

OPINION

Following a jury trial in 1984, the petitioner, Edward Jerome Harbison, was convicted of first degree murder and sentenced to death. On direct appeal, the Tennessee Supreme Court affirmed his conviction. State v. Harbison, 704 S.W.2d 314 (Tenn.1986). The United States Supreme Court denied certiorari. State v. Harbison, 476 U.S. 1153, 106 S. Ct. 2261, 90 L.Ed.2d 705 (1986). The petitioner then filed a petition for post-conviction relief raising an abundance of issues. After an evidentiary hearing, the trial court dismissed the application for post-conviction relief in part on the grounds of waiver and/or previous determination under Tenn. Code Ann. § 40-30-112 [repealed] and in part on the merits. The petitioner now appeals as of right from this denial of post-conviction relief.

It has long been established that the trial court's findings of fact and conclusions of law in post-conviction suits are afforded the weight of a jury verdict. See, e.g., Caruthers v. State, 814 S.W.2d 64, 67 (Tenn. Crim. App. 1991). "In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his petition by a preponderance of the evidence." McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the factual findings of the trial court are conclusive on appeal unless the appellate court finds that the evidence preponderates against the findings. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

SUFFICIENCY OF THE EVIDENCE

The petitioner's first contention is that the evidence adduced at his trial was insufficient to sustain a conviction of premeditated and deliberate first degree murder. The petitioner's brief points out that the only evidence of the manner in which the murder occurred was in the petitioner's confession. In this statement he made to the police, he said that the victim surprised him and his codefendant while they were

burglarizing the victim's home. The petitioner knew the victim and was aware that she carried a gun. When she reached into her purse, he panicked, grabbed a marble vase that was in the house, and struck her. There was also evidence from a police investigator that there were signs of struggle and there were photographs presented to the jury of the victim's very badly disfigured face indicating multiple blows.

The gist of the petitioner's argument is that deliberation was not shown in light of State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992). Tennessee courts have indeed reviewed pre-Brown cases for sufficiency applying the refined analyses of Brown. See, e.g., State v. Brimmer, 876 S.W.2d 75, 81 (Tenn. 1994); State v. Gentry, 881 S.W.2d 1, 4 (Tenn. Crim. App. 1994). Though meritorious on direct appeal, the petitioner's argument cannot be addressed in this post-conviction proceeding. The sufficiency issue was previously determined. "A ground for relief is 'previously determined' if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." Tenn. Code Ann. § 40-30-112(a) (1990) [repealed]. On appeal, the Tennessee Supreme Court affirmed the petitioner's conviction, addressing as its first issue whether there was sufficient proof to sustain the convictions. Harbison, 704 S.W.2d at 317. The court did not dwell specifically on the issues of deliberation and premeditation, but did state that the proof was "clearly sufficient." Id. at 319. There can be absolutely no doubt that the Supreme Court of Tennessee, our highest judicial tribunal is a "court of competent jurisdiction" and is the same court which decided Brown. This issue has no merit.

JURY INSTRUCTION REGARDING PREMEDITATION

The petitioner's second contention is also based upon Brown, 836 S.W.2d at 543, and its rejection of the jury instruction that "premeditation may be formed in an

instant." He argues that Brown should be applied retrospectively to invalidate the jury instruction given at his trial and thereby overturn his conviction. However, both the language and the context of Brown do not support its retrospective application. First, the decision in Brown was based on sufficiency of the evidence and not on the erroneous jury instruction. Secondly, the language in the opinion indicates an intent by the court that the instructional portion be prospective: "we conclude that it is prudent to abandon [the] instruction." Id. This court has already addressed the retroactivity of Brown and concluded that it does not "require invalidation of every first degree murder case wherein the jury has been instructed . . . that premeditation may be formed in an instant." State v. David Lee Richards, No. 03C01-9207-CR-230, Hamilton Co., 1993 WL 80536 (Tenn. Crim. App. Mar. 23, 1993), app. denied (Tenn. July 6, 1993); State v. William Paul Roberson, No. 01C01-9206-CC-00200, Putnam Co., 1993 WL 48850 (Tenn. Crim. App. Feb. 25, 1993), app. denied (Tenn. June 1, 1993); State v. Willie Bacon Jr., No. 1164, Hamilton Co., Slip Op. at 11, 1992 WL 183534 (Tenn. Crim. App. Aug. 4, 1992), app. denied (Tenn. Dec. 14, 1992). As this court has pointed out, abandonment of a confusing jury instruction does not necessarily mean that its previous use amounted to a due process violation. In other words, there may be trial errors which result in a reversal on direct appeal but do not implicate the fundamental constitutional rights which are pertinent to a post-conviction hearing. John Wayne Slate v. State, No. 03C01-9201-CR-00014, Sevier Co., WL 149170 at *4 (Tenn. Crim App. Apr. 27, 1994), app. denied (Tenn. Oct. 24, 1994) (concurring in results only).

INEFFECTIVE ASSISTANCE OF COUNSEL

A large portion of the petitioner's brief concentrates on his claim that his trial counsel was ineffective. On direct appeal, a general allegation of ineffective assistance was made consisting of three specific grounds. The Tennessee Supreme Court considered the trial counsel's alleged failures to investigate potential alibi witnesses, to effectively try the case, and to interpose motions for a judgment of acquittal at the proper times. Harbison, 704 S.W.2d at 319. The court found that the petitioner's attorneys rendered effective assistance under the standard of Baxter v. Rose, 523 S.W.2d 930, 936 Tenn. 1974).

Accepting the state's argument, the trial judge in this post-conviction proceeding found that the earlier determination on the issue of ineffective assistance was a bar to attempts to relitigate the issue even when raising different instances of counsel's incompetence or ineffectiveness. The post-conviction statute permits post-conviction petitions on all grounds "except those grounds which the court finds should be excluded because they have been waived or previously determined." Tenn. Code Ann. § 40-30-111 (1990) [repealed]. As discussed above, a ground is previously determined "if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." Tenn. Code Ann. § 40-30-112(a) (1990) [repealed]. Thus, a petitioner is not entitled to relitigate issues raised on direct appeal or in previous petitions for post-conviction relief. See State v. McClintock, 732 S.W.2d 268, 272 (Tenn. 1987). A ground is waived if "the petitioner knowingly and understandingly 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. § 40-30-112(b) (1990) [repealed]. A ground not raised in prior proceedings is rebuttably presumed to be waived. Tenn. Code Ann. § 40-30-112(b)(2) (1990) [repealed].

Several panels of this court have struggled with the issues of previous determination and waiver in the context of various incidents of ineffective assistance of counsel. When raising this Sixth Amendment claim, one panel of the court found that the failure to include certain incidents of ineffectiveness may bar their presentation at a later proceeding. John L. Bates v. State, No. 03C01-9208-CR--00279, Hamilton Co., 1993 WL 144618 (Tenn. Crim. App. May 6, 1993), app. denied, (Tenn. Nov. 1, 1993) (concurring in results only); William Edward Blake v. State, No. 03C01-9212-CR-00444, Knox Co., 1993 WL 310700 (Tenn. Crim. App. Aug. 17, 1993). However, in House v. State, 911 S.W.2d 705, 714 (Tenn. 1995), our supreme court stated:

We conclude that a “full and fair hearing” sufficient to support a finding of previous determination occurs if a petitioner is given the opportunity to present proof and argument on the petition for post-conviction relief. We further conclude that the rebuttable presumption of waiver is not overcome by an allegation that the petitioner did not personally and therefore, “knowingly and understandingly,” waive a ground for relief. Instead, waiver is to [be] determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney.

This means that regardless of whether we view different factual claims regarding ineffective assistance of counsel as separate grounds for relief for post-conviction purposes, the petitioner would be barred from raising them as grounds for relief at this time. Therefore, we conclude that the petitioner’s claims of ineffective assistance of counsel relative to his trial attorneys are waived. T.C.A. § 40-30-112(b)(2) (1990) [repealed].

However, what actually remains viable are the petitioner’s claims relating to his substitute counsel’s acts and omissions while representing the petitioner from the time of his motion for new trial through the direct appeal. It was this counsel who presented the ineffective assistance of trial counsel in that appeal. Because due process entitled the petitioner to the effective assistance of counsel in that appeal, see Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed.2d 821 (1985), the petitioner’s claims would still need to be addressed in terms of substitute counsel’s effectiveness in

failing to raise the various issues that have otherwise been deemed waived or previously determined. Thus, the petitioner's ineffective assistance of counsel claims must still be addressed in that context.

When the claim involves the effective assistance of counsel, this court must determine whether the advice given or services rendered by the attorney are "within the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's representation fell below the objective standard of Baxter and, additionally, that this representation prejudiced the defense. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed.2d 674 (1984). "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." State v. Melson, 772 S.W.2d 417, 419 (Tenn. 1989); Strickland, 466 U.S. at 686, 104 S. Ct. at 2064.

Initially, we note that a proper approach to this issue need not begin with an analysis of an attorney's conduct. If prejudice is not shown, it is unnecessary to determine the validity of the allegations regarding deficient performance. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The petitioner's first alleged incident of ineffectiveness is that trial counsel failed to obtain adequate expert assistance. He claims that it was essential that a psychological examination be conducted. The post-conviction hearing was the earliest time at which certain information regarding the petitioner's past surfaced. When he was about eight years old, he had a fourteen-year-old sister who murdered her two young children and then soon afterwards hanged herself in a state mental facility. Apparently, as a result of this incident, another sister developed mental problems that have been the cause of intermittent hospitalization since that time. Although the petitioner testified

at the post-conviction hearing that these tragic events affected him, he was unable to say how. In fact, there was no evidence presented at the post-conviction hearing suggesting that he was mentally unstable either at the time of the hearing or at any time in the past.

A clinical psychologist who interviewed the petitioner in 1990, some seven years after the offense, testified that the petitioner was below average in intelligence. He said that the petitioner would not have met the grounds for insanity for the trial, but that he did have concerns about the petitioner's competence to stand trial due to the difficulty the petitioner would have interacting with his attorneys and participating in his defense. Ultimately, though, he testified that he could not say that the petitioner was incompetent to stand trial at the time of the prosecution.

One of the petitioner's two trial attorneys testified that they found him to be sane and quite capable of conferring with them about the case.¹ Additionally, the evidence showed that the petitioner had worked steadily in several jobs prior to the crime and that he had obtained a large amount of legal knowledge by the time of the post-conviction hearing. This is indicative of the ability to comprehend fairly complex concepts. We conclude that the evidence does not preponderate against the trial court's finding that counsel was not ineffective in failing to obtain a psychological evaluation to determine sanity and competency.

Second, the petitioner asserts that his counsel should have procured an expert mineralogist to verify the results of the state's expert regarding the origins of vacuumings found in his car. The petitioner has failed to show how he was prejudiced by counsel's alleged error. There is no evidence that another mineralogist would have

¹ The petitioner's other trial attorney was deceased at the time of the post-conviction hearing.

concluded differently as to the particles found in the car or, if so, that such evidence would have affected the result of the trial. We conclude that this issue has no merit.

Third, the petitioner contends that his trial attorney failed to prepare and investigate for the motion to suppress regarding the confession he had given. The petitioner, who was questioned on two occasions, fully confessed during the second questioning. He contends that there was evidence that the police would not allow him to contact an attorney and that they pressured him with the threat of all-night questioning if he did not confess. Though the petitioner testified at the post-conviction hearing that he was held against his will and not allowed to talk to an attorney, this testimony was refuted by a detective who was present during both of the questionings. Additionally, the petitioner signed two Miranda waiver forms and stated in his confession that his rights had been read to him, that he understood them, and that no one had threatened him or promised him anything. It is doubtful that his trial counsel's preparation for the motion to suppress fell below the objective level of reasonable competence that our courts demand, but even if it did, we find that no prejudice occurred. Other than the petitioner's testimony, the evidence supports the trial court's finding that the petitioner's confession was given freely and voluntarily and that his trial counsel rendered effective assistance.

The petitioner's fourth allegation of ineffectiveness relates to his attorneys' lack of communication with him. He contends that his attorneys failed to discuss his theories of defense, particularly that his alibi defense was inconsistent with his confession. He also asserts that they did not inform him of the strategic risks of asserting one's innocence and then later trying to argue that the jury should not impose the death penalty on a defendant who, in the jury's eyes, lied to them. One trial attorney testified that he and his co-counsel did recognize the inconsistencies in the case and that they were aware of the potential conflict in the defense theory at trial and

then later at the sentencing hearing. However, he felt that his job as a lawyer was only to tell the petitioner that the defense was not a strong one, and, should it fail, the petitioner may well lose his credibility for the sentencing phase. At the post-conviction hearing, the trial court pointed out that the petitioner maintained that his alibi was true even at the post-conviction proceedings and commented that it was certainly not the attorneys' duty or right to create a more desirable and appropriate defense. We conclude that counsel rendered effective assistance.

Fifth, the petitioner asserts that his attorneys failed to make several important objections. He claims that his counsel should have objected to the presence of exhibits which sat in the courtroom throughout the entire trial and were never identified as coming from the victim's home. There was no testimony at the post-conviction hearing on this issue. Because most of the exhibits were properly identified and because we can find no evidence that the petitioner's case was prejudiced by the presence of those which were not, we conclude that this issue is without merit.

The petitioner claims that his defense counsel should have objected to certain evidence and argument showing victim impact. He refers specifically to testimony from the victim's husband that he auctioned off his home with everything in it thirty days after the murder. He also points to the prosecutor's closing argument which mentions the victim's loving friends, her husband left to spend his last days alone, and the brutal nature of the murder which caused the victim's brains to splatter on a wall twelve feet away from her body. The petitioner cited Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), which was decided the year after his case was affirmed by the Tennessee Supreme Court and certiorari was denied by the United States Supreme Court. Four years later, however, Booth was overruled by Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 2611, 115 L. Ed. 2d 720 (1991), where the Court held that the Eighth Amendment erects no per se bar to the admission of victim

impact evidence. Furthermore, those cases address the introduction of such evidence in the sentencing phase of a capital case. Here, the testimony and argument complained of occurred in the guilt phase of the proceedings. See State v. Cazes, 875 S.W.2d 253, 262 (Tenn. 1994) (pointing to the fact that victim impact proof occurred during the guilt phase of the proceedings as one basis for its admissibility). Finally, in light of the overwhelming proof adduced at trial, we find that the statements did not prejudice the defense even if somehow they were wrongfully considered by the jury.

The petitioner also argues that Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231(1985), was violated when defense counsel failed to object to the prosecution's statements that tended to diminish the jury's responsibility in imposing the death sentence. The holding in Caldwell is not retroactively applicable on collateral review. Sawyer v. Smith, 497 U.S. 227, 110 S. Ct. 2822, 2833, 111 L. Ed. 2d 93 (1990); Johnson v. State, 797 S.W.2d 578, 580 (Tenn. 1990). Moreover, the petitioner is only complaining about a few statements made during the closing argument. Even if they were improper, we find that the statements in their context could not have led the jury to believe that the responsibility for determining the appropriateness of defendant's sentence lay elsewhere. See, e.g., State v. West, 767 S.W.2d 387, 398-99 (Tenn. 1989).

The petitioner's sixth and final claim of ineffective assistance of counsel involves the sentencing phase of the trial. He contends that his trial attorneys failed adequately to investigate and present evidence of his troubled background. He argues that had his attorneys properly investigated his background, they would have seen a need for psychological evaluation for mitigation purposes. The petitioner's mother was the only witness at the sentencing phase of the petitioner's trial and her testimony focused on her view of the petitioner as a good son and a hard worker. In closing argument, the petitioner's attorney referred to the petitioner's lack of any prior criminal

history and his child-like demeanor. He also mentioned the fact that the petitioner did not take a weapon into the victim's home, suggesting that the murder was not planned by the petitioner.

Before the post-conviction hearing, counsel requested and was granted a psychological evaluation of the petitioner in order to assist the petitioner in showing how he was prejudiced by trial counsel's ineffectiveness. However, the trial court limited the evaluation to the petitioner's competency to stand trial and sanity at the time of the offense. At the post-conviction hearing, the evaluating psychologist testified that the petitioner did not meet the requirements of an insanity defense and was competent to stand trial. He stated that he was familiar with what was referred to as mitigation analysis, but added that none was performed because of the trial court's limitation of his evaluation. However, he did not explain what it entailed or what relevance it would have to the petitioner's sentencing. In any event, he concluded to a reasonable degree of psychological certainty that the petitioner is a follower rather than a leader and that it is unlikely that the petitioner would have instigated the offense. He also commented that the petitioner has difficulty understanding the long-range consequences of his actions.

At the post-conviction hearing, trial counsel admitted that he did not question the petitioner regarding the petitioner's psychological background or the psychological history of the petitioner's family. He admitted that had he known that the petitioner's sister killed her two children and subsequently hanged herself in a state mental facility, he would have requested a psychological evaluation for use at the sentencing phase. However, he added that there was never any indication that the petitioner was suffering from any mental defect that would have warranted his inquiry into the petitioner's background. Similarly, the petitioner's appellate counsel commented that the petitioner was difficult to deal with at times and was distrustful, but

that there was never any mention of any history of mental illness in the petitioner's family nor was there ever any indication that the petitioner suffered from a mental illness himself.

In State v. Cooper, 847 S.W.2d 521, 532-33 (Tenn. Crim. App. 1992), this court upheld a trial court's post-conviction remand of a death penalty case for resentencing due to counsel's ineffective assistance in the presentation of mitigating evidence concerning the petitioner's psychological background. In Cooper, a clinical psychologist and a psychiatrist evaluated the petitioner before the trial and both concluded that the petitioner was not legally insane. However, the psychiatrist diagnosed the petitioner as suffering from intermittent explosive disorder and the psychologist testified that the petitioner had an affective disorder that related to recurrent major depression over a long period of time. There was also evidence that the petitioner was under the influence of extreme mental or emotional disturbance and that he had attempted suicide numerous times. Nevertheless, the trial attorney did not pursue further investigation or analysis of the petitioner's mental state for use as mitigation at the sentencing phase of the trial. This court affirmed the post-conviction court's finding that "the trial attorney's investigation and preparation for the penalty phase did not meet the standard required by Baxter v. Rose." Id. at 532; see also State v. Adkins, 911 S.W.2d 334, 335 (Tenn. Crim. App. 1994), app. denied (Tenn. 1995) (counsel ineffective when failed to investigate or pursue information relating to capital defendant's abuse as child at hands of alcoholic father).

However, in this case, the trial attorneys had no indication that the petitioner was mentally ill at the time of the offense or incompetent to stand trial and, therefore, a psychological evaluation was not performed. The attorneys had no knowledge that the petitioner or his family had any history of mental illness. "There is no constitutional basis for a rule that would require a psychiatric evaluation in any

capital case.” Clanton v. Bair, 826 S.W. F.2d 1354, 1358 (4th Cir. 1987), cert. denied 484 U.S. 1036, 108 S. Ct. 762 (1988). In this respect, this case differs greatly from Cooper, because the attorneys never had any information which they failed to pursue or investigate adequately. Also different from Cooper is the fact that, in this case, the information of mental illness relates solely to the petitioner’s family and not directly to the petitioner himself. In fact, the petitioner’s testimony at the post-conviction hearing reflects a difficulty remembering his age at the time his sister killed her children and hanged herself. Also, the petitioner admitted that he did not know what effect, if any, his family’s history of mental illness may have had on him. Furthermore, petitioner’s appellate attorney recalled that the petitioner was difficult to deal with at times, but never gave him any indication of a history of mental illness precipitating any investigation into the petitioner’s background for appeal purposes. Finally, it is significant that after having been granted some psychological evaluation, the petitioner presented no evidence through the psychologist about what mitigation analysis could show had it been performed in this case. Therefore, we conclude that counsel’s actions at the sentencing phase did not fall below the objective standard of competency announced in Baxter.

Having found that trial counsel rendered effective assistance relating to the petitioner’s allegations, we conclude that petitioner has not been prejudiced by appellate counsel’s failure to raise any of these allegations on direct appeal. Therefore, appellate counsel was not ineffective.

RIGHT TO EXTENSIVE PSYCHOLOGICAL EXAMINATION

The petitioner’s next ground for post-conviction relief involves the trial court’s denial of an extensive psychological examination at the post-conviction stage. He argues that such an examination was necessary so that he could show prejudice on the issue of mitigation. In Teague v. State, 772 S.W.2d 915, 927 (Tenn. Crim. App.

1988), this court was confronted with a claim for investigative services in a post-conviction case, and concluded that Tennessee Supreme Court Rule 13, § 2.B(10) and Tenn. Code Ann. § 40-14-207(b), dealing with the provision of investigative and expert services in capital cases, apply only to the trial of an accused in a capital case and not to post-conviction cases. However, in Owens v. State, 908 S.W.2d 923 (Tenn. 1995), the Tennessee Supreme Court overruled Teague relative to the availability of expert services at the post-conviction stage in capital cases. In doing so, the court stated:

Considering the background and historical development of the various statutes at issue, we think that when the Legislature adopted subsection (b) of Tenn. Code Ann. § 40-14-207 in 1984, it intended for that provision to apply to post-conviction capital cases. . . . There is no specific limiting language within subsection (b) evidencing a legislative intent to limit its applicability to direct trial proceedings. Moreover, the provision was included within a statute dealing specifically with compensation and reimbursement of counsel. . . . It follows that the Legislature intended for the provision to apply to post-conviction capital cases. Otherwise, the provision would not have been included in a statute pertaining to a subject that was specifically incorporated by reference into the post-conviction statute - reimbursement of counsel.

Owens, 908 S.W.2d at 927-928.

As stated earlier, the trial court granted the petitioner's ex parte request for a psychological evaluation at the post-conviction stage but limited the evaluation to the petitioner's competency to stand trial and sanity at the time of the offense relative to the guilt phase. As a result, a clinical psychologist testified that the petitioner would not have met the requirements for an insanity defense and was competent at the time of the trial. However, a mitigation analysis was not performed.

In Owens, the supreme court warned that the application of T. C. A. § 40-14-207(b) to post-conviction capital cases "should not be interpreted as a 'blank check' requiring trial judges to hold ex parte hearings and authorize funds in every case" and stated that Supreme Court Rule 13, § 2.B(10) outlines the proper procedure for a request for expert services. Id. at 928. We note that, at the time of the petitioner's

post-conviction hearing, he would not have been entitled to the appointment of expert services under Teague. Furthermore, the petitioner's motion for expert services does not comply with Supreme Court Rule 13, § 2.B(10), because it fails to include: (1) how, when or where the examination is to be conducted, (2) the cost of the evaluation and report and (3) the cost of any other necessary services. See Supreme Court Rule 13, § 2.B(10)(b)-(d). Compliance with Rule 13, § 2.B(10) is a prerequisite to the trial court granting an ex parte hearing. Owens, 908 S.W.2d at 928. Nevertheless, the trial court in this case granted the petitioner an ex parte hearing and determined that the petitioner was entitled to expert assistance limited to the petitioner's sanity and competency.

Therefore, we must now address whether the trial court abused its discretion in denying the petitioner's request for expert assistance relative to mitigation. In order to receive expert services, the petitioner must demonstrate that the "services are necessary to ensure the protection of the petitioner's constitutional rights." Owens, 908 S.W.2d at 928. As Owens explains, "a petitioner must demonstrate by specific factual proof that the services of an expert or an investigator are necessary to establish a ground for post-conviction relief, and that the petitioner is unable to establish that ground for post-conviction relief by other available evidence." Id.

The decision to grant a request for expert services rests within the discretion of the trial court and will not be reversed on appeal unless there is a clear showing of an abuse of that discretion. Cazes, 875 S.W.2d at 261. However, we are precluded from addressing this issue due to the petitioner's failure to include a transcript of the ex parte proceedings and the subsequent motion hearing in the record on appeal. It is the duty of the petitioner to prepare a fair, accurate and complete record on appeal to enable meaningful appellate review. T.R.A.P. 24. In the absence of such a record, this issue is waived. State v. Oody, 823 S.W.2d 554, 559 (Tenn.

Crim. App. 1991). Furthermore, we conclude that because the petitioner has failed to show that either trial or appellate counsel's representation fell below the objective standard of competency provided in Baxter, any error that the post-conviction court may have committed in denying the petitioner an extensive evaluation is harmless.

JURY INSTRUCTIONS

The petitioner raises several issues concerning jury instructions. He contends that the trial court erred in instructing the jury not to consider sympathy in the sentencing decision. Our supreme court has upheld the "no-sympathy" instruction against constitutional attack on numerous occasions. See Cazes, 875 S.W.2d at 268; State v. Smith, 857 S.W.2d 1, 21 (Tenn. 1992). There is no merit to this issue.

The petitioner also contends that the trial court instructed the jury not to consider evidence of the circumstances under which his confession was obtained in violation of Crane v. Kentucky, 476 U.S. 683, 106 S. Ct. 2142, 2147, 90 L. Ed. 2d 636 (1986). In Crane, the court held that trial testimony regarding the circumstances surrounding a defendant's confession could not be excluded on the ground that the testimony pertained solely to the issue of voluntariness which had been previously resolved against the defendant in a pretrial ruling. Id. We agree with the state that the record does not support the petitioner's contention.

Under the heading of "[a]dmissions [a]gainst [i]nterest and [c]onfessions", the judge first charged the jury, "[i]t is also your duty to judge the truth of any such admission against interest or confession. In so judging, you should consider the circumstances under which the statement was obtained . . ." (emphasis added). Several sentences later, under the heading of "[c]onstitutional rights," the judge said, "[t]he jury will not endeavor to determine or consider whether constitutional rights were adhered to, or followed by police procedures, in the obtaining of any confession, or

physical evidence." When read together, these two instructions do not violate the holding in Crane in which the U.S. Supreme Court recognized:

(T)hat the circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual. The manner in which a statement was extracted is, of course, relevant to the purely legal question of its voluntariness, a question most, but not all, States assign to the trial judge alone to resolve. But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence.

Crane, 106 S. Ct. at 2145-46 (citations omitted). Our supreme court has held that "the admissibility of a confession is not a proper matter for submission to the jury, however, once admitted, the weight to be given a confession does become a matter for the jury's consideration." State v. Pursley, 550 S.W.2d 949, 950 (Tenn. 1977). The jury instructions given acknowledge that there are two distinct questions, one of which the jury must answer by considering the circumstances surrounding the petitioner's confession. This issue is without merit.

CONSTITUTIONAL CHALLENGES

The petitioner advances several arguments involving the constitutionality of Tennessee's statutory scheme. His first such assertion is that the felony murder statute, by eliminating the traditional common law and statutory elements of murder, is violative of his due process rights and the prohibition against cruel and unusual punishment. Our supreme court recently affirmed the constitutionality of our felony murder statute and therefore, the petitioner's complaint is without merit. State v. Middlebrooks, 840 S.W.2d 317, 337 (Tenn. 1992).

The petitioner's remaining issues relate to the constitutionality of the Tennessee death penalty statute. All of the arguments advanced by the petitioner have been repeatedly rejected by our supreme court. In a recent case, the supreme court found that it was unnecessary to elaborate as it addressed the constitutional issues

raised by a defendant which had been previously rejected by the court. Following this example, we find that it is unnecessary to discuss in detail the rationale behind those holdings as we are bound by the holdings of our supreme court. See Cazes, 875 S.W.2d at 268-69.

The petitioner's argument that the Tennessee statute provides no specific guidance as to which party has the burden of proving whether the mitigation outweighs the aggravation was rejected in State v. Boyd, 797 S.W.2d 589, 595-96, (Tenn. 1990), where the court said the statute, "clearly outlines where the burden of proof lies." See also State v. Thompson, 768 S.W.2d 239, 251-52 (Tenn.1989). The supreme court has also rejected the argument that the statute does not sufficiently limit the exercise of the jury's discretion once matters in aggravation are found, Smith, 857 S.W.2d at 22-23. Likewise, the supreme court found no merit in the argument that Tennessee's statute does not give the jury enough discretion by mandatorily requiring its members to impose the death penalty if they find that the aggravating circumstances outweigh the mitigating ones. Boyd, 797 S.W.2d at 596-97. In Smith, the court also addressed the petitioner's complaint that there is no requirement in the Tennessee statute that the jury make findings of fact as to the presence or absence of mitigating circumstances. Citing State v. Melson, 638 S.W.2d 342, 368 (Tenn. 1982), they disagreed with the contention that this asserted shortcoming prevents effective appellate review. Smith, 857 S.W.2d at 22.

Next, the petitioner raises several issues relating to what capital juries should be told in the charge to the jury. He points out that there is no requirement that the jury be instructed as to non-statutory mitigating circumstances. This, he contends, prevents the jury from giving the proper weight to those factors which are not specifically enumerated in the statute. The supreme court has repeatedly held that:

the only mandatory instructions with respect to mitigating circumstances are that those statutory circumstances which

are raised by the evidence shall be expressly charged, and the jury must be told that they shall weigh and consider any other facts or circumstances that are raised by the evidence that they find to be mitigating circumstances, in making the determination of which circumstances, aggravating or mitigating, outweigh the other.

Smith, 857 S.W.2d at 15, quoting State v. Hartman, 703 S.W.2d 106, 118 (Tenn. 1985).

The petitioner's next argument is that the jury should be told the effect of failing to reach a unanimous verdict. This has been addressed and repeatedly rejected by the supreme court. See Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 268. Lastly, the petitioner argues that the statute's failure to inform the jury of its ability to impose a life sentence out of mercy is a violation of the United States Constitution. That contention has also been rejected. Smith, 857 S.W.2d at 22.

In State v. Nichols, 877 S.W.2d 722, 737 (Tenn. 1994), our supreme court most recently rejected the petitioner's assertion that the imposition of the death penalty is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. See also State v. Black, 815 S.W.2d 166, 190-91 (Tenn. 1991). The next argument -- that the proportionality and arbitrariness review conducted by the Tennessee Supreme Court is constitutionally deficient -- was decided against the petitioner in State v. Groseclose, 615 S.W.2d 142, 150 (Tenn. 1981).

His final contention is that Tennessee's statute does not sufficiently narrow the population of defendants who are eligible for capital punishment. As an example, the petitioner refers to the situation where a defendant convicted of first degree felony murder can receive the death penalty with the underlying felony as the only aggravating circumstance. However, Middlebrooks, 840 S.W.2d at 346, addressed that situation finding that the felony murder aggravator cannot be used in that instance. Here, the jury found the petitioner guilty of premeditated and deliberate first-degree murder as well as felony murder. Therefore, as long as the premeditated and

deliberate first degree murder conviction stands, there is no constitutional barrier to the imposition of the death penalty.

In conclusion, the petitioner has not shown that the evidence preponderates against the trial court's findings and resulting determinations. The judgment of the trial court is affirmed.

PER CURIAM
(Scott, P.J., and Tipton, J.)
(White, J., not participating)