

## **APPENDIX**

(Excerpts from the Court of Criminal Appeals' Decision)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
November 19, 2002 Session

**STATE OF TENNESSEE v. CHRISTOPHER A. DAVIS**

**Appeal from the Criminal Court for Davidson County  
No. 96-B-866 J. Randall Wyatt, Judge**

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**No. M2001-01866-CCA-R3-DD - Filed March 25, 2003**

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The Appellant, Christopher A. Davis, was found guilty by a jury of two counts of first degree murder, two counts of especially aggravated robbery, and two counts of especially aggravated kidnapping. The jury sentenced the Appellant to death for each of the first degree murder convictions. The Appellant presents the following issues in this appeal as of right: (1) The trial court erred by not granting the Appellant's motion to disqualify the Davidson County District Attorney General's office from prosecuting the case; (2) the trial court erred by not granting the Appellant's motion to prohibit the State from relying upon the Appellant's prior murder conviction as an aggravating circumstance, because the conviction was for a crime committed while the Appellant was a juvenile; (3) the trial court erred by not suppressing the statement the Appellant made to police; (4) the trial court erred by denying defense counsel's motion to be allowed to withdraw from representing the Appellant; (5) the trial court erred by granting the State's motion to require the Appellant to supply the State information concerning mental health expert testimony to be presented during the sentencing phase of the trial; (6) the trial court erred by allowing a physician who did not perform the autopsy to testify concerning the autopsy and evidence obtained in connection therewith; (7) the trial court erred in allowing victim impact evidence to be introduced; (8) that the evidence presented at trial was insufficient to support a finding of guilt beyond a reasonable doubt; (9) that the evidence presented was insufficient to support the jury's finding that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt; (10) that the evidence presented was insufficient to support a finding that the aggravating factors were established beyond a reasonable doubt; (11) that Tennessee's death penalty statutory scheme is unconstitutional in several instances; (12) that the trial court erred in allowing certain cross-examination of defense witnesses; and (13) that the cumulative effect of errors made at trial denied the Appellant a fair trial in violation of his due process rights. Based on our review of the record on appeal, we affirm both the Appellant's convictions and the sentences imposed.

**Tenn. Code Ann. § 39-13-206 Death Penalty Appeal; Judgment of the Criminal Court  
Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which JOE G. RILEY and ALAN E. GLENN, JJ., joined.

Herschell D. Koger, Pulaski, Tennessee, for the Appellant, Christopher A. Davis.

Paul G. Summers, Attorney General and Reporter; Gill R. Geldreich, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Tom Thurman and Katrin Miller, Assistant District Attorneys General, for the appellee, State of Tennessee.

## OPINION

**[Deleted: Summary of Facts and Testimony]**

### ANALYSIS OF ISSUES

#### I.

**[Deleted: Disqualification District Attorney General's Office]**

#### II.

**[Deleted: The Juvenile Status of Appellant at the Time of Appellant's Prior Felony Conviction]**

#### III.

#### **Appellant's Statement to Police**

Appellant filed a motion to suppress his statements made to police. Appellant was first questioned at the criminal justice center after being detained outside his residence. At the time Appellant was apprehended, the police were unaware of his alleged involvement in the murders at issue. Mr. Davis was taken in a police car in handcuffs from his residence on Herman Street in Nashville to the criminal justice center. Appellant arrived at the criminal justice center at approximately noon on February 28, 1996. Appellant was first questioned by Detective Al Gray regarding his knowledge of the murder of a cab driver near the TSU campus in Nashville. Detective Gray advised Appellant of his Miranda rights prior to questioning him.

Detective Mike Roland testified that he first learned of Appellant's potential involvement in the murders of Lee and Ewing between 5:00 and 7:00 p.m. Detective Roland testified that he called Davis in to question him regarding the murders of Ewing and Lee and confirmed that Detective Gray had read Davis his rights and that he understood the same. He asked if Davis was

still willing to talk to him, and Davis responded yes. Appellant denied any involvement. The interview with Detective Roland began at approximately 9:00 p.m. Detective Roland testified that at about 9:45 p.m., Mr. Davis requested an attorney. No further questions were asked at that point.

Thereafter, Detective Roland obtained additional information linking Appellant to the murders of Lee and Ewing. Approximately one hour later, while Detective Roland was typing an arrest warrant, Appellant approached him and asked what he was doing. Detective Roland advised Appellant that he was typing a criminal homicide warrant for him, and Appellant stated that he wanted to talk.

After Appellant advised Detective Roland that he wanted to talk to him, Appellant was taken to an interview room, where he was read his Miranda rights. Appellant then signed a written waiver. The interview, including the reading of Appellant's rights, was videotaped. During the videotaped interview, Appellant stated that he wanted to cooperate. He advised that he did not commit the murders, but he had information about what occurred. He first stated that he was not present at the crime scene, but later recanted and stated he was present. He continued to deny, however, that he had played any role in the murders. He gave information regarding the weapons used, the scene of the crime, the time of the crimes, the manner in which the victims were murdered, and other people present at the murders.

The evidence shows that during the time Appellant was detained at the criminal justice center, he was provided with food and drink by the detectives. Detectives also admitted that Appellant complained of his stomach being upset. Detectives further admitted that Appellant advised that he was cold, and they provided him with a jacket. While at the criminal justice center, Appellant appeared tired at times and lay down to rest. Appellant asserts that as the detectives were gathering evidence linking him to the crime, detectives made statements within his hearing range regarding the evidence. Further, Appellant asserts that he was also specifically questioned regarding some of the evidence after he had requested an attorney. The detectives involved in the investigation denied his assertion.

Appellant's attorneys argue that Appellant's statements to police should be suppressed because all questioning should have ceased when Appellant first requested an attorney. Appellant further argues that he was in a weakened physical condition because he was still experiencing the aftereffects from a spider bite that he received a couple of weeks prior to his arrest.<sup>1</sup> Appellant asserts that his weakened physical condition from the spider bite, coupled with a lack of sleep and eating, rendered his statements involuntary. Appellant further argues that there was undue delay in taking him before the magistrate on the weapons charge, the charge for which he was transported to the criminal justice center. Appellant also asserts that a rapidly intensifying homicide investigation was being conducted near his vicinity, and that the subtle remarks made by detectives amounted to a tacit form of questioning. Essentially, Appellant's attorneys argue that the detectives's actions

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<sup>1</sup> Appellant had been hospitalized for two days at Vanderbilt Hospital for anemia as a result of a spider bite approximately ten days prior to his arrest.

amounted to an interrogation. As a result of the foregoing, Appellant advances the argument that his statement to the police was involuntary. The trial court, however, found that considering the totality of the circumstances, Appellant's statement was voluntary.

Our supreme court succinctly enunciated the proper standard of review in motion to suppress cases as follows:

Because issues of whether a defendant was placed into custody, interrogated, or voluntarily gave a confession are primarily issues of fact, we review these factual determinations by the trial court according to the standard set forth in State v. Odom, 928 S.W.2d 18 (Tenn. 1996). Under this standard, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." Questions about witness credibility and "resolution of conflicts in the evidence are matters entrusted to the trial judge," and the "testimony presented at trial may be considered by an appellate court in deciding the propriety of the trial court's ruling on a motion to suppress." Our review of a trial court's application of law to the facts, however, is conducted under a *de novo* standard of review.

State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001) (citations and footnote omitted), cert. denied, 534 U.S. 948, 122 S. Ct. 341, 151 L. Ed. 2d 258 (2001).

We will first address whether Appellant's statement should be suppressed pursuant to Tennessee Rule of Criminal Procedure 5(a) as advanced by Appellant. Tennessee Rule of Criminal Procedure 5(a) provides:

Any person arrested except upon a *capias* pursuant to an indictment or presentment shall be taken without unnecessary delay before the nearest appropriate magistrate of the county from which the warrant for arrest was issued, or the county in which the alleged offense occurred if the arrest was made without a warrant unless a citation is issued pursuant to Rule 3.5. If a person arrested without a warrant is brought before a magistrate, an affidavit of complaint shall be filed forthwith. When an arrested person appears initially before a magistrate, the magistrate shall proceed in accordance with this rule.

It is without dispute that Appellant was arrested and taken into custody between 11:00 a.m. and 12:00 p.m. It is further without dispute that Appellant gave a statement to the police at approximately 12:00 a.m. and was then taken before a magistrate. Appellant asserts that this twelve to thirteen hour delay in taking Appellant before a magistrate constituted unnecessary delay pursuant to Tennessee Rule of Criminal Procedure 5(a).

In State v. Huddleston, 924 S.W.2d 666, 670 (Tenn. 1996), our supreme court held that if an individual is not brought before a magistrate within 72 hours, there has been "unnecessary delay." We cannot find that because Appellant was not taken before a magistrate for twelve to thirteen hours

there was an unnecessary delay. Moreover, a confession obtained during a period of unnecessary delay is not automatically suppressed. Id.; see also State v. Carter, 16 S.W.3d 762, 769 (Tenn. 2000). Instead, a statement is to be excluded “only if an examination of the totality of the circumstances reveals that the statement is not voluntarily given.” Huddleston, 924 S.W.2d at 670. To determine if a statement was voluntarily given, we must consider:

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

Id. at 671 (quoting People v. Cipriano, 429 N.W.2d 781, 790 (Mich. 1988)).<sup>2</sup>

The trial court specifically cited the above referenced factors in its order. Based on the evidence presented at the hearing, the trial court found: the detectives were accommodating to Appellant’s needs; the Appellant was advised of his constitutional rights on two occasions; Appellant waived his constitutional rights in an effort to exculpate himself from involvement in the murders; Appellant’s demeanor indicated he was lucid and in full control of his mental and physical faculties; no evidence regarding Appellant’s intelligence or educational level that would raise questions regarding the voluntariness of the statement; no indication that Appellant’s injury from the spider bite affected his decision making; and Appellant’s statement lasted approximately one hour and was not conducted in an abusive or coercive manner. As a result, the trial court ruled that under the totality of the circumstances, Appellant’s statement was voluntary.

With regard to this issue, we conclude that there was no violation of Tennessee Rule of Criminal Procedure 5(a). Moreover, we find that even if there was a violation, Appellant’s statement should not be excluded because it was voluntary under the totality of the circumstances.

Next we must consider whether there was a violation of the Fourth Amendment that requires the suppression of Appellant’s statement. The Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to the extended detention of an individual after a warrantless arrest. Gerstein v. Pugh, 420 U.S. 103, 114, 125, 95 S. Ct. 854, 863, 869, 43 L. Ed. 2d 54, 65, 72 (1975). The United States Supreme Court has determined that absent a bona fide emergency or extraordinary circumstance, a judicial determination of probable cause is “prompt” if it occurs within 48 hours. County of Riverside v. McLaughlin, 500 U.S. 44, 56-57, 111 S. Ct. 1661,

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<sup>2</sup>This Court had previously adopted the voluntariness test by adopting the Cipriano test in State v. Readus, 764 S.W.2d 770, 774 (Tenn. Crim. App. 1988).

1670, 114 L. Ed. 2d 49, 63 (1991). The Supreme Court has explained that the probable cause determination does not pass constitutional muster simply because it occurs within 48 hours. Id. If a hearing is delayed unreasonably for the purpose of gathering evidence to justify an arrest, a delay is simply for delay's sake or a delay is motivated by ill will against the arrested individual, then it may not pass constitutional muster. Id. We find that here, Appellant was taken before a magistrate within 48 hours, and the determination of probable cause was not delayed unreasonably. Therefore, there was no violation of the Fourth Amendment and, therefore, no reason to suppress Appellant's statement pursuant thereto.

Appellant also argues that his statement was not voluntarily given because after he asserted his right to counsel, the police began a tacit form of interrogation by bringing incriminating evidence in front of him and conversing amongst themselves within his hearing range. Custodial interrogations must be preceded by Miranda warnings. Berkemer v. McCarty, 468 U.S. 420, 434, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Once the right to counsel has been invoked, the interrogation must stop, unless the person re-initiates the conversation and expresses a desire to talk to the police. State v. O'Guinn, 786 S.W.2d 243, 246 (Tenn. Crim. App. 1989). "Interrogation" encompasses any "practice that the police should know is reasonably likely to evoke an incriminating response from a suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 1690, 64 L. Ed. 2d 297, 308 (1980).

At the suppression hearing, Appellant testified that as the detectives were gathering evidence linking him to the crime, they made statements within his hearing range regarding the evidence and specifically questioned him regarding some of the evidence after he had requested an attorney. The detectives involved in the investigation denied these allegations. According to the record, approximately one hour passed between the time Appellant asserted his right to counsel and next requested to speak with Detective Roland. This Court has previously noted that "[t]he disclosure of incriminating evidence to a suspect . . . does not necessarily constitute interrogation within the meaning of Innis." State v. Maraschiello, 88 S.W.3d 586, 603 (Tenn. Crim. App. 2000) (citing Shedelbower v. Estelle, 885 F.2d 570, 573 (9th Cir. 1989); United States v. Vazquez, 857 F.2d 857, 861 (1st Cir. 1988)). After reviewing the record, we agree with the trial court that there is no evidence that the Appellant was coerced by any of the detectives into making the statement at issue. We find that the actions of the police do not constitute an interrogation under Innis.

With respect to the re-initiation of conversation by Appellant, the trial court specifically found that Appellant approached Detective Roland and initiated further conversation. The court noted that it accredited the testimony of Detective Roland on this issue. The court next found that Detective Roland twice advised Appellant of his constitutional rights, and Appellant executed a written waiver of his rights before resuming the interview. The court found no evidence that Appellant was coerced by any of the detectives into initiating the subsequent communication or that Appellant was otherwise engaged in any discussions about the case prior to the Appellant's request to resume the interview. Thus, the court resolved the conflicting testimony in favor of the detectives, rather than Appellant. We agree. Absent coercive activity by the police, we must conclude that the

Appellant voluntarily initiated a dialogue with Detective Roland and made the statement at issue. See Maraschiello, 88 S.W.3d at 604. Moreover, Detective Roland twice advised Appellant of his Miranda rights once questioning resumed. Thereafter, Appellant made a knowing and intelligent waiver of his Miranda rights.

Further, we are not persuaded by Appellant's argument that his weakened physical condition from the spider bite, coupled with a lack of sleep and eating, rendered his statements involuntary. The trial court found otherwise. As previously set forth, under the totality of the circumstances, the evidence does not preponderate against the trial court's finding that Appellant's statement was voluntarily made.

As a result of the foregoing, we conclude that the trial judge did not err in denying the motion to suppress the Appellant's statement. Accordingly, this issue is without merit.

#### IV.

#### **[Deleted: Counsel's Request to Withdraw from Representation]**

#### V.

#### **Notice of Intent to Present Expert Testimony of Mental Condition at Penalty Phase**

Appellant contends that the trial court erred in granting the State's motion requiring Appellant to supply information to the State regarding mental health issues that would be presented at the sentencing phase of trial. Pretrial, the State filed a Motion to Compel Discovery of Expert Testimony, pursuant to Rules 12.2 and 16 of the Tennessee Rules of Criminal Procedure. In its motion, the State requested the court require the defense to file a written notice of its intent to introduce expert testimony relating to mental disease or defect, or any other mental condition at the guilt or penalty phase of the trial. The court granted the State's motion, and Appellant sought an extraordinary appeal on the issue, which was granted. Ultimately, the issue was decided by the supreme court in State v. Reid, 981 S.W.2d 166 (Tenn. 1998).<sup>3</sup>

The supreme court held that a defendant is required to file a pre-trial notice of his intent to present expert testimony regarding mental health condition as mitigation evidence at the sentencing phase of a capital trial. On appeal, Appellant asserts that the Supreme Court's decision in Reid contravenes Rules 12.2 and 16 of the Tennessee Rules of Criminal Procedure.

This Court is without the authority to overrule the Supreme Court's decision in Reid. See Thompson v. State, 958 S.W.2d 156, 173 (Tenn. Crim. App. 1997). The Supreme Court has inherent power to make and enforce reasonable rules of procedure. Reid, 981 S.W.2d at 170. The

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<sup>3</sup> The Appellant's application for permission to appeal to the supreme court was consolidated with the application of Paul Dennis Reid on the same issue. The opinion of the court was filed and published as State v. Reid, 981 S.W.2d 166 (Tenn. 1998).



Reid decision set forth the controlling law on this issue. Moreover, as Appellant was one of the parties who litigated this issue in Reid, he is bound by the law of the case. See State v. Jefferson, 31 S.W.3d 558, 560-62 (Tenn. 2000). This issue is without merit.

## VI. Testimony of Dr. Levy

Appellant filed a pretrial motion requesting that the court determine the proper scope of Dr. Bruce Levy's testimony at trial. Specifically, Appellant requested that Dr. Levy be prohibited from testifying regarding the autopsies of the victims, as Dr. Levy did not perform the autopsies. The autopsies were performed by assistant medical examiners who were no longer employed in the Davidson County Medical Examiner's Office. D'Angelo Lee's autopsy was performed by Dr. Ann Bucholtz, and Gregory Ewing's autopsy was performed by Dr. George Mizell. The court ruled that if the State laid the proper foundation at trial, the autopsy reports would be admissible as substantive evidence under Tennessee Rule of Evidence 803(6) as a business record, under Tennessee Rule of Evidence 803(8) as a public record, and under Tennessee Code Annotated section 38-7-110. Further, the court ruled that if the State laid the proper foundation for Dr. Levy's testimony as an expert, Dr. Levy would be permitted to express his opinions in his field and to communicate to the jury that he relied upon the autopsy reports in forming his opinion.

Prior to Dr. Levy's testimony, Appellant objected, stating that because Dr. Levy did not personally retrieve any bullets from the bodies of the victims or see the same performed, the State could not establish the proper chain of custody of the bullets. Appellant argued that there was, therefore, a break in the chain of custody of the bullets, and the court should not permit testimony regarding the bullets. The State countered that the absence of one person's testimony in the chain of custody does not invalidate the chain. Furthermore, the State argued that the court had previously ruled that Dr. Levy would be permitted to testify based on the business records and public records exceptions to the hearsay rule. The court allowed the bullets into evidence and stated again that it would allow Dr. Levy to testify. The court cautioned the State, however, that it must establish the chain of custody.

Dr. Levy testified that he did not perform the autopsies on the victims, but the office followed a definite procedure for recovering bullets from a body. He testified that when they recover a bullet, they secure it, place it in a marked container, and lock it in an evidence locker. Later, they turn the evidence over to the police. He testified that the bullets recovered from Gregory Ewing were marked with the appropriate case identification number and had the initials G.M. on the envelope. He could not testify as to the handwriting of the initials, but he noted that Dr. George Mizell performed Mr. Ewing's autopsy. He further noted that the bullets recovered from Gregory Ewing were turned over to Sergeant Hunter of the Metro Police Department.<sup>4</sup> Similarly, Dr. Levy testified that the bullets recovered from D'Angelo Lee were placed in a container with the appropriate case number and

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<sup>4</sup> Sergeant Hunter had previously testified that he retrieved bullets that were recovered from Mr. Ewing's autopsy from the Davidson County Medical Examiner's office.

turned over to the Metro Police Department.<sup>5</sup> Dr. Levy admitted that he did not watch the autopsies as they were performed; therefore, he could not testify based on his personal knowledge that the bullets that had been placed into evidence were in fact bullets recovered from the victims. He stated that his testimony was based upon procedures followed in the medical examiner's office.

Following Dr. Levy's testimony, Appellant renewed his previous objection. The court ruled that based on the testimony from the police officers regarding retrieval of the bullets from the medical examiner's office and the testimony of Dr. Levy that the proper procedure for securing and identifying the bullets had been followed, the proper chain of custody had been established by the State. The court further ruled there was no suspicion surrounding the authenticity of the bullets.

The autopsy reports are admissible hearsay under Rules 803(6) and 803(8) of the Tennessee Rules of Evidence. See also State v. Mario Hawkins, No. 01C01-9701-CR-00014, 1998 WL 352095, at \*6-7 (Tenn. Crim. App. at Nashville, July 2, 1998). Further the autopsy reports are admissible as a public document pursuant to Tennessee Code Annotated section 38-7-110. The court did not err in allowing Dr. Levy to testify in this regard.

It is a fundamental rule of law that the State must establish an unbroken chain of custody in order to present physical proof into evidence. State v. Scott, 33 S.W.3d 746, 760 (Tenn. 2000); State v. Holbrooks, 983 S.W.2d 697, 701 (Tenn. Crim. App. 1998). However, every witness that handled the evidence in the chain is not required to testify in order to establish a lack of tampering with the evidence. Rather, the State is required to reasonably establish the identity of the evidence and its integrity. Scott, 33 S.W.3d at 760; Holbrooks, 983 S.W.2d at 701. This Court reviews the trial court's decision on whether the State has established the proper chain of custody of physical evidence under an abuse of discretion standard.

Based upon the evidence in the record and the trial court's ruling on the same, we conclude that the trial court did not abuse its discretion in determining that the State had met its burden of establishing the proper chain of custody. This issue is without merit.

## **VII. Victim Impact Evidence**

Appellant next argues on appeal that the court erred in allowing victim impact testimony to be admitted at the sentencing hearing through the testimony of the victim's mothers. Specifically, Appellant argues that victim impact evidence is irrelevant at a capital sentencing hearing and therefore unconstitutional. Appellant further contends that he was denied his right to confront the victims' children, as the mothers of the victims testified concerning the victims' children.

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<sup>5</sup> Officer Merrill had previously testified that he retrieved the bullets that were recovered during the autopsy of D'Angelo Lee from the medical examiner's office.

Victim impact evidence has been declared constitutional by the United States Supreme Court and the Tennessee Supreme Court. Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); State v. Nesbit, 978 S.W.2d 872, 889 (Tenn. 1998), cert. denied, 526 U.S. 1052, 119 S. Ct. 1359, 143 L. Ed. 2d 520 (1999). Moreover, Appellant's argument that he was denied the right to confront the victims' young children is similarly without merit. First, Appellant made no objection to the testimony of the victims' mothers that their grandchildren were confused and disturbed by their fathers' respective deaths. Appellant had the opportunity to rebut any evidence in this regard, but he chose not to do so. His decision not to challenge the testimony of the victims' mothers on this issue does not constitute a denial of confrontation. See Nesbit, 978 S.W.2d at 889-90 (citing Tenn. Code Ann. § 39-13-204(c) (1997) and explaining that the prosecution is allowed to introduce any evidence that is relevant to the issue of punishment, as long as the defendant is allowed a fair opportunity to rebut any hearsay statements so admitted). Accordingly, this issue is without merit.

### VIII.

**[Deleted: Sufficiency of the Evidence]**

### IX. and X.

**[Deleted: Sufficiency of Aggravating Evidence]**

### XI.

#### **Constitutionality of Tennessee's Death Penalty Statute**

Appellant contends that Tennessee's Death Penalty statute is unconstitutional in nineteen respects. He admits, however, that under current case law, the statute meets constitutional standards. Appellant fails to cite to any case law or other authority to support his contention that Tennessee's death penalty statute is unconstitutional. In fact, he makes no argument whatsoever. Under Rule 10(b) of the Rules of Court of Criminal Appeals, Appellant has waived this issue. Moreover, as Appellant admits, the death penalty statute has repeatedly been held constitutional. See e.g., State v. Keen, 31 S.W.3d 196, 233 (Tenn. 2000), cert. denied, 532 U.S. 907, 121 S. Ct. 1233, 149 L. Ed. 2d 142 (2001); State v. Nesbit, 978 S.W.2d 872, 902 (Tenn. 1998), cert. denied, 526 U.S. 1052, 119 S. Ct. 1359, 143 L. Ed. 2d 520 (1999); State v. Vann, 976 S.W.2d 93, 117 (Tenn. 1998), cert. denied, 526 U.S. 1071, 119 S. Ct. 1467, 143 L. Ed. 2d 551 (1999).

Appellant contends also that the aggravating factors applied in this case are unconstitutional. He concedes, however, that the relevant factors are facially constitutional under current law.

Further, Appellant contends that aggravating factor (i)(2) is not applicable to Appellant because Appellant's prior felony conviction was imposed after he was arrested on the charges in this case. Our supreme court reaffirmed in State v. Hodges, 944 S.W.2d 346, 357 (Tenn. 1997), cert. denied, 522 U.S. 999, 118 S. Ct. 567, 139 L. Ed. 2d 407 (1997), that if a prior conviction is received before the sentencing hearing, then factor (i)(2) is applicable. Therefore, this issue is without merit.

Next, Appellant contends that factors (i)(6) and (i)(7) overlap and therefore do not sufficiently narrow the class of death-eligible defendants in murder cases. Basically, Appellant argues that the factors have a similar purpose, to prevent killings that are exceedingly reprehensible, and therefore fail to narrow the class of death-eligible defendants in murder cases. However, the United States Supreme Court has ruled that the proper question is whether the factors “genuinely narrow the class of persons eligible for the death penalty.” Arave v. Creech, 507 U.S. 463, 474, 113 S. Ct. 1534, 1542, 123 L. Ed. 2d 188, 200 (1993) (quoting Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983)). Only if the aggravating circumstance applies to every defendant who has committed the particular crime does the aggravating factor fail to narrow the class of death-eligible defendants. Arave, 507 U.S. at 474. In this case, the proof at trial showed that Appellant planned to kidnap and rob the victims and that he planned to kill them because they knew him and could identify him. Both factors (i)(6) and (i)(7) are applicable in this instance. The fact that two aggravating factors are applicable to the same situation does not render them unconstitutional.

## **XII.**

### **References to Other Witnesses’ Testimony by the Prosecution During Cross-Examination**

Appellant argues that it was error for the court to allow the State’s attorney to cross-examine defense witnesses by referring to the testimony of other witnesses and to contrast their testimonies in an argumentative fashion. Appellant concedes that he did not raise this issue in his motion for new trial, but he asserts that this Court should review this issue under the plain error doctrine.

To review an issue under the plain error doctrine, five factors must be present: the record must clearly establish what occurred in the trial court; a clear and unequivocal rule of law must have been breached; a substantial right of the defendant must have been adversely affected; the accused did not waive the issue for tactical reasons; and consideration of the error is necessary to do substantial justice. State v. Adkisson, 899 S.W.2d 626, 641 (Tenn. Crim. App. 1994); see also Tenn. R. Crim. P. 52(b). This Court does not find that a clear and unequivocal rule of law was breached. Further, the examples advanced by Appellant in his brief demonstrate that the prosecution was attempting to test the veracity of the witnesses’ testimony. These matters are within the sound discretion of the trial court, and we find no error. Accordingly, this issue is without merit.

## **XIII.**

### **Cumulative Effect of Errors**

Finally, Appellant alleges that the cumulative effect of the errors in the trial court effectively denied him a fair trial. Again, Appellant failed to raise this issue in his motion for new trial. Issues not presented to the trial court in a motion for new trial are waived on appeal. Tenn. R. App. P. 13. Notwithstanding, this Court has found no merit in Appellant’s issues on appeal; therefore, there can be no cumulative effect. This issue is without merit.

**XVII.**

**[Deleted: Proportionality Review]**

**CONCLUSION**

In accordance with Tenn. Code Ann. § 39-13-206(c), we have considered the entire record and conclude that the sentence of death has not been imposed arbitrarily, that the evidence supports the jury's finding of the statutory circumstances, that the evidence supports the jury's finding that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, and that the sentence is not disproportionate. We have also reviewed all issues raised by the appellant. We find no error. As a result, the judgments of the trial court and the sentence of death imposed by the jury are AFFIRMED.

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DAVID H. WELLES, JUDGE