# The Governor's Council for Judicial Appointments

## State of Tennessee

### *Application for Nomination to Judicial Office*


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## *INTRODUCTION*

The State of Tennessee Executive Order No. 54 (May 19, 2016) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in Microsoft Word format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov. See section 2(g) of the application instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

## ***PROFESSIONAL BACKGROUND AND WORK EXPERIENCE***

1. State your present employment.

I serve as Criminal Court Judge, Division II, for the Sixth Judicial District in Knox County.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

2008 – BPR #27306

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee is the only state in which I have been licensed to practice law. In addition, I am licensed in the following federal courts:

Supreme Court of the United States – June 2, 2014 – Active

United States Court of Appeals for the Sixth Circuit – September 16, 2013 – Active

U.S. District Court for the Eastern District of Tennessee – October 18, 2013 – Active

U.S. District Court for the Middle District of Tennessee – September 9, 2013 – Active

U.S. District Court for the Western District of Tennessee – October 24, 2013 – Active

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Practice of Law

Throughout my studies at the University of Tennessee College of Law, I worked as a clerk at the Office of the District Attorney General for the Sixth Judicial District. After sitting for the bar examination in 2008, I was sworn in as an Acting Assistant District Attorney General pending my bar passage. I served in this capacity from August 2008 through October 2008.

In November 2008, I began service as Assistant District Attorney General in Knox County for D.A. Randall E. Nichols. I served in this capacity until August 2012.

In August 2012, I was sworn in as an Assistant Attorney General in the Office of the Attorney General and Reporter in Nashville. I served in this capacity until August 2014.

In August 2014, I was sworn in as Deputy District Attorney General to newly elected Knox County D.A. Charme P. Allen. I served in this capacity until December 2019.

On January 1, 2020, I was sworn in as Criminal Court Judge, Division II, for the Sixth Judicial District in Knox County. I currently serve in this capacity.

Experience other than the Practice of Law

I was raised in my family's business. During my early childhood, my parents operated M.A. Hixson's Grocery, a small, family-owned grocery store outside of Crossville. The store was open Monday through Saturday, 7 a.m. to 8 p.m., without the assistance of hired employees. By my teenage years, my father had transitioned into operating a small chain of convenience stores in the Crossville area. I worked in these stores after school and in the summers as a teenager.

In high school, I developed an interest in broadcast communications. I gained employment at WOWF-FM, a country radio station in Crossville. Initially, I worked as a statistician for the station's coverage of high school football and basketball broadcasts. When I obtained my driver's license, I began working afternoons and weekends at the station, providing news, weather, and obituary reports.

After enrolling at the University of Tennessee as an undergraduate, I volunteered at WUTK-FM, the University's student-operated radio station. I became the station's sports director and hosted a daily sports talk show known as Rock Solid Sports. In the spring of 2003, I began broadcasting U.T. baseball games on WUTK. That fall, I reached an agreement with Bearden High School to broadcast their football games. I sold underwriting packages to local businesses and used the proceeds of these sales to purchase the equipment needed to broadcast from away sites and to pay my broadcast staff, which included a color commentator and a studio host.

In the fall of 2003, I worked as an associate producer for Titans Radio broadcasts. I produced a pregame show and served as a broadcast booth assistant during home games. The following year, I worked as a producer on Sunday Sports Extra on WBIR-TV in Knoxville.

In 2003, I began an eight-year employment with the Vol Network as an announcer, reporter, and producer for University of Tennessee athletic broadcasts. I reported during Tennessee football and basketball broadcasts and served as a producer/studio host for midweek broadcasts, such as Vol Calls and Big Orange Hotline. My primary responsibility for the Vol Network was play-by-play and color commentary for Tennessee baseball broadcasts. I worked on the baseball broadcast team beginning in 2005, my senior year at U.T., throughout my time in law school, and through my first three years as an Assistant District Attorney General. The broadcast

schedule during this time was strenuous. College baseball plays a 56-game regular season, which generally results in four to five games a week from February through May or June.

In 2017, the faculty at the University of Tennessee College of Law approved my appointment as Adjunct Professor of Law. I have taught four semesters as an adjunct professor of trial practice.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

Division II is one of three divisions of the Criminal Court for Knox County. The three divisions equally share jurisdiction of criminal cases. I hear criminal cases at all stages of trial court litigation, including arraignments, pretrial motions, plea hearings, jury trials, sentencing hearings, motion for new trial hearings, post-conviction hearings, error coram nobis petitions, and habeas corpus proceedings. I review search warrant and judicial subpoena requests on a regular basis. In 2021, 1,066 criminal cases were concluded in Division II. As of the end of 2021, there were 1,028 active cases pending in Division II. I am assigned as the sole judge responsible for approving and supervising bonding companies in the jurisdiction.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

Assistant District Attorney General, November 2008 to August 2012: I began my career as a DUI prosecutor assigned to Knox County's Second General Sessions Court. After a period in General Sessions Court, I was assigned to prosecute DUI cases in Criminal Court where I

tried many cases to a jury. In order to gain more experience, I volunteered my spare time to assist other units within the office such as the Major Crimes Unit and the Drug Unit.

I was reassigned to the Child Abuse Unit in the summer of 2011. I investigated and prosecuted hundreds of cases of physical and sexual abuse of children, as well as cases of child exploitation. I worked closely with law enforcement officers, advising on investigatory tactics, assisting in the drafting of search warrants and investigative subpoenas, and approving or declining the filing of charges. I served as a member of the Knox County Child Protective Investigation Team, a multidisciplinary team of prosecutors, doctors, law enforcement officers, and social workers tasked with investigating all reported child abuse cases in Knox County. I also served on Knox County's Child Fatality Review Team, a multidisciplinary panel that reviews every non-natural child death in the county.

Assistant Attorney General, August 2012 to August 2014: My practice at the Office of the Attorney General and Reporter in Nashville was voluminous and wide-ranging. It included criminal and civil litigation at both the state and federal levels. I represented the State of Tennessee in over 80 cases before the Tennessee Court of Criminal Appeals. I participated in 18 oral arguments before this body. I served as counsel of record in over 60 habeas corpus actions in all three federal districts in Tennessee, as well as the United States Court of Appeals for the Sixth Circuit. A number of these habeas corpus suits were capital cases. I represented numerous state agencies and officials in various state and federal civil suits, including asset forfeitures, handgun permit appeals, declaratory judgment actions, and injunctive actions. I appeared in numerous courts across the state in this capacity. In some cases, I represented state judges and district attorneys general. I was part of a three-attorney team that defended Tennessee's single-drug lethal injection protocol, both in the Chancery Court for Davidson County and before the Tennessee Court of Appeals. I briefed and orally argued to the Tennessee Supreme Court in defense of a statute authorizing the State to seize and forfeit real property used in the commission of child exploitation offenses. I reviewed the legality of administrative rules promulgated by state agencies prior to their approval by the Attorney General. I assisted district attorneys general in the investigation and prosecution of white collar and public corruption cases. Finally, on the request of two members of the General Assembly, I authored Attorney General Opinion No. 14-13, "Pedestrian and Vehicular Use of Marked Bicycle Lanes," and No. 14-61, "Constitutionality of Payment Requirement for Liquor-by-the-Drink Licensees."

Deputy District Attorney General, August 2014 to December 2019: In August 2014, I returned to Knoxville to serve as Deputy District Attorney General to newly elected D.A. Charme P. Allen. As Deputy D.A., I served on an executive team including one or two other Deputy D.A.'s, a Chief Deputy D.A., and General Allen. The executive team supervised criminal prosecutions in three divisions of the Criminal Court, four divisions of the General Sessions Court, the Grand Jury, and the Juvenile Court. To staff these courts, the office employed almost 80 people, including 40 assistant district attorneys general.

My supervisory duties included setting the parameters of plea negotiations, review and approval of cases bound over from the General Sessions Court to the Grand Jury, approval of cases presented for direct review by the Grand Jury, regular meetings with personnel to ensure

compliance with office policy and ethical standards, and the review of cases for possible appeal to the Court of Criminal Appeals.

I dedicated considerable effort to formulating and advising General Allen on office policy, training prosecutors and law enforcement officers, reviewing and promoting criminal legislative proposals, and supervising our office's interaction with the media. I conducted numerous non-CLE training sessions for the staff, as well as outside entities such as the Knoxville Police Department, the Knox County Sheriff's Office, Knoxville's Police Advisory and Review Committee ("PARC"), and participants in the D.A.'s Citizens Academy. I assisted in drafting and reviewing the office's legislative proposals and traveled to Nashville yearly to promote the legislative package of the Tennessee District Attorneys General Conference.

I served as an office spokesman, coordinating and supervising the office's interaction with the media. My goal in this area was to strike the correct balance between properly advising the citizenry about the work of a public office while simultaneously adhering strictly to the ethical rules regarding extrajudicial statements. I coordinated the office's responses to requests made pursuant to the Tennessee Public Records Act. I worked closely with other public officials—including law enforcement agency chiefs, judges, clerks, magistrates, and other elected officials—to ensure the efficient and proper operation of the Knox County criminal justice system.

In addition to my supervisory duties, I maintained my own caseload during my time as Deputy D.A. I prosecuted multiple cases to jury trials, including cases of first degree murder, second degree murder, voluntary manslaughter, vehicular homicide, aggravated rape, felony drug charges, aggravated assault, simple assault, and resisting arrest. I personally prosecuted countless other cases that did not culminate in a jury trial. I worked with law enforcement officers to coordinate investigate efforts prior to charge.

On two occasions during my time as Deputy D.A., I received a special appointment from the Attorney General and Reporter to argue on behalf of Tennessee in appellate oral arguments. I represented the Department of Safety and Homeland Security in appeals of handgun permit denials in the General Sessions Court for Knox County, Civil Division. I appeared in the Chancery Court for Knox County on behalf of the State in an action to recover seized personal property. I worked closely with the Office of the Attorney General and Reporter to discuss legal strategy and to identify cases that were appropriate for appeal.

In 2018, I approached General Allen with a proposed model to assist in the investigation and potential prosecution of cold case homicides and sexual assaults. After receiving her approval, I worked with the faculty at the Duncan School of Law and the U.T. College of Law to implement an externship for the investigation of Knox County cold cases. The model utilized law students to give a fresh look to cases that had gone unsolved for years. It also provided students with a better opportunity to study and understand the pre-charge responsibilities of a prosecutor. When I left the office in 2019, we were preparing to begin our third semester of work in the Cold Case Justice Unit.

In 2019, Knox County stakeholders began implementation of an expanded pretrial release

program based upon a scoring matrix specifically created for our jurisdiction that measures an arrestee's propensity to reoffend and that arrestee's likelihood to appear for court. After being operational for only a few months, the program supervised hundreds of pretrial releasees who were released to supervision in lieu of posting a cash bail. I served on the supervision workgroup for this project. Working with judges, clerks, defense attorneys, consultants, and pretrial officers, I helped formulate the supervisory requirements for individuals released to the program. The timing of the program's implementation was fortuitous, as it laid valuable groundwork for the challenges we would face the next year with the COVID-19 pandemic.

Criminal Court Judge, January 2020 to present: One of my main focuses upon taking the bench was to ensure the expeditious resolution of cases. Both sides of a lawsuit are entitled to a speedy resolution of their dispute. Long delays in the criminal justice system serve to erode the public's confidence that the system is effectively serving its purpose. To this end, I implemented a system that combines scheduling orders, status hearing dates, plea deadline dates, and pretrial conference dates to ensure that cases are staying on-schedule and proceeding to a timely disposition.

Post-conviction petitions were a category of cases that had become especially problematic in this regard. There is a temptation to place post-conviction cases on the backburner behind active criminal prosecutions because they are collateral, non-constitutional proceedings. I felt that this temptation must be avoided because post-conviction proceedings, in truth, are an essential tool that allow state courts to ensure that a petitioner's trial or plea proceedings conformed with constitutional requirements, particularly a petitioner's right to the effective assistance of counsel. If there was any silver lining to the two suspensions of jury trials that we experienced during the pandemic, it was that I was able to use this time to work with court staff and attorneys to clear a backlog of post-conviction petitions, a handful of which had pended for more than a decade.

During my time on the bench, I have remained dedicated to being an active member of the bar and judicial community outside of my responsibilities in the courtroom. I feel that judges have a responsibility to be visible members of our legal and local communities. I have become active in the Tennessee Judicial Conference, serving on its Executive Committee since last July by virtue of my co-chairmanship of the Conference's Hospitality Committee. I also serve on the Criminal Pattern Jury Instructions and Legislative Committees of the Conference. I am a member of the Tennessee Trial Judges Association. I have remained active in the KBA, serving as a speaker at one of their CLE presentations. I have presented a CLE on behalf of the TBA. I have also continued my participation in KBA's Constitution Day outreach to local schools, as well as KBA's Buddy Match program, an initiative to increase diversity within the bar.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I am limiting my response to this question to cases that I handled as a practicing attorney. I will address cases of special note from my time on the bench in Question 10.

Assistant District Attorney General, 2008-2012

*State v. Herbert Michael Merritt*, No. 91370 (Knox Crim. Ct. Div. III). I served as co-counsel in the State's prosecution of the defendant for the first degree murder of a bar patron in the Halls community of Knox County in 2008. The defendant shot the random victim multiple times and then barricaded himself inside the bar and mutilated the victim's body before officers were able to negotiate his peaceful surrender. One of the main issues at trial involved the admission of expert mental health testimony and how it related to the defendant's ability to form the requisite mental state of premeditation. The defendant was convicted as charged, and his conviction was affirmed on appeal. *See id*, No. E2011-01348-CCA-R3-CD, 2013 WL 1189092 (Tenn. Crim. App. Mar. 22, 2013), *perm. app. denied* (Tenn. Aug. 13, 2013).

*State v. Mark Stephen Foster*, No. 94077 (Knox Crim. Ct. Div. II). In February 2010, the defendant, a disgruntled teacher at Knoxville's Inskip Elementary School, went to school on a snow day and shot the principal and assistant principal, seriously wounding both victims. I served as co-counsel during the prosecution of the defendant for attempted first degree murder and other firearms charges. The defendant pled guilty and received a sentence of 56 years following a contested sentencing hearing.

Assistant Attorney General, 2012-2014

*West, et al. v. Schofield, et al.*, No. 13-1627-I (Davidson Ch., Part I); No. M2014-00320-COA-R9-CV, 2014 WL 4815957 (Tenn. Ct. App. Sept. 29, 2014). A group of condemned state inmates sued multiple state officials and employees seeking to have Tennessee's one-drug lethal injection protocol declared unconstitutional. I worked on a three-attorney team charged with formulating a litigation strategy and defending the protocol before the Chancery Court of Davidson County. We sought interlocutory appeal after the Chancellor ordered the State to disclose the identity of those people directly involved in the execution process as part of its discovery obligation. I briefed the case and received a special appointment to argue before the Tennessee Court of Appeals that the identities sought were confidential and not subject to discovery. The Tennessee Supreme Court later adopted our argument and ruled in the State's favor in a case argued by the Office of Solicitor General. *See West, et al. v. Schofield, et al.*, 460 S.W.3d 113 (Tenn. 2015); *see also West, et al. v. Schofield, et al.*, 519 S.W.3d 550 (Tenn. 2017) (ruling on the merits of the case cited previously and upholding Tennessee's one-drug lethal injection protocol).

*Jonathan Wesley Stephenson v. State*, No. E2012-01339-CCA-R3-PD, 2014 WL 108137 (Tenn. Crim. App. Jan. 13, 2014), *perm. app. denied*, (Tenn. Sept. 19, 2014). In a complex capital case originating from Cocke County, I served as lead counsel on appeal before the Court of Criminal Appeals and on application pursuant to Tenn. R. App. P. 11 before the Tennessee Supreme Court (State's brief before the Court of Criminal Appeal attached as a writing sample). The petitioner was convicted for the 1989 murder of his wife and sentenced to death based upon Tennessee's "murder for remuneration" aggravating circumstance. After his initial death sentence was reversed in 1994 for an instructional error, the petitioner agreed to serve a sentence of life without the possibility of parole. In 2000, however, the petitioner obtained state habeas corpus relief because life without parole was not an available sentence for murder at the time of

the crime. He was resentenced to death by a jury in 2002. Against this procedural backdrop, the petitioner raised 19 issues in his post-conviction appeal. The State prevailed in the Court of Criminal Appeals, and the Tennessee Supreme Court refused to grant permission to appeal.

*Scott W. Grammer v. Michael Donahue, Warden*, No. 13-5770 (6th Cir. June 10, 2014). This federal habeas corpus appeal arose in the wake of the U.S. Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), which, for the first time, allowed state prisoners to allege the ineffectiveness of post-conviction counsel as a cause that would excuse their procedural default for failing to fairly present an issue in state court proceedings before raising that issue in a federal habeas corpus suit. I represented the state prison warden in the appeal to the United States Court of Appeals for the Sixth Circuit and argued on brief that the district court properly denied the petition for writ of habeas corpus. The petitioner, who was serving an effective 22-year sentence following three convictions of aggravated sexual battery in Hamilton County, argued that he exhausted his state remedies by raising a claim of ineffective assistance of counsel for failure to challenge the sufficiency of the evidence during his state post-conviction proceedings. The Court of Appeals remanded the case to the district court for a consideration of the merits of the petitioner's claim.

*Miqwon Leach v. Jerry Lester, Warden*, No. 14-5005 (6th Cir. Sept. 17, 2014). I represented the state prison warden in this federal habeas corpus appeal and successfully argued to the Court of Appeals for the Sixth Circuit on brief that the district court properly dismissed the petition in this case due to lack of subject-matter jurisdiction and for the failure to state a claim upon which relief can be granted. The petitioner is serving a sentence of life without the possibility of parole for a 1999 murder in Obion County.

*State v. Sprunger*, 458 S.W.3d 482 (Tenn. 2015). I represented the State on brief and in oral argument before the Tennessee Supreme Court in this case involving the forfeiture of real property pursuant to Tenn. Code Ann. § 39-17-1008, which allows for the forfeiture of real property used in the commission of child exploitation offenses. The appellant challenged the sufficiency of the evidence supporting the Chancery Court's finding of forfeiture and argued for an interpretation of the law that, if adopted, would have prevented future forfeitures under this statute as a practical matter. The Court instead held that the district attorney general seeking forfeiture in this case did not strictly comply with the mandatory procedural requirements in the statute and, on this basis, returned the remaining proceeds from the sale of the real property to the appellant.

*State v. Aguilar*, 437 S.W.3d 889 (Tenn. Crim. App. 2013). I served as lead counsel for the State on the appellant's direct appeal of his convictions for sexual exploitation of a minor. I argued on appeal that the appellant had no reasonable expectation of privacy in the contents of a file-sharing program on his computer. The Court of Criminal Appeals agreed with my standing argument and, for the first time in a reported case, found that the 2005 amendment to Tenn. Code Ann. § 39-17-1003 expressly authorizes the aggregation of exploitative images to increase the offender's punishment.

*State v. Jessica Kennedy*, No. E2013-00260-CCA-R3-CD, 2014 WL 3764178 (Tenn. Crim. App. July 30, 2014), *perm. app. denied* (Tenn. Dec. 16, 2014). The defendant was charged in

Monroe County for her role in the 2010 murder of the victim, who was shot, his body placed in the trunk of his car, and his car set on fire. A jury convicted the defendant of facilitation of first degree murder, and she received a sentence of 22 years. I represented the State before the Court of Criminal Appeals, where she raised ten issues on direct appeal. The judgments of the trial court were affirmed.

Deputy District Attorney General, 2014-2019

*State v. Timothy Dwayne Ison*, No. 106155 (Knox Crim. Ct. Div. III). I served as lead counsel in the prosecution of the defendant for the 2015 stabbing of a stranger on a Knoxville greenway. The jury convicted the defendant of first degree murder in a 2017 trial. In the sentencing phase, the jury imposed a sentence of life without the possibility of parole based, in part, upon the aggravating circumstance that the murder "was committed at random and the reasons for the killing are not obvious or easily understood[,]" the first time that this aggravator had been used in a Knox County court since its enactment in 2011. *See* Tenn. Code Ann. § 39-13-204(i)(17). The judgment was affirmed on direct appeal. *See id*., No. E2018-02122-CCA-R3-CD, 2020 WL 3263384 (Tenn. Crim. App. June 17, 2020), *no perm. app. filed*.

*State v. Norman Eugene Clark*, No. 103548 (Knox Crim. Ct. Div. I). A Knoxville man was accused of two counts of first degree murder in the brutal home-invasion homicides of his ex-girlfriend and her unborn child. His first trial resulted in a hung jury and a mistrial. Following his first trial but prior to his retrial, the defendant gave an interview to Dateline NBC. The news agency indicated that it would not air the contents of his interview until after his second trial. I led the State's efforts to obtain this unaired interview from NBC News via judicial process for potential use in the retrial. I worked closely with the Solicitor General's Office in Nashville as well as the Manhattan District Attorney's Office in our attempt to divest NBC News of its protections under the Shield Laws of Tennessee and New York (State's motion to divest attached as a writing sample). Our efforts were ultimately unsuccessful. The State dismissed the charges against the defendant following a second hung jury and mistrial.

*State v. Johnson and Williams*, Nos. 104964A-B, (Knox Crim. Ct. Div. II). Two University of Tennessee football players were accused of the aggravated rape of a female student-athlete. I served as co-counsel during this litigation, which included an interlocutory appeal to the Court of Criminal Appeals regarding the defendants' attempts to access via subpoena the cellular telephones and social media accounts belonging to the alleged victim and other witnesses. *See State v. Johnson and Williams*, 538 S.W.3d 32 (Tenn. Crim. App. 2017). Following a ten-day jury trial in July 2018, the defendants were acquitted.

*State v. Ralpheal Cameron Coffey*, No. 110330 (Knox Crim. Ct. Div. III). In 2016, the defendant led authorities on a two-county high speed chase that resulted in a fatal crash at a Knox County intersection. A Knoxville man who was engaged to be married the next weekend was killed, along with the defendant's passenger. I served as lead counsel in the prosecution of the defendant, which culminated in a jury trial in January 2019. The defendant was convicted of reckless vehicular homicide, reckless homicide, and numerous felony drug charges, including possession with intent to sell cocaine in a drug-free school zone. He was sentenced to forty-eight years in prison. The judgments were affirmed on direct appeal. *See id.*, No. E2019-01764-

CCA-R3-CD, 2021 WL 2834620 (Tenn. Crim. App. July 8, 2021), *perm. app. denied* (Tenn. Nov. 19, 2021).

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

*State v. Neal Scott Daniels*, No. 112763 (Knox Crim. Ct. Div. II). I presided over this felony DUI jury trial in July 2020, just over a week after the Supreme Court lifted its initial statewide suspension of jury trials. This was the first jury trial in Knox County following the end of the suspension and, to my knowledge, the second in the state. I overruled strenuous objections from the defense and ordered the trial to proceed as scheduled, following the implementation of extensive safety procedures given the public health situation at the time. After extensive pretrial litigation, *see, e.g., State v. Neal Scott Daniels*, No. E2020-00966-SC-R10-CD, Order (Tenn. July 21, 2020) (on the morning of trial, denying extraordinary appeal by the defendant seeking a continuance), the trial proceeded in an orderly and noneventful fashion. The *Daniels* case demonstrated that we could safely try cases to a jury in Knox County in the COVID era and helped to pave the way for multiple jury trials in our jurisdiction in the months to come. The defendant's judgment is currently pending appeal in the Court of Criminal Appeals. *See State v. Neal Scott Daniels*, No. E2021-00561-CCA-R3-CD.

*State v. Raffell Griffin, et al.*, Nos. 114931-114939, 114942-114943 (Knox Crim. Ct. Div. II). This case involved 11 co-defendants alleged to have been involved in a year-long, gang-related cocaine conspiracy. Four of the co-defendants were charged with a first degree murder related to the conspiracy. Pretrial litigation in this case was extensive, including multiple lengthy hearings on motions to dismiss, motions to suppress, motions to sever, and a motion to recuse me as judge based upon my prior employment with the prosecutor's office, an issue that went to the Tennessee Supreme Court on interlocutory appeal and resulted in that Court's affirmation of my decision not to recuse. *See State v. Griffin, et al.*, 610 S.W.3d 752 (Tenn. 2020); *see also State v. Clark*, 610 S.W.3d 739 (Tenn. 2020). The defendants' cases were severed for trial. Two of the defendants proceeded to trial and were convicted of first degree murder, along with drug and gun charges. One of the co-defendants pled guilty to first degree murder, and another proceeded to trial and was convicted of the drug and gun charges. The remaining defendants' cases were resolved by plea agreements with the State. These cases were arraigned before I took the bench, and the last trial was conducted in January 2022. These cases are significant because we were able to litigate a complex conspiracy case and bring all cases to resolution all while working around two pandemic-related jury trial suspensions and a stay of the proceedings pending interlocutory appeal.

*Cumecus R. Cates v. State*, Nos. 79375 and 79764 (Knox Crim. Ct. Div. II). These post-conviction petitions were filed in 2004 and were continued without a hearing until I took the

bench in 2020. Following an exhaustive review of pending post-conviction petitions in Division II, I highlighted this case as one that must be brought to hearing as soon as possible. An evidentiary hearing was held on November 23, 2020. On December 16, 2020, I issued an order granting partial relief to the petitioner (order attached as a writing sample). The petitioner subsequently reached an agreement with the State that resolved all of his pending cases.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

On April 1, 2020, I was appointed by the General Sessions Court for Rutherford County, Probate Division, to serve as the personal representative of the estate of my grandmother-in-law, Elois Snow. I was appointed pursuant to my nomination in the decedent's will. Following the administration of her will, the estate was closed on November 20, 2020. *In re: The Estate of Elois Snow*, No. 75PR1-2020-PR-140.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

When I was sworn in on January 1, 2020, I could never have anticipated the challenges that the COVID-19 pandemic would bring to the administration of the criminal justice system just two-and-a-half months later. More than anything else, the pandemic's effects on our system have defined my tenure as a judge. I cannot say enough about the extraordinary efforts of so many people in Knox County who came together to find a way to help our system function during this difficult time.

When the Supreme Court issued its first suspension of jury trials and in-person proceedings on March 13, 2020, I was in Murfreesboro for the last day of our spring judicial conference. I left the conference early so I could get back to Knoxville to attend a stakeholders meeting that afternoon that had been called to address the situation. In less than an hour, the stakeholders—judges, clerks, prosecutors, defense attorneys, public health officials, and law enforcement officers—had formulated a working plan to continue limited court operations for the weeks to come. Within days, I was holding court for Division II from a laptop in my basement.

The March 13 meeting was the first of many that have taken place on a regular basis throughout the pandemic. For months, all stakeholders met at least biweekly on a virtual platform to discuss issues that we were facing and possible solutions. This constant line of communication and cooperation was critical as we all worked towards the common goal of keeping our system running during the pandemic.

Throughout this challenge, the proactive steps taken by our jurisdiction regarding pretrial release played a crucial role in helping us reduce jail population to previously unimaginable levels. This lower jail population allowed the sheriff to appropriately manage his inmate population and provide the necessary quarantine for newly admitted inmates. The sheriff

quickly created video rooms at our downtown jail and at our offsite detention facility to accommodate the large number of proceedings that were now taking place via video in lieu of transporting the inmates into the courtrooms.

This level of cooperation by everyone involved in our local system allowed our courts to remain open, albeit virtually, and allowed us to hear hundreds if not thousands of cases that otherwise could not have been heard.

By July, the first wave of the virus had waned, and we faced the end of the first suspension of jury trials. While we were not required to resume jury trials at the local level, my two criminal court colleagues and I, following consultation with our system partners and local health officials, decided that jury trials should resume in Knox County. The decision was not an easy one, and it was met with no small amount of resistance. However, we felt then, and I still feel to this day, that it was absolutely imperative for Knox County's courts to be open and fully functioning, so long as we took the appropriate precautions to protect those participating in the process. Our jury system was too important, I believed, to be placed on hold indefinitely for the duration of a pandemic with no known end in sight.

The *Daniels* case, mentioned above, was the first case to proceed to trial in Knox County following the resumption of jury trials. It took a great deal of hard work and ingenuity by many people to allow the case to be heard. Scanning stations at the front entrance of the courthouse and at the juror check-in desk at the clerk's office ensured that no jurors with high temperatures were admitted. Jurors completed questionnaires to ensure that they were not experiencing COVID symptoms. In the courtroom, plexiglass was installed around the witness stand to allow witnesses to testify without masks in order to protect the confrontation rights of the accused and to allow the jurors to properly assess the witnesses' credibility. Exhibits were presented via a projector instead of passing them hand-to-hand through the jury box. Jury deliberations occurred in an unused courtroom, as opposed to our jury rooms, to allow for appropriate distancing. Exhibits were spread over tables by court officers prior to deliberations to allow the jurors to remain distanced while viewing the exhibits and to prevent the need for the jurors to touch the exhibits.

We learned much from our experience in *Daniels*. We were able to build on this experience and try a number of jury trials in all three divisions before they were again suspended in November 2020. I personally presided over five jury trials during this interim period, including a case of first degree murder. That is much fewer than I would normally try in a regular five-month period, but it was five cases that were brought to resolution that otherwise would not have been. Since the first suspension ended in July 2020—and considering that trials were again suspended from November 2020 through early April 2021—I have presided over 24 jury trials.

I write to say how proud I am of everyone involved in our justice system who came together and devised creative ways to deal with a situation that was unprecedented in our time. The guidance and leadership that we received from the Supreme Court and the Administrative Office of the Courts were invaluable. Our local leaders focused on ways to make the system work, instead of finding excuses for why it could not work. I am honored to have played a very small role in our combined effort.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

On October 18, 2019, I applied to the Tennessee Trial Court Vacancy Commission to fill the upcoming vacancy in the Criminal Court, Division II, Sixth Judicial District, created by the retirement of the Hon. Bob R. McGee. Because there were only two applicants for the position, the Commission did not hold a public hearing but instead forwarded the two applications to Governor Lee for his consideration. On December 10, 2019, Governor Lee appointed me to this position. I was sworn in on January 1, 2020.

## ***EDUCATION***

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

**The University of Tennessee College of Law, 2005-2008**

-Doctor of Jurisprudence, *summa cum laude*

-Order of the Coif

-Concentration in Advocacy and Dispute Resolution

-Recipient of the Robert E. Pryor Award for Excellence in Advocacy

-Recipient of the Constitutional Law Award, the Trial Practice Award, and the Interviewing and Counseling Award

-Howard Baker Memorial Scholar, Robert A. Finley Scholar, and College of Law Scholar

**The University of Tennessee, Knoxville, 2001-2005**

-Bachelor of Science in Communication, *summa cum laude*

-Major in Broadcasting and Political Science

-Bicentennial Scholar

## ***PERSONAL INFORMATION***

15. State your age and date of birth.

38. [redacted] 1983.

16. How long have you lived continuously in the State of Tennessee?

I have lived in Tennessee my entire life.

17. How long have you lived continuously in the county where you are now living?

I have lived in Knox County continuously since 2001, with the exception of 2012 through 2014, when we lived in Rutherford County during my employment at the Office of the Attorney General and Reporter in Nashville.

18. State the county in which you are registered to vote.

Knox County, Tennessee

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None. Last year, an attorney filed a complaint with the Board of Judicial Conduct against

me after I disqualified that attorney from a criminal case based upon my belief that she had engaged in unethical conduct during her representation of the defendant. On December 21, 2021, I was informed that the Board dismissed the attorney's complaint without requiring my response on the recommendation of Disciplinary Counsel.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

I have never filed a lawsuit nor have I ever been sued personally. However, in September 2021, I was sued in my official capacity in the U.S. District Court for the Eastern District of Tennessee by a criminal defendant who has a pending case in my court. Co-defendants in her lawsuit include the prosecutor on her criminal case, the elected District Attorney General, and her court-appointed defense attorney. The plaintiff claims damages and injunctive and declaratory relief for alleged violations of treaties of the United States, the Holy Bible, and various sections of the United States Code. The case is currently pending the District Court's decision on the defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. *See Elliott v. Criminal Court for Knox County, et al.*, No. 3:21-cv-00327-KAC-JEM. The plaintiff's criminal case is pending a jury trial scheduled for May 9, 2022. *See State v. Erica Antonette Elliott*, No. 119217.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Laurel Church of Christ, Member

Sertoma Center, Board of Directors, 2016 to present

CASA of East Tennessee, Board of Directors, 2015 to 2018

Knox County Republican Party, Parliamentarian, February 2019 to September 10, 2019

West Knox Republican Club

-President, January 2018 to September 10, 2019

-Vice President, January 2017 to December 2017

-Treasurer, January 2016 to December 2017

National Rifle Association, Life Member

Tennessee Farm Bureau, Member

Friend of the Great Smoky Mountains National Park

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

## ***ACHIEVEMENTS***

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Judicial Conference, 2020 to present

-Member of the Executive Committee, July 2021 to present

-Co-chairman of the Hospitality Committee, July 2021 to present

-Member of the Committee on Criminal Pattern Jury Instructions, 2020 to present

-Member of the Legislative Committee, 2020 to present

Tennessee Trial Judges Association, 2020 to present

Knoxville Bar Association, 2008-2012, 2014 to present

-Member of the Criminal Justice Section

Hamilton Burnett American Inn of Court, 2010 to present

Knoxville Federalist Society, 2017 to present

National District Attorneys Association, 2016 to 2019

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Knoxbiz.com 40 Under 40, 2019 Honoree

30. List the citations of any legal articles or books you have published.

I have not published a book or any scholarly legal articles. I have published the following articles in DICTA, the monthly publication of the Knoxville Bar Association:

-The Public Safety Act of 2016: Points of Litigation, May 2017

-When a True Man Acts Unlawfully: *State v. Perrier* Reshapes Self-Defense Law in Tennessee, April 2018

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

-I am scheduled to speak at the Spring 2022 meeting of the Tennessee Judicial Conference on the topic of unanimous jury verdicts.

-On November 6, 2020, I presented a CLE as part of the KBA's Views from the Bench program on the topic of Pandemic Practice: Applying Rules and Precedent in Unprecedented Times.

-On August 21, 2020, I presented a CLE as part of TBA's FastTrack Knoxville program on the topic of Criminal Court and Jury Trials in the Age of COVID.

-I taught a course on trial practice as an adjunct professor at the University of Tennessee College of Law in the fall semesters of 2017, 2018, 2019, and 2020.

-In February 2016, I was an instructor at the Knox County Sheriff's Office P.O.S.T. Academy on the topic of Criminal Prosecution: Working Alongside the District Attorney General.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

As stated, I currently serve as Criminal Court Judge, Division II, for the Sixth Judicial District

in Knox County. I was appointed to this position by the Governor in December 2019 and sworn in on January 1, 2020. I won a contested Republican primary election on March 3, 2020 and was uncontested in the general election that August. I have returned a petition and will appear as a candidate in the Republican primary election for this seat to be held on May 3, 2022.

In March 2017, I applied to the Merit Selection Panel for the position of United States Magistrate Judge for the Eastern District of Tennessee at Knoxville. I was not one of the five finalists submitted to the district judges for consideration.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

From *State v. Clark*, I have attached my motion as Deputy D.A. seeking to divest NBC News of its Shield Law protections under Tennessee and New York law. I drafted the motion in its entirety. I forwarded the motion to the Office of the Solicitor General, who provided minor edits prior to its filing.

From *Cates v. State*, I have attached my order as post-conviction judge partially granting post-conviction relief. A law clerk assisted me in drafting the statement of facts from the rape trial. The order is otherwise entirely my work.

From *Stephenson v. State*, I have attached the appellee's brief that I filed as Assistant A.G. on behalf of the State in the Court of Criminal Appeals. I drafted the brief in its entirety. Because it was a capital case, the brief was reviewed by the Deputy Attorney General in my division and the Office of Solicitor General, who provided minor edits.

## ***ESSAYS/PERSONAL STATEMENTS***

35. What are your reasons for seeking this position? ***(150 words or less)***

I have dedicated my career to public service in Tennessee's criminal justice system. I have witnessed firsthand how a judge's decisions impact countless defendants, victims, and witnesses. I have dealt with the ramifications of a judge's decisions years, if not decades, later through the study of transcripts in appellate litigation. I believe in the importance of our work, and I feel a personal responsibility to ensure that it is done correctly.

I believe that my experiences as a trial court litigator, appellate litigator, and trial judge have prepared me well for a position on the appellate court. The decisions of the Court of Criminal Appeals have a profound impact on the fair administration of justice in Tennessee. If selected, I would bring the same work ethic to this challenging position that I have demonstrated throughout my career.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

Judges have a responsibility to demonstrate a commitment to equal justice under the law both inside and outside of the courtroom. While I have been prevented from providing pro bono legal services during my career due to my status as either a prosecutor or judge, I have otherwise committed myself to actively seeking ways to improve our system and help citizens understand the importance of the judiciary. I have been a frequent participant in the KBA's Buddy Match diversity initiative. For years, I volunteered as a judge at the Jenkins Trial Competition at U.T. I have also served as a volunteer scorer for the TBA's Mock Trial Competition in Nashville. I am a regular participant in KBA's Constitution Day outreach and have worked with local students as part of this program to gain a better understanding of our founding documents.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I seek a judgeship on the Court of Criminal Appeals, Eastern Division. There are twelve judges on the court, four from each grand division of the state. The court hears appeals of criminal judgments and orders arising from the circuit and criminal courts. My experience, professionalism, and leadership skills would allow me to contribute to the Court's work immediately upon taking office. My appointment would give representation on the Court to Knoxville, the most populous city in this grand division and home to two of our state's law schools.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

As stated earlier, I have always believed that lawyers and judges should play an active role in their communities outside of their professional responsibilities. I have served on the board of directors for CASA of East Tennessee and currently serve on the board of the Sertoma Center, a non-profit organization that provides housing and services to intellectually and physically challenged adults. Due to board by-laws, I am term-limited at Sertoma and will leave their board this summer. I plan to seek other ways that I can serve our community once my term at Sertoma ends.

I have frequently participated in KBA's open service projects, where bar members volunteer for designated causes or organizations. Both as Deputy D.A. and judge, I have spoken regularly to civic groups and community organizations regarding current topics in the criminal justice system and would continue to do so if appointed to this position. In addition to my community involvement, I support my wife, Rachel, in her service as an ally at Restoration House, a non-profit organization designed to provide housing, education, and employment opportunities for single mothers who are transitioning into stable housing.

If appointed, I would continue my commitment of service to my community and would search for new ways to serve my fellow citizens.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I consider the time that I spent in my family's business as a child extremely important to the development of skills I needed to become a lawyer and judge later in life. Our grocery store operated from Monday through Saturday, from 7 a.m. to 8 p.m. We hired no outside employees, which meant that the store was operated during these hours mostly by my father, with occasional help from my mother and grandmother. In the afternoons, the school bus dropped me off at the store, and I stayed there until it closed every evening. The first lesson I learned from this experience was the importance of a strong work ethic to any successful endeavor. Another important lesson came from my interactions with customers from all backgrounds and walks of life. These interactions taught me the importance, at a very young age, of treating all people with courtesy and respect, regardless of their age, educational level, wealth, gender, or race.

I also credit my education at the University of Tennessee and my involvement in broadcasting for helping me develop communication skills that have been essential to my work as a lawyer and judge. Judges must not only be able to reach the correct legal conclusions; they must be able to communicate their reasoning in a way that is effective and leaves both parties with the belief that they received a fair hearing, even if they might disagree with the result reached. When I switched my career focus from broadcasting to law as an undergraduate, I had no way of knowing how valuable the skills I developed in the communications field would be in my future profession.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

A judge must uphold and enforce the law regardless of that judge's personal opinions regarding the substance of the law. As an Assistant Attorney General, I often represented the Department of Safety and Homeland Security in appeals from civil asset forfeiture cases. At the time, the venue for appealing the decision of an administrative law judge—no matter where the seizure occurred in the state—was in the Chancery Court for Davidson County. While I do not oppose asset forfeiture laws as a general matter, I found that this venue law operated to create a hardship on seemingly innocent third-party property owners who sought in good faith to exercise their rights under the law. For instance, imagine an innocent property owner whose vehicle was seized in an outlying county based upon the criminal conduct of a family member. The innocent property owner, acting *pro se*, inadvertently missed a filing deadline with the administrative agency. He would then have to incur the expense of traveling to Nashville to appeal the dismissal of his claim. In this situation, I was compelled to advance the position of my client—that the appeal should be dismissed—even though I personally believed that this statutory scheme created an unfair hardship on truly innocent third-party property owners.

In 2017, the General Assembly amended this law to create appellate venue closer to the county of seizure. Additionally, third-party owners now have a statutory right to be heard prior to the issuance of a forfeiture warrant.

## ***REFERENCES***

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

| |
|---|
| A. Douglas A. Blaze<br>Interim Dean and Professor of Law<br>The University of Tennessee College of Law<br>[redacted]<br>Knoxville, Tennessee 37996<br>[redacted] |
| B. Tom Satkowiak<br>Associate Athletic Director for Communications<br>The University of Tennessee<br>[redacted]<br>Knoxville, Tennessee 37996<br>[redacted] |
| C. Hon. Jennifer L. Smith<br>Criminal Court Judge, Division IV, for the Twentieth Judicial District in Davidson County (Former Associate Solicitor General, Deputy Attorney General for the Law Enforcement and Special Prosecutions Division, and Associate Deputy Attorney General for the Criminal Justice Division with the Office of the Attorney General and Reporter)<br>408 2nd Avenue North, Suite 6100<br>Nashville, Tennessee 37201<br>[redacted] |
| D. Scott C. Sutherland<br>Deputy Attorney General, Law Enforcement and Special Prosecutions Division<br>Office of the Attorney General and Reporter<br>[redacted]<br>Nashville, Tennessee 37202<br>[redacted] |
| E. John Wilkerson<br>Show Host and Announcer<br>Cumulus Broadcasting/The Vol Network<br>[redacted]<br>Knoxville, Tennessee 37919<br>[redacted] |

## ***AFFIRMATION CONCERNING APPLICATION***

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Criminal Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: February 17, 2022

Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

# THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
# ADMINISTRATIVE OFFICE OF THE COURTS

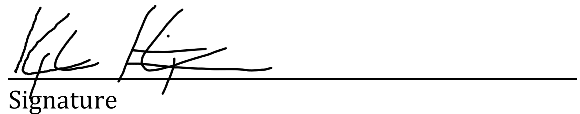
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

## TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
## TENNESSEE BOARD OF JUDICIAL CONDUCT
### AND OTHER LICENSING BOARDS

## WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Kyle A. Hixson
Type or Print Name



Signature

February 17, 2022
Date

27306
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

**IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE**
**DIVISION I**

| | | |
|---|---|---|
| **STATE OF TENNESSEE** | ) | |
| | ) | |
| **v.** | ) | **No. 103548** |
| | ) | |
| **NORMAN EUGENE CLARK** | ) | |

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**MOTION TO DIVEST ANDREA CANNING, TIM BEACHAM, AND THE CUSTODIAN OF RECORDS FOR DATELINE NBC AND NBCUNIVERSAL NEWS GROUP OF THE PROTECTIONS OF THE TENNESSEE AND NEW YORK SHIELD LAWS AND SUPPORTING MEMORANDUM OF LAW**

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COMES NOW the State of Tennessee, by and through Charme P. Allen, the District Attorney General for the Sixth Judicial District, pursuant to Tenn. Code Ann. § 24-1-208(c), and moves this Court for an order divesting necessary and material witnesses Andrea Canning, Tim Beacham, and the Custodian of Records for Dateline NBC and NBCUniversal News Group of the "Shield Law" protections codified at Tenn. Code Ann. § 24-1-208 and N.Y. Civil Rights Law § 79-h(c). The State incorporates a supporting Memorandum of Law into this Motion. The State would show the following at the hearing on this matter:

1. Witnesses Andrea Canning, Tim Beacham, and the Custodian of Records for Dateline NBC and NBCUniversal News Group should be divested of the qualified protection of Tenn. Code Ann. § 24-1-208 because the State will show by clear and convincing evidence that:

(A) There is probable cause to believe that these persons have information which is clearly relevant to a specific probable violation of law, to-wit: First Degree Murder, Tenn. Code Ann. § 39-13-202;

(B) The information sought cannot reasonably be obtained by alternative means; and

(C) There is a compelling and overriding public interest of the people of the State of Tennessee in the information.

*See* Tenn. Code Ann. § 24-1-208(c)(2).

2. Witnesses Andrea Canning, Tim Beacham, and the Custodian of Records for Dateline NBC and NBCUniversal News Group should be divested of the qualified protection of N.Y. Civil Rights Law § 79-h(c) because the State will make a clear and specific showing that the information sought from these witnesses:

(A) Is highly material and relevant;

(B) Is critical or necessary to the maintenance of the State's claim or proof of an issue material thereto; and

(C) Is not obtainable from any alternative source.

*See* N.Y. Civil Rights Law § 79-h(c).

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The State of Tennessee seeks a copy of the recorded interview of Norman Eugene Clark by employees of Dateline NBC (the "Interview") to use as evidence against the Defendant in his upcoming double-murder trial. On April 5, 2016, the State filed a petition in accordance with the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings asking the State of New York to issue subpoenas *duces tecum* to Andrea Canning, Tim Beacham, and the Custodian of Records for Dateline NBC and NBCUniversal News Group (the "Witnesses"). On April 8, 2016, the Court granted the State's Petition and issued the Certificate, finding that the Witnesses were "necessary and material" for the upcoming murder trial of Norman Eugene Clark and that the State "cannot reasonably obtain the Interview by alternative means." *See* Certificate at ¶¶ 5, 6. The Certificate indicated that the Witnesses may raise any applicable statutory or constitutional privilege before the Court. *See id.* at ¶ 11.

Prosecutors in the New York County District Attorney's Office filed the Certificate in the Supreme Court of the County of New York, Part 1. The Witnesses were ordered to appear before the Honorable Justice Larry R.C. Stephen on May 4, 2016, to show cause why the requested summons should not issue. The Witnesses responded to the Order to Show Cause by asserting the qualified privilege of N.Y. Civil Rights Law § 79-h(c) and by claiming that their testimony is not material and necessary and that appearing in Tennessee would cause them undue hardship.

At the hearing on May 4, 2016, Justice Stephen ordered the parties to appear before this Court to decide "whether the items should be turned over or not." *See* Transcript of May 4, 2016, hearing, at p. 3, ll. 5-8, attached hereto and incorporated by reference as Exhibit 1. Justice Stephen determined that this Court should "hold a hearing [in Tennessee] and make a determination whether this material should be disclosed, and, depending on the outcome of that proceeding, then the parties can come back [to New York] to ask that New York Shield Law be imposed if the [Tennessee Court] rules against NBC. . . ." *Id.* at p. 4, ll. 17-23.

On May 20, 2016, the Witnesses filed a Motion to Quash and supporting Memorandum of Law in this Court. The State files this Motion to Divest pursuant to Tenn. Code Ann. § 24-1-208.

## ARGUMENT

The Witnesses possess information that is clearly and highly relevant to the State's prosecution of Norman Eugene Clark for double-murder. They are not entitled to the qualified newsgathering protections of Tennessee or New York law.

### I. THE WITNESSES SHOULD BE DIVESTED OF THE QUALIFIED PROTECTION OF TENN. CODE ANN. § 24-1-208.

Tennessee law mandates that a member of the news media or press "shall not be required by a court . . . to disclose before . . . any Tennessee court . . . any information or the source of any information procured for publication or broadcast." Tenn. Code Ann. § 24-1-208(a). This reporter's privilege is qualified. A person seeking information protected by Section 208(a) may apply to the court having jurisdiction over the pending matter for an order divesting such protection. *See id.*

§ 24-1-208(c)(1). The application shall be granted only if the court after hearing the parties determines that the person seeking the information has shown by clear and convincing evidence that:

> (A) There is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law;
>
> (B) The person has demonstrated that the information sought cannot reasonably be obtained by alternative means; and
>
> (C) The person has demonstrated a compelling and overriding public interest of the people of the state of Tennessee in the information.

Tenn. Code Ann. § 24-1-208(c)(2). The General Assembly enacted Section 208 in 1973 following the United States Supreme Court's holding in *Branzburg v. Hayes*, 408 U.S. 665 (1972) that requiring a reporter to testify before a grand jury did not abridge that reporter's freedom of speech and press guaranteed by the First Amendment. *See Austin v. Memphis Pub. Co.*, 655 S.W.2d 146, 149 (Tenn. 1983). Unlike New York's Shield Law, Section 208 draws no distinction between confidential and non-confidential news information. *See id.* at 150.

**A. There Is Probable Cause to Believe that the Witnesses Have Information which is Clearly Relevant to a Specific Probable Violation of Law, to-wit: First Degree Murder, in Violation of Tenn. Code Ann. § 39-13-202.**

The Knox County Grand Jury has found that, more probably than not, Norman Eugene Clark murdered Brittany Eldridge and her unborn son, in violation of Tenn. Code Ann. § 39-13-202. The Witnesses concede that in September 2015, Andrea Canning and Tim Beacham interviewed the Defendant for the NBC News

television news magazine Dateline NBC. *See* Witnesses Memorandum of Law in Support of Motion to Quash, at p. 1; *see also* Affidavits of Andrea Canning and Tim Beacham, attached to the Memorandum. The Witnesses describe Dateline NBC as a "documentary-style news program that reports on matters of public interest and concern, including criminal prosecutions such as Clark's." *Id.* at pp. 1-2. Thus, the Witnesses concede that they recorded the Defendant for the purpose of documenting information concerning his criminal prosecution. This Interview is clearly relevant to his upcoming murder trial.

"Relevant evidence" means evidence having *any* tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Tenn. R. Evid. 401 (emphasis supplied). "The theoretical test for admissibility is a lenient one, as it should be[.] . . ." *Id.*, *Advisory Comm'n Cmt.* Simply put, "evidence is relevant if it helps the trier of fact resolve an issue of fact." Neil P. Cohen, *et al.*, *Tennessee Law of Evidence* § 4.01[4] at 4—8 (4th ed. 2000).

The Defendant's statements in the Interview, while hearsay, qualify as admissions by a party opponent, Tenn. R. Evid. 803(1.2), and are therefore admissible upon their authentication in the trial of this matter. Tennessee has adopted an expansive view of what qualifies as an admissible admission by a party opponent. Tennessee Rule of Evidence 803(1.2) provides that "[a] statement offered against a party that is . . . the party's own statement in either an individual or representative capacity" is "not excluded by the hearsay rule." Under Tennessee

law, it is irrelevant under Rule 803(1.2) whether the statement is against the declarant's interest or whether the statement was self-serving when made. "Contrary to some common misconceptions, it does not matter that the statement was self-serving when made but turns out to be harmful by the time of trial. . . . *If the opponent wants to use it, the statement comes in as evidence.*" *State v. Lewis*, 235 S.W.3d 136, 145 (Tenn. 2007) (quoting Neil P. Cohen, *et al.*, *Tennessee Law of Evidence* § 8.06[3][a] at 8—47 to 8—48 (5th ed. 2005)) (emphasis supplied). "*Anything the opposing party said or wrote out of court is admissible in court against that party.* Whether the statement was disserving or self-serving when made is immaterial." *Id.* (quoting Donald F. Paine, *Paine on Procedure: Admissions 'against interest'*, 43 Tenn. B.J. 32 (April 2007)) (emphasis supplied).

Tennessee courts recognize that a declarant's demeanor while making a statement—aside from any factual assertion made in the statement—can be an important consideration for the trier of fact. The Tennessee Supreme Court has quoted approvingly a federal court's definition of demeanor as

> embrac[ing] such facts as the tone of the voice in which a witness' statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or seeming levity.

*State v. Ellis*, 453 S.W.3d 889, 905 (Tenn. 2015) (quoting *Norng v. Shalala*, 885 F. Supp. 1199, 1221 (N.D. Iowa 1995) (quoting *Black's Law Dictionary* 430 (6th ed. 1990))). Indeed, "the carriage, behavior, bearing, manner and appearance of a

witness—in short, his 'demeanor'—is a part of the evidence." *Id*. (quoting *Dyer v. MacDougall*, 201 F.2d 265, 268-69 (2d Cir. 1952)).

The case against the Defendant is purely a circumstantial one, based partly on the Defendant being the only person with a motive to kill Ms. Eldridge and her unborn son, whom the Defendant had fathered. Thus, any statements or admissions given by the Defendant concerning the case other than those statements already in the State's possession are clearly relevant to the State's case. Aside from any factual admissions made by the Defendant, his video-recorded demeanor while discussing the brutal murder of his girlfriend and unborn son and the resulting trial will shed light to the trier of fact on the Defendant's attitude towards the victims and help the jury determine whether it is "more probable or less probable" that the Defendant had the motive to kill or the willingness to act to satisfy this motive. *See* Tenn. R. Evid 401.

Tennessee law is replete with instances where a party's admissions are used against that party in a criminal trial. If the Shield Law considerations were removed from this issue, it is inconceivable to think that a murder defendant's recorded statements regarding the case would be excluded on relevancy grounds. The presence of the Shield Law issue, however, does not alter the "lenient" standard of relevancy; Section 208 merely requires that that the sought information be "clearly" relevant to a specific violation of the law. The Witnesses possess a video-recording of the Defendant discussing this case a mere month after he personally viewed the State's case against him. His statements, along with his reactions and

his demeanor recorded so soon after seeing graphic evidence of the brutal killing of Ms. Eldridge, are clearly relevant to the State's case.

### B. The Information Sought Cannot Reasonably Be Obtained by Alternative Means.

The requested process is necessary because the State in good faith has tried repeatedly and unsuccessfully to obtain the Interview without judicial assistance. On December 3, 2015, Assistant District Attorney General Sean F. McDermott requested a copy of the Interview from Mr. Beacham via telephone; Mr. Beacham respectfully denied. On January 7, 2016, Mr. McDermott requested a copy of the Interview from Mason Scherer, a producer for Dateline NBC who was in Knoxville to cover the case. Mr. Scherer indicated that he did not have the authority to provide the interview.

Mr. McDermott sent two certified letters to NBC News requesting a copy of the Interview. The first letter, mailed on February 1, 2016, and addressed to the Editor-in-Chief of NBC News at 30 Rockefeller Plaza, New York, NY 10112, the address provided on NBC News' website at http://www.nbcnews.com/pages/contact-us for legal notices, was marked as 'Return to Sender'.

On February 10, 2016, Mr. Scherer informed Mr. McDermott via telephone that only David Corvo, Executive Producer of Dateline NBC, had the authority to release the Interview to the State. On February 11, 2016, Mr. McDermott sent a second certified letter and addressed it to Mr. Corvo. In a letter dated February 22, 2016, Beth R. Lobel, Senior Vice President NBCUniversal News Group Legal, informed Mr. McDermott that her organization refused to release the Interview.

In a voicemail to Mr. McDermott by Mr. Beacham on December 3, 2015, Mr. Beacham informed Mr. McDermott that if the State chose to try the Defendant's case again, Dateline NBC would not broadcast the Interview until after the retrial. In their Motion to Quash, the Witnesses affirm that they do not plan to air any Dateline NBC episode about the Defendant's prosecution until after the retrial. Thus, the State will be unable to obtain a copy of the Interview from a broadcast medium prior to the trial of September 26, 2016. In Mrs. Canning's and Mr. Beacham's affidavits, they both declare that no part of the Interview "has been broadcast or otherwise released to the public." Based upon these facts, the State will show at hearing that the Interview cannot reasonably be obtained by alternative means.[1]

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[1] The Witnesses cite a string of cases where divesture was not granted, all of which are unpersuasive when considering the proof that the State is prepared to present in this case. In *State ex rel. Gerbitz v. Curridan*, 738 S.W.2d 192 (Tenn. 1987), for instance, Hamilton County prosecutors sought a radio reporter's interview of "a man who committed a murder and has never been arrested." *See id.* at 193. This vague reference to a possible criminal offense in an unknown jurisdiction obviously did not serve to divest the reporter of his privilege. The high court detailed the lack of specificity underlying the State's request in that case as it related to the second element of Section 208:

> There is no explanation of what information was sought from appellee or what other efforts, if any, the Attorney General or other law enforcement agencies had made to determine the identity of the criminal offense, the offender himself, or the site of the offense. It does not appear whether the alleged crime occurred in Hamilton County or was subject to the jurisdiction of the Hamilton County grand jury. No investigation or inquiry by Hamilton County officials with officials from surrounding counties appears to have been made, nor has any check of prison or parole records been shown.

*Id*. at 193. While the prosecutors' efforts to obtain this interview were laudable, they clearly did not possess enough information about the underlying crime—if one even existed—to overcome the hurdle of Section 208.

*State v. Shaffer*, an unreported case from the Court of Appeals, is likewise distinguishable from the instant case. No. 89-208-II, 1990 WL 3347 (Tenn. Ct. App. Jan. 19, 1990). In *Shaffer*, the issue presented was whether a court could order an *in camera* review of requested material if a party has not first met the burden of Section 208. The court answered that question in the negative. The State is not requesting an *in camera* review in this case, so *Shaffer* does not apply.

### C. The People of the State of Tennessee Have a Compelling and Overriding Public Interest in Obtaining the Interview.

The Shield Law of Section 208 applies to the entire spectrum of lawsuits available to litigants in Tennessee, both civil and criminal. Indeed, the Shield Law has been utilized in wrongful termination lawsuits in chancery court, *see Dingman v. Harvell*, *et al.*, 814 S.W.2d 362 (Tenn. Ct. App. 1991), in federal bankruptcy proceedings, *see In re Copeland*, 291 B.R. 740 (Bankr. E.D. Tenn. 2003), in civil rights proceedings against pizza-delivery companies, *see Moore v. Domino's Pizza, L.L.C.*, 199 F.R.D. 598 (W.D. Tenn. Oct. 13, 2000), in civil wrongful death suits in circuit court, *see Austin*, 655 S.W.2d 146, and, of course in criminal actions. Even in the context of criminal cases, however, a witness ostensibly could invoke the protection during the litigation of any type of case, from a minor traffic offense to murder.

The high interest of the people in prosecuting criminal offenders is underscored by the people's presence as a party to these actions. Among the

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*State v. Franklin*, an unreported case from the Court of Criminal Appeals, did not even involve the application of Section 208. No. 01C01-9510-CR-00348, 1997 WL 83772 (Tenn. Crim. App. Feb. 28, 1997). The defendant in that case insisted that the State should have sought the entire video of his interview with a news reporter to show the context of his broadcast statement. In dicta, the court merely noted that had the State pursued the material, "it might well have been fruitless" due to the television station's plan to invoke the Shield Law. This hypothetical tangent is not a legal analysis that would be persuasive as to this case.

Finally, the Witnesses rely upon *In re Copeland*, 291 B.R. 740 (Bankr. E.D. Tenn. 2003), a case where the District Court applied Section 208 to quash a subpoena seeking the testimony of a reporter with the *Knoxville News-Sentinel* that was intended to impeach the credibility of a debtor in a bankruptcy proceeding. The court found that the party seeking the subpoena had not proven the "compelling and overriding public interest" prong of Section 208(c)(2)(C). The State wholeheartedly agrees with the Witnesses and the District Court that it is not a compelling and overriding public interest of the people of the state of Tennessee to impeach the credibility of a debtor in a bankruptcy case. The difference between *Copeland* and the instant murder case requires no elaboration.

spectrum of criminal cases, the people's interest in prosecution can be no higher and no more compelling than in cases of First Degree Murder. The people of this State have reserved the three most serious punishments available at law for offenders convicted of First Degree Murder; if convicted, an offender will be sentenced to life imprisonment, life imprisonment without the possibility of parole, or death. Tenn. Code Ann. § 39-13-204. Along the spectrum of types of lawsuits to which Section 208 could apply, First Degree Murder prosecutions hold an indisputable position as the type of case where the State's interest will be most compelling and most likely to override any other interest.

The Witnesses have asserted an interest in protecting the freedom of the press and promoting the free flow of information involving matters of public concern. These interests are important, and the State in no way means to denigrate the essential role that the media play in the criminal justice system or in our society in general. But, contrary to the Witnesses assertion in their pleadings, there exists no privilege under the First Amendment to protect reporters with knowledge of criminal conduct from becoming participants in criminal litigation. *See Branzburg*, 408 U.S. at 693 ("we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it"). The people's well-recognized interest in prosecuting an

accused murderer clearly overrides a reporter's nebulous interest in not disclosing evidence that is relevant to a criminal action.[2]

Anyone who interjects oneself into the midst of a pending criminal prosecution runs the risk of becoming a witness for either party in that prosecution. Prosecutors, for instance, go to great lengths during the course of a criminal investigation to ensure that they do not become fact witnesses and thus disqualify themselves from participating in the trial. Reporters play an important role in our society, but they do not hold an exalted position that prevents them from being witnesses in a criminal case when they obtain evidence that is relevant to that proceeding.

The people of Tennessee have a compelling and overriding interest in obtaining the recorded statements of an accused murderer to use as evidence in his prosecution for First Degree Murder.

## II. THE WITNESSES SHOULD BE DIVESTED OF THE QUALIFIED PROTECTION OF N.Y. CIVIL RIGHTS LAW § 79-h(c).

### INTRODUCTION

A threshold question regarding the application of New York's qualified protection is whether this Court, the demanding court in the out-of-state subpoena context, should analyze a privilege that exists in the laws of the sending state. An

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[2] The Witnesses' concerns of creating a "chilling effect" are overblown. To the State's knowledge, this case has received little or no notoriety outside the Knoxville media market. Dateline NBC reports on topics at the international level. It cannot seriously be argued that a single ruling from a criminal case in Knoxville, Tennessee will have a chilling effect on potential interview subjects around the world. Based upon the prior media coverage that this case has received, the only way that potential interviewees outside of the Knoxville market would learn of the Court's ruling would be if Dateline NBC reported it.

analysis of New York decisional law, which predictably contains more instances of the interstate application of media privileges, answers that question affirmatively.

During the May 4, 2016, hearing in New York City, counsel for the Witnesses stated that New York's Shield Law "is generally deemed to be much stronger than Tennessee['s.]" Ex. 1, at p. 3, ll. 16-17. This is only partially true, and it is only true in a way that is entirely irrelevant to this case. New York's statute, unlike Tennessee's, contains an absolute protection for confidential news. If this case involved the disclosure of confidential news or a confidential news source, it could undoubtedly be said that New York law provided a much stronger protection than Tennessee's Section 208.

The parties agree, however, that this case involves nonconfidential news, and thus only invokes the qualified privilege of New York's Shield Law. Upon comparison of the two states' qualified privileges, it is clear that Tennessee's Section 208 is at least on par with New York's Section 79-h(c) and arguably provides a greater protection than its New York counterpart.[3] This point is important when determining the proper venue for litigating the application of New York's Shield Law.

[3] The standard of proof in Tennessee is "clear and convincing", while in New York it is "clear and specific". In Tennessee, a party must show that the sought information is "clearly relevant", while New York requires proof that the information is "highly material and relevant". Both states require a showing that the information cannot be obtained by alternative means. New York requires the information to be "critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto." This requirement does not explicitly exist at Tennessee law, but Section 208, unlike the New York statute, requires the demanding party to demonstrate "a compelling and overriding public interest of the people of the state. . . ." Tennessee law, therefore, exceeds the protection of New York law in that Tennessee requires its courts to look beyond the nature of the evidence sought and examine the varying interests at play when determining whether to apply the privilege.

The New York Court of Appeals set forth the general rule for determining the venue of privilege determinations in *Matter of Codey v. Capital Cities, Am. Broadcasting Corp.*, 82 N.Y.2d 521 (1993) by holding that New York courts adjudicating out-of-state subpoena applications should decline to resolve admissibility issues, including privilege claims, so that they can be decided in the demanding state. In arriving at this general rule, the *Codey* court noted:

> It would be inefficient and inconsistent with the over-all purpose and design of this reciprocal statutory scheme to permit the sending State's courts to resolve questions of privilege on a[n out-of-state subpoena] application. The purpose of the Uniform Act was to establish a simple and consistent method for compelling the attendance of out-of-State witnesses. This goal would be frustrated if the [subpoena application] hearings conducted by the sending State were to become forums for the litigation of questions of admissibility and evidentiary privilege, most of which will inevitably have to be litigated again anyway during the course of the demanding State's criminal proceeding.

*Id*. at 529-30 (internal citations omitted). The *Codey* decision represented the formal adoption of what had been a practice in New York courts for years prior to its filing. *See, e.g., Matter of Superior Court of New Jersey v. Farber*, 405 N.Y. Supp. 2d 989, 991 (1978) (held New York Times reporter could assert his privileges under New York law in the demanding court in New Jersey); *In re Pitman*, 25 Misc. 2d 332, 334 (1960) (questions of privilege are to be raised in the demanding court in New Jersey); *see also In re Summons of Director, Women Organized Against Rape*, 30 Pa. D. & C. 3d 295, 297 (1984) (applying *Farber*, Pennsylvania court finds that subpoenaed party will be able to raise issues of privilege in the demanding state of New York).

In 2013, an issue involving the case of the Aurora, Colorado, theater shooter, James Holmes, prompted the New York Court of Appeals to carve out a thin exception to the general rule of *Codey*. In *Matter of Holmes v. Winter*, 22 N.Y.3d 300 (2013), defendant Holmes sought to subpoena Fox News reporter Jana Winter from New York for the purpose of disclosing the identity of the confidential law enforcement sources who had leaked the contents of defendant Holmes' journal to her. *Id.* at 303-05. New York's intermediate appellate court, applying *Codey*, held that the privilege issue should be litigated in Colorado. *Id*. at 306.

The Court of Appeals reversed the Appellate Division and denied the issuance of Winter's subpoena. Stating that the protection of the identity of confidential news informants is a "New York public policy of the highest order", *id*. at 320, the court held that denial of relief under an out-of-state subpoena petition is in order when it is justified by a strong public policy of New York. *Id*. at 314. The court noted that *Holmes*, unlike *Codey*, involved a disparity between the privileges present in the two states—*i.e.* New York absolutely protects the identity of confidential news informants while Colorado provided only a qualified immunity. *Id*. at 314. The court stated that "perhaps the most important factual distinction between [*Holmes*] and *Codey*[,]" is that *Holmes* involved the compelled disclosure of a confidential source, while *Codey* involved the disclosure of nonconfidential, nonpublished material. *Id*. at 315. The *Holmes* court noted that the exception it created involved a high standard that will "seldom be met." *Id*. at 320. It reaffirmed the rule from *Codey*: "absent a threatened violation of an extremely

strong and clear public policy of [New York] such as is present [in *Holmes*], New York courts adjudicating [out-of-state subpoena] applications should decline to resolve admissibility issues, including privilege claims, so that they can be decided in the demanding state." *Id*. at 319.

Applying *Codey* and *Holmes* to the instant case, it is clear that the general rule of *Codey* applies and the issue of New York's privilege should be adjudicated in this Court. First, as shown *supra*, there exists no disparity between the qualified privileges in New York and Tennessee; Tennessee's is arguably stronger. Second and most importantly, this case does not involve the compelled disclosure of a confidential news informant—a practice that would contravene a New York public policy of the highest order. This case, like *Codey*, involves the disclosure of nonconfidential, nonpublished news information. The rule of *Codey* applies, and this Court should adjudicate both the Tennessee and New York privilege issues on the merits.

**A. The Interview is Highly Material and Relevant.**

New York law recognizes that a defendant's own statements are highly material and relevant to a criminal prosecution. *People v. Combest*, 4 N.Y.3d 341, 347 (2005); *People v. Craver*, 150 Misc. 2d 631, 632 (1990). New York, like Tennessee, also recognizes the importance of a defendant's demeanor while speaking—particularly in the context of a video-recorded interview:

> The People seek to introduce evidence of defendant's actual words. No other source of the exact words possibly can exist other than the News 12 footage. And, this is not merely an audio recording—this is a videotape, which shows defendant's demeanor as he spoke the words,

> which is, of course, an aid to the jury in assessing the credibility of the communicator as well as the content of the communication.

*In re Subpoena Duces Tecum to News 12*, 50 Misc. 3d 1206(A), at *5 (Sup. Ct. Bronx Co. Dec. 7, 2015) (citing *Combest*, 4 N.Y.3d at 349-50). "[U]nlike [the statement of] a potential witness, a defendant's statement in a criminal case is always relevant." *People v. Mercereau*, 24 Misc. 3d 366 (2009).

The State otherwise restates its arguments and rationale as set forth *supra*, in section I. A.

**B. The Interview Is Critical or Necessary to the Maintenance of the State's Claim or Proof of an Issue Material Thereto.**

The case against the Defendant is purely circumstantial.[4] New York Courts have recognized the critical or necessary nature of a criminal defendant's statement in the context of a circumstantial case. "When dealing with a criminal prosecution based on circumstantial evidence, an admission made by a defendant is always a critical piece of evidence." *News 12*, 50 Misc. 3d at *6; *see also Mercereau*, 24 Misc. 3d at 369 ("[h]ere, particularly in a circumstantial case, evidence of both the defendant's allegedly inconsistent statements and motive is highly probative").

The court in *News 12* elaborated regarding the critical or necessary nature of a defendant's statement in a purely circumstantial case:

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[4] The only piece of arguably "direct" evidence are the Defendant's fingerprints, which were lifted from a television inside Ms. Eldridge's apartment, the scene of the crime. The fingerprints' presence as direct evidence is not at all helpful to the State's case; one would expect to find the Defendant's fingerprints in Ms. Eldridge's apartment, as he had been there many times previously. The incriminating aspect of these fingerprints arises from *how* they were situated on Ms. Eldridge's television—*i.e.*, the *circumstances* of how the fingerprints were found. The fingerprints were located on the top edge of the front screen of the television, with the fingers pointing in a downward direction (assuming the set was upright). This circumstance—the placement of the fingerprints—supported the State's theory that the Defendant placed the television screen-down on the floor following the murders in an attempt to stage a burglary scene.

> [T]he People argue that their case is wholly circumstantial. There is no smoking gun. They have evidence of motive, opportunity, and a witness who saw the defendant carrying things out of the home after Ms. Moore was last seen alive. They have evidence that Ms. Moore and the defendant did not get along and fought about her rent payments. . . . Where only circumstantial evidence exists, a conviction "rises or falls" based on all of the circumstances, including a defendant's admission.

*News 12*, 50 Misc. 3d at *6. In other words, a circumstantial case cannot exist by only showing the jury *some* of the circumstances; the jury must see all relevant circumstances in order to decide whether these circumstances indicate that an accused is guilty beyond a reasonable doubt.

The timing of the interview in question makes it especially critical or necessary to the State's circumstantial case. It is the only known recording of the Defendant speaking about the murders *after* hearing the State's case against him. While an accused's statement is always relevant when offered by a party opponent, *see Mercereau*, 24 Misc. 3d at 368-69, and while an accused's demeanor is an aid to the jury in determining his credibility, *see News 12*, 50 Misc. 3d at *5, the value of this recording is greatly enhanced by the fact that it occurred a month after the Defendant's first trial. The recording is the only evidence of the Defendant's post-trial "tone of [ ] voice", "the hestitation or readiness with which his answers are given, the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or seeming levity." *Ellis*, 453 S.W.3d at 905. Indeed, the mere fact that the Defendant agreed to give an interview to a national

news agency while his criminal case was still pending is a circumstance for the jury to consider.

In a purely circumstantial First Degree Murder case, any statement made by the accused is critical or necessary to the prosecution.

**C. The Interview Is Not Obtainable from Any Alternative Source.**

The State restates its arguments and rationale as set forth *supra*, in section I. B.

## CONCLUSION

The Witnesses should be divested of their qualified privilege under Tenn. Code Ann. § 24-1-208. The Court should apply the general rule of *Codey* and adjudicate the issue of New York's qualified privilege under N.Y. Civil Rights Law § 79-h(c). The Witnesses should likewise be divested of their qualified privilege under New York law.

WHEREFORE, PREMISES CONSIDERED, the State respectfully requests that this Court, after considering the pleadings of the parties and the evidence presented at hearing, enter an order divesting the Witnesses of their qualified privileges under Tenn. Code Ann. § 24-1-208 and N.Y. Civil Rights Law § 79-h(c). The order should reiterate the Court's request to issue the summonses requested in the previously-issued Certificate and that performance on said summonses should occur as early as practicable in advance of the trial of this matter, presently scheduled for September 26, 2016.

RESPECTFULLY SUBMITTED, this 21st day of June, 2016.

CHARME P. ALLEN
District Attorney General

KYLE HIXSON
Assistant District Attorney General

**CERTIFICATE OF SERVICE**

I hereby certify that an exact copy of the foregoing and attached documents were transmitted to counsel for the Defendant and counsel for the Witnesses electronically and by First Class U.S. Mail, postage prepaid, on this the 21st day of June, 2016.

KYLE HIXSON
Assistant District Attorney General

**IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE**
**DIVISION II**

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| **CUMECUS R. CATES** | ) | |
| | ) | |
| **v.** | ) | **Nos. 79375 and 79764** |
| | ) | |
| **STATE OF TENNESSEE** | ) | |

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**ORDER**

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This post-conviction action presents a long and tortured procedural history. On June 5, 1996, in docket 60747A, a Knox County grand jury returned an indictment charging petitioner Cumecus R. Cates with especially aggravated robbery occurring on or about February 8, 1996. On June 3, 1998, while still awaiting disposition on the robbery case, the petitioner was charged by presentment in docket 65693 with rape, relating to an incident in March of that year occurring in the Knox County Jail. The rape case proceeded to trial in June 2003.[1] On July 2, 2003, the jury convicted the petitioner of two counts of rape, as charged, Class B felonies.

On July 18, 2003, the petitioner reached an agreement with the State resulting in a plea agreement on the robbery case in 60747A and a sentencing agreement on the rape case in 65693. In 60747A, the petitioner pled guilty as charged to especially aggravated robbery and received an agreed sentenced of 20 years to be served at a 100% service rate. The 20-year sentence would run consecutively to Knox County docket numbers 68311, 68366, 68367, 68827,[2] and 71662, and to Sullivan County docket number S-43198. An agreed 10-

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[1] For ease of reference, the court may refer to these two cases as the rape case and the robbery case.

[2] In dockets 68311, 68366, 68367, and 68827, the petitioner pled guilty to four drug offenses on September 28, 2000, and received an agreed effective sentence of 16 years at a 30% service rate. On October 29, 2013, the petitioner filed a motion to correct an illegal sentence pursuant to Tenn. R. Crim. P. 36.1. The

year sentence was imposed for the rape conviction in 65693. It was agreed that this sentence would run concurrently with the 20-year robbery sentence. As part of this agreement, the petitioner waived his right to direct appeal in docket 65693. It was also agreed that the State would dismiss docket 65042, charging the petitioner with robbery, a Class C felony, docket 60903, charging aggravated burglary and theft, Class C and E felonies, respectively, and docket 70427, charging aggravated criminal trespassing, a Class A misdemeanor.

On April 1, 2004, the petitioner filed a pro se petition for post-conviction relief in docket 79375 challenging the robbery judgment in docket 60747A. The court summarily dismissed the petition on the basis that the case was pending before the Court of Criminal Appeals. This order was reversed because there was in fact no appeal pending on this matter before the appellate courts. *Cumecus R. Cates v. State*, No. E2004-02945-CCA-MR3-PC, 2006 WL 468774 (Tenn. Crim. App. Feb. 28, 2006). The petition was reinstated and remanded for further proceedings.

Meanwhile, on June 1, 2004, the petitioner had filed a pro-se petition for post-conviction relief in docket 79764 challenging the rape judgment in docket 65693. The predecessor judge found a colorable claim and appointed post-conviction counsel.

On November 4, 2011, successor post-conviction counsel[3] filed amended petitions

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trial court summarily dismissed the motion for failure to state a colorable claim, but this order was reversed and the case remanded for further proceedings. *See Cumecus R. Cates*, No. E2014-00011-CCA-R3-CD, 2014 WL 4104556 (Tenn. Crim. App. Aug. 20, 2014). On remand, a successor judge ruled on the merits of the motion, but this decision was also reversed for failure to comply with the procedures set forth in Rule 36.1 *See State v. Cumecus R. Cates*, No. E2015-00035-CCA-R3-CD, 2015 WL 9586339 (Tenn. Crim. App. Dec. 30, 2015), *perm. app. denied* (Tenn. May 6, 2016). The case was remanded for further proceedings. On December 3, 2020, pursuant to this remand, the court heard argument on the Rule 36.1 motion and denied relief on the basis that the challenged sentences had expired.

[3] Five different attorneys, including present counsel, have represented the petitioner on these two post-conviction actions through the years. Five different attorneys also represented the petitioner on the

for post-conviction relief in dockets 79375 and 79764. The State responded in opposition. An evidentiary hearing was held on November 23, 2020, with the petitioner present and represented by counsel and the State represented by the Office of the District Attorney General. Based upon the pleadings, the facts adduced at hearing, and the arguments of the parties, the court issues these findings of fact and conclusions of law.

## POST-CONVICTION RELIEF CLAIMS

After an examination of the petitions and amended petitions, the court has identified and numbered the following claims set forth by the petitioner.

***Claims Related to the Jury Trial in the Rape Case***

Claim One: Ineffective assistance of trial counsel for failing to interview any of the witnesses listed on the indictment and failing to interview the two victims.

Claim Two: Ineffective assistance of trial counsel for failing to discuss trial strategy or theory of defense with the petitioner and failing to inform the petitioner about the status of the case.

Claim Three: Ineffective assistance of trial counsel for failing to discuss with the petitioner the evidence against him and failing to provide him the State's discovery.

Claim Four: Ineffective assistance of trial counsel for failing to subpoena inmate Sherman Mason, a cell-mate of Dominick Williams, who would have testified that he did not see any rape and did not see the petitioner force anyone to commit any sexual acts.

Claim Five: Ineffective assistance of trial counsel for failing to introduce contradictory statements made by William Conner to jailers during his cross-examination of that witness.

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underlying robbery and rape charges while they pended in the general sessions and criminal courts.

***Claims Related to the Sentencing Agreement in the Rape Case***

Claim Six: Unknowing waiver of direct appeal because of the trial court's failure to advise the petitioner of the consequences of sexual offender registry and community supervision for life.

Claim Seven: Ineffective assistance of counsel leading to an invalid waiver of direct appeal because of counsel's failure to advise the petitioner of the consequences of sexual offender registry and community supervision for life.

***Claims Related to the Robbery Case***

Claim Eight: The guilty plea was not knowingly, voluntarily, nor intelligently entered.

Claim Nine: The sentences for the petitioner's conviction for rape and especially aggravated robbery are illegal because they run concurrently with one another.

Claim Ten: Ineffective assistance of plea counsel for failing to interview the witnesses in the robbery case.

Claim Eleven: Ineffective assistance of plea counsel for failing to discuss a theory of defense and failing to provide him the State's discovery.

***Claims Pertaining to Both Cases***

Claim Twelve: Ineffective assistance of trial counsel for failing to withdraw from representing the petitioner in light of an active conflict of interest.

## FINDINGS OF FACT

The court makes these findings fact based upon the evidence presented, which is more fully set forth in the record of this matter. This is not a full summary of the facts, but rather specific findings of fact limited to the claims presented.

At the time of the post-conviction hearing, Russell T. Greene had been in criminal defense practice for 25 years. Mr. Greene first came to represent the petitioner in a post-conviction proceeding regarding some of the petitioner's drug convictions. Mr. Greene was then appointed counsel on all of the petitioner's pending cases in Knox County, which were numerous. His appointment included an aggravated burglary case in docket 71662. Mr. Greene represented the petitioner in a jury trial on this case. The jury convicted the petitioner as charged and judgment entered on March 13, 2003. The rape case was set for trial in late June 2003.

## A. Facts Related to the Jury Trial in the Rape Case

### 1. The Facts at Trial

At hearing, the court took notice of the transcript from the jury trial in the rape case. The trial involved allegations that William L. Conner, Jr., following his arrest on February 28, 1998, was forced and coerced by the petitioner to perform sexual acts on another inmate and himself while inside the Knox County Jail. The facts adduced at trial can be summarized as follows.

Paul Gilliam, a repeat felon, testified that on March 1, 1998, he was incarcerated in Tank One, side B of the Knox County Jail after his previous bond was revoked. Mr. Gilliam was able to recognize the tank when presented with a floor plan. He indicated which cell he occupied, as well as the catwalk outside of the cells and the day room.

Each pair of inmates in a cell were permitted one hour daily to spend in the day room. Mr. Gilliam believed that he and his cellmate, Charles Ballard, were in the day room on March 1 between 3 and 5 p.m. that afternoon. Mr. Gilliam was trying to make phone calls from the day room. A few minutes passed when Mr. Ballard told him to "come here;

look at this." From his vantage, Mr. Gilliam said that he could see that Cory Johnson and Frank Tallow were in the first cell, the petitioner was in the second, and the victim was in the third. He proceeded to look down the catwalk through the A side of the tank, where he was able to see the victim dressed only in a sheet.

Mr. Gilliam describes the sheet being wrapped around the victim like a dress or a toga, and that he was exposed to be naked underneath. Exposing him was the petitioner, whom Mr. Gilliam was able to correctly identify in the courtroom. According to Mr. Gilliam, the petitioner was "openin' [the sheet] up lettin' everybody see him," and "takin' him in front of each cell, smackin' him on the ass, tellin' him to shake the pussy in front of everybody." From Mr. Gilliam's perspective, the witness was compliant with the petitioner's words and actions, and the other inmates were jeering at and degrading the victim.

Mr. Gilliam goes on to describe the different actions that the victim was forced to perform. While wearing the sheet, he was made to bite the petitioner's toenails and penetrate his own anus using his fingers, under threat of punishment. Mr. Gilliam said that "toward the end" another inmate, Dominick Williams, joined in the degrading actions, making the victim deliver envelopes to other inmates using only his lips. Eventually, the victim was forced to perform oral sex on Dominick Williams. According to Mr. Gilliam, the victim was kept close to Williams in a threatening way, and Williams used his physical presence and verbal intimidation to make the victim "do whatever [the petitioner] told him to do." Mr. Gilliam also testifies that a man named Sherman joined Dominick Williams in putting his penis through the cell bars and that Sherman spat on the victim. According to Mr. Gilliam, the petitioner was insistent that the victim put Williams's penis in his mouth.

Mr. Gilliam testifies that he tried to verbally encourage the victim to resist and that the petitioner became upset at Mr. Gilliam for interfering. The victim was noted as acting confused and quiet for the duration of the events, as if in a haze, unresponsive, or "broken down," in the words of Mr. Gilliam. All of the events Mr. Gilliam witnessed purportedly occurred along the A side catwalk, but the victim was occasionally brought back to his cell to "clean himself up." According to Mr. Gilliam, this involved another inmate, Cory Johnson, smearing the victim's face with a hair removal agent called Magic Shave, which burned his sensitive skin. On cross examination, Mr. Gilliam revealed that he, Charles Ballard, Cory Johnson, and the petitioner had an altercation earlier in the day room.

Mr. Gilliam's testimony continued, describing the atmosphere of the tank at the time. He explained that there is usually continuous noise, but this particular day it "was hyped," and the tank was filled with "a lot of commotion." However, he testified that it was "hush, hush," because they did not want to attract the attention of the officers. Mr. Gilliam said that he did not see any guards or officers in the catwalk, except when he and his cellmate returned from the day room afterward. He also describes the policy as an inmate to "mind your own business;" he explains that it would be taboo to call the officer or intentionally report the wrongdoings of a fellow inmate.

Mr. Gilliam said that there are a number of ways for the door of a cell to be left open; the police officers can be tricked, or they occasionally leave them open when taking an inmate out to see a doctor or lawyer. He explained that the most common reason that the door is left open is a new inmate being placed in a cell and the guards' forgetting to close it since they are not used to the new inmate being there.

Mr. Gilliam testified that he was returned to his cell before the inmates in side A

had finished with the victim and that he had been watching for about 35 minutes. Mr. Gilliam believed that, based on the noise, the harassment continued for another two hours. His final testimony was in regard to the petitioner, who he witnessed carrying a broom during the ordeal. Mr. Gilliam believed that the petitioner was the A side's "tray man," a cleaner who is responsible for collecting meal trays and cleaning the tank before meals. This responsibility would have allowed the petitioner to leave his cell and move freely about the catwalk and would also explain his possession of a broom.

Mr. Conner testified that he was jailed in tank one, A side, cell 3 of the classification pod in the jail. His cellmate was Richard Thaxton, with whom he had no issues, and he recognized Dominick Williams and the petitioner as being jailed in the same side of the tank. He had no prior knowledge or interactions with the petitioner before March 1. The victim explained that he was nervous in the tank, which was loud, full of commotion, and chaotic.

According to the victim, the petitioner was the tray man on March 1 when the incident occurred, and he was allowed to walk the catwalk between cells. The victim said that his cellmate and the petitioner "initiated" him by telling him the "rules" and consequences for breaking them. He was given a physical list of these rules, but did not know who wrote them, and believed that if he broke them, he would be beaten by the whole tank and possibly killed. The victim said that the petitioner's first words to him were telling him to come to the petitioner's cell so that he could be slapped. When the victim did not comply, the harassment began.

The victim testified that he and Dominick Williams were paddled by the petitioner through the bars using a meal tray, then told to undress and don their bedsheets like skirts.

The victim heard the petitioner tell Mr. Williams' cellmate to "make sure he had done it." Then the victim was told to wash his cellmate's laundry in the sink and to moan sexually. While the victim was doing this, the guards came and removed his roommate, Richard Thaxton. The petitioner allegedly yelled at the guards to watch, but the guard shook his head and quickly left. The victim unsuccessfully tried to alert the guards that his cell was left open but said that the petitioner told him not to alert them.

The victim went on to describe the petitioner pulling him out of the cell by his arm and into the catwalk. He believed that if he did not comply, he would be killed. Once out of his cell, the petitioner allegedly exposed the victim to the other inmates and repeatedly slapped his bottom, telling him to "shake [his] pussy." The victim described being slapped on the back of his head and being forced to kiss other inmates' feet. He was then instructed by the petitioner to finger his own anus, and against his will, he complied. The petitioner then threatened Dominick Williams to step to the bars, and the victim was taken to that cell. Williams was again threatened until he put his penis through the bars, and the petitioner instructed the victim to perform oral sex on Williams. He continued to comply against his will, albeit while protesting.

The victim testified that this degrading behavior continued until the petitioner heard the guards approaching. At this point, the victim was shoved back into his cell, but the door was left open. When his cellmate returned, the victim was crying and the other inmates were yelling that Thaxton "should have been there." The victim did not share this story until his arraignment, when he was moved to another tank, and he did not even share the details with his family.

Detective Darrell Johnson was an investigator with the Knox County Sheriff and

had worked in the Sheriff's office for 19 years. He was assigned to investigate this case on March 2, 1998 and was responsible for conducting interviews. Detective Johnson spoke with the victim, Mr. Gilliam, and Mr. Williams. He was able to confirm that the victim and Richard Thaxton shared cell 3, and that on the afternoon the victim was jailed, Mr. Thaxton was signed out for two hours on medical leave. Detective Johnson also confirmed through the jail that the petitioner was the assigned tray man for that day.

Other observations made by Detective Johnson include the absence of video surveillance in the tanks. He discovered that it is standard practice for the officers in the jail to perform "cell checks" and head counts every fifteen minutes. Detective Johnson said that he worked in the jail before becoming an investigator and explained that it is not standard practice to leave a cell door open when taking an inmate out. He testified that he did not remember this ever happening while he worked at the jail.

Richard Thaxton, the cellmate of the victim, described living in tank one with those he considered to be "the worst of the worst." He said that the guards took him out of his cell for a phone call, put him in shackles and cuffs, and shouted "door closed" as they shut the door and took him out. He also testified that he saw the guards conducting a head count every 30 minutes to an hour. After he returned, Mr. Thaxton saw the victim and commented on the abnormal smell of the cell. According to Mr. Thaxton, the victim was in a very bad mood and said that he had been told to "stick [his] fingers in [his] booty." Mr. Thaxton questioned the victim about why he did it, and he replied that he was trying to get out of the tank. Later that evening, the victim was removed by a guard after he was seen sitting in the corner.

Contrary to the findings of Detective Johnson, Mr. Thaxton said that he was only

gone from his cell for a few minutes to make a phone call, and that the jail record which reflected a two-hour medical leave was inaccurate. Mr. Thaxton also said on cross-examination that he would "help out" Cory Johnson in court if necessary. Mr. Thaxton was asked about his allegiances and gang affiliations and began repeating to the jury that he was "whatever [they] wanted him to be."

Cory Johnson, another inmate in tank one, A side, was present during the events of March 1. He testified that he never saw the victim outside of his cell on the catwalk and believed that the commotion outside was the daily fighting between cellmates. Mr. Johnson also went on to say that there was no one in the catwalk at all, and again contrasted Detective Johnson's findings by claiming that the petitioner was not the tray man. He insisted that inmates were only allowed out of their cells in pairs for an hour a day to visit the day room, and never to roam the catwalk. He said that he remembered the officers coming by approximately every half hour to check the cells, and that after the reporting of this incident, all of their cells were searched by the police.

On cross-examination, Cory Johnson revealed that he had gone by multiple aliases and had been arrested for multiple offenses. He also revealed a longstanding debt to the petitioner, who had helped Mr. Johnson in the past and even made his bail when he was arrested. Finally, Mr. Johnson testified as to possessing and smoking contraband cigarettes while in jail, for which he was disciplined.

Dominick Williams noted in his testimony that there was constant daily arguing and commotion in the pod and that everyone just wanted to get out. He saw neither the victim nor the petitioner outside their cells in the catwalk. Mr. Williams said that there was no fighting that day, but that there were plenty of inmates yelling and arguing. He insisted

that he remembered the victim but that they never did anything to each other. He said that he certainly did not receive oral sex from the victim.

On cross-examination, Mr. Williams corrected his earlier statement that the petitioner was not in the catwalk and revised it. He said instead that the petitioner was accompanying the tray man, who was actually one of the guards. However, Mr. Williams maintained that no verbal abuse occurred while the petitioner was out of his cell. When he was questioned on the matter, Mr. Williams admitted that he had previously argued with the petitioner, but that he was never spanked or assaulted by him. On redirect, Mr. Williams explained that his only interaction with the victim was a conversation where they both talked about wanting to get out of the tank. On re-cross, he gave further detail about his disagreement with the petitioner, explaining that this incident allowed all three of them to move out of the tank and to a different pod.

During the trial, the Defense called Sergeant Mike Bartleson, a shift supervisor over the second shift officers at the jail. He had worked there for a year and a half at the time of the trial and was in charge of supervising three of the tanks. He began his direct examination, but after an objection from the State and a meeting at the bench, it was discovered that his tenure at the jail did not align with the date of the events in question. While Sgt. Bartleson's expertise regarding the jail was acknowledged, it was decided that many practices or policies could have changed between the time of the crime and when Sgt. Bartleson began working at the jail. Because his testimony could not address a time period when he was not there, his expertise was considered irrelevant, and he was dismissed.

Officer Richard Scott Kanatzer worked in the tanks of the jail for a year-and-a-half,

starting in 1997. He was called to the stand because he was identified as the guard responsible for removing Richard Thaxton from his cell on March 1 and was asked to describe the details of this process, as well as his memories of that day.

Officer Kanatzer testified that opening a cell door is a mechanical process involving levers outside the catwalk which open them remotely. "You have to rotate the lever in the bottom position and turn a key," explained Officer Kanatzer, "and it rotates the doors out. You can designate which doors you want open and which doors you want closed." He continued, saying that you must open the access door to the catwalk, then select which doors to open with a lever. This process does not require the officer to enter the catwalk; Officer Kanatzer simply opened the door with the lever and yelled for the inmates to come out. It was part of Officer Kanatzer's duties to check the cells every 15 or 20 minutes and tend to the inmates' basic needs, a duty he says he performed with diligence.

Officer Kanatzer testified that he took Mr. Thaxton out of his cell on March 1, cuffed him, and then walked him out for a medical call from 6:24 to 8:26 p.m. that evening. Officer Kanatzer, being a patrolling guard for the pod, did not follow Thaxton to his medical call, but instead turned him over to other guards while remaining on duty in the tank. He specifically remembered the cell being closed when they returned and insisted that nothing unusual caught his eye during his routine patrols. Officer Kanatzer also said that he was diligent about closing cells, given the chaotic nature of the high-security inmates.

Officer Kanatzer gave some insight regarding the circumstances of life in the tank. He said that cellmates frequently stand at the cell doors, which are wide enough for their arms to hang out. He explained that the cells are positioned in such a way that inmates cannot see into other cells from their own, but they can see into other cells from the

catwalk. Officer Kanatzer describes the access door to the catwalk, which has a small window with a plastic flap over it for guards to quickly look at the cells.

Officer Kanatzer acknowledged before that regardless of the diligence of the officers, security breaches occasionally happen in the tanks. He conceded that contraband is discovered frequently and that fights between inmates are common. Officer Kanatzer testified that it would be reasonable, but not likely, for a cell door to be left open and that he never personally saw this occur. Officer Kanatzer voiced his concerns that other guards were not as diligent in their patrols and that the cells would occasionally go unchecked for up to an hour. He said that there was no timeclock or record kept for how often the guards patrolled, nor were the supervisors strict about when these patrols were performed.

The State called rebuttal witness Detective Darrell Johnson who testified about his interviews with the inmates. Following the incident, Detective Johnson interviewed the victim, who mentioned the name of Dominick Williams. Mr. Williams initially declined to give a statement or be interviewed, but a few days later, he consented. Detective Johnson testified that Mr. Williams seemed regretful, like he felt bad about not talking about the incident sooner. He was allegedly very forthcoming and cooperative in the interview. In his interview, Detective Johnson did not explain the allegations made by the victim to Mr. Williams, however, Mr. Williams seemed to be familiar with the situation and willing to speak freely about it.

Following the conclusion of the proof, on July 2, 2003, the jury convicted the petitioner as charged of both counts of rape.

**2. The Facts at Post-Conviction Hearing**

Following the conclusion of the petitioner's aggravated burglary trial, Mr. Greene

and the petitioner were in almost daily contact as they prepared for the rape trial. Mr. Greene obtained discovery from the State and reviewed this material with the petitioner. They discussed trial strategy and potential prosecution and defense witnesses. Mr. Greene's conversations with the petitioner occurred either at the jail or over the phone. As part of his trial preparation, Mr. Greene visited the jail and the scene of the incident.

The petitioner provided a witness list to Mr. Greene, and Mr. Greene sought to subpoena every witness that he could find on the list. Mr. Greene was able to secure attendance from three or four witnesses from the Tennessee Department of Correction, but he cannot remember their names at this time.[4] He did not refuse to subpoena any of the petitioner's listed witnesses. If a witness requested by the petitioner was not subpoenaed, it was because Mr. Greene could not locate that witness. The post-conviction record is silent as to which witnesses Mr. Greene did or did not interview in preparation for the trial. Mr. Greene called a total of five witnesses on the petitioner's behalf at trial: inmates Richard Thaxton, Corey Johnson, and Dominick Williams, and jail employees Sgt. Mike Bartleson and Off. Richard Kanatzer. Sherman Mason did not testify at trial or at the post-conviction hearing.

The relationship between the petitioner and Mr. Greene soured as they approached the trial date. Mr. Greene moved the trial court to relieve him as petitioner's counsel, but this request was denied. Mr. Greene continued to work on behalf of the petitioner, despite the difficulty of their relationship.

William Connor was a persuasive witness at trial during the State's case-in-chief. He appeared to be almost in shock as he testified and presented as scared, timid, and

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[4] The technical record indicates that three blank defense subpoenas issued prior to the trial. The returns on these subpoenas were not filed.

childlike to the jury. Following Mr. Connor's direct examination, Mr. Greene was presented with Mr. Connor's prior statement to law enforcement, and he was given time to review the transcript prior to his cross-examination. Mr. Greene noted that there were some minor inconsistencies in Mr. Connor's prior statement, but there were also allegations in the transcript, including an allegation of penetration with a broomstick, that were more serious than the testimony provided by Mr. Connor during his direct examination. Mr. Greene cross-examined Mr. Connor on some of the inconsistencies but decided to stop the cross-examination because he feared that he might open the door to admitting the harmful facts from the prior statement.

**B. Facts Related to the Sentencing Agreement in the Rape Case**

The consequences of community supervision for life and sexual offender registry were not discussed on the record during the plea hearing on July 18, 2003. Likewise, these consequences were not listed in the written plea petition signed by the petitioner and submitted to the court. The consequences were not mentioned in the written Waiver of Appeal executed by the petitioner. The first time these requirements are found in the record are in the uniform judgment documents entered by the court following the plea hearing.

The petitioner is adamant that he was unaware of the consequences of community supervision for life and sexual offender registry at the time he waived direct appeal on the rape case. The petitioner first learned of these consequences when they later took his picture for registration purposes in prison. He is likewise adamant that he never would have waived his direct appeal had he been aware of these consequences. Mr. Greene at first had difficulty remembering whether he advised the petitioner of these consequences

but later allowed that there was no reason to discuss the registry requirement because it was a mandatory part of the petitioner's punishment following his rape conviction.

Under these circumstances, the court finds that the petitioner was not advised of the consequences of community supervision for life and sexual offender registry by either the trial court or counsel prior to waiving his direct appeal as part of the sentencing agreement on the rape case. The court further accredits the petitioner's testimony that he would have pursued a direct appeal and challenged the rape conviction had he been advised of these mandatory consequences.

**C. Facts Related to the Robbery Case**

**1. The Factual Stipulation at Plea**

The following facts were presented as the factual basis for the petitioner's plea at the submission hearing:

> Walter Duncan would testify that on February 8, 1996, he was a UT student. That he was working part time at the Vestel Package Store in Knox County. That at some point on that evening, he was—three young black men came into the liquor store. That they were asking him questions about prices and the stock of the liquor. That he was there alone. That at some point, he was tackled by one individual. That he engaged in conflict with the three men. That he was beaten in the head and about his person. That he sustained a head injury from a blow with a liquor bottle. He would further testify that the quantity of money and a weapon that belonged to the owner of the store were also taken. And his car keys were taken. The men fled on foot. Mr. Duncan would testify that someone came into the store and assisted him in calling the police. The police got a description from him while he was on a gurney awaiting being transported to the hospital. That he was able to tell the police that one of the men was a very large young black male who had distinctive teeth. That he was then taken to the hospital where he remained for approximately four days. He was treated for a concussion, a very serious head injury. He would testify, and other witnesses would testify, that as a result of this blow to the head, that he temporarily incapacitated insofar as his ability to maintain a full-time load at school. That he sustained some personality changes. That he required follow-up medical treatment. That he sustained post-traumatic stress symptoms as a result of this. Panic attacks. That there was an actual break in his skull and so—

> Further testimony would be that at some point the police received information from a person that a man known as Meatbone was one of the participants in the robbery. The police were able to tie this name to Mr. Cumecus Cates. That based upon this information, Mr. Cates' photograph was placed in a line up. Mr. Duncan was shown this line up when he was in the hospital. At that time, he was under sedation and was not able to make any kind of identification at that point. But after his release from the hospital, he went to the police station, was shown a line up again, and he immediately was able to identify Mr. Cumecus Cates as one of his assailants. He made an in-court identification at his preliminary hearing at a later time. Based upon this information, the identification, the information from the other witness that this individual known as Meatbone had been a participant, the police arrested Mr. Cates.
>
> There would be essentially other medical proof regarding the nature and extent of Mr. Duncan's injuries. And further proof would be that all of these events occurred in Knox County.

### 2. The Facts at Post-Conviction Hearing

Mr. Greene obtained discovery from the State in the robbery case and discussed the case with the petitioner. Mr. Greene described the case as involving "rather gruesome" injuries to the victim. The main issue in the case was identification. Mr. Greene cannot recall whether he interviewed the civilian witnesses, but he assumes that he interviewed the law enforcement witnesses. Mr. Greene filed a motion for specific discovery regarding the victim's medical records to determine if it would be viable to challenge the "serious bodily injury" element. Mr. Greene attempted to construct an alibi defense in the case given the identity issue, but he had difficulty locating the needed witnesses. He unsuccessfully sought a continuance for this reason.

The petitioner's exposure was enormous given his prior record, his pending jury-trial convictions for aggravated burglary and rape, and his pending unresolved robbery case. The petitioner had seven prior felonies with different offense dates at the time of his agreement with the State: four Class B felonies and three Class C felonies. The State emailed Mr. Greene concerning the petitioner's exposure, including the possibility that any

sentence for the robbery could be ordered to run consecutively to the rape case.

Despite the petitioner's prior record, Mr. Greene obtained an offer from the State that would allow the petitioner to receive a sentence as a Range I offender on the robbery charge and receive a ten-year, concurrent sentence on the rape case, also in Range I. By law, the robbery case was a mandatory consecutive sentence to the petitioner's drug and aggravated burglary convictions. While the State's initial offer called for an effective sentence of 25 years, Mr. Greene negotiated for an effective sentence of 20 years at 100%. Part of this agreement was that the petitioner would waive his direct appeal in the rape case. Mr. Greene was able to secure the dismissal of separate robbery and aggravated burglary cases, in dockets 65042 and 60903. Mr. Greene conducted this negotiation at a time when his relationship with the petitioner was not optimal. Mr. Greene testified that he understood the petitioner's frustrations, but he could not let that interfere with his duty as his lawyer.

**D. Facts Related to Counsel's Alleged Conflict of Interest**

The petitioner claims that Mr. Greene had a conflict of interest in representing him because he also represented Eddie Smith, who he claims had an active robbery case against him at the time of these underlying proceedings. Mr. Greene cannot remember representing anyone by the name of Eddie Smith. The court finds that the petitioner failed to prove by clear and convincing evidence that Mr. Greene represented an Eddie Smith and, if he did, that it was the same Eddie Smith who had accused the petitioner of robbery. The court is convinced that if Mr. Greene had a bona fide conflict of interest in this case, he would have sought to be relieved from his representation of the petitioner for that reason.

## CONCLUSIONS OF LAW

Post-conviction relief is available for any conviction or sentence that 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. To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. Tenn. Code Ann. § 40-30-110(f); *Ward v. State*, 315 S.W.3d 461, 465 (Tenn. 2010). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009) (quoting *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998)).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth a two-prong test to prove ineffective assistance of counsel. The test requires the petitioner to prove both deficient performance of counsel and prejudice to the defense. *Dellinger v. State*, 279 S.W.3d 282, 293 (Tenn. 2009) (citing *Strickland*, 466 U.S. at 687). Deficient performance requires proof that "counsel's representation fell below an objective standard of reasonableness." *Id*. at 687-88. In its review, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Burns*, 6 S.W.3d 453, 462 (Tenn. 1999). Prejudice requires proof of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Dellinger*, 279 S.W.3d at 293 (citations omitted). In other words, the petitioner must establish that "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).

As to the deficient performance prong of *Strickland*, courts must not measure counsel's performance by "20-20 hindsight." *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). Rather, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Felts v. State*, 354 S.W.3d 266, 277 (Tenn. 2011) (citing *Strickland*, 466 U.S. at 689). The petitioner must overcome the presumption that, under the circumstances, counsel's challenged action "might be considered sound trial strategy." *Id.* Reviewing courts should not second guess counsel's strategic and tactical decisions. *Hellard*, 629 S.W.2d at 9.

The petitioner bears the burden of establishing both prongs of the *Strickland* test. *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004). Failure to establish either prong provides a sufficient basis to deny relief. *Id*. Accordingly, a court need not address both prongs if the petitioner makes an insufficient showing of one component. *Id*.

When a petitioner challenges his guilty plea on the basis of ineffective assistance of counsel, the petitioner must prove deficient performance and "there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." *Grindstaff,* 297 S.W.3d at 216–17 (Tenn. 2009) (quoting *Lockhart,* 474 U.S. at 59).

The Due Process Clause of the United States Constitution requires that guilty pleas be knowing and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). When evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that "[t]he standard was and remains whether the plea represents a voluntary

and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford,* 400 U.S. 25, 31 (1970) (citations omitted). The court reviewing the voluntariness of a guilty plea must look to the totality of the circumstances. *See State v. Turner,* 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). The circumstances include:

> [T]he relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

*Blakenship v. State,* 858 S.W.2d 897, 904 (Tenn. 1993) (citations omitted). A plea resulting from ignorance, misunderstanding, coercion, inducement, or threats is not "voluntary." *Id.*

***Claims related to the Jury Trial in the Rape Case***

**A. Claim One: Ineffective assistance of trial counsel for failing to interview any of the witnesses listed on the indictment and failing to interview the two victims.**

**1. Performance of Counsel**

The record is silent as to whether trial counsel interviewed the witnesses listed on the indictment in this case. Even if the record indicated that trial counsel failed to interview the witnesses, particularly Mr. Connor, it is entirely questionable that Mr. Connor would have agreed to speak with Mr. Greene under these circumstances had the request been made. Mr. Greene was nevertheless fully prepared to conduct cross-examinations of all witnesses called by the State. Further, the record indicates that Mr. Greene called five witnesses during the defense's case-in-chief. The petitioner has failed to present clear and convincing evidence that trial counsel acted deficiently in regard to preparing for the

State's witnesses.

**2. Prejudice**

Because the petitioner has failed to show deficient performance of counsel on this claim, it is unnecessary to address the prejudice prong of *Strickland*.

**B. Claim Two: Ineffective assistance of trial counsel for failing to discuss trial strategy or theory of defense with the petitioner and failing to inform the petitioner about the status of the case.**

**1. Performance of Counsel**

The facts presented show that trial counsel did in fact discuss trial strategy and defense theory with the petitioner during trial preparation. Counsel described being in contact with the petitioner on almost a daily basis. He went over discovery materials with the petitioner and attempted to procure defense witnesses requested by petitioner. As stated, trial counsel called five defense witnesses at trial. The petitioner has failed to show by clear and convincing evidence that trial counsel acted deficiently on this claim.

**2. Prejudice**

Because the petitioner has failed to show deficient performance of counsel on this claim, it is unnecessary to address the prejudice prong of *Strickland*.

**C. Claim Three: Ineffective assistance of trial counsel for failing to discuss with the petitioner the evidence against him and failing to provide him the State's discovery.**

**1. Performance of counsel**

As stated, *supra*, the facts indicate the opposite of the petitioner's claim on this point. Again, trial counsel repeatedly discussed the case with the petitioner and talked

about the materials provided in discovery. The petitioner has failed to show that trial counsel acted deficiently as to this claim.

**2. Prejudice**

Because the petitioner has failed to show deficient performance of counsel on this claim, it is unnecessary to address the prejudice prong of *Strickland*.

**D. Claim Four: Ineffective assistance of trial counsel for failing to subpoena inmate Sherman Mason, a cell-mate of Dominick Williams, who would have testified that he did not see any rape and did not see the petitioner force anyone to commit any sexual acts.**

**1. Performance of counsel**

Because the petitioner has failed to show prejudice on this claim, it is unnecessary to address the performance prong of *Strickland*.

**2. Prejudice**

To success on a claim of ineffective assistance of counsel for failure to call witness at trial, a post-conviction petitioner should present that witness at the post-conviction hearing. *Pylant*, 263 S.W.3d at 870 (citing *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990)). "As a general rule, this is the only way the petitioner can establish that . . . the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner." *Black*, 794 S.W.2d at 757.

The petitioner failed to present Sherman Mason's testimony at the post-conviction hearing. He has therefore failed to show how he was prejudiced by trial counsel's failure to call Mr. Mason. The petitioner is not entitled to relief on this claim.

**E. Claim Five: Ineffective assistance of trial counsel for failing to introduce contradictory statements made by William Conner to jailers during his cross-examination of that witness.**

**1. Performance of Counsel**

The record indicates that trial counsel started to impeach Mr. Connor on his prior inconsistent statements but then stopped because he feared that he would open the door to the introduction of the more prejudicial claims that he made in that prior statement. The record indicates that Mr. Connor was a sympathetic, credible witness. The record also shows that Mr. Connor might have been minimizing his abuse during his direct examination, which is not uncommon for victims of sexual assault. On this record, Mr. Greene acted prudently by not further attacking Mr. Connor's testimony. Further impeachment could have certainly been detrimental to the petitioner's defense. Mr. Greene made a strategic decision on this point that should not be second-guessed on post-conviction review. His performance was not deficient on this claim.

**2. Prejudice**

Because the petitioner has failed to show deficient performance of counsel on this claim, it is unnecessary to address the prejudice prong of *Strickland*.

***Claims Related to the Sentencing Agreement in the Rape Case***

**F. Claim Six: Unknowing waiver of direct appeal because of the trial court's failure to advise the petitioner of the consequences of sexual offender registry and community supervision for life.**

Tennessee Rule of Appellate Procedure 3(b) provides criminal defendants with a right to direct review from a judgment of conviction entered following a plea of not guilty.

There is no constitutional right to appeal. *See Ross v. Moffitt*, 417 U.S. 600, 611 (1974) ("it is clear that the State need not provide any appeal at all"); *see also Serrano v. State*, 133 S.W.3d 599, 604 (Tenn. 2004). The statutory right to appeal may be waived because the law "does not require an appeal of a conviction in a criminal case in the event the defendant, for reasons satisfactory to himself, desires not to have such an appeal." *Collins v. State*, 670 S.W.2d 219, 221 (Tenn. 1984).

It is undisputed here that the trial court failed to advise the petitioner of the consequences of community supervision for life and sexual offender registry that were attendant to his conviction of rape. It is further undisputed that an advisement regarding community supervision for life would be necessary before a court could accept a plea of guilty—*i.e.*, before accepting a waiver of the *constitutional* right to plead not guilty and proceed to a trial by jury—on a charge where that punitive requirement is a mandatory part of the sentence. *See Ward*, 315 S.W.3d 461; *see also State v. Nagele*, 353 S.W.3d 112 (Tenn. 2011). Here, however, the court's failure to advise of the community supervision for life requirement did not affect the petitioner's decision to waive a constitutional right but rather his decision to waive a right provided only by statutory law. The Post-Conviction Relief Act only protects against the abridgement of constitutional rights. Tenn. Code Ann. § 40-30-103. The petitioner can only show that the trial court's failure to advise abridged his statutory right to appeal. For this reason, he is not entitled to post-conviction relief on this claim.

**G. Claim Seven: Ineffective assistance of counsel leading to an invalid waiver of direct appeal because of counsel's failure to advise the petitioner of the consequences of sexual offender registry and community supervision for life.**

### 1. Performance of counsel

Because a defendant has a statutory right to appeal, an attorney has an obligation to consult with the defendant about an appeal following a conviction. *Arroyo v. State*, 434 S.W.3d 555, 559 (Tenn. 2014) (citing Tenn. Code Ann. § 40-14-203). The defendant may decide to waive the right to appeal, but any such waiver shall be accepted only if it is knowing and voluntary. *See Collins*, 670 S.W.2d at 221. To ensure that a defendant's waiver of appeal is knowing and voluntary, Tennessee Rule of Criminal Procedure 37(d)(2) requires the waiver to be in writing and signed by the defendant and his counsel. *Arroyo*, 434 S.W.3d at 560. Any purported waiver of the right to appeal is to be carefully scrutinized. *Serrano*, 133 S.W.3d at 604 (citing *Collins*, 670 S.W.2d at 221; *United States v. Cunningham*, 292 F.3d 115, 117 (2d Cir. 2002)).

It is uncontroverted in the record that the petitioner was not advised of the community supervision for life consequence prior to waiving his right to direct appeal on the rape conviction. If, as *Ward* provides, the advisement of this punitive consequence is a necessary prerequisite to a knowing and voluntary plea of guilty, the court cannot find any principled reason why the same advisement would not also be a prerequisite to a knowing and voluntary waiver of the right to direct appeal. Before allowing the petitioner to enter this waiver on the record, counsel should have advised the petitioner that he would be subjected to community supervision for life if the rape convictions went unchallenged.

In reaching this conclusion, the court does not discount the multiple difficulties that faced counsel during his representation of the petitioner at this time. The petitioner's exposure was so high that the prospect of community supervision for life might have been considered the least of his concerns by any objective standard. Further, and perhaps just as

importantly, the relationship between the petitioner and counsel had deteriorated to the point that communication on any subject was difficult at this time, especially communication regarding a punitive consequence that might pale in comparison to the total amount of incarceration being faced by the petitioner. Nevertheless, given the careful scrutiny that must be applied to waivers of appeal, the court is constrained to find that the petitioner should have been advised about the consequence of community supervision for life prior to waiving his right to appeal, and that did not occur.[5] The petitioner did not receive the effective representation of counsel on this point.

**2. Prejudice**

Released the same day as *Strickland*, the case of *United States v. Cronic* carved out limited exceptions to the prejudice requirement set forth in its companion case. 466 U.S. 648 (1984). Under the *Cronic* progeny, prejudice is presumed, without any need to show a chance of success on the merits, "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken." *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000). This presumption applies regardless of whether the defendant has signed an appeal waiver. *Garza v. Idaho*, 139 S.Ct. 738, 749 (2019). The presumption is premised on the understanding that there is no disciplined way to "accord any 'presumption of reliability' . . . to judicial proceedings that never took place." *Id.* (quoting *Flores-Ortega*, 528 U.S. at 483 and *Smith v. Robbins*, 528 U.S. 259, 286 (2000)). A panel of the Court of Criminal Appeals recently applied the principle from *Garza* in a post-conviction case where the petitioner had executed a waiver of appeal based upon the

---

[5] The court's finding is limited to the failure to advise regarding community supervision for life. *See Charles Wayne Dalton v. State*, No. M2014-02156-CCA-R3-ECN, 2016 WL 2638996 (Tenn. Crim. App. May 5, 2016) (failure to advise about placement on the sexual offender registry does not invalidate waiver of right to appeal the convictions that triggered the requirement).

deficient advice of counsel. *See Zacharious Cole v. State*, No. W2019-00841-CCA-R3-PC, 2020 WL 3288180 (Tenn. Crim. App. June 17, 2020).

The petitioner in this case signed a waiver of appeal based upon counsel's deficient failure to inform him of the punitive consequence of community supervision for life. Because this completely deprived the petitioner of a direct appeal on the rape case, prejudice is presumed "with no further showing from the [petitioner] of the merits of the underlying claims." *Flores-Ortega*, 528 U.S. at 484. The petitioner is entitled to post-conviction relief on this claim.

***Claims Related to the Robbery Case***

**H. Claim Eight: The guilty plea was not knowingly, voluntarily, nor intelligently entered.**

The petitioner reaped a great reward by entering into the agreement of July 18, 2003. First, he obtained a mid-range, Range I sentence on a Class A felony. Had the State convicted the petitioner at trial and shown at sentencing beyond a reasonable doubt that the petitioner was a persistent offender, which it appears from the petitioner's prior record that it would have been able to do, the petitioner would have faced a sentence between 40 to 60 years at 100% on the especially aggravated robbery case alone. Second, in the rape case, the petitioner would have faced a sentence of 20 to 30 years at 100% had the State been able to show that he was a persistent offender. Third, the petitioner was able to avoid consecutive sentencing on the rape and robbery cases. Any robbery conviction would have been subject to permissive consecutive sentencing in relation to the rape case, but based on this record, the State certainly would have been able to at least argue that consecutive sentencing should apply. Fourth, the petitioner also received the dismissal of separate

robbery and aggravated burglary cases. Clearly, the petitioner had a desire to avoid a much greater penalty that could have resulted had he proceeded to sentencing on the rape case and to trial on the robbery case.

Reviewing the other *Blakenship* factors, the court finds the petitioner to be an intelligent person. This is based upon his testimony at hearing, as well as the court's review of the petitioner's multiple filings in the technical record. The petitioner was familiar with the criminal justice at the time of this plea. He had multiple opportunities to confer with counsel leading up to the plea. Indeed, counsel had prepared the case and was ready to proceed to trial. The plea court held a full submission hearing on the record where the petitioner, under oath, waived his rights and pled guilty to this offense. Based upon all of these considerations, the court finds that the plea was knowingly, voluntarily, and intelligently entered in this case.

**I. Claim Nine: The sentences for the petitioner's conviction for Rape and Especially Aggravated Robbery are illegal because they run concurrently with one another.**

The petitioner was in custody pending disposition on the robbery case when the allegations leading to the rape charge arose. As stated in earlier appellate opinions in this case, the robbery case was allegedly committed while the defendant was on release status for docket numbers 68311, 68366, 68367, 68827, 71662, and Sullivan County docket number S-43198, and the robbery sentence was required to run consecutively to those cases. *See* Tenn. R. Crim. P. 32(c)(3)(C). There is no requirement in Rule 32 or in Tennessee Code Annotated section 40-20-111 that would *require* the rape and robbery sentences to run consecutively to one another. The sentences are not illegal in this regard,

and the petitioner is not entitled to relief.

**J. Claim Ten: Ineffective assistance of plea counsel for failing to interview the witnesses in the robbery case.**

**1. Performance of counsel**

Mr. Greene could not remember whether he interviewed the robbery victim or not. He assumed that he interviewed the law enforcement witnesses. It is the petitioner's burden to prove that these interviews did not occur during Mr. Greene's trial preparation. The petitioner has failed to prove deficient performance on this point by clear and convincing evidence.

**2. Prejudice**

Because the petitioner has failed to show deficient performance of counsel on this claim, it is unnecessary to address the prejudice prong of *Strickland*.

**K. Claim Eleven: Ineffective assistance of plea counsel for failing to discuss a theory of defense and failing to provide him the State's discovery.**

**1. Performance of counsel**

The record shows that Mr. Greene obtained discovery from the State and discussed the same with the petitioner. He explored the possibility of challenging the "serious bodily injury" element of the crime but decided this was not viable given the gruesome nature of the victim's injuries. Mr. Greene set out to prove an alibi defense and asked the court for a continuance because he was unable to find a necessary witness. As he had been on two prior occasions with the petitioner, Mr. Greene was prepared and ready to proceed to trial if the petitioner chose to. The petitioner has failed to show deficient performance by clear and convincing evidence.

**2. Prejudice**

Because the petitioner has failed to show deficient performance of counsel on this claim, it is unnecessary to address the prejudice prong of *Strickland*.

***Claims Pertaining to Both Cases***

**L. Claim Twelve: Ineffective assistance of trial counsel for failing to withdraw from representing the petitioner in light of an active conflict of interest.**

The petitioner has failed to show that a conflict of interest existed in this case. The petitioner has not shown that Mr. Greene ever represented a person named Eddie Smith or, if he did, that it was the same Eddie Smith who accused the petitioner of robbery. The petitioner is not entitled to relief.

**M. Remedy**

The court has found that the petitioner was deprived of his constitutional right to effective counsel leading to an invalid waiver of his direct appeal on the rape case. The court is denying all other claims. The record shows that the petitioner's waiver of appeal in the rape case was a bargained-for element of the State's global offer that resulted in a plea of guilty in the robbery case with a reduced sentence and dismissals in three other cases. Because the waiver of appeal cannot stand in light of the constitutional infirmity that preceded it, there is now a breach in the global agreement between the petitioner and the State.

The general rule has been that where a plea agreement is accepted and later breached, the remedy for the breach is either specific performance or restoration of the parties to the status existing immediately before the plea was entered. *State v. Mellon*, 118 S.W.3d 340, 347 (Tenn. 2003) (citing *Harris v. State,* 875 S.W.2d 662, 666 (Tenn.

1994); *State v. Turner,* 713 S.W.2d 327, 329 (Tenn. Crim. App. 1986); *Metheny v. State,* 589 S.W.2d 943, 945 (Tenn. Crim. App. 1979)).

In this case, the agreement of July 18, 2003, was breached by the petitioner successfully seeking, over the State's objection, to set aside the waiver of his appeal in the rape case. Specific performance is not available in this instance because the State cannot compel the petitioner to waive his right to appeal. Therefore, the only option available is to return the parties to the status existing immediately before the plea was entered. Specifically,

A) The judgment in the rape case, docket 65693, should be vacated, the sentence set aside, and the case set for a sentencing hearing (the underlying jury verdict remains undisturbed);

B) The judgment in the especially aggravated robbery case, docket 60747A, should be vacated and the case set for further proceedings; and

C) The judgments of dismissal in dockets 60903, 65042, and 70427 should be vacated, the indictments reinstated, and the cases set on the docket for further proceedings.

CONCLUSION

For the reasons stated, the Petition for Post-Conviction Relief is GRANTED IN PART and DENIED IN PART. The court grants the following relief:

A) The judgment in docket 65693 is VACATED and the sentence is SET ASIDE. The underlying jury verdict remains in place. The petitioner is referred to the state probation office for a presentence investigation. The case shall be set on the docket on February 9, 2021 for a sentencing hearing.

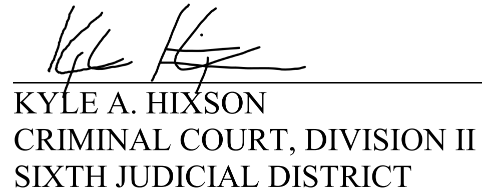
B) The judgment is docket 60747A is VACATED. The case shall be set on the

docket on February 9, 2021 for a status hearing.

C) The judgments of dismissal in dockets 60903, 65042 and 70427 are VACATED and the indictments REINSTATED. The cases shall be set on the docket on February 9, 2021 for a status hearing.

The Clerk shall forward a copy of this order to counsel for the petitioner, to the state probation office, and to the Office of the District Attorney General.

ENTER, this 16th day of December, 2020.



KYLE A. HIXSON
CRIMINAL COURT, DIVISION II
SIXTH JUDICIAL DISTRICT

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

| | | |
|---|---|---|
| JONATHAN W. STEPHENSON, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | COCKE COUNTY |
| v. | ) | No. E2012-01339-CCA-R3-PD |
| | ) | |
| STATE OF TENNESSEE, | ) | Post-Conviction |
| | ) | (CAPITAL CASE) |
| Appellee. | ) | |

ON APPEAL AS OF RIGHT FROM THE JUDGMENT
OF THE COCKE COUNTY CIRCUIT COURT

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BRIEF OF THE STATE OF TENNESSEE

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Tenn. Code Ann. § 39-13-204(j)(8) ........ 83

Tenn. Code Ann. § 39-13-204(k) ........ 36

Tenn. Code Ann. § 39-13-206(c)(1)(B) ........ 52

Tenn. Code Ann. § 40-23-114(b) ........ 105

Tenn. Code Ann. § 40-30-103 ........ 78

Tenn. Code Ann. § 40-30-106(f) ........ 50

Tenn. Code Ann. § 40-30-106(g) ........ 34, 77, 101

Tenn. Code Ann. § 40-30-106(g) ........ 46, 69

Tenn. Code Ann. § 40-30-110(f) ........ 31, 46, 69

Tenn. Code Ann. § 40-35-501 ........ 39

Tenn. Code Ann. § 40-35-501(f) ........ 40

1989 Tenn. Pub. Acts, ch. 591, § 1 ........ 2

1993 Tenn. Pub. Acts, ch. 473, § 3 ........ 39

1993 Tenn. Pub. Acts, ch. 473, § 14 ........ 36

## OTHER AUTHORITIES

Tenn. Att'y Gen. Op. 95-005 ........ 46

Tenn. Const. art. I, § 7 ........ 69, 70

Tenn. Const. art. I, § 8 .......... 34, 50, 101

Tenn. Const. art. I, § 9 .......... 63, 101

Tenn. Const. art. I, § 10 .......... 101

Tenn. Const. art. I, § 11 .......... 101

Tenn. Const. art. I, § 116 .......... 101

Tenn. Ct. Crim. App. R. 10(b) .......... 66

Tenn. R. App. P. 24(a) .......... 64

Tenn. R. App. P. 27(a)(7)(A) .......... 66

Tenn. R. Evid. 803(1.2) .......... 63

Tenn. Sup. Ct. R. 12 .......... *passim*

U.S. Const. amend. VI .......... 63

U.S. Const. amend. VIII .......... 104

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the petitioner is entitled to relief based upon his claims regarding specific performance of the 1994 sentencing agreement.

II. Whether the petitioner's claim that he received the ineffective assistance of counsel during the 1994 sentencing negotiations is waived and meritless.

III. Whether the post-conviction court properly denied relief on the petitioner's claims regarding the remuneration aggravating circumstance.

IV. Whether the petitioner's claim that 1990 trial counsel were ineffective for failing to lodge a Fourth Amendment challenge to the admissibility of his statement is waived and meritless.

V. Whether the State presented consistent theories at the respective trials of the petitioner and his co-defendant.

VI. Whether the petitioner received the effective assistance of counsel at his 2002 resentencing and on appeal.

VII. Whether the petitioner is entitled to relief based upon the constitutional challenges to his sentence.

VIII. Whether the petitioner has shown that cumulative errors entitle him to relief.

## STATEMENT OF THE CASE

Following the December 1989 murder of Lisa Stephenson, a Cocke County jury found her husband, Jonathan W. Stephenson ("the petitioner"), guilty of premeditated first degree murder and conspiracy to commit first degree murder. *State v. Stephenson*, 878 S.W.2d 530, 537 (Tenn. 1994). A sentencing hearing ensued, and the jury found one aggravating circumstance: "the defendant . . . employed another to commit the murder for remuneration or the promise of remuneration." *Id.* at 534 (quoting Tenn. Code Ann. § 39-13-204(i)(4) (1991)). The jury found no mitigating circumstances and sentenced the petitioner to death by electrocution. *Id.* at 534. The Honorable J. Kenneth Porter, Circuit Court Judge, sentenced the petitioner to a consecutive term of 25 years for the conspiracy conviction. *Id.*

On direct appeal, the Tennessee Supreme Court found no error in the guilt phase of the trial and affirmed the two convictions. *Id.* The Supreme Court held, however, that the trial court improperly instructed the jury during sentencing with pre-1989 law.[1] *Id.* at 558. The Supreme Court remanded both counts to the trial court for resentencing consistent with the 1989 Amendments. *Id.*

On remand, the parties reached an agreement by which the petitioner was sentenced to life without parole for the first degree murder offense and to 60 years for the conspiracy offense. *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000). The

[1] The 1989 Amendments to the Tennessee Criminal Sentencing Reform Act of 1982 took effect on November 1, 1989, approximately one month before the murder of Mrs. Stephenson. 1989 Tenn. Pub. Acts, ch. 591, § 1.

trial court entered judgment on October 6, 1994. (Ex. 30.)[2] On April 28, 1998, the petitioner filed a pro se habeas corpus challenge to his convictions in the Criminal Court for Johnson County. (HC I, 57); *Stephenson*, 28 S.W.3d at 910. The Tennessee Supreme Court eventually ruled that the petitioner's sentence of life without parole was an illegal sentence because it was not a statutorily authorized punishment at the time of the offense. *Id.* at 912. The Supreme Court remanded the murder conviction to the trial court for further proceedings but noted that its ruling did not affect the petitioner's separate conviction and 60-year sentence for the conspiracy charge. *Id.* at 912 n.3.

In 2002, resentencing proceedings commenced before the Honorable Ben W. Hooper, II, Circuit Court Judge. *State v. Stephenson*, 195 S.W.3d 574 (Tenn. 2006). A Cocke County jury found that the remuneration aggravating circumstance of Tenn. Code Ann. § 39-13-204(i)(4) applied. *Stephenson*, 195 S.W.3d at 585. The jury sentenced the petitioner to death. *Id.* On June 2, 2006, the Tennessee Supreme Court affirmed the petitioner's death sentence on direct appeal and ordered his execution to occur on October 11, 2006. *Id.* at 596.

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[2] References to the record will be indicated by volume, as marked thereon by the appellate court clerk, and by page number. References to the record of the 1990 guilt phase trial will be preceded by "1990". References to the record of the 1998 habeas corpus proceedings will be preceded by "HC". References to the 2002 resentencing trial will be preceded by "RS".

On October 5, 2006, the petitioner filed a pro se petition for post-conviction relief.[3] (I, 1-88.) The trial ordered a stay of the petitioner's execution and appointed the Office of the Post-Conviction Defender to represent the petitioner. (I, 91, 108-10.) A post-conviction hearing ensued from September 19 through 23, 2011. (XI-XV.) On December 12, 2011, the petitioner filed a written waiver of post-conviction counsel. (VIII, 1110-14.) The post-conviction court accepted this waiver and indicated that post-conviction counsel would serve as elbow counsel to the petitioner. (XVI, 44.) The post-conviction court entered an order on May 31, 2012, denying the petitioner relief. (VIII, 1132-66; IX, 1167-1260.) On June 21, 2012, the petitioner filed a timely pro se notice of appeal. (IX, 1261.) This Court appointed the Office of the Post-Conviction Defender to represent the petitioner on appeal. (IX, 1266.)

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[3] On June 16, 2004, the petitioner filed a habeas corpus petition in the Davidson County Criminal Court, which he voluntarily dismissed in August 2006. *Jonathan W. Stephenson v. Ricky Bell*, No. M2011-01562-CCA-R3-HC, 2012 WL 2356586, at *2 (Tenn. Crim. App. June 20, 2012) (copy attached), *perm. app. denied* (Tenn. Nov. 28, 2012). On June 22, 2010, he filed another habeas corpus petition in Davidson County, which the habeas court dismissed. *Id.* at *1. This Court affirmed the dismissal on appeal. *Id.*

On March 15, 2013, the petitioner filed a pro se notice of appeal in case number 4586 from the Davidson County Criminal Court. No. M2013-00720-CCA-R3-HC. The petitioner is appealing Judge Seth W. Norman's denial of a petition for writ of habeas corpus. *Id.*

## STATEMENT OF THE FACTS

### I. Resentencing Hearing

The facts from the resentencing hearing are summarized in the Tennessee Supreme Court's opinion in *State v. Stephenson*, 195 S.W.3d 574 (Tenn. 2006):

> At the resentencing hearing, the State presented proof showing that in December 1989, the defendant was married to Mrs. Stephenson and had a four-year-old son and an eight-month-old son. The defendant worked as a tractor-trailer driver in Morristown, Tennessee. In March 1989, the defendant met Julia Ann Webb ("Webb") at a bar in Knoxville, Tennessee, and the two became romantically involved. The defendant told Webb that his wife had been killed in a traffic accident five years earlier and that afterwards he had an affair with his wife's sister, "Kathy." He also told Webb that he had a child with each woman.
>
> In 1989, on numerous occasions, the defendant asked Glen Franklin Brewer ("Brewer"), a co-worker, to kill the wife of a friend. However, the description of the residence of the proposed victim matched the defendant's own home. On one occasion the defendant offered Brewer a boat, a motor, and a pickup truck in return for the requested killing. On another occasion the defendant offered Brewer $3,000.00 in return for the killing, and on yet another occasion, the defendant offered Brewer $5,000.00 from life insurance proceeds. The defendant complained to Brewer that his wife was receiving expensive psychiatric treatment and medication and that he feared he would "lose everything he had worked for" if he divorced her. In the fall of 1989, the defendant offered another man, Steven Michael Litz ("Litz"), who was a friend of [Ralph] Thompson, $5,000.00 to kill the defendant's wife because, the defendant said, she was going to divorce him and "take everything he'd ever worked for."
>
> On the evening of December 3, 1989, the defendant and Thompson took Thompson's 30/30 rifle and went to the home of Dave Robertson ("Robertson"), the defendant's employer, at around 7:30 p.m. After instructing Robertson to tell anyone who asked that he and Thompson had been at Robertson's house until 9:45 p.m., the defendant left with Thompson. The two men drove to an isolated area in Cocke County,

Tennessee, near the home of Thompson's uncle. Thompson had previously suggested that location as an out-of-the-way place where the defendant could "get rid of" Mrs. Stephenson. Mrs. Stephenson was lured to the remote location to pick up money for the defendant that was supposedly owed to him for "running" drugs. Thompson and the defendant waited there until Mrs. Stephenson arrived. As she sat in her vehicle, Mrs. Stephenson was shot at close range through the car's windshield. The bullet struck Mrs. Stephenson in the forehead and caused massive head injuries. The defendant told law enforcement officers that Thompson shot the victim, and the State's evidence showed that the defendant had offered to give Thompson a truck, a boat, and a motor for killing the victim. Thompson, however, testified that the defendant shot Mrs. Stephenson. Thompson added that, at the defendant's insistence, he also fired the rifle. The two then drove to the defendant's place of work, and the defendant subsequently headed to Ohio in an eighteen-wheeler truck. When Thompson asked about the defendant's children, the defendant told him that they would be all right because his father-in-law would check on them.

On his way out of the state, the defendant met Webb in Harrogate, Tennessee. He informed Webb that "Kathy" had just been killed by some people to whom she owed money. He explained that he and Thompson had gone to the scene of the killing where "Kathy" was found dead. The defendant and Thompson fought there with two men who had killed "Kathy," and they thought that the men were dead. The defendant said that he had not contacted the police because the police were in league with the killers. He told Webb that his children were with "Kathy's" father[4] and commented, "I didn't love her but I'm going to miss the Bitch." Webb recalled that she was with the defendant the weekend prior to Mrs. Stephenson's murder and that at that time the defendant purchased ammunition for a rifle at a K–Mart store.

After meeting with Webb, the defendant drove his truck to Ohio. Upon the discovery of his wife's body, the defendant was called back to Tennessee for questioning. The defendant initially denied involvement in his wife's murder. After Thompson and Robertson implicated him in Mrs. Stephenson's death, the defendant confessed to having Thompson kill her. At the time of Mrs. Stephenson's death, the defendant was the

[4] The two young boys were actually left alone at the defendant's house until Mrs. Stephenson's father found them the next day. [footnote in original.]

beneficiary of a $5,000.00 life insurance policy covering his wife. The defendant's sons, who were teenagers by the time of the resentencing hearing, were adopted by Mrs. Stephenson's parents and had no contact with their father, who, according to his former father-in-law, had never shown any remorse for the killing. At a separate trial, Thompson was convicted of first degree murder and was sentenced to life in prison.

In mitigation, the defendant presented evidence concerning his family history, psychological condition, and life in prison. Testimony from the defendant's parents and his younger brother painted a picture of a relatively normal childhood, although the defendant's mother testified that the defendant had suffered some emotional problems and was once hospitalized after attempting suicide. The defendant, the second of three sons, was described as "a regular kid" and as "a typical teenager" with a good sense of humor, who was quick-witted and more interested in sports than school. Because of his father's career as an officer in the United States Air Force, the family moved often. The defendant's mother worked outside the home. The defendant's brother testified about how the defendant had "raised" him while their mother and father worked. After twenty years of marriage, the defendant's parents divorced. Upset over the divorce, the defendant left his home in Anchorage, Alaska, as soon as he graduated from high school and went to live with his grandparents in Morristown and Newport, Tennessee. Prior to his convictions in this case, the defendant had no criminal record.

Dr. Eric S. Engum, a clinical psychologist specializing in clinical neuropsychology and forensic psychology, testified that he performed a two-day comprehensive evaluation of the defendant. Dr. Engum described the defendant as alert, responsive, articulate, and much more intelligent than the average convict. Despite a past history of Attention Deficit Disorder and a potential learning disability, the defendant had a comprehensive I.Q. of 118, a verbal I.Q. of 121, and a performance I.Q. of 111. According to Dr. Engum, the defendant falls into the "bright normal if not superior range of intellectual functioning," and an achievement test showed that he performs at above the high school graduate level in basic academic skills. Dr. Engum found no evidence of brain damage. The defendant's attention and concentration were good, and he performed above average on neuropsychological tests administered during the evaluation. Dr. Engum testified that the defendant suffers from a significant level of depression but that he

"masks" his condition. According to Dr. Engum, the defendant, who has a passive-aggressive personality, is resigned, withdrawn, and feels helpless. Nevertheless, the defendant's psychological difficulties do not interfere with his ability to perform his assigned tasks in prison, where he functions well. Dr. Engum diagnosed the defendant as suffering from a depressive disorder not otherwise specified and from a personality disorder not otherwise specified with schizoid, depressive, and avoidant features. Dr. Engum opined that prisoners with the defendant's psychological traits do not have major problems while incarcerated and generally are not recidivists.

Dr. Engum and other witnesses, including members of the defendant's family, correctional employees, and church workers, testified about the defendant's life at the Northeastern Correctional Center in Mountain City. The defendant served as a clerk in the law library, completed a program in paralegal studies and training in construction work, was an inmate advisor for the disciplinary board, spoke with troubled juveniles, participated in religious programs, was ordained as a minister, and played bass guitar in a multi-racial gospel band. He was described as a good inmate, an asset to the prison, "the cream of the crop," and "a good individual." Questioning by the State revealed that the defendant had several disciplinary reports prior to coming to the Northeastern Correctional Center but that he had only one minor disciplinary problem since then. His family members and church workers testified about the high esteem in which the defendant was held by the other prisoners and their families. The defendant's family testified that he had changed after coming to Northeastern Correctional Center. His mother described him as "very bitter and very angry" when he went to prison but said that he was now a different person: kind, thoughtful, hopeful, and caring. The defendant's father testified that Mrs. Stephenson's father will not allow the defendant's parents to see their two grandsons and that, although the defendant has asked his father to contact his sons for him, the defendant's former father-in-law obstructs any communication with the boys. In response to the State's questions, witnesses admitted that the defendant had never expressed remorse for killing his wife.

*Stephenson*, 195 S.W.3d at 582-85.

## II. Post-Conviction Hearing

The proof at the post-conviction hearing can generally be divided into five broad categories: proof pertaining to (1) the 1994 sentencing agreement and its effect on the 2002 resentencing hearing; (2) the facts of the murder and the application of the remuneration aggravating circumstance in Tenn. Code Ann. § 39-13-204(i)(4); (3) the constitutionality of the petitioner's 1989 statement to law enforcement; (4) the petitioner's mental state at the time of the offense;[5] and (5) counsel's usage of peremptory strikes during voir dire at resentencing.

### *A. The 1994 sentencing agreement*

William E. Leibrock, a Newport attorney licensed since 1970, represented the petitioner in the initial trial and on remand in 1994. (XIV, 420, 424.) The trial court originally appointed Mr. Leibrock to assist District Public Defender Edward Miller with the case, who was appointed to represent the petitioner at his arraignment in General Sessions Court. (XIV, 421.) As of 1989, Mr. Miller was newly-elected, and Mr. Leibrock had more criminal experience at the time as both a prosecutor and a defense attorney. (*Id.*) Both attorneys represented the petitioner through the resentencing proceedings in 1994. (XIV, 424, 440.)

Once the Supreme Court reversed the sentences in 1994, Mr. Leibrock recalled the petitioner's primary concern at resentencing: "getting him off death row so he

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[5] Much of the evidence presented pertained to the petitioner's competency at the time of hearing. This evidence has not been summarized, except for the portions relating to the specific issue raised by the petitioner on appeal.

would not be executed. That was number one. He didn't want to go to the electric chair . . . ." (XIV, 425.) The petitioner's second goal was to get off of death row so he could live in the general population of the prison. (*Id.*) With these two goals in mind, Mr. Leibrock approached District Attorney General Al Schmutzer in an attempt to negotiate a sentence. (*Id.*) The parties negotiated for "the better part of the day." (*Id.*)

Mr. Schmutzer led the prosecution of the petitioner's case from its inception through the resentencing in 2002. (XIII, 319-20.) After the case was remanded for resentencing in 1994, the parties selected a jury for that purpose, and Mr. Schmutzer was "ready to go to trial." (XIII, 321.) Before the resentencing hearing started, however, Mr. Schmutzer recalled being approached by defense counsel, who "wanted to know if there was something we could work out[.]" (*Id.*)

Even though Mr. Schmutzer was ready for the resentencing hearing, he approached Mr. Saylor, the victim's father, to discuss the possibility of a negotiated sentence. (XIII, 321.) Mr. Saylor sought finality to the prosecution. (*Id.*) Mr. Schmutzer recalled,

> He was literally at wits end on the whole thing and of course he was—as much as he wanted to see him get the death penalty he was also—quite frankly I think it was really becoming injurious to his health. I saw just a great deterioration in him from the time we had first tried it until this time and he did indicate that he would like to see some finality to it.

(*Id.*) Mr. Saylor indicated, however, that an agreement would require a guarantee that the petitioner would never be paroled. (*Id.*) Mr. Schmutzer informed him that

the only way that could be accomplished was through a sentence of life without parole. (*Id.*)

Mr. Schmutzer discussed the position of the victim's family during the 1994 hearing:

> I would not agree to this or even attempt to if it wasn't for the family wasn't in agreement. They have been adamant prior to this not to agree to anything and I was with them because I felt strongly, I felt that it was a death penalty case if there ever was one. If I ever tried one[,] this is it. But they've reached the point now where if they don't lay this thing down they're going to go to pieces. They can't put it down, I mean, this keeps going on and on and on. Mr. Saylor is coming apart at the seams. Something has got to happen, so they can walk away from it and get on with their lives.

(Ex. 21, at 33.)

Mr. Schmutzer knew that life without parole was not a statutory sentence for the petitioner's offense date, "[b]ut in talking to [Mr. Saylor] longer I got to thinking, well, you know, maybe as long as he could plead to that and the Department of Corrections would probably follow that as long as he didn't complain." (*Id.*) During the negotiations, Mr. Schmutzer informed defense counsel that the State would agree to life without parole on the murder charge if the petitioner would agree to an out-of-range, 60-year sentence on the conspiracy charge, consecutive to the life sentence. (XIII, 322.) Mr. Schmutzer made sure that the petitioner understood that he was accepting a sentence that was not available at the time his offense was committed. (XIII, 323.) Mr. Schmutzer admitted that there was a question as to "whether or not

this could be done" but concluded that if the petitioner "didn't raise it, of course I didn't think it was any problem." (XIII, 324.)

Mr. Leibrock described the positions of the parties at this sentencing negotiation: "[The victim's family's] insistence was that if they agreed to something less than death that he would never ever get out of prison, and so the plea resulted in life without parole and sixty years for conspiracy . . . ." (XIV, 426.) Mr. Miller described the situation as follows:

> I believe we were all aware, counsel for the defense and the State, that there could possibly be a challenge to the life without parole sentence because it was not a punishment for which was available at the time of Mr. Stephenson's offense. The sixty years was a buffer or a cushion in case the life without parole did not withstand challenge and it was to ensure the defendant never got out of prison even if the life without parole were overturned.

(XIV, 442-43.) Mr. Miller did not recall any discussions about whether this goal could have been accomplished with a legal sentence. (XIV, 443.)

At the 1994 hearing, the trial court explained to the petitioner that he was accepting a 60-year sentence, with a 36-year release eligibility date, consecutive to a sentence of life without parole: "That would mean that you are not going to get out of the penitentiary, that would mean that you are just in there." (Ex. 21, at 39.) The petitioner responded, "Death penalty is not much of a life, Your Honor." (*Id.*)

On April 28, 1998, four years after the sentencing agreement, the petitioner challenged his sentence of life without parole in habeas corpus proceedings. (HC I, 57); *see Stephenson*, 28 S.W.3d at 910-11. Mr. Schmutzer described his decision-

making process regarding the death penalty before and after the petitioner's successful habeas corpus action:

> I made the decision to seek the death penalty before the first trial and did seek it and the jury gave it to me and was prepared to seek it again the second time when we worked out the plea agreement. And, you know, when he basically abrogated the plea agreement, repudiated it, and at that point, of course, we brought him back to try him again on death.

(XIII, 325.)

John Edward Herbison, an attorney licensed since 1987, became involved in the petitioner's case when the Tennessee Supreme Court appointed him as appellate counsel during the petitioner's habeas challenge of his sentence of life without parole. (XIII, 352-53.) The petitioner's family later retained Mr. Herbison to represent the petitioner at the second resentencing remand. (XIII, 363.)

Mr. Herbison joined attorneys Carl Bob Ogle and Tim Moore, who had previously been appointed to represent the petitioner on remand. (XIII, 363.) Mr. Ogle, an attorney from Jefferson City, was appointed about a year before the petitioner's resentencing hearing, and the other two attorneys generally considered him lead counsel due to his seniority. (XIII, 363; XIV, 449-51; XV, 478.) Mr. Moore, an Assistant Federal Defender in the Eastern District of Tennessee at the time of the post-conviction hearing, was licensed in Tennessee and Georgia in 1984 and had conducted a private practice consisting of 85-90% criminal cases for approximately 12 years prior to his appointment in this case. (XV, 477.)

Mr. Ogle and Mr. Moore focused on developing factual issues, while Mr. Herbison focused on identifying legal issues. (XIII, 363; XIV, 452.) Mr. Moore described Mr. Herbison as being "a walking law library." (XV, 478.) Mr. Ogle described the trio as "work[ing] well together." (XIV, 451.) Mike Cohan was their lead investigator, and they employed Rosalind Andrews as a mitigation expert. (XIV, 452.)

During his representation of the petitioner, Mr. Herbison read the transcript from the 1994 sentencing proceedings many times. (XIII, 373.) Mr. Herbison understood that the agreement was designed to insure that the petitioner "never left prison under any circumstances." (XIII, 373.) Mr. Herbison believed that it was a "very high priority" for the victim's family that the petitioner would never be released on parole "or otherwise." (XIII, 374.) Mr. Herbison agreed that his reading of the transcript from 1994 led him to believe that a sentence of life without parole was an integral part of the plea agreement because it was necessary to satisfy the victim's family. (XIII, 400.) Mr. Herbison further agreed "that a life without parole sentence is analytically different from a life sentence." (XIII, 401.)

Although he did not represent the petitioner during the 1994 sentencing agreement, Mr. Moore said he did not believe that the impossibility of parole was a key provision to that agreement. (XV, 493-94.) Mr. Moore believed that the 60-year sentence insured that the petitioner would never leave prison in the event that the life without parole sentence "became an ordinary life sentence." (XV, 493.) At the time

of the post-conviction hearing, Mr. Moore was unsure if the release eligibility for a first degree murder conviction with an offense date of 1989 was 51 years or 25 years. (XV, 495-97.)

Mr. Moore stated that "for a variety of reasons obviously we talked about trying to resolve the case" in 2002 but added that there were never any extended conversations with the State because the petitioner would not "have entertained that." (XV, 480.) The petitioner's legal team did not ask for specific performance of the 1994 sentencing agreement. (XIII, 375; XIV, 463; XV, 481.) Mr. Herbison testified that he could think of no strategic reason for not making a specific performance claim. (XIII, 378.) Mr. Herbison stated that "a life sentence plus sixty years at sixty percent would have created an effective life without parole sentence, particularly given [the petitioner's] age." (XIII, 375.)

Concerning the possibility of an agreed-upon sentence in 2002, Mr. Ogle recalled, "The greatest offer he would allow us to make was twenty-five years which included taking care of the sixty year sentence." (XIV, 459.) Mr. Ogle stated, "It was clear throughout the process that Mr. Stephenson had some unrealistic expectations about what would come out of this." (XIV, 458.) Mr. Ogle said that he never seriously considered arguing that the 1994 agreement was still in effect because the petitioner "had appealed and set aside his part of the agreement." (XIV, 463.)

*B. The application of the "remuneration" aggravating circumstance*

The original trials for the petitioner and his co-conspirator, Ralph Thompson, were severed. (XIII, 326.) Mr. Schmutzer explained that the defendants gave statements that were relatively consistent, except each defendant claimed that the other pulled the trigger. (*Id.*) Mr. Schmutzer introduced the petitioner's statement against him in the guilt phase, in which the petitioner stated that Mr. Thompson actually shot the victim. (XIII, 327.) In Mr. Thompson's trial, Mr. Schumtzer did not argue who pulled the trigger. (XIII, 327-28.) Mr. Schmutzer never argued in Mr. Thompson's trial that the petitioner pulled the trigger. (XIII, 328.) Mr. Schmutzer acknowledged that he did not know the identity of the actual shooter and that he relied on the statements admitted against the petitioner and Mr. Thompson in their respective trials. (XIII, 331.)

Mr. Schmutzer's position was that the identity of the shooter did not matter. (XIII, 336.) Mr. Schmutzer did not read the remuneration statute as requiring the State to prove the identity of the shooter:

> It simply says to employ someone to kill someone for the remuneration or promise of remuneration, and that was proven. I don't think under any circumstance that the Court would throw out this case simply because when they got there at the last minute the person that did the hiring actually pulled the trigger, because the person he hired did everything else up until then providing the weapon, et cetera . . . . That aggravating factor, the importance to it is the fact that someone would employ someone else to kill someone. That's reducing someone's life to dollars and cents. That's about as cold-blooded and as calculated as you can get. That's evidence of a depraved and wicked mind . . . .

(*Id.*)

Mr. Herbison testified that the State relied solely on the murder for remuneration aggravating circumstance during the 2002 resentencing. (XIII, 365.) The defense strategy was to show that the State had not proven this aggravating circumstance beyond a reasonable doubt or that if the aggravator was proven, it was outweighed by mitigating factors. (*Id.*) Specifically, the defense theory was that the petitioner was the shooter, and, therefore, this could not be a murder for hire. (XIII, 390.)

Prior to the resentencing hearing, Mr. Herbison reviewed Mr. Schmutzer's closing argument in Mr. Thompson's trial and recalled that Mr. Schmutzer argued, in essence, that the actual identity of the shooter did not have to be proven by the State. (XIII, 402-03.) Mr. Herbison also reviewed this Court's opinion in Mr. Thompson's case, but he did not recall any finding that Mr. Thompson was the shooter. (XIII, 391.) Mr. Herbison did not review the State's brief in Mr. Thompson's appellate case, but he did review Judge Porter's Tenn. Sup. Ct. R. 12 report, in which the trial court notated that Mr. Thompson was probably the shooter. (XIII, 390-91.) Mr. Herbison recalled attempting to introduce an excerpt from the State's closing argument from Mr. Thompson's trial at the petitioner's resentencing, but it was excluded. (XIII, 392.)

Mr. Ogle agreed that the defense theory at resentencing was that remuneration aggravating circumstance could not apply to the actual shooter. (XIV, 464.) Mr.

Moore and Mr. Herbison argued this point during the jury instruction conference. (*Id.*) Mr. Ogle said that he had not read the briefs or this Court's opinion in Mr. Thompson's appellate case, but he read the transcript of Mr. Thompson's trial before the resentencing hearing. (*Id.*) When asked if the review of the appellate materials from Mr. Thompson's case would have made a difference, Mr. Ogle responded, "The only difference it would have made is we did try to talk about the approach they took in the Thompson case at trial but we would have just added that to it if we had had that." (XIV, 465.)

Mr. Ogle said that Mr. Herbison took the "laboring oar" on appeal. (*Id.*) Mr. Ogle stated that both he and Mr. Herbison made contributions to the appellate brief, but Mr. Ogle took Mr. Herbison's recommendation on which issues to include because he conducted the research. (XIV, 466.) When asked who made the final decision about which issues to include on appeal, Mr. Ogle stated,

> There [were] conversations we had back and forth about some strong points that we thought we had and some weaker points. I don't specifically recall those conversations but I'm sure before something was taken out we would have talked about that or at least left out what was included in the motion for a new trial. We would have talked about that and I would have deferred to his opinion at that point.

(*Id.*) Mr. Ogle is aware of the concept in death penalty appellate work that "it's probably better to over include than to under include issues," and stated, "[I]f you're

asking me would I make sure [the remuneration issue] stayed in today, I would."[6] (XIV, 466-67.)

The defense filed a motion for exculpatory evidence seeking any evidence that the petitioner was the shooter, and they received a copy of Mr. Thompson's statement. (XV, 487.) Mr. Moore did not believe that he looked at the State's brief or this Court's opinion in Mr. Thompson's case. (*Id.*) If the State had previously taken the position that Mr. Thompson was the shooter, Mr. Moore opined that such information would have aided his argument for a jury instruction saying that the remuneration aggravator does not apply if Mr. Thompson did not shoot the victim. (XV, 488.) Mr. Moore conceded that he did not know if the State actually argued this position either at trial or on appeal and admitted that he was merely relying on the argument of the petitioner's post-conviction counsel. (XV, 497-98.)

### C. *The constitutionality of the petitioner's statement to police*

Before the petitioner's 1990 trial, Mr. Leibrock filed a motion to suppress the petitioner's statement to police wherein he confessed his involvement in the victim's murder. (Ex. 28.) Mr. Leibrock's motion alleged that the statement was not voluntarily given and violated the petitioner's rights under the Fifth Amendment to the United States Constitution. (*Id.*) Neither Mr. Leibrock nor Mr. Miller could

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[6] The petitioner's appellate briefs following the direct appeal of his 2002 resentencing are not included in the record on appeal.

recall specific details about the suppression motion, and both attorneys deferred to the record. (XIV, 422, 432-33.)

Mr. Herbison testified that the petitioner's inculpatory statement was critical to establishing probable cause in the affidavit supporting his arrest warrant. (XIII, 366.) Prior to the resentencing hearing in 2002, Mr. Herbison prepared a motion to suppress the petitioner's statement on Fourth Amendment grounds, based upon *Dunaway v. New York*, 442 U.S. 200 (1979). (*Id.*) Mr. Herbison's theory was that the petitioner voluntarily went to the police station but was unlawfully detained without probable cause once he arrived, requiring suppression of his resulting statement. (XIII, 367.)

Mr. Herbison filed this suppression motion before resentencing, but the State countered that the admissibility of the petitioner's statement had previously been litigated at the 1990 proceedings. (XIII, 367-68.) Mr. Herbison believed that the Fourth Amendment issue had not been previously raised and was therefore properly before the resentencing court. (XIII, 368.) The resentencing court found that the suppression issue had been waived. (XIII, 369.)

Following the resentencing hearing, Mr. Herbison made an offer of proof concerning the Fourth Amendment claim. (*Id.*) Mr. Herbison recalled that Bob Stephenson, the petitioner's father, and Agent Davenport testified during this offer of proof. (*Id.*) Mr. Herbison also asked the resentencing court to take judicial notice of the suppression proceedings in the 1990 trial. (*Id.*) Mr. Herbison conceded that the

petitioner never asked to leave the police station during the course of the interview. (XIII, 399.) Mr. Herbison unsuccessfully pursued this issue on direct appeal before this Court and the Tennessee Supreme Court. (XIII, 369-70); *see Stephenson*, 195 S.W.3d at 591-92.

*D. The petitioner's mental state at the time of the offense*

The petitioner's mother, Nancy Lemieux, testified that the petitioner could not read by age nine, and a psychiatrist diagnosed him with ADHD and dyslexia. (XI, 28.) She said that the petitioner learned to read that year. (*Id.*) Ms. Lemieux said that the petitioner started having seizures when he was nine months old. (XI, 29.) A doctor at Kelly Air Force Base (the petitioner's father was in the Air Force) placed the petitioner on medication, and the seizures stopped. (XI, 30.) Ms. Lemieux stated that when the petitioner was seven or eight months old, her husband would "shake [the petitioner] really hard" when they were playing. (XI, 31.)

Prior to resentencing, Mr. Ogle reviewed the entire file of the petitioner's previous counsel. (XIV, 455.) Mr. Ogle also received Ms. Andrews' memorandum concerning her review of Mr. Miller's file. (*Id.*) The defense at resentencing employed Dr. Eric Engum to conduct a psychological examination of the petitioner. (XIV, 453.) Mr. Ogle continued the investigation by interviewing the same people referenced in Mr. Miller's file and Ms. Andrews' memorandum. (XIV, 457.)

While Dr. Engum did not testify at post-conviction and his report from 2002 was not made a part of the record, his testimony from resentencing indicates that the

petitioner had no brain damage. (RS XII, 809.) In fact, Dr. Engum's findings contradicted the earlier findings of attention deficit disorder:

> [A]gain going through the kind of inventory, attention and concentration were good despite the prior diagnosis of attention deficit.
>
> He did well on sensory input, motor output. He did well in memory conceptual reasoning, problem solving, learning, virtually everything was at the above average range.
>
> So I was satisfied there was no evidence of any type of cognitive dysfunction due to brain damage.

(RS XII, 815.) While Dr. Engum diagnosed the petitioner with low-level depression and a personality disorder not otherwise specified with schizoid, depressive, and avoidant features, Dr. Engum opined that the petitioner had adjusted to the prison environment and was doing well there. (RS XII, 822.)

After reviewing Dr. Engum's report, Mr. Ogle stated that the defense team did not feel as though they could substantiate a mitigation claim related to his findings. (XIV, 458.) Mr. Ogle did not consider finding another expert after receiving Dr. Engum's report because Mr. Ogle "had used Dr. Engum before and had some confidence in his abilities." (XIV, 459-60.) When further asked about not pursuing a mental health defense at resentencing, Mr. Ogle responded,

> I don't remember exactly what [Dr. Engum's] report said. I know that after we got that report we felt like we couldn't substantiate something that would be dispositive of the case with that. We knew that there was differences of opinion on both sides based on Mr. Miller's file, but again, my recollection is it didn't get those tied up real good, at least as far as what we thought would be successful.

(XIV, 460.) When asked why he focused on the positive side of the petitioner's rehabilitation—e.g., he was a good inmate, helped others, renewed his religious beliefs, and played in a gospel band in prison—as opposed to the negative aspects of his prior life—e.g., his family problems, medical problems, and suicide attempt—Mr. Ogle explained his strategy:

> We knew those [negative aspects] were there so I'm sure we discussed that. It was my feeling at least . . . I felt like the best chance to save [the petitioner's] life was to show that he had been rehabilitated and was not a danger, in fact, he was an asset to the prison community. And I had some concern that these others, we couldn't substantiate strong enough to get away with the idea that maybe that's kind of an excuse or whatever. Perhaps it wouldn't have happened that way but that was my thought process.

(XIV, 460-61.) Mr. Ogle agreed that presenting the petitioner's problems would not have diminished his positive strides since incarceration, but he thought "it would have spread more things out for the jury to think about." (XIV, 461.)

Clinical psychologist Dr. Samuel Craddock and forensic psychiatrist Dr. Rokeya S. Farooque both agreed with Dr. Engum's assessment that the petitioner did not suffer from a cognitive disorder. (XI, 155; XII, 166.) Dr. Craddock, now retired, examined the petitioner at Middle Tennessee Mental Health Institute (MTMHI) on August 17 and September 7, 2011. (XI, 117.) Dr. Craddock also examined the petitioner at MTMHI in 1990. (XI, 145.) Dr. Craddock reviewed the petitioner's psychiatric records from Alaska and noticed that no cognitive disorders were reported when the petitioner was 17. (XI, 122.) Dr. Craddock noted the petitioner's

participation in sports as a youth. (*Id.*) Dr. Craddock attributed any speech delays to the petitioner's inner ear problems as a youth, but he did not believe that the petitioner carried any of these issues into adulthood. (*Id.*)

Dr. Craddock stated that the petitioner was admitted for major depression while he was in Alaska, but he was never medicated, perhaps because he was a teenager at the time. (XI, 128.) Since Dr. Craddock met the petitioner in 1990, the petitioner had been admitted at Cherokee Mental Health Center, also for major depression. (XI, 127.) Dr. Craddock stated that Dr. Engum "certainly didn't see a cognitive disorder," and that Dr. Malcolm Spica was the first person to diagnose the petitioner with a cognitive disorder. (XI, 129.)

Dr. Craddock stated that he did not diagnose the petitioner with a personality disorder either. (XI, 144.) He stated, "I'm reluctant to give somebody a diagnosis unless I feel like I can fully defend it." (XI, 144-45.) Dr. Craddock said he was concerned that he could have missed a personality diagnosis, however, after hearing that the military had diagnosed the petitioner with a histrionic personality. (XI, 144.) Dr. Craddock stated that while he did not make this personality diagnosis, "I would just respect my colleagues though in saying that if they see it, I will acquiesce and say it exists." (XIV, 145.)

Dr. Farooque, also employed at MTMHI, examined the petitioner on an inpatient basis between August 17 and September 9, 2011. (XII, 166.) Following this 23-day examination of the petitioner, Dr. Farooque did not find a psychiatric

diagnosis in Axis I, nor did she find a personality disorder diagnosis in Axis II. (XII, 167.) In short, Dr. Farooque did not find the petitioner to be mentally ill. (XII, 175.)

Dr. Farooque ordered an EEG and a CT scan of the petitioner, the results of which were normal. (XII, 168.) Dr. Farooque noted that the results from the petitioner's EEG in 1990 were also normal. (XII, 193.) Referring to a report from Dr. Boswell in 1974, Dr. Farooque stated that EEG findings at that time were consistent with "minimal brain damage," but Dr. Farooque explained that "minimal brain damage" was a general term used by the psychiatric community at the time to describe Attention Deficit Hyperactivity Disorder because "we didn't know what was causing ADHD." (XII, 190.) "It doesn't mean that he had brain damage definite," she explained, "because I looked at the report before and there was no indication that he had any kind of brain damage." (*Id.*) She noted that Dr. Boswell found no soft neurological signs. (XII, 191.)

Dr. Farooque agreed with Dr. Craddock's finding that the petitioner did not suffer from a cognitive deficit. (XII, 195.) She did not find a cognitive deficit in her own evaluation of the petitioner, nor did she see a cognitive deficit after reviewing the petitioner's old records. (*Id.*) When asked why she did not ask Dr. Craddock to conduct the Delis-Kaplan test on the petitioner, she stated that she depended on Dr. Craddock's expertise, and she agreed with his findings. (XII, 196.)

Dr. Spica is a clinical neuropsychologist in private practice. (XII, 201.) Prior to the post-conviction hearing, Dr. Spica was asked to review the report of Dr. Engum. (XII, 203.) After this review, Dr. Spica asked to see the petitioner for additional testing. (*Id.*) Dr. Spica said that Dr. Engum had found "underlying difficulties" with the petitioner's frontal lobe functioning but eventually concluded that the petitioner was "essentially fine." (XII, 204.)

Dr. Spica said that every revision of a neuropsychological test tends to have better normative data and stated, "[T]here have been measures to assess frontal lobing functioning that may not have been available to Dr. Engum at the time." (XII, 205.) In light of this, Dr. Spica conducted a full and conventional neuropsychological examination of the petitioner. (XII, 206.) Dr. Spica said that he found three areas of difficulty that "essentially correspond to a diagnosis of cognitive disorder": executive functioning, new learning, and sensory motor speed. (*Id.*) Dr. Spica found that the petitioner "has areas of great strength and areas where he's essentially a smart person," but "[i]n contrast to those, he performed into the severely impaired range on very elemental tasks mediated by the frontal lobe." (XII, 208.)

Dr. Spica based his findings, in part, on the petitioner's poor performance on the letter number sequencing task, in which the petitioner scored in the first percentile. (XII, 208-09.) Dr. Spica claimed that Dr. Craddock did not perform a similar test on the petitioner that would have tested his executive functioning. (XII, 212.) Dr. Spica said that the petitioner scored in the fifth percentile in the "color

word naming" test. (XII, 209-10.) Dr. Spica also testified that the petitioner performed poorly in the task of alternating between naming pieces of furniture and vegetables. (XII, 210.)

Dr. Spica noted that the petitioner performed reliably worse on his tests when he was under a time pressure. (XII, 213.) He also stated that the petitioner passed all of his malingering tests. (XII, 215.) Dr. Spica felt that it was reasonable to conclude that the petitioner's frontal lobe damage occurred during childhood since it seemed to affect his educational activities and because he experienced febrile seizures. (XII, 228.)

At the request of the petitioner's post-conviction counsel, forensic psychiatrist Dr. Peter Brown conducted a psychiatric examination on the petitioner on May 22, 2011. (XI, 45-46.) Dr. Brown diagnosed the petitioner with cognitive disorder not otherwise specified and personality disorder with avoidant and dependent features. (XI, 48; Ex. 16.) In forming this opinion, Dr. Brown relied upon the petitioner's history, his own mental status examination, and the testing performed by Dr. Spica. (XI, 48.)

Dr. Brown disagreed with the Dr. Craddock's finding that the petitioner did not have a history of serious mental illness. (XI, 109.) Dr. Brown claimed that the petitioner had a cognitive disorder prior to 1990. (*Id.*) Dr. Brown also pointed to the petitioner's hospitalization for depression and his diagnosis by military examiners of having a histrionic personality. (*Id.*) Dr. Brown considered a histrionic personality

to be a serious mental illness. (*Id.*) Dr. Brown said that the benefit of hindsight and sophisticated testing that was not available when the petitioner was in the military has shown that the petitioner does indeed have a personality disorder. (XI, 105.) Although Dr. Brown opined that the petitioner had a serious mental illness prior to 1990, he conceded that Dr. Craddock's 1990 finding that neither the test results nor the petitioner's behavior was suggestive of a mental illness or other thought disorder was the "appropriate conclusion" based on the data that were available. (XI, 110.) Dr. Brown argued, however, that the "correct testing" and "the correct collection of information wasn't made . . . ." (*Id.*)

Dr. Brown cited the petitioner's four hospitalizations as a child for febrile convulsions as a possible explanation for his cognitive disorder. (XI, 94.) Dr. Brown said it was a possibility that the "roughhouse play" with his father could have aggravated the brain damage. (XI, 95.) Dr. Brown acknowledged that the results from the petitioner's EEG and CT scans were normal, but he claimed that neuropsychological testing was the better way of identifying these problems. (XI, 96-97.)

Dr. Brown further opined that the petitioner suffered from his cognitive and personality disorders at the time of the murder in 1989. (XV, 512.) Dr. Brown opined that these disorders affected the petitioner's judgment and his ability to conform to the law. (*Id.*) In Dr. Brown's opinion, the petitioner's condition would not support an insanity defense, but Dr. Brown believed that petitioner's

impairments rise to the level of Tennessee's statutory mitigating factor involving a mental disease or defect that "substantially affected the defendant's judgment[.]" (XV, 513.)

### E. *Usage of peremptory strikes at resentencing*

At resentencing, Mr. Herbison participated in voir dire to some extent, mostly focusing on developing challenges for cause. (XIII, 389.) Mr. Ogle took the lead at voir dire. (XIII, 389.) As Mr. Herbison stated, "I trusted the East Tennessee attorneys with jury selection far more than I trusted my own instincts." (XIII, 396.) Mr. Herbison felt that "co-counsel had a pretty good handle on who we did or didn't want." (XIII, 397.)

At the post-conviction hearing, Mr. Ogle had no independent recollection of his decision-making process at voir dire. (XIV, 467.) Generally, Mr. Ogle described the voir dire process as follows:

> We would discuss the information that we had on a particular juror. Tim [Moore] was from Cocke County and knew folks in Cocke County very well. If we got to a disagreement as to whether or not we should keep a juror I would defer to his knowledge of that individual in the community in which they lived or whatever. I don't recall any real arguments about that but certainly I would have deferred to his choice on that.

(XIV, 469.) Mr. Ogle could not remember the exact process used during voir dire at resentencing, but he stated that the only possible justification for not using all of the available peremptory strikes would be the "chance of getting somebody worse than that person." (XIV, 470.)

Mr. Moore recalled spending "a considerable amount of time" preparing for the voir dire process. (XV, 482.) The jurors were ranked by their answers on the questionnaire. (XV, 482.) The decision to keep or strike a potential juror was not solely based on the juror questionnaire completed before voir dire. (*Id.*) As Mr. Moore explained,

> Judge Hooper, as I recall, was very careful, as a judge should be in a death penalty case, to determine if there was some reason or some problem with a particular juror serving, and the transcripts will reflect this, but we spent time talking to people in the jury room. We didn't go solely from the questionnaire.

(XV, 482-83.)

## ARGUMENT

To sustain a petition for post-conviction relief, a defendant must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. Tenn. Code Ann. § 40-30-110(f); *Ward v. State*, 315 S.W.3d 461, 465 (Tenn. 2010). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009) (quoting *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998)).

Upon review, an appellate court should not re-weigh or re-evaluate the evidence below; all 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 trial judge, not the appellate courts. *See Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999) (citing *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997)). The trial judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. *Momon*, 18 S.W.3d at 156 (citations omitted). When reviewing the application of law to the post-conviction court's factual findings, the review is de novo, and the post-conviction court's conclusions of law are given no presumption of correctness. *Grindstaff*, 297 S.W.3d at 216 (citation omitted).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth a two-prong test to prove ineffective assistance of counsel. The test

requires the petitioner to prove both deficient performance of counsel and prejudice to the defense. *Dellinger v. State*, 279 S.W.3d 282, 293 (Tenn. 2009) (citing *Strickland*, 466 U.S. at 687). Deficient performance requires proof that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. In its review, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Burns*, 6 S.W.3d 453, 462 (Tenn. 1999). Prejudice requires proof of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Dellinger*, 279 S.W.3d at 293 (citations omitted). In other words, the petitioner must establish that "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).

As to the deficient performance prong of *Strickland*, courts must not measure counsel's performance by "20-20 hindsight." *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). Rather, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Felts v. State*, 354 S.W.3d 266, 277 (Tenn. 2011) (citing *Strickland*, 466 U.S. at 689). The petitioner must overcome the presumption that, under the circumstances, counsel's challenged action "might be considered

sound trial strategy." *Id.* Reviewing courts should not second guess counsel's strategic and tactical decisions. *Hellard*, 629 S.W.2d at 9.

The petitioner bears the burden of establishing both prongs of the *Strickland* test. *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004). Failure to establish either prong provides a sufficient basis to deny relief. (*Id.*) Accordingly, a court need not address both prongs if the petitioner makes an insufficient showing of one component. *Id.*

The aforementioned *Strickland* standard also applies to Sixth Amendment claims of ineffective assistance of appellate counsel. *Porterfield v. State*, 897 S.W.2d 672, 678 (Tenn. 1995). Again, the petitioner bears the burden of establishing both *Strickland* prongs, and his failure to establish either prong provides a sufficient basis to deny relief. *Carpenter*, 126 S.W.3d at 886. The determination of which issues to raise on appeal is generally with the sound discretion of appellate counsel. *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Campbell v. State*, 904 S.W.2d 594, 597 (Tenn. 1995).

## I. THE PETITIONER'S CLAIMS REGARDING SPECIFIC PERFORMANCE OF THE 1994 SENTENCING AGREEMENT ARE WAIVED AND MERITLESS.

### A. The Post-Conviction Court Properly Determined That the Petitioner Waived His Freestanding Claim for Specific Performance by Failing to Raise It at the 2002 Resentencing Hearing. (Pet'r Issue I.A.1)

The petitioner argues that the State did not honor the 1994 sentencing agreement between the parties. (Pet'r Br. at 4.) He contends that his current sentence of death, therefore, violates the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution and the Law of the Land Clause in Article I, Section 8, of the Tennessee Constitution and is unconstitutionally arbitrary. (*Id.*) Because the petitioner did not raise the issue of specific performance of the plea at the resentencing proceedings, the post-conviction court correctly ruled that the freestanding specific performance claim was waived.

"A ground for [post-conviction] relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented[.]" Tenn. Code Ann. § 40-30-106(g).[7] Furthermore, "[t]here is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived." *Id.* § 40-30-110(f). The State must assert the defense of waiver at the post-conviction hearing. *Walsh v. State*, 166

[7] The two exceptions to section -106(g) do not apply to this case.

S.W.3d 641, 645 (Tenn. 2005). The issue of waiver cannot be raised for the first time on appeal. *Id.* at 646.

At the 2002 resentencing hearing, the petitioner's first degree murder conviction was on remand from the Tennessee Supreme Court "for further proceedings." *Stephenson*, 28 S.W.3d at 912. The Supreme Court later clarified that, at the time of remand, the Cocke County Circuit Court held "exclusive subject matter jurisdiction of the [petitioner's] conviction for first degree murder [and] also possessed the inherent authority to impose a sentence for that conviction." *Stephenson*, 195 S.W.3d at 593. There is no dispute that the petitioner and his attorneys failed to raise the issue of specific performance at the 2002 resentencing hearing. Further, as required by *Walsh*, the State asserted the waiver defense to this issue in the post-conviction court.[8] Because the petitioner could have raised his specific performance claim at the 2002 resentencing, but did not, the trial court correctly found waiver of the issue. (IX, 1197.)

On the merits, however, the petitioner's freestanding specific performance claim also fails. At the time of the petitioner's offenses, the Code provided, in pertinent part:

> In the event that the trial court, or any other court with jurisdiction to do so, orders that a defendant convicted of first degree murder (whether the sentence is death or life imprisonment) be granted a new trial, either

[8] The petitioner first raised the specific performance claim in his "First Amended Petition for Post-Conviction Relief," and the State, in its Response, claimed that the issue had been waived. (II, 201, 257.)

as to guilt or punishment or both, the new trial shall include the possible punishments of death or life imprisonment.

Tenn. Code Ann. § 39-13-204(k) (Supp. 1990).[9] As this Court recently held in a habeas corpus appeal brought by the petitioner, "[t]he trial court properly conducted a new sentencing hearing for the Petitioner before a jury. That new jury again sentenced the Petitioner to death." *Stephenson v. Bell*, No. M2011-01562-CCA-R3-HC, 2012 WL 2356586, at *5 (Tenn. Crim. App. June 20, 2012) (copy attached), *perm. app. denied* (Tenn. Nov. 28, 2012). Although the terms of the 1994 sentencing agreement were well documented, no appellate court, either before or after the 2002 resentencing hearing, has held that the petitioner is entitled to a sentence of life with parole as a result of the 1994 agreement. By asking for a sentence of life with the possibility of parole, the petitioner now asks for specific performance of an agreement that never existed.

In *Santobello v. New York*, 404 U.S. 257, 258-59 (1971), a prosecutor made a sentencing recommendation to the trial court in violation of a prior prosecutor's promise made to the defendant during plea negotiations. In light of the prosecutor's breach of the promise made to the defendant, the Supreme Court held that the trial court should decide whether the defendant was entitled to specific performance of his plea—i.e., a new sentencing hearing in front of a new judge, where the prosecutor

[9] The General Assembly amended this portion of subsection -(k) in 1993 to add the possible punishment of "imprisonment for life without the possibility of parole." 1993 Tenn. Pub. Acts, ch. 473, § 14. The petitioner's case, however, is governed by the pre-1993 version of subsection –(k). *See State v. Cauthern*, 967 S.W.2d 726, 735 (Tenn. 1998) (citing the enacting provision in 1993 Tenn. Pub. Acts, ch. 473, § 1).

would not make a sentencing recommendation—or whether he was entitled to the right to withdraw his plea of guilty and start the case anew. *Id.* at 262-63. Tennessee courts follow this approach from *Santobello*: "When the State later breaches a plea bargain agreement, the aggrieved defendant may either seek specific performance of the agreement or ask the court to restore both parties to the status they occupied immediately before the plea was entered." *Harris v. State*, 875 S.W.2d 662, 666 (Tenn. 1994).

Most of the cases pertaining to specific performance arise out of the prosecution's breach of a promise made during plea negotiations. In this case, however, the State, by agreeing to a sentence of life without the possibility of parole, maintained every promise made to the defendant during the sentencing negotiations in 1994. All parties were aware at the time of the *possible* illegality of the sentence of life without parole. (XIII, 322; XIV, 442-43.) The petitioner, not the State, sought to attack the 1994 agreement by filing a collateral habeas corpus action in 1998. (HC I, 48.) The petitioner, of course, was within his rights to attack the illegal sentence, but he was not entitled to subvert the prior agreement and receive a sentence that the State would not have agreed to in 1994. (XIII, 321.)

The petitioner asks for a sentence of life with parole, but this is not *specific* performance of the 1994 agreement, which called for no possibility of parole. Specific performance in this instance is impossible because the agreed-upon sentence is illegal and unenforceable. *See New River Lumber Co. v. Tennessee Ry. Co.*, 145 Tenn.

266, 238 S.W. 867, 872 (1922) ("[c]ertainly, the court could not decree the performance of an unlawful contract"). When an illegal sentence follows a valid jury verdict, as is the case here, the Tennessee Supreme Court has noted, "the *only remedy* is the entry of an amended judgment order reflecting a legal sentence." *Cantrell v. Easterling*, 346 S.W.3d 445, 456 (Tenn. 2011). Further, "[a] new sentencing hearing may be necessary or desirable for the determination of a legal sentence." *Id.* at 456 n.12. Once an agreement is rejected or set aside, the State is not bound by any prior sentencing offers and may prosecute a defendant to the fullest extent of the law and seek the most severe punishment available under the law. *See State v. Mann*, 959 S.W.2d 503, 510 (Tenn. 1997); *see also State v. Hines*, 919 S.W.2d 573, 578 (Tenn. 1995).

The petitioner incorrectly characterizes the 1994 agreement, maintaining that the State promised not to seek the death penalty in exchange for a 60-year sentence on the conspiracy charge. (Pet'r Br. at 7.) The State never promised not to seek the death penalty. In fact, Mr. Schmutzer stated at the 1994 hearing, "I felt that it was a death penalty case if there ever was one." (Ex. 21, p. 33.) The benefit of the bargain for the State was the life sentence without the possibility of parole because that was the only way to absolutely guarantee that the petitioner would never be released from prison. (XIII, 321.) The State lost this benefit when the defendant "abrogated" the agreement by successfully challenging the sentence in a habeas corpus proceeding.

The petitioner incorrectly asserts that the 60-year sentence "effectively negated the possibility of release." (Pet'r Br. at 7.) Therefore, the petitioner maintains, the State received its desired result of denying him the possibility of parole. The petitioner, born in 1963, was 26 years old when he was arrested for his wife's murder. (Ex. 30.) The petitioner's release eligibility date on his 60-year sentence, standing alone, would have been no more than 36 years later, when the petitioner was 62 years old. Clearly, the 60-year sentence, even with its 60-percent service rate, does not negate the possibility of his release.

The addition of a consecutive life sentence with the possibility of parole does not compel a different conclusion. At the time of the petitioner's offense, persons sentenced to life imprisonment were eligible for release after service of 60 percent of 60 years "less sentence credits earned and retained by the defendant." Tenn. Code Ann. § 40-35-501 (1990). At the time, there was no statutory limit to reduction via earned sentencing credits. In 1993, however, the General Assembly provided that earned sentencing credits could not reduce a murder convict's release eligibility to less than 25 years. 1993 Tenn. Pub. Acts, ch. 473, § 3 (adding new subsection -(g) to Tenn. Code Ann. § 40-35-501). In that same Act, the General Assembly provided that juries in first degree murder sentencing hearings "shall be instructed that a defendant who receives a sentence of imprisonment for life shall not be eligible for parole consideration until the defendant has served at least twenty-five (25) full

calendar years of such sentence." *Id.* § 4 (amending Tenn. Code Ann. § 39-13-204(e)).

Since there was no statutory limit to release eligibility reduction under the 1989 Code, it is impossible to know when, exactly, the petitioner would have become eligible for parole on a life sentence.[10] A life sentence—even when coupled with a consecutive 60-year sentence at 60 percent—could not adequately protect the State's desire to insure that the petitioner was never paroled. This explains Mr. Schmutzer's statement to the victim's father that a life sentence without the possibility of parole was the only way to guarantee that the petitioner would never be released.[11] (XIII, 321.)

The petitioner is not entitled to specific performance because the State never breached the agreement. Even if the State did breach the agreement, specific performance of an illegal sentence is improper, and the petitioner would be resigned to the other option provided under the *Santobello* progeny: the restoration of the parties to the status existing immediately before the agreement was entered. *See Harris*, 875 S.W.2d at 666. In this case, the parties were properly restored to a

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[10] If the 25-year requirement enacted in 1993 is used as a guide, the petitioner could have become eligible for parole at age 87. This accounts for the consecutive sentence of 60 years at 60 percent. Importantly, however, this calculation does not account for sentencing credits that the petitioner could have earned and retained on the 60-year sentence. *See* Tenn. Code Ann. § 40-35-501(f) (1990) (allowing sentencing credits to reduce release eligibility of career offenders).

[11] As the trial court lamented in 1994, "Thompson walks out with a life sentence and . . . supposedly he can serve it in twenty-five years and I tell you right now he'll be out in twenty or less." (Ex. 21, at 60.)

resentencing hearing with a jury deciding whether the petitioner should be sentenced to death or life imprisonment.

### B. The Post-Conviction Court Properly Determined That the Petitioner Is Not Entitled to Relief Based Upon Counsel's Failure to Seek Specific Performance of the 1994 Sentencing Agreement at Resentencing or on Appeal. (Pet'r Issue I.A.2.b, c)

The petitioner argues that, at the 2002 resentencing hearing, he had the right to seek specific performance of his 1994 sentencing agreement. (Pet'r Br. at 11.) This right, the petitioner claims, "was the equivalent to a standing offer of a straight life sentence on the murder charge." (*Id.*) The petitioner contends that his counsel in 2002 were ineffective for failing to demand this life sentence. The post-conviction court correctly found that the petitioner received the effective assistance of counsel on this point.

As to *Strickland*'s deficiency prong, the post-conviction court found, "[T]he failure of counsel to raise an issue about the proper options at re-sentencing as it related to the plea and either specific performance or returning to the status quo was deficient performance." (IX, 1202.) The court noted that the Supreme Court had previously addressed the legality of the 60-year conspiracy sentence, but the issue of specific performance had not been addressed. (*Id.*) In reaching this conclusion, the post-conviction court cited the testimony of Messrs. Herbison and Moore, where they could think of no strategic reason for not seeking specific performance. (IX, 1204.)

The State respectfully disagrees with the post-conviction court's conclusion that 2002 counsel were deficient for not seeking specific performance of the 1994 agreement. The post-conviction court relied on the subjective beliefs of Messrs. Herbison and Moore that they should have sought specific performance. The performance analysis of *Strickland* is an objective one, and "every effort should be made to eliminate the distorting effects of hindsight," including the hindsight of trial counsel. *See Felts*, 354 S.W.3d at 277; *see also James W. Gann, Jr. v. State*, No. M2010-01944-CCA-R3-PC, 2012 WL 2870605, at *6 (Tenn. Crim. App. July 13, 2012) (copy attached) (performance was not deficient even though trial counsel "regretted" not objecting to the State's closing argument). For this reason, this Court has previously determined that counsel's admissions at the post-conviction level are not determinative on review. *Henry Eugene Hodges v. State*, No. M1999-00516-CCA-R3-PD, 2000 WL 1562865, at *14 (Tenn. Crim. App. Oct. 20, 2000) (copy attached).

Mr. Ogle explained that he never seriously considered arguing that the 1994 agreement was still in effect because the petitioner "had appealed and set aside his part of the agreement." (XIV, 463.) The petitioner's "part of the agreement" was to serve a life sentence without the possibility of parole. As Mr. Herbison concluded after reading the transcript of the 1994 proceedings, a sentence of life without the possibility of parole was necessary to satisfy the victim's family and an integral part of the agreement with the State. (XIII, 400.)

As shown, however, this sentence was illegal, and counsel could not demand specific performance of an illegal sentence. Counsel cannot be faulted for not seeking a legally unavailable remedy. Nor can counsel be faulted for not seeking enforcement of a life sentence with the possibility of parole. As Mr. Herbison noted, "a life without parole sentence is analytically different from a life sentence." (XIII, 401.) A sentence of life with the possibility of parole was unacceptable to the State, and such a sentence neither upholds the letter or the spirit of the 1994 agreement. The only avenue available to the petitioner at this point was to proceed to resentencing, as directed by Supreme Court. *Stephenson*, 28 S.W.3d at 912; *Stephenson*, 2012 WL 2356586, at *5.

Further, the petitioner has made absolutely no showing of prejudice. The post-conviction correctly found from the proof presented that the petitioner would not have accepted the option of specific performance in 2002. (IX, 1205.) Mr. Moore stated that the petitioner would not entertain any discussions of a sentencing agreement. (XV, 480.) Mr. Ogle cited the petitioner's unrealistic expectations: the petitioner would only accept a sentence of 25 years, and that included "taking care of" the 60-year sentence.[12] (XIV, 458-59.) Even if specific performance was a viable option in this case and even if counsel demanded that remedy before the resentencing

[12] These facts are also relevant to the determination of whether counsel were deficient for not demanding specific performance.

court, the record shows that the petitioner would not have accepted any such agreement. This prevents any showing of prejudice.

The petitioner incorrectly asserts that his notation to counsel from the 2002 resentencing hearing shows that he would have accepted a life sentence. (Pet.'r Br. at 16; Ex. 25.) While the notation does indicate that the petitioner *might have* accepted a life sentence (and its accompanying possibility of an early release on parole), it does not contradict Mr. Ogle's testimony that the petitioner also sought to invalidate the 60-year sentence in 2002. (XIV, 459.) There is no proof in the record indicating that the petitioner would have accepted a life sentence on the murder charge unless that agreement also vacated his 60-year conspiracy sentence. Even in light of this notation, the post-conviction properly found that the petitioner had not proven prejudice, and the facts do not preponderate against the findings underlying this decision.

The State submits that the petitioner has waived his claim of ineffective assistance of appellate counsel for failing to include a copy of his appellate briefs on direct appeal in this record. "Absent the necessary relevant material in the record an appellate court cannot consider the merits of an issue." *State v. Ballard,* 855 S.W.2d 557, 560-61 (Tenn. 1993); *see also State v. Oody,* 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). A proper review of the performance of appellate counsel would necessarily include a review of the briefs prepared by counsel. The petitioner has waived relief by failing to include these briefs in the record on appeal.

Assuming that appellate counsel decided not to pursue this specific performance claim on direct appeal, they were acting within their sound discretion. *See Campbell*, 904 S.W.2d at 597. When an omitted issue is without merit, the petitioner cannot prevail on an ineffective assistance claim. *Carpenter*, 126 S.W.3d at 887-88. Specific performance was simply not at play in this case. As shown, the defense remedy of specific performance must be predicated upon a valid agreement and a breach by the State, neither of which were present. The issue here involved an illegal sentence. Therefore, *Cantrell* is controlling, and a resentencing hearing on the murder conviction was properly in order. *Cantrell*, 346 S.W.3d at 456 n.12. The petitioner received the effective assistance of counsel at resentencing and on appeal. He is not entitled to relief.

## II. THE PETITIONER'S CLAIM THAT HE RECEIVED THE INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE 1994 SENTENCING NEGOTIATIONS IS WAIVED AND MERITLESS. (Pet'r Issue I.A.2.a)

The petitioner argues that he received the ineffective assistance of counsel during the sentencing negotiations in 1994 bccausc his attorneys failed to structure a legal sentence. The post-conviction court correctly found that the petitioner's attorneys were not deficient in this regard.

Initially, however, the State argues that any claim related to the judgment entered on October 6, 1994, has been waived due to the petitioner's failure to present the claim before a court of competent jurisdiction. *See* Tenn. Code Ann. §§ 40-30-106(g), -110(f). The post-conviction court took judicial notice that

> [i]n 1995, the Petitioner previously filed a petition for post-conviction relief challenging the 1994 plea proceedings on various grounds. In March 1996, the State admitted the issue of the invalidity of the sentence citing a 1995 Attorney General's Opinion [Tenn. Att'y Gen. Op. 95-005 (Jan. 20, 1995)] and stated that the Petitioner should have a new sentencing hearing and that it would seek the death penalty again. The Petitioner's post-conviction counsel at the time, Mr. Moore, objected to any ruling without a full hearing and subsequently the Petitioner dismissed his 1995 post-conviction petition and filed his related habeas corpus petition in Johnson County, Tennessee.

(IX, 1203 n.13.) Based upon this previous petition and its voluntary dismissal by the petitioner, the petitioner failed to raise this ground before a court of competent of jurisdiction in which the ground could have been presented, and it is therefore

waived.[13] Further, any challenge to the 60-year sentence has been waived by the petitioner's failure to file a petition to rehear challenging the Supreme Court's ruling in 2000 that the habeas action did not affect the 60-year sentence and that it was not void or illegal. *See Stephenson*, 195 S.W.3d at 596 n.16 (citing *Stephenson*, 28 S.W.3d at 912 n.3).

The post-conviction court addressed the merits of the petitioner's claim, however, and found that counsel in 1994 were attempting to negotiate a sentencing agreement that would avoid the death penalty "with a prosecutor who by his own statements stood ready a second time to seek the death penalty on the same facts for which he had previously been successful before a jury." (IX, 1212.) The post-conviction court also noted that the legality of a life sentence without parole had yet to be litigated in Tennessee at the time of the agreement. (IX, 1212-13.) Therefore, the court reasoned, the petitioner's attorneys were not deficient in fashioning this agreement. The record supports the post-conviction court's findings.

Mr. Leibrock recalled that the petitioner's primary concern in 1994 was "getting . . . off death row." (XIV, 425.) Nevertheless, the parties selected a jury for a capital resentencing, and Mr. Schmutzer was "ready to go to trial." (XIII, 321.) Once the parties began sentencing negotiations, Mr. Leibrock learned that the State

[13] On appeal, the State acknowledges that the defense of waiver was not raised in the post-conviction court as to this claim. *See Walsh*, 166 S.W.3d at 645-46.

would only entertain "something less than death" if the victim's family was guaranteed that the petitioner would never be released from prison. (XIV, 426.)

As shown, this goal could only be accomplished through a sentence of life without the possibility of parole. This sentence accomplished the petitioner's only goal in 1994: getting off death row. The post-conviction court correctly ruled that the legality of this sentence had yet to be litigated at the time of the 1994 agreement. *State v. Cauthern*, 967 S.W.2d 726 (Tenn. 1998), was the first Tennessee case to explicitly hold that a defendant could not be sentenced to life without parole for a murder occurring prior to July 1, 1993. *Id.* at 735. Without the guidance of *Cauthern*, and in light of the directive in Tenn. Code Ann. § 39-11-112 (requiring a defendant to be sentenced under a subsequent act if that act provides for a lesser penalty), counsel's recommendation of this agreement was at least a reasonable legal tactic at the time. At most, it was a shrewd maneuver that would have permanently kept the petitioner off death row had he not collaterally attacked the agreement four years later.

Any claim of ineffective assistance on this point, however, necessarily fails because the petitioner cannot demonstrate prejudice. The illegality of the 1994 sentence did not harm the petitioner in any way; it only returned him to the same place that he would have been had the agreement not been reached in the first instance. In some ways, the delay created between the 1994 agreement and the 2002 resentencing hearing could only serve to help the petitioner. *See Barker v. Wingo*, 407

U.S. 514, 521 (1972) ("[d]elay is not an uncommon defense tactic" because prosecution "witnesses may become unavailable or their memories may fade").

The petitioner has failed to demonstrate that his counsel in 1994 were deficient in negotiating his sentence. He has likewise failed to show that he was prejudiced by their representation. He is not entitled to relief.

## III. THE POST-CONVICTION COURT PROPERLY DENIED RELIEF ON THE PETITIONER'S CLAIMS REGARDING THE REMUNERATION AGGRAVATING CIRCUMSTANCE.

### A. The Petitioner's Freestanding Claims Challenging the Sufficiency of the Evidence Supporting the Application of the Remuneration Aggravating Circumstance Have Been Previously Determined and Are Meritless. (Pet'r Issue II.C.1)

The petitioner argues that the evidence in the record is legally insufficient to support the application of the remuneration aggravating circumstance found in Tenn. Code Ann. § 39-13-204(i)(4). (Pet'r Br. at 38.) He bases a plethora of claims on this alleged insufficiency, including violations of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as violations of Article I, Section 8, of the Tennessee Constitution and Tenn. Code Ann. 39-13-204(j). The post-conviction court correctly ruled that any claims regarding the sufficiency of the evidence were "waived and/or previously determined." (IX, 1228.)

A post-conviction ground for relief is subject to dismissal if it has been "previously determined" or if the ground is not cognizable in a post-conviction suit. *See* Tenn. Code Ann. § 40-30-106(f); *Caruthers v. State*, 814 S.W.2d 64, 69 (Tenn. Crim. App. 1991). A ground has been "previously determined" if

> a court of competent jurisdiction has ruled on the merits [of the ground] after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

*Id.* § 40-30-106(h). It is well-established that sufficiency of the evidence is not cognizable in a post-conviction suit. *Rhoden v. State*, 816 S.W.2d 56, 61 (Tenn. Crim. App. 1991); *Ray v. State*, 489 S.W.2d 849, 851 (Tenn. Crim. App. 1972); *Workman*, 868 S.W.2d at 711.

The record clearly demonstrates that the sufficiency of the evidence has been previously determined and is, therefore, not cognizable in post-conviction. The defense theory at the 2002 resentencing involved the argument that the remuneration aggravator could not apply to the person who actually shot the victim. (XIII, 365.) To support this claim, counsel subpoenaed Ralph Thompson to testify at the resentencing trial, and Mr. Thompson denied shooting the victim. (XII, 863; RS XII, 889.)

At the jury instruction conference during the 2002 proceedings, Messrs. Moore and Herbison argued that remuneration did not apply if Mr. Thompson did not shoot the victim. (XIV, 464; XV, 488.) Mr. Moore even asked the trial court for a jury instruction stating that the State cannot prove remuneration unless it proves that Mr. Thompson was the shooter. (XV, 488.) In his closing argument at resentencing, Mr. Ogle argued extensively that the proof did not show that Mr. Thompson killed the victim for hire, and therefore, remuneration could not apply. (RS XIV, 1059-62.)

In the petitioner's motion for new trial, he alleged, "[T]here was not sufficient, competent, and admissible evidence to allow a jury to find that the aggravating factor was present in this case." (RS II, 250.) Clearly, the petitioner challenged the factual

sufficiency of the State's proof regarding remuneration at resentencing. The petitioner received a full and fair hearing on the issue at resentencing, where he called a witness to support his theory, argued the alleged factual insufficiency to the jury, and raised legal objections regarding the issue to the trial court.

Further, on the petitioner's direct appeal from his resentencing hearing, this Court and the Tennessee Supreme Court were statutorily required to determine whether "[t]he evidence supports the jury's finding of [a] statutory aggravating circumstance[.]" Tenn. Code Ann. § 39-13-206(c)(1)(B); *see also State v. Banks*, 271 S.W.3d 90, 149 (Tenn. 2008); *State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997). In affirming the petitioner's death sentence, this Court found as follows:

> The jury heard testimony that the Defendant, the victim's husband, attempted to solicit at least two other persons to kill her before he agreed to give Ralph Thompson a boat and truck to carry out the murder, and that he actively participated in formulating and carrying out the murder. The Defendant asked Thompson for a good location to get rid of his wife, and the location admittedly supplied by Thompson was the place where the victim was later killed.

*State v. Jonathan Wesley Stephenson*, No. E2003-01091-CCA-R3-DD, 2005 WL 551938, at *25 (Tenn. Crim. App. Mar. 9, 2005) (copy attached). The Supreme Court, fully aware of the Mr. Thompson's claim that the petitioner was the triggerman,[14] also affirmed the death sentence, holding,

> [T]he evidence that the defendant offered to give Thompson a boat, a motor, and a truck is sufficient to support the jury's finding of

[14] "Thompson, however, testified that the defendant shot Mrs. Stephenson." *Stephenson*, 195 S.W.3d at 583.

> aggravating circumstance (i)(4), that the defendant committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration.

*Stephenson*, 195 S.W. at 593. The Supreme Court further concluded that the evidence was sufficient to support the jury's finding that the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt. *Id.*

The petitioner's sufficiency argument has been rejected by the trial court, the intermediate court, and the Supreme Court. For this reason, his freestanding claims involving the sufficiency of the evidence are not cognizable on post-conviction. The post-conviction court correctly ruled that the issue had been previously determined.

The petitioner's claims based upon insufficient evidence of remuneration also fail on the merits. In determining whether the evidence supports the application of an aggravating circumstance, the proper standard to consider is whether, after reviewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. *State v. Henderson*, 24 S.W.3d 307, 313 (Tenn. 2000). The Tennessee Supreme Court has recognized that a longstanding rule of sufficiency analysis also applies following a jury's finding of an aggravating circumstance in a capital case:

> [T]he jury may use their common knowledge and experience in deciding whether a fact is logically deducible from the circumstances in evidence, or in making reasonable inferences from the evidence, and may test the truth and weight of the evidence by their own general knowledge and judgment derived from experience, observation, and reflection . . . .

*State v. Nesbit*, 978 S.W.2d 872, 886 (Tenn. 1998) (quoting *Trousdale v. State*, 168 Tenn. 210, 76 S.W.2d 646 (1934)).

If proven beyond a reasonable doubt to a unanimous jury, the existence of the following aggravating circumstance may support the imposition of the death penalty: "The defendant committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration." Tenn. Code Ann. § 39-13-204(i)(4) (1991). The Tennessee Supreme Court has affirmed death sentences that were based solely upon the remuneration aggravating circumstance. *See, e.g, State v. Hutchison*, 898 S.W.2d 161, 175 (Tenn. 1994); *State v. Austin*, 87 S.W.3d 447, 464 (Tenn. 2002).

The petitioner's argument on this point is based entirely upon the false premise that he, and not Mr. Thompson, was the triggerman. In a sufficiency challenge, however, the petitioner is not entitled to the most favorable view of the evidence. Viewing the facts—including the petitioner's own statement—in the light most favorable to the State, a reasonable trier of fact could have found that the petitioner employed Mr. Thompson to murder the victim for remuneration or the promise of remuneration.

As the Supreme Court concluded in 2006, "the evidence that the [petitioner] offered to give Thompson a boat, a motor, and a truck is sufficient to support the jury's finding of aggravating circumstance (i)(4)." *Stephenson*, 195 S.W.3d at 593. The defendant and Ralph Thompson lured the victim to a secluded area that had

been selected by Mr. Thompson. (RS XI, 701.) Mr. Thompson, using his own rifle, murdered the victim by shooting her in the head at close-range with a rifle. (RS XI, 629, 630, 632, 701-03.) The defendant then fled to Columbus, Ohio. (RS XI, 703.) In exchange for killing the victim, the defendant promised Thompson a boat, motor, and truck. (RS XI, 703.) Just before the murder, the defendant stole a boat and boat motor from his father's house. (RS XI, 727, 730-31.) Other witnesses testified that the defendant had approached them and had also offered a boat, motor, truck, and cash in return for killing the victim. (RS XI, 650, 660.) Thus, there was overwhelming proof presented at the resentencing hearing to support the application of the (i)(4) aggravating circumstance.

As is evident from these facts, the proof at the resentencing hearing simply does not support the factual basis required for the petitioner's legal argument—that the petitioner was the triggerman. Mr. Thompson's testimony that he did not shoot the victim was predictable from a person who had an interest in minimizing his involvement in the crime.[15] Mr. Thompson's testimony also contradicts the petitioner's own statement admitted at trial and at the resentencing hearing, (1990 X, 514-16; RS XI 701-03), and the Supreme Court's finding in 1994 that the

[15] Minimization of his involvement might serve Mr. Thompson well in future parole hearings, for instance. He received a standard life sentence concurrent with a 22-year conspiracy sentence for murdering Mrs. Stephenson. *Ralph E. Thompson, Jr. v. State*, No. E2001-00003-CCA-R3-PC, 2002 WL 392820, at *1 (Tenn. Crim. App. Mar. 14, 2002) (copy attached).

petitioner's conviction was based upon a criminal responsibility theory,[16] meaning that the Court considered Mr. Thompson to be the principal actor in this murder.[17] *See Stephenson*, 878 S.W.2d at 557. The resentencing jury acted well within their province in not accrediting Mr. Thompson's claims.

By the time of the 2002 resentencing, the guilt of both men had been determined. Either as a principal actor or a criminally responsible actor, both men are guilty of the first degree murder of Lisa Stephenson. The trial court empanelled a jury for the sole purpose of determining whether the petitioner employed Mr. Thompson to participate in the murder of the victim with the promise of repayment or reward. The State proved this financial arrangement with ample evidence, and Mr. Thompson himself admits that he was at the scene of the victim's murder and that he fired the murder weapon on the night of the crime. (RS XII, 898-99.)

Even if the petitioner actually pulled the trigger—a conclusion towards which the proof does not militate—this in no way lessens his involvement in the murder or shows that he is deserving of a lighter punishment. Quite the contrary, this scenario

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[16] The Supreme Court quoted Tenn. Code Ann. § 39-11-402(2) as follows: "A person is criminally responsible for an offense committed by the conduct of another if . . . [a]cting 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 . . . ."

[17] Judging from the Tenn. Sup. Ct. R. 12 report from the petitioner's guilt phase trial in 1990, the trial court agreed with this assessment. The trial court summarized the facts of the homicide: "Stephenson hired another to kill his wife. He then took the man he hired out to kill his wife which the assassin did with a rifle—shooting her in the forehead." (1990 II, 268.) The trial court also wrote that the co-defendant "was the actual killer" and "[t]he killer is awaiting trial." (1990 II, 268-69.) Mr. Herbison also commented at the post-conviction hearing, "Judge Porter's notation in the Rule 12 report as to Mr. Thompson was that Thompson was probably the shooter." (XIII, 392.)

merely shows that the petitioner was calculating enough to hire someone to help him kill his wife *and* cold enough to personally fire the fatal shot into her forehead. The petitioner's view of the proof actually shows that he is more deserving of this severe penalty. Regardless of who pulled the trigger, the petitioner employed Mr. Thompson to participate in the murder of Mrs. Stephenson, and Mr. Thompson so participated.

Although he is not entitled to the factual conclusion that he was the triggerman, the petitioner assumes this conclusion in arguing that the remuneration aggravator in subsection –(i)(4) actually consists of three "composite elements."[18] These "composite elements" of the remuneration aggravator are found nowhere in Tennessee jurisprudence. Nevertheless, the proof clearly shows that elements one and three are satisfied in this case—i.e., this murder was preceded by an agreement to murder[19] and Mr. Thompson was motivated by the promise of compensation.[20] The

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[18] "(1) [T]he murder was preceded by an agreement to commit murder for hire; (2) the agent/employee to the contract performed the actual killing; and (3) the agent/employee was motivated by the promise of compensation." (Pet'r Br. at 19.)

[19] The petitioner argues that no agreement has been proved because the proof of the agreement is based entirely on the "uncorroborated" statement of the petitioner. The petitioner's statement regarding remuneration, however, was corroborated by Mr. Thompson's testimony, by the petitioner's theft of a boat and motor before the murder, and the petitioner's offer of a similar deal to other witnesses. (RS XI, 650, 660, 703, 727, 730-31.) This case is therefore factually distinguishable from *State v. Adams*, 631 S.W.2d 392 (Tenn. 1982), and the post-conviction court so found. (IX, 1234.) Further, the holding in *Adams* may be weakened by the reasoning in the more recent decision of *State v. Bane*, 57 S.W.3d 411, 420-21 (Tenn. 2001) (refusing to extend corroboration requirement for accomplice testimony to sentencing phase of capital trial).

[20] Mr. Thompson had no motive to participate in the victim's murder, other than promise of remuneration made by the petitioner.

remaining requirement proffered by the petitioner in "composite element" two—that the agent/employee be the triggerman—is not mandated by Tennessee law or compelled by the language of statute.

To further his argument on appeal that the employee must be the triggerman, the petitioner relies almost solely upon David Raybin's article, *New Death Penalty Statute Enacted*, Judicial Newsletter, University of Tennessee College of Law (May 1977). With respect to Mr. Raybin, the post-conviction court sustained the State's objection to his testimony and his newsletter article at the hearing.[21] (XIII, 291.) Therefore, unlike the petitioner's cited case of *State v. Terry*, 813 S.W.2d 420, 423 (Tenn. 1991), the court below did not rely on Mr. Raybin's article. In any event, Mr. Raybin's explanation of the aggravator in his article—that it applies to defendants who "employed another to commit the murder"—tracks the exact text of the aggravator and, therefore, does not aid in its interpretation. Further, as noted by the post-conviction court, Mr. Raybin conceded that the "four corners" of the statutory text allowed for its application to the petitioner. (XI, 103 n.18; XIII, 309-10.)

The petitioner also relies on opinions from the supreme courts of three other states, arguing that these states "have required proof that the agent/employer was the actual killer" in order for their murder-for-hire aggravators to apply. (Pet'r Br. at 27.)

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[21] The petitioner was allowed to make an offer of proof of Mr. Raybin's testimony and his article. (XIII, 293-317; Exs. 23A-B.)

The State respectfully disagrees with the petitioner's interpretation of these cited cases.

The petitioner first argues that the Oregon Supreme Court in *State v. Zweigart*, 188 P.3d 242 (Or. 2008), upheld a jury instruction that required a finding that the agent/employee was the triggerman before the aggravator could apply. The State disagrees with this characterization of the holding in *Zweigart*. While the opinion noted that the instruction, *as written*, did impose a requirement that the employee was the triggerman, the court did not reach the ultimate question of whether such a finding was *necessary* to satisfy the statute; the limiting nature of the instructional language obviated the need to make this determination. *Id.* at 247-48. The court noted, "That statute does not specify whether the person whom the defendant hired and paid must be the person who ultimately performed the physical act that caused the person's death."[22] *Id.* at 247. Notably, the court upheld the applicability of the murder-for-hire aggravator *and* the defendant's conviction in the second count, which required the jury to find that the defendant "personally" killed the victim in the course of a robbery. *Id.* at 248. The court affirmed the sentence of death. *Id.* at 254.

The New Jersey Supreme Court in *State v. McQuaid*, 688 A.2d 584 (N.J. 1997) likewise did not reach the ultimate conclusion sought by the petitioner. *McQuaid*, in fact, was neither a death penalty nor a remuneration case. One of the questions in

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[22] The applicable statute provides that a defendant is guilty of aggravated murder if "[t]he defendant solicited another to commit the murder and paid or agreed to pay the person money or other thing of value for committing the murder." Or. Rev. Stat. § 163.095(1)(b).

*McQuaid* was whether the defendant, an accomplice to a murder where his burglary partner was the triggerman, was death-eligible under New Jersey's "own conduct" requirement.[23] *Id*. at 591-93. In finding that the defendant was not death-eligible, the court examined New Jersey's remuneration statute merely to emphasize that it was the only exception to that state's "own conduct" rule pertaining to death eligibility. Thus, *McQuaid* was a case about the vicarious applicability of New Jersey's death penalty to non-triggerman accomplices, not a case about the interpretation of New Jersey's remuneration statute.

Finally, the case of *State v. Lovell*, 984 P.2d 382 (Utah 1999), is factually distinguishable from the petitioner's case. *Lovell* involved an appellant who, although he had hired two other people to kill the victim, eventually murdered the victim himself without any assistance. *Id*. at 384-85. The evidence in the instant case, on the other hand, shows that Mr. Thompson provided the loaded murder weapon, found the crime scene, directed the victim to the crime scene, was with the petitioner and the victim at the crime scene, and fired the murder weapon on the night of the murder. (RS XI, 629, 630, 632, 701-03; RS XII, 896, 898-99.) Further, the *Lovell* court was not passing on the applicability of a remuneration aggravator in that defendant's case; the trial court had not applied the aggravator, and the issue,

[23] This question arose in the post-conviction setting, where the court attempted to determine if it was an erroneous belief of death-eligibility that led the defendant to plead guilty and accept a non-capital sentence. *Id*. at 586.

therefore, was not squarely before the court on the defendant's appeal. *See Lovell*, 984 P.2d at 386.

The cases cited by the petitioner do not explicitly hold that their states' respective remuneration statutes cannot apply to a defendant who is the employer *and* triggerman. The post-conviction court in this case correctly found,

> The evidence argued in both cases established that both the Petitioner and Thompson played integral roles in the death of the victim. The evidence was sufficient to establish that Petitioner "employed" Thompson in a murder for hire scheme. The language of the aggravating factor here did not require that the person "employed" be the triggerman or that the person offering the promise of remuneration not be the triggerman.

(IX, 1234.) Although Tennessee's remuneration statute does not preclude such an application, this Court does not have to reach that question because the proof, viewed in the light most favorable to the State, shows that Mr. Thompson fired the fatal shot. The petitioner is not entitled to relief.

### B. The Petitioner Failed to Prove That 2002 Resentencing Counsel Were Ineffective in Their Representation Related to the Application of the Remuneration Aggravating Circumstance at Trial and on Appeal. (Pet'r Issue II.C.2)

Petitioner argues that counsel at his 2002 resentencing were ineffective in their representation regarding the application of the remuneration aggravating circumstance to his case. The substance of the petitioner's complaints can be categorized as follows: (1) counsel did not investigate and use at the trial the "admission" by the State and the "factual finding" by this Court in Mr. Thompson's

case that the petitioner was the triggerman; and (2) counsel failed to argue, both at resentencing and on appeal, that the petitioner's three proposed "composite elements" prevented a finding of the remuneration aggravator in this case. (Pet'r Br. 42-46.)

The post-conviction court correctly found that the petitioner failed to prove deficiency or prejudice on these points. Regarding the arguments and findings from Mr. Thompson's case, the post-conviction court found that counsel unsuccessfully attempted to introduce the State's argument in that case at the petitioner's resentencing hearing and further sought a special jury charge related to Mr. Thompson. (IX, 1231.) The post-conviction court noted that the State's allegedly inconsistent arguments, "[w]ere required by the different legal issues and admissible evidence presented at the different trials . . . ." (*Id.*)

Concerning the argument and the opinion on appeal, the post-conviction court found that this Court and the State

> were merely summarizing the admissible evidence in a discussion of the sufficiency of the evidence in the Thompson case. It would have been inappropriate to refer to evidence which had not been admitted against Thompson such as the Petitioner's statement. Such a summary of evidence by a court does not take into account all possible interpretations of the evidence but views the evidence in a light most favorable to the [S]tate to determine if the evidence is sufficient. The State has been limited by the rules of law and the statements of Thompson as to what could be admitted in Thompson's trial and what they could argue to the jury about how the offense occurred. The record clearly indicates that the State argued that while the jury could never be sure who the shooter was[,] the Petitioner and Thompson had both played an integral role in the victim's death and that the Petitioner had

> offered to pay Thompson with a boat, motor, and truck for his help in getting rid of the victim.

(IX, 1232-33.)

Many points of law support the post-conviction court's findings on this issue. As an initial point, the State could not use the petitioner's written statement against Mr. Thompson at Mr. Thompson's trial. Such usage would not have been permitted by the "party-opponent" hearsay exception, Tenn. R. Evid. 803(1.2), and it would have violated Mr. Thompson's constitutional rights to confront witnesses against him. *See* U.S. Const. amend. VI; Tenn. Const. art. I, § 9. For Fifth Amendment reasons, the State could not call the petitioner as a witness against Mr. Thompson.

Therefore, the only account at Mr. Thompson's trial regarding who shot the victim came from Mr. Thompson's own self-serving statement. *See Ralph E. Thompson, Jr., v. State*, No. E2001-00003-CCA-R3-PC, 2002 WL 392820, at *6-7 (Tenn. Crim. App. Mar. 14, 2002) (copy attached) (quoting Mr. Thompson's entire statement). Mr. Thompson's statement, of course, was contrary to the proof in the petitioner's guilt phase trial but not unexpectedly so. "As a practical matter, discrepancies are commonly unavoidable when several individuals are prosecuted in separate trials for the same offense." *Robinson*, 146 S.W.3d at 497.

When Mr. Thompson appealed his case to this Court, the parties were bound to argue the facts only from the record of Mr. Thompson's case, and they were constrained to view those facts in the light most favorable to the State's case against

Mr. Thompson. *See* Tenn. R. App. P. 24(a); *see also State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). An argument by the State that Mr. Thompson was the triggerman, or this Court's finding of the same, would have been entirely inappropriate given the record from Mr. Thompson's case. In ruling upon the sufficiency of Mr. Thompson's convicting evidence, this Court was making a legal determination based upon the facts in *that* record, not an explicit, precedential finding that the petitioner shot the victim. For this reason, the post-conviction court correctly found, "[T]he Thompson appeal did not establish a basis for the inapplicability of the aggravating factor." (IX, 1235.)

The record shows that counsel diligently pursued their stated strategy of convincing the jury that the remuneration aggravator could not apply to the employer/triggerman. (XIII, 390; XIV, 464.) The petitioner faults counsel for not reading the State's brief in Mr. Thompson's direct appeal. (Pet'r Br. 18.) He fails to note, however, that Mr. Ogle read the entire transcript from Mr. Thompson's trial prior to resentencing. (XIV, 464.) Further, Mr. Herbison read this Court's opinion in Mr. Thompson's case, as well as Judge Porter's Tenn. Sup. Ct. R. 12 report. (XIII, 390-91.) Mr. Moore filed a motion for exculpatory evidence, seeking any evidence in the State's possession that would indicate that the petitioner was the triggerman.[24] (RS I, 124; XV, 487.)

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[24] Tellingly, the only evidence provided in response was Mr. Thompson's statement. (RS II, 167; RS V, 46-47; XIII, 390-91.)

At the jury instruction conference at resentencing, Messrs. Herbison and Moore argued for the jury to be instructed that the remuneration aggravator could not apply to an individual who was both the employer and the triggerman. (XIV, 464.) Mr. Moore filed a motion with the trial court seeking dismissal of the death penalty notice against the petitioner because the State could not prove who fired the fatal shot. (RS II, 171-73.) Counsel attempted to enter a portion of the State's closing argument from Mr. Thompson's case into evidence at the petitioner's resentencing, but the trial court excluded it. (XIII, 392.) Counsel called Mr. Thompson as a witness at resentencing to support their theory of the inapplicability of the remuneration factor. (RS XII, 889.) Mr. Ogle argued the point to the jury at closing. (RS XIV, 1059-62.)

The petitioner has failed to show how additional research into Mr. Thompson's case—above and beyond that already conducted—would have assisted the defense at resentencing. The petitioner has cited no rule of evidence which would allow the State's appellate argument or a prior opinion from this Court to be submitted to the jury. The only other option would be to present that information to the trial court in support of their motions. The post-conviction court acknowledged this option but nevertheless found that the petitioner failed to establish prejudice on this point. Contrary to the petitioner's argument, counsel possessed no "silver bullet" that would have "dispositively established that the Petitioner was himself responsible

for the shooting." (Pet'r Br. at 44.) Counsel diligently presented the available evidence.

The petitioner also argues that counsel were ineffective for failing to argue for the application of his proposed "composite elements" of remuneration. (Pet'r Br. at 44.) The post-conviction court explicitly disagreed with the petitioner's contention that these "composite elements" are necessary to a finding of remuneration. (IX, 1238.) The post-conviction court explained, "The murder for hire aggravating factor by its language applies where the defendant 'employed another to commit the murder for remuneration.'" (*Id.*) The court continued, "As long as the person was 'employed,' as the evidence clearly supported in both the Petitioner's and Co-defendant Thompson's trials, the factor may apply." (*Id.*) For the reasons stated, counsel was not deficient for failing to argue for these "composite elements," and even if they had argued for their application, there is no showing of prejudice because any such motion would have been unavailing before the trial court.

The petitioner briefly mentions that he received the ineffective assistance of appellate counsel on this point, but he fails to support this contention with argument. He has waived relief on this point by failing to argue in compliance with Tenn. R. App. P. 27(a)(7)(A) (requiring appellant to list reasons why he is entitled to appellate relief, "with citations to the authorities and appropriate references to the record"). *See also* Tenn. Ct. Crim. App. R. 10(b). Also, the State again notes that the petitioner failed to include a copy of his appellate briefs on direct appeal in this record. This

prevented him from proving his factual contentions by clear and convincing evidence and causes him to waive relief on appeal for failing to include necessary material in the record. *See Ballard,* 855 S.W.2d at 560-61.

Counsel presented a strong defense at resentencing that remuneration could not apply to the petitioner. Counsel filed motions seeking dismissal of the death notice, requested special jury instructions, called witnesses to support this theory, and argued the theory to the jury and to the trial court in the motion for new trial. The post-conviction court correctly ruled that the petitioner received the effective assistance of counsel in this regard, and he is not entitled to relief.

**C. The Petitioner Failed to Show That Counsel's Representation Affected Appellate Proportionality Review. (Pet'r Issue V)**

The petitioner argues that due to counsel's failure to present evidence that the petitioner was the triggerman, "Tennessee appellate courts did not conduct meaningful and adequate proportionality reviews . . . ." (Pet'r Br. at 64-65.) The petitioner has failed to show deficient performance or prejudice, and he is therefore not entitled to relief.

Initially, the State contends that the petitioner has waived review on this point for failing to include his appellate briefs in the record on appeal. "Absent the necessary relevant material in the record an appellate court cannot consider the merits of an issue." *Ballard,* 855 S.W.2d at 560-61; *see also Oody,* 823 S.W.2d at 559.

Without these briefs, it is unknown to what extent the petitioner on appeal argued the facts that were presented at the hearing on this point.

Contrary to the petitioner's argument and as previously stated, counsel *did* argue and present evidence that the petitioner fired the fatal shot. Although the petitioner did not explicitly admit shooting his wife, counsel were able to elicit this fact from Mr. Thompson. The jury either did not accredit Mr. Thompson's testimony, or they did not consider it material to the question presented. On direct appeal, both this Court and the Supreme Court noted the factual discrepancy between the petitioner's statement and Mr. Thompson's testimony and were free to consider this discrepancy during their respective proportionality reviews. *See Stephenson*, 195 S.W.3d at 583; *Stephenson*, 2005 WL 551938, at *7. The petitioner has failed to show deficient performance or prejudice.

## IV. THE PETITIONER'S CLAIM THAT 1990 TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO LODGE A FOURTH AMENDMENT CHALLENGE TO THE ADMISSIBILITY OF HIS STATEMENT IS WAIVED AND MERITLESS. (Pet'r Issue III.C)

The petitioner argues that his counsel at the 1990 guilt phase trial—Messrs. Leibrock and Miller—were ineffective for not challenging his statement to police on Fourth Amendment grounds.[25] (Pet'r Br. at 60.) Specifically, he contends that this statement was the fruit of an unlawful detention unsupported by probable cause. (*Id.*) The post-conviction court found that the petitioner came to the sheriff's department with his father and never requested to leave the station. (IX, 1191-92, 1194.) Further, the post-conviction court found that probable cause existed to detain the petitioner at the time of his statement. (IX, 1194.) Therefore, the court found that the petitioner had failed to establish prejudice on this point. (*Id.*) The State agrees with the findings of the post-conviction court and further submits that a claim as to the ineffectiveness of 1990 trial counsel is waived.

The petitioner has waived his challenge to the effectiveness of his 1990 counsel in regard to a Fourth Amendment challenge to the admissibility of his statement to law enforcement.[26] *See* Tenn. Code Ann. §§ 40-30-106(g), -110(f). The petitioner filed a petition for post-conviction relief in the convicting court in 1995. (IX, 1203

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[25] The petitioner does not challenge the effectiveness of his 2002 resentencing counsel relative to this point. The petitioner acknowledges the Supreme Court's holding in 2006 that any challenge under the Fourth Amendment or Article I, Section 7, of the Tennessee Constitution was waived for failure to raise the issue prior to the 1990 trial. *Stephenson*, 195 S.W.3d at 591-92.

[26] The State asserted the defense of waiver as to this claim in its pleadings before the post-conviction court. (II, 255.)

n.13.) This 1995 petition would have been the proper vehicle for challenging the effectiveness of his counsel at the 1990 guilt phase trial (and, as shown, the effectiveness of counsel upon entry of his sentencing agreement in 1994).

In determining that the petitioner had waived the opportunity to lodge a Fourth Amendment challenge to the admissibility of his statement prior to the 2002 resentencing, the Supreme Court noted, "The fact that the defendant's sentence was overturned on appeal does not provide him with a second opportunity to litigate pre-trial issues that could have been raised before his original trial." *Stephenson*, 195 S.W.3d at 592. In the same vein, the fact that the petitioner successfully set aside his sentence in habeas corpus should not provide him an opportunity to litigate other issues that could have been properly adjudicated much earlier. By voluntarily dismissing his 1995 petition for post-conviction relief, the petitioner has failed to raise this claim before a court of competent jurisdiction, and it is therefore waived.

Nevertheless, the post-conviction court correctly found that the petitioner was not entitled to relief on the merits of this issue. The petitioner was not detained when he gave his statement. Even if he was detained, probable cause supported this detention. Counsel were not deficient for failing to raise this issue, and the petitioner was not prejudiced by its omission.

The Fourth Amendment to the United States Constitution and Article I, Section 7, of the Tennessee Constitution protect individuals from unreasonable searches and seizures by law enforcement officers. "[U]nder both the federal and

state constitutions, a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *State v. Bartram*, 925 S.W.2d 227, 229-30 (Tenn. 1996)).

The Tennessee Supreme Court has recognized three categories of police interventions with private citizens: (1) a full-scale arrest, which requires probable cause; (2) a brief investigatory detention, requiring reasonable suspicion of wrongdoing; and (3) a brief police-citizen encounter, requiring no objective justification. *State v. Echols*, 382 S.W.3d 266, 277 (Tenn. 2012); *State v. Daniel*, 12 S.W.3d 420, 424 (Tenn. 2000). "While arrests and investigatory stops are seizures implicating constitutional protections, consensual encounters are not." *State v. Nicholson*, 188 S.W.3d 649, 656 (Tenn. 2006).

One exception to the warrant requirement is a full-scale arrest supported by probable cause. *Echols*, 382 S.W.3d at 277; *State v. Hanning*, 296 S.W.3d 44, 48 (Tenn. 2009) (citing *Brown v. Illinois*, 422 U.S. 590, 598 (1975)). "Probable cause . . . exists if, at the time of the arrest, the facts and circumstances within the knowledge of the officers, and of which they had reasonably trustworthy information, are 'sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an offense.'" *Echols*, 382 S.W.3d at 277-78 (citations

omitted). "Probable cause must be more than a mere suspicion." *State v. Lawrence*, 154 S.W.3d 71, 76 (2005) (citing *State v. Melson*, 638 S.W.2d 342, 350 (Tenn. 1982)). However, probable cause "'deal[s] with probabilities[,] . . . not technical[ities,] . . . the factual and practical considerations of everyday life on which reasonable and prudent [persons] . . . act.'" *Echols*, 382 S.W.3d at 277-78 (citations omitted). "Simply stated, the officer must have 'probable cause to believe the person to be arrested has committed the crime.'" *Lawrence*, 154 S.W.3d at 75 (quoting *State v. Lewis*, 36 S.W.3d 88, 98 (Tenn. Crim. App. 2000)).

An arrest is "the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subject the person arrested to the actual control and will of the person making the arrest." *State v. Crutcher*, 989 S.W.2d 295, 301 (Tenn. 1999) (quoting *West v. State*, 425 S.W.2d 602, 605 (1968)). In order for an arrest to be effected, "there must be actual restraint on the arrestee's freedom of movement under legal authority of the arresting officer." *Echols*, 382 S.W.3d at 278 (quoting *Crutcher*, 989 S.W.2d at 301-02).

Under the Tennessee Constitution, a seizure implicating constitutional protections occurs only if, in view of all of the circumstances surrounding the encounter, a reasonable person would have believed that he or she was not free to leave. *Daniel*, 12 S.W.3d at 425. Factors to be considered when applying this totality of the circumstances analysis include: 1) the time, place and purpose of the

encounter; 2) the words used by the officer; 3) the officer's tone of voice and general demeanor; 4) the officer's statements to others who were present during the encounter; 5) the threatening presence of several officers; 6) the display of a weapon by an officer; and 7) the physical touching of the person of the citizen. *Id*. at 425–26; *Nicholson*, 188 S.W.3d at 657.

The petitioner gave his statement during a consensual encounter with law enforcement officers. The post-conviction court correctly noted that the petitioner "voluntarily went to the Hamblen County Sheriff's Department ["HCSD"] several times from December 4, 1989, to December 5, 1989" and "present[ed] himself as wanting to be very cooperative and wanting to help find the person responsible for the victim's murder." (RS XV, 20-21, 41; IX, 1191.) As the petitioner stated during his testimony in 2002, he went to HCSD because "[t]hey asked me to and I went on my own." (RS XV, 14.) The petitioner was "determined to go" to HCSD and was going to go to the station by himself if his father did not take him. (RS XV, 21-22.)

That evening, before speaking with the petitioner, David Davenport, a Special Agent with the Tennessee Bureau of Investigation, was informed by Hamblen County Sheriff Charles Long that Ralph Thompson had given a statement implicating himself and the petitioner in the victim's murder. (RS XV, 42-45, 47.) Agent Davenport spoke with Mr. Thompson at 8:20 p.m. that evening, and Mr. Thompson again confessed the involvement of himself and the petitioner in the murder of the victim. (RS XV, 45-46.) Agent Davenport considered Mr. Thompson to be reliable and

credible because he was able to give details, such as the location of the murder weapon. (RS XV, 47, 50-51.)

After speaking with Mr. Thompson, Agent Davenport spoke with the petitioner. (RS XV, 47-48.) The petitioner requested "to go in and see Mr. Thompson," and Agent Davenport allowed the petitioner to do so. (RS XV, 48.) Agent Davenport said,

> Up until the time that Ralph Thompson had given his statement and started unraveling the mystery surrounding Lisa's death, he was acting as a grieving husband and had come around and in and out of the sheriff's office, and came to us, and was very cooperative up until the time that Mr. Thompson told their involvement in the death of Lisa Stephenson.

(RS XV, 49.) After being confronted with the statements of Mr. Thompson and Dave Robertson, the petitioner asked Agent Davenport if he needed an attorney. (1990 V, 99.) Agent Davenport informed him that attorney Ben Strand was standing outside with the petitioner's father. (*Id.*) Upon hearing this, the petitioner hung his head and said, "No, I'll just go ahead. I'm going to tell the truth." (*Id.*)

The record clearly shows that the petitioner voluntarily came to HCSD, after prior voluntary trips to HCSD, and engaged in a consensual conversation with Agent Davenport. Not only did the petitioner voluntarily go to the station—a place that he been allowed to previously leave voluntarily—he was "determined" to go there. (RS XV, 21-22.) The mere fact that this conversation occurred at a police station does not elevate the encounter to a seizure. *See, e.g., Childs v. State*, 584 S.W.2d 783

(Tenn. 1979) (consensual encounter when individual voluntarily got into police car to go to police station); *see also State v. Cooper*, 912 S.W.2d 756, 766 (Tenn. Crim. App. 1995) (defendant not under arrest while questioned at police station).

Although Agent Davenport testified that, had the petitioner asked, he probably would not have allowed the petitioner to leave, this is irrelevant because the standard is an objective one from the viewpoint of someone in the petitioner's shoes. *Daniel*, 12 S.W.3d at 425. In any event, the post-conviction court found that that the petitioner never asked to leave. (IX, 1194.) Agent Davenport accommodated the only request made by the petitioner—that he be allowed to see Mr. Thompson. (RS XV, 48.) When the petitioner asked if he needed a lawyer, Agent Davenport told him that there was one outside, at which point the petitioner declined to speak with Mr. Strand and proceeded to confess to his role in his wife's murder. (1990 V, 99.) Agent Davenport never placed an "actual restraint on the arrestee's freedom of movement," and there was, therefore, no seizure. *See Echols*, 382 S.W.3d at 278.

Even if the petitioner had been "seized" and "under arrest" at the moment of his confession, there was ample probable cause at that point to warrant his detention. Before the petitioner's confession, Mr. Thompson had already "unraveled the mystery" behind the victim's murder. (RS XV, 49.) Since Mr. Thompson was a criminal informant, Agent Davenport was required to establish his basis of knowledge and his reliability. *See State v. Jacumin*, 778 S.W.2d 430, 436 (Tenn. 1989). Clearly, Mr. Thompson's basis of knowledge was derived from his role in the murder. As

Agent Davenport testified, his credibility and reliability were established by the details he provided regarding the murder, including the location of the murder weapon. (RS XV, 47, 50-51.) Mr. Thompson's account was further corroborated by the fact that the petitioner fled to Ohio following the murder. (RS XV, 41.) Contrary to the petitioner's argument, the fact that Mr. Thompson made this statement against his own penal interest does give credence to its reliability.[27] Also, at the time of the petitioner's statement, Agent Davenport had spoken with David Robertson and was aware of the petitioner's attempt to procure an alibi for the night of the murder. (1990 V, 72.)

There is no merit to a Fourth Amendment suppression argument because the petitioner was not seized until after he provided his statement to law enforcement. While Agent Davenport did not seize the petitioner prior to his statement, he had probable cause to do so if necessary. Although the issue is waived, counsel were not deficient for failing to raise this claim. Because the claim lacks merit, the petitioner was not prejudiced by its omission.

[27] The petitioner argues under this claim that Mr. Thompson's statement is not reliable enough to establish probable cause but argues under his remuneration claim that Mr. Thompson's statement *is* reliable enough to show that the petitioner was the triggerman.

## V. THE STATE PRESENTED CONSISTENT THEORIES AT THE RESPECTIVE TRIALS OF THE PETITIONER AND HIS CO-DEFENDANT. (Pet'r Issue IV)

The petitioner argues that the State violated his due process rights under the United States Constitution by presenting "factually contradictory theories at the 'core'" of its respective cases against Mr. Thompson and the petitioner. (Pet'r Br. at 62.) The petitioner contends that his counsel were ineffective for failing to raise this claim at trial or on appeal. The post-conviction court correctly found that the petitioner is not entitled to relief because the State did not present inconsistent theories at the co-defendants' trials. (IX, 1233.)

For reasons stated, the petitioner has waived any ineffective assistance claims against his trial counsel from 1990 or his sentencing counsel from 1994 for failing to raise these claims in a court of competent jurisdiction. *See* Tenn. Code Ann. § 40-30-106(g). Further, any freestanding due process claim is also waived because it was not raised on direct appeal. *Id.* The State addresses the petitioner's claim of ineffective assistance relative to his 2002 resentencing counsel.

Neither the United States Supreme Court nor the Tennessee Supreme Court has held that there is a due process right to consistent prosecution theories. *See Bradshaw v. Stumpf*, 545 U.S. 175, 190 (2005) (Thomas, J., dissenting) ("This Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories"). Because this claim does

involve the abridgment of a constitutional right, it is not cognizable in post-conviction. *See* Tenn. Code Ann. § 40-30-103.

The petitioner acknowledges that the Tennessee Supreme Court has not adopted the holding in *Smith v. Groose*, 205 F.3d 1045, 1052 (8th Cir. 2000) (due process violated when inconsistencies exist at the core of the prosecutor's cases against defendants for the same crime). In *State v. Robinson*, 146 S.W.3d 469 (Tenn. 2004), the Supreme Court did not reach the question of whether inconsistent prosecution theories create a Due Process violation because the Court found that the State had not, in fact, pursued inconsistent theories in the separate trials of co-defendants. *Id.* at 497-98. The Court found "isolated and immaterial" discrepancies in the proof of the multiple trials, but noted that "[a]s a practical matter, discrepancies are commonly unavoidable when several individuals are prosecuted in separate trials for the same offense." *Id.* at 497.

In the post-conviction appeal of *Berry v. State*, 366 S.W.3d 160 (Tenn. Crim. App. 2011), the alleged inconsistent theory involved differing accounts as to which co-defendant concocted the plan to murder the victims after robbing them. *Id.* at 182. In defendant Berry's trial, Mr. Cartwright, a third party present during the planning stage of the crime, testified that Berry stated that the victims would have to be killed after the robbery. *Id.* In co-defendant Davis' trial, however, Cartwright testified that Davis made this statement. *Id.*

On defendant Berry's direct appeal, the Tennessee Supreme Court found the inconsistency to be insignificant, "since in either case, both Davis and [Berry] were present and in apparent agreement when the statement was made." *State v. Berry*, 141 S.W.3d 549, 554 n.5 (Tenn. 2004). On post-conviction appeal, this Court added to that reasoning:

> Regardless of which of the two actually uttered the statement that the victims would have to be killed, the proof clearly established that both men agreed to the scheme and set out together, armed with handguns, to fulfill their plan. Whether guilty as the principal under a theory of criminal responsibility or as an equal participant in the codefendant's plan, the petitioner was nevertheless guilty of the charged offenses.

*Berry*, 366 S.W.3d at 182-83 (internal citations omitted). Despite the discrepancy in Cartwright's testimony, this Court held that the prosecution had not presented inconsistent theories against the co-defendants. *Id.* at 182.

In *State v. Housler*, 193 S.W.3d 476 (Tenn. 2006), the defendant Housler charged that the State presented evidence in co-defendant Matthews' trial that Matthews was the "lone perpetrator" in the multiple murders committed during the robbery of a Clarksville Taco Bell. *Id.* at 491. The case against Housler—based mainly around his own confession[28]—showed that Matthews did not, in fact, act alone but was substantially assisted by Housler in the planning and execution stages. *Id.* at 492.

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[28] The Supreme Court noted that Housler's confessions "admittedly contained numerous falsehoods that contradict evidence presented at Mathews' trial." *Id.* at 492.

In finding that the State had not presented inconsistent theories, the Supreme Court noted that "prosecutors are not omniscient," nor are they finders of facts. *Id.* at 493 (quoting *Thompson v. Calderon*, 120 F.3d 1045, 1071 (9th Cir. 1997) (Kozinski, J., dissenting)). "When a prosecutor has conflicting evidence *or simply does not know the truth*, he 'is entitled to retain skepticism about the evidence he presents and trust the jury to make the right judgment.'" *Id.* (emphasis supplied); *see also Thompson*, 120 F.3d at 1074-75 (Kleinfeld, J., dissenting) ("It is up to the jury, not the prosecutor, to decide what happened amidst a lot of lies").

In this case, the post-conviction court correctly found that the precise identification of the triggerman was neither "core" nor material to the petitioner's conviction or sentence. (IX, 1233.) The post-conviction court further found, "The evidence argued in both cases established that both the Petitioner and Thompson played integral roles in the death of the victim." (*Id.*) This finding is supported by the testimony of Mr. Schmutzer at hearing that he did not know the identity of the shooter, and the State's position in both cases was that the identity of the triggerman did not matter. (XIII, 328, 330, 336.)

Mr. Schmutzer noted that the inconsistencies came, not from the State, but "from the facts as presented by the two defendants and the way they confessed." (XIII, 329.) As stated, Mr. Schmutzer never argued at Mr. Thompson's trial that the petitioner pulled the trigger. (XIII, 328.) The petitioner relies exclusively upon the State's statement of facts and argument in Mr. Thompson's appellate cases to prove

this alleged core inconsistency. (Pet'r Br. at 63.) As the post-conviction court correctly found, the State was merely summarizing the admissible evidence in Mr. Thompson's case, and it would have been inappropriate to refer to the petitioner's statement in Mr. Thompson's appeal. (IX, 1232.)

The petitioner cites no case in the *Groose* progeny that would extend its holding to appellate arguments. As noted by Mr. Schmutzer, the State's appellate attorney would not be reading the petitioner's record alongside Mr. Thompson's record while drafting the State's brief in Mr. Thompson's case. (XIII, 329.) The entire rationale of *Groose* relied upon the role of the trial court prosecutor and the impropriety of a prosecutor presenting "diametrically opposed theories of guilt." *See Groose*, 205 F.3d at 1053 n.4.

Even if *Groose* applied in Tennessee, by its own terms it does not require prosecutors to "present precisely the same evidence and theories in trials for different defendants." *Id.* at 1052. Mr. Schmutzer did not present inconsistent theories in the respective trials. As the post-conviction court found, the State argued in both cases that the petitioner and Mr. Thompson played "integral roles" in the victim's murder. (IX, 1233.) The petitioner failed to show that the State presented inconsistent theories at the respective trials of the petitioner and Mr. Thompson. Like *Berry,* both men, either as a principal or under a theory of criminal responsibility, were equal participants in the victim's murder. *See Berry*, 366 S.W.3d at 182-83. Since no Due Process violation occurred, counsel in 2002 were not deficient for failing to raise the

issue, and the petitioner has not suffered prejudice. For these reasons, he is not entitled to relief.

## VI. THE PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS 2002 RESENTENCING AND ON APPEAL.

In addition to the petitioner's ineffective assistance claims discussed *supra*, he also claims that he was prejudiced by counsel's deficient failure to present mental mitigation evidence, failure to exercise peremptory strikes during voir dire, and failure to properly respond to the testimony of the victim's father. The petitioner is not entitled to relief.

### A. Counsel Were Effective in Their Investigation and Presentation of Mental Mitigation Evidence. (Pet'r Issue VI)

The petitioner contends that his 2002 resentencing counsel were ineffective for failing to investigate, discover, and present to the jury evidence of his personality disorder and cognitive impairments at the time of the offense. Petitioner argues that the presentation of his mental disease or defects would have established the statutory mitigating circumstance found in Tenn. Code Ann. § 39-13-204(j)(8).[29] The two-pronged *Strickland* analysis applies to claims that counsel were ineffective for failing to present mitigating evidence at a capital sentencing hearing. *See Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996). The post-conviction court correctly found that counsel were not deficient in their investigation and presentation of mental mitigation evidence. (IX, 1244.) Even if counsel were deficient, the court continued,

[29] "The capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment[.]"

the petitioner has not shown prejudice. (IX, 1245.) The record supports this conclusion.

Mr. Ogle was the only attorney from the petitioner's 2002 legal team who was questioned at the post-conviction hearing regarding the mitigation investigation that took place prior to the resentencing hearing. Counsel retained Mike Cohan as an investigator, Rosalind Andrews as a "mitigation expert," and Dr. Eric Engum for a psychological evaluation. (XIV, 452.) Counsel obtained and reviewed the entire file belonging to the attorneys from the 1990 trial, and Mr. Ogle noted that mental health issues were present in the petitioner's case. (XIV, 455-56.) Prior to trial, Ms. Andrews prepared a lengthy memorandum summarizing the contents of Mr. Miller's file and submitted it to Mr. Ogle. (XIV, 455.) As a result of this research, Mr. Ogle was aware of the petitioner's ADHD and dyslexia as a child, as well as his hospitalization in Alaska and his periodic depression. (XIV, 456.) Once they received this information from former counsel and Ms. Andrews, counsel interviewed the same people listed in these reports and found other witnesses to try to develop the issues. (XIV, 457.)

Dr. Samuel Craddock is a clinical psychologist who examined the petitioner both before his original guilt phase trial and before his hearing in the case *sub judice*. (XI, 117, 119.) Dr. Craddock reviewed the petitioner's prior school and mental health records but found no evidence of a cognitive mental disorder. (XI, 120.) Dr. Craddock noted that the petitioner had no cognitive disorder at age 17, and his

reports indicated that he played sports in school. (XI, 122.) While Dr. Craddock believes that the petitioner may have a personality disorder, Dr. Craddock never found the petitioner to suffer from a cognitive deficit and noted that Dr. Spica was the first person to make that diagnosis. (XI, 129, 155.)

Dr. Eric Engum was a clinical psychologist with a specialty in clinical neuropsychology and forensic psychology, and counsel retained him to perform a "Comprehensive Psychological and Neuropsychological Evaluation of Mr. Stephenson with an eye towards presenting potential mitigating testimony if he should go to a sentencing hearing." (RS XII, 808.)[30] Consistent with Dr. Craddock's earlier findings, Dr. Engum found that "there really was no evidence of any type of brain damage." (RS XII, 815.) Despite the petitioner's history as a child, he "really had acquired a large amount of knowledge, skills and ability that placed him arguably in the bright normal if not superior range of intellectual functioning." (RS XII, 813-14.)

Dr. Engum's found that the petitioner had no brain damage even though he had received records concerning the petitioner's prior history of attention deficit disorder and potential learning disability. (RS XII, 809.) Dr. Engum testified in 2002,

> [A]gain going through the kind of inventory, attention and concentration were good despite the prior diagnosis of attention deficit.

[30] Dr. Engum did not testify at post-conviction, and his report from the 2002 resentencing was not entered as an exhibit to the proceedings.

> He did well on sensory input, motor output. He did well in memory conceptual reasoning, problem solving, learning, virtually everything was at the above average range.
>
> So I was satisfied there was no evidence of any type of cognitive dysfunction due to brain damage.

(RS XII, 815.) While Dr. Engum diagnosed the petitioner with low-level depression and a personality disorder not otherwise specified with schizoid, depressive, and avoidant features, Dr. Engum opined that the petitioner had adjusted to the prison environment and was doing well there. (RS XII, 822.)

Mr. Ogle recalled that counsel knew they could not substantiate a mental health defense—"at least as far as what we thought would be successful"—after receiving these findings from their retained expert. (XIV, 460.) At this point, counsel decided to focus more on the petitioner's positive attributes as a successful member of the prison community, as opposed to focusing on any alleged mental health issues. Mr. Ogle stated,

> I felt like the best chance to save Jon's life was to show that he had been rehabilitated and was not a danger, in fact, he was an asset to the prison community. And I had some concern that these [negative mental issues], we couldn't substantiate strong enough to get away with the idea that maybe that's kind of an excuse or whatever.

(XIV, 461.) Further, Mr. Ogle was concerned that presenting these mental issues could dilute the petitioner's case, or, as he testified, "spread more things out for the jury to think about." (XIV, 461.)

The post-conviction court correctly found that counsel had retained Dr. Engum "to explore any available issues of mental health and/or brain damage." (IX, 1244.) The court refused to "find counsel deficient for having relied upon those experts." (*Id.*) The court continued,

> Counsel relied upon the defense team and understood that certain potential mitigating witnesses or evidence would not be helpful. Counsel made a strategic decision to focus on the theme of the Petitioner's favorable behavior in prison and to argue the inapplicability of the aggravating factor. They appropriately relied upon experts and formulated a strategy based on what they were provided.

(IX, 1244-45.) The court noted counsel's familiarity with Dr. Engum and Mr. Ogle's confidence in his work based upon their prior interactions. (IX, 1224.)

The petitioner argues on appeal that counsel (1) did not ask Dr. Engum to evaluate the petitioner's mental state at the time of the offense; and (2) did not ask Dr. Engum to consider how the petitioner's history helped explain his behavior at the time of the crime. (Pet'r Br. at 67-68.) The State submits that the petitioner has not proven these factual allegations by clear and convincing evidence.

Without Dr. Engum's testimony or prior report in the post-conviction record, it is difficult to determine what counsel did or did not ask him to do in 2002. Based upon his testimony in 2002, however, the record reflects that counsel asked him to evaluate the petitioner "with an eye towards presenting potential mitigating testimony," which included an examination of "past educational factors, past mental health issues, [and] past issues with regard to health status." (RS XII, 808.) Further,

Dr. Engum testified that he reviewed records indicating histories of attention deficit disorder and a potential learning disability. (RS XII, 809.) The petitioner has failed to show that counsel deficiently limited the scope of Dr. Engum's examination or failed to provide him with the necessary materials for a thorough report.

In attempting to show that counsel in 2002 should have offered proof of a mental defect, the petitioner offers the recent diagnoses of Drs. Spica and Brown. Dr. Spica which, following two examinations of the petitioner in 2009 and 2010, found that the petitioner had a cognitive disorder that originated in the frontal lobe of his brain. (XII, 206-08; Ex. 15.) Dr. Brown, relying in part on Dr. Spica's findings, agreed in his 2011 report that the petitioner had a cognitive disorder not otherwise specified. (XI, 48; Ex. 16.) Dr. Brown testified that the petitioner's cognitive and personality disorders impaired him to the extent that they substantially affected his judgment during the 1989 murder.[31] (XV, 513.)

The findings of a cognitive disorder by Drs. Spica and Brown are in direct contravention of the findings of Drs. Craddock, Engum, and Farooque. (RS XII 815; XI, 155; XII, 166.) Further, these more recent findings cannot be used to challenge counsel's conduct in 2002. Counsel cannot be judged by 20-20 hindsight. *Hellard*, 629 S.W.2d at 9. Dr. Spica admitted, "There have been measures to assess frontal lobing functioning that may not have been available to Dr. Engum at the time." (XII,

[31] Resentencing counsel *did* present testimony from Dr. Engum that the petitioner suffered from a personality disorder. (RS XII, 822.)

205.) This frontal lobe analysis, however, stood at the center of Dr. Spica's diagnosis of the petitioner in 2010. (Ex. 15.)

The petitioner now claims, in essence, that counsel were deficient because Dr. Engum failed to use a test on the petitioner that was not available at the time of his examination. Even Dr. Brown admits that the 1990 report finding no mental illness or thought disorder contained the "appropriate conclusions" based "on the data set that were available." (XI, 110.) The petitioner has made no showing that counsel could have taken any additional action in 2002 to ensure a more favorable report from Dr. Engum. "A defense attorney is not required to question a diagnosis put forth by a professional expert in the field." *Christa Gail Pike v. State*, No. E2009-00016-CCA-R3-PD, 2011 WL 1544207, at *54 (Tenn. Crim. App. Apr. 25, 2011) (copy attached), *perm. app. denied* (Tenn. Nov. 15, 2011). Counsel conducted a complete investigation based upon the information they possessed at the time.

Hypothetically, even if Dr. Engum *had diagnosed* the petitioner with a cognitive disorder in 2002, counsel still would have faced a monumental decision between two mutually exclusive lines of defense. On one hand, they could argue, as they did, that the petitioner is rehabilitated, intelligent and talented, no longer a threat to society, and actually an asset to the prison community. On the other hand, they could argue that the petitioner had been suffering from a mental disease or defect since the murder of his wife and that he still suffers from this disease—i.e., he is currently

afflicted with the same condition that led him to make the series of poor decisions that culminated in the death of his wife.

While this would have been an interesting hypothetical situation, counsel were not presented with this conundrum. Counsel received a report from a trusted psychologist, affirming all earlier findings that the petitioner suffered from no cognitive disorder. Instead of planting the seed in the jury's mind that the petitioner might still be under the influence of a mental disease, counsel sought to show the rehabilitative strides made by the petitioner while incarcerated. Counsel placed special emphasis on the petitioner's progress since he was removed from death row.[32] Counsel's decision was a strategic move that, in Mr. Ogle's opinion, gave the petitioner the best chance of avoiding death.

The post-conviction court further found that even if counsel were deficient, the petitioner had not been prejudiced by their performance. In order to prove prejudice by a deficient failure to present mitigating evidence, the petitioner must show that "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Goad*, 938 S.W.2d at 370 (quoting *Strickland*, 466 U.S. at 695).

Considering the three factors identified in *Goad*, it is clear that the petitioner also failed to establish prejudice. The first *Goad* factor calls for analysis of the "nature

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[32] Further, counsel insured that the jury was instructed on seven mitigating circumstances. (II, 13A.) Counsel called numerous witnesses, including the petitioner's family and multiple guards from Northeast Correctional Complex, to prove these mitigating circumstances. (XIII, 909, 937, 954, 962, 966, 986, 995.) In total, counsel called 12 witnesses in the petitioner's defense at resentencing.

and extent of the mitigating evidence that was available but not presented." *Id.* at 371. Here, the mitigating evidence urged by the petitioner—that he suffered from a mental disease or defect—was simply not available in 2002. The only available diagnosis at the time—that the petitioner had a personality disorder—was presented to the jury. Even if 2002 counsel possessed Dr. Brown's subsequent diagnosis of a cognitive impairment, this diagnosis is not compelling mitigation evidence. Any testimony of a cognitive impairment would have been contradicted by the testimony of Drs. Craddock and Farooque. (XI, 155; XII 167.) Further, Dr. Brown's belief that the petitioner suffered from this alleged cognitive impairment since childhood does not square with the petitioner's musical talents and sports participation as a youth, nor does it explain the petitioner's ability to speak and write in Japanese by ages five to seven. (XI, 94, 122; XII, 172.)

The second factor—"whether substantially similar mitigating evidence was presented to the jury"—militates in favor of the State. *See Goad*, 938 S.W.2d at 371. Although it would have been impossible to present evidence in 2002 that the petitioner suffered from a mental disease or defect, the petitioner did present evidence, mostly through Dr. Engum and his mother, of some of his mental and emotional difficulties. (RS XII, 809; RS XIII, 916.)

The third factor—"whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination"—also weighs in favor of the State. *See Goad*, 938 S.W.2d at 371. As

the post-conviction court correctly found, "The evidence of the Petitioner's efforts to employ someone to get rid of his wife so that he could get out of his marriage without losing financially was strong and the alleged differences in the presentation of mitigating evidence would not have affected the jury's determination." (IX, 1245.) Evidence of a cognitive disorder, even if it were available in 2002, would not have affected the jury's finding on the facts of this murder.

Counsel properly made a strategic decision to provide a defense of rehabilitation. This decision was based upon their thorough investigation and the mental health information available to them at the time. While the petitioner now alleges new mental health diagnoses, there is no proof that such diagnoses would have been possible with the testing available in 2002. More importantly to this claim, there is no proof that counsel could have taken steps additional steps to procure such diagnoses. The petitioner has failed to show that counsel were deficient in this respect. Further, application of the *Goad* factors indicates that the petitioner has failed to show prejudice. The post-conviction court correctly denied relief.

### B. Counsel Effectively Represented the Petitioner at Voir Dire. (Pet'r Issue VII)

The petitioner alleges that counsel were ineffective for failing to utilize peremptory challenges against three prospective jurors. The petitioner contends that these three jurors were "automatic death penalty" voters and were empanelled in violation of the Due Process Clause as described in *Morgan v. Illinois*, 504 U.S. 719,

729 (1992). The post-conviction court correctly ruled that the petitioner did not prove deficiency or prejudice on this claim. (IX, 1241.)

The impartiality requirements of the Sixth and Fourteenth Amendments allow a capital defendant to challenge for cause any prospective juror who has indicated that he will automatically vote for the death penalty in every case. *Morgan*, 504 U.S. at 729. The standard for exclusion for cause is whether the juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45 (1980); *Morgan*, 504 U.S. at 728.

In the context of an ineffective assistance claim, "a trial lawyer is 'accorded particular deference when conducting voir dire' and his or her 'actions during voir dire are considered to be matters of trial strategy.'" *William Glenn Rogers v. State*, No. M2010-01987-CCA-R3-PD, 2012 WL 3776675, at *36 (Tenn. Crim. App. Aug. 30, 2012) (copy attached) (quoting *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001)). Also, "[a] strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness." *Id.* If the petitioner proves counsel's deficient performance during voir dire, he is additionally required to prove prejudice—i.e., that the resulting jury was not impartial. *See Smith v. State*, 357 S.W.3d 322, 348 (Tenn. 2011); *see also Rogers*, 2012 WL 3776675, at *36.

In this case, the petitioner alleges that counsel were ineffective for failing to exercise peremptory challenges against jurors Lynn E. Fillers, Calisse R. Finchum, and Jo Ann Harris. (Pet'r Br. at 75.) The petitioner alleges that these three jurors were committed to voting for the death penalty and thus could not be impartial. As a factual matter, the petitioner failed to prove these allegations.

Juror Fillers indicated in his juror questionnaire that he did not believe that everyone convicted of murder should get the death penalty, nor should everyone who was convicted of arranging for someone else to kill another person. (Ex. 4, at 10.) While he indicated in his questionnaire that he believed that persons convicted of premeditated murders should receive death, (*id.* at 11), he also indicated that he would follow the judge's instructions and the law and that he would consider all penalties provided by Tennessee law. (*Id.* at 14.) During voir dire, Mr. Fillers testified that he would not automatically vote for the death penalty and that he would follow the judge's instructions. (RS VII, 132-33.) He further testified that he would not automatically impose the death penalty if someone was convicted of premeditated murder. (RS VII, 139.) Even knowing that the petitioner had already been convicted of premeditated murder, Mr. Fillers indicated that he could properly weigh the evidence and decide the case on the evidence and the law. (*Id.*)

Juror Finchum similarly answered in her questionnaire that she would not automatically impose death, that she would follow Tennessee law, and that she would consider all penalties provided by law. (Ex. 25, at 10, 14.) She believed that

everyone is innocent until proven guilty but expressed concern with prison overcrowding. (*Id.*, at 11.) At voir dire, Ms. Finchum indicated repeatedly that she could set aside any economic concerns and decide the petitioner's case solely upon the facts and the law. (RS IX, 379-80, 383-84.)

Like Jurors Fillers and Finchum, Ms. Harris also expressed a belief that not everyone convicted of murder should receive the death penalty. (Ex. 27, at 10.) On her questionnaire, she indicated that the death sentence is appropriate in cases of premeditated murder. (*Id.*, at 11.) At voir dire, Ms. Harris restated that she would not automatically vote for the death penalty and that she would follow the law by deciding the case in accordance with the jury instructions. (RS IX, 393.)

These three jurors were not "automatic death" voters, as described by the petitioner. All three jurors indicated a willingness to follow the court's instructions and decide the cases purely on the facts and the law. The petitioner has failed to show that the presence of these three people on his jury created a biased or partial jury.

In ruling on this claim, the post-conviction court found,

> Attorney Ogle testified that they had not exercised all of the peremptory challenges and that the only reason they would have done that was because they believed that they would get a less favorable juror based on the remaining jurors in the pool if they continued. The evidence also established that the attorneys did not base their decisions on jurors on the questionnaire alone. Attorney Moore testified that they had done a personal ranking system of jurors but that the ranking changed some with personal contact through voir dire.

(IX, 1241.) The record fully supports the findings of the post-conviction court. In addition to these findings, Mr. Herbison testified that he relied on co-counsel during voir dire due to their local knowledge of the citizens and that "co-counsel had a pretty good handle on who we did or didn't want." (XIII, 397.)

While Mr. Ogle acknowledged that counsel did not exercise all peremptory challenges, he indicated that the only reason he would not exercise all of his challenges "would be because we felt like there was a substantial chance of getting somebody worse than that person." (XIV, 470.) Based upon counsel's ranking of the venire and Mr. Moore's local knowledge of its constituents, counsel's decision to refrain from striking these three non-biased jurors was a sound trial strategy based upon adequate preparation. *See, e.g., Steven Ray Thacker v. State*, No. W2010-01637-CCA-R3-PD, 2012 WL 1020227, at *50 (Tenn. Crim. App. Mar. 23, 2012) (copy attached) (sound trial strategy where counsel refrained from using peremptory challenge based upon determination that seated panel was more favorable than the prospective jurors remaining in the jury pool), *perm. app. denied* (Tenn. Aug. 16, 2012).

The petitioner failed to show that counsel were deficient for not striking these three jurors. The "only reason" counsel would not have used all peremptory challenges would be to avoid less favorable jurors in the jury pool. (XIV, 470.) This was a sound trial strategy. There is no showing of prejudice because the petitioner has not proven that the seated jury was biased or partial. More importantly to this

particular prejudice analysis, the petitioner failed to show that the exercise of a challenge against these three jurors would have produced a jury that was more favorable to returning a life sentence. The post-conviction court correctly ruled that petitioner failed to prove both prongs of *Strickland*.

### C. The Petitioner Failed to Prove That Counsel Were Ineffective During the Cross-Examination of the Victim's Father. (Pet'r Issue VIII)

The petitioner argues that he received the ineffective assistance of counsel at trial and on appeal related to Mr. Ogle's cross-examination of the victim's father, H.A. Saylor, and Mr. Saylor's comment during this cross-examination that "they ought to hang the son-of-a-bitch," referring to the petitioner. The petitioner has failed to prove either prong of *Strickland,* and the post-conviction court correctly denied relief.

Statute allows for the victim's family to testify "at the sentencing hearing about the victim and about the impact of the murder on the family of the victim and other relevant persons." Tenn. Code Ann. § 39-13-204(c). Victim impact evidence should generally be

> [L]imited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family.

*State v. Nesbit*, 978 S.W.2d 872, 891 (Tenn. 1998) (citations omitted).

The post-conviction court found that counsel rebutted Mr. Saylor's testimony with a plea for the petitioner's life from his mother. (IX, 1252.) Further, the court noted that the jury was properly instructed on the use of victim impact evidence. (*Id.*) *See Stephenson*, 195 S.W.3d at 604. The post-conviction court found that the petitioner failed to establish prejudice on this claim.

As an initial point, the State notes that the petitioner entirely failed to question Mr. Ogle about his cross-examination of Mr. Saylor. Therefore, it is impossible to know what motivations or strategies were at play when Mr. Ogle elicited this response from the victim's father. For this reason, the petitioner has failed to show facts supporting this claim by clear and convincing evidence.

On this record, however, the State submits that Mr. Ogle was *intentionally* attempting to elicit a combative response from Mr. Saylor. A fuller view of Mr. Saylor's testimony shows Mr. Ogle's strategy:

> [Mr. Ogle]: Had you told Ms. Leimieux that if there was contact with their father through them that they would be allowed to see the children again?
>
> [Mr. Saylor]: No, I didn't say anything like that. I told them I didn't want that to happen.
>
> Q: You didn't want what to happen, sir?
>
> A: For them to try and take them to the penitentiary where he's in jail. It would be bad influence on the children.
>
> Q: Yes, sir. You certainly haven't encouraged any contact between the children and their father, have you?
>
> A: Absolutely none.
>
> Q: And I understand, you're pretty bitter at Mr. Stephenson, aren't you?

| | |
|---|---|
| A: | Wouldn't you be? |
| Q: | Yes, sir. I understand, I do. I wasn't making it a bad thing but the bitterness is why you haven't encouraged the contact? |
| A: | No, it's not bitter. This man murdered my daughter for no damn reason. |
| Q: | I understand. |
| A: | And they ought to hang the son-of-a-bitch. |
| Q: | I understand. |
| A: | You got that? |
| Q: | I understand. And I understand your feelings, sir. Honestly. I'm not mad at you, that's not . . . |
| A: | Then quit pressing, because I don't want him to ever see the children again. I adopted them and they don't belong to him; they belong to me. |

(RS XII, 773-75.) At an ensuing bench conference, the trial court informed the parties that Mr. Saylor was not to refrain from using this "hanging" language. (RS XII, 780.) While Mr. Schmutzer agreed, Mr. Ogle responded, "Just a second. You're not saying that I can't talk to the jury about the reason, I mean his bitterness that came through, I can't use that word?" (*Id.*) Apparently referring to the word "hanging," the trial court stated, "I don't want you to use those words." (*Id.*) Later, counsel elicited testimony from Ms. Leimieux that Mr. Saylor made it difficult for her to visit her grandchildren. (RS XIII, 918-19.) In closing, Mr. Ogle argued to the jury that what the petitioner has become "certainly outweighs the need for vengeance . . . ." (RS XIV, 1067.)

The record is at least susceptible to the conclusion that Mr. Ogle was attempting to portray Mr. Saylor as a vengeful, bitter man, while portraying the petitioner as a rehabilitated, changed person not deserving of death. This tactic

would be a sound trial strategy and would be reasonable considering the defense's other proof of the petitioner's rehabilitative efforts. By failing to ask Mr. Ogle about this topic, however, the petitioner has not proven deficient performance by clear and convincing evidence.

Further, the post-conviction court correctly ruled that the petitioner did not prove prejudice. The trial court properly instructed the jury that they could not make "an emotional response" to the victim impact evidence, nor could they consider it as proof of an aggravating circumstance. (RS II, 226-27.) Jurors are presumed to follow the instructions of the court. *Robinson*, 146 S.W.3d at 494. The petitioner has failed to carry his burden on this claim, and he is not entitled to relief.

## VII. THE PETITIONER'S CONSTITUTIONAL CHALLENGES TO THE DEATH PENALTY ARE WAIVED AND MERITLESS; FURTHERMORE, COUNSEL ACTED APPROPRIATELY BY NOT RAISING THEM.

The petitioner contends that the Tennessee death penalty sentencing statute and the appellant's sentence of death violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as the prohibition against ex post facto laws in Article I, Sections 9 and 10, of the Tennessee Constitution. The petitioner also contends that the statute and his death sentence violate his rights under Article I, Sections 8, 11, and 16, of the Tennessee Constitution. (Pet'r Br. at 78-80). The petitioner further argues that counsel were ineffective for failing to reserve these issues for appellate review.

The State notes, as an initial matter, that to the extent the petitioner raises the following constitutional issues as freestanding constitutional challenges to the death penalty, all of these claims are waived for failure to raise them on direct appeal. *See* Tenn. Code Ann. § 40-30-106(g). This failure is the crux of the appellant's ineffective assistance of appellate counsel claim on this count. To the extent the petitioner contends that it was ineffective assistance of counsel to not raise these constitutional issues, their lack of merit forecloses the success of any such contention.

### A. The Petitioner's Death Sentence Does Not Violate His Constitutional Rights, Nor Does it Impermissibly Infringe Upon His Right to Life. (Pet'r Issue IX.A)

The petitioner contends that his death sentence violates principles of substantive due process, cruel and unusual punishment, equal protection, and his

fundamental right to life. (Pet'r Br. at 78.) The focus of the petitioner's argument on this point is that death is not necessary to promote a compelling state interest because the State had previously agreed to a sentence of life without the possibility of parole.

The Tennessee Supreme Court rejected a similar argument in *Mann*, 959 S.W.2d at 510. In *Mann*, a plea agreement to a lesser charge was rejected by the defendant. *Id.* The Supreme Court held that once the plea was rejected, "the State may prosecute a defendant to the fullest extent of the law and seek the most severe punishment available under the law." *Id.* The Supreme Court adopted this Court's reasoning in rejecting the defendant's challenges under substantive due process, equal protection principles, and his right to life. *Id.* at 536 (appendix).

The Tennessee Supreme Court has also rejected other arguments that the death penalty violates a defendant's right to life without serving any compelling state interest. *Cauthern*, 145 S.W.3d at 629; *Nichols v. State*, 90 S.W.3d 576, 604 (2002). Most recently, this Court rejected a "right to life" argument in *Gregory Robinson v. State*, No. W2011-00967-CCA-R3-PD, 2013 WL 1149761, at *58 (Tenn. Crim. App. Mar. 20, 2013) (copy attached). Based upon this settled precedent, the petitioner's claim fails and counsel acted appropriately by not raising this issue on direct appeal.

**B. The Petitioner's Equal Protection Rights Were Not Violated Due to an Alleged Lack of Statewide Standards for Pursuing the Death Penalty. (Pet'r Issue IX.B.)**

The petitioner next argues that "[d]ue to inadequate guidance and oversight in the charging process, Tennessee does little to ensure" that the class of death-eligible defendants is narrowed to the worst murderers. (Pet'r Br. at 79-80.) The argument that Tennessee's death penalty statute fails to meaningfully narrow the class of eligible defendants has been considered, and rejected, many times. *State v. Hines*, 919 S.W.2d 573, 582 (Tenn. 1995); *State v. Howell*, 868 S.W.2d 238, 259 (Tenn. 1993). To the extent that the petitioner is challenging the charging discretion of the District Attorney General, this argument likewise has been repudiated. *Hines*, 919 S.W.2d at 582; *Pike*, 2011 WL 1544207, at *69. Again, the petitioner's claim fails and counsel cannot be faulted for not raising this issue on direct appeal.

**C. The Method of Execution by Lethal Injection Does Not Violate the Petitioner's Constitutional Rights, Nor Does the Promulgation of Tennessee's Lethal Injection Protocol Violate Due Process Concerns. (Pet'r Issue IX.C)**

The appellant contends that execution by lethal injection constitutes cruel and unusual punishment under the Tennessee and United States Constitutions (Pet'r Br. at 80.) The petitioner also contends that the imposition of lethal injection in his case violates ex post facto principles. (*Id.*) He further argues that the lethal injection protocol violates the Due Process Clause of the United States Constitution and the Law of the Land Clause of the Tennessee Constitution "because it was promulgated

without proper procedure or public oversight." (*Id.*) While the petitioner waived these issues for failing to raise them on direct appeal, the issues also lack merit.

The petitioner argues that Tennessee's lethal injection protocol violates the Due Process Clause of the United States Constitution and the Law of the Land Clause of the Tennessee Constitution "because it was promulgated without proper procedure or public oversight." The Tennessee Supreme Court, however, has held that the adoption of Tennessee's lethal injection protocol did not violate either the procedural or substantive aspects of the due process provisions found in the United States and Tennessee constitutions. *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 306–07 (Tenn. 2005). The petitioner's claim is without merit.

In finding Tennessee's method of lethal injection to be constitutionally sound, the Supreme Court determined that Tennessee's protocol is consistent with contemporary standards of decency and with the overwhelming majority of lethal injection protocols used by other states and the federal government. *Abdur'Rahman*, 181 S.W.3d at 306–07. "No court has ever held that lethal injection is cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution." *Id.* (citing *Cooper v. Rimmer*, 358 F.3d 655, 659 (9th Cir. 2004)).

The petitioner's ex post facto claims must also fail. The United Supreme Court has held that changing the mode of execution does not implicate the Ex Post Facto Clause in the United States Constitution. *See Malloy v. South Carolina*, 237 U.S. 180, 185 (1915). Further, Tennessee law allows the petitioner the option to be

executed by electrocution. *See* Tenn. Code Ann. § 40-23-114(b) (for offenses committed before January 1, 1999, defendant may sign written waiver and choose to be executed by electrocution). Since the petitioner has the choice to be executed by the mode prescribed at the time of his offense, there are no ex post facto implications. *See Johnson v. Bell*, 457 F. Supp. 2d 839, 841-42 (M.D. Tenn. 2006) ("providing an inmate with a choice of the method of execution, or permitting him to exercise no choice at all, does not . . . violate the Ex Post Facto Clause").

As shown, the petitioner's constitutional claims must fail. Concerning the claims of ineffective assistance, no testimony was developed at the post-conviction hearing regarding the constitutional challenges. As stated, the petitioner's appellate briefs from direct appeal are not in the record. Accordingly, he has failed to prove deficiency by clear and convincing evidence. Further, since the constitutional challenges were meritless, counsel acted appropriately if they did not, in fact, raise these issues on direct appeal.

## VIII. THE PETITIONER HAS FAILED TO ESTABLISH THAT CUMULATIVE ERRORS ENTITLE HIM TO RELIEF. (Pet'r Issue X)

The petitioner contends that "all claims of error coalesced into a unitary abridgement" of his constitutional rights. (Pet'r Br. at 80.) The United States and Tennessee Constitutions protect a criminal defendant's right to a fair trial, but they do not guarantee a perfect trial. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000). Our Supreme Court has noted that "circumstances warranting the application of the cumulative error doctrine to reverse a conviction or sentence remain rare." *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). There must have been "more than one actual error committed in the trial proceedings" in order to "warrant assessment under the cumulative error doctrine." *Id.* at 77. Because the petitioner has failed to establish any individual errors, he is not entitled to relief based on cumulative error.

## CONCLUSION

For the reasons stated, the judgment should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent by first class mail, postage prepaid to

Daniel E. Kirsch
Post-Conviction Defender
530 Church Street, Suite 600
Nashville, Tennessee 37219

on this 27th day of June, 2013.

KYLE HIXSON
Assistant Attorney General