

I. SUMMARY

This post-conviction case was filed December 4, 2017. Counsel was appointed in March of 2018. An Amended Petition was filed September 4, 2018 (with subsequent supplements) asserting a total of 46 claims. A hearing was held January 28-29, 2019, and the case taken under advisement. Both sides have submitted Post-Hearing Briefs which have been helpful to the Court. This *Memorandum and Order* is entered as required by Tennessee Code Annotated section 40-30-111(b) (d) and SCR 28, Sec. 9(A).

The proof at the post-conviction trial focused on the contention that massive, prejudicial and virulent pretrial publicity in Knox County made a fair trial in Knox County an impossibility and that trial counsel, although urged by the trial judge to change venue, did not do so.¹ Furthermore, it is alleged that the jury selection process prior to trial was insufficient to provide the Petitioner with a fair and impartial jury given the massive pretrial publicity and possible racial prejudice.

The Court has found that while trial counsel made an error in failing to ask for a change of venire, that error was not prejudicial. While massive and negative publicity was a threat to a fair trial, it was overcome by a lengthy jury selection process that resulted in a jury that was fairly and legally qualified to hear the case. The remaining assertions in the Amended Petition and its Supplements have also been found to be without merit for the reasons set out herein.

¹ When the Court uses the term “change of venue” it is not literal but means bringing in a jury from another county. *See* TENN. CODE ANN. § 20-4-201(2). It is a change of venire not venue. *See State v. Cobbins*, 2015 WL 4536564, *4-5 (Tenn. Crim. App. Sept. 2014).

For the reasons stated herein, the Court finds that the Amended Petition and its Supplemental Petitions are without merit and they are denied. This case is dismissed.

II. INTRODUCTION

As will be subsequently addressed in detail, the Petitioner's pleadings allege a total of 46 separate claims. Some of the claims are of substance while others involve issues for which there was no proof; claims previously determined in this case; or claims clearly without merit as being inconsistent with prior established case law. All the claims will be addressed in this memorandum and order.

In his Amended Petition for relief, Mr. Davidson asserts:²

- A. Issues surrounding pretrial publicity and the cross-racial nature of the offenses (i.e., white victims and black defendant) made it impossible for a fair, unbiased jury to be selected in Knoxville; trial counsel were ineffective in failing to move for a change of venue or venire and failing to voir dire potential jurors on these issues (Petitioner's claims 1-5, 7);
- B. Trial counsel were ineffective in other regards during jury selection, and the trial court's voir dire was also improper (Petitioner's claims 6, 8-13);
- C. The trial judge's misconduct constituted structural error which denied Petitioner a fair trial, and trial counsel were ineffective in developing and presenting the structural error claims at trial and on appeal (Petitioner's claims 14, 45);
- D. Trial counsel were ineffective in their handling of several issues before and during trial and on appeal (Petitioner's claims 15-25);

² The Court has summarized the Petitioner's claims here and reordered some of them for ease of presentation. Although the Court does not identify each claim individually in this Part, the Court will address each claim individually below in Part VIII.

- E. Trial counsel rendered ineffective assistance during the capital sentencing phase by failing to conduct an adequate mitigation investigation, failing to consult with and present expert testimony, failing to object to the State's presentation of evidence and argument, (Petitioner's claims 26-31);
- F. Counsel rendered ineffective assistance on appeal (Petitioner's claim 33);
- G. Newly discovered evidence renders Mr. Davidson "actually innocent" of the death penalty (Petitioner's claims 40-41);
- H. Constitutional concerns and issues surrounding the arbitrary nature of Petitioner's sentence render the death penalty in general and as applied to Mr. Davidson unconstitutional (Petitioner's claims 32, 34-37, 42-44 and 46); and
- I. Petitioner is entitled to relief based on cumulative error (Petitioner's claims 38-39).

Many of Petitioner's claims relate to an assertion of ineffective assistance of Counsel. To prevail on this claim, a petitioner must prove that (1) counsel's performance was deficient and (2) the deficient performance prejudice the defense. *Strickland v. Washington*, 466 U.S. 668 (1984).

Post-conviction relief is available "when the conviction is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." TENN. CODE ANN. § 40-30-103. A petitioner has the burden of proving his factual allegations by clear and convincing evidence. TENN. CODE ANN. § 40-30-110(b). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998) (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)).

There is a rebuttable presumption whereby a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived. TENN. CODE ANN. § 40-30-110(f). 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 constitutional requires retroactive application of the right; or (2) The failure to present the ground was the result of state action in violation of the federal or state constitution. *Id.* § 40-30-106(g)(1)-(2). Previously determined claims are also precluded from post-conviction review. *See id.* § 40-30-106(f). A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. *Id.* § 40-30-106(h). A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regarding of whether the petitioner actually introduced any evidence. *Id.*

When a petitioner contends trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing. *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990); *see also Scott v. State*, 936 S.W.2d 271, 273 (Tenn. Crim. App. 1996). As a general rule, presenting the testimony of an uncalled witness is the only way a petitioner can establish prejudice from the failure to call a witness.

III. OVERVIEW OF FACTS AND SENTENCE

A full rendition of the facts are well set out in the decision of the Supreme Court of Tennessee at *State v. Davidson*, 509 S.W.3d 156 (Tenn. 2016).

The proof at trial showed that on January 6, 2007, the two young adults Chris Newsom and Channon Christian were kidnapped, raped, robbed and finally murdered by Mr. Davidson and his friends/confederates George Thomas, Letalvis Cobbins and Vanessa Coleman. Another, Eric Boyd, was later charged in federal court with knowingly assisting in Mr. Davidson's attempts to avoid apprehension.

As to Mr. Davidson, The Tennessee Supreme Court summarized the proof as follows:

Mr. Davidson and his accomplices, using guns, kidnapped Chris and Channon and stole Channon's vehicle. They tied Chris's and Channon's hands behind their backs and stole money and personal items. After raping Chris, Mr. Davidson and his accomplices forced Chris to walk without shoes, socks, or pants on a January night to a desolate area beside a set of train tracks. They bound his feet with his belt. They blindfolded Chris, stuck a sock in his mouth and secured it with a shoelace, and wrapped a hooded sweatshirt around his head. They shot him three times and killed him. Two of the bullets removed from Chris's body were shot from the same gun and shared class characteristics with the High Standard revolver Mr. Davidson had in his possession when he was arrested. To hide the evidence of the murder, they wrapped Chris's body in a comforter, poured gasoline on him, and set his body on fire. Afterwards, Mr. Davidson was seen wearing Chris's shoes. Within an hour of the murder, Mr. Davidson tried to contact his girlfriend by using Chris's cell phone.

After killing Chris, Mr. Davidson and his friends returned to Mr. Davidson's house where they beat and repeatedly raped Channon. Abusing her for many hours, they then tied her into a fetal position, secured a plastic bag tightly over her head, put her in five plastic garbage bags, and stuffed her in a garbage can to suffocate to death. While Channon was dying in the garbage can, Mr. Davidson left to spend time with his girlfriend. He gave Channon's clothes and personal items to his girlfriend. Mr. Davidson and his

friends could have released Chris and Channon unharmed after stealing Channon's vehicle. Mr. Davidson did not know Chris and Channon and had no reason to kidnap, rape, and murder them. Chris and Channon had no defensive wounds. According to Mr. Davidson, Channon asked him if she was going to die, indicating she likely knew her fate. Viewing the facts in the light most favorable to the State, a reasonable jury could have easily found beyond a reasonable doubt that Mr. Davidson acted with premeditation when he shot Chris three times and killed him and bound Channon and stuffed her into a garbage can to die. A reasonable jury could have easily found beyond a reasonable doubt that Mr. Davidson committed these murders while also committing the crimes of kidnapping, robbery, and rape.

State v. Davidson, 509 S.W.3d at 214.

In describing why the death penalty was appropriate for Mr. Davidson for both the murders of Ms. Christian and Mr. Newsom the Court reiterated with even more detail:

The State's proof showed that Chris was robbed at gunpoint and taken against his will to a place where he was anally raped with sufficient force to injure his anus. After being raped, he was forced to walk without shoes, socks, and pants to a desolate area beside a set of train tracks. Chris was blindfolded with a bandana, his sock was forced in his mouth and tied with a shoelace, and his head wrapped in a sweatshirt. His ankles were bound by his belt and a strip of fabric, and his wrists were tied behind his back. He was shot three times—in his lower back, his neck, and his head. The trajectory of the bullet to his back indicated he was bent over when the shot was fired. The contact shot to his head was fatal. He had a hematoma in the right forehead region, indicating blunt force trauma possibly resulting from his fall to the ground after being shot. Chris had no defensive wounds because, according to the medical examiner, he could not defend himself.

The State introduced evidence that before her death, Channon was robbed, tied up, and taken to Mr. Davidson's house where she was brutally raped—orally, vaginally, and anally—by more than one assailant with such force that her anal/genital area and mouth were injured. The medical examiner explained this was not “just a rape,” explaining that some object came into contact with the genital area to inflict such serious injury; it may have been caused by someone kicking her in the genital area. She had extensive hemorrhages under her scalp, bruises on her arms, and “carpet burns” on her lower back and upper right buttock. A bleach-based cleaning liquid was sprayed into her mouth in an attempt to destroy the perpetrators' DNA. After being repeatedly forcibly raped and beaten, Channon was bound

into a fetal position with her hands and feet tied, her face wrapped in a plastic bag, her body put in five plastic garbage bags, and then stuffed into a garbage can to suffocate to death.

State v. Davidson, 509 S.W.3d at 220.

In commenting on the validity of the death sentence which Mr. Davidson received the Supreme Court stated “without question, Mr. Davidson has shown by his conduct he is the ‘worst of the worst’ and deserves the death penalty.” *State v. Davidson*, 509 S.W.3d at 227. The Court also described Mr. Davidson as having “an active and prominent role in the commission of the crimes for which he was convicted.” *State v. Davidson*, 509 S.W.3d at 225. The author of the Court of Criminal Appeals opinion affirming the death penalty for Mr. Davidson stated that “This case may well set a high-water mark as one of cruelty and depravity.” *State v. Davidson*, 2015 WL 1087126 *57 (Tenn. Crim. App. March 2015).

At the close of Mr. Davidson’s October 2009 trial the jury imposed two death sentences for the two (2) murders (the jury found four aggravating circumstances) and also found him guilty of especially aggravated robbery, especially aggravated kidnapping, aggravated rape, and facilitation of aggravated rape. *State v. Davidson*, 509 S.W.3d at 170.

IV. THE TRIAL JUDGE AND THE LONG PROCEDURAL HISTORY

Mr. Davidson and his associates Mr. Cobbins, Mr. Thomas and Ms. Coleman were indicted in State court for the murders and associated crimes. Boyd was indicated in

federal court for assisting Davidson in his attempt to avoid apprehension. Boyd was convicted in April 2008. See *United States v. Boyd*, 640 F.3d 657 (6th Cir. 2011).

The State cases were assigned to Judge Richard Baumgartner. The Defendants were to receive separate trials, counsel appointed, and lengthy pretrial proceedings took place. In State Court the cases were tried in succession as follows.

1. Cobbins Trial was held in August 2009 (before Judge Baumgartner) and he was found guilty of first degree murder. The death penalty was sought but he received life without parole, ultimately affirmed on appeal. *State v. Cobbins*, 2014 WL 4536564 (Tenn. Crim. App. Sept. 2014).

2. At the Davidson Trial in October 2009 (before Judge Baumgartner) he was found guilty as set out above. Verdict and death sentences affirmed, *State v. Davidson*, 509 S.W.3d 156 (Tenn. 2016).

3. At the Thomas Trial in December 2009 (before Judge Baumgartner) he was found guilty of first degree murder. The death penalty was sought but Thomas received life without parole. The verdict and sentence were later set aside on motion for a new trial. Thomas was retried before the undersigned Judge in May 2013. He was again found guilty of first degree murder and received consecutive life sentences. That verdict and sentence were affirmed at *State v. Thomas*, 2015 WL 513583 (Tenn. Crim. App. Feb. 2015).

4. At the Coleman Trial in November 2012 (before Judge Baumgartner), she was found not guilty of the greater offenses but guilty of a number of lesser offenses. This verdict was, however, set aside (with the agreement of the State). She was retried before

a different judge in November 2012 and again found guilty of a number of lesser offenses. That verdict and a 35-year sentence was affirmed on appeal. *State v. Coleman*, 2014 WL 6908409 (Tenn. Crim. App. Dec. 2014).

It is now widely known that in late 2010 Judge Baumgartner was investigated by the TBI for suspicion of opioid addiction and illegal purchases of opioids. He resigned his judgeship in January 2011. He later pled guilty to official misconduct in State court and placed in diversion. When it was still later learned the true extent of his criminal activities in pursuit of opioids, he was indicted and convicted in federal court and spent time in prison. See *United States v. Baumgartner*, 581 Fed. Appx. 522 (6th Cir. 2014).

In the meantime in State court a successor judge was appointed soon after the resignation of Baumgartner. At that time motions for new trials were pending for all four (4) Defendants: Davidson, Cobbins, Thomas and Coleman. All contended that they were entitled to new trials because of Baumgartner's opioid addiction. The State agreed that Baumgartner's addictive conduct during the Coleman Trial in May 2010 entitled her to a new trial.

As to the remaining Defendants, Davidson, Cobbins, and Thomas the first successor judge issued conflicting orders as a result of confusion as to the legal standard governing whether Baumgartner's addiction problems were such as to mandate a new trial for Davidson, Cobbins and Thomas for what is described as "structural error."

On May 24, 2012, the Supreme Court issued a ruling on the issue and clarified the rule to be applied. Misconduct outside the courtroom will not impeach the integrity of a trial or verdict "unless there is proof that the misconduct affected the trial proceedings."

No. E2012-00448-SC-R10_DD (May 24, 2012). See *State v. Davidson*, 509 S.W.3d at 228-229 (Appx.)

Subsequent to the May 2012 Supreme Court decision the first successor trial judge and the District Attorney were involved in several in-court verbal conflicts which created the perception that the judge might have lost his “cold neutrality” toward the State. The Court of Criminal Appeals ultimately felt that his removal was necessary. *State v. Cobbins*, 2012 WL 5266427 (Tenn. Crim. App. Oct. 25, 2012) (State’s recusal motion granted).

The undersigned Judge was then appointed to the case by the Chief Justice on October 31, 2012. The Court subsequently found Mr. Davidson’s motion for a new trial should be denied by Order dated January 15, 2013. The Court of Criminal Appeals affirmed the conviction and sentence on February 5, 2015 and the Supreme Court, which is required to review all death penalty verdicts, affirmed on December 19, 2016. The petition for post-conviction relief was filed by Mr. Davidson on December 4, 2017.

**V. PETITIONER’S MOTION TO CONTINUE
AND HIS NOTICE OF LACK OF READINESS**

On the day of beginning of trial (January 28, 2019), Petitioner’s Counsel filed a pleading titled “*Petitioner’s Notice of Lack of Readiness for Evidentiary Hearing and Denial of Adequate Prepared Counsel.*”

This “Notice” was mostly a renewal of the Petitioner’s motion for a continuance which had been filed on December 14, 2018, heard by the Court on December 21, 2018, and denied by the Court in a 13-page order signed December 27, 2018.

The Court's denial of a continuance was appealed to the Court of Appeals on December 28, 2018 pursuant to TRAP 10. The Court of Criminal Appeals denied the appeal by order entered January 17, 2019. The scheduled hearing therefore went forward as scheduled on January 28, 2019.

In the most general terms the Petitioner's Counsel have objected to the Court's scheduling which they contend as rigid insistence toward a rush to judgment. The hearing in this case was scheduled some 58 weeks after Counsel assisted the Petitioner in filing his "*pro se*" petition. The hearing was held some 43 weeks after Counsel's formal appointment. (March 1, 2018 to January 28, 2019). The case was set 58 weeks after filing and not even within the one year mandated by statute. TENN. CODE ANN. § 40-30-111(d). Furthermore, Petitioner's Counsel contend that the Court has denied them expert witnesses and access to other information, all to the prejudice of their client.

The Court has entered a series of orders addressing the issues raised by the Petitioner and has explained each and every ruling. Those orders will speak for themselves and they are adopted and incorporated herein. In addition to these incorporated orders the Court will undertake to additionally explain its position as it relates to Petitioner's continuance issue.

Another timeline will make clear some of the issues raised:

1. December 4, 2017: Mr. Davidson files his "*pro se*" 24-page petition for post-conviction relief. This "*pro se*" petition is drawn by lawyers from the Office of Post Conviction Defender. This shows that Petitioner's Counsel were well familiar with the case in the fall of 2017.

2. March 1, 2018: Office of Post Conviction Defender formally appointed to represent the Petitioner by a prior judge.

3. April 27, 2018: The undersigned Judge appointed to preside over the case. All Knox County judges had recused.

4. May 8, 2018: First scheduling order signed and entered.

5. May 24, 2018: Revised scheduling order signed and entered.

6. September 4, 2018: Petitioner files 156-page Amended Petition.

7. October 4, 2018: Case management and scheduling order signed setting case for January 28, 2019, and establishing dates for motions and notices, etc.

8. December 27, 2018: Order denying Petitioner's motion for a continuance. The Court well explained its reasoning in a 13-page order.

In addition to the above, the Court held a number of *ex parte* hearings (usually in Nashville courthouse, as both the Judge and Petitioner's Counsel live in Nashville.) The hearings were held pursuant to SCR 13, Sec. 5. Hearings were held:

1. July 26, 2018 on four (4) requests. An order was entered addressing each request and a 13-page Memorandum was entered explaining the Court's ruling. This included denying funds for Dr. Pamela Auble.

2. September 12, 2018: Hearing held on motion to reconsider Dr. Auble's denial and motion for ballistic expert. Both were denied by Order signed September 14, 2018, explaining the denial.

3. On September 17, 2018, the Court entered an order to give Dr. Lipman (who had been authorized in July) the assistance of Dr. Auble. This was explained in a 4-page Order.

4. By order signed October 25, 2018, the Court denied Petitioner's motion to reconsider the ballistic expert, and reconsider the previous denial of Dr. Edelman. (*See* July 28, 2018 Order).

5. An *ex parte* hearing was conducted on December 21, 2018 in Knoxville. The request for services by Dr. Merikangas was denied by an order signed December 27, 2018, and on reconsideration by an order signed January 7, 2019.

6. On December 21, 2018, in Knoxville, the Court heard an *ex parte* motion to subpoena records pertaining to members of Mr. Davidson's family. This was denied by order signed December 27, 2018.

While denying a number of requests, the Court did authorize:

- (1) investigative services,
- (2) paralegal services to find and organize the mass of publicity and media reports regarding Mr. Davidson's arrest, conduct, and trial, and
- (3) the hiring of the neuropharmacologist, Dr. Lipman.

The Court reiterates its affirmation of its prior orders. The Court, however, would add the following further observations.

Counsel have failed on their motion to continue to bring to the Court's attention any specific witnesses it has failed to interview or any missing witness that might have any information about any valid claims in this case. Mere vagaries and speculation are

insufficient to support a continuance. At no time did Counsel cite any information from interviews with the three (3) trial counsel, the mitigation specialist who testified at trial, the psychiatrist who testified at trial, or the neuropsychiatrist who examined the Petitioner prior to the 2009 trial. There is no indication that these participants in the trial preparation in 2008-09 were hostile, refused to be interviewed, or were unavailable for interviews.

If there were voids in trial counsel preparation in 2008-09 which would open the door for further expert testimony it was not shown to the Court.

Counsel seem unable to accept the parameters set by the Tennessee Supreme Court in its structural error decision of May 24, 2012. The Court adheres to its decision not to allow the Petitioner to seek out information that was not relevant to the trial judge's conduct affecting the trial proceedings.

The Court notes that all three (3) trial lawyers who testified at the hearing stated that the trial judge was intellectually engaged during the trial and showed no evidence of confusion and no evidence was entered to the contrary. No other witness testified otherwise.

Counsel continue to argue that evidence from the codefendant Mr. Thomas, only available in 2018, that Eric Boyd was the one who shot Chris Newsom, should be considered by the Court. There is no legal authority that the possible Thomas testimony which came to light only in 2018 would be cognizable in a post-conviction case attacking the 2009 conviction.

It is interesting to note that in his 2007 statement to the police, Mr. Davidson said that Thomas was the shooter, not Boyd. Now his lawyers say that they should be able to prove it was Boyd based on Thomas's 2018 revelation.³

Petitioner's Counsel appear to have spent an inordinate amount of time pursuing the so-called Boyd matter and evidence regarding the trial judge even though they were aware that the Court had ruled that the evidence was inadmissible and the so-called Boyd claim not cognizable.

Many of the denied requests for experts go to the assertion that maybe, just maybe, Mr. Davidson suffered brain damage as a child. This is really an attack on the trial counsel's choice of experts. Trial counsel hired both a psychiatrist and a neuropsychologist and the psychiatrist testified at the 2009 trial. *State v. Davidson*, 509 S.W.3d at 223.

In seeking their own neuropsychologist, neuropharmacologist and psychiatrist the Petitioner's Counsel failed to include any evidence that trial counsel failed to make appropriate choices of the retained 2009 experts or that trial counsel failed to adequately communicate with their own experts. There is no indication that the trial counsel were unavailable or unwilling to be interviewed and yet no information was ever shown to the Court that trial counsel failed to choose the right expert or to provide needed information.

³ All of this further ignores the fact that even if Boyd (or for that fact Thomas) was the shooter, Mr. Davidson would still be criminally responsible for the Newsom killing (and subject to the death penalty for his killing) and obviously the proof is that he killed Ms. Christian. See *Tyson v. Arizona*, 481 U.S. 137 (1987); *Owens v. State*, 13 S.W.3d 742, 759-63 (Tenn. Crim. app. 1999) (accessory to murder subject to death penalty). His present contention is far from an assertion of "stand alone actual innocence." See *Dillinger v. State*, 279 S.W.3d 282, 290, 290 n. 4 (Tenn. 2009).

In addition, Petitioner listed Dr. Brown as a witness on his witness list but never produced him at the hearing.

The case law makes clear that the choice of a qualified expert and that expert's diagnosis is very difficult to challenge as ineffective assistance. *Hinton v. Alabama*, 571 U.S. 263, 273-74 (2014) and *Jordan v. State*, 2016 WL 6078573 *61-63 (Tenn. Crim. App. Oct. 2016) (choice of an expert is virtually unchallengeable). In denying the requests related to this issue the Court was well aware of the cases cited above, as well as the lack of any specific information as a result of interviews with trial counsel or their hired experts.

As it turned out, the Petitioner's Counsel's assertion that additional testing "might" have shown brain damage, was refuted by the three (3) trial lawyers who testified regarding their lengthy conversations with Mr. Davidson in 2008-2009 and his ability to well understand the lawyers, ask intelligent questions, and otherwise manifest mental ability. The Petitioner did not testify at the hearing about his intellectual abilities although he had every right to do so and even an obligation to testify. TENN. CODE ANN. § 40-30-110(a) and SRC 28, Sec. 8(c)(1).

The affidavit of Dr. Lipman, who was listed as a witness but not called by the Petitioner, was filed the morning of the hearing. No motion was made but his affidavit was part of the so-called "*Notice of Lack of Readiness*." Dr. Lipman was hired in August 2018 as authorized by the Court. He now states that he could not be ready for the hearing and he had yet to interview Mr. Davidson.

The Petitioner took issue with the Court's failure to fund a firearm expert. This seems to relate to the trial testimony that the Petitioner's handgun was a .22 caliber and

that Chris Newsom was shot with a .22 bullet which could have come from the Petitioner's pistol but it also could have come from many thousands of other .22 pistols. The Supreme Court found this evidence relevant but "not highly probative." *State v. Davidson*, 509 S.W.3d at 207. Furthermore, Mr. Davidson in his statement to the police stated that he "assumed" his pistol was used to kill Chris Newsom. He stated that he thought Thomas had taken his pistol off his dresser, used it to kill Chris Newsom, and then returned it. An additional firearm expert was not warranted.

Petitioner's Counsel sought medical records from his deceased family members to somehow explore further, for possible additional mitigation, what appeared to be a thorough mitigation investigation and presentation by trial counsel and their mitigation expert in the 2009 trial. *See State v. Davidson*, 509 S.W.3d at 222-24. The Court ruled that further inquiry would not lead to relevant evidence.

In addressing the requests from Petitioner's Counsel, the Court declined to sign the submitted proposed orders for expert services unless the Court was convinced that the request was authorized by SCR 13, Sec. 5. Authorization is only allowed as follows:

(a)(1) In the trial and direct appeal of all criminal cases in which the defendant is entitled to appointed counsel and in the trial and appeals of post-conviction proceedings in capital cases involving indigent petitioners, the court, in an ex parte hearing, may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected. If such determination is made, the court may grant prior authorization for these necessary services in a reasonable amount to be determined by the court. The authorization shall be evidenced by a signed order of the court. The order shall provide for the payment or reimbursement of reasonable and necessary expenses by the director. *See Tenn. Code Ann. § 40-14-207(b); State v. Barnett*, 909 S.W.2d 423 (Tenn. 1995); *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995).

* * *

(b)(1) Every effort shall be made to obtain the services of a person or entity whose primary office of business is within 150 miles of the court where the case is pending. If the person or entity proposed to provide the service is not located within the 150-mile radius, the motion shall explain the efforts made to obtain the services of a provider within the 150-mile radius.

(2) Any motion seeking funding for expert or similar services shall itemize:

(A) the nature of the services requested;

(B) the name, address, qualifications, and licensure status, as evidenced by a curriculum vitae or resume, of the person or entity proposed to provide the services;

(C) the means, date, time, and location at which the services are to be provided; and

(D) a statement of the itemized costs of the services, including the hourly rate, and the amount of any expected additional or incidental costs.

(3) Any motion seeking funding for investigative or other similar services shall itemize:

(A) the type of investigation to be conducted;

(B) the specific facts that suggest the investigation likely will result in admissible evidence;

(C) an itemized list of anticipated expenses for the investigation;

(D) the name and address of the person or entity proposed to provide the services; and

(E) a statement indicating whether the person satisfies the licensure requirement of this rule.

(4) If a motion satisfies these threshold requirements, the trial court must conduct an ex parte hearing on the motion and determine if the

requested services are necessary to ensure the protection of the defendant's constitutional rights.

(c)(1) Funding shall be authorized only if, after conducting a hearing on the motion, the court determines that there is a particularized need for the requested services and that the hourly rate charged for the services is reasonable in that it is comparable to rates charged for similar services.

* * *

(3) Particularized need in the context of capital post-conviction proceedings is established when a petitioner shows, by reference to the particular facts and circumstances of the petitioner's case, that the services are necessary to establish a ground for post-conviction relief and that the petitioner will be unable to establish that ground for post-conviction relief by other available evidence. See *Owens*, 908 S.W.2d at 928.

(4) Particularized need cannot be established and funding requests should be denied where the motion contains only:

(A) undeveloped or conclusory assertions that such services would be beneficial;

(B) assertions establishing only the mere hope or suspicion that favorable evidence may be obtained;

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

(D) information indicating that the requested services fall within the capability and expertise of appointed counsel. See, e.g., *Barnett*, 909 S.W.2d at 430; *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985); *State v. Abraham*, 451 S.E.2d 131, 149 (N.C. 1994).

* * *

(d)(4) In a post-conviction capital case, a trial court shall not authorize more than a total of \$20,000 for all investigative services, unless in its sound discretion the trial court determines that extraordinary circumstances exist that have been proven by clear and convincing evidence.

(5) In a post-conviction capital case, a trial court shall not authorize more than a total of \$25,000 for the services of all experts unless in its sound discretion the trial court determines that extraordinary circumstances exist that have been proven by clear and convincing evidence.

The Court took its obligation, as set out above, seriously. The Court authorized what was necessary for Counsel to proceed on their substantive claims but denied them when based on speculation or lack of particularized need. Counsel may believe that he/she has to go up every alley but it is the Court's job to say no when the lawyer heads up what is clearly a blind alley.

As to the continuance, the Court would have granted a continuance if there had been any showing to the Court that additional time was necessary to proceed on a substantive claim. After at least 43 weeks Counsel did not make such a showing. They could only present the Court with speculation and an expressed need to proceed on an exploratory investigation with no reasonable boundary and little relationship to the apparent real issues in the case. The motion to continue was appropriately denied and the Court is convinced that Petitioner's Counsel were able to well present proof at the hearing focused on the substantive issues in this case.

VI. PROOF AT HEARING

At the evidentiary hearing, the Petitioner presented the testimony of the following witnesses:

1. Petitioner's attorneys at trial and on direct appeal:
 - a. David Eldridge, lead counsel;

- b. Doug Trant, co-counsel; and
 - c. Loretta Cravens, who assisted appointed counsel.
2. Steve Johnson, co-counsel for codefendant George Thomas;
 3. Jessica Thomson, paralegal with the Office of Post-Conviction Defender.

Counsel for the Petitioner also introduced numerous documents in lieu of live testimony; some of these documents will be considered on their merits, and some will be considered solely as offers of proof. The content of any relevant documents will be summarized in the section of this Order addressing Petitioner's stated issues.

Additionally, the Court questioned Leland Price, the State's lead attorney at trial and on post-conviction, about jury selection issues. The Court finds all testifying witnesses to be credible.

4. Of import are a significant number of witnesses who had knowledge of the events relevant to the October 2009 trial but were not called by the Petitioner.

a. The Petitioner, even though statute mandates that he "shall" testify.
TENN. CODE ANN. § 40-30-110(a) and SCR 28, Sec. 8(C)(b).

- b. No trial juror testified.
- c. The psychiatrist that testified at the October 2009 trial.
- d. The neuropsychologist that tested the Petitioner in 2009.
- e. The mitigation specialist that testified at the October 2009 trial.
- f. The jury consultant that assisted trial counsel at the jury selection in

October 2009.

The Court summarizes the testimony of the witnesses that testified as follows.⁴

A. PETITIONER'S TRIAL AND DIRECT APPEAL COUNSEL

1. *David Eldridge, Lead Counsel*

Mr. Eldridge, licensed as an attorney in Tennessee since 1987, has practiced criminal defense law in Knoxville since 1988, first with the firm of Ritchie, Fels, and Dillard, then with a firm he founded in the mid-2000s. Mr. Eldridge is the former President of the Knoxville Bar Association. He was appointed to represent Mr. Davidson in federal court in January 2007,⁵ and Mr. Eldridge represented Petitioner from the time Petitioner was charged in state court through direct appeal. Doug Trant was appointed as co-counsel once the State filed notice of intent to seek the death penalty. Mr. Eldridge said the two associates working at his firm at the time, Loretta Cravens and Troy Weston, worked on the case, and Mr. Eldridge's firm hired several law clerks to work on the case as well, all at expense to the Eldridge firm. During the lead up to the October 2009 trial, he attended a lengthy death penalty defense seminar in Georgia to hone his skills for his representation of Mr. Davidson.

At the time of his appointment, Mr. Eldridge was aware of the unpopular nature of Mr. Davidson and the codefendants and the serious nature of the offenses, so counsel was concerned how his representation of the Petitioner would affect the firm's practice. Mr. Eldridge was aware of the cross-racial nature of the case (white victims, black defendants)

⁴ There were 121 exhibits entered. Some were CDs which contained multiple copies of media stories and jury questionnaires.

⁵ Mr. Eldridge stated the federal charges against Mr. Davidson were later dismissed.

and that the victims were upper-middle-class residents of Knox County, while the codefendants were from outside East Tennessee.

Mr. Eldridge testified regarding the extensive nature of the pretrial and during-trial publicity in this case, as well as the content of the coverage. Mr. Eldridge's testimony was largely consistent with the testimony of the other witnesses, so that portion of his testimony will not be summarized here. Of note, Mr. Eldridge said he had personally been involved with other cases that had received media scrutiny, but none of his other cases had approached this level of coverage.

Mr. Eldridge stated he became aware of the negative internet comments toward the codefendants and their attorneys early on. Counsel said he tried his best to avoid reading the comments, but his curiosity got the best of him. Counsel stated many of the comments were "toxic," with some of them being of the "there is no need for a trial" variety. Mr. Eldridge also remembered some postings inquiring why the case was not receiving more attention nationally and stating that if the victims were black and the defendants white, the case would have received more attention. Mr. Eldridge recalled the press portrayed Mr. Davidson as the "ringleader" of these offenses early and often, and he remembered the phrase "torture slaying" was used often in media coverage of this case.

Mr. Eldridge stated he was aware of several threatening online posts and messages made toward him, Mr. Trant, and the attorneys for the other codefendants. He remembered contacting law enforcement after one particular threat; in that threat, a letter was mailed to Mr. Eldridge's office depicting a photograph from the *Knoxville News Sentinel* in which Mr. Davidson and his trial attorneys were all seen smiling. The

accompanying message made specific threats against Mr. Eldridge, Mr. Trant, and their families. Counsel turned the threatening letter over to the federal authorities. Mr. Eldridge said he remembered viewing many other online posts, but he saw no other post threatening enough to involve the police.

Mr. Eldridge recalled he did not personally collect media from other parts of the state, nor did he recall comparing the level of coverage elsewhere to the coverage in Knoxville. Nor did his firm commission any sort of poll to determine what the knowledge of this case was in other parts of the state. Mr. Eldridge recalled the other codefendants' attorneys sought changes of venue, with the trial court granting changes of venue (i.e., the juries were selected elsewhere but the cases tried in Knoxville). Counsel said his initial belief was that he and Mr. Trant would move for a change of venue, but Mr. Trant developed the strategy to try to pick the jury in Knox County. Counsel stated the defense team retained a jury selection specialist, Marjorie Fargo, to assist with jury selection. Mr. Eldridge did not recall if Ms. Fargo suggested any questions to ask prospective jurors, but he did remember Ms. Fargo suggested that the jury be selected from another county.

Mr. Eldridge recalled a march on a Saturday in May 2007 in which persons purporting to be from the Ku Klux Klan marched. Counsel said he did not remember many Klansmen attending the rally (in counsel's view, they were outnumbered by counter-protestors), and the march itself was very short. Mr. Eldridge did not remember a particularly large amount of shouting, nor did he recall what the various signs carried by the two sides read.

Mr. Eldridge recalled he attempted to have Mr. Davidson's post-arrest statement to police suppressed. That motion was denied, although certain portions of the statement were redacted and not presented to the jury at trial. Mr. Eldridge also recalled the trial judge ruled certain of the Petitioner's prior convictions could not be referenced on cross-examination if the Petitioner chose to testify at trial. However, the news articles published by the local media before trial referenced Petitioner's full criminal record and posted links to Mr. Davidson's entire, unredacted statement to police.

A significant portion of the Petitioner's direct examination of Mr. Eldridge consisted of counsel's identifying various documents which the Petitioner sought to introduce into evidence. The Court has reviewed all exhibits introduced into evidence at the evidentiary hearing; if any of the documents introduced in the examination of Mr. Eldridge are relevant to the Court's determination of certain issues, they will be discussed below.

On cross-examination, Mr. Eldridge reiterated Mr. Trant was the one who generated the strategy of attempting to pick the jury in Knox County. Mr. Eldridge noted Mr. Trant has practiced longer than he (Eldridge) has and has tried more jury trials, so ultimately Mr. Eldridge deferred to Mr. Trant on the venue issue. Mr. Eldridge testified he had no reason to doubt the trial judge would have granted a change of venire had one been sought. Mr. Eldridge also said both he and Mr. Trant discussed the change of venue issue with Mr. Davidson, and the Petitioner understood his options. Ultimately, counsel and the Petitioner understood that Mr. Trant's strategy was that the intense pretrial publicity in Knox County would make it impossible to select a jury. The parties knew it was a risky

choice. Mr. Eldridge said he had no reason to think Mr. Davidson could not understand the jury selection issue, and the Petitioner did not object to Mr. Trant's strategy, though Mr. Eldridge noted Petitioner relied on trial counsel in making that decision.

Mr. Eldridge did not recall whether he objected to Mr. Trant's strategy, though Mr. Eldridge thought he (Eldridge) would have needed convincing to agree with Mr. Trant. Counsel recalled discussing the jury selection issue with Judge Baumgartner before trial; the judge had begun procedures to pick a jury in Petitioner's case in Hamilton County, but counsel decided to select the jury in Knox County.

Mr. Eldridge testified that Petitioner was reasonably intelligent and showed no signs of intellectual disability. Counsel said Mr. Davidson understood things as they occurred; the Petitioner asked questions as needed, and Mr. Eldridge described Mr. Davidson as polite and courteous in their interactions. Counsel said Petitioner could read. When asked whether Dr. Brown diagnosed any issues, counsel said Dr. Brown did not tell Mr. Eldridge about anything that was particularly wrong with Petitioner. Mr. Eldridge said Dr. Brown would have testified about anything he had found.

Mr. Eldridge labeled this case as "extremely difficult," given the extraordinary volume of evidence implicating the Petitioner. Mr. Eldridge particularly noted the forensic evidence tying Petitioner to these offenses and the evidence found in Petitioner's possession at the time of his arrest. Counsel argued several motions to suppress much of the evidence, but the trial court denied most of the motions.

Counsel explained the case for death for Mr. Davidson was much stronger than it was for Mr. Cobbins, as the DNA evidence against Mr. Cobbins was not nearly as extensive

as it was against Mr. Davidson. Mr. Eldridge also pointed out that Mr. Davidson rented the house in which Ms. Christian's body was found and that Petitioner's fingerprint was found on a bag in which Ms. Christian's body was found.

Mr. Eldridge acknowledged that once it became apparent that a Knoxville jury could be selected, counsel should have moved to change venue. The defense strategy at trial was to attempt to blame the codefendants and establish an alternative reason for Ms. Christian to be present at the Chipman Street residence. Mr. Eldridge acknowledged this strategy drew a lot of anger, particularly from the victims' families, but counsel pursued "what was possible" given the facts and the DNA evidence. Mr. Eldridge stated the condemnation from the community did not affect his representation of Petitioner, as counsel did not refrain from doing anything in light of the negative comments and threats.

Mr. Eldridge acknowledged that after consulting with Ms. Fargo, Petitioner's trial counsel did not use all of their peremptory challenges. Counsel stated he and Mr. Trant knew before general voir dire began the order in which jurors would be called into the jury box, and Ms. Fargo advised the attorneys it was better to take the panel that was seated instead of using their challenges and having less favorable jurors placed into the box. On redirect examination, Mr. Eldridge said his review of the applicable Rule of Criminal Procedure convinced him that if a jury could not be selected in a particular county, it could not be picked elsewhere.

On questioning by the Court, Mr. Eldridge stated that if a jury from another county had heard the same evidence, he had no confidence that the other jury would have ruled differently. Counsel was not willing to admit he thought Mr. Davidson was certain to get

death; he had not heard Mr. Trant's "jury from Mars" comment (see below) before this hearing, but Mr. Eldridge had some concern over the statement if in fact Mr. Trant felt that way.

Mr. Eldridge said he expressed concern about Mr. Trant's plan from the outset. In hindsight, he realized the jury selection plan was a mistake, but Mr. Eldridge relied on Mr. Trant at the time. Mr. Eldridge also acknowledged the applicable statutes and rule of criminal procedure did not preclude a court from attempting to pick a jury again if an initial attempt proved unsuccessful.

When asked whether he was satisfied with jury selection, Mr. Eldridge stated the trial judge allowed the attorneys a great deal of latitude in conducting voir dire. Judge Baumgartner, for the most part, did not put much pressure on the attorneys to conduct voir dire quickly, and the attorneys were able to ask many more questions during individual voir dire than they would have in group voir dire. Mr. Eldridge said the amount of questioning was sufficient to ensure those jurors who remained after voir dire truly could not be challenged for cause.

Mr. Eldridge did acknowledge he could have done a better job of asking prospective jurors about racial issues, though counsel did try to address the issue.

Counsel stated he was "shocked" by what he learned about Judge Baumgartner's behavior. Mr. Eldridge testified he did not see any evidence of impairment or confusion on the judge's part during trial. Counsel said that the trial judge conferred often with the capital case attorney, Susan Jones, when making decisions, but counsel saw no signs of impairment on Judge Baumgartner's part.

Mr. Eldridge stated the victims' families were present throughout trial. The families wore buttons with the victims' faces on them, over the objections of trial counsel. Mr. Eldridge stated there were visible displays of anger by the families, particularly from Gary Christian, Channon Christian's father. Counsel did not describe the courtroom environment as a circus, but there was plenty of tension.

Mr. Eldridge stated he retained Dr. Brown after he (Brown) was recommended by another potential expert in Texas. Counsel had wanted to retain the Texas expert, but the Administrative Office of the Courts (AOC) would not approve paying the other expert. Counsel did not remember having any concerns over the amount of time Dr. Brown spent on the case. Mr. Eldridge recalled Dr. Spica's [the neuropsychologist] testing showed no signs of organic brain injury and no problems communicating on the Petitioner's part.

Upon additional questioning by the State, Mr. Eldridge did not recall anyone being unprepared to present mitigation evidence. Trial counsel's mitigation specialist, Rosalind Andrews, reportedly felt pressure to complete the summary she presented to counsel, but according to Mr. Eldridge nobody on the defense team expressed they were not ready for trial. Nor did Mr. Eldridge recall any issues with communication. He did acknowledge that at times, some potential witnesses identified by trial counsel refused to talk to the defense team.

2. *Doug Trant, Co-Counsel*

Mr. Trant, an attorney licensed to practice in Tennessee since 1979, was appointed as Petitioner's co-counsel when the State filed notice of intent to seek the death penalty against Mr. Davidson. Mr. Trant had been a licensed attorney for thirty years at the time

of trial and a well experienced and respected criminal defense attorney. Mr. Trant represented capital defendants in ten trials which proceeded to verdict. Before Mr. Davidson's case, only one of counsel's other clients had been sentenced to death, and that sentence was later reversed. Mr. Trant said he and Mr. Eldridge worked on most aspects of Petitioner's defense together, though he (Trant) handled suppression motions; the defense strategy focused largely on suppressing Petitioner's statement and items obtained through search warrants.

Mr. Trant described the media coverage of this case as "extensive." The *Knoxville News Sentinel* and reporters from the three major news stations were present at every hearing in this case and constantly publishing stories both in their respective media and on their respective websites. Counsel stated video cameras were present at every hearing in this case, and he also claimed many of the pretrial hearings and all trial proceedings in Mr. Davidson's case (and the cases of the codefendants) were broadcast on the local TV stations' websites. He described the content of the coverage as largely sensational but understood the media were doing their jobs.

Counsel testified the media reports themselves portrayed him and Mr. Eldridge as attorneys doing their jobs, but online comments posted on the websites of the various media outlets were extremely negative toward the defendants and their attorneys. Mr. Trant explained that at the time, the *News Sentinel* and the TV stations' websites included a comments section at the end of each story posted on their various websites in which persons could post comments anonymously or under an assumed name. Mr. Trant said several threats against himself, Mr. Eldridge, and the codefendants' attorneys appeared in these

comments sections, including death threats against the attorneys and their families. Mr. Trant surmised this online abuse led the media outlets to put an end to all online comments in coverage of this case.

Mr. Trant testified that the media portrayed the victims' families as bitter and hurt. He also recalled that the victims' families occasionally talked to Petitioner's trial attorneys and on some occasions the families would block counsel's access to the defense table. Once, Mr. Trant claimed, Chris Newsom's father tripped him in the hallway. He also claimed Chris's mother had made a threatening comment against the attorney after testimony regarding the victims' alleged drug use was presented in court. Counsel also stated the victims' families and supporters, who were present in court each day during the pretrial hearings and the Petitioner's trial itself, reacted visibly and audibly to courtroom proceedings. Given the group's proximity to jurors—they sat behind the State's table—Mr. Trant assumed the jury had to have seen or heard these actions.

Mr. Trant recalled at some point before trial he spoke with Randy Nichols, then the elected District Attorney General for Knox County, about a possible plea agreement in this case. Mr. Trant said Mr. Nichols often spoke informally with attorneys for capital defendants in an attempt to resolve death penalty cases before trial. Mr. Trant testified Mr. Nichols made what Mr. Trant considered a preliminary offer; under the proposed agreement, Mr. Davidson would plead guilty to the offenses as charged and be sentenced to life in prison without the possibility of parole. Mr. Trant discussed the potential offer with Mr. Davidson, and the Petitioner told counsel he (Davidson) was not interested in a

plea agreement or a life without parole sentence. Mr. Trant said he did not recall whether Mr. Eldridge was aware of the preliminary offer or discussed it with Petitioner.

When asked why the defense team did not move for a change of venue, Mr. Trant said his examination of the relevant statutes, court rules, and case law led him to conclude that only a defendant could move for a change of venue, and if a jury could not be seated in the indicting county, a defendant could not be tried—and, accordingly, could not be convicted—in that county. Mr. Trant said he had developed this strategy while representing a defendant in Claiborne County in the 1990s, and he decided to employ this strategy in this case, hoping that the potential inability to seat a Knox County jury would “thwart” the State’s ability to try the case and spur talks of a resolution. Mr. Trant was aware that Judge Baumgartner and others involved with the case expressed concern about the possibility a jury could not be seated in Knox County given the overwhelming pretrial publicity in the county, and both defense attorneys were fairly confident Judge Baumgartner would have granted a change of venue had counsel sought it. Mr. Trant discussed the potential strategy with Mr. Eldridge and the Petitioner, telling Petitioner that if the requisite number of jurors could not be found in the county, Mr. Davidson could not be tried and could not be convicted. At one point, Mr. Trant recalled, he told the Petitioner that if a jury were selected elsewhere, even a “jury from Mars” would return a death sentence if the State proved its case. Mr. Trant recalled Mr. Eldridge disagreed with Mr. Trant and preferred to change venue, but Petitioner agreed with employing the strategy of attempting to find a jury in Knox County in hopes of such attempts proving unsuccessful. Ultimately, though, a sufficient number of jurors were qualified to sit on Petitioner’s jury.

Regarding Judge Baumgartner, Mr. Trant testified he had known the judge since law school. Counsel had assisted with Baumgartner's judicial campaigns and practiced before the judge throughout his career. Mr. Trant said Judge Baumgartner had a reputation for using illegal drugs throughout his career. Counsel recalled one instance before Baumgartner was appointed to the bench during which Baumgartner visited Mr. Trant's home after a medical procedure. During this visit, Baumgartner asked Mr. Trant whether he had any hydrocodone pills; Mr. Trant, who had been prescribed hydrocodone but had only taken a couple of the pills he had been prescribed, gave his remaining pills to Baumgartner.

Mr. Trant recalled he and Judge Baumgartner had a personal falling out later in the judge's career after Baumgartner purportedly filed claims against a fellow Knox County Judge, Ray Jenkins, with the Court of the Judiciary. Mr. Trant represented Judge Jenkins in the disciplinary proceedings.

On cross-examination, Mr. Trant said the excessive publicity and the threats against him and his family did not affect Mr. Trant's performance. Counsel asserted he did not let Mr. Davidson down and still did the best job he (counsel) could do, even in light of the troubling online posts.

Mr. Trant described the evidence against Mr. Davidson as "overwhelming and damaging." As stated above, he described the defense strategy before trial as attempting to have as much evidence suppressed as possible. Although the motion to suppress the evidence obtained from the search of Petitioner's house was a "close issue," that motion, and practically all other suppression motions, were denied.

Counsel recalled that on August 24, 2009, during Mr. Cobbins' trial, Judge Baumgartner discussed the venue issue with Mr. Trant and Mr. Eldridge. During the hearing, Mr. Trant told the trial court that the decision to seek a Knox County jury was not made lightly. Counsel believed Mr. Davidson was present for the hearing.

Upon questioning by the Court, Mr. Trant said he spoke to Mr. Davidson "dozens" of times throughout these proceedings; some of these discussions occurred with both attorneys present, while other conversations were between Mr. Davidson and Mr. Trant. When asked about the nature of the talks, Mr. Trant said Petitioner was a "smart guy" and an active, engaged participant in the attorney/client discussions. Counsel made sure Mr. Davidson understood what they were telling Petitioner, and trial counsel kept Mr. Davidson up to date about their work at any particular time. Mr. Trant said he had no reason to question whether Mr. Davidson understood what was going on during these proceedings or understood what counsel were telling him. In fact, Mr. Trant testified, Mr. Davidson even made suggestions for certain tasks to undertake.

Mr. Trant acknowledged that Claiborne County, a small, rural county, was much different demographically than Knox County. Counsel also acknowledged he was unaware of any legal authority which supported his theory that a defendant could not be tried in a county in which a sufficient number of jurors could not be seated. When asked about the soundness of counsel's "jury from Mars" testimony in light of the Davidson County jury's declining to sentence Mr. Cobbins to death, Mr. Trant emphasized that the proof showed Mr. Davidson to be the most culpable of the four state court codefendants.

Of particular note, Mr. Trant stated that Mr. Davidson initiated the carjacking and the killing of Ms. Christian occurred at Petitioner's residence.

Mr. Trant testified that he and Mr. Eldridge were faced with the issue that several members of Mr. Davidson's family with whom counsel spoke were unwilling to testify in support of Mr. Davidson. These family members—who Mr. Trant did not identify—were willing to support Mr. Cobbins, Mr. Davidson's brother. When asked why Mr. Davidson rejected the potential plea offer from the State, Mr. Trant recalled that Mr. Davidson believed there was no difference between the death penalty and life without parole—though once Mr. Davidson was sentenced to death, his mood changed.

Although Mr. Trant was aware Judge Baumgartner had a reputation, dating from before becoming a judge, of abusing prescription medications, counsel said he was surprised to learn of the actions which ultimately led to the judge's resigning from the bench under considerable duress. Mr. Trant had no idea about the judge's addiction during trial until after the judge was removed from the bench. Mr. Trant testified that during trial, Judge Baumgartner did not appear confused, made no irrational rulings, and appeared to be aware of his surroundings. The judge, in counsel's view, had no problems interacting with counsel and the jurors during trial. The only unusual thing Mr. Trant observed during trial was that the judge was two to three hours late beginning court on one day during trial, with Judge Baumgartner offering no explanation of his tardiness.

Mr. Trant acknowledged he and Mr. Eldridge, while hopeful that a jury could not be seated in Knox County, proceeded through jury selection with the intent of getting a fair and impartial jury if in fact one could be seated in Knox County. Counsel retained a jury

selection expert, Marjorie Fargo, who reviewed juror questionnaires and investigated potential jurors. Ms. Fargo also assisted the attorneys during individual voir dire of prospective jurors. Mr. Trant noted that the defense team attempted to review the Facebook pages of all jurors who had Facebook accounts; on one occasion, a juror who told the Court during voir dire that she had not joined any Facebook pages related to the victims was successfully challenged for cause after the defense team investigation showed that the potential juror had, in fact, joined such a group.

Mr. Trant said he realized very early in jury selection that a jury would be seated from the Knox County venire when challenges for cause did not go as the attorneys had planned—in this Court’s view, this could mean either that the number of potential jurors eligible for a cause challenge was not as large as the number counsel had anticipated or that some of defense counsel’s challenges for cause were denied. Mr. Trant acknowledged that trial counsel did not use all their peremptory challenges, but Mr. Trant stated that the attorneys knew the order in which all jurors would be called into the box, and had counsel used their peremptory challenges on the jurors who ultimately sat, jurors who would have been less favorable to the defense would have been seated. Mr. Trant stated that he “thought” prospective jurors were asked questions about pretrial publicity, though he did not recall whether jurors were asked questions about race.

As stated above, Mr. Trant testified that some of the Petitioner’s family members interviewed by counsel and counsel’s retained mitigation specialist, Rosalind Andrews, were unwilling to assist in the Petitioner’s case. Mr. Trant recalled that Dr. Brown and Dr. Spica examined Petitioner in advance of trial, but Mr. Eldridge and Ms. Andrews were

primarily responsible for preparing and presenting the mitigation case. As stated above, Mr. Trant said he never saw any signs of intellectual impairments in the Petitioner; to Mr. Trant, Mr. Davidson appeared to be of average intelligence. Counsel also had no reason to believe Petitioner was unable to read or write. Counsel recalled Petitioner did "okay" in school.

Mr. Trant stated he first spoke to post-conviction counsel the Friday before this hearing began (i.e., January 25, in advance of his January 28 testimony). Mr. Trant acknowledged that post-conviction counsel had tried to contact him earlier, but Mr. Trant's work schedule and illness prevented him from meeting with post-conviction counsel until immediately before trial.

3. *Loretta Cravens*

Ms. Cravens, licensed as an attorney in Tennessee since 2004, formerly served as an associate at Mr. Eldridge's firm, and she assisted in Mr. Davidson's defense throughout trial and on direct appeal. As part of her work, she assembled census data in an attempt to determine the makeup of a potential Knox County jury pool. At the time of trial, which occurred shortly before the 2010 Census was taken, Knox County had an estimated population of 430,019. Of those, the Census Bureau estimated 87.7% were white, 8.9% were black, 12.9% were Age 65 or older, and approximately 22% were under age 18.

Ms. Cravens described the press coverage in this case as "pretty continuous" and persisted throughout the trial. She described the language contained in the reports as "colorful," meaning that the media reporting was generally biased in favor of the victims' families and the State's case. She recalled the three major news stations (channels 6, 8,

and 10) and the local newspaper (the *Knoxville News Sentinel*) constantly published stories on the case. For instance, during the federal trial of codefendant Eric Boyd, the *News Sentinel* published, both in its print publication and on its website, at least one article each day between April 8 and April 16, 2008. She also identified a *News Sentinel* story identifying the Christian/Newsom case as the “#1 story” the *News Sentinel* covered in 2007. She also identified pages from the *News Sentinel* website which contained links to case-related documents such as the codefendants’ statements.

Ms. Cravens also identified several other online stories published by various entities; these ranged from newspapers in other media markets to websites which were independent of legitimate news-gathering organizations.⁶ Ms. Cravens noted several of the articles which she saw contained untrue statements and rumors. Ms. Cravens said that while media outlets located outside Knoxville covered the case, their coverage was not as thorough as that by the Knoxville TV stations and newspaper. She recalled that Knoxville-area media members were present at every hearing, with certain pretrial hearings and the entire Cobbins trial being streamed online and televised on at least one cable news channel, possibly CourtTV.

Ms. Cravens recalled that the cross-racial nature of the case (i.e., black defendants and white victims) led to unwanted attention to the case. For instance, several online postings in this case (both those introduced as evidence and others which Ms. Cravens saw)

⁶ Among the online postings introduced into evidence were postings by “New Nation News” and the “Vanguard News Network.”

contained racist language. Ms. Cravens also recalled a May 2007 "Rally Against Genocide" in which the Ku Klux Klan and other white nationalist groups participated.

Like Mr. Trant and Mr. Eldridge, Ms. Cravens testified that Petitioner's trial attorneys received numerous threats online and in phone calls, including threats against the families of Mr. Trant and Mr. Eldridge. Ms. Cravens said the Eldridge firm attempted to log each threat and took certain security measures, including traveling in groups and hiring a male administrative assistant to work the front desk. Counsel stated none of the threats were acted upon. Ms. Cravens stated the threats were distressing but did not affect trial counsel's efforts or decision-making.

Ms. Cravens recalled the trial judge added additional security to the courtroom during trial, including additional uniformed and plain-clothed deputies. Trial counsel objected to an excessive number of uniformed police officers; this led to most of the in-court law enforcement being in plain clothes during trial. Ms. Cravens explained the courtroom was "as full as it could be" each day for trial. Ms. Cravens kept watch on the spectators during trial, and she noticed several noticeable reactions by the victims' families and friends during trial. Ms. Cravens said the jurors undoubtedly saw these reactions, but these reactions were limited to gasps, sighs, shakes of the head, and occasionally saying "no." Counsel recalled that at one point during the medical examiner's testimony, an employee of the District Attorney's Office passed out; the trial judge cleared the courtroom and Mr. Davidson's trial counsel moved for a mistrial, but this motion was denied.

On cross-examination, Ms. Cravens testified she only recalled one episode of an audience outburst which required the trial judge to address the audience. She did not recall

whether the jury was present for this admonition by the trial court, but she assumed the jury was not present. On the whole, she claimed, the trial judge maintained decorum, giving daily reminders to the spectators that they were to remain silent and show no visible emotion.

Ms. Cravens met with Mr. Davidson many times throughout the pendency of the case (all the way through direct appeal), but she was not present when Mr. Trant and Mr. Eldridge discussed the change of venue issue and the preliminary plea offer with Petitioner. Ms. Cravens recalled Mr. Davidson seemed intelligent; she saw no signs of intellectual disability on the Petitioner's part. She said Petitioner could read, interacted with his attorneys, and asked them questions.

Ms. Cravens did not recall any signs that Judge Baumgartner was impaired during trial, though she emphasized she did not look at the bench actively and had no interaction with the trial judge outside the courtroom.

Upon questioning by the Court, Ms. Cravens testified she was present for part of jury selection; she was not present for the entirety of individual voir dire but did attend general voir dire. She described trial counsel's actions in jury selection as "very methodical." She recalled trial counsel retained a jury selection consultant, Marjorie Fargo, who reviewed jury questionnaires, rated jurors, and met with the attorneys regarding particular jurors. Ms. Cravens recalled each juror was questioned individually about their knowledge of the case; nearly all prospective jurors had heard something about the case, and some persons in the pool believed Mr. Davidson was guilty. Ms. Cravens believed

the issue of race was addressed during voir dire, but she did not recall specifically how such issues were addressed.

B. OTHER WITNESSES

1. *Stephen Ross Johnson*

Mr. Johnson, licensed as an attorney in Tennessee since 2002, served as trial co-counsel (along with Tom Dillard, designated lead counsel) in codefendant George Thomas's case. He has practiced with his current firm, the Knoxville firm Ritchie, Dillard, Davies and Johnson, since becoming licensed. He described Knox County as a mostly white county with both urban and rural areas. He surmised the city had a minority population of less than 20% and the county a total minority population of less than 10%.

Mr. Johnson described the news coverage for the Christian/Newsom case as "pervasive, intrusive, and constant," and unlike anything he had seen before or since. He explained that between 2007 (when the offenses occurred) and 2009 (when three of the four codefendants, including Petitioner and Mr. Johnson's client, were tried), the three main news stations and the local newspaper covered the case extensively. Reporters were present at every hearing, countless stories were broadcast on TV, published in the newspaper, and posted on the websites of the newspaper and TV stations, and court proceedings (including gavel-to-gavel coverage of all four state codefendants' trials) were broadcast on the internet. He also noted the suppression hearings received extensive coverage. Like other witnesses, Mr. Johnson noted there were extensive online comments

posted on the news media websites, usually by anonymous commenters or commenters using pseudonyms.

Mr. Johnson acknowledged a racial factor in the case, given the fact that the defendants were black and the victims white. He also noted the racial aspect of the case "had to be discussed" from a legal standpoint and in the public domain. Mr. Johnson stated the racial component of the case probably affected the coverage of the case. He also said the coverage was influenced by the fact that Ms. Christian was a University of Tennessee student, Mr. Newsom was a well-regarded resident of the Halls Crossroads area of north Knox County, and the defendants were from outside East Tennessee, with only Mr. Davidson living in Knox County (albeit briefly) before the offenses occurred.

Mr. Johnson said public discussion of the case was unavoidable; when people found out he was an attorney, they wanted to discuss the case with him. Mr. Johnson said community interest in the case never lessened before the trials; if anything, interest would spike whenever a major court hearing occurred.

Mr. Johnson recalled in early 2007, a white supremacist rally was held regarding this case. He also stated many other prayer vigils were held throughout Knox County in honor of the victims. Furthermore, counsel recalled the media were "aggressive" in trying to talk to the victims' families and broadcast their views.

In short, Mr. Johnson said the community interest in this case was "atypical." The media coverage of this case was unheard of, even for a death penalty case. Counsel acknowledged some court cases are the subject of increased community interest in Knox County, especially when the case involves the University of Tennessee in some fashion.

But the level of coverage of and community interest in this case went above and beyond anything counsel had seen in his professional career.

On cross-examination, Mr. Johnson said he was unable to say whether all the online comments were posted by persons from Knox County. He also acknowledged “anyone” could access the online news stories and post comments, and while most of the comments were posted by “regional” individuals, some of those regional commenters could have come from other parts of East Tennessee. He also acknowledged there was no research into exactly how much of the interest in this case was generated inside the county versus outside the county.

2. *Jessica Thomson*

Ms. Thomson is the paralegal supervisor with the Office of the Post-Conviction Defender. As part of her duties in preparing Petitioner’s case, she assembled various media publications related to the case. She searched the Tennessee state archives to collect newspaper articles covering the case, mainly those published by the *Knoxville News Sentinel*, but also those by other papers throughout the state, particularly the *Chattanooga Times-Free Press*, and she attempted to collect news stories broadcast by the three major television news outlets in Knoxville.⁷

In collecting the TV stories, she received a report from News Data Services (NDS), a media monitoring corporation which compiled all mentions of the victims and codefendants on Knoxville television stations between January 1, 2007, and October 31,

⁷ Ms. Thomson made good and appropriate use of TRE 1006.

2009. For each broadcast story mentioning the targeted data, NDS would identify the television station, the close-captioned text mentioning the targeted information, market identification, program identification, date and time of broadcast, run time for the story, and the estimated audience figures for the particular story, which were based on estimated Nielsen rankings. The information compiled by NDS was put into PDF form and a spreadsheet containing the same information; a disc containing the information was introduced into evidence at this hearing. Ms. Thomson indicated that some of the TV stations' broadcasts mentioning the case did not appear in the NDS figures, because if the broadcast was not closed-captioned, the broadcast would not appear in the NDS figures.

Ms. Thomson reviewed the NDS-provided data as part of her testimony. The NDS data was broken down by media market, and she also searched for the number of times the case was mentioned on a particular day. Generally, the overwhelming majority of TV news stories were broadcast by the Knoxville stations, and the number of stories would spike at certain times, particularly around the time of major hearings and the codefendants' trials. For instance, between January 1, 2007, and October 31, 2009, the case was mentioned 3,111 times in broadcasts on Knoxville television stations. The Nashville TV stations mentioned the case 207 times, the Chattanooga stations mentioned the case 98 times, the Memphis stations 86 times, the Tri-Cities stations 44 times, and the Jackson station 26 times. Between the start of 2007 and the end of March 2008 (i.e., before the Eric Boyd federal court trial), Knoxville stations mentioned the case 842 times, Nashville stations 71 times, Chattanooga stations 20 times, Tri-Cities stations 16 times, Memphis stations 15 times, and the Jackson station 11 times.

In May 2007, the month in which the white supremacist demonstration was held in Knoxville, the case was mentioned 57 times on Knoxville TN TV stations. There were no mentions in Chattanooga. Between June 1, 2007, through September 30, 2008, there were 696 mentions on Knoxville TV broadcasts, while only three broadcasts occurred in Chattanooga. This time period included the Eric Boyd trial. On April 16, 2008, the date of Eric Boyd's guilty verdict in federal court, there were a total of 40 mentions on Knoxville TN TV stations, with a total estimated audience of two to three million viewers. There were no mentions of the Boyd verdict on Chattanooga TV stations.

Between November 1, 2008, and July 31, 2009, Knoxville TV stations mentioned the case 417 times, while the case was not mentioned once on Chattanooga stations. In the month of August 2009, during which the Cobbins trial was held, Knoxville TV stations mentioned the case 478 times, while the case was only mentioned 15 times by Chattanooga TV stations. Ms. Thomson's review of the NDS data led her to conclude there were 14 different mentions of Cobbins' testimony the day it happened, with an estimated audience of 408,000. The Chattanooga TV stations only mentioned the Cobbins testimony once.

Ms. Thomson's review of the NDS data led her to believe approximately 2.9 million persons saw a televised media broadcast related to Mr. Cobbins's verdict and sentence. Chattanooga stations broadcast coverage of the verdict and sentence only five times, with an audience of about 130,000.

Turning to newspaper coverage, Ms. Thomson said this case was mentioned 322 times in articles appearing in the *Knoxville News Sentinel* between January 2007 and

October 2009. 100 separate articles appeared on the *News Sentinel's* front page during that period. Conversely, the *Chattanooga Times-Free Press* mentioned the case 24 times during that time frame, with no articles appearing on the front page.

Ms. Thomson's research indicated that in August 2009, the month during which Mr. Cobbins's trial was held, 28 articles mentioning the Christian/Newsom case appeared in the *News Sentinel*, while only four articles appeared in the *Times Free-Press*. During the trial itself, the Knoxville paper had a front-page article mentioning the case on the first day of jury selection and on each day of the trial itself. Many of these front-page articles were above-the-fold articles. Conversely, the Chattanooga newspaper did not publish any front-page articles covering the Cobbins trial.

Ms. Thomson noted that Knoxville television stations used the term "ringleader" in their broadcasts 76 times between January 2007 and October 2009, with a total estimated audience of 2.5 million viewers. Only two TV news broadcasts in Chattanooga used the term in connection with this case. Ms. Thomson also noted:

- Assertions that Mr. Davidson was more culpable than Mr. Cobbins or Mr. Boyd were mentioned 53 times on Knoxville television, with an estimated total audience of 2.3 million viewers for those stories. No such mentions appeared on the Chattanooga TV news broadcasts;
- The statements of Mr. Davidson's codefendants were mentioned 78 times on Knoxville TV news broadcasts, with a total estimated audience of nearly 3.5 million viewers. No such reports appeared on Chattanooga TV news broadcasts;
- Petitioner's prior criminal offenses, incarcerations, or uncharged criminal acts were mentioned 63 times on Knoxville TV news broadcasts, with a total estimated viewership of 2.3 million viewers. No such reports appeared on Chattanooga TV news broadcasts;

- That victims' families' disappointment in the Cobbins sentence or belief Mr. Cobbins deserved the death penalty was mentioned 37 times on Knoxville TV news broadcasts, with a total estimated audience of 1.3 million viewers. Only one such mention appeared on Chattanooga TV news stations, with an estimated audience of just over 26,000 viewers.

Turning back to newspaper coverage, Petitioner introduced into evidence several *News Sentinel* stories and opinion pieces mentioning various racial aspects of the case, comments by the victims' families, and a comment by the foreperson of the Eric Boyd federal trial jury in which the juror said it was "hard avoiding coverage" of the Christian/Newsom case before the Boyd trial. Furthermore, during the Cobbins trial Mr. Davidson's jury selection was mentioned in an article published August 12, 2009. In that article, it was mentioned that potential jurors could "simply lie" about their views on the case and potentially be placed on the jury, as the attorneys could not "crawl inside the head" of potential jurors and ascertain their true feelings. On August 26, 2009, a *News Sentinel* article detailed testimony by Mr. Cobbins, who tried to pin "all of this" on his brother, Mr. Davidson. The article referenced that the Cobbins trial was essentially a preview of the upcoming Davidson trial. Of note, on August 27, 2009, the *News Sentinel* published stories about Mr. Cobbins' receiving a sentence of life without parole. In addition to mentioning the victims' families' disappointment over Mr. Cobbins' sentence, the paper published an article in which the victims' families stated the Cobbins jury should have come from Knox County because the "outside people" did not know the whole story. Also, the paper published an article mentioning that members of Mr. Cobbins' family stated Mr. Davidson was violent and domineering.

The *News Sentinel's* website also published a page containing links to many documents related to the case, including the unredacted statements of all codefendants, including Petitioner. An archived screen capture of the page containing these links was introduced into evidence; this screen capture showed the page was available before Mr. Davidson's jury selection began.

On cross-examination, Ms. Thomson acknowledged the Nielsen ratings included viewers who lived in portions of East Tennessee that were outside Knox County. She also acknowledged that the way the Nielsen ratings were structured, an estimated audience of three million viewers did not mean that three million unique viewers viewed a particular broadcast or group of broadcasts. Ms. Thomson also acknowledged that many internet news articles were available worldwide and could be viewed by almost anyone with a computer.

Ms. Thomson testified that generally, the media mentions of the story were significant in number when these offenses happened then lessened as time progressed. The number of media mentions increased during the Cobbins trial. Ms. Thomson also acknowledged the TV audience listings provided by NDS took into account only television broadcasts and not online video streaming. Finally, Ms. Thomson noted that some of the stories mentioning the term "ringleader" used the term in connection with Mr. Cobbins.

C. LELAND PRICE (QUESTIONED BY THE COURT)

Mr. Price, lead counsel for the State during trial and in these post-conviction proceedings, testified that several weeks before trial began,⁸ a large number of potential jurors who had received summonses appeared at the Knoxville Convention Center to fill out questionnaires. Judge Baumgartner gave an overview of the process, and jurors completed the questionnaires before they left. These questionnaires were then copied and given to the attorneys.

Over the course of eight days in late September 2009,⁹ the trial court conducted individual voir dire of those jurors who completed questionnaires. The trial judge, attorneys, and jurors sat around a table in the courtroom during questioning. Mr. Price recalled Judge Baumgartner asked each prospective juror about case knowledge and death penalty views then asked certain questions about the juror's questionnaire responses. The attorneys then asked questions, with the State and defense alternating which side went first with each juror. Those jurors remaining after individual voir dire were then subject to group voir dire, with the attorneys being informed beforehand the order in which jurors would be placed in the box.

Mr. Price stated the parties agreed to strike certain jurors based on their questionnaire answers. The trial judge encouraged this action, but Mr. Price insisted the final decision of which jurors to dismiss by agreement was left to the attorneys. Mr. Price

⁸ The record reflects this juror orientation occurred September 1, 2009.

⁹ The record reflects individual voir dire was held September 21-25 and September 28-30, 2009.

recalled many jurors who were questioned individually were removed for cause, but he did not remember the number excused for cause. He stated that some jurors were dismissed for cause by the trial judge based on their answers to questions during individual voir dire; in those instances, Mr. Price stated, Judge Baumgartner believed the jurors' answers to questions made it clear they were not qualified to serve as a juror in this case. Other jurors were challenged for cause on motion by the parties. Mr. Price recalled the general voir dire was completed in one day.¹⁰

On questioning by Petitioner's counsel, Mr. Price testified the attorneys for both parties reviewed the questionnaires before individual voir dire. Mr. Price acknowledged that some completed questionnaires were finished by jurors who were dismissed upon agreement of the parties and therefore not subject to individual voir dire. Mr. Price stated the jurors dismissed upon agreement of the parties may have included persons whose death penalty views were on both ends of the spectrum. As he did on questioning by the Court, Mr. Price insisted any jurors who were dismissed before individual voir dire were dismissed upon agreement of the parties and not sua sponte by the trial judge. He stated that such jurors dismissed by agreement were dismissed during individual voir dire; Mr. Price did not recall meeting with defense counsel before voir dire and agreeing to dismiss certain jurors. Mr. Price testified Judge Baumgartner may have dismissed some jurors for hardship on his own initiative, and these jurors dismissed for hardship may have included potential jurors who were against the death penalty. Mr. Price testified some of the jurors

¹⁰ The record reflects general voir dire occurred on October 2, 2009.

dismissed may have included persons who believed the Petitioner was guilty and who could not put aside those views.

Mr. Price stated the prospective jurors would have also completed a brief questionnaire containing basic contact information. Mr. Price was unsure whether these surveys were retained, but he recalled the State did not keep them.

Upon additional questioning by the Court, Mr. Price said the questionnaire was compiled after the attorneys for both sides submitted their own respective proposed questionnaires. The trial judge then assembled the questionnaire based on these submissions. Mr. Price stated every juror who completed a questionnaire was questioned in individual voir dire unless dismissed by agreement. Mr. Price stated at least fifty potential jurors remained after individual voir dire.¹¹

VII. ANALYSIS OF SUBSTANTIVE CLAIMS

As is clear from the above, the Petitioner contends that his trial counsel were ineffective in not moving for a change of venue in the face of massive negative, prejudicial, and virulent publicity which permeated the community, all of which, he alleges, deprived the Petitioner of a fair trial. Trial counsel knew they could move for a change of venue, the trial judge suggested a change of venue; the prosecutor expressed that he was dubious that a jury could be selected in Knox County; and all three of the codefendants had successfully moved for a change of venue.

¹¹ The Court's review of the questionnaires puts this figure at 70.

Inextricably bound to the above is the contention by the Petitioner that the massive and inflammatory pretrial publicity made a fair trial in Knox County an impossibility, whatever might be the jury selection process.

Beyond this and as an independent claim, is the assertion that the selection process and voir dire conducted by trial counsel was inept and inadequate as to pretrial publicity; racial prejudice; and views regarding the death penalty.

Because many of the Petitioner's claims concern the Petitioner's assertion he received the ineffective assistance of counsel before trial, during trial, and on appeal, the Court will first review the standard of review for ineffective assistance of counsel claims. Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) counsel's performance was deficient and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see *Lockart v. Fretwell*, 506 U.S. 364, 368-372 (1993). In other words, a showing counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show but for the substandard performance, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The *Strickland* standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the *Strickland* test. See *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of

ineffectiveness to show the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. In *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. The prejudice prong requires a petitioner to demonstrate "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." *Id.* Failure to satisfy either prong results in the denial of relief. *Id.* at 697.

On claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). When reviewing a defense attorney's actions, this Court may not use "20-20" hindsight to second-guess counsel's decisions regarding trial strategy and tactics.

The ineffective assistance claim presented to the Court at the evidentiary hearing, as mentioned, contends that (1) the failure to move for change of venue was not reasonable and (2) the voir dire of the jury was also not done competently, all to the prejudice of the Petitioner.

The second issue presented was the assertion that the massive and prejudicial pretrial publicity corrupted the Knox county community and made a fair trial impossible whatever might be the jury selection process. The Petitioner cites cases such as *Rideau v. Louisiana*, 373 U.S. 723 (1963); *United States v. Casellas-Toro*, 807 F.3d 380, 383 (1st Cir. 2015) (intense pretrial publicity created prejudice sufficient to require new trial and venue change) as authority. See also *Skilling v. United States*, 561 U.S. 358 (2010); *In re Tsarnaev*, 780 F.3d 14 (1st Cir. 2015) (Boston Marathon bombing case).

A. CHANGE OF VENUE ISSUE

The Petitioner contends that the failure to request a change of venue or venire by trial counsel is deficient performance of counsel as measured by an objective standard of reasonable performance and significantly prejudiced the Petitioner.

The detailed testimony of trial counsel is set out in Part VI(A) above and the strategy is explained. The decision to not ask for a change of venue was not the result of inattention or lack of experience but of the considered judgment of counsel after a full discussion of the risk with their client. The client, Mr. Davidson, concurred with the decision.

In Tennessee, a criminal defendant has a right to be tried in the county in which the crime occurred. TENN. CONST., Art. I, Sec. 9; TENN. R. CRIM. P. 18(a). See *State v. Smith*, 906 S.W.2d 6, 8-9 (Tenn. Crim. App. 1995).

The trial lawyers had thoroughly investigated the case, knew everything that was to be known, to include the massive and prejudicial negative publicity. After a debate they still then decided to not ask for a change of venue/venire as they concluded that a jury could not be seated in Knox County and that somehow then the case would be aborted/dismissed.

The Court is aware that the fact that a strategy did not work does not make the lawyer ineffective. *Williamson v. State*, 476 S.W.3d 405, 448 (Tenn. 2015); *Nesbit v. State*, 452 S.W.3d at 796; *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996).

However, under the circumstances of this case, and even given the required deference and strong presumption in favor of trial counsel's decision, the Court finds that no competent counsel would have taken the action of trial counsel in this case. Put another way, no competent attorney reasonably could have decided not to move for a change of venue/venire.

There are a multitude of reasons in support of the Court's opinion.

(1) There was no end game to the idea that no jury could be chosen in Knox County. No authority by trial counsel was ever cited that the inability to be able to choose a jury in Knox County would somehow lead to a dismissal or light sentence by plea agreement. The Court is now aware of *Kirk v. State*, 41 Tenn. 344 (1860) although it was never cited by trial counsel. In *Kirk* the court did rule in 1860 that venue could not be changed over a defendant's objection even though the trial judge certified that no jury could be seated in Lawrence County because of prior knowledge of the case. The murder conviction in the adjoining county was reversed and the case remanded back to Lawrence County for further proceedings.

Even if the first attempt to choose a jury had been unsuccessful, the case against Mr. Davidson would not have been dismissed. Many other options would have been available.

(a) a continuance until pretrial publicity threat abates. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

(b) an exhaustive attempt to seat a jury. It is highly unlikely that in a county with over 200,000 people in the potential venire that a jury could not be seated. We know now that a jury was seated on the first attempt to choose a jury.

(c) It is unlikely if no jury could be chosen in Knox County, that present legal interpretation would not allow, even over Defendant's objection, the transfer of a case to another county or an out-of-county venire. *See e.g. Sailor v. State*, 733 So. 2d 1057 (Fla. App. 1999) (State constitutional venue/jurisdictional rights may be overridden if absolutely necessary for a selection of a qualified jury even over defendant's objection); *Wafai v. People*, 750 P.2d 37, 47-48 (Colo. 1988) (same).

The trial counsel's strategy that no jury could be seated in Knox County and therefore this would result in a possible dismissal of the charges was not thought out, not fully researched, not plausible, and had almost no chance of benefitting Mr. Davidson.

(2) The trial judge twice, on the record, suggested to trial counsel that a change of venue/venire was appropriate and he had already taken steps to procure a jury from Hamilton County.

(3) The prosecutor not only did not oppose a change of venue/venire, but stated he thought it was necessary.

(4) All the codefendants' lawyers asked for and were granted a change of venue/venire.

(5) Letalvis Cobbins was tried in August 2009, three (3) months before the Davidson trial with an out-of-county jury. Cobbins did not receive the death penalty even though it was sought. *See State v. Cobbins*, 2014 WL 4536564 (Tenn. Crim. App. Sept.

2014). What stronger indication could there be that an out-of-county jury might benefit Mr. Davidson.

In making its assessment, the Court finds the holding below directly on point.

Despite the strong presumption that defense counsel's decisions are guided by sound trial strategy, it is not sufficient for counsel to merely articulate a reason for an act or omission alleged to constitute ineffective assistance of counsel. The trial strategy itself must be objectively reasonable. See *Strickland*, 466 U.S. at 681, 104 S. Ct. at 2061. This Court recently stated:

[T]he noun "strategy" is not an accused lawyer's talisman that necessarily defeats a charge of constitutional ineffectiveness. The strategy, which means "a plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result," Random House Dictionary 1298 (Rev. ed. 1975), must be reasonable. It need not be particularly intelligent or even one most lawyers would adopt, but it must be within the range of logical choices an ordinarily competent attorney ... would assess as reasonable to achieve a "specific goal."

Cone v. Bell, 243 F.3d 961, 978 (6th Cir. 2001); see also *Washington v. Hofbauer*, 228 F.3d 689, 704 (6th Cir. 2000) (court must assess whether the strategy itself was constitutionally deficient).

Miller v. Francis, 269 F.3d 609, 616 (6th Cir. 2001).

For the reasons set out above the Court finds that the decision not to seek a change of venue/venire fell below an objective standard of reasonableness and was therefore deficient.

The issue of whether the Petitioner was prejudiced by the venue/venire decision will be addressed later in this decision.

B. WAS THE VENIRE PREJUDICIALLY TAINTED BY PRETRIAL PUBLICITY

Petitioner contends that whatever the jury selection process, the prejudicial and corruptive pretrial publicity make a fair trial in Knoxville impossible.

In *Skilling v. United States*, 561 U.S. 358 (2010), the court addressed the issue. Skilling was an Enron executive and the trial took place in Houston, the home of Enron. The court first reviewed prior cases where the court had set aside verdicts because of corrupting pretrial publicity; a carnival atmosphere that dominated the trial; and what the court termed a “kangaroo court proceeding.” The court then stated:

In each of these cases, we overturned a “conviction obtained in a trial atmosphere that [was] utterly corrupted by press coverage”; our decisions, however, “cannot be made to stand for the proposition that juror exposure to ... news accounts of the crime ... alone presumptively deprives the defendant of due process.” *Murphy v. Florida*, 421 U.S. 794, 798-799, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975). See also, e.g., *Patton v. Yount*, 467 U.S. 1025, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). Prominence does not necessarily produce prejudice, and juror impartiality, we have reiterated, does not require ignorance. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (Jurors are not required to be “totally ignorant of the facts and issues involved”; “scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.”); *Reynolds v. United States*, 98 U.S. 145, 155-156, 25 L. Ed. 244 (1879) (“[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.”). A presumption of prejudice, our decisions indicate, attends only the extreme case.

Skilling, 561 U.S. at 380-81 (footnotes omitted).¹²

¹² This is contrasted with Mark Twain’s caustic comment that “We have a criminal justice system which is superior to any in the world; and its efficiency is only marred by the difficulty of finding twelve [persons] every day who don’t know anything and can’t read.” Ayres (ed.), *WIT AND WISDOM OF MARK TWAIN*, p. 129.

Among the cases distinguished by the *Skilling* Court was *Irvin v. Dowd*, 366 U.S. 717 (1961) in which the Court found presumed prejudice and reversed the murder conviction for the murder and robbery spree in a small rural community. In the months before the *Irvin* trial “a barrage of publicity was unleashed against him including reports of his confession to the slaying and robberies.” The publicized detailed facts in *Irvin* are not quite as extreme as this case but *Irvin* facts are more extreme than *Skilling*. *Skilling*, 561 U.S. at 392-93.

The Court found no presumed prejudice in the *Skilling* case and indicated it considered a number of factors.

- (1) size and characteristics of the community;
- (2) was there blatantly prejudicial publicity;
- (3) what was the time period of news coverage in relation to the trial;
- (4) did the jury acquit on any of the charges;
- (5) how aggressive was the trial judge in guarding against prejudice and in taking appropriate steps to reduce the risk.

Skilling, 561 U.S. at 382-85.¹³

This Court considered the above factors as follows.

1. Knoxville had a 2009 population in excess of 430,000 and a population eligible for jury service well in excess of 200,000. It is a university town and its education level is consistent with its urban environment and economic prosperity.

¹³ All these factors were discussed by Justice Ginsburg in the Section A of her decision which addressed only the issue of presumed prejudice.

2. The news stories about Mr. Davidson and his confederates were extensive, vivid, sometimes inaccurate, overzealous and contained statements by the victims' families and others calling for the death penalty for these heinous crimes. The Court credits the Petitioner's witnesses on the extent of publicity shown at the January 28-29, 2019 hearing.

3. The volume of publicity continued from the date of arrest with some variation, shown by the proof, which included the prior trials of Boyd and Cobbins, right up to the trial of Mr. Davidson in October 2009.

4. The jury found the Petitioner guilty of all counts charged except for the lesser of facilitation in the sexual assault of Chris Newsom. This factor, however, is no indication of unfairness when the proof of guilt is strong on all the charged counts. *United States v. Tsarnaev*, 157 F. Supp. 57, 68-71 (D.C. Mass. 2016). There is no showing here that the jury was in a rush to judgment during its deliberations.

5. The trial judge and counsel employed a screening questionnaire and follow up voir dire which lasted nine days. Individual voir dire lasted eight days. The judge and counsel sat at a table and questioned each juror in an informal manner lending itself to encouraging frankness. Group voir dire took place on the ninth day. Petitioner's counsel had the assistance of a jury consultant.¹⁴

6. The individual voir dire specifically dealt with exposure to pretrial publicity as well as views of the death penalty.

¹⁴ Voir dire in *Skilling* lasted 5 hours.

7. Jury selection (and the trial) was conducted with solemnity. No circus or carnival atmosphere invaded the jury selection process or the trial.

In determining whether there is a presumption of prejudice, the Court would contrast *Skilling*; *Patton v. Yount*, 467 U.S. 1025 (1984) and *Murphy v. Florida*, 421 U.S. 794 (1975) with cases like *Sheppard v. Maxwell*, 384 U.S. 333 (1966) and *Irvin v. Dowd*. At a lower level it would be a case in which the Petitioner cites *United States v. Casellas-Toro*, 807 F.3d 380 (1st Cir. 2015) contrasted with the Boston Marathon bombing cases of *In re Tsarnaev*, 780 F.3d 14 (1st Cir. 2015) and *United States v. Tsarnaev*, 157 F. Supp. 3d 57 (D. Mass. 2016).

At this point the Court need not resolve this close issue, as the Court finds that even if there is presumed prejudice in the jury venire, it has been rebutted. See *United States v. Chagra*, 669 F.2d 241, 250 (5th Cir. 1982). See also *United States v. Casellas-Toro*, 807 F.3d at 388-89 and *Coleman v. Kemp*, 778 F.2d 1487, 1541 n.25 (11th Cir. 1985); cf. *Mu'Min v. Virginia*, 500 U.S. 415, 428-29 (1991).

C. THE SEATED JURY WAS PROPERTY QUALIFIED

The Court finds that the presumption of prejudice (if it existed) was rebutted for the following reasons:

(1) The test of seating a juror, even one with some prior knowledge of a case or with a preconceived opinion is set out in the Criminal Rule as follows:

(c) Challenges for Cause.

(1) *Procedures.* After examination of any juror, the judge shall excuse that juror from the trial of the case if the court is of the opinion that there are grounds for challenge for cause. After the court has tentatively determined that the jury meets the prescribed qualifications, counsel may conduct further examination and, alternately, may exercise challenges for cause.

(2) *Grounds.* Any party may challenge a prospective juror for cause if:

(A) Cause Provided by Law. There exists any ground for challenge for cause provided by law;

(B) Exposure to Information. The prospective juror's exposure to potentially prejudicial information makes the person unacceptable as a juror. The court shall consider both the degree of exposure and the prospective juror's testimony as to his or her state of mind. A prospective juror who states that he or she will be unable to overcome preconceptions is subject to challenge for cause no matter how slight the exposure. If the prospective juror has seen or heard and remembers information that will be developed in the course of trial, or that may be inadmissible but is not so prejudicial as to create a substantial risk that his or her judgment will be affected, the prospective juror's acceptability depends on whether the court believes the testimony as to impartiality. A prospective juror who admits to having formed an opinion about the case is subject to challenge for cause unless the examination shows unequivocally that the prospective juror can be impartial.

TENN. R. CRIM. P. 24(c).

The above Rule is consistent with multiple court decisions which hold that prior knowledge or even an impression and opinion as to the merits of a case are not automatically disqualifying if the juror can set that aside and be fair and impartial. *Skilling*, 561 U.S. at 381. The trial court's judgment on the issue of impartiality is due deference as "a trial court's finding of juror impartiality may be overturned only for manifest error." *Mu'Min v. Virginia*, 500 U.S. 415, 428 (1991).

The overview of juror qualification in the face of prior knowledge and/or opinion is explained:

Pursuant to the Sixth Amendment, for a finding of juror impartiality when a juror is challenged for cause, the relevant question is "did [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Patton v. Yount*, 467 U.S. 1025, 1036, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). A qualified juror need not be "totally ignorant of the facts and issues involved." *Murphy v. Florida*, 421 U.S. 794, 800, 95 S. Ct. 2031, 44 L.Ed.2d 589 (1975). Rather, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* (quoting *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961)). In *Irvin*, the Supreme Court stated:

In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin, 366 U.S. at 722-23, 81 S. Ct. 1639.

If actual bias is discovered during *voir dire*, the trial court must excuse the prospective juror. *Hughes*, 258 F.3d at 459. "Actual bias is 'bias in fact'-the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *Id.* at 463 (quoting *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997) (citing *United States v. Wood*, 299 U.S. 123, 133, 57 S. Ct. 177, 81 L. Ed. 78 (1936))). Although bias can be revealed through a prospective juror's express admission, more frequently, jurors are reluctant to admit actual bias and the trial court must discover their biased attitudes through circumstantial evidence. *Id.* at 459 (citing *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977)).

Because Miller's claim for ineffective assistance of counsel is based on his trial counsel's failure to strike a biased juror, Miller must show that the juror was actually biased against him. *Id.* at 458 (citing *Goeders v. Hundley*, 59 F.3d 73, 75 (8th Cir. 1995) (citing *Smith v. Phillips*, 455 U.S. 209, 215, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982))). "A juror's express doubt as to her own impartiality on voir dire does not necessarily entail a finding of actual bias. The Supreme Court has upheld the impaneling of jurors who had doubted, or disclaimed outright, their own impartiality on *voir dire*." *Id.*; see also *Patton*, 467 U.S. at 1025, 104 S. Ct. 2885 (holding that trial court did not commit "manifest error" when finding jury members to be impartial despite admitting that they formed an opinion as to the defendant's guilt due to pretrial publicity).

Miller v. Webb, 385 F.3d 666, 673-674 (6th Cir. 2004).

(2) Trial counsel, having decided to try the case in Knox County because they thought a fair jury could not be seated, had strong incentive during the nine days of jury selection (eight days of individual voir dire) to be meticulous in ferreting out unqualified jurors. They even employed a jury consultant to assist them. It is important to note that trial counsel were sufficiently satisfied that they did not use all their peremptory challenges. Even more to the point, none of the seated jurors were challenged for cause.

(3) The trial judge was committed to the selection process as he had previously expressed his concern regarding the pretrial publicity. His admonishment and instructions to the jury were direct and clear and, when required, directed individually to seated jurors. He was directly involved in all aspects of the jury selection process.

(4) The individual voir dire of the potential jurors is always a factor to be considered related to the quality of the voir dire procedure. *Skilling*, 561 U.S. at 389.

(5) Petitioner contends that the length of the voir dire indicates the extent to which the jury was infected by prejudicial publicity. The undersigned has presided over

eight (8) death penalty trials and the voir dire in those trials all involved individual voir dire and took from three to six days. Jury selection in a death penalty case not only involves exposure to publicity but it involves an exploration of views on the death penalty which is a separate area of complexity. Furthermore, the judge is always faced with prospective jurors with health problems, child or work commitments, or other issues related to service on a lengthy trial. It is not an easy task to seat a jury in a death penalty case. The Court is of the opinion that the length of the voir dire is a positive rather than a negative as relates to the jurors finally seated in the case. It is an indication of how careful counsel and the court were in insuring that the jurors chosen would be fair and impartial.

(6) An initial screening of the jurors was done by distribution in September 2009 of a questionnaire. The questionnaire was 24 pages long and contained 128 questions. It concluded with a 6-paragraph admonition which the juror, under penalty of perjury, had to acknowledge and to state that he/she "will conduct myself accordingly." The use of a questionnaire is a factor to consider in judging the jury selection process. *Skilling*, 561 U.S. at 388-389.

(7) The Court puts reliance on the comments of the Supreme Court in *Mu'Min v. Virginia*, 500 U.S. 415 (1991). *Mu'Min* was an inmate serving time for murder who escaped and committed another murder and for that murder he received the death penalty. The pretrial publicity was intense prior to his trial. Many of the jurors had read about the case and the issue before the court was whether or not a jury was fairly selected given the alleged meager voir dire on pretrial publicity and prejudice. Ultimately, the Court found

no violation of constitutional requirements. The following observation regarding *Irvin v. Dowd* is instructive.

A trial court's findings of juror impartiality may "be overturned only for 'manifest error.'" *Patton v. Yount*, 467 U.S. 1025, 1031, 104 S. Ct. 2885, 2889, 81 L. Ed. 2d 847 (1984) (quoting *Irvin v. Dowd*, *supra*, 366 U.S., at 723, 81 S. Ct., at 1643). In *Patton*, we acknowledged that "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed," 467 U.S., at 1031, 104 S. Ct., at 2889, but this is not such a case. Had the trial court in this case been confronted with the "wave of public passion" engendered by pretrial publicity that occurred in connection with Irvin's trial, the Due Process Clause of the Fourteenth Amendment might well have required more extensive examination of potential jurors than it undertook here.

Mu'Min, 500 U.S. at 428-29. Here the trial judge did just what the Supreme Court suggested, in the face of possible public passion he undertook an extensive voir dire to include the lengthy individual voir dire of the jurors on the issue of pretrial publicity.

(8) This Court has carefully read the questionnaires and testimony of the 12 jurors who decided this case as well as the group voir dire. All the jurors had heard of the case, but nine indicated they had no opinion about Mr. Davidson even being involved. Two jurors had heard of his "involvement" but were "unsure" if he was guilty or not. Only one stated that Mr. Davidson was "probably guilty" but assured the judge he could set that view aside. The juror who stated Mr. Davidson was "probably guilty" was the one African-American on the jury. Some of the jurors had heard of the prior Cobbins verdict but only one had watched more than a snatch of the trial and that was the juror mentioned above who thought Mr. Davidson was "probably guilty." There was no proof that the Cobbins verdict bled into views about Mr. Davidson for the other 11.

The Court's consideration of the entire voir dire process is counted as set out below:

200 called into court
130 dismissed for various reasons
70 jurors left for general voir dire

80 dismissed for cause
10 challenges for cause denied
50 hardship or other disqualifications

Reasons for Dismissal for Cause (80 total)

Publicity	33
Automatically Vote for Death	9
Never Vote for Death	15
Relationship with persons involved in case	16
Victim of Similar Offense	2
Other	3
Multiple Reasons	1
Unknown (not discussed on record)	1

Multiple reasons

Publicity, cannot vote for death	1
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Other:

Ex-prosecutor	1
Joined Facebook Group (after telling Court she had not)	1
Poor views of law enforcement	1

The dismissals for exposure to pretrial publicity are not inordinately high. Contrast this with the four (4) week voir dire involving 430 persons, 268 of whom were excused for cause as having fixed opinions in *Irvin v. Dowd*. Of the 12 jurors seated in *Irvin*, eight thought he was probably guilty. *Irvin v. Dowd*, 366 U.S. at 720 and 727.

(9) The Court notes that the Petitioner did not call any of the 12 trial jurors (or explain their absence) at the January 28-29, 2019 hearing. If, as feared, the jury deliberated or discussed matters not admitting into evidence, Petitioner's Counsel had every right to produce that testimony. A juror's undisclosed bias can be proven post-trial.

See *Remmer v. United States*, 347 U.S. 227 (1954). Furthermore, jurors may testify post-trial “on the question of whether extraneous prejudicial information was improperly brought to the jury’s attention, [or] whether any outside influence was improperly brought to the jury’s attention.” TRE 606(b).

The Court is well aware of the rationale supporting the outcome in cases like *Irvin v. Dowd* and *United States v. Casellas-Toro* because there is a real concern that if an atmosphere of inflammatory prejudice saturates a community then individual jurors are unable to rise above the community contagion. Even though the trial jurors in good faith express fairness in the jury selection process they simply cannot shed the community predisposition.

The Court has considered the level of community predisposition generated by the described media coverage in this case, but holds that the jury selection process which resulted in the selection of the 12 jurors that decided this case has, for the reasons stated above, rebutted any prejudice (if it was presumed) generated by the pretrial publicity. The jury in this case was fairly seated and each juror met the requirements of Tenn. R. Crim. P. 24 and constitutional requirements of impartiality. *Skilling*, 561 U.S. at 380-81 and *Murphy v. Florida*, 421 U.S. 794 (1975).¹⁵ The fear that a jury could not be selected in

¹⁵ Petitioner cites to *State v. Kilburn*, 782 S.W.2d 199 (Tenn. Crim. App. 1989) as authority for his position. That case, however, is inapposite. The *Kilburn* court reversed the conviction because the trial judge should have granted a motion to excuse for cause because the juror’s clear knowledge of facts made the juror unqualified under the Tenn. R. Crim. P. 24(b)(2) standard.

Knox County did not even come close to being realized nor was the fear of utter corruption of the trial atmosphere realized. It has oft been stated that “the ultimate test is whether the jurors who actually sat and rendered verdicts were prejudiced by the pretrial publicity.” *Kent v. State*, 2018 WL 2189706 *13 (Tenn. Crim. App. May 2018) (citing *State v. Kyger*, 787 S.W.2d 13, 18-19 (Tenn. Crim. App. 1989)). The Court holds that the claim that Mr. Davidson suffered presumed prejudice as a result of the asserted prejudicial effects of the pretrial publicity, if it existed, has been rebutted.

The Court having determined that the trial jury was fairly chosen and qualified to hear this case, the Court necessarily also determines that while trial counsel breached an objective standard of reasonableness in failing to move for a change of venue/venire, there is no showing of prejudice. *Strickland*, 466 U.S. at 692 and 694. The Court therefore holds that the claim of ineffective assistance of counsel based on failure to move for a change of venue/venire fails.

D. CLAIM OF INEFFECTIVE ASSISTANCE BASED ON FAILURE TO ADEQUATELY ADDRESS RACIAL BIAS

Some of the massive media coverage contained comments regarding the racial identity of the defendants and the victims. Some of it also reported abject racial comments from fringe groups and outliers and the KKK even came for a demonstration in 2007. However most of the observations about race were directed at what some thought was the “political correctness” of the media outside of Knox County. This was the idea that the crimes would have been more widely reported if it has been a case of “white on black”

crime rather than “black on white” crime. However, prominently reported was the comment of a prosecutor that this was not a hate crime, as there was no indication that race played any part in the defendants’ choice of victims. Gary Christian, the outspoken father of Shannon, who was the source of many news stories, was reported as saying that the case was not about “race” but about “evil.”

All the trial jurors knew that Mr. Davidson was of a different race than the victims as shown in question 98 of the questionnaire. Asked on the questionnaire at question 97 if they had any unpleasant experience with persons of a different race, all answered “no.” The Supreme Court has held that in a capital case involving interracial violence that the defense is entitled to ask potential jurors about racial prejudice. *Turner v. Murry*, 476 U.S. 28 (1986).

Trial counsel in the group voir dire in this case addressed the race issue by asking jurors if they would be prejudiced against Mr. Davidson because he dated white women. When not receiving a negative response, counsel went on to other subjects. Both trial counsel testified at length at the January 28-29, 2019 hearing. Petitioner’s Counsel chose not to question them about their asking the interracial dating question or why they did not ask more penetrating questions on race. The burden is on the Petitioner to prove ineffective assistance of counsel.

The Court has considered Judge Gibbons’ decision in a federal case from Ohio. The Ohio Supreme Court had addressed the racial voir dire issue.

Smith relies on *Turner v. Murray*, 476 U.S. 28, 36-37, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986), for the proposition that a capital defendant accused of an interracial crime is

entitled to have the venire questioned so as to reveal any possible racial bias. Smith contends that, in the racially charged atmosphere of this case, competent counsel would have taken advantage of that entitlement.

In our view, Smith's arguments are purely speculative and unconvincing. We have held that "the conduct of voir dire by defense counsel does not have to take a particular form, nor do specific questions have to be asked." *State v. Evans*, 63 Ohio St. 3d 231, 247, 586 N.E.2d 1042 (1992). Moreover, as we noted in *State v. Watson*, 61 Ohio St. 3d 1, 572 N.E.2d 97 (1991), under *Turner v. Murray*, the actual decision to voir dire on racial prejudice is a choice best left to a capital defendant's counsel. *Id.*, 476 U.S. at 37, and fn. 10, 106 S. Ct. 1683.

State v. Smith, 731 N.E.2d at 651-52. Nothing in the Supreme Court of Ohio's analysis could be construed as contrary to clearly established federal law. In fact, the court reasonably interpreted Supreme Court precedent, noting that decisions about the content of questions during voir dire are typically left to the discretion of the trial counsel. *See, e.g., Lear v. Cowan*, 220 F.3d 825, 829 (7th Cir. 2000) (holding that trial counsel's failure to voir dire jurors on racial bias was not "unprofessional, subpar representation per se," and noting that "there are tactical reasons why a lawyer would not want to direct the jurors' attention to the interracial character of the crime, and the [Turner] Court recognized this"); *accord Hasan v. Ishee*, 2006 WL 3253081, *10-11, 2006 U.S. Dist. LEXIS 83926, at *28-32 (S.D. Ohio Aug. 14, 2006). Indeed, as the Supreme Court of Ohio explained,

Counsel could have properly determined that the examination of jurors' racial views during voir dire would be unwise, since the subject of racial prejudice is sensitive to most people, and raising it during voir dire could cause some jurors to be less candid if confronted with direct questions attempting to discern any hint of racial prejudice. In addition, our reading of the record leads us to conclude, contrary to Smith's assertions, that racial issues were not "woven into the fabric of trial."

State v. Smith, 731 N.E.2d at 652. This observation is especially appropriate in this case, since Mahdi's counsel apparently hoped that the jury would conclude that the murder of Darwish had been an accident. Conducting a voir dire on racial and religious grounds could have

emphasized the possible role of racial and religious animus in the commission of the crime, bolstering the prosecution's claim that the murder had been intentional. Thus, counsel had to weigh the potential harm that could flow from a voir dire on racial and religious bias against its arguable benefit. Trial counsel's decision not to voir dire prospective jurors on racial and religious bias seems a reasonable tactical decision.

Moreover, as the Supreme Court of Ohio concluded,

Yet, even if we viewed counsel's trial strategy as questionable, such a strategy should not compel us to find ineffective assistance of counsel. In these situations, we normally defer to counsel's judgment. *State v. Clayton*, 62 Ohio St. 2d 45, 49, 402 N.E.2d 1189 (1980). Since we find no legitimate basis for Smith's assertions that counsel were ineffective for not examining the venire on racial or religious bias, this proposition is not well taken.

State v. Smith, 731 N.E.2d at 652. Such an application cannot be said to constitute an objectively unreasonable application of federal law. Instead, it is based upon a particular view of the factual record in this case, determinations that under AEDPA are presumed to be correct, to which the court applied its reasonable interpretation of federal law. Consequently, Mahdi's claim that his trial counsel were ineffective fails. In turn, because Mahdi has failed to demonstrate that his trial counsel were ineffective, the claim that his appellate counsel were ineffective also fails. Given that Mahdi's trial counsel were not ineffective, Mahdi cannot argue that he suffered prejudice from his appellate counsel's failure to raise trial counsel's decision not to question jurors about religious and racial bias. No prejudice flows from the failure to raise a meritless claim.

Mahdi v. Bagley, 522 F.3d 631, 637-38 (6th Cir. 2008). *Mahdi* is consistent with other cases where counsel have been sustained because they did not want to emphasize any racial issue. See e.g. *Sexton v. French*, 163 F.3d 874, 886-887 (4th Cir. 1998) (insightful discussion of why counsel might not want to ask questions about racial attitudes) and *Dawkins v. United States*, 2014 WL 2818889 *15-16 (W.D. Tenn. 2014) (same).

Further information on the thought process of trial counsel would have been helpful, but without more the Court cannot assume that they acted without reason as illustrated in *Mahdi* and other cases cited. The Petitioner has failed to carry his burden on this issue and the Court therefore concluded that it is without merit.

VIII. DECISIONS ON THE 46 ASSERTED CLAIMS

The Amended Petition filed on September 4, 2018 (156 pages) contained 39 separate claims (1-39).

The supplemental amended petition filed on October 17, 2018 (29 pages) asserted an additional five claims (40-44).

A second supplemental amended petition was filed on December 14, 2018 (4 pages) asserting two more claims (45-46). Thus there are 46 separate claims asserted.

The State filed an answer on October 4, 2018 (47 pages) responding to claims 1-39. The State also answered (11 pages) the claims asserted in the Supplemental Petitions (claims 40-46) on January 18, 2019.

As previously mentioned, some of the asserted claims are of substance while others are not supported by proof; or involve claims previously determined in this case; or claims clearly without merit as being inconsistent with established case law. It is important to keep in mind that while Petitioner's Amended Petition and Supplemental Petitions totaling 192 pages and 46 separate claims covered a wide range of alleged errors; his pretrial brief (21 pages); proof at the hearing; and post-trial brief (53 pages) only addressed the issues

related to change of venue, allegation of massive and excessive publicity, and the jury selection process.

While the Amended Petition and supplements set forth some claims related to the conduct of trial counsel at trial—to include failing to object to evidence and prosecution conduct—these claims were never addressed in the pretrial brief, during the hearing, or in the post-trial brief. The Court has done its best to resolve these claims as set forth in the Amended Petition and its supplements.

In considering these claims as related to the failure to object, the Court keeps the following in mind.

a. Counsel's failure to object is not usually deficient performance

As a threshold matter, in a trial of any size, numerous potentially objectionable events occur. “[T]he Constitution does not insure that defense counsel will recognize and raise every conceivable constitutional claim.” *Engle v. Isaac*, 456 U.S. 107, 134, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). Moreover, experienced trial counsel learn that objections to each potentially objectionable event could actually act to their party's detriment. Learned counsel therefore use objections in a tactical manner. In light of this, any single failure to object usually cannot be said to have been error unless the evidence sought is so prejudicial to a client that failure to object essentially defaults the case to the state. Otherwise, defense counsel must so consistently fail to use objections, despite numerous and clear reasons for doing so, that counsel's failure cannot reasonably have been said to have been part of a trial strategy or tactical choice. *See Hodge v. Hurley*, 426 F.3d 368, 376 (6th Cir. 2005) (“[C]ounsel's failure to object to *any* of the numerous improper statements in the prosecution's closing argument is well outside [professional norms].”) (emphasis in original). [footnote omitted]

b. Petitioner fails to show how any alleged errors by counsel prejudiced Petitioner

Even assuming, *arguendo*, that Petitioner is able to prove that it was error for counsel to fail to object to the above-referenced evidence, Petitioner has failed to show how 1) the failure to object to any of the enumerated

instances amounts to a constitutional deprivation of counsel, and 2) how Petitioner was prejudiced by the admission—*i.e.*, why this Court should find that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052. Petitioner is not entitled to a presumption of prejudice unless it can be said that his counsel “fail[ed] meaningfully to oppose the prosecution’s case.” *Florida v. Nixon*, 543 U.S. 175, 179, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004).

Lundgren v. Mitchell, 440 F.3d 754, 774-75 (6th Cir. 2006).

The asserted claims are determined as follows:

A. PRETRIAL PUBLICITY, RACE, AND JURY SELECTION

1. *Counsel’s Ineffectiveness in Failing to Move for Change of Venue Based on Publicity*

Petitioner asserts a change of venue “was necessary due to the extensive, inflammatory and prejudicial pretrial media coverage of this case.”¹⁶ Counsel’s failure to move for a change of venue, Petitioner argues, constitutes ineffective assistance of counsel.

This claim is denied for the reasons stated in Part VII of this Order.

2. *Failing to Voir Dire Adequately on Issue of Pretrial Publicity*

Petitioner argues trial counsel rendered ineffective assistance in failing to conduct voir dire adequately on the issue of pretrial publicity and the degree to which jurors were exposed to such publicity.

This claim is denied for the reasons stated in Part VII of this Order.

¹⁶ Amended petition at 31.

3. *Counsel's Failure to Move for Change of Venue When "Actual Bias Among Potential Jurors Became Apparent"*

Petitioner asserts the voir dire and juror questionnaires completed in this case made clear that the Knox County jury pool was affected by "actual bias" and was thus prejudiced against Petitioner. Post-conviction counsel write, "No amount of rehabilitation could have cured the deeply ingrained prejudice among potential jurors who were subject to repeated exposure to the facts of this case."¹⁷ Trial counsel's failure to move for a change of venue in those circumstances, Petitioner asserts, constitutes ineffective assistance of counsel.

This claim is denied for the reasons stated in Part VII of this Order.

4. *Counsel's Failure to Move for Change of Venue Based on Interracial Status of the Crime*

No proof was presented at the post-conviction hearing that separated the racial issue from that of pretrial publicity. This claim is denied for the reasons specifically stated in Part VII(D) of this Order.

5. *Counsel's Failure to Raise Constitutional Cross-Section Challenge Based Upon Racial Composition of Venire*

Petitioner argues Mr. Trant and Mr. Eldridge "were ineffective due to their failure to adequately raise a constitutional cross-section challenge based on the racial composition of the venire."¹⁸ There was no proof presented at this hearing related to this issue.

¹⁷ *Id.* at 41.

¹⁸ *Id.* at 45.

Additionally, the Court notes trial counsel challenged the composition of the venire on direct appeal, and the appellate courts denied relief. *See State v. Davidson*, 509 S.W.3d 236-38 (appendix). Therefore, this claim is denied.

7. *Counsel's Failure to Ask Potential Jurors Questions Regarding Race*

This issue has been addressed in Part VII(D) of this Order; for the reasons expressed there, this claim is denied.

B. COUNSEL'S PERFORMANCE DURING JURY SELECTION

6. *Dismissal of Jurors Based Solely on Questionnaire Responses*

Petitioner argues Mr. Trant and Mr. Eldridge "gave ineffective representation for failing to object to the trial court's erroneous dismissal of jurors based purely on their answers on juror questionnaires."¹⁹ Petitioner also argues he is entitled to relief based on the trial court's actions themselves. This issue, along with many others presented in Mr. Davidson's petitions for relief, is waived because it has been raised for the first time on post-conviction *See* TENN. CODE ANN. § 40-30-106(g).

Petitioner's ineffective assistance claim is without merit. In the Court's view no evidence was presented at the post-conviction hearing to substantiate Petitioner's assertion that the trial court dismissed jurors based solely on their questionnaire responses. Petitioner did not identify the number of jurors who were so dismissed, and post-conviction counsel

¹⁹ *Id.* at 47.

did not ask the trial attorneys about whether any jurors were in fact dismissed by the judge based solely on questionnaire responses.

The only evidence introduced at the hearing regarding jurors being dismissed before individual voir dire came in the form of testimony from Mr. Price, who testified that any jurors who were dismissed before individual voir dire were dismissed upon the agreement of the parties. In light of this evidence, this Court concludes trial counsel did not render ineffective assistance as to this issue.

8. *Counsel's Failure to "Life Qualify" Jurors*

Petitioner argues trial counsel were ineffective in failing to follow the mandates of *Morgan v. Illinois*, 504 U.S. 719 (1992), and "adequately ensure that the prospective jurors could consider the mitigation in this case in relation to its potential aggravators[.]"²⁰ However, the Petitioner has failed to present adequate proof relative to this issue. The Amended Petition for relief does not identify specific jurors who trial counsel should have rehabilitated, and at the post-conviction hearing trial counsel were not asked specific questions about their attempts to life-qualify jurors during voir dire. Furthermore, this Court has reviewed the voir dire transcript and concludes trial counsel made a competent effort to ensure prospective jurors could give appropriate consideration to mitigating evidence. As explained below, this included objecting to what trial counsel saw as Judge

²⁰ *Id.* at 54.

Baumgartner's limiting prospective jurors' ability to be rehabilitated.²¹ Thus, this Court concludes trial counsel did not render ineffective assistance as to this issue.

9. *Trial Court's Striking Jurors Who Were Not Substantially Impaired in their Ability to Consider Death*

Petitioner argues the trial court improperly "struck several jurors who were scrupled regarding the death penalty but who were not substantially impaired in their ability to follow the law."²² This issue is waived because it has been raised for the first time on post-conviction *See* TENN. CODE ANN. § 40-30-106(g).

To any extent Petitioner's claim can be construed as an ineffective assistance of counsel claim, it is without merit. In the Amended Petition, Petitioner's Counsel identify only three jurors who were, supposedly, improperly stricken for the reasons asserted in this issue. This Court has reviewed the individual voir dire from those three jurors, and one of the jurors identified was actually retained for individual voir dire.²³ One of the other jurors was excused by the Court based on her views on the death penalty, which led to a specific objection by Mr. Davidson's trial counsel.²⁴ The third juror referenced in the Amended Petition was initially retained by the trial court, but after he left the courtroom Judge Baumgartner dismissed the prospective juror, stating, "I did not feel comfortable about

²¹ *See* discussion in Part VIII(B)(9) below.

²² Amended Petition at 56.

²³ *See* Amended petition at 57 (identifying voir dire transcript of Sept. 24, 2009, at 276); Voir Dire Transcript of Sept. 24, 2009, at 276 (voir dire of prospective juror Kinito S.).

²⁴ *See* Voir Dire transcript of Sept. 24, 2009, at 239-44 (voir dire of prospective juror Debbie P.).

[him]. I don't think he was - - I had the sense he wasn't being completely forthcoming with us. It's hard for me to put my finger on it."²⁵ After this juror was dismissed, Mr. Eldridge told the Court,

Judge, very briefly, I need to respectfully object to the Court advising jurors that have expressed opinions in opposition to the death penalty to informing the jurors that the lawyers are going to attempt to change their mind about their sincerely held beliefs or talk them out of their opinion, and I think that that statement by the Court, which of course, carried the authority of the Court, impairs our ability to attempt to rehabilitate those jurors, just for the record. We've had that a couple of times, and we have one coming up, and I'm going to respectfully object to those kinds of instructions. Thank you.²⁶

Trial counsel thus acted appropriately in objecting to the trial court's dismissing the two jurors identified by Mr. Davidson in the Amended Petition.

Petitioner also asserts the trial court improperly retained prospective jurors whose views should have led to their dismissal for cause. Petitioner identifies ten particular jurors who fall into this category. However, none of these ten prospective jurors served on Mr. Davidson's trial jury, so there was no prejudice in the trial court's permitting these jurors to remain in the jury pool following individual voir dire.

In light of the above analysis, this Court concludes Petitioner is not entitled to relief on this issue.

²⁵ Voir dire transcript of Sept. 24, 2009, at 292 (voir dire of prospective juror Adra (Walt) W.).

²⁶ *Id.* at 294.

10. *State's Improper Voir Dire*

The Petitioner's prosecutorial misconduct claim regarding jury selection is itself waived because it has been presented for the first time on post-conviction. *See* TENN. CODE ANN. § 40-30-106(g). Petitioner's assertion that trial counsel were ineffective in not objecting to the State's performance during voir dire must also fail. During the post-conviction hearing trial counsel were asked no questions about the State's voir dire questions, so this Court has no way of knowing whether trial counsel's failure to object resulted from a strategic decision. Furthermore, this Court has reviewed the voir dire transcript and finds that on the whole, the State's questions during jury selection were proper and did not prejudice Petitioner. Accordingly, the Court concludes Petitioner is not entitled to relief on this issue.

11. *Trial Court Errors During Voir Dire*

Petitioner argues several of Judge Baumgartner's actions during jury selection denied the Petitioner a fair trial. As with many of the issues Petitioner raises, this issue itself is waived because it has been raised for the first time on post-conviction. *See* TENN. CODE ANN. § 40-30-106(g).

To any extent Petitioner alleges trial counsel were ineffective in failing to challenge the trial judge's supposedly-improper actions during voir dire, the issue is without merit. During the post-conviction hearing, trial counsel were not asked specific questions about the trial judge's actions during voir dire, so this Court has no way of knowing whether trial counsel's not objecting to Judge Baumgartner's actions resulted from a strategic decision.

Furthermore, this Court has reviewed the voir dire transcripts and concludes that Judge Baumgartner's actions did not render the jury predisposed to find Petitioner guilty and sentence him to death. Petitioner is not entitled to relief on this issue.

12. *Counsel's Failure to Exhaust All Peremptory Challenges During Voir Dire*

Petitioner asserts trial counsel rendered ineffective assistance by failing to assert all of the defense's peremptory challenges during voir dire. According to Petitioner, counsel's actions left "[a]t least seven jurors [who] had either watched a portion of a co-defendant's trial . . . had heard Mr. Davidson was the ringleader of the crime[,] or felt he was guilty before the trial began."²⁷ Petitioner also argues trial counsel's failure to raise all peremptory challenges left them "unable to subsequently challenge the composition of the jury absent structural error."²⁸ The Court disagrees.

At the post-conviction hearing, trial counsel were not asked questions about any of the seven supposedly-prejudiced jurors, so this Court has no way of knowing whether counsel had any specific issues with these particular jurors. The Court has reviewed the voir dire of these identified jurors and concludes the trial court properly concluded these jurors were qualified to sit on the jury because they stated they could put aside what they had heard and consider the case solely on the evidence presented in the courtroom. Finally, at the post-conviction hearing trial counsel stated they did not exercise their

²⁷ Amended petition at 67.

²⁸ *Id.* at 68.

remaining challenges on the advice of their retained jury consultant. Trial counsel were aware which jurors would have come into the box had they exercised challenges on the jurors who were seated, and counsel and the jury consultant concluded the jurors who would have come into the box would have been less favorable to the defense than the jurors who were ultimately seated. As stated elsewhere, trial counsel has the right to rely on its retained consultants/experts, and this Court will not second-guess trial counsel's tactical decisions.

Accordingly, the Court concludes trial counsel were not ineffective as to this issue.

13. Errors Regarding Jury Sequestration

Petitioner asserts his right to a fair and impartial jury was violated by the trial court's "fail[ure] to properly sequester prospective jurors during the jury selection process and prior to the commencement of trial."²⁹ Petitioner claims that during the breaks between juror orientation (held September 1, 2009) and individual voir dire (September 21-30, 2009), jurors were "exposed to additional media coverage or contacts from community members addressing the case with them."³⁰ Mr. Davidson also takes exception to the length of time which elapsed between general voir dire (October 2, 2009) and the start of trial (October 19, 2009), and the manner in which the trial court questioned the jurors about what they had heard about the case on the first day of trial.

²⁹ Amended petition at 68.

³⁰ *Id.* at 69.

The Court disagrees with Petitioner's assertions. This issue itself is waived because it has now been presented for the first time. *See* TENN. CODE ANN. § 40-30-106(g). To any extent Petitioner argues trial counsel were ineffective in not objecting to the court's actions, that claim is without merit. Although Petitioner's amended petition points to several instances in the record in which prospective jurors informed the trial court, upon returning for voir dire, about various actions which could be seen as violations of the trial court's admonitions to avoid discussing the case or reading or viewing media accounts, there is no proof in the record that any of these jurors sat on the case. There is also no proof in the record that any of the jurors who sat on the case were unduly affected by their exposure to pretrial publicity or other case knowledge—none of the surviving jurors in this case testified at the post-conviction hearing, and post-conviction counsel did not ask trial counsel any questions about the gaps in the jury selection process or the effects of potential jurors' purported exposure to pretrial publicity following juror orientation.

In Tennessee, capital case jurors need only be sequestered once they are sworn. TENN. CODE ANN. § 40-18-116, *State v. McKay*, 680 S.W.2d 447, 453 (Tenn. 1984). The Court did not act improperly in following this law, and there was no proof the jurors who sat on Petitioner's case violated the Court's admonitions or were influenced by pretrial publicity. Because there is no proof of any error regarding juror sequestration, trial counsel did not render ineffective assistance in their handling of this issue.

C. ISSUES SURROUNDING JUDGE BAUMGARTNER

14. *Failure to Present Adequate Evidence of Judge Baumgartner's Impairment and Misconduct*
45. *Judge Baumgartner's Intoxication Deprived Petitioner of Competent, Duly Appointed Trial Judge*

In his petitions for relief, Mr. Davidson attempts to relitigate issues surrounding Judge Baumgartner's purported addiction during trial. As stated earlier in this Court's Order, before direct appeal the Tennessee Supreme Court narrowed the focus of the structural error analysis, and on direct appeal the appellate courts found the structural error issue to be without merit. *See State v. Cobbins et al.*, No. E2012-00448-SC-R10-DD (Tenn. May 24, 2012) (order addressing scope of structural error inquiry); *State v. Davidson*, 509 S.W.3d at 228-30 (appendix) (denying structural error claims in this case). Thus, Petitioner's claims raised in issue 45 have been previously determined and are not cognizable for determination here. *See* TENN. CODE ANN. § 40-30-106(h).

The issue regarding trial counsel's ineffectiveness is largely resolved by this Court's analysis as provided in Part VII above. Notably, while the voir dire transcript was not made part of the record on appeal, this Court's review of the voir dire transcript leads it to conclude Judge Baumgartner was actively engaged in the jury selection process and made appropriate rulings in dismissing jurors for cause. Additionally, Petitioner's three trial attorneys testified they did not find Judge Baumgartner to be affected by any medication he may have been taking at the time; rather, they found him to be an active and engaged participant in Mr. Davidson's trial. No other witness stated otherwise. Finally, the only evidence presented at this hearing of Judge Baumgartner's addiction at a judicial

proceeding related to the trial of Ms. Coleman in 2010, and the Tennessee Supreme Court has made clear that absent any proof that the trial judge's actions affected the proceedings in *Mr. Davidson's case*, Petitioner's structural error claim must fail.

Petitioner is not entitled to relief on these issues.

D. COUNSEL'S PERFORMANCE BEFORE TRIAL AND TRIAL GUILT/INNOCENCE PHASE

15. *Failure to Object to and Properly Preserve Errors Regarding Trial Court's Handling of Questions from the Jury*

The trial judge permitted jurors to submit questions to witnesses pursuant to Tennessee Rule of Criminal Procedure 24.1. Although trial counsel objected to this practice and raised the issue on appeal, *see State v. Davidson*, 509 S.W.3d at 236 (appendix), Petitioner argues trial counsel were ineffective in not challenging juror questions with any specificity.

At the post-conviction hearing, Mr. Trant and Mr. Eldridge were not asked about the jury's asking questions of witnesses at trial. Thus, this Court has no way of knowing whether trial counsel made a conscious decision not to object to specific jury questions or the answers they elicited. Furthermore, this Court has reviewed the portions of the record which Petitioner finds objectionable and has concluded that nothing contained in the jurors' questions or the responses they elicited was so prejudicial as to undermine Petitioner's right to a fair trial or otherwise entitle him to a new trial. Petitioner has failed to establish trial counsel rendered ineffective assistance as to this issue.

16. *Failure to Litigate Suppression of Petitioner's Statement Adequately*

Trial counsel challenged the admissibility of Petitioner's post-arrest statement to law enforcement before trial. The motion to suppress that statement was denied, and the Tennessee Supreme Court affirmed the trial court's ruling on direct appeal. *See State v. Davidson*, 509 S.W.3d at 186-92. Petitioner argues trial counsel were ineffective in failing to litigate this issue adequately. This Court disagrees.

The Court has reviewed the record, including the motion to suppress Mr. Davidson's statement, the hearing on the motion, the trial court's order denying the motion, and the Tennessee Supreme Court's review of the issue. This Court finds the trial court's order, which was affirmed by the Tennessee Supreme Court on appeal, to be well-reasoned. Nobody involved with the post-arrest interview—the Petitioner or the law enforcement officers who interviewed Petitioner—testified at the post-conviction hearing, so this Court has no evidence before it which could call the suppression issue into doubt. Finally, trial counsel were not asked about their strategy in pursuing this suppression motion, so this Court has no evidence before it to resolve the questions of whether trial counsel's strategy was reasonable and what more trial counsel could have done in their attempt to have the statement suppressed.

Accordingly, Petitioner has failed to establish trial counsel rendered ineffective assistance as to this issue.

17. *Counsel's Failure to Present Testimony of Forensic Pathologist*

Petitioner argues Mr. Eldridge and Mr. Trant “failed to properly utilize the services of a competent consulting forensic pathology expert to challenge the State’s evidence.”³¹ However, Counsel for the Petitioner did not present the testimony of a forensic pathologist or other expert at the post-conviction hearing to challenge the medical examiner’s findings, nor were counsel asked anything about the supposed failings of the medical examiner’s filings. Post-conviction counsel did not file a motion during the pendency of these proceedings seeking an expert in forensic pathology.

Per the Court of Criminal Appeals’ decision in *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990), the Petitioner’s failure to present any proof supporting this issue is fatal to his claim. Accordingly, the Court concludes trial counsel did not render ineffective assistance as to this issue.

18. *Failure to Consult with a Ballistics Expert*

Petitioner asserts trial counsel were ineffective for “fail[ing] to use an independent expert to challenge the State’s ballistics evidence.”³² An independent expert, Petitioner claims, would have “cast further doubt on the State’s theory that the weapon found with Mr. Davidson at the time of his arrest was the weapon used in the killing of Christopher Newsom.”³³

³¹ Amended petition at 83.

³² *Id.* at 86.

³³ *Id.* at 87.

This Court acknowledges that before the post-conviction hearing, Counsel for the Petitioner sought funds for a ballistics expert, but the Court denied the motion. Petitioner has cited to the denial of this expert, among others, to assert that Petitioner's attorneys have been unable to adequately prepare for and present the post-conviction case.

This Court concludes trial counsel did not render ineffective assistance in their handling of the issue. Trial counsel's actions in not retaining a ballistics expert did not prejudice Petitioner. This Court bases its conclusion in large part on reasoning explained in Part V above (*see infra* at 16-17) and in its order denying the Petitioner's motion for expert ballistics services, which is incorporated by reference.³⁴ This Court notes the Tennessee Supreme Court found the State's firearms testimony as "not highly probative," *see State v. Davidson*, 509 S.W.3d at 207. Additionally, in Mr. Davidson's post-arrest statement to law enforcement the Petitioner denied shooting Chris Newsom but "assumed [Petitioner's] gun was used" to accomplish Mr. Newsom's killing.³⁵

Furthermore, this issue was one of many which the Petitioner did not address at the post-conviction hearing. Trial counsel were not asked specific questions about the State's ballistics evidence or any efforts trial counsel made to challenge the State's expert. For this reason and the others stated above, Petitioner is not entitled to relief on this issue.

³⁴ See "Ex Parte Order Denying Petitioner's 'Sealed, Ex Parte Motion for the Services of Ballistics Expert and Forensic Consultant Frederick M. Wentling,'" filed Sept. 17, 2018.

³⁵ See trial exhibit 424, redacted transcript of Petitioner's January 11, 2007 statement, at 92-94.

19. *Failure to Investigate and Present a Fingerprint Expert*

Trial counsel challenged the admissibility of the State's fingerprint evidence at trial, asserting the methodology of the State's expert was flawed. The trial court denied the defense's motion to exclude this evidence, and the Tennessee Supreme Court affirmed this ruling on appeal. *See State v. Davidson*, 509 S.W.3d at 209-12. In this post-conviction proceeding, Petitioner argues that had Mr. Eldridge and Mr. Trant presented expert testimony challenging testimony that Petitioner's fingerprints were found on the trash cans into which Ms. Christian was placed before she died, "the issue of Mr. Davidson's presence at the time of Channon Christian's death would have been left unproven by the State."³⁶

As with the issue of the forensic pathologist, Counsel for the Petitioner did not seek the services of a fingerprint expert before the post-conviction hearing and did not present a fingerprint expert's testimony at the hearing. Thus, under *Black*, Petitioner's failure to present a witness in support of this issue necessarily means Petitioner has failed to carry his evidentiary burden, and he is not entitled to relief on this issue.

20. *Failure to Present Expert Witness Testimony Regarding Diminished Capacity*

Petitioner argues trial counsel "failure to retain, properly consult with, and properly develop the testimony of the kinds of qualified medical, psychiatric, and scientific experts

³⁶ Amended petition at 88.

that were required in this case to investigate and present evidence” of Petitioner’s inability to form the requisite mental state for first-degree murder.³⁷

The Court notes that during the pendency of these post-conviction proceedings, Counsel for the Petitioner sought the services of Drs. Pamela Auble and James Merikangas. Post-conviction counsel have asserted in pleadings filed after the Amended Petition that the denial of these experts prevented Counsel from raising this issue in these post-conviction proceedings.

This issue is related to the Petitioner’s other issues regarding what Mr. Davidson sees as trial counsel’s failure to obtain appropriate mental health-based evidence. As explained elsewhere in this order (*see infra* at 15-16), Dr. Brown, the Petitioner’s mental health expert who testified at the capital sentencing phase, and Dr. Spica, who conducted psychological testing upon which Dr. Brown relied in reaching his conclusions, did not testify at this post-conviction hearing. Thus, this Court has no way of knowing whether these experts discussed a potential diminished capacity defense with trial counsel or whether the experts thought such a defense would be successful. Nor were trial counsel asked about a diminished capacity defense at the post-conviction hearing. Mr. Davidson’s trial attorneys all stated that Mr. Davidson seemed reasonably intelligent and did not appear to exhibit any mental disorder. Additionally, Mr. Eldridge testified he believed that had Dr. Brown identified any serious psychological disorders or other issues relating to the Petitioner, Dr. Brown would have notified trial counsel. Between this testimony and Dr.

³⁷ *Id.* at 89.

Brown's testimony at the capital sentencing hearing, this Court concludes that trial counsel's decision not to seek a diminished capacity defense was reasonable, given the lack of evidence that would have supported this defense.

Accordingly, the Court concludes trial counsel did not provide ineffective assistance as to this issue.

21. *Failure to Investigate Potential Defense Witnesses Adequately/Presentation of Prejudicial Witness Testimony*

Petitioner argues trial counsel rendered ineffective assistance in presenting the testimony of Ethel Freeman and Jeffrey Bradley during the guilt/innocence phase of Petitioner's trial. Specifically, Petitioner asserts, "Both witnesses provided limited utility for Mr. Davidson's defense. Conversely, their testimony on cross-examination was damaging to Mr. Davidson's case."³⁸

As with many of the issues raised in Mr. Davidson's petitions for relief, at the post-conviction hearing very little evidence was presented regarding this issue. One of Petitioner's trial attorneys was asked whether he remembered Ms. Freeman, but counsel were asked no explicit questions about what they did to investigate and prepare the testimony of these two witnesses or the reasons trial counsel chose to call them at trial. Ms. Freeman and Mr. Bradley also did not testify at the post-conviction hearing.

Additionally, the Court notes two similar things. First, the testimony of these two witnesses was not the deciding factor in the jury's convicting Petitioner and sentencing him

³⁸ *Id.* at 91.

to death. Secondly, even if these two witnesses had not testified at Mr. Davidson's trial, the jury was presented with more than enough evidence to find Mr. Davidson guilty of the offenses for which he was convicted beyond a reasonable doubt. Counsel's presentation of these witnesses did not prejudice Petitioner; therefore, counsel did not render ineffective assistance as to this issue.

22. *Failure to Object, Limit, or Appeal Statements and Testimony Priming Implicit Bias*

In his amended Petition, Mr. Davidson identifies six specific instances of testimony or questioning/argument by the State that "played to the potential implicit biases of the jury"³⁹ and impermissibly implicated racial stereotypes. Petitioner asserts trial counsel were ineffective in their handling of these statements. The Court disagrees.

As with many other issues raised by Petitioner, trial counsel were not asked about any of the six specific instances of testimony, argument, or questions referenced in the Amended Petition. Nor were trial counsel asked about anything else related to implicit bias or racial stereotypes. Thus, the Court has no way of knowing whether trial counsel's actions resulted from a strategic decision or some other reasoned approach. Additionally, Petitioner presented no evidence in any form about implicit bias and the manner in which it might affect jury trials, nor did Petitioner present any evidence that the jurors who sat on Petitioner's jury exhibited racial prejudice of any kind. Thus, the Court concludes Petitioner has failed to show counsel rendered ineffective assistance as to this issue.

³⁹ *Id.* at 93.

23. *Failure to Integrate the Case for Life with the Guilt Phase Strategy*

Petitioner faults trial counsel for “fail[ing] to introduce mitigating themes and evidence into the guilt/innocence portion of Mr. Davidson’s trial” and instead “pursu[ing] a reasonable doubt defense that portrayed the decedents as willing visitors to the house on Chipman Street.”⁴⁰ At the post-conviction hearing, trial counsel were not asked any questions about “front-loading” mitigation during the guilt/innocence phase, so this Court has no evidence before it to determine whether trial counsel considered such a strategy.

Additionally, as stated throughout this order, the proof of the aggravating circumstances carried overwhelming weight given the brutal and horrific nature of the manner in which Chris Newsom and Channon Christian were killed. Trial counsel presented a mitigation case that was well within the norms of professional representation, but the mitigation evidence that was available and presented to the jury was not nearly enough to affect the jury’s decision in light of the proof of aggravating circumstances. Even if trial counsel had presented mitigation evidence during the guilt/innocence phase, there is not a reasonable probability that such evidence would have led to convictions of lesser charges or sentences of less than death. Because trial counsel’s actions did not prejudice Petitioner, trial counsel did not render ineffective assistance as to this issue.

⁴⁰ *Id.* at 94.

24. *Prosecutorial Misconduct/Trial Counsel Error Regarding Closing Argument*

Petitioner argues the State's closing argument during the guilt/innocence phase was rife with prosecutorial misconduct and that trial counsel were ineffective in not objecting to the argument. The prosecutorial misconduct issue, like many others raised in these proceedings, is waived because it has been raised for the first time on post-conviction. *See* Tenn. Code Ann. § 40-30-106(g).

Regarding Petitioner's claim trial counsel were ineffective in their handling of the State's closing argument, at the post-conviction hearing Mr. Trant and Mr. Eldridge were not asked about the State's closing argument. Thus, this Court has no way of knowing whether trial counsel's actions resulted from a strategic decision. Furthermore, the Court has reviewed the closing argument in its entirety and concludes the closing argument was not so improper as to violate Petitioner's right to a fair trial or require Petitioner's convictions to be reversed. Because trial counsel's actions did not prejudice petitioner, the Court concludes counsel did not render ineffective assistance as to this issue.

25. *Trial Court and Trial Counsel Error Regarding Reasonable Doubt Instruction*

Petitioner argues the reasonable doubt jury instruction given at trial was improper, and counsel therefore rendered ineffective assistance in not objecting to it. The Court disagrees. As with many other issues, the issue of the propriety of the instruction itself is waived because it has been raised for the first time on post-conviction. *See* TENN. CODE ANN. § 40-30-106(g).

Regarding the ineffective assistance of counsel issue, this Court has reviewed the trial judge's reasonable doubt instruction and concludes the instruction, including the "moral certainty" language Petitioner finds objectionable, is the same one that has been approved by the Tennessee Supreme Court. *See State v. Rimmer*, 250 S.W.3d 12, 30 (Tenn. 2008) (citing *State v. Hall*, 976 S.W.2d 121, 159 (Tenn. 1998) (appendix)). Counsel's failure to object to a permissible jury instruction did not constitute ineffective assistance of counsel.

E. COUNSEL'S PERFORMANCE DURING CAPITAL SENTENCING PHASE

Petitioner raises several arguments in support of his claim that he received the ineffective assistance of counsel during the sentencing phase. Before addressing Mr. Davidson's individual claims, this Court makes the following observations.

As stated elsewhere in this order, trial counsel presented a mitigation case that was well within the professional norms for defense counsel in death penalty cases. Counsel retained a mitigation specialist who collected evidence and attempted to speak to Petitioner's family members (some successfully, others not). Counsel retained the services of psychiatrist Dr. Peter Brown (who in turn obtained testing from neuropsychologist Dr. Malcom Spica) in an attempt to identify mental health-based mitigation evidence. However, the evaluation and testing conducted by Drs. Brown and Spica revealed the Petitioner to be of at least average intelligence and not suffering from any significant mental health conditions. This assessment of the experts' findings was supported by the testimony of trial counsel at the post-conviction hearing; Mr. Eldridge, Mr. Trant, and Ms.

Cravens all found Petitioner to be reasonably intelligent and capable of understanding the proceedings against him. During the capital sentencing phase, trial counsel also presented the testimony of family members and former mentors and foster family members in an attempt to humanize Petitioner.⁴¹ Mr. Trant testified the mitigation case was thwarted by some of Petitioner's family members being unwilling to testify on Mr. Davidson's behalf even though they were willing to testify in support of Petitioner's brother, Mr. Cobbins.

Trial counsel worked diligently to present a mitigation case, but ultimately the proof of the statutory aggravating circumstances proved overwhelming. It is difficult for this Court to envision the kind of mitigation evidence that would have been sufficient for trial counsel to overcome the extensive weight carried by these aggravating circumstances. Even if this Court would have approved the experts sought by Petitioner in these post-conviction proceedings, the testimony of post-conviction counsel and the proof presented in Dr. Brown's testimony make it doubtful to this Court that such experts would have been able to produce evidence which would have saved Mr. Davidson from a death sentence.

Against this backdrop, the Court examines Petitioner's issues.

26. *Failure to Conduct Adequate Mitigation Investigation Through the Retained Mitigation Specialist*

Trial counsel hired a mitigation specialist, Rosalind Andrews, who conducted a mitigation investigation and testified at trial regarding Petitioner's family history.⁴²

⁴¹ See *State v. Davidson*, 509 S.W.3d at 222-23.

⁴² See *State v. Davidson*, 509 S.W.3d at 222; capital sentencing transcript at 75-95 and 105-31 (testimony of Ms. Andrews).

Petitioner argues trial counsel were ineffective in retaining Ms. Andrews, stating that trial counsel “failed to hire a culturally competent specialist. Then they failed to supervise and oversee the mitigation investigation to ensure that it was conducted in a thorough, appropriate, and unbiased manner.”⁴³ The Court disagrees.

At the post-conviction hearing, trial counsel were not asked questions about the mitigation specialist’s performance, and Ms. Andrews did not testify. As such, this Court has little proof about what Ms. Andrews was asked to do, what she was not asked to do, whether any problems were identified with Ms. Andrews’ work, and whether trial counsel did anything to remedy any potential problems. Furthermore, Ms. Andrews’ investigative file was introduced as an exhibit at the post-conviction hearing, and this Court’s review of the file shows Ms. Andrews’ investigation to be thorough (*see* exhibit 105), especially in light of the unwillingness of some family members to participate. Trial counsel’s reliance on Ms. Andrews’ work was well within the professional norms of capital defense representation. Finally, little to no proof was presented at the post-conviction hearing about what evidence Ms. Andrews could have or should have uncovered and how such evidence could have led the jury to return a sentence of less than death.

Accordingly, the Court concludes counsel did not render ineffective assistance as to this issue.

⁴³ Amended petition at 104.

27. *Failure to Consult with Experts, Provide Experts with Information Critical to their Evaluations, Work with Experts to Develop Mitigating Evidence, and Present a Compelling Case for Life*

Petitioner takes issue with trial counsel's choice of mental health experts in developing the defense's mitigation case at trial. In Petitioner's view, had trial counsel "called upon a neuropsychologist, neurologist, or other expert to testify at trial, the jury would have been able to contextualize critical information concerning Mr. Davidson's background that mitigated in favor of a sentence other than death."⁴⁴ Petitioner also argues trial counsel did not provide their chosen experts with "sufficient information to generate conclusions regarding [Mr. Davidson's] mental health[.]"⁴⁵

Petitioner's arguments about the performance of Dr. Brown (and in turn, Dr. Spica) and of counsel's choice of these experts have been explored elsewhere in this Order (see *infra* at 15-16) and will not be explored in great detail here. Additionally, Petitioner argues his ability to present this issue has been thwarted by this Court's denying motions for several experts. That issue has also been explored elsewhere in this Order and will not be reviewed here.

At the post-conviction hearing trial counsel were not asked about their interactions with the experts in great detail. Plus, Dr. Brown and Dr. Spica did not testify at the post-conviction hearing, so this Court has no way of knowing whether the experts were in any way limited in evaluating the Petitioner or whether the experts had communication

⁴⁴ *Id.* at 118.

⁴⁵ *Id.*

problems with trial counsel. Additionally, absent the testimony of Dr. Brown and Dr. Spica, the Court cannot determine whether any additional testing, such as that sought by Mr. Davidson on post-conviction but denied by the Court, would have beneficial to the mitigation case. The Court therefore concludes Petitioner is not entitled to relief on this issue.

28. *Prosecutorial Misconduct / Trial Counsel's Failure to Object to Prosecution's Opening Statement*

29. *Prosecutorial Misconduct / Trial Counsel's Failure to Object to Prosecution's Closing Argument*

As is the case with the issue surrounding the State's arguments during the guilt/innocence phase, these issues themselves are waived because they have been raised for the first time on post-conviction. As with the State's arguments during the guilt/innocence phase, the Court has reviewed the State's opening statement and closing argument from the capital sentencing phase and concludes they were not improper, did not deny the Petitioner the right to a fair trial, and do not require reversal of Petitioner's death sentences. Trial counsel's failure to object did not prejudice Petitioner; therefore, counsel did not render ineffective assistance as to this issue.

30. *Prosecutorial Misconduct/Trial Counsel's Failure to Object to Victim Impact Testimony*

Petitioner argues the victim impact testimony introduced during the capital sentencing phase of Petitioner's trial constituted prosecutorial misconduct, and he also argues trial counsel were ineffective in not objecting to it.

As with other issues, Petitioner's argument that the victim impact statements were improper is waived because it is raised for the first time in these post-conviction proceedings. Regarding Petitioner's assertion that trial counsel were ineffective in their handling of the victim impact testimony, this Court notes post-conviction counsel did not ask Mr. Trant or Mr. Eldridge about the victim impact testimony. Thus, the Court has no way of knowing whether trial counsel's refusal to object resulted from a strategic decision. Furthermore, the Court has reviewed the victim impact testimony and concludes that it did not run afoul of the limits imposed by the Tennessee Supreme Court in *State v. Nesbit*, 978 S.W.2d 872 (Tenn. 1998), and related cases. Trial counsel's failure to object to permissible victim impact statements did not constitute ineffective assistance.

31. *Failure to Object to the State's Request for Defense Mitigation Specialist's Report*

Petitioner argues trial counsel rendered ineffective assistance for failing to object to the State's request for Ms. Andrews' report during the capital sentencing phase. The record reflects that after Ms. Andrews testified on direct examination, the State asked Ms.

Andrews if she prepared a report and, if so, whether she relied on it during her testimony.⁴⁶ Ms. Andrews replied she did rely on her report in testifying, so the State requested a copy of the report. Mr. Eldridge did object to providing the report to the State, noting that Ms. Andrews' testimony was only partly based on her report and that Ms. Andrews was not qualified as an expert. The trial court overruled the objection and concluded Ms. Andrews was an expert and therefore the State had the right to review Ms. Andrews' report. The State offered to have defense counsel meet with the trial court to identify certain parts of Ms. Andrews' report which may have been inadmissible, and while the trial judge instructed defense counsel to bring the mitigation report to the trial judge's office, the record is unclear whether Petitioner's trial counsel identified any portions of the report which were inadmissible. The State cross-examined Ms. Andrews, referencing her report on several occasions. Trial counsel did not object to any questions asked during cross-examination. The Amended Petition contends that Ms. Andrews was asked a question by the prosecutor which called for a response which Petitioner contends was privileged. There is no proof, however, that the offending question (specifically set forth on p. 126 of the Amended Petition) came from the report.

Furthermore, at the post-conviction hearing trial counsel were not asked questions about the State's cross-examination of Ms. Andrews, so this Court has no way of knowing whether trial counsel made a conscious, strategic decision not to object to Ms. Andrews' testimony after the trial court ordered the report to be submitted to the prosecution. And

⁴⁶ See transcript of capital sentencing phase at 95, *et seq.*

during Mr. Price's testimony at the post-conviction hearing, Petitioner's counsel did not ask Mr. Price whether he asked the question referenced in his cross-examination of Ms. Andrews from the mitigation report or not.

Finally, even if trial counsel's actions relative to this issue were somehow deficient, they did not prejudice Petitioner. This Court has reviewed Ms. Andrews' cross-examination testimony, and none of the mitigation specialist's testimony was so prejudicial as to affect the jury's sentencing outcome. Even if Ms. Andrews' cross-examination testimony had not been presented or subject to exclusion by the trial court, the exclusion of that evidence would not have led to a sentence of less than death. *See Christa Gail Pike v. State*, 2011 WL 1544207, at *55 (Tenn. Crim. App. Apr. 25, 2011) (trial counsel not ineffective in turning over mitigation report to State; no proof that anything in report turned over to prosecution would have affected outcome of trial or that a different result would have occurred absent the State's accessing the report). Petitioner has failed to establish trial counsel rendered ineffective assistance as to this issue.

F. COUNSEL'S PERFORMANCE ON DIRECT APPEAL

33. *Counsel's Failures on Direct Appeal*

Petitioner argues trial counsel were ineffective in their handling of Mr. Davidson's direct appeal. A significant portion of Petitioner's argument that appellate counsel were ineffective concerns appellate counsel's failure to have the voir dire proceedings transcribed and designated as part of the record on appeal. Having voir dire transcribed and added to the appellate record would have permitted appellate counsel to better present

Petitioner's jury selection issues on direct appeal, but even if this Court were to conclude appellate counsel's failure to ensure the voir dire transcript was added to the record was somehow deficient, such deficiency did not prejudice Petitioner. This Court has reviewed the jury selection issues raised by Petitioner—with the benefit of the voir dire transcript—and concludes none of Petitioner's stated issues entitle him to relief. Similarly, none of the other issues which Petitioner has raised during these post-conviction proceedings entitle him to relief, so even if appellate counsel failed to raise such issues, such failings did not prejudice Petitioner.

Petitioner is not entitled to relief on this issue.

G. "ACTUAL INNOCENCE" CLAIM/NEWLY DISCOVERED EVIDENCE

40. *Petitioner is "Actually Innocent of the Death Penalty" Relating to Mr. Newsom because the Jury Based its Sentence on an Invalid Aggravator*
41. *Newly Discovered Evidence that Petitioner did not Kill Mr. Newsom or Mutilate his Body Requires Resentencing*

As referenced above, in his Amended Petition Mr. Davidson argues potential testimony by George Thomas only available in 2018 in which Mr. Thomas would now state that Mr. Boyd, and not Mr. Davidson, killed Chris Newsom and set his body on fire constitutes newly discovered evidence that would render Mr. Davidson "actually innocent" of the death penalty as it relates to Mr. Newsom's murder because that death sentence would be based on an invalid aggravator. The Court disagrees. The Court has previously

stated these issues are not cognizable for post-conviction review. *See infra* at 14-15.⁴⁷ Thus, Petitioner is not entitled to relief on these issues.

H. CONSTITUTIONAL CONCERNS/ARBITRARINESS ISSUES

32. *Thirteenth Juror / Hurst Claim*

Petitioner argues Tennessee's requirement that a trial judge act as thirteenth juror violates *Hurst v. Florida*, 136 S. Ct. 616 (2016), and therefore renders Petitioner's death sentence unconstitutional. In *Hurst*, the United States Supreme Court invalidated Florida's former capital sentencing scheme, in which the jury rendered an advisory sentencing verdict but the ultimate sentence was imposed by the trial judge.

Several other Tennessee death row inmates raised *Hurst*-related claims in an attempt to challenge their death sentences; such claims were rejected. *See, e.g., Richard Odom v. State*, No. W2017-01027-CCA-R28-PD, order at 3-4 (Tenn. Crim. App. Oct. 20, 2017) (order denying permission to appeal in motion to reopen case, Tennessee's thirteenth juror rule does not violate *Hurst* or requirement that jury make factual findings necessary to impose death penalty); *no perm. app. filed*. This claim is without merit.

34. *Death is Disproportionate*

Mr. Davidson argues his "death sentence is disproportionate given his adverse childhood, lifelong history of substance abuse, and his impaired cognition during the time

⁴⁷ *See also* December 2018 order denying continuance, at 10-11.

of the offense.”⁴⁸ However, proportionality review is within the exclusive domain of the appellate courts on direct appeal. In one death penalty post-conviction case, the Court of Criminal Appeals rejected a petitioner’s post-conviction proportionality claim, stating, “It is well established that post-conviction proceedings may not be employed to raise and re-litigate issues determined on direct appeal.” *Robert Faulkner v. State*, No. W2012-00612-CCA-R3-PD, 2014 WL 4267460, at *85 (Tenn. Crim. App. Aug. 29, 2014) (citing *Miller v. State*, 54 S.W.3d 743, 747-48 (Tenn. 2001)). This issue is therefore not cognizable for this Court’s post-conviction review

Furthermore, on direct appeal, the Tennessee Supreme Court concluded Mr. Davidson’s death sentence was not disproportionate. *See State v. Davidson*, 509 S.W.3d at 218-27. Thus, this claim has been previously determined. Petitioner is not entitled to relief on this issue.

35. *Structural Defects in Death Penalty Scheme*

The Petitioner asserts Tennessee’s death penalty scheme is beset by multiple structural defects rendering it unconstitutional, including (but not limited to) the following:

(a) Violation of evolving standards of decency, which have led several states to abolish the death penalty and others to impose it rarely

The Petitioner asserts that “[e]volving standards of decency are resulting in a withering away of the death penalty in this country” and that Tennessee’s death penalty is

⁴⁸ Amended petition at 140.

beset by many of the same difficulties identified by Justice Breyer in his dissent in *Glossip v. Gross*, 135 S. Ct. 2726, 2761 (2015) (Breyer, J., dissenting). However, this Court is bound by abundant Tennessee Supreme Court precedent upholding the constitutionality of the death penalty. As the Tennessee Supreme Court's extensive review of the proportionality review system in one death penalty case makes clear, the Tennessee Supreme Court is mindful of the evolving standards of decency in reviewing challenges to the death penalty. *See State v. Pruitt*, 415 S.W.3d 180, 210-12 (Tenn. 2013). Challenges such as these are best suited to the appellate courts; in this Court, the claims do not entitle the petitioner to relief.

(b) Lack of statewide standards

The Petitioner's issue regarding the lack of statewide standards for seeking the death penalty appears to be a restatement of the challenge to the relatively unlimited discretion afforded prosecutors in deciding whether to seek the death penalty. The Tennessee Supreme Court has rejected these claims. *See State v. Banks*, 271 S.W.3d 90, 154-55 (Tenn. 2008). This issue is without merit.

(c) Violation of right to life

Tennessee's appellate courts have rejected this claim. *See State v. Hester*, 324 S.W.3d 1, 78-79 (Tenn. 2010).

(d) Violation of prohibition against cruel and unusual punishment

The Tennessee Supreme Court “has held, and repeatedly affirmed, that capital punishment does not violate the state and federal constitutions.” *Keen v. State*, 398 S.W.3d 594, 600 n.7 (Tenn. 2012).

(e) Grand jury’s failure to make findings as to the aggravating circumstances

The Petitioner claims he is ineligible for the death penalty because the aggravating factors making him eligible for a death sentence were not listed in the indictment and not approved by the grand jury. The Tennessee Supreme Court has rejected this claim. *See State v. Berry*, 141 S.W.3d 549, 558-61 (Tenn. 2004). This issue is without merit.

(f) Insufficient proportionality review

As stated above, the Tennessee Supreme Court has concluded the statutory proportionality review system is valid under both the federal and state constitutions. *See Pruitt*, 415 S.W.3d at 207-17. This issue is without merit.

(g) Other issues

To any extent the Petitioner raises other challenges to the constitutionality of the death penalty, the Court notes that the death penalty has withstood numerous constitutional challenges in both federal and state court. *See Cauthern v. State*, 145 S.W.3d 571, 629-30 (Tenn. Crim. App. 2004) (rejecting post-conviction petitioner’s numerous challenges to

constitutionality of death penalty); *Jordan*, 2016 WL 6078573, at *85 (same). Thus, such challenges are without merit.

36. *Unconstitutionality of Execution Methods*

The state's current lethal injection protocol has withstood a constitutional challenge. See *Abdur'Rahman v. Parker*, 558 S.W.3d 606 (Tenn. 2018). Mr. Davidson's challenge to electrocution is not ripe for determination, as Petitioner will only face electrocution if certain hypothetical, contingent future events set forth in Tennessee Code Annotated section 40-23-114(e) occur. See *West v. Schofield*, 468 S.W.3d 482 (Tenn. 2015). This claim is without merit.

37. *Violation of International Law*

Tennessee's appellate courts have concluded the death penalty does not violate international law. See, e.g., *Akil Jahi a/k/a Preston Carter v. State*, No. W2011-02669-CCA-R3-PD, 2014 WL 1004502, at *131 (Tenn. Crim. App. Mar. 13, 2014) (citing *State v. Odom*, 137 S.W.3d 572, 600 (Tenn. 2004)). Petitioner is not entitled to relief on this issue.

42. *Disparate Treatment of Codefendant*

Mr. Davidson argues, "It is disproportionate punishment for Mr. Davidson to be sentenced to death for the murder of Christopher Newsom while Eric Boyd faces—at worst—life imprisonment for committing the actual shooting and burning of Mr.

Newsom's body."⁴⁹ It is well-established that a jury's returning a death sentence for one codefendant and not others when the State seeks death against multiple codefendants is not disproportionate,⁵⁰ but Petitioner does not make this claim based on the verdicts and sentences the jury returned against codefendants Cobbins, Thomas, and Coleman. Rather, Petitioner asserts his death sentence cannot stand when the State will not be seeking the death penalty in Mr. Boyd's upcoming trial.

This Court is unaware of any Tennessee appellate opinion addressing this issue, but in addressing a related issue, the Tennessee Supreme Court has rejected arguments that one codefendant's death sentence is disproportionate simply because the State resolves a case against a codefendant by a guilty plea resulting in a sentence less than death. *See State v. Henley*, 774 S.W.2d 908, 918 (Tenn. 1989); *State v. Carter*, 714 S.W.2d 241, 251 (Tenn. 1986). Regardless of whether the State declines to seek the death penalty against a codefendant as a result of a guilty plea or refusing to file a death notice, the State's exercise of prosecutorial discretion does not render another codefendant's death sentence disproportionate. This issue is without merit.

43. *Inconsistent Prosecutorial Theories*

Mr. Davidson asserts that at codefendant Boyd's upcoming trial, the State may seek to introduce evidence that Mr. Boyd, and not Mr. Davidson, shot Chris Newsom to death and burned Mr. Newsom's body. If the State introduces such evidence, Petitioner reasons,

⁴⁹ First supplemental amended petition, at 20.

⁵⁰ *See State v. Stephenson*, 195 S.W.3d 574, 595-96 (Tenn. 2006).

it would differ from the evidence presented at Mr. Davidson's trial—in which Mr. Boyd was not mentioned as being involved in Mr. Newsom's death—and the resulting inconsistent prosecutorial theories would violate Petitioner's due process rights.

This Court notes that the Tennessee Supreme Court has refused to adopt the rule that “core inconsistencies” in two prosecutions violate due process. *See State v. Housler*, 193 S.W.3d 476, 492 (Tenn. 2006), *Berry v. State*, 366 S.W.3d 160, 182 (Tenn. Crim. App. 2011), *State v. Robinson*, 146 S.W.3d 469, 496 n.12 (Tenn. 2004). Petitioner is not entitled to relief on this issue.

44. *Consideration of Race in Proportionality Review*

Mr. Davidson asserts his death sentence is unconstitutional because the Tennessee Supreme Court includes the defendant's race as one of the factors it considers in proportionality review. *See State v. Bland*, 958 S.W.2d 651, 667 (Tenn. 1997). The Court disagrees.

As an initial matter, the Tennessee Supreme Court has upheld numerous challenges to the proportionality review system, and this Court is bound by that precedent. While it is undeniable that “[d]iscrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice,” *Rose v. Mitchell*, 443 U.S. 545, 55 (1979), the Tennessee Supreme Court has concluded the death penalty is not imposed in a discriminatory manner on the basis of, among other factors, race. *State v. Stephens*, 78 S.W.3d 817, 851-52 (Tenn. 2002). Finally, even one of the Tennessee Supreme Court's most ardent critics of the capital proportionality review system has stated that “race is a

factor which must be considered if proportionality review is to accomplish its purpose.”
State v. Chalmers, 28 S.W.3d 913, 921 (Tenn. 2000) (Birch, J., dissenting). This issue is
without merit.

46. *Arbitrary Death Sentence after Petitioner Rejected Life without Parole Offer*

Mr. Davidson argues his death sentence is arbitrary because the State continued to
seek the death penalty after the Petitioner rejected an offer for the Petitioner to plead guilty
in exchange for a sentence of life without possibility of parole. This Court disagrees.

At the post-conviction hearing, Mr. Trant testified then-District Attorney General
Randy Nichols, as was his practice in potential death penalty cases, discussed with Mr.
Trant the possibility of Mr. Davidson’s pleading guilty in return for a sentence of life
without possibility of parole. Mr. Trant testified that Mr. Davidson rejected this potential
offer. The State asserts this discussion was not a formal offer, but ultimately the nature of
these plea discussions is irrelevant to the Court’s determination. The Tennessee Supreme
Court has concluded that “District Attorneys General, when they are deciding whether or
not to pursue the death penalty, may make a plea offer of less than death and then may
pursue the death penalty if the defendant rejects the plea offer.” *State v. Hester*, 324 S.W.3d
1, 20 (Tenn. 2010) (citing *State v. Mann*, 959 S.W.3d 503, 509-11 (Tenn. 1997)). The
Tennessee Supreme Court has also observed,

To hold . . . that the State can pursue no greater charge or seek no greater
punishment than that offered during plea negotiations could effectively
abolish the practice of plea bargaining in first degree murder cases.
Prosecutors would rarely, if ever, be willing to make an offer of leniency in

exchange for a guilty plea. We decline to adopt such a radical and far reaching principle.

Mann, 959 S.W.2d at 510. Petitioner is not entitled to relief on this issue.

I. CUMULATIVE ERROR CLAIMS

38. *Cumulative Effect of Ineffective Assistance of Counsel and Other Errors*

39. *Sentencing Relief Based on Cumulative Error*

The Petitioner argues the cumulative effect of the errors alleged in his petition entitle him to relief. The Court is aware “multiple errors committed in the trial proceedings, each of which in isolation constitutes mere harmless error . . . [may] have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant’s right to a fair trial.” *Hester*, 324 S.W.3d at 76-77. However, the Court has found no underlying errors in any of the issues raised by Petitioner, so Mr. Davidson’s cumulative error claim must also fail. Furthermore, even if some errors did occur, such errors were so inconsequential that they did not affect the fairness of these proceedings.

IX. ORDER

For the reasons set out above the relief sought in the Amended Petition and Supplemental Petitions are denied. This case is dismissed. The Petitioner being indigent, costs are taxed to the State.

The Clerk shall comply with Tennessee Code Annotated section 40-30-112.

This 27 day of Feb, 2019.



Walter C. Kurtz, Judge
Criminal Court, Division II

By Designation of the Tennessee Supreme Court

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