he did, and he—he said something like [the Petitioner], I said look . . . you don't need to divulge any—you're about to—sounds like you're about a violate a confidential attorney-client relationship here. And so he said okay.
>
> He said I—almost as if I'm not going to [the Petitioner] said this or [the Petitioner]—but it was like our investigation—the totality of our investigation; we know that the jacket that they found on the side of the road that they—that the [S]tate thinks was [the Petitioner's] jacket, it's not his jacket. It's a jacket that was on the side of the road, but it wasn't the jacket.
>
> I said [to lead counsel], I don't know why you're telling me this. You ought to just tell the [S]tate. But it was almost as if—if they went and told other lawyers what he wanted to tell me, he felt like maybe he shouldn't do that but it was okay for him to sort of just unload to the judge.

In addition, the trial judge recalled lead counsel's informing him that the Petitioner had made a statement in reference to the co-defendant, specifically telling him that the Petitioner said, "I don't know why this guy wants to get in on this, . . . but if he—if that's what he wants, . . . that's fine with me[.]"

When asked if he felt that trial counsel "were violating attorney-client privilege" during the meeting, the trial judge responded "that was [his] initial thought." He clarified,

> It was my belief that they had either violated it or they could very—that they could violate in the next sentence that came out of their mouth. Or if they didn't violate it, it was so close. It was enough for me to say who[a], anything you tell me I'm telling the lawyers. And, in fact, you need to beat me to it; you need to go tell them.

The trial judge confirmed that at that time, he did not "take any steps to file any kind" of ethical complaint or other action against trial counsel, reasoning that the Petitioner's trial "was over," despite the fact that "post-trial activity" was continuing. The trial judge affirmed that following trial counsels' disclosure at his home, he did not take any steps to recuse himself from the Petitioner's case or the co-defendant's. Nonetheless, the trial

judge agreed that he had been subjected to information about the cases that "was outside of a judicial proceeding."

The trial judge indicated that "the next time" he was in Clarksville hearing motions in the co-defendant's case, he called the prosecutor and the co-defendant's lawyers into his office. According to the trial judge, this meeting occurred before the co-defendant's trial commenced, and he provided the lawyers involved in the co-defendant's case with the details of the conversation he had participated in with trial counsel. The trial judge testified that he "got the impression that" the co-defendant's lawyers may have already spoken to trial counsel about the matter. The trial judge stated further that none of the attorneys objected to his continuing on the co-defendant's case. The trial judge confirmed that he later placed the details of the conversation with trial counsel on the record at the co-defendant's motion for new trial hearing held on April 21, 2000. The trial judge explained that the initial meeting with the attorneys in the co-defendant's case occurred in his office, not in the courtroom setting, and that he felt "it was something that needed to be put in the record."

According to the trial judge, he also called the parties involved in the co-defendant's case to his office prior to the co-defendant's post-conviction relief hearing and once more informed them of trial counsels' disclosure. Again, no one objected to his continuing on the co-defendant's case. The trial judge affirmed that the co-defendant's post-trial proceedings "went forward" while the Petitioner's motion for new trial "lingered on and on and on." He affirmed that it was "several years later" before he issued an order adjudicating the Petitioner's motion for new trial. The trial judge confirmed that he admitted the unredacted timeline into evidence, over objection, at the co-defendant's motion for new trial hearing, finding that trial counsel had waived the attorney-client privilege for the Petitioner regarding that document. Accordingly, at the time of his issuing an order on the Petitioner's motion for new trial in 2005, he had engaged in this ex parte communication with trial counsel at his house, as well as had knowledge of the unredacted timeline that was extensively discussed in the co-defendant's post-trial proceedings.

The trial judge agreed that in regard to ruling on sufficiency of the evidence in the Petitioner's motion for new trial, he had "received statements from [trial counsel] saying that they believe that [the co-defendant] was innocent." He then indicated that he may not have believed trial counsels' statements and maintained that the evidence in the Petitioner's case "was beyond any and all reasonable doubt, and not only was it to a moral certainty it was to an absolute certainty that [the Petitioner] planned out and executed four innocent people in a hail of bullets, leaving four dead bodies in a pool of blood[.]" According to the trial judge, trial counsels' statement concerning the co-defendant's innocence did not "affect [him] at all in terms of [his] judgment on the

sufficiency of the evidence that was [ad]duced at the trial." The trial judge then opined that but for trial counsels' effective "lawyering," the Petitioner "would have been on death row."

In addition, the trial judge testified that much later, he "became convinced, based on the research that was done [during the co-defendant's post-conviction proceedings], that the lawyer could waive" the attorney-client privilege, which he believed occurred in this case. The trial judge opined that privilege had been waived when the Petitioner's lawyers "gave over information, files and things like that to the" co-defendant's lawyers. The trial judge did not remember having any discussions with trial counsel about whether the Petitioner had consented to waive the privilege.

Moreover, the trial judge did not recall whether they had a hearing on the Petitioner's motion for new trial. He affirmed that it was "possible" the matter could have been submitted "on the pleadings." The trial judge also explained that the new trial motion "got prolonged, in part," because trial counsel "had mixed feelings about proceeding with the motion for new trial," and their believing that if the Petitioner received a new trial, then it "would give the [S]tate another shot at the death penalty." The trial judge continued,

> [T]hey wanted some case law to develop in that, and said there was a case . . . in the pipeline and that . . . there ought to be a ruling on that pretty soon. And so they didn't want to proceed, because they said in court, that [the Petitioner] didn't know whether he wanted a new trial or not, because if he got a new trial, then he might as very well get the death penalty along with that new trial, and they weren't so sure they wanted to go down that road.

According to the trial judge, he got the "clear impression" from trial counsel that the Petitioner himself "was not sure if he wanted to proceed in a motion for new trial" because he did not want to be exposed to the death penalty upon retrial. The trial judge also noted that neither party "was pushing the motion for new trial" and said that the motion "just got out of sight, out of mind."

The trial judge also affirmed that he allowed associate counsel to withdraw from representing the Petitioner and indicated that associate counsel was "on and off in terms of his representation of" the Petitioner during the post-trial proceedings. Regarding allowing associate counsel to withdraw the first time in 2000, but then reappointing associate counsel in 2003, the trial judge explained that associate counsel wanted to lighten his workload initially because he "had some serious health problems[, c]ancer[,]" but that associate counsel later changed his mind and "wanted to see it through." The trial judge recalled issuing a second order in 2005 allowing associate counsel to withdraw, "essentially finding that there was a conflict for him to continue in the

representation of" the Petitioner. The trial judge maintained, "I think that's based on him representing to me that he and [the Petitioner] had gotten to a point where they just couldn't communicate anymore. That the conflict, I think, it was—was a conflict between the two of them." In addition, the trial judge acknowledged that lead counsel was "out of the picture" for a period of time while the Petitioner's motion for new trial was pending because lead counsel had gone to work for the United States government in Cambodia "trying to set a justice system" there.

One of the four prosecutors who participated in the Petitioner's trial, Steven Garrett, testified that he "[t]ried to" argue at trial that the Petitioner "was criminally responsible for another." In fact, Mr. Garrett asked a witness to explain the concept of criminal responsibility, but an objection was lodged. The question was never answered, and no limiting instruction was given. That witness was called to refute the defense's assertion that the co-defendant was in fact the shooter, according to Mr. Garrett.

Moreover, Mr. Garrett stated that during the "pretrial jury instruction conference," the trial judge "said he was not going to charge criminal responsibility," despite Mr. Garrett's pointing out "that there were some factors in there that gave rise to that charge." Mr. Garrett confirmed that the trial judge later gave the instruction. Mr. Garrett opined that the instruction "was justified based upon the evidence that had been presented." In addition, Mr. Garrett expressed his belief that other people, as well as the Petitioner, were involved in the robbery and murders. He likened the Petitioner to the head of an outlaw gang.

According to Mr. Garrett, he was "present for every moment of trial." Mr. Garrett affirmed that "[e]very time [he] was in" the courtroom, the Petitioner was also there, including during jury instructions. When asked what he would have done if the trial judge started without the Petitioner, Mr. Garrett responded, "I would have stood up and I would have made it known to the judge that the [Petitioner] was not present." This response would have occurred during "all instructional phases," including "the somewhat belated instruction on criminal responsibility," according to Mr. Garrett. Mr. Garrett affirmed that he did not ask for a facilitation instruction, and he could not remember if such a charge was ever discussed.

Mr. Garrett indicated that he was aware of the ex parte communication between the trial judge and trial counsel prior to the co-defendant's post-conviction petition and hearings. In addition, Mr. Garrett confirmed that he never attempted to have the trial judge recused from the Petitioner's motion for new trial proceedings. Mr. Garrett explained that he went to work in another office in May 1997 and did not "really know what was going on" in the Petitioner's case after that time.

The Petitioner testified that he was not present in the courtroom when the trial judge issued the supplemental instruction on criminal responsibility to the jury. The Petitioner claimed that the following day, while the jury was still deliberating, there was another instance when the trial judge addressed the jury and the transcript did not reflect that he was present in the courtroom.[10] He further claimed that he was not present for an "entire hearing" that took place on June 22, citing the transcript's failure to note his presence for that hearing. In support of his argument, the Petitioner cited to specific examples in the transcripts when the trial judge acknowledged that the Petitioner was present in the courtroom.

The Petitioner affirmed that it was his understanding following his convictions "that both attorneys were continuing to represent [him] throughout the filing and . . . arguing for a motion for new trial on [his] behalf[.]" The Petitioner indicated that associate counsel was relieved from representing him in 2000 due to medical issues and that lead counsel was his attorney from 2000 to 2003. The Petitioner further noted that associate counsel was reappointed to his case in 2003. According to the Petitioner, both associate and lead counsel and Mr. Lax came to visit him in late 2003 to discuss "the potential merits of a motion for new trial." At that time, they also discussed a motion to reschedule the hearing on the motion for new trial. According to the Petitioner, he was informed that the prosecutor "had signed off on it," and trial counsel "asked for an extension of time" because they were still waiting on preparation of the transcript. The Petitioner affirmed that he joined in a "joint motion" to reschedule the motion for new trial hearing date.

The Petitioner indicated that at this meeting, they reviewed the issues to be raised in the motion for new trial. One of the issues they discussed was the trial court's sua sponte issuance of the criminal responsibility instruction to the jury after they had already begun deliberating. They also talked about the Petitioner's absence from the courtroom during the supplemental jury instruction. Another issue, which the Petitioner "felt was the strongest," was the trial court's failure to issue any lesser-included offense instructions. According to the Petitioner, they also discussed application of the heinous, atrocious, and cruel factor to the Petitioner's sentence and the State's presentation of inconsistent theories at the Petitioner's and the co-defendant's trial. While they reviewed other issues, these were the "main ones that were never properly brought up" by trial counsel, in the Petitioner's opinion.

According to the Petitioner, sometime later, he signed a waiver in reference to the motion for new trial. When asked to explain his understanding of the waiver, the Petitioner responded,

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[10] As detailed later in this opinion, the Petitioner seems to be referring to the trial judge's response to two jury questions.

> The waiver was a way to show that they had came [sic] and consulted with me, and that the purpose of this amended motion for new trial that they had filed was simply to put something on the record to show activity from the circuit court, because the . . . case had been on the docket for so long.

The Petitioner stated that "the whole purpose of the waiver was to show some activity" on the case. He believed that trial counsel was going to file "another skeletal amended motion for new trial" because they were still waiting on a complete transcript in order to file a final motion. The Petitioner averred that it was never his intention to waive his presence at the motion for new trial hearing and that trial counsel informed him that the waiver was merely "procedural in nature."

The Petitioner testified that he had reviewed the motion for new trial and amended motion, which were "blank skeletal" motions with no factually specific argument. The Petitioner said that as he understood it, trial counsel would file a "[m]ore thorough motion" after the transcript was obtained, but that never happened. The Petitioner noted that there was "[n]othing substantively" different from the motion for new trial and the amended motion. He described the amended motion: "[I]t appears that they just photocopied it or just retyped the same issues over."

The Petitioner was asked if between 1996, when his jury trial concluded, and 2005 when his motion for new trial was ruled upon, he took "any steps to contact [his] attorneys to try to figure out what the holdup was in reference to the hearing on [his] motion for new trial." The Petitioner answered that when he received the letter from associate counsel in March 2005 advising him that his motion for new trial had been denied and to proceed pro se on appeal, he immediately called associate counsel and inquired, "[W]hat's going on? You—what happened to the hearing? What—you know, why aren't the issues brought up, what—what happened? You told me this was procedural. What is this?" According to the Petitioner, associate counsel "just basically said that—look, that answers your question. . . . Basically the judge ruled and that—that was all that can be done." The Petitioner indicated that he then filed a pro se motion to appeal, as well as writing letters to associate counsel and filing "a whole slew of pleadings." The Petitioner explained that he was trying "to get the motion for new trial opened up, since it was within [thirty] days of [the trial judge's] denying it," and he believed that the trial court had the "lawful authority" to give him a hearing on the motion.

The Petitioner said that thereafter, in May 2005, he was "brought . . . into open court" by the trial judge. According to the Petitioner, he also met with trial counsel at that same time, and associate counsel said to the Petitioner that he could no longer represent him and that they should not have represented the Petitioner "after [he] got convicted."

Next, the Petitioner testified that he did not know the co-defendant's defense team was in possession of the unredacted timeline until the direct appeal opinion in the co-defendant's case was issued in 2004. In addition, he stated that he was not advised of trial counsels' ex parte communication with the trial judge until 2009. According to the Petitioner, if he had known of these events, then he would "have moved the court to disqualify or [remove] . . . [trial counsel] from further representation." The Petitioner noted that trial counsel "became witnesses against [him]" and averred that they could not represent him effectively due to their conflict of interest. Specifically, the Petitioner maintained that he never gave trial counsel "authority to disclose any confidential information to the [co-defendant's] defense team"; that he never gave "them authority to disclose any confidential/privileged information with anyone"; and that he did not authorize them "to divulge facts" learned during their representation of him in order to draft an affidavit in support of the co-defendant.

The Petitioner was asked if there were any issues that "should have been argued by [his] trial counsel, if not at trial[,] in [his] motion for new trial." The Petitioner stated that he was "entitled to [an] instruction on facilitation." He cited to a fifty-two-page document he called the "theoretical guilt matrix," which he asserted provided evidence that "a reasonable juror could have found facilitation, or could have found lesser-included offenses."

The State called appellate counsel to testify. Appellate counsel stated that he did not "recall considering" as an issue on appeal whether the trial judge was competent to make a thirteenth juror determination. He further affirmed that he likewise did not raise any issue about the Petitioner's absence from the courtroom during portions of the trial proceedings. Appellate counsel indicated that he "would have been limited on appeal" to the issues presented by trial counsel in the Petitioner's motion for new trial. According to appellate counsel, he had no knowledge of the ex parte communication between the trial judge and trial counsel.

Appellate counsel explained, "[B]ack then it was my practice that if the client demanded that it be put forward I was going to try and find a way to at least put the phrases in front of the court." Appellate counsel confirmed that he met with the Petitioner while working on his appeal and that the Petitioner sent him "many writings . . . with volumes of things that [the Petitioner] wanted [appellate counsel] to consider." According to appellate counsel, he "tried to raise everything that [he] perceived [the Petitioner] to be demanding [he] raise."

Appellate counsel claimed that on appeal, he raised the issue of ineffective assistance of trial counsel at the Petitioner's behest. However, this court sent appellate counsel an order telling him to reconsider the issue "because it would, by effect, waive [the Petitioner's] right to file a post-conviction petition." The order also stated that the

matter had come to the attention of the court due to a pro se letter from the Petitioner, wherein he stated "that he did not think that the ineffective assistance of counsel argument should be raised." Appellate counsel thereafter withdrew the issue. In addition, appellate counsel affirmed that this court, in the direct appeal opinion, noted several times that the Petitioner's issues were not supported by citations to legal authority and were therefore "denied."

Appellate counsel stated that during the direct appeal process, the Petitioner wanted him removed from the case. However, this court did not allow appellate counsel to withdraw until after the opinion was issued. Due to the passage of time, appellate counsel could not remember if, after being allowed to withdraw, he sent the Petitioner "any kind of pro se application for [R]ule 11 or anything concluding [appellate counsel's] representation" and advising the Petitioner of his further appellate rights.

Following the conclusion of proof, the attorneys "submit[ted]" the case to the post-conviction court without argument. The post-conviction court thereafter denied the Petitioner relief by written order filed on August 7, 2017. Ultimately, the post-conviction court determined that "none of counsels[']actions prejudiced the [P]etitioner and none of the non-ineffective assistance claims entitle[d] [the Petitioner] to relief." This timely appeal followed.

ANALYSIS

Post-conviction relief is available when a "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. Dellinger v. State, 279 S.W.3d 282, 293 (Tenn. 2009) (citing U.S. Const. amend. VI; Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)). The burden in a post-conviction proceeding is on the petitioner to prove his allegations of fact supporting his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); see Dellinger, 279 S.W.3d at 293-94. On appeal, we are bound by the post-conviction court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Additionally, "questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved" by the post-conviction court. Id. However, appellate review of a post-conviction court's application of the law to the facts is de novo, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998).

The Petitioner, who has filed many voluminous pleadings and documents over the years, has chosen to proceed pro se on appeal.[11] He has filed a 205-page appellate brief that is accompanied by an appendix. He also filed a forty-six-page reply brief.[12] The Petitioner's issues on appeal center around (1) an ex parte communication between the trial judge and trial counsel that took place at the trial judge's residence; (2) trial counsels' inadvertent disclosure of the unredacted timeline to the co-defendant's defense team that contained attorney-client privileged information; (3) the lack of any jury instructions on lesser-included offenses for the felony murder counts; (4) the Petitioner's alleged absence during the issuance of the supplemental jury instruction on criminal responsibility and when the trial judge answered jury questions; and (5) cumulative error. We will attempt to decipher, disentangle, and succinctly address the Petitioner's issues as much as possible.

I. Conflict of Interest and Privilege-Related Issues

The Petitioner submits that trial counsel was ineffective because an actual conflict of interest existed due to the breach of attorney-client confidentiality and because trial counsel failed to adequately represent the Petitioner in post-trial motions. These issues concern two separate events: (1) trial counsels' meeting with the trial judge during the pendency of the Petitioner's motion for new trial and telling the judge that based upon their investigation of the case, the co-defendant could not have committed the Taco Bell murders and robbery, and (2) trial counsels' allowing the co-defendant's attorneys access to documents in the war room, including an unredacted timeline, which contained privileged, confidential conversations between the Petitioner and his defense team. According to the Petitioner, trial counsels' breaching attorney-client confidentiality on these two separate occasions created a conflict of interest that prevented them from zealously representing the Petitioner's interests post-trial and constituted ineffective assistance of counsel.

Regarding trial counsels' behavior divulging attorney-client privileged information, the post-conviction court determined that "trial counsels[']post-trial actions were deficient and counsel appear[ed] to have labored under a conflict of interest post-trial[.]" In so concluding, the post-conviction reasoned,

> [T]his [c]ourt believes [trial counsel] should have moved to withdraw after their post-trial meeting with [the trial judge], clearing the way for conflict-

[11] We note that it has been previously determined by the post-conviction court that the Petitioner has knowingly, intelligently, and voluntarily waived his right to appellate counsel.

[12] This court granted both of the Petitioner's motions for his briefs to exceed the page limitations set by Tennessee Rule of Appellate Procedure 27.

> free post-trial counsel. The [c]ourt also finds trial counsel should have done more to protect [the Petitioner's] privileged statements from discovery, and [trial counsel] appear to have done relatively little meaningful work on this case following the return of the jury's verdict.

However, the post-conviction court then determined that trial counsels' deficiencies did not prejudice the Petitioner. The post-conviction court observed that "none of the issues which [the Petitioner] and post-conviction counsel argue should have been raised in the new trial motion and on appeal would have entitled [the Petitioner] to relief." The post-conviction court concluded, "Thus, . . . the lack of prejudice to [the Petitioner] necessarily means [trial counsels'] post-trial actions did not constitute ineffective assistance."

Our first step—identifying the conditions that must be present for the Petitioner to obtain relief—depends on the type of ineffective assistance claim alleged. There are three possible categories of claims.

The first category is deficient attorney performance under Strickland v. Washington, 466 U.S. 668, 694 (1984), which is the "general rule" governing ineffective assistance claims made under the Sixth Amendment to the United States Constitution. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). In these cases, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland, 466 U.S. at 687; see Lockhart v. Fretwell, 506 U.S. 364, 368-72 (1993). "Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996). In addition, because they relate to mixed questions of law and fact, we review the post-conviction court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Fields, 40 S.W.3d at 457.

Deficient performance requires a showing that "counsel's representation fell below an objective standard of reasonableness," despite the fact that reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 688-89. As to the prejudice prong, the petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Vaughn v. State, 202 S.W.3d 106, 116 (Tenn. 2006) (citing Strickland, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. "That is, the petitioner must establish that his counsel's deficient performance was of such a degree that it deprived him of a fair trial

and called into question the reliability of the outcome." Pylant v. State, 263 S.W.3d 854, 869 (Tenn. 2008) (citing State v. Burns, 6 S.W.3d 453, 463 (Tenn. 1999)). "A reasonable probability of being found guilty of a lesser charge . . . satisfies the second prong of Strickland." Id.

When a court reviews a lawyer's performance, it "must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from the perspective of counsel at that time." Howell v. State, 185 S.W.3d 319, 326 (Tenn. 2006) (citing Strickland, 466 U.S. at 689). We will not deem counsel to have been ineffective merely because a different strategy or procedure might have produced a more favorable result. Rhoden v. State, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991). We recognize, however, that "deference to tactical choices only applies if the choices are informed ones based upon adequate preparation." Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992) (citing Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982)).

Second, in United States v. Cronic, 466 U.S. 648, 658 (1984), the companion case to Strickland, the United States Supreme Court indicated that there may be exceptional circumstances "that are so likely to prejudice the accused" that a violation of the Sixth Amendment right to counsel can be presumed. The presumption of prejudice under Cronic presents "a narrow exception to Strickland's holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense." Florida v. Nixon, 543 U.S. 175, 190 (2004). While Strickland applies to most "cases involving mere attorney error," Cronic applies to those cases in which there has been an actual or constructive denial of counsel. Roe v. Flores-Ortega, 528 U.S. 470, 482-83 (2000) (internal quotation omitted); see Strickland, 466 U.S. at 692 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."). "A reviewing court will presume prejudice to an accused's right to counsel only when there has been the complete deprivation of counsel at a critical stage of the proceedings, a complete failure to subject the State's case to adversarial testing, or under circumstances of such magnitude that no attorney could provide effective assistance." Berry v. State, 366 S.W.3d 160, 174 (Tenn. Crim. App. 2011).

The third category involves circumstances when a petitioner's attorney actively represented conflicting interests. See Cuyler v. Sullivan, 446 U.S. 335 (1980). In Strickland, 466 U.S. at 692, the Court, referring to Cuyler, stated that "[o]ne type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice" than those to which Cronic applies. In Cuyler, 446 U.S. at 345-350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those situations, prejudice is presumed only if the defendant demonstrates

that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler, 446 U.S. at 350 (footnote omitted). A petitioner who fails to show both an actual conflict and an adverse affect is not entitled to relief.

Before we begin our analysis, we noted that the post-conviction court in its order concluded that "trial counsels[']' post-trial actions were deficient and counsel appear[ed] to have labored under a conflict of interest post-trial," but that the Petitioner did not suffer prejudice. However, the post-conviction court made such a determination utilizing the Strickland standard without any specific reference to Cronic and Cuyler and did not provide any explanation of its basis for the perceived conflict of interest.

To begin, we will address the presumed prejudice standard announced in Cuyler, which was cited in the February 2017 amended petition prepared by counsel. The Supreme Court's holding in Cuyler is "limited [] to actual conflicts resulting from a lawyer's representation of multiple criminal defendants." Hernandez v. Johnson, 108 F.3d 554, 559 (5th Cir. 1997) (citing Beets v. Scott, 65 F.3d 1258, 1266 (5th Cir. 1995) (en banc)). Accordingly, "Strickland offers a superior framework for addressing attorney conflicts outside the multiple or serial client context." Beets, 65 F.3d at 1265. "Strickland more appropriately gauges an attorney's conflict of interest that springs not from multiple client representation but from a conflict between the attorney's personal interest and that of his client." Id. at 1260. When a personal conflict of interest is alleged, the pertinent inquiry is whether Petitioner has demonstrated that his "attorney's performance fell below an objective standard of reasonableness and that it prejudiced the defense, undermining the reliability of the proceeding." Id. at 1272-73. The "presumed prejudice standard" does not extend beyond cases involving multiple representation. Id. at 1265.

Here, there is no evidence that trial counsel actively represented conflicting interests that adversely affected trial counsels' performance during the post-trial phase. The conflict of interest present in these circumstances is not the type of conflict to which Cuyler applies. Trial counsel spoke with the trial judge and the co-defendant's attorneys after the Petitioner's trial was completed, expressing their belief of the co-defendant's innocence. These discussions took place because trial counsel felt some moral imperative to do so, not because they were representing the co-defendant. Likewise, the disclosure of the unredacted timeline was inadvertent, and once trial counsel learned of its disclosure, they sought the document's return. Their conflict does not arise from conflicting representation but from trial counsels' necessary involvement in the co-defendant's case, including testifying as a witness, due to their inadvertent disclosure of the unredacted timeline. As the State aptly notes, trial counsel were not engaged in any

conflicting representation of another party. Accordingly, the presumed prejudice standard of Cuyler is inapplicable to the Petitioner's case.

The Petitioner also makes a Cronic claim on appeal. The post-conviction court addressed the issues as presented by counsel in the February 2017 amended petiton, and a violation of Cronic was not specifically raised therein. Thus, Cronic was not referenced by the post-conviction court in its ruling. Nonetheless, the Petitioner had previously alleged a violation of Cronic in his pro se filings, and a presumed prejudice argument was presented at the post-conviction hearing. At the conclusion of proof, the lawyers submitted the voluminous pleadings and filings to the post-conviction court without making any argument or clarifying the issues to be addressed. This only served to exacerbate the difficulty in assessing the specific legal arguments properly presented to the post-conviction court for adjudication. Also, the State does not raise the allegation of waiver on appeal. Because the Petitioner is a layperson, who cited to Cronic in his pro se filings, and given the various nuances of these three standards, we decline to waive the Petitioner's Cronic argument. To do so would only compound the injustice to the judicial process that is present in this case.

In addition, this court has previously reviewed a petitioner's claim under Cronic even though it was not presented to the post-conviction court. See Demario Lawon Fisher v. State, No. M2018-00131-CCA-R3-PC, 2019 WL 1504391, at *7 (Tenn. Crim. App. Apr. 5, 2019); Jay Dee Garrity v. State, No. M2016-01463-CCA-R3-PC, 2018 WL 1691296, at *9 (Tenn. Crim. App. Apr. 4, 2018); Marcus Nixon v. State, No. W2006-00618-CCA-R3-PC, 2007 WL 1215031, at *7 (Tenn. Crim. App. Apr. 20, 2007). But see Ricky Vales v. State, No. W2017-02361-CCA-R3-PC, 2019 WL 1109907, at *4 (Tenn. Crim. App. Mar. 11, 2019) (waiving a petitioner's allegation of presumed prejudice where the State argued for waiver, but proceeding to address the Cronic claim and finding it to be without merit). Moreover, the United States Supreme Court has held that "whether we require the defendant to show actual prejudice . . . or whether we instead presume prejudice turns on the magnitude of the deprivation of the right to effective assistance of counsel." Flores-Ortega, 528 U.S. at 482. "[G]iven that the existence of any of the scenarios in Cronic results in per se reversible error," we will address [the Petitioner's] claims. Garrity, 2018 WL 1691296, at *9.

Before addressing the merits of the Petitioner's Cronic claim, we must address the State's argument that the Cronic standard is inapplicable here. The State argues that the Petitioner "identifies no 'complete' abandonment of counsel entitling him to a presumption of prejudice" pursuant to Cronic. Citing to Wallace v. State, 121 S.W.3d 652 (Tenn. 2003), the State submits that "[i]n the motion for new trial context, the Cronic standard applies to a complete failure to file such a motion." The State continues,

> But prejudice is only presumed from counsel's failure to file a motion when it waives all non-sufficiency issues on appeal. [Wallace, 121 S.W.3d] at 659. This was not the case here, as this [c]ourt found that only three of [the Petitioner's] [eighteen] appellate issues were waived for failure to litigate them in the motion for a new trial. See Matthews, 2008 WL 2662450, at *14, *17.

However, the State's reliance on Wallace is misplaced.

In Wallace, the petitioner's motion for new trial was untimely filed, and as a result of untimely filing, the petitioner did not receive appellate review of specific issues raised in the motion for new trial regarding alleged errors at trial. Our supreme court held in Wallace that prejudice was presumed under Cronic because "[c]ounsel's abandonment of his client at such a critical stage of the proceedings resulted in the failure to preserve and pursue the available post-trial remedies and the complete failure to subject the State to the adversarial appellate process." 121 S.W.3d at 658. In the instant case, we are not presented with a case such as Wallace, where the petitioner "was procedurally barred from pursuing issues on appeal, and the State's case was not subjected to adversarial scrutiny upon appeal." Id. at 660. Instead, we are faced with a scenario where trial counsel failed to act as an adversary and subject the Petitioner's motion for new trial proceedings to any meaningful adversarial testing.

Here, the Petitioner's motion for new trial was timely filed. However, the issues were skeletal in nature, without argument or citation to authority. The motion for new trial proceedings were not pursued for over seven years; meanwhile, trial counsel engaged in many unethical behaviors related specially to the Petitioner's representation. Once reinitiated, the amended motion again presented skeletal issues, raising only as new issues sufficiency of the evidence and the trial court's issuance of the instruction on criminal responsibility during jury deliberations. Thus, Wallace, and the injustice it seeks to prevent, is distinguishable from the injustice to the judicial process present here.

Turning to the merits of the Petitioner's Cronic claim, we reiterate the following facts and observe that more is at play here than trial counsels' conflict of interest alone. Trial counsel spoke with the trial judge and the co-defendant's attorneys after the Petitioner's trial was completed under what can only be classified as inauspicious circumstances. The meeting began at the courthouse, moved to a parking lot, and ended at the trial judge's home forty-five minutes away. During this conversation, trial counsel expressed their belief of the co-defendant's innocence. In so informing the trial judge, trial counsel disclosed privileged information based upon their investigation, whether outright or inferentially, to the trial judge. They in essence implied that the Petitioner was, in fact, guilty. The trial judge testified that he believed the meeting was to discuss fees and was not to talk about substantive matters. When substantive matters were

discussed, the trial judge promptly informed the State of the meeting. However, no one apparently ever informed the Petitioner of the meeting.

The circumstances surrounding the communication are troubling, to say the least. Trial counsel found the trial judge at work in the courtroom. Once court recessed for the day, trial counsel approached the trial judge and requested to speak with him. The trial judge advised trial counsel that he had plans for the evening and that any meeting would have to be quick. For whatever reason, trial counsel then agreed to follow the trial judge back to Clarksville and met in a parking lot. It is unclear why any short meeting about fees would need to be moved from the courthouse. Nonetheless, they apparently met in this parking lot but, due to logistics and the trial judge's well-founded discomfort with the setting, continued on to the trial judge's home. The trial judge's urgency to end the discussion for other plans seemingly dissipated. Once there, the meeting lasted roughly thirty minutes.

Trial counsel allowed the co-defendant's attorneys unsupervised access to the Petitioner's files and documents. Ms. Gore was able to obtain and copy the unredacted timeline, which contained statements made by the Petitioner that established his guilt and cruelty towards to the victims. Although trial counsel sought return of the document, the co-defendant's lawyers did not comply, and the unredacted timeline became a highly-litigated issue in the co-defendant's proceedings. Trial counsel obtained their own representation based upon the disclosure. Surely, when associate counsel was called to testify at the co-defendant's motion for new trial hearing in 2000, he was no longer conflict-free. When associate counsel withdrew in October 2000, he stated that lead counsel had returned from Cambodia and would be able to continue with the Petitioner's motion for new trial proceedings, now almost four years old. Lead counsel testified that he was unaware of any further obligations in the Petitioner's case despite the fact that he had never filed a formal motion to withdraw in the Petitioner's case. Even more perplexing is the trial court's decision to allow associate counsel to return to the Petitioner's case in 2003, at which time the conflict should have been apparent to all parties. Associate counsel acknowledged this precise conflict in his July 11, 2005 motion to withdraw from the Petitioner's case, and the trial court granted the motion.

Moreover, trial counsel failed to zealously represent their client by letting the case linger in the trial court for years without pursuing preparation of the transcript. This case languished in the trial court for over nine years before the motion for new trial was finally adjudicated in March 2005. Securing the transcript does not provide a valid reason for this delay; in fact, it appears that the co-defendant's lawyers had a copy of the Petitioner's trial transcript first. The trial judge testified that he got the "clear impression" from trial counsel that the Petitioner himself "was not sure if he wanted to proceed in a motion for new trial" because he did not want to be exposed to the death

penalty upon retrial. However, neither trial counsel nor the Petitioner confirmed the trial judge's assertion. We also question whether that was the state of the law at the time, given that the jury had already rejected a death sentence in this case. See Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (holding that if a trial court has rejected death as a possible sentence, double jeopardy bars the state from seeking the death penalty at re-sentencing, even where rejection of the death sentence was based on a legal error).

Just as in State v. Davis, 466 S.W.3d 49, 79 (Tenn. 2015) (Lee, J., concurring), "this case illustrates the danger of allowing a case to lay dormant while the wheels of justice grind to a halt." With the passage of time, memories fade and witnesses become intimidated, move, pass away, or simply want to forget the events they witnessed. Davis, 466 S.W.3d at 79. The law changes and evolves, as it has in this case, making identification of the proper principles to apply even more difficult. Timely adjudication of criminal charges is a right guaranteed by the United States Constitution. Id. Trial judges should manage their dockets in a timely manner, and defense lawyers and prosecutors should take reasonable efforts to expedite litigation. Id. The timely resolution of criminal cases is a foundational principle of our criminal justice system and is essential to the pursuit of justice. Id.

Here, trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing in the post-trial phase, and there has been a denial of the Petitioner's Sixth Amendment rights that makes the adversary process itself presumptively unreliable. See Cronic, 466 U.S. at 659. In addition to the inexcusable delay in the Petitioner's motion for new trial proceedings and the trial judge's and trial counsels' unethical behavior, trial counsel only filed a skeletal motion for new trial and amended motion for new trial. The amended motion for new trial, that took over seven years to file, raised only two additional issues. All issues were presented in cursory fashion without argument or citation to legal authority. Moreover, from the testimony at the post-conviction hearing, it appears trial counsel waived a hearing on the motion for new trial without providing evidence of the Petitioner's consent. The Petitioner's waiver only covered his presence at the motion for new trial hearing. Trial counsels' deficiencies in this case are egregious. We conclude that there has been a complete breakdown in the adversarial process. We cannot speculate about what issues might have been raised in the Petitioner's motion for new trial had he had the effective assistance of conflict-free counsel.

Because the presumed prejudice standard of Cronic applies, we hold that the Petitioner is entitled to relief. However, the Petitioner's convictions remain intact. Trial counsels' deficiencies occurred post-trial. Upon remand, the Petitioner is permitted a delayed motion for a new trial and conflict-free counsel during the motion for new trial

phase.[13] Thereafter, any appeal shall proceed in accordance with the Rules of Appellate Procedure.

II. Trial Judge's Competency[14]

Next, the Petitioner alleges that the post-conviction court erred by concluding that his due process rights "to an impartial [j]udge/competent [thirteenth] juror were not violated." According to the Petitioner, the post-conviction court misconstrued the issue. He states that his argument in the post-conviction court was not that the trial judge's "exposure to outside privileged information in and itself violated his due process rights to an impartial [j]udge." He submits, instead, that his argument, properly construed, was as follows:

> [H]is due process rights were violated because [the trial judge], after having been exposed to the extrajudicial privileged information, became immediately aware that an actual and significant conflict of interest existed between [the Petitioner] and his trial counsel, yet the [trial judge] knowingly disregarded, and intentionally refused to comply with, his judicial duty to inquire into and remedy the conflict of interest.

(Emphasis removed). He argues that the trial judge's failure to inquire into this conflict of interest disqualified the trial judge from ruling on the motion for new trial or rendering a thirteenth juror determination. Seemingly contrary to his position above, the Petitioner then notes that the trial judge "was objectively influenced by the extrajudicial information he received[,]" as reflected by the trial judge's thirteenth juror determination. According to the Petitioner, this provided evidence of the trial judge's bias against him and requires reversal for a successor judge to render a thirteenth juror determination.

As a separate issue, the Petitioner argues that trial counsel was ineffective by failing to seek recusal of the trial judge. The Petitioner asserts that trial counsels' ineffectiveness "was based upon their underlying conflict." According to the Petitioner, he has demonstrated that there was an actual conflict that adversely affected his trial counsel's performance. Again, he argues for a presumed prejudice standard.

In the post-conviction court, the Petitioner, through counsel, framed these issues in his amended petition as follows: (1) competency of the trial judge to sit as thirteenth juror due to his exposure to ex parte information provided by trial counsel; and (2) appellate

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[13] As discussed below, the trial judge's approval of the verdict as thirteenth juror can stand.

[14] In the event of further appellate review, we will address all of the Petitioner's issues, so that they not be pretermitted. See State v. Parris, 236 S.W.3d 173, 189 (Tenn. Crim. App. 2007) (following a similar procedure).

counsel's failure to argue the thirteenth juror issue on appeal. In the amended petition, it is specifically stated, "ex parte information received by the judge after the trial, but before the [m]otion for [n]ew [t]rial was ruled upon, should have rendered the trial judge unable to continue to hear the case, such that he would have been unable to rule upon any further matters in the case." The petition went on to state that the trial judge should have recused himself because his impartiality could have reasonably been questioned and that his attorneys were ineffective for failing to seek recusal of the trial judge based upon the trial judge's knowledge of disputed facts. According to the petition, the Petitioner's right to a fair and impartial tribunal was violated, which is a structural error that requires automatic reversal. It was also noted therein that when a trial court becomes aware of a potential conflict of interest, it is obligated to pursue the matter even if counsel does not. Therefore, the trial judge, knowing of the breach, should have removed trial counsel. The presumption of prejudice was again cited, and a new trial was requested.

The post-conviction court, in issuing its ruling, first observed that "[t]he ex parte meeting between trial counsel and [the trial judge] is particularly troubling when considering issues of appearance of impropriety and public confidence in the judiciary." The post-conviction court indicated that "the ex parte meeting between . . . trial counsel and the trial judge was far from wise." The post-conviction court continued,

> While not discounting any moral or emotional distress [trial counsel] may have been experiencing, counsels['] "baring their souls" to the trial judge who was still faced with presiding over both [the co-defendant's] trial and [the Petitioner's] motion for new trial could have had no practical effect upon the proceedings in the Taco Bell case. At the very least, [the trial judge] could have done nothing in either defendant's case with the information, and at worst the disclosure ran the risk of impermissibly prejudicing the trial judge against the co-defendants—the very issue [the Petitioner] now raises in this case. Perhaps most disconcerting are trial counsels['] admissions they did not consider the impact on [the Petitioner's] case in making their disclosures to [the trial judge] and counsels['] failure to notify [the Petitioner] about their meeting with the judge. Finally, the meeting was not excepted from the no-ex-parte communications rule and, therefore, likely violated the ethical rules established in the Code of Judicial Conduct.

These observations are on point.

In determining that the Petitioner had not shown ineffective assistance in this regard, the post-conviction court focused on prejudice. The post-conviction court reasoned,

> Clearly, [the trial judge] was exposed to information beyond the confines of [the Petitioner's] trial implicating the [P]etitioner in these offenses. However, the judge's order denying the motion for new trial does not reference the ex parte conversation with trial counsel or the evidence produced at [the co-defendant's] trial and motion for new trial hearing, and at the post-conviction hearing [the trial judge] testified he was not affected by the information he learned outside [the Petitioner's] trial in ruling on the [Petitioner's] motion for new trial. Furthermore, the [c]ourt notes the trial judge's meeting with counsel was not an active fact-finding exercise, and there was no prejudice inherent in the trial judge's learning about the [Petitioner's] timeline in the course of his judicial duties in the [the co-defendant's] case.[15] In the absence of evidence to the contrary, the [c]ourt must conclude the trial court was not prejudiced against [the Petitioner] based on the trial court's exposure to information outside of trial. Thus, the [P]etitioner's assertion the trial judge was incompetent to serve as thirteenth juror is without merit.

The post-conviction court then addressed the allegation of ineffective assistance of counsel for failing to seek recusal of the trial judge. The post-conviction court again determined that the Petitioner had failed to establish prejudice:

> Even if [trial counsel] had raised the issue and had convinced [the trial judge] to recuse himself from the new trial proceedings, . . . a successor judge would have been eligible to serve as thirteenth juror and rule on the motion for new trial. . . . [T]his [c]ourt is confident a successor judge would have been able to conclude the [P]etitioner's convictions were not contrary to the weight and sufficiency of the evidence. Counsel therefore did not render ineffective assistance as to this issue.

Litigants in Tennessee have a fundamental right to a "fair trial before an impartial tribunal." State v. Austin, 87 S.W.3d 447, 470 (Tenn. 2002). Tennessee Supreme Court Rule 10, Code of Judicial Conduct, Canon 2.11,[16] states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned," including when the "judge has . . . personal knowledge of facts that are in dispute in the proceeding" or when "[t]he judge knows that the judge . . . is likely to be a material witness in the proceeding." "[P]ersonal knowledge" pursuant to this provision has been defined by our supreme court: (1) "as knowledge that arises out of a judge's private, individual connection to particular facts and not including information that a

[15] We note that the Petitioner does not specifically reference the timeline in his appellate brief.

[16] The numbering of these Rules has changed since the incidents at issue, but the substance has not. Accordingly, we will cite to the current Rules.

judge learns in the course of her general judicial capacity or as a result of her day-to-day life as a citizen"; or (2) "as that which a judge obtains as a witness to the transaction or occurrence not in their judicial capacity." Holsclaw v. Ivy Hall Nursing Home, Inc., 530 S.W.3d 65, 69-70 (Tenn. 2017) (citing State v. Dorsey, 701 N.W.2d 238, 247 (Minn. 2005); United States v. Long, 88 F.R.D. 701, 702 (W.D. Pa. 1981), aff'd, 676 F.2d 688 (3d Cir. 1982). In addition, our supreme court has interpreted this provision to require a judge to disqualify himself or herself in any proceeding in which "a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." Id. at 69 (quoting State v. Cannon, 254 S.W.3d 287, 307 (Tenn. 2008)). "[T]he test for recusal is an objective one because the appearance of bias is just as injurious to the integrity of the courts as actual bias." Id.

Also, communications with a judge outside the presence of both parties are generally prohibited by the Code of Judicial Conduct. Canon 2.9(A) states that "[a] judge shall not initiate, permit, or consider ex parte communications or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter." Tenn. Sup. Ct. R. 10, Canon 2.9(A) (describing certain exceptions, such as scheduling or administrative issues). Comment 3 under this provision provides clarification that the communications may not be with any "other persons who are not participants in the proceeding," with a few exceptions. Tenn. Sup. Ct. R. 10, Canon 2.9, Cmt. 3. Comment 1 to Canon 2.9 explains, "To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge." If, however, "a judge receives an unauthorized ex parte communication bearing upon the substance of a matter," then "the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond." Tenn. Sup. Ct. R. 10, Canon 2.9(B).

As noted above, the trial judge testified that he believed the meeting was to discuss fees and was not to talk about substantive matters. When substantive matters were discussed, the trial judge promptly informed the State of the meeting as required by the Rule. As far as the judge's role in the communication, it is not necessarily the communication itself, but the circumstances surrounding the communication that are problematic. However, the trial judge did not recuse himself in this case despite the ex parte communication and the circumstances surrounding that communication.

Some errors "compromise the integrity of the judicial process itself" by "involv[ing] defects in the trial mechanism." State v. Rodriguez, 254 S.W.3d 361, 371 (Tenn. 2008). These errors are known as structural constitutional errors and they "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no [such]

criminal punishment may be regarded as fundamentally fair.'" Id. (alterations in original) (quoting Momon v. State, 18 S.W.3d 152, 165 (Tenn. 1999) (quoting Neder v. United States, 527 U.S. 1, 8-9 (1999))). Examples of structural constitutional errors include a biased trial judge, racial discrimination in the selection of a grand jury, the complete denial of counsel, the denial of a public trial, a defective reasonable-doubt instruction, and the denial of self-representation at trial. See Washington v. Recuenco, 548 U.S. 212, 218 n.2 (2006). These errors "are not amenable to harmless error review, and therefore, they require automatic reversal when they occur." Rodriguez, 254 S.W.3d at 371.

In State v. Letalvis Cobbins, LeMaricus Davidson, and George Thomas, No. E2012-00448-SC-R10-DD, slip op. at 3 (Tenn. May 24, 2012) (order), our supreme court held that a trial judge's out-of-court misconduct, in that case his addiction to opiate painkillers, did not constitute structural error "when there is no showing or indication in the record that the trial judge's misconduct affected the trial proceedings." While noting that the trial judge's actions in that case were "a clear and palpable violation" of the canons of judicial conduct, the supreme court, "in the absence of controlling authority otherwise," declined "to hold that a trial judge's out-of-court misconduct, by itself, constitutes structural error unless there is proof that the misconduct affected the trial proceedings." Id. at 4; see also State v. Leath, 461 S.W.3d 73, 116 (Tenn. Crim. App. 2013).

"[M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." Bracy v. Gramley, 520 U.S. 899, 904 (1997). Rather, these questions are "answered by common law, statute, or the professional standards of the bench and bar." Id. The floor established by the Due Process Clause simply "requires a 'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Id. at 904-05 (emphasis added). A trial judge's misconduct amounts to a structural constitutional error when the misconduct affects the judge's impartiality. Put another way, a trial judge's misconduct constitutes a structural error when that "conduct pierces the veil of judicial impartiality." People v. Stevens, 869 N.W.2d 233, 242 (Mich. 2015).

While we do not condone the trial judge's behavior, we are nonetheless constrained to agree with the post-conviction court that the Petitioner has not demonstrated how he was prejudiced by the trial judge's failure to recuse himself from the Petitioner's case. The ex parte meeting occurred after the Petitioner was convicted, so it did not influence the trial. Furthermore, the motion for new trial order does not reference the ex parte conversation or the evidence adduced at the co-defendant's trial. The trial judge learned the same type of information during the ex parte communication

as he did while presiding over the co-defendant's motion for new trial hearing and viewing the unredacted timeline.

In this regard, the post-conviction court made the following pertinent observations:

> [T]he Tennessee Supreme Court has observed "[a] trial judge is not disqualified because that judge has previously presided over legal proceedings involving the same defendant." State v. Reid, 213 S.W.3d 792, 815 (Tenn. 2006). Additionally, "Prior knowledge of the facts about the case is not sufficient in and of itself to require disqualification." Alley [v. State], 882 S.W.2d [810,] 822 [(Tenn. Crim. App. 1994)]. The same judge who presided over a defendant's trial usually presides over the same defendant's post-conviction proceedings despite the judge's prior exposure to the facts of the case because "to require recusal whenever a trial judge in a post-conviction proceeding has knowledge of disputed facts would wreak havoc in the criminal justice system." Harris v. State, 947 S.W.2d 156, 173 (Tenn. Crim. App. 1996). In short, issues regarding a trial judge's exposure to potentially disputed facts during judicial proceedings in either the same defendant's case or those of a codefendant can be summarized thusly: "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality [disqualification] unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky v. United States, 510 U.S. 540, 555 (1994).
>
> Finally, the [c]ourt finds the following comments from the First Circuit Court of Appeals particularly relevant in addressing these issues:
>
> > Insofar as the judge's presiding over the prior trials of [a defendant's] co-defendant[] may have resulted in his learning about facts damaging to [the particular defendant], the situation is not much different from when a presiding judge learns about evidence, later excluded, damaging to a defendant at a voir dire or bench conference in the same proceeding. While judges attempt to shield themselves from needless exposure to matters outside the record, they are necessarily exposed to them in the course of ruling on the admission of evidence; and the judicial system could not function if judges could deal but once in their lifetime with a given defendant, or had to withdraw from a case whenever they had presided in a related or companion case or in a

> separate trial in the same case. The mere fact, therefore, that a judge has already presided over the separate jury trials of codefendants does not, in our view, constitute reasonable grounds for questioning his impartiality in a subsequent jury trial involving a remaining co-defendant.
>
> [U.S. v. Cowden, 545 F.2d [257,] 265-66 [(1st Cir. 1976)] . . . . Or, as a former Chief Justice once observed, "trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1077 (1991) (Rehnquist, C.J., dissenting).

We agree with these well-reasoned findings.

In addition, most of the motion for new trial issues were reviewed on direct appeal and found to be without merit. The trial judge testified at the post-conviction hearing that he was not influenced by trial counsels' statement regarding the co-defendant's innocence, indicating that he may not have believed trial counsels' statements and maintaining that the evidence in the Petitioner's case "was beyond any and all reasonable doubt[.]" According to the trial judge, trial counsels' statement concerning the co-defendant's innocence did not "affect [him] at all in terms of [his] judgment on the sufficiency of the evidence that was [ad]duced at the trial." We cannot say that any bias or impartiality affected the trial judge's ruling on the Petitioner's motion for new trial. The Petitioner has failed to show any resultant prejudice from the trial judge's failure to recuse himself. See, e.g, Carlos Cornwell v. State, No. E2016-00236-CCA-R3-PC, 2017 WL 5957667, at * (Tenn. Crim. App. Dec. 1, 2017).

The Petitioner's assertion the trial judge was incompetent to serve as thirteenth juror is likewise without merit. Nothing in the record reflects that the trial judge was improperly influenced in his decision as thirteenth juror in the Petitioner's case from information he received during the ex parte communication with trial counsel or by presiding at the co-defendant's trial. See, e.g., State v. Stacey Dewayne Ramsey, No. 01C01-9412-CC-00408, 1998 WL 255576, at *14 (Tenn. Crim. App. May 19, 1998) (holding that the trial judge properly denied the defendant's motion to recuse, because although the trial judge heard similar testimony during the co-defendant's trial and approved the verdict of guilt against the co-defendant, the record did not reflect that the judge was influenced in his decision as a thirteenth juror in the defendant's case by his presiding at the co-defendant's trial). For these same reasons, because the Petitioner has failed to establish prejudice from the trial judge's failure to recuse himself, we hold that the Petitioner has not proven that trial counsel were ineffective when they did not move for trial judge's recusal. See, e.g., Jimmy Heard v. State, No. M2013-02661-CCA-R3-PC, 2015 WL 4773348, at *6 (Tenn. Crim. App. May 19, 2015) (concluding that a

motion to recuse would have been unsuccessful and, therefore, trial counsel could not be found to have performed ineffectively).

The Petitioner also argues that the trial judge's failure to inquire into trial counsels' alleged conflict of interest required recusal and violated his due process rights. Courts have an independent duty to ensure that all proceedings are conducted within the ethical standards of the profession and are "fair to all who observe." Wheat v. United States, 486 U.S. 153, 160, (1988). When, therefore, the trial court is aware or should be aware of a conflict of interest, there must be an inquiry as to its nature and appropriate measures taken. Frazier v. State, 303 S.W.3d 674, 683 (Tenn. 2010) (citing Cuyler, 446 U.S. at 346-47). Otherwise, prejudice will be presumed. Id. (citing Cuyler, 446 U.S. at 349-50). The Petitioner provides us with no authority, and we know of none, that requires a trial judge to recuse himself due to his failure to inquire into a conflict of interest. Such a scenario presents an unworkable "Catch-22." Moreover, Frazier is distinguishable from this case because Frazier dealt with a direct rather than imputed conflict. See Christopher Locke v. State, No. E2015-02027-CCA-R3-PC, 2017 WL 1416864, at *7 (Tenn. Crim. App. Apr. 19, 2017). These issues do not merit the Petitioner relief.

Briefly, we digress to discuss whether the trial judge's thirteenth juror determination can stand or whether the successor judge must make such a determination during the motion for new trial proceedings upon remand. Tennessee Rule of Criminal Procedure 33(d) provides that "[t]he trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence." This is the modern equivalent of the thirteenth juror rule and "imposes upon a trial court judge the mandatory duty to serve as the thirteenth juror in every criminal case, and that approval by the trial judge of the jury's verdict as the thirteenth juror is a necessary prerequisite to imposition of a valid judgment." State v. Biggs, 218 S.W.3d 643, 653 (Tenn. Crim. App. 2006) (internal quotation marks omitted) (quoting State v. Carter, 896 S.W.2d 119, 122 (Tenn. 1995)).

It is only when "the record contains statements by the trial judge expressing dissatisfaction with the weight of the evidence of the jury's verdict, or [evidence] indicating that the trial court absolved itself of its responsibility to act as the thirteenth juror, [that] an appellate court may reverse the trial court's judgment" on the basis that the trial court failed to carry out its duty as the thirteenth juror. Carter, 896 S.W.2d at 122. "[T]he accuracy of a trial court's thirteenth juror determination is not a subject of appellate review." State v. Moats, 906 S.W.2d 431, 435 (Tenn. 1995).

Here, the trial judge denied the Petitioner's motion for new trial and ruled that the evidence was sufficient to support the Petitioner's convictions. See Biggs, 218 S.W.3d at 653 (providing that we "may presume the trial court approved the verdict as the thirteenth

juror" when it has overruled a motion for new trial without comment). While we do not condone the trial judge's behavior in this case, our reversal is due to the failures of trial counsel and is not based upon the actions or rulings of the trial judge. For these reasons, we believe that the trial court's approval of the verdict as thirteenth juror can stand and that there is no need for the successor judge to examine this finding.

III. Lesser-Included Offense Instructions

The Petitioner raises numerous issues with the jury instructions. Many of these issues have multiple subsections. We discern that the Petitioner's overarching concern is that trial counsel were ineffective for failing to request lesser-included offense instructions, as well as an instruction on facilitation.

At the time these offenses were committed, the offense of felony murder constituted "[a] reckless killing of another" in the perpetration of certain offenses—in this case, robbery. Tenn. Code Ann. § 39-13-202(a)(2). The record reflects that the trial court did not charge any lesser-included offenses for felony murder. We note that the record contains no filings by trial counsel as to proposed lesser-included offenses, nor is there any discussion on this issue in the trial transcript.

Because our inquiry involves evaluating trial counsels' performance at the time of the trial and the motion for new trial, we will evaluate their decisions under the law of lesser-included offenses as it existed at the time of trial counsels' actions or inactions. See Wiley v. State, 183 S.W.3d 317, 326 (Tenn. 2006) (evaluating a petitioner's post-conviction claim of ineffective assistance of counsel in failing to request lesser-included offense instructions by reviewing counsel's actions in light of the law of lesser-included offenses as it existed at the time of the trial). The relevant law at the time of the Petitioner's trial provided, "It is the duty of all judges charging juries in cases of criminal prosecutions for any felony wherein two (2) or more grades or classes of offenses may be included in the indictment, to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so." Tenn. Code Ann. § 40-18-110(a). In other words, "section 40-18-110(a) require[d] trial judges to charge the jury on lesser-included offenses charged in the indictment whether requested to do so or not." State v. Lewis, 919 S.W.2d 62, 68 (Tenn. Crim. App. 1995) (citing Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979)). Furthermore, our supreme court had held that a defendant was entitled to jury instructions on all lesser-included offenses and on all lesser grades or classes of the offense charged if the evidence would support a conviction for the offense. State v. Trusty, 919 S.W.2d 305, 311 (Tenn. 1996).[17]

[17] Trusty was decided by our supreme court in March of 1996, a little less than three months before the Petitioner's trial began.

At the time of the Petitioner's trial, second degree murder required a knowing killing of another. Tenn. Code Ann. § 39-13-201 (1990). In Wiley, 183 S.W.3d at 326, our supreme court noted that the "the trial court failed to instruct the jury on second degree murder even though it was required to do so under Trusty." Additionally, reckless homicide and criminally negligent homicide were clearly lesser-included offenses at the time of the Petitioner's trial. See State v. Gilliam, 901 S.W.2d 385, 390-91 (Tenn. Crim. App. 1995). Also, before the Petitioner's trial began, this court had determined that "virtually every time one is charged with a felony by way of criminal responsibility for the conduct of another, facilitation of the felony would be a lesser-included offense." Lewis, 919 S.W.2d at 67. The trial court's instructions in this case included the contested supplemental criminal responsibility instruction. Finally, the court in Lewis also explicitly concluded the offense of facilitation of felony murder existed. Id.

We agree with the post-conviction court that the trial court should have instructed the jury on these lesser-included offenses.[18] However, this does not end our inquiry. Neither lead nor associate counsel were asked at the post-conviction hearing about their collective failure to request these lesser-included offense instructions. According to associate counsel, the Petitioner's defense theory included the involvement of "other people['s] being inside the Taco Bell restaurant." The defense implied that the co-defendant was in fact the shooter. During closing arguments, lead counsel maintained that law enforcement assumed the Petitioner was involved and made the evidence "fit" him. He averred that the State's witnesses were unreliable. He indicated that the co-defendant was at the party where the Petitioner supposedly discussed the robbery and suggested that the co-defendant planted the shotgun in the Petitioner's backyard. Possibly, trial counsel were envisioning an "all or nothing" scenario with the jury instructions, but they were not asked why they did not request any lesser-included-offense instructions. It is the Petitioner's obligation to prove his factual allegations by clear and convincing evidence. Accordingly, the Petitioner has failed to carry his burden of proving that counsel was deficient in failing to request these lesser-included instructions. See, e.g., William Edward Watkins v. State, No. M2008-02098-CCA-R3-PC, 2010 WL 4812762, at *8 (Tenn. Crim. App. Nov. 23, 2010) (finding that the petitioner had failed to carry his burden of proving that trial counsel was deficient for omitting the second degree murder instruction issue in the motion for new trial because there was no direct proof at the post-conviction hearing about why trial counsel did not include the issue).

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[18] The post-conviction court also found voluntary manslaughter to be a lesser-included offense of felony murder at the time of the Petitioner's trial. However, there is no evidence that the Petitioner was adequately provoked to support such an instruction.

Furthermore, whether a petitioner has suffered prejudice resulting from his counsel's failure to advocate proper jury instructions depends on "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, 263 S.W.3d at 869). This analysis "mirrors" the constitutional harmless error standard that would be applied had the issue been raised on direct appeal. Id. at 421.

The Tennessee Supreme Court in Moore clarified that the prejudice analysis in an allegation of error based on a failure to charge lesser-included offenses is dependent on a determination regarding whether any intervening or intermediate lesser-included offenses were charged to the jury. Moore, 485 S.W.3d at 421. When there is no intervening lesser-included offense charged, the situation we are faced with in the Petitioner's case, the reviewing court must consider the record, the evidence presented at trial, the defendant's theory, and the jury's verdict. Id. at 422 (citing State v. Allen, 69 S.W.3d 181, 191 (Tenn. 2002)). "In examining 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, and the existence of contradicting evidence of the distinguishing element." Id. (citing Allen, 69 S.W.3d at 191). If the court determines that there is no reasonable probability that a properly instructed jury would have convicted on the lesser-included offenses, then the petitioner is not entitled to relief. Id. at 423-24 (concluding that overwhelming evidence supported the distinguishing element between the greater and lesser offenses).

As stated earlier, felony murder at the time the Petitioner committed the offenses was a "reckless killing of another" committed in the perpetration of certain offenses—in this case, robbery. Similarly, reckless homicide was a "reckless killing of another." Tenn. Code Ann. § 39-13-215. However, second degree murder, which was a "knowing" killing of another, was the directly intervening lesser-included offense of felony murder. Second degree murder has a greater mens rea than the greater offense of felony murder. If the proof supported the mens rea of knowing then it necessarily included the mens rea of reckless. Accordingly, the distinguishing element at issue for both second degree murder and reckless homicide was whether the killings occurred during the perpetration or attempt to perpetrate the especially aggravated robbery. The jury also found the Petitioner guilty of the especially aggravated robbery, and there was no proof to suggest that the killings happened independently of the robbery. Furthermore, the proof established that each victim was shot multiple times, including three who died from shots to the head and two who suffered close-range shots. No reasonable juror would have concluded that the Petitioner acted only negligently. So, we can confidently say the Petitioner was not prejudiced by the failure to seek instructions on second degree murder, reckless homicide, or criminally negligent homicide.

Nonetheless, as the court in Moore noted, 485 S.W.3d at 421 n.4, the term "immediately lesser offense" does not encompass inchoate offenses such as facilitation; however, facilitation is in fact a lesser-included offense of felony murder. At the time of the Petitioner's trial, facilitation was defined as follows: "A person is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony." Tenn. Code Ann. § 39-11-403(a). Criminal responsibility, as relevant here, was defined as,

> A person is criminally responsible for an offense committed by the conduct of another if:
>
> . . . .
>
> Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids or attempts to aid another person to commit the offense[.]

Tenn. Code Ann. § 39-11-402(2). Accordingly, the distinguishing element was whether the Petitioner provided substantial assistance in the commission of these crimes without having the intent to promote or assist in their commission or to benefit from the proceeds of the offenses.

On direct appeal to this court, the Petitioner contended "that the evidence was insufficient to establish that he was criminally responsible for the actions of [the co-defendant] and insufficient to establish that [the co-defendant] had the intent to rob the Taco Bell." Mathews, 2008 WL 2662450, at *16. This court concluded that the record "was more than sufficient" to support the Petitioner's convictions for felony murder under either a theory of direct liability or criminal responsibility. Id. (citing State v. Lemacks, 996 S.W.2d 166, 171 (Tenn. 1999). In so concluding, this court cited to the following evidence:

> Both Carl and Shawntea Ward testified that the [Petitioner] knew details of the Taco Bell murder otherwise known only to law enforcement officers, including the manner in which the perpetrator had entered and exited the restaurant, where the victims' bodies were located, how many shots had been fired, and the type of weapons used. Mr. Ward and Mr. Cooper saw the [Petitioner] load the shotgun and nine millimeter handgun before wiping his fingerprints from the weapons and placing them into a black book bag. During that time, the defendant wore white surgical

> gloves. The [Petitioner] also donned black clothing over a Miami Hurricanes sweat suit and told them that they would "never see" the black clothing again. Just a day prior to the murders, the defendant asked Mr. Peghee to allow him to examine the safe in the Ft. Campbell mail room and specifically asked Mr. Peghee if one could access the safe by shooting the dial with a shotgun. On that same day, the [Petitioner] asked Ms. Underwood if exiting the rear door of the Taco Bell would activate an alarm. The [Petitioner's] jacket was found on the bank of the Red River a short distance from the Taco Bell. Stains on the jacket tested positive as the blood of Mr. Campbell, and black plastic fragments found in the pocket matched black fragments from the dial of the safe in the Taco Bell. Nine millimeter cartridge casings found at the scene and bullets recovered from the bodies of Mr. Campbell and Ms. Klopp matched casings and bullets found in the [Petitioner's] residence. Shotgun shells recovered from the scene matched those found at the [Petitioner's] residence and bore the same mechanism marks as the shotgun recovered from the [Petitioner's] residence. A bowling ball bag found in the [Petitioner's] car contained $2576 hidden under a bottom panel. Finally, the [Petitioner's] fingerprints were found on the door facing and ceiling vent cover in the men's restroom of the Taco Bell.

Id.

As noted above, the Petitioner maintained at trial that he was not involved in the robbery or killings. Trial counsel instead attempted to shift the blame to someone else, specifically the co-defendant. The Petitioner did not present any evidence at trial that he merely facilitated these crimes, and in fact, lead counsel objected to the State's asking a witness to define criminal responsibility and arguing any theory of guilt based on the co-defendant's involvement. Moreover, the co-defendant was also convicted of these crimes; the prosecution's theory in his trial being that he served as a "lookout" for the Petitioner. See Housler, 193 S.W.3d 484, 492-93. Finally, there was "overwhelming evidence of the [Petitioner's] participation in the crimes." Mathews, 2008 WL 2662450, at *16.

We agree with the post-conviction court that there is no reasonable probability that a properly instructed jury would have convicted on the lesser-included offenses. The trial court's failure to instruct on lesser-included offenses was, in short, harmless error. Therefore, the Petitioner did not suffer prejudice from trial counsel's failure to pursue lesser-included offense instructions. See, e.g., Eddie Medlock v. State, No. W2015-02130-CCA-R3-PC, 2016 WL 6135517, at *11 (Tenn. Crim. App. Oct. 21, 2016) (concluding that the petitioner had failed to establish prejudice from trial counsel's failure

to request or appeal the jury instructions regarding lesser-included offenses because there was no reasonable probability that a properly instructed jury would have convicted the petitioner on any lesser-included offenses).

IV. Absences from Courtroom

The Petitioner first submits that the preponderance of the evidence establishes that he was absent during the supplemental jury instruction on criminal responsibility and when the trial court answered two questions from the jury. The Petitioner then contends that absent his presence, the trial court's supplemental instruction and answer to the jury's question violated his constitutional right to be present for trial and constituted structural error. He also argues trial counsel's failure to object to his absence on these two occasions constituted reversible error.

Regarding the supplemental instruction, the record reflects that while the jury was deliberating, the trial court recalled the jury into the courtroom to instruct the jury on criminal responsibility for the conduct of another—an instruction which the trial court stated it had "inadvertently omitted" and upon which the jury was "not to place undue emphasis." The record does not indicate whether the Petitioner was present in the courtroom for this instruction. At the post-conviction hearing, both the Petitioner and two of his relatives testified he was not present during the supplemental instruction. Associate counsel and the trial judge could not recall whether the Petitioner was present, though they both stated that their customary practice would have been to secure the Petitioner's presence. Lead counsel was in fact absent himself when the trial judge issued the instruction; however, he recalled that when he returned he lodged an objection to the instruction and that the Petitioner was present at that time. In addition, appellate counsel testified that he spoke with the Petitioner about which issues to raise on appeal, and though they raised an issue about the trial court's giving of the supplemental instruction, they did not raise any issue about the Petitioner's absence from the courtroom during portions of the trial proceedings. Finally, the prosecutor testified that he was present for every portion of the Petitioner's trial and that the Petitioner was always there.

The Petitioner also argues his right to be present was violated when the court answered jury questions outside his presence. The post-conviction court summarized the following facts pertaining to this specific instance:

> The record reflects on Saturday, [June] 22, 1996, the jury submitted two questions: "Would you clarify Supplemental Instruction Number 2?" and "Would you clarify all of count Five?" The trial court's opening comments to the attorneys suggests the court had, off the record, received the jury questions, discussed the question with counsel, and crafted a

proposed response to the questions before addressing them in court. Once court resumed, the trial court provided the following response to the jury:

> It is the [c]ourt's duty to instruct as to the applicable law. It is the jury's duty to determine the law's application to the facts as you determine them to be. Neither the [c]ourt nor anyone else may invade the province of the jury in this regard. Any further explanation regarding Supplemental Instruction Number Two and Count Five of the indictment would thus be inappropriate.

The Petitioner testified that he was absent when the trial judge answered the jury's questions. Again, the prosecutor testified that he was present for every portion of the Petitioner's trial and that the Petitioner was always there.

The post-conviction court determined that the Petitioner had the right to be present on both occasions, during the supplemental instruction on criminal responsibility and the trial court's answering of the jury's questions. However, the post-conviction court declined to resolve the dispute on whether the Petitioner was or was not present on these occasions. Instead, the post-conviction court focused on whether the Petitioner suffered prejudice from his alleged absences. Because both parties have made much ado about the post-conviction's court decision not to address whether the Petitioner was in fact absent on these occasions, we again note that "a petitioner must establish both prongs of the test" and that "a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." Goad, 938 S.W.2d at 370 (citing Strickland, 466 U.S. at 697). "Indeed, a court need not address the components in any particular order or even address both if the [Petitioner] makes an insufficient showing of one component." Id. Accordingly, the post-conviction court was not mandated to resolve the dispute. We will turn to our analysis of whether the record supports the post-conviction court's determination that the Petitioner was not prejudiced by his alleged absences on these two occasions.

A defendant has a fundamental right under both the federal and state constitutions to be present during his trial. State v. Muse, 967 S.W.2d 764, 766 (Tenn. 1998) (citing U.S. Const. amends. V, VI, XIV; Tenn. Const. art. I, § 9). "Presence at 'trial' means that the defendant must be 'present in court from the beginning of the impaneling of the jury until the reception of the verdict and the discharge of the jury.'" Id. (quoting Logan v. State, 173 S.W. 443, 444 (Tenn. 1914)).

Rule 43(a) of the Tennessee Rules of Criminal Procedure also gives a defendant the right to be present at trial:

> (a) Presence Required. Unless excused by the court upon defendant's motion, the defendant shall be present at the arraignment, at every stage of the trial including impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

Tenn. R. Crim. P. 43(a); see also Crosby v. United States, 506 U.S. 255, 262 (1993) (interpreting Federal Rule of Criminal Procedure 43, which is similar to our state's rule, as prohibiting the trial in absentia of a defendant who is not present at the beginning of trial). The scope of this rule is broader than the constitutional right alone because the rule "embodies the protections afforded by the Confrontation Clause of the Sixth Amendment, the right to be present derived from the Due Process Clause[s] of the Fifth and Fourteenth Amendments, and the common law privilege of presence." Muse, 967 S.W.2d at 767. "For example, under the Confrontation Clause, a defendant has the right to be present in order to confront witnesses and evidence against him." Matthew L. Moates v. State, No. E2003-01926-CCA-R3-PC, 2004 WL 1196085, at *9 (Tenn. Crim. App. May 27, 2004) (citing United States v. Gagnon, 470 U.S. 522, 526 (1985)). Pursuant to due process, "a defendant has a right to be present 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" Id. (quoting Gagnon, 470 U.S. at 527) (additional internal quotations and citations omitted).

The Petitioner asserts the trial court's giving the supplemental instruction on criminal responsibility and responding to the jury's questions without the Petitioner's being present was a structural constitutional error requiring a new trial. We disagree.

The Petitioner, in support of his argument that automatic reversal is required, focuses on the Muse opinion, which held that the defendant's absence from the entire jury selection process required reversal, 967 S.W.2d at 768, as well as citing to Witt v. State, 45 Tenn. (5 Cold.) 11 (1867), an 1867 opinion of the Tennessee Supreme Court. In Witt, the court reversed a conviction based upon the trial court's rereading a portion of the original jury charge outside the defendant's presence while defense counsel were present in court. Id. at 13-17. Likewise, in 1907, our supreme court in Percer v. State, 103 S.W. 780, 781-83 (Tenn. 1907), reversed a conviction when the verdict was received in the defendant's absence. In doing so, our supreme court noted that the same principle applied "when the court charges the jury and when they are recharged or given additional instructions after retirement." Percer, 103 S.W. at 783 (citation omitted).

However, prior to 1967, neither Tennessee nor federal courts applied the harmless error doctrine to constitutional violations. See State v. Williams, 977 S.W.2d 101, 104 (Tenn. 1998); Sullivan v. Louisiana, 508 U.S. 275, 278 (1993); Arizona v. Fulminante, 499 U.S. 279, 306-07 (1991). Consequently, when a constitutional error occurred in a criminal trial, reversal was the automatic remedy. Id. In Chapman v. California, 386 U.S. 18 (1967), the United States Supreme Court rejected the proposition that all federal

constitutional errors that occur in the course of a criminal trial require reversal. Since Chapman, the Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Id. Generally, in modern jurisprudence, application of the harmless error doctrine is the rule rather than the exception. See Williams, 977 S.W.2d at 105; see also Rose v. Clark, 478 U.S. 570, 579 (1986) (applying harmless error to the defendant's absence during unconstitutional burden-shifting jury instructions on element of malice). Indeed, both the United States Supreme Court and the courts of this State have applied the harmless error doctrine to a wide variety of constitutional errors. See Momon, 18 S.W.3d at 164-65 (citing an abundance of cases finding harmless error).

Although in 1998 our supreme court in Muse held that automatic reversal was required in that case, the court also noted other jurisdictions had concluded that a defendant's absence during only a small portion of the jury selection process was subject to harmless error analysis. See 967 S.W.2d. at 768 (citing United States v. Gordon, 829 F.2d 119, 127-28 (D.C. Cir. 1987)). We note that even prior to Muse, this court had held that any error regarding a defendant's being absent from jury selection for a short period of time was harmless. Curtis v. State, 909 S.W.2d 465, 469-70 (Tenn. Crim. App. 1995). And following Muse, in State v. Marlon D. Beauregard, No. W1999-01496-CCA-R3-CD, 2000 WL 705978, at *8 (Tenn. Crim. App. May 26, 2000), this court held that the defendant's absence during the initial roll call of potential jurors during jury selection did not amount to reversible error, deeming the error harmless. Likewise, in State v. Michael Lewis, W2002-0321-CCA-R3-CD, 2003 WL 1697689, at *6 (Tenn. Crim. App. Mar. 26, 2003), this court held that the trial court's conducting an ex parte proceeding at the conclusion of the first day of trial when neither the defendant nor his attorney were present did not result in prejudice to the defendant or the judicial process. In accord, the panel in State v. James Denver Case, No. M2014-00949-CCA-R3-CD, 2015 WL 7458507, at *13 (Tenn. Crim. App. Nov. 24, 2015), concluded that it was harmless error when the defendant was absent while the jury returned to the courtroom during deliberation to review video evidence and the trial court addressed the jury.

The Petitioner's alleged absences occurred only during the issuing of a supplemental instruction on criminal responsibility and when the trial court answered two questions from the jury; it was not for the entirety of the jury instructions. We conclude that the post-conviction court properly applied the harmless error doctrine.

The supplemental criminal responsibility instruction was a correct statement of the law. It was also clear that associate counsel was present when the supplemental instruction was read. When lead counsel returned, he raised an objection to the instruction, including asking for further closing argument. Furthermore, this court on

direct appeal concluded that issuance of the supplemental criminal responsibility instruction was proper and that the instruction's timing did not prejudice the Petitioner. Mathews, 2008 WL 2662450, at *18. This court reasoned that although the timing of the trial court's supplemental instruction "was not ideal," "the record establishe[d] that the jury had been deliberating only a short time when the trial court called the parties to the courtroom and indicated that it had 'inadvertently omitted' an instruction on criminal responsibility." Id. This court further observed that the trial court also "specifically informed the jury that the omission of the instruction in the earlier charge was unintentional and twice warned the jury not to place undue emphasis on the instruction." Id. Thus, even if the Petitioner was absent during the reading of the supplemental criminal responsibility instruction, his absence was harmless.

Regarding the trial court's answering the jury's questions, we note this court has likewise applied the harmless error doctrine to a trial court's communication with a jury via note, necessarily outside of that defendant's presence. See State v. Jeremy Sims and Sherry Brookshire, No. W2013-01253-CCA-R3-CD, 2015 WL 5683755, at *17-18 (Tenn. Crim. App. Sept. 25, 2015). In concluding that the error in that case was harmless, this court reasoned as follows:

> Trial courts should refrain from communicating with deliberating juries by passing notes. State v. Mays, 677 S.W.2d 476, 479 (Tenn. Crim. App. 1984). To prevent even the appearance of judicial partiality or unfairness, any proceedings involving the jury after it has retired for deliberations should be conducted in open court and in the defendant's presence. State v. Tune, 872 S.W.2d 922, 928 (Tenn. Crim. App. 1993); Smith v. State, 566 S.W.2d 553, 559-60 (Tenn. Crim. App. 1978). The proper method for fielding jury questions during deliberations is to recall the jury, counsel for both parties, the defendant, and the court reporter and to resolve the matter on the record. Mays, 677 S.W.2d at 479.
>
> The failure to follow the proper procedure, however, is subject to harmless error analysis. Tune, 872 S.W.2d at 928; Mays, 677 S.W.2d at 479. If the defendant has not been prejudiced by an inappropriate response, reversal is not required. Tune, 872 S.W.2d at 928.

Id.

Here, there was nothing inappropriate about the trial court's response to the jury's questions. The trial court's answer to the questions was simply that it could not provide further explanation because to do so would invade the province of the jury. In addition, the record reflects that counsel was permitted input before the response was provided.

Accordingly, any error associated with the Petitioner's purported absence from the courtroom during the court's answering the jury's questions was harmless.

We conclude that any failure to secure the Petitioner's presence on these two occasions did not prejudice the Petitioner. Consequently, trial counsel did not render ineffective assistance as to this issue.

V. Cumulative Effect

The Petitioner claims that the cumulative effects of the trial judge's and trial counsels' errors entitle him to relief. We would not agree with the Petitioner under a pure Strickland analysis. The cumulative error doctrine recognizes that in some cases there may be multiple errors committed during the trial proceedings, which, standing alone, constitute harmless error; however, considered in the aggregate, these errors undermined the fairness of the trial and require a reversal. State v. Hester, 324 S.W.3d 1, 76 (Tenn. 2010). This court has also considered this doctrine in the context of ineffective assistance of counsel. See Gary Hawkins v. State, No. W2016-00723-CCA-R3-PC, 2017 WL 2829755, at *8 (Tenn. Crim. App. June 30, 2017). We have concluded that trial counsel were deficient in copious amounts post-trial and that the presumed prejudice of Cronic entitled the Petitioner to relief. In this case of further review, we note that if Cronic is found to be waived or inapplicable to the Petitioner's case, the Petitioner cannot establish prejudice under Strickland. He cannot show that he suffered prejudice from trial counsels' various deficiencies, when considered individually or together, because there is not a reasonable probability that but for this deficient performance, the Petitioner's motion for new trial would have been granted or he would have been granted relief on appeal. See, e.g., Larry Edward Moore, Jr. v. State, No. M2017-00903-CCA-R3-PC, 2018 WL 3238965, at *8 (Tenn. Crim. App. July 3, 2008), perm. app. denied (Tenn. Oct. 10, 2018) (determining that the petitioner did not suffer any prejudice from lead trial counsel's deficient performance because there was not a reasonable probability that, but for this deficient performance, the petitioner's motion for new trial would have been granted or he would have been granted relief on appeal). The evidence of the Petitioner's guilt was overwhelming. But for the application of Cronic, the Petitioner would not be entitled to relief via cumulative error.[19]

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[19] The Petitioner attempts to present a claim that the trial court violated Blakely v. Washington, 542 U.S. 296 (2004), when it sentenced him to twenty-five years for the especially aggravated robbery conviction. He also seemingly claims ineffective assistance in this regard. We agree with the State that any Blakely violation issue is waived because it is raised for the first time on appeal. See Cauthern v. State, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004); see also Tenn. R. App. P. 36(a). Moreover, any freestanding Blakely claim would not garner relief in a post-conviction proceeding. See Laraiel Winton v. State, No. W2005-01421-CCA-R3-PC, 2012 WL 273759, at *7 n.2 (Tenn. Crim. App. Jan. 31, 2012) (citation omitted). Finally, the Petitioner does not dispute that neither the post-conviction record nor in the direct

CONCLUSION

Based upon the foregoing, the judgment of the post-conviction court is reversed. The case is remanded for the appointment of conflict-free counsel to represent the Petitioner in the motion for new trial phase. His convictions remain intact.

D. KELLY THOMAS, JR., JUDGE

appeal record include a transcript of the sentencing hearing regarding this conviction. The Petitioner has failed to establish his factual allegations regarding his ineffective claim by clear and convicting evidence.