IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
July 9, 2013 Session

AKIL JAHI a.k.a. PRESTON CARTER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 28413 James. C. Beasley, Jr., Judge

No. W2011-02669-CCA-R3-PD - Filed March 13, 2014

The Petitioner, Akil Jahi a.k.a. Preston Carter, appeals the trial court's denial of post-conviction relief regarding his convictions for two counts of felony murder and sentences of death. The Petitioner contends that (1) he is intellectually disabled and, ineligible for the death penalty; (2) he received the ineffective assistance of counsel at both his original trial and resentencing hearing; (3) the death penalty is unconstitutional; and (4) the cumulative effect of all errors warrants relief. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JOSEPH M. TIPTON P.J., delivered the opinion of the Court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Peter C. Sales, David K. Taylor, Christopher E. Thorsen, and Heather H. Wright, Nashville, Tennessee, for the appellant, Akil Jahi a.k.a. Preston Carter.

Robert E. Cooper, Jr., Attorney General & Reporter; Nicholas W. Spangler, Assistant Attorney General; and Amy P. Weirich, District Attorney General; and John Campbell, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On January 25, 1995, the Petitioner pleaded guilty to two counts of felony murder during the perpetration of aggravated burglary and in a separate sentencing hearing, was sentenced to death. The Tennessee Supreme Court affirmed the Petitioner's convictions but reversed the sentences of death and remanded the case for a new sentencing hearing. See State v. Carter, 988 S.W.2d 145 (Tenn. 1999). The supreme court concluded that, because the verdict forms omitted the standard of beyond a reasonable doubt, the forms were illegal

and void. Id. at 153. At the resentencing hearing in February 2000, a jury again sentenced the Petitioner to death, and the Tennessee Supreme Court affirmed the sentences. See State v. Carter, 114 S.W.3d 895 (Tenn. 2003). The Petitioner filed a petition for post-conviction relief, which the trial court denied. This appeal followed.

BACKGROUND

The evidence presented during the 2000 resentencing hearing was summarized by the Tennessee Supreme Court on direct appeal:

> During the early morning hours of May 28, 1993, Carter, accompanied by Darnell Ivory and Louis Anderson, went to a Memphis apartment complex where Thomas and Tensia Jackson resided with their young daughter. . . . The three men were under the mistaken belief that the Jacksons' apartment was the residence of a drug dealer whom they intended to rob. Carter and Anderson knocked on the door of the Jacksons' apartment. Mr. Jackson came to the door but did not open it. Carter and Anderson asked Mr. Jackson "if he [had] anything." Mr. Jackson replied that he did not know what they were talking about, and he refused to open the door. The men quickly realized they had the wrong apartment. Nevertheless, after handing a sawed-off shotgun to Anderson, Carter kicked in the apartment door.
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> Carter and Anderson entered the Jacksons' apartment and demanded money. Mr. Jackson was told to call for his wife to "come out" and was forced into a closet. As Carter searched the apartment for money or drugs, Anderson raped Mrs. Jackson. According to Carter, Mr. Jackson came at him in an apparent attempt to defend his family. Carter admitted, however, that he shot Mr. Jackson while Mr. Jackson was crouching in his daughter's bedroom closet. Carter shot him at point-blank range with the sawed-off shotgun. Mr. Jackson's brain was literally blown out of his skull, and he died instantly. Next, Carter found Mrs. Jackson in the bathroom. She was clad only in a t-shirt, and she was screaming, "Please don't shoot me. I'll do anything. Please don't shoot." Ignoring her pleas to live, Carter shot Mrs. Jackson at close range as she lay on the bathroom floor. The shotgun pellets entered her left eye, and her brain exploded. She also died instantly.
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> Shortly before 4:00 a.m., three of Mr. Jackson's co-workers arrived at the Jacksons' apartment to pick him up for work at a local bakery. Among the co-workers were Mrs. Jackson's brother, Derrick Lott, and Thomas Jackson's brother, Kenneth Jackson. They found the front door to the Jacksons'

apartment kicked in and the master bedroom ransacked. Mr. Lott discovered the Jacksons' daughter lying in a pool of blood in the closet with her dead father. The child had not been physically injured.

On the evening of May 28, 1993, the date of the double homicide, Carter was arrested. He gave a statement to police admitting that he shot Mr. and Mrs. Jackson. The sawed-off shotgun Carter used was found in his apartment, and he admitted using this weapon to shoot the two victims.

In addition to proof regarding the circumstances of the murders, the State introduced evidence at the resentencing hearing that Carter had previously been convicted of aggravated robbery with a shotgun.

The State also presented victim impact evidence from two witnesses. Betty Mister, Tensia Jackson's mother, testified that she and her husband have custody of the Jacksons' daughter. Ms. Mister stated that [the Jacksons' daughter] misses her parents very much and wishes she could share her accomplishments with them. Ms. Mister explained that Thomas and Tensia Jackson had been high school sweethearts and that Mr. Jackson was "like a son of mine." Tensia and her mother shared a very close relationship. Ms. Mister told how Tensia, Ms. Mister's firstborn child, helped to care for her three younger siblings. Tensia Jackson's siblings were deeply affected by her death. According to Ms. Mister, Tensia was extremely close to her brother, Derrick Lott, and Tensia's death "tears him apart." Ms. Mister said that the Jacksons' deaths created a void, especially at family gatherings and holidays. She concluded, "You know, they are missing very much in our lives."

Kenneth Jackson, the second victim impact witness, was the older brother of Thomas Jackson. He had worked with his brother at the bakery, and they had carpooled to work each morning. Kenneth Jackson was present when the bodies of Thomas and Tensia Jackson were discovered. He testified that Thomas and Tensia "were just in love with each other." He described Thomas as a beautiful, good-hearted man who had never been to jail or to "a club." According to Kenneth Jackson, Thomas's main priority had been his wife and his daughter.

In mitigation, Carter presented the testimony of Dr. Joseph Charles Angelillo, a clinical psychologist. Dr. Angelillo interviewed Carter prior to the re-sentencing hearing, reviewed background materials such as Carter's school records and interviews with Carter's friends and family, and administered three

tests to Carter. Dr. Angelillo testified that the first test, the Wechsler Adult Intelligence Scale, revealed that Carter had a full scale IQ of 78, which was described as being in the "borderline range." Scores below the "borderline" indicate mild retardation. The second test, the Woodstock Johnson Test of Achievement, measures a person's current knowledge. This test showed Carter's proficiency in mathematical calculations at grade level 7.3, in applied mathematics at grade 5.8, in verbal encoding at grade 7.6, and in reading comprehension at grade 11, with a broad scale reading score at the seventh grade level. The third test, the Millon Clinical Multiaxial Inventory, Third Edition, a personality test, showed that Carter has "generalized anxiety disorder" and obsessive-compulsive personality traits. This test also showed that Carter has histrionic personality features, typified by a dramatic and shallow personality and difficulty empathizing with others. According to this test, Carter also possesses schizotypal personality features characteristic of persons who prefer solitude and exhibit eccentric behavior and beliefs. On cross-examination, Dr. Angelillo conceded that Carter is not mentally retarded.

The next witness was Carter, who testified that he had gone through the eighth grade in school and that at the time of resentencing he was twenty-nine years of age and had three children-two boys, eight and seven years old, and a girl, aged nine. He stated that he married in March of 2000 and that his wife visits him in prison on a weekly basis. Carter testified that he had been drinking alcohol and using marijuana all day prior to the double homicide and that he retrieved the sawed-off shotgun from his apartment when he, Anderson, and Ivory decided to commit a robbery. He admitted killing Mr. and Mrs. Jackson, but he asserted that he did not intend to kill anyone when he first went to the apartment. Carter conceded, however, that he knew very soon after he arrived at the Jacksons' residence that he was at the wrong apartment but that he nonetheless decided to rob the victims.

Carter stated that he did not know why he murdered the Jacksons, and he asked for forgiveness from the victims' families. Carter testified that he had changed since his former days of "just drinking and using drugs and taking things that I wanted." As a result, Carter legally changed his name to "Akil Jahi." "Akil," he explained, means "one who uses reason," and "Jahi" means "dignity." Carter testified that his years in prison taught him "how precious life is," how to "respect other people and respect authority," and "how to love and [have] compassion toward people." He thinks about the Jacksons all the time, and he asked to be permitted to help others avoid doing what he had done. He has had no disciplinary problems while on death row and missed

passing the G.E.D. exam by a single point. He writes poetry and participates in twice-weekly Christian worship services. On cross-examination, Carter admitted that he had been convicted of breaking into and burglarizing a vehicle in 1991 and that he was on probation for a theft conviction when he murdered the Jacksons.

Two employees of the Riverbend Maximum Security Institution, where Carter is on death row, also testified. Brenda K. Morrison, the Inmate Relations Coordinator, testified that Carter poses no disciplinary problems. According to Ms. Morrison, Carter achieved the least restrictive security rating in the shortest possible time. Ms. Morrison described Carter as being "very helpful." In her opinion, Carter "would not have a problem fitting in with the general [prison] population [if a sentence of life were returned]." The second witness, Cheryl Donaldson, a counselor for death row inmates, had daily interaction with Carter for over four years when he worked in an area near her office. Ms. Donaldson testified that Carter never exhibited any violent tendencies and she found him to be trustworthy.

The final mitigation witness was the Reverend Melita Padilla, an ordained United Methodist minister. Ms. Padilla began visiting Carter in 1996 when she was a student at Vanderbilt Divinity School. She visited Carter in prison on a regular basis as part of a program for visitation with death row prisoners. Carter initiated the visitation by placing his name on a list of inmates wishing to receive religious visitors. Ms. Padilla testified that she saw Carter grow as a person, both spiritually and intellectually, during their acquaintance. She read into evidence a letter that Carter had written to her.

Based on this proof, the jury found that the State had proven beyond a reasonable doubt the following two aggravating circumstances applicable to the murders of both Thomas and Tensia Jackson: "The defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person" and "The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." Tenn. Code Ann. § 39-13-204(i)(2),(5) (1991 & Supp. 1993). In addition, the jury found that the State had proven that the aggravating circumstances outweighed any

mitigating circumstances beyond a reasonable doubt. As a result, the jury sentenced Carter to death on both counts.

Carter, 114 S.W.3d at 898-901 (footnote omitted).

POST-CONVICTION HEARING

Original counsel testified that he was appointed to represent the Petitioner in the capital case and in an unrelated charge involving the aggravated robbery of a MAPCO convenience store. He was a prosecutor for eight years until 1991, during which time he prosecuted several capital cases. At the time of the Petitioner's trial, 95% of original counsel's practice was criminal defense. He had twenty-five to fifty felony cases and many misdemeanor cases in one year and was in court most days of the week. He did not know whether he had defended any capital cases before his appointment to the Petitioner's case. He could not recall whether he had attended any capital case seminars before the Petitioner's trial.

Original counsel testified that he initially was appointed as co-counsel but that after lead counsel became sick and had to withdraw, he was appointed as lead counsel. The trial court then appointed original co-counsel, who was appointed when the case had already been set for trial. Original co-counsel wanted it understood that because he was appointed late in the case, he did not want the responsibility of additional preparation other than the tasks that needed to be completed before the trial. Original counsel said original co-counsel's role was not supposed to be that of "elbow" counsel. Original counsel believed that the term elbow counsel suggested that the attorney was not involved in the case but was just "sitting there." He said that while original co-counsel understood that he would have a limited role, he did not understand that original co-counsel's role would be limited. Rather, he believed they were equally responsible.

Original counsel testified that the trial only involved the penalty phase. He examined all the witnesses during the penalty phase but asked original co-counsel to examine some witnesses during the trial. Original co-counsel responded, "Let me defer to you because you're doing such a good job."

Original counsel testified that he took the case involving the prior MAPCO aggravated robbery charge to trial because he had no other option. He explained that the State wanted to use a conviction in the MAPCO robbery as an aggravating circumstance in the capital case. He realized that any plea would have a negative impact on the capital case, and he did not believe he could settle the case. Original counsel had "heated" discussions with the

prosecutor in an attempt to convince the prosecutor not to rely upon any conviction for the MAPCO aggravated robbery in the capital case.

Original counsel testified that the Petitioner said he was drinking alcohol heavily at the time of the MAPCO robbery, was a heavy drinker, and used drugs such as marijuana. He spoke to the Petitioner's family about him but did not know when these conversations occurred. He noted that the Petitioner's girlfriend followed the case. He did not recall considering intoxication as a defense in the MAPCO aggravated robbery and did not recall that the facts were sufficient to support the defense.

Original counsel testified that he had the Petitioner evaluated by a mental health expert, who determined that the Petitioner's IQ was 75. He did not know when he had the Petitioner evaluated. He never believed that the Petitioner's intellectual functioning was an issue at the MAPCO aggravated robbery trial. When original counsel was asked whether he would have presented an intoxication defense during the MAPCO trial if he were aware that the Petitioner had low intellect and was drinking heavily before the MAPCO aggravated robbery, original counsel said he could not recall an intoxication defense ever being successful. At the time, he did not believe that it was a viable defense. He did not have the Petitioner evaluated by a neuropsychologist or consult any expert in preparing for the MAPCO trial. He did not recall considering a diminished capacity defense in the MAPCO trial.

Original counsel testified that he was certain that he visited the MAPCO that the Petitioner was accused of robbing as his practice was to visit the crime scenes. He did not recall that the police officers asked the Petitioner whether he robbed a MAPCO located on Tuhulahoma and Shelby Drive and that the Petitioner denied doing so. He did not recall whether the MAPCO that the Petitioner robbed was located at Tchulahoma and Winchester, approximately two and one-half miles away. He said that if the prosecutor argued regarding "robbery B" that the Petitioner denied committing "robbery A," he could have objected. He had no independent recollection regarding the argument.

Original counsel testified that he did not have a conflict of interest in representing the Petitioner in the capital case when he received notice of the State's intention to rely upon the Petitioner's conviction in the MAPCO aggravated robbery as an aggravating circumstance. He did not consult with anyone regarding his representation of the Petitioner in both cases. He did not inform the trial judge that there may have been an issue with his representing the Petitioner in both cases.

Original counsel was questioned regarding whether he should have presented some of the circumstances of the MAPCO aggravated robbery during the penalty phase of the

Petitioner's trial to mitigate the prior violent felony aggravating circumstance. He explained that every attorney must exercise some discretion in determining whether evidence will benefit the client's case. He said attorneys disagreed whether such evidence would be beneficial.

Original counsel did not recall whether he had used experts before using them in the Petitioner's case. He said Dr. Fred Steinberg was asked to evaluate the Petitioner's competency, his mental status at the time of the offenses, and his intellectual functioning. He acknowledged that Dr. Steinberg's report stated that the reason for the referral was to determine the Petitioner's competency for consideration of the death penalty. Original counsel, however, was certain that he requested that Dr. Steinberg examine any mental issues that would assist them in defending the Petitioner.

Original counsel testified that Dr. Steinberg found that the Petitioner had an IQ of 75. He assumed that both counsel met with Dr. Steinberg to discuss the relationship between the Petitioner's IQ and his social history, but he did not recall any meeting with Dr. Steinberg. He did not contact any organizations or experts in development disabilities or intellectual disability. He did not recall any conversations with Dr. Steinberg or original co-counsel regarding the need for a neuropsychologist. Also, he did not contact anyone to assess the Petitioner's possible deficits in adaptive behavior and did not recall anything in the Petitioner's background indicating intellectual disability before the age of eighteen.

Original counsel testified that he did not consider retaining an expert in substance abuse and addiction. He acknowledged that the Petitioner said he had been drinking alcohol heavily and had been smoking marijuana laced with cocaine in the hours before the murders.

Original counsel testified that according to his fee claim form, he met with the Petitioner in January 1994, February, March, July, September, and November. He met with the Petitioner's family on January 22, 1995, and the trial began on January 23, 1995. He said he met with the Petitioner's family on more than one occasion. The Petitioner had a girlfriend who remained close to him and a sister. Original counsel met with the Petitioner's mother, Viola Benson, and his grandmother. He said he and the Petitioner discussed at length the Petitioner's family members and the roles that each played in his life. He was unaware of the Petitioner's mother's intellectual functioning. He was unsure whether he met MacArthur Carter, the Petitioner's biological father, or whether he was aware of Mr. Carter's intellectual functioning. He said he met one father but did not know whether he met Mr. Carter or Arthur Benson, the Petitioner's stepfather.

Original counsel did not have any independent recollection of information about the Petitioner's childhood. He said that while he could have been aware of the death of Michael

Benson, the Petitioner's brother, he did not recall. He said he could have been aware that Vanessa Benson, the Petitioner's sister, had sickle cell disease. He also said he could have been aware of the discipline imposed within the Petitioner's home when he was a child. He did not recall the details of the divorce between the Petitioner's mother and stepfather but recalled that the Petitioner's grandmother assisted in his upbringing.

Original counsel did not recall whether he obtained the Petitioner's school records. He said that while obtaining school records is now a standard practice in capital cases, he was unsure whether it was the standard at the time of the Petitioner's trial. He did not recall whether the Petitioner was enrolled in special education classes or his reading comprehension and believed that the Petitioner was a relatively intelligent person. He was sure that he was aware that the Petitioner had an eighth-grade education. He did not recall, though, whether he knew that a number of the Petitioner's paternal and maternal relatives had alcohol and drug problems. He said that such evidence could be presented to the jury as mitigation evidence under the right circumstances.

Original counsel testified that the State refused to settle the case for a life sentence. Rather, the Petitioner entered an open-ended plea, and a sentencing hearing was held. At some point, counsel discussed the possibility of entering a guilty plea in order to limit the evidence that the State would introduce and to lessen the impact of that evidence. He said that the facts of the case were graphic. He believed that if the Petitioner entered a plea, the State may have only been allowed to introduce limited testimony for the purpose of the penalty phase and that the Petitioner would have had a chance to avoid the death penalty. Counsel said that as a result of the plea, they were able to limit the State's proof significantly during the penalty phase. He believed that the trial would last one week to ten days, but the penalty phase only lasted "a couple of days."

Original counsel testified that before the Petitioner entered the plea, counsel recommended that they go forward with the guilt phase. He explained that some attorneys believed that if a client pleaded not guilty, the jury would be required to work hard to try to find him not guilty. The jury might then give the defendant some consideration during the penalty phase and impose a life sentence. Counsel explained that other attorneys believed that if the amount of evidence can be limited, the limitation may be beneficial to the defendant during the penalty phase.

Original counsel testified that while preparing for the trial, he advised the Petitioner against pleading guilty and told him that they should go forward with the guilt phase. The Petitioner, however, stated he wanted to plead guilty. The Petitioner said he liked the strategy and wanted to use it. Original counsel stated that he attempted to persuade the Petitioner against entering a plea but that the Petitioner wished to plead guilty. He did not

recall how quickly the Petitioner decided to enter the plea. He said that the Petitioner insisted he enter the plea and that it was the Petitioner's decision to do so. Counsel believed that the Petitioner decided to enter the plea following voir dire. He said that until the Petitioner told the trial judge that he wanted to enter a plea, original counsel did not know whether he was going to do so or whether they were going forward with the guilt phase. Counsel said this uncertainty likely was the reason that he did not address the plea while questioning the jury during voir dire.

Original counsel testified that they and the prosecution disagreed regarding the offenses to which the Petitioner was entering a plea. The prosecution wanted the Petitioner to enter a plea to all counts in the indictment. Original counsel wanted him to enter a plea to felony murder and not premeditated murder, and the prosecution ultimately agreed. He said the trial court reviewed extensively with the Petitioner his rights and determined whether he knew what he was doing. The trial court also placed some limitation on the State regarding the evidence that it could present during the penalty phase.

Original counsel did not recall discussing with the Petitioner the possibility of withdrawing the plea after the trial court refused to exclude all evidence regarding the felony murder aggravating circumstance that the State wished to present. He explained that another reason for the plea was to establish acceptance of responsibility and remorse. He said the Petitioner was likeable and was well liked by his family. He also said that people who knew the Petitioner were shocked that he could have committed the offenses. He felt that if this evidence was presented during the penalty phase, the jury would consider imposing a life sentence.

When questioned whether the Petitioner seemed depressed, original counsel testified, "He was charged with capital murder, looking at the death penalty. That depresses everybody." He did not research the Petitioner's background to determine whether the depression was just the result of being charged with a capital offense. He did not recall having knowledge of whether the Petitioner had a history of depression.

Original counsel believed he discussed with Dr. Steinberg the issue of whether the Petitioner's brain functioning was impaired on the night of the murders. He said nothing in the defense's investigation established that the Petitioner was impaired on the night of the murders. He did not recall advising the Petitioner of the concept of diminished capacity, and he had not raised the issue in previous cases. He considered raising intoxication as a mitigating factor but not as a defense during the guilt phase.

Original counsel did not know why Dr. Steinberg did not include a discussion regarding the Petitioner's mental state at the time of the offenses in his report. He met with

Dr. Steinberg and informed him of the circumstances of the case, the defenses, and everything that he knew about the Petitioner. He asked Dr. Steinberg to provide him with any information that would assist him in defending the Petitioner. He said he could have asked Dr. Steinberg at the time of the evaluation about the Petitioner's mental state at the time of the offenses. He explained, "He's the doctor. I'm going to rely on him." Counsel did not investigate the Petitioner's cognitive abilities and ability to maintain employment. He testified that at the time of the trial, he was aware of the Petitioner's life situation in the months and weeks leading up to the offenses. He was certain that the Petitioner informed him that his girlfriend and children were going to be evicted from their home.

Original counsel testified that he was attentive to media coverage of the case. He identified an article from the *Tristate Defender*, a smaller publication in town. According to the article, the reporter interviewed the Petitioner and possibly a codefendant while they were in jail. The Petitioner discussed his involvement in the murders. Original counsel said he would have instructed the Petitioner not to talk to the media.

On cross-examination, original counsel testified that he believed he had a good relationship with the Petitioner. The Petitioner was cooperative in every respect. Following the trial, he received a letter that the Petitioner wrote to the Tennessee Board of Professional Responsibility in which he asserted that original counsel forced him to plead guilty. Counsel was "shocked" by the letter because he believed that he and the Petitioner had a good relationship.

Original counsel testified that when discussing the case with the Petitioner, he never got the impression that the Petitioner was unable to recall the events or provide counsel with information. During the course of his practice, original counsel had advised individuals who had a limited education. He said defendants with an IQ of 75 were not unusual. He said he discussed the case with the Petitioner every time they met. He said they met during every court appearance at a room in the courtroom where lawyers meet with their clients.

Original counsel testified that on the night of the murders, the Petitioner had been drinking heavily and smoking marijuana. The Petitioner, however, was able to recall what had occurred. He never denied that he was the shooter and identified a codefendant as the person who raped Mrs. Jackson. The Petitioner stated the shooting began after Mr. Jackson came at him with a knife. The Petitioner shot Mr. Jackson.

Original counsel testified what when he retained an expert, he relied upon the expert to complete the tasks within that expert's expertise. He said he gave Dr. Steinberg an open-ended request and wanted to know whether Dr. Steinberg could provide him any information that he could use to persuade the jury not to impose the death penalty. Dr. Steinberg never

told him that the Petitioner was intellectually disabled. He said he relied upon Dr. Steinberg to provide his professional opinion about the Petitioner's mental state and abilities. He said that had Dr. Steinberg told him another expert was necessary, he would have followed up on the information. Absent such a recommendation by Dr. Steinberg, he did not have any information to use to persuade the court to provide funds for an additional expert. Counsel explained that at the time of the Petitioner's case, judges would not grant funds for any expert that counsel wished to retain. Rather, trial judges routinely denied requests for funds for experts, including mitigation specialists.

Original counsel testified that if the Petitioner had not entered a guilty plea and the guilt phase of the trial had gone forward, the jury likely would have found the Petitioner guilty. The Petitioner confessed to the murders. One of the codefendants was going to testify against the Petitioner, and the State was prepared to present photographs of the "horrific" crime scene. The toddler was found in the closet with her dead father, and she was splattered in blood. There was evidence suggesting that the blood on the toddler came from her father when he was shot with the shotgun. Counsel stated that as a result of the plea, the State introduced less evidence than it would have introduced had the case proceeded to the guilt phase.

Original counsel believed that the Petitioner had a chance of avoiding the death penalty if he pleaded guilty and showed remorse to the jury. The jury would have needed to see the same Petitioner who counsel saw, a somewhat likeable person. Original counsel said he addressed the possibility of pleading guilty with the Petitioner before trial and discussed it with him on several occasions. The State would not offer any settlement of the case.

Original counsel testified that while he and original co-counsel attempted to persuade the Petitioner not to enter a guilty plea, the Petitioner decided otherwise. During the plea hearing, the trial court questioned the Petitioner regarding his understanding of the plea. Original counsel believed that the Petitioner understood his actions. He said that if he had believed that the Petitioner did not understand what he was doing or that the Petitioner was basing his decision to enter the plea on some other factor, he would have brought the information to the trial court's attention. Counsel stated that if he believed the Petitioner did not understand the consequences of his plea, he could not have proceeded with the plea.

Original counsel did not recall discussing the plea with the Petitioner's family but believed he did so. He advised the Petitioner's family that if they did not attend the trial and help the Petitioner, he would receive the death penalty. He said that the relatives upon whom the Petitioner wanted to rely refused to cooperate. One of the relatives said that if his name appeared in the newspaper as testifying in the case, he would lose his job. Original counsel did not want to force someone to attend the trial if that person refused to cooperate. Original

counsel said that someone whose testimony he believed would be helpful, such as the Petitioner's mother or grandmother, refused to attend and that either his father or step-father refused to attend trial.

On redirect examination, original counsel testified that he did not consider "front loading" the mitigation during the guilt phase. He was provided the Petitioner's statement and challenged it during a suppression hearing. He was certain that he gave the Petitioner legal documents to read. He did not recall whether the Petitioner could read the documents. Counsel reviewed the Petitioner's confession with him word for word to ensure that the Petitioner made the statements. He said the Petitioner understood the concept of felony murder.

Original counsel testified that those who were intellectually disabled or in the borderline range attempted to please others. Counsel was aware of the concept of masking where the person acts more knowledgeable than he or she is. He found the Petitioner to be cooperative. He acknowledged that being cooperative could be a characteristic of someone with low intelligence and said he previously had been around those who exhibited such a characteristic. He never got the impression, though, that the Petitioner was trying to please him. He acknowledged that behavior of becoming "fixed" on a point and not changing was a characteristic of borderline intelligence.

Original counsel testified that while the trial court allowed the State to introduce evidence of the offenses during the penalty phase, the proof was limited in terms of the number of witnesses who testified and the type of evidence entered. A number of photographs from the crime scene were not presented, and counsel could not recall if extensive testimony regarding the crime scene was presented. He did not recall the codefendants testifying during the penalty phase. He said the purpose of entering the plea was not only to limit the State's testimony but to also establish acceptance of responsibility. Counsel acknowledged that the alcohol and marijuana laced with cocaine may have affected the Petitioner's memory of the events. When the jury was chosen, he was not certain whether the Petitioner would enter a plea or decide to go forward with the guilt phase. He said he did not seek a continuance to discuss the options thoroughly with the Petitioner because he believed they previously discussed them thoroughly.

Original counsel testified that he would be hesitant to introduce evidence blaming the Petitioner's alcohol use rather than establishing acceptance of responsibility. He believed the jurors would be more sympathetic if they believed the Petitioner was accepting responsibility for his conduct and was truly remorseful. He said evidence of alcohol abuse before the homicides and acceptance of responsibility may or may not have been contradictory positions.

On recross-examination, original counsel testified that despite his advice that the Petitioner go forward with the trial, the Petitioner made up his own mind to enter the plea. He did not recall whether he or the Petitioner did not want the plea to reflect convictions for premeditated murder. Original counsel believed that the Petitioner should enter pleas to felony murder rather than premeditated murder. The Petitioner also avoided any conviction related to the rape. He said that the Petitioner insisted that he was not involved in the rape of Mrs. Jackson and that the State had no evidence of his involvement in the rape.

In response to questions by the post-conviction court, original counsel testified that he would not have allowed the plea to go forward if he believed that the Petitioner did not understand it. He was prepared to go to trial and had concluded that going forward with the trial was his best strategy. Counsel explained that his strategy during the guilt phase would have been to limit the Petitioner's association with the rape. He also would have attempted to mitigate the Petitioner's conduct because he was under the influence and the homicides were "triggered" by the rape. The Petitioner maintained that the plan was to rob the victims and leave. Original counsel explained that when the Petitioner discovered his codefendant raping Mrs. Jackson, it "triggered" something in him, and he shot Mr. Jackson after Mr. Jackson became aggressive toward him. Counsel further explained that the Petitioner shot Mr. Jackson in self-defense after Mr. Jackson came toward him with a knife. He did not know why the Petitioner shot Mrs. Jackson.

Original counsel testified that he did not know how his representation of the Petitioner in both the MAPCO aggravated robbery case and the capital case resulted in a conflict. He noted that a common strategy by the State was to try first the prior violent felony upon which it intended to rely in establishing an aggravating circumstance. He stated that although he objected and fought this decision, the State had been employing this practice for years.

Original counsel testified that the Petitioner's case was the only case in which he participated that the State refused to make an offer. He said he approached the prosecutor on approximately twelve occasions in an attempt to persuade him to reach a settlement. He explained that he attempted to convince the State to offer a life sentence because he believed that the jury would impose a death sentence. He said that the facts of the Petitioner's case were one of the worst that he had defended.

Original co-counsel testified that he had been practicing law since October 1979. During his career, he had practiced primarily in the area of criminal defense. At the time of the Petitioner's case, he had approximately fifty cases in different stages. Shortly after graduating from law school, he represented a defendant in a capital case. He represented at least two additional capital defendants before he was appointed to represent the Petitioner.

Original co-counsel did not recall the date he was appointed to represent the Petitioner but did not dispute the information in the trial record that he was appointed on November 23, 1994. He stated that Judge Joseph Dailey contacted him regarding the case and requested him to serve as co-counsel. Original co-counsel stated that he agreed to the appointment only if he were allowed to state on the record that he had not conducted his own investigation or prepared the case in a manner in which co-counsel normally was expected to do. He said Judge Dailey allowed him to state the information on the record.

Original co-counsel testified that he was appointed approximately one and one-half months before the trial. He acknowledged that he was not prepared to fulfill the duties normally required of co-counsel. He noted that approximately 90% of the work on the case had been completed before his appointment. Judge Dailey stated during a hearing that he did not expect original co-counsel to reinvestigate the case but only expected him to assist original counsel. Original co-counsel said he considered his role to be that of "elbow counsel." He stated he wanted to help Judge Dailey because Judge Dailey felt that the case needed to be tried and because co-counsel had to withdraw shortly before the trial. Original co-counsel did not feel that accepting the appointment was improper, stating that Judge Dailey would not have requested that he accept the appointment if it had been improper. He recalled that Judge Jon Kerry Blackwood presided at the trial, but he was unaware of why Judge Blackwood did so.

Original co-counsel testified that he reviewed the discovery materials and familiarized himself with the facts of the case. He attempted to familiarize himself with the case as much as possible on such short notice and to assist original lead counsel. He said he did not have any contact with previous co-counsel. He did not recall having any responsibilities at the trial or examining any witnesses. He assisted and advised original counsel. He stated that they discussed the strategy during the trial but that he did not recall original counsel requesting that he complete any tasks before trial.

Any motions were filed before original co-counsel was appointed. He recalled that he was present during a pretrial hearing and thought the hearing may have involved the defense's motion to suppress. He did not recall having any role in preparing for the hearing. He said he likely discussed the motion with original counsel on the day of the hearing but did not have any specific recollection of the discussion.

Original co-counsel testified that he did not recall any discussions with original counsel regarding a plea offer but that they would have discussed it if such an offer had been made. He did not recall a meeting with the prosecutors regarding a plea offer. He did not recall that the Petitioner's conviction for aggravated robbery of a MAPCO service station was relied upon by the State as an aggravating circumstance and did not recall any

discussions with original counsel regarding the conviction. He also did not recall whether he was aware that original counsel had represented the Petitioner at the MAPCO robbery trial and whether original counsel's representation at that trial was an issue.

Original co-counsel testified that he did not believe he examined the State's physical evidence. He did not recall any investigation regarding the bloody clothing that the victims' child was wearing when she was discovered. He also did not recall whether he knew that a rape kit had been performed on Mrs. Jackson. He said that original lead counsel would have conducted any investigation regarding the rape kit.

Original co-counsel testified that on the day of trial, he and original counsel discussed the strategy of the Petitioner pleading guilty and then asking the jury not to impose the death penalty. He said that original counsel believed they should employ this strategy and that he did not disagree with counsel. He stated that the evidence of guilt was overwhelming and that the Petitioner had given a full confession. They believed that the wisest strategy was to have the Petitioner admit that he was wrong and to ask the jury to spare his life. They also believed that the Petitioner's pleading guilty could prevent some of the "hard facts" from being presented to the jury. Original co-counsel noted that the State presented these facts during the sentencing hearing anyway. He believed that the jury would credit the Petitioner for admitting he was wrong and that he was ready to serve the rest of his life in prison for his actions and that, as a result, the jury would not impose the death penalty.

Original co-counsel testified that the Petitioner was very mild-mannered, stoic, calm, and laid back. He did not recall the Petitioner expressing any emotion during their meetings. The trial court described the Petitioner in the Rule 12 report as "passive and unemotional," and he agreed with this assessment.

Original co-counsel did not recall any information regarding the Petitioner's intellectual ability. He was aware of the intellectual disability "exemption" for the death penalty and was sure that he and original counsel discussed it at some point. He did not recall Dr. Fred Steinberg's testimony or that Dr. Steinberg administered the WAIS-R and found the Petitioner to have a full-scale IQ of 75. He stated that had he been aware of this information, he would have had the mitigation expert gather all records of prior IQ tests and school records to determine whether the Petitioner had any lower IQ scores in the past. If lower scores existed, he would have presented evidence and expert testimony indicating that the IQ score of 75 was an aberration and that the Petitioner's true IQ was lower. He acknowledged that he also would need an expert to conduct adaptive skills testing to determine if the Petitioner had deficits in adaptive skills, as well as evidence that the deficits and low IQ manifested prior to the age of eighteen. At the time of the trial, he was unaware

of the concept of standard error of measurement. He was familiar with adjusting IQ scores based upon the Flynn Effect.

Original co-counsel did not recall any discussions with original counsel regarding whether to request Dr. Steinberg conduct any further evaluations in addition to the competency evaluation. While original co-counsel recalled a discussion that the Petitioner was under the influence at the time of the offenses, he did not recall discussing the hiring of an expert on substance abuse with original counsel.

Original co-counsel testified that he believed he was effective as "elbow counsel." He did not know whether he was effective in handling a death penalty case because he did not conduct any investigation and did not take an active role in representing the Petitioner. He believed his performance in the role in which the judge requested that he take was "fine." He acknowledged he did not complete the tasks that generally are completed by co-counsel in a capital case. He agreed that a defendant in a death penalty case is entitled to two full-time attorneys working on the case as best they can.

Original co-counsel testified that after the Tennessee Supreme Court reversed the death sentence, the trial court appointed new counsel. He did not recall any specific contact with new counsel regarding the case. He did not believe he could have offered substantial assistance to the new counsel based upon his limited role in the case. He stated that if he spoke to new counsel, they would have discussed the facts of the case.

On cross-examination, original co-counsel testified that he and original counsel discussed the decision to enter a plea before the Petitioner did so. He was certain that they also discussed the decision with the Petitioner. He said the decision to enter the plea was that of the Petitioner, and he was certain that the trial court questioned the Petitioner regarding his decision to plead guilty. Co-counsel stated that the strategy in pleading guilty was based upon the "nasty" facts of the case. He also believed that the jury would show the Petitioner mercy if he admitted that he was wrong.

Original co-counsel testified that by the time he was appointed to the case, original counsel had represented the Petitioner for some time. He recalled that original counsel had completed the investigation and was ready for trial.

Resentencing counsel testified that he and resentencing co-counsel represented the Petitioner in his resentencing hearing in 2000. He had been licensed to practice law since 1984. Since 1990, approximately 75% of his practice had been criminal defense. At the time that he represented the Petitioner, he was in court on felony cases on a daily basis. He estimated that during that time, he had approximately thirty felony cases and a similar

number of cases in general sessions courts. He had represented defendants in multiple capital cases but did not know how many capital cases he had defended before he represented the Petitioner. On January 20, 2000, shortly before the Petitioner's resentencing hearing, he tried a case where the defendant was charged with first degree murder and armed robbery. At the time that he represented the Petitioner, he had attended a capital case seminar in Nashville.

Resentencing counsel testified that he was appointed to represent the Petitioner on March 16, 1999. He believed he spoke to prior counsel following his appointment but did not recall their conversation. He also believed resentencing co-counsel saw all of the documents or information that resentencing counsel received. He said he and resentencing co-counsel shared information on the case. He did not recall how they divided the work. He said they were both responsible for the sentencing hearing.

Resentencing counsel testified that according to his fee claim, he first contacted the Petitioner by telephone on April 19, 1999. He visited the Petitioner at the Shelby County Jail on April 23. His next visit with the Petitioner listed on the fee claim was on December 21, 1999. Based upon the information listed on the fee claim, he believed the visit occurred at Riverbend in Nashville. He noted that some of the time listed on the fee claim for trial preparation on February 13 and 14, 2000, could have involved meetings with the Petitioner.

Resentencing counsel testified that he was certain he met with the Petitioner's family members. He acknowledged that he did not list a meeting with family members on his fee claim but stated the meeting could have been included on the fee claim under witness preparation and interviews.

Resentencing counsel did not recall reading the transcript of the 1995 hearing but noted that according to his fee claim, he did so. He did not recall whether he reviewed the transcript of the MAPCO aggravated robbery trial. He knew that original counsel represented the Petitioner in the capital case in 1995, but he did not know whether he was aware original counsel represented the Petitioner in the aggravated robbery trial. He did not recall any discussion regarding a conflict of interest.

Resentencing counsel testified that they filed a motion in limine to prohibit testimony regarding the underlying facts of the MAPCO aggravated robbery, the conviction used to establish the prior violent felony circumstance. He wanted to prevent the jury from knowing that the Petitioner used a shotgun to rob the MAPCO. He acknowledged it was possible to present evidence that the Petitioner laid the shotgun on the counter, took candy for his children for lunch the following day, and prevented his codefendant from taking the clerk elsewhere. He said, however, that he did not believe it was in the Petitioner's best interest

to "dwell" on his robbing a MAPCO with a shotgun when he used a shotgun to kill the victims. Counsel did not know why he questioned the Petitioner regarding the MAPCO robbery after he filed the motion in limine. He said the decision may have been made after the trial court denied the motion.

Resentencing counsel also filed a motion requesting the trial court to instruct the jury on the availability of life without parole as a sentencing option. He was unsure whether he was aware at the time that the Petitioner was not eligible for that sentence. He believed the request was appropriate regardless of whether the Petitioner was eligible for a sentence of life without parole. He also filed a motion in limine seeking to prohibit the introduction of victim impact evidence. These motions were filed on the first day of the sentencing trial.

Resentencing counsel testified that he retained Inquisitor, Inc. ("Inquisitor") to investigate the Petitioner's case. He met with the investigators and discussed a possible issue of intellectual disability. He did not recall any issues obtaining funds to retain Inquisitor. He identified a letter to him from Danese Banks with Inquisitor stating that she had been advised that because there would not be a guilt/innocence phase in the trial, the Administrative Office of the Courts ("AOC") would not grant the full amount of funds requested. Counsel did not dispute the information in the affidavit enclosed with the letter that on April 15, 1999, he requested Inquisitor's assistance in conducting a mitigation investigation. The affidavit stated that they initially had requested funds to conduct both a guilt/innocence and mitigation investigation but that the affidavit amended the previous affidavit to limit the funding request to a mitigation investigation.

Resentencing counsel did not recall any issues regarding a lack of communication between him and Inquisitor. He also did not recall that the original trial date was August 23, 1999, and that the trial was continued to February 2000. Counsel said he requested that someone from Inquisitor draft an amended order approving funds for services. He explained that the investigators with Inquisitor had requested funds on a number of occasions and were familiar with the AOC's procedures and that the information that was required to be included in the orders.

Resentencing counsel testified that on September 9, 1999, Ron Lax with Inquisitor sent him a letter stating that although he understood that the amended order approving funds had been filed with the AOC in May 1999, Mr. Lax learned that this was not the case. Mr. Lax was concerned that unless the order was approved quickly, they may not have time to complete their investigation. Mr. Lax's letter stated that the amended order had been in resentencing counsel's office for some months but had not been sent to the AOC for approval. Resentencing counsel could not explain why the order was not sent to the AOC in a timely manner and said any failure to do so was an "oversight." Mr. Lax also stated in

the letter that Inquisitor typically did not draft orders and that he believed that it was inappropriate for them to do so. Counsel did not understand Mr. Lax's concern. The order approving the funds for Inquisitor was entered on September 15, 1999.

Resentencing counsel testified that according to a memorandum prepared by Mr. Lax on October 28, 1999, Mr. Lax had problems contacting resentencing counsel and receiving a response from him. Julie Hackenmiller sent resentencing counsel a letter that stated that she did not receive a telephone call from him as scheduled. Counsel did not recall any failure to return her telephone calls but had no reason to dispute the information in the letter. Ms. Hackenmiller sent a letter to both counsel stating that she called resentencing counsel's office and requested a meeting through his assistant. According to the letter, resentencing counsel never returned her telephone call. Counsel did not dispute the information in an in-house memorandum from Ms. Hackenmiller dated January 25, 2000, which stated that she received a call from resentencing counsel's secretary canceling a meeting scheduled on January 21 and that the meeting was not rescheduled.

Resentencing counsel testified that Mr. Lax sent a letter to both counsel stating that Ms. Hackenmiller informed them in December that the funds were depleted. Inquisitor prepared an affidavit requesting additional funds and forwarded it to resentencing counsel on January 7, 2000. The letter stated that due to Mr. Lax's personal guarantee to the trial judge that the mitigation investigation would be completed for the trial, Inquisitor continued with the investigation without the funds. Mr. Lax was concerned that as of January 25, the affidavit was still in resentencing counsel's office and that the order had not been prepared and presented to the trial judge. Counsel did not dispute that the affidavit remained in his office and did not have an explanation for the delay. On February 2, resentencing counsel sent a letter to the trial judge by facsimile enclosing an order granting the additional funds.

Resentencing counsel testified that he understood that the Petitioner and his codefendants had been up all evening before the offenses consuming various drugs and alcohol and were intoxicated at the time of the offenses. Counsel acknowledged that the Petitioner's consumption of alcohol and drugs before committing the offenses would be an appropriate issue for Inquisitor to have investigated. Counsel also acknowledged that according to Ms. Banks's summary of the case, one of the issues to be developed was the Petitioner's state of mind and whether he was intoxicated at the time of the offenses.

Resentencing counsel testified that in conducting a mitigation investigation, substance abuse on either side of the defendant's family is important as it may have impacted the defendant. He explained that a genetic loading for susceptibility to addiction could be possible if there is a history of substance abuse in the family. Counsel identified a memorandum prepared by Ms. Hackenmiller regarding her interview with the Petitioner's

mother and Melvin Hyde. The Petitioner's mother was known by Viola Benson when the Petitioner was young, and Mr. Hyde was her husband at the time of the resentencing hearing. Counsel acknowledged that the memorandum mentioned a number of the Petitioner's relatives who had problems with alcohol and substance abuse. He also acknowledged that it would be appropriate to supply a psychological expert or an addictionologist with the information. Counsel stated evidence of extensive criminal behavior in a defendant's family could establish that the defendant was influenced by family members to engage in criminal activity.

Resentencing counsel identified a memorandum from Ms. Hackenmiller regarding a telephone conference with both counsel on January 4, 2000. According to the memorandum, they discussed the immediate need to obtain a clinical neuropsychologist to evaluate the Petitioner. Counsel decided that they did not want to involve an addiction specialist or pharmacologist because they believed that they should not address the night of the offenses. Resentencing counsel did not recall why he did not want to involve an addiction specialist. He also did not know why they did not want to address the night of the offenses or how they could have avoided addressing that night.

Resentencing counsel did not remember who contacted Dr. Joseph Angelillo and believed that resentencing co-counsel may have done so. He did not recall directing Dr. Angelillo not to evaluate the Petitioner with regard to his mental state at the time of the offenses. He could not think of any reason that he would not want Dr. Angelillo to examine the Petitioner regarding his mental state at the time of the offenses. He identified a letter from the trial judge to resentencing co-counsel dated January 27, 2000, stating that the trial judge reviewed the motion for funds for a mental examination and would approve the disbursement only if he was assured that the evaluation would be completed by the February 14 trial date. Counsel was unable to explain why funds for a mental examination were not sought until approximately eighteen days before the trial.

Resentencing counsel testified that he characterized the Petitioner as a "raving maniac" during his opening statement because the Petitioner was "acting outside himself." He was acting due to the drugs and alcohol that he had consumed. Counsel testified that based upon the circumstances of the case, it would be appropriate to have the jury consider that the Petitioner was totally out of control due to drugs and alcohol and not acting as he would have been absent the drugs and alcohol. During opening statements, he also referred to the Petitioner's lifestyle at the time of the offenses. He stated that the Petitioner's drug and alcohol use evolved over a considerable period of time and that the Petitioner and his codefendants devised a plan to rob drug dealers for drugs and money.

Resentencing counsel testified that he was unaware whether the Petitioner was in the "throes of addiction" when the offense occurred. While there was evidence that the Petitioner was under the influence of drugs and alcohol at the time of the offenses, counsel did not know whether such evidence supported the conclusion that the Petitioner had an addiction. He did not consider whether the Petitioner had an addiction to be of real significance. Rather, he considered the Petitioner's actual intoxication at the time of the offenses to be important. He explained that "whether it was a long term addiction or whether it was something that just happened one time, if it just happened just that evening, the fact of the matter is that [the offenses were] driven by his mental state at the time [that resulted from] the drugs and alcohol." He was unaware of any strategy in telling the jury that the defense stipulated to all the aggravating circumstances, that there were no mitigating circumstances, and that alcohol was not a factor.

Resentencing counsel argued in closing arguments that there was no evidence that the Petitioner's childhood was bad and that the Petitioner's actions were that of a "mad person." He explained that he made this argument to establish that the Petitioner was acting out of character and that the offenses would not have occurred had he not been consuming drugs and alcohol.

Resentencing counsel testified that he admitted to the jury that evidence of the heinous, atrocious, or cruel aggravating circumstance existed. He believed that from the lay person's point of view, evidence of the existence of this aggravating circumstance was clear. He did not believe that arguing to the jury that the evidence was otherwise would have been beneficial to the Petitioner.

Resentencing counsel testified that one of the themes of mitigation was that while the Petitioner had committed bad acts, he had turned his life around in prison. Counsel acknowledged that correspondence from Inquisitor on January 7, 2000, indicated the need for a "prison expert." He did not recall discussing a prison expert and was unsure what a prison expert was. Rather, he wanted to present witnesses who were familiar with the Petitioner's conduct while incarcerated and any problems that he may have encountered. Pastor Melita Padilla, a minister who had extensive contact with the Petitioner, testified during the resentencing hearing regarding how the Petitioner had changed since the offenses. Resentencing counsel explained that the defense was attempting to establish that the Petitioner was not the same person that he was when he committed the offenses. They also were attempting to establish the Petitioner's exemplary prison record and his remorse.

Resentencing counsel testified that on February 7, 2000, Ms. Hackenmiller informed someone from his office that he needed to call Pastor Padilla. Pastor Padilla was upset because her calls to resentencing counsel had not been returned and she was forced to appear

in court on a date that conflicted with her schedule. Counsel did not recall not returning Pastor Padilla's telephone calls. On February 9, Pastor Padilla called and left a message. She was upset because she had called counsel's office numerous times. She stated she had questions regarding her testimony. Counsel did not know when he spoke to Pastor Padilla.

Resentencing counsel testified that he did not know to whom he was referring when he informed the trial court at the conclusion of the State's proof that there were several out-of-town witnesses whom the investigator had interviewed but that he had not yet done so. He said he may have been referring to Pastor Padilla and the employees from Riverbend. He did not know when he interviewed the witnesses from Riverbend. He did not recall waiting until after the State concluded its proof to speak to any witnesses.

Resentencing counsel testified that he and co-counsel discussed the Petitioner testifying at the hearing and his need to improve his expression of remorse and emotion. He said the Petitioner did not come across well regarding his feeling about the offenses. He wanted the Petitioner to cry when he testified. He described the offenses as "sad" and noted that a three-year-old child was present when her parents were killed. He wanted the Petitioner to convey to the jury how sorry he was that the child was left without parents. The Petitioner, however, would only say that he had no explanation for what had occurred. He did not come across as being sorry for what had happened to the victims. Counsel said the defense's position was that the Petitioner had changed and was sorry for the offenses.

Resentencing counsel was unaware of case law allowing him to call the Petitioner to testify for the limited purpose of mitigation and prohibiting the State from cross-examining him on the facts of the offenses. He did not know of any reason to ask the Petitioner whether he was on a "crime spree." He did not recall whether he questioned the Petitioner regarding the alcohol and drugs that he consumed before the offenses occurred. Counsel said he may have questioned the Petitioner about his employment and education. He explained that questions regarding the Petitioner's employment were designed to make the Petitioner seem more human to the jury rather than the way that the Petitioner acted in committing the offenses. The Petitioner responded that he worked at temporary jobs and in landscaping. Counsel did not know why he stated that in his experience almost every defendant connected with drugs had worked in either construction or landscaping and then asked the Petitioner whether a connection between the two existed. Counsel also knew of no reason to comment that maybe those who reported such jobs knew that they could not be verified and then asking the Petitioner whether he worked regular hours.

Resentencing counsel questioned the Petitioner regarding his plan to rob drug dealers. He said he was unaware of whether the Petitioner had the mental ability to plan. He said he and the Petitioner discussed his testimony before counsel called him to testify and that he was

aware of what the Petitioner's answer would be when he asked that question. Counsel did not recall the amount of time that he spent with the Petitioner in preparing him for his testimony. He wanted the Petitioner to tell the jury his mental state at the time of the offenses and explained that if the Petitioner did not know what the plan was, he was that much more intoxicated and did not know why he would do what he did. Counsel stated that although he did not retain an addiction expert because he wanted to stay away from the facts, he questioned the Petitioner regarding the events. He stated that his decision to question the Petitioner regarding the facts was dependent upon what evidence the State had presented.

Resentencing counsel agreed with the trial court's statement in its report prepared pursuant to Tennessee Supreme Court Rule 12 describing the Petitioner as "passive and unemotional." Counsel said he wanted the Petitioner to show more emotion than he was willing to exhibit. His questions to the Petitioner regarding his conduct were an attempt to have the Petitioner show the jury that he would not have acted in such a manner had he not been under the influence of drugs or alcohol. Counsel stated the Petitioner did not appear to have the ability to express remorse. He believed that the Petitioner would have demonstrated to the victims' child how sorry he was for the offenses and for the fact that she did not have any parents. The Petitioner, however, was unemotional.

Resentencing counsel testified that the State essentially asked the jury to do the same thing that the Petitioner was accused of doing. While accusing the Petitioner of taking the lives of two people, the State also was asking that the jury take the Petitioner's life. Counsel said he attempted to compare the State's actions in deliberately seeking death with the Petitioner's actions in deliberately killing the victims. He was aware that the Petitioner did not plead guilty to premeditated murder.

Resentencing counsel testified that subpoenas were issued for the Petitioner's mother; Vanessa Benson, the Petitioner's half-sister; and Mamie Watkins, the Petitioner's girlfriend. He did not remember whether he planned to call these witnesses to testify. He also did not know why he would have had subpoenas issued for these witnesses unless the subpoenas were necessary due to the witnesses' employment or other obligations. He said he was reluctant to call a witness on the Petitioner's behalf if a subpoena had to be issued to secure the presence of that witness. He believed that the subpoenas were issued for the convenience of the potential witnesses. While resentencing counsel did not recall who was called to testify on the Petitioner's behalf during the 2000 resentencing hearing, he said he and resentencing co-counsel discussed the matter and identified certain family members to testify on the Petitioner's behalf.

Resentencing counsel testified that counsel wanted the Petitioner's mother to be in the courtroom during the resentencing hearing. They did not want to call her to testify because

they did not believe that her testimony would benefit the Petitioner. Counsel did not recall the reason for their belief. He recalled that The Petitioner's mother would have testified that the Petitioner had a relatively normal childhood. He wanted to determine whether the Petitioner was raised in an environment that would have explained why he engaged in the conduct for which he was found guilty. He said he wanted family members in the courtroom for the jury to see that the Petitioner had loved ones who cared for him.

Resentencing counsel did not recall the Petitioner's mother's background or her intellectual functioning. He did not know what information the defense had regarding MacArthur Carter, the Petitioner's biological father. As the Petitioner grew older, he began associating with the wrong crowd and became involved in drugs. Counsel believed that he was aware that the Petitioner's brother, Michael, was killed in a train accident when the Petitioner was a child. He did not recall what conclusions counsel reached regarding the effect of Michael's death on the Petitioner. He was also aware that the Petitioner's sister, Vanessa, had sickle cell disease and would have known at the time of the Petitioner's resentencing hearing that Vanessa had to be taken to the hospital on numerous occasions. He did not know whether he was aware that the Petitioner attempted to care for Vanessa, took her to their car when she was transported to the hospital, and helped her with her medicine. He said such information could be mitigating evidence.

Resentencing counsel testified that he would have reviewed the Petitioner's school records and would have been familiar with the Petitioner's educational background and level of completion. He would have been aware that the Petitioner's mother and Arthur Benson, the Petitioner's stepfather, divorced when the Petitioner was in the eighth grade. He acknowledged that in some instances, children are affected by divorce, but he was unaware of how the divorce affected the Petitioner. He did not remember where the Petitioner lived following the divorce. He stated that at the time of the resentencing hearing, he would have been aware of when the Petitioner's drug and alcohol abuse began and its progression. He knew that a number of the Petitioner's relatives had criminal records, including arrests related to drugs and alcohol.

Resentencing counsel testified that he would have been provided with Dr. Fred Steinberg's evaluation of the Petitioner in 1995. Dr. Steinberg administered the WAIS-R and found that the Petitioner had an IQ score of 75. Counsel had no explanation for not wanting to develop the Petitioner's limited intellectual functioning and consumption of alcohol and drugs prior to the offenses as a mitigation theme.

Resentencing counsel testified that Patsy Webber was retained as a jury consultant. He did not recall any discussion regarding a jury questionnaire but believed he and co-counsel would have discussed preparing and distributing a questionnaire. He did not recall

any issues arising that prevented them from distributing the jury questionnaire to the prospective jurors until the first day of the trial.

Resentencing counsel testified that he was certain that he and co-counsel discussed which prospective jurors to strike from the panel and why. He said that while he had the final say as lead counsel, his decision was not to override the decision of co-counsel or the Petitioner. Rather, they discussed each juror and stated their thoughts regarding each juror. If they disagreed with his assessment, he might have gone along with them. He said the Petitioner fully participated in the jury selection process.

Resentencing counsel testified that he did not make a conscious decision to develop the theme of remorse and the Petitioner's plea of guilty during voir dire. He did not see any reason to tell the jury that the Petitioner was on death row. The goal of the defense was to convince the jury that death was not appropriate.

On cross-examination, resentencing counsel testified that he reviewed the transcript of the Petitioner's first trial in 1995 to determine what proof had been presented. He reviewed the testimony of the witnesses presented by the State and the evidence that the State presented to establish the aggravating circumstances. He did not recall prior counsel's strategy at the trial. He and co-counsel divided responsibilities and discussed strategy. He believed they retained Inquisitor because co-counsel was familiar with the company. They met with the investigators and reviewed their reports.

Resentencing counsel testified that he believed he and the Petitioner had a good working relationship. He described the facts as the "worst I've ever seen" and said that determining how to address those facts was a challenge. He decided to portray the Petitioner's conduct as committed by someone who was "deranged." Counsel said, "The facts were so bad. And they put those pictures in showing the victims in this case and talked about the child, and it was just a horrendous situation." Rather than attempt to minimize the facts, he decided to take the opposite approach, arguing that there had been enough "killing" in the case and that another "killing" was not necessary. He argued, "The State shouldn't be in the killing business."

Resentencing counsel testified that he intended to present evidence regarding how the Petitioner had changed while in prison. He presented a number of prison guards from Riverbend as witnesses, and they all had very good opinions of the Petitioner. The investigators interviewed a number of prison guards, and he did not recall anyone who had negative views of the Petitioner. The Petitioner had been promoted to a trusted position in a very short period of time. He was a janitor and was given access to the different pods. Before the resentencing hearing, he was promoted to data entry. Counsel said he argued that

even though the Petitioner would spend the rest of his life in prison, he could be a benefit to society due to his changed circumstances and his work with other inmates. Evidence was presented that the Petitioner was participating in Bible study with other inmates.

Resentencing counsel testified that he attempted to present letters that the Petitioner had written to Pastor Padilla. During a hearing outside the presence of the jury, the trial court ruled that Pastor Padilla could read only one letter. Counsel disagreed with the trial court's ruling and did not believe that the trial court's concern about time should have been an issue.

Resentencing counsel testified that according to a memorandum from Ms. Hackenmiller dated January 14, 2000, she contacted multiple mental health experts who declined to be involved in the case. Dr. Pusakalich stated that since IQ testing had been administered, he did not feel that additional IQ testing was necessary. Dr. Hutson and Dr. Wyatt Nichols also were mentioned in the memorandum.

Resentencing counsel believed co-counsel contacted Dr. Angelillo. They deferred to Dr. Angelillo's opinion and provided him with the information that they had available. Counsel said that had Dr. Angelillo suggested that the Petitioner undergo additional testing, he did not know whether he would have requested a continuance. He stated that a request for a continuance seemed to be the appropriate action to take but did not know whether he would have requested a continuance under the circumstances of this case. He explained that the Petitioner's conduct was so bad, he did not "think the jury would give a darn about anything other than what happened that night." Counsel stated that he believed they called Dr. Angelillo to testify because they needed "to cover our tails." He said, "I don't think it makes a whole—in the situation that we were facing in this particular case, with this proof, and the graphic pictures that what have you, these people didn't care."

Resentencing counsel testified the Petitioner's failure to show emotion was a problem. The Petitioner did not seem to know how to appear remorseful. Counsel attempted to push the Petitioner at the trial to show emotion. Before the Petitioner testified, counsel reviewed the Petitioner's testimony with him and explained to him that counsel would be hard on him during direct examination. Counsel wanted the Petitioner to admit to what occurred because if he failed to do so, the jury would believe that the Petitioner still did not "get" it. Counsel also wanted to "take some of the wind out of the prosecutor's sails" during cross-examination. He discussed with the Petitioner the fact that the prosecutor would be hard on him on cross-examination. Part of counsel's strategy was to be hard on the Petitioner also.

Resentencing counsel believed he and co-counsel did everything that they could to try to save the Petitioner's life given the circumstances of the offenses. He acknowledged that

there may have been instances when investigators or others attempted to contact him and he was unavailable. He believed, however, that he was prepared for the case.

Resentencing counsel testified that he had a limited budget because the trial court set out the amount of money that he could spend. He also had a limited amount of time to complete the investigation before the resentencing hearing. He said he did not think that tasks should be completed when he did not believe the tasks would help them on the case. He said that otherwise, he still could be investigating the Petitioner's case. He stated that although a number of different experts and witnesses could have been presented,

> the jury's not stupid. These people are looking at not the law, they're looking at the facts. And they want you to tell them something that makes sense. So, I mean, I guess we could have—a lot of other things that could have been done. But I didn't think that it was going to change anything in this case."

Resentencing counsel testified that nothing in the Petitioner's background was so "horrendous" to explain the Petitioner's actions in committing the offenses. He did not believe testimony that a family member was killed in a train accident would have been beneficial based upon the facts of the case. He learned from the Petitioner's family that the Petitioner did not begin to associate with the wrong crowd, drink alcohol, and smoke marijuana until he was fifteen or sixteen years old. Counsel said that the combination of the Petitioner's association with this group of people and his alcohol and drug use created a "combustible" situation whether "things just went crazy." He did not believe the Petitioner would have committed the offenses had he not associated with this group and consumed alcohol and drugs through the night and into the morning hours, and he attempted to persuade the jury of this.

Resentencing counsel testified that he did not retain an addiction specialist because the issue was not that the Petitioner was addicted to alcohol and drugs but that he had consumed alcohol and drugs on the night of the offenses. He explained that the important issue was the Petitioner's state of mind at the time the offenses occurred. He said he attempted to explain to the jury why the offenses, especially given that the victims were not the original targets. Counsel stated that he had

> to talk to [the jury] like they've got some sense. Talking to them about he had a drug addiction or he didn't go to the 8th grade or what have you. They don't care. They want to know why you killed these innocent people. Now, I know from an academic point of view, experts have got opinions, and there's no limit to where you can go with that. These people don't care about that. They're lay people. They want somebody to tell them why this man did what

> he did, just like I tried to get Mr. Carter to tell that little girl. And then, you've got to explain to them that this society, we don't need to engage in the same conduct that we are here to punish Mr. Carter for. Killing him makes us like him. That's the same thing he did.

On redirect examination, resentencing counsel testified that co-counsel prepared for the expert testimony and that no conscious decision was made not to call a specific expert. Rather, counsel did not believe that under the circumstances of the case that the expert testimony would have affected the jury's decision. He stated he did not believe any expert testimony regarding the Petitioner's drug addiction would have made "a hill of beans" to the jury. Rather, he believed it was important to emphasize the drugs and alcohol that the Petitioner had consumed on the night of the offenses. Counsel was unaware that Dr. Angelillo was not asked to evaluate the Petitioner regarding his mental state at the time of the offenses.

Resentencing counsel testified that he generally would meet with an expert and discuss the facts of the case. He also would listen to everyone's opinion regarding the best approach under the circumstances. He said the expert was responsible for informing counsel what information that he or she would need. He also said the expert should have as much information about the defendant as possible. He stated that if counsel did not retain a neuropsychologist, they decided not to do so because they believed it would not benefit the Petitioner's case based upon the facts and circumstances. Counsel did not believe evidence regarding the Petitioner's intellectual level and ability to comprehend would have affected the jury's verdict. He did not consider any possible effect that drugs and alcohol would have on a brain that did not function properly.

Resentencing counsel acknowledged that the death of a brother could have long-lasting effects on a sibling. He said retaining an expert to explain those effects would be appropriate if he had decided to pursue that strategy. Although he did not recall making a conscious decision regarding that strategy, he did not believe that such a strategy would have affected the jury's verdict.

Although resentencing counsel was not aware of case law allowing him to call the Petitioner to testify for a limited purpose, he did not believe he would have conducted his direct examination of the Petitioner differently regardless. He stated that in light of the evidence that had been presented at that time, he believed the more practical approach when viewed from a juror's prospective would have been for the Petitioner to accept responsibility for his conduct and attempt to explain that the conduct was not typical and that he had changed. Counsel also stated that addressing the offenses was not necessarily a last-minute change in strategy but was an adjustment based upon the evidence presented by the State.

He said that if the trial court had granted his motion in limine and prevented the State from presenting some of the horrific photographs, his strategy would have been somewhat different. Because the evidence was placed before the jury, however, he believed that he needed to address it.

Resentencing counsel testified that he discussed the Petitioner's testimony with him. He explained to the Petitioner what his approach would be and what the Petitioner could expect while on the witness stand. Counsel said he likely did not explain to the Petitioner that he planned to call the Petitioner a "raving maniac" because he likely did not anticipate that he would use that term. He did not know whether he informed the Petitioner that he planned to walk him through the steps of the offenses. He likely did not tell the Petitioner that he would stipulate to the aggravating circumstances. He said that while the Petitioner cooperated with him, he did not know that the Petitioner seemed willing to please him.

Resentencing counsel testified that he would have wanted to present evidence in an attempt to share the culpability with the Petitioner's codefendant because the codefendant perpetrated the rape. Counsel did not know what was stated during the hearing about the codefendant. He said he had the Petitioner's statement to the police and could have argued some exercise of control or dominance of the codefendant in directing the Petitioner's activities.

Resentencing counsel testified that before the Petitioner's resentencing hearing in February 2000, he had a jury trial that lasted from January 20 to January 25, 2000. He said the trial could have been the reason for his inability to return telephone calls during that time period. He did not recall that he was pressed for time in preparing for the Petitioner's resentencing hearing. He believed the defense team had completed the necessary preparations for the hearing and were prepared to go forward with the hearing.

Resentencing co-counsel testified that he had practiced law since 1993, when he went to work for original co-counsel, who was also his cousin. He no longer worked for original co-counsel when he was appointed to represent the Petitioner for the resentencing hearing in 2000. When he represented the Petitioner, the majority of his practice was criminal defense. He had developed his own practice and was accepting appointments in federal and state courts. He estimated that he was representing defendants in approximately twenty other felony cases at the time that he represented the Petitioner.

When questioned regarding his failure to object to the State informing the jury that the case involved a resentencing hearing, resentencing co-counsel testified that he did not remember the statement being made but that he would have wanted to keep the information from the jury. He said that on some occasions, the decision was made not to object because

the damage had been done and any objection would highlight the statement. He did not know if this was the situation.

Resentencing co-counsel testified that the Petitioner's case was his first capital case. He attended capital case seminars when he represented the Petitioner. He stated that if resentencing counsel was appointed in February 1999, he would have been appointed shortly thereafter. He acknowledged that according to his timesheets, he began working on the case on March 3 and 4, 1999 and that the order of appointment was entered on March 15, 1999. He stated that while they worked together, resentencing counsel was in charge of the process. They met and discussed those tasks that needed to be completed. Counsel asked him to complete certain tasks. He said that to the best of his recollection, he and resentencing counsel discussed the case on a frequent basis. He assumed that they shared any documents that they received. He believed that the investigators with Inquisitor sent any documents that they received to both counsel.

Resentencing co-counsel did not specifically recall whether he received prior counsel's files but stated that it was his practice to request the files. He acknowledged that there were documents from the previous trial in his files. He was sure that he discussed the 1995 trial with prior counsel. He also believed that he read the transcript of the 1995 proceedings.

Resentencing co-counsel did not recall Judge Blackwood, the trial judge, indicating that he wanted to try the case sooner than later. He identified a letter from the judge to defense counsel and the prosecutor stating that the case would take three days to try and that the judge wanted to try the case in August 1999.

Resentencing co-counsel did not recall drafting the pleadings. He acknowledged that he signed three pretrial motions, including a motion in limine to prohibit testimony regarding the underlying facts of the crime used to establish the prior violent felony aggravating circumstance. He did not recall whether he filed a motion requesting an instruction on life without parole. He stated that at some point, the law changed in Tennessee providing for a punishment of life without parole, but he did not recall whether the Petitioner was subject to a sentence of life without parole. He did not recall whether he and resentencing counsel discussed filing a motion for a change of venue but stated that they would have discussed the subject.

Resentencing co-counsel testified that when he met with the Petitioner, the Petitioner was not interested in a sentence of life or life without parole. Rather, he was only interested in the fact that he was going to receive the death penalty. Co-counsel did not know whether the Petitioner believed that life without parole was a possible sentence in his case. He

vaguely recalled a discussion with the prosecution of a possible settlement. The State made no offer other than death. The prosecutor told counsel that the Petitioner received the death penalty during the first sentencing hearing and that the State would attempt to persuade the jury to impose the death penalty during the resentencing hearing.

Resentencing co-counsel did not recall that Sheila Anderson informed the police of the homicides or that she was investigated by the defense team. He assumed that the State provided the "probable cause sheet" in discovery that said officers were acting upon information that they received from Ms. Anderson when they arrested the Petitioner. He identified the transcript of codefendant Louis Anderson's guilty plea hearing on June 23, 1995, during which the prosecutor stated that based upon Mr. Anderson's instructions, a concerned citizen called the police and reported those who had committed the homicides. According to the transcript, Mr. Anderson received a forty-year sentence to be served as a Range II offender. The prosecutor stated that in agreeing to the sentence, he considered the information that the police received from Ms. Anderson and her status as a confidential informant. Co-counsel did not recall whether he was aware that Mr. Anderson had received this sentence before the Petitioner's resentencing hearing. He also did not recall whether a member of the defense team requested the files in Mr. Anderson's case.

Resentencing co-counsel did not recall discussing with resentencing counsel any attempts to use the disparity between the sentence that the Petitioner was facing and the sentence that Mr. Anderson received as mitigating evidence. He stated that in hindsight, such evidence was worth consideration. He could not think of any reason that such evidence should not have been presented.

Resentencing co-counsel testified that he assumed that they used the materials obtained through discovery to prepare a list of the witnesses the State intended to present. He said witnesses who may have been called during the guilt phase were not necessarily going to testify during the penalty phase. He did not recall whether he reviewed the list of witnesses that the State subpoenaed for the 1995 trial. He believed they completed all tasks necessary to be prepared for the penalty phase.

Resentencing co-counsel testified that there was evidence that Mr. Anderson raped Mrs. Jackson. He did not recall whether counsel attempted to obtain the rape kit. He said they would have directed the investigators from Inquisitor to pursue this task. He said the State argued that the daughter's clothes were bloody because she had contact with her father while in the closet. He did not recall whether counsel directed the investigators to obtain the clothing that the victims' daughter was wearing.

When resentencing co-counsel was questioned regarding counsel's reason that they failed to object to the State's argument to the jury that the Petitioner placed the victims' daughter in the closet, he replied that the Petitioner had pleaded guilty to the murders and that the facts of the offenses were "very egregious." Counsel discussed the extent to which they should delve into the facts. Co-counsel said they believed their best approach was to establish that the Petitioner had adapted well in prison and was remorseful. They also sought to establish that the Petitioner was somewhat of a "caretaker" while on death row and that under certain circumstances, the Petitioner could become a productive citizen while incarcerated. Co-counsel said that while in hindsight attacking the facts was another approach, they chose at the time to establish that the Petitioner had redeeming value and that a sentence less than death was appropriate.

Resentencing co-counsel did not recall whose idea it was to retain Inquisitor but said that he frequently used them on cases. He said he met with the investigators but did not recall the specific topics that were discussed. He did not recall any discussions with resentencing counsel or anyone from Inquisitor about the investigators drafting motions or orders. He said he would not have asked them to complete those tasks and did not believe that Inquisitor's role was to draft pleadings or conduct legal research.

Resentencing co-counsel testified that he assumed that he and resentencing counsel requested that Inquisitor interview mitigation witnesses. Both counsel, however, interviewed witnesses. He said he met with the Petitioner's mother but did not recall whether she testified or if she wanted to testify. He did not recall anything about the Petitioner's mother or the Petitioner's stepfather or whether he met with the stepfather. He said that while Pastor Padilla testified during the resentencing hearing, he did not recall any specific communication with Inquisitor regarding Pastor Padilla. He did not recall any member of the defense team contacting Mr. Anderson.

Resentencing co-counsel did not recall any specific discussions with resentencing counsel or anyone from Inquisitor regarding an investigation into the Petitioner's state of mind on the night of the offenses. Counsel retained Dr. Angelillo to evaluate the Petitioner regarding issues of mental capacity and sanity. Co-counsel did not recall when Dr. Angelillo was retained or what prompted counsel to retain him. He stated that Dr. Steinberg testified at the Petitioner's sentencing hearing in 1995 but did not recall Dr. Steinberg's findings regarding the Petitioner's IQ.

Resentencing co-counsel testified that on January 20, 2000, the trial judge sent him a letter stating that he had received the motion for funds to conduct a mental health evaluation and would grant the motion. The letter also stated that the judge wanted to go forward with the trial on February 14, 2000. Co-counsel assumed that he drafted the motion

because the judge only addressed the letter to him. He noted that the trial court entered an amended order approving funds for a mental health evaluation on March 24, 2000, after the trial had been completed and that the order stated that the motion was presented on February 10. He explained that the motion may have been heard before February 10 and that the trial court requested an amended order. He noted that according to Dr. Angelillo's bill, he began working on the Petitioner's case on February 5. Dr. Angelillo testified at the resentencing hearing that he evaluated the Petitioner on February 8, 10, and 11.

Resentencing co-counsel acknowledged that Dr. Angelillo testified that the Petitioner had an IQ score of 75 based upon a 1994 test. Dr. Angelillo said the Petitioner's IQ score fell within the borderline range. Co-counsel acknowledged that according to Dr. Angelillo's report, he administered an IQ test to the Petitioner and that his IQ score was 78. Co-counsel said that if this test score was never presented to the jury, there was no reason to do so. He explained that Dr. Angelillo's evaluation seemed less mitigating with the higher score and that it was best to provide the jury with the lower IQ score.

Resentencing co-counsel testified that he did not know whether he researched the issue of intellectual disability in preparing for the Petitioner's case. He was not familiar with the standard error of measurement and did not recall any discussion with Dr. Angelillo regarding adjusting the Petitioner's IQ based upon the standard error of measurement. He also did not know whether he was aware of the Flynn Effect at the time of the Petitioner's trial. He was certain that he examined the statute regarding intellectual disability at the time of the Petitioner's trial.

Resentencing co-counsel testified that he did not recall whether counsel requested that Dr. Angelillo examine the Petitioner's state of mind on the night of the offense. He said that if Dr. Angelillo testified at the resentencing hearing that he did not examine the Petitioner's state of mind on the night of the offense, it is reasonable to believe that counsel never requested that he do so. He said Dr. Angelillo administered the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III), the Woodcock Johnson Test of Achievement, and the Million Clinical Multiaxial Inventory, Third Edition. He stated that it appeared the WAIS-III was the only test relating to the neurological functioning of the brain.

Resentencing co-counsel identified a memorandum from Ms. Hackenmiller with Inquisitor regarding a telephone conversation between her and both counsel. The memorandum stated that one of the mitigation themes was the Petitioner's good behavior in prison. The memorandum also noted the need to obtain a clinical neuropsychologist to evaluate the Petitioner. Co-counsel said the Petitioner's refusal to cooperate could have prompted the idea that a clinical neuropsychologist was needed. The Petitioner stated that he just wanted to die and that he did not want counsel to defend him. Co-counsel said the

Petitioner was not interested in the options of life or life without parole because he was prepared to die. Co-counsel said he continued to work on the case and agreed that he had an independent duty to investigate the case. He also said that the Petitioner's refusal to cooperate did not stop the defense team from going forward with the defense.

The memorandum also stated that counsel did not want to involve an addiction specialist or pharmacologist and felt that they should avoid addressing the night of the offenses. Co-counsel acknowledged evidence that the Petitioner had been smoking marijuana or mixing other drugs on the evening of the offenses. He said, however, that counsel made a tactical decision to avoid addressing the issue as a mitigating circumstance and to present evidence of the Petitioner's improvement since his incarceration. Co-counsel stated that at the time, they believed the Petitioner's improvement was a stronger position.

Resentencing co-counsel testified that in cross-examining Dr. O.C. Smith, he questioned him in general terms regarding the effects of alcohol and drugs on a person. He explained that they were concerned about what doors they might open in asking Dr. Smith specifically about his findings regarding the Petitioner. By questioning Dr. Smith about the effects of drugs and alcohol in general, they were able to present the argument without opening the door to other issues relating to the offenses.

Resentencing co-counsel testified that he was unaware of any reason to avoid presenting evidence of a genetic predisposition to substance abuse. He did not recall whether he was aware of any substance abuse in the Petitioner's family and said it was a subject that Inquisitor would have investigated. He also did not recall discussing the need for an expert with resentencing counsel and was unaware of any strategic decisions not to present such evidence.

Resentencing co-counsel did not recall issues in obtaining funding for Inquisitor. He said issues in communicating with the trial judge arose because the trial judge was not a local judge. There were delays in payments and in receiving responses from the court. He did not recall that the AOC denied funds for Inquisitor to investigate the guilt portion of the trial or that additional funds were needed for Inquisitor. He also did not recall any problems with an *ex parte* order approving funds for Inquisitor because it failed to include language required by the AOC.

Resentencing co-counsel identified a September 9, 1999 letter from Ron Lax with Inquisitor to resentencing counsel, a copy of which was sent to him. Mr. Lax stated that he had concerns regarding whether there was time to conduct a sufficient mitigation investigation, which generally took approximately six months to complete. Mr. Lax noted that historically, Inquisitor experienced problems in promptly receiving funding from the

AOC. He also stated that although staff from Inquisitor prepared the order for funding, he believed that it was inappropriate for them to prepare any orders in the future.

Resentencing co-counsel identified a letter from the trial judge to Elizabeth Sykes from the AOC, a copy of which was sent to resentencing counsel. The letter stated that an *ex parte* order for investigative services was submitted several months ago but that the AOC did not approve funding because the order did not include a finding that the services were necessary to ensure that the Petitioner's constitutional rights were properly protected. Co-counsel stated that he attempted to include this language in any request for funding for services. He said that he had other cases in which issues arose regarding funding for Inquisitor and that Inquisitor continued working on the cases in good faith. Co-counsel did not know whether Inquisitor did this in the Petitioner's case.

Resentencing co-counsel identified a January 19, 2000 letter from the trial judge to resentencing counsel that was sent through facsimile stating that the trial judge examined an affidavit for additional funds for an expert and that the investigation should be completed for the trial to commence on February 14, 2000. Co-counsel said that based upon his experience, expert services included services for the mitigation investigation, as well as medical experts. He explained that because the letter referred to "additional" services, he did not believe that the request was for funding for Dr. Angelillo but was additional funding for the mitigation specialist from Inquisitor.

Resentencing co-counsel testified that according to a memorandum from Ms. Hackenmiller dated January 25, 2000, she spoke to him and resentencing counsel's assistant and learned that the order for additional funding to continue their investigation had not been signed by the trial judge. He did not know the reason for the delay but said it appeared that resentencing counsel was responsible for that aspect of the case. According to a letter from Mr. Lax to both counsel, Ms. Hackenmiller informed them in December 1999 that funding for mitigation services had been depleted. An affidavit from Inquisitor requesting additional funds was forwarded to counsel on January 7. Mr. Lax stated he was advised by resentencing counsel's office that as of January 25, the affidavit was still in his office. Mr. Lax requested that counsel take action in obtaining approval for additional funding. Co-counsel did not recall any discussion with resentencing lead counsel regarding any issues with funding. He said it appeared that resentencing lead counsel was responsible for addressing the issue, and he deferred to resentencing lead counsel on the issue. He noted that Mr. Lax stated in the letter that Inquisitor would continue their investigation despite the delay in funding. On February 1, 2000, resentencing counsel sent a letter to the trial judge enclosing a motion and a proposed order and for additional funds and requested that the motion be approved before February 4, approximately ten days before trial.

Resentencing co-counsel testified that counsel retained a jury consultant and prepared juror questionnaires. The questionnaires were prepared as early as August 3, 1999, before the trial was continued. The questionnaires were not presented to the jury pool until February 14, 2000, the day on which the trial began. Co-counsel said that while he would have liked to have had more time to review the completed questionnaires, he did not recall whether counsel requested that the trial be continued. He noted that the trial judge was eager to have the case tried. Co-counsel said he, resentencing counsel, and the jury consultant spent a long evening at resentencing counsel's office reviewing the questionnaires and grading the potential jurors. They each graded the potential jurors and discussed their opinions regarding each potential juror. Co-counsel stated that while a decision about whether to keep or strike a juror was based upon the consensus, resentencing counsel made the final decision. Co-counsel said the Petitioner participated in jury selection. Counsel discussed voir dire with the Petitioner and his thoughts regarding those jurors who were chosen.

Resentencing co-counsel testified that the State relied upon the Petitioner's aggravated robbery conviction as an aggravating circumstance. He did not recall the tasks that were undertaken in investigating the robbery. He did not recall that Cedric Parker, the Petitioner' codefendant in the aggravated robbery, stated that the Petitioner was "kind of drunk" during the robbery. He did not know whether he was aware that original counsel also represented the Petitioner during the aggravated robbery trial or whether he and resentencing counsel discussed whether original counsel had a conflict of interest in representing the Petitioner in both the aggravated robbery and the capital cases. He said that if he determined that original counsel had a conflict, he was under a duty to inform the trial court. He did not recall whether he discussed the MAPCO robbery with original counsel or whether the conviction was challenged in post-conviction.

Resentencing co-counsel stated that the Petitioner testified during the resentencing hearing and that resentencing counsel questioned him. He did not know whether they discussed filing a motion in limine to limit the State's cross-examination of the Petitioner. He explained that they wanted to give the Petitioner the opportunity to show remorse, which included discussing his actions that evening. He said resentencing counsel hoped to draw testimony from the Petitioner that would show not only remorse but address some of the concerns that they believed the jury had regarding the heinous nature of the offenses.

Resentencing co-counsel testified that when he met with the Petitioner previously, the Petitioner did not seem to be emotionally animated. The Petitioner was not really interested in counsel's role and was somewhat quiet and "unaffected by it all." He said the Petitioner clearly stated that he was not interested in defending himself. He and resentencing counsel were concerned that the Petitioner would not be able to express emotion in front of the jury. Resentencing counsel was of the opinion that if he was unable to persuade the Petitioner to

show remorse, counsel would have problems saving the Petitioner from the death penalty. Co-counsel did not know of a strategy in examining the Petitioner in some detail regarding the use of the shotgun and the shells.

Resentencing co-counsel testified that he did not recall the reason that they did not present any of the Petitioner's family members as witnesses or what he knew about the Petitioner's childhood at the time of trial. He said that one of the mitigation specialist's duties was to discover information regarding the Petitioner's childhood. He stated that both counsel interviewed the witnesses who testified during the resentencing hearing. While visiting the Petitioner at Riverbend Maximum Security Institution in Nashville, counsel interviewed employees at the facility. These employees, however, were not available for counsel to brief them regarding their testimony until the morning before they testified. Co-counsel explained that issues arose regarding some employees' work schedules and their travel to and from Memphis.

Resentencing co-counsel testified that Pastor Padilla brought letters and poetry written by the Petitioner to the trial. Resentencing counsel told the trial judge that he had not seen the documents and requested time to review them. Co-counsel assumed that he had not reviewed the documents prior to the trial.

Resentencing co-counsel testified that resentencing counsel conducted both opening statements and closing arguments. They discussed the content of the opening statement and closing argument before they were delivered. Co-counsel assumed that they agreed to a strategy in presenting their opening statement and closing argument, but he did not recall the conversation. They had a general discussion regarding the theme and how they would proceed regarding the proof. He did not recall resentencing counsel informing him of the decision to describe the Petitioner to the jury as a "raving maniac" and to tell the jury that he was going to tell them what had occurred and how and why the offenses occurred.

Resentencing co-counsel testified that he was "surprised" by resentencing counsel's closing argument. He did not agree to stipulating to the existence of the aggravating circumstances that the State sought to establish and did not agree that no mitigating circumstances existed. He agreed that alcohol could have been a mitigating factor and did not believe that the statement that alcohol was not an excuse and should not be taken into account was accurate.

Resentencing co-counsel testified that he was unaware of a strategy in repeatedly informing the jury that the Petitioner was on death row. He said counsel intended to present evidence that the Petitioner was assigned additional responsibilities that other inmates on death row were not assigned. He explained that the presentation of the evidence required an

explanation as to why the Petitioner was distinguished from other death row inmates. He acknowledged that such evidence could have been presented by discussing various prisons rather than mentioning death row.

On cross-examination, resentencing co-counsel testified that the facts of the case were so heinous that dwelling on them during the sentencing hearing likely would not have been favorable to the Petitioner. He said counsel saw an opportunity to present the Petitioner in a light different from that which was presented in the 1995 sentencing hearing due to the circumstances of his incarceration at Riverbend. Counsel found that those who they interviewed were positive about the Petitioner's ability to adapt and take responsibility and to be assigned additional responsibilities. Co-counsel said he believed that a jury could view this evidence and determine that the death penalty should not be imposed. He stated that until the resentencing hearing, employees at Riverbend did not testify for inmates on death row. They believed that the Petitioner was unique.

Resentencing co-counsel testified that Inquisitor offered both investigative and mitigation services. He had worked with the company extensively in the past and believed the company was the best in its field. He said the investigators with Inquisitor were proactive and routinely sent counsel memoranda regarding the status of the investigation. He also said they made him and resentencing counsel aware of what information they had discovered, who they had interviewed, and what options were available. After discussing the mitigation evidence with the specialist, counsel arrived at a strategy to be employed in the Petitioner's case.

Resentencing co-counsel testified that even though there were delays in obtaining additional funding for Inquisitor, the investigators did not stop working on the Petitioner's case. He did not recall whether he interviewed the Petitioner's family members or whether he had the investigators from Inquisitor conduct the interviews. He noted that Inquisitor commonly provided the mental health expert a number of items for the expert's consideration, including information regarding the family and educational background. Inquisitor provided such information to Dr. Angelillo for his review.

Resentencing co-counsel testified that Dr. Angelillo did not diagnose the Petitioner as intellectually disabled. Co-counsel did not detect any problems with the Petitioner's ability to understand counsel's discussion of the case with him. The Petitioner was not interested in cooperating with the defense and saw any options for sentencing as basically a death sentence. Co-counsel did not recall instructing the Petitioner regarding what he should say when he testified. He said resentencing counsel's attempts to have the Petitioner show emotion during his testimony were unsuccessful. Co-counsel never saw the Petitioner

show an excess amount of emotion and said that he always appeared calm. The Petitioner cooperated and treated counsel respectfully but was not interested in assisting them.

Resentencing co-counsel did not recall the content of counsel's conversations with members of the Petitioner's family. He said that they discussed the possibility of testifying with the Petitioner's mother but that they decided it was best she not testify. He did not recall why they decided that she should not testify. He said that any decision not to present one of the Petitioner's family members as a witness was a strategic decision made following a discussion between counsel.

Resentencing co-counsel testified that the Petitioner recalled the offenses, what had occurred, his actions, and the actions of his codefendants. The Petitioner previously testified regarding this information. Co-counsel said an argument regarding the Petitioner's alcohol consumption was not consistent with counsel's strategy.

Resentencing co-counsel testified that counsel secured funds to retain a jury consultant, who assisted them in obtaining a profile of the type of juror that would be favorable to the Petitioner. The consultant assisted them in developing a scoring system regarding the different aspects of jurors who would be favorable and unfavorable. Counsel and the jury consultant reviewed the completed juror questionnaires the night before jury selection. Before exercising a challenge, counsel, the jury consultant, and the Petitioner discussed it. Co-counsel said he and resentencing counsel had a good relationship and that resentencing counsel was amenable to suggestions.

Resentencing co-counsel testified that counsel traveled to Riverbend and interviewed prison guards. He explained that they wanted to meet with the guards face-to-face to determine which of them would be the best witnesses to present. When counsel returned, they listed those they wanted to present as witnesses. Some of the guards were unable to attend the Petitioner's resentencing hearing. Co-counsel did not recall that the schedule set by the trial court prevented them from completing tasks that they wanted to complete prior to trial. He recalled that at the trial, the trial court decided a number of issues against them and did not allow them to introduce a number of letters.

On redirect examination, resentencing co-counsel testified that although counsel did not want to address the facts of the offenses because they were so heinous, resentencing counsel addressed the facts during his direct examination of the Petitioner. While he did not specifically recall the examination, he recalled that resentencing counsel "really went full force to get Mr. Carter to show some remorse, and it was an extensive and emotional examination." He recalled thinking during closing arguments that because the Petitioner did

not show remorse, resentencing counsel would have difficulty persuading the jury not to impose the death penalty.

Resentencing co-counsel testified that counsel discussed retaining an expert on prison adaptability but did not remember the specifics of the conversation. He did not know why they did not seek funds to retain a neuropsychologist and did not know whether they discussed presenting a diminished capacity claim with Dr. Angelillo.

Ron Lax, a private investigator and the owner of Inquisitor, had been an investigator for thirty-nine years and had been investigating capital cases since 1989. Inquisitor had been in business since 1989, and the company had been conducting investigations in both the guilt and penalty phases of capital trials since 1993. Mr. Lax identified Gloria Shettles as the director of mitigation services and Julie Hackenmiller as a mitigation specialist who was employed with Inquisitor for four or five years. Danese Banks was employed as an investigator with Inquisitor for approximately five years and occasionally assisted in the mitigation investigation.

Mr. Lax testified that counsel generally contacted the company and requested their services. Various investigators and mitigation specialists submitted affidavits to counsel outlining the services offered. Counsel attached the affidavits to a motion for funding and an order that were then submitted to the trial court. Mr. Lax explained that the employees at Inquisitor documented their work on time sheets, which they submitted to the bookkeeper on a daily basis. The bookkeeper then billed the client. Mr. Lax said that the employees at Inquisitor generally did not begin investigating a case until funding was received and that they continued to work on the case until the funds were depleted. They then requested additional funding. Mr. Lax said they generally did not continue working on a case without funding.

Mr. Lax testified that all actions that an investigator or specialist took on a case was documented in a memorandum, which was then forwarded to counsel every Tuesday. Mr. Lax hoped that counsel reviewed the memorandum, contacted them, and guided them in the direction that counsel wanted the investigation to take. If counsel did not contact them, their policy was to continue the investigation. Mr. Lax said team meetings were conducted on all capital cases. During those meetings, all the investigators and counsel examined what had been done in the investigation and what other tasks needed to be completed. The meeting was memorialized in a memorandum.

Mr. Lax testified that resentencing counsel contacted Inquisitor on April 15, 1999, requesting their services. At the time, counsel requested an investigation into the

guilt/innocence portion of the case, as well as mitigation services. Mr. Lax said a mitigation investigation took approximately six months to complete. He recalled that the resentencing hearing originally was set for August 1999 but was later continued. An in-house memorandum dated April 22, 1999, stated that counsel intended to conduct a "full-blown" hearing and requested an extensive mitigation investigation. On May 27, 1999, Ms. Banks sent a letter to resentencing counsel attaching affidavits from various investigators and mitigation specialists. The AOC declined to grant funds for an investigation into the guilt/innocence phase.

Mr. Lax testified that Ms. Banks sent counsel a memorandum on July 9, 1999, discussing an investigation into the Petitioner's state of mind at the time of the offenses. Mr. Lax explained that in investigating a person's state of mind, the investigators collected records and interviewed family members. They also secured the involvement of other experts.

Mr. Lax testified that according to an in-house memorandum dated August 19, 1999, Ms. Shettles and Ms. Banks were told to make themselves available for a telephone conference with counsel and the trial judge to discuss a continuance of the resentencing hearing. Ms. Shettles called resentencing counsel's office. Upon being advised that he was not in the office, Ms. Shettles stated that she had been requested to participate in a conference call and left her telephone number. Ms. Shettles was never contacted regarding the telephone conference.

Mr. Lax testified that on August 24, 1999, he sent resentencing counsel a letter outlining the events to date. The AOC had questioned why a guilt investigation was necessary when the Petitioner had pleaded guilty to the offenses. On May 27, 1999, Mr. Lax's office hand delivered an amended affidavit requesting funding for only a mitigation investigation. Mr. Lax noted in the letter that since May 1999, his office had inquired on a routine basis about the status of the approval for funding. He also noted a new trial date in February and said that while the mitigation investigation could be completed, the completion was contingent upon the receipt of funds.

Mr. Lax testified that on September 7, 1999, resentencing counsel set him a letter asking that someone from Inquistor prepare the amended order approving funding for the mitigation investigation. On September 9, Mr. Lax sent resentencing counsel an amended order along with a letter in which he stated that he did not feel Inquisitor should be drafting orders. Mr. Lax also expressed concern that an amended order had not been filed when the issue arose in May. He requested that resentencing counsel obtain approval of funding quickly to have sufficient time to complete the investigation. The trial court approved funding for Inquisitor on September 15.

Mr. Lax testified that in conducting an investigation, the mitigation specialists researched whether a defendant had a history of alcohol or substance abuse, a history of mental health issues, and a criminal history. They listed those relatives with a history of alcohol and substance abuse. Mr. Lax explained that a mitigation specialist wanted to learn about a history of alcohol or substance abuse in other members of the defendant's family to determine whether the defendant had a genetic background or predisposition to such abuse and to establish the atmosphere in which the defendant was raised. Mr. Lax noted that Ms. Hackenmiller summarized her interview of the Petitioner's mother in a memorandum and sent it to counsel.

Mr. Lax testified regarding the difficulties that he and Ms. Hackenmiller experienced in attempting to meet with counsel. Resentencing counsel called and requested that they meet with him at his office on October 22, 1999. Mr. Lax was scheduled to be out of town that week and called counsel's office to reschedule the meeting. Mr. Lax did not speak to counsel. Mr. Lax called again on October 25 but never heard from counsel. On November 15, Ms. Hackenmiller sent a letter to counsel stating that she did not receive a call from him on the previous day as scheduled. She informed counsel that she wanted to meet with him in person. On December 3, Ms. Hackenmiller sent a letter to both counsel stating that she called resentencing counsel's office and left a message requesting a meeting to discuss the direction of the case. She had not received a response as of December 3.

Mr. Lax identified a memorandum prepared by Ms. Hackenmiller regarding a telephone conference with counsel during which they discussed the immediate need to obtain funds to retain a neuropsychologist to evaluate the Petitioner. Mr. Lax explained that Inquisitor generally assisted in finding and suggesting experts. According to the memorandum, counsel decided against retaining an addiction specialist or a pharmacologist because they believed it was best to avoid addressing the night of the offenses. The memorandum noted that the possibility of a genetic predisposition regarding substance abuse should only be presented through an expert and that information regarding the family's history of criminal and substance abuse should be provided to that expert.

Mr. Lax testified that before the trial, the funds that had been provided to Inquisitor were depleted and that additional funds were necessary for Inquisitor to complete the mitigation investigation. On January 7, 2000, an administrative assistant with Inquisitor sent a letter to counsel enclosing an affidavit requesting additional funds. According to the affidavit, Inquisitor needed to obtain the Petitioner's prison records and school records, obtain records regarding a number of the Petitioner's family members, and complete the mitigation timeline. On January 25, Ms. Hackenmiller noted in a memorandum that she spoke to resentencing counsel's secretary and co-counsel and learned that the trial judge had

not signed an order approving the additional funds as of that day. On January 26, Mr. Lax sent counsel a letter stating that the funds had been depleted and that he had prepared an affidavit requesting additional funds on January 7. Mr. Lax noted that when the trial judge initially approved the funds, he was concerned that the mitigation investigation would delay the trial. Mr. Lax assured the trial judge that if funding was approved, Inquisitor would complete the investigation in time for trial. Mr. Lax expressed his concern in the letter that he had been advised that as of January 25, the affidavit was still in resentencing counsel's office and that a motion for additional funding had not been prepared. On February 2, twelve days before the trial Ms. Hackenmiller was informed that the trial court had approved the additional funding. Mr. Lax stated that during the course of the proceedings, Ms. Hackenmiller approached him on several occasions and expressed her frustration with counsel.

On cross-examination, Mr. Lax testified that he was not involved in the mitigation investigation in the Petitioner's case. Rather, he was testifying as his role as keeper of the records.

In response to questions from the post-conviction court, Mr. Lax testified that the investigators with Inquisitor generally did not begin working on a case before funds were approved because the AOC refused to pay for such work. Mr. Lax stated that on occasions in which an investigation was badly needed, the trial court requested that the AOC pay for work that Inquisitor did before funds were approved and that AOC generally approved such requests.

Christine Taylor, the Petitioner's sister, testified that she had three siblings, the Petitioner, Michael Benson, and Vanessa Benson. The Petitioner was approximately one year younger than Christine. Vanessa was seven or eight years younger than Christine. Their parents were Arthur and Viola Benson. She said that Arthur Benson was not her biological father and that while all of her siblings shared the same mother, they did not share the same fathers.

Michael was killed in a train accident when he was four or five years old and the Petitioner was five or six years old. Christine learned of the accident on the news but did not know that the child killed was Michael. She said that the family was together when they were informed of Michael's death. Christine recalled that their mother cried and that she saw her cry only twice in her life.

Christine testified that Vanessa had sickle cell disease and had since passed away. When she was growing up, Vanessa was sick and had to go to the hospital often. On one

occasion, the family had to cancel a vacation due to Vanessa's illness. On occasion, Vanessa hurt herself while playing which triggered her illness.

Christine testified that their stepfather raised her and her siblings as if he was their father. He was very strict. If one of the children did something that he or she was not supposed to do, their stepfather would either lecture or spank the child with a belt. Christine recalled that the children were disciplined by him for making bad grades or being bad at school. Christine said she made good grades in school and did not receive a spanking often for making bad grades. The Petitioner, however, often made bad grades and would receive a lecture and a spanking with a belt as a result. Christine recalled that the Petitioner cried when he was spanked and that she saw "red belt marks" on the Petitioner's legs following a spanking. The Petitioner often wet the bed when he was a child, and their stepfather would spank him as a result. Christine said the Petitioner hid the sheets in his closet on occasion after wetting the bed.

Christine testified that when she was seven or eight years old and the Petitioner was six or seven years old, she made mud pies and told the Petitioner that they were chocolate. As a result, the Petitioner attempted to eat them. Christine stated that the Petitioner attempted this "a few times."

Christine described their mother as quiet and reserved. Their mother and stepfather divorced when Christine was fifteen or sixteen years old and the Petitioner was fourteen or fifteen years old. Approximately one year before the divorce, their mother would return home upset and angry. Christine said their mother generally was angry with everyone, and Christine did not know why.

Following the divorce, their mother spent time at her sisters' homes on weekends playing cards. Christine and her siblings would go with their mother. Their aunts would drink beer, but Christine said their mother did not do so. They would not return home sometimes until the next morning. Christine stated that their mother did not supervise her and her siblings and that as a result, the Petitioner would stay out longer. Christine recalled that the family moved three or four times following the divorce.

Christine testified that the Petitioner spent time with his cousin, Louis Hill, following Michael's death. He began spending more time with his cousins around the time of their parents' divorce. Christine said that Mr. Hill was a car thief and that Mr. Hill, the Petitioner, and Mr. Hill's friends drank when they were together. Christine also saw them smoke marijuana "[p]robably a few times." She said that Mr. Hill was the leader of the group and that all of his friends followed him around. When the Petitioner was older and not with Mr. Hill, he stayed home with his children.

Christine testified that at one point, their mother moved to Nashville for a job. Christine moved in with their mother because she was pregnant and wanted to be with her mother. They encouraged the Petitioner to move to Nashville to get a fresh start. Their mother wanted to keep the Petitioner away from family members and friends such as Mr. Hill. Christine said that when the Petitioner lived in Nashville, he had a job and never drank alcohol. The Petitioner moved back to Memphis because his girlfriend, Mamie Watkins, was pregnant, and the Petitioner wanted to be with her. Christine recalled that Ms. Watkins would "nag" the Petitioner about money.

The Petitioner came to Christine's home the evening on which the offenses occurred. Christine said the Petitioner had been drinking alcohol and was "acting really strange." The Petitioner was loud and started an argument with a cousin. Christine could not recall whether she smelled alcohol on him. She said the Petitioner's behavior was different from his behavior on other occasions in which he had been drinking alcohol. She also said that while the Petitioner drank alcohol, he would not become as intoxicated as he was that evening. Christine saw the Petitioner the following day. She stated that he was sick and had been throwing up all day. Christine did not see the Petitioner taking drugs on the night of the offenses but assumed that he had done so based upon his behavior.

Christine testified during the Petitioner's original sentencing hearing in 1995. Their mother told her to go to defense counsel's office on the morning before trial, and the attorney told her that he wanted her to testify. Christine did not recall the attorney telling her about what he wanted her to testify. Christine said she had not spoken to the Petitioner's attorneys or any other member of the defense team before that meeting. During the meeting, she met with only one of the Petitioner's attorneys. She did not feel that she was prepared to testify. Christine stated that although she attended the Petitioner's resentencing hearing in 2000, she did not testify. She also stated that no one from the defense team contacted her in 2000.

Arthur Benson testified that although the Petitioner was his stepson, he treated the Petitioner like a son. He had two sons, the Petitioner and Michael Benson, and two daughters, Christine Taylor and Vanessa Benson. His only biological child was Vanessa.

Mr. Benson testified that the Petitioner was three and one-half years old when they met. He described the Petitioner as energetic and said the Petitioner appeared to be "starving for love." When he returned home from work, the Petitioner was overjoyed to see him. The Petitioner did not have a father before he met Mr. Benson. Mr. Benson said it appeared that no one had taken the time to teach the Petitioner basic skills. When it was time for the Petitioner to eat, he was placed on the floor on newspaper, and he ate with his hands. Mr. Benson taught the Petitioner how to use utensils.

When Mr. Benson met the Petitioner's mother, she was pregnant and living with her mother, her sisters, her brothers, and her siblings' children in a two or three-bedroom house. He was raised on a farm in the country in a very structured household. The household where the Petitioner's mother was living and the cursing by those who lived in the house were different from the household in which he was raised. He never heard his parents curse when he was a child. The Petitioner's mother's brothers and sisters drank alcohol on a daily basis and lived everyday as if it were a party. He never saw the Petitioner's maternal grandmother drink alcohol. He did not believe the household was an appropriate environment in which to raise children.

Mr. Benson testified that after he had known the Petitioner's mother for approximately two weeks, he invited her to move in with him. He said he wanted to help her. He explained that she seemed like a good person but that she needed help in almost every category. They married approximately one week later. Both the Petitioner and Christine also came to live with him.

Mr. Benson testified that the Petitioner's mother's family was close knit and visited often. One of her sisters and brothers-in-law lived with them for a few months after they were evicted from their apartment. One of the Petitioner's maternal aunts also lived with them for six months. He said he told the Petitioner's mother that he married her and not her family. He believed that her family saw him as a "free ticket" and always begged for money or asked him to buy them beer or cigarettes. The Petitioner's maternal grandmother also requested money to pay the utility bill. He said he helped the Petitioner's mother's family for a period of time until he realized that he was supporting the entire family.

Mr. Benson testified that none of the Petitioner's maternal aunts supervised their children. None of their children had fathers in their lives. He was unaware of any rules which the children were required to obey. The children drank alcohol and smoked at a young age. He believed that Lewis Hill had been in the juvenile court system.

Mr. Benson testified that his parents had ten children. They worked all week, attended school, and attended church on Sunday. They sat around the table and ate meals together. He and his siblings were not allowed to speak at the table and had to be in bed and wake up at specific times every morning. He described his parent's home as very structured. His father made the money and cared for the family. His family did not own a farm and were sharecroppers. His mother ensured that the children completed their homework. She did not accept bad grades and was the disciplinarian of the family. His mother punished the children by either counseling or spanking them with switches that she made the children retrieve from the yard. He said he and his younger sister probably received spankings on a daily basis. His family members were Baptists and attended Sunday school. They walked to Sunday school

and stayed for morning service. Someone generally drove them home from church. He said the core values of the home in which he was raised were church and education. He performed well in school and was a substitute teacher his senior year, teaching freshman science and senior chemistry.

Mr. Benson testified that after he graduated from high school, he planned to move to Memphis, find a part-time job, attend college, and become a teacher. He then found a job making more money than he had ever made. He married the Petitioner's mother and had a family. He later completed home study courses from Cornell University and received a degree in management. None of his siblings lived in Memphis.

Mr. Benson testified that when the Petitioner was a child, he loved to please people and would do just about anything for anyone who praised him. At a young age, Michael was more outgoing than the Petitioner, who was shy and withdrawn. The Petitioner enjoyed being alone and spent hours alone in his bedroom. On one occasion, the Petitioner returned home from school and reported that someone was teasing him. Michael told the Petitioner that he would go to his school and confront the boy. Michael was taller than the Petitioner. The Petitioner's mother enjoyed dressing the children alike, and Michael and the Petitioner shared a bedroom.

Mr. Benson testified that the Petitioner could follow simple instructions. If he gave the Petitioner several tasks to complete, however, the Petitioner could only complete a few of the tasks. Michael assisted the Petitioner in completing the tasks. Mr. Benson said that even though Michael was younger, he looked out for the Petitioner.

Mr. Benson testified that at first, he did not notice that the Petitioner was having problems at school. The Petitioner was young, and Mr. Benson had never been a parent. He later concluded that the Petitioner's learning ability was slow. He told the Petitioner's mother that the Petitioner should be tested because he seemed slow. The Petitioner's mother never agreed to have the Petitioner tested. He did not know why he did not go to the school and advocate on the Petitioner's behalf. He said he was working long hours and "dropped the ball." He believed the Petitioner's mother would have taken responsibility for ensuring that the Petitioner received the proper education.

Mr. Benson testified that at the time, he was working at a retail food store from 7:00 a.m. to 3:30 p.m. He assumed that if he was ensuring that the family had enough money for food and caring for the "big things," the Petitioner's mother would care for the children as his mother had done. He believed that he and the Petitioner's mother could have been better in ensuring that the children received proper education, learned core values, and built their characters. He did not believe they shared the same approach to parenting. If he and his

siblings were doing something wrong, his parents sat them down and talked to them. The Petitioner's mother came from a family where "everything goes," and there was no training or teaching.

Mr. Benson testified that he would sit the children down and talk to them when they misbehaved. When he employed this method with the Petitioner, the Petitioner became quiet. Although the Petitioner listened to him, the more that he counseled him, the quieter he became. He said it was as if the Petitioner shut down. Christine and Michael would assure Mr. Benson that they would not continue to misbehave and would defend themselves. The Petitioner did not attempt to justify his actions. Rather, when Mr. Benson questioned him, the Petitioner would drop his head. Mr. Benson said he began spanking the Petitioner with a belt until he realized that the spankings were not curtailing the behavior. He believed the Petitioner was stubborn and wanted to "outdo" him. He did not realize until later that something may have been wrong with the Petitioner. He said he primarily coached and counseled the children for bad grades and spanked them if counseling was ineffective. His counseling typically was ineffective on the Petitioner.

Mr. Benson testified that the Petitioner misbehaved as a child typically when he was with other children. He said the Petitioner seemed easily influenced. As a child, the Petitioner's peer group was primarily his cousins. At some point, the Petitioner became involved in the juvenile court system after he became involved in stealing a bicycle while visiting his cousins. Mr. Benson spoke to the Petitioner afterwards and said the Petitioner did not seem to understand the seriousness of the situation.

Mr. Benson testified that Christine wrote often. The Petitioner read "little small kid books" but not often. As he grew older, he lost all interest in reading. He said the Petitioner was always quiet and withdrawn. If he noticed that the Petitioner was acting as if he had something on his mind, he took him aside and talked to him. The Petitioner was always reluctant to share information with him.

Mr. Benson testified that Michael was five years old when he died. Michael's uncle was driving him to daycare and came to train tracks when a train was coming. Michael's uncle drove across the tracks when the gate was down. The car was hit by the train, and Michael was thrown eighty-five feet down the tracks and was killed. He said that it was a difficult time for the family but that the children seemed "fine." He believed he and the Petitioner's mother were too caught up in their own grief to pay attention to the Petitioner and Christine. He did not think about whether it was difficult for the Petitioner to be in the room that he had shared with Michael. He said the Petitioner was not the type of child who would have come to him and tell him about how Michael's death was affecting him.

Mr. Benson testified that Vanessa had sickle cell disease and often was hospitalized. Doctors informed them that Vanessa would not live past age eighteen. While the family knew of Vanessa's expected life span, he never discussed it with the children. Vanessa was hospitalized eight to ten times per year and would remain there for one week to ten days during each visit. When Vanessa had a sickle cell crisis, she would be in pain and reported that her bones hurt. She could not be touched too much and cried often. When Vanessa was hospitalized, the Petitioner's mother would stay with her in the morning, and he would stay with her after work. The other children generally stayed with their grandmother. He did not recall the children visiting Vanessa at the hospital.

Mr. Benson testified that the Petitioner's mother was like the Petitioner in that she was withdrawn and that he had difficulty obtaining information from her. She did not express her opinion if she disagreed and did not assist in making decisions. He made all the major decisions while she took care of the small things. He had to trust that she took care of the small things and did so correctly because she would not talk to him about the tasks. The decisions that she made included purchasing the children's clothes at the best price. He did not see her play with the children often. She complained that the children got on her nerves. He played with the children when he returned home from work.

Mr. Benson testified that he paid the bills. The Petitioner's mother told him that she would like to pay the bills by herself, so he gave her the checkbook. He returned home one night after work to find that had no electricity. She had spent the money on personal items rather than paying the utility bill.

Mr. Benson recalled that the Petitioner's mother tried to sell Mary Kay cosmetics and asked him to give her enough money to get started. Whenever she was ready to place an order, she expected him to pay for the orders. He attempted to explain to her that the money that she received from the customers had to be used for both the overhead and her profit. She never understood this.

Mr. Benson testified that the Petitioner's mother did the majority of the cooking in the house. She cooked basic food and never planned and created a complex meal. He believed the Petitioner learned to cook from his grandmother. He described the Petitioner as a very good cook who could prepare basic foods, as well as fried chicken, rice, gravy, and other items. He said the Petitioner prepared simple foods but was able to prepare a good meal using those foods.

Mr. Benson testified that he and the Petitioner's mother grew apart. She would not open up to him. She always seemed angry with him and the children, but he did not know the reason for her anger. The children also noticed that she had changed. She believed he

had been unfaithful, but he never suspected that she had been cheating on him. While they disagreed, they did not argue often. He said that it took two people to argue and that she did not participate. The children witnessed them arguing on some occasions and acted sad as a result.

Mr. Benson testified that he told the Petitioner's mother that he was leaving her if she did not change in two months and become a mother to her children and a wife to him. She did not believe him and did not change, and he left. He told the Petitioner that he would need to be the "man of the house" and that Mr. Benson wanted the Petitioner to take care of his mother and sisters. Mr. Benson also told the Petitioner that he loved him and would be there if he needed him. The Petitioner was sad that Mr. Benson was leaving.

After Mr. Benson and the Petitioner's mother separated, he attempted to reunite the family because of the children. He said he did not realize the effect of the separation on the children. He had moved out of the house, and the Petitioner's mother and the children came to stay with him for two weeks. She then returned to the house, keeping Vanessa and allowing Christine and the Petitioner to live with him. He believed that she wanted Vanessa to live with her so that she could receive child support. Her anger continued for approximately three years following the divorce. She spent quite a bit of time with her family, and he believed that her family members were bad influences.

Mr. Benson testified that at some point, the Petitioner returned to live with his mother. Mr. Benson had a new Buick car and a truck. He drove the truck to work and left the car in the garage. One day, he received a call from the Memphis Police Department reporting that the Petitioner was driving the car around Trezevant High School. He was angry and disappointed with the Petitioner. He talked to the Petitioner, who did not respond, and then caught the Petitioner around his neck and shook him.

Mr. Benson testified that he did not see the Petitioner regularly after he moved. He did not know what the Petitioner was doing but believed that the Petitioner was not subject to any rules or regulations. He had little contact with the Petitioner when the Petitioner was with Ms. Watkins and had his own family. He did not know Ms. Watkins and did not know what was occurring in the Petitioner's life. He said that after the Petitioner left, neither of them contacted each other.

Mr. Benson testified that in 1995, he would have talked to the Petitioner's counsel if they would have explained why it was important for him to tell them about the Petitioner and his role in the Petitioner's life. At the time, he did not believe that he could have helped the Petitioner. He attended the Petitioner's resentencing hearing in 2000. He was asked to be there as support for the family. He did not speak to the Petitioner's counsel and was not

asked to testify. He was sad and disappointed by the Petitioner's testimony at the resentencing hearing. He believed the Petitioner should have told the family that he had remorse about the events, but the Petitioner failed to do so. He said the Petitioner's demeanor in court was similar to his demeanor when he disciplined the Petitioner. The Petitioner answered all questions and was cooperative, but he did not "go the extra mile." Rather, the Petitioner "shut down" just as he did when he was young.

On cross-examination, Mr. Benson testified that when he learned that the Petitioner was involved in something so horrible, he tried to distance himself from it. He explained that his job required that he interact with the public. He overheard a customer state how "low down and cruel" the person who committed the acts was and that the person's parents were no better than him. He believed that if she thought that way, the whole world also thought that way.

Mamie Watkins, the Petitioner's former girlfriend, testified that they were together for ten years until his arrest. They met in junior high school when Ms. Watkins was sixteen years old and the Petitioner was seventeen years old. Ms. Watkins was pregnant when they met. The Petitioner raised the child as his own, and they had three other children together. At the time of the Petitioner's arrest, the oldest child was four years old.

Ms. Watkins testified that the Petitioner played with the children and cared for them when she was not at home. He cared for the children when they were sick. Ms. Watkins stated that the Petitioner could read a digital thermometer and knew what the temperature reading meant. The Petitioner could not read a mercury thermometer and could administer medication to the children only after shown the amount to be given. At the time of the Petitioner's resentencing hearing in 2000, the Petitioner had contact with the children and talked to them regularly by telephone. He gave them advice and asked them how they were doing in school. He also sent cards or gifts to them.

Ms. Watkins knew the Petitioner's mother and stepfather but did not know why they divorced. She met the Petitioner's biological father, MacArthur Carter, and believed that the Petitioner had met him previously. Ms. Watkins said that when she first met Mr. Carter, he was drinking alcohol. The Petitioner did not see either Mr. Carter or his stepfather often.

Ms. Watkins testified that the Petitioner assisted her with chores. When she asked the Petitioner to complete a chore, she had to explain the chore to him in stages. She also had to remind him to do a chore. When she told the Petitioner to drive somewhere, she had to explain the directions to him in detail. Ms. Watkins had never seen the Petitioner read a book. When they went out to a restaurant, the Petitioner would not read the menu. Rather,

Ms. Watkins showed him the items on the menu, and the Petitioner decided what to eat based on what Ms. Watkins decided to eat.

Ms. Watkins testified that she shopped for groceries and clothing for the family. When she sent the Petitioner to purchase groceries, he was unable to do so when the list included more than three items. If more than three items were on the list, he would forget something or purchase the wrong item.

Ms. Watkins testified that she was responsible for ensuring that the bills were paid. She said the Petitioner was not responsible with his money and would give money away to whoever asked for it or needed it. Ms. Watkins explained to the Petitioner that they did not have enough money to give to others. She stated that while the Petitioner understood that they needed the money, he continued to give it away. At the time of the Petitioner's arrest, they were behind on rent and utility payments. Ms. Watkins had received eviction notices but said that the Petitioner was unaware of the notices. Ms. Watkins said she was not working at the time because her youngest child was six months old and she was receiving "government assistance." They were evicted from their home approximately one month after the Petitioner's arrest.

Ms. Watkins recalled that the Petitioner became distant sometimes and kept to himself as a result. She saw him drink either Colt 45 malt liquor or Busch beer. He also drank liquor on occasion and acted like a different person. Ms. Watkins said the Petitioner spent time with Louis Hill and drank more alcohol when he was with Mr. Hill. The Petitioner also drank alcohol when he was depressed. Ms. Watkins believed the Petitioner had a drinking problem and discussed it with him. The Petitioner told her that he would try to stop drinking, but Ms. Watkins did not believe that the Petitioner did so. Ms. Watkins believed many members of the Petitioner's family had alcohol problems. The Petitioner would vomit after drinking a mixture of liquor and beer. Ms. Watkins had known the Petitioner to blackout from drinking and forget what he had done the previous night. She also saw the Petitioner smoke marijuana but did not see him consume any other drug.

Ms. Watkins believed that the Petitioner's cousins took advantage of him and that Mr. Hill kept the Petitioner away from her and their children. The Petitioner would not want to go with Mr. Hill, but Mr. Hill would "beg" him to leave. Ms. Watkins said Mr. Hill was a negative influence on the Petitioner and was the leader between the two men.

Ms. Watkins testified that she saw the Petitioner on the morning in which the offenses occurred. He was drinking quarts of Colt 45. The Petitioner left their home, but Ms. Watkins did not know where he was going. Ms. Watkins said that following his arrest, the

Petitioner seemed depressed but did not seem suicidal. After the trial, he seemed suicidal. The Petitioner never discussed the offenses or the court proceedings with Ms. Watkins.

Ms. Watkins testified at the 1995 trial. She said she met with one of the Petitioner's attorneys in a room at the courthouse before her testimony. She had not met with the Petitioner's attorneys or any member of his defense team previously. She met with the attorney for five to ten minutes, and the attorney told her what he wanted her to tell the jury. Ms. Watkins did not feel that she was prepared to testify. Ms. Watkins did not attend the hearing in 2000. She spoke to the Petitioner's attorneys while at her mother's home. The attorneys did not tell her that they wanted her to testify, and she did not receive a subpoena for the hearing.

Lonzy Catron, Jr., the Petitioner's cousin, testified that his mother, Pearlene Toles, and the Petitioner's mother, Viola Benson, were sisters. Mr. Catron was two years older than the Petitioner and had known him all of his life. Mr. Catron saw the Petitioner once or twice a week when they were younger at either the Petitioner's home or at church. He and the Petitioner played games together, had sleepovers, and watched television.

Mr. Catron testified that the Petitioner had a "happy home." His parents were hard working, and the Petitioner and his siblings were well-mannered and respectable. The Petitioner's mother was a nursing assistant who worked long hours. Mr. Catron stated that the Petitioner and his siblings were left home alone often and that the Petitioner and Christine "held down the house." The Petitioner mowed the yard and attempted to cook, while Christine cleaned the house. Mr. Catron described Christine as a "homebody," who was "mannerable" and "respectable." She made good grades in school and was never in any trouble.

Mr. Catron testified that when Michael Benson was four years old, Michael died in an automobile accident involving a train. Michael was riding with one of Mr. Catron's uncles, who tried to beat a train across the railroad tracks. The Petitioner was approximately seven years old at the time. Mr. Catron said that Michael's death affected the Petitioner "tremendously" and that the Petitioner seemed to find coping with Michael's death difficult. Mr. Catron did not believe that the Petitioner ever recovered from Michael's death. He said that following Michael's death, the Petitioner's family did not discuss their grief. Neither Mr. Catron nor the Petitioner really understood what death was, but the Petitioner discussed Michael's death with him later. The Petitioner stated that Michael was still in the house and that he could feel or interact with Michael. The Petitioner continued to discuss Michael until he was approximately fifteen years old.

Mr. Catron testified that Vanessa had sickle cell anemia and had been sick since birth. She complained of aching legs and fever and would remain in the hospital for three or four months at a time. Mr. Catron described the Petitioner as Vanessa's "caregiver." The Petitioner carried Vanessa to the car or to bed, gave her water or food, and consoled her if she was in pain. Christine and the Petitioner cared for Vanessa when their parents were away. The Petitioner took Vanessa to the hospital and back home, and he and Christine spent nights with Vanessa at the hospital.

Mr. Catron testified that until age ten or eleven, the Petitioner was still wetting the bed. The Petitioner was teased at school about it and got into fights as a result. Mr. Catron said the Petitioner did not make good grades in school. He heard that the Petitioner made Ds and Fs. When the Petitioner made bad grades, he was spanked across the buttocks with a belt.

Mr. Catron testified that the Petitioner was not a good reader and had "trouble getting the words out." He believed the Petitioner had trouble reading throughout the time he was in school. Christine or someone else in the family tried to help the Petitioner with his school work. Mr. Catron did not know whether Christine was actually helping the Petitioner or teasing him. Mr. Catron said he also helped the Petitioner with his school work.

Mr. Catron testified that when the Petitioner was a teenager, the Petitioner's stepfather was unfaithful to the Petitioner's mother. Mr. Catron once saw a young woman, who he had heard was the Petitioner's stepfather's girlfriend, come to the Petitioner's home. The Petitioner's mother and stepfather divorced, and the Petitioner had more freedom to do things that he would not have been able to do had his stepfather been in the home. The Petitioner was fifteen years old when they divorced and was seventeen years old when he quit school. The Petitioner moved out of his mother's home a few years after the divorce and lived with various aunts. The Petitioner did not have many clothes or possessions, so he carried his belongings in a sack whenever he moved.

Mr. Catron testified that at some point, the Petitioner began associating with him and his other cousins, Lewis Hill and Bobby Taylor. At first, the Petitioner did not drink alcohol, smoke marijuana, or steal things. Mr. Catron said that the Petitioner was from "the good side of the track" and that he and his cousins were from "the bad side of the track." They invited the Petitioner to the "bad side" and encouraged him to drink alcohol and smoke marijuana. Mr. Catron said they would coax the Petitioner into drinking alcohol and smoking marijuana.

Mr. Catron testified that when the Petitioner was a teenager, he like to drink quarts of Old English 800, a malt liquor with more "kick" than beer. Once the Petitioner began drinking, he would drink all day and night. According to Mr. Catron, the Petitioner's

drinking worsened until the offenses occurred. Mr. Catron said that the Petitioner did not have to drink much alcohol before he began changing. He described the Petitioner as an "angry drunk," who would become aggressive, talkative, and loud. Mr. Catron said that he would attempt to calm the Petitioner but that if he was unable to do so, he allowed the Petitioner to have his way.

Mr. Catron testified that he took the Petitioner with him to search for employment. They were laid off shortly before the offenses at the same place of employment. At that time, the Petitioner was unloading trucks for Delta Manufacturing. Mr. Catron described the Petitioner as a hard worker who did not have many skills. The Petitioner struggled with completing job applications, and Mr. Canton had to complete them for him. He did not believe the Petitioner understood the questions on the applications. Mr. Catron also completed the Petitioner's W-2 forms. He recalled that they had to take a reading and mathematics test as part of the application process for one employer. Once Mr. Catron completed the test, he allowed the Petitioner to copy his answers.

Mr. Catron recalled when the Petitioner began dating "Mamie" but did not recall Mamie's last name. Mamie had one child before she met the Petitioner, and she and the Petitioner had three children together. Mr. Catron did not believe that the Petitioner was ready for the responsibilities of raising children as he had the mind and mentality of a child himself. Mr. Catron said the Petitioner played with his children often and loved them.

Mr. Catron testified that the Petitioner and Mamie argued frequently over money and bills. Mr. Catron said the Petitioner did not manage his money well. The Petitioner did not pay his bills and spent the money designated for rent. Shortly before the offenses occurred, the Petitioner began using and selling drugs. Mr. Catron said that the Petitioner was not a good salesman and that he probably was giving away more drugs than he was selling. He explained that someone would give the Petitioner $20.00 and that the Petitioner would give the person $50.00 in drugs.

Mr. Catron testified on the Petitioner's behalf in 1995. Before testifying, he met with original lead counsel in his office. Mr. Catron said he understood that he was to testify about "good stuff" and was not supposed to say anything negative about the Petitioner. Mr. Catron was not contacted for the resentencing hearing in 2000. He said he was living at the same address during both the original trial in 1995 and the resentencing hearing in 2000. He also said he was willing to testify at the resentencing hearing.

On cross-examination, Mr. Catron testified that the Petitioner was hired at Delta before he went to prison for robbery. He did not have any contact with the Petitioner after the armed robbery and before the commission of the murders.

Monica McClain, an alcohol and drug counselor at Delta Hospital, testified that she assisted patients who were alcohol or substance dependent or who were in grief counseling. Ms. McClain grew up with the Petitioner and lived one house away from him. She was two years younger than the Petitioner and knew him from the time she was five years old. They played together and attended school and church together.

Ms. McClain knew the Petitioner's brother who died in a train accident. She said his brother's death affected the Petitioner. The Petitioner would pick up a toy and tell her that it belonged to Michael. The Petitioner would smell the toy and tell her what age that Michael would have been. The Petitioner's actions continued into his teenage years. Ms. McClain said the Petitioner's family did not discuss their problems and held everything inside. Following Michael's death, the Petitioner "shut down" and began wetting the bed. The Petitioner was teased by other children in the neighborhood and called "Peabody." Ms. McClain said that the teasing hurt the Petitioner and that he cried as a result. She also said the Petitioner continued to wet the bed until he was twelve years old.

Ms. McClain testified that the Petitioner's mother worked many shifts to pay bills and was not at home often. The Petitioner's stepfather also worked. As a result, the children grew up quickly. Ms. McClain said the Petitioner's oldest sister, Christine, was like a mother to the other siblings. Ms. McClain described the Petitioner's youngest sister who had sickle cell anemia as a "sweet girl." Ms. McClain said that the Petitioner and Vanessa shared a bond and that whenever Vanessa had to go to the hospital, the Petitioner would carry her to the family's car. Ms. McClain described the Petitioner's stepfather as a nice man who was quiet and laid back and who worked often.

Ms. McClain recalled that the Petitioner's mother and stepfather had marital problems and that they both had affairs. Their neighbors overheard them arguing and accusing each other of cheating. They divorced, and the Petitioner's stepfather told the Petitioner that he had to be "the man of the house."

Ms. McClain testified that she attended school with the Petitioner. Ms. McClain had dyslexia and was placed in a Title I resource class to learn how to read correctly. She said the Petitioner was also in the class because he could not read. The Petitioner attempted to read but was unable to do so. He also was unable to comply with the directions that he received. When the Petitioner was called on to read aloud in class, he acted out or made a joke to take the attention away from his reading.

Ms. McClain testified that she and the Petitioner made money by raking leaves and mowing yards in the neighborhood. She recalled that the Petitioner would be instructed to mow and edge the yard. He would mow the yard but not edge it. Ms. McClain explained

that the Petitioner's failure to edge was not due to laziness but was due to the Petitioner's failure to understand directions.

Ms. McClain testified that after the Petitioner's mother divorced, his mother and her two sisters threw parties at her home every weekend. The attendees drank alcohol and smoked marijuana in front of the children. The Petitioner's cousins, Lewis Hill, Bobby Taylor, and Eugene Hill, also attended the parties. Ms. McClain described the Petitioner as quiet and reserved. She said the Petitioner's behavior changed once he began associating with his cousins. His cousins pressured him to drink alcohol and shoplift. Ms. McClain stated the Petitioner did not drink alcohol in front of her out of respect for her Christian beliefs. Ms. McClain described Mr. Hill as the leader of the group and the Petitioner as a follower.

Ms. McClain testified that the Petitioner was angry that his family had fallen apart. After left, "Moses" moved in with the family. The Petitioner did not like having another man living in the house because he did not receive the attention from his mother that he received when no one else lived there. Ms. McClain recalled that at age fifteen, the Petitioner moved and lived with various cousins. He also left the school he and Ms. McClain attended. The Petitioner moved his things from house to house in a paper bag.

Ms. McClain testified that Ms. Watkins was the Petitioner's girlfriend and the mother of his children and described Ms. Watkins as "the boss." Ms. McClain said the Petitioner attempted to care for his children and Ms. Watkins's oldest child. The Petitioner loved his children and hugged and played with them. The Petitioner also tried to pay the bills. Ms. McClain knew the Petitioner was searching for a job but was unable to find a job due to his criminal record. She said the Petitioner did not handle money well and gave his money away. As a result, people took advantage of him. Ms. McClain did not believe that the Petitioner was ready for the responsibility of having children and a relationship. She said that he was not capable of being a leader and that Ms. Watkins told him what to do.

Ms. McClain testified that she saw the Petitioner shortly before the offenses. She said that the Petitioner appeared as if something was troubling him, that his eyes were red, and that he could have been crying. The Petitioner informed Ms. McClain that he could not pay his bills and that they were going to be evicted from their apartment. They did not have the opportunity to discuss the matter further because Ms. Watkins made the Petitioner leave.

Ms. McClain said no member of the Petitioner's defense team contacted her in 1995 or 2000. She also said that had they contacted her, she would have testified on the Petitioner's behalf.

Bobby Taylor, the Petitioner's cousin, testified that he is two years older than the Petitioner and had known him all of his life. He said that when the Petitioner was eighteen or nineteen years old, the Petitioner began having problems with money and began drinking alcohol heavily. Mr. Taylor drank alcohol with the Petitioner on a few occasions but never drank as much as the Petitioner. The Petitioner would drink malt liquor and then drink whiskey "pretty heavy." The Petitioner would drink all day, and Mr. Taylor saw the Petitioner intoxicated in the middle of the day. He said that when the Petitioner was drinking alcohol, he acted "just the same." The Petitioner's drinking continued until he was arrested.

On cross-examination, Mr. Taylor testified that the Petitioner would purchase his own alcohol on some occasions and that friends would purchase it for him on other occasions. Mr. Taylor was aware that the Petitioner was selling drugs to make money but said the Petitioner was not able to make much money. The Petitioner was selling drugs in the late 1980s and early 1990s before the offenses occurred.

On redirect examination, Mr. Taylor testified that when the Petitioner was selling drugs, people would tell him that they would pay him but then never had the correct amount of money. They would never pay the Petitioner the difference. He said the Petitioner did not know how to manage money because he was drinking alcohol. The Petitioner also gave money to the mother of his children because she complained that the children needed things. He said the Petitioner felt pressured and drank more alcohol as a result.

Jeffrey Tharpe testified that he has known the Petitioner for approximately twenty years and met him through the Petitioner's cousins, Eugene Taylor and Lewis Hill. At the time, Mr. Tharpe was a supervisor at a Kroger. Mr. Taylor said the Petitioner needed a job. Mr. Tharpe did not see the Petitioner complete a job application, but the Petitioner was hired. Mr. Tharpe was a supervisor on the night shift and supervised a total of six people. His employees buffed and mopped floors and ensured that the store was clean for the following day. They also assisted the stock crew and cleaned the warehouse. Mr. Tharpe said that when supervising the Petitioner and other employees, he gave them simple instructions for completing their tasks.

Mr. Tharpe testified that Eugene Taylor and Lewis Hill also worked with the Petitioner. The Petitioner and Mr. Hill were close and were more like brothers than cousins. Mr. Taylor was the oldest of the three men, and Mr. Hill was the youngest. Mr. Tharpe recalled that Mr. Hill was the leader of the group and talked more than the other two. Mr. Taylor, Mr. Hill, and the Petitioner each owned vehicles, but Mr. Hill did the majority of the driving. Mr. Hill drove even if in one of the others' vehicle. Mr. Tharpe described the Petitioner as reserved and quiet. The Petitioner talked more when he was in a group of

people. Mr. Tharpe said that when they first met, the Petitioner did not talk much unless the words were "pulled" out of him.

Mr. Tharpe testified that after work, the Petitioner and his cousins visited him at his house to play basketball, barbecue, and talk. Mr. Tharpe said they came to his house approximately four times per week and seemed to enjoy coming to his house. During their visits, the Petitioner, Mr. Taylor, and Mr. Hill discussed their mothers but never mentioned their fathers. Mr. Tharpe discussed family trips with them. He realized that most of them had never been outside of Memphis, so he took them to Nashville one day.

Mr. Tharpe believed that the Petitioner and his cousins were seeking help and attention. He also believed that they were searching for stability and a place where they could visit without chaos. At the time, the Petitioner was eighteen years old and married. Mr. Tharpe saw how the Petitioner approached the responsibilities associated with being married and tried to guide him. Mr. Taylor and Mr. Hill were not married and did not have the same lifestyle as the Petitioner. Mr. Tharpe told the Petitioner that he had to choose which lifestyle that he wanted to live. Mr. Tharpe said that during his last conversation with the Petitioner, the Petitioner informed him that he chose Mr. Tharpe's lifestyle. Mr. Tharpe believed that the Petitioner was a good father and tried to be a good husband.

Mr. Tharpe testified that he was not contacted by any member of the Petitioner's defense team in 1995 or 2000. He said that had he been contacted, he would have cooperated and testified.

Benjamin Ivy testified that he retired as a science laboratory teacher at Westwood Elementary in Memphis. He knew the Petitioner from the time that the Petitioner was in the third or fourth grade until he was in the sixth grade. Mr. Ivy taught the Petitioner in the science laboratory one day each week and described the Petitioner as a "moderate" student.

Mr. Ivy testified that the school had approximately 1100 to 1200 students at the time that the Petitioner attended the school. He remembered the Petitioner because the Petitioner was a "good" student in that he did not have any disciplinary issues. Mr. Ivy recalled that the Petitioner's parents attended open house and other activities at the school. Mr. Ivy noted the importance of parental support and stated that the support sends a message to children that their parents also support the teachers. Mr. Ivy was unaware that the Petitioner experienced considerable problems in academics once he reached the eighth grade.

Mr. Ivy testified that he lived in Memphis in 1995 and 2000. He also said that had he been asked, he would have answered any questions regarding the Petitioner and would have testified.

Dr. Joseph Angelillo, a clinical psychologist, testified that he was contacted to evaluate the Petitioner in the areas of cognitive and psychological functioning. He did not recall whether he was contacted by resentencing co-counsel or by Inquisitor. Dr. Angelillo met resentencing co-counsel at his office, and they walked over to the jail where he was introduced to the Petitioner. Dr. Angelillo did not recall any specific discussion with co-counsel regarding the scope of his evaluation.

Dr. Angelillo testified that when he was retained, he had seven to ten days to provide psychological information to counsel. He immediately began reviewing the case. He reviewed the Petitioner's school records and memoranda prepared by Inquisitor. According to his bill, he spent one hour reviewing case material.

Dr. Angelillo testified that to the best of his knowledge, he had no discussion with counsel regarding the need for neuropsychological testing. He said he did not conduct such testing. Rather, if he determined a need for such testing, he referred counsel to a neuropsychologist and included the recommendation in his report.

Dr. Angelillo testified that counsel did not request that he evaluate the Petitioner's mental state at the time of the offenses. He did not recall any discussion regarding the need to test the Petitioner for intellectual disability. Dr. Angelillo said that while he could offer an opinion regarding intellectual disability, he first would need to conduct IQ testing and evaluate the person's adaptive functioning. The records also would have to indicate the onset of adaptive deficits and deficient IQ before the age of eighteen. Dr. Angelillo said that counsel did not request that he evaluate the Petitioner's adaptive functioning and that there was insufficient time and funds available for him to do so. Dr. Angelillo did not recall referring the Petitioner to an intellectual disability specialist.

Dr. Angelillo testified that a person's raw IQ score may be used in determining the person's IQ without considering the standard error of measurement if the IQ score is high enough. The law considers an IQ of below 70 to be within the intellectually disabled range. If the person's raw IQ score was 100, his actual IQ would be well above the intellectual disabled range, and consideration of the standard error of measurement would be unnecessary. Dr. Angelillo stated that otherwise, both the standard error of measurement and the "Flynn Effect" should be considered in determining a person's actual IQ.

On cross-examination, Dr. Angelillo testified that he was qualified to administer IQ tests and offer an opinion regarding whether someone was intellectually disabled and that he had offered such opinions on prior occasions. Dr. Angelillo administered the WAIS-III, and the Petitioner received a full-scale IQ score of 78. Dr. Angelillo said this score placed the Petitioner within the borderline range of intellectual functioning. The Petitioner's verbal IQ

score was 81, and his performance IQ score was 79. Dr. Angelillo also administered four subtests of the Woodcock Johnson Achievement Test, two subtests in reading and two subtests in mathematics. The Petitioner received a grade equivalent score of 8.7 on the broad reading index and a grade equivalent score of 6.6 on the mathematical index. Dr. Angelillo did not recall that during the resentencing hearing, the prosecutor asked him on cross-examination whether the Petitioner was intellectually disabled and that he responded that the Petitioner was not. Dr. Angelillo stated he did not diagnose the Petitioner as intellectually disabled.

Dr. Angelillo testified that he diagnosed the Petitioner with generalized anxiety disorder, obsessive compulsive personality traits, histrionic personality features, and schizotypal personality functions. Due to the short amount of time that Dr. Angelillo had, he basically used the results from testing to diagnosis the Petitioner. He stated the Petitioner's presentation was consistent with the testing.

Dr. Angelillo testified that the Petitioner denied any psychological problems. He described the Petitioner as laid back and sociable. He further described the Petitioner as one who attempted to meet others' expectations, as self-denying and unassertive, and as fearful of taking risks for fear of making mistakes or appearing unconventional. Dr. Angelillo said detachment was a characteristic of one with schizotypal personality features.

Dr. Angelillo testified that he reviewed the Petitioner's school records, records of interviews of family members, his criminal history, and his prior psychological testing. Dr. Angelillo said that based upon his report and Dr. Steinberg's report, there seemed to be a change in the Petitioner's personality since his incarceration. Dr. Steinberg administered IQ testing and reported that the Petitioner had an IQ score of 75. Dr. Steinberg placed the Petitioner in the borderline level of intellectual functioning. Dr. Angelillo did not see a diagnosis of intellectual disability in the Petitioner's school records and said that neither he nor Dr. Steinberg diagnosed the Petitioner as intellectually disabled. Dr. Angelillo did not believe that he was provided with information that both of the Petitioner's parents had borderline intellectual functioning. He said the information was relevant to whether the Petitioner was intellectually disabled as the information indicated a genetic component.

Dr. Angelillo testified that Dr. Steinberg administered an objective psychological test and found reason to believe that the Petitioner was malingering based upon the validity of the scales. Dr. Steinberg found that the Petitioner had a deviant or aberrant response style. Dr. Angelillo stated he did not see such behavior when he tested the Petitioner. Rather, he found the Petitioner to be very cooperative and said that he seemed to minimize his psychological problems.

On redirect examination, Dr. Angelillo testified that many of those who are later found to be intellectually disabled sometimes minimize their psychological deficits. Dr. Angelillo did not administer all the testing required in order to render an opinion regarding whether the Petitioner was intellectually disabled. He said he could not offer such an opinion absent an evaluation of the Petitioner's adaptive functioning. Dr. Angelillo did not recall whether Dr. Steinberg tested the Petitioner's ability to read. Dr. Angelillo said that the Petitioner could have had difficulty reading some of the tests and that Dr. Steinberg interpreted such difficulty as malingering.

Dr. Angelillo testified that he met with the Petitioner on three occasions within a short period of time. He met with the Petitioner on February 8, 10, and 11, 2000. Dr. Angelillo reviewed interviews of five people. He tested the Petitioner in a controlled structured environment where the Petitioner had lived for many years. The Petitioner was not using drugs at the time. The Petitioner told Dr. Angelillo that he had reached a place where he was at peace.

Dr. Angelillo testified that he included a caveat in his report that he had a limited amount of background information in which to render an opinion. The reported stated, "It should be noted that because I do not have a history with this inmate (i.e. therapeutic history), I am being careful to cite the impressions that were gleaned from this test rather than making hard conclusions based on the same."

On recross-examination, Dr. Angelillo acknowledged that he testified during the resentencing hearing that the Petitioner was not intellectually disabled. Rather, he had an IQ of 78. Dr. Angelillo said that if he found any indication that the Petitioner was functioning within the intellectually disabled range, he would have provided counsel with the Petitioner's IQ and percentile. He said he was not asked to determine whether the Petitioner was intellectually disabled. Rather, Dr. Angelillo provided an opinion based upon the circumstances when he evaluated the Petitioner.

Dr. Angelillo testified that he did not evaluate the Petitioner regarding his mental status at the time of the offenses. He concluded that based upon the Petitioner's mental status at the time of the evaluation, he understood the circumstances and his actions. Dr. Angelillo did not recommend neuropsychological testing based upon his brief evaluation and the areas in which he was requested to evaluate the Petitioner. He said he had no information supporting an impairment because he did not evaluate whether the Petitioner had impairments. Dr. Angelillo stated that the Petitioner was not hallucinating and that there was no psychosis present during the evaluation. The Petitioner also did not have a history of hallucinations or psychosis.

Dr. Pamela Auble, a neuropsychologist and an expert in neuropsychology, testified that a clinical neuropsychologist evaluated brain functioning, usually through standardized testing, interviews, and reviewing records. A clinical neuropsychologist reviewed brain functioning, including memory, attention, intelligence, reasoning, and personality, to determine whether there is evidence of brain injury or dysfunction and the person's resulting limitations. Dr. Auble said the Petitioner's consistently low intelligence and poor performance in school were "red flags" indicating the need for a neuropsychological evaluation. She noted that some of the information in the Petitioner's background suggested that his coping skills were impaired.

Dr. Auble testified that when Dr. Steinberg evaluated the Petitioner in 1994, he administered the Luria Nebraska screening test, a brief neuropsychological screening test, and concluded that the Petitioner fell within the normal limits for his intelligence. Dr. Auble said an error score of eight or more on the Luria Nebraska was not considered to be normal and indicated the need for further assessment. She stated the Petitioner's score on the test was eight and indicated that he should have been assessed further. According to the test protocol, the Petitioner had problems with mathematics, verbal reasoning, relationships, and verbal memory. Dr. Auble stated that the Luria Nebraska indicates that something is wrong but does not provide information to identify the problem. Dr. Steinberg did not perform further neuropsychological testing based upon the result of the Luria Nebraska. Dr. Auble said that as a result, Dr. Steinberg was not in a position to conclude within a reasonable degree of certainty that the Petitioner exhibited no brain damage.

Dr. Auble testified that she disagreed with Dr. Steinberg's conclusion that the Petitioner had some tendency to malinger. Dr. Steinberg reached his conclusion after administering the Minnesota Multiphasic Personality Inventory ("MMPI"). Dr. Auble said that according to the data, the Petitioner responded in a random or unselective manner, and the trend scale of the MMPI was significantly elevated. Dr. Auble explained that the trend scale measures the tendency to answer "true" to every question regardless of content. She stated it was as if the person was not paying attention to his or her answers. Dr. Auble further stated this type of response style was most likely due to the Petitioner's difficulty in reading or understanding the content of the items. She said the Petitioner likely read better now than he did at the time that he was given the test. The Petitioner had an eighth-grade education at best, and the MMPI was written at an eighth-grade level. Dr. Auble believed that the Petitioner had problems understanding the items and that when he did not know what the item was, he responded "true."

Dr. Auble testified that malingering is thought to be that the person is faking problems and saying, "I have all the problems in the entire world." She explained that to determine whether a person was malingering, the person's answers of the questions would need to be

consistent. She did not believe that the Petitioner was malingering. Rather, she believed that he did not comprehend the questions. Dr. Auble did not agree with Dr. Steinberg's conclusion that the test results indicated the presence of antisocial personality disorder. Dr. Auble explained that Dr. Steinberg drew his conclusions from the Petitioner's profile on the MMPI, a test in which the Petitioner answered questions without comprehending them.

Dr. Auble testified that in evaluating the Petitioner, she interviewed him, reviewed records, reviewed summaries of interviews conducted by others, administered standardized testing, drafted a report, and drafted a supplement to the report. She met with the Petitioner on July 18, July 26, and August 22, 2005, and spent a total of 13.3 hours with him. Dr. Auble also drafted an affidavit for post-conviction counsel in support of a motion for funds for an addiction specialist. Dr. Auble said she commonly was involved in assisting attorneys in identifying and securing the assistance of other experts. She stated that if she performed an evaluation and noticed a problem that was not within her level of expertise, she may recommend another expert.

Dr. Auble testified that she administered to the Petitioner the test of memory malingering and the validity indicator profile nonverbal. According to the results of these tests, the Petitioner was attempting to answer the questions correctly, was compliant, and was not malingering. Dr. Auble also administered IQ testing and noted that the results were consistent with the results of the IQ testing that was administered previously. She said such consistency was another indication that the tests were valid.

Dr. Auble testified that she administered the WAIS-III to the Petitioner and that his full-scale IQ score was 79, placing him in the eighth percentile for the general population. She consulted with Dr. Geraldine Bishop and reviewed her report and test results. Dr. Auble noted that the Petitioner's full-scale IQ scores on the tests that he had been administered were 75, 78, 79, and 78. Dr. Auble said these scores were all within the same range, indicating that the Petitioner was making a good effort on the tests. She also said the scores indicated that the Petitioner had low intelligence. Dr. Auble noted that Dr. Bishop administered the WAIS-IV, that Dr. Auble and Dr. Angelillo administered the WAIS-III, and that Dr. Steinberg administered the WAIS-R. Dr. Auble stated the tests were relatively similar to each other and were updated and "renormed" every few years.

Dr. Auble testified that she learned the Petitioner had mild difficulties with attention and concentration. His personality testing showed he was at risk for substance abuse, which was consistent with his history. The Petitioner had a simple view of the world. The results of the personality testing also showed that the Petitioner had some concerns regarding his health and that he was somewhat lonely. Dr. Auble noted that neuropsychological testing

showed some significant impairments in the area of mental flexibility or the ability to cope with change or a complex situation.

Dr. Auble testified that she administered two tests of mental flexibility, the Wisconsin Card Sort and the Delis Kaplon Executive Function System. In the Wisconsin Card Sort, four cards were laid on a table. The person was given another card and told to put that card underneath whichever card that the person believed might go with that card. The first category required that the person match the cards according to color. Dr. Auble said it generally takes the person a few times to match the cards correctly because the person was unaware of the category. After the person was told to match ten cards in a row, Dr. Auble said she changed the category to shape without telling the person that she was changing the category. The third category was matching the number of dots that are on the cards. After the third category, she returned to the first category of color. Dr. Auble said that when she changed categories, she only told the person that he or she was correct or incorrect and does not tell the person in advance that the category has changed.

Dr. Auble testified that when she administered the Wisconsin Card Sort to the Petitioner, he made a few more mistakes than she expected but basically had in his head how to do it. After three categories, the Petitioner became overwhelmed. For the next seventy-six trials, the Petitioner did not understand that she had returned to the color category. He made a total of 800 errors. The Petitioner's score fell within the first percentile of those who were the same age and had the same education as the Petitioner. Dr. Auble said the number of errors indicated that the Petitioner was not using the feedback that he was provided.

Dr. Auble testified that the Wisconsin Card Sort also tested "perseverative response" or mental rigidity, which was making the same mistake over and over again. She determined whether the Petitioner changed or continued to make the same mistake when she told him that he was wrong. The Petitioner did not change. The Petitioner's score for perseverative response fell within the second percentile of those who were the same age and had the same education as the Petitioner. Dr. Auble said these test results also supported her conclusion that the Petitioner was impaired when addressing change.

Dr. Auble testified that she administered to the Petitioner the word context subtest or the Dulis Kaplan. In this test, Dr. Auble provided the person with a nonsense word and five sentences which included that word to allow the person to determine the meaning of the word. She first provided the person with two sentences and asked the person to determine the meaning of the word based on those sentences. When she gave the Petitioner the third sentence, he was unable to use the other two sentences to determine the meaning of the word. When she gave him the fourth sentence, the Petitioner chose a meaning that did not fit within any of the sentences. His performance was the same when provided the fifth sentence. The

Petitioner's score fell within the second percentile. Dr. Auble said that based on his performance, she determined that he was not able to bring information together and make sense of it in a normal way. The Petitioner tended to respond to the clue that he had just been given without considering the previous clues. He also tended to provide the correct answer to one clue and the wrong answer to the next clue. The Petitioner's consistently correct ration fell within the first percentile based upon those who were the same age.

Dr. Auble testified that she administered the tower subtest of the Dulis Kaplan during which the Petitioner was required to make a picture using a sample picture and a tower of rings on pegs and following the rules. The Petitioner was unable to follow the rules. He made a mistake and could not determine how to backtrack and correct the mistake. Dr. Auble said that while the Petitioner did not break the rules, he could not plan moves ahead so that he could make the picture. The Petitioner's score fell within the first percentile. Dr. Auble explained that the test involved planning, using the information obtained in the environment, changing and making sense of the information, and doing so in a way that allowed the person to do well in the world.

Dr. Auble testified that the Petitioner performed better on tasks requiring him to check between different concepts. She noted that Dr. Steinberg administered the Booklet Category Test, which was similar to the Wisconsin Card Sort except that the person was told when the rules are changed. Dr. Auble stated the Petitioner performance on that test was acceptable. He experienced problems when he did not know that the rules were going to change.

Dr. Auble testified that the Petitioner was incarcerated when she and Dr. Steinberg evaluated him. She said that in prison, the Petitioner knew the rules, and everything was predictable. Outside of prison, there were more decisions to be made, and the rules were not written down. The Petitioner had to cope with more than one thing at a time, and things changed without warning.

Dr. Auble testified that reviewing school records was important to document any of the Petitioner's impairments and his performance. She noted that the Petitioner repeated the eighth grade four times. She considered the Petitioner's repeating of the eighth grade to be a "red flag." Dr. Auble said that when Dr. Steinberg evaluated the Petitioner in 1994, there was some indication that neuropsychological testing should have been conducted. The Petitioner was later evaluated by Dr. Angelillo, who was not a neuropsychologist and did not administer such testing.

Dr. Auble testified regarding the importance in reviewing the Petitioner's criminal history records to examine what had happened to the Petitioner and what he had done. The Petitioner committed a robbery shortly before the homicides. During the robbery, the

Petitioner apparently was drinking heavily and had a codefendant. Dr. Auble said the Petitioner's commission of this robbery followed by the robbery of the victims indicated that something could have been going wrong in the Petitioner's life. Dr. Auble also said the Petitioner's criminal history could be another "red flag."

Dr. Auble noted the importance of the Petitioner's statements and testimony. The Petitioner did not show emotion when he testified. Dr. Auble said the Petitioner tended to "shut down" in situations of stress and pressure. When the Petitioner felt pressured, he drank, used drugs, and "shut down." Dr. Auble stated that at the time of the offenses when the events did not occur as planned, the Petitioner was unable to cope with it. She explained that when the Petitioner was confronted with a complicated situation, he was unable to cope with it and overreacted. He could not take it all in and form a plan to address the situation. Dr. Auble said the area of the Petitioner's brain that should have assisted him in coping with changing situations shut down.

Dr. Auble testified that she reviewed the facts of the offenses and the Petitioner's statements and discussed the case with the Petitioner. She said that based upon her understanding of the facts, the Petitioner's actions were not calculated but were more of a reaction of not being able to deal with the situation. The Petitioner gradually was "losing it" and become "hysterical." The Petitioner and his codefendant went to the wrong apartment. The Petitioner began to leave but then decided to enter the apartment. Dr. Auble said the codefendant raped Mrs. Jackson, which horrified the Petitioner. The Petitioner did not know what to do, so he returned to looking for items to take. Mr. Jackson attacked the Petitioner with a knife, and the Petitioner shot him. Dr. Auble did not believe that killing the victims was part of the plan. Rather, she believed that the Petitioner became overwhelmed and "hysterical" and began shooting. Dr. Auble did not know how much time had passed between the Petitioner's shooting Mr. Jackson and his shooting Mrs. Jackson.

Dr. Auble testified that review of summaries of interviews of others was important because the interviews provided different perspectives on the Petitioner's life. The interviews can provide a better understanding of a defendant, and a defendant may be reluctant to discuss family issues. Dr. Auble said the interviews also provided a comprehensive picture of the Petitioner and his brain functioning outside of prison.

Dr. Auble testified that she did not believe the Petitioner's mother was prepared to be a good parent. The Petitioner's mother was intellectually limited and raised by an abusive father. Dr. Auble said the risk for intellectual impairment increases when the parents are also intellectually limited. The petitioner's mother had her first child at age fifteen, and she had the Petitioner at age seventeen. Dr. Auble stated that the Petitioner's mother was raised in

an environment where she did not learn to be a good parent. The Petitioner's biological father, MacArthur Carter, had low intelligence and was not involved in the Petitioner's life.

Dr. Auble testified that a strong history of addiction and alcoholism was present on both sides of the Petitioner's family. The Petitioner's mother had eleven siblings. Five of the siblings had a history of alcoholism and drank to the point that they would be unable to remember anything the following day. Three of the siblings had a history of cocaine abuse. Mr. Carter had been an alcoholic since age sixteen or seventeen and had never received treatment. Mr. Carter's mother had seven brothers who were alcoholics, and she married a man who was an alcoholic. Dr. Auble said that alcoholism runs in families and that when there is alcoholism and addiction on both sides of the family, the risk that a person will cope with life through intoxication increases. Dr. Auble also said sons with alcoholic fathers have a greater risk of becoming alcoholics, even if they are adopted and raised in an entirely different environment. Dr. Auble believed that if a person is raised in an environment in which people drink alcohol, the person is taught that consumption of alcohol is a method of solving problems.

Dr. Auble testified that the Petitioner's social history showed three risk factors: low intelligence, addiction, and unstable family. Dr. Auble noted the Petitioner's family was particularly unstable during the early years before the Petitioner's mother and stepfather met. The Petitioner had intestinal parasites at age one. He lived with his maternal grandmother, along with aunts and uncles who used drugs. When the Petitioner's mother and stepfather married, the stepfather brought stability to the family, which Dr. Auble believed helped.

Dr. Auble testified that when the Petitioner was seven years old, his younger brother was killed by a train. They were about the same size and shared clothes and a bedroom. Following his brother's death, the Petitioner had nightmares and did not want to sleep in the bedroom they had shared. The Petitioner's mother and stepfather were unavailable to be with the Petitioner for some time because they also were grieving. Dr. Auble said the Petitioner demonstrated symptoms of post-traumatic stress disorder. The Petitioner discussed feeling numb and keeping to himself. Dr. Auble said he also had an anxiety disorder and continued to demonstrate anxiety during prior evaluations. When the Petitioner was transferred to Riverbend, he sought help for nightmares about his childhood. Dr. Auble believed these problems increased the Petitioner's insecurity and made him more tense. At age seven, the Petitioner was still in the developmental period. Dr. Auble noted research that trauma or abuse can alter a person's brain chemistry. She also noted that post-traumatic stress as a young child can alter a person's ability to cope with stress, meaning that with stress, the person overreacts.

Dr. Auble testified that the Petitioner's youngest sibling had sickle cell anemia and was very ill as a child. She went to the hospital on many occasions, and when she was not in the hospital, her bones ached. She could not walk and would feel pain whenever her bones were touched. She required a great amount of care and attention from her parents. Dr. Auble said that as a result, the Petitioner did not receive the amount of attention from his mother and stepfather that a child normally would receive. Dr. Auble believed that the Petitioner's mother was not able to cope with the problems as well as a person with the proper level of functioning would cope.

Dr. Auble testified that the Petitioner struggled in school. He began performing poorly in the second grade and did not improve on any achievement testing after the fourth grade. Dr. Auble explained that a student's primary task until the second grade is memorization. By the fourth or fifth grade, the student is supposed to begin using facts to reason and integrate information. The Petitioner was unable to do this, and his grades declined. He also stopped showing an accumulation of knowledge on achievement testing. When the Petitioner's grades worsened, the Petitioner's stepfather believed that the Petitioner was not trying and spanked him as a result.

Dr. Auble testified that the divorce of the Petitioner's mother and stepfather likely was more difficult for the Petitioner because his stepfather had been so important to the family's stability. His stepfather was a manager of a Megamarket and was relatively intelligent. Following the divorce, the Petitioner lived with his stepfather for some time and then moved in with his mother. His stepfather told him that he had to care for his mother and sisters. Dr. Auble said the Petitioner was a teenager who was not very intelligent and did not have good coping skills. As a result, the Petitioner was not prepared to be a father figure. The Petitioner's mother had many relatives who drank alcohol and used drugs. When the Petitioner moved in with his mother, he began associating with his cousins more and began drinking alcohol and using drugs. When the Petitioner's stepfather was in the home, he prevented some of the association with the Petitioner's mother's family because he believed her family was a bad influence. Dr. Auble testified that the Petitioner was anxious and tended to worry. He believed that he was responsible for his mother in a way that he was unable to fulfill.

Dr. Auble testified that leading up to the offenses, the Petitioner did not have a steady job and was having financial problems. According to the summaries of family interviews, the bills were due, and he was being threatened with eviction. The Petitioner had been involved with Ms. Watkins since the age of seventeen and was attempting to support four children under the age of five. According to the summaries of family interviews, Ms. Watkins always needed money and would use the rent money to eat at restaurants and on things other than rent. She may not have been faithful to the Petitioner. Dr. Auble stated that

in early 1993, Ms. Watkins may have been seeing other men, and the Petitioner did not want to know about it. The Petitioner was drinking alcohol frequently and using marijuana and cocaine.

Dr. Auble testified that she evaluated the Petitioner's mental status at the time that she saw him and at the time of the offenses. She believed that the Petitioner suffered from a mental illness at the time of the offenses. Dr. Auble diagnosed the Petitioner with adjustment disorder, along with anxiety and depression. She explained that an adjustment disorder involves the inability to cope with stressors in life and that the Petitioner was feeling anxious and depressed. Dr. Auble said that at the time of the hearing, the Petitioner had anxiety disorder not otherwise specified. She concluded that the Petitioner had borderline intellectual functioning, which is an IQ of between 70 and 79. Dr. Auble also concluded that the Petitioner had cognitive disorder not otherwise specified with impairments in executive abilities. She said the Petitioner did not have impairments in route memory dementia, or amnestic disorder. Dr. Auble concluded that the Petitioner was dependent upon alcohol and marijuana and abused cocaine. Dr. Auble testified that adjustment disorder, borderline intellectual functioning, and cognitive disorder not otherwise specified are all mental illnesses.

Dr. Auble testified that at the time of the offenses, the Petitioner was intoxicated and sleep deprived. She said the Petitioner had always taken responsibility for the shootings and accepted that he needed to be punished for it. He believed he was going to obtain drugs and possibly money from drug dealers.

Dr. Auble testified that diminished capacity only applies in a limited number of cases. The person must have been unable to form the requisite level of intent due to a mental disease or defect. Dr. Auble explained that the person with diminished capacity generally is guilty of some offense, but not premeditated first degree murder. Dr. Auble said diminished capacity does not apply to charges of felony murder. She also said that because the Petitioner was charged with premeditated first degree murder, evidence of diminished capacity should have been presented to negate premeditation. Dr. Auble concluded that due to the Petitioner's mental diseases and defects, he would have been impaired in forming the specific intent necessary for first degree murder. She believed the Petitioner was in a state of excitement and passion at the time of the shootings and was incapable of forming reflection and judgment.

When questioned regarding the concept of "front loading mitigation," Dr. Auble testified that research indicated that juries were often making or beginning to make decisions regarding sentencing during the guilt phase of the trial. The presentation of mitigating evidence regarding social history during the guilt phase can assist the jury in understanding

a defendant and place the offense into context. Dr. Auble said that had the Petitioner not entered a guilty plea, there would have been an opportunity for "front loading" mitigation. Dr. Auble stated she would have presented the Petitioner's history and the information about him that led to the diagnosis that was the basis of the diminished capacity claim.

When questioned regarding statutory mitigating circumstances, Dr. Auble testified that she believed the Petitioner's capacity to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect which was insufficient to establish a defense to the crime but which substantially affected his judgment. Dr. Auble said the mental diseases were the Petitioner's borderline intellectual functioning, the additional impairments in executive abilities, and the adjustment disorder with anxiety and depressed mood.

Dr. Auble reviewed a summary of an interview with original counsel regarding the events surrounding the Petitioner's guilty plea. She did not believe that original counsel's hopes that the Petitioner would change his mind regarding entering the plea were realistic due to the Petitioner's mental rigidity. The Petitioner's declining to enter a plea after being told that a plea would be advantageous would have required the Petitioner to change his view of what was going to occur. Dr. Auble said the Petitioner was unable to change his view. She also said her opinion was consistent with testing that both she and Dr. Steinberg administered to the Petitioner. Dr. Auble believed the Petitioner's ability to change course, particularly in open-ended situations, was impaired. The Petitioner was given direct advice that changed over time. The Petitioner experienced problems addressing this change. Dr. Auble believed that the Petitioner's mental rigidity continued to exist. She noted that Dr. Steinberg indicated that the Petitioner was experiencing some stress and anxiety, which Dr. Auble said would have impaired the Petitioner.

Dr. Auble testified that it did not appear that Dr. Steinberg was provided any information regarding the Petitioner's social history. Dr. Auble stated that Dr. Steinberg was not asked to document how the Petitioner's social history impacted him at the time of the offenses and that he did not refer to any mitigating factors that might be present. Dr. Auble said Dr. Steinberg was also not asked to evaluate the Petitioner regarding diminished capacity. Dr. Auble said the majority of Dr. Steinberg's report addressed competency and noted the report was entitled "forensic psychological competency evaluation." Dr. Auble noted that Dr. Steinberg's testimony was brief and that he did not discuss the Petitioner's problems with executive functioning or his state of mind at the time of the offenses. He also did not explain the meaning of borderline intellectual functioning. Dr. Auble said that counsel did not appear to understand the meaning of an IQ of 75 and that understanding the Petitioner's functioning would be important in representing him.

Dr. Auble testified that according to Dr. Angelillo's report, resentencing co-counsel referred the Petitioner to him for psychological, intellectual, and achievement testing. Dr. Angelillo was not a neuropsychologist and did not conduct neuropsychological testing. He was not asked during the sentencing hearing to address mitigation issues. He also was not asked to develop a social history and relate that history to the test results. Counsel did not question Dr. Angelillo regarding how the Petitioner's social history and limitations might have led to the offenses. Counsel questioned Dr. Angelillo regarding the IQ test, achievement testing, and personality testing. Although Dr. Angelillo testified that he had reviewed a number of documents relating to the Petitioner's social history, counsel never questioned him about that information or how it related to the testing.

Dr. Auble stated that had she testified at the Petitioner's sentencing hearing, she would have presented a "setup for failure" theme. Dr. Auble would have testified regarding the Petitioner's intellectual limitations, his limited education, his inability to adapt and integrate information, his inability to cope with changing situations on the testing, his work history, his family issues, and his risk for addiction. Tony Blake, the codefendant's brother-in-law, showed the Petitioner and his codefendant the apartment and gave them the code to enter the apartment complex. Dr. Auble said Mr. Blake's statements unintentionally set up the Petitioner to fail.

Dr. Auble testified that the Petitioner did well in prison, which is a structured environment. He had a job, attempted to live a better life, had positive relationships, and had matured emotionally. Dr. Auble said the Petitioner continued to be mentally rigid and intellectually limited. He did not abuse drugs or alcohol but continued to have some anxiety. Dr. Auble stated the Petitioner could have a life in prison. She noted that the changes apparently occurred by 2000 as reflected in Dr. Angelillo's report.

On cross-examination, Dr. Auble testified that during the 1995 trial, the Petitioner was unable to explain what had occurred. She agreed that inconsistencies existed between the Petitioner's version of the events and the physical evidence. In his statement, the Petitioner said that Mrs. Jackson begged for her life and that he shot her in the eye. Dr. Auble said the Petitioner's version of the events had been consistent throughout the years. She also said the Petitioner always accepted responsibility for the offenses and told her that he was very "bothered" by the events. Dr. Auble acknowledged that the Petitioner pleaded guilty to felony murder.

Dr. Auble testified that Dr. Angelillo discussed the Petitioner's apparent change since he first went into custody. During his incarceration, the Petitioner maintained employment and moved quickly through the security levels to the point that he was essentially a trustee.

He became involved in Bible study and assisted other inmates with their problems. The Petitioner took the GED test on several occasions but did not pass. He reported that he was one point away from passing on the last test he took.

Dr. Auble testified that before the offenses, the Petitioner was employed for some time, lost his job, and then found other employment. He worked in Nashville as a cook for approximately one and one-half years, which was the longest period of time that he maintained employment. The Petitioner wanted to be a chef.

Dr. Auble testified that dependency to drugs or alcohol is consistent with daily use and addiction, while abuse of drugs or alcohol is consistent with occasional use. When she said that the Petitioner abused cocaine, she meant he used it occasionally. She explained that although someone cannot become physically addicted to marijuana, a person can become psychologically addicted to the drug.

Dr. Geraldine Bishop, a psychologist, testified that she reviewed the Petitioner's records from Memphis City Schools and prepared charts of the his grades and scores on achievement tests. Dr. Bishop noted that the Petitioner was administered the Metropolitan Achievement Test, the California Achievement Test, and the Kulmann-Finch Test. She had never administered the Kulmann-Finch Test but was familiar with the other two tests. She also was familiar with the grading system in the Memphis school system.

Dr. Bishop said she researched the Kuhlmann-Finch Test and described it as an IQ test that was intended to serve as a measure of scholastic aptitude. She described the reliability of the test as "modest" and the validity of the test as "weak." She said the test was no longer used. The Kuhlmann-Finch Test was a group-administered test, which was considered to be less reliable and less valid than an individual-administered test. Dr. Bishop said it was a screening test used to determine whether a student might need to be tested further. The Petitioner took the Kuhlmann-Finch Test in the third grade and received an IQ score of 108.

Dr. Bishop testified that the Petitioner's records showed grades from the first grade through the eighth grade with the eighth grade listed multiple times. The Petitioner's grades appeared to be average through the third grade. In the third grade, the Petitioner's grades were lower and fell below average. He began to make Cs and Ds. While in the fourth grade, the Petitioner began receiving below-average grades in reading. He made Cs, Ds, and Fs in all academic subjects. In the sixth grade, the Petitioner began making Ds and Fs. Dr. Bishop stated that when the Petitioner was in the fourth grade, he should have been "flagged" to receive a thorough individual assessment. He also should have received an individual assessment in the sixth or seventh grade.

Dr. Bishop testified that in the first three grades, rote memorization of techniques is required. The teacher provides the students with a great deal of assistance and returns any incorrect work to the student to correct it. Beginning in the middle of the third grade and into the fourth and fifth grades, the students are expected to begin functioning on their own with less assistance from the teacher. If a student has questions, the teacher will make himself or herself available to answer them. When students enter junior high school, the teacher becomes less available. The teacher provides students with worksheets without providing instructions, and the students are expected to work entirely on their own.

Dr. Bishop testified that from the sixth grade to the seventh grade, the curriculum shifts to include abstract concepts. Abstract reasoning involves the students' abilities to reason inductively and deductively and reach a conclusion on their own without any assistance from the teacher. Dr. Bishop said abstract reasoning requires a fairly sophisticated level of cognitive development and a fairly rich history in terms of the students being able to read and draw a conclusion. Dr. Bishop noted that when the Petitioner was in the seventh grade, he earned on his academic subjects a majority of Fs with a few Ds and an occasional C.

Dr. Bishop testified that policies in the Memphis City School System discouraged holding back students for academic reasons. She said that there was a notation of a Chapter 1 program when the Petitioner was in the eighth grade. Chapter 1 is a program for students who have specific academic deficiencies, and the student is taken out of the classroom one or twice per week and tutored in a specific subject. Chapter 1 also is referred to as Title I and is not considered to be special education or resource.

Dr. Bishop did not see any serious behavioral or disciplinary problems in the Petitioner's school records. The Petitioner received predominately Ss for "satisfactory" and Ns for "needs improvement." Dr. Bishop explained that Ns refer to low-level problems such as failing to bring his equipment to class, not keeping his books, getting out of his seat, and not following ordinary instructions. If the Petitioner had true disciplinary problems, he would have received a U for "unsatisfactory."

Dr. Bishop testified that the multiple listing of grades in the eighth grade in the Petitioner's school records indicated that he repeated the eighth grade. The first time that the Petitioner was in the eighth grade was from 1983 to 1984. During that time, the Petitioner received Chapter 1 assistance in reading. The Petitioner repeated the eighth grade from 1984 to 1985 and received Chapter 1 assistance in arithmetic. Dr. Bishop found no evidence in the record that the Petitioner's grades improved as a result of the Chapter 1 program. While in the eighth grade during the 1985 through 1986 school year, the

Petitioner's grades declined. He received a D in reading, and Fs in English, arithmetic, history, and science.

When questioned why a student with the Petitioner's grades did not receive additional assistance, Dr. Bishop replied that resources were not available and that teachers likely were not encouraged to identify those students who belonged in special education programs. Some teachers also believed that "mainstreaming" would benefit the student. Dr. Bishop stated that while "mainstreaming" improved the student's overall behavior, there was little credible evidence that it was beneficial to students in the academic area.

Dr. Bishop testified that in the spring term of 1986, the Petitioner attended several different schools. She noted that the curriculum changed from one school to another. She explained that by changing schools so often, the curriculum was in a constant state of "flux." Dr. Bishop described the Petitioner's attendance in school as "perfectly adequate." The Petitioner incurred more absences when he was older. During the spring term of 1986, the Petitioner was absent twenty-seven days. In 1987, he was absent thirty-one days. Dr. Bishop considered the thirty-one absences to be excessive and not easily explained by illness. The Petitioner's school records indicated that the Petitioner was prescribed summer school, but there was no indication that the Petitioner attended summer school.

Dr. Bishop testified that the Petitioner was born in 1970 and that his last academic reference in his school records was in 1987. She said that at that age, students can withdraw from school without any special meetings being conducted. The Petitioner remained in the eighth grade from age fourteen or fifteen to age seventeen. Dr. Bishop said it was very unusual for a student to remain in one grade for such a long period of time. Even twenty years ago, a student who failed a grade for a second time would be singled out for a special education assessment.

Dr. Bishop examined the results of achievement tests that were administered to the Petitioner while he was in school. In Kindergarten, the Petitioner took the Metro Reading Test, a reading readiness test. While in the first through the third grades, the Petitioner was administered the Metropolitan Achievement Test, which is no longer used. The test provides scores in total reading, total mathematics, and total battery. Only the Petitioner's total battery scores were reported in his records. The Petitioner's total battery score in the first grade was a grade level score of 1.6. During the fourth month of the second grade, the Petitioner received a total battery score of 1.8, just slightly below grade level. In the third grade, the Petitioner's total battery score was 2.6. Dr. Bishop said that at that time, the Petitioner's score should have been 3.5 or higher. The Petitioner was re-administered the test six months later while in the third grade and received a total battery score of 3.4, which was approximately at grade level.

In the fourth grade, the Petitioner was administered an unknown achievement test and received a score of 3.4 in total reading and 3.0 in total mathematics. Dr. Bishop said that the score of 3.4 was slightly below grade level and that the score of 3.0 was much more below grade level and should have caught someone's attention. In April 1980, when the Petitioner was in the fourth grade, he was administered the California Achievement Test ("CAT"). Dr. Bishop explained that the CAT reports scores for respective vocabulary, reading comprehension, total reading, spelling, language mechanics, language expression, total language, mathematics computation, mathematics applications, total mathematics, total battery, and reference skills. The Petitioner's school records referred to two sets of scores on the CAT in April 1980. Dr. Bishop did not know why a student would be administered the same test in the same month.

On the first CAT that the Petitioner took in April 1980, he had grade equivalent scores in the reading areas of 4.3, 4.7, and 4.5, which were essentially at grade level. He received a grade equivalent score of 2.6 in spelling, which was below grade level. Dr. Bishop said the Petitioner's spelling appeared to be better than what was reflected in the score. She noted that the Petitioner's score in mathematics computation appeared satisfactory but that his score in mathematics application was slightly below grade level. The Petitioner's total battery grade equivalent score on the first CAT administered to him in April 1980 was 4.3 and 3.9 on the second test. The score of 3.9 on the second test fell within the seventeenth percentile. Dr. Bishop stated that the score of 3.9 on the second test meant that the Petitioner was approximately one-half year behind.

In March 1982, when the Petitioner was in the sixth grade, he was administered the CAT. His grade equivalent score in total battery was 5.2, which fell within the twenty-fifth percentile. Dr. Bishop explained that essentially 75% of the students were doing better that the Petitioner. She said that the Petitioner's score was below grade level and that he should have had a score of 6.5 to 6.7 at that point. When the Petitioner was administered the CAT in April 1983 while in the seventh grade, his total battery score was 5.0, which fell within the fourteenth percentile. Dr. Bishop said this score meant that the Petitioner essentially was two years behind. In April 1984, during the first time that the Petitioner was in the eighth grade, his total battery score was 6.2, which fell within the seventeenth percentile. The Petitioner received the same score in May 1985 during his second time in the eighth grade. Dr. Bishop stated that since the Petitioner was repeating the eighth grade and taking the same courses for the second time, his scores would have been expected to improve. In May 1986, when the Petitioner was in the eighth grade for a third time, his total battery score was 5.5, which fell within the twelfth percentile. In April 1987, when the Petitioner was in the eighth grade for a fourth time, his total battery score was 3.4, which fell within the third percentile.

Post-conviction counsel recalled Dr. Bishop to testify regarding an evaluation of the Petitioner's developmental impairments that she later performed. Dr. Bishop administered the WAIS-IV, the Wechsler Individual Achievement Test ("WIAT"), and the Vineland Adaptive Behavior Scales, Second Edition ("Vineland-II"). The WAIS-IV was the latest edition of the Wechsler IQ tests and was released in 2008. The Vineland-II was the most commonly used scale to measure adaptive behavior.

Dr. Bishop did not understand why the Petitioner was not administered a specific assessment when he was in school. Arthur Benson told Dr. Bishop that he became aware at some point that the Petitioner was slow and different from the other children in the family. He pleaded with the Petitioner's mother to have the Petitioner tested at school, but she refused. Dr. Bishop believed that had the Petitioner been administered in-depth testing, he would have been placed in a more extensive special education program than the program in which he was enrolled. Dr. Bishop also believed that even if he received individual attention at school, he would have continued to have academic and intellectual deficits but that he would not have failed the eighth grade on four occasions. The Petitioner changed residences a total of twenty-three times while in school, and sixteen of those occasions occurred when he was in the eighth grade. When the Petitioner entered the eighth grade for the third time, his mother and stepfather divorced, and he had little parental supervision as a result. Dr. Bishop said he had little motivation and began missing more school.

Dr. Bishop testified that those who are developmentally disabled have strengths and weaknesses. She said the Petitioner's rote memory was slightly better than his other intellectual functions. Rote memory is a person's ability to remember short strings of information and to repeat them just as the person heard them. Dr. Bishop stated the Petitioner had better scores in mathematical tests, which required rote memory, than in verbal tests.

Dr. Bishop testified that those who are developmentally disabled attempt to avoid the appearance of failure and are very passive. Since those who are intellectually disabled experience problems in determining what to do in most situations, they become followers and allow others to direct their behavior. Dr. Bishop said this situation occurred with the Petitioner. He had no friends and associated with his cousins, who were "street kids." He did whatever they told him to do. It never occurred to the Petitioner that he did anything wrong until he was told so when he arrived home. The Petitioner was trusting and known to be very passive. He got into trouble as a teenager as a result of being a follower and doing whatever he was told.

Dr. Bishop testified that the Petitioner's teachers found him to be cooperative until he hit the eighth grade "plateau." The Petitioner's interest declined every year, and his "low

level acting out" and absences increased. He did not remain in his seat, did not pay attention, did not hand in his assignments, and did not bring pencils and paper to class. Dr. Bishop said he was not very disruptive until his mother and stepfather divorced. He then became "slightly more disruptive" but was never aggressive. Dr. Bishop did not recall any disciplinary issues with the Petitioner until he was in the eighth grade, during which time he began to be suspended from school.

Dr. Bishop testified that the Petitioner blended into the background and did not stand out in any way. She said this failure to stand out might be the reason that he was not singled out for special education. The Petitioner was considered quiet and cooperative, and his family saw him as a "lazy" student. Unlike his siblings who were "alert, oriented, imaginative, [and] inventive," the Petitioner had a "blank" or "confused" expression on his face and faded into the background.

Dr. Bishop discussed the concept of "masking" or "faking normal." She said those who are intellectually disabled look at superficial characteristics, determine what they believe people might consider "cool," and act that way. Because those who are intellectually disabled do not have good decision-making skills, they tend to latch onto things that are loud and disruptive. They miss the subtle social cues to which children learn to respond. Dr. Bishop said the Petitioner exhibited these same characteristics. He did not have any friends and did not seem to have a good concept for social situations. He could easily be talked into doing something. Dr. Bishop said he did not have a meaningful relationship until he met Ms. Watkins.

Dr. Bishop interviewed "Monica," a lifelong friend of the Petitioner. She looked out for the Petitioner and explained things to him. If the Petitioner was unable to complete a form, he turned to her for help. Monica often advised the Petitioner to stay away from the people with whom he was associating, including Ms. Watkins. Dr. Bishop noted that Monica and the Petitioner's stepfather differed on the adaptive behavior scale in that the stepfather saw the Petitioner as very quiet, reserved, and uncommunicative. Monica was the only person in the Petitioner's life with whom he could talk and from whom he could receive total acceptance. Dr. Bishop explained that interviews of collateral sources regarding a person's background were part of the testing process under the Vineland. She said those whom she interviewed agreed on a fairly consistent basis throughout the scale.

Dr. Bishop testified that those who are intellectually disabled may not notice the expression on someone's face or body language. They do not respond to mild negative cues. When they perceive a negative cue, they become upset and tend to exaggerate the significance of negative cues. Dr. Bishop said the Petitioner was unable to read social cues. She saw little expression on his face and believed he was depressed. Dr. Bishop asked the

Petitioner how he felt about his counsel seeking to use an intellectual disability defense. Without being aware of the consequences, the Petitioner said he did not want them to persue that avenue. He said he did not want his children to think that he is intellectually disabled. The Petitioner did not deny that he might have limited intelligence, but he did not want anyone to know.

Dr. Bishop testified that "flat affect" means that a person shows little to no expression. She found the Petitioner to have flat affect and that it was a lifelong characteristic. Dr. Bishop saw references to flat affect going back to the Petitioner's elementary years. When she was interviewing the Petitioner, he did not show facial expressions. He expressed concern that his mother was not visiting or communicating with him. He also expressed pride that his daughter was to graduate from high school. Dr. Bishop said for the majority of the time, the Petitioner was "pretty stony faced."

Dr. Bishop testified that those who are intellectually disabled attempt to please others and do not want to do something that will push others away. They are eager to please and are followers. Dr. Bishop said both the Petitioner's background and his interview with her were characterized by passiveness, cooperativeness, and eagerness to please. When the rules change, those who are intellectually disabled do not know how to react and may just quietly go along with the crowd.

Dr. Bishop testified that the Petitioner's weakest intellectual skill was in the area of comprehension. Comprehension involved understanding and making judgments in normal and routine social situations. If a person is so impaired in normal comprehension, he or she cannot comprehend anything that is unusual or novel. Dr. Bishop said that those who are intellectually disabled do not think on their feet very well. They do not understand the rules and would make a decision based upon the choice that would make them feel the best in the quickest amount of time. Dr. Bishop said that during the Petitioner's prior arrests, he did not have any long-term "horrible" consequences and felt that he could trust the law to care for his interests.

Dr. Bishop testified that those who are borderline intellectually disabled, particularly those whose IQs fall within the 70s, are considered to have significant intellectual limitations even though they are not intellectually disabled. Those who have an IQ of 75 or higher would function fairly well in routine situations in which they are certain of the rules and they know that they are not going to appear slow or ignorant. When they are in hostile peer situations, they do not know how to function. They do not know why they are being teased or how to adjust their behavior. Dr. Bishop said that in a situation that is unusual or not routine, those who are borderline intellectually disabled are unable to function. Dr. Bishop also said this characteristic would fit within the Petitioner's IQ scores.

Dr. Bishop administered the WAIS-IV to the Petitioner, and he received an IQ score of 78. The Petitioner had an IQ score of 75 in an IQ test administered by Dr. Steinberg, an IQ score of 78 in a test administered by Dr. Angelillo, and an IQ score of 79 in a test administered by Dr. Auble. Dr. Bishop said these scores fell within the borderline range.

Dr. Bishop analyzed the Petitioner's verbal IQ scores on the WAIS-IV that she had administered. She divided the scores into four categories: verbal comprehension, processing speed, working memory, and perceptual reasoning. Processing speed relates to how well a person can judge spatial relations in the environment such as following a map and working on an assembly line. The Petitioner's scores in processing speed were within the average range.

Dr. Bishop testified that working memory is memory that a person uses in an immediate situation. This area of memory requires a person to process the information, retain the information for a period of time, and act on the information. The Petitioner's working memory scores were not quite within the average range. Dr. Bishop said the Petitioner could not take a shopping list to the store and return with all of the items on the list. She also said that in an informal or vocational situation, the Petitioner would have difficulty with any three-part instructions, depending on the complexity of the tasks. Dr. Bishop stated the Petitioner could have difficulty with two-part instructions for a complex task. According to Dr. Bishop, a person functioning at that level would find it difficult to find any employment other than very simple, menial work.

Dr. Bishop testified that perceptional reasoning is the ability to use the physical concepts in the environment and fit them together. It involves knowing what direction to take to reach a goal. Perceptional reasoning might involve thinking or planning ahead or just making a simpler decision. On the perceptual reasoning scale, the Petitioner had a composite score of 84, with a range of 79 to 91. Dr. Bishop explained that if 85 is considered within the bottom of the average range, the Petitioner's score borderline between low and average. His score was somewhat stronger than his scores on other tests.

Dr. Bishop testified that there are four subtests on the verbal comprehension scale, two related to academics and two related to pure reasoning abilities. The two subtests related to academics are vocabulary and information. The Petitioner performed slightly better, although delayed, on both tests. The Petitioner's scores fell within the borderline range on the information subtest and within the intellectually disabled range on the vocabulary subtest. The two subtests related to pure reasoning abilities are similarities and comprehension. The Petitioner's scores fell within the mildly intellectually disabled range on the similarities subtest and within the moderately intellectually disabled range on the comprehension subtest.

Dr. Bishop testified that the similarities subtest measures the ability for form abstract concepts to distinguish the essential from the nonessential. She explained that the ability to form abstract concepts affects a person's ability to hear, comprehend words, and make decisions based upon the immediate and long-term effects. Dr. Bishop asked the Petitioner to identify the connection between two words. She began with a relatively simple idea and gradually made the test more difficult until she began to question the Petitioner about concepts that he believed were entirely unrelated. The Petitioner's score was five and fell within the fifth percentile.

Dr. Bishop testified that when a person who is intellectually disabled does not understand something, the person is careful not to tell anyone due to fear that it would make the person look bad. The person can only think about the part of the information that he or she understands, and the rest of the information becomes "wallpaper." Dr. Bishop said the Petitioner addressed the world in terms of verbal comprehension by paying attention to the things that he could understand and ignored everything else. Dr. Bishop did not believe that the Petitioner could understand her testimony or "legal jargon."

Dr. Bishop testified that the comprehension subtest measures social judgment, social reasoning, and intellectual flexibility. The Petitioner's score on the comprehension subtest fell within the second percentile. Dr. Bishop explained that as a result, the Petitioner could not use social judgment to reason or make daily decisions. The Petitioner's social group was primarily his family members. The more desirable friends or acquaintances did not treat the Petitioner well. The Petitioner was unable to determine why his cousins asked him to do things that they knew would get him into trouble. Dr. Bishop said that before the Petitioner became involved in criminal activity, drinking alcohol, and consuming drugs, he would have been considered someone who followed the rules that he knew and understood. Dr. Bishop stated the rules were basically rote rules. It was only after the Petitioner began failing school and associating with family members on his mother's side that he began getting into trouble.

Dr. Bishop testified that the Wechsler test protocols acknowledge the consideration of a standard error of measurement because many performance variables cannot be accounted. The standard error of measurement for the WAIS-R, the test that Dr. Steinberg administered to the Petitioner, is plus or minus seven points.

Dr. Bishop testified that Dr. James Flynn described the Flynn Effect in great detail in the 1980s but that the phenomenon had existed longer. She explained that Dr. Flynn was a statistician who noticed that IQ scores were rising over time. People adapted to an increasingly complex culture so that the average ability increased over time. Dr. Bishop said that as time passed, the IQ test would become less appropriate for predicting a person's true IQ. She explained that as a result, a person's IQ increased .3 points per year. Dr. Bishop

stated that the WAIS-R test was sixteen years old and that application of the Flynn Effect would result in a reduction of the IQ score by five points from 75 to 70. Dr. Bishop then considered the standard error of measurement. She concluded that the Petitioner's IQ based upon the results of the WAIS-R administered by Dr. Steinberg was between 63 and 92.

Dr. Bishop testified that in determining whether someone is intellectually disabled, she also considers adaptive deficits. She said consideration of adaptive deficits is important when the person's IQ score is around 70. When Dr. Bishop considered the Petitioner's IQ score of 75 on the WAIS-R, the Flynn Effect, the standard error of measurement, and additional testing on adaptive deficits, she concluded that the Petitioner was intellectually disabled under the national guidelines.

Dr. Bishop testified that Dr. Angelillo administered the WAIS-II and that the Petitioner received a full-scale score of 78. She said that when the standard error of measurement was applied, the Petitioner's IQ range was 71 to 85. Dr. Bishop further said that application of the Flynn Effect required a reduction of two points. Based upon the application of the standard error of measurement, the Flynn Effect, and the results of adaptive testing, Dr. Bishop concluded that it was possible that the Petitioner met all three criteria of intellectual disability in the Tennessee statute.

Dr. Bishop testified that Dr. Auble administered the WAIS-III to the Petitioner who received a full-scale IQ score of 79. The WAIS-III was "normed" approximately ten years before Dr. Auble administered the test to the Petitioner. Dr. Bishop said that based upon the Flynn Effect, three points should be subtracted from the Petitioner's IQ score. She also applied the standard error of measurement, which she said was seven points. Dr. Bishop stated that as a result, the Petitioner's true IQ was between 69 and 86. According to Dr. Bishop, the Petitioner could have been diagnosed as intellectually disabled if adaptive deficits testing had been administered showing that the Petitioner had sufficient adaptive deficits to qualify under the Tennessee statute and the onset of the issues occurred during the developmental period.

Dr. Bishop testified that the WAIS-IV was normed approximately two years before she administered the test to the Petitioner. She said that based upon the Flynn Effect, one point should be subtracted from the Petitioner's full-scale IQ score of 78. Dr. Bishop stated that when she determined a person's IQ, she considered the standard error of measurement, the Flynn Effect, and the person's adaptive deficits.

Dr. Bishop testified that she would not declare a person with an IQ score of 80 to be intellectually disabled because the person would fall just above the IQ criterion even if the standard error of measurement was applied. Even if the person had deficits in adaptive

behavior, she could not apply the standard error of measurement to conclude that a person with an IQ score of 80 is intellectually disabled. Dr. Bishop said she could not consider the adaptive deficits alone. Rather, she would conclude that the person is of limited intelligence.

Dr. Bishop testified that the American Association of Intellectual and Developmental Disabilities ("AAIDD") was a national organization of professionals and families representing the needs of those with developmental disabilities. Dr. Bishop said the AAIDD was the largest and most widely respected organization regarding developmental disabilities. She acknowledged that while the AAIDD applied the standard error of measurement, the organization did not recognize the application of the Flynn Effect.

Dr. Bishop testified that Dr. Angelillo and Dr. Auble administered the Woodcock Johnson Test, an achievement test. The purpose of the test was to make specific academic recommendations to teachers and families. The reading portion of the test had twelve subtests. Dr. Bishop said not every one of the subtests was administered to the Petitioner. Rather, each doctor administered four of the subtests and used the test as a screening measure. Dr. Bishop said the Petitioner's reading comprehension scores on the Woodcock Johnson Test were not consistent with the scores on the reading comprehension test that she administered. She explained that the reading comprehension test on the Woodcock Johnson required that the person read one sentence at a time and then do something with the information in the one sentence. The reading comprehension on the WIAT-II required that the person read a paragraph and work up to six to eight paragraphs. The person could not use rote memory and did not have to form concepts and apply them to what he or she was reading. Rather, the person must remember and connect information together in his or her head.

Dr. Bishop testified that in determining whether someone was intellectually disabled, she considered her clinical judgment and the characteristics of the situation. She explained that a person with an IQ of 75 could be trained to get on a bus and go to a particular stop. If, however, a person was asked to sit in a courtroom and decide whether the person's counsel was representing him or her well or whether to waive his or her right to a jury trial, an IQ of 75 is not sufficient to allow the person to make those decisions. Dr. Bishop said that when the death penalty was sought, she considered how well equipped the person was mentally to assist in his or her own defense.

Dr. Bishop testified that a professional specializing in developmental disabilities was needed when the defendant had the comprehension of a nine-year-old and must determine whether his or her attorney was providing competent representation or whether the person understood the waiver of his or her rights. Dr. Bishop said the person should be addressed using words and concepts that a nine-year-old would understand. She did not believe that

a nine-year-old would be able to participate in jury selection in a meaningful way. Dr. Bishop also believed that a developmental legal specialist who worked with children would need to sit with the person and explain the process in simple terms. Dr. Bishop acknowledged that as a result, a trial might "drag on endlessly." She also acknowledged that an attorney could explain the process to the defendant in simple terms. Dr. Bishop stated that the concept of waiving a jury trial and having the sentence imposed by the jury could be confusing to a person with limited intelligence.

Dr. Bishop testified that every report that she had reviewed stated that the Petitioner was suffering from anxiety and depression. She said that under optimal circumstances, the Petitioner had an attention span of approximately fifteen minutes before he became distracted. Under the circumstances, Dr. Bishop did not believe that the Petitioner was in a position to determine whether he should enter a plea. Dr. Bishop explained that she examined not only whether he had a specific IQ but whether he was able to participate meaningfully in his own defense.

Dr. Bishop testified that the "practice effect" relates to the enhancement of test scores when the tests were repeated in rapid succession. The practice effect generally affects scores in the areas of perceptual reasoning and memory. Dr. Bishop said that by taking four WAIS IQ tests, the Petitioner might have been able to recall some of the rules of the tests. She believed that two or more years had elapsed between each test. As a result, Dr. Bishop believed that while the practice effect existed in the Petitioner's case, she believed its affects were "negligible." Dr. Bishop explained that the Petitioner likely remembered that he would be required to perform arithmetic problems in his head but that he would not have remembered the answers to the problems that he was asked to complete two years ago. Dr. Bishop said the Petitioner likely understood the system and what he would be required to do. She believed that as a result, some mild enhancement of scoring could have occurred due to the Petitioner's familiarity with the type of test, particularly in the area of perceptual reasoning.

Dr. Bishop testified that a person's IQ score was only one factor when determining the person's actual functioning level. She also considered adaptive testing and prior testing to determine whether the person was intellectually disabled. Dr. Bishop said she considered the purpose of the testing and how well the person could function in a given situation. If the purpose of the testing was to assign the person to a vocational class, a different test profile might be more important. Dr. Bishop said the person's verbal competence became extremely important if the person was asked to function in a "verbally loaded" situation. Dr. Bishop stated that the issue of the Petitioner's intelligence in this case related to his verbal functioning. She concluded that the Petitioner was "extremely [intellectually disabled] with his ability to participate in a court proceeding." Dr. Bishop said that it was not safe to

assume that the Petitioner understood the court proceedings but that it likely was safe to assume that he did not understand the proceedings.

Dr. Bishop testified that the Petitioner's stepfather was the only father the Petitioner ever had and that the Petitioner loved and respected him. When the Petitioner failed to achieve his stepfather's expectations, his stepfather treated him harshly. The Petitioner's stepfather did not understand for a long time that the Petitioner was slow. He began to suspect that something was wrong with the Petitioner because the Petitioner did not respond to punishment and Michael began to excel at everything that the Petitioner was unable to do. The Petitioner's stepfather did not know how to change his approach, and the punishment continued. Dr. Bishop said that if an authority figure spoke in a reasonable tone, asked questions, and provided guidance just as the Petitioner's stepfather did, someone with the Petitioner's disabilities tended to agree with that authority figure. Dr. Bishop believed that if a judge, as an authority figure, spoke to the Petitioner as if he understood the proceedings and gave him the usual guilty plea colloquy, the Petitioner would mask the fact that he did not understand what was being said. Dr. Bishop said the Petitioner likely would just agree and say what he believed was expected of him.

Dr. Bishop testified that based upon her review of the plea colloquy, she did not believe that the Petitioner understood the proceedings. She noted that although the Petitioner knew what murder was, he was not questioned regarding his understanding of first degree murder. Dr. Bishop did not believe that the Petitioner understood his right not to incriminate himself or the meaning of "compelled." She believed that while the Petitioner understood that he was pleading guilty, he did not understand the ramifications of his plea. Dr. Bishop acknowledged that the Petitioner never denied killing the victims. She believed that the Petitioner understood when his counsel explained that he could plead either guilty or not guilty and that if he pleaded guilty, he would receive a sentence or jail term. Dr. Bishop did not know whether the Petitioner understood that by pleading guilty, there would not be a jury during the plea hearing. She did not believe that the Petitioner understood what a plea hearing was or whether he was competent. Dr. Bishop believed the Petitioner understood the facts but did not understand the mitigating circumstances.

Dr. Bishop believed that at the time of the trial, the Petitioner understood that he had killed someone and that it was wrong. She did not believe the Petitioner understood this when he was shooting the victims. Dr. Bishop did not believe the Petitioner had any knowledge of mitigating circumstances, but she did not know whether counsel discussed that with him. She did not believe he understood the implications of the plea. Dr. Bishop said, "I don't think that he understood that he was waiving the right to make his case for either living or dying." Dr. Bishop stated she would have informed the Petitioner that if he pleaded

guilty, he likely would receive the death penalty. She would have kept the questions simple and limited them to five to seven words.

Dr. Bishop testified that the Petitioner had significant clinical depression and anxiety. She said that if his counsel were aware of this, they should have attempted to have the Petitioner treated and to explain to him that he had a meaningful choice. Counsel should have explained that there was an advantage of being alive and remaining in jail rather than being executed.

Dr. Bishop testified that a person needed to be of average intelligence with an IQ of 85 or more to understand court proceedings. She explained, "I think that courtroom procedures, I think that police procedures, are so complicated that when you're dealing with somebody less than average intelligence, the safe assumption is they're not getting it at all." Dr. Bishop believed that a person with average intelligence sufficiently understands the proceedings to ask questions and inform his or her counsel of what the person does not understand. Dr. Bishop assumed that someone with lower than average intelligence and a passive personality would not ask questions about the proceedings. In such situations, it is incumbent upon counsel to take care in explaining the proceedings to the person.

Dr. Bishop testified that if a person had a verbal IQ of 85 and a performance IQ of 75, he or she would be able to understand the court proceedings on an average level. If the person had a verbal IQ of 70 and a performance IQ of 85, Dr. Bishop did not believe the person would understand the court proceedings. She said an attorney must determine the extent of the client's education. If the client repeated grades or quit school, the attorney must ask additional questions and obtain information regarding the client's family. Dr. Bishop noted that both of the Petitioner's biological parents were mentally slow. She said that had she been retained by the Petitioner's trial counsel, she would have advised the trial court of the Petitioner's level of functioning and informed the trial court that its questioning of the Petitioner should be different than the standard questioning in a plea hearing. She also would have raised competency issues.

Dr. Bishop testified that in determining whether the Petitioner had deficits in adaptive behavior, she administered the Vineland-II to Monica McLean and Arthur Benson. She told them that they could not help the Petitioner by rating him either too high or too low. Rather, they should provide the exact answers to the questions. Dr. Bishop believed the Petitioner's stepfather and Ms. McLean did as she instructed.

Dr. Bishop testified that the Vineland-II is divided into four primary categories: communication skills, daily living skills, socialization skills, and motor skills. Dr. Bishop

gathered historical information from those who knew the Petitioner and how he functioned before he was arrested. She said deficiencies in one out of the four major domains qualifies the person as being considered intellectually disabled. The Petitioner performed at the intellectually disabled level on three of the four domains. The area of motor skills was the only category in which the Petitioner performed within the average range. The Petitioner received a score of 55 on his composite score, less than 50 on communication skills, less than 70 on daily living skills, and slightly over 50 in social skills. Both the Petitioner's stepfather and Ms. McLean said that the Petitioner could read something written on a fourth grade level but not something written on a sixth grade level.

Dr. Bishop testified that in her report, she concluded that the Petitioner had borderline intelligence and described his deficiencies. The borderline IQ level was around 75. Dr. Bishop said this conclusion was based upon the "strict guideline." She also concluded in her report that the Petitioner had substantial impairments in comprehension and social intelligence.

Dr. Bishop believed that the Petitioner could be classified as intellectually disabled under the AAIDD standards. She concluded that he met the second prong of the AAIDD standards in that he had limitations in adaptive behavior in more than one category. Dr. Bishop found evidence that these deficits occurred early in the developmental period and persisted.

Dr. Bishop concluded that the Petitioner would be considered intellectually disabled under the Tennessee statute if the Flynn Effect and the standard error of measurement were applied. She said that he also met the deficits standard in Tennessee and that this disability occurred during the developmental period. Dr. Bishop said that if the Flynn Effect and the standard error of measurement were not applied, the Petitioner would be considered to be borderline intellectually disabled.

On cross-examination, Dr. Bishop testified that she did not evaluate the Petitioner until 2009 and did not speak to any of his previous attorneys. She acknowledged that attorneys likely had some exposure to clients with limited education and whose IQs fall between 70 and 85. Dr. Bishop did not speak to original counsel to determine his experiences in representing those who may have limited intelligence.

Dr. Bishop was aware that original counsel had the Petitioner examined for competency for the first trial. Dr. Bishop believed that the general standard for competency differed from competency of those who were intellectually limited. She explained that most competency issues related to whether a person could understand the roles or the various

participants in the court proceedings or whether the person was psychotic at the time of the offenses. If there were deficits, there was an assumption that the person could become competent through treatment.

Dr. Bishop testified that she trusted her findings regarding the Petitioner's intellectual limitations more than Dr. Steinberg's findings. Dr. Steinberg used standard assessment instructions, which Dr. Bishop did not believe were appropriate for someone with very limited mental abilities. Dr. Bishop did not interview Dr. Steinberg or Dr. Angelillo. She acknowledged that Dr. Angelillo also did not find the Petitioner to be incompetent.

Dr. Bishop testified that the AAIDD's definition of intellectual disability included flexibility to allow the clinician to address the issues of a particular person. The goal was to ensure that the person received the best possible treatment. Dr. Bishop said that the Diagnostic and Statistical Manual of Mental Disorders ("DSM") did not apply the standard error of measurement but that the AAIDD applied it. She acknowledged that the AAIDD and the American Psychological Association ("APA") did not apply the Flynn Effect. Capital litigation was the only area of which Dr. Bishop was aware that applied the Flynn Effect. Dr. Bishop acknowledged that the testing manual for the WAIS-III did not apply the Flynn Effect but applied the standard error of measurement. She further acknowledged that application of the standard error of measurement did not necessarily result in a subtraction of a person's IQ score. Rather, the person's IQ could be higher or lower than his or her IQ score when the standard error of measurement was considered.

Dr. Bishop testified that the Petitioner enjoyed writing poetry. She was unaware that the Petitioner taught a Bible study class. The Petitioner was not considered to be a reader before his arrest but developed the habit of reading while incarcerated. Dr. Bishop said that in his poetry, the Petitioner used simple language and concepts. She acknowledged that the Petitioner had done well in prison but did not know what his job was in prison.

Dr. Bishop testified that the Petitioner had jobs before he was incarcerated but believed that his substance abuse prevented him from maintaining employment for a period of time. She also believed that someone assisted the Petitioner in obtaining those jobs by completing his job applications for him. Once the Petitioner learned the rote tasks of the job, he was able to perform very well.

On redirect examination, Dr. Bishop testified that the Petitioner's inability to follow compound instructions was reflected in his adaptive behavior scaling. The Petitioner's friends and his stepfather reported that he could reheat food but was unable to follow a recipe. Evidence suggested that he cooked foods that were simple to prepare.

Dr. Bishop testified that those who are borderline or intellectually disabled do well in the structured prison environment. She was aware that the Petitioner failed the test for his GED on multiple occasions. Dr. Bishop believed the Petitioner could read a newspaper or magazine and retain information from it. She also believed the Petitioner could read a book that was written simply and included few concepts. Dr. Bishop did not know whether she could determine what concepts the Petitioner would obtain from a book written for the average reader.

Dr. Bishop was aware that the Flynn Effect is accepted in capital cases in some jurisdictions. She noted that Dr. Steinberg did not list the materials that he reviewed in his report. There was no evidence that Dr. Steinberg or Dr. Angelillo considered neuropsychological testing. Dr. Bishop did not see in either doctor's report whether adaptive testing was considered.

Dr. Paul Ragan, a psychiatrist, was accepted by the post-conviction court as an expert in addiction psychiatry, adult psychiatry, and psychosomatic psychiatry. He interviewed the Petitioner at Riverbend on three separate occasions for a total of eight hours. He reviewed Dr. Steinberg's report and testimony during the penalty phase, Dr. Angelillo's report and testing, a transcript of testimony from relatives and friends during the post-conviction hearing, Dr. Bishop's report and earlier testimony at the post-conviction hearing, Dr. Auble's report, the Petitioner's school records, his testimony in 1995 and 2000, the Petitioner's mother's medical records, the Tennessee Supreme Court's decisions on direct appeal, the Petitioner's statement to police, his codefendants' statements to police, summaries of interviews of the Petitioner's family members, friends, and teachers, and the Petitioner's GED record in prison. Dr. Ragan also interviewed the Petitioner's mother and Christine. Vanessa was in the hospital and, therefore, was unavailable.

Dr. Ragan testified that the Petitioner was the second child of a teenage mother who was living with her own mother in a small apartment. The Petitioner's mother was one of thirteen siblings, the majority of whom lived in the small apartment. Dr. Ragan believed she was ill-equipped as a parent to raise a child. The Petitioner was fed on the floor off a newspaper, and he ate with his hands. Dr. Ragan said the Petitioner appeared to have some developmental delays, which his stepfather noted after marrying his mother.

Dr. Ragan testified that around age two, the Petitioner was taken to a pediatric clinic and diagnosed with an intestinal worm infestation. According to the medical records, the Petitioner was treated for ascaris lumbricodies, a large roundworm. Dr. Ragan said this roundworm was obtained through exposure of either fecal matter or dirt on the ground. This condition tends to be an indication of very crowded living conditions, and one child can pass

it to another. The roundworm also indicates less than sanitary conditions. Dr. Ragan said diapers were washed in the toilet bowl, which could be a sign of relative neglect.

Dr. Ragan testified that the Petitioner's mother repeated the second grade and is recorded to have attended the eighth grade. In the spring of the last year of school, she was administered a reading test, and her score was at a grade equivalent level of the third month of the fourth grade. Dr. Ragan noted that she did not go past the eighth grade. At age fifteen, she became pregnant with Christine and quit school, giving birth in January 1969. She later ended the relationship with Christine's father.

Dr. Ragan testified that the Petitioner's maternal grandmother worked and could not afford a babysitter. When the Petitioner's mother was home alone as a teenager, boys from the neighborhood, including Christine's father, would visit her. Dr. Ragan referenced a report that Christine's father came to the Petitioner's mother's home on one occasion with a BB gun. The Petitioner's mother was lying on the bed with Christine, and the BB gun went off striking the Petitioner's mother in the buttocks. She later met MacArthur Carter and became pregnant with the Petitioner.

Dr. Ragan testified that Mr. Carter repeated the second grade and completed the sixth grade. In the sixth grade, Mr. Carter took a reading test that placed him on a fourth-grade level. Dr. Ragan noted similarities between the educational background of the Petitioner's parents. Mr. Carter lived next to the Petitioner's mother and was a few years older than her. Reports noted that he was working in construction. Mr. Carter visited her during the day when her mother was not there. The visitors left when her mother returned home. At that time, Mr. Carter had a significant drinking problem and may have been violent toward her when he was drinking.

Dr. Ragan testified that Mr. Carter enlisted in the Marine Corps in June of 1969 during the Vietnam War. He began basic training at boot camp at Parris Island, South Carolina, but he lasted only nineteen days. He was dropped from the training company, placed in a casualty company, and then referred to the Aptitude Board. He was having problems reading orders and any manuals such as those connected to weapons. He had represented that he went through the eighth grade in school. The Aptitude Board found that because he only went to the sixth grade, he was a deficient reader and was not trainable in the Marine Corps. Dr. Ragan said that Mr. Carter scored in the sixteenth percentile on the first general test that he took and that this score should have been sufficient to enlist in the Marine Corps. Dr. Ragan also said that because Mr. Carter possibly misrepresented his education and could not read, the Aptitude Board determined that he did not have the

aptitude for basic training in the Marne Corps. He was not enlisted long enough to obtain military benefits, and he received an honorable discharge.

Dr. Ragan testified that Mr. Carter was assigned a reenlistment code of RE4, which was the lowest reenlistment code and would have precluded Mr. Carter from attempting to reenlist. Mr. Carter also was assigned to mental group three. Dr. Ragan explained that the lower the mental group, the more restrictions are placed on the person. Mr. Carter originally was felt to be in one of the lower levels that could be accepted for enlistment. His performance, however, was even below the third level. Based upon Mr. Carter's military and school records, Dr. Ragan believed that his intellectual function was low and was complicated by his "burgeoning alcohol dependence." Dr. Ragan said he could not diagnose Mr. Carter as intellectually disabled.

Dr. Ragan testified that to the best of his knowledge, the Petitioner's mother was living with her mother and siblings when Mr. Carter was in the military. Little evidence existed that Mr. Carter and the Petitioner's mother reunited after Mr. Carter was discharged. He was arrested for public intoxication five days after the Petitioner was born. Dr. Ragan found no evidence that Mr. Carter was involved in raising the Petitioner.

Dr. Ragan testified that during the Petitioner's first few years of life, there was evidence of some level of neglect and unsanitary conditions. Dr. Ragan noted that the intestinal infestation could cause some level of malnutrition because the child was competing with the worm for nutrition. Worm infestation also can block absorption of nutrients. When the Petitioner's stepfather and mother married, his stepfather noted that the Petitioner was behind on learning his letters and wet the bed. The approach employed by the Petitioner's grandmother was to spank the Petitioner, who had problems responding to this approach. She spanked the Petitioner with either a switch or a belt.

Dr. Ragan testified that the Petitioner's mother and stepfather when the Petitioner was approximately two years old and his mother was nineteen years old. His stepfather was six years older than his mother and had a full-time job at a variety of different grocery stores, including Piggly Wiggly. His stepfather graduated from high school and came from a fairly strong Baptist family. Church was very important in his family. His mother was a teacher, and education also was important. The courtship between the Petitioner's mother and stepfather lasted for a number of weeks. At the same time, his mother was pregnant for a third time by another man. She had a total of four children by four different men. The Petitioner's mother and stepfather married in June, and the Petitioner's younger brother was born in November. His stepfather accepted the child as his own son. His mother and her two other children moved into a house with his stepfather.

Dr. Ragan testified that the Petitioner's stepfather was fairly strict with the children. He taught the Petitioner to use utensils and eat in a chair with the rest of the family. The Petitioner had difficulty learning his letters. His stepfather discovered that if he sang the letters, it helped the Petitioner learn them. The Petitioner's stepfather played with the Petitioner and attempted to do a good job in raising him. His stepfather rose up in the ranks in the grocery store business and worked long hours in the Petitioner's early and middle childhood.

Dr. Ragan testified that Christine was fairly intelligent. The Petitioner became fond of Michael. They shared a room and dressed similarly at times. Michael developed faster than the Petitioner and was taller than the Petitioner at one point. Christine liked to write and scribble notes. Michael was curious and seemed to be engaged with the world. Their stepfather took the family to church every Sunday. At church, the Petitioner seemed more fearful than the other children and stayed close to his stepfather. At some point, Michael began helping the Petitioner. When the Petitioner was teased at school, Michael defended him. Dr. Ragan said the Petitioner struggled with carrying out one task and recalling the next step. Michael helped him with those tasks.

Dr. Ragan testified that early one morning, a maternal uncle by marriage was driving Michael to school. The Petitioner's mother was a nurse's aide and often worked twelve-hour shifts. Cars were stopped, and a train was approaching. The uncle tried to beat the train across the track. The vehicle was hit by the train, and Michael was killed. Michael was four and one-half years old, and the Petitioner was seven years old. Dr. Ragan said the family had difficulties discussing Michael's death. The Petitioner's mother was not emotionally available for the children and was never one who discussed her feelings.

Dr. Ragan testified that Michael's death appeared to have a profound effect on the Petitioner. The Petitioner had improved his bed-wetting problem, but the problem regressed after Michael's death. The Petitioner also avoided the room that he had shared with Michael. Dr. Ragan believed the Petitioner had "childhood traumatic grief" that continued for many years. Dr. Ragan explained that a seven-year-old child does not have the cognitive development to understand death. The Petitioner blamed himself for Michael's death and believed that had he been with Michael, he would have saved Michael. The Petitioner told one of his cousins that he played with Michael. Dr. Ragan said the Petitioner and other family members had a sense of Michael's presence in the house for many years. Dr. Ragan also said the Petitioner was not able to process the loss. He had dreams about his childhood loss and reported that the dreams continued when he was incarcerated for the homicides.

Dr. Ragan testified that Vanessa was the Petitioner's stepfather's biological child and was born when the Petitioner was six years old. At age one, she was diagnosed with sickle cell disease and was admitted to the hospital with dehydration. The diagnosis occurred around the time of Michael's death. Dr. Ragan explained that with sickle cell disease, the red blood cells have an abnormal shape and clog the blood vessels and capillaries to different organs. It is one of the most common causes of strokes in children. When an acute sickle cell crisis occurs, the tissue is deprived of oxygen and causes extreme pain. The Petitioner and Christine cared for Vanessa while their mother and stepfather were working. Dr. Ragan said the Petitioner seemed to respond to Vanessa's suffering and tried to care for her. He heated her food and carried her to the vehicle when his parents had to transport her to the hospital.

Dr. Ragan described the relationship of the Petitioner's mother and stepfather as "strained." Dr. Ragan said the Petitioner's stepfather's educational attainment, vocational attainment, and performance and functioning in the family were above that of the Petitioner's mother. As time progressed, the Petitioner's stepfather became increasingly frustrated with the Petitioner's mother. She did not know how to drive. He purchased her a car and instructed her not to drive it before he taught her. She drove the car anyway and crashed it. Dr. Ragan stated teaching her how to drive was a "chore." She wanted to pay the bills, and he allowed her to do so. She was unable to pay the bills, and the electricity was disconnected when she neglected to pay the bill. Some bills were paid twice, while others were not paid.

Dr. Ragan testified that the Petitioner's social functioning was slowed and that he struggled in school. When the Petitioner was seven years old, his stepfather had concerns about the Petitioner and wanted to have him tested. Dr. Ragan said that the Petitioner's mother refused and that there was a sense that she believed his stepfather was "picking on" the Petitioner because he was a stepson and not a biological child. Dr. Ragan also said she could not appreciate the Petitioner's problems. She had difficulty in enforcing the rules and being able to partner with the Petitioner's stepfather in terms of discipline. He imposed the discipline in the home. Dr. Ragan stated the Petitioner's mother had a very permissive parenting style and did not have the intellectual capacity to be able to provide guidance.

Dr. Ragan testified that several teachers noted the Petitioner's struggles in school. One teacher reported that she knew that the Petitioner was falling behind and spoke to his mother regarding summer school. She did not understand and would not agree to allow the Petitioner to attend summer school.

Dr. Ragan testified that the Petitioner's stepfather valued making good grades in school. Initially, he was kind and understanding. When the Petitioner wet his bed, he helped

him change clothes so that the Petitioner would not smell of urine. Dr. Ragan believed that he became frustrated and regularly spanked the children with a belt as a result. Christine avoided the spankings because she made good grades. The Petitioner never made good grades and was spanked regularly for making bad grades. The spankings were so frequent that the Petitioner would "shut down" and not show emotion.

Dr. Ragan testified that the Petitioner learned in a very concrete fashion. If the situation was clear, the Petitioner knew what to do and what not to do. Dr. Ragan found no evidence that the Petitioner was unruly or defiant. Rather, the Petitioner got into trouble when he encountered a new situation. The Petitioner had one incident involving the juvenile system at age ten or eleven. One of his maternal cousins instructed the Petitioner to take a bicycle. Dr. Ragan said it did not appear that the Petitioner understood that he was stealing the bicycle. The Petitioner believed that because his cousin said that he could take the bicycle, he had permission to do so. The Petitioner rode the bicycle and took it home. The woman in the house from where the Petitioner took the bicycle saw him take it and called the police. The police recovered the bicycle, and the Petitioner received a spanking. The Petitioner's stepfather believed that at that time, the Petitioner had difficulty understanding the concept of ownership. Dr. Ragan described this difficulty as a cognitive delay.

Dr. Ragan testified that the Petitioner began struggling in school in the third grade and that he repeated the eighth grade four times. During his second year in the eighth grade, his mother and stepfather separated and then divorced. The family moved often following the divorce, and the Petitioner was enrolled in a number of different schools as a result. Dr. Ragan said the moves made developing a peer group difficult for the Petitioner. The Petitioner's maternal cousins were his predominant peer group in his teens.

Dr. Ragan testified that the divorce occurred after the Petitioner's mother opened a piece of mail that was a title to a new car that the Petitioner's stepfather had purchased for a young woman. She suspected infidelity, and they argued. He denied any infidelity and had the woman, her boyfriend, and her mother over for dinner. The Petitioner's mother became more distant and then became involved with another man. They argued in front of the children, and the Petitioner's stepfather moved out of the home. He then moved back into the home, and she and the children moved into an apartment. Following the divorce, the Petitioner's mother and stepfather continued to live together for some time because the children wanted them to reconcile. Dr. Ragan said the family was so preoccupied with the marital discord, separation, and divorce that the Petitioner was lost in the shuffle. According to Dr. Ragan, the divorce represented another loss for the Petitioner. The divorce was difficult for him to process and understand and caused him a good deal of distress.

Dr. Ragan testified that following the divorce, Christine and the Petitioner lived with their stepfather, while Vanessa lived with their mother. Vanessa was unhappy with the arrangement. Christine was reunited with Vanessa and their mother, and the Petitioner was able to visit them.

Dr. Ragan testified that the Petitioner's stepfather was the only father the Petitioner had ever known. The Petitioner also was "wary" of him, who suspected the Petitioner's intellectual difficulties. When he left, he told the Petitioner that he had to be the man of the family. The Petitioner did not respond. Dr. Ragan said the Petitioner was scared and did not know how he was going to do as instructed. Dr. Ragan also said the Petitioner experienced a traumatic rupture of his relationship with his stepfather. Christine was able to "finagle" a way to return to her mother's home where there was less discipline, while the Petitioner remained with their stepfather. His stepfather would give the Petitioner the keys to his car and instruct the Petitioner to wash the car. On one occasion, while his stepfather was at work, the Petitioner drove the car, and his stepfather learned of the incident. At the time, the Petitioner was sixteen years old and did not have a driver's license. His stepfather spanked him, and he left as a result. The Petitioner remained in the eighth grade for one or two more years. He had no supervision and was staying with different maternal cousins and his mother. Dr. Ragan said it was not clear that the Petitioner remained at any place for a period of time.

Dr. Ragan testified that the Petitioner was allowed to play with his maternal cousins even though his stepfather discouraged it. The Petitioner's cousins lived with his aunts, who were fairly permissive. The Petitioner recalled that his favorite aunt allowed them to drink alcohol. The Petitioner's cousins drank alcohol, used drugs, and were delinquent. The Petitioner's cousins referred to him as "sanctified" because he was from the "right side of the tracks," had attended church, did not drink alcohol, did not smoke marijuana, and did not shoplift. Beginning when the Petitioner was sixteen or seventeen years old and continuing until he was twenty-three, his cousins applied a great deal of pressure and taught the Petitioner to drink alcohol, smoke marijuana, and shoplift. Dr. Ragan said the Petitioner did not have independent self-esteem and did not have friends upon whom to fall back. He was "easy prey."

Dr. Ragan testified that ten of the Petitioner's cousins had criminal histories. The Petitioner was exposed primarily to the maternal side of the family. Although the Petitioner's stepfather had brothers and sisters, they lived in Mississippi and did not influence the Petitioner.

Dr. Ragan testified that alcoholism had a heredability rate of 30% to 35%. There was a history of substance abuse on both sides of the Petitioner's family. The cousins with whom the Petitioner associated had both substance abuse problems and criminal histories. Nine of the thirteen siblings on the Petitioner's mother's side had a history of substance abuse. Two of the nine died when they were relatively young. The Petitioner's biological father, one of his great aunts, and one of his great uncles had a history of substance abuse. Dr. Ragan said it likely was the most extensive genetic loading for substance abuse that he had seen.

Dr. Ragan testified that those with substance abuse problems also have psychiatric disorders. He said that whenever he had a patient who was depressed, he must examine the patient's family history for substance abuse. When he had a patient with substance abuse problems, he also looked for mood disorders. Dr. Ragan said some of the genes that contribute to alcoholism also can contribute to depression.

Dr. Ragan testified that genetic influence and early exposure to drinking influence alcoholism. When a person is addicted to alcohol or drugs, the alcohol or drugs cease to have much of an effect, so the person increases the amount consumed. The consequences of drinking alcohol becomes more severe, and the person cannot stop and loses control. Dr. Ragan explained that the addict no longer has free will over the substance and cannot quit using the substance on his or her own. He said drinking causes a detriment to those who have lower cognitive functioning. Drinking alcohol has a damaging effect on the brain over time and causes some of the nerve cells to lose some of their connections. Those with lower cognitive functioning do not have the strength to admit that they have a problem. Dr. Ragan said the Petitioner was an addict who had lower cognitive functioning.

Dr. Ragan testified that in determining whether someone is an addict, he looked for escalating use and examined the volume and amount of the alcohol consumed and the frequency of the consumption. Dr. Ragan said the Petitioner was an addict at age twenty-three based upon the frequency of his alcohol use and the level of his tolerance. Dr. Ragan noted references to the Petitioner's consuming malt liquor. The volume of alcohol in beer varies from 4.5% to 5% per volume, while the volume of alcohol in malt liquor is 8%. Malt liquor can be purchased in either twenty-two-ounce or forty-ounce bottles. Dr. Ragan said that in determining the amount of alcohol consumed, the volume of the alcohol and not the number of drinks must be ascertained. Dr. Ragan also said alcoholism and substance abuse are recognized as medical disorders. Dr. Ragan stated that because the Petitioner was addicted to alcohol and marijuana, he could not stop using them absent outside intervention.

Dr. Ragan testified that the Petitioner met Mamie Watkins at the Skylane Apartments where some of the Petitioner's aunts and cousins lived. At the time, Ms. Watkins was

pregnant by another man, and Dr. Ragan believed the Petitioner wanted to help her. They had a reasonably lasting relationship and lived together for some time. The Petitioner's mother found employment in Nashville, and she and Christine encouraged the Petitioner to move away from the environment in Memphis. The Petitioner's relationship with Ms. Watkins waned to some degree when he lived in Nashville. They continued to visit each other, and Ms. Watkins became pregnant with the Petitioner's child.

Dr. Ragan testified that the Petitioner lived in an apartment with his mother in Nashville. He worked at a local restaurant and attended parties at Tennessee State University where he drank alcohol and used marijuana and cocaine. The Petitioner visited Ms. Watkins in Memphis on occasion. He attempted to persuade Ms. Watkins to move to Nashville. Ms. Watkins went to Nashville but returned to Memphis after becoming homesick.

Dr. Ragan testified that while living in Memphis, the Petitioner was employed as a cook in a restaurant and dreamed of becoming a chef. Dr. Ragan did not believe the Petitioner's goal was realistic based upon his cognitive disabilities. A chef must be able to manage a kitchen, prepare a menu, purchase food, and prepare a budget. The Petitioner was able to prepare simple dishes. He, however, did not have the skills to prepare dishes that required that he read a recipe and complete multiple steps.

Dr. Ragan testified that the Petitioner moved back to Memphis shortly before the birth of his first child. He and Ms. Watkins then had two more children. In 1993, the Petitioner and Ms. Watkins had four children under the age of five living in their household, including Ms. Watkins's other son.

Dr. Ragan testified that according to Ms. Watkins and one of the Petitioner's cousins, the Petitioner was not able to manage money. The Petitioner gave money away, and people took advantage of him. The Petitioner also had problems sleeping due to his alcohol consumption. The Petitioner enjoyed playing with his children, and Ms. Watkins went to clubs while the Petitioner babysat. Dr. Ragan said the Petitioner appeared to be more comfortable with his children than with adults. Dr. Ragan explained that the Petitioner related to the children and that children are more accepting when they are young.

Dr. Ragan testified that Ms. Watkins was the dominant one in the relationship and that the Petitioner was the submissive person. Ms. Watkins constantly badgered the Petitioner to obtain employment and make money. Ms. Watkins would do this in front of others. Dr. Ragan said the Petitioner was desperate for money on a monthly basis. In 1990 or 1991, he contacted his mother or stepfather requesting money.

Dr. Ragan testified that Lewis Hill, the Petitioner's cousin, assisted the Petitioner in finding employment. Mr. Hill had completed job applications for the Petitioner and had gotten him a job without an interview. Mr. Hill, however, was in Mississippi and was unavailable to assist the Petitioner. As a result, the Petitioner repeatedly failed to obtain employment. The Petitioner's car had broken down, and he did not have the money to repair it. The Petitioner's family reported that he enjoyed working on cars, but Dr. Ragan said the Petitioner may have been more involved in "superficial tinkering" and was not able to repair cars.

Dr. Ragan testified that when the beginning of the month approached, the Petitioner became increasingly depressed. The Petitioner did not have any money and was receiving increased pressure from Ms. Watkins. Dr. Ragan said Ms. Watkins took advantage of the relationship because the Petitioner would ask family members for money. Dr. Ragan also said Ms. Watkins and Christine took advantage of the Petitioner because he enjoyed babysitting. Ms. Watkins and Christine would go to a club together while the Petitioner babysat their children. The Petitioner was on probation at the time and appeared to have kept his scheduled meetings with his probation officer. According to Dr. Ragan, the probation officer knew that the Petitioner did not have any money to pay the fees each month, and he accepted stolen items from the Petitioner.

Dr. Ragan testified that the Petitioner's relationship with Ms. Watkins grew increasingly stressed and strained. Ms. Watkins was aware of the Petitioner's difficulties. He did not know how to read a thermometer. He could babysit but could not take the children to the doctor. The Petitioner could not shop for groceries. Ms. Watkins said that if the grocery list included more than three items, the Petitioner would return without the correct items. Dr. Ragan explained that the Petitioner's working memory was so small that he could only hold a few things in his head at one time. Dr. Ragan noted that Ms. Watkins knew that the Petitioner could not be the "bread winner" due to his cognitive performance and inability to obtain employment and maintain his car. At the same time, Ms. Watkins made statements in the presence of the Petitioner's family members such as "Why don't you get a job?" and "You have to get money." Dr. Ragan said Ms. Watkins exploited the Petitioner's need to please her. Both the Petitioner and Ms. Watkins drank heavily. Whenever Ms. Watkins and Christine went to a club, Ms. Watkins would drink so heavily that Christine could not trust her to drive.

Dr. Ragan testified that by that time, the Petitioner's addiction to alcohol and marijuana was in "full flourish." The Petitioner was drinking and smoking on a daily basis. Dr. Ragan noted that both alcohol and marijuana exacerbate mood disorders. Due to the pressures to perform, the Petitioner became increasingly depressed. Dr. Ragan said that the

Petitioner's depression worsened to the point that he was having suicidal thoughts in the weeks before the robbery and murders. Approximately one week before the murders, the Petitioner visited his cousin, Eugene Taylor, with a shotgun. Mr. Taylor became so alarmed that the Petitioner would commit suicide that he took the shotgun away from the Petitioner and made the Petitioner spend the night at his home.

Dr. Ragan testified that the Petitioner had difficulties sleeping for many years. His amount of sleep deteriorated as his depression and alcohol addiction worsened. Dr. Ragan stated that sleep deprivation impairs the ability to solve problems and concentrate. In the months leading up to the murders, the Petitioner suffered from chronic sleep deprivation. The Petitioner's sleeping problems increased with his depression, increased stress, and the sense of loss of control. Dr. Ragan noted reports that the Petitioner would remain awake all night, often with friends, and then would sleep intermittently during the day.

Dr. Ragan testified that in the months leading up to the murders, the Petitioner was no longer in control of the addictive substances. Dr. Ragan said addiction at that level changes the brain chemistry. He explained that both alcohol and marijuana have a fairly substantial effect on the frontal lobes, including decision making and inhibiting impulses. Those who normally would control their behavior are unable to do so. A person's mood also becomes magnified when drinking, and alcohol impairs "simple thinking."

Dr. Ragan testified that before the Petitioner and Cedric Parker, a cousin, robbed a MAPCO store on March 8, 1993, they had been to a party at a cousin's house where they were drinking heavily. Dr. Ragan found no evidence that they planned the robbery in detail. Rather, Mr. Parker had worked at a MAPCO previously and knew how to enter the store, rob the workers, and leave quickly. Dr. Ragan said the Petitioner was easily influenced and went along with Mr. Parker as his "sidekick." They robbed the MAPCO at approximately 6:00 a.m. Mr. Parker was the leader, and the Petitioner brought the shotgun. At one point, the Petitioner laid the shotgun down and took candy, explaining to the MAPCO attendant that he planned to include the candy in his children's lunches the next day. Dr. Ragan stated that once they obtained the money, the Petitioner wanted to leave but that Mr. Parker wanted to take one of the female attendants to the back room intending to sexually assault her. They left without Mr. Parker's assaulting anyone.

Dr. Ragan testified that following the robbery in March 1993 and before the murders in May 1993, the Petitioner was behind on rent. One week before the murders, the Petitioner was so depressed that he had thoughts of suicide. The day before the murders, he and Ms. Watkins had been served with an eviction notice. The following month, while the Petitioner was in jail, Ms. Watkins and the children were evicted.

Dr. Ragan testified that before the murders, the Petitioner had been drinking at his apartment. His two codefendants came to the apartment. They were on their way to take Lewis Anderson's mother somewhere and needed money. The Petitioner asked to go along with them and gave them money for gas. The Petitioner reported that he had finished a six-pack of eight-ounce cans of beer. On their way to get Mr. Anderson's mother, they bought a twelve-pack of beer. They picked up Mr. Anderson's mother and took her to her apartment. By that time, the Petitioner and Mr. Anderson had finished drinking the beer. They then bought another twelve-pack of beer and were drinking when they arrived at Shelia Anderson's home.

Dr. Ragan testified that the Petitioner and his codefendants got the idea to rob drug dealers from Tony Blake, Ms. Anderson's husband. Dr. Ragan said the men were intoxicated. Mr. Blake said he knew a marijuana dealer who was receiving large shipments of marijuana through Federal Express and "fronting" people substantial amounts of marijuana to sell. Mr. Blake suggested the robbery and drove the men to the apartments. He gave them the entry code to the gate and identified the apartment.

Dr. Ragan testified that the men returned to Ms. Anderson's home. They continued their "somewhat aimless w[a]nderings" and continued drinking alcohol. They then went to the apartment of Mr. Anderson's other sister where they continued to drink alcohol and smoked marijuana laced with cocaine. The Petitioner said he forgot about the robbery until Mr. Anderson mentioned it again. A female relative saw the Petitioner at the apartment and knew that he was intoxicated, was on probation, and had a curfew. The relative called the Petitioner's mother, and the Petitioner and his mother spoke briefly. Dr. Ragan said the Petitioner's need for money was in the back of his mind. Dr. Ragan also said that although others were telling the Petitioner to go home, he was with his friends and did not have the social, emotional, or intellectual personality to tell his friends that he was going home. The Petitioner also did not have a car. At some point, the car that the Petitioner and his codefendants were driving around broke down, and they stole a car.

Dr. Ragan testified that the Petitioner and his codefendants drove to Christine's apartment and that the Petitioner went to the apartment while his codefendants remained inside the car. Eugene Taylor was there and recalled that the Petitioner was intoxicated and asking for money. The Petitioner argued with Christine because she did not have the money. Christine was upset because the Petitioner was intoxicated and told him to go home. The Petitioner returned to the burgundy Cadillac with his codefendants. The Cadillac was the car that the Petitioner and the codefendants stole together. Dr. Ragan understood that Mr. Anderson's car broke down and that Mr. Anderson led the others to steal another car. After

leaving Christine's apartment, the Petitioner and his codefendants continued to drink. Mr. Anderson mentioned the robbery again, and they went to the victims' apartment.

Dr. Ragan testified that Darnell Ivery was the driver and remained in the car while Mr. Anderson and the Petitioner went to the victims' apartment. The Petitioner was holding the shotgun, and they went to the door and knocked on it. Mr. Jackson came to the door. Mr. Anderson and the Petitioner determined that they were at the wrong apartment, and the Petitioner believed that they needed to leave. Dr. Ragan said the shotgun was both for the robbery and for protection because a person should not enter a drug dealer's home without protection. The Petitioner began to walk back down the stairs. Dr. Ragan said Mr. Anderson took charge, ordered the Petitioner to return, took the shotgun from him, and ordered him to kick in the door. Mr. Anderson was crippled and not physically capable of kicking in the door. The Petitioner gave Mr. Anderson the shotgun and kicked in the door. Dr. Ragan stated Mr. Anderson brandished the shotgun and initiated the sequence of events.

Dr. Ragan testified that he reviewed the police crime scene video, which included the interior of the apartment and both victims' bodies. The apartment was approximately 1,000 square feet and included two bedrooms, a living area, and a kitchen. Mr. Anderson ordered Mr. Jackson to lie on the bed, and the Petitioner began searching for drugs and money. The Petitioner noticed that Mr. Anderson disappeared, entered the other bedroom, and saw Mr. Anderson raping Mrs. Jackson. Mr. Anderson ordered the Petitioner to leave, and the Petitioner took the shotgun, which was lying on the bed, and left the room. The Petitioner was very upset by seeing the rape. Dr. Ragan said, "In my medical opinion if [Mr. Anderson] hadn't raped Mrs. Jackson if they had just ransacked the apartment, looked for whatever and then left, the murders would have never happened." Dr. Ragan also said the rape was not part of the plan and began "derailing" the Petitioner regarding his thought process.

Dr. Ragan testified that working memory allows a person to take in what is occurring and do something with it. He said that when the Petitioner was sober and in a quiet room, the Petitioner's working memory was at least two standard deviations below the main or less than 5% of the population. At the time of the murders, the Petitioner was intoxicated and did not have sufficient self-awareness of his capabilities. Dr. Ragan explained that the Petitioner was unable to solve problems because he was "horribly impaired" and had a "surge" of fear, anger, and disgust with Mr. Anderson for raping Mrs. Jackson. The Petitioner told Dr. Ragan that he considered telling Mr. Anderson to stop and then leave. Dr. Ragan said the Petitioner was not capable of doing so and was overwhelmed. The Petitioner continued to search for drugs and money.

Dr. Ragan testified that while the Petitioner was bent over looking underneath the couch for valuables, Mr. Jackson attacked the Petitioner from behind with a knife. According to Dr. Ragan, the Petitioner was in a "flight" or emergency situation and was in a "high level of panic." The Petitioner was able to fight off Mr. Jackson, and Mr. Jackson retreated. The Petitioner went after him. Dr. Ragan said that by the time that Mr. Jackson tried to hide, he was in the closet, and the Petitioner shot him.

Dr. Ragan testified that the Petitioner then went looking for Mr. Anderson because he had some awareness that killing someone was not part of the plan. Dr. Ragan said the Petitioner did not intend to kill someone and was not a habitually violent person. Rather, he was in "complete panic" and wanted to leave. The Petitioner entered the bedroom where Mr. Anderson was pulling up his pants and demanding that Mrs. Jackson tell them where the money and valuables were. Mrs. Jackson retreated to the bathroom door and was screaming and yelling. Dr. Ragan described the situation as chaotic. The Petitioner reported that as he was holding the gun on her and "sort of" turning away, he fired the shotgun and killed her. Dr. Ragan explained that although Mrs. Jackson begged the Petitioner not to shoot her, her statements did not register with the Petitioner. Dr. Ragan did not believe the Petitioner's acts were that of a "cold hardened criminal." Rather, he believed the Petitioner committed the acts impulsively in the chaos of the bedroom.

The Petitioner told Dr. Ragan that he was not interested in taking anything from the apartment at that point. Rather, he just wanted him and Mr. Anderson to leave. Dr. Ragan said the Petitioner was unable to disassociate himself from Mr. Anderson. Before the shootings, Mr. Anderson took some clothing. He also took a black bag while they were leaving. The Petitioner told Dr. Ragan that he did not take anything from the apartment. According to Dr. Ragan, the Petitioner's leaving the apartment depended on Mr. Anderson's leaving. Dr. Ragan explained that the Petitioner had been in dependent relationships for years and that those with severe depression felt worthless. The Petitioner did not believe he could tell anyone what to do anymore. Dr. Ragan said the Petitioner was very subordinate to the point of being a subservient individual in these relationships.

While leaving the apartment, Mr. Anderson dropped the bag. They drove away in the Cadillac. Both codefendants went to their apartments. The Petitioner drove the stolen car back to his apartment and made no effort to hide it. Dr. Ragan said the Petitioner felt a great deal of panic and terror over the events. Ms. Watkins woke up when the Petitioner arrived home, and the Petitioner briefly spoke to her. He stayed awake all night and was overwhelmed by what had occurred. The Petitioner had an appointment with his probation officer the next morning. He called his mother to take him to the appointment. His mother noticed that he appeared different and upset. Later that day, the police came to the

Petitioner's apartment and asked him what had occurred. They asked him to give them the shotgun, and the Petitioner complied with every request.

Dr. Ragan did a mental status examination on the Petitioner. He had the Petitioner subtract sevens from 100. Dr. Ragan said the Petitioner had difficulty with "serial seven subtractions." The Petitioner reported performance anxiety and said, "I've got brain freeze." At that time, he and Dr. Ragan had been meeting for approximately one hour. The Petitioner was able to answer three out of five questions correctly.

Dr. Ragan testified that the peridal lobes, which allow a person to make a map and construct reality, are located behind the frontal lobes. Dr. Ragan tested the Petitioner by asking him to draw items that were over-learned, such as the face of a clock that was set to a certain time. Dr. Ragan said the test required some executive functioning and was more of a test for delirium. The Petitioner was able to complete the test. The Petitioner's drawings were crude but within normal limits. Dr. Ragan then showed the Petitioner a cube and asked him to draw it. The Petitioner was unable to do so. Dr. Ragan had no reason to believe that the Petitioner's mental condition deteriorated since he had been in prison. He was able to determine the Petitioner's basic level of functioning at the time of the offense absent drugs and alcohol.

Dr. Ragan noted that other members of the Petitioner's family had mental deficiencies, including the Petitioner's parents. Dr. Ragan also noted that the fact that the Petitioner's parents had low intelligence and a fourth grade reading level did not "come out of the blue." Rather, intellectual deficiencies were replete throughout the Petitioner's family. The Petitioner's peer group were his cousins, who had low intellectual attainment and grew up in households without fathers and without supervision.

Dr. Ragan testified that a person's fund of knowledge is determined by asking the person questions regarding general items that are slanted toward the person's educational level, background, and interests. Dr. Ragan said the Petitioner did his best to answer the substantive questions. Dr. Ragan also said the Petitioner attempted to answer the questions with some level of confidence even though the Petitioner obviously did not know the answers. In determining the Petitioner's fund of knowledge, Dr. Ragan asked him what subjects he enjoyed in school, and the Petitioner said history. Dr. Ragan asked the Petitioner who discovered America, and the Petitioner did not know. The Petitioner reported that his favorite football team was the University of Alabama. He did not know the location of the university but knew the university's colors. When Dr. Ragan asked the Petitioner where the University of Alabama was, the Petitioner replied, "Georgia." The Petitioner knew the day and month of his children's birthdays but did not know the year and could not calculate it.

Dr. Ragan said the Petitioner's deficiencies in fund of knowledge were consistent with the results of IQ and cognitive testing.

Dr. Ragan testified that the Petitioner had a good deal of remorse and regret for the offenses and changed his name in a way to turn over a new leaf. He chose his name with the help of other inmates and from a book entitled "The Book of Golden Names." The Petitioner did not know that the name was an Arabic name. Rather, he believed the name was based upon an African language. The Petitioner grew up in the Baptist church, and his new name included no religious identification.

Dr. Ragan testified that the Axis system was instituted to organize different categories of difficulties. The majority of psychiatric disorders fall within Axis I. Cognitive difficulties relating to a person's IQ fall within Axis II. Axis II disorders are those that occur from a developmental point of view and include personal disorders and include personality disorders and intellectual functioning.

Dr. Ragan diagnosed the Petitioner under Axis I with alcohol dependence, cannabis dependence, cocaine abuse, and anxiety disorder not otherwise specified. The Petitioner spontaneously demonstrated anxiety, and the anxiety did not seem to have crystallized in some of the different anxiety disorders, such as generalized anxiety and obsessive compulsiveness. Dr. Ragan said the Petitioner's anxiety may well be "part and parcel" of post-traumatic stress disorder.

Dr. Ragan testified that based upon his diagnosis, the Petitioner would have experienced anxiety in a court setting or while testifying. The Petitioner shut down when overwhelmed by anxiety and did not become anxious in a hysterical or expressive fashion. Dr. Ragan said that to see the Petitioner's anxiety, a person would have had to spend time with him and have him sufficiently relaxed that he would share information.

Dr. Ragan suspected that the Petitioner suffered from post-traumatic stress disorder but said that further investigation was necessary. Dr. Ragan also would need to spend more time with the Petitioner. Dr. Ragan could not diagnose the Petitioner with post-traumatic stress disorder because the Petitioner had difficulty understanding some of the questions used to determine post-traumatic stress disorder. Dr. Ragan said that his opinion was not that post-traumatic stress disorder did not exist but that the evidence was insufficient to make such a diagnosis. Dr. Ragan also ruled out substance induced mood disorder. He explained that alcohol is both a psychological and biological depressant that makes a person more depressed so that the person drinks more. A portion of the depression is attributable to the psychologically depressant effects of the substance.

Dr. Ragan also diagnosed the Petitioner under Axis I with cognitive disorder, not otherwise specified. The diagnosis was based upon evidence that the Petitioner's difficulties with cognitive functioning went beyond just low IQ and upon the results of the neuropsychological testing. Dr. Ragan diagnosed the Petitioner under Axis II with borderline intellectual functioning and infinite personality traits. He found certain stressors under Axis IV.

Dr. Ragan testified that he diagnosed the Petitioner under Axis II with dependent personality traits pursuant to the Diagnostic and Fiscal Manual (DFM). He explained that personality traits become pathological when they are so persistent that they interfere with daily functioning. Dr. Ragan said the Petitioner had four of the five traits to diagnose him with dependent personality disorder. The Petitioner's traits were of such a magnitude, persistence, and severity that he had a dependent personality. Dr. Ragan explained that personality develops during formative years and that the Petitioner's cognitive difficulties contributed to his dependent personality. Dr. Ragan also explained that a person's personality develops with the person's relationship with his or her parents and friends. He said the Petitioner's adaptive strategy was incorporated into his personality and became how he dealt with the world. The Petitioner was very likeable, tried to please, and was "easy" to be around. Dr. Ragan said this kind of person performs well in a structured prison setting.

Dr. Ragan testified that the Petitioner's flat affect had been misinterpreted as a type of sociopathic nonchalance or his not caring. The Petitioner's flat affect, however, was the opposite. Dr. Ragan said that being examined on the witness stand would have produced stress and affected the Petitioner's demeanor.

On cross-examination, Dr. Ragan testified that his summary of what occurred regarding the offenses was based upon his discussion with the Petitioner, his review of the police report, the Petitioner's prior testimony, the codefendants' statements, and other information. Dr. Ragan estimated that "less than half" the information came from his interview with the Petitioner. To the best of Dr. Ragan's recollection, the information provided by the Petitioner was consistent with the record. Dr. Ragan also took into account that the codefendants attempted to put themselves in the best possible light in their statements to the police. Dr. Ragan said the Petitioner did not have the cognitive functioning to make himself appear in the best possible light.

Dr. Ragan testified that as the day of the offenses progressed, the Petitioner also consumed vodka and whiskey. Dr. Ragan said that based on his experience, those who are intoxicated cannot always recall the precise amount of alcohol consumed. He also said the Petitioner drank a substantial amount of alcohol between 3:00 p.m. and the time of the

offenses, approximately nine and one-half hours later. Dr. Ragan acknowledged that if the Petitioner had not spent his money on alcohol, he could have paid his bills. Dr. Ragan explained that one of the signs of addictions is a person's use of rent money to purchase alcohol or drugs.

Dr. Ragan testified that the Petitioner did not tell him that he did not know what to do in the victims' apartment without Mr. Anderson. The Petitioner told him that when he entered the bedroom, he began to turn away, and the gun went off hitting Mrs. Jackson. The Petitioner also told Dr. Ragan that Mrs. Jackson was screaming for her life and may have put her hand toward the barrel of the shotgun. Dr. Ragan stated the Petitioner felt bad that a child was in the apartment.

On redirect examination, Dr. Ragan testified that many who read the Petitioner's statement would be "flabbergasted" that the Petitioner waived his rights and spoke to the police. He said the Petitioner did not have the "good sense" to remain quiet and request counsel. Rather, the Petitioner knew that he had done something wrong and "fessed up." Dr. Ragan stated the Petitioner was functioning in a primitive, reflective manner and had been subordinate to others for years. Dr. Ragan believed the Petitioner was operating on automatic behavior and not thinking things through.

In response to questions by the post-conviction court, Dr. Ragan testified that someone who had been drinking heavily for nine and one-half hours, was using drugs, and was extremely intoxicated could experience problems with memory. The Petitioner was not at the point of passing out or blacking out, as he was still walking around. Dr. Ragan said his opinion was not that the Petitioner was so heavily intoxicated that he could not perform any actions. He explained that in an acute fight-or-flight state, people fixate on memories.

Dr. Ragan explained that a fight or flight situation is a specific psychological mechanism when the brain acts reflexively when there is a perceived threat. The fight or flight situation takes time to subside. After Mr. Jackson retreated, the Petitioner followed him. Dr. Ragan said that even though Mr. Jackson was no longer a threat, the fight-or-flight situation does not end that quickly. The Petitioner did not deescalate and decide that Mr. Jackson was no longer a threat. Although Dr. Ragan did not know the distance from the middle of the living room to the bedroom, he said the distance was compressed. Dr. Ragan agreed that the Petitioner also was angry at Mr. Jackson, but he did not believe that anger was the Petitioner's predominant emotion.

Dr. Ragan testified that if the Petitioner had any wits about him, he would have determined Mr. Jackson's location before searching for money and drugs. Instead, the

Petitioner had a one-track mind to search for drugs and money and turned his back to Mr. Jackson. Dr. Ragan believed that the Petitioner's actions in pursuing Mr. Jackson in a very short time and shooting him were reflexive. Dr. Ragan said the events occurred so quickly that he did not believe that the Petitioner did not have time to think that he was going to punish Mr. Jackson for attacking him.

Dr. Ragan testified that the Petitioner's shooting Mrs. Jackson was reflexive based upon the chaos. Mr. Anderson continued to escalate the situation. He demanded to know where the money was and threw a jewelry box at Mrs. Jackson. Mrs. Jackson was screaming. Dr. Ragan believed that the sequence of events occurred very rapidly and that the Petitioner was in a level of panic. The Petitioner was upset with Mr. Anderson for raping Mrs. Jackson. Dr. Ragan noted the Petitioner was not a particularly violent individual and was very passive. Dr. Ragan said this evidence was relevant to mitigation and did not absolve the Petitioner of criminal responsibility.

Buddy Michael Mears, an associate professor at John Marshall Law School in Atlanta, Georgia, had served as lead counsel in thirty or forty capital cases and tried twenty-seven capital cases through the sentencing phase. He was accepted as an expert by the post-conviction court. Mr. Mears reviewed the transcripts from the 1995 proceedings and the 2000 proceedings, the opinions from the appellate courts, the appellate briefs, the Petitioner's statement to the police, and the reports from Dr. Steinberg, Dr. Angelillo, Dr. Auble, Dr. Bishop, and Dr. Ragan. Mr. Mears also spent one day in court observing the testimony of some of the Petitioner's trial counsel during the post-conviction proceedings. He was familiar with the prevailing norms of practice of attorneys handling capital cases from 1995 to 2000.

Mr. Mears testified that counsel must obtain as much information as possible. He said the rule of thumb was to investigate back one or two generations, including the defendant's parents. School records, hospital records, military records, prior court records, and prison records must be obtained. Family members, friends, and school teachers must be interviewed. Counsel must use a mitigation specialist to develop a psycho-social history of the defendant. Mr. Mears said that once this information is gathered, counsel must determine what types of experts are needed.

Mr. Mears testified that as early as the late 1980s and into the 1990s, the practice was to retain a neuropsychologist to conduct a neurological assessment. If the assessment showed some type of organic impairment or physical manifestations of mental health issues, a psychiatrist was needed to examine the medical aspects of the impairment or manifestation. A neuropsychological test also would reveal substantive information regarding the client's

makeup. Mr. Mears said school records and military records would show "red flags" demonstrating the need for a neuropsychologist. A red flag would include information that a defendant was held back two or three years in school. Mr. Mears said his practice was that the neuropsychological examination was the beginning of the assessment of his client's cognitive abilities.

Mr. Mears testified that an expert must know what direction counsel was looking for the expert to take. Mr. Mears's practice in the early 1990s was to instruct his experts to provide him with preliminary reports and to refrain from drafting a final report until he ensured that he and the expert had a meeting of the minds. He said counsel must know what the expert's abilities were and what his or her testimony would be before counsel called that expert to testify. Mr. Mears also said counsel may need to obtain consultations from experts if counsel was able to obtain funding or if the expert agreed to bill counsel later.

Mr. Mears testified that even if raw scores and an initial assessment did not support a finding of intellectual disability, a client's limited cognitive abilities should be presented as mitigation evidence. Jurors should understand cognitive disconnect or impairment as reasons why a defendant committed or did not commit the offense. Mr. Mears said jurors want to know why a defendant committed the offense.

Mr. Mears testified that a client's attempt to mask disabilities was well known in 1995. Mr. Mears explained that clients wanted to do whatever they can to convince counsel that they were not intellectually disabled. Counsel may believe that the client can read, but the client answered "yes" or "no" because the client believed that was the answer that he or she was supposed to provide. Mr. Mears said counsel cannot rely upon information provided by a client to assess borderline intelligence or intellectual disability.

Mr. Mears testified that a red flag indicating mental issues included a client's desire to enter a plea in a capital case. He said entering a guilty plea did not provide a defendant with any advantage regarding the ultimate outcome of the sentence. He acknowledged that the decision to plead guilty could only be made by the defendant. Mr. Mears stated, however, that a reasonable, professional attorney needed to ensure that the client understood what he was doing, even to the extent of having family members talk to him. Mr. Mears said that even if the guilt phase is "open and shut," evidence could be presented in the guilt phase that could help a defendant in the penalty phase. Mr. Mears had clients who insisted on pleading guilty, and he did everything he could to persuade the client from doing so. He succeeded most of the time.

Mr. Mears testified that counsel is obligated to advise the trial court of the facts surrounding a client's decision to enter a guilty plea. He stated that if the client insists on pleading guilty over counsel's advice, counsel should request an *ex parte* hearing and move to withdraw. If counsel believed that the client was making the decision based upon a cognitive disconnect with reality, counsel had an obligation to inform the court.

Mr. Mears testified that he generally approached the prosecutor and offered to enter a plea if the prosecutor agreed not to seek the death penalty. If the prosecutor insisted on a sentencing hearing, counsel must ensure that the client understood what would occur if he entered a plea. Mr. Mears said counsel must ensure that the client understands that there is no advantage to entering the plea other than a faster trial to the penalty phase. Counsel also must explain what evidence would be introduced.

Mr. Mears testified that counsel must investigate any prior convictions upon which the prosecution plans to rely as an aggravating circumstance. Counsel must examine the circumstances of the prior offense because it can yield mitigating evidence. Mr. Mears said he would attack the prior conviction in a motion in limine in an attempt to exclude any reference of the offense based upon constitutional infirmities. Counsel must investigate whether the conviction was constitutionally based and relitigate the offense in some form or another.

Mr. Mears testified that because approximately 90% of capital cases go to the penalty phase, counsel must present a theme that connects both the guilt phase and the penalty phase. The theme must be developed after the investigation is completed. Counsel must develop a theme that is reasonable and believable and that at least one juror "will buy."

Mr. Mears testified that he would not say that alcoholism was hereditary but noted that some studies identified connections between alcoholic parents and alcoholic or substance abuse in their children. One of the issues was whether an alcoholic parent created some cognitive disconnect for a child during childhood. Mr. Mears said counsel should investigate the extent of a client's history of alcohol or substance abuse. He also said, "It's always been my experience, jurors don't like alcohol or drugs as an excuse for having committed a crime. So you don't want to go there. You can't come in and say he or she committed this crime because they were drunk." According to Mr. Mears, counsel should investigate why the client is an alcoholic or abusing drugs. He noted a number of scientific studies that were available in the 1980s and 1990s showing that substance and alcohol abuse were frequently the result of self-medication. A person who cannot deal with the world cognitively retreats into alcohol or drugs. Mr. Mears said such evidence would not excuse a defendant's crime but may diminish the defendant's *mens rea*. Such evidence also could be used in mitigation.

Mr. Mears testified that evidence of addiction could be used to explain conduct, and counsel could weave it into the guilt/innocence theme. Mr. Mears said a jury was not going to feel sorry for the client and that should not be counsel's goal. Mr. Mears explained, "Jurors want to know, if I sentence this person to death, am I doing it because this is an evil person, that this person is beyond redemption." Mr. Mears said the presentation of such evidence in the guilt phase without the jurors thinking that counsel was trying to excuse the crime is almost an "art."

Mr. Mears testified that the prevailing practice was to refrain from telling the jurors that a defendant was on death row during a resentencing hearing. The jurors must be told that the only issue is sentencing. Mr. Mears said to inform the jurors that a defendant already had been sentenced to death excuses the jurors from any responsibility regarding whether to decide to sentence the defendant to death. Counsel can present evidence of a defendant's actions while in jail without telling the jury that he was on death row. Counsel also must work with the trial court in crafting a jury instruction. The jury should be instructed that a defendant had been in prison but that they should disregard where he had been in prison.

Mr. Mears testified that counsel who had represented a defendant in a prior case was not absolutely prohibited from representing a defendant in a capital case. He said the "ante gets way up there" if the State was relying upon the prior conviction in the capital case. Counsel must be careful about a conflict of interest in such situations. Mr. Mears stated it was difficult to investigate and attack a prior conviction if counsel also represented the defendant in a prior case. Mr. Mears said he would never do so because it was fraught with too many issues of ethics and professionalism. Counsel representing a defendant in a capital case should investigate the performance of counsel in prior cases.

Mr. Mears testified that counsel should be careful in presenting issues regarding intellectual disability and other forms of mental illness because a mental illness may lead jurors to believe that the defendant was very dangerous. The proper presentation of such evidence requires experts. The presentation of such evidence began with voir dire.

Mr. Mears testified that counsel should not decide whether the client should testify until counsel knew the client well and knew the client's strengths and weaknesses. The prevailing standard was that a client rarely helps himself or herself. Jurors now understood that they were not going to learn much from a defendant. A client should testify only in rare circumstances when the defense centers around self-defense and the client could help himself or herself. The client should testify only if he or she can communicate. Mr. Mears noted studies indicated that jurors state that even if the client showed remorse, they expected him

to beg for his life. He further noted that a person who had been in jail or on the streets had difficulty in showing remorse because it is not "macho."

TRIAL COURT'S FINDINGS

The trial court entered a 145-page order denying relief. The court found that original counsel did not create a conflict of interest by representing the Petitioner on both the MAPCO robbery and the capital cases. The court found no actual conflict of interest existed because original counsel did challenge the Petitioner's robbery conviction on direct appeal and represented the Petitioner in the capital case without compromising his own personal interest. The Petitioner did not present any evidence demonstrating that original counsel was deficient in representing him in the MAPCO aggravated robbery case. Noting that disqualification of counsel was a drastic remedy when based upon the appearance of impropriety, the court found that even if original counsel addressed the issue, the trial court likely would not have disqualified original counsel.

A. 1995 Proceedings

In addressing the Petitioner's claims that his original counsel in 1995 were ineffective, the trial court concluded that any claims regarding how any deficient performance affected the jury's verdict of death in 1995 were irrelevant because the Tennessee Supreme Court overturned the Petitioner's 1995 death sentence. The court determined that the only relevant issue was whether counsel's performance affected the Petitioner's decision to enter guilty pleas to two counts of felony murder.

The trial court rejected the Petitioner's claim that original counsel failed to establish a working relationship with him. The court noted that according to original counsel's fee claim, he met with the Petitioner ten times before the trial and spent approximately twenty-six hours with him. Original counsel also met with the Petitioner after each court appearance and did not report any communication problems. While original counsel initially believed that entering a plea was the best strategy, he later changed his mind and advised the Petitioner to go forward with the trial. The Petitioner, however, decided that he wanted to enter the guilty pleas. The court noted original counsel's testimony that both he and the trial court questioned the Petitioner extensively before he entered the pleas. Original co-counsel stated that their advice to the Petitioner to enter a guilty plea was based upon the overwhelming evidence against the Petitioner, including a detailed confession. The court noted original co-counsel's testimony that they believed they might be able to persuade the jury to return a punishment less than death if the Petitioner acknowledged guilt and remorse to the jury. The court also noted that counsel met with the Petitioner's family, some of whom

were not cooperative. Original counsel was aware of the Petitioner's education background and had him evaluated. The court found that counsel created an atmosphere where the Petitioner was able to contribute to his defense and provide them with information regarding potential defenses and mitigation. The court found nothing about the attorney-client relationship affected the Petitioner's ability to evaluate his options and to make an informed decision regarding whether to enter a guilty plea.

The trial court rejected the Petitioner's claim that his counsel in 1995 failed to investigate the MAPCO aggravated robbery conviction adequately. The court noted that original counsel represented the Petitioner in the aggravated robbery case and was familiar with the underlying facts of the conviction. The court found that counsel made a strategic decision not to address the underlying facts of the prior conviction with the jury. The court concluded that counsel was not deficient and that any deficiency did not result in prejudice because the Petitioner's 1995 death sentence was reversed on appeal. The court also concluded that no further investigation of the prior conviction was needed to advise the Petitioner competently regarding guilty pleas to the two murders. The court noted that original counsel was aware that the Petitioner was drinking prior to the commission of the prior aggravated robbery but that he did not believe the evidence supported an intoxication defense.

The trial court concluded the Petitioner's 1995 counsel were not ineffective in investigating the circumstances of the offenses. The court found that before advising the Petitioner whether to enter the pleas, counsel were aware that the Petitioner was intoxicated on the night of the murders and sought expert assistance in evaluating the Petitioner's cognitive functioning. Counsel presented evidence during the 1995 sentencing hearing that the Petitioner was drinking alcohol and using drugs in the hours leading up to the murders and that the Petitioner had borderline intellectual functioning. The court noted original counsel's testimony that he spoke to family members and likely was aware of the Petitioner's financial situation at the time of the murders.

The trial court found that the Petitioner's 1995 counsel adequately investigated his social and family history. The court noted original counsel's testimony that he met with members of the Petitioner's family, some of whom were not cooperative. He had the Petitioner evaluated by Dr. Steinberg and was aware that the Petitioner was in the borderline range of intellectual functioning. Original counsel also was aware that the Petitioner abused drugs and alcohol. Although original counsel could not recall clearly, he said he likely knew about the substance abuse in the Petitioner's family, the death of the Petitioner's brother, the physical condition of the Petitioner's sister, and other aspects of the Petitioner's background.

The court concluded that even if counsel were deficient, any deficiency did not affect the Petitioner's decision to enter the guilty pleas.

The trial court rejected the Petitioner's claim that his 1995 counsel were ineffective in failing to retain a neuropsychologist. The court found that counsel could not demonstrate particularized need based upon Dr. Steinberg's evaluation of the Petitioner. Dr. Steinberg found that the Petitioner was not intellectually disabled and did not recommend further neuropsychological testing. Rather, he found evidence that the Petitioner was malingering and suffered from anti-social personality disorder. The post-conviction court noted that Dr. Steinberg found no evidence that the Petitioner suffered from a mental disease or defect. The court also concluded that the failure of counsel to retain a neuropsychologist did not undermine the validity of the Petitioner's guilty pleas. Although Dr. Auble testified that the Petitioner's intellectual limitations precluded him from changing course after counsel advised him against entering the pleas, the court found that the Petitioner was advised properly by counsel and by the trial court before he entered his pleas, was able to respond cogently to the questions asked, and was able to waive his rights and enter the pleas.

The trial court also rejected the Petitioner's claim that his 1995 counsel were ineffective in failing to retain an addiction and substance abuse expert. The court found that it was unlikely that the court would have been willing to grant funding for an addiction specialist in 1995. The court further found that even if counsel were deficient, the lack of such expert testimony likely had little impact on the Petitioner's decision to plead guilty as other evidence of the Petitioner's substance abuse was available and presented to the jury.

With regard to the Petitioner's claim that the referral question posed to Dr. Steinberg was improperly limited and that the social history and background information provided to Dr. Steinberg was insufficient, the trial court found that original counsel's testimony contradicted the Petitioner's claim. With regard to the Petitioner's claim that counsel should have argued that he was intellectually disabled, the court found that given the state of the law on intellectual disability in 1995 and Dr. Steinberg's finding that the Petitioner had a full scale IQ of 75, counsel would not have prevailed in excluding the death penalty as a sentencing option if he had raised the issue. The court also found that Dr. Steinberg sufficiently explained the significance of an IQ of 75 to the jury and that any deficiency did not result in prejudice as the death sentence was overturned on appeal.

The trial court determined that counsel were not ineffective in failing to use Dr. Steinberg in evaluating whether the Petitioner fully comprehended his rights and was capable of waiving those rights and entering valid guilty pleas. According to the court, both counsel and the court extensively questioned the Petitioner about his desire to enter the pleas and the

benefits and detriments of his choice. The Petitioner said he understood and wished to enter the guilty pleas. Original counsel said that he did not have any problems communicating with the Petitioner and that the Petitioner appeared to understand his advice. Both counsel said they would have alerted the trial court if they believed the Petitioner was not competent to enter the pleas or if they had any concern that the Petitioner did not understand the consequences of his actions.

The trial court concluded that counsel were not ineffective in failing to investigate and present evidence of the Petitioner's diminished capacity. The court noted that Dr. Steinberg did not state that the Petitioner was suffering from a mental disease or defect that would have prevented him from forming the culpable mental statement for either premeditated murder or the underlying felony in the felony murder charges. The court also noted that original counsel requested that Dr. Steinberg evaluate the Petitioner's mental state at the time of the offense and requested that he provide the defense with any information that would assist in mitigation. The court found that even if counsel had the benefit of Dr. Auble's diagnosis, a theory of diminished capacity would not have been supported. The court stated that a diagnosis of depression and adjustment disorder might have been insufficient even under current law to support the admission of diminished capacity evidence. It noted Dr. Auble only testified that the Petitioner's condition would have "impaired" or "reduced" his ability to form the culpable state required for premeditated first degree murder. Dr. Auble did not state definitively that the Petitioner lacked all ability to form the culpable mental state as required by case law.

The trial court concluded that the Petitioner failed to demonstrate that counsel's workload at the time of his trial affected his decision to enter his guilty pleas. The court found that counsel were prepared to go to trial and advised the Petitioner to do so. The court rejected the Petitioner's claim that counsel advised him to plead guilty to felony murder based upon the faulty assumption that the plea would limit the State's proof as to the charge of aggravated robbery and rape during the penalty phase. The court noted original counsel's testimony that although the trial court ruled that the State could present evidence of the robbery and rape, he believed the Petitioner's decision to plead guilty was successful in that the evidence the State presented to the jury was limited significantly. The court concluded that the Petitioner failed to establish that counsel would have advised the Petitioner differently initially even if they knew that the State's proof would not be limited as a result of the pleas. Both counsel testified that the primary purpose for suggesting the Petitioner enter the pleas was to show the jury that the Petitioner accepted responsibility for his actions and was remorseful. They later advised the Petitioner to proceed to a trial, but the Petitioner insisted on entering the pleas.

The trial court concluded that the Petitioner failed to present any evidence supporting his claim that counsel were ineffective in failing to challenge the validity of his arrest warrant. The court rejected the Petitioner's claim that counsel were ineffective in failing to cross-examine witnesses appropriately and present expert testimony during the suppression hearing regarding the effect of his intoxication on his ability to consent to police questioning. The court found that counsel adequately cross-examined witnesses. The court also noted that during the suppression hearing, the officers testified that the Petitioner did not appear to be intoxicated and appeared to understand his rights and that the Petitioner testified that he understood his rights and was not coerced or compelled to give a statement to the police.

B. 2000 Proceedings

The trial court rejected the Petitioner's claim that his counsel at the 2000 resentencing hearing were ineffective in failing to establish an attorney-client relationship. The court noted that the Petitioner was housed at Riverbend Maximum Security Prison and that the logistics of counsel meeting with him were different than in cases where a defendant was housed locally. Resentencing counsel did not recall any problems communicating with the Petitioner. He talked to the Petitioner over the telephone in April 1999 and met with him in April and December 1999. Before the Petitioner testified, counsel reviewed his testimony with him, explained the purpose behind the questions that counsel planned to ask, and explained the importance of demonstrating remorse. Resentencing co-counsel said the Petitioner was not cooperative and said he did not want counsel to defend him. Counsel continued to investigate and prepare for the Petitioner's resentencing hearing. They also were assisted by investigators with Inquisitor who investigated the Petitioner's background, gathered records, and recommended experts to assist them in preparing the mitigation evidence. The court also rejected the Petitioner's claim that counsel failed to maintain an acceptable workload.

The trial court concluded that resentencing counsel were not ineffective in failing to raise any conflict of original counsel. The court found that original counsel's representation in both the MAPCO aggravated robbery case and the capital case did not create a "material limitations conflict" requiring the removal of counsel.

The trial court found that resentencing counsel were not ineffective in their investigation and presentation of evidence regarding the MAPCO aggravated robbery. The court noted resentencing counsel's testimony that they filed a motion in limine to preclude the State from presenting the underlying facts of the MAPCO aggravated robbery to the jury. Counsel did not believe it was in the Petitioner's best interest to dwell on his having robbed a MAPCO with a shotgun when he used a shotgun to kill the victims. The trial court noted

that once the motion in limine was denied, counsel adapted. The trial court noted that counsel attempted to mitigate the State's introduction of those facts by questioning the Petitioner regarding certain aspects of the MAPCO aggravated robbery. The Petitioner testified that during that time period, he was in a downward spiral of "drinking and drugging." The court noted counsel decided to include the MAPCO aggravated robbery as part of their larger argument that the Petitioner's behavior at or near the time of the murders was the direct result of his alcohol and drug consumption. The court also noted that counsel argued to the jury that the Petitioner was a different person without the drugs and alcohol. The court found counsel spent many hours preparing for a trial and gave much thought to the strategy that they would employ. Counsel had to adjust tactics as the evidence or the trial court's rulings required.

The trial court concluded that the Petitioner's counsel in 2000 were not ineffective in failing to present additional evidence regarding the Petitioner's cognitive impairments, alcohol and drug addiction, and financial situation. The court found that counsel made an informed and reasonable tactical decision to focus upon the Petitioner's drug and alcohol use in the hours leading up to the murders, to argue that the Petitioner's behavior was out of character, and to attempt to show the jury that the Petitioner had taken responsibility for his actions and demonstrated remorse.

The trial court rejected the Petitioner's argument that neurological dysfunction affected his ability to assist counsel and make decisions regarding whether to testify and that counsel were ineffective in failing to investigate his limitations further. The court noted that Dr. Angelillo found the Petitioner to have an IQ of 78 and stated that the Petitioner appeared to understand the questions and was able to communicate his answers. Both counsel said the Petitioner did not have problems communicating with them. Resentencing co-counsel testified that when the Petitioner was cooperative, he provided them with information regarding the case. The trial court concluded that counsel were not ineffective in failing to seek additional testing or an additional evaluation of the Petitioner to assist them in communicating with him and to assist the Petitioner in determining whether to testify. The court determined that even if counsel sought funds for such additional testing, they likely would not have succeeded in obtaining the funds given the evaluations by Dr. Angelillo and Dr. Steinberg.

The trial court concluded that counsel were not ineffective in failing to present evidence of diminished capacity during the sentencing hearing. The court found that even if counsel had an obligation to pursue this strategy, the Petitioner failed to establish prejudice for the same reasons that he failed to establish prejudice based upon his 1995 counsel's failure to present such evidence. The court also concluded that resentencing counsel were

not ineffective in failing to seek funds to retain a neuropsychologist and found that the Petitioner would not have been able to establish particularized need based upon the evaluations of Dr. Angelillo and Dr. Steinberg.

The trial court found that although resentencing counsel may have been able to present sufficient evidence to support the need for an expert in substance abuse, counsel based their decision not to seek such an expert on reasonable tactical choices. The court noted the issue was not that counsel was unaware of drug abuse in the Petitioner's family or the Petitioner's addiction but that counsel chose to focus upon the Petitioner's drug and alcohol use at the time of the offenses. Resentencing counsel believed the best chance of reaching the jury was to focus upon the Petitioner's drug use at the time of the offenses and to emphasize how the Petitioner had changed since the offenses.

The trial court did not conclude that counsel were ineffective in using Dr. Angelillo's services based upon Dr. Angelillo's testimony at the trial and the post-conviction hearing and counsel's mitigation strategy. The court concluded, though, that counsel were deficient in failing to request additional funds timely for the mitigation investigation. The court, however, concluded that the Petitioner failed to establish prejudice as the investigator continued to work despite the depleted funding.

The trial court rejected the Petitioner's claim that resentencing counsel were ineffective in failing to interview the Riverbend employees prior to a trial. The court noted resentencing co-counsel's testimony that they had interviewed the employees previously but that the employees were unavailable for briefing until the morning of their testimony. The court, however, concluded that counsel should have been more proactive in preparing for the testimony of Pastor Padilla. The court concluded, though, that the Petitioner failed to establish prejudice because Pastor Padilla's testimony supported counsel's arguments that the Petitioner's behavior on the night of the murders was abhorrent, that he was remorseful, and that he was amenable to rehabilitation. The court noted that although counsel were unaware of the existence of the Petitioner's letters before the trial, counsel had Pastor Padilla read one of the letters to the jury. Pastor Padilla said the letter was representative of the letters she had received from the Petitioner over the years.

The trial court rejected the Petitioner's claim that counsel should have discovered and presented evidence of his family, social, and academic background. The court noted its previous discussion of counsel's mitigation theory and the reasons they gave in not pursuing certain avenues of mitigation. The court concluded that these tactical decisions were reasonable and informed. The court also noted that evidence of the Petitioner's academic struggles and limited intellectual functioning were presented to the jury.

The trial court determined that resentencing counsel were not ineffective in failing to use the Petitioner's neurological impairments to challenge his statements to the police and his 1995 guilty pleas. The court found that both original counsel and the court properly advised the Petitioner of his rights and that the Petitioner was capable of voluntarily entering his guilty pleas despite his cognitive limitations. The court also found that for the same reasons that original counsel were not ineffective in failing to challenge the Petitioner's statements to police based upon cognitive dysfunction, resentencing counsel were not ineffective in failing to challenge the Petitioner's statements.

The trial court concluded that resentencing counsel were not ineffective during opening statements in failing to inform the jury that mitigation included any aspects of his character or record and any other circumstances of the offense that he proffered as a basis for a sentence less than death. The court noted that the jury was instructed that they could consider as mitigation any aspects of the offense or character of the Petitioner. The court determined that resentencing counsel were not ineffective during opening statements in failing to inform the jury that the issue was not whether the Petitioner was responsible for the acts but his degree of moral culpability. The court also determined that counsel was not ineffective in failing to inform the jury that the Petitioner pleaded guilty due to remorse as counsel consistently argued a theme of remorse throughout the resentencing hearing.

The trial court determined that resentencing counsel were not ineffective in closing arguments. The court found counsel's argument was appropriate given the nature of the offenses and the strategy employed during the resentencing hearing.

C. Intellectual Disability

The trial court rejected the Petitioner's claim that he was intellectually disabled and ineligible for the death penalty. The court found that the Petitioner failed to establish that he had "[s]ignificantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (IQ) of seventy (70) or below" as required by Tennessee Code Annotated section 39-13-203. The court reviewed the testimony of Dr. Angelillo, Dr. Auble, and Dr. Bishop.

The trial court noted that Dr. Angelillo administered the WAIS-III and that the Petitioner had a full-scale IQ score of 78. Dr. Angelillo also reviewed Dr. Steinberg's report, which noted that he found the Petitioner to have an IQ score of 75. Dr. Angelillo stated that Dr. Steinberg did not diagnose the Petitioner as intellectually disabled and that the Petitioner had not been diagnosed as intellectually disabled according to his school records. The court noted that at the Petitioner's resentencing hearing, Dr. Angelillo testified that the Petitioner was not intellectually disabled. The court also noted that Dr. Auble administered the WAIS-

III and that the Petitioner had a full-scale IQ score of 79. Dr. Auble stated that the fact that the testing corresponded closely with prior testing gave it a high level of validity.

The trial court noted that Dr. Bishop administered the WAIS-IV and found that the Petitioner had a full-scale IQ score of 78 with considerable deficits in verbal comprehension. Dr. Bishop adjusted the Petitioner's IQ scores to account for the standard error of measurement and the Flynn Effect. Dr. Bishop adjusted the test scores as follows:

Test	**Doctor**	**Date**	**Full Scale Score**	**Adjusted Score**
WAIS-R	Dr. Steinberg	1994	75	63-92 range
WAIS-III	Dr. Angelillo	2000	78	69-85 range
WAIS-III	Dr. Auble	2008	79	69-86 range
WAIS-IV	Dr. Bishop	2009	78	

The trial court stated that Dr. Bishop was unable to provide an actual numerical score representing the Petitioner's likely IQ and that she could not state definitively that the Petitioner's IQ was either above or below seventy. Dr. Bishop acknowledged that the application of the Flynn Effect was not considered an acceptable practice by either the APA or the AAIDD and that the Wechsler series did not allow for the results to be adjusted pursuant to the Flynn Effect. Dr. Bishop stated that to her knowledge, capital litigation is the only area of the law addressing intellectual disability where the Flynn Effect was being applied.

The trial court found that of the experts who testified regarding the Petitioner's intellectual capabilities, only Dr. Bishop found him to be intellectually disabled. The court declined to adjust the Petitioner's score pursuant to the Flynn Effect, finding that the Flynn Effect was not recognized by the APA, the AAIDD, or the Wechsler administrators. The court noted that rather than stating that the Petitioner likely had a certain IQ or had an IQ either above or below seventy, Dr. Bishop provided a range of possible IQ scores. The court found that all of the Petitioner's raw scores were above seventy and were within one or two points of each other, raising the validity of the scores and indicating that the Petitioner likely had a full-scale IQ in the mid-to-low seventies.

The trial court found that the Petitioner met the second and third prongs in Tennessee Code Annotated section 39-13-203. The court found that the Petitioner established that he suffered from deficits in adaptive behavior in the areas of communication and verbal skills.

The court also concluded that the deficits in adaptive behavior and any deficits in intellectual functioning were present prior to the age of eighteen. Thus, the court concluded that the IQ score did not exlcude the Petitioner from a death penalty sentence.

ANALYSIS

The Petitioner contends that (1) he is intellectually disabled and ineligible for the death penalty; (2) he received ineffective assistance at both his original trial and resentencing hearing; (3) the death penalty is unconstitutional; and (4) the cumulative effect of all errors warrants relief.

I. INTELLECTUAL DISABILITY

In 1990, Tennessee Code Annotated section 39-13-203 was enacted prohibiting the execution of defendants who were intellectually disabled at the time that they committed first degree murder. See T.C.A. § 39-13-203(b); State v. Howell, 151 S.W.3d 450, 455 (Tenn. 2004); State v. Van Tran, 66 S.W.3d 790 (Tenn. 2001). Although the statute is not to be applied retroactively, the execution of intellectually disabled individuals violates constitutional prohibitions against cruel and unusual punishment. Howell, 151 S.W.3d at 455 (citing Van Tran, 66 S.W.3d at 798-99); see Atkins v. Virginia, 536 U.S. 304, 321 (2002).

In Tennessee, "intellectual disability" rendering a defendant ineligible for the death penalty requires:

> (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligent quotient (IQ) of seventy (70) or below;
>
> (2) Deficits in adaptive behavior; and
>
> (3) The intellectual disability must have manifested during the developmental period, or by eighteen (18) years of age.

T.C.A. § 39-13-203(a). All three prongs must be satisfied to establish intellectual disability.

The Petitioner has the burden of establishing intellectual disability by a preponderance of the evidence. See T.C.A. § 39-13-203(c); Howell, 151 S.W.3d at 465. The issue of whether a defendant is intellectually disabled and, thus, ineligible for the death penalty is a mixed question of law and fact. Michael Wayne Howell v. State, No. W2009-02426-CCA-R3-PD, slip op. at 16 (Tenn. Crim. App. June 14, 2011), perm. app. denied (Tenn. Jan. 9, 2013). We review the trial court's findings of fact de novo, with a

presumption of correctness that is overcome only if the preponderance of the evidence is contrary to the trial court's findings. See Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). This court conducts a de novo review of the application of the law to the facts with no presumption of correctness attaching to the trial court's conclusions of law. Id. at 457. This court also conducts a de novo review of mixed questions of law and fact. Id.

Regarding "[s]ignificantly subaverage general intellectual functioning" under section 39-13-203(a)(1), the Tennessee Supreme Court previously held in Howell that the demarcation of an IQ score of 70 was a "bright-line" rule that must be met. Howell, 151 S.W.3d at 456-59. The court also held that the statutory provision should not be interpreted to allow for a standard error of measurement or any other circumstance whereby an individual with an IQ above 70 could be considered intellectually disabled. Id. at 457-58.

On April 11, 2011, though, the Tennessee Supreme Court concluded that although an individual's IQ is generally obtained through standardized intelligence tests, section 39-13-203 does not provide clear direction regarding how an IQ should be determined and does not specify any particular test or testing method that should be utilized. Coleman v. State, 341 S.W.3d 221, 241 (Tenn. 2011). The court noted that section 39-13-203(a)(1) requires a "functional intelligence quotient of seventy (70) or below" and does not require a "functional intelligence quotient test score of seventy (70) or below." Id. Therefore, "the trial courts may receive and consider any relevant and admissible evidence regarding whether the defendant's functional IQ at the time of the offense was seventy (70) or below." Id.

The supreme court noted that section 39-13-203(a)(1) differs with clinical practice in one material respect. Id. at 247. In diagnosing intellectual disability, clinicians generally report their conclusions regarding an individual's IQ within a range, and section 39-13-201(a)(1) requires more definite testimony. Id. As a result, "an expert's opinion regarding a criminal defendant's IQ cannot be expressed within a range (i.e., that the defendant's IQ falls somewhere between 65 to 75) but must be expressed specifically (i.e., that the defendant's IQ is 75 or is 'seventy (70) or below' or is above 70)." Id. at 242.

In determining whether a defendant's functional IQ is 70 or below, "a trial court should consider all evidence that is admissible under the rules for expert testimony." Keen v. State, 398 S.W.3d 594, 605 (Tenn. 2012). Experts may use relevant and reliable practices, methods, standards, and data in formulating their opinions. Coleman, 341 S.W.3d at 242. Moreover,

> if the trial court determines that professionals who assess a person's IQ customarily consider a particular test's standard error of measurement, the Flynn Effect, the practice effect, or other factors affecting the accuracy,

> reliability, or fairness of the instrument or instruments used to assess or measure the defendant's IQ, an expert should be permitted to base his or her assessment of the defendant's "functional intelligence quotient" on a consideration of those factors.

Id. at n.55. The emphasis to be placed upon clinical judgment varies depending upon "the type and amount of information available, the complexity of the issue, and the presence of one or more challenging conditions or situations." Id. at 246. The trial court is not required to follow any particular expert's opinion but must fully and fairly consider all evidence presented, including the results of all IQ tests administered to the defendant. Id. at 242.

Therefore, pursuant to Coleman, "a trial court may accept the opinion of an expert that a defendant's IQ is 70 or below based upon the application of the Flynn Effect even though the defendant received an IQ score of 75 on the applicable test." Michael Wayne Howell, slip op. at 17. The application of the Flynn Effect or the standard error of measurement, however, is not required. Coleman, 341 S.W.3d at 242 n.55; Michael Wayne Howell, slip op. at 17. As a result, a trial court "may reject the application of the Flynn Effect to adjust IQ scores based upon evidence of its lack of validity and consider the IQ score of 75 as the defendant's functional IQ" Michael Wayne Howell, slip op. at 17.

On October 8, 2013, the Tennessee Supreme Court filed its opinion in State v. Pruitt,415 S.W.3d. 180 (Tenn. 2013), further clarifying Coleman. Pruitt presented testimony from Dr. Rebecca Rutledge, who assessed Pruitt in November 1996 when Pruitt was sixteen years old at the request of juvenile court. Pruitt received an IQ score of 66 on the Slosson Intelligence Scale, which Dr. Rutledge said fell within the mildly intellectually disabled range. Dr. Rutledge said that Pruitt did not appear to have taken the testing seriously and that his test results may have been slightly lower than his actual level of cognitive functioning. She stated that Pruitt would have continued to test in the mildly intellectually disabled range had he put forth more effort. Id. at 194-95.

Dr. Rutledge also reviewed a report from the Middle Tennessee Mental Health Institute ("MTMHI") from a September 2006 evaluation of Pruitt which reflected a diagnosis of mildly intellectually disabled. While Dr. Rutledge acknowledged that the WAIS test is the "gold standard" for IQ testing, she said Pruitt would have "fallen pretty close" to his score on the Slosson test had he taken the WAIS test in 1996. Id. at 195.

The State presented the testimony of Dr. Sam Craddock, who evaluated Pruitt in 2006 at MTMHI. Dr. Craddock testified that the report of the evaluation erroneously stated that Pruitt was diagnosed as mildly intellectually disabled. Id. at 199. He said the correct diagnosis was "borderline intellectual functioning." Id. Pruitt received an IQ score of 68 on

a test administered by Dr. Craddock. Id. Dr. Craddock said the report stated that Pruitt appeared to make good effort on the test "[w]ith the exception of him occasionally giving quick responses with accompanying little thought." As a result, he believed Pruitt's IQ was higher than his scores reflected. Other factors that led Dr. Craddock to conclude that Pruitt's score was indicative of intellectual disability included his score on the Beta test and his school records. Id. The trial court found that Pruitt failed to prove by a preponderance of the evidence that he had significantly subaverage intellectual functioning as evidenced by an IQ of 70 or below. Id. at 200.

The Tennessee Supreme Court first noted that Pruitt's raw IQ test scores were below 70. Id. at 202. The court further noted that although both experts stated that Pruitt may not have given his best effort on the tests, neither expert testified that Pruitt's IQ would have been higher than 70 had his effort been greater. Id. at 203. Moreover, neither expert testified that Pruitt's test scores were "unreliable." Id. The court explained,

> Although the scores in this case were called into question by the trial court, neither expert opined that Mr. Pruitt's IQ was greater than seventy, whether through lack of effort or on some other basis for adjustment of the raw score. Neither expert testified that the tests had an element of unreliability in their administration.

Id. "In the absence of expert testimony that his IQ was above seventy," the court held that the evidence preponderated against the trial court's finding that Pruitt failed to establish significantly subaverage general intellectual functioning as evidence by a functional IQ of 70 or below. Id.

In the present case, the Petitioner's raw IQ scores were all above seventy. Therefore, to establish that he had significantly subaverage general intellectual functioning as provided in Tennessee Code Annotated section 39-13-203(a)(1), the Petitioner must present evidence that the raw IQ scores or the method of testing was unreliable and that his functional IQ is seventy or below. See Pruitt, 415 S.W.3d at 203; Coleman, 341 S.W.3d at 242. The methods, practices, standards, and data upon which the Petitioner's expert relied in challenging the reliability and validity of the Petitioner's IQ test scores must be reliable and the type that are customarily considered by professionals who assess a person's IQ. See Coleman, 341 S.W.3d at 242, n.55.

We note that the Petitioner did not raise the issue of intellectual disability in his pro se post-conviction petition, his amended petition, or his consolidated amended petition. Dr. Bishop initially testified on the first day of the evidentiary hearing on January 20, 2009, and her testimony was limited to a description of the Petitioner's school records. Dr. Bishop's

report in which she raised the issue of intellectual disability was dated August 25, 2009. Despite the fact that post-conviction counsel became aware of the issue of intellectual disability as early as August of 2009, they did not raise the issue in the consolidated amended petition filed in December of 2010. Rather, the first time the Petitioner raised the issue in any pleading was in his post-hearing brief, which was filed after the proof had closed. By failing to raise the issue in any of his post-conviction petitions, the Petitioner risked waiving the issue. Moreover, raising the issue in a post-conviction petition would have ensured that both the State and the Petitioner were provided "a full and fair opportunity to collect, exchange, and present the requisite proof." Pruitt, 415 S.W.3d at 201 (addressing the defendant's failure to raise the issue in a pretrial motion). The record does not reflect whether the State had the opportunity to collect, exchange, and present proof regarding the Petitioner's claim of intellectual disability. We need not concern ourselves with these deficiencies, though, because we conclude that the evidence presented by the Petitioner failed to establish that he has a functional IQ of 70 or below.

This is not a case in which the trial court was presented with competing experts by the defendant and the State. See Sidney Porterfield v. State, No. W012-00753-CCA-R3-PD, slip op. at 27-28 (Tenn. Crim. App. June 20, 2013), perm. app. denied (Tenn. Oct. 31, 2013); Michael Wayne Howell, slip op. at 17-19. Rather, the Petitioner presented the testimony of Dr. Angelillo and Dr. Auble, neither of whom testified that his raw IQ scores were unreliable. Dr. Auble testified that the consistency in the Petitioner's raw IQ scores indicated that the test scores were valid and that he was making a good effort on the tests. Only Dr. Bishop testified that the Petitioner's raw IQ scores were unreliable and that the Petitioner met the definition of intellectual disability.

The Petitioner contends that although Dr. Bishop testified to the ranges in which the Petitioner's IQ fell on each IQ test that he was administered based upon the application of the standard error of measurement and the Flynn Effect, the trial court erred in finding that Dr. Bishop stated her expert opinion of the Petitioner's functional IQ in a range. The Petitioner argues that by concluding that he fell within the statutory definition of intellectually disabled as set forth in Tennessee Code Annotated section 39-13-203(a), Dr. Bishop found that the Petitioner's functional IQ was seventy or below as required by section 39-13-203(a)(1).

The supreme court in Coleman stated that section 39-13-203(a)(1) requires experts to provide "definite testimony" regarding a defendant's functional IQ. Coleman, 341 S.W.3d at 247. Experts must testify "to a specific score" or at least that the defendant's functional IQ "is either 'seventy (70) or below' or above seventy." Id.

The only case in which this court has held that the expert's opinion failed to meet the "definite testimony" requirement was Dr. Flynn's testimony in Michael Wayne Howell. Dr. Flynn made mathematical adjustments to Howell's IQ scores based upon the Flynn Effect and the standard error of measurement and concluded that Howell's IQ was between 56 and 81 based upon those calculations. Michael Wayne Howell, slip op. at 18. Not only did Dr. Bishop testify to the ranges of each of the Petitioner's IQ scores when the Flynn Effect and the standard error of measurement were applied, but she also testified that the Petitioner met the definition of intellectual disability. We note that Dr. Bishop's testimony regarding the ranges of the Petitioner's IQ scores when adjusted for the Flynn Effect and the standard error of measurement and her testimony that the Petitioner met the definition of intellectual disability were two separate conclusions. In concluding that the Petitioner met the definition of intellectual disability, Dr. Bishop not only relied upon the Petitioner's adjusted IQ ranges but also upon her interview with the Petitioner, other testing, and her review of the Petitioner's records. The evidence preponderates against the trial court's finding that Dr. Bishop could not state definitely that the Petitioner's functional IQ is either above or below seventy. Rather, we conclude that Dr. Bishop's testimony that the Petitioner met the definition of intellectual disability was sufficient to meet the "definite testimony" requirement set forth in Coleman.

Regardless of the trial court's erroneous finding that Dr. Bishop failed to meet the "definite testimony" requirement, the trial court also declined to apply the Flynn Effect to determine whether the Petitioner met the requirements of 39-13-203(a)(1). The trial court is not required to accept the application of the Flynn Effect to adjust raw IQ scores downward if the court determines that the Flynn Effect is not a generally accepted practice by professional who assess a person's IQ. See Coleman, 341 S.W.3d at 242 n.55; see also Sidney Porterfield, slip op. at 27 (upholding the trial court's refusal to consider the Flynn Effect based upon evidence that the Flynn Effect is not a generally accepted practice in the psychological community); Michael Wayne Howell, slip op. at 17 (same).

Although Dr. Bishop applied the Flynn Effect in concluding that the Petitioner's IQ was seventy or below, she acknowledged on cross-examination that the APA and the AAIDD had not accepted the application of the Flynn Effect and that the Wechsler administrators discouraged its use in the Wechsler series of IQ tests. Dr. Bishop also acknowledged that capital litigation was the only area of law in which she was aware that the Flynn Effect was applied. As our supreme court recognized, "the soundness of any particular expert's opinion regarding a defendant's IQ may be tested by vigorous cross-examination." Coleman, 341 S.W.3d at 242. The trial court found that applying the Flynn Effect was not a generally accepted practice in the psychological community. The trial court's findings are not contrary to the holding in Coleman.

The Petitioner asserts that Dr. Bishop's finding of intellectual disability was more credible than the other experts who evaluated him. The trial court is not required to follow any particular expert's opinion but must give "full and fair consideration to all the evidence presented, including the results of all the IQ tests administered to the defendant." Id. We defer to a trial court's findings with respect to witness credibility, the weight and value of witness testimony, and the resolution of factual issues presented by the evidence. Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999).

Dr. Bishop did not offer any testimony regarding whether the Petitioner would be considered intellectually disabled or what his functional IQ was absent application of the Flynn Effect. Rather, she testified that the Petitioner's four raw IQ scores fell within the borderline range. The trial court noted the testimony of Dr. Angelillo and Dr. Auble that the Petitioner's intelligence fell within the borderline range. The trial court accredited Dr. Auble's testimony that the consistency of the Petitioner's raw IQ scores was an "indication of validity." Based upon this evidence, we conclude that the Petitioner failed to establish by a preponderance of the evidence that he had "[s]ignificantly subaverage general intellectual functioning" as evidence by an IQ of seventy or below. See T.C.A. § 39-13-203(a)(1). Because the Petitioner failed to establish all three prongs of intellectual disability in section 39-13-203, he is not entitled to relief.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

The Petitioner contends that he received the ineffective assistance of counsel with regard to both the guilty plea proceeding and the resentencing hearing. In pertinent part, the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. This right to counsel is "'so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.'" Gideon v. Wainwright, 372 U.S. 335, 340 (1963) (quoting Betts v. Brady, 316 U.S. 455, 465 (1942)). Inherent in the right to counsel is the right to the effective assistance of counsel. Cuyler v. Sullivan, 446 U.S. 335, 344 (1980). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

The United States Supreme Court adopted a two-prong test to evaluate a claim of ineffectiveness:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not

> functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. 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.

Strickland, 466 U.S. at 687. The performance prong of the Strickland test requires a showing that counsel's representation fell below an objective standard of reasonableness, or "outside the wide range of professionally competent assistance." Id. at 690. "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." Strickland, 466 U.S. at 689.

Upon reviewing claims of ineffective assistance of counsel, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Additionally, courts should defer to trial strategy or tactical choices if they are informed ones based upon adequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Finally, we note that criminal defendants are "not entitled to perfect representation, only constitutionally adequate representation." Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.'" Burger v. Kemp, 483 U.S. 776, 794 (1987) (quoting United States v. Cronic, 466 U.S. 648, 655 n.38 (1984)). Notwithstanding, we recognize that "[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." Id. at 785.

If the petitioner shows that counsel's representation fell below a reasonable standard, he must satisfy the prejudice prong of the Strickland test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. In evaluating whether a petitioner satisfied the prejudice prong, a court must ask "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. 364, 372 (1993) (citing Strickland, 466 U.S. at 687). In other words, "a petitioner must establish that the deficiency of counsel was of such a degree that it deprived the [petitioner] of a fair trial and called into question the reliability of the outcome." Nichols, 90 S.W.3d at 587. That is, "the evidence stemming from the failure to prepare a sound defense or [to] present witnesses must be significant, but it does not necessarily follow that the trial would have otherwise resulted in an acquittal." State v.

Zimmerman, 823 S.W.2d 220, 225 (Tenn. Crim. App. 1991). "A reasonable probability of being found guilty of a lesser charge, or a shorter sentence, satisfies the second prong in Strickland." Id.

In order to satisfy the "prejudice" requirement in the context of a guilty plea, a petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985); see Serrano v. State, 133 S.W.3d 599, 605 (Tenn. 2004). When challenging a death sentence, the petitioner must show that "'there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death." Henley, 960 S.W.2d at 579-80 (quoting Strickland, 466 U.S. at 695).

A. 1995 Guilty Plea Proceedings

The Petitioner contends that his 1995 guilty plea should be overturned because it was the result of the ineffective assistance of counsel. The Petitioner asserts that original counsel had a conflict of interest in representing him in the capital case when original counsel represented him in the MAPCO aggravated robbery case. The Petitioner also argues that original counsel failed to (1) establish a proper attorney-client relationship; (2) investigate and prepare a diminished capacity defense and evidence of mitigating circumstances; (3) challenge properly the admissibility of the Petitioner's statement to police; and (4) file the proper pretrial motions.

1. Conflict of Interest

On March 9, 1993, more than two months before the victims were killed, the Petitioner and his codefendant, Cedric Parker, robbed a MAPCO Express convenience store using a shotgun. The Petitioner was indicted for aggravated robbery. Original counsel represented the Petitioner at the trial, which was held on September 14, 1994. The jury convicted the Petitioner of aggravated robbery, and the trial court sentenced him to eight years' confinement. The trial judge who presided over the Petitioner's aggravated robbery trial also presided over the capital trial. This court affirmed the Petitioner's conviction on direct appeal. See State v. Preston Carter, No. 02C01-9504-CR-00100 (Tenn. Crim. App. July 26, 1996).

After the Petitioner was convicted and sentenced for aggravated robbery, he was indicted in November 1993 for two counts of premeditated first degree murder, felony murder in the perpetration of aggravated burglary, and felony murder in the perpetration of aggravated robbery. On October 7, 1994, the State filed a notice of its intention to seek the

death penalty against the Petitioner. The State intended to rely upon four aggravated circumstances, including that the Petitioner had a prior conviction for a felony, whose statutory elements involve the use of violence to the person. See T.C.A. § 39-13-204(i)(2) (1991). In sentencing the Petitioner to death in 1995, the jury found only one aggravating circumstance, that the murders were especially heinous, atrocious, or cruel. See Carter, 988 S.W.2d at 146 (citing T.C.A. § 39-13-204(i)(5)).

The Petitioner contends that original counsel had an actual conflict of interest in representing him in the capital case because original counsel also had represented him in the aggravated robbery case, upon which the State relied as an aggravating circumstance pursuant to Tennessee Code Annotated section 39-13-204(i)(2) (1991). The Petitioner asserts that because original counsel represented him in both cases, original counsel was not in a position to challenge his own effectiveness in the MAPCO aggravated robbery case as a basis for challenging the application of the (i)(2) aggravating circumstance.

"[A]n actual conflict of interest includes any circumstances in which an attorney cannot exercise his or her independent professional judgment free of 'compromising interests and loyalties.'" State v. White, 114 S.W.3d 469, 476 (Tenn. 2003) (quoting State v. Culbreath, 30 S.W.3d 309, 312-13 (Tenn. 2000)). A defendant who demonstrates that a conflict of interest "actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980). The possibility of a conflict is insufficient to "impugn" a criminal conviction. Id. However, unless the petitioner proves that trial counsel was burdened by an actual conflict of interest, he must establish that trial counsel's performance was deficient and that he was prejudiced by this deficiency. Strickland, 466 U.S. at 692.

The Petitioner relies upon Frazier v. State, 303 S.W.3d 674 (Tenn. 2010), in support of his claim that original counsel had an actual conflict of interest. In Frazier, our supreme court held that "an attorney in a post-conviction proceeding who has represented the same petitioner on direct appeal has a clear conflict of interest." Frazier, 303 S.W.3d at 682. The court reasoned that "counsel representing a post-conviction petitioner can hardly be expected to objectively evaluate his or her performance on the direct appeal of a conviction and sentence." Id. at 683. Frazier was filed approximately fifteen years after the Petitioner's initial trial in January 1995. Nevertheless, the basis of the holding in Frazier that trial counsel cannot be expected to challenge his or her own ineffectiveness was established at the time of the Petitioner's initial trial. See id. at 682-83 (citing cases).

Original counsel's representation of the Petitioner in the aggravated robbery case did not completely preclude counsel from attempting to persuade the jury not to rely upon the prior conviction as an aggravating circumstance. While original counsel would have been

in conflict for arguing to the jury that the aggravated robbery conviction was the result of the ineffective assistance of counsel, the Petitioner failed to present any evidence in the post-conviction hearing to show that the aggravated robbery conviction was the result of the ineffective assistance of counsel. Furthermore, the jury did not find that the State established the (i)(2) aggravating circumstance in imposing the death penalty during the 1995 trial. The Petitioner is not entitled to relief regarding this issue.

2. Failure to Establish Proper Attorney-Client Relationship

The Petitioner asserts that original counsel and original co-counsel failed to establish a proper attorney-client relationship. He submits that original counsel was conflicted and that original co-counsel failed to provide meaningful assistance.

The record reflects that original counsel adequately conferred with the Petitioner and created an atmosphere whereby the Petitioner was able to participate actively in his own defense. According to original counsel's fee claim form, he met with the Petitioner on at least ten occasions for a total of more than twenty hours. As noted by the trial court, original counsel also met with the Petitioner following each court appearance and reported no problems communicating with the Petitioner. They discussed the facts of the case, the defense strategy, and the Petitioner's social history. Original counsel sought to suppress the Petitioner's statement to police, had the Petitioner evaluated by a mental health expert, and interviewed members of the Petitioner's family.

While original co-counsel's role was more limited, he familiarized himself with the facts of the case and the defense's investigation, most of which was completed before original co-counsel's appointment. Original co-counsel participated in interviews with the Petitioner's family members and was aware of the Petitioner's educational background and the results of Dr. Steinberg's evaluation. Based upon the overwhelming evidence of guilt and their investigation, counsel devised a strategy in an effort to persuade the jury to return a verdict other than death. They discussed the strategy, including the entering of a guilty plea, with the Petitioner. Although counsel later advised the Petitioner against entering the plea, the Petitioner stated he wanted to do so. He acknowledged that he had killed the victims and said he liked the strategy of acknowledging guilt and showing remorse.

The record supports the trial court's finding that "counsel developed an appropriate relationship with petitioner and created an atmosphere where petitioner was able to contribute to his defense and to provide counsel with information pertinent to potential defenses or mitigation." The Petitioner is not entitled to relief regarding this issue.

3. Failure to Investigate

The Petitioner submits that counsel failed to investigate his case properly because they did not retain a neuropsychologist and an addiction and substance abuse expert.

a. Neuropsychologist

The Petitioner contends that a neuropsychologist was necessary to assist counsel in understanding his intellectual limitations, in presenting evidence of diminished capacity, and in presenting mitigation evidence. The trial court found that counsel would not have been able to establish particularized need for funding to retain a neuropsychologist.

Due process of law principles require the appointment of expert assistance at trial when the defendant establishes that such assistance is necessary to conduct a constitutionally adequate defense. See State v. Barnett, 909 S.W.2d 423, 426-28 (Tenn. 1995). The Tennessee Supreme Court has held that "while a State need not provide an indigent defendant with all the assistance his wealthier counterpart might buy . . . fundamental fairness requires a State to provide an indigent defendant with the 'basic tools of an adequate defense on appeal.'" Id. at 426 (quoting Ake v. Oklahoma, 470 U.S. 68, 77 (1985)).

However, the obligation of a trial court to afford an indigent defendant with the benefit of expert assistance does not arise unless the defendant makes a threshold showing of a "particularized need" for the expert assistance. See Tenn. Sup. Ct. R. 13, § 5(c)(1); Barnett, 909 S.W.2d at 430-31. In the context of criminal cases, particularized need is established

> when a defendant shows by reference to the particular facts and circumstances that the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the defense at trial and that the requested services are necessary to protect the defendant's right to a fair trial.

Tenn. Sup. Ct. R. 13, § 5(c)(2). Particularized need cannot be established and the court should deny funding requests when the motion for such funding includes only:

> (A) undeveloped or conclusory assertions that such services would be beneficial;
>
> (B) assertions establishing only the mere hope or suspicion that favorable evidence may be obtained;

(C) information indicating that the requested services relate to factual issues or matters within the province or understanding of the jury; or

(D) information indicating that the requested services fall within the capability and expertise of appointed counsel.

Id. at (c)(4).

Unsupported assertions that an expert is necessary to counter proof offered by the State is not sufficient to establish particularized need. Barnett, 909 S.W.2d at 431. The defendant must refer to the facts and circumstances of the particular case and demonstrate that the appointment of the expert is necessary to ensure a fair trial. Id. The issue of whether a defendant has made the threshold showing is to be determined on a case-by-case basis. Id.

Original counsel reported no difficulties in communicating with the Petitioner. Based upon his communications with the Petitioner, which totaled more than twenty hours, original counsel believed the Petitioner was "a reasonably intelligent fellow." Although the Petitioner was drinking alcohol and smoking marijuana laced with cocaine on the night of the offenses, he was able to recall the facts and circumstances of the offenses. Original counsel also had the Petitioner evaluated by Dr. Steinberg. The trial court credited original counsel's testimony that he requested Dr. Steinberg to evaluate the Petitioner's competency, his mental status at the time of the offenses, his intellectual capabilities, and any other issues that could assist the defense in mitigation.

According to Dr. Steinberg's report, the Petitioner was able to maintain a logical train of thought and had no delusional thinking. Although the Petitioner acknowledged daily use of alcohol and marijuana, he was able to provide a "good and detailed account of the murder incident and events leading to his arrest." Dr. Steinberg concluded that the Petitioner demonstrated "a good capacity to testify relevantly."

In evaluating the Petitioner's competency, Dr. Steinberg found that the Petitioner comprehended the Miranda warnings and had a good factual and rational understanding of the proceedings. Dr. Steinberg concluded that the Petitioner was capable of consulting with counsel within a reasonable degree of rational understanding. The Petitioner understood the charges and range and nature of the possible penalties. He was able to appraise the likely outcome and available legal defenses and plan a legal strategy. He understood the roles of the personnel within the proceedings and court procedure. Dr. Steinberg found that the Petitioner demonstrated an adequate ability to relate to counsel and disclose pertinent facts surrounding the offense. The Petitioner understood the concept of retribution and demonstrated "some ability to acknowledge the survivors."

Dr. Steinberg administered the WAIS-R, and the Petitioner received an IQ score of 75, which fell within the borderline range of intelligence. Dr. Steinberg found nothing suggesting either psychological or organic pathology acutely interfering with the Petitioner's intellectual functioning. Rather, Dr. Steinberg stated the Petitioner had historically limited intellectual resources. Dr. Steinberg found that the Petitioner demonstrated traits of antisocial personality disorder. Dr. Steinberg administered the Bonder Visual-Motor Gestalt and found nothing indicating "brain damage or disorganization due to thinking problems." He administered neuropsychological screening tests and found that the Petitioner's performance fell within the normal limits. Dr. Steinberg concluded that the Petitioner did not have brain damage or a mental illness and that the test data indicated some tendency to malinger.

Dr. Steinberg's report includes no "particular facts and circumstances" to demonstrate the need for neuropsychological testing. While Dr. Auble testified that Dr. Steinberg's conclusions were wrong based upon the results of the neuropsychological screening tests that he administered, counsel cannot be faulted for relying upon an expert's assessment of testing that he administered. See Byron Lewis Black v. State, No. 01C01-9709-CR-00422 (Tenn. Crim. App. Apr. 8, 1999) ("The attorneys are not guarantors of the validity of an expert's results."), perm. app. denied (Tenn. Sept. 13, 1999). Dr. Steinberg's report and counsel's interaction with the Petitioner when considered together demonstrate that any funding for neuropsychological testing would have been sought in the mere "hope or suspicion" that favorable evidence could be obtained. See Barnett, 909 S.W.3d 431 (upholding the trial court's denial of funding for a psychiatrist when the facts in support of funding only established the mere "hope or suspicion" that favorable evidence could be obtained from an evaluation). Such "hope or suspicion" does not rise to the level of particularized need. If counsel had sought funding for neuropsychological testing based upon this information, the trial court would have denied the motion.

b. Addiction and Substance Abuse Expert

The Petitioner submits that counsel were ineffective in failing to retain an addiction and substance abuse expert. According to the Petitioner, an addiction and substance abuse expert, such as Dr. Ragan, would have aided the defense in developing evidence of diminished capacity and mitigation themes.

The trial court found that counsel would not have been able to establish particularized need for funding to retain such an expert. Original counsel testified that he was aware that the Petitioner had a substance abuse problem. The Petitioner reported to Dr. Steinberg that he drank alcohol and smoke marijuana daily and that he occasionally had blackouts. Original counsel was aware that the Petitioner had been drinking alcohol and smoking marijuana on

the day of the murders and presented such evidence during both the suppression hearing and the penalty phase. Based upon this evidence, we conclude that counsel could have established particularized need for funding to retain an addiction and substance abuse expert.

The Petitioner, however, has failed to establish prejudice. Before the trial in January 1995, this court released the opinion in State v. Phipps, 883 S.W.2d 138 (Tenn. Crim. App. 1994), recognizing the concept of diminished capacity as "a rule of evidence which allows the introduction of evidence to negate the existence of specific intent when a defendant is charged with a specific intent crime." Phipps, 883 S.W.2d at 143 (citations omitted). Thus, evidence of a defendant's mental condition may be relevant and admissible to rebut the mens rea element of an offense. Id. at 149. Although evidence of a defendant's diminished capacity does not constitute a defense capable of excusing or defeating a criminal charge, such evidence is relevant in determining the defendant's mens rea. Id. at 143. Such evidence "is an attempt to prove that the defendant, incapable of the requisite intent of the crime charged, is innocent of that crime but may well be guilty of a lesser one." Id.

In the present case, the Petitioner pleaded guilty to two counts of felony murder during the perpetration of aggravated burglary. At the time of the offenses, felony murder was defined as "[a] reckless killing of another committed in the perpetration of, or attempt to perpetrate, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping or aircraft piracy." T.C.A. § 39-13-202(a)(2) (1991). Aggravated burglary was defined as the entering of a habitation without the effective consent of the owner and with the intent to commit a felony or theft. T.C.A. §§ 39-14-402, -403 (1991).

Dr. Ragan did not testify that the Petitioner had a mental disease or defect making him incapable of forming the requisite mens rea for felony murder during the perpetration of aggravated burglary. Dr. Ragan's testimony focused upon whether the Petitioner intended to kill the victims, which was an element of the premeditated first degree murder charges that were dismissed as a result of the Petitioner's guilty pleas. Dr. Ragan acknowledged that such evidence did not absolve the Petitioner of criminal responsibility but was relevant as mitigating evidence.

While Dr. Auble also testified regarding diminished capacity, she focused upon whether the Petitioner could have premeditated the murders. She acknowledged that diminished capacity did not apply to the Petitioner's felony murder charges. Therefore, the Petitioner failed to establish that counsel's failure to retain an addiction and substance abuse expert and to develop evidence of diminished capacity affected the Petitioner's guilty plea to two counts of felony murder.

The Petitioner also asserts that an addiction and substance abuse expert was necessary to assist in the development of mitigating factors. Because the Tennessee Supreme Court reversed the Petitioner's original death sentence, he cannot establish that any deficiencies by counsel during the initial penalty phase resulted in prejudice. See Carter, 988 S.W.2d at 146. The Petitioner is not entitled to relief regarding this issue.

4. Failure to Challenge the Admissibility of the Petitioner's Statements Properly

The Petitioner contends that although counsel sought to suppress his statements to the police, they failed to do so properly. He argues that counsel failed to present expert testimony from a neuropsychologist or an addiction specialist regarding the effect of his intoxication and intellectual limitations on his ability to consent to police questioning.

As we have held, counsel would not have been able to establish particularized need for funds to retain a neuropsychologist based upon Dr. Steinberg's report. Dr. Steinberg found that the Petitioner provided a detailed account of the offenses and events leading to his arrest, comprehended the Miranda warnings, and demonstrated the competency to understand or waive the Miranda warnings.

Furthermore, none of the experts presented by the Petitioner at the post-conviction hearing testified that the Petitioner did not knowingly and voluntarily waive his Miranda rights and talk to the police. Counsel sought to suppress the Petitioner's statements to the police before the trial. As noted by the Tennessee Supreme Court, the Petitioner admitted at the suppression hearing that he was given the Miranda warnings three times and understood them because he had been arrested previously. Carter, 988 S.W.2d at 149-50. He also admitted that the statements were not the result of coercion or threats and were given freely and voluntarily. Id. at 150. The Petitioner is not entitled to relief regarding this issue.

5. Failure to File Appropriate Pretrial Motions

The Petitioner submits that counsel were ineffective in failing to file appropriate motions before the trial. According to the Petitioner, counsel should have filed motions challenging the constitutionality of Tennessee's death penalty statute and requesting funds to retain a neuropsychologist and an addiction expert. We have held that counsel were not ineffective in declining to seek funds to retain a neuropsychologist and an addiction expert. Moreover, as we address later in the opinion, the constitutionality of the death penalty in Tennessee has been upheld on numerous occasions.

B. 2000 Resentencing Hearing

The Petitioner submits that resentencing counsel were ineffective in failing to (1) establish a proper attorney-client relationship; (2) conduct a proper investigation, secure the assistance of appropriate experts, and develop a comprehensive mitigation theory; (3) properly prepare the witnesses; (4) make an appropriate opening statement and closing argument and conduct an appropriate direct examination of the Petitioner; (5) challenge the Petitioner's statements to the police, his 1995 guilty plea, and the MAPCO aggravated burglary conviction; and (6) file the necessary pretrial motions.

1. Failure to Establish a Proper Attorney-Client Relationship

The Petitioner contends that resentencing counsel failed to spend the time with him that was necessary to establish a proper attorney-client relationship. He submits that as a result, counsel presented "the single worst defense strategy" and did not adequately investigate his social history.

The evidence presented at the post-conviction hearing reflects that counsel informed the Petitioner of the developments and progress in the case and consulted with him on strategy. According to resentencing counsel's fee claim form, he met with the Petitioner for at least 13.25 hours. Counsel testified that some of the hours spent on trial preparation could have included meetings with the Petitioner. He believed he had a good relationship with the Petitioner and said he had no problems communicating with him. They discussed the Petitioner's testimony, what they hoped to accomplish through his testimony, and jury selection. Resentencing co-counsel reported that the Petitioner understood counsel's discussions with him and provided them information about the case.

Resentencing counsel hired Inquisitor to conduct a mitigation investigation. Counsel was aware of the circumstances of the offenses, including the Petitioner's claim that he consumed alcohol and drugs before committing the offenses. He also was aware of substance abuse in the Petitioner's family, as well as the Petitioner's personal history of substance abuse. Counsel learned that the Petitioner's brother was killed in a train accident, that one of his sisters had sickle cell anemia, and that his mother and stepfather divorced when he was in the eighth grade.

Counsel had the Petitioner's school records and were aware of his poor grades and low achievement. They also had Dr. Steinberg's report and were aware of his findings. Counsel provided the Petitioner's school records, Dr. Steinberg's report, the Petitioner's criminal history, and copies of interviews with various family members to Dr. Angelillo. Dr. Angelillo administered the WAIS-III, and the Petitioner received an IQ score of 78, which

Dr. Angelillo stated fell within the borderline range of intellectual functioning. Dr. Angelillo also administered an achievement test and concluded that there was "no indication of learning disability in the areas of reading and mathematics." Dr. Angelillo noted the differences between his findings and Dr. Steinberg's findings. Dr. Angelillo stated his findings were consistent with the statements of those who had associated with the Petitioner in the past several years and with the Petitioner's claim that he had "made strides in accepting the consequences of his past actions."

Counsel also interviewed various personnel at the prison regarding the Petitioner's job performance, conduct, and activities while in prison. Based upon the defense's mitigation investigation, counsel's meetings with the Petitioner, and the facts and circumstances of the offenses, counsel decided on a mitigation strategy that focused upon the Petitioner's remorse and change in the years since the initial trial.

Although resentencing co-counsel stated the Petitioner was uncooperative initially, counsel were able to engage the Petitioner to participate in his own defense. Counsel retained a jury consultant and collaborated with the jury consultant and the Petitioner in selecting a jury. Resentencing counsel and the Petitioner discussed the Petitioner's testimony and the reason that resentencing counsel planned to be "hard" on him during direct examination. Counsel admitted that the Petitioner did not display much emotion during their meetings, but resentencing co-counsel testified that the Petitioner "was able to communicate with us in an emotional way."

The record establishes that counsel adequately communicated with the Petitioner, learned of his social history, developed a strategy that they believed would be the most likely to save the Petitioner's life, and engaged the Petitioner to participate in his own defense despite his initial refusal to cooperate. The record supports the trial court's finding that counsel established a proper attorney-client relationship with the Petitioner.

2. Failure to Conduct a Proper Investigation, Secure Appropriate Experts, and Develop a Comprehensive Mitigation Theory

The Petitioner asserts that counsel failed to conduct a proper investigation into his background, his cognitive impairments, his diminished capacity, and his state of mind at the time of the offenses. The Petitioner also asserts that counsel should have retained a neuropsychologist and an addiction and substance abuse expert. The Petitioner argues that as a result, counsel did not develop a comprehensive mitigation theory.

a. Counsel's Investigation

Although counsel does not have a constitutional duty to offer mitigation evidence at the penalty phase of a capital trial, counsel does have a duty to investigate and prepare for both the guilt and penalty phases. See Goad v. State, 938 S.W.2d 363, 369-70 (Tenn. 1996). Counsel does not have an absolute duty to investigate particular facts or a certain line of defense. Strickland, 466 U.S. at 691. Counsel does have a duty to make a reasonable investigation or to make a reasonable decision that makes a particular investigation unnecessary. Id. In determining whether counsel breached this duty, this court reviews counsel's performance for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as viewed from counsel's prospective at that time. See Wiggins v. State, 539 U.S. 510, 523 (2003). Counsel is not required to investigate every conceivable line of mitigation evidence regardless of how unlikely the effort would be to assist the defendant at sentencing. Id. at 533. Likewise, counsel is not required to interview every conceivable witness. See Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). We will not conclude that counsel's performance is deficient for failing to unveil all mitigation evidence, if, after a reasonable investigation, counsel had not been put on notice of the existence of that evidence. See Babbit v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998).

The trial court found that counsel made an informed, reasonable, and tactical decision to focus upon the Petitioner's drug and alcohol use before the offenses, the Petitioner's acceptance of responsibility and remorse, and the change in the Petitioner since the offenses. The United States Supreme Court has emphasized the "countless ways to provide effective assistance in any given case" and noted that "the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690-91; see also Baxter, 523 S.W.2d at 935-36 (recognizing that counsel should investigate all apparently substantial defenses); Hellard, 629 S.W.2d at 9 (emphasizing that a reviewing court should not second guess counsel's strategic and tactical decisions).

Counsel has the duty to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions," and "what investigation decisions are reasonable depends critically on such information." Id. "[W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has

said, the need for further investigation may be considerably diminished or eliminated altogether." Id. The fact that a particular strategy or tactical decision failed does not by itself establish deficiency. Goad, 938 S.W.2d at 369.

The United States Supreme Court recently recognized that a court is required to "'indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment.'" Cullen v. Pinholster, 131 S.Ct. 1388, 1407 (2011) (quoting Strickland, 466 U.S. 689-90). A court is required not just to give counsel the benefit of the doubt but must "affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as they did." Id. (quotations omitted).

In the present case, counsel retained a mitigation investigator, met with the Petitioner, interviewed family members and personnel at Riverbend, and had the Petitioner evaluated by Dr. Angelillo. Counsel were aware of the facts and circumstances of the offenses, the Petitioner's claims that he consumed alcohol and drugs before committing the offenses, his statements to the police and the circumstances of his arrest, his history of substance abuse, the substance abuse in his family, the death of his brother in a train accident, his sister's sickle cell anemia, the divorce of his mother and stepfather, his poor grades and low achievement scores, his limited intellectual ability, Dr. Steinberg's report and findings, and Dr. Angelillo's report and findings.

Resentencing counsel testified that determining how to address the facts of the case was a challenge because the facts were the "worst [he had] ever seen." He noted the limited amount of time he had to complete his investigation. Testimony and exhibits were presented at the post-conviction hearing regarding the trial judge's insistence that the resentencing hearing be held in February 2000, approximately one year after the Tennessee Supreme Court filed its opinion reversing the death sentence. See Carter, 988 S.W.2d at 145. As a result, counsel only completed those tasks that they believed would benefit the Petitioner.

Resentencing counsel found nothing in the Petitioner's background that was so "horrendous" that it would explain the Petitioner's actions. Resentencing counsel believed that the jury would not care that the Petitioner had a drug addiction or only an eighth grade education. As a result of the investigation and the facts of the case, counsel decided to present as a mitigation theme that at the time of the offenses, the Petitioner had been drinking alcohol and consuming drugs, that he accepted responsibility for his actions, that he was sorry for what he had done, and that he had changed in prison to such an extent that he would be a useful member of society while serving a life sentence.

The Petitioner argues that the mitigation investigation was incomplete because counsel failed to request additional funding in a timely manner to continue the investigation

after the initial funding was depleted. We agree that counsel unnecessarily delayed seeking additional funding to continue the mitigation investigation. As found by the trial court, though, Inquisitor continued with their investigation despite the delay.

The Petitioner avers that counsel were ineffective in the hiring and directing of Dr. Angelillo. According to the Petitioner, counsel failed to retain Dr. Angelillo in a timely manner, provide him with all necessary background information, and direct him to evaluate the Petitioner's mental state at the time of the offenses and his intellectual functioning.

Although counsel failed to secure funding to retain Dr. Angelillo until shortly before the trial, they provided him with adequate background information, including the Petitioner's school records, records of interviews with the Petitioner's family, his criminal history, and Dr. Steinberg's report. Dr. Angelillo testified at the post-conviction hearing that counsel did not request that he determine the Petitioner's state of mind at the time of the offenses. Both counsel and Dr. Angelillo had the report of Dr. Steinberg, who had evaluated the Petitioner's mental status at the time of the offenses. Dr. Steinberg did not identify any issues in his report with the Petitioner's state of mind at the time of the offenses. Dr. Angelillo did not conduct any further testing of the Petitioner in preparation for the post-conviction proceedings and offered no opinion at the post-conviction hearing regarding the Petitioner's state of mind when he committed the offenses.

Dr. Angelillo evaluated the Petitioner regarding his intellectual limitations. During the resentencing hearing, Dr. Angelillo explained the three psychological tests he administered, the results of the tests, and his conclusions based upon the testing. Dr. Angelillo said the Petitioner's IQ score of 78 on the WAIS-III fell within the borderline range. On cross-examination, Dr. Angelillo confirmed that the Petitioner's intellectual level was "well below average" but said the Petitioner was not intellectually disabled. The Petitioner faults counsel for failing to instruct Dr. Angelillo to administer adaptive function testing to determine whether the Petitioner was intellectually disabled. Dr. Angelillo, however, did not perform such testing before the post-conviction hearing and did not testify that the additional testing would have changed his opinion that the Petitioner was not intellectually disabled.

The Petitioner faults counsel for failing to have the Petitioner evaluated by a neuropsychologist. Like original trial counsel, resentencing counsel would not have been able to establish particularized need for funding to retain a neuropsychologist.

Resentencing counsel reported no problems communicating with the Petitioner. Resentencing co-counsel testified that the Petitioner understood counsel's discussions with him and provided them information about the case. Neither Dr. Steinberg nor Dr. Angelillo

recommended that the Petitioner be evaluated by a neuropsychologist. Dr. Angelillo testified at the post-conviction hearing that if he determined that a need existed for neuropsychological testing, he referred counsel to a neuropsychologist and included the recommendation in his report. No such recommendation was included in Dr. Angelillo's report. Dr. Steinberg administered neuropsychological screening tests and found that the Petitioner's performance fell within the normal limits. If counsel had sought funding for neuropsychological testing based upon this information, the trial court would have denied the motion.

The Petitioner asserts that counsel were ineffective in failing to retain an addiction and substance abuse specialist. The trial court found that while counsel may have been able to establish particularized need for an addiction and substance abuse expert, counsel made a reasonable tactical decision not to seek funds to retain such an expert. The court found that counsel were aware of the history of substance abuse in the Petitioner's family and the Petitioner's addiction but chose to focus upon the Petitioner's drug and alcohol use at the time of the offenses. The court noted resentencing counsel believed the best chance of convincing the jury to impose a life sentence was to focus upon the Petitioner's drug and alcohol use at the time of the offenses and to emphasize how the Petitioner had changed since the offenses.

Before the resentencing trial, counsel had reviewed the transcripts of the prior proceedings and were aware of the evidence against the Petitioner, including the Petitioner's statements to the police and his testimony at the suppression hearing and the initial penalty phase trial. Although the Petitioner stated that he had been drinking alcohol and ingesting drugs in the hours leading up to the offenses, Dr. Steinberg raised no issues in his report regarding the Petitioner's mental state at the time of the offenses. The defense team interviewed personnel at Riverbend regarding the Petitioner's job performance and behavior while in prison. Dr. Angelillo evaluated the Petitioner and found that the Petitioner's behavior and attitude had changed since Dr. Steinberg's evaluation. Dr. Angelillo noted in his report that the Petitioner claimed to have "made strides in accepting the consequences of his past actions."

Counsel also were aware of various events in the Petitioner's life, including the death of his brother in a train accident, his sister's sickle cell anemia, and the divorce of his mother and stepfather. Resentencing counsel said he did not see anything in the Petitioner's background so "horrendous" that it would explain the Petitioner's actions in committing the offenses. Resentencing counsel did not believe that testimony regarding the Petitioner's background would have been beneficial based upon the facts of the case.

Rather than attempting to minimize the seriousness of the offenses, counsel decided to acknowledge to the jury that evidence of the heinous, atrocious, or cruel aggravating circumstance existed. Counsel believed that evidence of the existence of this aggravating circumstance was clear from a lay person's point of view. This is not a case in which counsel did not conduct any inquiry into petitioner's background and social history. See Williams v. Taylor, 529 U.S. 362, 396 (2000). Based upon their investigation and the facts and circumstances of the case, counsel made a reasonable tactical decision to present as mitigation that the Petitioner had been drinking alcohol and consuming drugs before committing the offenses, that the Petitioner acknowledged that his actions were wrong and he should be punished, that he was sorry for his actions, and that he had changed while in prison and could be a useful member of society while serving a life sentence. The Petitioner is not entitled to relief regarding this issue.

b. Prejudice

Even if counsel were deficient in their investigation and presentation of mitigating evidence, the deficiency did not result in prejudice. We review the following factors in determining whether counsel were ineffective in failing to present mitigating evidence: (1) the nature and extent of the mitigating evidence that was available but not presented by trial counsel; (2) whether counsel presented substantially similar mitigation evidence to the jury in either the guilt or penalty phase of the proceedings; and (3) whether the evidence of applicable aggravating factors was so strong that mitigating evidence would not have affected the jury's determination. Goad, 938 S.W.2d at 371.

The State presented evidence at the trial of two aggravating factors. The State relied upon, and the jury found, the following aggravating factors to support the death penalty: the defendant was previously convicted of one or more felonies with statutory elements that involved the use of violence to the person; and the murder was especially heinous, atrocious, or cruel. T.C.A. § 39-130204(i)(2), (5).

The State relied upon the Petitioner's prior conviction for aggravated robbery to support the prior violent felony aggravating circumstance in (i)(2). On direct appeal, the Tennessee Supreme Court concluded that evidence that the Petitioner was convicted of aggravated robbery by use of a deadly weapon on October 20, 1994, approximately three months before his conviction in this case, was "clearly sufficient" to establish the (i)(2) aggravating circumstance. Carter, 114 S.W.3d at 907.

The Tennessee Supreme Court concluded that the evidence was sufficient to support the (i)(5) aggravating circumstance. Carter, 114 S.W.3d at 907-08. The court noted that it previously had determined that the evidence was sufficient and that the same facts upon

which the court relied in the initial appeal were presented at the resentencing trial. Id. In the Petitioner's initial appeal, the Tennessee Supreme Court concluded that the evidence was sufficient to establish the (i)(5) aggravating circumstance based upon mental torture. Carter, 988 S.W.2d at 150. The court reasoned:

> The evidence demonstrates that the defendant armed himself with a sawed-off shotgun and went to the Jacksons' apartment in the middle of the night. He kicked in the apartment door and, along with [his codefendant] Anderson, demanded money and drugs. They continued to make the demands even though the couple repeatedly said they did not know what the two men were talking about. Although the defendant quickly realized he and Anderson had the wrong apartment, he pursued the senseless attack on the unsuspecting family.
>
> Mr. Jackson certainly endured mental torture. He was forced to lure his wife out of the safety of the bathroom. He knew the men were violent because the defendant was armed with a shotgun and had kicked in his door. After luring his wife out of the bathroom, she was raped. Although Mr. Jackson was not in the bedroom when the attack on his wife occurred, he surely knew or at least strongly suspected that his wife was being injured or raped because Anderson repeatedly told the defendant to close the bedroom door. Mr. Jackson, who was held at gunpoint, was helpless to assist his wife.
>
> The jury could have reasonably inferred that the child was placed in the closet or entered the closet prior to the shooting of her father because the child's uncle found her beside her dead father. The jury could even infer that her father tried to protect her in the closet. Her nightgown was covered with blood. Thus, a jury could find that she was there when the defendant placed the shotgun to Mr. Jackson's head and pulled the trigger.
>
> Mr. Jackson inevitably feared for his daughter's safety during the time the two were in the closet before he was shot. Mr. Jackson feared for the safety of his wife whom [sic] he knew was with one of the attackers in another room. Mr. Jackson's anguish over the safety of his family was compounded by fear of what fate he might suffer.
>
> Mrs. Jackson certainly endured mental torture. While she was being raped in the bedroom, she surely wondered what was happening to her husband and daughter in the other part of the apartment. While she was being attacked, Mrs. Jackson would certainly have heard the shotgun blast and

> wondered if her husband and daughter were both still alive. She would also realize that her own life was at risk because the robbery had escalated into a murderous attack. When the defendant entered the bedroom, she asked what had happened to her husband. She screamed when the men responded only by demanding money. Anderson threw a jewelry box at Mrs. Jackson, and the defendant backed Mrs. Jackson into the small bathroom. As she tried to shield herself with her hands, she certainly thought about her fate and the fate of her husband and daughter. The defendant admitted that in the last moments of her life she begged and pleaded with him not to shoot. She offered to "do anything." The defendant shot Mrs. Jackson at close range.

Id. at 150-51.

As mitigation evidence, the Petitioner presented the testimony of Dr. Angelillo regarding his limited intellect, including his full-scale IQ score of 78, which Dr. Angelillo concluded fell within the borderline range. Dr. Angelillo said that although the Petitioner "was not the smartest guy around," he was not intellectually disabled and was capable of understanding what was occurring around him. Dr. Angelillo diagnosed the Petitioner with generalized anxiety disorder, obsessive-compulsive personality traits, histrionic personality features, and schizotypal personalty features.

The Petitioner also presented the testimony of two employees from Riverbend who testified regarding his behavior, job performance, classification level, and activities while incarcerated. Pastor Padilla testified regarding her meetings with the Petitioner, letters and poetry that he had written, and the changes that she had observed in the Petitioner since she first met him in 1996.

The Petitioner testified regarding his children and the lifestyle that he was living at the time of the offenses. The Petitioner said he was "just drinking and using drugs and taking things that he wanted." He also said he had been "drinking and using drugs all day" before the murders. The Petitioner acknowledged that he should be punished for his actions but asked that he be allowed to live so that he could help others. He also asked for forgiveness from the victims' family. He stated that while in prison, he learned "how precious life is" and to respect others. The Petitioner said he thought about the victims "all the time." He described his typical day on death row, his job duties, and his activities.

We cannot conclude that the failure to introduce the additional evidence presented by the Petitioner at the post-conviction hearing resulted in prejudice. Dr. Auble and Dr. Ragan both stated that their testimony regarding the offenses was based, in part, upon their conversations with the Petitioner and his statements to police. Dr. Auble agreed that

inconsistencies existed between the Petitioner's version of the events and the physical evidence. The jury heard evidence of the Petitioner's intellectual limitations, his use of alcohol and drugs before the murders, and his lifestyle at that time. Based upon the mitigating evidence presented and the strong evidence supporting the aggravating circumstances, the Petitioner failed to show a reasonable probability that, had such evidence been presented, the jury would have failed to find beyond a reasonable doubt that the aggravating and mitigating circumstances warranted death.

3. Failure to Prepare Witnesses

The Petitioner asserts that counsel were ineffective in failing to meet with and prepare the witnesses from Riverbend before the trial. The trial court credited resentencing co-counsel's testimony that he and resentencing counsel interviewed the Riverbend employees before the trial but that the employees were unavailable for briefing until the morning of their testimony. Moreover, the Petitioner failed to present the testimony of the Riverbend witnesses at the post-conviction hearing and, therefore, failed to establish that these witnesses had any additional mitigating evidence to offer. See Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) (stating that for a petitioner to establish ineffective assistance for failure to call a trial witness, the witness' testimony should be presented at the post-conviction hearing).

The trial court found that although counsel should have been more proactive in preparing for Pastor Padilla's testimony, the Petitioner failed to establish prejudice. Pastor Padilla's testimony supported counsel's argument that the Petitioner was remorseful and amenable to rehabilitation. Although counsel were unaware before the trial of the letters written by the Petitioner, the trial court allowed Pastor Padilla to read one of the letters to the jury, which she stated was representative of the other letters that the Petitioner had written to her through the years. The Petitioner also failed to present Pastor Padilla as a witness in the post-conviction hearing and, thus, failed to establish what, if any, additional testimony Pastor Padilla would have offered. See Black, 794 S.W.2d at 757.

4. Failure to Make Appropriate Arguments and Conduct a Proper Direct Examination of the Petitioner

The Petitioner submits that resentencing counsel was ineffective in his opening statement, direct examination of the Petitioner, and closing argument.

a. Opening Statement

The Petitioner argues that resentencing counsel failed to tell the jury that mitigation included any aspect of the Petitioner's character or record and any other circumstances of the offenses that he proffered as a basis for a sentence less than death. The trial court, however, instructed the jury regarding all of the mitigating circumstances in Tennessee Code Annotated section 39-13-204(j) and told the jury that it should consider any mitigating circumstances supported by the evidence. Accordingly, the Petitioner has failed to establish that counsel was deficient or that the deficiency resulted in prejudice.

The Petitioner contends that resentencing counsel failed to inform the jury that the issue was not whether the Petitioner committed the offenses but that the issue involved his degree of moral culpability. Counsel, the prosecutor, and the trial court told the jury that the Petitioner had pleaded guilty to the murders and that the purpose of the trial was to decide whether the Petitioner should receive a sentence of life or death. The Petitioner is not entitled to relief regarding this issue.

The Petitioner avers that resentencing counsel failed to inform the jury that the Petitioner pleaded guilty due to his remorse. As the trial court found, however, counsel presented and argued a theme of remorse throughout the trial. Counsel elicited testimony from the Petitioner regarding remorse and argued remorse during closing arguments. The Petitioner is not entitled to relief regarding this issue.

b. Direct Examination of the Petitioner

The Petitioner asserts that resentencing counsel was ineffective in eliciting testimony from the Petitioner that (1) he knew what he was doing on the night of the murders; (2) he robbed the MAPCO with the same gun; (3) the only use for the shotgun was a violent act; (4) he, like other defendants connect with drugs, lied when he claimed he was employed with a landscaping company; (5) they "waited under the cover of darkness" and loaded the shotgun on the way to the apartment; (6) "most folks would say there is no punishment severe enough for you"; (7) "a lot of folks would say that death was too easy"; and (8) he had been on death row since May of 1993.

The trial court found that counsel initially challenged the introduction of the underlying facts of the MAPCO robbery. After the motion was denied, counsel attempted to mitigate the State's introduction of the facts by questioning the Petitioner on direct examination regarding the facts. The Petitioner testified that during the months leading up to the murder, including the time in which he committed the MAPCO robbery, he was in a downward spiral of "drinking and drugging." The trial court found that counsel decided to

include the MAPCO robbery as part of a larger argument that the Petitioner's behavior at and near the time of the murders was a direct result of his alcohol and drug consumption.

Resentencing counsel also testified that he believed it was imperative for the Petitioner to accept responsibility for his actions and to express remorse in front of the jury. As a result, counsel questioned the Petitioner extensively regarding the circumstances of the offenses, his lifestyle at the time, and his current lifestyle in an attempt to persuade the Petitioner to express remorse for his actions. We conclude that resentencing counsel's direct examination of the Petitioner was appropriate given the nature of the offenses and the strategy employed during the resentencing trial.

c. Closing Arguments

According to the Petitioner, resentencing counsel "crossed the line" when he argued that (1) the Petitioner probably deserved to die; (2) he could not "think of a circumstance where someone cold-bloodedly kills someone else and it not be heinous; that it not be atrocious; that is not be cruel"; (3) the State had proven its aggravating factors; (4) it would be easy to kill the Petitioner; (5) what kind of person would do this; (6) the Petitioner was drinking alcohol, using drugs, and hanging out with his friends; (7) drugs and alcohol were not a factor to take into consideration; (8) there was not evidence that the Petitioner had a bad childhood; (9) there was not proof of anything mitigating in the Petitioner's life; and (10) the Petitioner was not insane and knew what he was doing.

The trial court found that counsel's closing argument was appropriate given the nature of the offenses and the strategy employed during the resentencing trial. Counsel attempted to connect with the jury by acknowledging the horrific nature of the offenses. He argued that regardless of the nature of the offenses, the Petitioner should not receive the death penalty because he had accepted responsibility for the offenses, was remorseful, and had changed while in prison. Counsel argued that the Petitioner's conduct in committing the offenses was not consistent with the rest of the Petitioner's life and that the Petitioner changed his name because he was ashamed of his past. We conclude that counsel's closing argument was consistent with the strategy employed during the hearing. The Petitioner is not entitled to relief regarding this issue.

5. Failure to Challenge Confession, Plea, and MAPCO Aggravated Robbery Conviction

The Petitioner contends that counsel were ineffective in failing to challenge his statements to the police and his 1995 guilty plea. In support of his contention, the Petitioner relies upon the same arguments that he made in asserting that original counsel were

ineffective in challenging his statement. He also asserts that his guilty pleas were the result of ineffective assistance of original counsel. For the same reasons that the Petitioner failed to establish that original counsel were ineffective in challenging his statements to the police, the Petitioner also failed to establish that resentencing counsel were ineffective in failing to challenge the statements in the resentencing trial. Likewise, the Petitioner did not establish that his guilty plea was the result of ineffective assistance of counsel. Therefore, resentencing counsel were not ineffective in failing to challenge the guilty plea on this basis.

The Petitioner argues that for the same reasons that original counsel should have challenged the MAPCO aggravated robbery conviction as an aggravator, resentencing counsel should have challenged the conviction at the resentencing hearing. The Petitioner, however, failed to present evidence establishing that the aggravated robbery conviction was the result of ineffective assistance of counsel. Moreover, resentencing counsel made a reasonable strategic decision to focus upon the Petitioner's acceptance of responsibility and remorse and his change while in prison rather than to focus upon challenging the aggravating circumstances that the State sought to establish. The Petitioner is not entitled to relief regarding this issue.

6. Failure to File Necessary Pretrial Motions

The Petitioner argues that while counsel filed a motion in limine to limit victim impact evidence, the motion did not include any legal argument. On direct appeal, the Tennessee Supreme Court upheld the admission of victim impact evidence. Carter, 114 S.W.3d at 906-07. The Petitioner did not identify the specific testimony that he believed to be prejudicial. This issue is without merit.

The Petitioner faults counsel for failing to file a motion in limine to exclude evidence that he was on "death row." Given the strength of the aggravating circumstances, evidence that the Petitioner was on "death row" did not result in prejudice.

The Petitioner asserts that counsel were ineffective in failing to file a motion alleging abuse of process by the State and a motion to limit the State's evidence only to specific aggravating factors. The Petitioner failed to identify the abuses or evidence that he claims was improperly entered or otherwise provide an argument in support of these issues. Therefore, these issues are without merit.

The Petitioner argues that counsel were ineffective in failing to challenge the proportionality of the death penalty in his case. The Tennessee Supreme Court, however, independently reviewed the proportionality of the Petitioner's sentence and affirmed the imposition of the death penalty. Carter, 114 S.W.3d at 906-07. This issue is without merit.

The Petitioner asserts that counsel were ineffective in failing to request a jury instruction stating that any doubts regarding sentencing are to be resolved in favor of a life sentence. The trial court instructed the jury properly regarding its duties and the burden of proof. Counsel's failure to request this special instruction did not result in an incomplete jury charge.

According to the Petitioner, counsel should have filed motions challenging the constitutionality of Tennessee's death penalty statute. As we address below, the constitutionality of the death penalty in Tennessee has been upheld on numerous occasions.

III. CONSTITUTIONALITY OF THE DEATH PENALTY

The Petitioner contends that the death penalty impinges upon his fundamental right to life and the prohibition against cruel and unusual punishment. The Tennessee Supreme Court has rejected these arguments. See State v. Hester, 324 S.W.3d 1, 79 (Tenn. 2010); Abdur' Rahman v. Bredsen, 181 S.W.3d 292, 305-09 (Tenn. 2005); Cauthern v. State, 145 S.W.3d 571, 629 (Tenn. 2004).

The Petitioner asserts that capital punishment violates international law. Arguments that the death penalty is unconstitutional under international laws and treaties have been systematically rejected. See, e.g. State v. Odom, 137 S.W.3d 572, 600 (Tenn. 2004).

The Petitioner submits that the discretion of Tennessee's district attorneys general to seek the death penalty violates his rights under the Tennessee and United States constitutions. This claim, however, has been rejected by the Tennessee Supreme Court. See, e.g. State v. Hines, 919 S.W.2d 573, 582 (Tenn. 1995).

The Petitioner asserts that the State failed to ensure the availability of adequate trial counsel and defense resources and that, as a result, he was denied his right to a fair trial. The Petitioner has failed to establish that he was subjected to an unfair trial based upon inadequate defense resources. We have also concluded that counsel's performance was not ineffective. This claim is without merit.

Finally, the Petitioner contends that Tennessee's proportionality review is not a meaningful system of review and violates his due process rights. The Petitioner's argument is contrary to establish precedent. See, e.g. State v. Cazes, 875 S.W.2d 253, 270-71 (Tenn. 1994). "While important as an additional safeguard against arbitrary or capricious sentencing, comparative proportionality review is not constitutionally required." State v. Bland, 958 S.W.2d 651, 663 (Tenn. 1997). We note that our supreme court recently reaffirmed the Bland procedure for proportionality review, involving comparison between

the case to be reviewed and other cases involving defendants convicted of the same or similar crimes with an eye toward "the facts of the crimes, the characteristics of the defendants, and the aggravating and mitigating circumstances involved." Pruitt, 415 S.W.3d at 207-12 (citing Bland, 958 S.W.2d at 664).

IV. CUMULATIVE ERROR

The Petitioner asserts counsel's performance was constitutionally deficient based upon the cumulative effect of the errors. We conclude the Petitioner's counsel were not ineffective based upon any single alleged error or the cumulative effect thereof. The Petitioner is not entitled to relief on this issue.

CONCLUSION

For the foregoing reasons, we conclude that the Petitioner is not entitled to post-conviction relief. Accordingly, we affirm the judgment of the trial court.

_____

JOSEPH M. TIPTON, PRESIDING JUDGE