CAPITAL CASE
EXECUTION SCHEDULED FOR AUGUST 4, 2020 AT 7:00 CDT

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD WAYNE NICHOLS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 26, 2019 Session

HAROLD WAYNE NICHOLS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Hamilton County
No. 205863 Don R. Ash, Senior Judge

No. E2018-00626-CCA-R3-PD

Petitioner, Harold Wayne Nichols, pled guilty to first degree murder in 1990. A jury imposed the death penalty. In June of 2016, Petitioner moved to reopen his post-conviction petition on the basis that the Supreme Court's decision in *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551 (2015), announced a new rule of constitutional law requiring retroactive application. The post-conviction court granted the motion to reopen, but after Petitioner amended his petition and asserted additional claims, the post-conviction court denied relief without a hearing. On appeal, Petitioner argues (1) that the sole aggravating circumstance supporting his death sentence is unconstitutionally vague under *Johnson*; (2) that a judge, rather than a jury, determined facts in imposing the death penalty in violation of *Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616 (2016), a new rule of constitutional law requiring retroactive application; (3) that the State committed prosecutorial misconduct at Petitioner's sentencing hearing, along with a related ineffective assistance of trial counsel claim; (4) that the post-conviction court erred in canceling the scheduled evidentiary hearing without notice and a fair opportunity to be heard; (5) that the post-conviction court erred in denying the parties' proposed settlement agreement to vacate the death sentence and enter a judgment of life imprisonment; and (6) that Petitioner's death sentence is invalid due to the cumulative effect of the asserted errors. Following our review, we affirm the judgment of the post-conviction court.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and CAMILLE R. MCMULLEN, JJ., joined.

Deborah Y. Drew, Deputy Post-Conviction Defender; Andrew L. Harris, Assistant Post-Conviction Defender, Nashville, Tennessee, for the appellant, Harold Wayne Nichols.

Herbert H. Slatery III, Attorney General and Reporter; Nicholas W. Spangler, Senior Assistant Attorney General; Neal Pinkston, District Attorney General; and Crystle Carrion, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

On May 9, 1990, Petitioner pled guilty to first degree felony murder, aggravated rape, and first degree burglary with his sentence to be determined by a jury. The Tennessee Supreme Court summarized the evidence presented at the sentencing hearing as follows:

> The proof showed that on the night of September 30, 1988, [Petitioner] broke into the house where the 21-year-old-victim, Karen Pulley, lived with two roommates in the Brainerd area of Chattanooga, Tennessee. After finding Pulley home alone in her upstairs bedroom, [Petitioner] tore her undergarments from her and violently raped her. Because of her resistance during the rape, he forcibly struck her at least twice in the head with a two-by-four he had picked up after entering the house. After the rape, [Petitioner], while still struggling with the victim, struck her again several times with great force in the head with the two-by-four. The next morning, one of Karen Pulley's roommates discovered her alive and lying in a pool of blood on the floor next to her bed. Pulley died the next day. Three months after the rape and murder, a Chattanooga police detective questioned [Petitioner] about Pulley's murder while he was in the custody of the East Ridge police department on unrelated charges. It was at this point that [Petitioner] confessed to the crime. This videotaped confession provided the only link between [Petitioner] and the Pulley rape and murder.
>
> The evidence showed that, until his arrest in January 1989, [Petitioner] roamed the city at night and, when "energized," relentlessly searched for vulnerable female victims. At the time of trial, [Petitioner] had been convicted on five charges of aggravated rape involving four other Chattanooga women. These rapes had occurred in December 1988 and January 1989, within three months after Pulley's rape and murder. . . .

State v. Nichols, 877 S.W.2d 722, 726 (Tenn. 1994) (footnotes omitted), *cert. denied*, 513 U.S. 1114 (1995). In three of those prior rapes, Petitioner had been armed with a weapon (a cord, a knife, and a pistol, respectively), and he caused personal injury to the victim in the fourth. *Id.*

In support of the death penalty, the State relied upon two aggravating circumstances: (1) that Petitioner had one or more prior convictions for violent felonies, namely the five convictions for aggravated rape, and (2) that the murder occurred during the commission of a felony. *See* T.C.A. § 39-2-203(i)(2) & (7). The jury imposed the death penalty after finding both aggravating circumstances were proven beyond a reasonable doubt and that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt.[1] On direct appeal, the Tennessee Supreme Court concluded, among other issues, that the application of the felony murder aggravating circumstance was harmless error and affirmed Petitioner's convictions and death sentence. *Id*. at 738-39.

On April 20, 1995, Petitioner filed a petition for post-conviction relief, raising multiple claims of ineffective assistance of trial counsel. Following an extensive evidentiary hearing spanning eight days, the post-conviction court upheld Petitioner's convictions and death sentence.[2] On appeal to this Court, we held that the trial court erred in allowing Petitioner to assert his right against self-incrimination at the post-conviction hearing but affirmed the post-conviction court's denial of relief. *Harold Wayne Nichols v. State*, E1998-00562-CCA-R3-PD, 2001 WL 55747 (Tenn. Crim. App. Jan. 19, 2001). The Tennessee Supreme Court held that this Court should not have addressed the self-incrimination issue but affirmed the post-conviction court's denial of relief. *Nichols v. State*, 90 S.W.3d 576 (Tenn. 2002). Petitioner was subsequently unsuccessful in his attempt to seek federal habeas corpus relief. *See Nichols v. Heidle*, 725 F.3d 516 (6th Cir. 2013), *cert. denied*, 135 S. Ct. 704 (2014).

On June 24, 2016, Petitioner filed a motion to reopen his post-conviction petition, alleging that *Johnson v. United States* announced a new constitutional rule requiring retrospective application. In *Johnson*, the United States Supreme Court held that the "residual clause" of the Armed Career Criminal Act ("ACCA"), which defined prior violent felony for the purpose of sentence enhancement as an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another," was void for vagueness. *See* 135 S. Ct. at 2557-58. Petitioner argued that pursuant to the

[1] The trial court subsequently imposed consecutive sentences of 60 years for aggravated rape and 15 years for first degree burglary.

[2] Petitioner also filed a post-conviction petition challenging his non-capital convictions for the rapes of the four other victims, which had served as the basis of the prior violent felony aggravating circumstance. The post-conviction court granted partial relief in the form of a new sentencing hearing in the non-capital rape cases. *See Nichols v. State*, 90 S.W.3d 576, 586-87 (Tenn. 2002). Petitioner ultimately received an effective sentence of 25 years in those four cases, as well as an effective sentence of 225 years for the rapes or attempted rapes of five other victims. *See State v. Harold Wayne Nichols*, No. E2008-00169-CCA-R3-CD, 2009 WL 2633099, at *3 (Tenn. Crim. App. Aug. 27, 2009), *perm. app. denied* (Tenn. Mar. 1, 2010).

ruling in *Johnson*, Tennessee's prior violent felony aggravating circumstance – the sole aggravating circumstance supporting his death sentence – was similarly void for vagueness. On September 29, 2016, the State filed a response to the motion to reopen, arguing that the ruling in *Johnson* did not apply to the language of Tennessee's prior violent felony aggravator, which was more akin to the "elements clause" of the ACCA that was held to be constitutional in *Johnson*. *See* 135 S. Ct. at 2563.

At an October 4, 2016 hearing, the post-conviction court found that Petitioner had stated a "colorable claim" for reopening post-conviction proceedings. In its order granting the motion to reopen, the post-conviction court noted that Petitioner's case was unusual due to the timing of his offense and the amendment of the sentencing statutes in 1989. Even though the pre-1989 statute[3] should have applied to Petitioner's case, the jury was actually instructed on the post-1989 aggravating factor.[4] The post-conviction court noted that challenges to the post-1989 aggravating factor "would likely fail to state a claim in a motion to reopen" because it specifically referred to the "statutory elements" of the prior offense, similar to the "elements clause" that was upheld in *Johnson*. However, the post-conviction court found that the pre-1989 aggravating factor "contained language which arguably was similar to the federal statutory clause recently found unconstitutionally vague in *Johnson*." The post-conviction court stated that its finding that Petitioner's motion to reopen stated a colorable claim was based in part on the "alleged lack of guidance regarding the trial court's application of the pre-1989 prior violent felony conviction statutory aggravating circumstance" as well as "upon the differing conclusions federal and state courts have reached in applying the *Johnson* holding to non-ACCA cases." The order directed Petitioner's counsel "to investigate all possible constitutional grounds for relief for the purpose of filing an amended petition" and that the amended petition should address "any additional issues counsel deems necessary."

On January 12, 2017, Petitioner filed an amendment to the post-conviction petition reasserting the *Johnson* claim as well as adding the following additional claims: (1) that Petitioner's death sentence was invalid under the United States Supreme Court's decision in *Hurst v. Florida*, a new rule of constitutional law requiring retrospective application, because a judge made findings of fact rather than the jury; (2) that the State committed prosecutorial misconduct during closing argument at the sentencing hearing by alluding to the possibility of Petitioner's release if the death penalty were not imposed as well as a related claim that trial counsel were ineffective for failing to object to the argument and

[3] "The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person." T.C.A. § 39-13-204(i)(2) (1988).

[4] "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." T.C.A. § 39-13-204(i)(2) (Supp. 1990). As noted below, Petitioner has not challenged this jury instruction as error.

failing to interview jurors regarding the effect of the argument; (3) that Tennessee's death penalty system is "broken"; and (4) that Petitioner's constitutional rights were abridged by the cumulative effect of the errors.

During a December 8, 2017 teleconference with the post-conviction court, the parties announced that they were engaged in settlement negotiations to modify Petitioner's sentence to life imprisonment. At a January 31, 2018 hearing, Petitioner argued that the State could concede that error had occurred in the imposition of the death sentence and could modify the sentence to life imprisonment. The District Attorney General responded that the State was prepared to concede error and enter into an agreement whereby Petitioner's sentence would be modified and his petition withdrawn. The post-conviction court, concerned that a basis to grant post-conviction relief had not been established, opined that a valid basis for post-conviction relief had to be found as a prerequisite to the parties entering a settlement agreement modifying the sentence. The post-conviction court, however, permitted the parties to submit additional authority concerning the propriety of the settlement agreement and rescheduled the hearing for March 14, 2018. On February 12, 2018, the Petitioner filed a motion to approve the settlement agreement, citing similar agreements in other death penalty cases and Petitioner's record of good behavior while incarcerated.

On March 7, 2018, one week prior to the rescheduled hearing, the post-conviction court entered an order summarily denying relief. The post-conviction court stated that it had "reviewed the pleadings of the parties, the record, and applicable law" in accordance with the provisions of the Post-Conviction Procedure Act. The post-conviction court noted that at the time it granted the motion to reopen on the basis that Petitioner had stated a colorable claim, no appellate court had determined whether *Johnson* applied to Tennessee's prior violent felony aggravator. Since then, the Court of Criminal Appeals had rejected such a claim. *See Donnie E. Johnson v. State*, No. W2017-00848-CCA-R28-PD, Order (Tenn. Crim. App. Sept. 11, 2017), *perm. app. denied* (Tenn. Jan. 19, 2018). The post-conviction court concluded that based on the *Donnie E. Johnson* decision, "this issue is appropriate for disposition without a hearing." As to the additional claims raised in the amended petition, the post-conviction court concluded based on its preliminary review that *Hurst* did not announce a new rule of constitutional law that required retrospective application and was inapplicable to this case and that the remaining claims were previously determined, waived, and/or time-barred. Finally, the post-conviction court concluded that it was "not appropriate to accept . . . [the] proposed settlement agreement under the circumstances of this case where there is no claim for post-conviction relief before this Court which should survive this Court's statutorily required preliminary order." On April 6, 2018, Petitioner filed a notice of appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure.

Analysis

In *Case v. Nebraska*, 381 U.S. 336 (1965), the United States Supreme Court recommended that the states implement post-conviction procedures to address alleged constitutional errors arising in state convictions in order to divert the burden of habeas corpus ligation in the federal courts. In response, the Tennessee legislature passed the Post-Conviction Procedure Act whereby a defendant may seek relief "when a conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. In its current ideation, the Post-Conviction Procedure Act "contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment." T.C.A. § 40-30-102(c). While "any second or subsequent petition shall be summarily dismissed," a petitioner may seek relief on the basis of claims that arise after the disposition of the initial petition by filing a motion to reopen the post-conviction proceedings "under the limited circumstances set out in § 40-30-117." *Id.*; *see Fletcher v. State*, 951 S.W.2d 378, 380 (Tenn. 1997).

A motion to reopen post-conviction proceedings should be granted only under the following circumstances:

> (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial; or
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> (2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
>
> (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and
>
> (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the

conviction set aside or the sentence reduced.

T.C.A. § 40-30-117(a). The motion should set out the factual basis underlying the claim, supported by affidavit. T.C.A. § 40-30-117(b). Once the post-conviction court grants the motion to reopen,[5] "the procedure, relief and appellate provisions of this part shall apply." *Id*.; *see* T.C.A. § 40-30-101 ("This part shall be known and may be referred to as the 'Post-Conviction Procedure Act.'"). The appellate provisions of the Post-Conviction Procedure Act allow for an appeal as of right under Tennessee Rule of Appellate Procedure 3(b) from a final order granting or denying post-conviction relief. T.C.A. § 40-30-116; Tenn. Sup. Ct. R. 28, § 10(A).[6] We review the lower court's summary denial of post-conviction relief de novo. *Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004).

I. Johnson Claim

In *Johnson*, the Supreme Court held that the "residual clause" contained in the definition of a violent felony under the ACCA was unconstitutionally vague. *Johnson*, 135 S. Ct. at 2557. The ACCA increases the punishment of a defendant convicted of being a felon in possession of a firearm if he has three or more previous convictions for a violent felony. 18 U.S.C. § 924(e)(1). The ACCA defined a "violent felony" as

[5] We note that even though the post-conviction court in this case applied the "colorable claim" standard, which is less stringent than the clear and convincing evidence standard that should be applied to motions to reopen under section 40-30-117(a), *see Howell v. State*, 151 S.W.3d 450, 460 (Tenn. 2004), the State has not challenged the propriety of the post-conviction court's decision to grant the motion to reopen on the *Johnson* claim.

[6] Noting that this matter was initiated as a motion to reopen post-conviction proceedings, this Court directed the parties to submit supplemental briefing addressing whether we had jurisdiction to hear this appeal. *See Timothy Roberson v. State*, No. W2007-00230-CCA-R3-PC, 2007 WL 3286681, at *9 (Tenn. Crim. App. Nov. 7, 2007) (holding that there is no appeal as of right from the denial of a motion to reopen under Tenn. R. App. P. 3(b) and that the failure to follow the procedural requirements for seeking permission to appeal under T.C.A. § 40-30-117(c) "deprives this Court of jurisdiction to entertain such matter"), *perm. app. denied* (Tenn. Apr. 14, 2008). Both parties agreed that the post-conviction court's March 7, 2018 order was not a denial of the motion to reopen but was a denial of post-conviction relief on the merits. We agree that this Court has jurisdiction over this appeal under Tennessee Code Annotated section 40-30-117(b) and Tennessee Rule of Appellate Procedure 3. *Accord. Michael Angelo Coleman v. State*, No. W2007-02767-CCA-R3-PD, 2010 WL 118696 (Tenn. Crim. App. Jan. 13, 2010), *aff'd in part, vacated in part*, 341 S.W.3d 221 (Tenn. 2011); *Byron Lewis Black v. State*, No. M2004-01345-CCA-R3-PD, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005), *perm. app. denied* (Tenn. Feb. 21, 2006); *contra Floyd Lee Perry, Jr. v. State*, No. W2013-00901-CCA-R3-PC, 2014 WL 1377579, at *4 (Tenn. Crim. App. Apr. 7, 2014) (holding that there was "a procedural error in bringing this appeal before this court" when the petitioner filed a Rule 3 notice of appeal rather than an application for permission to appeal under section -117(c) even though the post-conviction court determined that the motion to reopen presented a colorable claim, appointed counsel, allowed amendment of the motion, and held a hearing prior to denying relief), *perm. app. denied* (Tenn. Sept. 18, 2014).

> any crime punishable by imprisonment for a term exceeding one year . . . that – (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.

18 U.S.C. § 924(e)(2)(B) (emphasis added). The "otherwise involves conduct" language is known as the ACCA's residual clause. *Johnson*, 135 S. Ct. at 2556. The Court observed that "unlike the part of the definition of a violent felony that asks whether the crime 'has *as an element* the use of . . . physical force,' the residual clause asks whether the crime '*involves conduct*' that presents too much risk of physical injury." *Id*. at 2557 (emphasis in original). Because of prior precedent holding that the statute required a categorical rather than a fact-specific approach, federal courts were required "to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Id*. (citing *James v. United States*, 550 U.S. 192, 208 (2007)). The Supreme Court determined this judicial assessment of risk under the residual clause, which was not tied to either real-world facts or statutory elements, was unconstitutionally vague because it "leaves grave uncertainty about how to estimate the risk posed by a crime" and "about how much risk it takes for a crime to qualify as a violent felony." *Id*. at 2557-58. However, the Court clarified that its decision "does not call into the question . . . the remainder of the [ACCA]'s definition of a violent felony." *Id*. at 2563. Thus, the elements clause of the ACCA's violent felony definition survived constitutional scrutiny. *See Stokeling v. United States*, __ U.S. __, 139 S. Ct. 544, 550 (2019) (applying the elements clause to Florida's robbery statute).

While the concept of a statute being unconstitutionally void for vagueness is not new, *see, e.g.*, *Maynard v. Cartwright*, 486 U.S. 356 (1988) (holding a statutory aggravating factor void for vagueness), the Supreme Court subsequently clarified that *Johnson* did announce a new substantive rule which applied retroactively on collateral review. *Welch v. United States*, __ U.S. __, 136 S. Ct. 1257, 1265 (2016) (applying the retroactivity standard set out in *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny); *cf. Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001) (applying the *Teague* retroactivity standard to a motion to reopen). The Court explained that the residual clause was deemed void for vagueness because "courts were to determine whether a crime involved a 'serious potential risk of physical injury' by considering not the defendant's actual conduct but an 'idealized ordinary case of the crime.'" *Id*. at 1262 (quoting *Johnson*, 135 S. Ct. at 2561). In applying *Johnson* to other federal statutes similarly defining violent felony, the Supreme Court held that "the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'" *United States v. Davis*, __ U.S. __, 139 S. Ct. 2319, 2326 (2019). However, "a case-specific approach would avoid the vagueness problems that doomed the statute[] in *Johnson*[.]" *Id.* at 2327.

The aggravating circumstance applicable at the time Petitioner committed his crime provides that "[t]he defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person." T.C.A. § 39-13-204(i)(2) (1988). However, as noted by the post-conviction court, the jury in Petitioner's capital sentencing hearing was instructed on the post-1989 version of the prior violent felony aggravator, which looks to whether the "statutory elements [of the prior conviction] involve the use of violence to the person." T.C.A. § 39-13-204(i)(2) (Supp. 1990). Though Petitioner refers to his jury as having been "erroneously instructed," he has never challenged this instruction as error, *see generally Nichols v. State*, 90 S.W.3d 576 (Tenn. 2002); *State v. Nichols*, 877 S.W.2d 722 (Tenn. 1994), and he does not do so now. Instead, Petitioner argues that either version of the prior violent felony aggravator would be void for vagueness under *Johnson* because "the addition of the word 'elements' to the statute did not significantly alter the meaning of the statute."

However, this Court has rejected *Johnson* claims with respect to both the pre- and post-1989 statutory language in prior cases denying permission to appeal from the denial of a motion to reopen. *See Donnie E. Johnson v. State*, No. W2017-00848-CCA-R28-PD, Order (Tenn. Crim. App. Sept. 11, 2017) (upholding pre-1989 aggravating factor), *perm. app. denied* (Tenn. Jan. 19, 2018); *Gary W. Sutton v. State*, No. E2016-02112-CCA-R28-PD, Order (Tenn. Crim. App. Jan. 23, 2017) (upholding post-1989 aggravating factor), *perm. app. denied* (Tenn. May 18, 2017). This is because our supreme court has held, that under either version of the statute, trial courts are to look to the actual facts of the prior felony to determine the use of violence when such cannot be determined by the elements of the offense alone. *See State v. Sims*, 45 S.W.3d 1, 12 (Tenn. 2001) (holding that under the post-1989 aggravating factor, a trial court "must necessarily examine the facts underlying the prior felony if the statutory elements of that felony may be satisfied either with or without proof of violence"); *State v. Moore*, 614 S.W.2d 348, 351 (Tenn. 1981) (holding that the State was required "to show that there was in fact either violence to another or the threat thereof" for prior felonies that did not "by their very definition involve the use or threat of violence to a person").[7] Thus, our precedent has never required the use of a judicially imagined ordinary case in applying the prior violent felony aggravating circumstance. The fact that the federal statues invalidated by *Johnson* and its progeny could not be saved by applying a fact-specific approach due to the language of those statutes and the precedent interpreting that language does not mean that a fact-specific approach is itself unconstitutional. *See Davis*, 139 S. Ct. at 2327 (recognizing that a case-specific approach would avoid a vagueness problem but rejecting it based on "the statute's text, context, and history"); *cf. State v. Crank*, 468 S.W.3d 15, 22-23 (Tenn. 2015) ("In evaluating a statute for vagueness, courts may consider the plain

[7] The pre-1982 aggravating factor applied in *Moore* contained identical language to the pre-1989 aggravating factor at issue herein.

meaning of the statutory terms, the legislative history, and prior judicial interpretations of the statutory language."). Thus, regardless of which version of the statute did or should have applied to Petitioner, Tennessee's prior violent felony aggravating circumstance is not void for vagueness under *Johnson*. Petitioner is not entitled to relief on this claim.

II. Additional Claims and Scope of Amendment

The next question we must determine is the permissible scope of amendment once a post-conviction court grants a motion to reopen. Despite directing counsel to "investigate all possible constitutional grounds for relief for the purpose of filing an amended petition" in the order granting the motion to reopen, the post-conviction court noted that the additional claims raised in the amended petition were "beyond the intended scope of the current proceedings"; however, the post-conviction court addressed all of Petitioner's claims on the merits. Petitioner contends that because the post-conviction court granted his motion to reopen, the additional claims raised in his amended petition are "part of the initial post-conviction petition proceedings" and are, therefore, not procedurally defaulted. The State argues that because the post-conviction court only granted Petitioner's motion to reopen with respect to the *Johnson* claim and Petitioner's additional claims do not qualify under any of the exceptions to the one-petition rule under Tennessee Code Annotated section 40-30-102(c), the additional claims are procedurally barred.

In *Coleman v. State*, the Tennessee Supreme Court addressed the procedural limitations of raising claims in a motion to reopen and subsequent amendments, which include "the statute of limitations, the restrictions on re-opening petitions for post-conviction relief once they have been ruled on, and the prohibition against re-litigating issues that have been previously determined." 341 S.W.3d 221, 255 (Tenn. 2011). The Post-Conviction Procedure Act "contemplates the filing of only one (1) petition for post-conviction relief," T.C.A. § 40-30-102(c), which must be done within the one-year statute of limitations. *Id*. at (a). The motion to reopen stands as an exception to the one-petition rule. *See id.* at (c) (citing T.C.A. § 40-30-117). The grounds to reopen post-conviction proceedings correspond with the statutory grounds for tolling the statute of limitations. T.C.A. §§ 40-30-102(b), -117(a). Moreover, a claim for relief must not have been previously determined or it will be summarily dismissed. *See* T.C.A. § 40-30-106(f). Failure to overcome these hurdles results in claims that are procedurally barred. *Coleman*, 341 S.W.3d at 257-58. Thus, a post-conviction court's grant of a motion to reopen does not fully place a petitioner back into the procedural posture of his original post-conviction proceedings. *See id.* (holding that ineffective assistance of counsel claim was procedurally barred even though the post-conviction court granted motion to reopen with respect to intellectual disability claim); *Corey Alan Bennett v. State*, No. E2014-01637-CCA-R3-PC, 2015 WL 12978648, at *4 (Tenn. Crim. App. June 29, 2015) ("The only way in which the petitioner may reach back to his original petition is through a

motion to reopen the original petition, and, even then, only the new issues raised will be addressed."), *perm. app. denied* (Tenn. Nov. 24, 2015).

A. Hurst Claim

Petitioner argues that the United States Supreme Court's decision in *Hurst v. Florida* is a new rule of constitutional law requiring retrospective application, which, if true, would bring this claim under an exception to the one-year statute of limitations and the one-petition rule.[8] *See* T.C.A. §§ 40-30-102(b)(1), -117(a)(1). In *Hurst*, the United States Supreme Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619. Petitioner argues that this rule was violated in his case because "the trial judge made independent factual findings regarding the existence of the prior violent felony aggravating circumstance necessary for the imposition of the death penalty." Petitioner argues that this rule was further violated when the appellate court, after striking the felony murder aggravating circumstance, reweighed the remaining aggravating circumstance against the mitigation evidence in determining that the error was harmless. *See Nichols*, 877 S.W.2d at 737-39. The State responds that *Hurst* did not announce a new rule of constitutional law requiring retrospective application and, thus, consideration of the issue is procedurally barred.

In order to determine whether an appellate court ruling creates a new constitutional rule that must be applied retroactively to cases on collateral review, the Post-Conviction Procedure Act provides the following guidance:

> For purposes of this part, a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds. A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority

[8] We note there was some discussion at the October 4, 2016 hearing regarding the possibility of filing either an amended or a second motion to reopen, presumably with regard to the *Hurst* claim, depending on the post-conviction court's ruling on the pending motion to reopen with respect to the *Johnson* claim. There is no limit on the number of motions to reopen that may be filed, only a limit on the types of claims that may be brought. *See* T.C.A. § 40-30-117. If Petitioner had raised this claim as a separate motion to reopen and it had been denied by the post-conviction court, our jurisdiction to hear the appeal would be dependent on whether Petitioner followed the proper procedure for seeking permission to appeal pursuant to Tennessee Code Annotated section 40-30-117(c). *See Timothy Roberson*, 2007 WL 3286681, at *9. Additionally, our standard of review would be abuse of discretion rather than de novo. *See* T.C.A. § 40-30-117(c); *Fletcher v. State*, 951 S.W.2d 378, 383 (Tenn. 1997).

> to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

T.C.A. § 40-30-122. The United States Supreme Court has stated that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] . . . if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (citations omitted). The Tennessee Supreme Court has applied the *Teague* retroactivity standard to motions to reopen under Tennessee Code Annotated section 40-30-117(a)(1). *See Van Tran*, 66 S.W.3d at 810-11.

In *Hurst*, the United States Supreme Court held that Florida's capital sentencing scheme was unconstitutional under the Sixth Amendment because it "required the judge alone to find the existence of an aggravating circumstance" while the jury merely provided an advisory sentence without making any specific findings. 136 S. Ct. at 624. In reaching this conclusion, the Court relied heavily on its previous decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (holding that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" must be submitted to a jury), and *Ring v. Arizona*, 536 U.S. 584, 604 (2002) (applying *Apprendi* to capital sentencing and the finding of aggravating circumstances). *See Hurst*, 136 S. Ct. at 621-22. Specifically, the Court held that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's [because l]ike Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty." *Id*. Thus, "[i]n light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment." *Id*. at 622.

Hurst is clearly derivative of *Apprendi* and *Ring*; it did not expand upon their holdings or otherwise break new ground. The fact that the *Hurst* Court expressly overruled pre-*Apprendi* cases upholding Florida's capital sentencing scheme does not mean that the decision was not dictated by precedent or was susceptible to reasonable debate; those cases were overruled precisely because they were irreconcilable with *Apprendi*. *See Hurst*, 136 S. Ct. at 623 (overruling *Hildwin v. Florida*, 490 U.S. 638 (1989) and *Spaziano v. Florida*, 468 U.S. 447 (1984)). The United States Supreme Court has previously held that its decision in *Ring* "announced a new procedural rule that *does not apply retroactively* to cases already final under direct review," *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (emphasis added), even though it too overruled a pre-*Apprendi* case. *See Ring*, 536 U.S. at 603 (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)). Moreover, this Court has held that neither *Ring* nor *Apprendi* required retrospective application to cases on collateral review. *See, e.g.*, *Anthony Darrell Hines v. State*, No. M2004-01610-CCA-RM-PD, 2004 WL 1567120, at *37 (Tenn. Crim. App. July 14, 2004), *perm. app. denied* (Tenn. Nov. 29, 2004). Thus, it follows that *Hurst* likewise does not require retrospective application. This Court has consistently held as such in

previous cases denying permission to appeal from the denial of a motion to reopen raising a *Hurst* claim. *See, e.g.*, *Charles Rice v. State*, No. W2017-01719-CCA-R28-PD, Order (Tenn. Crim. App. Nov. 14, 2017), *perm. app. denied* (Tenn. Mar. 15, 2018); *Dennis Wade Suttles v. State*, No. E2017-00840-CCA-R28-PD, Order (Tenn. Crim. App. Sept. 18, 2017), *perm. app. denied* (Tenn. Jan. 18, 2018). Because *Hurst* did not announce a new rule of constitutional law that must be applied retrospectively, this claim is procedurally barred by both the one-year statute of limitations and the one-petition rule. *See* T.C.A. §§ 40-30-102(b), -117(a). Petitioner is not entitled to relief.

B. Prosecutorial Misconduct and Ineffective Assistance of Counsel Claims

Petitioner argues that during closing argument at the capital sentencing hearing, the State committed prosecutorial misconduct by commenting on the possibility of parole and Petitioner's future dangerousness if released, thereby tainting the jury's verdict and rendering his death sentence unconstitutional. He argues that the majority's conclusion on direct appeal that the argument did not "prejudicially affect[] the jury's sentencing determination," *Nichols*, 877 S.W.2d at 733, was wrong based on affidavits from jurors indicating that they voted for death based on the belief that "the State of Tennessee would never actually execute anyone sentenced to death" and that "a death sentence served as a de facto life in prison without the possibility of parole (LWOP) sentence." In a closely related argument, Petitioner alleges that trial counsel were ineffective for failing to object to the improper argument and for "failing to interview jury members about the State's closing argument prior to litigating the motion for a new trial."

Regardless of whether this issue is framed as one of prosecutorial misconduct or ineffective assistance of counsel, it has been previously determined. "A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." T.C.A. § 40-30-106(h). Regardless of whether a petitioner actually does so, "[a] full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence[.]" *Id.*; *see also* Tenn. Sup. Ct. R. 28, § 2(E). Petitioner raised this exact claim of prosecutorial misconduct on direct appeal. *See Nichols*, 877 S.W.2d at 732-33. Additionally, Petitioner raised several claims of ineffective assistance of trial counsel during his original post-conviction proceedings. *See Nichols*, 90 S.W.3d at 587-605. Because ineffective assistance of counsel is a single ground for relief that may not be relitigated by presenting additional factual allegations, *see Cone v. State*, 927 S.W.2d 579, 581-82 (Tenn. Crim. App. 1995), the issue cannot be relitigated through a motion to reopen after having been presented in the original post-conviction proceedings. *See Coleman*, 341 S.W.3d at 257-58. Because Petitioner's claim of prosecutorial misconduct during closing argument, as well as the related claim of ineffective assistance of counsel, cannot overcome the hurdle of having been previously determined, consideration of these issues is procedurally barred. T.C.A. § 40-30-106(f).

Acknowledging the post-conviction court's determination that these issues were previously determined, Petitioner argues that due process concerns and the exceptions to the "law of the case" doctrine overcome the Post-Conviction Procedure Act's bar on previously determined issues. While this Court has previously recognized that due process concerns may "overcome the Act's bar on previously determined issues in some instances," *William G. Allen v. State*, No. M2009-02151-CCA-R3-PC, 2011 WL 1601587, at *7 (Tenn. Crim. App. Apr. 26, 2011), *perm. app. denied* (Tenn. Aug. 25, 2011), Petitioner has pointed us to no case where it has successfully been invoked. *See id.* at *9 (concluding that due process did not require relaxation of the bar against previously determined issues). As interpreted in the context of tolling the statute of limitations, due process requires that petitioners "be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner" before claims may be terminated for failure to comply with procedural requirements. *See Harris v. State*, 301 S.W.3d 141, 145 (Tenn. 2010). However, by their very definition, previously determined issues have been presented at a "full and fair hearing." *See* T.C.A. § 40-30-106(h); Tenn. Sup. Ct. R. 28, § 2(E). Even if due process may be invoked to overcome the bar on previously determined issues, Petitioner has not alleged how he was prevented from presenting these claims at a meaningful time and in a meaningful manner. *Cf. Whitehead v. State*, 402 S.W.3d 615, 631 (Tenn. 2013) (holding that due process tolling of the statute of limitations requires a showing of "some extraordinary circumstance" that prevented timely filing).

Moreover, the law of the case doctrine prevents the reconsideration of claims that have been decided in a prior appeal of the same case. *See State v. Jefferson*, 31 S.W.3d 558, 560-61 (Tenn. 2000). Although it has been cited in some opinions by this Court to support a post-conviction court's refusal to reconsider previously determined issues, the exceptions to the law of the case doctrine have never been applied in a post-conviction context. *William G. Allen*, 2011 WL 1601587, at *8; *see Jefferson*, 31 S.W.3d at 561 (stating that the limited exceptions to the law of the case doctrine include substantially different evidence, a clearly erroneous resulting in manifest injustice, and a change in the controlling law). Even if the exceptions did apply, Petitioner's claim of substantially different evidence is based on inadmissible juror affidavits about the effect of the prosecutor's argument on their deliberation, which would not justify reconsideration of the issue. *See Hutchison v. State*, 118 S.W.3d 720, 740-41 (Tenn. Crim. App. 2003) (citing Tenn. R. Evid. 606(b)) (holding post-conviction court's exclusion of juror affidavit regarding effect missing evidence would have had on verdict was proper).

Finally, even if Petitioner could overcome the procedural hurdle of these claims having been previously determined, they do not fall under one of the exceptions to either the one-year statute of limitations or the one-petition rule. *See* T.C.A. §§ 40-30-102(b), -117(a). Petitioner's claims of prosecutorial misconduct and ineffective assistance of

counsel are procedurally barred under the Post-Conviction Procedure Act. Petitioner is not entitled to relief on either claim.

III. Canceling the Evidentiary Hearing

At the conclusion of the January 31, 2018 hearing, the post-conviction court reset the hearing to March 14, 2018, for either the entry of the proposed settlement agreement or an evidentiary hearing on the merits of Petitioner's claims. However, one week prior to the rescheduled hearing, the post-conviction court entered its order summarily denying post-conviction relief on all of Petitioner's claims. On appeal, Petitioner argues that the post-conviction court violated his right to due process by failing to provide him with notice and an opportunity to be heard. The State responds that Petitioner had multiple opportunities to be heard and that the Post-Conviction Procedure Act compelled summary dismissal of a petition that failed to raise meritorious claims.

The Post-Conviction Procedure Act details the review process that precedes an evidentiary hearing. First, the post-conviction court considers the petition itself to determine whether it asserts a colorable claim for relief. T.C.A. § 40-30-106(f). A colorable claim is "a claim that, if taken as true, in the light most favorable to the petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." Tenn. Sup. Ct. R. 28, § 2(H). If the facts alleged in the petition, taken as true, fail to show that the petitioner is entitled to relief, the petition shall be dismissed. T.C.A. § 40-30-106(f). Additionally, the post-conviction court must determine whether the petition has been timely filed and whether any claims for relief have been waived or previously determined. T.C.A. § 40-30-106(b), (f). If the petition survives this initial review, the post-conviction court may afford an indigent pro se petitioner the opportunity to have counsel appointed and to amend the petition, if necessary. T.C.A. § 40-30-107(b)(1). The State then has an opportunity to file a response. T.C.A. § 40-30-108. In the final stage of the process preceding an evidentiary hearing, the post-conviction court reviews the entire record, including the petition, the State's response, and any other files and records before it. T.C.A. § 40-30-109(a). If, upon reviewing these documents, the post-conviction court determines conclusively that the petitioner is not entitled to relief, the petition shall be dismissed. *Id*. Thus, "the Post-Conviction Procedure Act clearly affords the [post-conviction] court the authority to dismiss a petition without holding an evidentiary hearing, notwithstanding the fact that the petition may have survived earlier dismissal." *Burnett v. State*, 92 S.W.3d 403, 407 (Tenn. 2002); *see also Swanson v. State*, 749 S.W.2d 731, 736 (Tenn. 1988) (holding that when a colorable claim for relief has been presented, a hearing may not be necessary after the petitioner has had the assistance of counsel to amend the petition, by which the court may then fully evaluate the merits of the claim); *Andre Benson v. State*, No. W2016-02346-CCA-R3-PC, 2018 WL 486000, at *3 (Tenn. Crim. App. Jan. 19, 2018) ("A post-conviction court may also

dismiss the petition later in the process but still prior to a hearing . . . on the basis that a petitioner is conclusively not entitled to relief."), *no perm. app. filed*.

In this case, the post-conviction court determined that Petitioner, who was already represented by counsel, raised a colorable claim for relief in his motion to reopen and allowed Petitioner the opportunity to submit an amended petition. At the January 31, 2018 hearing, the post-conviction court indicated its concern that Petitioner had not asserted a meritorious ground for relief and allowed Petitioner the opportunity to submit supplemental briefing. Thereafter, the post-conviction court "reviewed the pleadings of the parties, the record, and applicable law" and determined that Petitioner's claims were "appropriate for disposition without a hearing." As we have already concluded, the post-conviction court did not err in denying relief on any of the claims raised by Petitioner. The *Johnson* claim was the only one that was not procedurally barred; because that claim raised only a question of law and statutory interpretation, there was no need for an evidentiary hearing. *See Sowell v. State*, 724 S.W.2d 374, 378 (Tenn. Crim. App. 1986) (affirming post-conviction court's dismissal of petition without a hearing when "[t]he only valid issue raised was a legal question which has been decided adversely to defendant's contention by the case law of this State"). The post-conviction court, despite its earlier finding that Petitioner had raised a colorable claim, was clearly authorized by the Post-Conviction Procedure Act to dismiss the amended petition without an evidentiary hearing upon conclusively determining that Petitioner was not entitled to relief. *See Burnett*, 92 S.W.3d at 407; *Swanson*, 749 S.W.2d at 736.

IV. Proposed Settlement Agreement

Petitioner argues that the post-conviction court erred by denying the proposed settlement agreement wherein Petitioner's sentence would be modified from death to life imprisonment. According to Petitioner, "post-conviction courts are empowered to settle a case for less than death without determining a likelihood of prevailing on a specific claim." Petitioner asserts that the post-conviction court abused its discretion and acted arbitrarily and without legal authority in concluding that it was "not appropriate to accept such a proposed agreement under the circumstances of this case where there is no claim for post-conviction relief before this Court which should survive this Court's statutorily required preliminary order." Despite the fact that the District Attorney General was prepared to enter into this settlement agreement and concede relief on the *Johnson* and *Hurst* claims in the post-conviction court, the State argues on appeal that these claims are meritless and that "only the Governor has the authority to unwind a criminal judgment absent a judicial finding that the judgment is infirm." We agree with the State's position on appeal that the post-conviction court lacked jurisdiction to entertain the settlement agreement.

Under the Post-Conviction Procedure Act,

> [i]f the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, . . . the court shall vacate and set aside the judgment or order a delayed appeal as provided in this part and shall enter an appropriate order and any supplementary orders that may be necessary and proper.

T.C.A. § 40-30-111(a). Petitioner focuses on the portion of the statute regarding the entry of "an appropriate order" and argues that this language gives the post-conviction court the authority to accept a settlement agreement in a capital case without making any findings as to the merits of the post-conviction claims. Relying heavily upon several trial court orders in other capital post-conviction cases wherein the court accepted the parties' agreement to modify a death sentence, Petitioner argues that there is a consistent practice among trial courts of granting the requested relief without hearing any proof, requiring the State to make any concessions, or making any findings regarding the merits of the underlying post-conviction claims. However, these unappealed trial court orders hold no binding precedential value upon our Court or any other court. *See State v. Candra Ann Frazier*, No. 03C01-9904-CC-00146, 1999 WL 1042322, at *2 (Tenn. Crim. App. Nov. 18, 1999) (noting that "the circuit court's opinion merely constitutes persuasive authority and is not binding, under the theory of stare decisis, upon other judicial circuits").

More importantly, Petitioner's argument overlooks and completely ignores the first clause of the statute: "*If* the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable . . . ." T.C.A. § 40-30-111(a) (emphasis added). Clearly, the post-conviction court's authority to vacate a judgment, order a delayed appeal, or enter any other "appropriate order" is contingent upon the court's finding that the judgment is void or voidable due to an infringement of the petitioner's constitutional rights. *See Wilson v. State*, 724 S.W.2d 766, 768 (Tenn. Crim. App. 1986) (holding that trial court's grant of delayed appeal was inappropriate where there was no finding of constitutional deprivation on the face of the order). Only upon a finding that either the conviction or sentence is constitutionally infirm can the post-conviction court vacate the judgment and place the parties back into their original positions, whereupon they may negotiate an agreement to settle the case without a new trial or sentencing hearing. *See State v. Boyd*, 51 S.W.3d 206, 211-12 (Tenn. Crim. App. 2000). As this Court has noted, "the post-conviction law is not for the purpose of providing sentence modifications" but for remedying constitutional violations. *Leroy Williams v. State*, No. 03C01-9209-CR-00306, 1993 WL 243869, at *3 (Tenn. Crim. App. July 6, 1993) (citing *State v. Carter*, 669 S.W.2d 707 (Tenn. Crim. App. 1984)).

Moreover, the post-conviction court did not abuse its discretion in refusing to accept the District Attorney General's concession of error on Petitioner's post-conviction claims. *See State v. Hester*, 324 S.W.3d 1, 69 (Tenn. 2010) (holding that a court is not

required to accept the State's concession). Indeed, the post-conviction court acted well within its authority by independently analyzing the issues to determine whether the concession reflected an accurate statement of the law. *See Barron v. State Dep't of Human Servs.*, 184 S.W.3d 219, 223 (Tenn. 2006); *see also State v. Shepherd*, 902 S.W.2d 895, 906 (Tenn. 1995) (independently analyzing the defendant's death sentence after finding "no legal basis in this record for outright modification of the sentence to life," despite the State's concession at oral argument). The Post-Conviction Procedure Act requires the post-conviction court to "state the findings of fact and conclusions of law with regard to each ground" in its final order disposing of the post-conviction petition, regardless of whether it is granting or denying relief. T.C.A. § 40-30-111(b); Tenn. Sup. Ct. R. 28, § 9(A); *see State v. Swanson*, 680 S.W.2d 487, 489 (Tenn. Crim. App. 1984) (noting that this is a mandatory requirement designed to facilitate appellate review of the post-conviction proceedings). The post-conviction court did not act arbitrarily or abuse its discretion in following the statutory requirements of the Post-Conviction Procedure Act.

In the absence of a finding of constitutional violation sufficient to grant post-conviction relief, the post-conviction court is without jurisdiction to modify a final judgment. *See Delwin O'Neal v. State*, No. M2009-00507-CCA-R3-PC, 2010 WL 1644244, at *2 (Tenn. Crim. App. Apr. 23, 2010) (affirming trial court's finding that it lacked jurisdiction over a post-conviction petitioner's request for a reduction of sentence after constitutional claims were abandoned), *perm. app. denied* (Tenn. Sept. 3, 2010). Petitioner's reliance on case law addressing a trial court's authority to accept a plea agreement to resolve pending charges pre-trial is misplaced given that Petitioner's convictions have long since become final. "[O]nce the judgment becomes final in the trial court, the court shall have no jurisdiction or authority to change the sentence in any manner[,]" T.C.A. § 40-35-319(b), except under certain limited circumstances "authorized by statute or rule." *State v. Moore*, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991); *see, e.g.*, T.C.A. § 40-35-212; Tenn. R. Crim. P. 35, 36, 36.1; *see also Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999) (noting the availability of habeas corpus and post-conviction to collaterally attack a conviction or sentence that has become final). "[J]urisdiction to modify a final judgment cannot be grounded upon waiver or agreement by the parties." *Moore*, 814 S.W.2d at 383 (citing *State v. Hamlin*, 655 S.W.2d 200 (Tenn. Crim. App. 1983)). "It is well-settled that a judgment beyond the jurisdiction of a court is void." *Boyd*, 51 S.W.3d at 210 (citing *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996)); *see also Lonnie Graves v. State*, No. 03C01-9301-CR-00001, 1993 WL 498422, at *1 (Tenn. Crim. App. Dec. 1, 1993) (citing *State v. Bouchard*, 563 S.W.2d 561, 563 (Tenn. Crim. App. 1977)) (holding that "[t]he purported modification of an order that has 'ripened' into a final judgment is void" despite the agreement of the parties). To hold otherwise would effectively allow the trial court to exercise the pardoning and commutation power, which is vested solely in the Governor under Article 3, section 6 of the Tennessee Constitution. *See Workman v. State*, 22 S.W.3d 807, 808

(Tenn. 2000); *State v. Dalton*, 72 S.W. 456, 457 (Tenn. 1903). Thus, the post-conviction court did not err in refusing to accept the proposed settlement agreement and modify a final judgment when it lacked the statutory authority to do so under the Post-Conviction Procedure Act.

V. Cumulative Error

Finally, Petitioner argues that "all claims of error coalesced into a unitary abridgment of [Petitioner's] constitutional rights." "To warrant assessment under the cumulative error doctrine, there must have been more than one actual error committed in the trial proceedings." *State v. Hester*, 324 S.W.3d 1, 77 (Tenn. 2010). Because Petitioner has not established any error in the post-conviction proceedings, he is not entitled to relief via the cumulative error doctrine.

Conclusion

Based on the foregoing, we affirm the judgment of the post-conviction court.

_____
TIMOTHY L. EASTER, JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

HAROLD WAYNE NICHOLS v. STATE OF TENNESSEE

Criminal Court for Hamilton County
No. 205863

No. E2018-00626-SC-R11-PD

ORDER

Upon consideration of the application for permission to appeal of Harold Wayne Nichols and the record before us, the application is denied.

PER CURIAM

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE
DIVISION I

HAROLD WAYNE NICHOLS,	)	
Petitioner	)	
	)	**No. 205863**
v.	)	**(CAPITAL CASE)**
	)	**(POST-CONVICTION)**
STATE OF TENNESSEE,	)	**(Reopened)**
Respondent.	)	

ORDER

I. Introduction

Petitioner, Harold Wayne Nichols, by and through counsel, filed a motion to reopen June 24, 2016, pursuant to Tenn. Code Ann. § 40-30-117(a)(1), claiming he is entitled to relief based upon new rules of law as announced in Johnson v. United States, 576 U.S. , 135 S. Ct. 2251 (2015). The State filed a response on September 29, 2016, asking for summary denial of Petitioner's motion to reopen. In October 2016, this Court granted Petitioner's motion as stating a colorable claim. On January 13, 2017, Petitioner filed an Amended Petition For Post-Conviction Relief, and the State filed its response on November 2, 2017. The amended petition raises the claim pursuant to Johnson as well as several other claims. Subsequently, the parties notified this Court of a proposed agreed settlement of the case and the matter was set for hearing on January 31, 2018. Prior to the hearing, this Court reviewed all materials in preparation of an order to address all the claims in the January 2017 Amended Petition as required by statute. See Tenn. Code Ann. § 40-30-106.

After reviewing the Amended Petition, the record, the submitted agreement, and the law, this Court had concerns regarding the basis for the agreed order. On January 31, 2018, this Court addressed the parties and sought any additional information concerning the proposed agreement to set aside the sentence of death and enter an agreed upon non-capital sentence. The parties were given an opportunity to submit additional authority and argument following the hearing. This Court has now reviewed the pleadings of the parties, the record, and applicable law, and hereby enters this order pursuant to statute. See Tenn. Code Ann. § 40-30-106.

II. Procedural History

Trial

On May 9, 1990, Petitioner entered a plea of guilty to the felony murder of 21 year old Karen Pulley on September 30, 1988. The jury found the following aggravating circumstances beyond a reasonable doubt in sentencing Petitioner to death for the felony murder:

> (1) The defendant was previously convicted of one (1) or more felonies that involved the use or threat or violence; and
>
> (2) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb.

See Tenn. Code Ann. § 39-2-203(i)(2), and (7) (1982). On appeal, the Tennessee Supreme Court affirmed both his convictions and sentences after determining the erroneous application of the felony murder aggravating circumstance was harmless error. State v. Nichols, 877 S.W.2d 722 (Tenn. 1994), cert. denied, 513 U.S.1114 (1995).

Post-Conviction

Petitioner subsequently filed a timely petition for post-conviction relief which was denied by the trial court following a full hearing. The denial of post-conviction relief was affirmed on appeal. Nichols v. State, 90 S.W.3d 576 (Tenn. 2002); see also, Nichols v. State, 2001 WL 55747 (Tenn. Crim. App. Jan. 19, 2001).

Federal Habeas Corpus Proceedings

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 which was denied by the federal district court and then affirmed on appeal. Nichols v. Heidle, 725 F.3d 516 (6th Cir. 2013), cert. denied, 135 U.S. 704 (2014); see also, Nichols v. Bell, 440 F. Supp. 2d 730 (E.D. Tenn. 2006) and Nichols v. Bell, 440 F. Supp. 2d 847 (E.D. Tenn. 2006).

III. Post-Conviction Standards

Relief under the Post-Conviction Procedure Act is available when a petitioner's "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103 (2014). "The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Tenn. Code Ann. § 40-30-106(d) (2014). The court preliminarily reviews the petition to determine if any issues raised should be dismissed as either previously determined and/or waived. Tenn. Code Ann. § 40-30-106(f)-(h)(2014). The procedural bars of previous determination and waiver are statutorily defined:

> (g) A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in

> which the ground could have been presented unless:
>
> (1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or
>
> (2) The failure to present the ground was the result of state action in violation of the federal or state constitution.
>
> (h) A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

Tenn. Code Ann. § 40-30-106(g) and (h); see Tenn. S. Ct. R. 28, Section 2(D) and (E). In a post-conviction proceeding, the petitioner has the burden of presenting his case and establishing the factual grounds alleged by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f) and Tenn. S. Ct. R. 28, Section 8(D)(1); see also Davidson v. State, 453 S.W.3d 386, 392 (Tenn. 2014).

IV. Analysis of *Johnson* Claim

Petitioner argues in his Motion to Reopen and his Amended Petition for Post-Conviction Relief he is entitled to relief pursuant to what he claims is a new rule announced in Johnson v. United States, 135 S. Ct. 2551 (2015). Specifically, Petitioner claims the language of the prior violent felony aggravating circumstance in Tennessee's capital sentencing statute, Tenn. Code Ann. § 39-2-203(i)(2)(1982), is unconstitutionally vague under Johnson.

Initially, when this Court ruled Petitioner had stated a "colorable claim" as to Johnson, there was no authority in Tennessee which addressed this issue. Since then, the Tennessee Court of Criminal Appeals has decided Donnie Johnson v. State, No. W2017-00848-CCA-R28—PD (Tenn. Crim. App. September 11, 2017), perm. app. denied, (Tenn. January 19, 2018). In Johnson, the court held

> In [*Johnson v. United States*], the Supreme Court held that the "residual clause" contained in the definition of a violent felony of the federal Armed Career Criminal Act of 1984

(ACCA) is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2557. The ACCA increases the punishment of a defendant convicted of being a felon in possession of a firearm if he or she has three or more previous convictions for a violent felony. 18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" as

> "any crime punishable by imprisonment for a term exceeding one year . . . that – (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."§924(e)(2)(B) (emphasis added).

The "otherwise involves conduct that presents a serious potential risk of physical injury to another" language is known as the ACCA's "residual clause." *Johnson*, 135 S. Ct. at 2556. The court observed that, "unlike the part of the definition of a violent felony that asks whether the crime 'has as an element the use … of physical force,' the residual clause asks whether the crime 'involves conduct' that presents too much risk of physical injury." *Id.* at 2557. (emphasis in original). In making its ruling, the Supreme Court reasoned that the residual clause is unconstitutionally vague because it "leaves grave uncertainty about how to estimate the risk posed by a crime" and it "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2557-58. In other words, "[d]eciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Id.* at 2557. That "task goes beyond deciding whether creation of risk is an element of the crime." *Id.* (emphasis added). As such, the majority declined the dissent's suggestion that looking at the particular facts underlying the prior violent felony could save the residual clause from vagueness. *Id.* at 2561-62.

The Petitioner alleges that the *Johnson* decision created a new constitutional right that would provide an avenue of relief pursuant to Tennessee Code Annotated section 40-30-117(a)(1). We must first look at *Johnson* to determine if a new constitutional right was created. Tennessee Code Annotated section 40-30-122 addresses interpretation of a new rule of constitutional law stating in part:

> "For purposes of this part, a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds."

Further, the courts have determined that a "case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] ... if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 109 S.Ct. 1060, 1070 (1989) (citations omitted); *see also Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001). On its face, the *Johnson* decision does not appear to create a new constitutional right but only applies an existing constitutional test to a statute. When referencing *Johnson*, the United States Supreme Court described the reasoning for the decision as follows:

> "Last Term, this Court decided *Johnson v. United States*, 135 S.Ct. 2551 (2015). *Johnson* considered the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii). The Court held that provision void for vagueness."

Welch v. United States, 136 S. Ct. 1257, 1260–61 (2016) (emphasis added). The court further stated:

> "Less than three weeks later, this Court issued its decision in *Johnson* holding, as already noted, that the residual clause is void for vagueness."

Id. (emphasis added). The ruling of the *Welch* court reinforces the idea that no new constitutional right was created by the *Johnson* opinion. The "void for vagueness" doctrine was not a new creation of the *Johnson* court in that the due process provisions of the 5th and 14th amendments have been utilized many times prior to *Johnson* to determine that a statute is unconstitutionally vague. *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999) (speculation as to meaning of statute not allowed); *Maynard v. Cartwright*, 108 S.Ct. 1853 (1988) (aggravating circumstance language held as unconstitutionally vague); *Kolender v. Lawson*, 103 S. Ct. 1855 (1983) (statute held to be unconstitutionally vague by requiring "credible and reliable" identification); *Colautti v. Franklin*, 99 S. Ct. 675 (1979) (statute vague due to required interpretation of "is viable" and "may be viable"); *Smith v. Goguen*, 94 S. Ct. 1242 (1974) (due process is denied where inherently vague statutory language permits selective law enforcement); *Grayned v. City of Rockford*, 92 S. Ct. 2294 (1972) (enactment is void for vagueness if its prohibitions are not clearly defined). As such, we cannot find that the United States Supreme Court established a new constitutional right through its ruling in *Johnson*.

Even if a new retroactively applicable constitutional right was created by the *Johnson* decision, such ruling would not offer relief to the Petitioner. The argument of the Petitioner is that one of the aggravating factors found by the jury to sentence the Petitioner to death is vague and under the ruling espoused by the *Johnson* court would be unconstitutional. The statute referenced by the Petitioner has been amended since the time of his trial and conviction but at the time of trial stated: "The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person." Tenn. Code Ann. §39-13-204(i)(2)(1988). A comparison of the two clauses the ACCA and the pre-1989 (i)(2) provision reveals that application of the *Johnson* court ruling would not result in the finding that the pre-1989 (i)(2) provision is unconstitutionally vague.

The "residual clause" of the ACCA defines a violent felony as a felony that "otherwise involves conduct that presents a serious risk of physical injury to another" while the pre-1989 (i)(2) provision required that the felony "involve the use or threat of violence to the person." The vagueness of the ACCA provision arose out of the multitude of potential means for physical injury to arise from a crime. As set out in the *Johnson* opinion, the phrasing of the ACCA required the trier of fact to determine any number of outcomes of a crime that may result in injury. *Id.* at 2557-2558. The determination was not a fact based determination upon the actual crime for which the defendant was being tried but a determination that in the ordinary course of the listed crime could the risk of physical injury arise. *Id.* The reason for this interpretation of the ACCA was the prior ruling by the Supreme Court in *Taylor v. United States* requiring the court to use the "categorical approach" in applying the ACCA. *Id.* (*citing Taylor v. United States*, 110 S. Ct. 2143 (1990)). Under this "categorical approach", the court must assess "whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" *Id.* (*citing Begay v. United States*, 128 S. Ct. 1581 (2008)). With these constraints, the ACCA, as written, required the trier of fact to imagine some far reaching machination to determine any number of possible outcomes not specifically related to the underlying felony.

> The pre-1989 (i)(2) provision differs from the ACCA in its specificity that the prior felonies involve the use or threat of violence to a person and the governance of how the prior crime is to be interpreted. Unlike the ACCA, which had been limited in interpretation by *Begay* and *Taylor*, there was no such limitation requiring the "ordinary case" interpretation of the prior felony portion of the (i)(2) aggravator at the time of the trial of the Petitioner. The Tennessee Supreme Court had previously taken up the issue of how to determine if the prior felony involved violence to a person pursuant to the (i)(2) provision as then written. *See State v. Moore*, 614 S.W.2d 348 (Tenn. 1981). The instruction given from the Tennessee Supreme Court in *Moore* distinguishes itself from the stated unconstitutional weakness in *Johnson* in that the *Moore* court required a determination of the existence of violence to a person to be made on the facts of the actual crime charged. *Id.* at 351. *Moore* centered its determination around prior crimes of arson and burglary, both of which the court found could be crimes that did or did not involve violence to the person depending upon the facts of the specific case. *Id.* With *Moore* as guidance for the application of the "use or threat of violence" language of the pre-1989 (i)(2) provision, the vagueness shortcoming of the ACCA as found in *Johnson* would not apply. *Moore* did not limit determination of the pre-1989 (i)(2) provision to an "ordinary case" of the prior felony but required the court to look at the specific acts of the prior felony to determine if the use or threat of violence to a person was present. As such, the ruling of the Supreme Court in *Johnson* would have no effect upon the pre-1989 version of Tennessee Code Annotated section 39-13-204(i)(2) and the post-conviction court did not abuse its discretion in denying the Petitioner's motion.

In Andre Benson v. State, 2018 WL 486000 (Tenn. Crim. App. January 19, 2018), the Court discussed the post-conviction process and stated as follows:

> A colorable claim is a claim that, "if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." *Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004)(quoting Tenn. Sup. Ct. R. 28, § 2(H)). A post-conviction court may also dismiss the petition later in the process but still prior to a hearing, after reviewing the petition, the State's response, and the records and files associated with the petition, on the basis that a petitioner is conclusively not entitled to relief. T.C.A. § 40-30-109(a).

Here, this Court initially granted the motion to reopen to determine if Johnson was applicable to the Tennessee capital sentencing statute. As previously stated, the appellate courts have now addressed this issue and determined Petitioner is not entitled to relief on this issue. Accordingly, this Court finds this issue is appropriate for disposition without a hearing.[1]

[1] In his motion to approve the settlement agreement, Petitioner asserts "[b]y finding that Petitioner demonstrated a colorable claim regarding the application of Johnson to his prior violent felony conviction aggravator, this Court recognized that the Johnson claim has merit." This Court does not agree. If true, this would mean every colorable claim in a petition would entitle a petitioner to relief without a hearing, and this is certainly not the law. Otherwise, no hearings would be necessary because relief would be established merely upon the pleadings.

V. Analysis of Non-*Johnson* Claims Raised In January 2017 Petition

In his January 2017 Amended Petition, Petitioner raised several claims not related to his Johnson v. United States claim.

Initially, this Court finds the additional claims raised in Claims II, III, IV, and V were not covered by the order granting the motion to reopen. Although the order may have included general language, it was this Court's intention the petitioner was only permitted to reopen his proceedings as it related to the Johnson claim. Therefore, Claims II-V are beyond the intended scope of the current proceedings.

Due to the general language of the October 2016 order, however, this Court will conduct a standard preliminary review pursuant to Tenn. Code Ann. § 40-30-106 as to each of these non-Johnson claims.

Claim II

In Claim II, Petitioner asserts Hurst v. Florida, 136 S. Ct. 616 (Tenn. 2016), announced a new "constitutional right which was not recognized as existing at the time of trial" and "retroactive application of that right is required." In Hurst v. Florida, the United States Supreme Court held Florida's capital sentencing scheme violated Ring v. Arizona, 536 U.S. 584 (2002). Under the Florida law addressed in Hurst, a jury rendered an advisory verdict on capital sentencing, but the trial judge made the ultimate factual determinations necessary to sentence a defendant to death. Hurst, 136 S. Ct. at 621-22. The Hurst Court held this procedure was invalid because it did "not require the jury to make the critical findings necessary to impose the death penalty" in violation of the Sixth Amendment. Id. at 622.

Here, Petitioner claims (1) the trial court rather than the jury made the critical finding Petitioner was previously convicted of one or more felonies, other than the charged offense, which

involved the use of violence to the person which was required for the imposition of the death penalty, and (2) the appellate court rendered findings required for the imposition of the death penalty when it struck down one of the two aggravating circumstances and then it, rather than a jury, reweighed the evidence to determine any error in the application of the inapplicable sentencing factor was harmless.

In Hurst, the Court held as follows:

> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. ——, ——, 133 S. Ct. 2151, 2156, 186 L.Ed.2d 314 (2013). In *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), this Court held that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury. In the years since *Apprendi*, we have applied its rule to instances involving plea bargains, *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), sentencing guidelines, *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005), criminal fines, *Southern Union Co. v. United States*, 567 U.S. ——, 132 S. Ct. 2344, 183 L.Ed.2d 318 (2012), mandatory minimums, *Alleyne*, 570 U.S., at ——, 133 S. Ct., at 2166 and, in *Ring*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556, capital punishment.
>
> In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death. An Arizona jury had convicted Timothy Ring of felony murder. 536 U.S., at 591, 122 S. Ct. 2428. Under state law, "Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made." *Id.*, at 592, 122 S. Ct. 2428. Specifically, a judge could sentence Ring to death only after independently finding at least one aggravating circumstance. *Id.*, at 592–593, 122 S. Ct. 2428. Ring's judge followed this procedure, found an aggravating circumstance, and sentenced Ring to death.
>
> The Court had little difficulty concluding that "'the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'" *Id.*, at 604, 122 S. Ct. 2428 (quoting *Apprendi*, 530 U.S., at 494, 120 S. Ct. 2348; alterations omitted). Had Ring's judge not engaged in any factfinding, Ring would have received a life sentence. *Ring*, 536 U.S., at 597, 122 S. Ct. 2428. Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment.
>
> The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating

> circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona,* 497 U.S. 639, 648, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990); accord, *State v. Steele,* 921 So.2d 538, 546 (Fla.2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").
>
> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring,* we hold that Hurst's sentence violates the Sixth Amendment.

136 S. Ct. at 621-22.

As stated previously, a jury convicted Petitioner of first degree murder and sentenced him to death based upon its finding of two aggravating circumstances proven beyond a reasonable doubt. Subsequently, the appellate court struck down the (i)(7) aggravating factor and performed a harmless error analysis of the record to determine if the application of the inapplicable factor was or was not a harmless error as it related to sentencing.

At the hearing on January 31, 2018, the parties submitted Petitioner's claim as it related to Hurst entitled him to relief. This Court, however, finds the law does not support the parties' position.

Initially, this must consider whether Hurst announced a new rule of constitutional law which should be applied retroactively.

> A "case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] ... if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301 (1989) (citations omitted); *see also Van Tran v. State*, 66 S.W.3d 790, 810–11 (Tenn.2001). Courts addressing whether *Apprendi* sets forth a new rule have held that, in *Apprendi*, "the Supreme Court announced a new constitutional rule of criminal procedure by holding that 'other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt.' " *In re Clemmons*, 259 F.3d 489, 491 (6th Cir.2001) (quoting *Apprendi*, 530 U.S. at 491); *see also United States v. Sanders*, 247 F.3d 139, 147 (4th Cir.2001) (holding that "*Apprendi* is certainly a new rule of criminal procedure"); *United States v. Moss*, 252 F.3d 993, 997 (8th Cir.2001)(holding that "*Apprendi* is obviously a 'new rule' "). Because *Apprendi* sets forth a new constitutional rule of criminal procedure, the fundamental question becomes whether *Apprendi* applies retroactively to the petitioner's case.
>
> New rules of constitutional criminal procedure are generally not applied retroactively on collateral review. *Teague*, 489 U.S. at 310. However, this general rule is subject to two exceptions.

> *Id* . "First, a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' " *Id.* at 307. Second, a new rule should be applied retroactively if it is a "watershed rule of criminal procedure, ... which implicates both the accuracy and fundamental fairness of criminal proceedings." *Moss*, 252 F.3d at 998 (citing *Teague*, 489 U.S. at 312). Clearly, the first exception is not applicable to the petitioner's claim, because the rule set forth in *Apprendi* "did not decriminalize any class of conduct or prohibit a certain category of punishment for a class of defendants." *McCoy v. United States*, 266 F.3d 1245, 1256 (11th Cir.2001). Furthermore, the great weight of authority holds that *Apprendi* is not the type of watershed rule of criminal procedure that qualifies for retroactive application under the second exception. *Dukes v. United States*, 255 F.3d 912, 913 (8th Cir.2001) (holding that "*Apprendi* presents a new rule of constitutional law that is not of 'watershed' magnitude and, consequently, petitioners may not raise *Apprendi* claims on collateral review"); *Sanders*, 247 F.3d at 151 (holding that "the new rule announced in *Apprendi* does not rise to the level of a watershed rule of criminal procedure which 'alters our understanding of the bedrock elements essential to the fairness of a proceeding" '); *McCoy*, 266 F.3d at 1257 (agreeing with the other circuits that "*Apprendi* is not sufficiently fundamental to fall within *Teague's* second exception"). Accordingly, we conclude that the new constitutional rule of criminal procedure announced in *Apprendi* does not apply retroactively on collateral review.

William Steve Greenup v. State, No. W2001–01764–CCA–R3–PC, 2002 WL 31246136 (Tenn.Crim.App., at Jackson, Oct. 2, 2002).

In Dennis Wade Suttles v. State, No. E2017-00840-CCA-R28-PD (Tenn. Crim. App. Order, September 18, 2017), perm. app. denied, (Tenn. January 18, 2018), the Tennessee Court of Criminal Appeals addressed claims related to Hurst, which included the first issue raised here by Petitioner. In Suttles, the court held the decision in Hurst did not announce a new constitutional rule requiring retrospective application.

In Cauthern v. State, 145 S.W.3d 571 (Tenn. 2004), a very similar argument to the issue raised by Petitioner related to the appellate court's decision was raised and also found not to require retroactive application of Apprendi or Ring. In Cauthern, the petitioner collaterally attacked the harmless error analysis undertaken on his direct appeal from his 1995 resentencing trial. The Tennessee Supreme Court had found the instruction given on one of the aggravating circumstances in 1995 to have been the wrong instruction. The court, however, had gone further to find the error was harmless. On collateral review, petitioner Cauthern argued the harmless error finding improperly substituted the court's judgment for one of a correctly-charged jury and thus

violated Ring. The Tennessee Supreme Court, however, found neither Apprendi nor Ring provided the petitioner any relief on his post-conviction claims.

This Court has carefully considered Petitioner's claims related to Hurst and the applicable law. This Hurst Court simply applied its previous holdings in Apprendi and Ring to Florida's capital-sentencing scheme. Thus, the Court did not announce a new rule of constitutional law, nor did it expand its holdings in Apprendi and Ring.

Although this Court does not find Hurst presents a claim under Tennessee law which should be applied retroactively on collateral review, this Court will address the substance of the claim as well.

In Tennessee at the time of Petitioner's offense, a capital trial was bifurcated into two phases. See Tenn. Code Ann. § 39-2-203. In the first phase of the trial, often referred to as the guilt phase, the jury determined whether the defendant was guilty of first degree murder as charged.[2] If the jury found the defendant guilty of first degree murder, and the State had filed a notice of death eligible aggravating factors, the second phase of the trial, referred to as the penalty phase or sentencing phase, began. Tenn. Code Ann. § 39-2-203(a). At the penalty phase, the parties could present to the jury any evidence relevant to sentencing, particularly relating to the statutory aggravating circumstances[3] contained in the State's notice, and any mitigating circumstances as listed in §39-2-203(j), or as raised by the evidence during either phase of the trial. Tenn. Code Ann. § 39-2-203(c).

Pursuant to statute, the jury was required to find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt before it could consider a sentence of death. If no aggravating factor was found, the jury was instructed to return a sentence of life imprisonment. Tenn. Code Ann. § 39-2-203(f). If the jury unanimously found one or more

[2] First degree murder may be either premeditated first degree murder or first degree felony murder.

[3] Tenn. Code Ann. §39-2-203(i).

aggravating circumstances existed, but found they did not outweigh the mitigating circumstances, the jury was required to sentence the defendant to a sentence of life imprisonment. Id. If the jury unanimously found one or more aggravating circumstances existed and found they outweighed any mitigating circumstances, the jury was required to return a sentence of death. Tenn. Code Ann. § 39-2-203(g).

Therefore, in Tennessee a capital defendant such as Petitioner became eligible for the death penalty upon the finding of at least one of the aggravating circumstances found in §39-2-203(i) and noticed by the State. There is a distinction between when a person is "eligible" for the death penalty and whether or not the death penalty is "appropriate" in a particular case for a capital defendant who *is* eligible for the death penalty.

Ring and Hurst both require any factual finding which exposes a defendant to or makes a defendant eligible for a sentence of death must be proven to a jury beyond a reasonable doubt. However, once the jury unanimously finds the fact or facts which expose a defendant to imposition of the death penalty, i.e. an aggravating circumstance, Ring and Hurst have no further application. Under Apprendi, the trial court may "exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing ... sentence within statutory limits in the individual case." Apprendi, 530 U.S. at 481.

Here, Petitioner first argues when the trial court instructed the jury certain offenses constituted offenses involving the use or threat of violence to the person it impermissibly constituted a "finding" of the (i)(2) aggravating circumstance and, therefore, rendered his death sentence unconstitutional.

The Tennessee Supreme Court examined the same issue in State v. Cole, 155 S.W.3d 885 (Tenn. 2005), pre-Hurst. The appellate court examined the relevant case law as follows:

> The defendant's death sentence is based upon aggravating circumstance (i)(2), which applies when "[t]he 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." Tenn. Code Ann. § 39–13–204(i)(2) (1999)....

The defendant maintains that by instructing the jury that the statutory elements of these felonies involve the use of violence to the person, the trial court violated the Fifth and Sixth Amendments to the United States Constitution. Relying upon *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000) and *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002), the defendant maintains that when the prosecution is relying upon the (i)(2) aggravating circumstance to support imposition of the death penalty, the United States Constitution mandates that the jury, not the judge, determine whether "the statutory elements" of the prior felony conviction "involve the use of violence to the person." The defendant concedes that the trial court followed the procedure enunciated by this Court in *State v. Sims,* 45 S.W.3d 1 (Tenn. 2001), and applied in more recent decisions of this Court. Nonetheless, the defendant maintains that the *Sims* procedure is not constitutionally sound in light of the United States Supreme Court decisions in *Apprendi* and *Ring.* The State, in contrast, maintains that the trial court's jury instruction and the procedure enunciated by this Court in *Sims* do not violate *Apprendi* and *Ring.*

* * *

We begin our analysis with *Sims,* in which this Court considered how trial courts should proceed when the prior felony convictions upon which the prosecution relies to establish the (i)(2) aggravating circumstance include alternative statutory elements that do not necessarily involve the use of violence to the person. In *Sims,* after carefully considering the language of the aggravating circumstance as well as the procedure utilized by the trial court, this Court held that in determining whether the statutory elements of a prior felony conviction involve the use of violence against the person, "the trial judge must necessarily examine the facts underlying the prior felony...." 45 S.W.3d at 11–12. We explained that

> [t]o hold otherwise would yield an absurd result, the particular facts of this case being an ideal example. A plain reading of the statute indicates that the legislature intended to allow juries to consider a defendant's prior violent crimes in reaching a decision during the sentencing phase of a first degree murder trial. The underlying facts of Sims's prior felony convictions involve his shooting two people sitting in a car. To hold that these prior convictions do not involve use of violence against a person would be an absurd result contrary to the objectives of the criminal code. We cannot adhere to a result so clearly opposing legislative intent.

Id. at 12.

This Court has since reaffirmed the procedure developed in *Sims.* For example, in *State v. McKinney,* 74 S.W.3d 291, 305 (Tenn. 2002), we pointed out that, the "critical issue" for purposes of the (i)(2) aggravating circumstance is "whether the statutory elements of [the prior felony] involve the use of violence to the person *by definition.*" (Emphasis added.) We reiterated that *Sims* provided the "appropriate analytical framework" for resolving this important issue. *Id.* at 306. In rejecting the defendant's challenge to the sufficiency of the evidence and in concluding that McKinney's prior conviction for aggravated robbery had been premised upon statutory elements that involve the use of violence to the person, this Court stated:

> Here, the defendant testified during sentencing that he did not participate in the aggravated robbery that served as the basis of the aggravating circumstance. The defendant admitted, however, that his co-defendant was armed with a weapon and that he waited in the getaway car while the co-defendant carried out the robbery. Moreover, as the State observes, the defendant pled guilty to an indictment alleging that he and his co-defendant "violently by the use of a deadly weapon" robbed the victim. This Court has frequently held that the entry of an informed and counseled guilty plea constitutes an admission of all of the facts and elements necessary to sustain a conviction and a waiver of any non-jurisdictional defects or constitutional irregularities.

Id. at 306 (citations omitted). The following summary of the *Sims* procedure from *State v. Powers,* 101 S.W.3d 383, 400–01 (Tenn. 2003), also provides guidance on the issue presented in this appeal:

> In *Sims,* the State introduced evidence of two prior convictions for aggravated assault to establish the prior violent felony circumstance. We recognized that the statutory elements of aggravated assault do not necessarily involve the use of violence. Accordingly, we approved a procedure in which the trial judge, outside the presence of the jury, *considers the underlying facts of the prior assaults to determine whether the elements of those offenses involved the use of violence to the person. If the trial court determines that the statutory elements of the prior offense involved the use of violence, the State may introduce evidence that the defendant had previously been convicted of the prior offenses. The trial court then would instruct the jury that those convictions involved the use of violence to the person.*

Id. at 400–01 (emphasis added).

Having summarized *Sims* and its progeny, we turn to *Apprendi* and *Ring.* In *Apprendi,* the defendant had been convicted of second-degree unlawful possession of a firearm, an offense carrying a maximum penalty of ten years imprisonment. 530 U.S. at 469–70, 120 S. Ct. 2348. On the prosecutor's motion, the sentencing judge found by a preponderance of the evidence that the crime had been committed "'with a purpose to intimidate ... because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Id.* at 468–69, 120 S. Ct. 2348 (quoting N.J. Stat. Ann. § 2C:44–3(e) (West Supp. 1999–2000)). This judicial finding of racial motivation had the effect of doubling from ten years to twenty years the maximum sentence to which Apprendi was exposed. *Id.* at 469, 120 S. Ct. 2348. The judge sentenced Apprendi to twelve years in prison, two years more than the maximum that would have applied but for the judicial finding of racial motivation. Apprendi challenged the constitutionality of his sentence, arguing that under the Due Process Clause of the Fourteenth Amendment and the notice and jury trial guarantees of the Sixth Amendment, he was entitled to have a jury determine on the basis of proof beyond a reasonable doubt whether his crime had been racially motivated. *Id.* at 471–72, 120 S. Ct. 2348.

The United States Supreme Court concluded that Apprendi's constitutional

challenge had merit. After commenting that its answer to the question presented had been "foreshadowed by [its] opinion in *Jones v. United States,* 526 U.S. 227, 119 S. Ct. 1215, 143 L.Ed.2d 311 (1999)," the Court in *Apprendi* held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S. Ct. 2348. Applying this rule, the Court struck down the challenged New Jersey procedure as "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." *Id.* at 497, 120 S. Ct. 2348.

Two years later, in *Ring,* the Court applied *Apprendi* to the Arizona capital sentencing statutes. 536 U.S. at 588–89, 122 S. Ct. 2428. The narrow question presented in *Ring* was "whether [an] aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." *Id.* at 597. The Court emphasized the limited nature of the issue presented, noting that of the thirty-eight states with capital punishment, twenty-nine, including Tennessee, "commit sentencing decisions to juries." *Id.* at 608 n. 6, 122 S. Ct. 2428. Overruling its prior decision in *Walton v. Arizona,* 497 U.S. 639, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990), the Court in *Ring* held that, because Arizona's enumerated aggravating factors operate as "'the functional equivalent of [ ] element[s] of a greater offense,' " the Sixth Amendment requires that they be found by a jury, rather than by a judge. *Id.* at 609, 122 S. Ct. 2428 (quoting *Apprendi,* 530 U.S. at 494 n. 19, 120 S. Ct. 2348); *see Holton,* 126 S.W.3d at 863 (discussing the decision in *Ring*). Explaining its holding, the Court stated:

> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the *factfinding* necessary to increase a defendant's sentence by two years, but not the *factfinding* necessary to put him to death. We hold that the Sixth Amendment applies to both.

536 U.S. at 609, 122 S. Ct. 2428 (emphasis added). Thus, the holdings of *Apprendi* and *Ring* were succinctly described by the following language from *Ring:* "If a State makes an increase in a defendant's authorized punishment contingent on the *finding of a fact,* that *fact*—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring,* 536 U.S. at 602, 122 S. Ct. 2428 (emphasis added).

More recently, in *Blakely v. Washington,* 542 U.S. 296, [301], 124 S. Ct. 2531, 2536, 159 L.Ed.2d 403 (2004), the United States Supreme Court "appl[ied] the rule [ ] expressed in *Apprendi.*" The petitioner in *Blakely* had been:

> sentenced to more than three years above the 53–month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State [of Washington] nevertheless contends that there was no *Apprendi* violation because the relevant "statutory maximum" is not 53 months, but the 10–year maximum for class B felonies in [Wash. Rev.Code Ann.] § 9A.20.021(1)(b). It observes that no exceptional sentence may exceed that limit. *See* [Wash. Rev. Code Ann.] §

> 9.94A.420. Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See Ring, supra,* at 602, 122 S. Ct. 2428 (" 'the maximum he would receive if punished according to the facts reflected in the jury verdict alone' " (quoting *Apprendi, supra,* at 483, 120 S. Ct. 2348)); *Harris v. United States,* 536 U.S. 545, 563, 122 S. Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); *cf. Apprendi, supra,* at 488, 120 S. Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [1 J.] Bishop, [Criminal Procedure] § 87, at 55, and the judge exceeds his proper authority.
>
> *Id.* at [303-04], 124 S. Ct. at 2537.
>
> Clearly, *Apprendi* and its progeny preclude judges from finding "additional facts," *id.,* that increase a defendant's sentence beyond the "statutory maximum," *id.,* which is defined as the maximum sentence a judge may impose "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* Equally as clear is that *Apprendi* and its progeny do not limit a judge's authority to make *legal* determinations that precede a jury's fact-finding and imposition of sentence.

Cole, 155 S.W.3d at 899-903. Applying this case law to Mr. Cole's stated issue, the Court concluded,

> The *Sims* procedure involves a legal determination, and as such this procedure does not transgress the dictates of *Apprendi* and its progeny. The (i)(2) aggravating circumstance requires only that the *statutory elements* of the prior felony involve the use of violence to the person. The *Sims* procedure authorizes trial judges merely to examine the facts, record, and evidence *underlying* the prior conviction to ascertain which "statutory elements" served as the basis of the prior felony conviction. This is a legal determination that neither requires nor allows trial judges to make factual findings as to whether the prior conviction involved violence. This legal determination is analogous to the preliminary questions trial judges often are called upon to decide when determining the admissibility of evidence. *See* Tenn. R. Evid. 104.
>
> Furthermore, by making this legal determination, the trial court neither inflicts punishment nor usurps or infringes upon the jury's role as fact-finder. Once the trial court determines as a matter of law that the statutory elements of the prior convictions involve the use of violence, the jury must then determine as matters of fact whether the prosecution has proven the (i)(2) aggravating circumstance beyond a reasonable doubt and whether aggravating circumstances outweigh

> mitigating circumstances beyond a reasonable doubt. The jury alone must decide these factual questions, and these are the factual questions that determine whether the maximum sentence of death will be imposed. Additionally, the facts underlying prior convictions are themselves facts that either were found by a jury's verdict of guilt or facts that were admitted by a plea of guilty. Permitting the trial judge to examine such facts merely to determine which of the *statutory elements* formed the basis of the prior conviction does not violate *Apprendi* and its progeny.

Id. at 904.

After carefully considering the record, the issue raised and the applicable law, this Court finds the trial court's determination the prior offenses which the State relied upon in Mr. Nichols's case involved the use or threat of violence to the person was a legal determination which did not violate Petitioner's rights under the Sixth Amendment or Hurst. Therefore, Petitioner is not entitled to the relief sought on this issue.

Petitioner's alternative position here asserts a capital defendant is not eligible for the death penalty in Tennessee unless the jury finds the aggravating circumstances outweigh the mitigating circumstances. This assertion is simply incorrect. A Tennessee jury need only unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt to render a capital defendant *eligible* for the death penalty. Whether the aggravating circumstance or circumstances outweigh the mitigating circumstances is not a finding of fact necessary to make a capital defendant eligible for the death penalty. After a defendant has already been found to be death penalty eligible, any subsequent weighing processes for sentencing purposes do not implicate Apprendi and Ring; weighing is *not* a fact-finding process subject to the Sixth Amendment, because "[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination." State v. Belton, 74 N.E. 3d 319 (Ohio April 20, 2016)(quoting and citing State v. Gales, 265 Neb. 598, 628, 658 N.W.2d 604 (2003); see, e.g., State v. Fry, 138 N.M. 700, 718, 126 P.3d 516 (2005); *Ortiz v. State,* 869 A.2d 285, 303–305 (Del.2005); Ritchie v. State, 809 N.E.2d 258, 268 (Ind.2004)). "Instead, the weighing process amounts to "a complex moral judgment" about what penalty to impose upon a defendant who is

already death-penalty eligible." Belton, (quoting United States v. Runyon, 707 F.3d 475, 515–516 (4th Cir.2013) (citing cases from other federal appeals courts).

In addition, the United States Supreme Court has recently denied certiorari in two cases which raised issues pursuant to Hurst.

In Burnside v. State, 352 P.3d 627 (Nev. June 25, 2015), rehearing denied, (Nev. Oct. 22, 2015), the Nevada Supreme Court invalidated one of two statutory aggravating circumstances, reweighed the evidence, found the remaining aggravator outweighed the mitigation, and affirmed the sentence of death. Subsequently, Burnside cited Ring and Hurst in his petition for a writ of certiorari to the United States Supreme Court. Burnside attempted to present the same argument presented here concerning whether a reweighing of evidence on appeal after invalidating one of the aggravating circumstances was a violation of the Sixth Amendment. The United States Supreme Court, however, denied certiorari on March 21, 2016. Burnside v. Nevada, 136 S. Ct. 1466 (2016).

In Davila v. Davis, 650 Fed. Appx. 860 (5th Cir. 2016), petitioner was denied a certificate of appealability in federal habeas proceedings on the issue of whether the Sixth Amendment and Hurst placed a burden on the State to prove a lack of mitigating evidence beyond a reasonable doubt. The jury did make the finding under the statute; however, it was not required to be beyond a reasonable doubt. Petitioner Davila filed a petition for writ of certiorari in the United States Supreme Court presenting the following question: "In light of Hurst v. Florida, 136 S. Ct. 616, 622 (2016), must Texas' second punishment special issue,[4] which is a necessary finding for a sentence of death, be decided by the jury beyond a reasonable doubt?" The United States Supreme Court again did not find Hurst established any right which warranted hearing the issue and denied

[4] The "second punishment special issue" referred to is "Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?" Tex. Code Crim. Pro. art. 37.071.

certiorari. Davila v. Davis, __ U.S. __, 137 S. Ct. 810 (January 13, 2017)(certiorari granted as to separate issue).

After carefully considering the record, the issue raised and the applicable law, and for the reasons stated above, this Court finds Petitioner is not entitled to the relief sought on this issue.

Claim III

Claim III asserts the State committed prosecutorial misconduct in its closing statements at trial in violation of his constitutional rights, and counsel was ineffective as it related to this issue. Specifically, he alleges the State made an improper argument concerning Petitioner's future dangerousness if subsequently released on parole, and counsel failed to object. Petitioner has also submitted several affidavits from jurors on this claim. Claim III is not newly discovered and would clearly be time-barred under Tenn. Code Ann. § 40-30-102.

In addition, the issues raised in Claim III were either raised unsuccessfully on direct appeal or post-conviction making them previously determined, and/or they are waived as not having been previously raised when available. This Court does not agree this Court should reconsider the issue as asserted by Petitioner based upon affidavits from jurors who could have been interviewed at any time post trial. This Court finds Claim III does not entitle Petitioner to any relief sought.

Claim IV

In Claim IV, Petitioner asserts the death penalty is unconstitutional because the system is fundamentally "broken." However, as the Court and the parties are well aware, the constitutionality of capital punishment in the United States and in Tennessee has been upheld on numerous occasions. Furthermore, this Court notes the Tennessee Supreme Court has addressed this issue previously in the direct appeal of a capital case:

> Mr. Hester contends that the current system of capital punishment in the State of

> Tennessee is fundamentally "broken." Accordingly, he invites this Court to begin dismantling the system by vacating his death sentence. Because this invitation reflects Mr. Hester's misunderstanding of the role of the courts, we respectfully decline.
>
> Tennessee's courts should never hesitate to perform their constitutionally assigned role as a check and balance on the actions of the other branches of government. However, in performing this responsibility, Tennessee's courts must maintain appropriate respect for the breathing room needed for a representative democracy to thrive. At the core of our representative democracy is the principle that the people are the ultimate sovereign. Therefore, the courts must give full effect to the will of the people, expressed through laws duly enacted by their elected representatives, subject only to the limitations imposed by the federal and state constitutions.
>
> The people, through their elected representatives, are primarily responsible for establishing the public policy of this State. The Constitution of Tennessee does not empower us to sit as "Platonic guardians" or as a super-legislature with the power to dismantle statutory systems because they do not meet our standards of desirable social policy. By accepting Mr. Hester's invitation to tear down Tennessee's system of capital punishment, we would be arrogating to ourselves power that is not ours to exercise. This we decline to do.

State v. Hester, 324 S.W.3d 1, 81 (Tenn. 2010) (footnote omitted). The Tennessee Supreme Court's prior review of this claim in Hester makes clear this issue is not a new constitutional issue which would be cognizable here.

Furthermore, the Tennessee Supreme Court continuously reviews capital punishment system in light of evolving standards of decency. See, e.g., State v. Pruitt, 415 S.W.3d 210-12 (Tenn. 2013) (extensive analysis of proportionality review system in light of evolving standards of decency). Such analysis by the Tennessee Supreme Court helps ensure the death penalty in Tennessee does not become a broken system. Furthermore, as a trial court, this Court is bound by appellate court precedent. Any assertion the capital punishment system is broken in this state must be addressed to the appellate courts and the General Assembly.

In addition to not being a cognizable issue here, this Court would find this issue has been waived by not having been previously raised. Petitioner is not entitled to relief on this issue.

Claim V

Petitioner claims he is entitled to relief based upon the cumulative effect of the errors

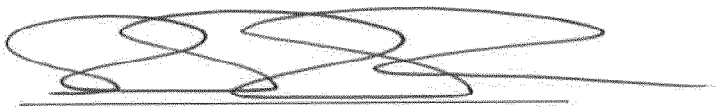
contained in his Claims I through V. This Court, however, already has found Claims II-IV are time-barred, previously determined, and/or waived. The only issue remaining for consideration by this Court is Claim I. This Court finds no basis for a claim of cumulative error which would warrant consideration here.

VI. Conclusion

Petitioner asserts this Court, in its discretion, may accept a proposed agreed disposition of a post-conviction case prior to an evidentiary hearing, and should accept the agreement here. However, this Court, in its discretion, finds it is not appropriate to accept such a proposed agreement under the circumstances of this case where there is no claim for post-conviction relief before this Court which should survive this Court's statutorily required preliminary order.

For the reasons stated above, Petitioner's Motion to Approve Settlement Agreement is DENIED, and this matter is DISMISSED.

IT IS SO ORDERED this the 7 day of March, 2018.



Don R. Ash
Senior Judge

CERTIFICATE OF SERVICE

I, _____, Clerk, hereby certify I have mailed a true and exact copy of same to Counsel of Record for Petitioner, and the State this the _____ day of _____, 20___.

JURY VERDICT
JUDGMENT
ORDER ALLOWING 30 DAYS TO PERFECT APPEAL

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE = DIVISION I

MAY 12, 1990

Court met pursuant to adjournment, present and presiding the Honorable DOUGLAS A. MEYER, Judge, etc., when the following proceedings were had, to-wit:

* * * * * * * * * * * * *

175423 State v. Harold Wayne Nichols - Aggravated Rape

175425 State v. Harold Wayne Nichols - First Degree Burglary

The above cases are hereby ordered passed to July 26, 1990, for sentencing hearing.

175504 State v. Harold Wayne Nichols - Murder in First Degree

Again came the Attorney General and the defendant in person with his attorneys, Mr. Hugh Moore and Mrs. Rosemarie Bryan, and the same sworn jury, to-wit: Eudona E. Thornton, Jackie O. Brewington, Ronald A. Shoulders, Emma Kathy Sircy, Charles R. Talley, Patsy R. Shaw, Cherlyn A. Thomason, Roy Clyde Woodard, Cynthia Elizabeth Settle, Vickie Lee Thompson, Walter M. Stephenson, and Nathleene M. Witt, after having been respited on last evening under authority of Tennessee Code Annotated, Section 40-18-116, and the jury reitred to begin their deliberations and in due time were returned into open Court, and upon their oaths say that they fix the punishment for the defendant, Harold Wayne Nichols, at Death by Electrocution with each juror signing said Sentencing Charge given to them by the Court, as required by law.

Upon the verdict of the jury as to sentencing, it is the judgement of the Court that the defendant, Harold Wayne Nichols, be sentenced to Death by Electrocution, and the date of execution set on May 31, 1991 unless stayed by appropriate Court order. Execution will issue against the defendant.

Defendant is allowed 30 days within which to file a Motion for New Trial in this case.

Thereupon, Court adjourned pending further business of the Court.

/s/ Douglas A. Meyer
JUDGE

877 S.W.2d 722
Supreme Court of Tennessee,
at Knoxville.

STATE of Tennessee, Appellee,
v.
Harold Wayne NICHOLS, Appellant.

May 2, 1994.
|
Order on Petition for Rehearing June 20, 1994.

Synopsis

Defendant was convicted in the Hamilton County Court, Douglas A. Meyer, J., of first-degree felony-murder and was sentenced by jury to death. He appealed. The Supreme Court, Anderson, J., held that: (1) bringing jury from another county back to county of arrest did not prejudice defendant; (2) psychologist's notes of interviews with defendant were admissible; and (3) use of felony-murder for which defendant had been convicted as aggravating circumstance was harmless error.

Affirmed.

Reid, C.J., dissented with opinion.

Attorneys and Law Firms

***725** Hugh J. Moore, Jr., Rosemarie Bryan, Chattanooga, for appellant.

Charles W. Burson, Atty. Gen. & Reporter, Stan Lanzo, Dist. Atty. Gen., Chattanooga, for appellee.

OPINION

ANDERSON, Justice.

In this capital case, the defendant, Harold Wayne Nichols, pled guilty to first-degree felony murder and was sentenced by a jury to death. At the sentencing hearing, the jury found two aggravating circumstances: (1) Nichols' five previous convictions for aggravated rape and (2) the fact that the murder occurred during the commission of a felony. Tenn.Code Ann. § 39–13–204(i)(2) & (7). The jury found that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt and sentenced the defendant to death. The defendant now appeals his sentence, alleging a number of errors in the sentencing phase.

We have thoroughly examined the record of this sentencing hearing and conclude that any trial errors committed during the sentencing phase were harmless error beyond a reasonable doubt and did not affect the jury's verdict of death. Although the use in this case of the aggravating circumstance that the murder occurred during the commission of a felony violated Article I, § 16, of the Tennessee Constitution and the Eighth Amendment to the United States Constitution, *see* *State v. Middlebrooks,* 840 S.W.2d 317, 346 (Tenn.1992) (Drowota and O'Brien, JJ., dissenting), we conclude that the sentencing jury's consideration of the invalid circumstance was harmless error beyond a reasonable doubt. Accordingly, we affirm the jury's sentence of death.

BACKGROUND

Because of the substantial publicity surrounding the murder and rape cases, the defendant requested a change of venue prior to trial. The trial court granted the change of venue to Sumner County, but only for the limited purpose of jury selection. The court then ordered the case back to Hamilton County for trial with the Sumner County jury. The trial reconvened in Hamilton County on May 9, 1990. Following the court's denial of the defendant's motion to suppress his videotaped confessions, the defendant entered pleas of guilty to the charges of first-degree felony murder, aggravated rape, and first-degree burglary. [1]

1 The State dismissed a charge of premeditated first-degree murder.

The trial proceeded to the penalty phase with the State relying on two aggravating ***726** circumstances: (1) the murder's occurrence during the commission of a felony and (2) Nichols' previous convictions of violent felonies. Tenn.Code Ann. § 39–13–204(i)(2) & (7). The State introduced evidence concerning the nature and circumstance of the crime, which included the defendant's videotaped confession, testimony from the medical examiner about the nature and extent of the victim's injuries and the cause of her death, and testimony from the detective who had questioned the defendant on the videotaped interview. The Hamilton County Criminal Court Clerk also testified concerning the defendant's five prior convictions for aggravated rape.

The proof showed that on the night of September 30, 1988, the defendant broke into the house where the 21–year–old–victim, Karen Pulley, lived with two roommates in the Brainerd area of Chattanooga, Tennessee. After finding Pulley home alone in her upstairs bedroom, the defendant tore her undergarments from her and violently raped her. Because of her resistance during the rape, he forcibly struck her at least twice in the head with a two-by-four he had picked up after entering the house. After the rape, the defendant, while still struggling with the victim, struck her again several times with great force in the head with the two-by-four. The next morning, one of Karen Pulley's roommates discovered her alive and lying in a pool of blood on the floor next to her bed. Pulley died the next day. Three months after the rape and murder, a Chattanooga police detective questioned the defendant about Pulley's murder while he was in the custody of the East Ridge police department on unrelated charges. It was at this point that the defendant confessed to the crime. This videotaped confession provided the only link between the defendant and the Pulley rape and murder.

The evidence showed that, until his arrest in January 1989, the defendant roamed the city at night and, when "energized," relentlessly searched for vulnerable female victims. At the time of trial, the defendant had been convicted on five charges of aggravated rape involving four other Chattanooga women. [2] These rapes had occurred in December 1988 and January 1989, within three months after Pulley's rape and murder. The convictions presented to the jury were as follows:

2 The record reveals that, prior to this capital murder trial, the defendant had been charged with the aggravated rape and attempted rape of twelve victims other than Pulley.

The defendant was indicted for feloniously engaging in sexual penetration of T.R. on December 27, 1988, by the use of force or coercion while the defendant was armed with a weapon—a cord. The defendant pled guilty to the offense of aggravated rape.

The defendant was indicted for feloniously engaging in sexual penetration—anal intercourse—with S.T. on the 3rd day of January, 1989, by the use of force or coercion while he, the defendant, was armed with a weapon—a pistol. The defendant pled guilty to aggravated rape.

The defendant was indicted for feloniously engaging in sexual penetration—fellatio—with P.A.R. on January 3, 1989, thereby causing personal injury to her. The defendant was also indicted for feloniously engaging in sexual penetration —vaginal intercourse—with P.A.R., on January 3, 1989. The defendant pled not guilty and the jury found the defendant guilty of aggravated rape in each case.

The defendant was indicted for feloniously engaging in sexual penetration, vaginal intercourse, with P.A.G. on December 21, 1988, by the use of force or coercion while he, the defendant, was armed with a weapon—a knife. The defendant pled not guilty and a jury convicted the defendant of aggravated rape.

***727** The primary factors in mitigation presented by the defense were the defendant's cooperation with the police and the psychological effects of his childhood. Several persons who knew the defendant testified to his good character and passive nature.

The defendant also took the stand and testified about his life and the violent crimes he had committed. After his mother died of breast cancer when he was ten years old, he and his older sister were placed in an orphanage for six years by his father, who was apparently emotionally abusive, at least to the defendant's older sister. In 1976, just as he was about to be adopted, he was returned to his father. In 1984 he pled guilty to attempted rape, was sentenced to five years in prison and served eighteen months. Thereafter, he violated parole and served an additional nine months. He was married in 1986. At the time of the killing, he was employed by Godfather's Pizza as a first assistant manager.

Defendant testified that when he committed these violent criminal acts, a "strange energized feeling" that he could not resist would come over him and result in actions that he could not stop. He explained that he had not asked for help for his affliction or told anyone about his criminal activity because he was afraid he would lose everything. He expressed remorse for his actions but testified that, if he had not been arrested, he would have continued to violently attack women.

Finally, Dr. Eric Engum, a lawyer and clinical psychologist, testified that he had diagnosed the defendant with a psychological disorder termed "intermittent explosive disorder." According to Engum, a person suffering from this disorder normally experiences an increasing, irresistible drive that results in some type of violent, destructive act. Dr. Engum opined that the defendant's condition may have grown out of his anger at abandonment in childhood but conceded that the disorder was rare. According to him, the defendant would function normally in an institutional regimented setting but, if released, would repeat the violent behavior. The State offered Dr. Engum's investigating notes to prove that he was a member of the defense team acting as a lawyer searching for a defense, rather than an objective psychologist searching for a diagnosis.

After deliberating approximately two hours, the jury returned a verdict of death based on the two statutory aggravating circumstances. The defendant now appeals that sentence, and we address hereafter the errors alleged.

I. CHANGE OF VENUE

The initial ground for appeal presents the Court with a question of first impression. As related in the preceding section, the defendant made a pretrial motion for change of venue, based on the extensive publicity that his arrest had generated in Hamilton County, Tennessee, and the surrounding area. The trial court granted the motion and moved the trial to Sumner County, some 125 miles away, but only for the limited purpose of selecting an unbiased jury. Once the Sumner County jury had been selected and sworn, the trial judge, over the defendant's objection, transferred the case and transported the jury back to Hamilton County for trial. Although the defendant originally moved for a change of venue, he now objects to what he characterizes as "two changes of venue" and contends that the trial court's procedure violated Article I, Section 9 of the Tennessee Constitution.

That provision of the state constitution grants a criminal defendant the right to trial by "an impartial jury of the County in which the crime shall have been committed." Although it literally refers to the place from which the jurors must be summoned, commonly known as the vicinage, the provision has been held to determine the venue of the trial as well. *See Chadwick v. State,* 201 Tenn. 57, 60, 296 S.W.2d 857, 859 (1956). In *State v. Upchurch,* 620 S.W.2d 540 (Tenn.Crim.App.1980), the trial court, faced with the defendant's objection to a change of venue, followed the provision's literal command by selecting a jury "of the County" where the crime occurred, but then moved the site of the trial. The Court of Criminal Appeals held that in the absence of a motion for change of venue, Article I, § 9, "has been interpreted to require that the accused be ***728** tried in the county

in which the crime has been committed." *Id.* at 542 (citing *Lester v. State,* 212 Tenn. 338, 370 S.W.2d 405 (1963); *Chadwick,* 201 Tenn. 57, 296 S.W.2d 857 (1956). Hence, Tennessee case law has interpreted the local vicinage requirement in our state constitution to include a concomitant requirement of local venue that cannot be changed except on application of or with the consent of the defendant. *Chadwick,* 296 S.W.2d at 859.

The State argues that by trying the defendant in the county in which the crime was committed, the trial court did not abuse its discretion, even though a jury was selected from a different county. The State relies on cases from two other jurisdictions in which selection of the jury from a county different than the trial venue was approved by the courts. *See* *State v. Chandler,* 324 N.C. 172, 376 S.E.2d 728, 735 (1989), and *State v. Forsyth,* 233 Mont. 389, 761 P.2d 363, 381 (1988). In both cases, however, selection of an out-of-county jury was specifically authorized by statute. Since Tennessee has no comparable statute, we must look to our constitution and rules of procedure for guidance.

The constitutional concern with the locality of trial has its origins in colonial history. When the British Parliament in 1769 attempted to try American colonists for treason in England, the Virginia House of Burgesses responded that such a plan would deprive colonists of "the inestimable Privilege of being tried by a Jury from the Vicinage, as well as the Liberty of summoning and producing Witnesses in such Trial."[3] The Declaration of Independence denounced the English monarchy "[f]or transporting us beyond Seas to be tried for pretended offenses."[4] The first Continental Congress lauded "the great and inestimable privilege of being tried by their peers of the vicinage...."[5] There can be little doubt that early Americans valued highly the right to be tried by local jurors in the place where the crime occurred.

3 *See* Blume, *The Place of Trial in Criminal Cases: Constitutional Vicinage and Venue,* 43 Mich.L.Rev. 59, 63–65 (1944); Wright, Federal Practice and Procedure: Criminal 2d § 301 (1982).

4 *See* U.S.C.A. Declaration of Independence, at 3; Blume, *supra,* at 66.

5 *See* Blume, *supra,* at 65.

These historical values are embodied in two provisions of the United States Constitution. Article III, Section 2 provides that "the trial of all crimes ... shall be held in the state where the said crimes shall have been committed." The Sixth Amendment then allows for "an impartial jury of the state and district wherein the crime shall have been committed." One court has observed that although Article III speaks to the site of the trial and the Sixth Amendment addresses the place from which the jury is selected, "[t]his distinction ... has never been given any weight, perhaps ... because the requirement that a jury be chosen from the state and district where the crime was committed presupposes that the jury will sit where it is chosen." *United States v. Passodelis,* 615 F.2d 975, 977 n. 3 (3rd Cir.1980).

Our Tennessee Constitution obviously reflects similar concerns and values. The dispositive question here is whether the defendant waived his rights under Article I, § 9, as to both venue and vicinage when he moved for a change of venue. We conclude that the change of venue motion constitutes a waiver of Article I, § 9, rights. Accordingly, unless the defendant is prejudiced, the administration of justice harmed, or the trial court abuses its discretion, no reversible error occurs when a trial court judge employs the unorthodox procedure used in this case in response to a defendant's motion for a change of venue.

Here, the trial judge attempted to solve the problem of possible taint to the jury pool from the extensive pretrial publicity that surrounded this case and the other charges against the defendant. The trial judge was, at the same time, commendably concerned that, if the trial were held in a distant county, the defendant's family and others would be prevented from attending. The decision to undergo the expense and disruption of moving the jury, rather than local witnesses and other interested persons, was obviously designed ***729** to meet the core complaint of the defendant's motion. There is no showing by the defendant that prejudice resulted from bringing a jury from Sumner County to try his case in Hamilton County.

We conclude that in this particular case the procedure used by the trial judge was not reversible error. We note, however, that a statute which addresses the issue of summoning juries from another county, where there is a motion for change of venue, would ensure uniformity and fairness across the state and avoid error from excessive experimentation. We would encourage the legislature to address this issue.

II. Psychological "Reports"

The defendant raises another difficult issue concerning the State's access to the defense psychologist's records of his interviews with Nichols and others. Dr. Eric Engum, hired by the defendant's counsel to evaluate Wayne Nichols, tested Nichols and interviewed him, his wife, his father, and his minister. After each interview, Dr. Engum wrote an extensive memorandum of the discussion and his conclusions. However, he did not write a summary report until the second day of trial, after the court had determined that the state should have access to all interview reports, as well as psychological test results, because they were prepared by a prospective witness. In this situation, we agree with the trial court's conclusion that the interview reports were properly discoverable.

The relevant reciprocal discovery provisions of Tenn.R.Crim.P. 16(b)(1)(B) are as follows:

> If the defendant requests disclosure [of the state's documents, tangible objects, reports of examinations and tests] ... the defendant, on request of the state, shall permit the state to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

On the other hand, the rule precludes discovery of "reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents ... or of statements made by ... defense witnesses ... to the defendant, his agents or attorneys." Tenn.R.Crim.P. 16(b)(2). Thus, while the results and evaluations of the standardized psychological tests contained in Dr. Engum's files were clearly discoverable, we must determine whether the interview notes are more accurately "reports" and "results" of mental examinations pertaining to Dr. Engum's testimony, subject to discovery under Rule 16, or whether they are "statements" made to defense counsel that are not subject to disclosure prior to trial. We find that, in the absence of any other records of Dr. Engum's evaluation of the defendant, the interview records are discoverable.

Because Dr. Engum is both a licensed lawyer and a psychologist, our first inquiry under Rule 16(b)(2) is whether Dr. Engum was acting in the capacity of an attorney or of a psychologist at the time the interviews took place and the notes memorializing those interviews were taken. The problem is complicated by Dr. Engum's apparent dual role in this case. He was seemingly both an expert psychological witness and a member of the defense team who helped to form strategy and evaluate witnesses. Dr. Engum testified that he was hired to evaluate Nichols's psychological status. Moreover, in a jury-out hearing he assured the court that he was "sitting here with [his] psychologist hat on." Therefore, his reports are not the undiscoverable work product of an agent or attorney of the defendant.

Furthermore, we find that these interview notes are significantly more than the statements of a prospective witness to defense counsel. They are the only records of interviews conducted as part of an ongoing evaluation of the defendant. Because a final report was not prepared until the second day of the hearing, and then only when it became apparent that the interview reports were admissible, the memoranda of the interviews ***730** provided the most complete written psychological evaluation of Wayne

Nichols. As such, we find that the interview reports are "results or reports of ... mental examinations," not mere statements, and that these reports formed the basis for Dr. Engum's testimony.

We thus conclude that when a psychologist or psychiatrist does not prepare a summary report, but instead relies on extensive memoranda to record not only observations and hypotheses but also evaluations, such records are discoverable under Rule 16(b)(1)(B). As the Court of Criminal Appeals has correctly observed, "To allow the defendant to evade the reciprocal discovery rule [by making no formal report and claiming that mere "notes" are undiscoverable] would effectively nullify the meaning of Rule 16(b)(1)(B)." *State v. Bell,* 690 S.W.2d 879, 883 (Tenn.Crim.App.1985). In *Bell,* the trial court required the defendant's psychiatrist to submit to a deposition or to furnish a report in order to assure compliance with the reciprocal discovery provisions of Rule 16. Although we do not suggest that the trial court should require a formal report in every case, we do conclude, under the facts of this case, that Rule 16 authorized discovery of the available reports to the extent that they related to the testimony to be given at trial. [6]

6 *See State v. Vilvarajah,* 735 S.W.2d 837, 839 (Tenn.Crim.App.1987) (limiting discovery to results or reports that relate to the prospective witness's testimony).

III. Jury Verdict Form

The defendant argues that the trial court erred in refusing to declare a mistrial when the jury returned a verdict form listing nonstatutory aggravating circumstances.

After deliberating approximately two hours, the jury returned a verdict of death. Although the State had relied upon and the judge had charged the statutory aggravating circumstances of felony murder and prior violent felony convictions, Tenn.Code Ann. § 39–13–204(i)(2) and (7), the jury listed as the sole "statutory" aggravating circumstances:

(1) First degree murder of Karen E. Pulley;

(2) The unfeeling brutality of the first degree murder of Karen E. Pulley;

(3) The lack of remorse; and

(4) The lack of respect of human rights.

The defendant moved for a mistrial because of this error. Concluding that the jury had a right to clarify its verdict, the trial court recharged the jury on the aggravating factors presented by the State and instructed them that they should "not take account of any other facts or circumstances" in deciding the penalty in this case.

The jury retired again and returned fifteen minutes later with an amended verdict form on which it had crossed out the erroneous material and listed the two statutory aggravating circumstances. The trial court then determined that the jury originally had not listed these two circumstances because it had assumed it need not copy statutory aggravating circumstances on the form. Each juror answered affirmatively when asked by the court whether, before reporting the verdict the first time, he or she had found (1) that each of the two statutory aggravating circumstances had been proved beyond a reasonable doubt, and (2) that these circumstances outweighed any mitigating circumstances.

When the jury reports an incorrect or imperfect verdict, the trial court has both the power and the duty to redirect the jury's attention to the law and return them to the jury room with directions to reconsider their verdict. *State v. Mounce,* 859 S.W.2d 319, 322 (Tenn.1993); *Meade v. State,* 530 S.W.2d 784, 787 (Tenn.Crim.App.1975); *Jenkins v. State,* 509 S.W.2d 240, 248

(Tenn.Crim.App.1974). The trial court in this case was entitled to exercise this power and perform this duty and did not abuse its discretion in denying a mistrial.

The defendant argues that the verdict, as returned, indicated that the jury considered nonstatutory factors. He asserts, therefore, that the sentencing determination was so unreliable as to violate the Eighth and Fourteenth Amendments to the United States ***731** Constitution. [7] We disagree. The trial judge ascertained that, prior to the return of the initial verdict, each juror had found the existence beyond a reasonable doubt of the two statutory aggravating circumstances upon which the State sought the death penalty. Each juror also confirmed that he or she had previously found that these two aggravating circumstances outweighed any mitigating circumstances. The jury verdict itself reported that the jury found the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt.

7 Without clarification, defendant also alleges violation of the Sixth Amendment, and Art. I, §§ 8, 9, and 10 of the Tennessee Constitution.

The initial verdict's revelation that the jury considered factors beyond the statutory aggravating circumstances does not invalidate the verdict under the Eighth Amendment. Once a capital sentencing jury finds that a defendant falls within the legislatively-defined category of persons eligible for the death penalty, the jury is free to consider a myriad of factors to determine whether death is the punishment appropriate to the offense and the individual defendant. *California v. Ramos,* 463 U.S. 992, 1005, 103 S.Ct. 3446, 3456, 77 L.Ed.2d 1171 (1983); *Barclay v. Florida,* 463 U.S. 939, 948, 103 S.Ct. 3418, 3424, 77 L.Ed.2d 1134 (1983); *Zant v. Stephens,* 462 U.S. 862, 878, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235 (1983). It is clear from the record that the jury had found that the defendant met the statutory criteria for capital punishment.

Furthermore, the factors originally listed by the jurors as bases for the sentence are not irrelevant or improper but concern the circumstances of the crime and the character of the defendant. These are factors the jury may consider under the statute. *See* Tenn.Code Ann. § 39–13–204(c). Consideration of the character and record of the individual offender and the circumstances of the particular offense is also a constitutionally indispensable part of the process of inflicting the penalty of death. *Woodson v. North Carolina,* 428 U.S. 280, 303, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). For these reasons, we hold that the jury's consideration of the listed factors did not render the verdict invalid or unreliable under the Eighth and Fourteenth Amendments.

IV. Circumstances of the Offense—Admissibility

Because the defendant had already pled guilty to aggravated rape and felony-murder, he objected to the State's introduction of extensive evidence of the nature and circumstances of the crime. He insists that, in the sentencing hearing, only evidence relevant to aggravating and mitigating circumstances should have been allowed.

Tenn.Code Ann. § 39–13–204(c) permits, at a sentencing hearing, evidence "as to any matter that the court deems relevant to the punishment," including (but not limited to) "the nature and circumstances of the crime." In *State v. Teague,* 680 S.W.2d 785, 788 (Tenn.1984), *cert. denied,* 473 U.S. 911, 105 S.Ct. 3538, 87 L.Ed.2d 662 (1985), the defendant argued that the trial court erred by allowing the State to introduce evidence concerning the murder at the *re-sentencing hearing.* This Court approved the admission of evidence about "how the crime was committed, the injuries, and aggravating and mitigating factors." Because the defendant pled guilty, the sentencing jury here, as in *Teague,* had no information about the offense, absent the complained of evidence. A description of the crime and its circumstances was thus clearly admissible. Moreover, an "individualized [sentencing] determination" based on the defendant's character and the circumstances of the crime is constitutionally required. *See Zant v. Stephens,* 462 U.S. 862, 879, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983). In this case, the trial court permitted

the introduction of evidence tending to "individualize" the case for the jury, while carefully limiting the evidence to testimony relevant to the crime. We find no error in this regard.

V. Defendant's Confession—Admissibility

The trial court also admitted Nichols's videotaped confession to aggravated ***732** rape and to the felony-murder for which he was sentenced. Nichols contends that the tape was improperly admitted because it was irrelevant to sentencing; he also claims that it was obtained in violation of his Fifth Amendment right not to incriminate himself. We find both objections without merit.

As to the first issue, the taped confession was highly relevant to sentencing because it fully described the "nature and circumstances of the crime." Thus, the confession was properly admitted under Tenn.Code Ann. § 39–13–204(c).

With regard to the claim that the confession was involuntary, a trial court's determination at a suppression hearing will not be overturned if there is any material evidence to support it. *See State v. Harbison,* 704 S.W.3d 314, 318 (Tenn.1986), *cert. denied,* 476 U.S. 1153, 106 S.Ct. 2261, 90 L.Ed.2d 705 (1986). We find ample evidence to support the court's finding that the confession in this case was admissible. The arresting officers read *Miranda* warnings to Nichols, and Nichols signed a written waiver of those rights. The officers disputed Nichols's testimony that he requested an attorney and that they coerced him into a statement, and the judge credited the officers' testimony. Finally, the videotaped confession shows the interrogating officer reading Nichols his *Miranda* warnings and Nichols again waiving those rights. Thus, the record supports the court's finding that the confession was voluntary and, therefore, admissible.

VI. Evidence of Prior Conviction

The defendant next argues that the trial court erred by admitting evidence of his 1984 conviction for assault with intent to commit rape. The state did not list this prior conviction as an aggravating circumstance pursuant to Tenn.Code Ann. § 39–13–204(i)(2), but rather sought to use the conviction to impeach Nichols. The court admitted the evidence, not for impeachment purposes, [8] but to allow the state to rebut the defendant's argument that the 1988 and 1989 crimes were sudden deviations from his normally placid behavior.

8 The trial court presumably did not admit the conviction for impeachment purposes because the State had failed to give defense attorneys reasonable written notice of its intent to use the convictions, as required by Tenn.R.Evid. 609(a)(3).

Prior bad acts, including crimes, may be admissible for purposes other than showing conformity with a character trait displayed by the prior bad act. Tenn.R.Evid. 404(b). Pursuant to Rule 404(b), in a hearing outside the jury's presence, the court must find that a material issue exists other than the defendant's propensity for conduct in conformity with the prior bad act. Furthermore, the court must exclude the evidence if the danger of unfair prejudice outweighs the probative value of the evidence.

Here, the trial court held such a hearing at the defendant's request to review the Rule 404(b) issue as it applied to his 1984 conviction. The court noted that Nichols had clearly indicated that the murder and rape in this case were the result of a sudden feeling that overcame him and that defense counsel had attempted to show that the crime was inconsistent with the defendant's otherwise passive nature. Instead of admitting the 1984 assault conviction to prove that the murder in this case conformed to defendant's previous violent behavior, the court admitted the conviction to rebut evidence that the defendant was a docile person. Prior bad acts are admissible to rebut a defendant's claim of having led a peaceful, normal life. *State v. Patton,* 593 S.W.2d 913, 917 (Tenn.1979). We conclude that the admission of this probative evidence was not outweighed by the danger of unfair prejudice and that, with proper limiting instructions, it could be considered by the jury.

VII. Parole Argument

The defendant contends that two statements made during the State's closing argument constituted an impermissible argument that a sentence of life did not mean life imprisonment because there was the possibility that the defendant could be released early on parole. The first statement occurred during initial closing argument. In context, it appears as follows:

> ***733** But what do you do, what do you do with a man who's perpetrated that kind of crime? What do you do with a man who's committed senseless murder, and after he does it, instead of being remorseful, he rapes other women? What do you do with him? *He's been in the penitentiary. He got a five year sentence in '84 and he served eighteen months.* What do you do with him? What's left ... And you heard the psychologist say that if he's out he'll do it again. He even admitted, "Mr. Nichols, if you hadn't been arrested January 5, 1989, you would still be out there committing rapes," and he said yes.
>
> Ladies and gentlemen, justice is doing what you have to do to make sure that Harold Wayne Nichols never rapes again and that he never murders again, whatever it takes.

(Emphasis added.) No objection was made.

The second statement occurred during the State's rebuttal. In context, this argument reads:

> Mr. Moore says, "Prison is hell. Send him there." *Yeah, '84 they sent him there on a five year sentence and he served eighteen months and got out and raped again.* Sure, send him there.
>
> If the death penalty, ladies and gentlemen, isn't applied in a case like this, when does it apply? A man who's shown even in being in prison that he's not going to change, he rapes and murders, and he goes out and does it again and again and again, and if he wasn't in jail right now he'd be doing it again.

(Emphasis added.) The prosecutor then argued that one of punishment's purposes is to "remove the individual from society so that another woman won't be raped again, another woman won't be murdered again." The defendant shortly afterward objected to this argument as implying that a life sentence is not a life sentence.

Any references to parole possibilities during argument, even indirect references, are improper. *Smith v. State,* 527 S.W.2d 737, 738 (Tenn.1975); *Graham v. State,* 202 Tenn. 423, 304 S.W.2d 622 (1957). While the present argument could be interpreted as hinting at the idea that a life sentence carries with it the possibility that defendant will rape and murder again, i.e., might be released into the free world, it does not clearly mention parole possibilities for defendant in the present proceeding. In addition, the argument, perhaps more directly, raises the issues of the failure of prior incarceration to affect the defendant's behavior and of the defendant's potential for future dangerousness. It was, in part, also a response to the defendant's argument that he would be completely harmless upon incarceration. *See State v. Bates,* 804 S.W.2d 868, 881 (Tenn.1991). In any event, to whatever degree improper, these arguments did not constitute error which prejudicially affected the jury's sentencing determination. *See State v. Hines,* 758 S.W.2d 515, 520 (Tenn.1988).

VIII. Caldwell Error

The defendant contends that the prosecutor's argument that "the people of the State of Tennessee, speaking through their legislators, have asked that the death penalty be a punishment" diminished the jury's responsibility in making the sentencing decision in this case and violated *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This statement was a reply to the defendant's argument that the only reason the death penalty was being sought was because "the

prosecution wants Harold Wayne Nichols to die" and was meant to point out that the people of Tennessee through their elected representatives, not the prosecution, had determined that death was a possible punishment in such cases. The defendant made no contemporaneous objection to this argument. In its opening argument, the State emphasized that it was the jury's duty to make the sentencing decision in this case. Taken in context, the prosecution's argument did not lead the jury to believe that the responsibility for determining the appropriateness of defendant's sentence lay elsewhere. *See, e.g., State v. West,* 767 S.W.2d 387, 398–399 (Tenn.1989) (*Caldwell* error harmless beyond a reasonable doubt); *State v. Taylor,* 771 S.W.2d 387, 396 (Tenn.1989); *Teague v. State,* 772 S.W.2d 915, 926 (Tenn.Crim.App.1988).

*734 *IX. Jury Instructions*

Defendant Nichols next asserts that the jury instructions given by the trial court were deficient or erroneous in several respects.

A. Burden of Proof

The defendant first challenges the trial court's instruction on the state's burden of proof. The court instructed the jury that it must find proof "beyond a reasonable doubt" and be convinced to a "moral certainty" of the existence of the aggravating circumstances and of the fact that they outweighed the mitigating circumstances. Nichols claims that a sentence based upon the jurors' "moral certainty" is a lower burden of proof than evidentiary certainty, and thus violative of the due process clauses of the state and federal constitutions.

In *Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), the United States Supreme Court held unconstitutional an instruction equating reasonable doubt with "grave uncertainty" or "actual substantial doubt." The Court held that, when those definitions of reasonable doubt accompany an instruction that conviction is appropriate upon the jury's "moral certainty" of guilt, then a jury might impermissibly convict on less proof than required under the due process clause. We conclude, however, that the use of the phrase "moral certainty" by itself is insufficient to invalidate an instruction on the meaning of reasonable doubt. Whereas the instruction at issue in *Cage* required the jury to have an extremely high degree of doubt before acquitting a defendant, our instruction does not require "grave uncertainty" to support acquittal. When considered in conjunction with an instruction that "[r]easonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict," we find that the instruction properly reflects the evidentiary certainty required by the "due process" clause of the federal constitution and the "law of the land" provision in our state constitution. *See also Odeneal v. State,* 128 Tenn. 60, 157 S.W. 419 (1913). The context in which the instruction was given clearly conveyed the jury's responsibility to decide the verdict based on the facts and the law.

Nichols also challenges the trial court for failing to instruct the jury that there is a presumption of "no aggravating circumstances" in sentencing, similar to the presumption of innocence at the guilt phase of the trial. The court did, however, instruct the jury that it must determine the existence of any aggravating circumstances beyond a reasonable doubt. This instruction clearly implies that no aggravating circumstances can be presumed.

B. Mitigating Factors

The defendant next alleges that the trial court failed to instruct the jury that it could consider nonstatutory mitigating factors. Nichols contends that the trial court's instruction specified only three statutory mitigating circumstances, leaving other mitigating factors to the jury's recollection, in violation of *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

In *Lockett,* the United States Supreme Court disapproved a death penalty statute that mandated death unless at least one of three mitigating factors specified by statute was found to exist. The Court held that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Id.* at 608, 98 S.Ct. at 2967. Unlike the statute at issue in *Lockett,* our criminal code specifically permits consideration of mitigating circumstances other than those listed in Tenn.Code Ann. § 39–13–204(j)(1)–(8). *See* Tenn.Code Ann. § 39–13–204(j)(9). Moreover, we have held that the jury must be instructed that it can consider "any other facts or circumstances that are raised by the evidence that they find to be mitigating circumstances...." *State v. Hartman,* 703 S.W.2d 106, 118 (Tenn.1985), *cert. denied,* 478 U.S. 1010, 106 S.Ct. 3308, 92 L.Ed.2d 721 (1986).

In this case, after the trial court instructed the jury on three specific statutory mitigating circumstances, it also instructed the jury to consider "[a]ny other mitigating factor which is raised by the evidence." Moreover, ***735** the defendant, although given the opportunity, offered no other specific mitigating circumstances to be charged to the jury. Thus, the court's instruction under Tenn.Code Ann. § 39–13–204(j)(9) complied with *Lockett.*

Next, the defendant argues that the court's instructions may have led the jury to believe that unanimity regarding the mitigating circumstances was required, in violation of *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), and *McKoy v. North Carolina,* 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). This contention is without merit. *See State v. Smith,* 857 S.W.2d 1, 18 (Tenn.1993); *State v. Bates,* 804 S.W.2d 868, 882–83 (Tenn.1991) *cert. denied,* 502 U.S. 841, 112 S.Ct. 131, 116 L.Ed.2d 98 (1991); *State v. Thompson,* 768 S.W.2d 239, 250–52 (Tenn.1989), *cert. denied,* 497 U.S. 1031, 110 S.Ct. 3288, 111 L.Ed.2d 796 (1990).

C. Statutory Definition of Crime

The State relied upon, and the jury found, the aggravating circumstance that the murder was committed while the defendant was committing rape, etc. Tenn.Code Ann. § 39–13–204(i)(7). The trial court is required to provide the jury with the statutory definition of the felony relied upon by the State to prove aggravating circumstance (i)(7). *State v. Hines,* 758 S.W.2d 515, 521–524 (1988); *State v. Moore,* 614 S.W.2d 348, 350–351 (Tenn.1981). The trial court did not instruct the statutory definition of rape in connection with its charge on this aggravating circumstance. Earlier, however, in connection with its instruction on felony murder, it had instructed the jury on the elements of aggravated rape. It is generally harmless error where the court simply fails to repeat a definition already given, and we find that to be the case here. *See State v. Wright,* 756 S.W.2d 669, 675 (Tenn.1988); *State v. Carter,* 714 S.W.2d 241, 250 (Tenn.1986); *State v. Laney,* 654 S.W.2d 383, 388–389 (Tenn.1983); *compare State v. Hines, supra.*

D. Re–Instruction on Mitigating Circumstances

After the jury returned the initial verdict form, which did not list the statutory aggravating circumstances, the trial court reinstructed the jury regarding aggravating circumstances. The court denied the defendant's request to recharge mitigating circumstances as well. The court ascertained that the corrected verdict was the verdict the jury had reached the first time they returned the form. There was no reversible error in the failure to recharge the mitigating circumstances or to include the words

"beyond a reasonable doubt" in the questions asked the jurors. We have concluded the initial verdict was a legal verdict and the jury had a right to correct it under proper instruction.

E. Law and Facts Instruction

Finally, the defendant objects to the trial court's instruction that:

> The jury are the sole judges of the facts, and of the law as it applies to the facts in the case. In making up your verdict, you are to consider the law in connection with the facts; but the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the Court.

Nichols argues that this instruction violated Article I, Section 19 of the Tennessee Constitution by interfering with the jury's absolute discretion in determining the law and the facts. The issue is without merit. *State v. Bane,* 853 S.W.2d 483, 489 (Tenn.1993); *State v. Black,* 815 S.W.2d 166, 186–87 (Tenn.1991).

To summarize, we find no reversible error in connection with the jury instructions given by the trial court in this case.

X. Chronological Order

As a result of the serial rapes, the defendant faced forty charges growing out of some fourteen incidents. The murder of Karen Pulley occurred during the first such incident. The trial court denied defendant's motion to have the cases tried in chronological order. The defendant alleges that the prosecutor deliberately set out to try the cases out of chronological order solely to create an additional aggravating circumstance. The district attorney admitted that this was one reason for the order in which the cases were ***736** scheduled to be tried. The defendant contends that allowing a prosecutor the discretion "to orchestrate a series of trials" in this fashion constitutes cruel and unusual punishment and violates due process and equal protection. He particularly claims that such discretion results in arbitrary and capricious imposition of the death penalty contrary to the principles of *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Tenn.Code Ann. § 39–13–204(i)(2) provides that the death penalty may be imposed where "[t]he 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." (Emphasis added.) For purposes of this aggravating circumstance, the order in which the crimes were actually committed is irrelevant so long as the convictions have been entered before the sentencing hearing at which they were introduced. *State v. Caldwell,* 671 S.W.2d 459, 464–465 (Tenn.1984); *cf. State v. Teague,* 680 S.W.2d 785, 790 (Tenn.1984) (conviction occurring after first capital sentencing hearing but before sentencing hearing on remand could be used to establish circumstance (i)(2) at resentencing hearing).

It goes without saying that the implementation of this aggravating circumstance may be subject to a certain degree of prosecutorial discretion; but implementation of the criminal laws against murder "necessarily requires discretionary judgments." *McCleskey v. Kemp,* 481 U.S. 279, 299, 107 S.Ct. 1756, 1769, 95 L.Ed.2d 262 (1987). Prosecutorial discretion of this nature does not offend the Eighth Amendment under *Furman,* which

> held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the criminal.

Gregg v. Georgia, 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976); *see also State v. Brimmer,* 876 S.W.2d 75 (Tenn.1994). Where this fundamental discretion is involved, it will not be assumed that "what is unexplained is invidious," *McCleskey v. Kemp,* 481 U.S. at 309, 107 S.Ct. at 1778; and "exceptionally clear proof" is required before an abuse of discretion will be found in the operation of the criminal justice process. *Id.* at 299, 107 S.Ct. at 1769. No such showing has been made in this case. We further find that the record does not support the defendant's assertion that the prosecutor's decision concerning the order of prosecution of the multiple charges facing the defendant violated either equal protection or due process. Accordingly, we find no merit in this issue.

XI. Polling the Jury

The defendant argues that the trial court's failure to ask each juror whether he or she had found that the aggravating circumstances outweighed the mitigating circumstances *beyond a reasonable doubt* when it polled the jurors upon the return of the verdict [9] violates several of his constitutional rights (Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Art. I, §§ 8, 9, and 16 of the Tennessee Constitution). This issue is essentially a challenge of the verdict's reliability. In this respect, it should be noted, first, that the jurors were instructed that they must find that aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt and, second, that the verdict form itself states that the jury unanimously found that the statutory aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. The court was only ascertaining that this was the jurors' verdict and its omission of the phrase "beyond a reasonable doubt" in this question during the polling does not invalidate an otherwise valid verdict.

9 The defendant incorrectly alleges that the trial court did not poll each juror as to whether he or she had found the statutory aggravating facts had been proven beyond a reasonable doubt. This question was asked each juror. Also, the trial court did poll the foreperson as to her finding on the weighing of mitigating factors.

*737 *XII. Constitutionality of Tennessee Death Penalty Statute*

The defendant raises the same constitutional issues that the Court rejected in *State v. Black,* 815 S.W.2d 166 (Tenn.1991) (statute creates a mandatory death penalty and death penalty is cruel and unusual). The issues have no merit.

XIII. Notice of Aggravating Circumstance

The defendant contends he did not receive proper notice under Tenn.R.Crim.P. 12.3 of the conviction of aggravated rape (anal rape) as an aggravating circumstance. The State erroneously gave notice of Indictment 175487, alleging aggravated rape on October 24, 1989, which had been dismissed. The defendant, however, had pled guilty to Indictment 175433, aggravated rape [anal rape] of the same victim on the same day, October 24, 1989. The defendant was aware that he had pled guilty to aggravated rape on October 24, 1989, and was not misled or prejudiced by the State's error. *Cf. State v. Debro,* 787 S.W.2d 932

(Tenn.Crim.App.1989); *cf. also* *State v. Adams,* 788 S.W.2d 557 (Tenn.1990) (when a detail of required notice is incorrect, issue is whether the notice was materially misleading and defendant has duty to inquire further). [10] There is no merit in the defendant's contention.

10 *Debro* and *Adams* are decisions under Tenn.Code Ann. § 40–35–202(a) and Tenn.R.Crim.P. 12.3(a) (Notice in Noncapital Cases). Tenn.R.Crim.P. 12.3(b) (Notice in Capital Cases) requires only reference to the citation of the circumstance, not a listing of specific convictions. Technically, the material defendant complains of here was surplusage under the rule.

XIV. Admissibility of Prior Convictions

The defendant argues that none of the five prior convictions for aggravated rape could be used to prove aggravating circumstance (i)(2) because they were not "final" under Tenn.R.Crim.P. 32(e) [11] The defendant argues that the convictions were not final since no "judgments of conviction" had been entered. No judgments had been entered because the trial court had delayed sentencing at the defendant's request. The trial court held that "even under Rule 32(e) ... we do have final convictions in those cases." *Cf.* *McCrae v. State,* 395 So.2d 1145, 1153–1154 (Fla.1981) (an adjudication of guilt is not necessary for "conviction" under Florida's similar aggravating circumstance). Tenn.Code Ann. § 39–13–204(i)(2) requires only a previous "conviction." The State argues that the indictments and minutes of the trial court offered to prove these convictions were admissible under either Tenn.R.Evid. 803(b) (Records of Regularly Conducted Activity) or 893(8) (Public Records and Reports). We agree and conclude that the convictions were admissible.

11 Tenn.R.Crim.P. 32(e) requires a judgment of conviction to set forth the plea, the verdict or findings, and the adjudication and sentence and be signed by the judge and entered by the clerk. Tenn.R.Evid. 803(22) states that judgments of previous felony convictions are not excluded by the hearsay rule.

XV. Newly Discovered Evidence

The defendant contends that newly discovered evidence entitles him to a new trial. After trial, defendant's counsel received allegedly new information relating to abuse of the defendant by his father, which allegations have been kept confidential.

To obtain a new trial on the basis of newly discovered evidence, the defendant must establish (1) reasonable diligence in seeking the newly discovered evidence; (2) materiality of the evidence; and (3) that the evidence will likely change the result of the trial. *State v. Goswick,* 656 S.W.2d 355, 358–360 (Tenn.1983). The trial court found that the first prong had been met but the other two were not established. We agree that this alleged evidence, even if it could be produced as represented, would not change the results of the trial. Proof had already been introduced in the record that the defendant's father was abusive. Accordingly, we agree with the trial court's judgment denying a new trial.

XVI. Harmless Error Analysis of Middlebrooks Error

Sometime after the trial of this case, a Court majority concluded in *State v. Middlebrooks,* ***738** 840 S.W.2d 317, 346 (Tenn.1992) (Drowota and O'Brien, JJ., dissenting), that when a defendant is convicted of felony murder, the State's use of felony murder as an aggravating circumstance at the sentencing hearing violates the state and federal constitutions because the aggravating circumstance is a duplication of the crime itself and does not narrow the class of death-eligible defendants as is constitutionally required. There is no question that, in this case, the sentencing jury's consideration of the invalid felony-

murder aggravating circumstance was state constitutional error. We must now determine whether the error was harmless beyond a reasonable doubt. *See* *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Howell,* 868 S.W.2d 238 (Tenn.1993). In this particular context, an error is harmless beyond a reasonable doubt if an appellate court can conclude that the sentence would have been the same had the sentencing authority given no weight to the invalid aggravating circumstance. *Stringer v. Black,* 503 U.S. 222, ——, 112 S.Ct. 1130, 1137, 117 L.Ed.2d 367 (1992); *State v. Howell,* 868 S.W.2d at 262.

We have recently stated that it is important, when conducting harmless error review,

> ... to completely examine the record for the presence of factors which potentially influence the sentence ultimately imposed. These include, but are not limited to, the number and strength of remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality and strength of mitigating evidence.
>
> ... [E]ven more crucial than the sum of the remaining aggravating circumstances is the qualitative nature of each circumstance, its substance and persuasiveness, as well as the quantum of proof supporting it. In that respect, the Tennessee statute assigns no relative importance to the various statutory aggravating circumstances. By their very nature, and under the proof in certain cases, however, some aggravating circumstances may be more qualitatively persuasive and objectively reliable than others....

State v. Howell, 868 S.W.2d at 260–61. That is particularly true of the aggravating circumstance remaining in this case. Tenn.Code Ann. § 39–13–204(i)(2) (previous convictions of felonies involving the use of violence to the person). In addition, as the present case illustrates, the effect and qualitative persuasiveness of the remaining aggravating circumstance on the sentence increases where there is proof of more than one prior violent felony conviction.

The State, here, offered proof that the defendant had committed five similar aggravated rapes within 90 days of Pulley's murder, and in three instances was armed with weapons including a cord, a pistol, and a knife. The modus operandi of the convictions was similar to the felony resulting in Pulley's murder. The defendant, when "energized," went out night after night, roaming the city, selecting vulnerable victims, eventually breaking into their homes and violently committing rape. The evidence supporting the remaining valid aggravating circumstance is undisputed and overwhelming.

Moreover, no inadmissible or erroneous evidence was introduced to establish the invalid felony-murder aggravating circumstance. The defendant pled guilty to felony-murder. The prosecution was then properly allowed to present evidence of the nature and circumstances of the crime in order to provide the jury enough information to make an individualized sentencing determination of the appropriateness of the death penalty. Elimination of the invalid felony-murder aggravating circumstance does not "remove any evidence from the jury's total consideration." *State v. Howell,* 868 S.W.2d at 261.

An examination of the State's argument also reveals that no great emphasis was placed on the fact that the murder occurred during the course of a felony. The bulk of the argument relative to aggravating circumstances focused on the defendant's prior criminal record and the predatory nature of the crimes.

Finally, we have examined the quality and strength of the defendant's mitigation proof in our analysis to determine the effect of the invalid aggravating circumstance on the sentence. Primarily the defendant's mitigation ***739** proof related to his childhood environment, his character, and passive nature. The State offered evidence in rebuttal to show that a few years earlier, he had been convicted and sentenced to the penitentiary for an attempted rape. In addition, expert proof from Dr. Engum was offered to show that the defendant was suffering from a rare condition called intermittent explosive disorder. The State rebutted Dr. Engum's testimony, however, by offering proof that he acted in a dual role as a lawyer and member of the defense team searching for a defense, rather than as an objective psychologist.

After carefully considering the entire record, and the factors discussed above, we have determined, beyond a reasonable doubt, that the sentence would have been the same had the jury given no weight to the invalid felony-murder aggravating circumstance. Accordingly, the jury's sentence of death is affirmed.

CONCLUSION

We have carefully considered the defendant's contentions as to the alleged errors occurring during the sentencing phase and conclude the defendant's death sentence should be affirmed.

In accordance with the mandate of Tenn.Code Ann. § 39–13–206(c)(1)(D) (1991), we find that the sentence of death was not imposed in an arbitrary fashion, that the evidence overwhelmingly supports the jury's finding of the statutory aggravating circumstance, and that the evidence supports the jury's finding that the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt. Our comparative proportionality review reveals that the sentence in this case is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and character of the defendant. *See* *State v. Cazes,* 875 S.W.2d 253 (Tenn.1994); *State v. House,* 743 S.W.2d 141 (Tenn.1987); *State v. McNish,* 727 S.W.2d 490 (Tenn.1987); and *State v. King,* 718 S.W.2d 241 (Tenn.1986).

The dissent suggests that no meaningful comparative proportionality review is possible without a procedure that includes objective criteria to determine proportionality. We disagree. A majority of this Court recently stated in *State v. Cazes, supra,* that we do not

> take lightly our duty to conduct a comparative review in each case.... Because we do not find it necessary in every case to compare in writing, detail by detail, all the specific cases or circumstances which are considered in our proportionality review, it does *not* follow ... that we have failed to perform an effective comparative proportionality review as outlined in *State v. Barber,* 753 S.W.2d 659, 663–668 (Tenn.1988).

Id. (emphasis in original).

So it is in this case. We have performed a thorough and searching proportionality review and conclude the sentence is not excessive or disproportionate.

The dissent also argues that the defendant is not among the worst of the bad because he had "lived a normal and productive life, except for the criminal episodes." Again, we emphatically disagree. The proof demonstrates the defendant is undoubtedly "among the worst of the bad," and clearly belongs among those who are eligible for the ultimate sanction. The defendant was convicted of attempted rape in 1984, served 18 months, was placed on parole, violated it and was returned to prison. He committed five aggravated rapes within 90 days of his rape and murder of Karen Pulley and in three instances was armed with weapons. He prowled the city night after night searching out vulnerable female victims. Moreover, both the defendant and Dr. Engum testified that if released, he would continue to roam and to rape. At the most, the evidence showed only that the defendant had been able to function without violence in a prison setting. It does not show that the rape and murder of Karen Pulley and the previous rape convictions were aberrations in an otherwise productive life. Accordingly, based on the nature of the crime and the character of the defendant, we conclude that the sentence in this case is neither excessive nor disproportionate to the penalty imposed in similar cases.

We, therefore, affirm the sentence of death. The sentence will be carried out as ***740** provided by law on the 2nd day of August, 1994, unless otherwise ordered by this Court or by other proper authority. Costs of this appeal are assessed against the defendant, Harold Wayne Nichols.

DROWOTA and O'BRIEN, JJ., concur.

REID, C.J., dissents.

DAUGHTREY, J., not participating.

REID, Chief Justice, dissenting.

I dissent with regard to the majority's findings that the defendant waived his right to object to the jury under Article I, section 9 of the Tennessee Constitution, that the prosecutor's argument concerning parole was not prejudicial error, that the use of the invalid aggravating circumstance of felony murder as an aggravator was harmless error, and that death in this case is not a disproportionate punishment.

CHANGE OF VENUE

The United States Constitution and the Tennessee Constitution guarantee to every person charged with the commission of a crime the right to a trial in the county where the crime was committed by an impartial jury selected from the citizens of that county. U.S. Const. amend. VI; Tenn. Const. art. I, §§ 6, 9. The venue for the trial of a criminal case can be changed only upon the application of the accused or upon the court's own motion with the consent of the accused. Tenn.R.Crim.P. 21(a). Change of venue can be accomplished in Tennessee only by following the statutory procedure. A defendant in a criminal case is entitled to a change of venue if for "causes, then existing, he cannot have a fair and impartial trial in the county" where the case is pending. T.C.A. § 20–4–203 (1980). If, upon the application of the accused, the court finds that the accused cannot have a fair and impartial trial in the county where the charge is pending, T.C.A. § 20–4–206 (1980) requires that the case be removed "to the nearest adjoining county free from the like exception."

This statutory procedure was not followed in this case. The trial court granted the defendant's application for a change of venue upon the necessary finding that the defendant could not have a fair and impartial trial in Hamilton County. The court, however, did not grant a change of venue. Instead, over the objection of the defendant, the court moved the proceedings to Sumner County from whence a jury was selected and transported back to Hamilton County, where the trial was held. There was no showing that Sumner County was the "nearest adjoining county" in which an impartial jury could be impanelled. In fact, Sumner County is five counties removed from Hamilton County. Consequently, despite the finding that the defendant was entitled to a change of venue, he was not in fact granted a change of venue. Instead of granting a change of venue, the trial court gave the defendant a change of venire, a procedure unknown to Tennessee, but permitted in some states by statute. *Odle v. Superior Court of Contra Costa County,* 32 Cal.3d 932, 187 Cal.Rptr. 455, 654 P.2d 225, 242 (1982) (Mosk, J., dissenting).

I do not agree with the majority's recommendation that the procedure followed in this case be authorized by statute. In my opinion, the procedure provided by present law is adequate and should be followed. A defendant has the right to a change of venue only when the state cannot afford him an impartial trial guaranteed by the constitution. If the trial must be moved in order to have a fair and impartial trial, the requirement that it be moved to the nearest county in which a fair and impartial trial can be had is entirely reasonable. It accommodates the accused's right to have the trial as close to the scene of the crime as possible, and it accommodates the public's interest in conserving time and expense incident to the trial.

I would find the unauthorized departure from the plain provisions of the statute to be reversible error.

ARGUMENT CONCERNING PAROLE

The majority acknowledges that any reference to parole possibilities during argument, even indirect references, are improper. However, it characterizes the prosecution's argument as perhaps "hinting at the idea that a life sentence carries with it the possibility that defendant will rape and murder ***741** again," and concludes the argument was not prejudicial error. *Supra* at 733.

Even though parole is not specifically mentioned in the prosecutor's argument, the import of the argument is dramatically clear—unless the defendant is sentenced to death he will be released from prison and rape again. During the prosecutor's initial closing statement, he rhetorically asked: "What do you do with him? He's been in the penitentiary. He got a five year sentence in '84 and he served eighteen months. What do you do with him? What's left? ... And you heard the psychologist say that if he's out he'll do it again." During rebuttal, the prosecutor remarked, "[The defendant's lawyer] says, 'Prison is hell. Send him there.' Yeah, '84 they sent him there on a five year sentence and he served 18 months and got out and raped again. Sure, send him there." Immediately after mentioning the defendant's previous release on parole, the prosecutor quoted Dr. Engum as saying that the defendant might "do it again" if released from prison. This remark was pointless except as an attempt to tell the jury that the possibility of release was a real danger in this case. Moreover, the prosecutor's mention of the defendant's previous parole in response to defense counsel's "prison is hell" argument certainly suggests that death would be the only appropriate sentence given the possibility of parole.

The argument was a comment upon the possibility of parole and was reversible error. *See Smith v. State,* 527 S.W.2d 737, 739 (Tenn.1975).

INVALID AGGRAVATING CIRCUMSTANCE

This Court concluded in *State v. Middlebrooks,* 840 S.W.2d 317, 346 (Tenn.1992), *cert. dismissed,* 510 U.S. 124, 114 S.Ct. 651, 126 L.Ed.2d 555 (1993), that when a defendant is convicted of felony murder, the State's use as an aggravating circumstance at the sentencing hearing of the fact that the murder occurred during the commission of a felony, violates the state and federal constitutions because the aggravator is simply a duplication of the crime itself, and therefore does not sufficiently narrow the class of death-eligible defendants. The sentence in *Middlebrooks* was reversed and the case remanded for resentencing because the Court was unable to conclude beyond a reasonable doubt that the use of the invalid felony murder aggravating circumstance was harmless error, even though the Court found that the remaining aggravating circumstance, that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of the mind, [1] was amply supported by the evidence. *Id.* at 347.

1 Tenn.Code Ann. § 39–2–203(i)(5) (1982).

Middlebrooks was a significant decision in the evaluation of constitutional principles applicable to the sentence of death. It was decided against a background of decisions by this Court and the United States Supreme Court regarding harmless error in capital sentencing.

Prior to 1967, the federal courts assumed that harmless error analysis did not apply to federal constitutional violations, so that when a federal constitutional error occurred, reversal was the automatic remedy. James C. Scoville, Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing,* 54 U.Chi.L.Rev. 740, 741–42 (1987) (hereinafter "Scoville, *Deadly Mistakes*"). Tennessee courts applied the same rule of automatic reversal to state constitutional errors as well. *See e.g. Dykes v. State,* 201 Tenn. 65, 296 S.W.2d 861, 862 (1956). In *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the

U.S. Supreme Court approved the application of the harmless error test to federal constitutional errors in state criminal trials, but held that, in order to deem an error harmless, the reviewing court must be persuaded beyond a reasonable doubt, that the error complained of did not contribute to the verdict obtained. *Id.* at 24, 87 S.Ct. at 828. However, in *Chapman* the Court acknowledged that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. *Id.* at 23, 87 S.Ct. at 827 (citing *e.g., Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to counsel); ***742** *Tumey v. State of Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (right to impartial judge)).

The United States Supreme Court held in *Clemons v. Mississippi,* 494 U.S. 738, 752, 110 S.Ct. 1441, 1450, 108 L.Ed.2d 725 (1990), that the federal constitution is not violated by an appellate court's harmless error analysis when errors occur in a capital sentencing hearing, even when the error involved is the unconstitutional submission of an aggravating circumstance to the jury. The question under *Chapman,* in that context, is not whether the legally admitted evidence was sufficient to support the death sentence, but rather, whether the State has proven "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Satterwhite v. Texas,* 486 U.S. 249, 258–59, 108 S.Ct. 1792, 1798–99, 100 L.Ed.2d 284 (1988) (quoting *Chapman,* 386 U.S. at 24, 87 S.Ct. at 828); *see also State v. Cauthern,* 778 S.W.2d 39, 47 n. 1 (1989), *cert. denied,* 495 U.S. 904, 110 S.Ct. 1922, 109 L.Ed.2d 286 (1990).

Error not rising to the level of a constitutional rights deprivation are judged for harm or prejudice under Rule 52(a) of the Tennessee Rules of Criminal Procedure and Rule 36(b) of the Tennessee Rules of Appellate Procedure. In several important ways, the test for harmlessness of constitutional errors differs from that for nonconstitutional errors. First, once a constitutional error is found, the burden shifts to the state to prove that it is harmless; the burden does not shift to the state for the nonconstitutional errors. Second, the reviewing court must be persuaded "beyond a reasonable doubt" that the error did not affect the trial outcome in order to deem the error harmless—a stricter standard of persuasion than for nonconstitutional error. Finally, a most significant difference is that some constitutional errors never can be deemed harmless, whereas any nonconstitutional error may be considered harmless in a particular case. Scoville, *Deadly Mistakes,* 54 U.Chi.L.Rev. at 744.

Later, in *Sochor v. Florida,* 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992), the Supreme Court concluded that an appellate court cannot fulfill its obligations of meaningful review by simply reciting the formula for harmless error. Justice O'Connor, concurring, observed that:

> In *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), we held that before a federal constitutional error can be held harmless, the reviewing court must find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24, 87 S.Ct. at 828. This is a justifiably high standard, and while it can be met without uttering the magic words "harmless error," see *ante* [504 U.S. at —— – ——, 112 S.Ct.] at 2122–2123, the reverse is not true. An appellate court's bald assertion that an error of constitutional dimensions was "harmless" cannot substitute for a principled explanation of how the court reached that conclusion.

Id., 504 U.S. at ——, 112 S.Ct. at 2123 (O'Connor, J., concurring).

Tennessee courts have applied the *Chapman* constitutional harmless error analysis to both state and federal constitutional errors. *See e.g. State v. Middlebrooks,* 840 S.W.2d at 347; *State v. Cook,* 816 S.W.2d 322, 326 (Tenn.1991). The invalidation of the aggravating circumstance in *Middlebrooks* was clearly constitutionally based, and therefore any *Middlebrooks* errors are subject to constitutional harmless error analysis. While not every error occurring in a capital sentencing hearing is of constitutional dimension, the line between constitutional and non-constitutional error is often blurred

due to the Eighth Amendment requirement for a heightened need for reliability. *See* *State v. Terry,* 813 S.W.2d 420 (Tenn.1991) (quoting *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion), and *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion)). When evidence is introduced into the sentencing calculation that potentially undermines the Eighth Amendment reliability requirement, constitutional harmless error analysis should be employed. *State v. Terry,* 813 S.W.2d at 425 (because evidence of the invalid aggravating circumstance was introduced, and the defendant introduced strong mitigation proof and only one valid aggravator remained, this Court could not conclude that the error was ***743** harmless *beyond a reasonable doubt*); *see also* *State v. Bobo,* 727 S.W.2d 945, 956 (Tenn.) *cert. denied,* 484 U.S. 872, 108 S.Ct. 204, 98 L.Ed.2d 155 (1987) (evidence of an invalid aggravator was introduced; however, because there was little evidence in mitigation, and two other valid aggravators were clearly established, the error was found harmless *beyond a reasonable doubt*); *State v. Cone,* 665 S.W.2d 87, 95 (Tenn.) *cert. denied,* 467 U.S. 1210, 104 S.Ct. 2400, 81 L.Ed.2d 357 (1984) (jury heard evidence on an aggravator held invalid by the Court, but the error was harmless *beyond a reasonable doubt* because at least three other aggravators were clearly established); *State v. Campbell,* 664 S.W.2d 281, 284 (Tenn.) *cert. denied,* 469 U.S. 920, 105 S.Ct. 302, 83 L.Ed.2d 236 (1984) (jury heard evidence of non-violent prior felony convictions, but the Court held such error was harmless *beyond a reasonable doubt* because there was no mitigating evidence and two other valid aggravators); *compare* *State v. Williams,* 690 S.W.2d 517, 533 (Tenn.1985) (probability of prejudice resulting from the consideration of the improperly admitted evidence required reversal); *State v. Johnson,* 661 S.W.2d 854, 862 (Tenn.1983) (consideration of the improperly admitted evidence requires reversal because of the probability of prejudice); *State v. Adkins,* 653 S.W.2d 708, 716 (Tenn.1983) (the probability of prejudice from the wrongfully allowed evidence is so great reversal is required).

In *State v. Howell,* 868 S.W.2d 238 (Tenn.1993), use of felony murder as an aggravating circumstance was found to be invalid pursuant to the *Middlebrooks* decision. However, even though the Court in *Middlebrooks* was unable to conclude that the use of the invalid aggravating circumstance was harmless error, 840 S.W.2d at 347, the Court began in *Howell* a harmless error analysis based on an examination of the number and weight of remaining aggravating circumstances, the jury instructions, the prosecutor's argument, the evidence admitted to establish the invalid aggravator, and the nature and quality of mitigating evidence. The Court's rationale in *Howell* was:

> In order to guarantee the precision that individualized sentencing considerations demand and provide a principled explanation for our conclusion in each case, it is important, when conducting harmless error review, to completely examine the record for the presence of [these] factors which potentially influence the sentence ultimately imposed.

State v. Howell, 868 S.W.2d at 260–61.

My concurrence in *Howell* was based on the majority's analysis of these factors, upon which it concluded that beyond a reasonable doubt, charging the invalid aggravating circumstance did not affect the jury's decision to impose the sentence of death, and also on the fact that no evidence was admitted in support of the invalid aggravating circumstance that was not admissible to show the circumstances of the crime. *Id.* at 732–733 (Reid, C.J., concurring).

In the case before the Court, no evidence was admitted in support of the invalid circumstance, but the record does not, in my view, support the conclusion that the State has shown beyond a reasonable doubt, the jury was not influenced by the aggravating

circumstance. Even under the *Howell* analysis, the admission of the invalid circumstance was not harmless error. The State relied on two aggravating circumstances to support the death penalty—previous convictions for aggravated rape, and the fact that the murder occurred during the commission of a violent felony. The jury was instructed to decide whether the aggravating circumstances were supported by the evidence, and whether they outweighed the mitigating evidence. At the sentencing hearing, evidence of the aggravating circumstances was offered, which included substantial emphasis on the circumstances of the crime itself. Evidence of mitigating circumstances was offered from the defendant, his family, co-workers, and friends as to his character, work background and attitude, and family history. He also submitted the testimony of a clinical psychologist who had diagnosed the defendant as having intermittent explosive disorder. The State's closing argument emphasized the felony murder aggravating circumstance at least as much as the aggravating ***744** circumstance of prior convictions. The most dramatic evidence of the content of the jury's instruction and deliberation, and the weight of the remaining aggravator, was their initial return of the juror death penalty verdict form. This form cited four "aggravating circumstances" concerning the murder itself, but no aggravating circumstances concerning the defendant's record of convictions. The death penalty verdict form cited the four aggravating circumstances as follows:

1. First-degree murder of Karen E. Pulley

2. Unfeeling brutality of the first-degree murder

3. Lack of remorse

4. Lack of respect of human rights

The trial judge sent the jury out to deliberate a second time, and only then did it insert the statutory language supporting the prior conviction aggravating circumstance onto the death penalty verdict form. These circumstances cast grave doubt on the jury's decision.

Our narrow task here is to determine whether the invalid aggravating circumstance of felony murder influenced the jury to impose a sentence of death. There is at the very least a reasonable possibility that the injection of the invalid felony murder aggravating circumstance into the weighing process by the jury contributed to the death sentence, and I cannot conclude that beyond a reasonable doubt the error did not contribute to the verdict. *See* *Chapman,* 386 U.S. at 24, 87 S.Ct. at 828.

Based on the same analysis, I would find that the evidence does not support the verdict that beyond a reasonable doubt the aggravating circumstance does not outweigh the mitigating circumstances. *See* *State v. Smith,* 857 S.W.2d 1, 21 (Tenn.) *cert. denied,* 510 U.S. 996, 114 S.Ct. 561, 126 L.Ed.2d 461 (1993).

COMPARATIVE PROPORTIONALITY REVIEW

The majority summarily states that the sentence of death is "neither excessive nor disproportionate." *Supra* at 739. I disagree with the majority's conclusion for two reasons. The first is that no meaningful proportionality review was done in this case. The comparative proportionality review mandated by statute requires more of this Court than its general impressions of what sentences have been imposed in similar cases. *See* *State v. Howell,* 868 S.W.2d 238, 262 (Tenn.1993) (Reid, C.J., concurring). This is the type of case that demonstrates the need for a definite and precise procedure that includes objective criteria for determining whether the sentence of death in a particular case is excessive or disproportionate in comparison to the penalties imposed in similar cases. A procedure whereby the conduct and character of criminal offenders can be categorized according to generally accepted levels of moral turpitude would provide a structure and standards needed by this Court, trial courts, defense counsel, and prosecutors to avoid the arbitrariness inherent in the present practice. *State v. Harris,* 839 S.W.2d 54, 84–85 (Tenn.1992), *cert. denied,* 507 U.S. 954, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993) (Reid, C.J., dissenting).

The second reason for dissenting on this issue is that the evidence is not sufficient to support a finding that the defendant is among the worst of the bad. The circumstances of the offense in this case are egregious and could qualify the defendant for the ultimate sanction if only the criminal act is considered. However, T.C.A. § 39–13–206(c)(1)(D) requires that reviewing courts consider both the nature of the crime and the character of the offender. The evidence regarding the character of the defendant is not conclusive. Expert evidence shows that the defendant suffered from substantial mental and emotional problems. The other evidence shows that he lived a normal and productive life, except for the criminal episodes. In the absence of objective criteria whereby the defendant's conduct and character can be adjudged dispassionately, I cannot say that the penalty of death is not disproportionate to the penalty imposed in similar cases in which the death penalty was rejected. *See* *State v. Cazes,* 875 S.W.2d 253, 270 (Tenn.1994), (Reid, C.J., concurring and dissenting); ***745** *State v. Middlebrooks,* 840 S.W.2d 317, 354–55 (Tenn.1992) (Reid, C.J., concurring and dissenting).

ORDER ON PETITION FOR REHEARING

PER CURIAM.

The appellant, Harold Wayne Nichols, has filed a petition for rehearing in this cause, which the Court has considered and concludes should be denied.

It is so ORDERED.

DAUGHTREY, J., not participating.

All Citations

877 S.W.2d 722, 62 USLW 2771

IV. Conclusion

For the foregoing reasons, the undersigned recommends that Defendant's Motion for Summary Judgment be GRANTED IN PART and DENIED IN PART. Specifically, Defendant's Motion for Summary Judgment should be DENIED with regard to Plaintiff's Free Exercise claims. Defendant's Motion for Summary Judgment should be GRANTED with regard to Plaintiff's Establishment Clause claims.

Any party has ten (10) days from receipt of this Report and Recommendation in which to file any written objections to it with the District Court. Any party opposing said objections shall have ten (10) days from receipt of any objections filed in which to file any responses to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), *reh'g denied*, 474 U.S. 1111, 106 S.Ct. 899, 88 L.Ed.2d 933 (1986).

July 7, 2006.

Harold Wayne NICHOLS, Petitioner,

v.

Ricky BELL, Warden, Riverbend Maximum Security Institution, Respondent.

No. 1:02 CV 330.

United States District Court,
E.D. Tennessee,
at Chattanooga.

July 25, 2006.

Background: Following affirmance on appeal of defendant's conviction by guilty plea of first degree murder and imposition of the death penalty, 877 S.W.2d 722, defendant filed petition for writ of habeas corpus.

Holdings: The District Court, Edgar, J., held that:

(1) trial counsel's deficient performance, if any, in failing to review serology evidence obtained from murder victim's rape kit did not prejudice defendant;

(2) counsel's conduct in allegedly failing to investigate alleged coercive tactics used in obtaining defendant's confession to murder was not deficient;

(3) defendant was not prejudiced by trial counsel's alleged failure to investigate the possibility that his confession to capital murder was false;

(4) petitioner failed to establish that there was a reasonable probability that a jury would have returned a different sentence had the evidence introduced during the post-conviction proceeding concerning mitigation been introduced during the penalty phase;

(5) there was no prosecutorial misconduct;

(6) trial court's decision not to declare a mistrial after the jury returned with a verdict of death based on four non-statutory aggravating circumstances did not violate defendant's constitutional rights; and

(7) evidence demonstrating the nature and circumstances of capital murder defendant's crime was not constitutionally impermissible.

Motion to dismiss granted.

1. Habeas Corpus ⚿319.1

A habeas petitioner has failed to exhaust his available state court remedies if he still has the opportunity to raise his claim by any available state court procedure. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⚿382

To exhaust available state remedies, a habeas petitioner must have presented to the state courts both the legal basis of the claim for which he seeks habeas relief and the factual basis of the claim. 28 U.S.C.A. § 2254.

3. Habeas Corpus ⚿382

A habeas petitioner has not exhausted his state remedies if he has merely presented a particular legal theory to the courts without presenting each factual claim. 28 U.S.C.A. § 2254.

4. Habeas Corpus ⚿382

The standard for determining whether a habeas petitioner has exhausted the factual basis of his claim is whether the additional facts fundamentally alter the legal claim already considered by the state courts, and the supplementation and clarification of the state-court factual record does not necessarily change a claim so dramatically as to require that the state courts be given a new opportunity to hear the issues. 28 U.S.C.A. § 2254.

5. Habeas Corpus ⚿401

To show "actual innocence" of the death penalty imposed, so as to excuse procedural default, habeas petitioner must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found petitioner eligible for the death penalty. 28 U.S.C.A. § 2254.

6. Habeas Corpus ⚿603

If a prisoner purposefully or by inadvertence lets the time run under which he could have filed his habeas petition, he cannot file a petition beyond the statutory time, even if he claims actual innocence. 28 U.S.C.A. § 2254.

7. Criminal Law ⚿641.13(6)

Trial counsel's deficient performance, if any, in failing to review serology evidence obtained from murder victim's rape kit did not prejudice defendant, as required ineffective assistance of counsel claim; defendant consistently admitted his guilt to authorities, his counsel, and his wife, testified during the sentencing portion of his criminal proceedings that he broke into the victim's home, raped her, and beat her with a board as he was leaving the crime scene, and, although defendant initially denied having intercourse with the victim, he eventually told counsel that it was possible that he could have penetrated the victim. U.S.C.A. Const. Amend. 6.

8. Habeas Corpus ⚿486(1)

Habeas petitioner could not challenge trial counsel's performance during state court proceedings in unrelated rape case on his habeas petition for relief on capital murder and death sentence. 28 U.S.C.A. § 2254.

9. Criminal Law ⚿641.13(6)

Trial counsel's conduct in allegedly failing to investigate alleged coercive tactics used in obtaining defendant's confession to murder was not deficient, as element of claim of ineffective assistance of counsel; trial counsel attempted to have defendant's statement suppressed on the grounds of coercion and involuntariness but was unsuccessful.

10. Habeas Corpus ⚿490(3)

Alleged coercive nature of the interrogation of murder victim's boyfriend did not demonstrate that defendant was coerced to confess to the murder, as required for federal habeas relief. 28 U.S.C.A. § 2254.

11. Criminal Law ⚿641.13(6)

Defendant was not prejudiced by trial counsel's alleged failure to investigate alleged coercive tactics used in obtaining defendant's murder confession, as required to establish ineffective assistance of counsel; defendant failed to demonstrate what

evidence trial counsel would have discovered had he been debriefed more thoroughly regarding his confession.

12. Criminal Law ⚿641.13(6)

Trial counsel's alleged failure to listen to continuous tape recording of defendant's statements made to the police was not prejudicial to defendant, as required to establish ineffective assistance of counsel claim; defendant did not reveal what trial counsel would have uncovered had counsel listened to the continuous tape.

13. Criminal Law ⚿641.13(5)

Failure of defense counsel to investigate any proof of innocence, in prosecution for capital murder and aggravated rape in which defendant entered guilty plea, did not prejudice defendant, as required to establish ineffective assistance of counsel; defendant confessed to the crime and continued to confess to counsel, his investigator, his psychological expert, and his wife.

14. Criminal Law ⚿641.13(5)

Defendant was not prejudiced by trial counsel's alleged failure to investigate the possibility that his confession to capital murder was false, as required to establish ineffective assistance of counsel claim; defendant neither alleged nor demonstrated that he would have proceeded to trial if counsel had conducted an investigation into the possibility of a false confession.

15. Criminal Law ⚿641.13(5)

Trial counsel did not perform deficiently in investigating other possible suspects in capital murder proceedings, to which defendant pleaded guilty, as required to establish ineffective assistance of counsel claim; defendant failed to explain what additional evidence counsel would have obtained had counsel investigated the other suspects rather than depending on detective's explanation of his investigation of the suspects.

16. Habeas Corpus ⚿475.1

Petitioner's claim that trial counsel was ineffective for advising petitioner to plead guilty in unrelated rape cases prior to petitioner being evaluated by his court authorized psychologist was not cognizable on habeas review of defendant's conviction by guilty plea of capital murder. 28 U.S.C.A. § 2254.

17. Habeas Corpus ⚿470

State supreme court's determination that defendant's arrest was based on probable cause was not contrary to, nor an unreasonable application of federal law, as required for habeas relief on defendant's claim of that trial counsel was ineffective for failing to investigate whether there was probable cause to arrest; evidence demonstrated that petitioner had been identified prior to his arrest and thus, his arrest was based on probable cause. 28 U.S.C.A. § 2254.

18. Habeas Corpus ⚿486(5)

Habeas petitioner failed to establish that there was a reasonable probability that a jury would have returned a different sentence had the evidence introduced during the post-conviction proceeding concerning mitigation been introduced during the penalty phase of petitioner's trial, as required for petitioner to establish ineffective assistance of counsel; the proof before the jury was that petitioner's father was emotionally detached and the death of petitioner's grandmother and mother, the only two adults whom he loved and with whom he had a close relationship, was very traumatic for petitioner and virtually left him alone at the age of 10 and the proof introduced during petitioner's state post-conviction proceedings was virtually the same as that introduced during petitioner's sentencing hearing. 28 U.S.C.A. § 2254.

19. Sentencing and Punishment ⚿1780(2)

Prosecutor's conduct during the penalty phase of capital murder trial, eliciting acknowledgment from defendant about the facts of certain cases used as aggravators, including that he raped a female at knifepoint using a knife from her kitchen, that he raped a female using an electrical cord, and that he raped another young girl using a knife and pistol did not amount to prosecutorial misconduct; the questions were relevant to the proof of the statutory aggravating circumstance in that it explained the weapons used by defendant to commit the felonies and established the felonies used as aggravating circumstance were in fact, crimes of violence or involved the threat of violence.

20. Habeas Corpus ⚿497

Prosecutorial misconduct must be so egregious as to deny a petitioner a fundamentally fair trial before habeas relief becomes available. 28 U.S.C.A. § 2254.

21. Criminal Law ⚿1171.1(2.1)

The factors the court considers in determining whether prosecutorial misconduct resulted in a denial of due process are the following: (1) the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; (2) whether they are isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the competent proof to establish the guilt of the accused. U.S.C.A. Const.Amend. 5.

22. Sentencing and Punishment ⚿1714

At penalty phase of capital murder proceedings, statutory mitigating circumstance regarding youthfulness of a defendant was not applicable to a defendant who was 28 years old, a high school graduate, and described as bright normal, if not high average to bright normal in the level of intelligence, was previously in the military, was married, and worked as an assistant manager at a pizza restaurant. West's T.C.A. § 39–13–204(j)(7).

23. Sentencing and Punishment ⚿1786

Under Tennessee law, whether a jury decides to sentence a defendant to death or life, the sentence must be agreed upon unanimously by all jurors. West's T.C.A. § 39–13–204.

24. Sentencing and Punishment ⚿1780(3)

In the context of the penalty phase of a death penalty prosecution, a constitutional violation does not occur when a jury is not instructed of the consequence of failing to reach a unanimous verdict. 18 U.S.C.A. § 3591.

25. Criminal Law ⚿865(1, 2)

A judge may encourage a jury having difficulty reaching a verdict to deliberate longer and give due consideration and respect to the views of their peers; however, a judge errs in instructing the jury to deliberate further if the jury has reached a final verdict, which has been announced and recorded.

26. Sentencing and Punishment ⚿1779(3)

Trial court's decision not to declare a mistrial after the jury returned with a verdict of death based on four non-statutory aggravating circumstances and redirecting the jury's attention to the law and returning them to the jury room with directions to reconsider their verdict did not violate defendant's constitutional rights; the printed portion of the verdict reflected they unanimously found the punishment should be death, the listed statutory aggravating circumstances beyond a reasonable doubt, the State had proven beyond a reasonable doubt the statutory aggravating circumstances outweighed beyond a reasonable doubt the mitigating circum-

stances and they unanimously found that death should be the punishment for petitioner.

27. Criminal Law ⚿867

Under Tennessee law, a manifest necessity requiring a mistrial is shown only when there is no feasible and just alternative to halting the proceedings.

28. Sentencing and Punishment ⚿1779(3)

Although re-instruction on the mitigating circumstances may have been the better practice at sentencing phase of capital murder trial, when re-instructing the jury to correct an invalid verdict, failure to re-instruct on mitigation did not violate defendant's Eighth Amendment rights; the jurors clarified their initial verdict when the trial judge conducted the polling of the jury, the polling of the jury revealed that each juror had initially found the existence, beyond a reasonable doubt, of the two statutory aggravating circumstances and found that those circumstances outweighed any mitigating circumstances, and, in addition, the court initially gave the jury repeated instructions on mitigating circumstances and considering them in reaching their verdict. U.S.C.A. Const. Amend. 8.

29. Habeas Corpus ⚿508

On habeas corpus review, jury's consideration of improper felony-murder aggravating circumstance in capital murder case did not so infect the balancing process such that it was constitutionally impermissible for the Tennessee Supreme Court to affirm the death sentence; the state supreme court noted that the state offered proof that the defendant had committed five similar aggravated rapes within 90 days of the victim's murder, using weapons in three instances, the improper aggravating factor did not convey new information to the jury, and the remaining aggravating circumstance was quite significant. 28 U.S.C.A. § 2254.

30. Habeas Corpus ⚿508

Evidence demonstrating the nature and circumstances of capital murder defendant's crime was not constitutionally impermissible, notwithstanding fact that defendant pleaded guilty to all charges, and thus, habeas relief was not warranted; the challenged evidence was relevant to the statutory aggravating circumstance that the murder was committed while committing rape, was necessary because it was relevant to punishment and to counter defendant's mitigating evidence, and, more importantly, the evidence was permitted under Tennessee law. T.C.A. § 39–13–203(c) (1989); 28 U.S.C.A. § 2254.

31. Habeas Corpus ⚿366

Habeas petitioner procedurally defaulted on claim that trial court violated his constitutional rights when it ordered him to release to the state the personal notes and writings made by petitioner's expert psychologist, given that the claim was not raised on direct appeal as asserted by petitioner in his habeas petition. 28 U.S.C.A. § 2254.

32. Habeas Corpus ⚿480

Alleged violations of the attorney work-product doctrine are not cognizable on habeas corpus review because the privilege for attorney work-product is not a constitutional privilege under the United States Constitution, nor is the privilege applicable to the states under any federal law or treaty. 28 U.S.C.A. § 2254.

33. Habeas Corpus ⚿480

Tennessee Supreme Court's determination that when a psychologist of capital murder defendant did not prepare a summary report, but instead relied on extensive memoranda to record not only observations and hypotheses but also

evaluations, such records were discoverable by the prosecution was not contrary to, or an unreasonable application of, federal law, as would warrant federal habeas relief; the failure of counsel to abide by the court's reciprocal discovery order and their explanation for failing to comply with the order, was sufficient to support the trial judge's conclusion that it appeared the omission was willful and motivated to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence. 28 U.S.C.A. § 2254; Tenn.Rules Crim.Proc., Rule 16(b)(1)(B).

34. Habeas Corpus ⚿508

Tennessee Supreme Court's decision to deny habeas petitioner relief on his claim that the prosecutor implied petitioner may be paroled if given a life sentence was neither contrary to, nor an unreasonable application of, federal law, as required for federal habeas relief; the petitioner would have been eligible for parole after serving a certain number of years if he received a life sentence. 28 U.S.C.A. § 2254.

35. Habeas Corpus ⚿508

Improper closing argument during the penalty phase of a capital trial warrants federal habeas corpus relief only when the argument renders the sentencing hearing fundamentally unfair. 28 U.S.C.A. § 2254.

36. Habeas Corpus ⚿497

Undesirable or universally condemned remarks by the prosecutor will not warrant habeas relief unless the remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 2254.

37. Habeas Corpus ⚿498

To obtain habeas relief, a petitioner must demonstrate the alleged incorrect jury instruction was more than undesirable, erroneous, or universally condemned, but rather, that taken as a whole, the instruction must be so infirm that it rendered the entire trial fundamentally unfair. 28 U.S.C.A. § 2254.

38. Habeas Corpus ⚿498

State supreme court's approval of reasonable doubt jury instruction in capital murder case, instructing that the state must prove any statutory aggravating circumstances beyond a reasonable doubt and to a moral certainty was not contrary to, nor an unreasonable application of federal law, as would warrant federal habeas relief; taken as a whole, the instruction informed the jury that it could convict only if the prosecution established any statutory aggravating circumstances beyond a reasonable doubt and that decision had to be based on a careful examination of all the proof. 28 U.S.C.A. § 2254.

39. Criminal Law ⚿796

Sentencing instructions which create a substantial likelihood that reasonable jurors might think they are precluded from considering any mitigating evidence unless all jurors agreed on the existence of a particular mitigating circumstance are constitutionally invalid.

40. Criminal Law ⚿798(.7)

A unanimity instruction that refers to the process of weighing aggravating circumstances against mitigating factors, as opposed to a unanimity instruction referring to the process of finding or considering a mitigating factor, is acceptable.

41. Sentencing and Punishment ⚿1780(3)

The Eighth Amendment does not require the trial court to restate the elements of any underlying felonies advanced as aggravating circumstances at the sentencing phase of a capital murder trial where the same jury remains impaneled during the guilt and the sentencing phase

and the sentencing phase closely follows the guilt phase. U.S.C.A. Const.Amend. 8.

42. Habeas Corpus ⇐490(3)

State court's determination that habeas petitioner did not ask for an attorney and that his confession was not coerced was not contrary to, or an unreasonable application of, clearly established federal law, as would warrant federal habeas relief; the petitioner signed numerous waivers which included waiving his right to counsel and the trial judge believed the testimony of the police officers over that of petitioner. 28 U.S.C.A. § 2254.

43. Habeas Corpus ⇐508

State court's decision that habeas petitioner's videotaped confession was relevant to sentencing because it established the nature and circumstances of the offense and that petitioner's confession was knowingly and voluntarily given after the defendant was advised of, and waived his constitutional rights, was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, as would warrant federal habeas relief. 28 U.S.C.A. § 2254; T.C.A. § 39–13–203(c) (1989).

44. Habeas Corpus ⇐461

State supreme court's determination that trying defendant's cases out of chronological order for the purpose of obtaining evidence for prior felony aggravating circumstance for a death penalty trial did not violate defendant's constitutional rights was neither contrary to, nor an unreasonable application of, clearly established federal law, as would warrant federal habeas relief. 28 U.S.C.A. § 2254(d).

45. Habeas Corpus ⇐383

Habeas petitioner procedurally defaulted his claim that the trial court erred when it allowed the prosecution to use his prior convictions as aggravating circumstances to support the death penalty; on direct appeal, petitioner did not rely upon any federal cases employing constitutional analysis, upon any state cases employing federal constitutional analysis, phrase the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right, or allege facts were within the mainstream of constitutional law. 28 U.S.C.A. § 2254.

46. Habeas Corpus ⇐383

Habeas petitioner procedurally defaulted his claim that the trial court erred by admitting evidence of prior convictions; petitioner raised the claim in state court, citing to the state rules of evidence, but made only a passing reference to certain constitutional amendments of the Constitution.

47. Habeas Corpus ⇐508

State supreme court's determination that defendant had proper notice of the correct prior conviction to be used as an aggravating circumstance in defendant's capital murder trial was neither contrary to nor an unreasonable application of federal law, as would warrant federal habeas relief; although the state incorrectly included a case number of a prior case that had been dismissed, defendant was provided with the date upon which defendant pleaded guilty and the correct court in which defendant entered the guilty plea. 28 U.S.C.A. § 2254.

48. Criminal Law ⇐938(1)

To obtain a new trial in Tennessee on the basis of newly discovered evidence, the defendant must establish the following: (1) reasonable diligence in seeking the newly discovered evidence; (2) materiality of the evidence; and (3) that the evidence will likely change the result of the trial.

49. Habeas Corpus ⇐461

To obtain relief on cumulative error grounds, a habeas petitioner must present an accumulation of non-reversible errors that must lead the district court to the firm belief that an injustice has been done

resulting in a fundamentally unfair proceeding; however, the mere addition of numerous insubstantial complaints will not lead to a successful cumulative error argument. 28 U.S.C.A. § 2254.

Stephen M. Kissinger, Dana C. Hansen Chavis, Knoxville, TN, for Petitioner.

Alice B. Lustre, Gill R. Geldreich, Jennifer L. Smith, Mark A. Fulks, Paul G. Summers, Stephen W. Austin, Nashville, TN, Leonard Green, Cincinnati, OH, for Respondent.

MEMORANDUM OPINION

EDGAR, District Judge.

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Harold Wayne Nichols ("Nichols" or "petitioner"), a death-sentenced inmate at the Riverbend Maximum Security Institution in Nashville, Tennessee, brings this petition for writ of habeas corpus against the Warden, Ricky Bell ("State" or "respondent"), pursuant to 28 U.S.C. § 2254 [Court File No. 82]. Nichols is petitioning this Court for a writ of habeas corpus discharging him from his "unconstitutional and invalid conviction for first-degree murder" and his resulting death sentence [Court File No. 82, at 1]. Before the Court is respondent's motion and memorandum to dismiss the amended petition [Court File Nos. 119, 120], petitioner's response to the motion to dismiss the amended petition [Court File Nos. 140, 211, Attachment # 1], and respondent's reply to petitioner's response to the motion to dismiss [Court File No. 155]. After carefully considering

arguments of counsel and the applicable law, the Court will **GRANT** the respondent's motion to dismiss [Court File No. 119].

I.

FACTUAL BACKGROUND

On May 9, 1990, Nichols pleaded guilty to first-degree felony murder, aggravated rape, and first-degree burglary [1] in the Criminal Court of Hamilton County before a jury impaneled from Sumner County, Tennessee. The trial proceeded to the penalty phase with the State relying on two aggravating circumstances: (1) the murder's occurrence during the commission of a felony, and (2) Nichols' previous convictions of violent felonies. Tenn.Code Ann. § 39–13–204(i)(2) & (7). At the conclusion of the sentencing hearing, after deliberating approximately two hours, the jury returned a verdict of death based on the two statutory aggravating circumstances.

On direct appeal, the Tennessee Supreme Court determined the use of the felony-murder for which Nichols had been convicted as an aggravating circumstance was error; however, they determined the error was harmless and affirmed the convictions and sentences. The following recitation of the facts is from the direct appeal to the Supreme Court of Tennessee.

A. Facts at the Trial Level

> Because of the substantial publicity surrounding the murder and rape cases, the defendant requested a change of venue prior to trial. The trial court granted the change of venue to Sumner County, but only for the limited purpose of jury selection. The court then ordered the case back to Hamilton County for trial with the Sumner County jury. The trial reconvened in Hamilton County on May 9, 1990. Following the court's denial of the defendant's motion to suppress his videotaped confessions, the defendant entered pleas of guilty to the charges of first-degree felony murder, aggravated rape, and first-degree burglary. [The State dismissed a charge of premeditated first-degree murder.]
>
> The trial proceeded to the penalty phase with the State relying on two aggravating circumstances: (1) the murder's occurrence during the commission of a felony and (2) Nichols' previous convictions of violent felonies. Tenn.Code Ann. § 39–13–204(i)(2) & (7). The State introduced evidence concerning the nature and circumstance of the crime, which included the defendant's videotaped confession, testimony from the medical examiner about the nature and extent of the victim's injuries and the cause of her death, and testimony from the detective who had questioned the defendant on the videotaped interview. The Hamilton County Criminal Court Clerk also testified concerning the defendant's five prior convictions for aggravated rape.
>
> The proof showed that on the night of September 30, 1988, the defendant broke into the house where the 21–year–old–victim, Karen Pulley, lived with two roommates in the Brainerd area of Chattanooga, Tennessee. After finding Pulley home alone in her upstairs bedroom, the defendant tore her undergarments from her and violently raped her. Because of her resistance during the rape, he forcibly struck her at least twice in the head with a two-by-four he had picked up after entering the house. After the rape, the defendant, while still

1. Nichols was granted state post-conviction relief from the sentences in the aggravated rape and first-degree burglary convictions by the state post-conviction court. *See Nichols v. State,* 2001 WL 55747, at *3 (Tenn.Crim.App. 2001). Nichols is presently awaiting re-sentencing on those convictions.

struggling with the victim, struck her again several times with great force in the head with the two-by-four. The next morning, one of Karen Pulley's roommates discovered her alive and lying in a pool of blood on the floor next to her bed. Pulley died the next day. Three months after the rape and murder, a Chattanooga police detective questioned the defendant about Pulley's murder while he was in the custody of the East Ridge police department on unrelated charges. It was at this point that the defendant confessed to the crime. This videotaped confession provided the only link between the defendant and the Pulley rape and murder.

The evidence showed that, until his arrest in January 1989, the defendant roamed the city at night and, when "energized" relentlessly searched for vulnerable female victims. At the time of trial, the defendant had been convicted on five charges of aggravated rape involving four other Chattanooga women. These rapes had occurred in December 1988 and January 1989, within three months after Pulley's rape and murder. The convictions presented to the jury were as follows:

The defendant was indicted for feloniously engaging in sexual penetration of T.R. on December 27, 1988, by the use of force or coercion while the defendant was armed with a weapon-a cord. The defendant plead guilty to the offense of aggravated rape.

The defendant was indicted for feloniously engaging in sexual penetration—-anal intercourse-with S.T. on the 3rd day of January, 1989, by the use of force or coercion while he, the defendant, was armed with a weapon-a pistol. The defendant pled guilty to aggravated rape.

The defendant was indicted for feloniously engaging in sexual penetration-fellatio-with P.A.R. on January 3, 1989, thereby causing personal injury to her. The defendant was also indicted for feloniously engaging in sexual penetration—vaginal intercourse-with P.A.R., on January 3, 1989. The defendant pled not guilty and the jury found the defendant guilty of aggravated rape in each case.

The defendant was indicted for feloniously engaging in sexual penetration, vaginal intercourse, with P.A.G. on December 21, 1988, by the use of force or coercion while he, the defendant, was armed with a weapon-a knife. The defendant pled not guilty and a jury convicted the defendant of aggravated rape.

The primary factors in mitigation presented by the defense were the defendant's cooperation with the police and the psychological effects of his childhood. Several persons who knew the defendant testified to his good character and passive nature.

The defendant also took the stand and testified about his life and the violent crimes he had committed. After his mother died of breast cancer when he was ten years old, he and his older sister were placed in an orphanage for six years by his father, who was apparently emotionally abusive, at least to the defendant's older sister. In 1976, just as he was about to be adopted, he was returned to his father. In 1984 he pled guilty to attempted rape, was sentenced to five years in prison and served eighteen months. Thereafter, he violated parole and served an additional nine months. He was married in 1986. At the time of the killing, he was employed by Godfather's Pizza as a first assistant manager.

Defendant testified that when he committed these violent criminal acts, a "strange energized feeling" that he could not resist would come over him and result in actions that he could not

stop. He explained that he had not asked for help for his affliction or told anyone about this criminal activity because he was afraid he would lose everything. He expressed remorse for his actions but testified that, if he had not been arrested, he would have continued to violently attack women.

Finally, Dr. Eric Engum, a lawyer and clinical psychologist, testified that he had diagnosed the defendant with a psychological disorder termed "intermittent explosive disorder." According to Engum, a person suffering from this disorder normally experiences an increasing, irresistible drive that results in some type of violent, destructive act. Dr. Engum opined that the defendant's condition may have grown out of his anger at abandonment in childhood but conceded that the disorder was rare. According to him, the defendant would function normally in a institutional regimented setting but, if released, would repeat the violent behavior. The State offered Dr. Engum's investigating notes to prove that he was a member of the defense team acting as a lawyer searching for a defense, rather than an objective psychologist searching for a diagnosis.

State v. Nichols, 877 S.W.2d 722, 725–27 (Tenn.1994), *cert. denied*, 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995).

B. Facts Introduced During the State Post–Conviction Hearing

Some additional facts not introduced at the trial level were introduced by petitioner during his state post-conviction hearing [Addendum No. 1].[2] The substance of the testimony of the witnesses presented at the state post-conviction hearing will be taken from different sections of the appellate opinion. *Nichols v. State*, 2001 WL 55747 (Tenn.Crim.App.2001). Throughout the proceedings involving this death penalty case, the related cases, and the cases used as aggravating factors, Nichols was represented by the same two appointed counsel, against whom he has made claims of ineffective assistance counsel. An overview of the proof presented at the state post-conviction hearing is included in the Court of Criminal Appeals decision. The following recitation of the pertinent facts is from the appeal of the denial of his post-conviction petition to the Tennessee Court of Criminal Appeals:

> Senior trial counsel appointed by the trial court was a 1966 graduate of Vanderbilt University and a 1969 graduate of Yale Law School. He was a law clerk for a United States District Court judge, an attorney with the Civil Rights Division of the Justice Department for three years, and an Assistant United States Attorney for three years. Previously, he had been counsel in two capital cases, and his practice consisted of ten percent criminal work and ninety percent civil work. He was the author of the voir dire section of the Tennessee Association of Criminal Defense Lawyers ("TACDL") Death Penalty Manual.
>
> Junior trial counsel was a member of both the National Association of Criminal Defense Lawyers and the TACDL. She was on the board of directors of the TACDL in 1989 and had been a member of the organization for a number of years, holding various offices. She had been the head of their continuing legal education program for a year. She had attended a number of TACDL seminars and had presented a Tennessee criminal law update at "one or two" seminars. Before representing the petitioner, she had attended at least one TACDL capital case seminar, as well as a capital case

2. Additional facts were introduced by petitioner to support his claim that his trial counsel were ineffective for failing to fully inform the jury of his complete mental health history.

seminar of the National Association of Criminal Defense Lawyers.

Additionally, she had attended criminal seminars presented by the Chattanooga Bar Association. According to testimony, as well as an exhibit introduced during the post-conviction hearing, the combined hours billed by trial counsel for the matters in which they represented the petitioner were as follows:

1,386.80 Out-of-court hours in the Karen Pulley case

259.75 In-court hours in the Karen Pulley case

654.50 Out-of-court hours in the rape cases

29.25 In-court hours in the rape cases

According to counsel, the 2,330.30 hours billed were less than the actual combined hours spent on the various matters, but the total was reduced to avoid duplicative billings. Additionally, according to counsel, the 289 in-court hours "were always" with the petitioner present and usually included a meeting with the petitioner in the court anteroom. Further, trial counsel spent "at least" 69.75 hours meeting with the petitioner in jail.

The investigator retained by trial counsel was Michael Cohan, who had been a self-employed private investigator since 1986. He has a bachelor's degree in criminal justice and had been employed in "one form of police work or another" during most of the years since 1969. For four years, he had been a military police officer and was then employed for two years as a police officer by the University of Tennessee. Next, he was a Metro narcotics officer in Knoxville for about five years and then was the assistant regional director for investigations for the Department of Human Services Welfare Fraud Division for approximately five years. He left that position in 1986 to become a private investigator. According to his time records, he spent fifty-one hours conferring with trial counsel and met with the petitioner on more than one occasion, although the records showed only one six-hour meeting. He recorded 163 hours locating and interviewing witnesses. He had previously been involved in several capital cases but was unable to say exactly how many.

Nichols v. State, 2001 WL 55747, *2–5 (Tenn.Crim.App.2001). As the Tennessee appellate court observed, one of petitioner's claims is that his trial counsel were ineffective for failing to investigate Nichols' confessions to ascertain whether they were "false." According to petitioner, the confessions, especially to the other crimes, were very brief and basically answers to leading questions. Therefore, according to petitioner, had counsel investigated the confessions, they would have determined the confessions were false. The various confessions made by petitioner will be recited below as summarized in the appellate court decision.

In addition to the hour-long videotaped statement which the petitioner made regarding the death of Karen Pulley, as described in the supreme court opinion affirming his conviction for that crime, he made additional statements regarding his guilt in that case, as well as the others with which he was charged. On January 6, 1989, beginning at 12:47 a.m., he confessed to law enforcement officers to the rapes of D.L., P.G., P.R., and S.T. These confessions were short, and the purpose of the questions appeared to be to determine how many rape complaints would be closed as the result of the arrest of the petitioner. Shortly after that, he confessed to a rape and an attempted rape in Tiftonia, occurring apparently in October and December 1988, as well as a third rape that occurred in

the same area, the victims not being identified by name and the intent of the questions apparently being to ascertain whether the petitioner had committed these rapes as well. Next, the petitioner confessed to two rapes occurring in Red Bank, with the victims again not being identified by name. Also, the petitioner made additional short confessions as to items he had taken from three rape scenes, one relating to the rape of P.G. The other victims were not identified by name. It appears that all of these statements were tape-recorded. It is unclear how many statements subsequently were made to law enforcement officers in addition to these.

That same morning, an oral statement was taken from the petitioner's wife, who said that beginning in July or August of 1988, the petitioner began going out at night. On some occasions, she would be aware when he left, but other times she "would wake up and he would be gone and [she] would wonder where he was." She said on January 3, 1989, he left home between 8:30 and 9:00 p.m. and returned home about 7:00 a.m. This is the period when P.R. and S.T. were both raped. She told officers that he explained the scratch on his eye when he arrived home by saying that as he was driving with gloves on to pick her up from work, his eye began to itch and, unable to scratch himself because of the gloves, he picked up a screwdriver to do so and poked himself in the eye, cutting himself. She testified in the Karen Pulley trial that she had asked him, presumably after his arrest, about the Pulley murder, and he told her that he was guilty of it.

As trial counsel noted during the post-conviction hearing, the petitioner consistently admitted to them his guilt as to the charges against him. During a meeting with Michael Cohan, the investigator for defense counsel, the petitioner described in detail his attack upon Karen Pulley. Additionally, he admitted his guilt to Dr. Eric Engum, a psychologist retained by trial counsel. Further, he admitted his guilt in the death of Karen Pulley to the victim's mother and told his uncle, during a post-trial visit to the petitioner in prison, that he was guilty. He also testified in court as to his guilt. During the penalty phase of the Karen Pulley trial, the petitioner testified as to his rape and murder of the victim.

Id. at *5–7.

Although Nichols admitted, during the sentencing hearing, that he attacked and raped Pulley after entering her residence, he maintained that he did not intend to kill the victim. *Id.* at *8. He explained that she was hanging onto him when he was trying to leave and that is why he hit her, numerous times, with the two-by-four. *Id.*

A number of witnesses testified at the consolidated evidentiary hearing on Nichols' state post-conviction petitions.[3] Not all of the testimony is relevant to this habeas petition. Thus, the Court will summarize the pertinent portions and discuss the substance of the testimony in relevant portions of this opinion. The Court observes that the petitioner did not personally present any relevant testimony at his state post-conviction hearing. The state post-conviction court ruled that although petitioner did not have a privilege against self-incrimination at the hearing, the court would not require him to respond to incriminating questions from the State. Consequently, other than providing basic biographical information, petitioner, asserting

3. Nichols filed petitions for post-conviction relief in state court for his conviction for first degree felony murder and his death sentence, as well as for a number of convictions for sexual attacks on four additional victims.

a Fifth Amendment privilege, refused to answer any of the State's questions regarding the offenses themselves.

Petitioner presented numerous witnesses, identified as mitigation witnesses, during his state post-conviction proceedings. The first witness to testify was Mr. Winston Gonia ("Mr. Gonia").[4] A retired minister, Mr. Gonia testified he had been on the Board of Tomlinson Children's Home, the orphanage where petitioner temporarily resided [Court File No. 19, Addendum No. 1, Vol. X, at 27–29]. Mr. Gonia was the minister at East Chattanooga Church of God of Prophecy for approximately four years (1962–1965). Petitioner and his family attended this church during the time Mr. Gonia was the minister. Mr. Gonia visited petitioner and his family at their home and observed them at church functions. Mr. Gonia testified petitioner's home was nice and clean, and whenever he visited he felt very welcomed. [Court File No. 19, Addendum No. 1, Vol. X, at 37]. Mr. Gonia observed petitioner's mother and grandmother exhibit love and affection towards petitioner and his siblings. However, he described petitioner's father as quiet, withdrawn, and introverted. Mr. Gonia did not observe petitioner's father demonstrate any love or affection toward his family. Furthermore, Mr. Gonia sensed some uneasiness around petitioner's father which he described as a "strange feeling," but he could not say that there was or was not any abuse in the family [Court File No. 19, Addendum No. 1, Vol. X, at 33–35].

Mr. Gonia returned to the area in 1976 for a couple of years and he reconnected with the petitioner after Nichols returned home from the orphanage to live with his father, sometime in 1977. Mr. Gonia found petitioner to be outgoing and he thought petitioner was going to become an important community member [Court File No. 19, Addendum No. 1, Vol. X, at 40–42]. On cross-examination, Mr. Gonia testified he met with petitioner's trial counsel two or three times and he testified about petitioner's good character during his sentencing hearing. Mr. Gonia concluded his testimony acknowledging that he never saw any abuse in petitioner's family [Court File No. 19, Addendum No. 1, Vol. X, at 44–47].

Ms. Diane Sample Allred ("Ms. Allred"), petitioner's cousin, testified that she and her older brother began living with petitioner's family in 1961, after her parents died [Court File No. 19, Addendum No. 1, Vol. X, at 49–50]. Ms. Allred first thought petitioner's family was "just one happy family" but after living there a couple of years, she observed petitioner's father going into rages and spanking petitioner's older sister "till blood would run out of her legs." [Court File No. 19, Addendum No. 1, Vol. X, at 52–53]. Neither Ms. Allred nor her brother were subjected to spankings but petitioner and his sister were whipped by their father.

Ms. Allred moved out of petitioner's home in 1967, when petitioner was almost seven (7) years old. Petitioner's grandmother lived in the house with them and was described as very loving towards petitioner and his sister, as was petitioner's mother. Ms. Allred observed petitioner's mother holding and hugging her children, unlike petitioner's father, who she never observed holding petitioner, not even when he was an infant [Court File No. 19, Addendum No. 1, Vol. X, at 53–55].

Ms. Allred recollected that petitioner loved to attend church, sing at church, and recite the Bible forward and backward. Ms. Allred did not observe anything about petitioner that made her think he was anything other than a normal child [Court

4. Mr. Gonia testified on petitioner's behalf during his sentencing hearing.

File No. 19, Addendum No. 1, Vol. X, at 80–81].

During the time Ms. Allred resided with petitioner's family in the Chattanooga area, they moved several times. While living in North Chattanooga, petitioner's father would often sit on the couch naked which resulted in Ms. Allred being exposed to him as she left the bathroom to go to her bedroom, a bedroom she shared with the mother of petitioner's father.[5] Ms. Allred testified no one believed her when she complained about petitioner's father exposing himself to her. Ms. Allred's testimony then became confusing because she testified that when they moved to 3206 Dodson Avenue, she was fifteen (15) years old and petitioner's mother had just had her cancer surgery. At that time, petitioner's father allegedly would go to Ms. Allred's bedroom naked, asking her if he could get in the bed with her, while petitioner's mother would cry and try to get her husband to return to their bedroom with her and her children.[6] Ms. Allred responded by "cover[ing] up all over and just tell[ing] him to leave [her] alone." [Court File No. 19, Addendum No. 1, Vol. X, at 56–58]. However, when testifying about petitioner's grandmother's death, Ms. Allred testified petitioner's mother had breast cancer after the grandmother's death, but that she (Ms. Allred) had moved out prior to that time but would come back over to the house to pick up petitioner's mother for her chemo treatment [Court File No. 19, Addendum No. 1, Vol. X, at 58–62].

After petitioner's mother died, his sister called Ms. Allred crying and told her that petitioner's father was sexually mistreating her. A pastor and his wife, Eddie and Helen Gray, brought petitioner and his sister to Ms. Allred's front door requesting that she go to court and testify about petitioner's father's sexual conduct towards her. She agreed to do so, but later Mr. Gray informed her that petitioner's father had agreed to send his children to the orphanage if no one would talk about the abuse [Court File No. 19, Addendum No. 1, Vol. X, at 70–77].[7]

Ms. Allred testified she was not contacted by petitioner's trial counsel. However, on cross-examination, she explained that she had not had any contact with petitioner's family since 1971, and neither petitioner nor his sister knew she lived in Alabama. She acknowledged that from 1971 to the time this crime occurred, 1988, she had no contact with petitioner or his family [Court File No. 19, Addendum No. 1, Vol. X, at 78–80].

Mr. Royce Sampley, Ms. Allred's brother and petitioner's cousin, came from Bolivar, Texas, to testify on petitioner's behalf during his state post-conviction hearing. Mr. Sampley lived in his uncle's home for approximately six years. Mr. Sampley testified the environment in petitioner's home was "threatening" because his uncle, Mr. Mack Nichols, was an angry person who took his anger out on everyone who lived with him [Court File No. 19, Addendum No. 1, Vol. X, at 92–94].

Mr. Sampley perceived his uncle's relationship towards him and his cousins as one of indifference and basically not wanting to be bothered with any of the children

5. According to Ms. Allred, petitioner and his sibling shared a bedroom and bed with his parents. However, according to petitioner's sister, Ms. Deborah Sullivan, her parents slept in the great room, petitioner slept in a corner in the great room across from her parents, and Ms. Sullivan slept in the bedroom between Ms. Allred and the bathroom.

6. Ms. Allred testified the grandmother, who shared her room and bed, would be gone on these occasions.

7. Mr. Gray died in 1992 or 1993, prior to the state post-conviction hearing.

living in the house. Mr. Sampley described his uncle as a person who was always angry and mad. However, Mr. Sampley did state that "it wasn't so much physical that I noticed[,]" but rather, it was Mr. Mack Nichols' demeanor and attitude, which Mr. Sampley described as constantly in a rage and cussing, that set the threatening tone in the house [Court File No. 19, Addendum No. 1, Vol. X, at 94–95]. Mr. Sampley described his uncle's attitude toward his wife and mother as one of resentment when he had to transport them places. However, Mr Sampley said his uncle was pleasant whenever he wanted someone to do something for him [Court File No. 19, Addendum No. 1, Vol. X, at 95–96].

Mr. Sampley's testimony regarding the alleged abuse of his sister by Mr. Mack Nichols is somewhat confusing. First, Mr. Sampley testified that he did not realize his uncle was exposing himself to his sister until after he moved out of his uncle's house. At that time Mr. Sampley tried to talk to some of his relatives about the situation but they did not believe him. Then Mr. Sampley testified he tried to discuss the matter with some of his relatives so that he and his sister could get out of the situation because they were still living with petitioner and his family [Court File No. 19, Addendum No. 1, Vol. X, at 96–99].

Mr. Sampley left petitioner's home in 1967 and never returned. However, Mr. Sampley did see petitioner, his sister, and mother about a year after he moved out of their house but that was their last contact. Mr. Sampley testified no one contacted him prior to petitioner's trial [Court File No. 19, Addendum No. 1, Vol. X, at 99–101].

On cross-examination Mr. Sampley testified he could not remember whether his sister, Joan, called and told him about petitioner's arrest before, during, or after the trial. Mr. Sampley testified petitioner would not have known how to contact him [Court File No. 19, Addendum No. 1, Vol. X, at 101–07].

The state post-conviction court also reviewed the videotaped deposition of petitioner's sister, Ms. Deborah Diane Sullivan ("Ms. Sullivan"). The video tape and sixty-eight page transcript reveals petitioner's sister was very guarded in her answers and not willing to discuss any alleged sexual abuse of her by her father. When asked if there were any allegations of abuse she responded that there were no such allegations "where Wayne is concerned" [Court File No. 67, Addendum No. 9, Exhibit 11, at 36]. Ms. Sullivan described her father's household as "mentally trying." She testified her father and grandmother spanked her and there were constant threats of spankings [Court File No. 67, Addendum No. 9, Exhibit 11, at 11–12, 37].

As previously noted, Ms. Sullivan's testimony differed from Ms. Allred's testimony, in that Ms. Sullivan testified her mother and father slept out in the great room and she had a bedroom between Ms. Allred's and the grandmother's room and the bathroom. Ms. Allred testified petitioner, his sister, and parents slept in the same bedroom. Ms. Sullivan testified her bed was a double bed and her recollection was that petitioner slept in the corner of the great room across from where her parents slept [Court File No. 67, Addendum No. 9, Exhibit 11, at 9].

Ms. Sullivan's testimony paints a picture of a family who, more or less, stayed to themselves. The children did not bring friends home from school. Other than relatives, the only other visitors the children had were a neighbor's grandchildren, but that apparently was only on a rare occasion. Petitioner's father was described as the disciplinarian and although Ms. Sulli-

van remembered being spanked with a switch until there were welts, when asked if Mr. Mack Nichols ever spanked until there was blood, Ms. Sullivan responded "[p]robably" [Court File No. 67, Addendum No. 9, Exhibit 11, at 10]. Although she was sure her father spanked petitioner, Ms. Sullivan could not recall a particular time when he did so. Ms. Sullivan stated her mother did not attempt to stop the spankings and her Grandmother Tillman, who lived with them and was Mr. Nichols' mother, also spanked them with switches. Ms. Sullivan's testimony indicates there was very little communication in the family. When asked if anyone tried to explain death in relation to the death of their mother she responded that "[y]ou have to, you just, you're handed these things or these things take place and you just, you roll with it, you just go with it, whatever... There is a death and then you know they are dead and you go to the funeral and you don't have them anymore and that's it" [Court File No. 67, Addendum No. 9, Exhibit 11, at 33–34].

Ms. Sullivan did admit that there were allegations her father abused her but she would not elaborate on the subject [Court File No. 67, Addendum No. 9, Exhibit 11, at 36–37]. She stated she was constantly living in fear at home and the atmosphere was not healthy, but she and petitioner never discussed their home-life [Court File No. 67, Addendum No. 9, Exhibit 11, at 38]. When asked specifics about the alleged abuse, Ms. Sullivan generally responded that the abuse, if there was any, was against her and not petitioner [Court File No. 67, Addendum No. 9, Exhibit 11, at 40–42]. She stated that, to her knowledge, petitioner was never physically or sexually abused by their father [Court File No. 67, Addendum No. 9, Exhibit 11, at 43]. Ms. Sullivan has always told people that she and petitioner were sent to the orphanage because their father was unable to care for them. She was told by Sue Puryear, the lady she ran to for protection from her father, that was all she needed to tell people. However, Ms. Sullivan stated her father was emotionally unable to take care of her and petitioner:

> ... but then that was always. I mean we didn't—you know, emotionally mother I guess and grandma probably was the emotional support if there was such a thing back then. There again, it goes back to that old mentality where kids are to be seen and not heard and emotional support was not—I don't know. That wasn't—I don't know if that was even in the vocabulary back then, you know, give kids emotional support.

[Court File No. 67, Addendum No. 9, Exhibit 11, at 45–47].

Ms. Sullivan described her relationship with petitioner as a close loving relationship. Ms. Sullivan wanted petitioner to stay with his father because she did not think a father and son should be separated [Court File No. 67, Addendum No. 9, Exhibit 11, at 43]. Her recollection was, as a child, petitioner was always with his father, but when he was older petitioner would stay out late and basically felt he could come and go as he pleased [Court File No. 67, Addendum No. 9, Exhibit 11, at 53]. Although she described an incident where petitioner came home to his father's house drunk, she stated her father drank very little [Court File No. 67, Addendum No. 9, Exhibit 11, at 54].

Ms. Sullivan testified petitioner had a sleepy eye, speech impediment, and pneumonia when he was young [Court File No. 67, Addendum No. 9, Exhibit 11, at 56]. When she thinks of her mother she thinks of love. When asked about her memories of her father, who was still alive at the time, petitioner's sister stated that when she needed to have contact with her father, she knew where to contact him [Court File No. 67, Addendum No. 9, Exhibit 11, at

59]. Ms. Sullivan revealed that petitioner's trial attorneys probably tried to contact her and probably spoke with her husband because her husband told her that the petitioner's lawyers were calling and trying to get in touch with her.

A number of other witnesses, family and neighbors, testified at the state post-conviction evidentiary hearing. Since much of the testimony was not mitigating, the Court will discuss the relevant substance of their testimony in the relevant portions of this opinion.

II.

PROCEDURAL BACKGROUND

The State of Tennessee has provided the Court with copies of petitioner's state court proceedings [Court File Nos. 17–24, 26–27, 30–33, 37–43, 50, 52, 55, 67–75, 122–23, 194; Addenda 1–11]. Petitioner's conviction and sentence were affirmed on direct appeal. *State v. Nichols*, 877 S.W.2d 722 (Tenn.1994).

Petitioner filed his original petition for post-conviction relief on April 20, 1995, in the Criminal Court of Hamilton County, Tennessee. Petitioner alleged twenty-five instances of constitutional violations [Court File No. 17, Addendum No. 1, Vol. 2, at 9–25]. Petitioner, through his attorneys, filed an amended petition on September 15, 1995, and December 16, 1996 [Court File No. 17, Addendum No. 1, Vol. 2, at 31, 138–163]. At the conclusion of an evidentiary hearing and after considering post-hearing briefs, the trial court denied the petition on March 18, 1998 [Court File No. 18, Addendum No. 1, Vol. 3, at 498–516].

On April 17, 1998, petitioner, through counsel, filed a notice of appeal to the Tennessee Court of Criminal Appeals on the following issues:

I. Whether petitioner received effective assistance of counsel at the guilty stage of his capital trial and in his non-capital cases?

II. Whether Mr. Nichols was denied the effective assistance of counsel by his counsel's failure to move to suppress his confessions on the theory that the statements were made during a period of illegal arrest?

III. Whether Mr. Nichols was denied the effective assistance of counsel in the penalty phase of his capital trial?

IV. Was Mr. Nichols denied effective assistance of counsel by the failure of his trial counsel to object to improper argument and cross-examination by the prosecutor and failure to raise prosecutorial misconduct in the motion for a new trial or on appeal?

V. Whether petitioner's counsel were ineffective for failing to request jury instructions and for failing to object to the trial court's improper jury instructions?

VI. Are the findings of fact by the court below clearly erroneous?

VII. Did counsel render ineffective assistance by failing to raise at trial or on appeal that death by electrocution is cruel and unusual punishment?

VIII. Did trial and appellate counsel render ineffective assistance by failing to argue in the trial court or on appeal that requiring the petitioner to turn over his psychiatric expert's rough notes, which included statements made by petitioner to his psychiatric expert, violated petitioner's right to remain silent in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, § 9 of the Tennessee Constitution?

IX. Were the accumulation the [sic] errors in this case prejudicial?

X. Must the sentence of death in the instant case be set aside as the imposition of death is unreliable and violates the values recognized and protected by the Eighth and Fourteenth Amend-

ments to the Constitution of the United States and Article I § 16 of the Tennessee Constitution?

XI. Is the death sentence unconstitutional, because it infringes upon Mr. Nichols' fundamental right to life, and is not necessary to promote any compelling state interest?

[Court File No. 26, Addendum No. 2, Doc. 1, at xiv-xv].

In addition to attacking his first degree murder conviction, as well as convictions for aggravated rape and first degree burglary resulting from the same facts, Nichols had also filed petitions for post-conviction relief from a number of convictions for sexual attacks on four additional victims. The appellate court consolidated the cases and affirmed the judgments of the post-conviction court, which denied petitioner post-conviction relief from his convictions, but granted him new sentencing hearings in the noncapital cases. *Nichols v. State,* 2001 WL 55747 (Tenn.Crim.App.2001).

Nichols filed a petition for rehearing which was denied [Court File No. 26, Addendum No. 2, Docs. 5–6]. Petitioner then filed a motion to consider post-judgment facts which was denied by the appellate court [Court File No. 26, Addendum No. 2, Docs. 7–8]. Nichols next appealed the judgment of the Tennessee Court of Criminal Appeals to the Tennessee Supreme Court. In his application for permission to appeal, petitioner raised the following issues:

I. Did the Court of Criminal Appeals apply an improper standard of review, thus requiring that this Court intervene to secure uniformity of decision, and to assert its supervisory authority over the lower courts?

II. Should this Court grant permission to appeal to address to [sic] conclusions of the Court of Criminal Appeals regarding the [sic] Mr. Nichols' privilege against self-discrimination?

A. Did the decision of the Court of Criminal Appeals deny Mr. Nichols' right to due process under the 14th amendment to the United States Constitution by deciding an issue which had neither been briefed nor argued?

B. Did the decision of the Court of Criminal Appeals violate established procedural rules requiring the intervention of this court by deciding an issue which had neither been briefed or argued?

C. Should this court grant permission to appeal to clarify the scope of a post-conviction petitioner's right to remain silent under the Fifth Amendment to the United States Constitution or Article I, Section 9 of the Tennessee Constitution?

III. Did the Court of Criminal Appeals err in denying Mr. Nichols the opportunity to return to the trial court for additional DNA testing?

IV. Whether Mr. Nichols received ineffective assistance of counsel at the guilt stage of his capital trial and in his noncapital cases.

V. Whether Mr. Nichols was denied the effective assistance of counsel by his counsel's failure to move to suppress his confessions on the theory that the statements were made during a period of illegal arrest.

VI. Whether Mr. Nichols was denied the effective assistance of counsel in the penalty phase of his capital trial.

VII. Was Mr. Nichols denied effective assistance of counsel by the failure of his trial counsel to object to improper argument and cross-examination by the prosecutor and failure to raise prosecutorial misconduct in the motion for a new trial or on appeal?

VIII. Whether Mr. Nichols' counsel were ineffective for failing to request jury instructions and for failing to object

to the trial court's improper jury instructions.

IX. Are the findings of fact by the court below clearly erroneous?

X. Did trial and appellate counsel render ineffective assistance by failing to argue in the trial court or on appeal that requiring Mr. Nichols to turn over his psychiatric expert's rough notes, which included statements made by him to his psychiatric expert, violated Nichols' right to remain silent in violation of the fifth and fourteenth amendments to the Constitution of the United States and Article I, § 9 of the Tennessee Constitution?

XI. Were the accumulation [of] the errors in this case prejudicial?

XII. Must the sentence of death in the instant case be set aside as the imposition of death is unreliable and violates the values recognized and protected by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, § 16 of the Tennessee Constitution?

XIII. Is the death sentence unconstitutional, because it infringes upon Mr. Nichols' fundamental right to life, and is not necessary to promote any compelling state interest?

[Court File No. 27, Addendum No. 3, Tab 1, p. xv-xvi].

The Tennessee Supreme Court granted the application for permission to appeal, and informed the parties that the Court was particularly interested in the issue of whether the Court of Criminal Appeals erred in raising and deciding the issue of how the Fifth Amendment right against self-incrimination applied to Nichols at the petitioner's post-conviction hearing. The Tennessee Supreme Court instructed the parties that "[t]his statement of the issue for oral argument does not prevent the parties from raising additional issues . . .," [Court File No. 27, Addendum No. 3, Tab 3].

Petitioner's brief included the following issues:

I. Does a death-sentenced post-conviction petitioner have a right to remain silent under the fifth amendment to the United States Constitution or Article I, Section 9 of the Tennessee Constitution?

II. Did the decision of the Court of Criminal Appeals deny Mr. Nichols his right to due process under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 16 of the Tennessee Constitution by deciding an issue which had neither been briefed nor argued?

III. Did the Court of Criminal Appeals err in denying Mr. Nichols the opportunity to return to the trial court for additional DNA testing?

IV. Did the Court of Criminal Appeals apply an improper standard of proof concerning petitioner's claims of ineffective assistance of counsel?

V. Was Mr. Nichols denied effective assistance of counsel by the failure of his trial counsel to object to improper argument and cross-examination by the prosecutor and failure to raise prosecutorial misconduct in the motion for a new trial or on appeal?

VI. Did Mr. Nichols receive ineffective assistance of counsel at the guilt stage of his capital trial and in his non-capital cases?

VII. Was Mr. Nichols denied the effective assistance of counsel by his counsel's failure to move to suppress his confessions on the theory that the statements were made during a period of illegal arrest?

VIII. Was Mr. Nichols denied the effective assistance of counsel at the penalty phase of his capital trial?

IX. Were Mr. Nichols' counsel ineffective for failing to request jury instructions and for failing to object to the trial court's improper jury instructions?

X. Are the findings of fact by the court below clearly erroneous?

XI. Did trial and appellate counsel render ineffective assistance by failing to argue in the trial court or on appeal that requiring Mr. Nichols to turn over his psychiatric expert's rough notes, which included statements made by him to his psychiatric expert, violate Mr. Nichols' right to remain silent in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 9 of the Tennessee Constitution?

XII. Were the accumulation of errors in this case prejudicial?

XIII. Must the sentence of death in the instant case be set aside as the imposition of death is unreliable and violates the values recognized and protected by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 16 of the Tennessee Constitution?

XIV. Is the death sentence unconstitutional because it infringes upon Mr. Nichols' fundamental right to life, and is not necessary to promote any compelling state interest?

Nichols requested the Court to consider all issues, even though some issues were not repeated in this brief [Court File No. 27, Addendum No. 3, Tab 4, p. x-xi]. The Supreme Court of Tennessee ultimately affirmed the judgment of the Court of Criminal Appeals on October 7, 2002 [Court File No. 27, Addendum No. 3, Tab 7].

On October 23, 2002, in the United States District Court for the Eastern District of Tennessee, Southern Division, Chattanooga, Tennessee, Nichols' counsel filed a motion and application to appoint counsel under 21 U.S.C. § 848(q)(4)(B) to investigate, prepare and file a petition for writ of habeas corpus [Court File No. 1]. Nichols did not request a stay of execution and it did not appear that an execution date had been set. Nevertheless, this Court ordered that if an execution date had been set, that it was stayed pending further orders of this Court.

Petitioner's motion was granted; counsel was appointed; and petitioner was permitted to proceed without payment of fees [Court File No. 3]. During the course of this proceeding, petitioner has filed numerous motions. A motion for discovery [Court File No. 47] was filed on petitioner's behalf and was denied [Court File No. 77]. Nichols filed a motion to conduct destructive testing and discovery [Court File No. 85] and a motion to stay the habeas proceedings pending the resolution of state court DNA testing [Court File No. 87], both of which were denied [Court File No. 102]. In addition, petitioner's renewed motions to conduct destructive testing and discovery and to hold this matter in abeyance [Court File No. 106] were also denied [Court File No. 124]. Nichols' motion to expand the record [Court File No. 111] was granted [Court File No. 124]. Petitioner also filed a motion for an order directing the filing of additional transcripts and appellate brief [Court File No. 143] which was denied [Court File No. 149]. A second motion by Nichols to expand the record [Court File No. 160] was denied by the Court as moot since the attachments petitioner requested to expand the record with were already a part of the record [Court File No. 178]. Petitioner's third motion for discovery requesting an order permitting DNA testing of evidence [Court File No. 182] was partially withdrawn and the remaining portion of the motion was denied [Court File No. 206]. Petitioner's motion for a copy of the addenda [Court File No. 212] was denied [Court File No.

218] and his motion to direct the State to file missing or incomplete documents [Court File No. 214] was granted in part [Court File No. 227]. Petitioner's motion for reconsideration of the Court's decision denying him a copy of the addenda was referred to the United States Magistrate Judge, as was a portion of the motion requesting the State to file missing or incomplete documents [Court File No. 228]. The claims were eventually resolved by agreement of the parties (respondent provided a copy of the addenda to the petitioner and the incomplete or missing documents were filed with the Court) [Court File Nos. 247, 249].

On May 23, 2003, Nichols filed his petition for writ of habeas corpus [Court File No. 9] which the Court returned as insufficient [Court File No. 14]. On September 2, 2003, petitioner filed another habeas corpus petition [Court File Nos. 34, 35] which was stricken from the record [Court File No. 77]. On November 20, 2003, Nichols filed an amended habeas petition [Court File No. 78]. The State has filed a motion to dismiss pursuant to 28 U.S.C. § 2254(d) [Court File No. 119], to which petitioner has objected [Court File Nos. 140, 211, 213].

III.

STANDARDS OF REVIEW

A. Habeas Claims Cognizable Under 28 U.S.C. § 2254

A federal district court has jurisdiction to grant a writ of habeas corpus under § 2254 of Title 28 to the United States Code. 28 U.S.C. § 2254. Section 2254(a) limits the court's jurisdiction to those cases in which a petitioner "in custody pursuant to the judgment of a State court" alleges "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The initial question in a habeas petition is, therefore, whether the petitioner raises claims cognizable under § 2254(a).

B. Review of Habeas Claims on the Merits

The Antiterrorism and Effective Death Penalty Act ("AEDPA") made a number of procedural and substantive changes to the habeas corpus provisions codified in Chapter 153 of Title 28 of the United States Code. Section 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), limits a federal district court's review of habeas claims that were adjudicated on the merits in state court. In particular, a court considering a habeas claim must defer to any decision by a state court concerning that claim unless the state court's judgment (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). The United States Supreme Court has interpreted the language of § 2254. *See Williams v. Taylor,* 529 U.S. 362, 402, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (O'Connor, J., delivering the opinion of the Court as to Part II and concurring as to Parts I and III–V); *see also Harris v. Stovall,* 212 F.3d 940 (6th Cir.2000), *cert. denied,* 532 U.S. 947, 121 S.Ct. 1415, 149 L.Ed.2d 356 (2001) (construing *Williams*).

According to the *Williams* Court, the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" refers to "holdings, as opposed to dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams,* 529 U.S. at 412, 120 S.Ct. 1495. Hence, a federal

district court hearing a habeas corpus petition may not look to lower federal court decisions to determine whether the state court's decision "was contrary to, or involved an unreasonable application of, clearly established law." *See id.; Harris,* 212 F.3d at 943–44.

The phrase "contrary to ... clearly established precedent" means "substantially different from the relevant precedent of [the Supreme Court]." *Williams,* 529 U.S. at 405, 120 S.Ct. 1495. A state court decision is "contrary to ... clearly established precedent" if the state court applied a rule contradicting the governing law set forth in Supreme Court cases. *Id.* Similarly, a state court decision is "contrary to ... clearly established precedent" if the state court confronted a set of facts materially indistinguishable from a Supreme Court decision and arrived at a different result. *Id.* at 405–08, 120 S.Ct. 1495. However, a state court decision applying valid Supreme Court precedent does not fall within the "contrary to" language and cannot be reviewed by a federal court under § 2254(d)(1), even if the federal court would have reached a different result in applying the rule.

The phrase "an unreasonable application of ... clearly established precedent" means an "application of clearly established law [that] was objectively unreasonable." *Id.* at 409, 120 S.Ct. 1495. It does not mean "an incorrect application of federal law." *Id.* at 410, 120 S.Ct. 1495 (emphasis original). Hence, if a federal court concludes in its independent judgment that the state-court decision applied clearly established federal law erroneously or incorrectly, it could grant habeas relief under § 2254(d)(1) only if the application was also unreasonable. *Id.* at 410–13, 120 S.Ct. 1495.

In sum, the changes made to § 2254(d) by the AEDPA require federal courts to pay greater deference to the determinations made by state courts than they were required to under the previous statutory language. *Tinsley v. O'Dea,* 142 F.3d 436 (6th Cir.) (unpublished table decision), available in 1998 WL 124045, at *2, *cert. denied,* 525 U.S. 937, 119 S.Ct. 353, 142 L.Ed.2d 291 (1998); *Harpster v. Ohio,* 128 F.3d 322 (6th Cir.1997), *cert. denied,* 522 U.S. 1112, 118 S.Ct. 1044, 140 L.Ed.2d 109 (1998); *Spreitzer v. Peters,* 114 F.3d 1435, 1441 (7th Cir.), *modified on other grounds,* 127 F.3d 551 (1997), *cert. denied,* 522 U.S. 1120, 118 S.Ct. 1060, 140 L.Ed.2d 121 (1998).

C. Factual Bases for Habeas Claims

In reviewing a state court's adjudication of a habeas claim, the federal district court must presume the state court's factual determinations were correct. 28 U.S.C. § 2254(e)(1). The petitioner may rebut this presumption of correctness by clear and convincing evidence. *Id.* If the petitioner has failed to develop the factual basis for his habeas claim in the state-court proceedings however, he generally is not entitled to an evidentiary hearing unless (1) the legal or factual basis of the habeas claim did not exist at the time of the state-court proceedings, and (2) "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense." *Id.* § 2254(e)(2).

A petitioner "fail[s] to develop the factual basis" for his habeas claim in the state-court proceedings through a lack of diligence or some greater fault attributable to him or his counsel. *Williams v. Taylor,* 529 U.S. 420, 431–35, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). Congress intended that "prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an

evidentiary hearing." *Id.* Hence, whether a petitioner must satisfy the heightened standard imposed by § 2254(e)(2) depends on whether the petitioner was diligent in his efforts to develop a factual basis for his claim, not on whether the facts could have been discovered or whether those efforts would have been successful. *Id.* at 433–37, 120 S.Ct. 1479.

Lack of diligence will not bar an evidentiary hearing if efforts to discover the facts would have been in vain because there is no relationship between the petitioner's fault and the impossibility of discovery. 28 U.S.C. § 2254(e)(2)(A)(i). Similarly, a petitioner's lack of diligence or fault will not bar a hearing if there is clear and convincing evidence a reasonable trier of fact would not have found the petitioner guilty of the underlying offense but for constitutional error, *id.* § 2254(e)(2)(B), or if a new rule of constitutional law not available at the time of the earlier proceedings is made retroactive to cases on collateral review by the Supreme Court, *id.* § 2254(e)(2)(A)(i). Thus, a petitioner who failed to develop the factual basis of a claim in state court proceedings through lack of diligence or fault has an opportunity to obtain an evidentiary hearing if the legal or factual basis of the claim did not exist at the time of state court proceedings. *Williams,* 529 U.S. at 435–37, 120 S.Ct. 1479.

In summary, a petitioner must be diligent in developing the record and, if possible, in presenting all claims of constitutional error so the state court will have its rightful opportunity to adjudicate federal rights. If the petitioner contributes to the absence of a full and fair adjudication in state court and fails to diligently develop the record, then an evidentiary hearing is prohibited in federal court pursuant to § 2254(e)(2) unless the other stringent requirements of the statute are met. If a petitioner made insufficient effort to pursue a claim in state court, then he will be prohibited from pursuing the claim in federal court. However, if a petitioner failed to develop the factual basis of a claim because he was unable to develop his claim in state court despite diligent effort, then an evidentiary hearing will not be barred by § 2254(e)(2). *See id.* at 437, 120 S.Ct. 1479.

D. Procedural Default

Title 28, United States Code, Section 2254(b), limits federal court jurisdiction to hear a habeas claim to those cases in which a petitioner has exhausted all available state court remedies:

> (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective processes; or circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254(b); *see also Granberry v. Greer,* 481 U.S. 129, 133–34, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987); *Rose v. Lundy,* 455 U.S. 509, 519, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982); Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts.

[1, 2] A petitioner has failed to exhaust his available state court remedies if he still has the opportunity to raise his claim by any available state court procedure. *Gray v. Netherland,* 518 U.S. 152, 161, 116 S.Ct.

2074, 135 L.Ed.2d 457 (1996), *Preiser v. Rodriguez,* 411 U.S. 475, 477, 489–90, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973); *Gall v. Parker,* 231 F.3d 265, 283–84 (6th Cir. 2000), *cert. denied,* 533 U.S. 941, 121 S.Ct. 2577, 150 L.Ed.2d 739 (2001). To exhaust these state remedies, the petitioner must have presented to the state courts both the legal basis of the claim for which he seeks habeas relief and the factual basis of the claim. *Gray,* 518 U.S. at 162–63, 116 S.Ct. 2074 (stating that the exhaustion requirement is not satisfied "by presenting the state courts only with the facts necessary to state a claim for relief"); *Picard v. Connor,* 404 U.S. 270, 275–76, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); *Rust v. Zent,* 17 F.3d 155, 160 (6th Cir.1994). The factual allegations made in federal court must be the same factual allegations made in state court, and the substance of a federal habeas claim presented to the federal court must first be presented to the state court. *Picard,* 404 U.S. at 276, 92 S.Ct. 509.

[3] When a petitioner raises different factual issues under the same legal theory, he is required to present each factual claim to the highest state court in order to exhaust his state remedies. *See O'Sullivan v. Boerckel,* 526 U.S. 838, 844–45, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). A petitioner has not exhausted his state remedies if he has merely presented a particular legal theory to the courts without presenting each factual claim. *Pillette v. Foltz,* 824 F.2d 494, 497–98 (6th Cir.1987). Moreover, each factual claim must be presented to the state courts as a matter of specific federal law. *Anderson v. Harless,* 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) ("It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made"); *Gray,* 518 U.S. at 163, 116 S.Ct. 2074 ("It is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court"); *Duncan v. Henry,* 513 U.S. 364, 366, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.").

[4] Conversely, if a petitioner presented the substance of his habeas claim to the state courts, an elaboration of the facts or legal theories will not result in a new claim. *Jones v. Washington,* 15 F.3d 671, 674–75 (7th Cir.), *cert. denied,* 512 U.S. 1241, 114 S.Ct. 2753, 129 L.Ed.2d 870 (1994). The standard for determining whether the petitioner has exhausted the factual basis of his claim is whether the additional facts "fundamentally alter the legal claim already considered by the state courts." *Vasquez v. Hillery,* 474 U.S. 254, 260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). The supplementation and clarification of the state-court factual record does not necessarily change a claim so dramatically as to require that the state courts be given a new opportunity to hear the issues. *Id.* at 258–60, 106 S.Ct. 617. The "failure to make every factual argument to support [a] claim does not constitute a failure to exhaust." *Patterson v. Cuyler,* 729 F.2d 925, 929 (3rd Cir.1984); *see also Picard,* 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971) (A claim may be fairly presented to the state court without citing chapter and verse of the Constitution.).

At bottom, a claim sought to be vindicated in a federal habeas proceeding must have first been raised in the state courts so the state courts have the first opportunity to hear the claim. The state court to which the petitioner presented the issue of federal law must address the merits of those claims. *Coleman v. Thompson,* 501 U.S. 722, 734–35, 111 S.Ct. 2546, 115

L.Ed.2d 640 (1991). If the state court decides those claims on an adequate and independent state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, the petitioner is barred by this procedural default from seeking federal habeas review, unless he can show cause and prejudice for that default. *Edwards v. Carpenter,* 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000); *Teague v. Lane,* 489 U.S. 288, 297–99, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Wainwright v. Sykes,* 433 U.S. 72, 87–88, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Cause for a procedural default depends on some "objective factor external to the defense" that interfered with the petitioner's efforts to comply with the procedural rule. *Coleman,* 501 U.S. at 752–53, 111 S.Ct. 2546; *Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

E. Miscarriage of Justice: Actual Innocence

A petitioner may avoid the procedural bar and the necessity of showing cause and prejudice by demonstrating "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman,* 501 U.S. at 750, 111 S.Ct. 2546. The petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime." *Schlup v. Delo,* 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (quoting *Carrier,* 477 U.S. at 496, 106 S.Ct. 2639). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.; see also Sawyer v. Whitley,* 505 U.S. 333, 339 n. 5, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992) (holding that a petitioner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt" (citations omitted)).

In addition to a claim of actual innocence, a habeas petitioner must demonstrate "an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins,* 506 U.S. 390, 400, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). Thus, "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 404, 113 S.Ct. 853. The Supreme Court of the United States has explicitly tied the fundamental miscarriage of justice exception to the petitioner's innocence to ensure the exception would remain rare and only be applied in the extraordinary case, while also ensuring relief would be extended to those who are truly deserving. *See Schlup,* 513 U.S. at 299, 115 S.Ct. 851.

[5, 6] The miscarriage of justice exception is concerned with actual—not legal—innocence. *See Smith v. Murray,* 477 U.S. 527, 537, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). Hence, to show "actual innocence" of the death penalty imposed, a petitioner must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found petitioner eligible for the death penalty. *See Sawyer,* 505 U.S. at 336, 112 S.Ct. 2514. Actual innocence "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." *Smith,* 477 U.S. at 537, 106 S.Ct. 2661, *quoted in Sawyer,* 505 U.S. at 339–40, 112 S.Ct. 2514. "Actual innocence" of the death penalty is a very narrow exception and must be determined by relatively objective standards. The "actual innocence" requirement must focus on those

elements that render a defendant eligible for the death penalty and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error. *Sawyer*, 505 U.S. at 347, 112 S.Ct. 2514. Finally, "if a prisoner purposefully or by inadvertence lets the time run under which he could have filed his [habeas] petition, he cannot file a petition beyond the statutory time, even if he claims 'actual innocence.'" *Workman v. Bell*, 227 F.3d 331, 342 (6th Cir.2000), *cert. denied*, 531 U.S. 1193, 121 S.Ct. 1194, 149 L.Ed.2d 109 (2001).

F. Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure, the Court will render summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to conclusively show no genuine issue of material fact exists. *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir.1994), *cert. denied*, 516 U.S. 806, 116 S.Ct. 50, 133 L.Ed.2d 15 (1995); *Kentucky Div., Horsemen's Benevolent & Protective Assoc., Inc. v. Turfway Park Racing Assoc., Inc.*, 20 F.3d 1406, 1411 (6th Cir.1994). The Court must view the facts and all inferences drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Oakland Gin Co., Inc. v. Marlow*, 44 F.3d 426, 429 (6th Cir.1995); *City Management Corp. v. U.S. Chemical Co., Inc.*, 43 F.3d 244, 250 (6th Cir.1994).

Once the moving party presents evidence sufficient to support a motion under Rule 56, the nonmoving party is not entitled to a trial merely on the basis of allegations. The nonmoving party may not rest on its pleadings, but must come forward with some significant probative evidence to support its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Lansing Dairy*, 39 F.3d at 1347; *Horsemen's Benevolent*, 20 F.3d at 1411; *see also Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 404–06 (6th Cir.1992) (holding courts do not have the responsibility to search *sua sponte* the record for genuine issues of material fact). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548.

The Court determines whether sufficient evidence has been presented to make the issue of fact a proper question for the trier of fact, but does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); 60 *Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435–36 (6th Cir.1987). The standard for summary judgment mirrors the standard for directed verdict. The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52, 106 S.Ct. 2505. There must be some probative evidence from which the fact finder could reasonably find for the nonmoving party. If the Court concludes a fair-minded fact finder could not return a verdict in favor of the nonmoving party based on the evidence presented, it may enter a summary judgment. *Id.; Lansing Dairy*, 39 F.3d at 1347; *Horsemen's Benevolent*, 20 F.3d at 1411.

IV.

ANALYSIS

The Court will address petitioner's numerous claims in his amended petition for

writ of habeas corpus and identify them as they are identified in his amended petition [Court File No. 82].

A. Claims Adjudicated in State Court

1. Ineffective Assistance of Counsel at the Guilt Stage (Claim 12)

Petitioner contends he received ineffective assistance of counsel at the guilt stage of his capital case in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Although this claim is confusingly pled with numerous sub-claims, the claims will be addressed in the sequence in which petitioner pled them in an effort to keep the claims in this memorandum opinion in the same sequence as petitioner pled them. Petitioner maintains that due to counsel's alleged inadequate performance there is a reasonable probability—sufficient to undermine confidence in the outcome of trial, sentencing, appeal and post-conviction proceedings—that had counsel performed reasonably, petitioner would not have been convicted or sentenced to death and/or would have received relief on appeal or in post-conviction proceedings. Petitioner alleges numerous instances of counsel's ineffectiveness.

The criteria for analyzing a claim of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* requires a defendant to demonstrate two essential elements: (1) counsel's performance was deficient (*i.e.,* counsel was not functioning as counsel guaranteed the defendant by the Sixth Amendment), and (2) counsel's deficient performance prejudiced the defense (*i.e.,* deprived the defendant of a fair trial rendering the outcome of the trial unreliable). *Id.* at 687–88, 104 S.Ct. 2052; *see also McQueen v. Scroggy,* 99 F.3d 1302, 1310–11 (6th Cir. 1996), *cert. denied,* 520 U.S. 1257, 117 S.Ct. 2422, 138 L.Ed.2d 185 (1997); *Sims v. Livesay,* 970 F.2d 1575, 1579–81 (6th Cir. 1992); *Flippins v. United States,* 808 F.2d 16, 17–18 (6th Cir.), *cert. denied,* 481 U.S. 1056, 107 S.Ct. 2197, 95 L.Ed.2d 852 (1987). To establish his attorney was not performing within the range of competence demanded of attorneys in criminal cases, a defendant must demonstrate the attorney's representation fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 687–88, 104 S.Ct. 2052; *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow,* 977 F.2d 222, 229 (6th Cir.1992); *see also West v. Seabold,* 73 F.3d 81, 84 (6th Cir.1996). There is a strong presumption counsel's conduct was within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052; *Sims,* 970 F.2d at 1579–80.

"Reviewing courts focus on whether counsel's errors have undermined the reliability of and confidence that the trial was fair and just." *Austin v. Bell,* 126 F.3d 843, 847 (6th Cir.1997) (*citing Strickland,* 466 U.S. at 687, 104 S.Ct. 2052; *United States v. Cronic,* 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657, (1984); *McQueen,* 99 F.3d at 1310–11). The Court cannot indulge in hindsight but must instead evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors. *Strickland,* 466 U.S. at 690, 104 S.Ct. 2052; *McQueen,* 99 F.3d at 1311. Trial counsel's tactical decisions are particularly difficult to attack. *McQueen,* 99 F.3d at 1311; *O'Hara v. Wigginton,* 24 F.3d 823, 828 (6th Cir.1994). A defendant's challenge to such decisions must overcome a presumption that the challenged actions might be considered sound

trial strategy. *McQueen*, 99 F.3d at 1311; *O'Hara*, 24 F.3d at 828. Effective assistance of counsel is presumed, and the Court will not generally question matters involving trial strategy. *See United States v. Chambers*, 944 F.2d 1253, 1272 (6th Cir.1991). "[R]eviewing court[s] must remember that 'counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Wong v. Money*, 142 F.3d 313, 319 (6th Cir.1998) (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052).

To establish the prejudice prong, a petitioner who enters a guilty plea 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, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The Court must make an independent judicial evaluation of counsel's performance and determine whether counsel acted reasonably under all the circumstances. *McQueen*, 99 F.3d at 1311; *O'Hara*, 24 F.3d at 828; *Ward v. United States*, 995 F.2d 1317, 1321–22 (6th Cir. 1993); *Sims*, 970 F.2d at 1580–81. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the [ultimate] judgment." *West*, 73 F.3d at 84 (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052 (further citation omitted)).

a. Failure to Investigate Serology Evidence (Claim 12.a)

[7] Petitioner claims his state trial counsel failed to investigate and analyze evidence of his innocence. Petitioner asserts that trial counsel failed to review serology evidence contained within the Tennessee Bureau of Investigation ("TBI") reports which contained demonstrable evidence that petitioner was excluded as the rapist and murderer of Karen Pulley. Because no antigens were detected from the Pulley rape kit and because petitioner was noted as a secretor of H antigens, he claims he is excluded as the rapist and murderer of Karen Pulley.

Contrary to the respondent's argument that petitioner's claim of ineffective assistance of counsel during the guilt phase of his trial is waived, or incognizable, or fails to state a claim upon which habeas corpus relief may be granted because the petitioner pleaded guilty, petitioner may challenge his counsel's performance during the guilt phase of his trial. Petitioner raised the claim of ineffective assistance of counsel at the guilt stage in his state post-conviction proceedings. *See Nichols v. State*, 90 S.W.3d 576, 587 (Tenn.2002). To obtain habeas relief, petitioner must meet the prejudice prong of the ineffective assistance of council test by demonstrating that there is a reasonable probability that if it had not been for counsel's errors, he would have pleaded not guilty and gone to trial.

This claim has been presented to the state courts; thus it as been exhausted. In his state post-conviction proceedings, petitioner alleged counsel was ineffective for failing to investigate serology evidence that excluded him as the perpetrator of the murder and aggravated rape of Karen Pulley. *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn.2002).

Petitioner has not directed the Court's attention to any testimony in the record reflecting that trial counsel failed to review the serology evidence contained within the TBI reports. The record reveals, contrary to petitioner's contention, that counsel did review the serology evidence and made a decision not to conduct DNA testing on the serology sample referred to in the TBI report. Mr. Moore, petitioner's trial counsel, testified there was sperm on a slide [Court File No. 21, Addendum No. 1, Vols. 13–14, p. 492]. However, when asked

about whether he thought it was important to see whether that sperm head matched up with his client, counsel testified that he could not reconstruct the situation or explain what led them to the decision not to retain a DNA testing lab, but in petitioner's case, defense counsel did not think it would be fruitful to determine to whom the sperm head belonged. When asked whether counsel thought it was important to exclude the possibility that someone else had sex with the victim other than the petitioner, counsel responded that in this case, he did not think this line of inquiry would be fruitful [Court File No. 21, Addendum No. 1, Vols. 13–14, p. 492–94]. Once counsel was told that petitioner waived his attorney-client privilege counsel elaborated:

> I didn't think the line of inquiry was fruitful, I just didn't, from my—the conversations Ms. Bryan and I had had with Mr. Nichols trying to determine whether someone else had raped Ms. Pulley did not seem to us to be—that seemed to be a waste of time.
>
> . . . .
>
> We had a lot of conversations with Mr. Nichols and based on those conversations and based on our work on the case that did not seem like a fruitful line of inquiry. If I for a minute had thought that someone else had raped and killed Karen Pulley, I would have gone after that tooth and nail.

[Court File No. 21, Addendum No. 1, Vols. 13–14, at 495–98]. Defense counsel could not recall specifics, but did remember having a discussion with co-counsel about the serology results and the secretor status of petitioner and the victim [Court File No. 21, Addendum No. 1, Vols. 13–14, at 506–08].

Petitioner's other attorney, Ms. Bryan, testified they inquired about having DNA tests performed on some of the evidence. She was not able to remember specifics but believed they spoke with a DNA expert up North and in Atlanta. Ms. Bryan also testified they took some slides to someone co-counsel knew at Memorial Hospital, and she remembered that someone told them "the samples didn't have enough materials to make the determinations that needed to be made" [Court File No. 21, Addendum No. 1. Vols. 13–14, at 688–90].

Petitioner refers the Court to the report of Joe Minor, a serologist with the TBI, which reflects that the liquid blood sample from Karen Pulley was not suitable for typing. Additionally, the report reflects the vaginal and saliva cotton swabs were tested, but the typing test failed to indicate the presence of the A, B, or H antigens [Court File No. 70, Addendum No. 9, Exhibit 95]. Petitioner is apparently a blood type O secretor who produces H antigens in his bodily fluid. *Nichols v. State,* 90 S.W.3d at 588. In addition, typing tests conducted on the liquid blood sample contained in the rape evidence collection kit from Karen Pulley were consistent with the ABO Blood Type O. Petitioner contends that the reports "showed that there was demonstrable evidence that Mr. Nichols was excluded as the rapist and murderer of Karen Pulley, because, despite evidence of sperm, no antigens were detected from the Pulley rape kit and Mr. Nichols was noted as a secretor of H antigens" [Court File No. 78, at 7].

The Court has not been directed to, nor has it found, any testimony by Joe Minor or any other expert witness demonstrating that Joe Minor's report concludes petitioner did not rape and murder Karen Pulley. Petitioner called Mr. Mike VanSant ("Mr. VanSant"), a serologist for the TBI who was involved in training Joe Minor during the late 1980s. Although Mr. VanSant did not test the rape kit in the instant case, he testified that petitioner is "a blood type O;

PGM type is 2–1; the H antigen was present; and that would indicate that Mr. Nichols is a type O secretor and he would secrete the H antigen in his body fluids." [Court File No. 23, Addendum No. 1, Vol. 17–18, at 1211–12]. Mr. VanSant also testified that the H antigen is a universal antigen and if a person is a secretor he will normally secrete the H antigen. However, he also testified, "Some people don't have a lot" [Court File No. 23, Addendum No. 1, Vols. 17–18, at 1197].

The state post-conviction transcript reflects that Joe Minor was expected to be called to testify about this report; however, neither party has directed the Court's attention to his testimony. Moreover, the Court has not found a transcript of Joe Minor's testimony in the record.[8] When post-conviction counsel attempted to ask Mr. VanSant about the report on the instant case, the State objected, arguing the victim had massive blood transfusions at the hospital that were not her blood type and may not have had her exact antigen patterns. Although Mr. VanSant's testimony is confusing, he clearly did not testify petitioner was excluded as the perpetrator of this crime. Petitioner's post-conviction counsel then asked Mr. VanSant if massive blood transfusions in the hospital could have had any affect on the blood samples to which he answered "yes." [Court File No. 23, Addendum No. 1, Vol. 17–18, at 1232–33]. Mr. VanSant also testified that blood transfusions would not have any affect on other body fluids [*Id.* at 1134], but when asked whether there was a way to distinguish blood from semen on the vaginal swab if the swab was bloody he responded:

> ANSWER: No, on a vaginal swab if semen is present I'm dealing with a mixture of two fluids from two different people if semen is present in a vaginal swab.
>
> QUESTION: Even if there's a lot of blood?
>
> ANSWER: That, I really couldn't answer. If there's a lot of blood, blood flow then yes, naturally it's going to have the cleansing action over a period of time.
>
> QUESTION: Over a period of time, but just because there's a lot of blood, that doesn't hide the fact that there's semen there, that whatever antigens you would get from the semen?
>
> ANSWER: Not necessarily.

[Court File No. 23, Addendum No. 1 Vol. 17–18, at 1235–36]. There was no follow-up testimony or evidence on this issue and the state appellate court determined that, given the equivocal nature of the evidence regarding whether massive bleeding may have had a cleansing action that affected the discovery of antigens, as well as the lack of expert testimony indicating the petitioner was excluded as the perpetrator, the evidence was inconclusive. The Tennessee Supreme Court agreed with the state trial court's conclusion that the evidence presented during the post-conviction proceedings failed to establish trial counsel's performance was deficient. In addition, the Tennessee Supreme Court summarized it's finding as follows:

> In sum, as the trial court found, nothing at post-conviction established that trial counsel's representation fell below an objective standard of reasonableness . . . in failing to investigate evidence of innocence. . . .
>
> In addition, we also agree with the Court of Criminal Appeals' conclusion that the petitioner failed to show any

8. Neither Joe Minor nor any other serologist testified for the State during the state post-conviction proceedings.

> prejudice under the second prong of the analysis with respect to his guilty plea to the offenses involving Karen Pulley. As we have pointed out in detail, the record reveals that Nichols confessed to the offenses against Karen Pulley and that he knowingly and voluntarily entered pleas of guilty. The petitioner was well aware that the defense strategy was to accept responsibility for his actions and focus on mitigating evidence. Moreover, given his confessions and the consistent statements of guilt he made to his trial counsel and others, it would be speculation to find that the evidence at the post-conviction, which did not exclude Nichols as the perpetrator or otherwise establish a defense, would have resulted in a decision to proceed to trial instead of pleading guilty.

Nichols v. State, 90 S.W.3d at 595.

It is strongly presumed that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. An attorney's strategic decisions, based on information supplied by the defendant and from a thorough investigation of relevant facts and law, are virtually unchallengeable. *See Ransom v. Johnson,* 126 F.3d 716, 721 (5th Cir.1997). Standing alone, petitioner's claim that counsel failed to review serology evidence may have been professionally deficient because counsel has a duty to make a reasonable investigation of a defendant's case or to make a reasonable decision that a particular investigation is unnecessary. *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052. However, the reasonableness of decisions regarding investigation depends on information supplied by the defendant. *See McCoy v. Lynaugh,* 874 F.2d 954, 964 (5th Cir.1989). Counsel is not required to advance every non-frivolous argument or to investigate every conceivable claim.

In the instant case, petitioner has merely alleged trial counsel failed to review the serology report which petitioner claims demonstrates that there was demonstrable evidence that he was excluded as the rapist and murderer of the victim, "because, despite evidence of sperm, no antigens were detected from the Pulley rape kit and Mr. Nichols was noted as a secretor of H antigens" [Court File No. 78, at 7]. There is no proof in the record that counsel failed to review the serology evidence. The proof before this Court contradicts petitioner's claim as trial counsel testified they contemplated having DNA tests run on the serology evidence but ultimately decided against having such test conducted. [Court File No. 20, Addendum No. 1, Vols. 11–12, p. 432–33; Court File No. 21, Addendum No. 1, Vols. 13–14, p. 492–508, 688–90].

Moreover, even if trial counsel's performance was deficient in this regard, petitioner has not demonstrated any prejudice as a result of alleged deficient performance by his counsel. Petitioner's post-conviction counsel failed to ask Mr. VanSant if the information contained in Joe Minor's report excluded the petitioner as the rapist and murderer in this case. Petitioner has not provided any expert testimony that this serology report excludes him as the rapist and murderer in this case. Indeed, the evidence at the post-conviction proceeding did not exclude Nichols as the perpetrator and, as the state courts observed, nothing presented during petitioner's post-conviction proceedings established that trial counsel's representation fell below an objective standard of reasonableness in failing to investigate evidence. The record does not reflect that counsel failed to investigate and analyze the serology evidence, but rather, reflects that counsel was aware of the serology report, made contact with DNA experts, but ultimately determined the material on the

slide was not sufficient for DNA testing [Addendum No. 1, Vols. 13–14, at 688–690].

For petitioner to meet his burden of demonstrating counsel was ineffective as it relates to this issue, he must state with specificity what the investigation would have revealed, what evidence would have resulted from that investigation, and how such would have altered the outcome of the case. *Moawad v. Anderson,* 143 F.3d 942, 948 (5th Cir.1998). Furthermore, when trial counsel's decision not to pursue further investigation into a potential defense is based on investigation and consultation with the defendant which leads the attorney to believe that further investigation would be fruitless, that decision may not be challenged as unreasonable.

This is a case where petitioner consistently admitted his guilt to authorities, his counsel, and his wife. Additionally, petitioner testified during the sentencing portion of his criminal proceedings that he broke into the victim's home, raped her, and beat her with a 2×4 as he was leaving the crime scene. Although petitioner initially denied having intercourse with the victim, he eventually told counsel that it was possible that he could have penetrated the victim [Addendum No. 1, Vols. 13–14, at 693]. Petitioner has not shown that the serology evidence excluded him as the rapist and murderer of the victim. Indeed, a recent DNA test revealed that petitioner shares the same genetic profile as the source of the spermatozoa from the victim's gown. Consequently, petitioner cannot be eliminated as the source of the spermatozoa from the victim's gown [Court File No. 244–2]. Petitioner has failed to demonstrate that the alleged error had any effect on the judgment. Petitioner has not shown that counsel's alleged deficient performance caused the outcome to be unreliable or the proceeding to be fundamentally unfair.

In evaluating this claim of ineffective assistance of counsel during the guilt stage, the Court must determine if there is a reasonable probability that had trial counsel reviewed the serology report, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart,* 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Miller v. Straub,* 299 F.3d 570, 581 (6th Cir.2002); *Lyons v. Jackson,* 299 F.3d 588, 599 (6th Cir.2002). As to the sentencing phase, petitioner must establish a reasonable probability that the jury would not have imposed the death sentence in the absence of the alleged error. *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052. Petitioner does not argue, nor does the Court find, that there is a reasonable probability that he would not have pleaded guilty and insisted on going to trial had counsel investigated and analyzed the serology reports. Additionally, petitioner has not shown, nor does the Court find, that there is a reasonable probability that the jury would not have imposed the death sentence in the absence of the alleged error.

The appellate court found the serology evidence to be equivocal and inconclusive. The court reached this conclusion because petitioner failed to demonstrate that massive bleeding would not have had a cleansing action affecting the discovery of antigens. Furthermore, petitioner failed to introduce expert testimony that the petitioner was excluded as the perpetrator. Thus, the appellate court denied relief on this claim concluding the evidence was inconclusive. *Nichols v. State,* 90 S.W.3d 576, 588 (2002).

The rejection of this claim by the Tennessee courts was neither the product of an unreasonable application of clearly established Federal law nor the result of an unreasonable determination of the facts in light of the evidence presented in the state

court proceeding. This aspect of petitioner's ineffective assistance claim does not warrant federal habeas relief.

b. *Case of T.R.(Claim 12.b)*

[8] Petitioner asserts that trial counsel failed to provide Mr. VanSant with facts that would have transformed his conclusion—that the tests he performed on the sperm found in the vagina in the T.R. case were inconclusive—to a conclusion that petitioner was excluded as a suspect. Although petitioner fails to explain why this Court should review counsel's actions in an unrelated rape case, a review of the record reveals that petitioner's conviction for the aggravated rape of T.R. was used at the sentencing hearing as an aggravating factor to sentence petitioner to death. However, petitioner is not claiming counsel failed to obtain and review material that counsel knew the prosecution would probably rely on as evidence of aggravation during the sentencing stage of his capital murder proceedings, *see Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), but rather, petitioner is attacking the performance of counsel during their handling of his case involving the rape of T.R.

Petitioner claims his prior conviction for the aggravated rape of T.R. was flawed because counsel failed to provide necessary information to VanSant which would have enabled him to exclude petitioner as a suspect in the T.R. case. Petitioner may not attack his conviction and sentence for the rape of T.R. in this habeas proceeding. To challenge counsel's performance during the state court proceedings in the T.R. case, petitioner must file a habeas petition pursuant to 28 U.S.C. § 2254 in that case.

Accordingly, petitioner is not entitled to relief in this habeas proceeding on his claim that trial counsel failed to provide necessary information to VanSant in the T.R. case.

c. *Alibi Evidence in the T.M. Case (Claim 12.c)*

Petitioner contends trial counsel missed solid alibi evidence in the T.M. case which would have demonstrated petitioner was physically at work at Godfather's Pizza in Red Bank, Tennessee, at the time of the rape of T.M. in Tiftonia, Tennessee. Petitioner contends the residence of T.M. was too far from the Red Bank store for petitioner to have been the perpetrator of the rape. Petitioner contends that this alibi evidence should have put trial counsel on notice that his confession in the T.M. case was unreliable and should have led counsel to question the reliability of any statement he made.

Once again, petitioner is challenging trial counsel's performance in relation to a conviction for which he has yet to be resentenced and for which he has no habeas petition pending. This Court has no jurisdiction at this time to consider this claim. Accordingly, petitioner is not entitled to any habeas relief on this claim.

d. *Coerced Statement (Claims 12.d and 12.e)*

Petitioner claims his trial counsel failed to properly debrief him about the circumstances surrounding his interrogation and subsequent confession. Thus, petitioner argues, trial counsel failed to obtain evidence that his statement was coerced.[9]

9. Petitioner is mistaken. Trial counsel did question petitioner about the circumstances surrounding his interrogation and subsequent confession. Counsel's investigation into petitioner's confession led them to file a motion to suppress his statement on the ground that law enforcement coerced petitioner into making an involuntary statement. *See State v. Nichols,* 877 S.W.2d 722, 732 (Tenn.1994).

Respondent, questioning whether this claim is properly before the Court, asserts the claim is without merit because the investigation conducted by petitioner's trial counsel was objectively reasonable in light of petitioner's repeated confessions.[10]

[9] First, petitioner asserts that trial counsel failed to properly debrief him to find evidence of coercion. Petitioner argues there was evidence that the officers told him that, if he cooperated, he would receive treatment. Petitioner also claims that he was told if he requested counsel the officers would have to wake the judge and the judge would treat him more harshly. As explained below, these claims were addressed by the trial judge in petitioner's motion to suppress his statements during his criminal proceedings.

[10] Second, petitioner contends the coercive nature of the interrogation process was demonstrated through the testimony Dr. Richard Ofshe [11] and the victim's former boyfriend, Scott Simcox.[12] Petitioner claims Mr. Simcox's testimony that Detective Heck showed him diagrams of the murder scene and familiarized him with the evidence demonstrates Detective Heck educated Mr. Simcox about the facts of the crime. Petitioner also claims Detective Heck used psychological coercion by showing Simcox the victim's picture and telling him the victim had been telling people how much she loved him. Detective Heck asked Mr. Simcox if his fingerprints would be in the victim's bedroom, and petitioner contends Detective Heck was suggesting that Simcox's fingerprints had been found.

The alleged coercive nature of the interrogation of Scott Simcox does not demonstrate petitioner was coerced to confess in the instant case. Consequently, his argument that Scott Simcox was subjected to a coercive interrogation process, offers petitioner no relief in this habeas proceeding.

Dr. Richard Ofshe has a Ph.D. in sociology and is a professor at the University of California at Berkeley. Dr. Ofshe is a social psychologist who teaches, works, and researches in the field of coercive police interrogation techniques and the phenomenon of false or coerced confessions. Dr. Ofshe testified through his deposition at petitioner's state post-conviction hearing.[13]

Dr. Ofshe testified experts in the field agree that false confessions exist, that individuals can be coerced into giving false confessions, and that there exist identifiable coercive police interrogation techniques which are likely to produce false confessions. Dr. Ofshe testified that more investigation is necessary to determine whether certain of those techniques were used in petitioner's case.

Petitioner's assertion that Dr. Ofshe found significant examples of coercion used in taking the petitioner's statement is simply incorrect. Rather, Dr. Ofshe testified he did not see any evidence that trial counsel thoroughly debriefed petitioner about the history of the interrogation. Dr.

10. Petitioner made this argument when he appealed his post-conviction case to the Tennessee appellate court [Court File No. 26, Addendum No. 2, Doc. 1].

11. Dr. Ofshe did not testify that petitioner's statement was coerced.

12. Simcox testified Detective Heck did not start telling him things or sharing any information with him, including showing him the diagram, until after the detective had questioned him [Court File No.24, Addendum No. 1, Vol. 19–20, at 1479].

13. Dr. Ofshe was not subjected to cross-examination because, although the Assistant District Attorney had been noticed for the deposition, he informed petitioner's counsel he was waiving his appearance [Court File No. 68, Addendum No. 9, Exhibit 79, p. 4].

Ofshe did not testify that the interrogation methods used in this case demonstrate petitioner was coerced into confessing to the crime. Dr. Ofshe testified petitioner "volunteers certain things during the course of the suppression hearing, but the attorneys don't develop those points which makes me suspect that they never gave them adequate consideration" [Addendum No. 68, Addendum No. 9, Exhibit 79, p. 57]. This is mere speculation on Dr. Ofshe's part, and petitioner has not submitted any evidence demonstrating what information counsel failed to develop.

Dr. Ofshe observed that petitioner testified during the suppression hearing that the officers indicated Nichols would receive treatment if he cooperated with them. It was Dr. Ofshe's opinion, that the officer's assurance of treatment should have caused trial counsel to very carefully debrief petitioner to determine how the subject of petitioner receiving help was broached during the interrogation. This is important, according to Dr. Ofshe, because a promise of a benefit, the treatment in this instance, for an admission of guilt would render the statement involuntary. Dr. Ofshe testified that the discussion of treatment could have been raised in such a way that would have been coercive but because of the "jumbled way" in which petitioner testified about that discussion Dr. Ofshe was unable to determine whether the treatment discussion was coercive [Court File No. 68, Addendum No. 9, Exhibit 79, p. 57–59].

In Dr. Ofshe's opinion, there appeared to have been no investigation of the circumstances surrounding the interrogation and the reliability of petitioner's statement confessing to the instant criminal episode. Dr. Ofshe's testimony referred generally to all of petitioner's cases. Dr. Ofshe stated that a detailed history of the interrogation process should have been investigated and a thorough evaluation of the physical evidence should have been conducted to determine whether the atmosphere of the interrogation and the physical evidence supported the confession. Dr. Ofshe found it astounding that there was no evidence linking petitioner to the crime. Dr. Ofshe concluded the lack of physical evidence linking petitioner to the crime, along with the physical evidence disconfirming petitioner as the perpetrator, should have signaled to his trial counsel there was a distinct possibility Nichols may be innocent.[14] Dr. Ofshe did not identify any physical evidence in the case before this Court which "disconfirmed" petitioner's involvement in the instant crime [Court File No. 68, Addendum No. 9, Exhibit 79, at 62–66].

Dr. Ofshe said petitioner asked for counsel; and law enforcement's response, that they would have to wake the judge who would in turn treat petitioner more harshly, is a tactic to coerce a person not to press for his right to counsel. In petitioner's case, however, trial counsel filed an unsuccessful motion to suppress his statement on the basis that his statement was coerced. Trial counsel specifically argued that petitioner's confession was coerced on the basis that law enforcement ignored petitioner's invocation of his right to counsel and law enforcement promised to obtain treatment for petitioner [Court File No. 37, Addendum No. 5, Vol. 1, at 226–239, Brief in Support of Motion to Suppress]. However, the trial court specifically concluded that it did not believe Mr. Nichols' claim that he requested counsel.

> The Court, first, does not believe Mr. Nichols. Mr. Nichols testimony is [sic] to the fact that he was not—or that he

14. Additionally, Dr. Ofshe testified he did not formulate any opinion as to the veracity of petitioner's confession.

did ask for an attorney. The court finds that he did not make that. The Court thinks that the Court is a pretty good lie detector. And I did observe Mr. Nichols' manner and demeanor. I observed Mr. Dyer's manner and demeanor and I observed Mr. Holland's manner and demeanor as they were testifying. And Mr. Nichols was telling the truth on most things but Mr. Nichols was not telling the truth as to that particular point.

. . . And there's no indication or no evidence whatsoever that there was any intimidation, other than the statement by Mr. Nichols, which the Court does not believe.

[Court File No. 39, Addendum No. 5, Vol. 10, pp. 151–53].

The trial judge credited the testimony of law enforcement over that of petitioner's, concluding the confession was not coerced and was admissible. The failed attempt by trial counsel to have petitioner's statement suppressed on the grounds of coercion and involuntariness demonstrate that counsel did investigate the circumstances surrounding petitioner's confession. Petitioner has failed to produce clear and convincing evidence that the trial court's credibility determinations and factual determination that his interrogation lacked coercion was unreasonable. Absent clear and convincing evidence that those determinations were unreasonable, the trial court's conclusion that the confession was admissible and not coerced must stand. Accordingly, this claim is without merit.

[11] Even assuming counsel was deficient for failing to investigate the alleged coercive tactics more thoroughly, petitioner has not demonstrated he was prejudiced by counsel's alleged deficient actions. Petitioner has not demonstrated what evidence trial counsel would have discovered had they debriefed him more thoroughly regarding his confession. Therefore, petitioner is not entitled to habeas relief on this claim because not only has he not demonstrated counsel was deficient, petitioner has not demonstrated any prejudice as a result of counsel not debriefing him more thoroughly in the instant case. Thus, he has not demonstrated trial counsel rendered ineffective assistance during his criminal proceedings.

Petitioner's failure to demonstrate counsel's representation fell below an objective standard of reasonableness for failing to investigate the confession as coerced and his failure to demonstrate he was prejudiced by counsel's alleged deficient performance results in the dismissal of this claim. The state court's determination that petitioner did not establish ineffective assistance of counsel was not an unreasonable application of clearly established federal law or an unreasonable determination of the facts. Accordingly, this claim will be **DISMISSED**.

e. ***Failure to Attack Confession (Claim 12.f)***

[12] Petitioner contends that had counsel investigated the circumstances surrounding his interrogation and confession to determine the reliability of petitioner's confessions, counsel would have been prepared to attack Nichols' confession at both the hearing on the motion to suppress and at trial. According to petitioner, trial counsel never heard a continuous tape recording of the statements made starting at 12:47 a.m. on Friday, January 6, 1989, including the statement petitioner made after he was taken to each of the East Ridge crime scenes. Petitioner's reference to the East Ridge crime scenes indicates he is referring to evidence that does not pertain to this case, but rather, to his cases pending in state court. Nevertheless, petitioner has failed to demonstrate

he was prejudiced by counsel's failure to listen to this continuous tape recording.

To the extent petitioner is challenging trial counsel's performance in relation to the suppression motion in the instant case, he fails to state a viable claim. Petitioner does not reveal what trial counsel would have uncovered had "this investigation been undertaken" [Court File No. 82, p. 8]. Therefore, he has failed to demonstrate counsel rendered ineffective assistance of counsel and he has failed to demonstrate he suffered any prejudice from counsel's alleged ineffective assistance. Specifically, petitioner has not demonstrated that had counsel listened to the continuous tape recording or investigated the circumstances surrounding his interrogation and confession that he would have gone to trial rather than entered a guilty plea.

Accordingly, the state court's decision that counsel was not deficient for failing to investigate the nature of the interrogation was neither an unreasonable application of clearly established Supreme Court law or contrary to Supreme Court precedent. In addition, the state court decision did not involve an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Accordingly, this claim does not entitle petitioner to any habeas relief and it will be **DISMISSED**.

f. ***Failure to Investigate Critical Evidence (Claim 12.g)***

As the next illustration of ineffective assistance of counsel, petitioner alleges his attorneys, convinced of his guilt, failed to investigate evidence suggesting his confession was false. As an initial matter, to the extent petitioner has made this an attack on other cases not before this Court, he is not entitled to any habeas relief on a claim pertaining to any of his cases which are not the subject of this habeas petition.[15]

The Court will address each claim below, but as to petitioner's general claim that trial counsel failed to investigate critical evidence because counsel was erroneously convinced petitioner was guilty, the Court finds nothing in the record to reflect that Nichols ever told his attorneys any of these confessions were false or that he was not guilty of these crimes. The state courts had no specific information demonstrating his confessions were false or that he was innocent, nor has Nichols presented any such evidence in this Court.

At no time did petitioner give counsel any reason to doubt he committed the crimes to which he confessed, nor has he submitted any evidence in this Court to demonstrate his confessions are false or that he is not guilty of the murder in the instant case. The Tennessee Supreme Court found petitioner's argument, that his statements should have been challenged as false because they contain inaccuracies and omissions, "is immediately undercut . . . by the fact that the petitioner never refuted his confessions or his own statements to his trial counsel and others." *Nichols v. State,* 90 S.W.3d 576, 594 (Tenn. 2002) The Tennessee Supreme Court observed, "nothing at post-conviction established that trial counsel's representation fell below an objective standard of reasonableness either in failing to investigate evidence of innocence or in failing to challenge the confession as false when viewed in the context of the petitioner's own confessions and statements of guilt." *Nichols v. State,* 90 S.W.3d at 595.

Petitioner has not demonstrated that the performance of his counsel was deficient. The state courts found the evidence pre-

15. The Court will consider Claims 12.g.i.1, 12.g.ii, and 12.g.iv only as they pertain to the instant habeas petition.

sented at the state post-conviction proceedings did not alter the fact that Nichols consistently admitted his guilt and never provided a basis for trial counsel to challenge his confessions as false. Although petitioner had the right to have counsel present all appropriate defenses, this right does not extend to using perjury, and an attorney's duty to a client does not extend to assisting a client in committing perjury. In view of petitioner's detailed and compelling video-taped confession and his constant admission of guilt, counsel was not deficient for failing to investigate the lack of physical evidence. Petitioner has failed to demonstrate the state court's conclusion is unreasonable.

(1) *Lack of Physical Evidence (Claim 12.g.i.)*

In Claim **12.g.i.**, petitioner asserts there was no physical evidence linking him with the subject offense for which he was convicted.[16] Petitioner contends counsel ignored the lack of evidence linking him to the subject offense because counsel was erroneously convinced petitioner was guilty of all offenses to which he confessed. First, the Court observes that, at the time of trial, there was serology evidence that did not exclude petitioner as the perpetrator of the crime for which he is convicted.

(a) *Weapon in S.T. Case (Claim 12.g.i.(1))*

As this allegation does not relate to any of the Pulley offenses, it will not be addressed.

(b) *2 × 4 Lumber in the Murder Case (Claim 12.g.i.(2))*

[13] In Claim **12.g.i.(2),** petitioner contends no physical evidence links him to the instant murder and rape. Petitioner maintains the State incorrectly argued the 2x4 links him to this case since there is no proof that it is the same 2x4 described in his confession. Petitioner had confessed that he used a 2x4 to kill the victim in this case.

In his post-arrest confession, petitioner explained that he had hit Karen Pulley with a 2x4 piece of lumber; put it in his car; and later tossed it out his open passenger window, down a sloped wooded area near an intersection. Chattanooga police officers searched the area and found nothing. Shortly afterwards, the area was searched again and this time the 2x4 was discovered lying at the base of a tree. No other 2x4 was found in the area and petitioner, who was present at this search, said that "it looked like" the one he had thrown through his car window.

During the post-conviction hearing, the unsuccessful initial search was presented as a claim. Also considered was testimony from the victim's roommate that she had gone to the area where the 2x4 was found, which was already occupied by a number of people, and the 2x4 was leaning against a tree as though it had been placed there. The victim's roommate said she was uncertain the board came from her home.

According to the forensic report from the Hamilton County Medical Examiners Office, the 2x4 had no hair or fibers on it. Also presented through the affidavit of Craig Lahren ("Lahren"), the author of the forensic report from the Hamilton County Medical Examiners Office, was his testimony that Lahren looked for blood during the initial examination of the 2x4 but had found no blood on it. Additionally, during state post-conviction proceedings a forensic entomologist testified he found no hair, blood, or soft tissue on the board, though he did not believe the blood "would

16. For reasons of clarity the Court has rephrased the claims to show that only allegations related to the Pulley case will be considered.

have worked off" or that blood or soft tissue would have been eaten by insects. Nor did he find plant material though he would have expected to find it, given the length of time the board had supposedly been exposed to the elements.

Lead counsel testified that, while the 2x4 did not contain the victim's hair or blood, it was located where petitioner said he had thrown it. Junior defense counsel also testified that she was aware of the forensic report and had interviewed its author, though the author himself offered testimony to the contrary concerning an interview. When reviewing this issue on post-conviction appeal, the Tennessee Supreme Court, though recognizing in hindsight counsel might have explored more fully the serology and the absence of physical evidence on the murder weapon, found no deficient performance concerning defense counsel's investigation of any proof of innocence. *Nichols v. State*, 90 S.W.3d 576, 595 (Tenn.2002).

Given that petitioner had confessed to the crime; had voluntarily and knowingly pled guilty; and had agreed to his counsel's strategy to accept responsibility for the conduct, focusing instead on evidence to mitigate the crime, the Tennessee Supreme Court concluded no prejudice had been shown.

Based upon petitioner's damaging confession and the fact that he continued to confess to counsel, his investigator, his psychological expert, and his wife, the Court finds that the state court's conclusion, that trial counsel did not render deficient performance by failing to investigate any proof of innocence, is reasonable. Moreover, since petitioner has failed to demonstrate he would have insisted on going to trial had he known there was no forensic evidence linking him to the 2×4, he has failed to demonstrate he was prejudiced by counsel's alleged failure to investigate any proof of innocence. *See Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (In order to satisfy the prejudice requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would have not pleaded guilty but would have insisted ongoing to trial).

When a claim has been adjudicated on the merits in state court, a petitioner can only be granted relief if the state court decision is contrary to or involves an unreasonable application of federal law, in light of the evidence presented or is based on an unreasonable determination of the facts. The state court decision was none of these things. Therefore, the writ will not issue with respect to this claim.

(2) *Confessions in Other Cases (Claim 12.g.ii)*

As this allegation does not relate to any of the Pulley offenses, it will not be addressed.

(3) *Pulley Confession (Claim 12.g.iii)*

Petitioner claims that, during and for hours before his confession, Detective Heck fully briefed him as to the facts in this case. Petitioner contends Detective Heck often referred him to a notebook, to assist the petitioner when his memory failed, as to details of the layout of Pulley's room, items found in the house, and the location of the house.

As alleged in the habeas petition, this claim contains no factual development—indeed, petitioner did not place the facts underlying his claim before the state courts either. Petitioner invoked his right against self-incrimination when called as the State's witness at the post-conviction hearing, and refused to answer questions about the offenses or his post-conviction allegations. Having failed to flesh out his claim with facts, apparently petitioner is relying here, as he did in the state court,

on his videotaped confession to supply the missing factual allegations.[17]

Petitioner's factually unsupported claim that Detective Heck fully briefed him for hours as to the facts in this case is not sufficient to state a claim for habeas relief. Because petitioner has not identified any facts of which he was unaware prior to Detective Heck's alleged coaching, his claim that Detective Heck coached him for hours prior to his video-taped confession lacks a factual basis, even though Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts requires a habeas petitioner to "specify all the grounds for relief which are available" and "set forth facts to the claim asserted that is important." *See* Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts (Advisory Committee Note to 1976 Amendment to Rule 2). For this reason, it is insufficient to state a claim. Thus, petitioner's claim, that counsel was ineffective for failing to investigate the several hour briefing to which he was subjected by Detective Heck prior to giving his video-taped confession, will be **DISMISSED** for failing to set forth in summary form the facts supporting this claim. Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts.

A review of petitioner's video-taped confession reveals that petitioner knew the facts of the case and there is no indication that petitioner's confession was untrue. Petitioner provided facts during his video-taped confession that Detective Heck had no way of knowing prior to petitioner divulging them. Petitioner provided Detective Heck with details of where he initially parked when he was surreptitiously surveying the house and the occupants, in addition to providing the route he drove when he departed and returned to commit the crime. This is information about which Detective Heck would have no independent knowledge. Therefore, it was reasonable for petitioner's counsel to rely upon his confession of guilt to law enforcement and to them and other parties when making strategic decisions on how to proceed with the case.

Finding it was entirely reasonable for counsel's actions to be influenced by petitioner's statements, the Tennessee Supreme Court observed that Nichols had given a detailed emotional videotaped confession to the murder and rape of the victim in the instant case, in which he had given a description of the victim's house, his point of entry into the house, the layout of the victim's bedroom, and the circumstances surrounding the rape and murder. *Nichols v. State*, 90 S.W.3d at 593, *citing Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. 2052 (stating that reasonableness of counsel's actions "may be determined or substantially influenced by the defendant's own statements or actions"). Ultimately, the state court found that the evidence offered during the post-conviction proceedings did not demonstrate any deficiency of performance on the part of trial counsel.

17. Though petitioner is responsible for making out his own claims and though factually-unsupported claims, such as these, do not entitle petitioner to relief, *Barefoot v. Estelle*, the Court, being mindful that this is a death penalty case has viewed petitioner's video-taped confession. In it he gives a detailed narrative of the evening's events; describes the route he traveled to reach the victim's home; recounts how he surreptitiously approached the victim's house and looked through the window before leaving, only to return later to commit the rape and murder; and identifies the location where he parked his car. Petitioner has not alleged, much less shown, that Detective Heck was aware of these facts prior to petitioner's divulging them. Nothing in the videotape supports petitioner's allegations that Detective Heck briefed him on the facts of the case resulting in his false confession or, indeed, his allegations that the confession was false.

Id. at 596 (concluding that "nothing at post-conviction established that trial counsel's representation fell below an objective standard of reasonableness either in failing to investigate evidence of innocence or in failing to challenge the confessions as false when viewed in the context of the petitioner's own confessions and statements of guilt."). The state courts also found that Nichols failed to demonstrate prejudice. *Id.*

Petitioner submits that, for two reasons, the state court's decision does not pass muster under AEDPA's standard of review for adjudicated claims. First of all, he proposes that the state court decision was reached by employing the wrong standard of review under Tennessee law. Even if this allegation is true, it does not present a cognizable issue in this instant proceeding because federal habeas courts do not sit to correct errors of state law. *Estelle v. McGuire,* 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

Secondly, petitioner maintains that the state courts violated the *Strickland* standard. Petitioner must do more than demonstrate that the Tennessee judiciary's application of federal law was incorrect because a federal habeas court may not issue the writ simply because it concludes, in its independent judgment, that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, the application must also be unreasonable. *Williams v. Taylor,* 529 U.S. 362, 411, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Hence, the Court finds no merit to either of these submissions. The Tennessee Supreme Court determined Nichols failed to present evidence that established trial counsel's performance was deficient. Specifically, the Tennessee Supreme Court found "nothing at post-conviction established that trial counsel's representation fell below an objective standard of reasonableness either in failing to investigate evidence of innocence or in failing to challenge the confessions as false when viewed in the context of the petitioner's own confessions and statements of guilt." *Nichols v. State,* 90 S.W.3d at 596. The state court also found that Nichols failed to demonstrate prejudice as it observed that "it would be speculation to find that the evidence at the post-conviction, which did not exclude Nichols as the perpetrator or otherwise establish a defense, would have resulted in a decision to proceed to trial instead of pleading guilty." *Id.*

In view of petitioner's confession and his various statements of guilt, as well as the lack of any evidence excluding him as the perpetrator or establishing a defense to the rape and murder charges, the state court's application of the test in *Strickland,* as modified by *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), to petitioner's claim, was not objectively unreasonable and was based upon a reasonable determination of the facts in light of the evidence presented to that court. Accordingly, petitioner is not entitled to any habeas relief on this claim.

(4) *Fred Coats (Claim 12.g.iv.)*

Petitioner also invites the Court to consider facts relating to his conviction in the rape case of S.T. In essence, Nichols is proposing to prove that because counsel's representation was allegedly sloppy in S.T.'s case, ergo it was sloppy in the instant case also. Counsel's performance is to be judged on the particular facts and circumstances of the conviction under attack, not on the facts underlying a conviction not being challenged. This claim will not be addressed.

g. *False Confession (Claims 12.h—j)*

[14] As his next example of attorney error, petitioner alleges trial counsel failed

to investigate the possibility that his confession was false—indeed petitioner asserts that counsel admitted as much (**Claim 12.h**). In addition, petitioner claims counsel relied upon the statements of the investigating detective concerning other suspects, rather than conducting their own independent investigation of those persons (**Claim 12.j**).

It is important to note what petitioner is not claiming in this instance. Petitioner is not claiming that his confessions are false—indeed, he has never so asserted. Instead, he is claiming counsel should have challenged his confessions as false because they contained inaccuracies and omissions. In essence, petitioner is attacking trial counsel's strategy to have petitioner be honest and admit his guilt and to concentrate on presenting a mitigation defense to avoid a sentence of death. Petitioner now insists his attorneys should have pursued a different strategy—to attack the way the law enforcement officers handled his case and, thereby, emphasize that there was reasonable doubt as to his guilt. However, petitioner has failed to demonstrate trial counsel's strategic decision was not reasonable sound trial strategy. *See Strickland v. Washington,* 466 U.S. at 689, 104 S.Ct. 2052. Moreover, petitioner has neither alleged nor demonstrated that he would have proceeded to trial if counsel had conducted an investigation into the possibility of a false confession, thus, he has failed to demonstrate any resulting prejudice.

(1) *Inadequate Investigation (Other Suspects)*

[15] Petitioner asserts that Phillip Redwine, Jim Snow, and Fred Coats were suspects whom trial counsel failed to adequately investigate (**Claim 12.i**). According to petitioner, there was evidence that Phillip Redwine shaved all the hair off his body from the neck down as the police were approaching his home to question him about the rapes; proof that Jim Snow had been charged with making sexually harassing phone calls to members of Ms. Pulley's church and was suspected of making a sexually harassing phone call to Ms. Pulley's housemate after Ms. Pulley's death; and evidence that Fred Coats was a prime suspect in the murder and rape of Ms. Pulley as well as the rape of several of the other victims to which petitioner pleaded guilty.[18]

During the state post-conviction proceedings, senior trial counsel testified he was fully aware of the "Coats matter." Junior defense counsel stated she had no reason to believe Redwine had raped and murdered the victim in this case. In addition, she had discussed the other suspects with Detective Heck and corroborated the information from him when necessary. The post-conviction court made the following finding:

> Trial counsel and investigator Cohan testified that any allegation that counsel should have more fully researched the possibility of a false confession was "ludicrous." The petitioner gave very detailed statements to trial counsel separate from his statements given to the police. Trial counsel testified that they thoroughly discussed the options available with the petitioner and that the petitioner understood that his confessions would be very damaging evidence at the guilt phase. They advised him that if he entered a guilty plea and took responsibility for his actions that the jury might take this into consideration

18. Furthermore, as noted earlier, the Court will not consider allegations of ineffective assistance of counsel with respect to other cases, such as the allegations presented in (Claim 12.i), because attorney errors in those cases, if there are any, will not furnish a basis for habeas relief arising out of petitioner's conviction in the Pulley case.

> in the penalty phase and not impose the death penalty despite the obviously weighty aggravating factors. Under all the circumstances, the decision to plea was a strategic decision which will not now be questioned using 20–20 hindsight. It is also noted that counsel's time records "speak for themselves" as to the substantial amount of time expended by counsel on this case.

Nichols v. State, 2001 WL 55747, at *33 (Tenn.Crim.App.2001).

Ultimately, the state court found that, based upon the record, trial counsel's investigation of other suspects was adequate and not deficient. Petitioner has failed to explain what additional evidence counsel would have obtained had counsel investigated the other suspects rather than depending on Detective Heck's explanation of his investigation of the suspects. Petitioner has failed to provide any evidence that would have been revealed by further investigation, demonstrating his confessions were false or that there was reasonable doubt as to his culpability. Accordingly, Nichols has failed to demonstrate defense counsel was deficient or that he suffered any prejudice as a result of his attorneys' alleged failure to further investigate other possible suspects.

Having found no deficiency of performance, the state court did not, and need not, address the prejudice component of *Strickland*. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Nevertheless, it does not appear that petitioner has identified any additional evidence which would have been discovered had his attorneys conducted a more in-depth investigation of the suspects, nor pointed to any proof that would have shown his confessions to be false had counsel pursued the matter further. Absent such evidence, there was no prejudice flowing from counsel's alleged unprofessional conduct. Accordingly, the state court decision was reasonable.

(2) *Inadequate Investigation (Physical Evidence)*

Petitioner complains that trial counsel's reliance on the explanations given by Detective Heck caused his attorneys to overlook a number of important facts which would have undermined his confession. Nichols contends that the lack of physical evidence linking him to the instant crime; the difference in the physical evidence and characteristics of the crime scene and his description in this statement; the hair and other biological samples that excluded him; and the two pubic hairs obtained from the victim which matched neither the victim nor petitioner, are all factors that counsel should have considered and which should have caused counsel to question the reliability of petitioner's confessions (**Claim 12.j**).

The state appellate court determined petitioner failed to demonstrate that the outcome of this case would have been different had trial counsel defended the case by claiming that his confession was false and making the various other arguments which Nichols contends would have established reasonable doubt. The state appellate court could not "conclude that the juries in these cases would have agreed that there was reasonable doubt as to his guilt, in light of his detailed confessions, including the lengthy, detailed, emotional videotaped confession he provided in the Karen Pulley case." *Nichols v. State*, 2001 WL 55747, at *40. The appellate court supported its conclusion with the following findings:

> Trial counsel testified that, after their investigations of the evidence and many conversations with the petitioner concerning the details he provided them in the Pulley and other cases, there was no reason whatsoever to believe that the

> petitioner did not commit the offenses. Therefore, junior trial counsel described any idea of presenting a defense based on the petitioner's actual innocence as "ludicrous."
>
> In view of petitioner's confessions to police and his detailed statements to his trial counsel, there is no indication that an investigation as to the truth of the statements or of the evidence would have led counsel to any findings which, in turn, would have changed their recommendation that the petitioner plead guilty to the Pulley rape and murder. The petitioner maintains that advising him to plead guilty to the capital murder could only have made sense, and therefore been done on the reasonable advice of counsel, if such a plea were entered in order to avoid the possibility of a death sentence. Trial counsel testified, however, that after losing the battle to have the videotaped confession suppressed, their focus shifted to a strategy of trying to save the petitioner's life by presenting him in the best light possible, which included his taking responsibility for his crimes and offering mitigation evidence which might cause the jury to be sympathetic toward him despite his crimes.

Id. at *42. The appellate court applied the "prejudice rule" in *Hill v. Lockhart*, and concluded petitioner did not show that, but for the alleged errors of his trial counsel, he would not have pleaded guilty but would have insisted on going to trial.

Petitioner's claim that the Tennessee Court of Criminal Appeals used the wrong standard of review under Tennessee law is of no consequence in this proceeding because the focus of this proceeding is on violations of the federal Constitution, statutes, and treaties. *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). The focus is not on violations of purely state law. Petitioner's claim that the Tennessee Court of Criminal Appeals also violated the *Strickland* standard does not entitle him to habeas relief because the federal habeas scheme authorizes federal court intervention only when a state court decision is objectively unreasonable. It is not here. Moreover, it is not clear why Nichols is alleging *Strickland* was violated.

The appellate court began its analysis of the ineffective assistance claim by citing *Strickland* and by ultimately concluding that petitioner failed to show his trial counsel did not perform within the range required of attorneys in criminal cases and failed to show a reasonable probability that, but for the alleged attorney errors, the result would have been different. *Nichols v. State*, 2001 WL 55747, at *40. Further in its discussion, the appellate court stated it could not say "no reasonable lawyer would have represented his or her client as petitioner's counsel did." *Id.* at *43. Assuming petitioner is attacking the "no reasonable lawyer" language, the district court finds that the state court recited the complete *Strickland* standard elsewhere and thus, any alleged incorrect word did not render the appellate court's decision unreasonable. *See Holland v. Jackson*, 542 U.S. 649, 654, 934, 124 S.Ct. 2736, 159 L.Ed.2d 683 (2004) ("§ 2254(d) requires that 'state-court decisions be given the benefit of the doubt' .... [R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Citing Woodford v. Visciotti*, 537 U.S. 19, 23–24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002).)

Taking into consideration Nichols' confessions and consistent statements of guilt made to trial counsel and others, the Tennessee Supreme Court concluded, "it would be speculation to find that the evidence at the post-conviction [proceedings], which did not exclude Nichols as the perpetrator or otherwise establish a defense, would have resulted in a decision to proceed to trial instead of pleading guilty."

Nichols v. State, 90 S.W.3d 576, 595 (Tenn. 2002).

Trial strategy itself must be objectively reasonable. "A strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness." *Hughes v. United States,* 258 F.3d 453, 457 (6th Cir.2001). Petitioner has failed to demonstrate counsel's strategic decision to advise petitioner to enter a guilty plea was unreasonable or based upon a unreasonable investigation. Petitioner has not demonstrated that counsel's strategic decision fell below an objective standard of reasonableness under prevailing professional norms and permeated the entire proceeding with obvious unfairness. *See Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. Assuming for the sake of discussion, that counsel's strategy was unreasonable, thus resulting in deficient performance, petitioner still would not be entitled to habeas relief because he has not alleged nor demonstrated that, but for counsel's unprofessional errors, he would have proceeded to trial.

This Court finds it was not an unreasonable application of *Strickland* and *Hill* for the state court to conclude that there was no showing of prejudice resulting from the alleged error in failing to investigate the physical evidence, or lack thereof, and thereby disprove the truth of petitioner's confession. Based on Nichols' numerous confessions and consistent statements of guilt—none of which have been repudiated—there simply was no basis for trial counsel to investigate a false-confession defense. The Tennessee Supreme Court made reasonable factual determinations in light of the evidence in the state court record and reasonably applied the standards set forth in *Strickland v. Washington* and *Hill v. Lockhart.* Consequently, petitioner is not entitled to any habeas relief on his claims alleged in Claims 12.i. and 12.j of his § 2254 petition.

h. *Ineffective Use of Psychological Expert (Claim 12.k)*

[16] Petitioner contends counsel ineffectively used the psychological expert which had been provided by the Court. Specifically, petitioner claims counsel was ineffective when they permitted petitioner to plead guilty to the S.T. and T.R. cases prior to being examined by his court authorized psychologist. Respondent maintains that this claim, which relates to two of petitioner's non-capital convictions in which no final judgments have been entered, is not cognizable in this proceeding. Additionally, respondent argues that this claim was not raised in the Tennessee Supreme Court, and thus is procedurally, defaulted.[19]

Nevertheless, petitioner's assertion that this Court may properly review whether trial counsel engaged in an adequate investigation of evidence supporting the aggravating circumstance is worded in such a way so as to obfuscate petitioner's actual claim. Petitioner's actual claim is an at-

19. Petitioner has recently filed a motion to dismiss certain claims which are dependent upon a showing of actual innocence. Petitioner has moved to dismiss certain claims, including his *Schlup* gateway argument with respect to this claim [Court File No. 243–1]. On or about October 25, 2005, Dr. Blake reported to the state trial court conducting the post-conviction DNA proceedings, that new scientific testing reveals Nichols is not excluded as the source of the spermatozoa from the victim's gown. In fact, the report reflects that the source of the spermatozoa on the Pulley gown was characterized as Unknown Male # 1 and that petitioner "is identified as Unknown Male # 1." (Court File No. 244). Therefore, petitioner moves to withdraw his *Schlup* gateway arguments with respect to Claim 12(k).

tack on trial counsel's performance (alleged ineffective performance for advising petitioner to plead guilty in the S.T. and T.R. cases prior to petitioner being evaluated by his court authorized psychologist) in handling the underlying convictions which were used by the State as aggravating circumstances to support the death penalty. Petitioner is not claiming trial counsel failed to examine his prior convictions to determine whether the records of the prior convictions contained any potentially mitigation evidence, but rather, petitioner is challenging trial counsel's performance in relation to Nichols' prior criminal convictions which are not before this Court. While *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 2467, 162 L.Ed.2d 360 (2005), found "[c]ounsel fell short . . . because they failed to make reasonable efforts to review the prior conviction file, despite knowing that the prosecution intended to introduce Rompilla's prior conviction not merely by entering a notice of conviction into evidence but by quoting damaging testimony of the rape victim in that case[,]" *Rompilla* does not apply here. This is so because trial counsel represented Nichols in the cases which furnished the basis for the prior-convictions aggravating circumstance and was already familiar with the material in those files. Moreover, in the instant case, petitioner is attacking counsel's performance in relation to the convictions used as aggravating circumstances. This is not permissible in this habeas proceeding.

This claim is not cognizable in this habeas proceeding because it attacks counsel's performance in cases not before this Court. When a conviction is legally flawed, counsel should seek to have it set aside. However, this is not the proper forum for petitioner to attack counsel's performance in relation to a conviction being used as an aggravating circumstance. Accordingly, this claim does not entitle petitioner to any habeas relief.

i. ***Illegal Arrest(Claim12.l)***

Petitioner contends, in this claim, that trial counsel failed to investigate and properly argue that his arrest was not supported by probable cause, since his arrest was based solely on information given by an anonymous caller. Further, Nichols contends he was not identified in a photographic array until after his arrest and that his lawyers failed to pursue this claim. Finally, he maintains that counsel had possession of reports upon which to construct these arguments and that their failure to do so constitutes ineffective assistance.

When this claim was urged on the post-conviction court, it acknowledged that the record contained ambiguities regarding probable cause since two officers involved in the arrest had given inconsistent statements regarding the timing of the photo identifications. However, it also pointed out that one of those officers testified at the post-conviction hearing—the other officer was deceased at the time—and that the petitioner did not question him concerning the issue, thereby passing on the opportunity to clear up the ambiguities. Lead counsel testified that, while he could not remember what he did in regard to investigating whether or not there was probable cause to arrest petitioner, he was sure he and junior counsel "were satisfied that there was probable cause from the evidence that [they] had or [they] wouldn't have gone forward with it" [Court File No. 20, Addendum No. 1, Vol. 12, at 444]. The state court ultimately concluded that, absent proof by petitioner that the pre-arrest identification had not occurred, he had failed to show prejudice resulting from counsel's failure to assert a probable cause challenge.

Neither party in this action has directed the Court's attention to the records supporting their argument on this claim nor the records that supported the state court's decision.[20] It is neither a proper use of judicial resources nor the Court's responsibility to search through the thousands of pages of record to determine whether petitioner can support his claim with facts. The State has failed to direct the Court's attention to the "[n]umerous documents and/or statements" referring "to some pre-arrest identifications" relied upon by the state court [Court File No. 18, Addendum No. 1, Vol. 3, at 540]. Moreover, petitioner has not directed the Court's attention to any record indicating that none of the photo identifications were made prior to police going to his residence to arrest him. Petitioner has not demonstrated that the state court decision was based on an unreasonable determination of the facts.

Although there are ambiguities in the record, some of the records reflect Nichols was identified prior to his arrest. For example, the record includes an arrest report reflecting that "[a]fter Nichols was identified in a photo line up by the victim in incident # 88–9459 and six other victims in cases pending in Chattanooga and East Ridge Police Officers responded to his residence where he was taken into custody without incident" [Court File No. 69, Addendum No. 9, Vol. 81A]. In addition, a January 6, 1989 report prepared by Officer Dyer and approved by R.E. Dodd, reflects that a warrant on one of the East Ridge cases was secured and detectives from East Ridge, Chattanooga, and Red Bank responded to petitioner's residence and took him into custody [Court File No. 69, Addendum No. 9, Vol. 81A].

The record also contains handwritten notes from some unidentified source reflecting Detective Holland received an anonymous call on January 5, 1989, Officer Buck Turner of the East Ridge Police Department held a photo lineup, and P.R. positively identified petitioner. It appears D.L., S.T., and P.G. all positively identified petitioner as their assailant and then law enforcement was sent to pick up petitioner [Court File No. 74, Addendum No. 9, Vol. 130]. There are also handwritten notes, also from an unidentified source, reflecting that on Wednesday, January 4, 1989, an anonymous call was received; and there was a follow-up call giving petitioner's date of birth. The note reflects petitioner was run on NCIC and it reflected he had a prior conviction. A mug shot of petitioner was obtained and a photo lineup was conducted on Friday and then law enforcement picked up petitioner [Court File No. 74, Addendum No. 9, Vol. 129]. There are also affidavits of complaints stating petitioner was arrested after giving his voluntary statement in the P.G., S.T., P.R. and D.L. cases. However, these affidavits do not contradict the fact that D.L., S.T., and P.G. all positively identified petitioner as their assailant prior to law enforcement picking up petitioner.

[17] Based on Officer Dyer's report, it appears that petitioner was arrested on an East Ridge, Tennessee, case and then after he was arrested on that case and made statements, he was arrested on the other cases. Although the record arguably consists of some ambiguities, petitioner has not demonstrated his arrest was not based on probable cause [Court File No. 69, Addendum No. 9, Vol. 81A]. Petitioner has not directed the district court's attention to, nor has this Court found, anything in

20. Petitioner expanded the record with Exhibit 47, at 88, which includes a newspaper article reflecting that Capt. Larry Holland stated petitioner was arrested after four East Ridge rape victims identified him in a photo lineup [Court File No. 250].

the record demonstrating petitioner's arrest was not based on probable cause. Indeed, the record reflects petitioner was arrested on some of the charges subsequent to being identified in a photo lineup. Petitioner has not provided any evidence to contradict the evidence demonstrating petitioner's arrest was based on probable cause.

The Tennessee Supreme Court determined that the petitioner failed to establish his arrest was illegal, because there was evidence in the record indicating that he had been identified before his arrest. The Tennessee Supreme Court referred to an East Ridge Police Department offense report dated January 6, 1989, reflecting that officers received an anonymous tip on January 5, 1989, which led them to conduct a computer check on petitioner resulting in the discovery of his prior arrest for a sex offense. In addition, the report indicates a victim identified petitioner as the perpetrator from his mug shot and that "she was the fourth victim in a row" to identify him [Court File No. 69, Addendum 9, Exhibit 81A]. The Tennessee Supreme Court also observed, "the record reveals that at the trial of P.R., Captain Holland of the East Ridge Police Department testified that the victim identified Nichols prior to his arrest on January 5, 1989." *Nichols v. State,* 90 S.W.3d at 597. Observing that none of the victims were called to testify during the post-conviction proceedings as to when they identified petitioner, the state court concluded that the evidence did not preponderate against the trial court's factual findings that although petitioner identified ambiguities, he failed to establish the lack of pre-arrest identifications.

Petitioner has not demonstrated that he was denied effective assistance of counsel as it relates to his claim that probable cause was lacking when he was arrested. Lead counsel testified that although he could not remember what he did in regard to investigating whether or not there was probable cause to arrest petitioner, he was sure he and junior counsel "were satisfied that there was probable cause from the evidence that [they] had or [they] wouldn't have gone forward with it" [Court File No. 20, Addendum No. 1, Vol. 12, at 444]. There is evidence in the record which supports the state court findings that petitioner had been identified prior to his arrest and thus, his arrest was based on probable cause. This conclusion was not based on an unreasonable determination of the facts, nor was this conclusion contrary to or an unreasonable application of clearly established federal law. Nichols has not demonstrated that the state court finding is unreasonable. The state court finding that petitioner was legally arrested and counsel was not deficient is reasonable and not contrary to any federal law. Petitioner is not entitled to any habeas relief on this claim.

2. *Ineffective Assistance of Counsel During the Penalty Phase (Claim 13.a)*

Petitioner contends counsel was ineffective during the penalty phase of his capital trial. First, petitioner contends counsel failed to adequately investigate the circumstances of the case and present a competent mitigation case during the sentencing phase of his trial. Petitioner contends that rather than present evidence of the abuse he suffered growing up, counsel presented "good boy" and "good Christian" evidence. Petitioner asserts that the testimony presented during his state post-conviction hearing of his abusive childhood should have been investigated by his trial counsel and presented during the penalty phase of his trial. The Court will summarize the mitigating evidence that trial counsel relied upon and compare it to the mitigating evidence presented during petitioner's post-conviction hearing.

a. *Abuse Evidence Introduced at Trial*

The first witness presented by petitioner during the penalty phase of his trial was his then wife, Joanne Nichols ("Mrs. Nichols"), who testified petitioner and his father did not have a close relationship. Mrs. Nichols testified petitioner and his father did not get along and there was always conflict between the two of them. Mrs. Nichols believed his father accused him of things he had no control over. Mrs. Nichols testified petitioner's father was a very cold, very harsh, and very unloving person. Mrs. Nichols felt very uneasy around petitioner's father. [Court File No. 42, Addendum No. 5, Vols. 22–23, at 305–310].

Petitioner's next mitigation witness during the penalty phase of his death penalty trial was Reverend L.E. Butler. Reverend Butler did not testify about any abuse [*Id.* at 322–337].

Next, Nichols took the stand during the penalty of his death penalty trial and testified about his life. Petitioner was unable to recall what type of relationship he had with his father when he was younger and had no memory of his father treating him badly. However, he did recall that his older sister had a kidney problem which resulted in her wetting the bed and one time his father directed him to get a rope so he could tie petitioner's sister to the bed and whip her for wetting the bed. Petitioner went to tell his mother and she held him while the father whipped his sister [*Id.* at 326–47].

While at an orphanage from 1970–1976, petitioner's father visited two or three times [*Id.* at 351]. Nichols stated he lived with his father and although his father wanted him to go to work, he finished high school and then went to work for Willwear Hosiery Company. Petitioner testified his relationship with his father was a strange relationship because whenever petitioner wanted to go out with the other kids from school, his father did not want him associating with the other kids and the two of them would end up in a "big cuss fight." [*Id.* at 354]. On cross-examination, the petitioner testified he has no memory of his father being abusive to him [*Id.* at 382].

Petitioner's next mitigation witness during the penalty phase of his death penalty trial was Dr. Eric S. Engum, a clinical psychologist, who has a Masters Degree in Psychology, a Ph.D. in Clinical Psychology, and a law degree. Dr. Engum diagnosed Nichols with intermittent explosive disorder which is characterized by a loss of control of behavior. Dr. Engum described the disorder as an impulse that continues to build and build until, unable to resist, the person acts on the impulse [*Id.* at 433–36]. Dr. Engum explained the development of petitioner's internal rage as coming from psychosocial or developmental factors as follows:

> The types of things that the experts in the field identify are punitive, hostile environment in which the child is raised, maybe alcoholic, abusive parent, abandonment, lack of love or empathy in the family unit, estrangement or essentially being socially isolated from the social milieu or, as we say the world as it exists. Social isolation I guess is the best term. Tremendous feelings of impotence, and what I say by that is a person who feels that they're not worth anything, they're not important, who've met a lot of defeats in life and kind of internalized that and get the picture of themselves as somebody who really has not succeeded in anything. They see themselves in a very negative light.
>
> . . . .
>
> [F]rom the evidence that I was able to pull together over many months, it appears that [Nichols] was at a number of points in his life subjected to a punitive,

aggressive, hostile father. It also appears that at various points in his life figures to whom he bonded, mother, grandmother, were just ripped away from him. For instance, his first remembrance is at age five. He simply remembers his grandmother dying without any warning, without even being aware. At age ten, even though his mother had been sick for a long time, he apparently was never told of that, and one day she literally dies. He's taken away and put in an orphanage. He has—he bonds with a number of the different house parents and they mysteriously disappear. And it seems that his life is through that. So you have a child who builds up this sense of being abandoned and he responds angrily.

[Court File No. 42, Addendum No. 5, Vols. 22–23, at 437–40].

Dr. Engum testified that Nichols' self-esteem is very poor and he engaged in self-defeating behaviors; for example, petitioner would have a decent job and then do something to undermine himself. While in the military and in the orphanage petitioner seemed to be the model individual. Dr. Engum testified a person with intermittent explosive disorder would probably be "[v]iolent, wild, absolutely out of control ... probably somebody who's unthinking, who is just acting" [*Id.* at 445]. However, Dr. Engum identified petitioner's strengths as able to function well in institutional settings and possessing high average to bright normal in the level of intelligence.

Reverend Winston Gonia was petitioner's next witness during the penalty phase of his death penalty trial. Reverend Gonia knew petitioner when he was ten or eleven, attending East Chattanooga Church of God of Prophesy, and testified he was a real congenial child, but Reverend Gonia was not questioned about any abuse [Court File No. 43, Addendum No. 5, Vols. 24–27, at 477–78].

b. *Abuse Evidence Introduced During State Post–Conviction Proceedings*

During his state post-conviction proceedings, petitioner presented numerous mitigating witnesses. The Court will summarize the most pertinent post-conviction mitigation testimony. During the post-conviction proceeding, Reverend Gonia provided more of an insight to Nichols' home life than he did when testifying during the penalty stage of petitioner's original trial. However, he did not present any evidence of abuse during either proceeding. Winston Gonia, a retired minister, was petitioner's first mitigation witness during his state post-conviction proceedings. Rev. Gonia testified he was acquainted with petitioner's family and was in their home at least once a month to visit.

Reverend Gonia described petitioner's father as very shy, withdrawn, introverted. He had observed petitioner's father hug the children, but never observed him taking petitioner or other children aside and talking to them. However, Reverend Gonia then stated petitioner's father showed no emotion to his family and Gonia did not observe him showing affection to his family. On the other hand, Reverend Gonia observed quite a bit of affection being shown by petitioner's mother and grandmother towards Nichols and his sister [Court File No. 19, Addendum No. 1, Vols. 5–10, at 28–34].

When asked how the orphanage disciplined, Reverend Gonia testified he was not sure but he had heard that at times a switch or strap was used on the children. In addition, Gonia testified petitioner's father sent a social security check to the orphanage to help pay petitioner's expenses [*Id.* at 39–40]. Reverend Gonia testified he never saw any abuse in petitioner's house [*Id.* at 45–47].

Diane Allred, petitioner's cousin, testified her parents died and she and her brother lived with petitioner and his family. Ms. Allred described the relationship between petitioner's parents and the relationship between petitioner's father and his family as very happy, just one happy family at the beginning. However, after a couple of years, petitioner's father began going into rages and spanking Deborah. According to Ms. Allred, he would whip Deborah until the blood would run out of her legs, and once Nichols got older, his father did the same to him. When his wife told him not to whip the children, Nichols' father would "say ugly things and curse" [*Id.* at 52–53]. Ms. Allred also testified that although petitioner's father was often an angry man for the three to five years she lived there (until petitioner was seven), petitioner was loved and hugged by his mother and grandmother [*Id.* at 54–55].

Ms. Allred revealed that petitioner's father exhibited inappropriate behavior towards her. Ms. Allred testified petitioner's father would sit on the couch naked exposing himself to her as she got ready for school. When she complained to people, they basically ignored her and told her to quit telling lies. When Ms. Allred was fifteen, petitioner's mother had cancer surgery. At that time, petitioner's father began to go to Ms. Allred's bedroom without any clothes on while petitioner's mother would stay in her bed crying for petitioner's father to return to their bedroom. According to Ms. Allred, petitioner, his sister, and parents slept in one bed. Ms. Allred shared a bed with the petitioner's paternal grandmother, but whenever this happened the grandmother was away on a visit. Ms. Allred would tell petitioner's father to leave her alone. Petitioner's father was very angry one Friday when he had to bring his mother home in the middle of grocery shopping after she became ill. According to Ms. Allred, petitioner's father was very angry that day and walked the floors saying ugly things, never checking on his mother, who died the next Monday from a heart attack [Court File No. 19, Addendum No. 1, Vols. 5–10, at 59–61].

After the grandmother's death, petitioner's mother was diagnosed with cancer. At that time, petitioner's father took care of running the household and taking care of the children. Ms. Allred did not reside at Nichols' home after petitioner's mother died; however, petitioner's sister called Ms. Allred and told her she (petitioner's sister) was being sexually abused by her father. At a later point in time, Eddie and Helen Gray brought petitioner and his sister to Ms. Allred's house, told her inappropriate things were happening in the home, and asked Ms. Allred whether she would testify in court about the abuse she suffered at the hands of petitioner's father. Thereafter, Ms. Allred was told that an agreement was reached where petitioner's father would turn his children over to the orphanage and he would not be prosecuted [Court File No. 19, Addendum No. 1, Vols. 5–10, at 70–75].

According to Ms. Allred, she was never contacted by petitioner's trial counsel and she had no contact with petitioner's family from 1971 until petitioner's post-conviction counsel contacted her. She testified neither petitioner nor his sister knew where she was and had no way of knowing how to contact her. She had no contact with petitioner or his sister from 1971 to 1988 [*Id.* at 79–83]. Ms. Allred had no knowledge of petitioner ever being sexually molested or mistreated and had no knowledge of petitioner's life from 1971 to 1988 [*Id.* at 82–83].

Ms. Allred's brother and petitioner's cousin, Royce Sampley ("Mr. Sampley"), was the next post-conviction witness. When Mr. Sampley was twelve years old his parents died, and he and Ms. Allred were placed in petitioner's home. Mr.

Sampley's other siblings were placed in an orphanage. Mr. Sampley lived with his cousin for approximately six years and described the home as threatening because petitioner's father was angry all the time and took it out on the rest of the family. He described petitioner's father as indifferent and angry whenever he had to take one of the family members somewhere. Mr. Sampley testified petitioner's father was angry but he was not physical.

Mr. Sampley did not realize petitioner's father was exposing himself to Ms. Allred until after he left their home. Once he became aware of the situation he spoke with relatives who did not believe him. Mr. Sampley left petitioner's home in 1967, living there from the age of 13–18. Mr. Sampley testified he was not contacted by trial counsel.

On cross-examination Mr. Sampley verified he never saw petitioner's father sexually abuse anyone [Court File No. 19, Addendum No. 1, Vols. 5–10, at 103–05]. However, he described petitioner's father as a person who was continually in a rage. Mr. Sampley also testified that petitioner would not have known how to contact him during the time of his trial. The prosecutor demonstrated that although Ms. Allred and Mr. Sampley were raised in the same environment as petitioner, neither of them turned to a life of crime.

Juanita Herron ("Ms. Herron"), a sixty-two year old cousin of Nichols, testified she was familiar with petitioner's family because they would see each other every month or so when her family would visit his family, or petitioner's family would travel to Huntsville, Alabama, to visit her family. Ms. Herron testified that petitioner's sister accused her father of molesting her. Ms. Herron's father was involved in getting petitioner and his sister out of their father's house and into the orphanage [*Id.* at 121–28].

Margaret Elizabeth Crox ("Ms. Crox") was petitioner's neighbor for a period of time when his cousins lived in the house with them. Ms. Crox described petitioner as a loving and affectionate child and his mother as a spiritual and good woman [Court File No. 19, Addendum No. 1, Vols. 5–10, at 141–43]. Ms. Crox described petitioner's father as very quiet. She observed petitioner's father sporadically attending church with the rest of the family. Ms. Crox testified she had no knowledge of the relationship between petitioner and his father [*Id.* at 146–57].

Linda Crox Johnson testified she grew up in the house next to petitioner's, and has no memory of petitioner's father having contact with his children and has no memory of ever speaking to petitioner's father [Court File No. 20, Addendum No. 1, Vols. 11–12, at 151–53].

Petitioner's seventy-two year old uncle, Claude Nichols, testified on behalf of petitioner at his state post-conviction hearing. Mr. Nichols testified petitioner's father was his older brother. Their father left their mother with three children and petitioner's father worked hard to help the family [Court File No. 20, Addendum No. 1, Vols. 11–12, at 156–58]. Petitioner's father never gave his mother any trouble, he did not run around, and he did all he could to try to take care of his mother and siblings. Petitioner's father did not have much of a childhood. He served three years in World War II before being honorably discharged [*Id.* at 168–72]. On redirect, Claude Nichols testified petitioner's father acted inappropriately towards his daughter [*Id.* at 180–81].

Louella Wagoner, petitioner's cousin, described petitioner's mother and grandmother as very pleasant people and petitioner's father as very stern and strict [*Id.* at 183–187].

Ms. Jacqueline Boruff ("Ms. Boruff") lived three or four blocks from petitioner in the late 1970's into the early 1980's, and knew him because petitioner and her son were friends. Petitioner was 14 or 15 years old when Ms. Boruff met him. Ms. Boruff described petitioner as a nice child and "a really neat guy" [*Id.* at 242–43]. Ms. Boruff knew petitioner's mom from Kay's Kastle and she described her as a very sweet and happy lady. However, Ms. Boruff never met petitioner's father but did talk to him on the phone several times. Ms. Boruff described petitioner's father as very fanatical, very cold, and uncaring [*Id.* at 244–55].

Linda Cannon Melton ("Ms. Melton") was a house-parent at Tomlinson Home for Children. She worked at the girl's home and supervised petitioner's sister, and from 1975–76 she took care of petitioner. Petitioner and his sister visited each other often while at Tomlinson. Ms. Melton described petitioner as a sweetheart. Ms. Melton never met petitioner's father and was not aware of any communication between petitioner and his father during the time he was at Tomlinson Home for Children. Ms. Melton testified that they were not allowed to paddle the girls, instead, they gave them more chores as punishment. Ms. Melton believes, but is not sure, that her ex-husband followed the same rule for the boys [Court File No. 20, Vols. 11–12, at 282–91].

On cross-examination, Ms. Melton said she knew petitioner from 1973–1976, and she was one of his house-parents from 1975–76. Ms. Melton never paddled petitioner and she never saw anyone else paddle petitioner; "during the period of time that my ex-husband and I were there I would have to answer it [paddling of Wayne] did not happen." [*Id.* at 294]. Ms. Melton stated the law on corporal punishment changed around 1976 and she knew of no change in the church's policy but in any event, while she worked at the orphanage petitioner was never paddled. Ms. Melton provided petitioner with a loving environment and gave him every benefit she could [Court File No. 20, Vols. 11–12, at 295–96].

Dennis Samply ("Dennis"), petitioner's cousin, went to the Tomlinson Home for Children when he was six years old and lived there until he was about 14 years old, at which time he left to live with his brother, Royce Samply, and his wife. Dennis testified that a lady contacted him more than once about Wayne after he was arrested on this charge and questioned him about his background and his life at the orphanage, and whether he knew why petitioner's father was not attending the trial [Court File No. 20, Addendum No. 1, Vols. 11–12, at 311–15]. Dennis contacted petitioner's father during the trial and was told not to call back. Dennis was contacted on petitioner's behalf two or three times and he related some of his family history to the lady.

Dennis was not in the orphanage at the same time as petitioner, and he does not know much about petitioner's family background. Dennis was not sure whether petitioner had the same house-parents he had when he was there, but Dennis claims his house-parents, the West's, whipped him until he bled. Dennis testified he was never allowed to talk about anything that went on in the orphanage. He stated they were whipped for anything, that by just saying something wrong they would be sent to their room, stripped, laid across the bed and whipped [*Id.* at 316–21]. On cross-examination, Dennis testified petitioner had the West's as house-parents when he first went to the orphanage, but they retired soon after petitioner's arrival and petitioner lived in another house. Dennis had no idea whether petitioner was ever beaten at the orphanage. Dennis

also testified that he had been beaten by all three house-parents he had while living at the orphanage [*Id.* at 322–25].

Michael Cohan ("Mr. Cohan") was petitioner's trial investigator. Mr. Cohan noted that petitioner said his father asked him to be his girl on one occasion.

Petitioner's junior counsel, Ms. Rosemarie Bryan, testified it was her opinion that the mitigation witnesses presented by state post-conviction counsel was cumulative to what trial counsel put on during the penalty phase. Moreover, she thought that had they put those witnesses on, the State would have done as they did during the state post-conviction proceeding and demonstrate that although some of the witnesses were raised in an environment similar to petitioner, they never committed crimes. For example, Royce Sampley lost both of his parents at a young age, lived with petitioner's father in their house, had no heat in his bedroom, but never committed a crime. Ms. Bryan's investigation revealed that the family members whom they chose not to call, were not going to testify to anything that would make the jury want to spare petitioner's life. Moreover, some of the people she interviewed suggested that she should avoid the family members. The family members she called either would not talk to her or after she spoke with them she determined their testimony would not be helpful. She believed the fact that most of the family members who were raised under the same or similar circumstances, but had never been arrested, would have hurt the defense in front of the jury more than they would have helped them.

Ms. Bryan testified she believed the only option was to show a fair assessment of petitioner's life and have him take the stand and take responsibility for his actions. She did not think anything post-conviction counsel presented demonstrated that she was ineffective [*Id.* at 629–60]. Ms. Bryan testified the family members were not as cooperative with them as they apparently were with post-conviction counsel.

Ms. Bryan testified she spoke with petitioner's sister and her husband numerous times, but his sister was the most unwilling witness that anyone would ever want to put on the stand. The sister was not going to talk about any abuse in their family, and told Ms. Bryan that there was nothing she could say that would help petitioner or she would be there. Ms. Bryan was told by the sister's husband that she was not going to testify under any circumstances [*Id.* at 664–65]. Ms. Bryan discussed this situation with petitioner and Ms. Bryan called his sister's residence again, and once more was told the sister would not testify. Ms. Bryan then discussed the sister's response with petitioner. Counsel and petitioner decided that it was better not to call petitioner's sister since she was not going to add anything in mitigation and they were afraid she might end up hurting them. Petitioner did not want his sister called because he did not want her to go through the ordeal of testifying. Ms. Bryan testified that if his sister said no one ever called her that is not true [*Id.* at 666].

Jacqueline Bailey ("Ms. Bailey") was a part-time counselor at Tomlinson Children's Home from 1974 until it closed in 1977. She testified petitioner's sister had a problem with wetting the bed at least up until the time she got married. Ms. Bailey testified she had no knowledge of petitioner having any behavior problems and observed that petitioner and his sister had a very close relationship. When they were closing the home, petitioner's sister attempted to have petitioner live with her but for some unidentified reason, that did not happen. Ms. Bailey stated she had information from petitioner's sister that

their household was abusive when they lived at home, but she was not a party to the decision to send petitioner to his father's house. On cross-examination, Ms. Bailey testified that none of the other children she worked with at Tomlinson Orphanage became serial rapists and murders. On re-direct examination, Ms. Bailey testified she could not remember any of the orphanage children going to jail but a lot of the children from the orphanage had problems even after leaving the orphanage [Court File No. 22, Addendum No. 1, Vols. 15–16, at 760–69].

Petitioner's sister, Ms. Deborah Diane Sullivan ("Ms. Sullivan") testified by videotaped deposition. When asked whether she was concerned, while growing up in her parents home, that her father would explode into a rage, she responded that she could not think of any specific incident when that happened nor was she able to describe her father in those words. However, she did testify she recalled feeling afraid of getting a spanking. When asked whether her father ever spanked until there was blood she replied probably. When asked whether he spanked until there were welts, she answered "yes." [Court File No. 67, Addendum No. 9, Exhibit 11, pp. 9–10]. Although Ms. Sullivan was sure her dad spanked petitioner, she was unable to recall a specific time or incident when a spanking of petitioner occurred.

Ms. Sullivan revealed that as children, she and petitioner were generally isolated from other children other than the contacts they made through attending school. Petitioner and his sister were not permitted to play with other children after school or go to the community center with their friends. Ms. Sullivan has no recollection of anyone explaining the seriousness of her mother's illness to her or petitioner. At the time of her mother's death, the only people living in the home was Ms. Sullivan, petitioner, and their parents. Ms. Sullivan has no recollection of she and petitioner ever discussing her mother's death. Although Ms. Sullivan admitted there were allegations that her father abused her, there is no evidence in her testimony that petitioner was ever abused by his father [Court File No. 67, Addendum No. 9, Exhibit 11, pp. 36–68]. Ms. Sullivan described the household as "mentally trying" causing her to be in constant fear [Court File No. 67, Addendum No. 9, Exhibit 11, pp. 37–38]. Ms. Sullivan had no knowledge of petitioner ever being physically or sexually abused by their father [Court File No. 67, Addendum No. 9, Exhibit 11, pp. 43].

Dr. David Solovey ("Dr. Solovey"), a forensic psychologist practicing in Chattanooga, Tennessee, interpreted Dr. Engum's testimony as petitioner being an aggressor or someone who would not contribute in a positive way to society. It appeared to Dr. Solovey that Dr. Engum was attempting "to define how it was that this person could do these terrible things, you know, what the makeup of a person who would do, you know, things like this. As opposed to presenting a humane side, he seemed to present a side that identified Mr. Nichols as being an aggressor or somebody who would be—well, not, not render much positive to society ...." [Court File No. 22, Vols. 15–16, at 869–76].

Dr. Solovey found petitioner to be a very difficult individual to assess because looking at him to determine how to explain his aggressive acts was difficult and very different than looking at him strictly for mitigation purposes. Dr. Solovey assessed petitioner as an individual who was damaged early in life and although he initially attempts to handle stressful situations in a mature way, as the stress continues he falls apart and loses confidence and when he is really cornered and threatened, he

acts out aggressively. Dr. Solovey said state post-conviction counsel provided him material that was similar in nature to what Dr. Engum had, but his materials were more extensive than Dr. Engum's. Dr. Solovey's final diagnosis was impulse control disorder which he testified was similar but different than Dr. Engum's diagnosis of intermittent explosive disorder. An impulse disorder was described as a failure to resist an impulse or drive or temptation and an intermittent explosive disorder was described as discreet experiences of just blowing up and acting out of control.

Frank Einstein ("Mr. Einstein"), a sentencing consultant, testified on behalf of petitioner. Mr. Einstein testified that trial counsel successfully identified all or most of the major issues to investigate [*Id.* at 954]; however, in his opinion, trial counsel presented very little of the information about petitioner's background to the jury [*Id.* at 962–63]. According to Mr. Einstein, counsel should have presented evidence about petitioner reciting the books of the Bible, singing in the church, and being a bright little happy red-haired child. One of the main mitigation themes Mr. Einstein identified was problems in petitioner's home, *i.e.,* living with a controlling, intimidating father, who was emotionally aloof and cold to people and who allegedly subjected petitioner to physical abuse. In addition, Mr. Einstein believes trial counsel should have introduced evidence explaining the reasons for petitioner being placed in the orphanage and evidence of the prevalence of sexual abuse within petitioner's home. Mr. Einstein also suggested evidence of the family's isolation should have been introduced along with evidence of the failure of adults and institutions to protect petitioner and his sister from their father's abuse [*Id.* at 963–969]. Finally, Mr. Einstein also suggested that trial counsel should have presented evidence of petitioner's history of adjusting positively to incarceration [*Id.* at 970].

[18] The Court has read the mitigating evidence presented at trial and the mitigating evidence presented during petitioner's state post-conviction proceedings. Although post-conviction counsel presented numerous witnesses which they allege are mitigation witnesses, they in fact, offered very little additional mitigation proof. In his original trial, petitioner's expert, Dr. Engum, testified petitioner suffered from intermittent explosive disorder which developed for two reasons: (1) as a result of his father being punitive, aggressive, and hostile; and (2) as a result of petitioner's life figures to whom he bonded—mother and grandmother—being ripped away from him [Court File No. 42, Addendum No. 5, Vols. 22–23, at 437–40]. Dr. Engum also explained petitioner remembered his grandmother dying without warning, his mother being sick with cancer and dying without anyone preparing him for such outcome, and then being taken away from his father, separated from his sister, and being placed in the orphanage. In addition, Nichols bonded with a number of different house parents and then they disappeared. Thus, according to Dr. Engum, petitioner, as a child, grew up with a sense of being abandoned and he responded angrily [*Id.*].

Although Dr. Engum's testimony at the trial's sentencing phase could probably have been more detailed, the end result is that it included the information about which Dr. Solovey testified. The evidence which petitioner introduced during his state post-conviction hearing is basically the same as the evidence introduced during his sentencing phase hearing. Trial counsel was aware of most of the evidence post-conviction counsel presented to support petitioner's post-conviction petition. The Supreme Court of Tennessee made the following findings and conclusions:

> The trial court, after considering the testimony of all of these witnesses dur-

ing the post-conviction hearings and reviewing the record, made extensive finding of fact, including:

Petitioner presented numerous relatives and acquaintances at the hearings in this matter to demonstrate the amount and type of mitigating evidence which was not presented at the sentencing hearing at the original trial .... Many of these witnesses, however, were cumulative and only expounded on issues which were raised through the evidence presented by trial counsel at the sentencing hearing .... The psychologist retained by post-conviction counsel even testified that while he may have had more personal history in conducting his evaluation, it was essentially the same kind of information Dr. Engum and trial counsel had at the original trial.

The trial court further concluded:

Many of the witnesses testified that they were not contacted and that the petitioner probably did not know how to contact them. Some witnesses, however, testified that the petitioner knew how to contact them but that they received no contact and did not step forward on their own. Using 20–20 hindsight more witnesses may have been preferable; based upon all the evidence and documentation, however, this court finds that counsel [were] not derelict in their investigation of this case and that no prejudice has been shown .... Any additional witnesses would have been cumulative or the weight of their testimony would have been minimal. The aggravator of prior violent felonies was very substantial.

We agree with the Court of Criminal Appeals that the evidence in the record supported the trial court's findings and conclusions.

Nichols v. State, 90 S.W.3d 576, 601 (Tenn. 2002).

The Supreme Court of Tennessee observed that the nature and extent of the evidence at post-conviction focused on the petitioner's family background, abusive father, placement in a children's home, and pleasant personality as a child. In addition, petitioner never testified he suffered any abuse; and his sister, who made herself unavailable to trial counsel and refused to testify, testified in a video-deposition at the state post-conviction proceedings she has no knowledge of petitioner ever being abused physically or sexually by their father [Court File No. 67, Addendum 9, Exhibit 11, p. 43]. One witness testified physical abuse took place at the orphanage, but there was no evidence that petitioner was ever the victim of abuse while at the orphanage. Indeed, several other witnesses testified the orphanage was not an abusive environment. The state court concluded trial counsel identified and supported the relevant mitigating themes.

The evidence of petitioner's unstable and deprived childhood presented at the post-convictions proceedings, though more extensive, was virtually identical. The evidence at both hearings revealed petitioner was raised by an unloving and abusive father, and that the important family members in his life who showed him love were all taken away from him suddenly.

However, the record of the state post-conviction hearing reflects some discrepancies in the mitigating evidence presented during petitioner's state post-conviction hearing. For example, Mr. Sampley, a relative who resided with petitioner for several years, testified that although petitioner's father was an angry man who would have fits of rage, he did not exhibit his rage physically. On the other hand, Mr. Sampley's sister, Ms. Allred, who also resided with petitioner, testified that when petitioner was older his father would whip

him until blood ran from his legs. However, the record reflects petitioner has no recollection of such beatings and petitioner's sister described no such beating of petitioner. Additionally, Ms. Allred's contention that petitioner's family all slept in the same bed is contradicted by the testimony of petitioner's sister that she had her own bedroom and petitioner slept separate from his parents in a corner of the room.

The Supreme Court of Tennessee concluded that any evidence at post-conviction which was not cumulative or may have bolstered the evidence presented at trial would not have affected the jury's determination given the strong evidence supporting the prior violent felonies aggravating circumstance. "Nichols has not established a reasonable probability that the jury would have concluded that the 'balance of aggravating and mitigating circumstances did not warrant death.'" *Nichols v. State*, 90 S.W.3d at 602 (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052).

In light of the fact that post-conviction counsel presented virtually the same mitigating evidence as trial counsel, the quantity of mitigating evidence does not persuade this Court that there is a reasonable probability that a jury would have returned a different sentence had the evidence introduced during the post-conviction proceeding been introduced during the penalty phase of petitioner's trial.[21] The proof before the jury was that petitioner's father was emotionally detached and the death of petitioner's grandmother and mother, the only two adults whom he loved and with whom he had a close relationship, was very traumatic for petitioner and virtually left him alone at the age of ten. The proof introduced during petitioner's state post-conviction proceedings was virtually the same as that introduced during petitioner's sentencing hearing.

As the state court observed, there was very strong evidence supporting the prior violent felonies aggravating circumstance. Although the abuse and atmosphere in the household is relevant, there is no evidence that petitioner suffered any abuse to such a degree that the jury's decision would have been influenced.[22] A comparison of the mitigating evidence actually presented at sentencing with the mitigating evidence contained in the post-conviction record does not reveal that the additional mitigating evidence is so compelling that there is a reasonable probability that the outcome of the sentencing trial would have been altered. *See Neal v. Puckett*, 286 F.3d 230, 241 (5th Cir.2002), *cert. denied*, 537 U.S. 1104, 123 S.Ct. 963, 154 L.Ed.2d 772 (2003) ("In determining prejudice, we are thus required to compare the evidence actually presented at sentencing with all the mitigating evidence contained in the post-conviction record. Stated to the point: Is this additional mitigating evidence so compelling that there is a reasonable probability at least one juror could reasonably have determined that . . . death was not an appropriate sentence?").

Consequently, the state court's resolution of this claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent. In addition, the state court decision was not based on an unreasonable determination of

21. Although habeas counsel presented, in her response to respondent's motion to dismiss, a very compelling argument designed to persuade a jury to spare petitioner's life, much of counsel's evidence is not properly before this Court as it was not presented by witnesses under oath in state court [Court File No. 213–2, pp. 74–105].

22. Habeas counsel's presentation of abuse to petitioner is not supported by sworn testimony or affidavits in the record. Therefore, the Court compares the testimony presented during petitioner's state post-conviction proceedings and the testimony presented during his sentencing hearing.

the facts in light of the evidence presented in the post-conviction court proceedings. Accordingly, petitioner is not entitled to any habeas relief on his claim of ineffective assistance of counsel during the penalty phase of his death penalty proceeding.

3. *Prosecutorial Misconduct(Claim 13.b)*

[19] Next, petitioner asserts that trial counsel was ineffective during the penalty phase of his murder trial, as well as during the motion for new trial and on appeal, when his attorneys failed to object to the prosecutor questioning petitioner about the specific facts of the convictions used as aggravating circumstances. The prosecutor during the penalty phase elicited acknowledgment from petitioner about the facts of certain cases used as aggravators. Petitioner acknowledged that he raped a female, who was home alone in East Ridge, at knife-point using a knife from her kitchen [Court File No. 42, Addendum No. 5, Vols. 22–23, at 409]. Petitioner also acknowledged he raped a female on December 27, 1988, using an electrical cord; and on January 3, 1989, he raped a lady twice [*Id.* at 410]. Lastly, Nichols admitted that he raped another young girl in East Ridge using a knife and pistol.

In closing argument, the prosecutor identified the aggravating circumstance the State was relying upon by identifying the date, the victim, and the weapon petitioner used to accomplish the rape [Court File No. 43, Addendum No. 5, Vols. 24–27, at 508–09]. Later in the closing argument, the prosecutor referred to the aggravating felonies, asking petitioner whether he was crying when he held a knife to the throat of one victim, a cord to another, and a pistol to another [Court File No. 43, Addendum No. 5, Vols. 24–27, at 563].

The Supreme Court of Tennessee made a few observations when disposing of this claim:

> First, we note that [*State v.*] *Bigbee,* [885 S.W.2d 797 (Tenn.1994)], had not been decided at the time of the sentencing in this case; thus, counsel cannot be considered deficient for failing to object to a violation of its holding. Second, the record indicates that the facts of the underlying rapes were briefly cited by the prosecutor and admitted by Nichols without a lengthy discussion or detailed description of the rapes. Finally, the prosecution did not enhance the aggravating circumstance by unduly or repeatedly emphasizing the underlying facts of the prior convictions, nor did it imply that the jury should impose the death penalty based on the facts of the prior convictions in such a manner that affected the verdict to the prejudice of the petitioner.

Nichols v. State, 90 S.W.3d at 603.

The appellate court concluded that trial counsel was not ineffective for failing to object to the prosecutor's conduct, and there was no reasonable probability of a different outcome even if counsel had objected. To determine whether counsel was ineffective for failing to object or raise a claim of prosecutorial misconduct, the Court must first determine if the prosecutor engaged in misconduct.

[20] Prosecutorial misconduct must be so egregious as to deny a petitioner a fundamentally fair trial before habeas relief becomes available. *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); *Donnelly v. DeChristoforo,* 416 U.S. 637, 643–45, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). "[I]t 'is not enough that the prosecutor's remarks were undesirable or even universally condemned.' " *Darden,* 477 U.S. at 181, 106 S.Ct. 2464 (citation omitted). "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a

denial of due process.' " *Id.* (quoting *Donnelly*). The appropriate standard of review for such a claim on a writ of habeas corpus is the narrow one of due process. *Id.*

[21] In determining when prosecutorial misconduct warrants a new trial, this Court uses a two-step approach. First, the Court must determine whether the prosecutor's conduct and remarks were improper. If the remarks were improper, the Court then considers and weighs four factors to determine whether the conduct warrants habeas relief. *See United States v. Carter,* 236 F.3d 777, 783 (6th Cir.2001). The factors this Court considers in determining whether prosecutorial misconduct resulted in a denial of due process are the following:

1. The degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused;
2. Whether they are isolated or extensive;
3. Whether they were deliberately or accidentally placed before the jury; and
4. The strength of the competent proof to establish the guilt of the accused.

Byrd v. Collins, 209 F.3d 486, 528–534 (6th Cir.2000), *cert. denied,* 531 U.S. 1082, 121 S.Ct. 786, 148 L.Ed.2d 682 (2001).

The questions asked by the prosecutor in petitioner's case did not have a tendency to mislead the jury and although they arguably prejudiced the accused, they were factual questions. They were very isolated but apparently deliberately placed before the jury. However, the guilt of the petitioner was proven without those facts. Assuming without deciding that the prosecutor is not permitted to ask questions about the facts and circumstances of the underlying felony used as an aggravating circumstance in a death penalty case, "[n]evertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *United States v. Young,* 470 U.S. 1, 11, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

Initially, the Court observes that although the charge of aggravated rape arguably suggests a crime of violence or threat of violence, it does not indicate on its face that the offense involves violence or a threat of violence. Moreover, under Tennessee law at the time petitioner was tried for these crimes, aggravated rape included certain circumstances where violence was not involved.[23] Additionally, the prosecutor's reference to the weapons used to commit the crime established that the

23. Tenn.Code Ann. § 39–2–603 (1988) (Repealed November 1, 1989) stated:

(a) Aggravated rape is unlawful penetration penetration of a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:

(1) Force or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon;

(2) The defendant causes bodily injury to the victim;

(3) The defendant is aided or abetted by one (1) or more other persons; and

(A) Force or coercion is used to accomplish the act; or

(B) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or

(4) The victim is less than thirteen (13) years of age.

(Emphasis added). Petitioner committed this crime on September 30, 1988, and it appears the other rapes used as aggravating circumstances were committed between December 1988 and January 1989.

aggravating circumstance was a felony involving the use of violence to the person. Under Tenn.Code Ann. § 39–13–204, the statutory aggravating circumstance relied upon by the State in the penalty phase of petitioner's first degree murder trial was, "(2) 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 people* [.]" Tenn.Code Ann. § 39–13–204(i)(2)(1990).

Unlike *Cozzolino v. State,* 584 S.W.2d 765 (Tenn.1979), one of the cases cited by petitioner, where the evidence of subsequent crimes argued by the prosecutor was not admissible to establish any of the aggravating circumstances, the challenged questions and statements made by the prosecutor in the instant case were relevant to the proof of the statutory aggravating circumstance in that it explained the weapons used by petitioner to commit the felonies and established the felonies used as aggravating circumstance were in fact, crimes of violence or involved the threat of violence. The case of *State v. Bigbee,* 885 S.W.2d 797, 812 (Tenn.1994), cited by petitioner, involved a substantial amount of facts and arguments about the facts of the felony used as an aggravating circumstance. In *Bigbee,* the jury was informed of the sentence the defendant received from the aggravating circumstance in addition to being informed of the underlying facts of defendant's previous conviction, *i.e.,* "the murder occurred around 1:17 a.m. in a Montgomery County convenience store when the clerk, a forty-year-old mother of four, had been shot and killed .... During closing argument, the prosecutor not only discussed the sentence imposed as a result of the Montgomery County conviction but also extensively referred to the facts of the Montgomery County murder, the character of the victim of that killing and the impact of her death upon her family[.]" *State v. Bigbee,* 885 S.W.2d at 809–810. In addition, the *Bigbee* court concluded the prosecutor "engaged in improper argument by strongly implying during argument that imposition of the death penalty in this case would be an appropriate way to further punish the defendant for the Montgomery County killing, for which he had already received a life sentence." *Id.* at 812.

In the case before the Court, the prosecutor did not extensively refer to the facts of the underlying felonies supporting the aggravating circumstance. Nevertheless, even if the prosecutor improperly questioned Nichols and referred to the weapons used in the underlying felonies during closing argument, the prosecutor's questions and argument were not nearly as egregious or extensive as that in *Bigbee.* This Court finds that the state court's determination is reasonable that counsel was not deficient for failing to object to a violation of a state case, *Bigbee,* a case which had not been decided at the time of petitioner's sentencing. Additionally, that finding along with the state court's conclusion that the argument did not affect the jury's determination to the prejudice of petitioner is not contrary to, or an unreasonable application of, federal law. The state court conclusions were based on reasonable factual determinations in light of the evidence in the state court record.

Even if the comments were improper, the comments in the context of the entire penalty phase trial do not rise to the level of a constitutional violation. Therefore, the State's isolated questions and argument about the facts and circumstances of the underlying felony convictions did not deny petitioner due process. Trial counsel's failure to object to the questions or raise the issue of prosecutorial misconduct in the motion for new trial or on appeal was not deficient assistance.

The burden is on petitioner to demonstrate the state court adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or that the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in state court. Petitioner has failed to carry his burden on this claim. Accordingly, petitioner is not entitled to any relief on his claim that trial counsel were ineffective for failing to object to the prosecutor's questions relative to petitioner's prior convictions.

4. *Failure to Request Jury Instructions and Object to Improper Instructions (Claim 13.c)*

Petitioner makes two claims regarding jury instructions. First, petitioner claims trial counsel was ineffective for failing to request jury instructions, and secondly, he claims counsel was ineffective by failing to object to the trial court's improper jury instructions. The Court will first address the claim that counsel was ineffective for failing to request jury instructions.

a. *Failure to Request Jury Instruction*

Petitioner complains that trial counsel failed to ask the trial court to provide the jury with a definition of mitigation and an instruction regarding the weight to be given to mitigating evidence. Petitioner also contends that, based on the evidence presented, trial counsel should have requested the trial court to charge the jury that his youthfulness and his substantial mental impairment were to be considered as mitigating factors pursuant to Tenn.Code Ann. § 39–13–204(j)(7). Other jury instructions that petitioner contends were supported by the evidence and should have been given were petitioner's remorse for committing the crime; his difficult childhood; his suffering abuse from his dad; he had the love and support of family and friends; he did not have the intent to kill; and he did not flee when arrested or offer any resistance.

The trial court instructed the jury of its duty to consider mitigating factors as follows:

> [A]ny mitigating circumstances which shall include, but not limited to, the following:
>
> (1) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (2) The defendant acted under extreme duress.
>
> (3) The capacity of the defendant to appreciate the wrongfulness of his conduct or 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.
>
> (4) Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense.

[Court File No. 43, Addendum No. 5, Vols. 24–27, at 579–560].

The Supreme Court of the United States has emphasized the need for broad inquiry into all relevant mitigating evidence to permit the jury to make an individualized determination regarding whether to sentence a defendant to death. *Tuilaepa v. California*, 512 U.S. 967, 969–72, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). This requirement is satisfied when the jury is allowed to consider all relevant mitigating evidence. *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). Additionally, in the penalty phase, the Supreme Court case law has established that the

sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. *Penry v. Lynaugh*, 492 U.S. 302, 317–18, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). However, states are permitted to "structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Johnson v. Texas*, 509 U.S. 350, 362, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (*quoting Boyde v. California*, 494 U.S. 370, 377, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)). The Supreme Court's consistent concern has been that juries not be precluded from being able to give effect to mitigating evidence. *See Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). However, the Court has not held "that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence," but instead their "decisions suggest that complete jury discretion is constitutionally permissible." *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998). Furthermore, the United States Supreme Court has ruled that "[t]he absence of an instruction on the concept of mitigation and of instructions on particular statutorily defined mitigating factors did not violate the Eighth and Fourteenth Amendments to the United States Constitution." *Buchanan*, 522 U.S. at 279, 118 S.Ct. 757.

In the instant case, the state appellate court determined an instruction on the definition of mitigation and the weight to be given mitigating circumstances was not required. As to the claim that trial counsel failed to request a jury instruction regarding statutory mitigating factors of youthfulness and substantial mental impairment, the appellate court concluded the record did not support an instruction on the mitigating circumstance of the youthfulness of the petitioner as he was a 28–year–old high school graduate who had served in the military. Petitioner is simply incorrect as to his claim that the trial court failed to instruct the jury about his substantial mental impairment because the record reflects the trial court did charge the jury on the statutory mitigating circumstance regarding substantial mental impairment. As to the non-statutory mitigating circumstances, the Supreme Court of Tennessee determined that at the time of this offense and trial, the trial court was not required to charge the jury on specific non-statutory mitigating circumstances.

[22] The jury instructions in petitioner's case did not violate the constitutional principles requiring broad inquiry into all relevant mitigating evidence. The statutory mitigating circumstance regarding youthfulness of a defendant was not applicable to the petitioner who was 28 years old, a high school graduate, and described as "bright normal, if not—high average to bright normal in the level of intelligence" [Court File No. 42, Addendum No. 5, Vols. 22–23, at 446]. Petitioner was previously in the military, was married, and worked as an assistant manager at Godfather's Pizza. There is no evidence to support this instruction, thus, counsel's failure to request such instruction is not deficient performance.

The trial court gave the substantial impairment instruction, thus, this claim is frivolous [Court File No. 43, Addendum No. 5, Vols. 24–27, at 580,584]. The trial court instructed the jury that they shall consider specified mitigating circumstances and all mitigating factors raised by the evidence. The instruction did not foreclose the jury's consideration of any mitigating evidence nor did it constrain the manner in which the jury was able to give effect to mitigation. The entire context in which the instructions were given expressly informed the jury it could consider any

mitigating factor raised by the evidence. Additionally, the context of the proceedings, along with the extensive arguments by both the defense and prosecutor on the mitigating evidence, would have led reasonable jurors to believe the evidence of petitioner's background, his alleged remorse, and his lack of intent to kill could be considered in mitigation, in addition to any other evidence the jurors considered mitigating. The instruction to the jury to consider any other mitigating factor raised by the evidence directed consideration of any circumstance that might excuse the crime, including post-crime mitigating evidence as well as background and character evidence of the petitioner. *See Brown v. Payton*, 544 U.S. 133, 141–42, 125 S.Ct. 1432, 161 L.Ed.2d 334 (2005). Consequently, it is not reasonably likely that the jurors in petitioner's case understood the lack of specific non-statutory mitigating factors to preclude consideration of relevant mitigating evidence offered by petitioner.

The Tennessee Supreme Court did not unreasonably apply Supreme Court precedent in concluding petitioner's counsel performed adequately. Nor was its decision contrary to any federal law. Petitioner has not directed the Court to, nor has the Court found, any Supreme Court law which requires the instructions petitioner claims should have been requested. The trial court instructed the jury to consider a list of specific mitigating factors in addition to "[a]ny other mitigating factor which is raised by the evidence produced by either the prosecution or defense" [Court File No. 43, Addendum No. 5, Vols. 24–27, at 580, 584]. Because the state court instructed the jury that it could consider any factor—necessarily including [petitioner's remorse, difficult childhood, love and support of family and friends, lack of intent to kill, and submission to arrest]—and because federal courts generally "presume that juries follow their instructions," *Washington v. Hofbauer*, 228 F.3d 689, 706 (6th Cir.2000), counsel could reasonably have expected that the decision not to request a specific instruction regarding [these presumably mitigating circumstances] would not have changed the jury's deliberations. Consequently, counsel was not deficient for failing to request mitigating instructions. The state court's rejection of this claim was not unreasonable and petitioner is not entitled to any habeas relief on his claim that trial counsel failed to request mitigating instructions.

b. *Improper Unanimity Instruction*

Next petitioner avers that trial counsel failed to object to the state court's unanimity instruction that stated "[t]he verdict must be unanimous and each juror must sign his or her name beneath the verdict. The trial court's instructions raise the constitutionally unacceptable specter that Mr. Nichols' death sentence results from a juror's misapprehension about the results of a hung jury." [Court File No. 82, at 21].

This claim is confusingly pled. However, the Court understands petitioner to assert that counsel was ineffective for failing to object to the trial court's unanimity instruction, an instruction which petitioner claims misled the jury as to the consequences of failing to unanimously agree on petitioner's sentence. The Tennessee Supreme Court rejected the argument on the basis that it had rejected arguments contesting the unanimous verdict instruction in the past. *Nichols v. State*, 90 S.W.3d at 604.

[23] To the extent petitioner contends counsel was deficient for failing to object to the unanimity instruction, he has failed to state a claim. The Tennessee statute provides that whether the jury decides to sentence a defendant to death or life, the sentence must be agreed upon unanimously by all jurors. Tenn.Code Ann. § 39–13–204. Thus, the jury instruction stating

whatever verdict the jury reached must be unanimous was a correct statement of applicable Tennessee law and not unconstitutional. Nevertheless, if this instruction was allegedly incorrect under state law, it is not a basis for habeas relief absent a showing that a defendant's federal constitutional rights were violated by the instruction. *See Estelle v. McGuire*, 502 U.S. 62, 71–72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Coe v. Bell*, 161 F.3d 320, 339–40 (6th Cir.1998). Petitioner has not directed the Court to a United States Supreme Court case holding that such a unanimity instruction is unconstitutional. Consequently, petitioner has failed to demonstrate his federal constitutional rights were violated and has failed to demonstrate counsel was deficient in failing to object to the unanimity instruction and that he suffered any prejudice due to counsel's failure to object to the unanimity instruction. Now the Court will turn to petitioner's claim that counsel should have requested that the jury be instructed as to the consequence of failing to unanimously agree on a sentence.

Petitioner has not directed the Court's attention to, nor has the Court found, any Supreme Court precedent constitutionally requiring that a jury must be instructed as to the consequences of a breakdown in the deliberation process. *See Roe v. Baker*, 316 F.3d 557, 563–564 (6th Cir.2002); *Buell v. Mitchell*, 274 F.3d 337, 357 (6th Cir.2001). The United States Supreme Court has discussed the effect of denying a petitioner's request for a jury instruction on the consequences of a jury deadlock in the context of the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591, in *Jones v. United States*, 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999). The Supreme Court concluded that the United States Constitution does not require that a jury in every capital case be instructed as to the consequences of a breakdown in the deliberation process. *Id.* at 382–83, 119 S.Ct. 2090. Errors in jury instructions must be so egregious that they render the entire trial fundamentally unfair. *See Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

The petitioner, in effect, argues that the jury should be told the consequence of failing to reach a unanimous verdict. This has been addressed and repeatedly rejected by the Tennessee Supreme Court. *See State v. Nesbit*, 978 S.W.2d 872, 902–03 (Tenn.1998); *State v. Brimmer*, 876 S.W.2d 75, 87 (Tenn.1994). The United States Court of Appeals for the Sixth Circuit has also rejected the argument that jurors should be instructed that a defendant will receive a life sentence if they fail to reach a unanimous sentence. *Coe v. Bell*, 161 F.3d 320, 339 (6th Cir.1998).

The trial court in petitioner's case instructed the jury as follows: "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous." [Court File No. 43, Addendum No. 5, Vol. 24, at 574]. However, the Court further instructed the jury about its duty,

> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

[Court File No. 43, Addendum No. 5, Vol. 24, at 574–75]. The jury instructions re-

quired the jury to unanimously agree upon the punishment, whether they determined the punishment should be death or life. The jury was not instructed on the consequence of failing to reach a unanimous verdict and that is what the petitioner is complaining about in this issue.

The Court first notes the state court neither expressly discussed or articulated any specific federal constitutional authority as the basis for its decision, nor did it provide the reasoning underlying its resolution of petitioner's challenge to Tennessee's death penalty scheme. However, its decision is not disconsonant with Supreme Court decisions involving the constitutionality of state capital sentencing procedures. *See, e.g., Jones v. United States,* 527 U.S. 373, 381, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) (holding the Eighth Amendment does not require that the jury be instructed about consequences of failure to agree on capital sentence); *Buchanan v. Angelone,* 522 U.S. 269, 276–77, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998) (finding a state may shape and structure jury's consideration of mitigating evidence, but must allow broad inquiry into all such evidence and must not preclude jury from giving effect to it).

[24] In order to be entitled to habeas corpus relief on this claim, petitioner must demonstrate the state court decision is "contrary to" or an "unreasonable application of" clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d); *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Here, petitioner has failed to do so. A constitutional violation does not occur when a jury is not instructed of the consequence of failing to reach a unanimous verdict. Thus, the state court's determination that defense counsel's representation was not deficient for not challenging the court's jury instructions or for failing to request the jury be instructed as to the consequences of a deadlock, was not contrary to, or an unreasonable application of, clearly established federal law. Accordingly, petitioner has not demonstrated counsel was ineffective for failing to object to the instruction. Thus, a writ may not issue with regard to this claim.

5. *Counsel's Failure to Argue Against Disclosure of Psychologist's Notes (Claim 13.d)*

Petitioner claims trial counsel rendered ineffective assistance of counsel for failing to argue in the trial court or on appeal that his Fifth Amendment right to remain silent and Fourteenth Amendment rights were violated when the trial court required petitioner to turn over his psychiatric expert's rough notes, which included statements made by him to his psychiatric expert.

This claim is withdrawn by petitioner in his Response to Respondent's Motion to Dismiss Pursuant to 28 U.S.C. § 2254 [Court File No. 213–3, at 113; Court File No.253–1, at 1–2]. Accordingly, petitioner is not entitled to any habeas relief on this claim.

6. *Counsel's Direction of Investigation of Mitigation (Claim 13.e)*

Petitioner claims counsel failed to provide direction and focus with respect to the investigation of mitigation evidence, resulting in ineffective assistance for failing to properly define and explain the role of the retained expert. Petitioner has failed to set forth facts supporting this claim in his habeas petition as required by Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts.[24] Peti-

24. The Court observes that petitioner provides factual support in his response to the State's motion to dismiss [Court File No. 213–3].

tioner has failed to cite to that part of the record pertinent to this claim. *See* 28 U.S.C. § 2254(f). Accordingly, he is not entitled to relief on this claim.

The Court has reviewed the record and alternately finds this claim is procedurally defaulted. Petitioner contends he raised this claim and sub-claim in his direct appeal of the denial of post-conviction relief and in his application for permission to appeal to the Tennessee Supreme Court. The Court, however, is unable to find a claim that counsel failed to provide direction and focus with respect to the investigation of mitigation evidence to the retained expert. Petitioner has failed to identify that portion of the record demonstrating this claim, Claim 13.d, was raised in state court [Court File No. 26, Addendum No. 2, Vol. 1].[25] However, assuming for the sake of discussion that this claim is properly before the Court, a review of the record reveals that petitioner is not entitled to any habeas relief on this claim.

The post-conviction court determined defense counsel tried to present the defendant as an individual who had been a good child with a harsh childhood, the same defense presented by post-conviction counsel. The post-conviction court observed that post-conviction counsel simply had developed more witnesses over a substantial amount of time but petitioner failed to establish any prejudice on this issue. The report of petitioner's trial expert explains that petitioner was raised in a hostile, physically and emotionally abusive environment. The report explains that after the death of his protective and nurturing mother, he was subject to physical and emotional abuse by his father. The expert discussed the petitioner's problems in terms of abandonment, physical and emotional abuse, and frustration [Court File No. 68, Addendum No. 9, Vol. 68]. Although the evidence could perhaps have been presented in a more persuasive and compelling manner, the basic information of petitioner's traumatic, disruptive, and abusive childhood was presented to the sentencing jury. The Court does not find anything in this voluminous record that reflects trial counsel failed to provide direction and focus for the investigation of mitigating evidence to the expert.[26] Petitioner did not present Dr. Engum during his state post-conviction proceeding to testify regarding this claim. Accordingly, the

25. Additionally, petitioner has recently notified the Court Dr. Blake's report to the state trial court reveals petitioner is identified as the source of the spermatozoa from the victim's gown, and thus, petitioner moves to withdraw his *Schlup* gateway arguments with respect to this claim, Claim 13(e).

26. Although petitioner was permitted to expand the record with the reports of Dr. David Liska and Dr. Faye E. Sultan, the Court has determined these records will not be considered as they are cumulative and were not considered by the state court. The Court will consider only the facts actually presented to the state court and contained in its record in determining whether the state court's decision involved an unreasonable application of the law to the facts when it adjudicated petitioner's ineffectiveness claim. 28 U.S.C. § 2254(d)(2). Considering new facts presented for the first time in this habeas proceeding would skew the determination to be made under AEDPA's standards of review because, logically, the state court could not have applied the law to facts that were not before it.

Dr. David Liska's report relies upon evidence that was not introduced by sworn testimony during the state court proceedings. Many of the alleged incidents Dr. Liska relies upon to reach his conclusion directly contradict the sworn testimony. For example, Dr. Liska refers to petitioner's father sexually abusing him and his sister, both in the bath and in bed, and petitioner witnessing the abuse of his sister [Court File No. 111–2, pp. 25–26]. Neither petitioner nor his sister have ever testified that such occurred. Moreover, Dr. Liska's report and Dr. Sultan's report are generally cumulative to the evidence presented at the sentencing hearing and the state-post conviction hearing.

Court rejects petitioner's contention and finds he is not entitled to any habeas relief on this claim.

7. *Cumulative Error*

Petitioner contends he was denied due process by the accumulation of errors by trial counsel. The Tennessee Supreme Court determined petitioner failed to establish any individual errors and, therefore, concluded that there was no cumulative effect of errors. *Nichols v. State,* 90 S.W.3d 576, 607 (Tenn.2002).

Likewise, petitioner's habeas petition has failed to establish any individual errors and, therefore, there is no cumulative effect of errors. The state court decision is not contrary to, or an unreasonable application of, federal law, nor is it based upon an unreasonable factual determination. Accordingly, petitioner's cumulative error claim is without merit and respondent's motion to dismiss will be **GRANTED** on this claim.

8. *Arbitrary and Invalid Death Sentence (Claims 15, 20, 21(g), and 25)*

Petitioner has raised several claims concerning the manner in which the death sentence was imposed. Because the claims are intertwined and all claims challenge the manner in which the death sentence was imposed, the Court will address all claims concerning the imposition of the death penalty in this section. The Court will first identify each claim, summarize the pertinent facts, and then dispose of the claims.

First, petitioner contends the trial court violated his Sixth, Eighth, and Fourteenth Amendment rights when it refused to declare a mistrial when the jury invalidly and erroneously sentenced petitioner to death based upon non-statutory aggravating factors (**Claim 15**). Petitioner next avers his death sentence violates his rights under the Sixth, Eighth, and Fourteenth Amendments because after the jury returned a death sentence based on non-statutory aggravating circumstances, the judge recharged the jury but only recharged them on aggravating circumstances, permitting the jury to correct its judgment (**Claim 21(g)**). In his third related claim, petitioner contends the trial court erred when it improperly polled the jury by misstating the applicable requirements of the law (**Claim 25**). Lastly, petitioner contends his death sentence is unconstitutional because the jury relied upon an aggravating circumstance declared unconstitutional on direct review; and the Tennessee Supreme Court's application of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), harmless error review was contrary to, or an unreasonable application of federal law (**Claim 20**).[27]

a. *Facts*

The State relied upon two statutory aggravating factors to support its request for the death penalty for petitioner: (1) The defendant was previously convicted on one or more felonies, other than the present charge, which statutory elements involve the use of violence to the person; and (2) the murder was committed while Nichols was committing or attempting to commit rape. Nichols pleaded guilty to felony-murder, and the State was permitted to present a substantial amount of proof of the rape and murder during petitioner's sentencing trial.

27. Petitioner has recently notified the Court that since the Dr. Blake reported to the state trial court conducting the post-conviction DNA proceedings that new scientific testing reveals that petitioner is identified as the source of the spermatozoa from the victim's gown, he moves to withdraw his *Schlup* gateway arguments with respect to Claims 20 and 21(g).

The jury was instructed on their duty to fix punishment of death or life imprisonment [Court File No. 43, Addendum No. 5, Vol. 24, at 577–592]. The Court instructed the jury that they were limited to considering the two aggravating factors identified above [*Id.* at 579–581]. When asked if there were any requests, defense counsel responded yes, and a bench conference ensued. Afterwards, the state court again instructed the jury about the aggravating and mitigating factors and instructed the jury that it was limited to considering only the two statutory aggravating circumstances when deciding whether the death penalty was the appropriate punishment in this case. Subsequently, two other bench conferences were held whereupon the court further charged the jury again only as to the portion of the charge explaining the weighing process of the aggravating and mitigating circumstances and the procedure for completing the verdict form [*Id.* at 581–592]. The trial court's written charge was given to the jury to use during deliberations [Court File No. 43, Addendum No. 5, Vol. 24, at 592].

The jury returned, unanimously finding the following listed non-statutory aggravating circumstances beyond a reasonable doubt:

(1) First degree murder of Karen E. Pulley,

(2) The unfeeling brutality of the first degree murder of Karen E. Pulley,

(3) The lack of remorse; and

(4) The lack of respect of human rights.

[Court File No. 43, Addendum No. 5, Vol. 24, at 599–600]. The jury unanimously found that the punishment for petitioner shall be death. The jury did not list any statutory aggravating circumstances.

Whereupon, trial counsel moved for a mistrial [*Id.* at 600]. The trial court determined the jury had a right to rectify their verdict and recharged them only as to the circumstances under which the death penalty shall be imposed and reiterated the two statutory aggravating circumstances they could consider [*Id.* at 600–606]. After stating the statutory aggravating circumstances, the court further instructed the jury:

> Members of the jury, the Court has read to you the aggravating circumstances which the law requires you to consider if you find beyond a reasonable doubt that the evidence was established. You shall not take account of any other facts or circumstances as the bases for deciding whether the death penalty would be appropriate punishment in this case.

[Court File No. 43, Addendum No. 5, Vol. 25, at 606]. Then the court explained the form for Punishment of Death. The trial court refused to re-charge on the mitigating circumstances telling trial counsel, "[n]o, they have found that he is guilty so you can note an exception." *Id.* at 607. The jury returned approximately fifteen minutes later with the original Punishment of Death verdict form. The jury had marked out the four non-statutory aggravating factors and written in the two statutory aggravating factors which the State had relied upon when seeking the death penalty.

b. *Failure to Declare Mistrial (Claim 15)*

First, petitioner challenges the trial court's decision not to declare a mistrial after the jury returned with a verdict of death based on four non-statutory aggravating circumstances (**Claim 15**).

This issue was addressed by the Supreme Court of Tennessee on direct appeal. The Tennessee Supreme Court made the following observations about the trial court's polling of the jury after it returned the second verdict:

> The trial court then determined that the jury originally had not listed [the] two

> [statutory aggravating] circumstances because it had assumed it need not copy statutory aggravating circumstances on the form. Each juror answered affirmatively when asked by the court whether, before reporting the verdict the first time, he or she had found (1) that each of the two statutory aggravating circumstances had been proved beyond a reasonable doubt, and (2) that these circumstances outweighed any mitigating circumstances.

State v. Nichols, 877 S.W.2d at 730.

The Tennessee Supreme Court concluded that, "[w]hen the jury reports an incorrect or imperfect verdict, the trial court has the power and the duty to redirect the jury's attention to the law and return them to the jury room with directions to reconsider their verdict." *State v. Nichols,* 877 S.W.2d 722, 730–31 (Tenn.1994). The state supreme court concluded the trial court was entitled to exercise this power and perform this duty, and by doing so, the trial court did not abuse its discretion in denying a mistrial.

Furthermore, the court concluded that the jury's consideration of the factors it originally listed on the verdict form did not render the verdict invalid or unreliable under the Eighth and Fourteenth Amendments. *Id.* at 731. The Tennessee Supreme Court determined the record clearly reflected that the jury had found that the defendant met the statutory criteria for capital punishment:

> The trial judge ascertained that, prior to the return of the initial verdict, each juror had found the existence beyond a reasonable doubt of the two statutory aggravating circumstances upon which the State sought the death penalty. Each juror also confirmed that he or she had previously found that these two aggravating circumstances outweighed any mitigating circumstances. The jury verdict itself reported that the jury found the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt.

Id. at 731.

Citing to United States Supreme Court precedent, the Supreme Court of Tennessee concluded that "once a capital sentencing jury finds a defendant falls within the legislatively-defined category of persons eligible for the death penalty, a jury is free to consider a myriad of factors to determine whether death is the punishment appropriate to the offense and the individual defendant." *Id., citing California v. Ramos,* 463 U.S. 992, 1008, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983); *Barclay v. Florida,* 463 U.S. 939, 950, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983) ("Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment."); *Zant v. Stephens,* 462 U.S. 862, 878–79, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.") (emphasis in original).

In the instant case, the Tennessee Supreme Court concluded the record clearly reflected that the jury had initially found Nichols met the statutory criteria for capital punishment. Additionally, the Supreme Court of Tennessee stated that the

factors originally listed by the jury as bases for the sentence concerning the circumstances of the crime and character of Nichols are factors the jury can consider under Tenn.Code Ann. § 39–13–204(c),[28] and consideration of the factors initially listed by the jury did not render the verdict invalid or unreliable under the Eighth and Fourteenth Amendments.

[25] When a court is faced with an ambiguous verdict, it may ask the jury to clarify its meaning. *See Unit Drilling Co. v. Enron Oil & Gas Co.,* 108 F.3d 1186, 1191 (10th Cir.1997). A judge may also encourage a jury having difficulty reaching a verdict to deliberate longer and give due consideration and respect to the views of their peers, *Allen v. United States,* 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896), "[h]owever, a judge errs in instructing the jury to deliberate further if the jury has reached a final verdict, which has been announced and recorded[.]" *United States v. Straach,* 987 F.2d 232, 242 (5th Cir. 1993), *citing United States v. Taylor,* 507 F.2d 166, 168 (5th Cir.1975). A jury reaches a valid verdict when the deliberations are over, the result is announced in open court, and no dissent by a juror is registered. *United States v. McFerren,* 907 F.Supp. 266, 269 (W.D.Tenn.1995) *citing United States v. Love,* 597 F.2d 81, 85 (6th Cir.1979). However, the practice of permitting a jury to correct a mistake in its announced verdict before it has been accepted and the jury discharged has been approved in numerous cases. *United States v. Love,* 597 F.2d at 85; *also see McHugh v. Olympia Entertainment, Inc.,* 37 Fed.Appx. 730 (6th Cir.2002), (unpublished table decision), *available in* 2002 WL 1065948 (district judge resubmitted original questions and verdict form, and re-instructed the jury and submitted clarifying questions, because the court did not "redetermine" the findings made by the jury, no error was found in obtaining clarification of jury's original verdict). It is the judge's job to clear up any confusion with concrete accuracy. *See Bollenbach v. United States,* 326 U.S. 607, 613, 66 S.Ct. 402, 90 L.Ed. 350 (1946).

[26, 27] This is a case with an ambiguous verdict. The verdict reflects the jury initially listed non-statutory aggravating circumstances rather than statutory aggravating circumstances as instructed by the court. However, the printed portion of the verdict reflects they unanimously found the punishment should be death; the listed statutory aggravating circumstances beyond a reasonable doubt; the State had proven beyond a reasonable doubt the statutory aggravating circumstances outweighed beyond a reasonable doubt the mitigating circumstances; and they unanimously found that death should be the punishment for petitioner [Court File No. 37, Addendum No. 5, Vol. 1, at 562]. Petitioner has not demonstrated that the trial court's actions of redirecting the jury's attention to the law and returning them to the jury room with directions to reconsider their verdict were unconstitutional. Ten-

28. The statute in effect at the time of petitioner's sentencing was Tenn.Code Ann. § 39–13–203(c) which provided:

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted . . . .

nessee law provides that a trial court has both the power and duty to return the jury to deliberate with directions to reconsider their verdict when a jury reports an incorrect or imperfect verdict. *State v. Mounce*, 859 S.W.2d 319, 322 (Tenn.1993)(verdict where 12 jurors voted to impose fine but only 8 voted to find defendant guilty, trial court should have instructed the jury to reconsider their verdict and sent them back to deliberate). "Great caution must be exercised when declaring a mistrial based on necessity because, 'where the ruling is mistaken or abused, the defendant may not be reprosecuted.' " *State v. Skelton*, 77 S.W.3d 791, 798–99 (Tenn.Crim.App.2001). A mistrial may be declared only in cases of manifest necessity. An example of "manifest necessity" recognized as a sufficient reason for declaring a mistrial is the inability of the jury to reach a unanimous verdict. *Id.* at 799. Under Tennessee law, a manifest necessity is shown only when there is no feasible and just alternative to halting the proceedings. *Id.* Because manifest necessity was not proven in this case, declaring a mistrial would have been improper. A court may obtain clarification from a still-empaneled jury of the meaning of its answers and verdict. Therefore, the Court had the power and authority to permit the jury to correct its mistake in the verdict.

Petitioner has not directed this district court to any United States Supreme Court case, nor has the Court found such case, that demonstrates the trial court's decision to send the jury back to correct their verdict was contrary to, or an unreasonable application of, federal law. Nor has petitioner demonstrated the state court decision was based upon an unreasonable determination of the facts. Consequently, petitioner is not entitled to any relief on this claim. The respondent's motion to dismiss on this claim will be **GRANTED**.

c. *Court Erroneously Refused to Recharge Jury on Mitigating Circumstances (Claim 21(g))*

[28] When the trial court recharged the jury and sent it back for further deliberations, the court refused to recharge the jury on mitigating factors. The trial court specifically refused to recharge on mitigating circumstances stating, "[n]o, they have found that he is guilty . . ." [Court File No. 43, Addendum No. 5, Vol. 24, at 607]. The jury retired for further deliberations and returned with the original verdict form which reflected they had marked through their original non-statutory aggravators and written the two statutory aggravating circumstances, *i.e.*, finding Nichols was previously convicted of one or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person; and the murder was committed while Nichols was engaged in committing, or was attempting to commit, or was fleeing after committing or attempting to commit rape. The jury unanimously determined that death was petitioner's punishment. Petitioner contends his capital sentencing proceeding violated the Eighth Amendment when the trial court re-instructed the jury to correct an invalid verdict without re-instructing the jury on mitigating factors.

"The United States Supreme Court has stated that the capital sentencer must make a reasoned moral and individualized determination based on the defendant's background, character and crime that death is the appropriate punishment." *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). The Eighth Amendment mandates the jury must have been able to consider and give effect to all relevant mitigating evidence offered by petitioner. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In *Boyde v. California*, 494 U.S.

370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), the Supreme Court of the United States provided the standard for determining whether a jury instruction that is claimed to be ambiguous, and therefore subject to an erroneous interpretation, requires reversal of the conviction. The proper inquiry is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. *Id.* at 380, 110 S.Ct. 1190. The petitioner contends the trial court's failure to include the mitigating circumstances instruction when re-instructing the jury and considering the part of the re-instruction that advised the jury they were not to take account of any other facts or circumstances as the bases for deciding whether the death penalty would be appropriate punishment in this case results in a reasonable likelihood that the jury failed to consider mitigating evidence when rendering the second verdict. At first glance, it appears that petitioner makes a legitimate claim. However, the subsequent polling of the jury reveals the initial verdict was a constitutional verdict even though the jury wrote non-statutory aggravating circumstances on the verdict form. Therefore, petitioner suffered no prejudice as a result of the trial court's failure to also re-instruct on mitigating circumstances.

Here, the sworn jury was initially properly and fully instructed on mitigating factors and weighing aggravating and mitigating factors. The jury was initially given the requested mitigating instructions and the written instructions were in the jury room during deliberation. This is not a case where the jury was not instructed or not properly instructed on fixing punishment, at least initially after several corrected instructions. The polling of the jury reveals petitioner did not suffer any prejudice due to the trial court's failure to re-instruct on the mitigating circumstances.[29]

Significantly, the trial court sent the written instructions to the jury during its initial deliberations, and nothing in the record reveals that the jury did not have them when it returned for further deliberations. Petitioner's trial attorneys argued the mitigating evidence and asked the jury to sentence him to life based on that evidence. Moreover, the State presented strong aggravating evidence, as shown by the relatively short period of deliberation. Petitioner raped and murdered the victim; after committing that crime, petitioner violently raped several other women; and petitioner admitted he was guilty of the felony-murder and of several other rapes.

Here, the jury was required to decide whether to sentence petitioner to life imprisonment or death. Evaluating the jury instructions as a whole, it is clear the jury was initially fully and properly instructed on mitigating evidence and how to weigh it against the aggravating circumstances. There was no evidence of jury confusion in relation to mitigating evidence and the

29. After returning with a corrected verdict the trial judge ask the forelady several questions and her answers reflected that they had initially found the two statutory aggravating factors but had not written them in because they were the two listed [presumably in the jury instructions because they are not written on the death verdict] and the other four circumstances they wrote in were a word of explanation [Court File No. 43, Addendum No. 5, Vol. 25, at 610–14]. The jury was polled and each juror stated that before reporting the verdict the first time, he or she had found each of the two statutory aggravating circumstances had been proven beyond a reasonable doubt and the two statutory aggravating circumstances outweighed any mitigating circumstances and that was their verdict prior to the time they first attempted to report [Court File No. 43, Addendum No. 5, Vol. 25, at 608–617].

weight to accord it but rather, the confusion was on what aggravating circumstances to list on the death verdict.[30]

In the present case, the trial judge resubmitted the original verdict form and reinstructed the jury only as to the aggravating circumstances to correct the jury's ambiguous original death penalty verdict. The trial judge did not return the jury to the jury room to deliberate further but rather, sent the jury back only to correct the death verdict. This claim was raised on direct appeal on constitutional grounds. The Supreme Court of Tennessee observed that the trial court ascertained the corrected verdict was the verdict the jury had reached the first time it returned the form. The Supreme Court of Tennessee found there was no reversible error in the failure to re-charge the mitigating circumstances or to include the words "beyond a reasonable doubt" in the questions asked the jurors. The court "concluded the initial verdict was a legal verdict and the jury had a right to correct it under proper instruction." *State v. Nichols*, 877 S.W.2d 722, 735 (Tenn.1994). The Tennessee Supreme Court found no reversible error in connection with the failure to re-instruct the jury on mitigating factors.

Although this Court believes re-instruction on the mitigating circumstances may have been the better practice, failure to reinstruct on mitigation was not prejudicial where the clarification of the initial jury verdict demonstrates the original verdict was a legal verdict. The jurors clarified their initial verdict when the trial judge conducted the polling of the jury. The polling of the jury revealed that each juror had initially found the existence, beyond a reasonable doubt, of the two statutory aggravating circumstances and found that those circumstances outweighed any mitigating circumstances [Court File No. 43, Addendum No. 5, Vol. 25, pp. 610–617].[31] In addition, the court initially gave the jury repeated instructions on mitigating circumstances and considering them in reaching their verdict [Court File No. 43, Addendum No. 5, Vol. 25, pp. 580–591]. Consequently, it was not necessary for the trial court to re-instruct the jury on the mitigating circumstances. Moreover, even if it was error for the court to fail to reinstruct on the mitigating circumstances, petitioner has not demonstrated that the jury instructions, or lack thereof, taken as a whole, were so infirm that they rendered the entire trial fundamentally unfair. *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). There is nothing in the record that indicates the jury failed to understand the function of mitigating circumstances when they decided petitioner's sentence or when they corrected their verdict.

In the instant case, the instructions were initially sent with the jury into deliberations [Court File No. 43, Addendum No. 5, Vol. 24, at 592]. The verdict they initially returned was ambiguous but was ultimately clarified when the court polled the jury. Viewing the jury instructions in the context of the charge as a whole, rather than in isolation, the failure to re-instruct the jury on the mitigating circumstances was not fatal. The jury was initially properly instructed on mitigating circumstances. Petitioner has failed to demonstrate that the failure to re-instruct the jury on mitigating circumstances so infected the entire

30. There is nothing in the record to indicate any confusion on the part of the jury when they returned the death penalty verdict rather than the life sentence verdict.

31. The death penalty verdict form originally returned by the jury reflected they unanimously found the aggravating circumstances outweighed, beyond a reasonable doubt, the mitigating circumstances [Court File No. 37, Addendum No. 5, Vol. 1, p. 562].

trial that his conviction violated due process.

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process[.]"

Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977).

Petitioner has not fulfilled his burden of proving that the trial court's failure to reinstruct on mitigating circumstances was so prejudicial that his conviction violates due process. Consequently, he is not entitled to habeas corpus relief on this claim.

The state court judgment must be upheld since petitioner has not demonstrated the state court adjudication resulted in a decision that is contrary to or an unreasonable application of clearly established federal law. Petitioner has not demonstrated the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in state court. Accordingly, respondent's motion to dismiss will be **GRANTED** as to this claim.

d. ***Polling of Jury(Claim 25)***

Petitioner maintains that the trial court improperly polled the jury by misstating the applicable requirements of the law in violation of the Sixth, Eighth, and Fourteenth Amendments. The jury was polled by the trial judge after it announced its second verdict. According to petitioner, only one juror was properly polled as to the proper standard for weighing aggravating circumstances against mitigating circumstances. Petitioner contends each juror should have been asked whether he or she found the aggravating factors were proven by the evidence beyond a reasonable doubt, and whether he or she found those two aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt, as required by Tenn.Code Ann. § 39–13–204(f). Petitioner also contends the trial judge failed to poll the forelady of the jury as to the finding on the mitigating factors, but only asked her whether the aggravating factors were weighed against the mitigating factors.

First, the trial judge initially asked the forelady "did the jury find those two aggravating factors had been proven by the evidence *beyond a reasonable doubt* before you came back the first time?" [Court File No. 43, Addendum No. 5, Vol. 25, at 610](emphasis added). Each individual juror, including the forelady, was then polled as to whether he or she had found the State had proven the two statutory aggravating circumstances beyond a reasonable doubt, and each juror responded "Yes" [*Id.* at 610–617].

Next petitioner contends that each juror should have been polled as to whether he or she found that those two aggravating circumstances outweighed any mitigating circumstance beyond a reasonable doubt. The trial judge failed to ask all the jurors this question. The Tennessee statute requires that once the jury unanimously determined at least one statutory aggravating circumstance had been proven beyond a reasonable doubt *and* that such aggravating circumstance had been proven by the State to outweigh any mitigating circumstances *beyond a reasonable doubt,* the sentence shall be death. Tenn.Code Ann. §§ 39–13–204(g)(1)(A) and (B).

The Tennessee Supreme Court found that the challenge was essentially a challenge of the verdict's reliability. The state court observed the jurors were instructed

that they must find the aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt and that the verdict form itself states that the jury unanimously found that the statutory aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt [Court File No. 37, Addendum No. 5, Vol. 1, p. 562]. The state court found the trial judge was only ascertaining that this was the jurors' verdict and its omission of the phrase "beyond a reasonable doubt" did not invalidate an otherwise valid verdict.

The state court relied upon a poll that cured the alleged error with the verdict. The initial verdict reflected the jury relied upon four non-statutory aggravating factors to impose the death sentence. The polling revealed each juror initially considered only the two statutory aggravating factors when determining whether petitioner was death-eligible and that each juror found the statutory aggravating circumstances outweighed any mitigating circumstance.

Petitioner cites *Brasfield v. United States,* 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345 (1926), and *Lowenfield v. Phelps,* 484 U.S. 231, 240, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), for the proposition that polling of the jurors by a trial judge should be undertaken with caution. However, the Court is unpersuaded by petitioner's argument that these two jury-polling cases are on-point Supreme Court precedent supporting his claim. In *Lowenfield,* the Court upheld a trial court's decision to ask jurors whether further deliberation would help them reach a verdict and the trial court's subsequent supplemental instruction, finding there was no coercion. 484 U.S. at 240, 108 S.Ct. 546. Nothing that the trial judge did in petitioner's case was coercive or denied petitioner a constitutional right. Thus, *Lowenfield* does not support petitioner's claim. In *Brasfield* the trial court asked the jury how it was divided numerically. That did not happen in the instant case. These cases cited by petitioner do not indicate that petitioner's trial judge improperly polled or coerced the jury.

The trial court questioned the foreperson, asking whether the jury found the two statutory aggravating factors beyond a reasonable doubt before they returned to the court the first time, and the foreperson responded they had. In addition, the trial judge ask the foreperson if the jury assumed that they did not have to write those two findings on the verdict form, to which she responded "yes"[Court File No. 43, Addendum No. 5, Vol. 25, at 610]. The trial judge then stated, "[s]o you thought that since you found those two, and those are the only two listed, that you did not have to actually copy those in there?" The jury forelady responded "yes" [*Id.*]. The trial court polled the jury and each individual juror confirmed the finding of the two aggravating factors beyond a reasonable doubt, that the two aggravating factors had outweighed any mitigating factors, and that the verdict was reached before they reported the first time [*Id.* at 610–617]. Considering the complete facts and circumstances of this case, the combination of the jury's initial jury verdict, the polling of the jury, and the re-instruction, petitioner has not demonstrated that the state court decision was based on an unreasonable determination of the facts in light of the evidence, or that the state court decision was contrary to, or an unreasonable application of, federal law.

"The purpose of polling is to ascertain that each juror approves of the verdict and has not been coerced or induced to concur in a verdict to which he or she does not fully assent. Polling gives effect to each juror's right to change his or her mind about the verdict agreed to in the jury

room even though the likelihood of such change is remote. If the trial court decides to poll the jury at all, it had substantial discretion in determining the manner of polling." *Dunaway v. Moore,* 78 F.3d 584 (6th Cir.1996) (unpublished table decision), *available in* 1996 WL 102425, at *7 (citations omitted).

The jurors answered in the affirmative when asked by the court whether they found the two aggravating circumstances outweighed any mitigating circumstance before they reported their first verdict. The polling of the jury made critical inquiries and provided adequate support for the conclusion that the initial verdict was valid. Other than the initial written verdict, which the jury polling revealed was valid, petitioner has not provided any evidence that the initial verdict was invalid. Petitioner has not demonstrated that the state court's determination was based on an unreasonable determination of the facts nor has he demonstrated that the decision was contrary to, or an unreasonable application of, clearly established federal law. Accordingly, petitioner is not entitled to any habeas relief on this claim.

e. *Middlebrooks' Error (Claim 20)*

Petitioner contends he was sentenced on an unconstitutional felony-murder aggravating circumstance and any "weighing calculus" undertaken by the jury occurred with undue consideration given to this unconstitutional aggravating circumstance. Sometime after petitioner's trial, the Tennessee Supreme Court concluded in *State v. Middlebrooks,* 840 S.W.2d 317 (Tenn. 1992), that when a defendant is convicted of felony murder, the state's use of felony murder as an aggravating circumstance at the sentencing hearing violates the state and federal constitutions because the aggravating circumstance is a duplication of the crime itself and fails to narrow the class of death-eligible defendants. The Tennessee Supreme Court determined the sentencing jury's consideration of the invalid felony-murder aggravating circumstance was state constitutional error.

The Tennessee Supreme Court applied the harmless error test as set forth in *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *State v. Howell,* 868 S.W.2d 238 (Tenn.1993), holding that an error is harmless beyond a reasonable doubt if an appellate court can conclude the sentence would have been the same had the sentencing authority given no weight to the invalid aggravating circumstance. *State v. Nichols,* 877 S.W.2d at 739, *citing Stringer v. Black,* 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992); *State v. Howell,* 868 S.W.2d at 262. The court observed that in conducting this harmless error inquiry, it must carefully consider all factors that may have influenced the jury when imposing the death sentence, including other aggravating factors and the proof supporting the other circumstances.

[29] Performing a harmless error analysis under *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the state supreme court determined the error was harmless beyond a reasonable doubt because the sentence would have been the same had the sentencing authority given no weight to the invalid aggravating circumstance. Although only one statutory aggravating circumstance remained, the Tennessee Supreme Court determined "the effect and qualitative persuasiveness of the remaining aggravating circumstance on the sentence increases where there is proof of more than one prior violent felony conviction." *State v. Nichols,* 877 S.W.2d 722, 738 (Tenn.1994). The state supreme court noted that the State offered proof that the defendant had committed five similar aggravated rapes within 90 days of the victim's murder, us-

ing weapons in three instances.[32] The court found the evidence of this remaining aggravating circumstance undisputed and overwhelming. The court also observed that no inadmissible or erroneous evidence was introduced to establish the invalid felony-murder aggravating circumstance so eliminating the felony-murder aggravator did not remove any evidence from the jury's consideration.

The court found the defendant's mitigation proof consisted of his childhood environment, his character, and passive nature. The court observed that the State introduced evidence "in rebuttal to show that a few years earlier, he had been convicted and sentenced to the penitentiary for an attempted rape." *Id.* at 739. In addition, the Tennessee Supreme Court observed that the State rebutted Dr. Engum's diagnosis of intermittent explosive disorder by offering proof that Dr. Engum acted in a dual role as a lawyer and member of the defense team searching for a defense, rather than as an objective psychologist.

Petitioner argues the state court decision is contrary to, or an unreasonable application of, federal law, and based on an unreasonable determination of facts. Petitioner contends the four reasons asserted by the state court for finding harmless error are not reasonably supported by the record and not sufficient to prove beyond a reasonable doubt that the error did not contribute to the jury's verdict.

Under AEDPA, review by the district court is confined to whether the Tennessee Supreme Court's harmless error analysis was an unreasonable application of clearly established Supreme Court precedent. This Court recognizes that in Tennessee, a state which requires its juries to weigh aggravating and mitigating factors, the invalidation of one of the aggravating circumstances removes a mass from one side of the scale. Under such circumstances, "[t]here is no way to know if the jury's analysis—how the aggravating and mitigating circumstances balanced—would have reached the same result even without the invalid factor." *Coe v. Bell*, 161 F.3d 320, 334 (6th Cir.1998). However, despite the fact that state appellate courts can never truly know how a jury viewed an improper aggravating factor, the Supreme Court of the United States has repeatedly held that it is appropriate for a state appellate court itself to reweigh the aggravating and mitigating circumstances when determining whether consideration of the invalid aggravating factor by a sentencer was harmless. *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

The Tennessee Supreme Court made an individualized determination on the basis of the character of the individual and the circumstances of the crime. *Id.* at 753, 110 S.Ct. 1441. In reviewing the Tennessee Supreme Court's analysis, this Court does not reweigh the aggravating and mitigating factors, but instead, is limited to ensuring that the Tennessee Supreme Court's harmless error review was not unreasonable. *Abdus–Samad v. Bell*, 420 F.3d 614, 622 (6th Cir.2005). To grant petitioner relief on this claim, he must show the state court applied federal law to the facts of his case in an objectively unreasonable manner.

In petitioner's case, the Tennessee Supreme Court reviewed the complete record for the presence of factors which potentially influenced the death sentence. This review included consideration of the strength of the one remaining aggravating factor; the prosecutor's arguments at sentencing; the evidence admitted to establish

32. "The defendant was previously convicted of one (1) or more felonies, other than the present change, whose statutory elements involve the use of violence to the person[.]" Tenn.Code Ann. § 39–13–204(h)(2).

the invalid aggravating circumstance; and the nature, quality, and strength of the mitigating factors. The court also evaluated the remaining aggravating circumstance and its qualitative nature, its substance and persuasiveness, as well as the quantum of proof supporting it.

First, the Tennessee Supreme Court considered the effect and qualitative persuasiveness of the remaining aggravating circumstance on the sentence, observing that the effect and persuasiveness increases where there is proof of more than one prior violent felony conviction. The court found the remaining valid aggravating circumstance to be undisputed and overwhelming for the following reasons:

> The State, here, offered proof that the defendant had committed five similar aggravated rapes within 90 days of Pulley's murder, and in three instances was armed with weapons including a cord, a pistol, and a knife. The modus operandi of the convictions was similar to the felony resulting in Pulley's murder. The defendant when "energized," went out night after night, roaming the city, selecting vulnerable victims, eventually breaking into their homes and violently committing rape.

Nichols, 877 S.W.2d at 738.

Petitioner, citing *Old Chief v. United States,* 519 U.S. 172, 185, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), argues it was improper for the court to consider these facts. *Old Chief* held that a district court abuses its discretion, under Federal Rule of Evidence 403, by admitting the full record of a prior conviction after a defendant offers to concede the fact of the prior conviction. Petitioner has not demonstrated that he conceded the fact of his prior convictions. Nevertheless, *Old Chief* was based on federal rules and statutes and not the Constitution, and was decided several years after petitioner's trial and direct appeal and offers Nichols no support for this claim.

Next, petitioner complains about the state court findings that no inadmissible or erroneous evidence was introduced to establish the invalid felony-murder, and the removal of the invalid aggravating circumstance did not remove any evidence from the jury's total consideration. Petitioner complains that the prosecution was not entitled to introduce all the evidence it did under the guise of informing the jury about the circumstances of the case. Petitioner pleaded guilty to the murder during the guilt phase, thus the trial court permitted the prosecution to present evidence of the nature and circumstances of the crime so as to provide the jury with enough information to make an individualized sentencing determination of the appropriateness of the sentence. Petitioner has not provided, and the district court's research did not reveal, any federal law demonstrating the introduction of this evidence was error. Finally, the state court examined petitioner's mitigation proof in analyzing the effect of the invalid aggravating circumstance on the sentence.[33]

33. Petitioner's reliance on *Brown v. Sanders,* —— U.S. ——, 126 S.Ct. 884, 163 L.Ed.2d 723 (2006) is unavailing. The United States Supreme Court held:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighting process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

Brown v. Sanders, —— U.S. ——, ——, 126 S.Ct. 884, 892, 163 L.Ed.2d 723 (2006). The test used in petitioner's case was more strict than the test announced in *Brown.* In petitioner's case, the mere submission of the invalid aggravating circumstance to the jury amounted to unconstitutional error, an error that was subjected to a harmless error analysis.

The Tennessee Supreme Court examined the quality and strength of the defendant's mitigation proof in their analysis to determine the effect of the invalid aggravating circumstance on the sentence. The state court described the mitigation proof as follows:

> Primarily the defendant's mitigation proof related to his childhood environment, his character, and passive nature. The State offered evidence in rebuttal to show that a few years earlier, he had been convicted and sentenced to the penitentiary for an attempted rape. In addition, expert proof from Dr. Engum was offered to show that the defendant was suffering from a rare condition called intermittent explosive disorder. The State rebutted Dr. Engum's testimony, however, by offering proof that he acted in a dual role as a lawyer and member of the defense team searching for a defense, rather than as an objective psychologist.

Nichols, 877 S.W.2d at 738. The Tennessee court was permitted to consider the strength of the mitigating circumstances and weigh it against the remaining aggravating factor. In so doing, the court acknowledged that some of the mitigating evidenced had been rebutted by the State.

The Tennessee Supreme Court's finding that the impact of the improper aggravating factor was not significant enough to put the jury's decision in question was not an unreasonable finding. Given that the improper aggravating factor did not convey new information to the jury [34] and that the remaining aggravating circumstance was quite significant, it was not unreasonable for the Tennessee Supreme Court to determine that the jury's verdict in this case would have been the same had it not considered the felony-murder aggravating factor. The jury's consideration of the improper aggravating circumstance in this case has not so infected the balancing process such that it is constitutionally impermissible for the Tennessee Supreme Court to affirm the death sentence Moreover, the Sixth Circuit has determined *Middlebrooks* is a rule of Tennessee constitutional law and is not cognizable in federal habeas proceedings, despite *Middlebrooks'* discussion of federal case law. *Coe v. Bell,* 161 F.3d 320, 348 (6th Cir.1998).

Accordingly, the respondent's motion to dismiss as to the *Middlebrook's* claim will be **GRANTED**.

9. *Objection to Evidence (Claim 16)*

[30] Petitioner, having pleaded guilty to all charges, avers that the trial court erred when it permitted the State to put on its entire case-in-chief during the sentencing phase. At the time of petitioner's sentencing hearing in May 1990, as the Tennessee Supreme Court noted, Tenn. Code Ann. § 39–13–203(c) permitted the following evidence to be introduced during the sentencing hearing:

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (I); and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evi-

34. Under Tennessee law at the time petitioner committed the crime and at the time of his sentencing, evidence of the nature and circumstances of the crime was permitted to be presented in the sentencing proceeding. Tenn.Code Ann. § 39–2–203 (1987).

> dence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or of the state of Tennessee.

Tenn.Code Ann. § 39–13–203(c) (Effective Nov. 1, 1989); § 39–13–204(c).

The state supreme court found the evidence admissible, citing to the above referenced statute, and the fact that since petitioner pleaded guilty, the sentencing jury had no information about the offense other than the evidence petitioner complains should not have been introduced. The court found the evidence tended to "individualize" the case for the jury and was limited to testimony relevant to the crime.

The Supreme Court of the United States has found that statutory aggravating circumstances play a constitutionally necessary function, *i.e.,* they narrow the class of persons eligible for the death penalty. In addition the Supreme Court has found, "the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens,* 462 U.S. 862, 878–79, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (emphasis in original). Petitioner complains that the Tennessee Supreme Court's reliance on *Zant* was unreasonable.

First, petitioner pleaded guilty to one count of felony-murder. The challenged evidence is relevant to the statutory aggravating circumstance that the murder was committed while committing rape. Realizing that aggravating circumstance has since been deemed unconstitutional by the Tennessee courts, at the time of trial the court's determination that the evidence was relevant to punishment was not incorrect. Tennessee law provided that any matter the court deemed relevant to the punishment, including any evidence to establish or rebut any mitigating factors, could be introduced in the sentencing phase of a first degree murder trial. Petitioner announced, at the beginning of his trial, that he would plead guilty. Therefore, the trial court determined the facts and circumstances surrounding the crime, which would have been presented to the jury had petitioner gone to trial, was relevant to punishment.

Petitioner has not cited to Supreme Court precedent, and the Court does not know of any federal law, which prohibits evidence related to the nature and circumstances of the crime from being introduced during a sentencing hearing following a defendant's guilty plea to the offense. Indeed, any such law would be inconsonant, if not in direct conflict, with the requirements of the Eighth Amendment. *See Clemons v. Mississippi,* 494 U.S. 738, 748, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) ("The primary concern in the Eighth Amendment context has been that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime."); *Barclay v. Florida,* 463 U.S. 939, 950, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983) (After a death-qualifying conviction the sentencer then "is free to consider a myriad of factors to determine whether or not death is the appropriate punishment."); *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (The sentencer in a capital case may not be prevented from considering "any of the circumstances of the offense that the defendant proffers" to mitigate the punishment.).

The evidence of the circumstances of the crime was necessary because it was relevant to punishment and to counter petitioner's mitigating evidence. More importantly, the evidence was permitted under Tennessee law and petitioner has not sustained his burden of proving the decision of the Tennessee Supreme Court was contrary to, or an unreasonable application of, clearly established federal law, nor was it an unreasonable determination of the facts. Evidence demonstrating the nature and circumstances of the crime was not constitutionally impermissible.

Consequently, petitioner is not entitled to any habeas relief on his claim that it was error for the trial court to permit evidence relevant to the nature and circumstances of the crime during his sentencing hearing. The evidentiary rulings, by the trial judge, in petitioner's sentencing hearing were constitutionally permissible and necessary to ensure a reliable and individualized sentencing decision. Respondent's motion as to this claim will be **GRANTED**.

10. *Discovery of Expert's Notes and Memorandums (Claim 17)*

[31] Petitioner contends the trial court violated his rights under the Sixth, Eighth, and Fourteenth Amendments when it ordered him to release to the State the personal notes and writings made by petitioner's expert psychologist, in violation of Rule 16 of the Tennessee Rules of Criminal Procedure, thus depriving him of effective assistance of counsel. Petitioner has mistakenly asserted that this claim was exhausted on direct appeal. This claim was not raised on direct appeal as asserted by petitioner in this habeas petition. Petitioner's claim on direct appeal was raised as follows:

> THE TRIAL COURT ERRED WHEN IT ORDERED MR. NICHOLS TO RELEASE TO THE STATE THE PERSONAL NOTES AND WRITINGS MADE BY MR. NICHOLS' EXPERT PSYCHOLOGIST, IN VIOLATION OF RULE 16, TENNESSEE RULES OF CRIMINAL PROCEDURE.

[Court File No. 50, Addendum 6, Vol. 1, at 24]. Consequently, petitioner's claim that in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution the release of Dr. Engum's memoranda to the State, in violation of Rule 16 of the Tennessee Rules of Criminal Procedure, deprived him of effective assistance of counsel is procedurally defaulted. Absence a showing of cause and prejudice, this claim will be **DISMISSED.**

In the last paragraph of petitioner's claim in his appellate brief on direct appeal relating to the disclosure of Dr. Engum's memoranda, petitioner claimed the production of the internal notes and memoranda and the use of the same by the State to condemn the defense strategy was a violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The exhaustion doctrine requires the petitioner to present "the same claim under the same theory" to the state courts before raising it on federal habeas review. *Pillette v. Foltz,* 824 F.2d 494, 497 (6th Cir. 1987). When determining whether petitioner "fairly presented" this federal constitutional claim to the state courts, this Court considers whether:

> 1) the petitioner phrased the federal claim in terms of the pertinent constitutional law or in terms sufficiently particular to allege a denial of the specific constitutional right in question;
>
> 2) the petitioner relied upon federal cases employing the constitutional analysis in question;
>
> 3) the petitioner relied upon state cases employing the federal constitutional analysis in question; or

4) the petitioner alleged "facts well within the mainstream of [the pertinent] constitutional law."

Hicks v. Straub, 377 F.3d 538, 553 (6th Cir.2004) (quoting *McMeans v. Brigano,* 228 F.3d 674, 2000 WL 1472708 (6th Cir. 2000) (holding that general allegations of the denial of rights to a fair trial and due process fail to fairly present the claims that specific constitutional rights were violated). In the instant case, petitioner's cite to *Hickman v. Taylor,* 329 U.S. 495, 510, 67 S.Ct. 385, 91 L.Ed. 451 (1947), for the proposition that an attorney's work product must remain undiscoverable, did not fairly present the claim that petitioner's constitutional rights were violated. Furthermore, petitioner's claim on direct appeal that "[t]he production of all of Dr. Engum's preliminary internal notes and memoranda, in contravention of Rule 16, Tennessee Rules of Criminal Procedure, and the use by the State of those notes to ridicule defense witnesses and to condemn the defense strategy, was prejudicial error, and a violation of the Defendant's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution," does not constitute a fair presentation of the federal constitutional claim Nichols raises in his habeas petition that the release of Dr. Engum's memoranda to the State deprived him of effective assistance of counsel.

Although petitioner failed to raise this claim as a constitutional issue in the state courts, if this Court were to interpret this convoluted claim as an exhausted constitutional claim, petitioner would not be entitled to any habeas relief. Although the state appellate court did not address the claim on a constitutional basis, this Court can review the state court decision under AEDPA. This is so, because a state court need not cite to, nor even be aware of, clearly established Supreme Court precedents, " 'so long as neither the reasoning nor the result of the state-court decision contradicts them.' " *Mitchell v. Esparza,* 540 U.S. 12, 16, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003) (per curiam) (*quoting Early v. Packer,* 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002). Therefore, this district court will make an independent, but deferential, review of the record and the applicable law to determine whether the state court decision is "contrary to" clearly established Supreme Court precedents in that it "applies a rule that contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Williams v. Taylor,* 529 U.S. 362, 405–06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In addition, this Court will review the state court decision in terms of whether it is based on an unreasonable determination of the facts in light of the evidence presented in state court. *See Harris v. Stovall,* 212 F.3d 940, 943 (6th Cir.2000). Therefore, out of an abundance of caution, the Court will address this unexhausted claim.

[32] Petitioner argues Dr. Engum's memoranda should have been protected from disclosure by the attorney work-product doctrine. Violation of the attorney work-product doctrine is not cognizable here because the privilege for attorney work-product is not a constitutional privilege under the United States Constitution, nor is the privilege applicable to the states under any federal law or treaty. "[T]he work-product doctrine is firmly established as a common law privilege." *In re Grand Jury Proceedings,* 473 F.2d 840, 845 (8th Cir.1973). Moreover, the work-product privilege is not absolute. *United States v. Nobles,* 422 U.S. 225, 239, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975).

Although the work-product doctrine is more frequently asserted as a bar to discovery in civil actions, it also applies to criminal proceedings. *United States v.*

Nobles, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). The work-product doctrine protects against disclosure of materials prepared in anticipation of litigation or prepared for trial by a party, his attorney, or his representative. *See Maine v. United States Dep't of Interior,* 298 F.3d 60, 66 (1st Cir.2002). Normally, ordinary work product may be discoverable where production "is essential to the preparation of one's case," or where the relevant information would be difficult or impossible to obtain. *See Hickman v. Taylor,* 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947). However, opinion work product qualifies for greater protection. *See Upjohn Co. v. United States,* 449 U.S. 383, 401–02, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)(Before disclosure of attorneys' opinion work-product is ordered a "far stronger showing of necessity and unavailability by other means is required"). The district court's research did not reveal that the United States Supreme Court or the Sixth Circuit Court of Appeals has taken a position regarding the extent of such protections for opinion work product.

Although opinion work-product doctrine protection does not disappear once a trial has begun, and the United States Supreme Court has acknowledged disclosure of an attorney's efforts at trial could disrupt the orderly development and presentation of a case, the Supreme Court declined to delineate the scope of the doctrine at trial in *United States v. Nobles,* 422 U.S. 225, 239, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), and this Court's research has not revealed a Supreme Court case delineating the scope of the doctrine at trial.

However, the *Nobles* Court observed that the work-product doctrine is not absolute and may be waived and so found. Work product is a qualified evidentiary privilege rather than an absolute protection. *Westinghouse Elec. Corp. v. Republic of Philippines,* 951 F.2d 1414, 1417 fn. 1 (3rd Cir.1991). In *Nobles,* the defendant in a criminal case argued that the work-product doctrine exempted the investigator's report from disclosure at trial, but the Supreme Court found its protection was unavailable to Nobles. The *Nobles* Court determined Nobles waived the privilege derived from the work-product doctrine when he sought to present the testimony of the investigator and contrast his recollection of the contested statements with that of the prosecution's witnesses. The Court found that Nobles waived the privilege with respect to matters covered by the investigator's testimony by electing to present the investigator as a witness. The Supreme Court concluded Nobles was not permitted to advance the work-product doctrine to sustain a unilateral testimonial use of work product. *Nobles,* 422 U.S. at 240, 95 S.Ct. 2160. The *Nobles* trial court advised it would conduct an *in camera* inspection of the investigator's report and would excise all reference to matters relevant to the precise statement at issue. When defense counsel refused to produce the report, the *Nobles* trial court precluded the investigator from testifying about his interviews with the witnesses.

The *Nobles* Court observed that the recognition of the work-product doctrine by the United States Supreme Court in *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), reflected the strong "public policy underlying the orderly prosecution and defense of legal claims." *United States v. Nobles,* 422 U.S. at 236, 95 S.Ct. 2160. Although the Court recognized a qualified privilege for certain materials prepared by an attorney preparing for litigation, it also recognized that the privilege derived from the work-product doctrine is not absolute.

> The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived. Here respondent sought to adduce the testimony of the investigator

> and contrast his recollection of the contested statements with that of the prosecution's witnesses. Respondent, by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his testimony. Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.

United States v. Nobles, 422 U.S. at 239–240, 95 S.Ct. 2160. The Supreme Court also observed that when counsel attempts to make a testimonial use of work-product materials, "the normal rules of evidence come into play with respect to cross-examination and production of documents." *Id.* at 240 n. 14, 95 S.Ct. 2160.

The Supreme Court found that the district court in *Nobles* properly exercised its discretion because its order only opened "to prosecution scrutiny the portion of the report that related to the testimony the investigator would offer to discredit the witnesses' identification testimony. The Court further afforded respondent the maximum opportunity to assist in avoiding unwarranted disclosure or to exercise an informed choice to call for the investigator's testimony and thereby open his report to examination." *Id.* at 240–41, 95 S.Ct. 2160.

In finding that the court's preclusion sanction was an entirely proper method of assuring compliance with its order, the Supreme Court observed that,

> The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been half-truth. Deciding, as we do, that it was within the court's discretion to assure that the jury would hear the full testimony of the investigator rather that [sic] a truncated portion favorable to respondent, we think it would be artificial indeed to deprive the court of the power to effectuate that judgement. Nor do we find constitutional significance in the fact that the court in this instance was able to exclude the testimony in advance rather than receive it in evidence and thereafter charge the jury to disregard it when respondent's counsel refused, as he said he would, to produce the report.

Id. at 241, 95 S.Ct. 2160.

In the instant case Dr. Engum testified on petitioner's behalf during the sentencing phase. Applying the principles in *Nobles* to the instant case, the state court's conclusion preventing petitioner from arguing the work-product doctrine to sustain a unilateral testimonial use of work product was not contrary to, nor an unreasonable application, of federal law. Consequently, petitioner's claim that disclosure of Dr. Engum's memoranda violated the attorney work-product doctrine will be **DISMISSED**.

In addition to finding that the release of Dr. Engum's memoranda did not violate the attorney work-product doctrine, the state courts also concluded that under the facts of this case, the memoranda memorializing Dr. Engum's interviews were discoverable. After petitioner filed his motions for discovery, the State filed motions seeking reciprocal discovery, specifically requesting reports of examinations.[35]

35. The discovery provision relevant to this issue is found in Tenn. R.Crim. P 16(b)(1)(B) which provided for reciprocal discovery under the circumstances of petitioner's case. The State requested reciprocal discovery; thus, petitioner was required to allow the State to inspect and copy any results or re-

However, petitioner failed to provide any discovery regarding his psychologist, Dr. Engum. Petitioner's trial counsel hired Dr. Engum. Dr. Engum evaluated and tested petitioner and also interviewed petitioner, his wife, his father, and his minister. After each interview, Dr. Engum, at the request of petitioner's counsel, wrote a memorandum for their use in preparing a defense and preparing to examine witnesses [Court File No. 42, Addendum No. 5, Vol. 22, at 202–03]. During the trial, the prosecutor was notified that petitioner intended to call a psychologist only after the prosecutor asked if Nichols intended to offer any psychiatric or medical proof [Court File No. 42, Addendum No. 5, at 201]. Dr. Engum did not write a summary report until the second day of trial, only after counsel realized the court was inclined to give the State access to all interview reports, as well as psychological test results, because they were prepared by a prospective witness.

Although Dr. Eric Engum was hired by petitioner's trial counsel to evaluate petitioner, trial counsel failed to have Dr. Engum prepare a report, having him instead prepare written memoranda for use in preparing their defense and examination [Court File No. 42, Addendum No. 5, Vol. 22, at 201–203]. Trial counsel's untimely notification to the State of their intent to present an expert on petitioner's behalf the day before he was to testify resulted in the prosecutor having access to the memoranda prepared by Dr. Engum. The prosecutor had a substantial need for the material because he was prevented from rebutting Dr. Engum's testimony with his own expert. Petitioner's untimely notification deprived the State of its opportunity to retain its own expert to analyze and testify about the tests and diagnosis.

The state trial court possessed the inherent authority to impose a sanction. The trial judge could have precluded Dr. Engum's testimony; but instead it permitted Dr. Engum's testimony and ordered the doctor's memoranda be given to the prosecutor. The state trial court found that the failure of petitioner's trial counsel to request a report from their expert resulted in Nichols having an unfair advantage that the court could not accept, and that the State was entitled to know the content of the psychologist's testimony. At that time, defense counsel offered to make the expert "available for voir dire, a private meeting, or whatever the State" wanted, but the court, finding the offer was untimely, responded that defense counsel's failure to have Dr. Engum prepare a report prevented the State from obtaining a psychologist [Court File No. 42, Addendum No. 5, Vol. 22, at 220–222]. The court determined it could either preclude Dr. Engum from testifying or give the memoranda to the State. The court performed an *in camera* inspection and permitted the State to read the memoranda. After the court made its ruling, defense counsel notified the court that Dr. Engum had dictated a report and it would be delivered to the court within thirty minutes. In an attempt to convince the trial court not to give the memoranda to the State, trial counsel also argued Dr. Engum did not reach a conclusion until April 23, 1990,[36] and the memoranda in-

ports of the mental examination performed by Dr. Engum. Petitioner was required to allow the State to copy that information which petitioner intended to introduce as evidence in chief at the trial or which were prepared by a witness whom the petitioner intended to call to trial when the results or reports relate to his testimony. However, Tenn. R.Crim. P. 16(b)(2) precludes discovery of "reports, memoranda, or other internal defense documents made by the defendant, or his attorneys, or agents ... or of statements made by ... defense witnesses ... to the defendant, his agents or attorneys."

36. This portion of the sentencing hearing occurred on May 10, 1990.

cluded statements made by the petitioner after Dr. Engum assured petitioner that anything he said to Dr. Engum would be confidential. The court determined that, under the circumstances, giving only the report to the State during the trial was not sufficient to place both sides "on a level playing field" [Court File No. 42, Addendum No. 5, Vol. 22, at 227–229].

The Tennessee Supreme Court, acknowledging this issue was difficult, concluded that the results and evaluations of the standardized psychological tests contained in Dr. Engum's files were clearly discoverable. The court also concluded that in the absence of any other records of Dr. Engum's evaluation of petitioner, the memoranda of the interviews were discoverable because his memoranda were not the undiscoverable work product of an agent or attorney of the petitioner. The Tennessee Supreme Court found that the memoranda were the only records of interviews conducted as part of an ongoing evaluation of petitioner, and since the final report was not prepared until the second day of the hearing, and only then because it became apparent that the memoranda were admissible, the memoranda of the interviews provided the most complete written psychological evaluation of petitioner and that these memoranda formed the basis for Dr. Engum's testimony.

The problem here is that Dr. Engum, a lawyer and a psychologist, was wearing too many hats in this case. First, he advised petitioner, incorrectly, that anything he said to him would be confidential. Second, it appears from the content of Dr. Engum's memoranda that he was also working as a member of the defense team, assisting trial counsel in preparing a mitigating defense, rather than evaluating petitioner as a neutral and objective psychologist.

In the instant case, Rule 16 of the Tennessee Rules of Criminal Procedure, required petitioner to "permit the State to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to the witness's testimony." The rule also provides that if a party fails to comply with the rule the court may "order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances." Tenn. R.Crim. P. 16.

In Tennessee a trial judge has the authority to take appropriate actions, as deemed necessary, to prevent discovery abuse. *Mercer v. Vanderbilt University, Inc.,* 134 S.W.3d 121, 133 (Tenn.2004)(The court determined the plaintiff would need an additional three to six weeks to retain additional experts and prepare for these "surprise witnesses" so the court determined witness exclusion was an appropriate sanction for Vanderbilt's failure to supplement its answers to the plaintiff's interrogatories). This discretionary decision will only be set aside when the trial court misconstrues or misapplies the controlling legal principle or has acted inconsistently with the substantial weight of the evidence. *White v. Vanderbilt Univ.,* 21 S.W.3d 215, 223 (Tenn.Ct.App.1999). Courts may also impose sanctions based on its inherent authority. A court's inherent power "is governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wa-*

bash R. Co., 370 U.S. 626, 630–31, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). The decision to impose sanctions lies within the sound discretion of the court. Sanctions are "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976). Under the abuse of discretion standard, the relevant inquiry is whether any reasonable person would agree with the court's decision. *See Morales v. American Honda Motor Co. Inc.*, 151 F.3d 500, 511 (6th Cir.1998).

Although preclusion of evidence as a sanction unquestionably implicates the Sixth Amendment because it prevents a criminal defendant from presenting relevant evidence and diminishes his ability to present a defense, it is not necessarily unconstitutional. *See Rock v. Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). The Supreme Court of the United States has found that an "accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). "In the exercise of this right [right of an accused to present witnesses in his own defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *United States v. Nobles*, 422 U.S. 225, 241, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975).

This matter arguably involves possible bad faith conduct during the discovery period. Although trial counsel did not admit any bad faith, counsel did admit this situation arose because they failed to have Dr. Engum prepare a report. The State requested discovery and the petitioner was ordered to provide reciprocal discovery. Petitioner's failure to provide discovery prevented the State from determining whether or not they needed to hire their own expert. This placed the trial court in a position of deciding whether to exclude Dr. Engum as a witness, whether to postpone the trial which had already begun, or whether to allow the State access to the internal memoranda.

[33] Unlike *Nobles*, petitioner found himself in this situation because he failed to abide by the court's discovery order. As a sanction permitted by Tenn. R.Crim. P. 16(d)(2) for failing to abide by the trial court's discovery order, the Court permitted the State access to Dr. Engum's memoranda. A review of the record indicates the trial judge required all of the notes and memoranda be given to the State because of the danger that Dr. Engum's testimony and report, alone, may have mislead the jury. Dr. Engum's report reflected that he relied upon interviews with certain witnesses in the course of diagnosis. Therefore, absent any other documentation of the interviews with the witnesses upon which Dr. Engum relied upon to make his diagnosis, the trial court's decision was not unreasonable.

Although the right of a defendant to present evidence is fundamental, it is not absolute. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). In *Taylor*, the Supreme Court observed that in *Nobles* the Court, "upheld an order excluding the testimony of an expert wit-

ness tendered by the defendant because he had refused to permit discovery of a 'highly relevant' report .... The court's preclusion sanction was an entirely proper method of assuring compliance with its order. Respondent's argument that this ruling deprived him of the Sixth Amendment rights to compulsory process and cross-examination misconceives the issue." *Nobles,* 422 U.S. at 241, 95 S.Ct. 2160. In *Taylor,* defendant's counsel violated a state procedural rule by failing to identify a particular defense witness before trial in response to a pretrial discovery request. *Taylor v. Illinois,* 484 U.S. at 403–05, 108 S.Ct. 646. The Supreme Court upheld the trial court's exclusion of the defense witness from testifying as a sanction for defense counsel's deliberate failure to identify the witness prior to trial.

Although "a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor[,] ... the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance." *Id.* at 414–15, 108 S.Ct. 646. In *Taylor,* the United State Supreme Court concluded that "[a] trial judge could insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony." *Id.* at 415, 108 S.Ct. 646.

The Supreme Court reiterated its holding in *Taylor* in *Michigan v. Lucas,* 500 U.S. 145, 152, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991), stating "that when a discovery violation amounts to willful misconduct and is designed to obtain a tactical advantage, regardless of whether prejudice to the prosecution could have been avoided by a lesser penalty, the severest sanction is appropriate." This Court is guided here by the principles and reasoning of *Nobles, Taylor,* and *Lucas.*

Failure of petitioner's counsel to comply with the trial court's order was prejudicial to the State's litigation stance. The trial court was faced with either having to continue the trial or sanction the petitioner for his actions by precluding the petitioner from presenting his psychologist or the lesser sanction, which the trial court imposed, of ordering the petitioner's expert to release his personal notes and writings to the State.

Applying the principles and reasoning of *Nobles, Taylor,* and *Lucas,* by analogy, to the instant case, the failure of counsel to abide by the court's reciprocal discovery order and their explanation for failing to comply with the order, was sufficient to support the trial judge's conclusion that it appeared the omission was willful and motivated to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence. In light of the principles and reasoning of *Nobles, Taylor,* and *Lucas,* and weighing petitioner's Sixth Amendment rights against the countervailing public interests in the integrity of the adversary process, the interest in fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process, the Tennessee Supreme Court's affirmation of the

trial judge's order that petitioner had to release his psychologist's personal notes and writing to the prosecution as a sanction for his attorneys' misconduct was not unreasonable.

The Tennessee Supreme Court concluded that when a psychologist or psychiatrist does not prepare a summary report, but instead relies on extensive memoranda to record not only observations and hypotheses but also evaluations, such records are discoverable under Tenn. R.Crim. P. 16(b)(1)(B) because to allow the defendant to evade a reciprocal discovery rule by making no formal report and then claiming that mere "notes" are undiscoverable would effectively nullify the meaning of Rule 16(b)(1)(B).

Consequently, the state court's conclusion that under the facts of this case, the memoranda memorializing Dr. Engum's interviews was discoverable, is not contrary to, or an unreasonable application of, federal law, nor is it an unreasonable determination of the facts as they were presented. Accordingly, petitioner's claim relative to the release of his psychologist's memoranda will be **DISMISSED**.

11. *Prosecutorial Misconduct (Claim 18)*

[34] In this claim, petitioner asserts that prosecutorial misconduct violated his Sixth, Eighth, and Fourteenth Amendment rights. According to petitioner, his death sentence is invalid because the prosecutor informed the jury that a life sentence, if given to petitioner, would not in fact be a life sentence. In addition, petitioner claims the prosecutor displayed, in a chopping manner, the alleged murder weapon, a 2×4 piece of lumber, during closing argument. To the extent petitioner raised on direct appeal in state court the claim his death sentence is invalid because the prosecutor informed the jury that a life sentence would not in fact be a life sentence, thus properly exhausting his state remedies, this issue is properly before this Court and will be addressed. However, to the extent petitioner did not fairly present displaying the alleged murder weapon claim in state court, this issue is procedurally defaulted, and absent a showing of cause and prejudice it will be dismissed.[37]

On direct appeal petitioner argued that the prosecutor made statements concerning the possibility of petitioner's parole on two occasions. Petitioner claimed the prosecutor first stated:

> But what do you do, what do you do with a man who's perpetrated that kind of crime? What do you do with a man who's committed senseless murder, and after he does it, instead of being remorseful, he rapes other women? What do you do with him? *He's been in the penitentiary. He got a five year sentence in '84 and he served eighteen months. What do you do with him? What's left? But I ask you to do this, ladies and gentlemen.* And you heard the psychologist say that if he's out he'll do it again. He even admitted, "Mr. Nichols, if you hadn't been arrested January the 5th, 1989, you would still be out there committing rapes," and he said yes.
>
> Ladies and gentlemen, justice is doing what you have to do to make sure that Harold Wayne Nichols never rapes

37. Petitioner has recently notified the Court that since Dr. Blake reported to the state trial court conducting the post-conviction DNA proceedings that new scientific testing reveals that petitioner is identified as the source of the spermatozoa from the victim's gown, he moves to withdraw his *Schlup* gateway arguments with respect to Claim 18. Apparently, petitioner is withdrawing his procedurally defaulted claim regarding the displaying of the alleged murder weapon.

again and that he never murders again, whatever it takes. Thank you.

[Court File No. 43, Addendum No. 5, Vol. 24, at 511–12; Court File No. 50, Addendum No. 6, Vol. 1 at 32]. No objection was made to this argument. Petitioner also complained of the prosecutor's later argument in response to defense counsel's argument that prison was hell and the jury should send petitioner to prison. "[In] '84 they sent him there on a five year sentence and he served eighteen months and got out and raped again. Sure, send him there." [Court File No. 43, Addendum No. 5, Vol. 24, at 567; Court File No. 50, Addendum No. 6, Vol. 1, at 32]. Then the prosecutor argued that one of the purposes of punishment is to remove petitioner from society so that he could not rape or murder another woman. Shortly thereafter, petitioner objected to his argument as implying a life sentence did not actually mean petitioner would be incarcerated for life [Court File No. 43, Addendum No. 5, Vol. 24, at 568–69].

The state court addressed this issue finding that to whatever degree these arguments were improper they did not constitute error which prejudicially affected the jury's sentencing determination. The Court found the challenged arguments hinted "at the idea that a life sentence carries with it the possibility that defendant will rape and murder again . . . [but] it does not clearly mention parole possibilities for defendant in the present proceeding." The state court determined the argument directly raised "the failure of prior incarceration to affect the defendant's behavior and of the defendant's potential for future dangerousness." *State v. Nichols,* 877 S.W.2d 722, 733 (Tenn.1994). In addition, the state court found the argument was, in part, a response to petitioner's argument that he would be completely harmless upon incarceration.

[35, 36] Improper closing argument during the penalty phase of a capital trial warrants federal habeas corpus relief only when the argument renders the sentencing hearing fundamentally unfair. *See Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (the relevant question is whether the prosecutor's comments infected the trial with unfairness so as to make the resulting conviction a denial of due process); *Donnelly v. DeChristoforo,* 416 U.S. 637, 642–45, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (establishing "fundamental fairness" standard for prosecutorial misconduct during guilt phase); *Buell v. Mitchell,* 274 F.3d 337, 364–65 (6th Cir.2001) (habeas relief for alleged prosecutorial misconduct during both guilt and sentencing phases required showing that prosecutor's conduct was so egregious as to render the petitioner's trial fundamentally unfair under the totality of the circumstances). Thus, undesirable or universally condemned remarks by the prosecutor will not warrant habeas relief unless the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. at 642–645, 94 S.Ct. 1868; *see Darden v. Wainwright,* 477 U.S. at 181, 106 S.Ct. 2464.

The Supreme Court "has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system." *Simmons v. South Carolina,* 512 U.S. 154, 162, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), citing *Jurek v. Texas,* 428 U.S. 262, 275, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)(joint opinion of Stewart, Powell, and Stevens, JJ.) (noting that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose"); *California v. Ramos,*

463 U.S. 992, 1003, n. 17, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) (explaining that it is proper for a sentencing jury in a capital case to consider "the defendant's potential for reform and whether his probable future behavior counsels against the desirability of his release into society").

Petitioner's reliance on *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), is unavailing. The rule created by the *Simmons* case is that where a defendant's future dangerousness is at issue, "the parole-ineligibility instruction is required only when, assuming the jury fixes the sentence at life, the defendant is ineligible for parole under state law." *Ramdass v. Angelone*, 530 U.S. 156, 166, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000). Although the prosecutor urged a verdict of death because petitioner had previously been incarcerated and when released began raping again and because petitioner would do so again upon release from jail,[38] petitioner would have been eligible for parole after serving a certain number of years if he received a life sentence. Therefore, unlike *Simmons*, petitioner was not ineligible for parole under state law.

Federal courts will generally defer to a state's determination as to what a jury should and should not be told about sentencing. *See California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). The Tennessee Supreme Court did not find the arguments improper but found that to whatever extent they were improper, the arguments did not constitute error which prejudiced the jury's sentencing determination. The relevant question before this Court is whether the Tennessee Supreme Court's decision was an unreasonable application of federal law. The record supports the conclusion that the Tennessee Supreme Court's finding was reasonable. The record before this Court does not support a finding that the prosecution's alleged misconduct affected the fairness of petitioner's trial.

Consequently, the Tennessee Supreme Court's decision to deny petitioner relief on his claim that the prosecutor implied petitioner may be paroled if given a life sentence was neither contrary to, nor an unreasonable application of, federal law; nor has petitioner demonstrated the state court decision was based on an unreasonable determination of the facts before it. Accordingly, petitioner's claim of prosecutorial misconduct on the basis of this argument will be **DISMISSED.**

Now the Court turns to petitioner's claim of prosecutorial misconduct on the theory that the prosecutor brandished the 2×4 board claimed to be the murder weapon in this case.

Petitioner inserts a claim that the prosecutor picked up the 2×4 that was allegedly used to assault the victim and brandished it in a chopping manner which he claims prejudiced the jury against him. Petitioner has failed to direct the Court's attention to the location in the transcript describing this incident and the Court is unable to find any reference to this incident in the transcript.

38. In addition, when the prosecutor asked petitioner, "[a]nd if you were out in the streets of Hamilton County right now, women of Hamilton County would not be safe from a possible attack by Harold Wayne Nichols, would they?" Petitioner responded, "Not unless I had gotten help" [Court File No. 42, Addendum No. 5, Vol. 23, at 411]. Dr. Engum testified petitioner functioned well in institutional settings and that petitioner had not experienced any incidences of aggressive or violent episodes in institutional settings [Court File No. 42, Addendum No. 5, Vol. 23, at 441]. Dr. Engum also testified petitioner would continue to rape women if released from jail, and Dr. Engum said petitioner should be incarcerated for the rest of his life [Court File No. 43, Addendum No. 5, Vol. 24, at 456].

The State argues that although the claim was raised on direct appeal, petitioner failed to raise an objection during the State's closing argument, thus it is procedurally defaulted. Furthermore, according to the State, the Tennessee Supreme Court was precluded from considering the issue as a result of the inadequate appellate record.

The Court has found nothing in this voluminous record that reflects the prosecutor brandished the alleged weapon used by petitioner to kill the victim during closing argument. However, assuming this incident did happen, petitioner has not demonstrated that the prosecutor's alleged behavior so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). There is no evidence in the record indicating the prosecutor's alleged action of brandishing the alleged murder weapon, taken in the context of the trial as a whole, was sufficiently prejudicial to have deprived petitioner of his right to a fair trial. Accordingly, petitioner is not entitled to any habeas relief on this claim.

12. ***Change of Venue (Claim 19)***

Petitioner claims his constitutional rights were violated when the trial court granted his motion for change of venue and ordered a Sumner County jury to hear the case in Hamilton County. Respondent contends this claim is not cognizable in a federal habeas proceeding because the vicinage clause of the Sixth Amendment is not applicable to the State through the Fourteenth Amendment.

The Tennessee Supreme Court determined that when petitioner filed a motion for a change of venue, he waived his rights under Article I, § 9, of the Tennessee Constitution. The state court concluded the change of venue motion constituted a waiver and unless petitioner is prejudiced, the administration of justice harmed, or the trial court abused its discretion, then no reversible error occurred when a trial court judge employs the unorthodox procedure of ordering an out-of-county jury to hear the case in Hamilton County.[39] In petitioner's case the court found no reversible error.

Assuming petitioner's concluding sentence on direct appeal properly presented this claim as a constitutional claim,[40] he is

39. The Court explained:

> Here, the trial judge attempted to solve the problem of possible taint to the jury pool from the extensive pretrial publicity that surrounded this case and the other charges against the defendant. The trial judge was, at the same time, commendably concerned that, if the trial were held in a distant county, the defendant's family and others would be prevented from attending. The decision to undergo the expense and disruption of moving the jury, rather than local witnesses and other interested persons, was obviously designed to meet the core complaint of the defendant's motion. There is no showing by the defendant that prejudice resulted from bringing a jury from Sumner County to try a his case in Hamilton County.
>
> We conclude that in this particular case the procedure used by the trial judge was not reversible error.

State v. Nichols, 877 S.W.2d 722, 728–29 (Tenn.1994).

40.

> "The unprecedented trial method present in this case is not permitted under the Tennessee Constitution, the Tennessee Rules of Criminal Procedure or the case law of Tennessee. The two changes of venue which occurred here violated the Defendant's rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution . . . ."

[Court File No. 50, Addendum No. 6, Vol. 1, pp. 41–42]

not entitled to any habeas relief. This is so because the Sixth Amendment guarantees a defendant the right to a trial by an impartial jury. U.S. Const. Amend. VI. This fair-trial right is effectuated by impaneling a jury of impartial, "indifferent" jurors who render a verdict based on evidence adduced at the trial. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Petitioner is not claiming that he did not receive an impartial jury but rather, his impartial jury was selected from Sumner County and transported to Hamilton County for trial. This is not a claim of constitutional dimensions. The Sixth Circuit has determined that "districts," as used in the Sixth Amendment, refers only to federal judicial districts and has never been defined to apply to states. *See Caudill v. Scott*, 857 F.2d 344 (6th Cir.1988). "Technically, the Sixth Amendment addresses only 'vicinage' (the place from which jurors are to be selected) rather than venue." *United States v. Wood*, 364 F.3d 704, 721 fn. 2, (6th Cir.2004). Although the Court observes that the requirement that a jury be chosen from the state and district where the crime was committed normally means that the jury will sit where it is chosen, once petitioner filed a motion for a change of venue, he relinquished any right to be tried by a jury from the district where the crime occurred. There is no provision in the Constitution mandating a trial in the county where the jury is selected. Petitioner has not demonstrated that he was denied a constitutional right when the trial judge granted his motion for a change of venue and ordered a Sumner County jury to try the case in Hamilton County, where the crime was committed.

Accordingly, petitioner has not demonstrated that the state court unreasonably determined the facts or unreasonably applied the governing legal principles of clearly established federal law to the facts of this case. Additionally, petitioner has not shown that the state court acted contrary to clearly established federal law by applying a legal rule that contradicts the Supreme Court's prior holdings or that the state court reached a different result from one of the Supreme Court's cases despite confronting indistinguishable facts. Therefore, petitioner is not entitled to any habeas relief on his change of venue claim.

13. *Unconstitutional Jury Instructions (Claim 21)*

Petitioner contends his death sentence violates his constitutional rights because his jury was provided unconstitutional and statutorily inadequate jury instructions. Petitioner raises several claims which the Court will address individually.

a. *Reasonable Doubt Jury Instruction (Claim 21.a)*

Petitioner asserts that the trial court failed to properly instruct the jury as to the definition of reasonable doubt. Petitioner contends the instruction permitted a reasonable juror to interpret the instruction to permit a finding of guilt based upon a degree of proof below that required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioner contends the state court equated the requisite degree of proof to such proof as would allow the mind to rest easily upon the certainty of the juror's verdict and to a moral certainty rather than to an evidentiary certainty.

On direct appeal the Tennessee Supreme Court determined that, unlike the unconstitutional instruction in *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), which equated reasonable doubt with "grave uncertainty" or "actual substantial doubt," the instant instruction used the phrase "moral certainty" by itself and was, therefore, insufficient to invalidate an instruction on the meaning of

reasonable doubt. The court observed that the *Cage* instruction required the jury to have an extremely high degree of doubt before acquitting a defendant, but the petitioner's instruction did not require "grave uncertainty" to support acquittal. The Tennessee Supreme Court reasoned:

> When considered in conjunction with an instruction that "[r]easonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the investigation, to let the mind rest easily upon the certainty of your verdict," we find that the instruction properly reflects the evidentiary certainty required by the "due process" clause of the federal constitution and the "law of the land" provision in our state constitution.... The context in which the instruction was given clearly conveyed the jury's responsibility to decide the verdict based on the facts and the law.

State v. Nichols, 877 S.W.2d 722, 734 (1994).

[37] Petitioner's reliance on *Cage* must be viewed in light of subsequent Supreme Court precedent. Specifically, the Supreme Court has disapproved of the standard of review language in *Cage* and has concluded that the correct standard is, " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the constitution." *See Estelle v. McGuire,* 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (quoting *Boyde v. California,* 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)). To obtain habeas relief, petitioner must demonstrate the alleged incorrect jury instruction was more than undesirable, erroneous, or universally condemned, but rather, that taken as a whole, the instruction must be so infirm that it rendered the entire trial fundamentally unfair. *Estelle v. McGuire,* 502 U.S. at 72, 112 S.Ct. 475. Therefore, "only if 'the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' " will petitioner be granted habeas relief. *Baze v. Parker,* 371 F.3d 310, 327 (6th Cir.2004) (quoting *Henderson v. Kibbe,* 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977)), *cert. denied,* 544 U.S. 931, 125 S.Ct. 1670, 161 L.Ed.2d 495 (2005).

Petitioner's jury received the following reasonable doubt instruction:

> The burden of proof is upon the State to prove any statutory aggravating circumstance or circumstances beyond a reasonable doubt and to a moral certainty. Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the verdict. The law makes you, the jury the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence.

Nichols contends that in *Cage v. Louisiana,* 498 U.S. 39, 41, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) (per curiam), the United States Supreme Court held that such an instruction was unconstitutional because it allowed the jury to find guilt based on a degree of proof below that required by the Constitution. A "moral certainty" suggested jurors needed an "actual substantial doubt" or a grave uncertainty, instead of "a reasonable doubt" to acquit, rather than a "evidentiary certainty." (*Cf. Austin v. Bell,* 126 F.3d 843, 847 (6th Cir.1997), *cert. denied,* 523 U.S. 1079, 118 S.Ct. 1526, 140 L.Ed.2d 677(1998)).

Petitioner's contention is devoid of merit because the instruction in *Cage* specifically instructed that a reasonable doubt is an actual substantial doubt and the doubt must rise to a grave uncertainty. The instruction in *Cage* was substantially different from the petitioner's claim before this Court. The United States Supreme Court explained,

> The instruction equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt that is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Cage v. Louisiana, 498 U.S. at 40–41, 111 S.Ct. 328.

Petitioner asserts Tennessee's reasonable doubt instruction given in this case has been held to be constitutionally defective under *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) and *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). Petitioner relies upon the case of *Rickman v. Dutton*, 864 F.Supp. 686, 708–10 (M.D.Tenn.1994), wherein District Judge Nixon determined "the 'moral certainty' language in conjunction with the 'mind rest easily' language suggests to a reasonable juror a lower burden of proof than what is constitutionally required." *Rickman v. Dutton*, 864 F.Supp. at 710. Although *Rickman* was affirmed on appeal, the Court of Appeals for the Sixth Circuit observed that both parties advanced numerous issues on appeal but concluded only one issue was necessary to resolve the appeal. The Sixth Circuit determined only that the district court correctly found Rickman to have been unconstitutionally denied effective assistance of counsel under the Sixth Amendment. *See Rickman v. Bell*, 131 F.3d 1150, 1152 (6th Cir.1997), *cert. denied*, 523 U.S. 1133, 118 S.Ct. 1827, 140 L.Ed.2d 962 (1998).

Petitioner's reliance on *Rickman* is, therefore, misplaced as it is not clearly established Supreme Court jurisprudence. This Court must only look to holdings of the United States Supreme Court when determining whether a state court decision is contrary to or an unreasonable application of Supreme Court law. The *Rickman* case is not clearly established Supreme Court precedent; thus, it does not provide grounds to grant habeas relief. In addition, there are Sixth Circuit cases decided after *Rickman* finding Tennessee's reasonable doubt instruction acceptable.

The constitutionality of Tennessee's reasonable doubt instruction has been approved by *Austin v. Bell*, 126 F.3d 843, 847 (6th Cir.1997), *cert. denied*, 523 U.S. 1079, 118 S.Ct. 1526, 140 L.Ed.2d 677 (1998). Although *Austin* was applying the prior version of 28 U.S.C. § 2254, rather than the "contrary to or unreasonable application" standards, its analysis is valid.

Austin reviewed a habeas petition where the trial court instructed the jury as follows:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that my arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty

> is required as to every proposition of proof requisite to constitute the offense.

Austin v. Bell, 126 F.3d at 846. This instruction is almost identical to the instruction issued in petitioner's case. *Austin* upheld the instruction, citing *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).

In *Victor v. Nebraska*, the Supreme Court held that use of the term "moral certainty" does not, of itself, render a "reasonable doubt" instruction unconstitutional. The phrase "moral certainty" is constitutionally permissible where the rest of the instruction "lends content to the phrase," and indicates the government's proper burden of proof. *Austin v. Bell*, 126 F.3d at 847 (citations omitted). In particular, the court held that:

> The reasonable doubt instruction in this case is more like the acceptable language in *Victor* than the unacceptable language in *Cage*. The language of an "inability to let the mind rest easily" lends content to the phrase "moral certainty" similar to the "abiding conviction" language in *Victor*, increasing, if anything, the prosecutor's burden of proof. It also does not create a reasonable likelihood that the jury applied the instruction in a way that would lower the state's burden of proof because it does not increase the measure of doubt beyond a "reasonable doubt."

Id. Since *Austin*, the Sixth Circuit has upheld virtually identical instructions for both the guilt and sentencing phases in other Tennessee death penalty cases. *See Workman v. Bell*, 178 F.3d 759, 776–777 (6th Cir.1998), *cert. denied*, 528 U.S. 913, 120 S.Ct. 264, 145 L.Ed.2d 221, 1999 WL 624390 (Oct. 4, 1999); *Coe v. Bell*, 161 F.3d 320, 329, *cert. denied*, 528 U.S. 842, 120 S.Ct. 110, 145 L.Ed.2d 93, 1999 WL 373745 (Oct. 4, 1999); *Cone v. Bell*, 243 F.3d 961, 971–72 (6th Cir.2001); *also see King v. Bell*, 392 F.Supp.2d 964 (M.D.Tenn.2005).

[38] In evaluating the instant reasonable doubt jury instruction, this Court observes that the Due Process Clause requires that the instruction not lead a jury to convict on a lesser showing than "reasonable doubt" and, that when taken as a whole, the instruction must adequately convey the concept of reasonable doubt. The jury in the instant case was instructed that the State must prove any statutory aggravating circumstance(s) beyond a reasonable doubt and to a moral certainty. Taken as a whole, the instruction informed the jury that it could convict only if the prosecution established any statutory aggravating circumstances beyond a reasonable doubt and that decision had to be based on a careful examination of all the proof. The instruction explained the term "moral certainty," and the language of "an inability, after such investigation, to let the mind rest easily," lends content to the "moral certainty" praise, thus, indicating the State's proper burden of proof. *See Workman v. Bell*, 178 F.3d at 776–777. The instruction does not create a reasonable likelihood that the jury applied the challenged instruction in a way that would lower the State's burden of proof.

Accordingly, the state court's decision approving this instruction is not contrary to, nor an unreasonable application of, clearly established Supreme Court jurisprudence under *Cage*, *Estelle*, or *Victor*, and is without merit. Petitioner's claim that the reasonable doubt jury instruction was unconstitutional will be **DISMISSED.**

b. *Presumption of No Aggravating Circumstance (Claim 21.b)*

Petitioner complains the trial court failed to instruct the jury that it must presume there are no aggravating circumstances. The Tennessee Supreme Court observed that the trial court instructed the jury it must determine the existence of

any aggravating circumstance beyond a reasonable doubt, and that this instruction clearly implied no aggravating circumstance could be presumed.

This Court has not been made aware of any authority that there is a constitutional requirement for a "no aggravating circumstances" presumption. Petitioner has not demonstrated that the Tennessee Supreme Court's decision was contrary to, or involved an unreasonable application of, clearly established federal law. Accordingly, petitioner is entitled to no relief on his claim that the trial court failed to instruct the jury as to a presumption that there are no aggravating circumstances. This claim will be **DISMISSED.**

c. *Non–Statutory Mitigating Factors (Claim 21.c)*

Petitioner asserts he was denied his Eighth Amendment right to an individualized sentencing by the trial court's failure to instruct the jury on non-statutory mitigating factors. The Tennessee Supreme Court determined that the trial court's mitigating instructions were constitutional. The trial court instructed the jury on three statutory mitigating factors and instructed the jury to consider "[a]ny other mitigating factor which is raised by the evidence produced by either the prosecution or defense" [Court File No. 43, Addendum No. 5, Vol. 24, at 579–80].

On direct appeal, petitioner asserted the trial court instructed the jury on three statutory mitigating factors, leaving the other mitigating factors to the jury's recollection, in violation of *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In *Lockett,* the death penalty statute mandated death unless at least one of three statutory mitigating factors was found to exist. The United States Supreme Court held that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Id.* at 608., 98 S.Ct. 2954 Unlike the situation in *Lockett,* the trial court instructed petitioner's jury on three specific statutory mitigating factors and directed them to consider "[a]ny other mitigating factor which is raised by the evidence . . . ." [Court File No. 43, Addendum No. 5, Vol. 24, at 580].

The Tennessee Supreme Court observed that petitioner, although given the opportunity to offer specific jury instructions, did not submit any specific mitigating circumstances to be charged to the jury. Thus, the state court concluded the trial court's instruction to consider any other mitigating evidence in the record complied with *Lockett.* The state court's conclusion is not opposite to *Lockett* nor did the state court unreasonably apply the *Lockett* principles to the facts of petitioner's case. Accordingly, petitioner's claim that the trial court failed to instruct the jury on non-statutory mitigating circumstances will be DISMISSED.

d. *Unanimous Finding of Mitigating Circumstances (Claim 21.d)*

Petitioner presents a confusing claim regarding jury instructions on mitigating circumstances. First, petitioner contends "[t]he trial court failed to properly instruct the jury as to the unanimity required as to mitigating factors." Then, petitioner claims that a reasonable interpretation of the instructions provided to the jury by the trial court is that the jurors would have to reach a unanimous verdict on mitigating circumstance(s) before such circumstance(s) could be weighed against any aggravating circumstance(s) found by the jury. On direct appeal the Tennessee Supreme Court summarily found "[t]his contention without merit." *State v. Nichols,* 877 S.W.2d at 735.

[39] Sentencing instructions which create a substantial likelihood that reasonable jurors might think they are precluded from considering any mitigating evidence unless all jurors agreed on the existence of a particular mitigating circumstance are constitutionally invalid. *Mills v. Maryland*, 486 U.S. 367, 384, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). In *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), the Supreme Court found that the instructions and verdict form which expressly limited the jury's consideration to mitigating circumstances unanimously found, impermissibly limited the jurors' consideration of mitigating evidence.

Contrary to petitioner's assertion, the trial court's instructions did not lead the jury to believe they were precluded from considering any mitigating evidence in the absence of unanimity [Court File No. 43, Addendum No. 5, Vol. 24, Jury Charge at 570–592]. Under the instructions, petitioner's jury was instructed to first determine the aggravating circumstances beyond a reasonable doubt and upon a unanimous finding of the existence of one or more statutory aggravating circumstances to consider any relevant mitigating circumstances. The jury was then instructed that if they unanimously determined that at least one or more statutory aggravating circumstances have been proven by the State, beyond a reasonable doubt, and said circumstance(s) outweighed any mitigating circumstance(s), the sentence shall be death [Court File No. 43, Addendum No. 5, Vol. 24, at 583–587; 589–591]. In the present case, unlike the jury instructions in *Mills* where the jury was instructed they were required to impose the death sentence if they unanimously found a aggravating circumstance but could not agree unanimously as to the existence of any particular mitigating circumstance, or *McKoy*, where the jury was limited to considering only mitigating circumstances unanimously found, there was no instruction that petitioner's jury must agree upon the existence of mitigating circumstances.

[40] The instant instructions required unanimity as it related to aggravating circumstances, but did not require unanimity as it related to mitigating circumstances. Therefore, the "only reasonable reading of the instructions is that, by omission, unanimity is not required" as to the mitigating factors and the instruction is, therefore, constitutional. *Coe v. Bell*, 161 F.3d 320, 338 (6th Cir.1998), *cert. denied*, 528 U.S. 842, 120 S.Ct. 110, 145 L.Ed.2d 93 (1999). The unanimity in petitioner's jury instructions refers to the finding of the statutory aggravating circumstance, weighing process, and a unanimous verdict but only if the jurors unanimously agree on a verdict. The instructions direct unanimity as to the results of weighing, but not unanimity as to the finding of a mitigating circumstance. The instructions required the jury to unanimously find the statutory aggravating circumstance(s) outweighed the mitigating circumstance(s) to sentence petitioner to death, or to unanimously find the statutory aggravating circumstance(s), if so found, did not outweigh the mitigating circumstance(s) to sentence petitioner to life [Court File No. 43, Addendum No. 5, Vol. 24, at 586–587; 589–591]. A unanimity instruction that refers to the process of weighing aggravating circumstances against mitigating factors—as opposed to a unanimity instruction referring to the process of finding or considering a mitigating factor—is acceptable. *Coe v. Bell*, 161 F.3d at 338; *see also Williams v. Coyle*, 260 F.3d 684, 702 (6th Cir.2001) (jury instruction that did not require unanimity as to the existence of a mitigating circumstance(s) but only required unanimity as to the question of whether the aggravating circumstances as a whole outweighed the mitigating circumstances as a whole does

not violate clearly established federal law). The jury instructions given in petitioner's case did not require unanimity as to the presence of a mitigating factor.

Petitioner has neither demonstrated that the state court decision was contrary to, or an unreasonable application of, federal law, nor an unreasonable determination of the facts. Thus, petitioner's claim that the jury was instructed that unanimity was required to find a mitigating circumstance will be **DISMISSED.**

e. *Elements of Underlying Felony Aggravating Circumstance (Claim 21.e)* [41]

Petitioner presents another claim regarding jury instructions. In this claim, petitioner contends the trial court failed to charge the jury as to the elements of the crime of rape, but rather charged the jury as to the elements of aggravated rape—which did not contain a definition of rape—and the elements of burglary. Petitioner maintains that the offenses of aggravated rape and burglary did not relate to the statutory aggravating circumstances which were charged by the State, and that the trial court's instructions to the jury respecting these two crimes would only serve to confuse the jury and lead them to believe that they could consider aggravating circumstances which the State had not charged.

To clarify petitioner's claim, the Court observes the State relied upon the aggravating circumstance that the murder was committed while petitioner was committing a rape. Although the trial court failed to instruct the jury on the statutory definition of rape, it did instruct the jury on the elements of aggravated rape in connection with its instruction on felony murder.

The Tennessee Supreme Court observed that it is generally harmless error for the court to simply fail to repeat a definition already given and the court determined "that to be the case here." *State v. Nichols,* 877 S.W.2d at 735.

The first degree murder instruction identified the essential elements of the offense and instructed the jury that the petitioner unlawfully killed the victim during the perpetration of or attempt to perpetrate rape and petitioner intended to commit rape. Next, the trial judge instructed the jury on the elements of aggravated rape and first degree burglary. The aggravated rape instruction included the element of rape when it instructed that one of the essential elements of the offense was that petitioner had unlawful sexual penetration of the alleged victim and the instruction included a definition of sexual penetration [Court File No. 43, Addendum No. 5, Vol. 24, at 575–76]. In addition, petitioner pleaded guilty to the aggravated rape of the victim which necessarily means he pleaded guilty to raping the victim [Court File No. 41, Addendum No. 5, Vol. 21, at 14–15].

[41] The Eighth Amendment does not require the trial court to restate the elements of any underlying felonies advanced as aggravating circumstances at the sentencing phase where the same jury remains impaneled during the guilt and the sentencing phase and the sentencing phase closely follows the guilt phase. *See Carter v. Bell,* 218 F.3d 581, 604 (6th Cir.2000). The fact that petitioner pleaded guilty to the underlying felony of aggravated rape appears to resolve this controversy. However, the fact that the Tennessee Supreme Court found the use of this aggravating circumstance unconstitutional but found

41. Petitioner has recently notified the Court that since Dr. Blake reported to the state trial court conducting the post-conviction DNA proceedings that new scientific testing reveals that petitioner is identified as the source of the spermatozoa from the victim's gown, he moves to withdraw his *Schlup* gateway arguments with respect to Claim 21(e).

the death sentence was supported by the petitioner's previous convictions for more than one felony involving violence does in fact, resolve this claim. Accordingly, petitioner is not entitled to any habeas relief on his claim that the trial judge failed to instruct the jury on the elements of rape and this claim will be **DISMISSED.**

f. ***Failure of Trial Court to Instruct the Jury of its Role as Both Trier of Fact and Law (Claim 21.f)*** [42]

Petitioner contends the trial court failed to instruct the jury of its role as both trier of fact and law. Petitioner complains that the trial judge instructed the jury that the court was the proper source from which they were to receive the law. This was inadequate, according to petitioner, because it failed to advise the jury that the judge was merely a witness to the jury as to what the law is and that if the jury differed with the court as to the law, the jury had a right to disregard the court's instruction on the law.

Petitioner raised this claim on direct appeal on the basis of state law and as a state constitutional violation. However, assuming without deciding that petitioner has not procedurally defaulted this claim, or if he has, that he can show cause and prejudice, the claim is without merit because the judge gave the following instruction:

> The jury are the sole judges of the facts, and of the law as it applies to the facts in the case. In making up your verdict, you are to consider the law in connection with the facts; but the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the court.

[Court File No. 43, Addendum No. 5, Vol. 24, at 577–578].

In addition to being incorrect that the trial court failed to instruct the jury on its role as the judge of the law and facts, petitioner has failed to demonstrate, much less allege, that the state court decision was contrary to, or based on an unreasonable application of, federal law. Consequently, this claim is procedurally defaulted and absent a showing of cause and prejudice it will be **DISMISSED.** As a alternative, the claim is **DISMISSED** because the state court gave the instruction and the decision of the state court was not contrary to, nor an unreasonable application of, federal law.

g. ***Failure to Re-instruct Jury on Mitigating Circumstances (Claim 21.g)***

This claim was addressed previously in this memorandum opinion under section 8 *supra,* at 799 – 800.

h. ***Cumulative Error (Claim 21.h)***

Petitioner claims that the cumulative error of all the alleged erroneous jury instructions render petitioner's sentencing hearing fundamentally unfair in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Contrary to petitioner's claim that he raised this claim on direct appeal and it was denied on the merits, the Court finds that the cumulative error claim was neither raised nor denied on the merits. The sentence that "[i]ndividually and combined, these errors not only warrant but *require* reversal of the sentence in this case[,]" in the body of the claim that the jury instructions were unconstitutional, arguably does

42. Petitioner has recently notified the Court that since Dr. Blake reported to the state trial court conducting the post-conviction DNA proceedings that new scientific testing reveals that petitioner is identified as the source of the spermatozoa from the victim's gown, he moves to withdraw his *Schlup* gateway arguments with respect to Claim 21(f).

not constitute full exhaustion.[43] Indeed, the Supreme Court of Tennessee did not determine that the sentence constituted a cumulative error claim, and they did not address such a claim. Nevertheless, the Tennessee Supreme Court summarized its findings in relation to all the challenged jury instructions by finding no reversible error. This Court concludes that the state court's finding of no reversible error as to any of the challenged jury instructions was not contrary to, nor an unreasonable application of, federal law, and necessarily results in this claim being **DISMISSED.**

14. *Videotaped Confession Evidence (Claim 22)*

[42] Next petitioner presents a claim alleging his constitutional rights were violated when the trial court admitted into evidence his videotaped confession. According to petitioner, the statement was taken after he was refused counsel and under coercive circumstances, rendering the confession untrustworthy. Petitioner also argues the statement was irrelevant as to the issues before the jury during the penalty phase.

The Tennessee Supreme Court observed that Tenn.Code Ann. § 39–13–204(c) permits, at a sentencing hearing, "evidence ... as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances ... and any evidence tending to establish or rebut any mitigating factors." The court concluded that a description of the crime and its circumstances was admissible and since the petitioner pleaded guilty, the sentencing jury lacked any information about the offense absent the videotaped confession which the court determined was admissible. Relying upon *Zant v. Stephens,* 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), for the proposition that an individualized sentencing determination based on the defendant's character and the circumstances of the crime is constitutionally required, the Tennessee Supreme Court found the trial court permitted the introduction of evidence tending to individualize the case for the jury and limited the evidence to testimony relevant to the crime; thus, there was no error.

In addition, the state court found Nichols' confession was not obtained in violation of his Fifth Amendment right not to incriminate himself because there was ample evidence to support the trial court's finding that the confession was voluntary. The Supreme Court of Tennessee found that the arresting officers read *Miranda* warnings to petitioner who signed a written waiver of those rights. The officers disputed petitioner's claim that he requested an attorney and that they coerced him into making a statement, and the record supported the trial judge's decision crediting the testimony of the officers. The videotaped confession revealed the interrogating officer read petitioner his *Miranda* warnings and petitioner waived those rights; therefore, the court found that the record supported the court's finding that the confession was voluntary, and therefore, admissible. The Supreme Court of Tennessee also concluded the videotaped confession was properly admitted because it was relevant to sentencing since it in-

43. It appears that petitioner concedes his procedural default of this claim as he has notified the Court that since Dr. Blake reported to the state trial court conducting the post-conviction DNA proceedings that new scientific testing reveals that petitioner is identified as the source of the spermatozoa from the victim's gown, he moves to withdraw his *Schlup* gateway arguments with respect to this claim.

cluded a full description of the nature and circumstances of the crime. *State v. Nichols,* 877 S.W.2d at 731–32.

Petitioner was taken into custody by officers of the East Ridge Police Department during the evening of January 5, 1989. Petitioner was placed in a room at the East Ridge Police Station with numerous law enforcement officers from several police jurisdictions. It was during that questioning that petitioner allegedly requested an attorney. The questioning at that time did not pertain to the instant crimes. On January 6, 1989, at approximately 8:00 p.m. petitioner agreed to speak with Detective Richard Heck and was taken to the Chattanooga Police Department where he eventually gave a videotaped statement concerning the instant crime. There is no allegation that petitioner invoked his right to counsel while speaking with Detective Heck, consequently, there is no evidence that the videotaped confession was taken after he invoked his right to counsel to Detective Heck or under coercive circumstances.

The transcript from the suppression hearing in petitioner's other rape cases along with his taped confession in this case does not demonstrate his statement is untrustworthy, unconstitutional, or taken under coercive circumstances. A review of the record in this case demonstrates the trial judge's decision to deny the motion to suppress the confession was based on sufficient evidence. Petitioner confessed to the police that he committed the instant crimes after he had been arrested on other charges. The police officers testified they did not hear petitioner request an attorney in their presence.

At the hearing on the motion to suppress, the trial court heard two different accounts of what transpired after defendant's arrest [Court File No. 48, Addendum No. 5, Vol. 9, at 1–150; Court File No. 49, Addendum No. 5, Vol. 10, at 151–57]. Petitioner testified he told Officer Holland and Officer Turner of the East Ridge Police Department that he wanted to stop the interview until he spoke with an attorney. Their alleged response was that if they had to wait for an attorney they would have to get search warrants; to get search warrants they would have to wake a judge who would not be too happy being woken up in the middle of the night; and it would just be easier to cooperate with them. At that time, the questioning continued [Court File No. 38, Addendum No. 5, Vol. 9, at 11–12]. On cross-examination, petitioner confirmed that at 11:23 p.m., while at the East Ridge Police Department, he signed the waiver form waiving his constitutional rights and agreeing to give a statement, but petitioner testified he did so only after he was denied counsel [*Id.* at 31]. The next day at approximately 8:00 or 8:30, petitioner signed a rights waiver for Detective Heck, the detective investigating the instant case. Petitioner initialed next to each right to acknowledge he understood each right he was waiving [*Id.* at 42–44]. Petitioner signed six separate rights forms waiving his rights after he allegedly requested counsel [*Id.* at 47]. In addition, he agreed to go to Erlanger Hospital and provide blood and hair samples; he agreed to ride around and look at the places where the rape victims lived; and petitioner signed a consent for law enforcement to search his residence and car [*Id.* at 47–54].

Detective Sergeant Dyer of the Red Bank Police Department testified he was present the night of petitioner's arrest where the *Miranda* warnings were orally given to petitioner while he was standing in front of a tree being handcuffed. Detective Sergeant Dyer also observed petitioner signing the rights waiver at the police department [Court File No. 38, Addendum No. 5, Vol. 9, at 63–64]. Detective Sergeant Dyer had no knowledge of petitioner asking for an attorney [*Id.,* at 67].

Detective Captain Holland testified they left headquarters at 11:00 p.m. in route to petitioner's residence [*Id.* at 97]. According to Detective Captain Holland, at no time did petitioner request counsel in Detective Captain Holland's presence [Court File No. 38, Addendum No. 5, Vol. 9, at 100–101]. After petitioner signed his rights waiver at 11:23 p.m., Detective Captain Holland talked to petitioner about the East Ridge rape cases, and at 12:47 a.m. on January 6th he turned the tape recorder on, introduced other law enforcement officials who subsequently left, leaving petitioner in the room with Detective Captain Holland and Detective Heck, the detective in charge of the instant case [*Id.* at 106–107].

The trial judge concluded petitioner was not telling the truth and that he in fact, did not ask for an attorney and his confession was not coerced. The trial judge denied the motion to suppress in an oral opinion that is free of constitutional error on this issue [Court File No. 39, Addendum 5, Vol. 10, at 151–53]. The trial judge's credibility findings are supported by the record. Petitioner signed numerous waivers which included waiving his right to counsel and the trial judge believed the testimony of the police officers over that of petitioner. The record supports the trial judge's denial of petitioner's motion to suppress his videotaped confession. The state court's decision was not contrary to, or an unreasonable application of, clearly established Supreme Court law; nor was it based on an unreasonable determination of the facts presented in state court.

As to the claim that the videotaped confession was irrelevant to the issues before the jury during the penalty phase, petitioner is simply incorrect. The state code provided that,

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances . . .; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. . . .

Tenn.Code Ann. § 39–2–203(c) (1988); Tenn.Code Ann. § 39–13–203(c) [Effective November 1, 1989].

[43] Therefore, the state court's decision that the petitioner's videotaped confession was relevant to sentencing because it established the nature and circumstances of the offense and that petitioner's confession was knowingly and voluntarily given after the defendant was advised of, and waived his constitutional rights, was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. In addition, the adjudication of the claim did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law.

Accordingly, petitioner is not entitled to any habeas relief on his claim that the trial court erred when it admitted, into evidence, petitioner's videotaped confession which will result in this claim being **DISMISSED.**

15. *Chronological Order of Trials (Claim 23) and Prior Convictions (Claim 28)*

Petitioner has raised two somewhat related claims which the Court will address in this section. First, petitioner challenges

the order of his trials (Claim 23). Second, petitioner challenges the use of the prior convictions as an aggravating circumstance claiming they were not final convictions because final judgments had not been entered (Claim 28). The Court will address these claims separately in this section.

a. *Chronological Order (Claim 23)*

Petitioner alleges his Equal Protection and Due Process Rights were violated when his murder trial was conducted out of chronological order. The murder of the victim in the instant case occurred on September 29, 1988, sometime prior to the other felonies which were used as aggravating circumstances in this case. Petitioner contends the trial court erred when it denied his motion to try the cases in chronological order (based on the time they were committed), and instead, scheduled petitioner's trials out of chronological order in order to provide the prosecutor with the evidence of additional aggravating circumstances in the death penalty trial. Petitioner maintains the prosecutor was permitted to create an additional aggravating circumstance to support his request for the death penalty, and the prosecutor's discretion was exercised in a way which led to an arbitrary and capricious imposition of the death penalty.

This claim was exhausted in the Tennessee Supreme Court on direct appeal as a violation of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The Tennessee Supreme Court summarized the facts surrounding this claim as follows:

> As a result of the serial rapes, the defendant faced forty charges growing out of some fourteen incidents. The murder of Karen Pulley occurred during the first such incident. The trial court denied defendant's motion to have the cases tried in chronological order. The defendant alleges that the prosecutor deliberately set out to try the cases out of chronological order solely to create an additional aggravating circumstance. The district attorney admitted that this was one reason for the order in which the cases were scheduled to be tried. The defendant contends that allowing a prosecutor the discretion "to orchestrate a series of trial" in this fashion constitutes cruel and unusual punishment and violates due process and equal protection.

State v. Nichols, 877 S.W.2d at 735–36.

The court determined that for purposes of the aggravating circumstance, the order in which the crimes were actually committed is irrelevant so long as the convictions have been entered before the sentencing hearing at which they were introduced. The Tennessee Supreme Court supported its conclusion with two state cases, *State v. Caldwell*, 671 S.W.2d 459, 464–465 (Tenn. 1984); *cf. State v. Teague*, 680 S.W.2d 785, 790 (Tenn.1984) (conviction occurring after first capital sentencing hearing but before sentencing hearing on remand could be used to establish the prior violent felony conviction aggravating circumstance). The state court found that prosecutorial discretion of this nature and under these circumstances did not offend the Eighth Amendment under *Furman* which held:

> [I]n order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the criminal.

State v. Nichols, 877 S.W.2d at 736 (quoting *Gregg v. Georgia*, 428 U.S. 153, 199, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), *citing Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)). The Tennessee Supreme Court also noted that where this discretion is involved what is unexplained will not be found to be invidious

and an abuse of discretion unless the proof is exceptionally clear that abuse occurred. *Id., citing McCleskey v. Kemp,* 481 U.S. 279, 299, 309, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). The Tennessee Supreme Court concluded no such showing was made and that the record did not reflect that the prosecutor's decision to try the crimes out of chronological order violated equal protection or due process.

Under Tennessee law, the language in the statute, "previously convicted," has been defined as clearly indicating that the date of conviction, not the date of the commission of the crime, is the important factor. "The order in which the crimes were actually committed is irrelevant, as long as the convictions have been entered before the sentencing hearing at which they are introduced." *State v. Copeland,* 2005 WL 2008177, *23 (Tenn.Crim.App. 2005), *citing State v. Caldwell,* 671 S.W.2d 459, 465 (Tenn.), *cert. denied,* 469 U.S. 873, 105 S.Ct. 231, 83 L.Ed.2d 160 (1984). Tennessee law requires that the State prove prior criminal convictions, not prior criminal activity.

[44] Although petitioner claims the prosecutor's decision to try the cases out of chronological order was done so as to create an aggravating circumstance of prior violent felony convictions, violating his right to equal protection and due process, petitioner has not pointed to a United States Supreme Court case which holds that it is unconstitutional for a prosecutor to try cases out of chronological order for the purpose of obtaining evidence for the prior felony aggravating circumstance for a death penalty trial. In *Tuilaepa v. California,* 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994), the Supreme Court did find that states are permitted to focus the jury's attention on a capital defendant's prior criminal record. The issue in *Tuilaepa* was the constitutionality of an aggravating circumstance which permitted the sentencer to consider the defendant's prior criminal activity. Although the challenge was based on the allegation that the circumstance was unconstitutionally vague, the Supreme Court explained that the circumstance rested in part on a determination whether certain events occurred, thus requiring the jury to consider matters of historical fact. The *Tuilaepa* Court pointed out that "[b]oth a backward-looking and a forward-looking inquiry are a permissible part of the sentencing process" and states have considerable latitude in determining how to guide the sentencer's decision in this respect. *Id.* at 976–77, 114 S.Ct. 2630. Petitioner's jury was permitted to conduct a backward-looking and forward-looking inquiry when looking at the prior convictions for crimes committed after the murder; and petitioner has not directed the Court's attention to any United States Supreme Court law prohibiting this.

Moreover, the state court cases which have addressed the issue of whether it is proper to permit a subsequent crime for which there is a conviction at the time of sentencing to be considered for enhancement purposes hold that prior convictions for crimes committed after the crime upon which a defendant is being sentenced are sufficient to establish a statutory aggravating circumstance. *Knight v. State,* 770 So.2d 663, 670 (Fla.2000), *cert. denied,* 532 U.S. 1011, 121 S.Ct. 1743, 149 L.Ed.2d 666 (2001) (determining it was proper to consider a subsequent crime as a prior violent felony since the statute referred to previous convictions and not previous crimes); *King v. State,* 390 So.2d 315, 320 (Fla. 1980), *cert. denied,* 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981) ("The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance."); *Daugherty v. State,* 419 So.2d 1067 (Fla.1982) (finding prior conviction for subsequent crime

qualified as previous conviction); *State v. Steelman,* 126 Ariz. 19, 612 P.2d 475 (1980) (rejecting a claim that out-of-state murder and robbery convictions should not have been considered as an aggravating circumstance since they were committed after the murders for which the defendant was sentenced to death). *See also People v. Hendricks,* 43 Cal.3d 584, 238 Cal.Rptr. 66, 737 P.2d 1350 (1987) (holding that the order of the commission of the homicides was immaterial for implementation of a prior murder convictions special circumstance statute). Furthermore, state courts have found that the term "previously convicted," which is used in state statutes to establish prior violent felony convictions as an aggravating circumstance, refers to a time prior to the sentence, as opposed to prior to the date of the commission of the capital offense. *Ex Parte Coulter,* 438 So.2d 352 (Ala.1983); *see also Coulter v. State,* 438 So.2d 336 (Ala.Cr.App.1982).

While it is not difficult to appreciate the logic of petitioner's argument that the prosecutor was able to engineer the order of the trials to the State's advantage at sentencing—in fact, the prosecutor actually related on the record that "[w]e never anticipated trying the homicide case until we were in a position where we felt comfortable about the number of aggravating circumstances" [Court File No. 39, Addendum No. 5, Vol. 12, at 3–4], nevertheless, it remains that petitioner has not directed this district court to any Supreme Court precedent finding such actions to be unconstitutional.

Because this claim does not entitle the petitioner to relief unless adjudication of the claim resulted in a decision that was contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, *see* 28 U.S.C. § 2254(d), and because the state court's resolution of the claim (*i.e.,* that trying Nichols' cases out of chronological order did not violate his constitutional rights) was neither of these things, his claim will be **DISMISSED.**

b. ***Prior Convictions (Claim 28)***

Petitioner also challenges the use of prior convictions as an aggravating circumstance, without asserting a constitutional violation, claiming they were not final convictions because final judgments had not been entered. Judgments had not been entered in these cases because the trial court delayed sentencing at the request of Nichols. *See State v. Nichols,* 877 S.W.2d at 737.

This claim was raised in state court only as a matter of state law. The Tennessee Supreme Court concluded that Tenn.Code Ann. § 39–13–204(i)(2) [44] requires only a previous conviction and not a final judgment, and the indictment and minutes of the trial court offered to prove these convictions were admissible under the Tennessee Rules of Evidence.

Petitioner failed to raise this claim in his habeas petition or in state court on constitutional grounds. Petitioner raised this claim on direct appeal under "the procedures set out in Tennessee Rule of Criminal Procedure 32(e) and Tennessee Rule of Evidence 803(22)" [Court File No. 50, Addendum 6, Vol. 1, at 79–80]. "[T]he habeas petitioner must present his claim to the state courts as a federal constitutional issue—not merely as an issue arising under state law." *Koontz v. Glossa,* 731 F.2d 365, 368 (6th Cir.1984). Although petitioner stated, in his state appellate brief, "[t]o allow the use of these cases as 'final convictions' was error and violated Mr. Nichols' rights under the Fourth, Fifth, Sixth,

44. This aggravating circumstance provides: "The defendant was previously *convicted* of one (1) or more felonies . . . ."

and Eighth Amendments to the United States Constitution . . and a new sentencing hearing should be granted" [*Id.*], these general allegations of denial of these broad constitutional rights does not constitute a fair presentation of the claim that specific constitutional rights were violated. *See McMeans v. Brigano,* 228 F.3d 674, 681 (6th Cir.2000). The factual and legal basis for a constitutional claim must be presented to the state courts. Without specifying which particular right identified under each amendment was violated, petitioner failed to fairly present this claim as a constitutional violation in the Tennessee courts. On direct appeal petitioner did not rely upon any federal cases employing constitutional analysis; upon any state cases employing federal constitutional analysis; phrase the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or allege facts were within the mainstream of constitutional law. *See Franklin v. Rose,* 811 F.2d 322, 326 (6th Cir.1987).

[45] Consequently, petitioner has procedurally defaulted his claim that the trial court erred when it allowed the prosecution to use his prior convictions as aggravating circumstances to support the death penalty. Petitioner's failure to exhaust state remedies on federal constitutional grounds has resulted in a procedural default of this claim. *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Petitioner did not present the claim in state court as a matter of federal law and absent a showing of cause and prejudice or miscarriage of justice, the claim is not reviewable in this habeas proceeding. Petitioner has offered nothing to demonstrate cause and prejudice. Moreover, petitioner has failed to allege a violation of any constitutional right in this habeas petition.

Assuming for the sake of argument that this claim was exhausted, petitioner would not be entitled to any habeas relief because he has not demonstrated that the state court decision was contrary to, or an unreasonable application of, federal law. Thus habeas review of this claim is barred by petitioner's state procedural default and it will be **DISMISSED.**

16. ***1984 Convictions (Claim 24)***

[46] Challenging the constitutionality of his 1984 convictions being admitted into evidence, petitioner asserts the notice provisions of the Tennessee Rules of Evidence were not followed; an evidentiary hearing was not held; and the convictions were inadmissible under Rule 609 or Rule 404(b) of the Tennessee Rules of Evidence. The Tennessee Supreme Court concluded the trial court admitted the evidence, not for impeachment purposes, but rather to allow the State to rebut Nichols' argument that the 1988 and 1989 crimes were sudden deviations from his normally placid behavior. Finding that petitioner had clearly indicated the murder and rape in the instant case were the result of a sudden feeling that overcame him, and that defense counsel had attempted to show the crime was inconsistent with defendant's otherwise passive nature, the Tennessee Supreme Court concluded the trial court admitted the conviction to rebut evidence that petitioner was a docile person. Finding that the admission of this probative evidence outweighed the danger of unfair prejudice with proper limiting instructions, the court concluded the evidence could be considered by the jury.

Petitioner raised this claim in state court, citing to the Tennessee Rules of Evidence, though he did make a passing reference to certain constitutional amendments of the United States Constitution.[45]

45. The last sentence in Nichols' brief on direct appeal claiming that the admission of the

"Fair presentation of a federal constitutional issue to a state court requires that the issue be raised by direct citation to federal cases employing constitutional analysis or to state cases relying on constitutional analysis with similar fact patterns." *Deitz v. Money,* 391 F.3d 804, 808 (6th Cir.2004). This claim was exhausted in the Tennessee Supreme Court on direct appeal as an error of state law and federal habeas corpus relief does not lie for errors of state law. The failure to fairly present this as a constitutional claim in state court has resulted in the procedural default of any claim of federal constitutional error. No cause and prejudice or miscarriage of justice proof has been offered. Petitioner has procedurally defaulted his claim that the trial court erred by admitting evidence of his 1984 conviction resulting in the **DISMISSAL** of this claim.[46]

17. *Polling the Jury (Claim 25)*

The Court resolved this issue above in section 8.d *supra,* at 806 – 808.

18. *Unconstitutionality of Tennessee's Death Penalty Statute (Claim 26)*

Petitioner contends the Tennessee death penalty statute violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution for nine different reasons. On direct appeal petitioner challenged the constitutionality of the Tennessee death penalty statute on the ground that it creates a mandatory death penalty, and on the ground that it is cruel and unusual punishment. Neither of these grounds are raised in the habeas petition. On post-conviction appeal petitioner did not raise this claim.

Petitioner has procedurally defaulted claim twenty-six in its entirety because he failed to present this claim to the state court. Absent a showing of cause and prejudice petitioner is not entitled to any habeas relief on this claim.[47] Hence, petitioner's claim attacking the constitutionality of Tennessee's death penalty statute will be DISMISSED as procedurally defaulted.

19. *Notice of Prior Conviction in Case 175433 As Aggravating Circumstance (Claim 27)*

According to petitioner, his Sixth, Eighth, and Fourteenth Amendment rights were violated when the trial court permitted the prosecutor to rely upon his conviction for aggravated rape in case number 175433 as an aggravating circumstance.

[47] Prior to trial, the State filed its notice of aggravating circumstances and

1984 conviction denied his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution does not fulfill petitioner's obligation to first fairly present all constitutional claims to state courts [Court File No. 50, Addendum No. 6, Vol. 1, p. 37–38].

46. Assuming purely for argument's sake, that petitioner exhausted his state remedies, respondent's motion to dismiss this claim would be granted because petitioner has not demonstrated that the state court decision was based on an unreasonable determination of the facts, unreasonable application of federal law, or was contrary to federal law.

47. The Court observes that the Sixth Circuit has held that Tennessee's death penalty statute, enacted in 1977, is constitutional. *Workman v. Bell,* 178 F.3d 759, 778 (6th Cir.1998). Assuming *arguendo* that this claim is properly before the Court, petitioner would not be entitled to habeas relief. This is so, because he has failed to demonstrate the Tennessee Supreme Court's denial of his claim, on direct appeal, attacking Tennessee's capital sentencing scheme as cruel and unusual punishment was contrary to or an unreasonable application of federal law.

the notice included a prior conviction of Aggravated Rape case number 175487 on October 24, 1989, in Division I of Hamilton County Criminal Court. On the day of his guilty plea and sentencing hearing in the instant case, petitioner objected to the use of case number 175487 as an aggravating circumstance because the State had dismissed that case. The prosecutor indicated that case number 175433 was dismissed but upon review of his file the prosecutor determined that case number 175433, charging aggravated rape by anal intercourse, was in fact the indictment to which petitioner pleaded guilty; and petitioner's case number 175487 charging aggravated rape by vaginal intercourse of the same victim had in fact been dismissed. The prosecutor argued the notice which provided the correct charge of aggravated rape, the correct date upon which he pleaded guilty, and the correct court in which Nichols entered the guilty plea was sufficient notice of the prior felony conviction since petitioner knew the crime to which he pleaded guilty [Court File No. 41, Addendum No. 5, Vol. 21, at 47–52]. The trial court, denying petitioner's challenge, observed that petitioner and counsel knew which case he pleaded guilty to on that date and the incorrect docket number did not deny him proper notice of the prior conviction to be used as an aggravating circumstance [*Id.* at 53].

The Tennessee Supreme Court determined petitioner was aware that he had pleaded guilty to aggravated rape on October 24, 1989, and was not misled or prejudiced by the State's error. There is nothing in the record to indicate petitioner was not aware that the State intended to use his October 24, 1989 aggravated rape conviction as an aggravating circumstance. Petitioner has not directed the district court to any United States Supreme Court case which provides that notice of a prior felony conviction is insufficient when the defendant is notified of the correct charge of aggravated rape, the correct date of the guilty plea, and the correct court in which a guilty plea was entered, but where there is an incorrect case/indictment number.[48] The Tennessee Supreme Court's decision that the petitioner was neither mislead nor prejudiced by the State's notice of aggravating circumstances is neither contrary to, nor an unreasonable application of, any clearly established federal law.

Petitioner's claim that he had no prior notice of a conviction used as an aggravating circumstance will be **DISMISSED.**

20. *Newly Discovered Evidence (Claim 29)*

Petitioner's allegation that the trial court erred in denying his motion for new trial is without merit. After trial, petitioner's counsel received allegedly new information from an anonymous male source relating to abuse of the defendant by his father, which allegations have been kept confidential [Court File No. 43, Addendum

48. Petitioner knew the case number to which the notice referred had been dismissed and that the crime to which the notice referred was actually case number 175433. Petitioner has not demonstrated that he was not on notice of the prior conviction that the state intended to use to as an aggravating circumstance. Petitioner cites *Jones v. United States,* 526 U.S. 227, 249, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), and *Hamling v. United States,* 418 U.S. 87, 116–18, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), for the proposition that he has a right to fair notice of the crime to which the State intends to use as an aggravating factor. Petitioner has not demonstrated that he was denied fair notice when the State mistakenly typed in the number of a case which was actually dismissed but provided the correct charge of aggravated rape, the correct date upon which he entered his guilty plea, and the correct court in which he entered his guilty plea. Petitioner knew the case number to which the notice referred had been dismissed.

No. 5, Vol. 27, at Exhibit D (after page 32)].

The Tennessee Supreme Court determined that petitioner would not be entitled to a new trial unless he could establish reasonable diligence in seeking the newly discovered evidence, materiality of the evidence, and that the evidence would likely change the result of the trial. The court observed that the trial court found the first prong-reasonable diligence in seeking the newly discovered evidence-had been met, but found the other two were not established. The Tennessee Supreme Court agreed the alleged evidence, if it could be produced as represented, would not change the results of the trial. Observing that proof had already been introduced in the record that Nichols' father was abusive, the court agreed with the trial court's judgment denying a new trial.

[48] Because of the interest in preserving the finality of judgments, however, motions for a new trial based upon newly discovered evidence are "granted with caution." *United States v. Seago,* 930 F.2d 482, 488 (6th Cir.1991). "A trial judge's order denying a motion for new trial on an appraisal of newly discovered evidence should remain undisturbed 'except for most extraordinary circumstances.' " *Wolcher v. United States,* 76 S.Ct. 254, 255, 100 L.Ed. 1521 (1955) (quoting *United States v. Johnson,* 327 U.S. 106, 111, 66 S.Ct. 464, 90 L.Ed. 562 (1946)). To obtain a new trial in Tennessee on the basis of newly discovered evidence, the defendant must establish the following: (1) reasonable diligence in seeking the newly discovered evidence; (2) materiality of the evidence; and (3) that the evidence will likely change the result of the trial. *State v. Goswick,* 656 S.W.2d 355, 358–360 (Tenn. 1983).

The Court has reviewed the alleged new evidence and finds the state court decision, that the evidence would likely not change the results of the trial, is based on a reasonable determination of the facts in light of the evidence in the state court record, and is not contrary to, or an unreasonable application of, clearly established federal law as established by the United States Supreme Court. The information provided by the anonymous male source is subject to exclusion under the hearsay rules. There is no evidence that this person actually witnessed the alleged act. No credible or reliable evidence was submitted to the trial court; the caller was anonymous. Moreover, there is no indication the witness could be contacted and subpoenaed to court to testify. Additionally, trial counsel's affidavit reflects that petitioner has no recollection of the alleged incident [Court File No. 43, Addendum No. 5, Vol. 27, Exhibit D]. In sum, there is no proof that the newly discovered evidence is admissible and credible and that it would have produced a different result if presented before the original judgment. Accordingly, petitioner's claim that the trial court erred when it denied his motion for new trial on the basis of newly discovered evidence will be DISMISSED as it was not based on an unreasonable determination of the facts, nor was it contrary to, or an unreasonable application of Supreme Court precedent.

21. *Caldwell Error (Claim 30)*

Petitioner alleges that in violation of his rights under the Eighth Amendment to the United States Constitution, the imposition of his death sentence is error because the prosecutor presented arguments that implied the decision was not final, minimized the jury's role in sentencing, and diminished the collective sense of responsibility, in violation of United States Supreme Court precedent. Specifically, petitioner contends the prosecutor minimized the jury's role in the case by referring to himself as the "bad guy" who sought the

punishment of death against petitioner, implying that it was the State of Tennessee which chose the penalty.

On direct appeal petitioner claimed the statement by the prosecutor that it was the people of Tennessee who asked that punishment be the death penalty minimized the jury's role in this case. Petitioner also claimed the statement implied that because the State of Tennessee chose to pursue the death penalty, the death penalty should be applied in this case, thus, diminishing the responsibility of the jury. The Tennessee Supreme Court interpreted petitioner's claim as attacking the prosecutor's argument that "the people of the State of Tennessee, speaking through their legislators, have asked that the death penalty be a punishment" and claiming that it diminished the jury's responsibility in making the sentencing decision in this case had violated *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The court determined,

> This statement was a reply to the defendant's argument that the only reason the death penalty was being sought was because "the prosecution wants Harold Wayne Nichols to die" and was meant to point out that the people of Tennessee through their elected representatives, not the prosecution, had determined that death was a possible punishment in such cases. The defendant made no contemporaneous objection to this argument. In its opening argument, the State emphasized that it was the jury's duty to make the sentencing decision in this case. Taken in context, the prosecution's argument did not lead the jury to believe that the responsibility for determining the appropriateness of defendant's sentence lay elsewhere.

State v. Nichols, 877 S.W.2d at 733.

The only claim fairly presented to the state court on this subject is petitioner's attack on the prosecutor's statement telling the jury that it was the people of Tennessee who asked that the death penalty be the punishment in Tennessee, and that such statement minimized the jury's role and diminished its collective sense of responsibility in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). This is the only statement petitioner challenged on direct appeal and, therefore, is the only claim that is not procedurally defaulted and properly before this Court.

In *Caldwell*, the prosecutor told the jury that any decision it made would automatically be reviewed by the state supreme court and that its decision would not be final. *Caldwell*, 472 U.S. at 324–26, 105 S.Ct. 2633. This is not what happened in the instant case.

First, the prosecutor argued,

> Ladies and gentlemen, it's not like the State is heartless. It's not like the State wants you to do this, but it's a question, ladies and gentlemen, of just getting down to basic what's right, what's fair, and what is just. It's not a matter of wants or not wants. It's not a matter of what the family wants. It's not a matter of what the State wants. It's not a matter of what people in Hamilton County want. Want is not the issue. But what do you do, what do you do with a man who's perpetrated that kind of crime?

[Court File No. 43, Addendum No. 5, Vol. 24, at 511]. The defense counsel argued,

> The prosecution in this case, from the testimony of our expert in his cross examination, and some other things that were said during the evidence in this case, may want you to kill Wayne Nichols because his lawyers put together a defense for him, not a defense to his killing Karen Pulley, but a defense to their killing him . . .

. . . .

> But don't kill—or don't let Wayne Nichols be killed because we asked Eric Engum to look at various ways of presenting our evidence to you because we asked him what might be wrong with Wayne Nichols.
>
> Don't kill him because we used the ministers in his life, . . . Don't kill him because we applied to your human quality. Don't kill him because we appealed to your religion. . . . Don't kill Wayne Nichols because Eric Engum wrote a report.

[*Id.* at 512–15]. At this point the prosecutor objected to defense counsel "referring to the jury killing Wayne Nichols." [*Id.* at 515]. Defense counsel later argued,

> But we're here because the prosecution wants Harold Wayne Nichols to die. Now Mr. Bevil told you it's not about the State wanting Harold Wayne Nichols to die. If it's not, then why are we here? They want him to die, and we've tried to give you reasons he can live, not reasons to let him off. No one wants Wayne Nichols on the streets again, including Wayne. You heard Wayne testify, and the prosecutor pointed it out to you, that if he were on the streets today, he doesn't know, he might've done it again. He doesn't want to be on the streets and he's not asking you to put him on 'em. We just gave you reasons, or tried to give you reasons why he can live, why you can sentence him to life in prison.

[*Id.* at 523–24]. Defense counsel closed arguing,

> The prosecution in this case would like for you to go back into the jury room and to decide that if you exercise mercy and compassion, and that if you sentence Wayne Nichols to life in prison, in some way the State has lost the case. Now the State is you and me and everybody out here, Judge Meyer, Ms. Rogers. Everybody here is the State. We're the State. Think about this. You know, the State, that's us, we never lose, we never lose when justice is done. If you believe that justice allows you to sentence Wayne Nichols to a life term in prison, then the State has won. Remember he's already been convicted of five rapes, each of which carries a maximum life term. When justice is done the State always wins. We're always better when justice is done. Despite what the State might tell you, you have a choice. You have a personal, individual, moral choice that you can take into your heart. It's your duty to be fair. And you told us that you would be fair. . . .

[*Id.* at 555]. The prosecutor responded

> Members of the jury, I know you've heard a lot of talking and you probably don't want to hear any more, and I don't blame you. It's late and I know you're tired. But I would ask that you bear with me and give me a chance to just respond because, you know, I sort of feel like I'm on trial here. I've heard the prosecutor, the prosecutor, the prosecutor so many times that I feel like, you know, maybe I'm in the wrong. Maybe I ought to just go over and lay down in the floor and say, "There's no sense in prosecuting this case. Let's don't get the death penalty. Let's don't even ask the jury to consider it. It doesn't matter that the people of the State of Tennessee, speaking through their legislators, have asked that the death penalty be a punishment. But why do you want to be the bad guy, Steve? Why do you want to be the prosecutor? . . ."

[*Id.* at 555–56].

The statements made by the prosecutor informed the jury that "the people of the State of Tennessee, speaking through their legislators, have asked that the death penalty be a punishment" [*Id.* at 556] (empha-

sis added). Defense counsel did not object to this argument at the time. This argument did not lead the jury to believe the responsibility for determining the appropriateness of the defendant's death rests elsewhere as prohibited by *Caldwell v. Mississippi*, 472 U.S. 320, 329, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The prosecutor did not tell the jury that the people of the State of Tennessee, speaking through their legislators, have determined that petitioner should receive the death penalty but only that the death penalty could be asked for in this situation.

In *Caldwell*, the condemned comments told the jury that the defense "would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable." *Caldwell v. Mississippi*, 472 U.S. at 325, 105 S.Ct. 2633. The Supreme Court has subsequently explained that *Caldwell* is relevant only to comments that "mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright*, 477 U.S. 168, 184, n. 15, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). The statement in the instant case did not mislead the jury as to its role, it only explained why the State was asking for the death penalty—they were asking for the death penalty because the law allowed it. Nothing in *Caldwell* prohibits the State from telling the jury the law permits the State to ask for the death penalty under certain circumstances.

In order to establish a *Caldwell* violation, a defendant must show the remarks made to the jury "improperly described the role assigned to the jury by local law," minimizing their sense of true responsibility. *Dugger v. Adams*, 489 U.S. 401, 407, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989). In the instant case, the prosecutor's argument did not improperly describe the role assigned to the jury by local law. In light of the facts before the Court, the state post-conviction court's adjudication of this claim was neither contrary to, nor an unreasonable application of, existing Supreme Court precedent, *i.e., Caldwell v. Mississippi.*

Accordingly, petitioner's *Caldwell* claim will be **DISMISSED.**

22. *Cumulative Error (Claim 31)*

Petitioner presents a claim of cumulative error. Petitioner claims "[t]he accumulation of errors which occurred before, during, and after Mr. Nichols' state capital proceedings constitute a fundamental denial of due process of law" [Court File No. 82, at, 48].

On post-conviction review, the Tennessee Supreme Court found that petitioner's contention that the trial court's findings were clearly erroneous and that the cumulative effect of all the errors in the record amounted to reversible error were without merit. *Nichols v. State*, 90 S.W.3d 576, 607 (Tenn.2002).

[49] "Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone ... may cumulatively produce a trial setting that is fundamentally unfair." *United States v. Hernandez*, 227 F.3d 686, 697 (6th Cir. 2000) (*citing Walker v. Engle*, 703 F.2d 959, 963 (6th Cir.1983)) (internal quotation marks omitted). However, the standard the Supreme Court has directed federal courts to use on collateral review is whether the trial error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (*quoting Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). To obtain relief, therefore, petitioner must present

an accumulation of non-reversible errors that must lead this district court to the firm belief that an injustice has been done resulting in a "fundamentally unfair" proceeding. However, the mere addition of numerous insubstantial complaints will not lead to a successful "cumulative error" argument. *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir.2000) (defendant cannot simply add individual meritless claims to show cumulative error).

In analyzing the case for cumulative error, the Court evaluates the effect of matters determined to be error, not the cumulative effect of non-errors. *Lundy v. Campbell*, 888 F.2d 467, 481 (6th Cir.1989), *cert. denied*, 495 U.S. 950, 110 S.Ct. 2212, 109 L.Ed.2d 538 (1990). In addition the Court may only consider the errors committed in the state trial court, and only errors that have not been procedurally barred from habeas corpus review. *Derden v. McNeel*, 978 F.2d 1453, 1458 (5th Cir.1992) (*en banc*), *cert. denied*, 508 U.S. 960, 113 S.Ct. 2928, 124 L.Ed.2d 679 (1993).

To the extent this claim was initially raised in state court, the Supreme Court of Tennessee determined that any errors were harmless beyond a reasonable doubt. The accumulation of these alleged non-reversible errors do not lead this federal district court to the firm belief that an injustice has been done resulting in a "fundamentally unfair" proceeding. Petitioner has failed to demonstrate that, based upon alleged cumulative error, that the combined effect of individually harmless errors was so prejudicial as to render his trial fundamentally unfair or his sentence and conviction unreliable. The Court concludes that petitioner has not demonstrated that any errors made by the state courts deprived him of due process. There is no cumulative error made out by a combination of the various unavailing arguments raised in this case.

Petitioner has failed to demonstrate that the state court's decision was contrary to, or involved an unreasonable application of, established federal law as determined by the United States Supreme Court, or involved an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, the Court will **GRANT** respondent's motion to dismiss on this cumulative error claim and petitioner's cumulative error claim will be **DISMISSED.**

23. *Actual Innocent Claim (Claim 32)*

Petitioner has filed a motion to dismiss certain claims, specifically requesting to withdraw his actual innocence claim [Court File No. 243]. While this habeas proceeding was pending, petitioner pursued DNA testing in state court. The test results have been filed with the court and indicate the spermatozoa from the Karen Pulley gown was petitioner's [Court file No. 243]. The motion to dismiss certain claims including petitioner's actual innocent claim is **GRANTED** [Court File No. 243].

V.

CONCLUSION

Respondent's motion for summary judgment will be **GRANTED** as to all claims. Petitioner is not entitled to an evidentiary hearing, and his petition filed pursuant to 28 U.S.C. § 2254 will be **DISMISSED.**

A judgment will enter.

725 F.3d 516
United States Court of Appeals,
Sixth Circuit.

Harold Wayne NICHOLS, Petitioner–Appellant,
v.
Stanton HEIDLE, Warden, Respondent–Appellee.

No. 06–6495.
|
Argued: Jan. 24, 2013.
|
Decided and Filed: July 25, 2013.
|
Rehearing and Rehearing En Banc Denied Sept. 5, 2013.

Synopsis

Background: Following affirmance on appeal of defendant's conviction for first-degree murder and aggravated rape and imposition of the death penalty, 877 S.W.2d 722, defendant filed petition for writ of habeas corpus. The United States District Court for the Eastern District of Tennessee, 440 F.Supp.2d 730, Allan Edgar, J., dismissed. Petitioner appealed.

Holdings: The Court of Appeals, Alice M. Batchelder, Chief Judge, held that:

petitioner failed to show trial counsel's strategy in sentence-selection phase of trial was unreasonable;

jury instruction did not require or imply that the jury find mitigating factors unanimously;

state court finding that jury unanimously found two statutory aggravating factors was a reasonable determination;

any error in failing to re-instruct the jury to reconsider mitigating factors was not so prejudicial as to violate due process;

petitioner did not demonstrate that trial court's polling of the jury was contrary to or an unreasonable application of any clearly established federal law;

the order in which crimes were actually committed is irrelevant to whether the convictions can be considered as an aggravating factor in sentence selection phase of a capital trial;

trial court's use of non-final convictions as basis for statutory aggravating factor was not contrary to or an unreasonable application of clearly established federal law; and

state's use of notes and writings of defendant's psychological expert to confront the expert was not improper.

Affirmed.

Boyce F. Martin, Jr., Circuit Judge, filed concurring opinion.

Attorneys and Law Firms

***520 ARGUED:** Dana C. Hansen Chavis, Federal Defender Services Of Eastern Tennessee, Inc., Knoxville, Tennessee, for Appellant. James E. Gaylord, Office Of The Attorney General, Nashville, Tennessee, for Appellee. **ON BRIEF:** Dana C. Hansen Chavis, Federal Defender Services Of Eastern Tennessee, Inc., Knoxville, Tennessee, for Appellant. Mark A. Fulks, Office Of The Attorney General, Nashville, Tennessee, for Appellee.

Before: BATCHELDER, Chief Judge; MARTIN and COOK, Circuit Judges.

BATCHELDER, C.J., delivered the opinion of the court, in which COOK, J., joined. MARTIN, J. (p. 516), delivered a separate concurring opinion.

OPINION

ALICE M. BATCHELDER, Chief Judge.

Petitioner Harold Wayne Nichols, a Tennessee state prisoner awaiting execution, appeals on several grounds the district court's denial of his petition for writ of habeas corpus. Finding no merit in any of these grounds, we AFFIRM.

I.

A. Background

By any measure, Wayne Nichols had an oppressive and forlorn childhood, due to his father's abuse, his mother's illness, their poverty, and the church-dominated society into which he was born. Born December 31, 1960, to a poor family in Cleveland, Tennessee, near Chattanooga, he lived in a tiny, run-down house with his father Mac, mother Nanny Lou, and sister Deborah, who was three years older. The four shared a room. Mac's mother, Oma, lived in the other room. They were members of the Church of God of Prophecy and Mac allowed no visitors other than the occasional church member. Mac was a mean, abusive, and outright vile man.

On June 11, 1961, Mac's sister Betty Sampley and her husband drowned during ***521** a family outing, so two of their six children—Royce and Diana, then 13 and 12 years old—moved into the already-crowded Nichols household. [1] The four younger Sampley children were placed in the nearby Tomlinson Children's Home, an orphanage run by the Church of God of Prophecy. For the next several years, Mac frequently exposed himself to adolescent Diana, menaced her sexually, and may have sexually assaulted her (the full extent of the abuse is unclear).

1 Diana shared a bed with grandmother Oma and Royce slept on an unheated back porch.

In August 1966, Oma died. In May 1967, Royce graduated from high school and moved out. And in January 1968, Diana married and moved out. Nanny Lou had been diagnosed with breast cancer in October 1966 and spent much of the rest of her life bedridden. Nanny Lou died of breast cancer on January 29, 1971. Wayne was then 10 years old and was left isolated in the home with just his 13–year–old sister and abusive father.

Mac continued to abuse Deborah and Wayne physically, and began (or continued) to abuse Deborah (and possibly Wayne) sexually. Mac's sexual abuse of Deborah soon became so flagrant that certain church leaders were compelled to intervene and on August 12, 1971, less than seven months after Nanny Lou's death, the church leaders brokered an agreement with Mac

whereby Wayne and Deborah would be removed from his care and, in exchange, the abuse was covered up and Mac was never charged criminally. Wayne and Deborah, then 10 and 13 years old, were placed in the Tomlinson Children's Home. According to testimony and records of operating procedures, this was a stereotypically harsh and inhospitable orphanage.[2] Wayne and Deborah remained there for the next several years. Mac did not visit or interact with them.

2 Testimonial accounts describe the Tomlinson Home as being like a "correctional institution," "the Army," and a "hellacious home." Testimonial accounts describe intense violence and cruelty, including severe lashings and a child forced to eat his own vomit. The Tomlinson Houseparent Guide instructed the houseparents to use corporal punishment "firmly and thoroughly," but cautioned against leaving severe visible bruises.

It is noteworthy that 10 years earlier, in 1961, cousins Diana and Royce Sampley, then ages 12 and 13, were considered too old for the Tomlinson Home and were therefore sent to live with the Nichols. The Nichols children, at ages 10 and 13, might have been the oldest children at the Tomlinson Home during their time there.

On May 1, 1976, Deborah married and moved away, apparently out of the state. On June 28, 1977, Wayne, who was then age 17, was returned to live with Mac.[3] At that time, Mac was receiving disability benefits, drinking heavily, and cavorting with prostitutes. Mac was verbally and physically abusive to Wayne, though apparently not sexually abusive as the record reports only a single incident, in which he propositioned Wayne sexually and Wayne declined. While in high school, Wayne began to roam at night rather than go home.

3 At one point, the record says "as he was about to be adopted," which seems unlikely since he was 17 years old. At another point, the record suggests that Wayne was sent back to his father because there were only a few children left at the orphanage and it was closing down, which is reasonable as it did close shortly thereafter.

Wayne graduated from Kirkman Technical High School in August 1979, but had trouble finding work. Over the next two years, he worked a series of minimum-wage jobs and then enlisted in the Army on November 30, 1981. In March 1982, while stationed at Ft. Riley, Kansas, Wayne met a woman and they moved in ***522** together, even though she was married to another soldier. They never married but had a daughter, who was born in November 1983. Wayne did not fare well in the Army and was discharged in November 1983, a full two years early. Wayne did not fare well in this relationship either and in early 1984 Wayne left this woman and their daughter in Kansas and returned to Chattanooga.

It is unclear where Wayne was living upon his return to Chattanooga in early 1984, but he likely returned to live with his father, Mac. Wayne was reportedly working at a convenience store.

On the night of August 30, 1984, Wayne climbed through a window into an apartment that was shared by two women. According to Wayne, he intended only to rob the apartment and did not expect anyone to be there. But finding one of the women there, he grabbed her and attempted to rape her. She resisted and Wayne fled. Police arrested Wayne on September 4, 1984, and on December 13, 1984, he pled guilty to burglary and assault with attempt to rape. The court sentenced him to five years in prison, of which he served 18 months. While in prison at the Brushy Mountain State Penitentiary, psychologist Dr. Floyd Doughty prepared a psychological report on Wayne and found nothing remarkable.

Wayne was released on parole April 29, 1986, but missed a parole appointment on July 9, 1986, so his parole officer filed a violation (August 18, 1986), and Wayne went to jail for one month, from September 26, 1986, until October 26, 1986. He was then released and ordered to live with his father until he married his fiancee, Joanne.

Wayne and Joanne married on November 1, 1986. They both had jobs; Joanne at Sathers Candy and Wayne at Godfather's Pizza. They lived with Mac in the beginning, which Joanne recounted as having been awful. Mac was unreasonably demanding and verbally abusive, to which Wayne was apologetic and subservient. Eventually, Joanne and Wayne moved out. By all accounts, their marriage was happy and loving; Joanne was smitten with Wayne right up until his January 1989 arrest for the rapes and murder, and she claimed that he had treated her wonderfully throughout their relationship. In April 1987, Joanne had surgery

for a blocked fallopian tube. And in June 1987, the woman in Kansas filed a paternity suit seeking child support. Wayne settled and paid some money. Otherwise, Wayne and Joanne appeared to be doing fine.

At 11:45 p.m. on June 29, 1987, a woman living in the East Ridge suburb of Chattanooga (almost four miles from Wayne's neighborhood) saw a man in a white t-shirt lurking outside her house and called the police. When the police arrived 10 minutes later, they found Wayne (in a white t-shirt) leaving the woods about 300 feet from the woman's house. Because he did not live in the area and could not give any reason for his being there, the police arrested him for prowling and carrying a dangerous weapon, a knife. On July 29, 1987, Wayne was returned to county jail for a year for the prowling conviction and parole violation. Wayne was released from jail on June 1, 1988. Joanne welcomed him home and Godfather's Pizza welcomed him back to work as though nothing had happened.

But according to Joanne, beginning in July or August of 1988, Wayne began to go out at night alone and stay out all night. He told her he was just restless and, apparently, she believed him. When she worried that he was having an affair, he was able to reassure her that he was not. Their relationship was solid. And, in September 1988, Wayne was promoted to first ***523** assistant manager at Godfather's Pizza. So that must have been going well also.

B. Crimes

The State prosecuted and convicted Wayne Nichols for the rapes or attempted rapes of 12 women during his three-month rape spree, which spanned the period from September 30, 1988, to January 3, 1989.[4] But based on Nichols's additional confessions and his psychologists' assessments, there were almost certainly more victims and more rapes.

4 In a peculiar tangent, a 16–year–old girl accused Nichols of raping her, "resulting in [her] pregnancy." The State later dismissed this claim after discovering it was false. This girl had worked with Nichols at Godfather's Pizza, had gotten rides to and from work from him, and, according to Joanne, had attended a Christmas party with them the day after the alleged rape without showing any problem with Nichols at that time. Sometime in April 1989, well after Nichols had been arrested and the story of his rape spree publicized, this girl told police that Nichols had sexually harassed her and other female employees on numerous occasions and that he had raped her on December 15, 1988. Nichols vehemently denied committing that particular rape, despite confessing to numerous others, and defense counsel were able to show that Nichols could not have committed that rape as alleged. It turned out that the girl had gotten pregnant and had attempted to cover it up by falsely claiming to have been a victim of Nichols's serial rapes. The prosecution dismissed this charge on October 3, 1989.

This aspect of Nichols's rape cases is perhaps most noteworthy because it demonstrates Nichols's willingness and ability to dispute and defend against a false rape accusation, thereby undermining a suggestion that Nichols's numerous other confessions were the result of coercion or the mere acquiescence to police suggestion. Nichols has abandoned his prior claims that his confessions were the product of coercion and police manipulation, but hints of those accusations linger in his present arguments, including his mitigation argument, and he has only at this stage—the appeal of the denial of his federal habeas corpus petition—abandoned his actual-innocence claim. *See* fn. 6, *infra.*

Victim # 1: Karen Elise Pulley (rape, murder)

On the night of Friday, September 30, 1988, Nichols parked near a house in the Brainerd area of Chattanooga where 21–year–old Karen Pulley lived with two female house mates. Nichols watched the house from outside and saw one of the women dress and leave. Nichols armed himself with a short length of two-by-four lumber,[5] climbed in a bathroom window, and roamed through the house. When he found Karen Pulley in bed and alone, he struck her in the head with the two-by-four, tore her clothes from her, and forcibly raped her vaginally. Afterwards, Nichols hit her in the head several more times with the two-by-four, crushing her skull, and left her on the floor, bleeding and unconscious. Nichols inflicted an astounding amount of damage

to Karen Pulley's head and body, as is evident from both the autopsy and the gruesome crime-scene photos, particularly when compared to photos of Karen Pulley from before the murder.

5 It is unclear whether Nichols found the two-by-four outside the house or inside, but it is certain that he obtained the two-by-four at the crime scene. Nichols did not bring the two-by-four with him.

One of Pulley's house mates found her the next morning, alive but unconscious, lying on the floor in a large pool of blood. Pulley died at the hospital later that day—she never regained consciousness. Police investigated relentlessly for three months. They collected samples for all manner of forensic testing, including fingerprinting and biological testing, [6] received and pursued ***524** hundreds of tips, questioned over 100 people, and investigated numerous possible suspects, but made no progress toward solving the crime. Specifically, the police never suspected Nichols and had not even established that the murder weapon was a two-by-four.

6 Among the numerous biological samples were spermatozoa collected from her gown. Initial testing could not be matched to Nichols and that was part of an actual-innocence claim. But in October 2005, advanced DNA testing matched the sample to Nichols and confirmed that he had been the perpetrator, as he had confessed.

In January 1989, the police identified Nichols as a suspect in a series of other rapes in neighboring communities, discussed *infra,* and after initially denying knowledge of this rape and murder, Nichols confessed and recorded a detailed confession. Nichols eventually pled guilty and, following a sentencing trial, a jury recommended the death penalty, which the court imposed. The sentencing trial and the death sentence are the basis for this appeal.

Victim # 2 (rape) [7]

7 In February 1991, well after the Pulley murder trial and conviction, Nichols entered guilty pleas to six additional rapes or attempted rapes, as part of a plea agreement. Nichols did not appeal any of these six convictions (i.e., Victims # 2, 3, 4, 6, 9, and 10). These crimes comprise a substantial part of Nichols's rape spree and are in the record, but were not formally part of the Pulley murder trial and were only alluded to vaguely during that proceeding.

On state post-conviction review, the state trial court referred to these additional convictions in its denial of Nichols's petition, noting that they would be considered during a potential resentencing. *See* Section II.A, *infra.* The Tennessee Supreme Court, in analyzing Nichols's claim about the order of his trials, referred to Nichols's "forty charges growing out of some fourteen incidents," *Nichols,* 877 S.W.2d at 735. *See* Section II.F, *infra.*

Sometime shortly after midnight on Thursday, October 20, 1988, Nichols approached a house in the Tiftonia neighborhood of Chattanooga where a 23–year–old married woman was home alone. At about 12:30 a.m., just before going to bed, she unlocked a side door for her husband, who would typically arrive home from work shortly after that hour. Nichols entered through the unlocked door at about 12:45 a.m., picked up a candlestick, and found the woman in her bedroom. He struck her on the head with the candlestick multiple times, leaving wounds that would require stitches, threatened to kill her, choked her, and then raped her vaginally.

Afterward, Nichols warned her not to move, so the woman knelt on the bed, motionless and terrified, until her husband arrived home from work some time later. He called the police. Apparently, Nichols called the house while the police were there—the victim answered and recognized his voice but was too scared to hear what he said. She gave the phone to a police officer, but the record does not contain a police report from those officers about any such phone call.

When arrested in January 1989, Nichols confessed to this rape and eventually (after the Pulley murder trial) entered a guilty plea pursuant to a plea agreement. This was the one of six guilty pleas and corresponding convictions that Nichols did not appeal.

Victim # 3 (rape)

At about 4:45 a.m. on Tuesday, November 1, 1988, Nichols went to a home in the East Ridge suburb of Chattanooga,[8] where ***525** a single woman lived alone. The woman awoke to find Nichols standing over her holding a large knife to her throat. Nichols warned her not to scream or he would kill her. He then turned on the light, took her to the closet, and picked out a black skirt, white blouse, and black high heels. He had her dress and then took her back to the bed where he raped her vaginally, ejaculating on the skirt.[9] He had her undress and bathe while he watched. He then told her not to call the police or he would kill her, and left, taking the skirt with him.

8 This date was Nichols's second wedding anniversary and this address was walking distance from Nichols's house. Originally, Nichols's wife Joanne had protested that Nichols could not have committed this rape because they had been together on their anniversary, but later she realized that he had left in the middle of that night.

9 Elsewhere, the record reports that Nichols hit this victim with a vase and took the vase with him, but the police report prepared at the time of the crime does not refer to any vase.

Nichols confessed to this rape and eventually (after the Pulley murder trial) entered a guilty plea pursuant to a plea agreement, even though this victim could not identify him. This was one of six guilty pleas and corresponding convictions that Nichols did not appeal.

Victim # 4 (attempted rape)

At about 12:45 a.m. on Monday, November 21, 1988, Nichols parked outside a house in the Red Bank suburb of Chattanooga, where a 35–year–old single mother lived with her young son. Nichols had been casing this house for some time, possibly weeks. Nichols climbed on a lawn chair in the back yard to open a window, climbed through the window and over the washing machine, and went to the bedroom. Nichols woke the woman and turned on the light but she screamed and fought. They rolled onto the floor, while Nichols struck her several times in the face and head.[10]

10 Photos in the record show that her eye was blackened badly and her face visibly swollen. Also, there is a convoluted reference in the record to Nichols's hitting her with a walking cane, taking the walking cane when he fled, and placing the cane on the victim's porch a couple of nights later. This was never fully explained.

When the woman's young son called out, they stopped fighting momentarily. Nichols stood behind the woman and told her to tell the boy everything was okay, which she did. Meanwhile, her dog had come into the room, and she ordered the dog to attack. When the dog moved towards them, Nichols fled taking her purse and a walking cane. The woman followed Nichols outside, screaming at him while he fled to his car. She got her gun from her car and then called the police.

When the police arrived, the woman recounted that a couple of weeks earlier, she had seen a car like Nichols's parked in the same place Nichols had parked on the night of the attack. When she approached the car, it drove off. On a different day around the same time, she had come home to find that someone had gone through her underwear drawer. Also, because the window through which Nichols had climbed in had been painted shut, she surmised that he had pried it open from the inside during an earlier break-in and left it unlocked, unbeknownst to her.

The woman gave the police an accurate description of Nichols and, following his arrest, identified him by photo. Nichols confessed and eventually pled guilty to assault with intent to rape. This was one of six convictions that he did not appeal.

Victim # 5 (rape)

At 1:30 a.m. on Wednesday, December 21, 1988, Nichols went to a house in the East Ridge suburb of Chattanooga, where ***526** a single woman lived alone. Nichols watched through a window and saw that she was alone. He entered the house through the front door, which was unlocked, picked up a knife from the kitchen, and found the woman sleeping on a couch in the living room. He woke her, ordered her to the bedroom, cut and tore her clothes off, and armed with a knife, forcibly raped her vaginally. He attempted to rape her anally, but could not do so and instead ejaculated on her face. He ordered her into the shower, turned it on, and forced her to wash her hair and face. While his victim was in the shower, Nichols left, taking the knife and her purse with him. [11]

11 At approximately 8:00 p.m. on January 3, 1989, this victim received a telephone call at her home in which the caller said only, "I want to eat your puss." She later believed the caller was Nichols, based on the voice and the fact that he had her name and phone number from the contents of her purse.

The police showed this victim a photo of Nichols on January 5, 1989, and asked if she could identify him. She could not, but she later identified him when she saw him on TV and again when asked in court. The State tried Nichols to a jury and the jury convicted him of burglary, larceny, and aggravated rape. This was one of the prior violent felonies that the State used as a death-penalty qualifier in the Pulley murder trial.

Victim # 6 (attempted rape)

At about 1:05 a.m. on Thursday, December 22, 1988, Nichols went to a house in the Tiftonia neighborhood of Chattanooga, where a 35–year–old woman lived alone. Nichols broke in through the back door and found that the woman was in the shower. Nichols took a knife from a kitchen drawer and attacked her when she emerged from the shower, stabbing her several times in the hand and arm. When she fought back, inflicting a cut on Nichols's eye, he fled.

Nichols may have been stalking this woman for some time. In addition to this attempted rape, Nichols was also convicted of attempted burglary of this residence on December 8, 1988. There is no further explanation of this in the record. The absence of any other charges on this earlier date suggests that he could not get in or left because the woman was not home.

This victim gave the police an accurate description of Nichols and, following his arrest, identified him from a photo. Nichols confessed to committing this attack and eventually pled guilty to attempted rape. This was one of six guilty pleas and convictions that he did not appeal.

Victim # 7 (rape)

At 11:15 p.m. on Tuesday, December 27, 1988, Nichols went to an address in the Red Bank suburb of Chattanooga, where a single woman lived alone. The woman had returned from a movie and was making trips to her car, carrying items into her house. Nichols, who had entered the residence through a back window, pulled an electrical cord from an iron, surprised her from behind, lynched the cord around her neck, and dragged her back inside. Nichols ordered her to strip and when she delayed, he punched her and ripped off her clothes. When she told him she was menstruating, he punched her several times in the face and head. He forced her to perform oral sex and then forcibly raped her vaginally. He told her not to move and then fled. After about 10 minutes, she called 911.

Nichols confessed to this rape and, during this confession, he began laughing. When police asked why he thought it was ***527** so funny, Nichols said: "Well, it's not really funny what happened, but the whole thing is sort of funny." This laughing was

reportedly unmistakable on the video of the confession. Nichols entered a guilty plea even though serology evidence could not be matched to him at that time, and the court convicted him of burglary and aggravated rape. This was one of the prior violent felonies used as a death-penalty qualifier in the Pulley murder trial.

Victim # 8 (attempted rape)

On Saturday, December 31, 1988, Nichols went to the Tiftonia neighborhood of Chattanooga, where he attempted to rape a woman in her home. The record contains few specifics. Nichols confessed on video, but this crime was not prosecuted.

On Monday, January 2, 1989, Nichols had been home from work because he was feeling ill and spent the day lying in bed. At about 8:30 or 9:00 p.m., he got up and dressed and told Joanne he was going to get hamburgers. He did not return until 7:00 a.m. the next morning. During that time, Nichols committed three rapes and attempted another.

Victim # 9 (rape)

At 12:15 a.m. on Tuesday, January 3, 1989, Nichols went to an apartment in the East Brainerd or East Ridge neighborhood of Chattanooga, where a 31–year–old single mother lived with her four-year-old daughter. Nichols entered and found the woman and her daughter asleep in the master bed. Nichols threatened to harm the daughter if the woman did not comply, so she told her daughter everything was okay, put a videotape in the VCR for her to watch, and went to the living room with Nichols. Nichols forced her to undress and lie down on the couch; he then raped her vaginally, coercing her with a knife. Nichols told her that if he saw any police at her apartment, he would come back and hurt or kill her daughter. She did not call the police until the next evening. She described Nichols to the police and added that he smelled of cigarettes. She later identified him from a photo line up.

Apparently, Nichols had been watching this victim's apartment for several weeks. On Thanksgiving weekend, six weeks earlier, this woman had returned home to find the windows and doors unlocked. A stick or bar that had secured a sliding door had been removed and put under the couch. Several baskets and other items were oddly out of place and several lights were on that had not been on when she left. She later suspected that the intruder had been Nichols, familiarizing himself with the layout of the apartment and unlocking doors and windows for his entry at a later time.

Nichols confessed to the police and eventually pled guilty to this rape. This was one of six guilty pleas and convictions that he did not appeal.

Victim # 10 (attempted burglary with intent to rape)

At about 1:00 a.m. on Tuesday, January 3, 1989, Nichols arrived at an apartment in the East Ridge suburb of Chattanooga. Nichols cut the window screens and pried at the doors, but could not break in, so he gave up and went next door to the residence of the next victim. When police responded to Victim # 11's 911 call at 3:34 a.m., they searched the area and found that the rear screens of this apartment had been cut and the rear door, front door, and front window had been pried on. Police woke the woman inside, who had been unaware of the attempted break in. Nichols confessed and pled guilty to "attempted burglary by night with intent to rape." This was one of six guilty pleas and convictions that he did not appeal.

528 *Victim # 11 (rape) [12]

12 This was actually charged and convicted as two separate rapes, so the record reflects that the prosecutor in the Pulley murder trial presented five prior rape convictions as prior violent felonies for purposes of death-penalty qualification, even though the prosecutor actually presented four cases concerning four victims and four incidents.

At about 1:30 a.m. on Tuesday, January 3, 1989, Nichols approached the neighboring apartment (to Victim # 10), where a 28–year–old single mother lived with her children. Nichols pried open the back door with a screwdriver, breaking a window. The woman heard the noise and got out of bed to investigate. Halfway down the stairs, she saw Nichols breaking in and ran back upstairs and called 911. The dispatcher recorded the 911 call at 1:36 a.m. Nichols followed her upstairs, hung up the phone, and ordered her downstairs. The children were sleeping or watching TV upstairs and Nichols threatened to harm her and kill the children if she did not comply. Nichols tore her nightgown off of her and when she begged him to stop, he punched her in the face, again threatened the children, and scratched her in the process, drawing blood. Nichols forcibly raped her orally, vaginally, and anally. He did not ejaculate. Nichols told her not to move until he was gone, but when he left the room, she ran upstairs for a robe. When the police rang the doorbell moments later, the woman answered and Nichols fled out the back. Police pursued unsuccessfully.

This woman initially identified another man as the rapist from a photo array (one Fred Joseph Coats, also suspected in the next rape, Victim # 12), but at a subsequent in-person line up determined that it had not been Coats. She later identified Nichols from a photo array and identified him for a jury in court. Nichols was tried to a jury and convicted of burglary and two counts of aggravated rape. The prosecutor in the Pulley murder trial offered these two rape convictions as two of the five prior violent felonies for death-penalty qualification.

Victim # 12 (rape)

At 4:00 a.m. on Tuesday, January 3, 1989, Nichols arrived at a house in the East Ridge suburb of Chattanooga, where a 26–year–old woman lived alone. This woman had returned home at approximately 1:00 a.m. and fallen asleep on her couch. She was awakened by two sharp blows to her head and face. Nichols had entered through a window by climbing on top of her car. Nichols held a knife to her throat and threatened to kill her if she did not comply. He forced her to the bedroom, chose an outfit for her, and forced her to dress in it, all the while threatening her and hitting her. Nichols then forcibly ripped and cut the clothes off of her, cutting her leg in the process. Nichols attempted to rape her anally, but was unable to do so. When she claimed to be nauseous, Nichols turned to get her a wash cloth and she reached for a .38 pistol she had in the night stand. Nichols wrestled the gun away from her, beat her some more, and raped her anally, by force and with the threat of the knife held against her. When he finished, Nichols held the gun to her head and fired the empty chamber, apparently to horrify her or to show it was empty. Nichols forced her into the shower and left while she was showering. She called 911 at 4:43 a.m.

After his arrest, this woman identified Nichols from a photo array. After his confession, police took Nichols to her house and he pointed out where and how he had climbed onto her car to get into the window. During a consensual search of his car, police recovered the woman's gun ***529** and the knife from her kitchen. Nichols had also stolen her purse. Nichols entered guilty pleas to burglary, larceny, and aggravated rape. [13] This was one of the prior violent felonies cited as a death-penalty qualifier in the Pulley murder trial.

13 The record mistakenly reports in a couple of places that the State dismissed the charges in this rape case. That is incorrect. The State dismissed an "attempted murder" charge in this case when it was established that Nichols knew, before pulling trigger, that the chamber was empty in the gun and that even the victim had told the police so.

C. Arrest and Confession

At 8:10 p.m. on Thursday, January 5, 1989, East Ridge Police Captain Larry Holland received an anonymous phone call from an unidentified man—later determined to be one Chuck Mull, [14] —alleging that Nichols was the serial rapist and providing Nichols's date of birth. Routine follow-up revealed Nichols's 1984 arrest and conviction for burglary and attempted rape. Police showed photo-arrays to four of the victims, each of whom identified Nichols immediately. An arrest warrant issued.

14 Mull was Larry Kilgore's roommate, and possibly romantic partner, who was jealous of Nichols's friendship with Kilgore. Kilgore had been very fond of Nichols and eventually testified for Nichols at the Pulley murder trial, asserting that Nichols was the best friend he had ever had and insisting that Nichols was the best person he had ever known. Mull's jealousy of Nichols led him to suspect Nichols when no one else did, and to call the police with the tip.

Police arrested Nichols at his home at 11:06 p.m. and took him to the East Ridge police station for questioning, with several officers from different communities present. Nichols signed a waiver of counsel and Miranda rights at 11:23 p.m. A little over an hour later, at 12:47 a.m. (Friday, January 6, 1989), Nichols recorded a videotaped confession to the rapes of Victims # 3, 5, 11, and 12.

Questioning continued until approximately 4:21 a.m., and then police allowed Nichols to sleep for several hours before beginning questioning again at approximately 11:30 a.m. that same morning (Friday, January 6, 1989). Nichols confessed to several other rapes and attempted rapes, including several of those described above as well as at least two others that were never prosecuted. [15] It was suspected by police and even by Nichols's defense psychologists that Nichols had almost certainly committed more rapes than those known.

15 Nichols confessed to at least two other rapes (Victims # 13 and 14) that he committed in Red Bank. Neither of these were prosecuted and further details are not contained in the present record.

That evening, police showed pictures of Nichols to some other victims. Victim # 11 identified him at 5:20 p.m., Victim # 3 identified him an hour later, and then # 12 and # 5. At 8:00 p.m., the police took Nichols to the Chattanooga Police Department where he made a full confession, on video, to the Pulley rape and murder, a case in which he had never until then been a suspect. A few hours later, actually 1:20 a.m. on Saturday, January 7, 1989, Nichols directed a detective to a lot in East Ridge to recover the two-by-four he had used to murder Karen Pulley. [16] On Sunday, January ***530** 8, 1989, Joanna Nichols relayed to another police officer that, after his arrest, Nichols had confessed to her about his committing some of the rapes and the Pulley murder.

16 Questions existed about this two-by-four. Forensic investigation found no hair, fibers, blood, or soft tissue on the two-by-four, even though Nichols had crushed Pulley's skull with it and splattered blood all over the room. Also, the two-by-four did not appear weathered even though it had presumably been outside since September. At one point, the record says that one of Pulley's roommates found the two-by-four. The prosecution entered the two-by-four into evidence at Nichols's sentencing trial and the detective testified to its recovery and chain-of-possession. Because Nichols long ago abandoned any claim of error concerning this two-by-four as the murder weapon, it is not an issue now and will not be considered further in this opinion.

The State proceeded with indictments on all of the cases individually. On February 1, 1989, the State indicted Nichols for the Pulley rape and murder. On April 5, 1989, Nichols moved the state trial court to compel the State to prosecute his crimes in the chronological order in which they were committed, but the court denied the motion. On July 18, 1989, Kenneth Nickerson, Ph.D., and Fausto Natal, M.D., of the Johnson Mental Health Center, Inc. in Chattanooga, Tennessee, provided the court with a competency report in which they found Nichols competent to stand trial.

D. Trials and Prosecution

Nichols had the same counsel for all of his trials: Hugh Moore and Rosemarie Bryan. The first significant hearing was September 6, 1989, on Nichols's motion to suppress his confessions in the rape cases. The trial court did not believe Nichols's assertion that he had requested an attorney; found that Nichols had not been coerced; and denied the motion.

The State prosecuted five of the rape charges (concerning four victims) to conviction before initiating the Pulley rape-and-murder trial:

1.) Victim # 7, guilty plea, September 13, 1989, Case No. 175495.

2.) Victim # 12, guilty plea, October 24, 1989, No. 175433.

3.) Victim # 11, guilty verdicts (2), January 11, 1990, Nos. 175438 and 178087.

4.) Victim # 5, guilty verdict, February 21, 1990, No. 180537.

It is noteworthy that, for each of these convictions, Nichols's counsel moved the court to stay the sentencing phase until after the completion of the other guilt-phase determinations, specifically until after the Pulley murder trial. The court granted the motions and did not sentence Nichols on any of these non-capital convictions until December 13 and 14, 1990. [17]

17 In December 1996, Nichols petitioned for post-conviction relief from these five non-capital sentences, arguing that the trial court had failed to abide by certain state-common-law sentencing principles. *See Nichols v. Tennessee,* 90 S.W.3d 576, 586 n. 4 (Tenn.2002). Thereafter, sometime between 1997 and 2002, the post-conviction court granted this petition and held that Nichols was entitled to new sentencing proceedings for these non-capital convictions. *See id.* at 586. The State did not appeal, *id.,* but neither did the state trial court proceed immediately with this re-sentencing, *see Tennessee v. Nichols,* No. E2008–00169, 2009 WL 2633099, *2 (Tenn.Crim.App. Aug. 27, 2009). Eventually, on or about December 17, 2007, the state trial court re-sentenced Nichols on these non-capital convictions, sentencing him to the minimum sentence for each offense, to be served concurrently, for an effective sentence of 25 years. *Id.* at *3.

Note that Nichols's aggregate effective sentence for the other six non-capital offenses—to which he entered guilty pleas and which he never appealed (i.e., Victims # 2, 3, 4, 6, 9, and 10)—is 225 years. *See id.* at *1.

The Pulley murder trial began on May 7, 1990. Nichols had requested a change of venue, but the trial court did not change the venue of the trial. Instead, the trial court selected jurors from another county (Sumner County) and brought them to Hamilton County, where the crimes had occurred, for the trial. After jury selection, the trial court denied Nichols's motion to suppress his video-and audio-taped ***531** confession to the Pulley rape and murder, so Nichols changed his plea and entered guilty pleas to charges of first degree felony murder, aggravated rape, and first degree burglary. [18] The trial court held a colloquy, accepted the guilty pleas, convicted Nichols, and proceeded to the sentencing phase.

18 The State dismissed a charge of premeditated first degree murder.

At sentencing, the State sought the death penalty based on two specific, statutory aggravating circumstances:

(1) the murder occurred during commission of a felony (rape); [19] and

19 The Tennessee Supreme Court later held in *Tennessee v. Middlebrooks,* 840 S.W.2d 317, 346 (Tenn.1992), that reliance on this factor (i.e., that the murder occurred during the commission of a felony) as a death-penalty-qualifying aggravating circumstance is unconstitutional, in violation of Article I, § 16, of the Tennessee Constitution and the Eighth Amendment to the United States Constitution. On direct appeal in this case, the Tennessee Supreme Court acknowledged this error in Nichols's sentencing, but held it was harmless. *Tennessee v. Nichols,* 877 S.W.2d 722, 725 (Tenn.1994).

(2) Nichols's previous convictions for violent felonies (i.e., the other five rapes).

The State's first two witnesses, Chattanooga Police Officers Clarence Wilhoit and Gary Schroyer, described the Pulley-murder crime scene and authenticated the introduction of her bloody clothing into evidence. The third witness, paramedic William Craig, described Karen Pulley's condition [20] upon his arrival and his medical response, further described the crime scene, and introduced the crime scene photographs. The next two witnesses, Karen Pulley's house mates, testified about Karen Pulley, the house layout, the circumstances surrounding the murder, and the crime scene. [21] The sixth witness, Detective Richard Heck, testified about the crime scene and the ensuing investigation, and re-created the events of the rape and murder for the jury. More importantly, Det. Heck introduced Nichols's videotaped confession, which was played for the jury, and commented on that confession. He also introduced maps Nichols had drawn during the confession and narrated a video, played for the jury, in which the police re-created Nichols's path into and through the house during the murder, as Nichols had described it in his confession. The seventh witness, medical examiner Dr. Frank King, testified about the injuries to Karen Pulley; specifically, the particularities of the sexual assault, [22] evidence of her struggle, the force and brutality of the blows to her head, and the nature of her death, including the likelihood ***532** that the two-by-four was the murder weapon. He authenticated the autopsy report, as well as several diagrams and photographs, for introduction into evidence. The final witness, Hamilton County Court Clerk Harold Rohen, introduced the records of Nichols's five other rape convictions that were offered as death-penalty-qualifying, aggravating circumstances.

20 Craig testified that Pulley's head had been crushed so severely that he could not recognize her as a woman and, in fact, because her body and particularly her feet were so small, he had insisted to the other paramedics that she was actually "a small child." Craig further testified that he had "seen many [ ] violent crimes[,] ... traffic accidents [,] ... [and] carnage in [his military] service [in Vietnam], but nothing this brutal, I mean just brutal."

21 Nichols's defense counsel objected to these first five witnesses—Officers Wilhoit and Schroyer, paramedic Craig, and Pulley's two house mates—arguing that their testimony was irrelevant to the sentencing determination and, therefore, inadmissible. The trial court heard each of their testimonies, in full, outside of the presence of the jury, and then overruled the objection and allowed each of them to testify a second time, in the presence of the jury.

22 Dr. King testified that, based on his examination, the rape had likely been Karen Pulley's first experience with vaginal sex and because the opening to her hymen was so very small, much smaller than normal, significant force would have been necessary to penetrate the tissue, which he labeled a "traumatic tearing," and would have been very painful.

The defense argued for mitigation based on Nichols's admission of guilt, cooperation with police, and the psychological effects of his troubled childhood. The defense produced witnesses who testified to Nichols's good character and passive nature—his wife Joanne, a friend and coworker named Larry Kilgore, and three preachers familiar with his childhood and the orphanage: Rev. L.E. Butler, Rev. Winston Gonia, and Rev. Charles Hawkins. Joanne testified that she and Nichols had "the perfect marriage," that Nichols "was always caring, kind, and nice," and that her family adored him, so she was shocked by the crimes. She conceded that Nichols had confessed to her, but pled for his life, insisting that while he "should [not] be out on the streets," he did not "deserve[ ] the electric chair." Kilgore testified that, even knowing of the crimes, he considered Nichols the "best friend that [he had] ever had" and "one of the nicest men [he had] ever known." Rev. Butler testified that he had known Nichols since he was "a very small child," that Nichols had a religious upbringing, and that, in meeting with him since the murders, Nichols had "shown remorse ... a repentant spirit, remorseful spirit." Rev. Butler then opined about "demon possession" and that Nichols had been under the control of an evil spirit, but conceded on cross-examination that Nichols had never sought help for this perceived demon possession nor shown any remorse before his arrest. Rev. Gonia testified that Nichols had been a good child and, though Nichols had done horrible things, "[a]s far as I know ..., he's still a good person." Rev. Hawkins testified that he had known Nichols as a boy at the Tomlinson Home and had also spoken with Nichols in jail since his arrest. He remembered Nichols as "a very fine young man" and viewed him in jail as remorseful and "more like the Wayne [Nichols] that I knew as a boy growing up."

Nichols testified about his personal history, including his childhood (though he could not remember if his father was abusive to him), his time at the orphanage, his early adulthood (including the attempted rape in 1984), and his relationships with Mac

and Joanne. Nichols also discussed his crimes, asserting that he knew the rapes were "wrong and terrible," and that he had not wanted to do them, but that a "strange feeling" compelled him and he had been unable to control it. He specifically admitted to the Pulley rape and murder, though he insisted that he had not meant to kill Karen Pulley and was remorseful. On cross-examination he conceded that if he had not been arrested he would have continued prowling at night and raping women, and that he had confessed primarily to set the record straight because the police had been falsely accusing him of other rapes, assaults, and even child molestation, that he had not committed.

Dr. Eric Engum, a psychologist who is also a lawyer, testified as a psychological expert for the defense. Dr. Engum had diagnosed Nichols with "intermittent explosive disorder," a type of "impulse control disorder" in which Nichols's "ability to resist [wa]s overwhelmed." Dr. Engum found no organic brain injury and attributed this diagnosis to "psychosocial factors", explaining:

> The types of things that the experts in the field identify [as causal factors] are ***533** [a] punitive, hostile environment in which the child is raised, maybe alcoholic, abusive parent, abandonment, lack of love or empathy in the family unit, estrangement or essentially being socially isolated from the social milieu or, as we say, the world as it exists. Social isolation[,] I guess[,] is the best term. Tremendous feelings of impotence, and what I say by that is a person who feels that they're not worth anything, they're not important, who've met a lot of defeats in life and kind of internalized that and get the picture of themselves as somebody who really has not succeeded in anything. They see themselves in a very negative light.
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> ...
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> [F]rom the evidence that I was able to pull together over many months, it appears that [Nichols] was at a number of points in his life subjected to a punitive, aggressive, hostile father. It also appears that at various points in his life figures to whom he bonded, mother, grandmother were just ripped away from him. For instance, his first remembrance is at age five. He simply remembers his grandmother dying without any warning, without even being aware. At age ten, even though his mother had been sick for a long time, he apparently was never told of that, and one day she literally dies. He's taken away and put in an orphanage. He has——he bonds with a number of different house parents and they mysteriously disappear. And it seems that his life is through that. So you have a child who builds up this sense of being abandoned and he responds angrily.
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> ...
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> There is a huge gap [in his memory] and I should emphasize. From before age ten, from before the time he went into the orphanage he has minimal recollection of any events in his lifetime. And consistent with the diagnosis, most authorities believe that that's an attempt simply to repress all of the bad and negative things that occurred during his early years. And so the child essentially internalizes the anger and frustration, and it can either stay internalized or it can explode at various times.

Dr. Engum was careful to note that, in his opinion, Nichols had been aware of the wrongfulness of his actions, but had been unable to control them and was remorseful afterwards.

On cross-examination, Dr. Engum explained that Nichols's sister had refused to speak with him for his investigation, despite significant efforts. An aunt and uncle had also refused. And he had been unable to locate anyone, other than Rev. Gonia, to discuss the Tomlinson Children's Home. But the most important part of Dr. Engum's cross-examination testimony concerned the State's use of his notes to impeach his testimony and undermine his credibility. Because defense counsel had not requested, and Dr. Engum had not prepared, an expert report to give to the State, the trial court ordered the defense to turn over Dr. Engum's notes.[23] Using ***534** those notes, the State portrayed Dr. Engum as a defense team lawyer, not an independent psychologist, who was actively trying to persuade (or trick) the jury. For example, in his correspondence with defense counsel, Dr. Engum repeatedly referred to "us" and "we" as though he were part of the defense team, such as in the statement: "Joanne provides a wealth of information which I believe will help us at least support an argument for the irresistible impulse defense."[24] Moreover, concerning potential defense witness Rev. L.E. Butler, Dr. Engum wrote to defense counsel:

23 Before calling an expert witness, an attorney must provide a report as to what the expert will testify, or else make the expert available for deposition. Tenn. R.Crim. P. 16(b)(1)(B)(iii); *see also* Tenn. R. Civ. P. 26.02(4)(A)(ii); *Coe v. Tenn.,* 17 S.W.3d 193, 214 (Tenn.2000). Nichols's counsel did neither. When the State told the court that defense counsel had not provided any expert report (or even identified any expert), despite the State's express discovery request for such a report, defense counsel argued that they were not obliged to provide a report because their expert, Dr. Engum, had not prepared a written report. They offered him for deposition, but as this was now the middle of trial—with the time for declaration of experts and opportunity for depositions long since past—the court rejected that offer and ordered defense counsel to produce any written notes that Dr. Engum had prepared. Defense counsel argued that those notes were privileged work product, but the court disagreed and reviewed them *in camera.* Meanwhile, defense counsel had Dr. Engum hastily prepare a report over the lunch recess and offered that instead. The court rejected that offer as well, explaining that such a report was long past due. Defense counsel provided the court with Dr. Engum's numerous written notes and letters, which included not only Dr. Engum's psychological assessment of Nichols, but his opinion of witnesses and suggestions of legal defense strategies. After *in camera* review, the court provided those documents to the State as satisfaction of the discovery requirement, rather than forbidding Dr. Engum's testimony.

24 Note that, ultimately, Dr. Engum did not diagnose Nichols with "irresistible impulse," but rather, diagnosed him with "intermittent explosive disorder."

> Reverend Butler is the type of individual that I characterize [as] the limited public figure. He would probably protest all the way to the stand and then revel and bask in the notoriety of his testimony. I believe that his testimony could also be fairly powerful. As we have discussed, we are trying to build a mitigating factor of irresistible impulse.... Reverend Butler can add to the persuasiveness of this argument by recasting the irresistible impulse into possession by the devil. This may have a great impact and influence upon those members of the jury with religious leanings.... The only negative note that he might bring is with regard to [Nichols]'s choice to let the devil into his heart. Reverend Butler also states that if only [Nichols] had chosen to come back into the church, none of this would have happened. Hence, we need to be very careful that Reverend Butler does not recast this 'possession theme' into an active, voluntary, knowing choice. I am afraid that he might state that the church held out their hands to [Nichols] but [Nichols] did not reciprocate and it is for this reason that [Nichols] committed these crimes. During its questioning of Dr. Engum and again in closing argument, the State argued that this was a lawyer striving to "build a mitigating factor" or "influence the jury"; not a psychological expert presenting an objective opinion of about a defendant's psychological condition.

At the close of evidence and following closing arguments, the court instructed the jury on reaching its verdict and completing a particular verdict form. The court instructed the jury to reach three decisions and that only a unanimous agreement on each would warrant the death penalty:

(1) Whether the State had proven, beyond a reasonable doubt, one or more of the two listed, statutory, aggravating factors (i.e., that the murder occurred during commission of a rape, and that Nichols had convictions for five other rapes);

(2) Whether the State had proven, beyond a reasonable doubt, that the statutory aggravating factor(s) outweighed the mitigating factors; and

***535** (3) Whether the punishment should be death.

Importantly, the verdict form also required, after the first question, that the jury write down *which* of the two listed, statutory, aggravating factors they had unanimously found.

After receiving these instructions and retiring for the evening, the jury began the next day, May 12, 1990, and after two hours of deliberation, returned a death sentence, with the following four aggravating factors listed on the verdict form:

(1) First degree murder of Karen E. Pulley;

(2) The unfeeling brutality of the first degree murder of Karen E. Pulley;

(3) The lack of remorse; and

(4) The lack of respect of human rights.

The jury also found, expressly and unanimously on the form, that the aggravating factors outweighed, beyond a reasonable doubt, the mitigating factors.

Defense counsel moved for a mistrial on the basis that the State had not proposed or proven those four factors, which were not statutory factors and were, therefore, impermissible. After hearing argument (outside the presence of the jury), the trial court denied the motion and instead re-instructed the jury. Defense counsel moved the court to re-instruct about the mitigating circumstances, but the court declined. The jury returned 15 minutes later with the four prior, erroneous factors crossed out and these two statutory aggravating factors written in:

(1) The defendant was previously convicted of one or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person. The State is relying upon the crimes of Aggravated Rape, which are felonies involving the use or threat of violence to the person.

(2) The murder was committed while the defendant was engaged in committing, or was attempting to commit, or was fleeing after committing or attempting to commit rape.

The jury also found—expressly, unanimously, and beyond a reasonable doubt—that the aggravating factors outweighed, beyond a reasonable doubt, the mitigating factors.

The court then questioned the jury foreperson, asking whether the jury had found that the two statutory aggravating factors had been proven beyond a reasonable doubt *before* they returned the verdict the first time; whether the jurors had assumed they did not need to write those two factors on the verdict form; and whether the reason for that assumption was because they had found the only two factors listed. The jury foreperson answered yes to all three questions. The court then polled the entire jury, asking each juror if he or she had found the statutory aggravating factors beyond a reasonable doubt, had found the two statutory aggravating factors outweighed any mitigating factors, and had made that decision before returning the verdict the first time. [25] Each juror answered yes to each ***536** question and both the State and defense counsel declined further polling.

25 The court was consistent in questioning each of the 12 jurors, but for three occasions.
In questioning the fourth juror it polled, the court also asked: "And what I stated earlier was correct, that you assumed that since you found both of them you did not have to write those in there? ... And that's why you made these other explanations?" The juror answered yes to both of these additional questions.
In questioning the sixth juror polled, the court added the "beyond a reasonable doubt" condition to the weighing question, asking: "Did you find that they outweighed beyond a reasonable doubt the mitigating circumstances?" The juror answered yes. The court did not include the "beyond a reasonable doubt" condition in asking the weighing question to any of the other jurors. No one appeared to notice the difference, as it was not mentioned.
In re-questioning the jury foreperson, who was the seventh juror polled, the court also asked: "And I believe the verdict is in your handwriting.... So the first part you wrote in, you felt was just a word of explanation of why you did that? ... But you actually had already found the existence of those two aggravating circumstances?" The juror answered yes to all three of these additional questions; to the third she said, "Definitely, Your Honor."

The court dismissed the jury and announced the death sentence. Nichols moved for a new trial (June 11, 1990), amended that motion (November 30, 1990), and amended it again (December 13, 1990). On December 17, 1990, the trial court heard argument on Nichols's motions for new trial and denied them. Nichols appealed.

E. State Court Appeals

Nichols's trial counsel, Hugh Moore and Rosemarie Bryan, continued to represent him on appeal. On May 2, 1994, the Tennessee Supreme Court affirmed the death sentence:

> The proof demonstrates [that Nichols] is undoubtedly 'among the worst of the bad,' and clearly belongs among those who are eligible for the ultimate sanction. [Nichols] was convicted of attempted rape in 1984, served 18 months, was placed on parole, violated it[,] and was returned to prison. He committed five aggravated rapes within 90 days of his rape and murder of Karen Pulley and in three instances was armed with weapons. He prowled the city night after night searching out vulnerable female victims. Moreover, both [Nichols] and Dr. Engum testified that if released, he would continue to roam and to rape. At the most, the evidence showed only that [Nichols] had been able to function without violence in a prison setting. It does not show that the rape and murder of Karen Pulley and the previous rape convictions were aberrations in an otherwise productive life.

Tennessee v. Nichols, 877 S.W.2d 722, 739 (Tenn.1994). The Tennessee Supreme Court denied rehearing, *Tenn. v. Nichols,* 1994 Tenn. LEXIS 202 at *1 (Tenn. June 20, 1994), and the United States Supreme Court denied certiorari. *Nichols v. Tenn.,* 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (Jan. 17, 1995).

On December 19, 1995, the Tennessee Court of Criminal Appeals affirmed the five supporting rape convictions (Victims # 5, 7, 11, and 12) and the non-capital sentences in all cases, including Pulley. *Tenn. v. Nichols,* No. 03C01–9108–CR–00236, 1995 WL 755957 at *19 (Tenn.Ct.App., Dec. 19, 1995). The trial court later vacated those sentences and re-sentenced Nichols. *See Tenn. v. Nichols,* No. E2008–00169, 2009 WL 2633099 at *2 (Tenn.Crim.App. Aug. 27, 2009).

Meanwhile, on April 25, 1995, Nichols had petitioned the state trial court for post-conviction relief from the Pulley murder conviction. New attorneys represented Nichols in his state post-conviction motion: Mary Ann Green, Paul Buchanan, and Don Dawson. The trial court conducted an extensive evidentiary hearing, in which Nichols's new counsel produced over 20 additional witnesses, though not Nichols himself.[26] On March 18, 1998, the state ***537** trial court denied post-conviction relief. Nichols appealed.

26 The State called Nichols to testify at this hearing but Nichols refused to answer any substantive questions, claiming a constitutional (Fifth Amendment) right against self-incrimination. The trial court ruled that Nichols did not have such a right at the post-conviction stage of the proceedings, but did not require him to answer any questions or hold his refusal against him. On appeal, the Tennessee Court of Criminal Appeals held that Nichols "had no basis to refuse to answer the questions ... [and] an adverse inference could have been drawn because of [Nichols]'s refusal to answer." *Nichols,* 2001 WL 55747 at *16. The Tennessee Supreme Court disagreed with the appellate court, holding that Nichols properly invoked his right not to answer, but further held that the appellate court's error had not affected the decision. *Nichols v. Tenn.,* 90 S.W.3d 576, 607 (Tenn.2002).

On appeal to the Tennessee Court of Criminal Appeals, Nichols raised eleven issues, eight involving ineffective assistance of trial counsel. The appeals court affirmed. *Nichols v. Tenn.,* 2001 WL 55747 at *72 (Tenn.Crim.App. Jan.19, 2001). The Tennessee Supreme Court granted leave to appeal, particularly the issue of Nichols's Fifth Amendment right against self-incrimination *vis-a-vis* the disclosed psychologist notes, *Nichols v. Tenn.,* 2001 Tenn. LEXIS 551 at *1 (Tenn. July 2, 2001), but affirmed as well. *Nichols v. Tenn.,* 90 S.W.3d 576, 607 (Tenn. Oct. 7, 2002).

F. Federal Habeas

Nichols filed his petition for a writ of habeas corpus in federal district court on May 23, 2003. Nichols had a new attorney, Stephen Kissenger. The district court returned the petition for refiling on July 9, 2003, because it had exceeded the page limit. Nichols filed a revised petition raising 34 enumerated claims, many with multiple sub-claims (Aug. 18, 2003).

A psychiatric report by David Lisak, Ph.D., University of Massachusetts, dated February 11, 2004, opined that Nichols suffers an "array of traumatic experiences and adverse childhood conditions" that "alter[ed] [his] brain development," and led to "serious, long term psychological, psychiatric, and functional impairments." And a psychiatric report by Faye Sultan, Ph.D, University Psychological Associates (Charlotte, N.C.), dated March 18, 2004, opined that Nichols suffers from intermittent explosive disorder, dissociative disorder, and personality disorder; and was "under the influence of serious mental illness" when committing the crimes. On May 5, 2004, Nichols moved the district court to expand the record to add these reports.

In October 2005, additional DNA testing confirmed that Nichols was the source of the spermatozoa samples collected from Karen Pulley's gown. Consequently, in November 2005, Nichols's counsel dismissed several claims that were predicated on his claim of actual innocence or that relied on actual innocence as a cause-and-prejudice exception.

On July 25, 2006, the district court dismissed the petition without a hearing, but granted Nichols a certificate of appealability on seven issues. *Nichols v. Bell,* 440 F.Supp.2d 730 (E.D.Tenn.2006). On November 28, 2006, Nichols appealed here and this court subsequently granted Nichols a COA on one additional issue. [27] We address each of these eight issues in turn.

27 In his concurring opinion, *infra,* Judge Martin stresses and condemns the length of the judicial proceedings in this case (i.e., "Nichols'[s] execution was supposed to take place [in] 1994 ... and [since then] this case has been moving through our justice system ... providing no closure for the families of the victims."). It is certainly understandable that the general public, including the families of the victims, might question and even condemn the fact that the appellate process in this case—a case in which the defendant confessed and pled guilty—has lasted over 20 years. More particularly, it would be understandable that the general public, including the families of the victims, might question and even condemn the fact that this appeal has sat in the Sixth Circuit, before this panel, for almost seven (7) years. It is somewhat perplexing, however, that Judge Martin would publicize and condemn this situation.

This appeal arrived here on December 1, 2006, and was assigned to this panel on December 5, 2006, with Judge Martin designated as the lead judge, holding primary responsibility for moving the appeal forward. On March 30, 2007, Nichols's counsel moved to expand the certificate of appealability, and that motion was referred to Judge Martin, as the lead judge. The State moved for an extension of time to reply, which Judge Martin granted, and the State eventually filed its reply on April 30, 2007. Judge Martin did not move this appeal forward for over three (3) years.

On May 12, 2010, I advised the panel that I was inclined to grant the motion as to one additional issue and Judge Cook agreed on May 14, 2010. On May 26, 2010, Judge Martin advised that he had misfiled the case and motion, but would retrieve it and reply by June 7, 2010. After receiving no response from Judge Martin for five (5) months, on November 5, 2010, I offered to take the lead on the appeal and file an order granting the motion, based on the concurrence by Judge Cook. Judge Martin agreed on November 10, 2010, and I issued the order that same day.

There followed two motions for extension of time by Nichols and four by the State, all of which were granted, though eventually we ordered that no further extensions would be granted. At no point did Judge Martin object to the grant of any extension of time or urge that the appeal proceed more rapidly. The parties completed their briefing in February 2012 and, considering the availability of the advocates and the judges, oral argument was eventually scheduled for and conducted on January 24, 2013. Since that time, we have been preparing this memorandum opinion.

We agree that the 23 years since conviction in this case appears unreasonably long and, particularly, that the seven-year duration before this court was due in large part to an unjustified period of inactivity. We also recognize that although we did not insist that Judge Martin move this appeal along, much of that inactivity (at least three years' worth) remains directly attributable to him. We think Judge Martin's public denouncement of the delay in completing this appeal is misplaced.

***538 II.**

Because Nichols filed his habeas petition in May 2003, we apply the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104–132, 110 Stat. 1214, codified at 28 U.S.C. § 2254 *et al.* Under AEDPA, we review the last state court decision that adjudicated the merits, to determine whether that decision "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1)-(2).

A state court "unreasonably applies" clearly established law when its ruling is "so lacking in justification that [the] error [is] well understood and comprehended in existing law[,] beyond any possibility for fairminded disagreement." *Harrington v. Richter,* 562 U.S. ——, 131 S.Ct. 770, 786–87, 178 L.Ed.2d 624 (2011); *see also Williams v. Taylor,* 529 U.S. 362, 409, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) ("objectively unreasonable").

Importantly, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law ... [and] [t]his distinction creates a substantially higher threshold for obtaining relief than [would] *de novo* review." *Renico v. Lett,* 559 U.S. 766, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010) (quotation marks and citation omitted). In fact, "[i]t is not necessary ... to decide whether the [state court]'s decision—or, for that matter, the trial judge's [decision]—was right or wrong.... [W]hether the trial judge was right or wrong is not the pertinent question under AEDPA." *Id.* at 1865 n. 3. And the possibility that the federal habeas court might "conclude[ ] in its independent ***539** judgment that the [state court] applied clearly established federal law erroneously or incorrectly" is wholly irrelevant. *See Williams,* 529 U.S. at 411, 120 S.Ct. 1495. "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington,* 131 S.Ct. at 786.

Because "[a] federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system," *Miller–El v. Cockrell,* 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), "AEDPA ... imposes a highly deferential standard [on the federal courts] for evaluating state-court rulings, and demands that state-court decisions be given the benefit of the doubt," *Renico,* 130 S.Ct. at 1862 (quotation marks and citation omitted). Even in the case of a summary denial, when the state court has not fully explained the rationale for its decision, the reviewing "habeas court must determine what arguments or theories could have supported the state court's decision; and then it must ask whether it is possible [that] fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior [Supreme Court] decision." *Cullen v. Pinholster,* 563 U.S. ——, 131 S.Ct. 1388, 1402, 179 L.Ed.2d 557 (2011) (quotation marks and editorial marks omitted).

Moreover, "[e]valuating whether a rule application was unreasonable requires considering the rule's specificity." *Harrington,* 131 S.Ct. at 786 (quotation marks omitted). "The more general the rule at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—the more leeway state courts have in reaching outcomes in case-by-case determinations." *Renico,* 130 S.Ct. at 1864 (editorial and quotation marks omitted). "[I]t is not an unreasonable application of clearly established [f]ederal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court." *Harrington,* 131 S.Ct. at 786 (quoting *Knowles v. Mirzayance,* 556 U.S. 111, 122, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009) (quotation marks omitted)).

"If this standard is difficult to meet, that is because it was meant to be." *Harrington,* 131 S.Ct. at 786. Indeed, "[s]ection 2254(d) reflects the view that habeas corpus is a guard against *extreme malfunctions* in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id.* (quotation marks and citation omitted; emphasis added).

A. Assistance of Counsel

Nichols claims he received ineffective assistance of counsel, arguing that his trial counsel did not thoroughly investigate possible mitigating witnesses and, consequently, did not provide the jury with a sufficient mitigation argument. Nichols specifically contends that his trial counsel should have focused on his abusive childhood and called more witnesses to bolster that argument.

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that it prejudiced him. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance means that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. Prejudice means "there is a reasonable probability that, but for counsel's unprofessional errors [i.e., deficient performance], the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. A habeas petitioner is ***540** entitled to relief on an ineffective-assistance claim only if the state court's rejection of that claim was "contrary to, or involved an unreasonable application of" *Strickland,* or rested "on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Therefore, the combined effect of *Strickland* and § 2254(d) is "doubly deferential" review. *Pinholster,* 131 S.Ct. at 1403 (citation omitted). Put differently, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland* 's deferential standard." *Harrington,* 131 S.Ct. at 788.

The counsel at issue, Nichols's trial counsel (Hugh Moore and Rosemarie Bryan), presented seven witnesses at the sentencing trial. Nichols's wife, his best friend, and three preachers testified that—but for the rapes and the murder—Nichols was a kind and caring husband and friend, had been a good-natured and religious child, and was sincerely remorseful. [28] Nichols testified also, to emphasize his cooperation with the police, that he had confessed willingly, and that he was sorry. He also testified about his troubled childhood and the uncontrollable, energized feeling that compelled him to rape and murder. Dr. Engum testified about Nichols's troubled childhood, opined that Nichols suffered from "intermittent explosive disorder," and connected the two.

28 One of the preachers, Rev. Butler, also testified about demon possession and offered his belief that, when committing the rapes and murder, Nichols had been under the control of an evil spirit.

After his conviction and unsuccessful appeals, Nichols obtained new counsel and petitioned the state trial court for post-conviction relief. During eight days of hearings on that petition, Nichols's post-conviction counsel introduced thousands of pages of records and more than 20 witnesses, including family, people from his childhood, preachers, teachers, orphanage workers, jail and prison guards, two psychiatric experts, his trial counsel, and even a sentencing expert. [29] The theory was that if trial counsel had produced all of these witnesses and had further emphasized Nichols's troubled childhood as a mitigating factor, such an approach would have persuaded the jury to forego the death penalty. The state trial court was not persuaded, explaining:

29 The State called Nichols to testify but Nichols refused to answer any substantive questions. *See* fn. 26, *supra.*

> [Nichols's post-conviction counsel] presented numerous relatives and acquaintances at the hearings in this matter to demonstrate the amount and type of mitigating evidence which was not presented at the sentencing hearing in the original trial.... Many of these witnesses, however, were cumulative and only expounded on issues which were raised through the

evidence presented by trial counsel at the sentencing hearing, i.e., the evidence was 'substantially similar' to the mitigating evidence previously presented to the jury. The psychologist retained by post-conviction counsel even testified that while he may have had more personal history in conducting his evaluation, it was essentially the same kind of information Dr. Engum and trial counsel had at the original trial.

> The issue of the abusive environment in which [Nichols] grew up was addressed at [Nichols]'s sentencing hearing. The new witnesses who testified here would thus have been cumulative and the prejudice is not apparent. In addition, the allegations of sexual misconduct related to [Nichols]'s sister were ***541** also raised at the motion for new trial. It was determined then and on direct appeal that the evidence was additional evidence on the issue of the abusive home environment which already had been raised by the evidence. Most of the evidence related to these claims was hearsay and it is noted that [Nichols] did not himself testify to these alleged incidents and apparently has no memory of them. The documents [submitted in post-conviction] also state and the trial court found that [Nichols] and counsel made a diligent effort to find this type of information prior to trial but were unable to find any witness who would state more specific facts about any abuse. The documents demonstrate that [Nichols] told investigator Cohan that his father disciplined them but not really beyond what he thought was the parental norm. [Nichols] also told his defense team about the orphanage and stated that he had not been treated badly there. He even told them about one set of houseparents who considered keeping him when the orphanage was closing but that he was taken back to his father instead.
>
> Many of the witnesses testified that they were not contacted and that [Nichols] probably did not know how to contact them. Some witnesses, however, testified that [Nichols] knew how to contact them but that they received no contact and did not step forward on their own. Using 20–20 hindsight[,] more witnesses may have been preferable; based upon all the evidence and documentation, however, this court finds that counsel w[ere] not derelict in their investigation of this case and that no prejudice has been shown. The evidence indicates that many witnesses were unwilling to talk to counsel about many of these matters during the time frame of [Nichols]'s original proceedings [eight years earlier]. Any additional witnesses would for the most part have been cumulative or the weight of their testimony would have been minimal. The aggravator of prior violent felonies was very substantial. It is also noted that this factor could be even more substantial at any resentencing hearing because [Nichols] subsequently pled guilty to additional offenses.

The state appellate court affirmed. Nichols appealed to the Tennessee Supreme Court, which was the last state court to render a decision on this issue.

The Tennessee Supreme Court conducted its own review of the witness testimony from the hearings, reiterated the trial court's findings, and "agree[d] that the evidence in the record supported the trial court's findings and conclusions." *Nichols v. Tenn.,* 90 S.W.3d 576, 598–602 (Tenn.2002).

> [T]he record indicates that trial counsel identified and supported the relevant mitigating themes. The evidence presented at post-conviction did not contest trial counsel's performance in this regard, but rather, second-guessed the quantity of the mitigating evidence and the manner of its presentation....
>
> [I]t appears that any of the evidence at post-conviction which was not cumulative or may have bolstered the evidence presented at trial would not have affected the jury's determination given the strong evidence supporting the prior violent felonies aggravating circumstance. In sum, Nichols has not established a reasonable probability that the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 602 (quotation marks and citations omitted). Therefore, the Tennessee Supreme Court, on an independent review of ***542** the record, determined that Nichols's trial counsel's performance was not deficient and, even if it were, Nichols had not shown (or could not show) prejudice.

Upon review of this record, we conclude that the Tennessee Supreme Court reasonably applied *Strickland* and reasonably determined the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d). In his briefing here, Nichols's counsel summarizes the post-conviction evidence:

> Witnesses vividly described the isolation and physical, sexual[,] and emotional abuse in the Nichols house; explained in detail how the deaths of his grandmother and mother affected Nichols; described the escalation of abuse by Nichols' father; explained the circumstances of abuse leading to the children's placement in the orphanage; vividly described Nichols' separation from his sister and the 'hellacoius' conditions at the orphanage; discussed Nichols' life after the orphanage with his still-abusive father, the distressing circumstances regarding Nichols' daughter's mother resulting in alienation from his daughter; and, ultimately, his changed disposition.

While the additional testimony may have been more "vivid," "detailed," or "distressing," it was not new—all of these basic facts had been introduced at the original sentencing, albeit in a more perfunctory or cursory manner. This failure to produce or identify any new, previously undiscovered, facts severely undermines the claim that the original investigation was objectively deficient. Moreover, this additional evidence is subject to the same vulnerability that Nichols's original counsel feared at the original sentencing: numerous people—be it his sister, his cousins, or the other orphans—suffered the same, or worse, childhood conditions as Nichols, yet none of them committed serial rapes or murder. We agree with the Tennessee Supreme Court that the additional evidence presented at the post-conviction hearings was ultimately duplicative or merely cumulative of the evidence presented at the original sentencing trial. And we agree that a comparison does not reveal that the additional mitigating evidence is so compelling that there is a reasonable probability that the outcome of the sentencing trial would have been different.

Because our review is "doubly deferential," *Pinholster,* 131 S.Ct. at 1403, we are also mindful that "[i]n assessing deficient performance, reviewing courts must take care not to second guess strategic decisions that failed to bear fruit." *Jackson v. Bradshaw,* 681 F.3d 753, 760 (6th Cir.2012) (citing *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052) (quotation marks omitted). Both trial attorneys, Hugh Moore and Rosemarie Bryan, testified in the post-conviction hearings concerning the accusations of deficient performance posed by Nichols's post-conviction counsel.

Hugh Moore answered numerous questions about the decisions made in preparation and performance of the Pulley murder trial. At one point during this testimony, Moore explained:

> Question: Did you make what you feel like was a good attempt to try to get as much mitigation before the jury as possible?
>
> Moore: To get as much before the jury as possible?
>
> Question: Yes, sir.
>
> Moore: I made an attempt to put the very best case I could before the jury, but I'm not sure that putting the very best case before the jury means putting as much evidence before the jury as you possibly can.
>
> Question: Did you—were you here present when the other witnesses testified the last time that ... were all pretty much mitigation-type witnesses?
>
> ***543** Moore: I heard some of them.
>
> Question: All right. Did you—you did not call any of those that had previously testified here on the two days in this post conviction, did you?
>
> Moore: No, and I didn't hear a single witness testify that I would have called.
>
> Question: Okay. So it's your feeling that none of these witnesses added anything?

Moore: Add anything to—I mean factually added something?

Question: Added anything sufficient to the point where you felt like you would have called them had you—

Moore: No, no.

Moore reiterated this belief in later testimony, answering, "I don't believe that cumulative evidence is very effective with a jury."

Rosemarie Bryan testified that, in her opinion, the post-conviction witnesses were cumulative to those she and Moore had presented at the original sentencing, and she "thought the damaging testimony from those folks hurt [post-conviction counsel's case] a lot more than how they helped and ... in front of a jury that would have been much worse." Specifically, she said:

> In my estimation, ... [those additional witnesses] did no good and would have done no good in the case. Yes, you are absolutely right, you put people on the stand that said things that were not said at [Nichols]'s sentencing phase. Yes, you did. But I do not believe that any of that would have made any difference in the trial. And I believe we put on—if you had 90 lawyers they'd put on 90 different mitigation phases, they'd put on 90 different sorts of trials. I think we put on the best we could put on under all of the circumstances, and we made some judgment calls not to use some people in the family. And after seeing them here I think I made the right call.

When questioned why she did not further emphasize Nichols's troubled childhood, Bryan answered that, "we made a studied judgment call on that and were afraid that if we pushed it too far ... it could come back to bite us, yes, and it could not be helpful."

Both trial attorneys defended the challenged performance as a strategic decision or decisions, made based on their training, experience, and the particular circumstances of the case. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *English v. Romanowski,* 602 F.3d 714, 726 (6th Cir.2010) (quoting *Strickland,* 466 U.S. at 690, 104 S.Ct. 2052) (quotation marks and editorial marks omitted). Nichols has not proven that the investigation was not thorough, nor has he proven that the strategic choices were unreasonable.

The state court's resolution of this claim was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent. Nor was the state court decision based on an unreasonable determination of the facts in light of the evidence presented in the postconviction proceedings. Consequently, Nichols is not entitled to habeas relief on this claim of ineffective assistance of counsel during the penalty phase of his death penalty proceeding.

B. Jury Instruction

Nichols claims that the court improperly required unanimity in finding a mitigating factor because it did not instruct, explicitly and specifically, that unanimity was not required. Nichols relies on *Mills v. Maryland,* 486 U.S. 367, 370, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), in ***544** which the Supreme Court held a death sentence unconstitutional because the jurors, attempting to complete the verdict form in a yes-or-no manner, as instructed, thought they were precluded from finding mitigating factors unless they agreed unanimously on the existence of a particular mitigating factor. Such is not the case here.

In his briefing here, Nichols's counsel asserts that "the instructions and verdict form instructed the jurors to unanimously agree on mitigating factors." Apt. Br. at 48 (capitalization omitted). That is simply not true. The instructions were as follows,[30] with underlining added:

30 On its first attempt, the court misread the instructions, omitting the "beyond a reasonable doubt" phrase at certain locations. After a bench conference and a brief recess, the court read the instructions to the jury a second time, but again omitted the "beyond a reasonable doubt" phrase at certain locations. The court read the second half of this passage twice more (four total) before getting it entirely correct. The quoted passage is the final, correct version.

Tennessee Code Annotated 39–2–203(i) provides that no death penalty shall be imposed by a jury but upon a *unanimous* finding that the State has proven beyond a reasonable doubt of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

(1) The defendant was previously convicted of one or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person.

The State is relying upon the crimes of Aggravated Rape, which are felonies involving the use of threat or violence to the person.

(2) The murder was committed while the defendant was engaged in committing, or was attempting to commit, or was fleeing after committing or attempting to commit rape.

Members of the Jury, the Court has read to you the aggravating circumstances which the law requires you to consider if you are to find beyond a reasonable doubt that the evidence was established. You shall not take account of any other facts or circumstances as the bases for deciding whether the death penalty would be appropriate punishment in this case.

Tennessee Code Annotated 39–13–203(j) provides that in arriving at the punishment, the jury shall consider as heretofore indicated, any mitigating circumstance which shall include, but not be limited to, the following:

(1) The murder was committed while the defendant was under the influence of extreme mental or emotional duress.

(2) The defendant acted under extreme duress.

(3) The capacity of the defendant to appreciate the wrongfulness of his conduct or 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.

(4) Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense.

If you *unanimously* determine that at least one or more statutory aggravating circumstances have been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances outweigh any mitigating circumstance or circumstances beyond a reasonable doubt, the sentence shall be death. The jury shall state in writing the statutory aggravating circumstance or circumstances ***545** so found, and signify in writing that the statutory aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances so found, beyond a reasonable doubt.

You will write your findings and verdict upon the enclosed form attached hereto and made a part of this charge. Your verdict should be as follows:

(1) We, the jury, *unanimously* find the following listed statutory aggravating circumstance or circumstances, beyond a reasonable doubt.

(2) We, the jury, *unanimously* find that the statutory aggravating circumstance or circumstances so listed above outweigh the mitigating circumstance or circumstances, beyond a reasonable doubt.

(3) Therefore, we, the jury, *unanimously* find that the punishment shall be death.

The verdict must be *unanimous* and each juror must sign his or her name beneath the verdict.

If you *unanimously* determine that no statutory aggravating circumstances have been proved by the State beyond a reasonable doubt; or if the jury *unanimously* determines that a statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt but that said statutory aggravating circumstance or circumstances did not outweigh one or more mitigating circumstances beyond a reasonable doubt, the sentence shall be life imprisonment. You will write your verdict upon the enclosed form attached hereto and made a part of this charge.

The verdict should be as follows:

We, the jury, *unanimously* find that the punishment shall be life imprisonment.

The verdict must be *unanimous* and signed by each juror.

You will have two forms. The first form, Punishment of Death.

(1) We, the jury, *unanimously* find the following listed statutory aggravating circumstance or circumstances, beyond a reasonable doubt:

(Here list the statutory aggravating circumstance or circumstances so found beyond a reasonable doubt, which shall be limited to those enumerated by the Court for your consideration.)

(2) We, the jury, *unanimously* find that the State has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh beyond a reasonable doubt the mitigating circumstance or circumstances.

(3) Therefore, we, the jury, *unanimously* find that the punishment for the defendant, Harold Wayne Nichols, shall be death.

Then there are twelve places for each juror to affix your signature.

The second form provides Punishment of Life Imprisonment.

We, the jury, *unanimously* find that the punishment shall be life imprisonment.

And there are twelve spaces for each juror to sign your name to that form.

(underling added).

Contrary to counsel's mischaracterization, neither these instructions nor the verdict form ever required the jurors to agree unanimously on any mitigating factor or factors. A plain reading of these instructions reveals that unanimity was required to find the aggravating factors, unanimity was required to find that the aggravating factors outweighed the mitigating factors, and unanimity was required to impose the sentence, be it death or life imprisonment. ***546** But, in stark contrast, unanimity was not required for the mitigating factors—any juror could, in fact was instructed to (i.e., "shall"), consider any mitigating factor, listed or otherwise, and, for the weighing step, mitigating factors were effectively presumed, as there is no requirement that mitigating factors be "found" at all.

Unlike the jury instructions in *Mills,* 486 U.S. at 371, 108 S.Ct. 1860, these instructions did not require or even imply that the jury must agree upon the existence of a mitigating circumstance. At most, these instructions omitted an express instruction about the mitigating factors, or as Nichols's counsel put it in his briefing, "[n]o instruction told the jury what to do if some

but not all of the jurors believed that a mitigating factor existed." As an aside, we do not agree that the absence of an express instruction left the jury without guidance in this circumstance—the instructions required each juror to consider any mitigating factor, listed or otherwise, in its weighing calculus. That is, if some but not all of the jurors (or even a single juror) found the existence of a mitigating factor, the instructions required those jurors (or that juror) to weigh it against the aggravating factors, albeit only considering those aggravating factors that had been unanimously agreed upon.

Regardless, based on our review and the foregoing passage, we find that with regard to mitigating factors, these instructions contain no express requirement of unanimity—that is, they omit any requirement of unanimity. And, as we have previously held, "the only reasonable reading of [such] instruction [i]s that, by omission, no unanimity [i]s required." *See* *Coe v. Bell,* 161 F.3d 320, 338 (6th Cir.1998) (citing *Kordenbrock v. Scroggy,* 919 F.2d 1091, 1121 (6th Cir.1990) (en banc)).

The state court's resolution of this claim was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent. Nor was the state court decision based on an unreasonable determination of the facts. Consequently, Nichols is not entitled to habeas relief on this claim of improper jury instructions during the penalty phase of his death penalty proceeding.

C. Verdict Form

Nichols claims that the jury's error in completing the verdict form was actually an error in reaching its decision, which was uncorrectable, invalidated the original verdict, and, consequently, necessitated a mistrial. There is no dispute that the jury erred in completing the verdict form; the question is whether the court's ruling or response was an unreasonable application of clearly established constitutional law. *See* 28 U.S.C. § 2254(d)(1); *Harrington,* 131 S.Ct. at 786.

As detailed in the foregoing section, the court thoroughly instructed the jury on making its sentencing decision and completing the verdict form. The court specified that the jury had three decisions and that only a unanimous agreement on each would warrant the death penalty:

(1) Whether the State had proven, beyond a reasonable doubt, one or more of the listed, statutory, aggravating factors;

(2) Whether the State had proven, beyond a reasonable doubt, that the statutory aggravating factor(s) outweighed the mitigating factors; and

(3) Whether the punishment should be death.

After two hours of deliberation, the jury returned a unanimous verdict—on a form signed by all 12 jurors—answering affirmatively each of these three questions. But the verdict form also required, after the first question, that the jury write down ***547** which listed, statutory, aggravating factors they had unanimously found. And this is the jury's error: in completing this portion of the prescribed form, the jury foreperson did not write down either of the listed, statutory, aggravating factors (i.e., the prior violent crimes of rape or that the murder was committed as part of perpetrating a rape); instead, the jury foreperson wrote down (and the other jurors signed on to) the following four factors:

(1) The first degree murder of Karen Pulley;

(2) The unfeeling brutality of the first degree murder of Karen Pulley;

(3) Nichols's lack of remorse; and

(4) Nichols's lack of respect for human rights.

The court had not instructed the jury on any of these four factors, nor were they listed on the written charge sent to the jury room. These were the jury's own creation. But, notably, the jury did not reject the two listed aggravating factors, expressly or otherwise. In fact, the jury foreperson explained to the court later that the jury had found that the State had proven the two statutory aggravating factors but had mistakenly assumed that those were not the factors to be written on the form, and instead thought, apparently, that the form was asking them to supply additional reasons. So the court had a death verdict in which the jury found unanimously, beyond a reasonable doubt, that the State had proven aggravating factors, that the aggravating factors outweighed the mitigating factors, and that death was the proper sentence. But in the part of the form explaining its decision, the jury had listed the wrong aggravating factors and had failed to list the right ones. The court assumed—correctly, as was confirmed in colloquy with the jury foreperson—that the jury agreed on the listed, statutory, aggravating factors, but had misunderstood the requirement that they copy those same listed factors onto the verdict form.

Defense counsel moved for a mistrial on the basis that the State had not proposed or proven the four new factors, which were not statutory factors, and argued further that those non-statutory factors were impermissible. After hearing argument (outside the presence of the jury), the trial court denied the motion and instead re-instructed the jury to re-complete the form. The jury returned 15 minutes later with the four non-statutory factors crossed out and the two listed, statutory, aggravating factors written in. In the returned verdict, the jury again found—expressly, unanimously, and beyond a reasonable doubt—that these aggravating factors outweighed the mitigating factors and, therefore, the appropriate punishment would be death.

As a factual matter, the Tennessee Supreme Court determined that, as part of its original verdict, the jury had found that the State had proven the statutory aggravating factors, even though they had failed to write those factors on the verdict form, explaining:

> [T]he jury originally had not listed these two circumstances because it had assumed it need not copy statutory aggravating circumstances on the form. Each juror answered affirmatively when asked by the court whether, before reporting the verdict the first time, he or she had found (1) that each of the two statutory aggravating circumstances had been proved beyond a reasonable doubt, and (2) that these circumstances outweighed any mitigating circumstances.

Tennessee v. Nichols, 877 S.W.2d 722, 730 (Tenn.1994). Based on our careful review of the record, this is a perfectly reasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2).

***548** From this, the Tennessee Supreme Court held that the initial verdict was legal and valid, despite the error in the verdict form, and affirmed the trial court's refusal to grant a mistrial. *Nichols,* 877 S.W.2d at 730–31. The court held, as a matter of state law, that, "[w]hen the jury reports an incorrect or imperfect verdict, the trial court has both the power and the duty to redirect the jury's attention to the law and return them to the jury room with directions to reconsider their verdict." *Id.* at 730 (citing *Tennessee v. Mounce,* 859 S.W.2d 319, 322 (Tenn.1993)). The court further held that the four additional factors, though non-statutory, were "factors the jury may consider under the [Tennessee murder-sentencing] statute." *Id.* at 731 (citing Tenn.Code Ann. § 39–13–204(c)).

As a matter of federal constitutional law, the court cited *California v. Ramos,* 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), *Barclay v. Florida,* 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), and *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), to support its holding that the United States Constitution would not forbid the jury from considering those additional four factors. In *Zant,* 462 U.S. at 878, 103 S.Ct. 2733, the Supreme Court explained

that "statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death." In *Barclay,* 463 U.S. at 950, 103 S.Ct. 3418, the Supreme Court said: "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether or not death is the appropriate punishment." We have no difficulty concluding that the Tennessee Supreme Court reasonably applied this precedent.

In his briefing here, Nichols's counsel points to *Stringer v. Black,* 503 U.S. 222, 232, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), as a constitutional prohibition against a capital jury's creation of its own aggravating factors and, therefore, contends that the Tennessee Supreme Court's ruling was contrary to or an unreasonable application of this clearly established law. We find that *Stringer* does not stand for any such proposition. The jury in *Stringer* did not create any aggravating factors of its own; rather, the state legislature defined the factors, the court charged the jury with them, and the jury considered and decided them as charged. *Stringer,* 503 U.S. at 226, 112 S.Ct. 1130. When Stringer's counsel argued that one of the factors defined and charged was unconstitutionally vague, the Supreme Court agreed, concluding that the "[u]se of a vague or imprecise aggravating factor" was problematic. *Id.* at 237, 112 S.Ct. 1130. In the present case, the court charged the jury with two explicit, statutory, aggravating factors, which were neither vague nor imprecise. The error here was not due to any vague or imprecise language in the charged aggravating factors, the error was due to the jury's misunderstanding of how to complete the verdict form. Consequently, *Stringer* is inapposite to the present issue and circumstances.

Neither *Stringer* nor any of the other cases cited in Nichols's brief demonstrate that the state trial court's decision to send the jury back to correct the verdict form was contrary to or an unreasonable application ***549** of any federal law. Nichols is not entitled to relief on this claim.

D. Jury Re–Instruction

Nichols claims that, rather than re-instructing the jury to clarify the verdict form, the trial court ordered a death sentence: i.e., "the court directed a death verdict"; "[t]he judge instructed the jury to disregard mitigating evidence"; and "the jury wasn't allowed to consider mitigating evidence." Apt. Br. at 76–77. These claims are not true. The trial court began from the premise —which the Tennessee Supreme Court properly affirmed, as explained in the foregoing section—that the jury had already announced its verdict, and re-instructed it as follows about the form:

> Jurors, Tennessee Code Annotated 39–2–203(i) provides that no death penalty shall be imposed by a jury but upon a unanimous finding that the State has proven beyond a reasonable doubt the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:
>
> (1) The defendant was previously convicted of one or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person.
>
> (2) The murder was committed while the defendant was engaged in committing, or was attempting to commit, or was fleeing after committing or attempting to commit rape.
>
> Members of the jury, the Court has read to you the aggravating circumstances which the law requires you to consider if you find beyond a reasonable doubt that the evidence was established. You shall not take into account of any other facts or circumstances as the bases for deciding whether the death penalty would be appropriate punishment in this case. [31]

31 As was explained in the foregoing section, both Tennessee and federal law permit a jury to consider additional aggravating factors, so this instruction was not a correct statement of either law. Consequently, if the jury erred by failing to abide by this particular instruction, such error would not be cognizable on habeas review as a violation of federal law.

The form for Punishment of Death.

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances beyond a reasonable doubt:

(Here list the statutory aggravating circumstance or circumstances so found, which shall be limited to those enumerated by the Court for your consideration.)

And then there is a space for the jury to fill in the statutory aggravating circumstance.

The jury can take the Court's charge and retire back to the jury room.

Defense counsel urged the court, both before and after the re-instruction, to re-instruct the jury on mitigating factors also, but the court refused, explaining that "they have [already] found that he is guilty." That is, the trial court was not instructing the jury to reconsider its verdict or any aspect of it; the trial court was accepting that the jury had already reached and announced a verdict, and was merely instructing the jury to clarify on the form that they had properly considered—and found that the State had proven—the statutory aggravating factors.

On direct appeal, the Tennessee Supreme Court affirmed this succinctly, based on its earlier holding—which we approved in the foregoing section—that "the initial verdict was a legal verdict and the jury had a right to correct it under proper instruction." *Nichols,* 877 S.W.2d at 735. ***550** Accordingly, "[t]here was no reversible error in the failure to recharge the mitigating circumstances or to include the words 'beyond a reasonable doubt' in the questions asked the jurors." *Id.*

Nichols contends that the court was required to instruct the jury to reconsider whether it found the statutory aggravating factors and, if so, to re-weigh those aggravating factors—without considering the improper aggravating factors—against the mitigating factors, as though it had never reached the first verdict. The district court identified the controlling law on this issue:

> The [petitioner's] burden of demonstrating that an erroneous [jury] instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned.

Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977) (footnotes, quotation marks, and citations omitted). The district court also elaborated on the applicable facts and circumstances, analyzed this claim under that law, and found no such prejudice from this particular instruction:

[T]he sworn jury was initially properly and fully instructed on mitigating factors and weighing aggravating and mitigating factors. The jury was initially given the requested mitigating instructions and the written instructions were in the jury room during deliberation. This is not a case where the jury was not instructed or not properly instructed on fixing punishment, at least initially after several corrected instructions. The polling of the jury reveals [Nichols] did not suffer any prejudice due to the trial court's failure to re-instruct on the mitigating circumstances.

> Significantly, the trial court sent the written instructions to the jury during its initial deliberations, and nothing in the record reveals that the jury did not have them when it returned for further deliberations. [Nichols]'s trial attorneys argued the mitigating evidence and asked the jury to sentence him to life based on that evidence. Moreover, the State presented strong aggravating evidence, as shown by the relatively short period of deliberation. [Nichols] raped and murdered the victim; after committing that crime, [Nichols] violently raped several other women; and [Nichols] admitted he was guilty of the felony-murder and of several other rapes.
>
> [T]he jury was required to decide whether to sentence [Nichols] to life imprisonment or death. Evaluating the jury instructions as a whole, it is clear the jury was initially fully and properly instructed on mitigating evidence and how to weigh it against the aggravating circumstances. There was no evidence of jury confusion in relation to mitigating evidence and the weight to accord it but rather, the confusion was on what aggravating circumstances to list on the death verdict [form].

Nichols v. Bell, 440 F.Supp.2d 730, 804–05 (E.D.Tenn.2006) (footnotes omitted).

Nichols cannot show that the state trial court's failure to re-instruct the jury on mitigating factors was so prejudicial that his conviction violates due process. Nor can Nichols show that the state court decision was contrary to or an unreasonable application of clearly established federal law, or an unreasonable determination of ***551** the facts. Nichols is not entitled to relief on this claim.

E. Polling the Jury

Nichols claims that the trial court's post-verdict polling of the jury, after it had resubmitted the corrected verdict form, comprised questions that: (1) misstated the law, in that they did not specifically ask whether each juror had found each decision "beyond a reasonable doubt"; and (2) were coercive, in that they "were calculated to elicit an affirmative response to give legitimacy to an otherwise illegal verdict." The State responds that, even assuming these questions were thus flawed, Nichols cannot point to any Supreme Court case law holding that the trial court must conduct post-verdict polling in a particular manner, because there is no such holding.

Recall that when the jury returned its corrected verdict form, the jury foreperson had crossed out the four non-statutory factors and written in the two statutory aggravating factors. The form also stated the jury's finding, beyond a reasonable doubt, that the aggravating factors outweighed the mitigating factors and that the death penalty was the appropriate sentence.

The court questioned the jury foreperson, asking whether the jury had found—*before* they returned the verdict the first time—that the State had proven the two statutory aggravating factors beyond a reasonable doubt; whether the jurors had mistakenly assumed that those were not the factors to be written on the verdict form; and whether the reason for that assumption was because they had found the only two factors listed. The jury foreperson answered yes to all three questions. The court then polled the entire jury individually, asking each juror if he or she had found the statutory aggravating factors beyond a reasonable doubt, had found the two aggravating factors outweighed any mitigating factors, and had made that decision before returning the verdict the first time. [32] Each juror answered yes to each question.

32 The court was consistent in questioning each of the jurors, but for three occasions. *See* fn. 25, *supra.*

As discussed in the two foregoing sections, the Tennessee Supreme Court began its analysis of this issue from its holding that "the initial verdict was a legal verdict," and concluded that "[t]here was no reversible error in the failure to ... include the words 'beyond a reasonable doubt' in the questions asked the jurors." *Nichols,* 877 S.W.2d at 735. The court also elaborated on its reasoning:

> This issue is essentially a challenge of the verdict's reliability. In this respect, it should be noted, first, that the jurors were instructed that they must find that aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt and, second, that the verdict form itself states that the jury unanimously found that the statutory aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. The court was only ascertaining that this was the jurors' verdict and its omission of the phrase 'beyond a reasonable doubt' in this question during the polling does not invalidate an otherwise valid verdict.

Id. at 736.

In his briefing here, Nichols cites three cases as putative Supreme Court precedent—*Brasfield v. United States,* 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345 (1926), ***552** *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), and *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)—but each is significantly off point. *Brasfield,* 272 U.S. at 449, 47 S.Ct. 135, stands for the proposition that a trial court may not "inquir[e] of a jury, unable to agree, the extent of its numerical division." Here, the jury had already agreed and the court made no such inquiry. *Lowenfield,* 484 U.S. at 241, 108 S.Ct. 546, stands for the proposition that a trial court may inquire of a jury, unable to agree, whether further deliberation would enable them to arrive at a verdict. Here, the jury had already agreed, and the court made no such inquiry. Finally, *Maynard,* 486 U.S. at 360, 108 S.Ct. 1853, stands for the proposition that statutorily prescribed death-qualifying aggravating factors must not be vague, arbitrary, or capricious. *Maynard* says nothing whatsoever about post-verdict polling of a jury. None of these cases provides clearly established precedent on this particular point.

In its analysis, the district court quoted from an unpublished Sixth Circuit case for the guiding purpose behind post-verdict jury polling. *See Nichols,* 440 F.Supp.2d at 807–08. To wit:

> The purpose of [post-verdict] polling is to ascertain that each juror approves of the verdict and has not been coerced or induced to concur in a verdict to which he or she does not fully assent. [Post-verdict] [p]olling gives effect to each juror's right to change his or her mind about the verdict agreed to in the jury room even though the likelihood of such change is remote. If the trial court decides to poll the jury at all, it has substantial discretion in determining the manner of polling.

Dunaway v. Moore, 78 F.3d 584, 1996 WL 102425, *7 (6th Cir.1996) (table) (citing *U.S. v. Miller,* 59 F.3d 417, 419 (3d Cir.1995), *Audette v. Isaksen Fishing Corp.,* 789 F.2d 956, 958 (1st Cir.1986)).

Considering all of the facts and circumstances of this case, the combination of the jury's initial jury verdict, the re-instruction, and the post-verdict polling, Nichols has not demonstrated that the state court decision was based on an unreasonable determination of the facts in light of the evidence, or that the state court decision was contrary to or an unreasonable application of any clearly established federal law. Nichols is not entitled to habeas relief on this claim.

F. Order of the Trials

Nichols claims the State violated his rights to due process, equal protection, or the Eighth Amendment by prosecuting later-occurring crimes first, rather than trying them chronologically in the order he committed the crimes (i.e., Pulley first), in order to create prior-violent-felony convictions to qualify him for the death penalty. The State responds that, even assuming the factual predicates, Nichols cannot point to any Supreme Court holding that requires the State to prosecute offenses in chronological order to avoid prior convictions, because there is no such holding.

The Tennessee Supreme Court analyzed this claim under both Tennessee state law and federal constitutional law, and rejected it outright:

> As a result of the serial rapes, [Nichols] faced forty [40] charges growing out of some fourteen [14] incidents. The murder of Karen Pulley occurred during the first such incident. The trial court denied [Nichols]'s motion to have the cases tried in chronological order.... [Nichols] contends that allowing a prosecutor the discretion to orchestrate a series of trials in this fashion constitutes cruel and unusual punishment and violates ***553** due process and equal protection. He particularly claims that such discretion results in arbitrary and capricious imposition of the death penalty contrary to the principles of *Furman v. Georgia,* 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972).
>
> Tenn.Code Ann. § 39–13–204(i)(2) provides that the death penalty may be imposed where the defendant was previously convicted of one or more felonies other than the present charge, whose statutory elements involve the use of violence to the person. For purposes of this aggravating circumstance, the order in which the crimes were actually committed is irrelevant so long as the convictions have been entered before the sentencing hearing at which they were introduced.
>
> It goes without saying that the implementation of this aggravating circumstance may be subject to a certain degree of prosecutorial discretion; but implementation of the criminal laws against murder necessarily requires discretionary judgments. *McCleskey v. Kemp,* 481 U.S. 279, 299 [107 S.Ct. 1756, 95 L.Ed.2d 262] (1987). Prosecutorial discretion of this nature does not offend the Eighth Amendment under *Furman,* which 'held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the criminal.' *Gregg v. Georgia,* 428 U.S. 153, 199 [96 S.Ct. 2909, 49 L.Ed.2d 859] (1976). Where this fundamental discretion is involved, it will not be assumed that 'what is unexplained is invidious,' *McCleskey v. Kemp,* 481 U.S. at 309 [107 S.Ct. 1756], and 'exceptionally clear proof' is required before an abuse of discretion will be found in the operation of the criminal justice process. *Id.* at 299 [107 S.Ct. 1756]. No such showing has been made in this case. We further find that the record does not support [Nichols]'s assertion that the prosecutor's decision concerning the order of prosecution of the multiple charges facing [Nichols] violated either equal protection or due process. Accordingly, we find no merit in this issue.

Nichols, 877 S.W.2d at 735–36 (certain quotation marks, editorial marks, and citations omitted).

The district court echoed this reasoning and added its own analysis concerning the application of Supreme Court precedent, finding no support for Nichols's claim:

> Under Tennessee law, the language in the statute, 'previously convicted,' has been defined as clearly indicating that the date of conviction, not the date of the commission of the crime, is the important factor. The order in which the crimes were actually committed is irrelevant, as long as the convictions have been entered before the sentencing hearing at which they are introduced. Tennessee law requires that the State prove prior criminal convictions, not prior criminal activity.

> Although [Nichols] claims the prosecutor's decision to try the cases out of chronological order was done so as to create an aggravating circumstance of prior violent felony convictions, violating his right to equal protection and due process, [Nichols] has not pointed to a United States Supreme Court case which holds that it is unconstitutional for a prosecutor to try cases out of chronological order for the purpose of obtaining evidence for the prior felony aggravating circumstance for a death penalty ***554** trial. In *Tuilaepa v. California,* 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750] (1994), the Supreme Court did find that states are permitted to focus the jury's attention on a capital defendant's prior criminal record. The issue in *Tuilaepa* was the constitutionality of an aggravating circumstance which permitted the sentencer to consider the defendant's prior criminal activity. Although the challenge was based on the allegation that the circumstance was unconstitutionally vague, the Supreme Court explained that the circumstance rested in part on a determination whether certain events occurred, thus requiring the jury to consider matters of historical fact. The *Tuilaepa* Court pointed out that 'both a backward-looking and a forward-looking inquiry are a permissible part of the sentencing process' and states have considerable latitude in determining how to guide the sentencer's decision in this respect. *Id.* at 976–77 [114 S.Ct. 2630]. [Nichols]'s jury was permitted to conduct a backward-looking and forward-looking inquiry when looking at the prior convictions for crimes committed after the murder; and [Nichols] has not directed th[is] [c]ourt's attention to any United States Supreme Court law prohibiting this.

Nichols, 440 F.Supp.2d at 837 (certain quotation marks, editorial marks, and citations omitted).

In his briefing here, Nichols cites four Supreme Court cases as precedent that, he contends, the Tennessee courts applied unreasonably: *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), *Roberts v. Louisiana,* 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). These cases stand for the broad proposition that the trial court must direct the jury to consider the individual characteristics of the crime and the criminal, so as to limit the jury's discretion and ensure that it does not impose the death penalty in an arbitrary or capricious manner. None of these cases concerns the State's role in prosecuting multiple crimes or proving aggravating factors in support of the death penalty. It is telling, however, that the aggravating factor at issue—i.e., Nichols's perpetration of multiple additional violent rapes—is certainly a characteristic of the criminal, and a very significant one. When considering Nichols's individual character and his suitability for the death penalty, the fact that Nichols committed these additional crimes would be critical to the jury's individualized assessment, whether he committed them prior to the murder, after the murder, or even in the courthouse hallway just prior to sentencing. The fact that Tennessee requires "conviction" rather than merely accusation does not change the importance of this information to the jury's consideration, it merely protects Nichols's right to be presumed innocent prior to conviction and accepts that he has been proven guilty after conviction. As the Tennessee Supreme Court explained, it is the commission of the crimes that matters; "the order in which the crimes were actually committed is irrelevant so long as the convictions have been entered before the sentencing hearing at which they were introduced." *See* *Nichols,* 877 S.W.2d at 735–36.

The Tennessee Supreme Court reasonably relied on *McCleskey v. Kemp,* 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), for its proposition that the prosecutor has wide discretion in pursuing the death penalty, and that nothing in *Furman* or *Gregg* contradicted this discretion. *See* *Nichols,* 877 S.W.2d at 736. The district court relied on ***555** *Tuilaepa v. California,* 512 U.S. 967, 976–77, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994),[33] for its proposition that the jury can properly "consider the defendant's prior criminal activity" in deciding on the death sentence, and that "[b]oth a backward-looking and a forward-looking inquiry [into a defendant's criminal characteristics] are a permissible part of the sentencing process." This precedent further refutes Nichols's argument that the State violated the Constitution by prosecuting his later-occurring crimes first so that it could create prior-violent-felony convictions. Finally, it bears express mention that the Tennessee statute lists the death-qualifying factor as prior "conviction" of violent crime, not prior "commission" of violent crime. Presumably, the

Tennessee legislature recognizes the difference, and the Tennessee courts were not unreasonable in interpreting the statute as written.

33 The Supreme Court published *Tuilaepa* on June 30, 1994, almost eight weeks after the Tennessee Supreme Court published the *Nichols* decision (May 2, 1994), so *Tuilaepa* was not guiding precedent at the time of the *Nichols* decision. It does indicate, however, that the *Nichols* Court was correct in its general assessment of the precedent.

Nichols has not demonstrated that the state court decision was based on an unreasonable determination of the facts or that the decision was contrary to or an unreasonable application of any clearly established Supreme Court law. Nichols is not entitled to habeas relief on this claim.

G. "Non–Final" Prior Convictions

Nichols claims that the prior-violent-felony convictions (i.e., the other rape convictions) were not "prior" convictions because they were not technically "final" under Tennessee Rule of Criminal Procedure 32(e) at the time of the Pulley murder trial, because the trial court had not imposed sentence on those convictions or entered formal judgments of conviction. Notably, the court had not sentenced Nichols on any of those convictions because Nichols's counsel had moved the court to stay the sentencing until after the completion of the other guilt-phase determinations, specifically until after the Pulley murder trial. The court granted the motions and did not sentence Nichols on any of the non-capital convictions until December 13 and 14, 1990.

The Tennessee Supreme Court decided this issue as a matter of state law, holding that the aggravating-factor statute, Tenn.Code Ann. § 39–13–204(i)(2), requires only a "previous convict[ion]," not a final judgment; that "the indictments and minutes of the trial court [that the State] offered to prove these convictions[,] were admissible under either Tenn. R. Evid. 803(b) (Records of Regularly Conducted Activity) or 893(8) (Public Records and Reports)"; and that "the convictions were [therefore] admissible." *Nichols,* 877 S.W.2d at 737. The district court recognized that Nichols had challenged only state law and found this claim procedurally defaulted:

> [Nichols] failed to raise this claim in his habeas petition or in state court on constitutional grounds.... 'The habeas petitioner must present his claim to the state courts as a federal constitutional issue—not merely as an issue arising under state law.' *Koontz v. Glossa,* 731 F.2d 365, 368 (6th Cir.1984). Although [Nichols] stated, in his state appellate brief, 'to allow the use of these cases as 'final convictions' was error and violated Mr. Nichols' rights under the Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution ...', these general allegations of denial of these broad constitutional rights does not constitute a fair presentation of the claim that specific constitutional rights ***556** were violated. *See McMeans v. Brigano,* 228 F.3d 674, 681 (6th Cir.2000). The factual and legal basis for a constitutional claim must be presented to the state courts. Without specifying which particular right identified under each amendment was violated, [Nichols] failed to fairly present this claim as a constitutional violation in the Tennessee courts. On direct appeal[,] [Nichols] did not rely upon any federal cases employing constitutional analysis; [rely] upon any state cases employing federal constitutional analysis; phrase the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or allege facts were within the mainstream of constitutional law. *See Franklin v. Rose,* 811 F.2d 322, 326 (6th Cir.1987).
>
> Consequently, [Nichols] has procedurally defaulted his claim that the trial court erred when it allowed the prosecution to use his prior convictions as aggravating circumstances to support the death penalty.... *Coleman v. Thompson,* 501 U.S. 722, 750 [111 S.Ct. 2546, 115 L.Ed.2d 640] (1991). [Nichols] did not present the claim in state court as a matter of federal law and absent a showing of cause and prejudice or miscarriage of justice, the claim is not reviewable in this habeas proceeding. [Nichols] has offered nothing to demonstrate cause and prejudice. Moreover, [Nichols] has failed to allege a violation of any constitutional right in this habeas petition.

> Assuming for the sake of argument that this claim was exhausted, [Nichols] would [still] not be entitled to any habeas relief because he has not demonstrated that the state court decision was contrary to, or an unreasonable application of, federal law. Thus habeas review of this claim is barred by [Nichols]'s state procedural default and it will be DISMISSED.

Nichols, 440 F.Supp.2d at 838–39 (editorial marks omitted).

In his initial briefing here, Nichols completely ignored the district court's finding of procedural default, whereas in his reply brief he protested that he had cited to "the Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution" in his brief to the Tennessee Supreme Court, but again ignored the district court's explanation as to why that was insufficient. In short, Nichols has offered us no basis upon which to reverse the district court's finding of procedural default and we find none ourselves. Nichols has defaulted this claim.

Moreover, we agree with the district court that, even if Nichols had properly raised this claim, he has not demonstrated that the state court decision was contrary to or an unreasonable application of clearly established federal law. [34] Nichols is not entitled to habeas relief on this claim.

34 We would perhaps be remiss if we failed to note the applicability of the of the invited-error doctrine. Under the doctrine, "a party may not complain on appeal of errors that he himself invited or provoked the court to commit." *United States v. Wells,* 519 U.S. 482, 488, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997) (editorial and quotation marks omitted) (citing *United States v. Sharpe,* 996 F.2d 125, 129 (6th Cir.1993), and *Harvis v. Roadway Express, Inc.,* 923 F.2d 59, 60 (6th Cir.1991)). The reason the state trial court had not sentenced Nichols on any of those convictions was because Nichols's counsel had moved the court to stay the sentencing until after the completion of the other guilt-phase determinations, specifically until after the Pulley murder trial. Therefore, if this were error, it would be error invited by Nichols's counsel.

H. Disclosure of Expert Psychologist's Notes

Nichols claims that the state trial court violated his constitutional right ***557** to a fair trial by forcing the defense to disclose the expert psychologist's (i.e., Dr. Engum's) notes to the prosecution. [35] The State responds that Nichols did not raise this claim in the state courts as a constitutional violation and has, therefore, procedurally defaulted this claim. The State correctly points out that Nichols's primary argument to the state courts concerned the Tennessee discovery rules and his secondary argument concerned the attorney work-product doctrine, neither of which is cognizable on federal habeas review because neither is a federal constitutional issue. But, as Nichols points out, he did assert a constitutional claim in his brief to the Tennessee Supreme Court, albeit vaguely, claiming: "The production of all of Dr. Engum's preliminary internal notes and memoranda, ... and the use by the State of those notes to ridicule defense witnesses and to condemn the defense strategy, was prejudicial error, and a violation of [Nichols]'s rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution...."

35 In his briefing here, Nichols also claims that this alleged error was due to the ineffective assistance of his trial counsel. Nichols raised a similar ineffective-assistance claim to the Tennessee Supreme Court in his appeal from the state post-conviction proceedings, and that court affirmed the denial of the claim as meritless. Nichols raised an ineffective-assistance claim in his § 2254 petition, but later expressly withdrew that claim. The district court relied on that withdrawal to deny the claim. *Nichols,* 440 F.Supp.2d at 797 ("This claim is withdrawn by petitioner.... Accordingly, petitioner is not entitled to any habeas relief on this claim."). But for certain narrow exceptions, we do not review claims that were not properly presented in the district court. *See Foster v. Barilow,* 6 F.3d 405, 407 (6th Cir.1993); *Bason v. Yukins,* 328 Fed.Appx. 323, 324 (6th Cir.2009). Moreover, Nichols did not obtain a COA for this issue, which further

counsels against our review. *See* *Hartman v. Bagley,* 492 F.3d 347, 371 n. 1 (6th Cir.2007). Accordingly, we decline to consider this aspect of the claim on appeal and summarily affirm the district court's denial.

The Tennessee Supreme Court did not address this constitutional claim (and the district court denied it as having been procedurally defaulted). "Claims that were not adjudicated on the merits in [s]tate court proceedings receive the pre-AEDPA standard of review: *de novo* for questions of law (including mixed questions of law and fact), and clear error for questions of fact." *Robinson v. Howes,* 663 F.3d 819, 823 (6th Cir.2011) (quotation marks omitted). We review this claim *de novo.*

The question—as preserved by Nichols's state court claim—is whether the State prosecutor's questions and comments, based on Dr. Engum's notes, "so infected the trial with unfairness as to make the resulting [decision] a denial of due process." *See* *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quotation marks omitted). In the Sixth Circuit, we have established a two-step test for analyzing such prosecutorial-misconduct claims:

> First, this court determines whether the prosecution's conduct or remarks were improper. If the answer is affirmative, then the court considers four factors to decide whether the improper acts were sufficiently flagrant to warrant reversal: (1) whether the evidence against the defendant was strong, (2) whether the conduct of the prosecution tended to mislead the jury or prejudice the defendant; (3) whether the conduct or remarks were isolated or extensive; and (4) whether the remarks were made deliberately or accidentally.

Slagle v. Bagley, 457 F.3d 501, 515–16 (6th Cir.2006). We must also be mindful that "the touchstone of due process analysis in ***558** cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips,* 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

In his briefing here, Nichols quotes several questions or comments made by the State prosecutor during the sentencing trial, but argues specifically only that "prosecutorial suggestions that the defense was misleading or fooling the jury violated Nichols' constitutional rights." We consider this claim under the aforementioned two-step test.

Recall that Dr. Engum is a psychologist and a lawyer who testified as a psychological expert for the defense. Dr. Engum diagnosed Nichols with "intermittent explosive disorder," a type of "impulse control disorder" in which Nichols's "ability to resist [wa]s overwhelmed." Dr. Engum found no organic brain injury and attributed his diagnosis to "psychosocial factors," such as the "punitive, hostile environment" in which Nichols was raised, his abusive father, abandonment, lack of love or empathy, estrangement, and his being socially isolated. Dr. Engum was careful to note his opinion that Nichols had been aware of the wrongfulness of his actions though unable to control them, but also emphasized that Nichols was remorseful afterwards.

On cross-examination, the State used Dr. Engum's notes to impeach his testimony and portray him as a defense team lawyer, not an independent psychologist, who was actively trying to persuade the jury. For example, the State brought out that, in his correspondence with defense counsel, Dr. Engum repeatedly referred to "us" and "we" as though he were part of the defense team, such as in the statement: "Joanne provides a wealth of information which I believe will help us at least support an argument for the irresistible impulse defense."[36] Moreover, concerning potential defense witness Rev. L.E. Butler, Dr. Engum wrote to defense counsel:

36 Note that, ultimately, Dr. Engum did not diagnose Nichols with "irresistible impulse," but rather, diagnosed him with "intermittent explosive disorder."

> Reverend Butler is the type of individual that I characterize [as] the limited public figure. He would probably protest all the way to the stand and then revel and bask in the notoriety of his testimony. I believe that his testimony could also be fairly powerful. As we have discussed, we are trying to build a mitigating factor of irresistible impulse [37].... Reverend Butler can add to the persuasiveness of this argument by recasting the irresistible impulse into possession by the devil. This may have a great impact and influence upon those members of the jury with religious leanings.... The only negative note that he might bring is with regard to [Nichols]'s choice to let the devil into his heart. Reverend Butler also states that if only [Nichols] had chosen to come back into the church, none of this would have happened. Hence, we need to be very careful that Reverend Butler does not recast this 'possession theme' into an active, voluntary, knowing choice. I am afraid that he might state that the church held out their hands to [Nichols] but [Nichols] did not reciprocate and it is for this reason that [Nichols] committed these crimes.

37 *See* fn. 36, *supra.*

During its questioning of Dr. Engum and again in closing argument, the State argued that this was a lawyer striving to "build a mitigating factor" or "influence the jury"; not a psychological expert presenting ***559** an objective opinion of about a defendant's psychological condition.

The first step of our inquiry is to determine whether the State's questions or comments were improper. *See* *Slagle,* 457 F.3d at 516. Given that the State was merely confronting Dr. Engum with his own writings and that the inference being suggested from those writings—that Dr. Engum was attempting to fool or mislead the jury by purporting to be an independent expert while, in reality, acting as a member of the defense team trying to persuade them against a death sentence—was not unreasonable under these facts, we do not find these questions or comments improper in this circumstance. But even if we were to find these questions or comments improper, we would not find them sufficiently flagrant to warrant reversal under the second step of the inquiry. *See* *id.*

The evidence of the aggravating factors—both that Nichols committed the murder as part of a rape and that he had been convicted of other violent rapes—was not only very strong, but was undisputed. The State's questions and comments did not mislead the jury; in fact, they were directed at clarifying for the jury Dr. Engum's true position and the trustworthiness of his testimony. These remarks were isolated to only Dr. Engum and to his testimony, albeit some of which involved Rev. Butler's testimony by association. But the State did not impugn defense counsel or any other witnesses with this impeachment evidence or questioning. Finally, and the only factor that would cut against the State here, there is no dispute that these remarks were made deliberately.

Based on our review of the governing law, these particular remarks, and the circumstances in which they arose, we do not find prosecutorial misconduct in this instance. Nichols is not entitled to habeas relief on his claims relative to the disclosure of his psychologist's notes.

III.

For all of the foregoing reasons, we **AFFIRM** the judgment of the district court. Nichols is not entitled to habeas relief on any of the claims he has raised herein.

BOYCE F. MARTIN, JR., Circuit Judge, concurring.

In this, my last death penalty case as a judge on the Sixth Circuit, I must concur in affirming the judgment of the district court. Despite my concurrence, I continue to condemn the use of the death penalty as an arbitrary, biased, and broken criminal justice tool. The facts of this case make it one of the more tragic and disturbing cases that I have heard in years. While Nichols' actions are despicable, I cannot ignore the fact that his actions were committed in the late 1980s and that he was convicted in 1990.

Nichols' execution was supposed to take place in 1994. I have been on this bench since 1979, and for twenty-three of my thirty-four years as a judge on this Court this case has been moving through our justice system, consuming countless judicial hours, money, legal resources, and providing no closure for the families of the victims. Retired Supreme Court Justice John Paul Stevens has called for a dispassionate and impartial comparison of the enormous cost that death penalty litigation imposes on society with the benefits it produces. The time, money, and energy spent trying to secure the death of this defendant would have been better spent improving this country's mental-health and educational institutions, which may help prevent crimes such as the ones we are presented with today.

All Citations

725 F.3d 516

End of Document

JUDGMENT 175433

IN THE CRIMINAL / CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

CASE #: 175433 [illegible]

JUDICIAL DISTRICT: ELEVEN

JUDICIAL DIVISION: [illegible]

STATE OF TENNESSEE

VS.

DEFENDANT: NICHOLS, HAROLD WAYNE

DATE OF BIRTH: 12/31/[illegible] SEX: M RACE: W

[illegible] INDICTMENT #

COUNT #:

ATTORNEY FOR THE STATE: [illegible]

COUNSEL FOR DEFENDANT: [illegible]

( ) RETAINED ( ) APPOINTED ( ) PUBLIC DEFENDER

ALIAS:

SSN: [illegible]

WARRANT #

* JUDGMENT *

COMES THE DISTRICT ATTORNEY GENERAL FOR THE STATE AND THE DEFENDANT WITH COUNSEL OF RECORD FOR ENTRY OF JUDGMENT. ON THE [illegible] DAY OF [illegible], 19[illegible], THE DEFENDANT:

(X) PLED GUILTY

[illegible]:
( ) GUILTY
( ) JURY VERDICT
( ) BENCH TRIAL
( ) NOLO CONTENDERE

( ) NOT GUILTY
( ) NOT GUILTY BY REASON OF INSANITY

INDICTMENT: CLASS (CIRCLE ONE): 1ST (A) B C D E
OFFENSE: AGGRAVATED RAPE

AMENDED CHARGE:
OFFENSE DATE: 1/3/[illegible] COUNTY: HAMILTON
CONVICTION OFFENSE: Aggravated rape

TCA #: 39[illegible]
CONVICTION CLASS (CIRCLE ONE): 1ST (A) B C D E
SENTENCE IMPOSED-DATE [illegible]
(X) FELONY ( ) MISDEMEANOR

AFTER CONSIDERING THE EVIDENCE, THE ENTIRE RECORD, AND ALL FACTORS IN T.C.A. TITLE 40, CHAPTER 35, ALL OF WHICH ARE INCORPORATED BY REFERENCE HEREIN, THE COURT'S FINDINGS AND RULINGS ARE:

( ) [illegible]
( ) DETERMINATE
( ) INDETERMINATE
FROM ___ YRS. TO ___ YRS.
( ) CLASS X 1979 - 1982: 35%
( ) 1ST DEGREE MURDER

( ) SENTENCE REFORM ACT 1982
( ) ESPECIALLY MITIGATED 20% RANGE 1
( ) STANDARD 30% RANGE 1
( ) PERSISTENT 35% RANGE 2
( ) ESPECIALLY AGGRAVATED 35% RANGE 2
( ) ESPECIALLY AGGRAVATED AND PERSISTENT 40% RANGE 2
( ) HABITUAL
( ) 1ST DEGREE MURDER

( ) SENTENCE REFORM ACT 1989
( ) [illegible] 20%
( ) MITIGATED 20%
( ) STANDARD 30% RANGE 1
( ) MULTIPLE 35% RANGE 2
(X) PERSISTENT 45% RANGE 3
( ) CAREER 60%
( ) 1ST DEGREE MURDER

SENTENCED TO:
(X) TDOC
( ) COUNTY JAIL
( ) WORKHOUSE
( ) WORK RELEASE
( ) PROBATION
( ) COMMUNITY BASED ALTERNATIVE
(SPECIFY):

SENTENCE LENGTH:
[illegible] YEARS ___ MONTHS ___ DAYS ___ LIFE
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (______)
___ % MIN. SVC. PRIOR TO PAROLE OR WORK RELEASE ___ % MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (______)
___ % MIN. SVC. PRIOR TO PAROLE OR WORK RELEASE ___ % MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS
___ YEARS ___ MONTHS ___ DAYS EFFECTIVE: ______
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS

PRETRIAL JAIL CREDIT PERIOD: FROM 1/2/[illegible] TO DATE FROM ___ TO ___ OR [illegible] OF DAYS ___

COURT ORDERED FEES:
$50.00 [illegible] FEE
$96.00 [illegible] TAX
$ ___ SUPERVISION
$ ___ CHILD SUPPORT
$481.00 COURT COSTS
$ ___ [illegible] FINES
$ ___ CIR. INT. FEE

$ ___ [illegible] FEE
$ ___ [illegible] FEE
$ ___ [illegible] FEE

RESTITUTION:
VICTIM NAME ______
ADDRESS ______
TOTAL AMOUNT $ ______ $ ______ PER [illegible]
UNPAID COMMUNITY SERVICE:
___ HOURS, ___ DAYS, ___ WEEKS, ___ [illegible]

(X) THE DEFENDANT HAVING BEEN FOUND GUILTY IS RENDERED INFAMOUS.

[illegible] #

CONCURRENT WITH:

CONSECUTIVE TO: 175432

SPECIAL CONDITIONS:

DOUGLAS A. MEYER
JUDGE [illegible]

Douglas A. Meyer
JUDGE SIGNATURE (DATE SIGNED)

1-2-91
DATE OF ENTRY OF JUDGMENT

[signature]
ATTORNEY FOR THE STATE/SIGNATURE (OPTIONAL)

DEFENDANT'S ATTORNEY/SIGNATURE (OPTIONAL)

TOTAL P.09

JUDGMENT 180537

IN THE CRIMINAL /CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

CASE #: 180537

COURT #:

JUDICIAL DISTRICT: ELEVEN

ATTORNEY FOR THE STATE: V.C. Bright

JUDICIAL DIVISION: 1

COUNSEL FOR DEFENDANT: Hugh Moore
(__) RETAINED (X) APPOINTED (__) PUBLIC DEFENDER

STATE OF TENNESSEE
VS.

DEFENDANT: NICHOLS, HAROLD WAYNE
DATE OF BIRTH: 12/31/60 SEX: M RACE: W
FROM JURISDICTION:

ALIAS:
SSN: 409600049
WARRANT #:

JUDGMENT

CAME THE DISTRICT ATTORNEY GENERAL FOR THE STATE AND THE DEFENDANT WITH COUNSEL OF RECORD FOR ENTRY OF JUDGMENT.
ON THE 21st DAY OF February, 19 90, THE DEFENDANT:

(__) PLED GUILTY

BY TRIAL:
(X) GUILTY (__) NOT GUILTY
(__) JURY VERDICT (__) NOT GUILTY BY REASON OF INSANITY
(__) BENCH TRIAL
(__) NOLO CONTENDERE

INDICTMENT: CLASS (CIRCLE ONE): 1ST (2) B C D E
OFFENSE: AGGRAVATED RAPE

AMENDED CHARGE: AGGRAVATED RAPE
OFFENSE DATE: 2/20/89 COUNTY: HAMILTON
CONVICTION OFFENSE: Agg. Rape

TCA #: 39606002
CONVICTION CLASS (CIRCLE ONE): 1ST (2) B C D E
SENTENCE IMPOSED: DATE 2/21/90
(X) FELONY (__) MISDEMEANOR

AFTER CONSIDERING THE EVIDENCE, THE ENTIRE RECORD, AND ALL FACTORS IN T.C.A. TITLE 40, CHAPTER 35, ALL OF WHICH ARE INCORPORATED BY REFERENCE HEREIN, THE COURT'S FINDINGS AND RULINGS ARE:

(__) PRE 1982 SENTENCE:
(__) DETERMINATE
(__) INDETERMINATE
FROM ___ YRS. TO ___ YRS.
(__) CLASS 1 1979 - 1982: 35%
(__) 1ST DEGREE MURDER

(__) SENTENCE REFORM ACT 1982
(__) ESPECIALLY MITIGATED 20% RANGE 1
(__) STANDARD 30% RANGE 1
(__) PREVIOUSLY 35% RANGE 2
(__) ESPECIALLY AGGRAVATED 40%
PERSISTENT 40% RANGE 2
(__) HABITUAL
(__) 1ST DEGREE MURDER

(__) SENTENCE REFORM ACT 1989
(__) MITIGATED 30%
(__) HISTORIC 30%
(__) STANDARD 30% RANGE 1
(__) MULTIPLE 35% RANGE 2
(__) PERSISTENT 40% RANGE 3
(__) CAREER 60%
(__) 1ST DEGREE MURDER

SENTENCED TO:

SENTENCE LENGTH:

(X) TDOC 40 YEARS ___ MONTHS ___ DAYS ___ LIFE
(__) COUNTY JAIL ___ YEARS ___ MONTHS ___ DAYS ___ BOOKS ___ WEEK-ENDS ___ PERIODIC(___)
___% MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE ___% MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
(__) WORKHOUSE ___ YEARS ___ MONTHS ___ DAYS ___ BOOKS ___ WEEK-ENDS ___ PERIODIC(___)
___% MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE ___% MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
(__) WORK RELEASE ___ YEARS ___ MONTHS ___ DAYS EFFECTIVE:
(__) PROBATION ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS
(__) COMMUNITY BASED ALTERNATIVE
EFFECTIVE:

PRETRIAL JAIL CREDIT PERIOD: FROM 2/6/89 TO 2/24/90 FROM __/__/__ TO __/__/__ OR NUMBER OF DAYS ___

$ 28.00 STATE TAX $ ___ DOT FEE
$ 17.00 COUNTY TAX $ ___ JAIL FEES
$ 1.00 LIBRARY TAX $ ___ VICTIM FEE
$ ___ COURT COST
$ ___ FINES
$ ___ CIC 10% FEE $ ___ REV. COST
$ 76.50 CIC FEE
___ INDIGENT CREDIT O N COSTS

RESTITUTION:
VICTIM NAME
ADDRESS

TOTAL AMOUNT $ ___ $ ___ PER MONTH
UNPAID COMMUNITY SERVICE:
(___ HOURS, ___ DAYS, ___ WEEKS, ___ MONTHS)

(X) THE DEFENDANT HAVING BEEN FOUND GUILTY IS ORDERED HEREBY:

TCCC # ___

CONCURRENT WITH: #180536

CONSECUTIVE TO:

SPECIAL CONDITIONS:

DOUGLAS A. MEYER
JUDGE NAME

Douglas A. Meyer
JUDGE SIGNATURE (DATE SIGNED) 2/21/90
DATE OF ENTRY OF JUDGMENT

ATTORNEY FOR THE STATE/SIGNATURE (OPTIONAL)

DEFENDANT'S ATTORNEY/SIGNATURE (OPTIONAL)

432

... APPEAL..

JUDGMENT 178087

IN THE CRIMINAL / CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

CASE #: 178087 COUNT #:

JUDICIAL DISTRICT: ELEVEN ATTORNEY FOR THE STATE: V.C. Bright

JUDICIAL DIVISION: 3 COUNSEL FOR DEFENDANT: MOORE, HUGH
(__) RETAINED (X) APPOINTED (__) PUBLIC DEFENDER

STATE OF TENNESSEE
vs.

DEFENDANT: NICHOLS, HAROLD WAYNE ALIAS:
DATE OF BIRTH: 12/31/60 SEX: M RACE: W SSN: 409440049
FROM INDICTMENT #: WARRANT #:

* JUDGMENT *

COMES THE DISTRICT ATTORNEY GENERAL FOR THE STATE AND THE DEFENDANT WITH COUNSEL OF RECORD FOR ENTRY OF JUDGMENT, ON THE 11th DAY OF January, 19 90 THE DEFENDANT:

(__) PLED GUILTY

IN FORM:
(X) GUILTY (__) NOT GUILTY
(X) JURY VERDICT (__) NOT GUILTY BY REASON OF INSANITY
(__) BENCH TRIAL
(__) NOLO CONTENDERE

INDICTMENT: CLASS (CIRCLE ONE): 1ST (A) B C D E
OFFENSE: AGGRAVATED RAPE
AMENDED CHARGE:
OFFENSE DATE: 1-1-89 COUNTY: HAMILTON
CONVICTION OFFENSE: Agg. Rape
TCA §: 39020601
CONVICTION CLASS (CIRCLE ONE): 1ST (A) B C D E
SENTENCE IMPOSED-DATE: 1/11/90
(X) PRIORS (__) ENHANCEMENT

AFTER CONSIDERING THE EVIDENCE, THE ENTIRE RECORD, AND ALL FACTORS IN T.C.A. TITLE 40, CHAPTER 35, ALL OF WHICH ARE INCORPORATED BY REFERENCE HEREIN, THE COURT'S FINDINGS AND RULINGS ARE:

(__) PRE 1982 SENTENCE:
(__) DETERMINATE
(__) INDETERMINATE
FROM ___ YRS. TO ___ YRS.
(__) CLASS X 1979 - 1982: 30%
(__) 1ST DEGREE MURDER

(__) SENTENCE REFORM ACT 1982
(__) ESPECIALLY AGGRAVATED 60% RANGE 1
(__) 95% RANGE 1
(__) PERPETRATED 35% RANGE 2
(__) ESPECIALLY AGGRAVATED 35% RANGE 2
(__) ESPECIALLY AGGRAVATED AND PERSISTENT 40% RANGE 2
(__) HABITUAL
(__) 1ST DEGREE MURDER

(X) SENTENCE REFORM ACT 1989
(__) MITIGATED 20%
(__) MITIGATED 30%
(__) STANDARD 30% RANGE 1
(__) MULTIPLE 25% RANGE 2
(__) PERSISTENT 40% RANGE 3
(X) CAREER 60%
(__) 1ST DEGREE MURDER

SENTENCED TO:
(X) TDOC
(__) COUNTY JAIL
(__) WORKHOUSE
(__) WORK RELEASE
(__) PROBATION
(__) COMMUNITY BASED ALTERNATIVE
SPECIFY:

SENTENCE LENGTH:
60 YEARS ___ MONTHS ___ DAYS ___ LIFE
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (_____)
___ % MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE ___ % MIN. SVC. PRIOR TO RELEASE (INCARCERATION ONLY)
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (_____)
___ % MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE ___ % MIN. SVC. PRIOR TO RELEASE (INCARCERATION ONLY)
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS
___ YEARS ___ MONTHS ___ DAYS EFFECTIVE: _____
___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS

PRETRIAL JAIL CREDIT PERIOD FROM 9/28/89 TO 1/11/90 FROM __/__/__ TO __/__/__ OR NUMBER OF DAYS ___

$ 76.00 STATE TAX $ ___ DOI FEE
$ 17.00 COUNTY TAX $ ___ JAIL FEES
$ 1.00 LITIGANT TAX $ ___ VICTIM-WIT.
$ ___ COURT COSTS
$ ___ FINES
$ ___ CLE FIN FEE $ ___ REV. COST
$ 37.50 CSC FEE
___ JUDICIAL CREDIT G H COSTS

RESTITUTION:
VICTIM NAME:
AMOUNT:

TOTAL AMOUNT $ ___ $ ___ PER MONTH
___ UNPAID COMMUNITY SERVICE:
___ HOURS, ___ DAYS, ___ WEEKS, ___ MONTHS)

(X) THE DEFENDANT HAVING BEEN FOUND GUILTY IS ORDERED IMPRISONED.

TDOC #: ___

CONCURRENT WITH: # 190536

CONSECUTIVE TO: # 175492

SPECIAL CONDITIONS:

Douglas A. Meyer
JUDGE NAME

Douglas A. Meyer
JUDGE SIGNATURE (DATE SIGNED)

1/11/90
DATE OF ENTRY OF JUDGMENT

ATTORNEY FOR THE STATE/SIGNATURE (OPTIONAL)

DEFENDANT'S ATTORNEY/SIGNATURE (OPTIONAL)

429

JUDGMENT 175438

IN THE CRIMINAL /CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

CASE #: 175438 COUNT #: _____

JUDICIAL DISTRICT: ELEVEN ATTORNEY FOR THE STATE: H.C. Wright

JUDICIAL DIVISION: 1 COUNSEL FOR DEFENDANT: [X] RETAINED [ ] APPOINTED [ ] PUBLIC DEFENDER

STATE OF TENNESSEE
VS.

DEFENDANT: NICHOLS, HAROLD WAYNE ALIAS:
DATE OF BIRTH: 12/31/60 SEX: M RACE: W SSN: 409010049
FROM INDICTMENT #: _____ PAROLE #: _____

* JUDGMENT *

COMES THE DISTRICT ATTORNEY GENERAL FOR THE STATE AND THE DEFENDANT WITH COUNSEL OF RECORD FOR ENTRY OF JUDGMENT. ON THE 11th DAY OF January, 19 90, THE DEFENDANT:

[ ] PLED GUILTY

IN FOUND:
[X] GUILTY [ ] NOT GUILTY
[X] JURY VERDICT [ ] NOT GUILTY BY REASON OF INSANITY
[ ] BENCH TRIAL
[ ] HOLD CONFERENCE

INDICTMENT: CLASS (CIRCLE ONE): 1ST (A) B C D E
OFFENSE: AGGRAVATED RAPE

AMENDED CHARGE:
OFFENSE DATE: 1/13/89 COUNTY: HAMILTON
CONVICTION OFFENSE: Aggravated Rape
TCA #: 39-2-603
CONVICTION CLASS (CIRCLE ONE): 1ST (A) B C D E
SENTENCE IMPOSED DATE: 12/14/90
[X] FELONY [ ] MISDEMEANOR

AFTER CONSIDERING THE EVIDENCE, THE ENTIRE RECORD, AND ALL FACTORS IN T.C.A., TITLE 40, CHAPTER 35, ALL OF WHICH ARE INCORPORATED BY REFERENCE HEREIN, THE COURT'S FINDINGS AND RULINGS ARE:

[ ] PRE 1982 SENTENCE:
[ ] DETERMINATE
[ ] INDETERMINATE
FROM ___ YRS. TO ___ YRS.
[ ] CLASS X 1979 + 1982: 35%
[ ] 1ST DEGREE MURDER

[ ] SENTENCE REFORM ACT 1982
[ ] ESPECIALLY MITIGATED 30% RANGE 1
[ ] STANDARD 30% RANGE 1
[ ] PERSISTENT 35% RANGE 2
[ ] ESPECIALLY AGGRAVATED 35% RANGE 2
[ ] ESPECIALLY AGGRAVATED 30% PERSISTENT 40% RANGE 2
[ ] MANSLAUGHTER
[ ] 1ST DEGREE MURDER

[X] SENTENCE REFORM ACT 1989
[ ] MITIGATED 25%
[ ] MITIGATED 30%
[ ] STANDARD 30% RANGE 1
[ ] PROBABLE 35% RANGE 2
[ ] PERSISTENT 45% RANGE 3
[X] CHANGED 60%
[ ] 1ST DEGREE MURDER

SENTENCED TO: SENTENCE LENGTH:

[X] TDOC 60 YEARS ___ MONTHS ___ DAYS ___ LIFE
[ ] COUNTY JAIL ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (_____)
___% MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE ___% MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
[ ] WORKHOUSE ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (_____)
___% MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE ___% MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
[ ] WORK RELEASE ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS
[ ] PROBATION ___ YEARS ___ MONTHS ___ DAYS EFFECTIVE: _____
[ ] COMMUNITY BASED ALTERNATIVE ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS
SPECIFY: _____

PRETRIAL JAIL CREDIT PERIOD FROM 2/2/89 TO 2/28/90 FROM __/__/__ TO __/__/__ OR NUMBER OF DAYS ____

$ 76.00 STATE TAX $ _____ DUI FEE
$ 17.00 COURT TAX $ _____ JAIL FEES
$ 1.00 LIBRARY TAX $ _____ VICTIM FEE
$ _____ COURT COST
$ _____ FINES
$ _____ CLK SVC FEE $ _____ REV. COST
$ 24.50 SVC FEE
___ INDIGENT CREDIT O R COSTS

INSTITUTION:
VICTIM NAME: _____
ADDRESS: _____
TOTAL AMOUNT $ _____ $ _____ PER MONTH
_____ UNPAID COMMUNITY SERVICE:
(___HOURS, ___DAYS, ___WEEKS, ___MONTHS)

[X] THE DEFENDANT HAVING BEEN FOUND GUILTY IS SENTENCED TO:

TDOC #: _____ CONCURRENT WITH: #180536 CONSECUTIVE TO:

SPECIAL CONDITIONS:

DOUGLAS A. MEYER
JUDGE NAME

Douglas A. Meyer
JUDGE SIGNATURE (DATE SIGNED)

12-14-90
DATE OF ENTRY OF JUDGMENT

ATTORNEY FOR THE STATE/SIGNATURE (OPTIONAL)

DEFENDANT'S ATTORNEY/SIGNATURE (OPTIONAL)

424

JUDGMENT 175495

IN THE CRIMINAL / CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

CASE #: 175495
JUDICIAL DISTRICT: ELEVEN
JUDICIAL DIVISION: I

COUNT #: ______
ATTORNEY FOR THE STATE: H. C. Bright
COUNSEL FOR DEFENDANT: [illegible]
(__) RETAINED (✓) APPOINTED (__) PUBLIC DEFENDER

STATE OF TENNESSEE
VS.

DEFENDANT: NICHOLS, HAROLD WAYNE
DATE OF BIRTH: 12/11/60 SEX: M RACE: W
FROM INDICTMENT #______

ALIAS:
SSN: [illegible]
WARRANT #______

****
* J U D G M E N T *
****

COMES THE DISTRICT ATTORNEY GENERAL FOR THE STATE AND THE DEFENDANT WITH COUNSEL OF RECORD FOR ENTRY OF JUDGMENT. ON THE 13th DAY OF September, 19 89, THE DEFENDANT:

(✓) PLED GUILTY

IS FOUND:
(✓) GUILTY (__) NOT GUILTY
(__) JURY VERDICT (__) NOT GUILTY BY REASON OF INSANITY
(__) BENCH TRIAL
(__) NOLO CONTENDERE

INDICTMENT: CLASS (CIRCLE ONE): 1ST (A) B C D E
OFFENSE: AGGRAVATED RAPE

AMENDED CHARGE:
OFFENSE DATE: 12/22/88 COUNTY: HAMILTON
CONVICTION OFFENSE: Aggravated Rape
TCA #: [illegible]
CONVICTION CLASS (CIRCLE ONE): 1ST (A) B C D E
SENTENCE IMPOSED DATE 12/14/90
(✓) FELONY (__) MISDEMEANOR

AFTER CONSIDERING THE EVIDENCE, THE ENTIRE RECORD, AND ALL FACTORS IN T.C.A. TITLE 40, CHAPTER 35, ALL OF WHICH ARE INCORPORATED BY REFERENCE HEREIN, THE COURT'S FINDINGS AND RULINGS ARE:

(__) PRE 1982 SENTENCE:	(__) SENTENCE REFORM ACT 1982	(✓) SENTENCE REFORM ACT 1989
(__) DETERMINATE	(__) ESPECIALLY MITIGATED 20% RANGE 1	(__) MITIGATED 20%
(__) INDETERMINATE	(__) STANDARD 30% RANGE 1	(__) MITIGATED 30%
FROM ___ YRS. TO ___ YRS.	(__) PERSISTENT 35% RANGE 2	(__) STANDARD 30% RANGE 1
(__) CLASS X 1979 - 1982: 35%	(__) ESPECIALLY AGGRAVATED 35% RANGE 2	(✓) MULTIPLE 35% RANGE 2
(__) 1ST DEGREE MURDER	(__) ESPECIALLY AGGRAVATED AND PERSISTENT 40% RANGE 2	(__) PERSISTENT 45% RANGE 3
	(__) HABITUAL	(__) CAREER 60%
	(__) 1ST DEGREE MURDER	(__) 1ST DEGREE MURDER

SENTENCED TO: SENTENCE LENGTH:
(✓) TDOC 16 YEARS ___ MONTHS ___ DAYS ___ LIFE
(__) COUNTY JAIL ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (______)
___% MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE ___% MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
(__) WORKHOUSE ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS ___ PERIODIC: (______)
___% MIN. SVC. PRIOR TO PROGRAM OR WORK RELEASE ___% MIN. SVC. PRIOR TO RELEASE (MISDEMEANOR ONLY)
(__) WORK RELEASE ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS
(__) PROBATION ___ YEARS ___ MONTHS ___ DAYS EFFECTIVE: ______
(__) COMMUNITY BASED ALTERNATIVE ___ YEARS ___ MONTHS ___ DAYS ___ HOURS ___ WEEK-ENDS
SPECIFY: ______

PRETRIAL JAIL CREDIT PERIODS: FROM 1/6/89 TO 12/14/90 FROM _/_/_ TO _/_/_ OR NUMBER OF DAYS ___

$ 26.00 STATE TAX $______ DOI FEE
$ 19.00 COUNTY TAX $______ JAIL FEES
$ 1.00 LIBRARY TAX $______ VICTIM FEE
$______ COURT COST
$______ FINES
$______ CLK IND FEE $______ REV. COST
$ 26.50 CIC FEE
___ INDIGENT CREDIT O F COSTS

RESTITUTION:
VICTIM NAME ______
ADDRESS ______
TOTAL AMOUNT $______ $______ PER MONTH
______ UNPAID COMMUNITY SERVICE:
(___ HOURS, ___ DAYS, ___ WEEKS, ___ MONTHS)

(✓) THE DEFENDANT HAVING BEEN FOUND GUILTY IS RENDERED INFAMOUS.

TDOC # ______ CONCURRENT WITH: #190536 CONSECUTIVE TO: #175457;

SPECIAL CONDITIONS:

DOUGLAS A. MEYER
JUDGE NAME

Douglas A. Meyer
JUDGE SIGNATURE (DATE SIGNED)

12-14-90
DATE OF ENTRY OF JUDGMENT

[signature]
ATTORNEY FOR THE STATE/SIGNATURE (OPTIONAL)

DEFENDANT'S ATTORNEY/SIGNATURE (OPTIONAL)

427

... ... PENDING APPEAL

XXIV . NO. 47

IN THE CRIMINAL COURT OF TENNESSEE AT CHATTANOOGA

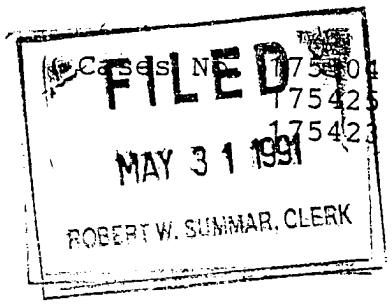
THE ELEVENTH JUDICIAL DISTRICT

STATE OF TENNESSEE,
Appellee,

VS.

HAROLD WAYNE NICHOLS,
Appellant.

Cases Nos. 175404
175425
175423



TRANSCRIPT OF THE EVIDENCE

Volume Four of Five Volumes

THE HONORABLE DOUGLAS A. MEYER, PRESIDING JUDGE

APPEARANCES

FOR THE APPELLEE:

Mr. Stephen Bevil
Assistant District Attorney General
Hamilton County Justice Building
Chattanooga, TN 37402

FOR THE APPELLANT:

Mr. Hugh J. Moore, Jr.
Ms. Rosemarie Bryan
Attorneys-at-Law
1100 American National Bank Building
Chattanooga, TN 37402

entire course of this sentencing phase. The jury are the sole judges of the facts, and of the law as it applies to the facts in the case. In making up your verdict, you are to consider the law in connection with the facts; but the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the Court.

The burden of proof is upon the State to prove any statutory aggravating circumstance or circumstances beyond a reasonable doubt and to a moral certainty.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the verdict. The law makes you, the jury, the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence.

Tennessee Code Annotated 39-2-203(i) provides that no death penalty shall be imposed by a jury but upon a unanimous finding of the existence of one or more of the statutory aggravating circumstances, which shall be limited

to the following:

(1) The defendant was previously convicted of one or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person.

The State is relying upon the crimes of Aggravated Rape, which are felonies involving the use of threat or violence to the person.

(2) The murder was committed while defendant was engaged in committing, or was attempting to commit, or was fleeing after committing or attempting to commit rape.

Members of the jury, the Court has previously read to you the aggravating circumstances which the law requires you to consider if you are to find beyond a reasonable doubt that the evidence was established. You shall not take account of any other facts or circumstances as the bases for deciding whether the death penalty would be appropriate punishment in this case.

Tennessee Code Annotated 39-13-203(j), provides that in arriving at the punishment, the jury shall consider as heretofore indicated, any mitigating circumstances which shall include, but not be limited to, the following:

(1) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(2) The defendant acted under extreme duress.

(3) The capacity of the defendant to appreciate the wrongfulness of his conduct or 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.

(4) Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense.

If you unanimously determine that at least one or more statutory aggravating circumstances have been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances outweigh any mitigating circumstance or circumstances, the sentence shall be death. The jury shall state in writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify in writing that the statutory aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances so found.

You will write your findings and verdict upon the enclosed form attached hereto and made a part of this charge. Your verdict should be as follows:

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances.

(2) We, the jury, unanimously find that the statutory aggravating circumstance or circumstances so listed above outweigh the mitigating circumstance or circumstances.

(3) We, the jury, unanimously find that the punishment shall be death.

The verdict must be unanimous and each juror must sign his or her name beneath the verdict.

If you unanimously determine that no statutory aggravating circumstances has been proved by the State beyond a reasonable doubt; or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt but that said statutory aggravating circumstance or circumstances did not outweigh one or more mitigating circumstances, the sentence shall be life imprisonment. You will write your verdict upon the enclosed form attached hereto and made a part of this charge.

The verdict should be as follows:

We, the jury, unanimously find that the punishment shall be life imprisonment.

The verdict must be unanimous and signed by each juror.

Are there any requests?

HAROLD WAYNE NICHOLS VS. STATE OF TENNESSEE

DECLARATION OF VICKIE L. WOOD (THOMPSON)

STATE OF TENNEESSEE

COUNTY OF WILSON

I, Vickie L. Wood (Thompson), do hereby declare under penalty of perjury the following:

I am over the age of eighteen (18) years of age, am competent to make this Declaration, and have personal knowledge of the facts contained herein.

I reside in Wilson County, Tennessee at [redacted]

I was a juror in May of 1990 at the trial of Mr. Nichols. While it has been many years since I served on this jury, I do remember many aspects of the trial. I remember that Mr. Nichols confessed to the murder of Ms. Pulley so our decision focused on his sentencing. I remember vividly the description of the crime by Mr. Nichols, and as a young woman, it was very disturbing. I don't remember the defense presenting anything to let me know about Mr. Nichols' life, mental health, or intellectual abilities. While I do not question Mr. Nichols' guilt or our part as a jury in that decision, I wanted to hear more evidence about Mr. Nichols' background and life. If the defense had presented evidence of abuse neglect, mental illness, and/or intellectual disabilities, it would have had a significant impact on my decision on sentencing and I would have considered an alternative sentence.

I also remember the prosecution asserted that if we sentenced Mr. Nichols to life, he might be released and hurt someone again and since the state of Tennessee hadn't executed anyone in many years, it would be unlikely he would ever be put to death. As jurors we considered that when we sentenced Mr. Nichols.

I declare the foregoing under penalties of perjury.

Dated: December 28, 2016

Vickie L. Wood (Thompson)

Declarant

Witnessed by: Heather L Barrow

Date: December 28, 2016

HAROLD WAYNE NICHOLS VS. STATE OF TENNESSEE

DECLARATION OF Eudora Craig (Little)

STATE OF TN

COUNTY OF Macon

I, Eudora Craig (Little), do hereby declare under penalty of perjury the following is true to the best of my knowledge, information and belief:

I am over the age of eighteen (18) years of age, am competent to make this Declaration, and have personal knowledge of the facts contained herein.

I reside in Macon County, Lafayette, at

I was a juror on the Harold Wayne Nichols trial in May of 1990. While it was many years ago, I do remember that Mr. Nichols pleaded guilty and our main focus as a jury was to decide on the appropriate sentence for Mr. Nichols. We heard detailed evidence about the circumstances of the crime and we also heard the testimony of a psychiatrist who told us that Mr. Nichols had a disease & would do this again. The prosecutors also told us that, if we gave Mr. Nichols life he could get out & hurt someone again. We also discussed it as jurors & believed if we sentenced him to death, he would never be executed because TN never executes people. If I had the

EC

option to sentence Mr. Nichols to life without parole, I would have chosen that as his sentence. As a juror on his case, I would prefer to see Mr. Nichols not be on death row and not be executed. I would want him to receive life without parole.

I declare the foregoing under penalties of perjury.

Dated: 12-21-16

Eudora Craig (Lisa)
Declarant

Witnessed by: Regina D Charles

Date: December 21, 2016

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE
DIVISION I

HAROLD WAYNE NICHOLS,	}	
	}	POST CONVICTION
PETITIONER,	}	CASE NO.:
	}	
VS.	}	HAMILTON COUNTY CRIMINAL
	}	NO.: 175504
STATE OF TENNESSEE,	}	
	}	
RESPONDENT.	}	

AFFIDAVIT

STATE OF TENNESSEE }
}
COUNTY OF DAVIDSON }

I, Walter Mai Stephenson, after being duly sworn in accordance with the law, make oath the facts and circumstances hereinafter declared are true to the best of my knowledge, information and belief:

1. I am a citizen and resident of Gallatin, Sumner County, Tennessee, and my address is

2. I was one of the twelve jurors that was impaneled to sentence the Petitioner, Harold Wayne Nichols, for capital murder.

3. Prior to reaching our collective decision, myself and other members of the jury discussed the fact that Tennessee has a death penalty but as of the date of our deliberations no one had been put to death as a result.

4. Since each juror reached his or her own individualized decision in their respective determinations, I cannot speak for the other jurors as to how or what influenced them or how much weight he or she placed on each factor that ultimately lead to the imposition of the death penalty.

5. However, with regard to my personal judgment, it was never my personal intent that the Petitioner be put to death. My logic was that a sentence of death would not result in the Petitioner's execution as history has thus far confirmed, but by imposing this sentence, it would guarantee that he would stay in prison forever.

FURTHER AFFIANT SAITH NOT.

Walter Mai Stephenson

WALTER MAI STEPHENSON

SWORN TO AND SUBSCRIBED
Before me on this the
11th Day of June, 1997.

BARBARA M. CAMPBELL
NOTARY PUBLIC AT LARGE
DAVIDSON COUNTY, TENN.

Barbara M. Campbell

NOTARY PUBLIC
My Commission Expires: 11-22-97

FILED IN OFFICE
2017 JUN 13 AM 6:21
VICKIE DEAN, CLERK

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE v. HAROLD WAYNE NICHOLS

Criminal Court for Hamilton County
No. 175504

No. E1998-00562-SC-R11-PD

ORDER

On September 20, 2019, the State filed a motion to set an execution date for Harold Wayne Nichols stating that Mr. Nichols had completed the standard three-tier appeals process and requesting that an execution date be set pursuant to Tennessee Supreme Court Rule 12(4)(A). On December 30, 2019, Mr. Nichols filed a response opposing the State's motion because of his Rule 11 application in this Court regarding his motion to reopen post-conviction proceedings. *See Nichols v. State*, No. E2018-00626-SC-R11-PD. Mr. Nichols also requested that this Court issue a certificate of commutation to the governor under Tennessee Code Annotated section 40-27-106 because of certain enumerated extenuating circumstances.

Because the Court has now denied Mr. Nichols' Rule 11 application, it provides no basis for denying the motion to set an execution date. Furthermore, after careful review of the request for a certificate of commutation and the supporting documentation, the Court concludes that under the principles announced in *Workman v. State*, 22 S.W.3d 807 (Tenn. 2000), Mr. Nichols has presented no extenuating circumstances warranting issuance of a certificate of commutation. It is therefore ORDERED that the request for a certificate of commutation is DENIED.

Upon due consideration, the State's motion to set an execution date is GRANTED. Accordingly, under the provisions of Rule 12(4)(E), it is hereby ORDERED, ADJUDGED and DECREED by this Court that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law on the 4th day of August, 2020, unless otherwise ordered by this Court or other appropriate authority. No later than July 20, 2020, the Warden or his designee shall notify Mr. Nichols of the method that the Tennessee Department of Correction (TDOC) will use to carry out the execution and of any decision by the Commissioner of TDOC to rely upon the Capital Punishment Enforcement Act.

Counsel for Harold Wayne Nichols shall provide a copy of any order staying execution of this order to the Office of the Clerk of the Appellate Court in Nashville. The Clerk shall expeditiously furnish a copy of any order of stay to the Warden of the Riverbend Maximum Security Institution.

PER CURIAM