IN THE
CIRCUIT COURT
MONTGOMERY COUNTY, TENNESSEE
DIVISION III

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CHERYL J. CASTLE, CLERK
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BY: Wendy Davis D.C.

DAVID G. HOUSLER, JR., Petitioner	)	
	)	Case No. 39217
v.	)	
	)	(Post-Conviction)
STATE OF TENNESSEE, Respondent	)	

ORDER GRANTING PETITION FOR POST-CONVICTION RELIEF AND PETITION FOR WRIT OF ERROR CORAM NOBIS

This matter came before the Court on December 7-11 and December 14-18, 2009, for a hearing on the *Petitioner's Amended Petition for Post-Conviction Relief and, Alternatively, Motion for Writ of Error Coram Nobis*, filed with the Court on January 30, 2009.

The record reflects that following a November 1997 jury trial, the Petitioner was found guilty of four counts of first degree murder and sentenced to life in prison on each count. The trial court ordered that these sentences be served consecutively. After the Petitioner's convictions and sentences were affirmed on direct appeal, the Petitioner filed a timely pro se petition for post-conviction relief. After counsel was appointed, the Petitioner filed an amended petition. In the petition, the Petitioner alleges that: (1) he received the ineffective assistance of counsel before trial, during trial, and on appeal; (2) his rights to due process were violated based upon missing material records and the State's failure to disclose exculpatory evidence; and (3) newly available evidence establishes that he is innocent of the

offenses for which he was convicted. Regarding his ineffective assistance of counsel claim, the Petitioner asserts:

(a) Pretrial counsel, Laurence McMillan, was ineffective for failing to challenge the October 1995 proffer agreement and the statement the Petitioner gave pursuant to that agreement. The Petitioner argues that the agreement was void and illusory in that it was based on previous statements which the State knew were untrue and gave the State the unilateral power to determine whether the Petitioner breached the agreement;

(b) Pretrial counsel was ineffective for not challenging the State's declaration that the Petitioner breached the proffer agreement;

(c) Pretrial counsel was ineffective for failing to disclose conflicts of interest which gave rise to the appearance of impropriety and affected his performance as counsel;

(d) Trial counsel, Michael Terry and Stephanie Gore, were ineffective for failing to challenge the Petitioner's statements, including the statement given pursuant to the proffer agreement and statements given to the police before the proffer statement, which he claims were involuntary and violated his rights under the Fifth Amendment;

(e) Trial counsel rendered ineffective assistance at the suppression hearing challenging the proffer statement in that counsel encouraged the Petitioner to

waive the attorney-client privilege as to pretrial counsel, failed to call an expert on false confessions, failed to move to redact certain parts of the Petitioner's statements, failed to challenge the special prosecutor's hiring of a certain witness to work on the Petitioner's case, failed to seek to enforce the proffer agreement, and failed to argue that the proffer agreement was void, illusory, and unconscionable;

(f) Trial counsel were ineffective for retaining and relying upon the services of investigators who were either ineffective or had conflicts of interest which adversely affected their performance;

(g) Trial counsel did not provide the Petitioner with the basic tools of an adequate defense;

(g) Trial counsel were ineffective at trial for failing to call certain witnesses and not seeking to exclude the testimony of another witness;

(h) Trial counsel failed to introduce exculpatory evidence at trial;

(i) Trial counsel failed to introduce mitigation evidence during sentencing; and

(j) Mr. Terry, who also represented the Petitioner on appeal, was ineffective for failing to raise many of the above-referenced issues on appeal and failing to challenge the trial court's delay in resolving the Petitioner's motion for new trial.

After reviewing the record, the Court finds that the Petitioner received the ineffective assistance of counsel and is entitled to a new trial. The trial court also grants the Petitioner's motion for writ of error coram nobis.

I. Factual Background and Procedural History

The record reflects that on January 30, 1994, the bodies of four Taco Bell employees were found at a Taco Bell located on Riverside Drive in Clarksville. The four victims died of gunshot wounds. The State prosecuted Courtney Mathews, a Taco Bell employee, under the theory that he shot his coworkers and took money from the store. Following a 1996 jury trial, Mr. Mathews was convicted of four counts of first degree murder and one count of especially aggravated robbery. The State sought the death penalty for the murder convictions; however, the jury imposed four sentences of life imprisonment without the possibility of parole. The trial court ordered that Mr. Mathews serve his sentences consecutively. The Tennessee Court of Criminal Appeals affirmed Mr. Mathews' convictions and sentences on appeal. State v. Courtney B. Matthews, No. M2005-00843-CCA-R3-CD, Montgomery County (Tenn. Crim. App. July 8, 2008), no perm. app. filed.

In November 1995, the Petitioner was charged via presentment with four counts of premeditated first degree murder, four counts of felony murder, and one count of especially aggravated robbery in connection with the Taco Bell robbery and murders. The State proceeded under the theory that the Petitioner was criminally responsible for Mr. Mathews'

actions in robbing the store and killing the victims. The case proceeded to trial in November 1997. The State filed a notice of intent to seek the death penalty but withdrew the notice before trial. However, the State still sought to sentence the Petitioner to life imprisonment without the possibility of parole. The State also dismissed the premeditated murder and especially aggravated robbery counts and tried the Petitioner solely on four counts of first degree felony murder.

The Tennessee Supreme Court summarized the testimony from the Housler trial as follows:

> On January 30, 1994, officers of the Clarksville, Tennessee, Police Department discovered the bodies of Kevin Campbell, Angela Wyatt, Patricia Price, and Marcia Klopp inside a Taco Bell restaurant. Each of the four victims, all of whom were employees of the restaurant, suffered multiple gunshot wounds. Officers also discovered that a safe in the business office of the restaurant had been blown open by a shotgun blast and emptied of nearly $3,000 in cash and coins.
>
> The crime garnered local outrage and national media attention, and within days Courtney B. Mathews, a newly-hired part-time employee of the restaurant, was arrested and charged with the murders and robbery. Mathews was also a military soldier stationed at nearby Fort Campbell, Kentucky.
>
> Work records showed that on January 29, 1994, Mathews clocked in to work at 2:10 p.m., clocked out for a break at 7:39 p.m., clocked back in at 8:12 p.m., and ended his shift at 9:11 p.m.
>
> Mathews resided on Ryder Avenue in Clarksville, four to five miles from the Taco Bell on Riverside Drive. According to Carl Ward, Mathews' roommate at the time, Mathews arrived home from work at 9:30 p.m. on the night of the murders and went into his room where he placed a shotgun, a .9 millimeter handgun, and either a .22 or .25 handgun, along with shells and ammunition, in a book bag. Mathews also grabbed a bowling-ball bag and a pair of white latex gloves and left the apartment alone. Ward testified that

when Mathews left the house, he was wearing two layers of clothes—a Miami Hurricanes sweat suit underneath black pants, a white shirt and a tie, and a black three-quarter length coat. Before he left, Mathews told Ward, who had been examining the guns, to wipe his prints from them.

About an hour after Mathews left work on the evening of January 29, a Taco Bell employee, Jelaine Walker, saw Mathews inside the restaurant again. Walker observed Mathews crouching behind a trash can in the dining area. Mathews said to Walker, "I am gone, you don't see me." Company policy prohibited entry of anyone into the restaurant once the dining area was closed at midnight; the drive-through lane generally remained open until 1:00 or 1:30 a.m.

Investigation of the crime scene revealed a disrupted ceiling tile in the men's bathroom that appeared to have been moved to create an opening after someone had been hiding above. A forensic specialist from the Tennessee Bureau of Investigation (TBI) later confirmed that Mathews' fingerprints were on a fan vent near the displaced tile.

Witness Frankie Sanford placed an order from the drive-through lane of Taco Bell at 1:30 a.m. on the day of the murders. Inside the restaurant he saw, alive and well, each of the four victims working as normal; he also saw Mathews, in uniform, working.

When John Ballard, a shift manager at the Taco Bell, stopped by the drive-through window at approximately 1:45 a.m., the employees were engaged in normal closing activities. Klopp, the evening manager at Taco Bell on the night of the killings, told Ballard that they had been very busy and hence were unable to close the drive-through window until 1:30 a.m. Ballard left the restaurant around 2:00 a.m.

Witness Allen Ceruti, who at the time was employed by the Tennessee Department of Correction, drove by the Taco Bell at 4:30 a.m. on the day of the murders. He testified that he saw an African-American male partially open the metal rear door of the Taco Bell restaurant from the inside. Mathews is African-American.

When Ballard arrived later the next morning at approximately 7:25 a.m. to open the restaurant, he noticed that the employees' cars were still in the parking lot. After unlocking the main entrance, Ballard entered the Taco Bell and discovered one of the victim's bodies. He left and immediately called 9-1-

1. Police arrived shortly thereafter, performed a sweep of the building, and found the bodies of the four victims inside. TBI agents were soon called to collect evidence from the crime scene.

In the general work area of the restaurant, twenty-four cartridge cases, all fired from a .9 millimeter gun, were recovered. Eight fired bullets were also found lodged in various places throughout the restaurant. Investigators determined that the cartridge cases, the fired bullets, and the bullet fragments recovered from the victims' bodies were all fired from the same .9 millimeter gun. The office safe had been broken into after the combination dial was shot off. According to forensic investigators, two different guns, a shotgun and a .9 millimeter, had been used to shoot the safe. Found inside the business office of the restaurant were a Federal brand lead-slug shot shell case, lead fragments from the slug, and an unfired Federal lead-slug shot shell—along with plastic fragments from the safe dial. An audit later revealed that exactly $2,967.68 had been taken from the restaurant.

On the day of the murders, David Lee Rose was working at the McDonald's near I-24 in Clarksville. While he was emptying the trash, he discovered inside several unfired .12 gauge shotgun shells and numerous .9 millimeter bullets (some of which had been chambered in a weapon), some coins in wrappers, a black wallet, and a black leather glove. He also disposed of two half-eaten hamburgers that were in the bag with the other items. Rose took the ammunition and change home with him. He did not keep the glove or the wallet. When Rose learned about the murders, he returned the shells and bullets to his store manager. Investigators later determined that the chamber markings on the shotgun shells that Rose found matched those on the shotgun shells collected from the crime scene. The chamber markings on the .9 millimeter bullets that he found, however, did not match those found on the bullets collected from Taco Bell. A search of Mathews' car yielded a bowling ball bag containing $2,576 along with a collection of credit and identification cards strewn about the car's interior.

Investigators of the Clarksville Police Department searched for evidence along the interstate. Underneath the Red River Bridge on I-24, they collected several items of clothing, pieces of a latex glove, and other sundry items. One of the clothing items recovered was a three-quarter length black jacket. Forensic investigators determined that a stain on the jacket was the blood of victim Kevin Campbell. Also, plastic fragments lodged in the coat were determined to be of the same type plastic as the plastic dial blown off the safe.

Ward, Mathews' roommate, identified the coat as the one that Mathews was wearing on the night of the murders; he also testified that he had not seen the coat since that time and that Mathews, when he left their apartment on the night of the murders, said that no one would see the clothes he was wearing again. Ward further stated that on the following Tuesday after the murders, Mathews attempted suicide in their apartment. On this evening, Mathews told Ward, while crying, "I don't deserve to live. I killed four people."

Between the Sunday of the murders and the Tuesday that Mathews attempted suicide, Mathews told Shawntea Hooks, Ward's then-girlfriend, how he believed the perpetrator committed the crime:

> Well, he told me that whoever did it, they went into the Taco Bell before it closed. They went into the men's bathroom and climbed into the ceiling, waited until the store closed. They came down . . . and he said they killed two people in the front of the store and two in the back.

Shawn Peghee worked with Mathews at Fort Campbell in the mailroom. On the Friday before the murders, Mathews asked Peghee questions about the safe in the mailroom and whether one would be able to get inside by shooting it. According to Peghee, as Mathews left the mailroom, "he sort of looked back at me with a smile on his face, sort of a smirk, and he said something big was going to happen that weekend."

During the time that Mathews worked at Taco Bell, he asked Assistant Manager Deann Rivaf if anything was stored in the ceiling.

Fitz Dickson, who had known Mathews for eleven years, testified that he purchased a .9 millimeter gun for Mathews in 1993. Dickson also testified that he saw Mathews buy ammunition for the gun on the same day that he purchased it for him.

During a search of Mathews' residence, investigators recovered several bullet fragments that Mathews had fired into the floor of his bedroom during an argument with his estranged wife sometime before the murders. Investigators also collected several unfired rounds. A TBI forensic scientist testified that a cartridge case and numerous bullet fragments recovered from Mathews' apartment came from the same .9 millimeter weapon as the cartridges and bullets recovered from the crime scene and the victims' bodies.

Shells provided to investigators by Shawn Depto, who loaned Mathews a shotgun and some shells, had the same chamber markings as those recovered at McDonald's. On November 21, 1995, a plastic bag containing a disassembled Winchester shotgun was found behind Mathews' residence. After reassembling the shotgun, forensic examiners determined that the lead slug used to shoot open the Taco Bell safe was fired from this shotgun. The shells provided by Depto and those recovered from McDonald's also matched the slug and shells collected from Taco Bell. Depto also identified this shotgun as the one he loaned Mathews.

In June 1994, a jury convicted Mathews of the robbery of the Taco Bell and the murders of the four employees. He was sentenced to life imprisonment without parole.

On March 7, 1994, TBI Agent Jeff Puckett and Detective George Elliott of the Clarksville Police Department interviewed David G. Housler, Jr., at Fort Campbell, Kentucky. Housler was also a solider stationed at Fort Campbell; at the time, he had been detained by military authorities for being absent without leave. Detective Elliott suspected Housler of an unrelated robbery that occurred in front of Grandpa's Hardware Store in Clarksville about a week before the Taco Bell murders. During the course of the interview, Housler denied involvement in the Taco Bell murders and stated that on the night of the killings he attended a party with friends at Kevin Tween's mobile-home trailer in Oak Grove, Kentucky. His best recollection was that he stayed there all night with his girlfriend, Sulyn Ulangca. He also stated that on January 21, a week and a day before the murders, he and Sulyn may have attended a party at the same trailer; he further stated that he did not personally know Mathews and did not meet him at that particular party. He denied any role in the robbery outside the Grandpa's store as well. Housler was later arrested for that robbery.

While in jail on the aggravated robbery charge, Housler informed his lawyer, Larry McMillan, that he had information about the Taco Bell murders. McMillan negotiated an agreement with Clarksville District Attorney General John Carney that Housler would provide information and serve as a witness against Mathews in return for a reduced bond and a lesser charge for the Grandpa's robbery. Housler gave a statement on March 21, 1994, outlining the following: He met Mathews during a party at the trailer in Oak Grove, Kentucky on January 21, 1994. Mathews said in the presence of several people, including Housler, that he had a place to rob—his place of work—and that when he did it, he would not leave any witnesses. He also stated that once

he committed the robbery, they could read about it in the newspapers. Housler said that he did not see Mathews again until March 15, when the two were in jail. Housler claimed that Mathews admitted committing the Taco Bell murders and giggled about it. Mathews also claimed to have attempted suicide while in jail. Housler also mentioned that his first statement to investigators on March 7 was not truthful because he did not want to get involved. After giving this statement on March 21, Housler was released on bond, and he returned to Kentucky.

During October 1994, prosecutors asked Housler to return to Clarksville to resolve some inconsistencies between his statements and information gathered from other sources. On October 11, Housler admitted to "gassing up"[1] Mathews to commit the robbery. Apparently, at this point Housler's status changed from witness to suspect. On October 19, prosecutors entered into a proffer agreement with Housler whereby Housler would receive a recommended sentence of fifteen years for conspiracy to commit murder and four years for the unrelated robbery, to be served concurrently, in return for providing truthful information about the Taco Bell murders and serving as a witness against Mathews.

On October 20, 1995, Housler and his attorney met again with Carney and others. During this interview, Housler gave a written statement, which relayed the following information: Housler met Mathews at the trailer in Kentucky about a week before the Taco Bell murders. At the party, Mathews, Housler, and Charlie Brown talked about robberies and other crimes that each had committed. Housler said that he bragged about committing the robbery outside Grandpa's. Mathews brought up the idea of robbing the place where he worked. Mathews said he would go in and leave no witnesses. Housler told Mathews that he doubted he would commit the crime but, if Mathews would, he would go with him. When Housler asked Kevin "Red" Tween if he knew about the plan, Tween responded, "[W]hatever, whenever." Melanie Darwish then approached Housler and Mathews and said she would participate as well. Housler stated that Mathews was carrying a .9 millimeter handgun under his clothes at this party. On January 29, 1994, Housler arrived with Sulyn Ulangca at the trailer around nightfall. Mathews was in the trailer with Tween, Darwish, Kendra Corley, and Dana Ulangca (Sulyn's brother). Tween told Housler that "tonight is the night" for robbing the Taco Bell, and he asked Housler to get some ammunition. Housler left the trailer and visited someone called "Hippie Dude," who sold him a box of shotgun shells and box of .9

[1] That is, to encourage or persuade Mathews to commit the crimes.

millimeter bullets. Housler returned to the trailer at around 11:00 p.m. Dana Ulangca was asleep, and Kendra Corley had left. Sulyn immediately pleaded with him not to participate in the robbery. While Housler argued with her, the others started to plan the robbery and killings. Housler did not hear the details. By the time Housler's argument with Sulyn ended, the group was ready to leave. Housler drove his white Tracer, and Darwish drove her red Tempo. Tween was wearing a dark-blue hooded jacket and blue jeans, and Mathews was wearing a black knee-length jacket. The group stopped at the Minit Mart for beer and cigarettes. On the ride to Taco Bell, Mathews told Tween to get the register, and he would take care of the safe. Tween had a .9 millimeter pistol, while Mathews seemed to have the shotgun—a twenty-four inch Mossberg pump—stuffed under his coat. However, during the drive, Mathews told Housler that Corley placed the guns in a trash can at the restaurant where they would be available to him. Housler had his .9 millimeter handgun.

Housler also related in his written statement that, upon arriving at the Taco Bell, he pulled up to the drive-through window. Mathews exited the car and tapped on the window, which was opened by a heavy-set woman with brown hair. Mathews stated that he needed to get inside to retrieve his wallet or driver's license. During this time, Housler saw Darwish's car in the mall parking lot. Tween then told Housler to keep the car running and that if anyone pulled up to the restaurant to honk the horn twice and leave. Tween got out of the car and ran behind the dumpsters. Housler decided not to go inside because he was fighting with Sulyn. He pulled up parallel to the main double doors of the restaurant. Housler saw Mathews and the woman walk toward the counter area near the bathrooms. After about twenty minutes, he heard ten to fifteen loud pops from inside the building, which lasted for about two to three minutes. After the pops stopped, Housler heard a loud bang, which "sounded like a metal door being swung open[,]" and within seconds he saw Tween run from behind the Taco Bell to the dumpsters. Next, he heard a similar bang and then saw another person exit the Taco Bell and run in the direction of the dumpsters. He put the car in gear and drove, almost hitting an older model Chevelle with a Tennessee license plate starting "DFN." He stated that Darwish drove the getaway car with Tween and Mathews inside. Housler drove to the nearby Dingo Boot parking lot, where the group had previously agreed to meet. Darwish pulled up soon after with Mathews and Tween. Mathews got out of Darwish's car, opened the trunk, and threw in the shotgun and a Taco Bell bag; Tween got out and threw in his pistol. Housler then asked Tween what happened. Tween said Mathews took all the employees in the back and "flipped out." Tween told Housler to leave, and Housler returned to the trailer. Tween and Darwish arrived at the trailer about

thirty minutes later without Mathews. Housler asked where his cut of the money was, and Tween said that Mathews would bring it later. Tween also said that Mathews shot the victims in the head "gangster-style" to ensure that they were dead. Housler left the trailer an hour later, telling Tween to wait there for his cut of the money. Housler mentioned that Mathews said that he got $1,500 from the robbery. Housler drove to Jennifer Ellis's house and stayed there until 6:00 p.m. that same day. He went back to the trailer and asked Tween for his money, but Tween said that Mathews had not returned. Housler left his car on the road where Jennifer Ellis lived because he thought it would be connected to the murders. He believed that police later impounded his car. Housler stated he did not see Mathews again until they met in jail.

Investigators contacted Sulyn Ulangca in North Carolina; she could not corroborate Housler's statement. When Ulangca returned to Tennessee to confront Housler, he did not want to see her and confessed to implicating an innocent person. Prosecutors informed Housler that he had breached the agreement and that they were revoking it. Housler then attempted to run but was caught and taken to jail. Prosecutors immediately sought an indictment from the grand jury based on his October 20 written statement.

On November 7, 1995, Housler was charged with four counts of premeditated murder, four counts of felony murder, and one count of especially aggravated robbery. The State filed a notice of intent to seek the death penalty. The State later withdrew its notice and filed notice of intent to seek life without parole. On September 3, 1997, the State obtained a superseding indictment, which charged only four counts of felony murder.

Housler's trial was held November 12 through 21, 1997, more than a year after Mathews' trial. Because Mathews' prosecutors were potential witnesses in the Housler trial, a different prosecutor, District Attorney General Robert "Gus" Radford, conducted the State's case against Housler.

From our reading of the Housler trial transcript, it appears that General Radford's strategy was (1) to establish Mathews' guilt in committing the Taco Bell robbery and murders by using many of the same witnesses and much of the same evidence that the prosecution used at Mathews' trial and (2) to establish Housler's guilt in the same crimes by using his written statement, which placed him with Mathews as a lookout on the night of the killings, and with the testimony of several corroborating witnesses.

Housler objected to the introduction of his written confession at trial on

the ground that it was substantially false. The trial judge overruled this objection, and the statement was admitted. During their respective testimonies at trial, both District Attorney General John Carney, a prosecutor at Mathews' trial, and TBI Agent Jeff Puckett, who took Housler's statement, admitted that significant portions of Housler's statement were false. Carney admitted that he presented evidence at Mathews' trial that Mathews purchased all the ammunition used in the crime. This evidence conflicted with Housler's story that he purchased the ammunition from "Hippie Dude"; in fact, investigators contacted "Hippie Dude" in Michigan, and he denied Housler's account. Carney admitted to arguing that Mathews hid in the ceiling of the Taco Bell, which conflicted with Housler's account that Mathews got inside the restaurant by saying he needed to retrieve his wallet and that he left after fifteen to twenty minutes. Carney admitted that Housler's statement that Mathews was at the trailer on January 21 was not true—in fact, Taco Bell records showed that Mathews was at work at that time. Carney admitted that Housler implicated innocent people, most notably Sulyn. Carney stated that Minit Mart could not verify that Housler, Tween, and Mathews entered the store on the night of the murders. Agent Puckett testified that he did not consider truthful Housler's statement that Mathews and Corley were at the trailer at dusk on January 21 because their respective employers' records showed that they were both at work during that time. Puckett also admitted to testifying at Mathews' trial that the Hippie Dude story could not be confirmed. He further conceded that the Grandpa's robbery occurred on January 23 and that therefore Housler's story that he bragged about it on January 21 was false.

Relevant portions of the testimony presented at Housler's trial included the following: Michele Antaya testified that on January 29, 1994, at approximately 11:15 p.m., she stopped at the Taco Bell drive-through window. According to Antaya, she saw an African-American male walk from behind the Taco Bell dumpsters toward her car. She described him as around five feet ten inches tall, stocky, and with short hair shaved on the sides. She testified that he was wearing a dark jacket with a hood and dark pants. This description matched Mathews.

Yowanda Maurizzio went through the Taco Bell drive-through at about 1:15 a.m. on January 30, 1994. She observed a black male speaking with a black female inside the restaurant. Only one other African-American male besides Mathews was employed at the restaurant, and he was not on duty the day of the murders.

Frankie Sanford testified that he was at the Taco Bell drive-through about 1:30 a.m. on January 30. He said that he saw Mathews dressed in his Taco Bell uniform working inside the restaurant.

Jacqueline Dickinson stopped at a traffic light in front of the Taco Bell around 2:40 a.m., looked into the restaurant, and saw a white male at the counter looking toward the Long John Silver's lot next door. According to Dickinson, the man was wearing a long green jacket with a big hood and a dark pair of jeans. She described the man as five feet nine inches to six feet tall, medium build, with short hair brown hair cut in a military style. She also saw in the Taco Bell parking lot a white car "facing inward towards the building." The car was not in the same position as a white car owned by one of the victims that was parked there that night.

Damien Cromartie stopped at the Taco Bell around 3:00 a.m. He observed a few vehicles in the parking lot and a brown or burgundy sedan parked in the Two Rivers Mall parking lot behind the Taco Bell. When he pulled into the drive-through lane, he saw a large piece of cardboard in the window. On the cardboard he saw the silhouettes of two or three people moving around inside the restaurant.

Bill Hudspeth testified that, between 2:00 and 2:30 a.m. on January 30, 1994, he drove by the Taco Bell and saw a white male run diagonally from an area behind the restaurant to the front of his car and then toward a muffler shop across the street. Hudspeth described the male as between five feet nine inches and six feet tall, with short hair, and a stocky build. Hudspeth said another white male with short hair, a stocky build, and a bit taller than the other individual was standing near the muffler shop.

Mark Jolly testified that he was in the Shoney's parking lot across the street from the Taco Bell between 2:30 and 3:00 a.m. on January 30, 1994, when he heard two loud bangs and saw a man running from the back of the Taco Bell. According to Jolly, the man was a Puerto Rican or a light-skinned African-American male, wearing shorts, and carrying something rolled up in a brown bag in his left hand. After he saw the man, Jolly observed the lobby lights in the Taco Bell flicker on and off two or three times.

Allen Ceruti testified that he passed by the Taco Bell between 4:20 and 4:30 a.m. He observed an African-American male standing at the open back door.

Charlie Brown testified that Mathews and Housler were both at a party together at the trailer in Oak Grove, probably on January 21. During his testimony, Brown recanted a statement he made in November 1995, wherein he said that he heard Mathews talking about robbing the place where he worked.

Melanie Darwish testified that she may have lent her car to Housler on the night of the robbery and murders, although she was not sure. According to Darwish, she was at home in bed on that night. Darwish said that Mathews had been at a party at the trailer; however, she did not remember Housler being there.

Lopez Gaddes, a convicted drug trafficker, was in the Montgomery County Jail with Housler in 1994. Housler told Gaddes that he knew Mathews and that Housler, Charlie Brown, and Mathews had conversations about robbing the Taco Bell. Housler told him that the first conversation about the robbery took place at a party a week or two before the murders. Housler also told Gaddes that the group again talked about committing the robbery at the barracks. When Gaddes asked Housler if he was scared, Housler responded that he was not because Mathews acted as the trigger man.

Jason Carr testified that he was incarcerated with Housler in the Montgomery County Jail during March 1994. During a card game with Housler and Charlie Brown, one of the two men (he could not remember which) stated that Housler's car was used in the getaway of the Taco Bell murders.

Larry Underhill, another inmate, testified that Housler told him, while the two were in jail, that he killed the Taco Bell employees. Underhill said that Housler told him that the victims were shot execution-style. Housler also asked Underhill about the possibility of redemption for sin.

Christopher Ester, a convicted felon, frequently visited the trailer in Oak Grove. Ester testified that he saw Mathews at the trailer on January 29, 1994. Mathews talked about the robberies he had committed. According to Ester, Mathews and Housler had a conversation that night. Ester testified that Mathews left the trailer around 12:30 or 1:00 a.m. and that Housler left about 2:30 or 3:00 a.m. after he and Ulangca got into an argument. Housler was supposed to call and let the group know his whereabouts, but he never did.

Orlando Gill also visited the trailer. He believed that he met Mathews the weekend before the murders, when Kendra Corley brought Mathews to the trailer. He observed Housler and Mathews conversing in the kitchen.

Hector Ortiz also saw Mathews at the trailer with Corley before the murders. He likewise observed Mathews and Housler conversing. Ortiz was at the trailer on the night of the murders, and he saw Housler and Ulangca there but not Mathews. When he left around 1:00 a.m., neither Housler nor Ulangca was present in the trailer. When he returned to the trailer around 2:30 or 3:00 a.m., the couple still was not there.

Kendra Corley testified that Mathews did not go to a party at the trailer on January 21, 1994, because he was working. Corley stated that she did bring Mathews to the trailer on Saturday, January 22, and they arrived between 9:30 and 10:00 p.m. Corley stated that she did not go to the trailer with Mathews on January 28. According to Corley, Mathews gave her $255 in five-dollar bills just before his suicide attempt. Corley also identified the black jacket as belonging to Mathews.

James Bowen testified that Corley brought Mathews to the party a week before the murders. Bowen overheard Housler and Mathews discussing the robbery of Taco Bell. According to Bowen, Housler and Mathews argued over who would do the shooting and who would be the lookout. Bowen testified that Mathews stated they would rob Taco Bell because, since Mathews worked there, it would be easier for them. Bowen stated that he saw Housler and Ulangca go into the trailer's bedroom about 2:00 a.m. and that they were still there when he woke up.

Housler testified in his own defense. He denied any involvement in the robbery and murders. He asserted that his October 20 statement was wholly false and concocted from jailhouse rumors and newspaper reports. Housler claimed that in order to get out of jail he lied about knowing of Mathews' involvement in the crimes. He also asserted an alibi defense, saying that he was with Sulyn the entire night of the murders.

At trial, Sulyn Ulangca now claimed that Housler was with her on the night of the murders. But she also admitted that she previously was unable to account for Housler's whereabouts on the night of the killings.

State v. Housler, 193 S.W.3d 476, 479-87 (Tenn. 2006). The jury found the Petitioner guilty of four counts of first degree felony murder and sentenced the Petitioner to life in prison (with the possibility of parole) on each count. At a later sentencing hearing, the trial court ordered that the Petitioner's sentences be served consecutively.

On December 22, 1997, the Petitioner filed a timely motion for new trial. The Petitioner filed a renewed motion for new trial in November 1999, and a hearing on the Petitioner's motions was held beginning on March 16, 2000. The trial court denied the new trial motion on February 5, 2002.

The Petitioner subsequently filed a timely appeal with the Tennessee Court of Criminal Appeals. The appellate court summarized the Petitioner's issues as follows:

> (1) Whether his confessions were properly admitted into evidence when the State and the trial court knew the confessions were false and unreliable;
>
> (2) Whether the State committed prosecutorial misconduct by using the recanted testimony of Robert Eastland, Robert Dawson, and Michael Miller and by failing to inform defense counsel or the trial court that Jeremy Thompson had recanted his statement;
>
> (3) Whether he is entitled to a new trial based upon the newly recanted testimony of Larry Underhill;
>
> (4) Whether the trial court erred in denying a new trial when a juror fell asleep during the trial;
>
> (5) Whether the Mathews time-line proves his innocence;
>
> (6) Whether the State prosecuted Housler and Courtney Mathews under inconsistent theories; and

(7) Whether consecutive sentencing was proper.

State v. David G. Housler, Jr., No. M2002-00419-CCA-R3-CD, Montgomery County, slip op. at 1-2 (Tenn. Crim. App. Feb. 27, 2004) (hereinafter Housler CCA Opinion). The court concluded that the Petitioner's issues were without merit and affirmed the Petitioner's convictions and sentences. Id., slip op. at 28.

The Petitioner then filed a timely application for permission to appeal with the Tennessee Supreme Court. The court "granted review principally to determine whether the State violated the Appellant's Due Process rights (1) by introducing into evidence at his murder trial the Appellant's confession, which contained several known falsehoods, or (2) by advancing allegedly inconsistent theories, arguments, and facts in the Appellant's and his co-defendant's respective prosecutions." Housler, 193 S.W.3d at 479. On May 19, 2006, the supreme court issued an opinion affirming the Petitioner's convictions and sentences. The court summarized its holdings as follows:

> We hold that a criminal defendant's confession may be used against him consistent with Due Process protections even when the confession contains peripheral facts known by prosecutors to be false. Further, we hold on the facts presented to us in this case that the State did not pursue inconsistent prosecutions in the respective trials of the Appellant and his co-defendant and that, therefore, we need not address whether a criminal defendant's Due Process rights could be violated by such inconsistency.

Id.

The Petitioner filed a timely pro se petition for post-conviction relief on May 14, 2007. The Court appointed counsel, and the Petitioner filed an amended petition for relief

on January 30, 2009. The Court held an evidentiary hearing on the petition between December 7 and December 18, 2009. The parties filed their proposed findings of fact and conclusions of law on September 3, 2010.

II. Evidentiary Hearing Testimony

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

- David G. Housler, Petitioner
- John W. Carney, Jr., District Attorney
- Steven L. Garrett, Assistant District Attorney
- Helen O. Young, Assistant District Attorney
- Robert G. "Gus" Radford, who was appointed as District Attorney pro tempore for this case
- Laurence M. McMillan, Petitioner's pretrial counsel
- Michael Terry, Petitioner's lead trial counsel
- Stephanie Gore, Petitioner's trial co-counsel
- Jeff Puckett, TBI Assistant Director
- Lanny Wilder, TBI Agent
- Isaiah "Skip" Gant, former lead counsel for Courtney Mathews
- Ronald L. Lax, owner and investigator with Inquisitor, Inc.
- Gloria J. Shettles, Inquisitor investigator

- Danese Banks, former Inquisitor investigator
- Dr. Richard J. Ofshe,
- Dr. William Bernet,
- David and Lislatta Housler, petitioner's parents
- Insert name here, Petitioner's friend
- Robert Inserra, former Army CID investigator
- Carter Smith, Army CID investigator

Petitioner David Housler

The Petitioner testified that he was initially arrested by Army CID in March 1994 on an AWOL charge. He was brought to the Military Police (MP) station at Fort Campbell and kept in a "cage" behind the front desk during much of his four days there. He said that the enclosure was open on two sides, so he had no privacy, and that the area was noisy. He also said that bright lights were kept on him constantly during his time in the cage and that he slept on a metal slab in the cage. He said that he was cold, even with a blanket. The Petitioner said that these conditions led to him not sleeping much during his time there.

The Petitioner testified that although he was arrested on a military AWOL charge, he was questioned by two civilian officers—TBI agent Jeff Puckett and a Clarksville police officer whose name he did not remember—about the Taco Bell offenses and a robbery outside Grandpa's, a Clarksville store. The Petitioner said that he was not offered the services of an attorney during questioning, nor did the officers inform him that he had such

a right. The Petitioner added that he did not recall receiving Miranda warnings in either verbal or written form during his questioning at Fort Campbell.

The Petitioner testified that on March 7, 1994, the first day of questioning, he "denied everything" concerning both the Taco Bell murders and the Grandpa's robbery. He also denied ever having met Courtney Mathews. Despite these denials, the officers continued questioning the Petitioner, asking him "pretty much the same questions over and over again" about the two incidents. On March 10, the Petitioner took a polygraph examination, during which time he again denied involvement in both the Taco Bell and Grandpa's offenses. However, when the officers informed him that he had "failed" the test regarding Grandpa's, the Petitioner eventually admitted his participation in the Grandpa's robbery. After this admission, the Petitioner was arrested for the Grandpa's robbery and transported to the Clarksville jail. The Petitioner recalled that his initial bail was $100,000.

The Petitioner recalled that at some point after his arraignment, Mr. McMillan was appointed to represent him. During his first meeting with Mr. McMillan, the Petitioner told his attorney that he had committed the Grandpa's robbery, to which Mr. McMillan replied that he could do nothing for the Petitioner unless he knew something about the Taco Bell offenses. According to the Petitioner, Mr. McMillan did not explicitly suggest that the Petitioner offer information regarding the Taco Bell offenses in return for some sort of deal but that such a course of action was "implied" by the attorney's words. The Petitioner said that Mr. McMillan asked the Petitioner nothing about his CID interrogation (including

whether he had an attorney present during questioning, the conditions in which he was kept, and whether he had been advised of his Miranda rights).

According to the Petitioner, Mr. McMillan did not say that he had formerly been one of Mr. Carney's law partners. The Petitioner said that if Mr. McMillan had divulged this information, he "would have tried to get another lawyer."

The Petitioner was receptive to the prospect of a favorable deal for the Grandpa's offenses because his girlfriend, Sulyn Ulangca, was pregnant at the time and he wanted to get out of jail "long enough to get a little money up and maybe help Sulyn out a little bit." Thus, he decided to concoct a story based upon what he had seen on television and in the newspapers and heard in jail. His story was composed largely with the assistance of Charlie Brown, a fellow Clarksville jail inmate. The Petitioner said that he did not believe that anyone would "buy" his story, but he still went ahead with his plan because he wanted out of jail. According to the Petitioner, Mr. McMillan did not ask the Petitioner about the substance of the statement, nor did he advise the Petitioner about the potential problems he faced in giving the statement, especially a statement that was untrue.

The Petitioner said that the police interviewed him about his statement. During this interview, which took place at the Clarksville jail on March 21, 1994, the Petitioner told the police that he had been at a party at a trailer in Oak Grove, Kentucky, at which he heard Courtney Mathews and some other people "talking about the Taco Bell robbery." The Petitioner initially said that in his first statement, he did not state that he heard Mr. Mathews explicitly plan the robbery, but after reading the statement, he acknowledged that he told the

interviewing officers that Mr. Mathews had said that he would not leave any witnesses. The Petitioner recalled that his bail was reduced to $10,000 after he talked to police but that he was not released from jail at that point.

In April 1994, the police again questioned the Petitioner, this time about a statement made by Michael Miller. The Petitioner recalled that Mr. Miller had said that he knew the Petitioner when they were both fourteen years old and lived on Long Island, which the Petitioner said was false, as he had never been to New York before and never met Mr. Miller until they were both in jail. The Petitioner also said that Mr. Miller had overheard the Petitioner and Mr. Brown talking about the Taco Bell crimes and that the Petitioner had helped get rid of the guns used in the offenses—facts which the Petitioner insisted were untrue. The Petitioner said that he did not recall whether Mr. McMillan was present during the April 1994 questioning and that he had no advance notice of the interrogation before it began.

The Petitioner said that he did not learn until after the trial in the instant case that Mr. McMillan represented Mr. Miller at the time Mr. Miller made his statement. Had he known about Mr. McMillan's representation of Mr. Miller, the Petitioner would have sought another attorney.

In September 1994, the Petitioner's bail was lowered to $1,000, and he successfully posted bond. The Petitioner said that Mr. McMillan did not meet with him between April and September 1994. After his release, the Petitioner went to Fort Knox, Kentucky, where he was discharged from the army. The Petitioner then moved back to his parents' home in

Radcliff, Kentucky. Between September 1994 and October 1995 he held "a couple of jobs" in an attempt to support his then-three-year-old daughter. The Petitioner said that during his time out of jail, he kept waiting for the authorities to notify him that they had learned that his Taco Bell story was untrue and that he was to return to jail. The Petitioner said that when he finally received the call to return to Clarksville, he was not told why he was being called back, although he assumed that he would be serving his sentence in the Grandpa's case.

The Petitioner testified that on the morning of October 11, 1995, he reported to Mr. McMillan's office. The Petitioner said that he and his attorney went straight to the district attorney's office and that Mr. McMillan did not give him any advice about the upcoming interrogation. The Petitioner said that in this interview, the State's agents asked him "pretty much the same series of questions over and over" about the March 1994 statement. The Petitioner said that he repeatedly asked that the questioning stop, but the State did not stop the questioning and Mr. McMillan made no similar request. During this interview, the Petitioner did not change significantly the substance of his earlier statement. Eventually, the State ended the questioning, and the Petitioner agreed to return to Clarksville one week later for additional testing. The Petitioner testified that after this interview, Mr. McMillan did not speak to him about the interview or about the Petitioner's version of events.

The Petitioner returned to Clarksville on October 19, at which time he was subjected to "more aggressive" questioning by State agents. The Petitioner said that the interviewers told him that they knew his March 1994 statement was a lie, that one of the interviewers showed him "gory" pictures of the victims, and that he was told that whomever was involved

in the Taco Bell murders would "fry," which the Petitioner interpreted as receiving the death penalty. The Petitioner said that he repeatedly asked for this interview to stop, but the interviewers refused. The Petitioner said that this interview began around 7:00 or 8:00 that morning and ended when it was dark outside. He said that he received only bathroom breaks during the interrogation and that he smoked and ate inside the interrogation room. The Petitioner said that Mr. McMillan again failed to demand that the interview stop and did not offer the Petitioner any advice during the course of the interrogation. The Petitioner recalled that he told "the whole room" that the March 1994 statement was a lie but that the State continued questioning him like nothing had happened.

The Petitioner said that at one point, he was left alone inside the interview room with TBI Agent Jeff Puckett. The Petitioner said that Mr. Puckett informed the Petitioner something to the effect of "tell the truth or you are going to fry[.]" This comment made the Petitioner nervous because to this point, Mr. Puckett had been relatively friendly toward the Petitioner, but he was now being "harsh" and "[a]ngry" toward the petitioner.

After the rest of the interviewers returned, the Petitioner made the first significant change to his story, telling the interviewers that he had helped plan the Taco Bell offenses rather than simply hear Mr. Mathews and others talk about the offenses. The Petitioner said that he used the phrase "gassed up" to describe his interaction with Mr. Mathews; the Petitioner said that the term meant that he "egged [Mr. Mathews"] on." The Petitioner said that Mr. McMillan reacted to this comment by pulling the Petitioner aside and stating that the Petitioner had implicated himself in a conspiracy to commit first degree murder and was

facing a potential sentence of life in prison. The Petitioner said that Mr. McMillan left the Petitioner alone to talk with the district attorney without giving the Petitioner advice regarding how to proceed at that point. The Petitioner said that the State agents also told the Petitioner that he had incriminated himself, although the Petitioner said that nobody told him exactly how he had incriminated himself and that he did not understand why his comments were incriminating.

The Petitioner said that after the State agents and his attorney told him that he had incriminated himself, he believed that he needed to do whatever he could do to get out of a potential life sentence, even if it meant making up more stories about the Taco Bell offenses. The Petitioner said that at this point, the "format" of the interview changed, as the Petitioner would suggest a fact, the State would either accept it or reject it, with the Petitioner attempting to tailor his story to fit what the interviewers wanted to hear. The Petitioner said that at one point, his attorney and the district attorney left the interview room, presumably to discuss a potential plea deal, but that the interviewers kept interviewing the Petitioner outside the presence of counsel.

Eventually, Mr. McMillan returned with a plea agreement, which the Petitioner read and signed but did not understand fully. The Petitioner said that Mr. McMillan did not read the proffer agreement to the Petitioner and did not explain the consequences of signing the agreement. The Petitioner said that he was concerned about the provision whereby the State would decide whether the Petitioner's statement represented the truth; when the Petitioner asked Mr. McMillan about the provision, the attorney replied, "you ain't gotta worry about

it, [Mr. Carney]'s a pretty good guy." The Petitioner said that his understanding of the agreement was such that if the State determined he was lying, "the wors[t] I could do was Grandpa's and maybe perjury[.] Which was less than the last thing they were trying to give me anyways." The Petitioner said that Mr. McMillan did not explain to him that in case of breach, the State could use the statement against the Petitioner in a prosecution for the Taco Bell offenses. The Petitioner said that he did not understand that provision, stating, "That doesn't make sense. It's a lie, so now it is the truth to use against you, it never even crossed my mind."

The Petitioner said that after he signed the agreement upon the advice of counsel, who told him that the proffer agreement was "a good deal," the interviewers resumed questioning. The Petitioner said that he "frequently" changed his story to gauge how the interviewers would respond to the different facts that the Petitioner offered. The Petitioner said that his story was composed exclusively of lies; when asked why he did not tell the interviewers that the statement was a lie, the Petitioner responded, "I was overwhelmed, I didn't know what to do. . . . There was no one there to help me. I had no clue what to do. I just knew I didn't want to go to prison for the rest of my life."

The night of October 19, the Petitioner and some friends partied in the Petitioner's hotel room, which was paid for by the District Attorney's Office. The Petitioner and his friends ordered alcoholic beverages, which were also placed on the State's tab. The Petitioner said that his alcohol consumption "might have" left him impaired during the

following morning's questioning and that neither Mr. McMillan nor the interviewers asked him whether he felt competent to answer questions.

The Petitioner said that on the morning of October 20 Mr. Puckett wrote down a statement based upon the Petitioner's answers to the State's questions. The Petitioner said that this interview largely reflected the statements he had given on October 19 and that the Petitioner rewrote Mr. Puckett's statement in his own handwriting. According to the Petitioner, Mr. McMillan left the interview room at some point that morning and was "in and out" for "most of that day." At some point, Mr. Puckett asked the Petitioner if he had given Mr. Mathews the idea to kill the witnesses; the Petitioner denied this accusation, but Mr. Puckett placed this fact in the version of events that he (and the Petitioner) wrote at the end of the morning's questioning.

After the morning's questioning, the Petitioner took a polygraph examination, during which he was asked several questions about his potential involvement in the Taco Bell offenses. The Petitioner said that he received no Miranda warnings before this examination. After the Petitioner was informed that the test results indicated he had been "deceptive" during the examination, he gave another statement that afternoon. The Petitioner's afternoon statement represented several different changes in his story. For instance, the Petitioner placed his friends in the story and told the police where he had stopped to buy ammunition and liquor. The Petitioner's statement was also the first one that placed him at the Taco Bell at the time the crimes were committed. In the statement, the Petitioner also said that he had driven to the Taco Bell, although at the time his car, a white Mercury Tracer, had its windows

"busted out." The Petitioner said that Mr. Puckett wrote out the statement, he signed it, and the interview ended.

On November 7, the Petitioner returned to Clarksville for more questioning. As was the case with the October 1995 interviews, Mr. McMillan offered the Petitioner no advice prior to this latest interview, which was held at the District Attorney's Office. Upon arriving at the interview, the district attorney informed the Petitioner that the State wanted him to confront Sulyn Ulangca, who had originally provided and alibi for the petitioner but who had since changed her story. The Petitioner refused to confront Ms. Ulangca, despite the district attorney's warning that the Petitioner would breach the agreement if he refused to so confront Ms. Ulangca, because he did not want to get her into trouble. He also told the State agents that his earlier statements were all lies. After telling the interviewers that he refused to confront Ms. Ulangca, the Petitioner asked if he was under arrest; when Mr. McMillan replied, "no," the Petitioner attempted to leave the building by walking down some steps. According to the Petitioner, two people ran up the steps and grabbed the petitioner, arresting and handcuffing him. The Petitioner said that Mr. McMillan responded to these events by saying nothing and "[j]ust walk[ing] away."

The Petitioner recalled that eventually Michael Terry and Stephanie Gore replaced Mr. McMillan as his counsel. During an April 1997 suppression hearing, Mr. Terry and Ms. Gore convinced the Petitioner to waive his attorney-client privilege with Mr. McMillan; he claimed that his attorneys did not explain why this decision would benefit him. The Petitioner also said that Mr. Terry and Ms. Gore failed to tell him that they had in their

possession a timeline prepared by Inquisitor employees in which Mr. Mathews detailed his involvement in the Taco Bell offenses—a timeline which did not implicate the Petitioner. Had the Petitioner known about the timeline before trial, he would have encouraged his attorneys to use it at trial.

On cross-examination, the Petitioner acknowledged that all "party trailer" regulars were questioned about the Taco Bell offenses. The Petitioner acknowledged that he signed a Miranda waiver form before the March 10, 1994 polygraph examination, a waiver which he believed applied only to the polygraph examination. He admitted that he did not read the rights waiver form verbatim before signing the form. The Petitioner said that he did not request an attorney for the polygraph examination or for the earlier CID interrogations because he "didn't see the reason for it." The Petitioner acknowledged that his first day of questioning at CID lasted three or four hours at most, although he did not recall whether he was questioned about the Taco Bell offenses during all four of the days he was at CID. The record reflects that the Petitioner was asked about—and that he admitted to—a series of automobile break-ins that were unrelated to the Taco Bell offenses.

The Petitioner testified that he became dissatisfied with Mr. McMillan's services before the Petitioner was arrested but that he never requested another attorney. The Petitioner also acknowledged that he never told his attorney that his story concerning the Taco Bell offenses was a lie and that his attorney did not tell him to lie to the police. The Petitioner also acknowledged that he never asked Mr. McMillan whether he knew Mr. Miller or anyone from the District Attorney's Office. The Petitioner also admitted that after he was

released from jail in September 1994, he never inquired about the nature of his pending charges or their potential trial or disposition date. He also did not ask Mr. McMillan why he had to return to Clarksville in October 1995 and did not ask to speak to his attorney during the October 1995 interrogations.

The Petitioner testified that he first met Mr. Mathews while they were both housed in the Clarksville jail after the Taco Bell offenses occurred. The Petitioner said that he saw Mr. Mathews three times at most. The Petitioner also said that he met Mr. Miller in jail and spoke to him mainly while playing cards. The Petitioner never asked Mr. Miller why he was being housed in jail. Regarding his March 1994 statement, the Petitioner initially testified that he never heard anyone actually talk about committing the Taco Bell offenses during the party trailer, but he later added that he would "sometimes" hear people talking about robbing a place but that he would "never take [any] of that stuff seriously."

The Petitioner acknowledged that at one point he was arraigned on charges of public intoxication and contributing to the delinquency of a juvenile but that he did not remember the particulars of the hearing. He also did not recall the specifics of any hearings he may have had concerning the Grandpa's robbery. The Petitioner insisted that although he could not remember the particulars of these hearings, he could remember the particulars of the events related to the Taco Bell case.

The Petitioner acknowledged that under the terms of the proffer agreement, he would be charged with one count of conspiracy to commit first degree murder in connection with the Taco Bell offenses and that his charge of aggravated robbery in connection with the

Grandpa's case would be reduced to robbery. The Petitioner again insisted that he signed the document although he did not understand its terms and Mr. McMillan did not explain the terms. The Petitioner said that he signed the document at the insistence of Mr. McMillan, who told the Petitioner that he had no reason to worry about the agreement. Based on counsel's assurances, the Petitioner did not ask counsel to explain the proffer agreement. The Petitioner acknowledged that although Mr. Puckett wrote out the final proffer statement, Mr. Puckett read each page to the Petitioner and he (the Petitioner) initialed every page of the proffer statement. The Petitioner insisted that Mr. McMillan was not present when the proffer statement was written.

The Petitioner testified that although he came up with the idea to lie about his involvement in the Taco Bell crimes, he believed that the State "helped me with the story. I mean, they leaded (sic) me with the story." The Petitioner also said that he was not advised of his Miranda rights before signing the proffer agreement.

The Petitioner said that at the time he signed the proffer agreement, he did not understand that he could breach the agreement by falsely implicating an innocent person. The Petitioner said that he falsely implicated Ms. Ulangca, Kevin Tween, and Melanie Darwish in the Taco Bell offenses because "I figured they knew where I was the night of the robbery" and would "tell [the police] where I was [on] the night of the crime[.]"

On redirect examination, the Petitioner was shown a copy of the Miranda waiver from the March 10, 1994 polygraph examination. Upon reviewing that document, the Petitioner reiterated that he believed that the waiver applied only to the polygraph examination, not to

any of the CID interrogations. Upon additional recross examination, the Petitioner testified that he did not refuse to answer the State's questions during the October 1995 interrogations while Mr. McMillan was not present because he "didn't think it was an option."

District Attorney John Carney

John Carney, the elected District Attorney for the Nineteenth Judicial District, testified that he was appointed District Attorney in June 1993 after serving over two decades with the Tennessee Bureau of Investigation (TBI); Mr. Carney said that he was the TBI director upon his resignation. Mr. Carney, who obtained his law license in 1990 but did not practice until after he left TBI, said that he worked in a Clarksville law firm approximately six months before he was appointed District Attorney. He said that Mr. McMillan was one of the other attorneys at the firm and that he had worked with Mr. McMillan in representing a client accused in a child's death. Mr. Carney said that he and Mr. McMillan became friends during their work together but that the two men did not socialize together outside the office. Mr. Carney said that the attorneys in his former firm shared overhead expenses but that they did not share profits generated through the attorneys' practice.

Mr. Carney said that he designated Steve Garrett as the lead prosecutor in the Taco Bell case because Mr. Garrett "was one of the most experienced [p]rosecutors in our office." Mr. Carney said that Charles Bush, another Assistant District Attorney, worked on the case until he became a General Sessions Court Judge, at which point Assistant District Attorney Helen Young began working on the case. Mr. Carney said that Jeff Puckett was the TBI

agent assigned to the case; Mr. Carney said that Mr. Puckett routinely informed the District Attorney's office about developments in the TBI's investigation. Mr. Carney said that he also gathered information from Carter Smith, an agent with the Army's Criminal Investigation Division (CID).

Mr. Carney testified that he first heard about the Petitioner around March 7, 1994. He said that at that time, the Petitioner, who was being held by CID, "had been AWOL from the service and was a suspect in the Grandpa's robbery" along with Melanie Darwish. Mr. Carney recalled that Mr. Puckett and Clarksville Police Department Detective George Elliott also interviewed the Petitioner on March 10, 1994, at CID. Mr. Carney testified that initially the Petitioner was only considered a suspect in the Grandpa's robbery but that the Petitioner's name soon surfaced in connection with the Taco Bell offenses:

> His name came up along with Courtney Mathews' name and along with a string of names of people that came up in reference to a party trailer that was owned by Kevin Tween, also known as Red Tween, his name and Courtney Mathews' name had come up and they were associated by being at or around that trailer and at that time, at that time—Courtney Mathews was under investigation. I know there was an individual from Ft. Campbell where Courtney Mathews worked, and he questioned him about blowing a dial off of a safe and that's exactly what happened in the Taco Bell case.

Mr. Carney said that although his office was aware that "a bunch of people" purportedly attended a party at the "party trailer," none of these other persons were arrested in March 1994. He also admitted that the Petitioner's March 21, 1994 statement did not implicate the Petitioner, although the Petitioner did identify other persons who, when interviewed, implicated the Petitioner in the Taco Bell offenses.

Mr. Carney testified that he believed that he saw signed Miranda waivers for at least one of the Petitioner's March 1994 statements to police and a polygraph examination, but that for all police interviews conducted while the Petitioner was on bond, there were likely no written Miranda waivers in the record.[2] He also said that the Petitioner was likely not given verbal Miranda warnings for the interviews because the Petitioner was not in custody and Mr. McMillan was present. He also acknowledged that there were no "tape recordings" of any conversations between the Petitioner and State agents.

Mr. Carney testified that he did not recall exactly when Mr. McMillan was first appointed to represent the Petitioner, although he did recall that at some point shortly after the Petitioner was arrested and brought back to Clarksville—possibly around March 10, 1994—Mr. McMillan informed either Mr. Carney or Mr. Garrett that the Petitioner "very likely had information pertaining to the Taco Bell murders." Mr. Carney said that this case represented the first time that his office had prosecuted one of Mr. McMillan's clients since Mr. Carney became District Attorney. He said that he was not concerned about prosecuting one of Mr. McMillan's clients "because when I took the oath of office to be District Attorney, I [had] to prosecute cases . . . it [did not] make any difference if Larry McMillan was the attorney or not[.] It still doesn't."

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[2]Outside the presence of Mr. Carney, Mr. Baugh stated that no written Miranda waiver existed for the Petitioner's October 20, 1995 polygraph examination, although the Petitioner signed a report prepared in connection with the examination. However, when TBI Agent Lanny Wilder later testified for the State, he produced from his own records a signed Miranda waiver from the October 20 polygraph exam. Counsel for both parties stated that they had not seen this waiver prior to Mr. Wilder's testimony.

Mr. Carney described his initial conversation with Mr. McMillan regarding the Petitioner's potential information:

> Well, I was naturally curious of the fact that there was somebody out there that may have information about it[.] I mean at that time, Courtney Mathews had been charged with the murders. We felt very strongly, the investigators and myself and the other prosecutors in the office . . . so naturally we were going to have discussions with him as to one, who his client is? What's his client charged with? What type of information that they had? How useful could it be, was it relevant or not? What's the credibility of the person? I mean all of those different things go into weighing—let me hear what you got to say from your client and then we'll talk about—we'll take the next step. But if he doesn't present something that is not relevant to the case or he's not credible—I mean, we'd probably still listen to him but he would have to produce and not only produce with information but information that was truthful and also information that was—could be corroborated

Mr. Carney said that at the time he first spoke with Mr. McMillan about the Petitioner, "I don't know if [the Petitioner] was on the horizon then but his name was certainly mentioned . . . with other people at this trailer . . . to which, Courtney Mathews had been coming along with Kendra Corley."

Mr. Carney testified that he may have spoken with Mr. McMillan about the Petitioner providing a statement to police in March 1994, but that he did not offer the Petitioner any "deals" until the October 1995 proffer statement. He did say that he talked with Mr. McMillan about a bond reduction, and that the Petitioner ultimately made bond and returned to Kentucky. Mr. Carney described the State's actions between March 1994 and October 1995 as follows:

> I don't recall having any conversation with Larry while [the Petitioner] was out . . . we had taken the statement, the polygraph from him, and then we had dispatched, basically investigators out to go look at the contents of the

> statement at that point in time and I know one of the critical ones that was that we had sent Agent Puckett and Detective Charvis to . . . Salem, North Carolina during that period of time and it was after that, that we . . . contacted Mr. McMillan and said that we would like to have Mr. Housler come back. There [were] some inconsistencies in his statements and that we had interviewed his girlfriend at the time, Sulyn Ulangca, who was living in Salem, North Carolina, and they had conducted an interview with her and also had polygraphed her while they were there in North Carolina, so there [were] problems there that were contrary to what Mr. Housler had previously stated. . . . [O]ne of the things that we were doing was going out and trying to corroborate his statement, trying to see whether or not he was telling us the truth, and I know on many, many times that we were saying, look—all we are interested in here is the truth. Tell us the truth, tell us the whole truth pertaining to what your knowledge is[.]

Mr. Carney said that he recalled the Petitioner to Clarksville on October 11, 1995, and that all parties involved—the Petitioner, Mr. McMillan, and the State—understood that "[t]here was a condition or agreement [regarding the Petitioner's bond] that he would return when requested." Mr. Carney said that the Petitioner was only a "witness" in the Taco Bell case, although he remained a defendant in the Grandpa's robbery case. Mr. Carney recalled that at the meeting—at which he, the Petitioner, Mr. McMillan, Mr. Puckett, and Mr. Garrett were present—the Petitioner was asked about Michael Miller's statement and two "failed" polygraph examinations. Mr. Carney acknowledged that the Petitioner "probably" was not advised of his Miranda rights during that meeting "because he wasn't in custody . . . [a]nd he had his lawyer present."

Mr. Carney described the substance of the October 11 interview:

> I don't think we accused him of—we were more wanting to listen to what he had to say. He was saying some things that were contradictory. . . . I don't think he was ever accused . . . he put himself into position eventually where he was down there, and I think at some point that morning, I think a polygraph

> person had been contacted previously and was there and ready. I think if I am right, at that point in time, he and McMillan talked and we—McMillan came back and says there is additional information pertaining to his involvement, the presence of others that had not previously come out, and at that point, I think everything kind of changed? I definitely remember them having that conversation and him coming back—he, McMillan, coming back and saying things have—he has more information just beyond this 187'ing them and all that—actually my recollection of that is that he was talking about he was part of the planning, he was part of the participation and he was—I know at least those things which really [piqued] our interest from that point because that hadn't come out before then[.]

Mr. Carney recalled that at one point during an interview, Mr. Bush placed the victims' photographs in front of the Petitioner, who did not want to look at the photographs. The district attorney insisted that he did not hear anyone tell the Petitioner that he would "fry," although Mr. Carney admitted telling the Petitioner that he would "pursue" anyone involved with the Taco Bell offenses.

Mr. Carney said that his office and representatives from the police and the TBI again met with the Petitioner and Mr. McMillan on October 19 and October 20, 1995. The district attorney said that he did not believe that the Petitioner was advised of his Miranda rights at any time because at that time, the Petitioner "was still considered a witness. He was not in custody and he had his lawyer there."

Mr. Carney said that at some point during the interview,[3] most of the State's representatives and Mr. McMillan left the interview room, leaving the Petitioner alone in the room with Mr. Puckett. After a while, Mr. Puckett left the room and told Mr. Carney that

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[3]According to a TBI report prepared by Mr. Puckett, this interview occurred on October 20, 1995.

while he (Mr. Puckett) was alone with the Petitioner, he had asked the Petitioner if he was telling the truth. Mr. Puckett told Mr. Carney that the Petitioner had "brought up the 187 them and I feel like I gassed him up to kill these people and there was a mention about whether or not he was going to go and grew [sic] the balls enough to go down there and do this robbery . . . ." According to the district attorney, "that was a critical turning point because now he [was] implicating [him]self deeper into—at least at that point in time, a conspiracy[.]"

Mr. Carney testified that he did not recall whether Mr. McMillan heard this conversation between Mr. Puckett and Mr. Carney, although at some point the district attorney informed Mr. McMillan about the Petitioner's statement to Mr. Puckett. He said that Mr. McMillan was "frustrated" upon hearing about the Petitioner's comments, but that he did not object to Mr. Puckett's questioning the Petitioner. The district attorney said that at some point after the Petitioner's statement to Mr. Puckett, the prosecution team decided to obtain a written, signed statement from the Petitioner. The prosecution team then began drafting a written "proffer agreement" outlining the conditions under which the Petitioner would give his statement—specifically, the charges to which the Petitioner would plead guilty and the sentences he would receive were he to cooperate. Mr. Carney said that he told Mr. McMillan about the State's intent to develop a proffer agreement, although the district attorney did not seek Mr. McMillan's input about potential offenses or sentences. Mr. Carney said that he obtained a copy of a proffer agreement from the United States Attorney's Office in Nashville and used this federal document as a guide in drafting the proffer

agreement in the instant case. Mr. Carney said that once the prosecutors developed a "final" draft of the proffer agreement, they showed it to Mr. McMillan. The district attorney said that Mr. McMillan "was concerned with what the reduced charges were going to be," and that the Petitioner's attorney "didn't have any problems" with the charges to which the Petitioner would plead guilty: one count of conspiracy to commit first degree murder, for which the Petitioner would be sentenced to fifteen years as a range I, standard offender; and one count of robbery, to which the Petitioner would receive a concurrent sentence of four years as a range I, standard offender. Mr. Carney said that he did not remember Mr. McMillan requesting that any additional conditions be added to the agreement, which the Petitioner signed.

Mr. Carney acknowledged that the agreement was drafted in response to the Petitioner's comments to Mr. Puckett about "gassing up" Mr. Matthews and "187'ing" people. The district attorney testified that he believed "gassed up" meant that the Petitioner "encouraged [Mr. Mathews] to do it." Mr. Carney said that such encouragement by itself may not be a crime, "but if you aid or contribute to that gassing up and take some overt act in its part, that would be" a crime. When asked about other evidence which supported a conspiracy to commit murder charged, Mr. Carney responded,

> Well, I would have to go back and look at the initial interviews that he did, March 7th, March 10th, polygraph test. He had a white car that could be placed down at the scene at the time, at or around the same time that all this was happening. He was wearing—I think he was wearing clothing that matched one of the people inside that he was seen by several witnesses.

Mr. Carney later acknowledged that in the Petitioner's March 7 statement, the Petitioner did not implicate himself in the Taco Bell offenses.

In reviewing the terms of the proffer agreement, Mr. Carney said that although the phrase, "I believe that your client may have information of use to the State" did not specifically reference the Taco Bell offenses, he said that the parties understood that the phrase referenced the Taco Bell offenses and that the State would not have made the proffer agreement if the Petitioner did not have any information concerning the Taco Bell crimes. In discussing the phrase, "the value of this information will be determined unilaterally by my office in its sole discretion," the district attorney said,

> Value can mean a lot of things, whether or not something is of value depends on what information it and in light of this text, it would be what knowledge did he have that would be useful to the State and it would be looked into, it would have been investigated, there would have been a determination of whether or not the information that he provided was useful, was it relevant? If so, it had value. That's why it was so critical that when this final version was taken, that—there are a lot of things—it may be truth and it [has] value to it[.] Truthfulness is value. Credibility is value, because that ultimately goes—the credibility of witnesses, which would have been in this situation, David Housler, would be credible. I mean, is he going to be credible in the eyes of a jury? And they are the ones that are going to make that determination whether or not he is credible or not, so it does have a value because if the State of Tennessee puts him on the witness stand and vouches for his credibility, that has value.

Mr. Carney assessed the phrase, "I assure you my office's evaluation of your client's position following receipt of this proffer will be undertaken in good faith," as follows:

> It means that our office after receiving the information . . . [is] going to evaluate the information that he had. Is it truthful? Is it reliable? Is it credible? Can it be corroborated? Are there others involved? All of the things that he is saying—our office is saying we'll evaluate it and analyze it in

> good faith. That we won't just ignore it and say well, he never said that or he might have said it but it is not true. If he said it, then we are going to assume because we are operating under this agreement that he is going to tell us the truth. . . . [W]e would be evaluating every single thing that he said. Could it be corroborated? Was it false? Did he implicate others in the crime that weren't here. All of that stuff. And we would include taking polygraphs and passing or failing polygraphs. All that information has to be considered.

In reviewing the phrase, "If your client wishes to engage in an off-the-record proffer," Mr. Carney said that the "off-the-record proffer" was the discussion the Petitioner had with the prosecution team during which the Petitioner would provide his version of events the night of the Taco Bell murders. Based on this information, the State and the Petitioner would fashion the final, "on-the-record" proffer. Mr. Carney said that although the proffer agreement itself did not contain an explicit provision whereby the Petitioner agreed to give a formal, written, "on-the-record" proffer statement, he said, "I don't think there is any confusion there as to what [the Petitioner] was going to do[.]" Mr. Carney insisted that the Petitioner reviewed, made changes to, and signed the "on-the-record" proffer statement which Mr. Puckett wrote in response to the Petitioner's oral statements to the prosecution team.

Mr. Carney said that he believed that if the Petitioner breached the proffer agreement, he could have used the proffer statement against the Petitioner in court. Mr. Carney said that Mr. McMillan did not ask him any questions about the terms of the agreement and that the district attorney did not believe that the terms of the proffer agreement were ambiguous. The record reflects that the Petitioner signed the proffer agreement on October 19, 1995, and that

the Petitioner returned to the District Attorney's office the next day for additional questioning.

Mr. Carney said that during on October 20, 1995, he, the Petitioner, Mr. McMillan, Mr. Puckett, Mr. Charvis, Mr. Garrett, and a victim witness coordinator from the District Attorney's office were all present, although Mr. Carney admitted that he was "in and out" of the interview room that day. The district attorney said that the Petitioner was likely not advised of his Miranda rights on October 20. Mr. Carney recalled that the prosecutors conducted an interview with the Petitioner—the substance of which was later memorialized in a TBI report filed by Mr. Puckett. The report indicates that at the end of the interview, "the formal statement was going to be written and adopted by David Housler with his attorney present." However, Mr. Carney acknowledged that the typewritten version of the proffer statement does not contain Mr. McMillan's signature.

Mr. Carney said that he was not surprised about the contents of the proffer statement. He said that the proffer statement was valuable "to some degree" in that "it had potential to open up the investigation further than just [the Petitioner] and Courtney Mathews."

Mr. Carney testified that at some point after the Petitioner gave the proffer statement, the State called the Petitioner back to Clarksville "to discuss some inconsistencies in his statement and to also talk to him about why he implicated Sulyn Ulangca[.]" The district attorney said that his office had administered a polygraph examination to Ms. Ulangca, who agreed to come to Clarksville. Mr. Carney described the conditions under which the November 7, 1995, meeting was held:

> [Ms. Ulangca] was brought back here to confront him, not him to her. We didn't bring her back to be confronted by Housler, who had made those accusations. We brought her back here to listed to what he had to say. She already knew that, when she came down here voluntarily, and she was willing to go in there and look him in the face and tell him that he was lying on her.

After stating that the Petitioner refused to confront Ms. Ulangca, Mr. Carney described the end of the meeting:

> After [the Petitioner] said he didn't want a confrontation, Mr. McMillan stated that he wanted to talk to his client. At that point in time . . . we got up and left the library and left Mr. McMillan and David Housler there by themselves to have a talk. That talk went on, I can't remember, it may have lasted thirty minutes . . . . When he came back inside and we got back together, Mr. McMillan said that Housler said to him . . . everything in his statement that he gave was true except for the fact—except for what he had said about Sulyn's involvement of being down there with him, in the car with him, as the robbery occurred and the murders occurred. All the rest of it was true . . . at that point in time, we told him—I know I felt like and [Mr. Garrett] did too that there had been a material breach in the proffer agreement and we told him that we felt like that there had been a breach in the agreement, that he had now implicated an innocent person because we had already talked to [Ms. Ulangca], done all the interviews with her, she was totally adamant about it. She even at one time said that she—would swear or put her hand on her child's head that she was telling truth, that [the Petitioner] was a damn liar and was willing to confront him. When that occurred, I got up to leave . . . the library to go in to the office and see how she was doing, she was in there by herself[.] Some of the rest of them came out and at that point in time, I heard this commotion going on. People running and opening doors and running down steps and I got up to see what it was and the next thing I knew, I went about halfway down the stairwell and David had gotten up and bolted out of the library. T.B.I. Agent Mike Breedlove and I think Agent Rick Stout were coming up the stairwell and apprehended him, before he could run out the front door. They brought him back up, put handcuffs on him and put him in the chair—in a chair there in the library.

Mr. Carney said that he also believed that the Petitioner breached the statement by providing untruthful information about from where he had "either bought or got rid of a gun

. . . we followed up . . . the man was interviewed by T.B.I. [a]gents and denied any involvement with" the Petitioner.

Mr. Carney testified that when he declared that the Petitioner had breached the proffer agreement, Mr. McMillan "was very upset about it. . . . I think he was extremely frustrated." The district attorney did not recall Mr. McMillan objecting to the State's declaration of breach. Mr. Carney said that he moved the trial court to recuse his office from this case because he believed that he would be a witness at trial. The court granted the request, and Gus Radford, the District Attorney from the Twenty-Third Judicial District, was appointed. Mr. Carney said that he did not talk with Mr. Radford about discovery in this case.

On cross-examination, Mr. Carney testified that his office first became aware of the Petitioner as one of the people who attended parties at Mr. Tween's "party trailer," and that Mr. Mathews was also identified as a "party trailer" attendee. The district attorney also said that the Grandpa's robbery, to which Mr. Housler initially denied but later admitted participating, occurred a few weeks before the Taco Bell offenses.

Mr. Carney said that there was no requirement that a police officer obtain a written Miranda waiver before conducting a custodial interview, and that "[i]f a person was not in custody, [a police officer] was not required to give Miranda unless the person started implicating himself in a crime[.]" Mr. Carney said that TBI policy was to have a witness present for any Miranda warnings that were not memorialized via a written waiver. When asked if the proffer agreement could be considered as plea negotiations, Mr. Carney replied, "Yes. It was taken in that context, yes."

When asked about the Miller statement, Mr. Carney replied, "the one key thing in the Miller statement was Miller said that Housler told him that the shotgun shells—shotgun was wrapped in plastic and was buried across the fence line in the back of Ryder Avenue." Mr. Carney said that he was present when a shotgun and ammunition were found in the place identified in Miller's statement. Mr. Carney said that to his knowledge, Mr. McMillan never represented Mr. Miller.

Assistant District Attorney Steve Garrett

Steve Garrett, an Assistant District Attorney for the Nineteenth Judicial District, testified that he was the lead prosecuting attorney in the Taco Bell case. Mr. Garrett said that early in the State's investigation, the State developed the theory that Courtney Mathews was the sole shooter in the murders. However, after speaking to other people who, like Mr. Mathews, were known to frequent the "party trailer," the State began investigating the Petitioner, who had been identified by other trailer regulars. Mr. Garrett said that about two weeks after the Taco Bell offenses, the State also developed the Petitioner as a suspect in the Grandpa's robbery, which had happened in December 1993.

Mr. Garrett said that sometime in March 1994, he learned that Mr. Puckett and Mr. Elliot had questioned the Petitioner on March 7, 1994, at Fort Campbell, where the Petitioner was being held on an AWOL charge. Mr. Garrett recalled that the Petitioner was transferred to the Montgomery County Jail in Clarksville and charged with the Grandpa's robbery. That same month, Mr. Garrett met with the Petitioner and Mr. McMillan. When asked if during

this meeting the two attorneys discussed any consideration for the Petitioner giving a statement related to the Taco Bell offenses, Mr. Garrett replied,

> . . . . I can tell you that consideration was discussed, and it was discussed in this context, I don't remember the details, but at this particular time in March of 1994, I think you were talking about theories, one of the things that we were considering was this: Premeditation, Courtney Mathews. And we had picked up that Housler amongst other party trailer goers had had conversations with Mathews, and the discussions were about robbing various establishment[s], and then it honed down to, you know, the Taco Bell.
>
> And some of those folks that I think, that we talked with early on there was a Bowen and a Pellino, and we interviewed them several times, but the initial conversations I think were made pursuant to our efforts to prepare for a preliminary hearing, even though we didn't call Bowen and Pellino to the preliminary hearing. The point being this: I believe at that point in time, based upon the conversations, it was Housler, who as a participant in the party trailers had been the only one, according to these folks, to whom Mathews had discussed a premeditation aspect; i.e.[,] we're going to one 87 them, you know, leave no witnesses. And so that's—you know, that's why we were interested in Housler at that point in time as a possible witness to premeditation conversations. So I'm saying that to say yes, there probably were discussion about considerations, you know, in that context.

Mr. Garrett recalled that on March 21, 1994, the Petitioner gave a statement regarding the Taco Bell offenses. Mr. Garrett said that in this statement, the Petitioner did not mention being present at the Taco Bell during the crimes, but at that point "[t]he issue [was] whether or not he implicated himself in the planning of it." Mr. Garrett recalled that shortly after the Petitioner's March 21 statement, Michael Miller gave a statement implicating the Petitioner in the offenses. Mr. Garrett described the Miller statement as it related to the State's early investigation in this case:

> . . . . Miller's statement kind of became a reference point for a while in terms of, very candidly, we thought that if Housler was involved in the Taco Bell murders we thought most likely he was involved in the planning parts of

> it. And initially in the spring of 1994 we did not think that he was actually down there. And Miller's statement was one of the influencing factors for that determination.
>
> To me one of the compelling—I mean, early on the compelling evidence was Ken Hodges. He was a [FBI] . . . profiler. He went in there on the day of the shootings and he walked through the crime scene and came back out and said single shooter using a blitz style shooting technique, and walking or running real fast and pretty much putting them down where they worked. And he said the person would have a military background, and probably has committed violent crimes before. To me that was—that was pretty compelling.

Mr. Garrett said that he "believed" that the Petitioner was confronted with the Miller statement at some point before being released on bond in September 1994. Mr. Garrett said that the Petitioner returned to Clarksville in October 1995 upon the State's request. Mr. Garrett said that the State called the Petitioner back to Clarksville "so that we could talk about what he knew about Taco Bell . . . whether or not he was going to be a witness or whether not, you know, we was actually . . . more deeply involved" in the offenses. Mr. Garrett said that he was unsure whether the Petitioner's returning to Clarksville upon request was a condition of the Petitioner's bond.

The first October 1995 meeting between the Petitioner and the prosecution team occurred on October 11. The Petitioner, Mr. McMillan, Mr. Carney, Mr. Garrett, Mr. Bush, Mr. Puckett, Mr. Charvis, and Will King, a victim/witness coordinator, were present for the meeting, which lasted approximately three-and-a-half to four hours. Mr. Garrett did not recall anyone accusing the Petitioner of being involved in the Taco Bell offenses, but he did "remember some intense, profane questioning about what was up; what do you know about the various contractions and consistencies that we had on previous statements?" Mr. Garrett

described the evidence which the State had obtained prior to this meeting which led the State to question the Petitioner about his Taco Bell involvement:

> I guess two prefatory events that brought us there that day [were] our involvement with [Sulyn Ulangca] and, in my mind's eye, Mark Jolly in February of 1995.
>
> Mr. Carney and I took Mark Jolly down to the Taco Bell. He was the Ford artillery observer. And, again, that was another, I want to say, benchmark of compelling evidence, what Mark Jolly saw . . . from 2:30 a.m. to 3:00 a.m.
>
> And just let me say I believe Jolly's statement was corroborated even further by a guy named Hudsputh and a guy named Justin Herd . . . those witnesses being found further on down the road, but Jolly basically tells us—he's the only one at that time who heard anything like shots being fired; and he describes a signal system; he describes people running, or a person running from the Taco Bell; he describes what apparently are getaway cars or lookout cars moving around down there. I mean a lot of concerted action, and—and in fact something we had not heard before. And so we had that foundation. And then, of course, as you know we had [Sulyn Ulangca], who's saying . . . I can't alibi David Housler.

Mr. Garrett said that the prosecutors were "not shouting or yelling at Housler" during the "pretty intense questioning" that occurred on October 11. At one point, the Petitioner told the prosecutors that he had told Courtney Mathews "that he was a little bitch if he didn't go down there, and if he grew the balls to go I would go." Mr. Garrett testified that at one point, Mr. Bush showed the Petitioner photographs of the victims, which the Petitioner did not want to view. Mr. Garrett denied that any of the prosecutors told the Petitioner that he would fry; furthermore, he said that the only time anyone mentioned the death penalty was when the Petitioner asked the prosecutors if Courtney Mathews would get the death penalty.

Mr. Garrett testified that Mr. McMillan did not object to the questioning and did not instruct the Petitioner not to answer any questions. He also said that the prosecutors "took

several breaks so that Housler could talk with his attorney[.]" According to Mr. Garrett, Mr. McMillan eventually informed the prosecutors that the Petitioner wanted to return to Kentucky to talk to his mother. Mr. Carney agreed, and the questioning ended.

The Petitioner returned to Clarksville on October 19, 1995, for additional questioning. Mr. Garrett, Mr. Carney, Mr. McMillan, the Petitioner, Mr. Puckett, and Mr. Charvis were present for this meeting, which began around 10:00 a.m. and ended at some point that evening. Mr. Garrett said that on October 19, the State decided to draft a proffer agreement, with Mr. Garrett drafting the agreement based upon the template Mr. Carney had acquired from the United States Attorney's Office. Mr. Garrett said that he had talked with Mr. McMillan during the October 11 meeting about composing a proffer agreement, but that the State did not discuss the details of the agreement with Mr. McMillan while the agreement was being drafted. Mr. Garrett said that the State proposed charging the Petitioner with conspiracy to commit first degree murder because before the proffer agreement was drafted the Petitioner had not admitted to accompanying Mr. Mathews to the Taco Bell. Mr. Garrett said that he eventually began to negotiate the terms of the agreement with Mr. McMillan, but that Mr. McMillan did not object to any of the terms of the agreement, nor was the proffer agreement ever challenged in court.

In reviewing the terms of the agreement, Mr. Garrett said that the term "value" as it related to the information the Petitioner provided meant "[e]videntiary value." Upon further questioning by post-conviction counsel, Mr. Garrett explained the term further:

> Well, for example, in the case of Housler if he were an accomplice

> down there we're going to have to have independent corroborative evidence; any other participants down there we're going to have to have independent corroborative evidence. It could be physical, it could be . . . the success of criminal prosecution turns upon the holy Trinity; and that's corroborated confessions, admissions, corroborated eye witness accounts, and physical evidence. So all of that, we'd want lots of it; as much of it as we could get, you know, in the prosecution of any individual that was involved.

Mr. Garrett said that the prosecutors informed the Petitioner that "we're going to take everything that you say . . . we're going to try to corroborate it, trying to back it up in some form . . . or give some explanation for it based on independent evidence, because we're going to put you on the stand . . . ." He further testified that the prosecutors were particularly concerned about the Petitioner's potential testimony because the Petitioner had a penchant for "burying big bones of truth in a ground of lies." Therefore, the State hoped to "back up [the Petitioner's statements] with independent corroborative evidence and/or explain why he would be lying as to other aspects of . . . his version of the events."

Mr. Garrett interpreted the phrase "off-the-record proffer" as unsworn statement, not recorded by the court reporter, given to the prosecutors. Mr. Garrett acknowledged that the proffer agreement did not contain a provision whereby the Petitioner agreed to submit to an "on-the-record" proffer. Mr. Garrett acknowledged that the agreement provided to a fifteen-year effective sentence as a range I, standard offender, which meant that the Petitioner could have been eligible for release upon serving thirty percent of his sentence, or four-and-a-half years. The prosecutor also acknowledged that the Petitioner potentially could have been sentenced as a mitigated offender, which would have allowed him to be released upon the

service of twenty percent of his sentence, or three years. The parties signed the proffer agreement on October 19.

Mr. Garrett testified that the Petitioner returned to the District Attorney's office the next day for more questioning, with the State's representatives from October 19 all returning. Mr. Garrett said that the State interviewed the Petitioner the morning of October 20, before the formal statement associated with the proffer agreement was taken; this interview was later summarized in a TBI report filed by Mr. Puckett. Mr. Garrett acknowledged that Mr. Puckett's report indicated that an ex parte conversation between the Petitioner and Mr. Puckett occurred during the October 20 meeting, although Mr. Garrett only remembered a conversation between Mr. Puckett and the Petitioner (outside Mr. McMillan's presence) occurring on October 11. Mr. Garrett said that he did not remember why the "pre-proffer statement" interview ended when it did. Mr. Garrett said that the interview which resulted in the formal, written proffer statement occurred after an afternoon polygraph interview which the Petitioner demanded, and that Mr. Garrett was not present during the taking of the proffer statement. Mr. Garrett also acknowledged that Mr. McMillan did not sign the proffer statement and that the proffer statement did not indicate whether Mr. McMillan was present for the taking of the proffer statement.

Mr. Garrett said that he first heard the Petitioner talk about driving to the Taco Bell and serving as a lookout during the October 19 interview, although he admitted that this information was not contained in Mr. Puckett's report concerning the interview between the Petitioner and the State conducted the morning of October 20. Mr. Garrett said that this

development was important because the State "couldn't have gotten first degree murder unless we had him going down there to the Taco Bell[.]" Mr. Garrett then explained the potential effect of the proffer statement on the Courtney Mathews prosecution:

> I was—I was very relieved in—I was relieved in this context: You go back to February, March of 1995, and you go down there with Mark Jolly, okay, and Jolly tells you what he saw. That is very, very, as I said, compelling evidence, and pretty much came away from that with the idea that we've got multiple participants in this—this thing, and its' not over yet, okay; we've got, I mean, Mathews, the circumstantial evidence seems to indicate that he's the shooter, but we've got a lookout system, we've got getaway cars, we've got a signal system, and so we've got all that.
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> . . . .
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> . . . . [W]hen Housler came forward and Housler implicates himself as being down there and participating as a lookout, . . . it was like a heavy weight had been taken off my shoulders and from around my ankles, because I felt like that the substantive truth was we are dealing with multiple participants. . . .
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> . . . . [W]e contemplated . . . using Housler as an eyewitness; the idea that [Sulyn Ulangca], if they [were] down there, would help us because we could keep Housler as the lookout; presumably, we might be able to get to the other participants, I think Housler was naming Tween and Darwish at that time, might be able to make cases against them. That was what we were thinking probably after October the 11th.

Mr. Garrett said that as the State began to investigate the information provided in the proffer statement, "we were getting information back at that particular time that this stuff wasn't panning out." However, Mr. Garrett said that he was not upset over this development, because "[i]t created an investigative surge, which I wanted. It answered the question about multiple participants." For instance, the State determined that Kevin Tween and Melanie Darwish "weren't involved in any shape, form, or fashion."

On November 7, 1995, the Petitioner was called back to Clarksville; according to Mr. Garrett, "The substance of [the meeting] was, I think, a confrontation between he and [Ms. Ulangca], or vice versa, whether or not he would engage in that type of meeting." Mr. Garrett recalled that the Petitioner refused to see Ms. Ulangca. After the Petitioner refused to confront Ms. Ulangca, Mr. Garrett, Mr. Carney, and Mr. McMillan met, and Mr. Carney said that "Housler had . . . breach[ed] the agreement in that he refused to confront [Sulyn Ulangca]." According to Mr. Garrett, the Petitioner later changed his statement "to exclude he and [Sulyn] from participating in any of the Taco Bell episode." Mr. Garrett said Mr. Carney declared the that the Petitioner had breached the proffer agreement, and that he did not remember Mr. McMillan objecting to the declaration of breach.

On cross-examination, Mr. Garrett said that although the Army Criminal Investigation Division (CID) was involved "to some extent" in investigating this case, he said that CID was involved in "less than five percent" of the investigation, which was largely handled by TBI and the Clarksville Police Department. Mr. Garrett surmised that he spoke to CID Agent Carter Smith "on two occasions during the course of the year-and-a-half or two year period" in which Mr. Carney's office prosecuted the Petitioner's case. Mr. Garrett said he was unaware of CID making any arrest or interviewing any of the Taco Bell witnesses. Mr. Garrett said that the CID report, issued in September 1994, stating that the Petitioner was not involved in the Taco Bell offenses "would have been an accurate statement of the perceptions of [the district attorney's office" and the law-enforcement officers" at that time. Mr. Garrett

also suggested that the CID report "was probably generated on the basis of Smith's conversations with Puckett and Charvis and not an independent investigation by [CID]."

Mr. Garrett testified that he first heard the Petitioner use the phrase "gassed up" at the October 11, 1995 meeting with prosecutors. Mr. Garrett said someone asked the Petitioner what this phrase meant, at which point the Petitioner replied that he had told Mr. Mathews that he was a "little bitch" and if Mr. Mathews "grew the balls to go down there" the Petitioner would go with him.

Mr. Garrett said that during the October 19 interview, the Petitioner, "in addition to [admitting to] gassing [Mr. Mathews] up and encouraging him to go down there," the Petitioner told the prosecutors that he "went down there; he described going down off of Boot Hill and Mathews racking a shotgun." According to Mr. Garrett, the Petitioner also described Sulyn Ulangca "discouraging him, trying to slap him in the head or something like that to keep him from doing this. They go down there, and [the Petitioner] is a lookout in his car." According to Mr. Garrett, at the October 19 meeting the Petitioner further described the events surrounding the Taco Bell crimes:

> He, Housler, is a lookout in his car and he's parked in front of the Taco Bell. At some point he says that he saw the individual who turned out to be the Clopp, manager style personnel, wearing a different uniform, heavier set. I remember distinctively that he said that. He describes a door being slammed, hearing a door being slammed and hearing what apparently were gunshots. He describes Tween, I believe, running from that door and he says another person ran from the door.

Mr. Garrett said that until the Petitioner's October statements, Ms. Ulangca had been a potential source of an alibi for the Petitioner, but in October, the Petitioner began to implicate her as "[a]t least a witness" to the Taco Bell offenses.

Mr. Garrett said that he believed that if the Petitioner breached the proffer agreement, "then we could prosecute him for the underlying charges—apart from perjury we could prosecute him for the underlying charges, and we could use the statements given pursuant to the proffer agreement against him in the prosecution for those underlying charges."

Mr. Garrett testified regarding the information in the proffer statement that the State knew was false by time the Petitioner was interviewed on November 7, 1995. He testified that the Petitioner had told the prosecutors that he and Kevin Tween had stopped at a convenience store in the early morning hours of January 30, 1994, and bought beer and cigarettes. After the Petitioner's proffer statement, the State interviewed the clerk working the store that morning, and the clerk "was adamant that [the Petitioner and Mr. Tween] weren't in there during the early morning hours of the 30th." Mr. Puckett and Mr. Charvis had also interviewed Sulyn Ulangca, who denied being at the Taco Bell. The State was also unable to find "Hippy Dude," who supposedly sold the ammunition used in the killings.

On redirect examination, Mr. Garrett said that CID report's conclusion that the Petitioner was not involved in the Taco Bell offenses "accurately reflected a perception on [the State's part]" in September 1994. He added, "If you'd asked me in September '94 I'd [have said] we think [the Petitioner] took part in the planning stages of it, he talked with Mathews about robbing the Taco Bell, [and] about leaving no witnesses," but at that time he

would have viewed the Petitioner's assertion that he was present at the Taco Bell the night of the murders as "puffing in jail[.]" Mr. Garrett also acknowledged that in October 1995, when the State decided to draft the proffer agreement, he was aware that the Petitioner's "stories had been changing.

Mr. Garrett acknowledged that in the written proffer statement, Ms. Ulangca was described as yelling at the Petitioner and trying to "talk Mr. Housler out of going" to the Taco Bell. He also acknowledged that in the proffer statement, the Petitioner described how, after Ms. Ulangca got into a car heading toward the Taco Bell, she told the Petitioner something to the effect of, "what are we doing; let's pull out of this[.]" When asked whether, according to the proffer statement, Ms. Ulangca was not a participant in the Taco Bell murders, Mr. Garrett replied, "According to the proffer statement there would be an issue as to her culpable mental state . . . . At that time we didn't think she had even gone down there as an eyewitness, [and] that she truly could not alibi" the Petitioner.

Assistant District Attorney Helen Young

Assistant District Attorney Helen Young testified that at the time of the Taco Bell offenses she served as a prosecuting attorney in General Sessions Court. She said that early in Mr. Mathews's case she "questioned one, maybe two witnesses at the preliminary hearing" and had little further involvement in the case until fellow ADA Charles Bush was appointed general sessions court judge, after which she assisted Mr. Garrett in prosecuting the case. Ms. Young said that she did not work on providing discovery to the Mathews defense team;

rather, Mr. Bush and Mr. Garrett handled this task. Ms. Young said the District Attorney employed "open file" discovery in this case, which Ms. Young described as, "If we have it you get it. If it's in control of [the] State, we turn it over." Ms. Young said that open file discovery was not a common practice before the Taco Bell case but that her office now routinely employed open file discovery. Ms. Young recalled that Mr. Puckett and Mr. Charvis "were not happy" with the open file discovery procedure, although she did not recall the source of their contention with open file discovery.

Ms. Young testified that Mr. Garrett authored a memorandum expressing dissatisfaction with the Taco Bell investigation and trial preparation. Ms. Young said that her colleague's dissatisfaction stemmed from his belief that "the prosecutor ought to determine what's necessary and what's not" and that certain investigators working on the case were not taking his requests seriously enough. Ms. Young said that although her name appeared on the memorandum, she had no role in composing it. Ms. Young testified that she was not involved in prosecuting the Petitioner.

When asked about the length of time that would elapse between a suspect's indictment and the beginning of discovery, Ms. Young explained,

> It would just—it would just depend . . . the voluminous nature of the file might require that you ask them to come to your office at a later time. If it's the—it depends on at the time of the arraignment as it relates to the commission of the crime whether or not our paperwork is complete, whether or not we have everything yet.
>
> Sometimes there's so many documents and you consider the seriousness of the case, you want the defense attorney to come with you and document things instead of just being handed over. but there is no policy on that; that

> each's assistant's discretion, according to what the court directs, what the defense attorney wants to do and what the assistant wants to do.

The record indicates that the Petitioner's trial counsel first requested discovery on May 3, 1996, and that the District Attorney's Office was recused in this case on February 7, 1997. Ms. Young said that she did not know whether her office provided discovery during the time it prosecuted the Petitioner's case, although she "assumed they did . . . ." She testified that although the TBI discovery binders in the instant case indicated that she provided discovery to the Petitioner's trial defense team, she said that she did not recall the contents of the binders, which were given to her by someone (whose identity she did not recall) for her to pass along to the Petitioner's attorneys.

Ms. Young recalled that there was some concern over a "loose collection of materials" which she was asked to review. Specifically, she recalled that Mr. Garrett was concerned that the materials

> either had not been reviewed by investigators, investigated or turned over, something of that nature. The main thing I remember about that past the point of going though it is at some point after the trial was over, because I got called by Housler's defense team at some hearing, was that even though General Garrett thought no one had been made aware of these, the statements from all these witnesses had been contained on discovery documents that had been prepared by Charles Bush long before I was involved in the case.

Ms. Young said that although she did not talk to the Petitioner personally, she believed that "you had a bunch of hoodlums hanging out at a that trailer, Courtney Mathews went in to rob, the others were there to gas up and watch, and ran." Ms. Young based her

opinion on the statements of Housler and other trailer regulars, as well as the fact that the shotgun used in the killings was found "where Housler said it was[.]"

Former District Attorney Gus Radford

Robert "Gus" Radford, the former District Attorney for the Twenty-Fourth Judicial District who served as District Attorney pro tempore at the Petitioner's trial, testified that at the time of the Petitioner's trial, he followed the rules of "complete discovery," which he explained as, "anything that you are going to use . . . as your case in chief, you have to give in discovery and then anything that is exculpatory, if you intend to use it or not, you have to give to the Defense[.]" He said that the rules of discovery also applied to witnesses' statements, noting, "If I had a written statement, [the defense] had an open file and could look at it." Mr. Radford said that he supervised discovery in cases where he was the lead prosecutor because "I would want to make sure that discovery was properly complied with[.]" Mr. Radford testified that he did not recalled how discovery was handled in the Petitioner's case, although he did say that "Mr. Terry was quite thorough in getting discovery. He had everything that I had."

Mr. Radford testified that he did not follow the Taco Bell investigation after the murders were committed and did not participate in prosecuting Mr. Mathews. Mr. Radford said that Mr. Carney's office provided him with the record from the Courtney Mathews case, along with investigatory and secretarial support when needed. Mr. Radford also said that he received support from Mr. Puckett.

Mr. Radford stated that Mr. Garrett did not come to work for him between February and November 1997[4] and that he did not assist him in preparing the case. Mr. Radford that he discussed Mr. Garrett's and Mr. Carney's testimony with the men before the Petitioner's trial but did not otherwise discuss the case with them.

When asked about the "open file" discovery policy in this case, Mr. Radford replied, "you open your file and Defense counsel is free to come in and inspect and take anything they want to and look at it, and have copies of anything they want." Mr. Radford said that in his practice, his office would actually copy the State's file and give the copy to a defendant's attorney. He added,

> [T]hey could look at the file. . . . I don't want them to come and open the file drawer, but I would certainly if they didn't feel like they had anything, they would be perfectly free to look at mine and compare theirs. And I would invite that because . . . sometimes you might forget something or miss something, [and] you don't want to do that.

Mr. Radford testified that he followed the open file discovery policy because

> the penalty . . . for not getting some discovery is that you can't use it in trial. And I certainly didn't want to get myself in that shape or if it was exculpatory evidence, then it could be even worse. You might have a Judge ordering acquittal or mistrial or something of that nature, so you wanted to make sure that you complied with the Rule of Discovery, a very important rule.

When asked whether discovery was a contentious issue in this case, Mr. Radford replied that "[a]nything with Mr. Terry was contentious." Mr. Radford was asked about Mr. Terry's "Motion to Compel Discovery of State's Agents' Rough Notes and for Oral

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[4]This testimony conflicts with Mr. Radford's testimony at the April 1997 suppression hearing, at which he informed the Court that he had hired Mr. Garrett, who would begin work on June 1, 1997.

Argument," in which Mr. Terry argued that the State was in possession of "other information . . . regarding interviews and interrogation of David Housler that has not been submitted to Defendant, including notes, memoranda, and other documents maintained by the State." Mr. Radford stated that he did not recall this dispute and insisted that he "gave him everything we had."

Mr. Radford said that he did not recall "any kind of promise I made to Mr. Underhill" in return for his testimony. The record reflects that at the hearing on the Petitioner's motion for new trial, Mr. Radford acknowledged that he "got a letter from [Mr. Underhill] complaining once about him not getting his old jail cell back, because he wasn't back in time," but Mr. Radford testified that "I don't know what I did to let [the Court] know that there was a letter but not the letter of the type and nature that he was talking about." A copy of a letter sent by Mr. Underhill, received by Mr. Radford's office on May 20, 1998, was read into the record; in the letter, Mr. Underhill said that he was not returned to his former cell after testifying in the Petitioner's trial and claimed that before trial, Mr. Radford promised Mr. Underhill that he would write letters to the parole board on Mr. Underhill's behalf. Mr. Radford testified that "I must have give[n] [the Underhill letters] to Defense Counsel, because they have [them.]" He also denied promising Mr. Underhill that he would write a letter to the parole board, stated that did not recall whether Mr. Underhill asked him to write such letters, and did not recall whether he promised Mr. Underhill that he would be returned to his former prison cell after testifying at the Petitioner's trial.

Mr. Radford was also asked about a letter sent by Mr. Underhill and received by Mr. Radford on October 17, 1997." In this letter, Mr. Underhill asked Mr. Radford to "confirm . . . the exact date that you have scheduled for me to testify against David Housler" and "contact the authorities here and reconfirm that I will not lose my present cell while I am in Court testifying." Mr. Radford testified that he "didn't pay a lot of attention to it because I didn't let him dictate when he was going to testify and when he wasn't," and he also did not recall "ever contacting anybody at the prison to get his jail cell. Now, whether Mr. Puckett did it or some of the investigators, or we tried to do that, they may have. I did not." Mr. Radford also testified that he did not consider returning an inmate to his former jail cell after his testimony to be consideration.

Mr. Radford denied seeing the Army CID report before the evidentiary hearing. He said that had he been in possession of the report, he would have provided it to the Petitioner's attorneys. He testified that the TBI and Clarksville Police Department should have given the report to him, but "they didn't, evidently." When asked whether he was "responsible for the actions of the police . . . which could implicate your prosecution," Mr. Radford replied,

> No, I can't be responsible for what the police [do]. I can make every effort that they do everything they are supposed to do, that they follow through on the investigation. They are instructed to give me all the material and most likely they did, this was most likely an oversight[.] . . . [H]ow they investigate a case or what they do, I have a hard enough time prosecuting a case and putting on the witnesses and doing that . . . I was the only prosecutor. I didn't have a number two chair. I did this by myself. I was making every effort that I could to prosecute this case properly and I believe I did. I had not only to meet the standards set upon me that I put upon myself, but [also] some extremely stringent standards that [were] set by the Court, which there should

have been. And I did everything I could to meet all of those. If this [report] was not given to [the defense], it was because I didn't have it.

Regarding the unredacted timeline, Mr. Radford recalled that he received a July 5, 2000 letter from Mr. Terry in which Mr. Terry asked Mr. Radford to review the Mathews timeline. Mr. Radford testified that he reviewed the timeline but he denied that the timeline contained anything that would have affected his theory of the case, in which Mr. Mathews committed the murders and "Mr. Housler was there with him, ready, willing and able to aid and abet, and did . . . participate by being a lookout and perhaps driving the getaway car." Mr. Radford acknowledged that in certain passages of the timeline detailing conversations between Mr. Mathews and Mr. Lax, Mr. Housler's name was not mentioned—a fact which did not "accord with the State's theory that he helped plan this robbery murder." However, Mr. Radford testified that Mr. Mathews may not have mentioned the Petitioner's name because "[i]t is standard that they don't snitch on each other and [if] one gets caught, they try to cover for the other one. . . . It is pretty common. I have been doing this a long time, I see it all the time."

Mr. Radford said that had he reviewed the timeline before trial, it would not have affected his decision to prosecute the Petitioner:

> I just . . . didn't consider it credible evidence, for the same reason, I suppose, that the Court of Criminal Appeals didn't reverse the conviction on this evidence. It was presented to them, or that the trial Court didn't, when it had the opportunity. I didn't consider what some defendant—a murderer, a killer, a thief, told somebody or what it was purported he said to somebody that was in contradiction to everything that I knew, in fact, had happened, would be credible evidence and I didn't put much stock in it then and I don't put much stock in it now.

When asked whether he would have had "second thoughts about the State's theory" had he reviewed the memoranda referenced in the timeline, Mr. Radford replied, "To the contrary, I think probably it would have strengthened my resolve that he was guilty, and I believe he was and still is." When asked whether a reasonable person would, in "privileged and confidential communications to their own counsel, . . . protect a co-defendant when that co-defendant had snitched on them and made statements that implicated them and that could lead them to the electric chair," Mr. Radford replied,

> A reasonable person would not cooperate with what the co-defendant was going to testify to, now would they? And if [Mr. Mathews] had implicated Mr. Housler and said in fact, Mr. Housler was there, he would be corroborating Mr. Housler's statement. So, no, a reasonable person would deny that Mr. Housler had anything to do with it, particularly if Mr. Housler was going to testify him and say that he did[.]

On cross-examination, Mr. Radford said that he withdrew the State's notice of intent to seek the death penalty because he "didn't feel like it was a realistic option, particularly since the prime person, the shooter, had not got[ten] the death penalty." Mr. Radford said that Mr. Terry was "a very good, hard-fighting adversary" who "held [Mr. Radford's] feet to the fire, and that is what he should have done."

Regarding the proffer statement, Mr. Radford testified, "the State never held out that everything [the Petitioner] said in there was true. Part of it, we said[,] was factual and then he embellished and put things in there that were not true, which is not unusual." He agreed that there was "significant" corroboration for those parts of the Petitioner's statements that were true.

TBI Agent Jeff Puckett

TBI Deputy Director Jeff Puckett, who held the rank of Special Agent during the events at issue in the instant case, testified that he, Clarksville Police Department Detective Allen Charvis, and CID Agent Carter Smith were the main investigators on this case. He denied that there were any "definitive" roles for any of the law enforcement officials in this case; rather, he said that the investigation "was a cooperative investigation. We all worked together." Mr. Puckett said that whenever he wanted to interview anyone stationed at Fort Campbell, he usually notified Mr. Smith, who would arrange to have the interview subject brought in for the interview. Mr. Puckett testified that he did not know whether he was required to notify CID of his intent to interview someone at the base, but he added, "it was a courtesy. And I felt like they could help facilitate those things." Mr. Puckett said that these interviews were usually held at the CID office, at an empty desk, cubicle, or interview room, although sometimes the interviews occurred at one of the fast-food restaurants on post. Mr. Puckett said that Mr. Smith was present "[o]n occasion" for some of the interviews, but noted that he did "[n]ot necessarily" have to be present. Mr. Puckett also noted that he generally did not advise the interview subjects of their Miranda rights because "generally they were not in custody."

Mr. Puckett testified that as part of his investigation, he attempted to interview all of the persons who had attended parties at the "party trailer" in Oak Grove, Kentucky. According to Mr. Puckett, these persons included the Petitioner, Kendra Corley, Courtney

Mathews, Kevin Tween, Dana Ulangca, Sulyn Ulangca, Melanie Darwish, James Pellino, James Bowen, and Ed Worth. In February 1994, the authorities first heard the Petitioner's name from one of the trailer attendees, whose identity Mr. Puckett did not remember. Mr. Puckett said that initially, the authorities only heard the Petitioner's name in connection with "something about robberies [that] had been discussed at this trailer." By this time, Mr. Mathews was suspect in the Taco Bell offenses and had been arrested three or four days after the victims were killed.

Mr. Puckett testified that as he interviewed more of the trailer attendees, "Generally they were all consistent in who attended the party . . . and that there [were] discussions of crimes that some of them had committed. . . . [A] conversation was overheard where Courtney Mathews was discussing with others about a place to rob, and that place was Taco Bell." Not all of the party regulars identified Mr. Mathews as being present at the party.

Mr. Puckett first interviewed the Petitioner on March 7, 1994, at the CID office. At the time, Mr. Puckett was aware that the Petitioner was facing charges for being AWOL (absent without leave). Mr. Puckett said that although after the fact he believed the Petitioner was "in custody" for Miranda purposes at the time of the interview, he did not recall whether he believed the Petitioner was in custody at the time of the interview. Nevertheless, Mr. Puckett's report detailing the interview indicates that the Petitioner was advised of his Miranda rights before the interview. Mr. Puckett said that when he advised persons of their Miranda rights, he did so orally by reading from a card which had the warnings printed on it. Mr. Puckett testified that he would give the subject a written Miranda waiver if such a

form was available or if Mr. Puckett believed the interview would be significant, but Mr. Puckett later testified that he could not "remember using a written waiver very often, if ever."

Mr. Puckett said that Detective George Elliott with the Clarksville Police Department was also present at this interview. Mr. Puckett said that Mr. Elliott was investigating the Grandpa's robbery, and therefore the two law enforcement officers had different "objectives" heading into the interview. Mr. Puckett said that he did not recall the specific questions he asked the Petitioner during the March 7 interview, but he said, "I'm sure that I asked him did he recall attending a party at a particular trailer in Oak Grove, who his associates were, who he knew, general questions." Mr. Puckett added that based upon his "general practice," he likely would not have told the Petitioner about his interviews with other persons connected with the party trailer.

Mr. Puckett's report prepared after the interview indicates that the Petitioner told Mr. Puckett and Mr. Elliott that "on the night of the Taco Bell robberies . . . he was at Red's trailer at a party with his friends." Additionally, the Petitioner said that "on the night of January 21st 1994, the Friday night a week and day before the Taco Bell robberies, he believe[d] he was at home with his girlfriend . . . in Clarksville." Mr. Puckett said that he first heard the January 21 date "from an interview that another agent did of some people that attended the party[.]" Mr. Puckett said that he did not know whether the Petitioner was asked specifically about his involvement in the Taco Bell offenses during the interview; Mr. Puckett added that before the interview, he "thought that [the Petitioner] might have [had] some involvement in the planning of it, or perhaps [knew] beforehand in conversation about

it." Mr. Puckett noted that he had been told that such planning occurred on January 21; however, at the March 7 interview the Petitioner "state[d] that if [he] was at that party that he [did] not remember meeting Courtney Mathews or discussing any kind of robberies with anyone." The Petitioner also denied owning a nine millimeter pistol or tech nine machine pistol, guns which had been identified as potentially being used in either the Grandpa's robbery or the Taco Bell offenses.

Mr. Puckett testified that the Petitioner's polygraph examination was not administered until March 10, 1994—three days after the initial interview—based on logistical concerns. When advised that the record reflected that Mr. Puckett and Mr. Elliott also interviewed the Petitioner on March 8 and 9, Mr. Puckett said that those interviews likely concerned the Grandpa's robbery "as a courtesy, or [Mr. Elliott] would have asked for me to accompany him because of the party trailer crowd," which also included Melanie Darwish, who the record reflects was also suspected in the Grandpa's robbery.

Mr. Puckett testified that he did not recall anything about the Petitioner's appearance or demeanor during the CID interviews, and he also said that he was "almost certain [the Petitioner] wasn't handcuffed" during the interviews. Mr. Puckett also said that he was unaware of where the Petitioner was being held before or after the interview sessions each day. When showed a form, completed by TBI Agent Lanny Wilder in connection with the polygraph examination, that indicated that the Petitioner had gotten "very little" sleep and was "somewhat nervous" before the polygraph examination, Mr. Puckett said that he did not remember the Petitioner complain about lack of sleep during the interviews. He also did not

recall the Petitioner complain that he was cold. Mr. Puckett further described the Petitioner's demeanor as "[a]verage" and did not recall the Petitioner's demeanor changing during the interview sessions. When asked to describe an "average" demeanor, Mr. Puckett said that the Petitioner "was at ease, didn't seem to be overly nervous or sleepy .... I don't recall any abnormal behavior."

Mr. Puckett testified that he may have worked with Mr. Wilder in developing the polygraph questions, although only Mr. Wilder was present in the examination room with the Petitioner during the polygraph examination. During the examination, the Petitioner denied that he discussed robbing the Taco Bell with anyone, denied involvement in the Taco Bell robbery in any way, and denied knowing Courtney Mathews before the Taco Bell robbery. Mr. Puckett said that Mr. Wilder's report prepared in connection with the polygraph examination indicated that the Petitioner was not asked any questions about the Grandpa's robbery; Mr. Puckett said that the Petitioner ultimately admitted to participating in the Grandpa's robbery, although he did not recall whether this admission occurred before or after the polygraph examination. Mr. Puckett indicated that the Petitioner admitted to the Grandpa's robbery before his March 21 interview in Clarksville.

The record reflects that the Petitioner signed two forms related to the March 10 polygraph examination: a waiver of Miranda rights and a consent to the polygraph examination itself. Mr. Puckett said that the consent form was concerned with "voluntariness; that [the Petitioner] voluntarily took the polygraph without duress, [or] coercion."

After the March 7 interview, Mr. Puckett conducted "interviews with a number of people," interviews which led Mr. Puckett to suspect that the Petitioner had participated in "specific conversation about a robbery with Courtney Mathews." Specifically, Mr. Puckett said, "I think it came from a Mike Pellino and a James Bowen, perhaps Charlie Brown. And I'm reca[ll]ing people at the party that acknowledged that Housler and Mathews were together, and then some of them overheard a conversation regarding the planning of a robbery." Mr. Puckett also said that the information could have come from Michael Miller.

On March 21, Mr. Puckett met with the Petitioner, who by this time was being held in Montgomery County in connection with the Grandpa's robbery, and Mr. McMillan. Mr. Puckett also said that Mr. Carney may have been present, given the severity of the case. Mr. Puckett testified that he did not recall whether the statement was given "as some part of deal or consideration[.]" The report Mr. Puckett prepared in connection with this interview reflects that the March 21 interview was a "written" interview, while the March 7 interview was an "oral" one. Mr. Puckett testified that in a written interview, the witness or subject would "summarize their involvement in an investigation, and I would reduce their words to writing, and they would . . . review that statement or . . . I would read that statement line by line, sentence by sentence, and have any corrections, or additions, or deletions, and they would adopt that statement as their own." Mr. Puckett acknowledged that he, rather than the Petitioner, wrote out the Petitioner's words "[b]ecause I feel like that I could flesh out the detail and get to specifics that I feel [are] important or pertinent in the investigation" and that such details would not be present in a statement written out by the interview subject.

Mr. Puckett said that he elicited the Petitioner's response by "ask[ing] general questions and let[ting] them give me their synopsis of . . . what transpired at any given time." Mr. Puckett said that "I would ask, certainly had, you become familiar with a specific location, or do you know a specific person." Mr. Puckett said that he explained the interview process to the Petitioner before the interview and had the Petitioner review the statement before signing it. Mr. Puckett said that he decided to make the Petitioner's March 21 statement a written statement rather than an oral statement because "I thought it was a significant interview, and I wanted to make sure that I got it as accurately as I could and that it was Mr. Housler's statement and not mine."

In reviewing the March 21 statement, Mr. Puckett "suspect[ed]" that he asked the Petitioner about the supposed January 21 party. After noting that Mr. Pellino's name was mentioned in the March 21 statement, post-conviction counsel asked Mr. Puckett about the statement Mr. Pellino provided in connection with this case; Mr. Puckett recalled that Mr. Pellino "gave a couple of stories, but the story I recall is that he overheard, or it had been recounted to him[,] that someone overheard Mathews and Housler talking about places to rob," particularly Taco Bell. When asked whether Mr. Pellino ever changed his version of events, Mr. Puckett replied, "At some point I think he told me that he overheard portions and that James Bowen overheard portions and related to him portions. . . . [Mr. Pellino] had firsthand knowledge as to some portions but not all of it . . . ." Specifically, Mr. Puckett said that Mr. Pellino "was at the party and . . . witnessed Mathews and Housler talking, . . . and

they talked about robberies in general, but I'm not sure if he overheard the Taco Bell part or [if] that was recounted to him."

Mr. Puckett testified that at some point during the statement, the Petitioner recalled a conversation he had with Mr. Mathews in the Montgomery County Jail. The Petitioner claimed that during this conversation, he asked Mr. Mathews "what he was in for," to which Mr. Mathews replied, "like you don't know." The Petitioner then claimed to have asked Mr. Mathews, "did you do it," to which Mr. Mathews "said yeah and giggled." In the statement, the Petitioner also claimed that he had not seen Mr. Mathews between the January 21 party and time he saw Mr. Mathews in jail. Mr. Puckett said he did not recall what happened to the Petitioner after this interview, and he acknowledged that he did not see the Petitioner again until October 1995.

Mr. Puckett acknowledged that his work calendar from March 1994 indicated that on March 15 and 16, 1994, he met with Mr. Carney and Mr. McMillan concerning the Taco Bell case. Mr. Puckett said that he recalled nothing from this meeting, and that meeting with attorneys without a suspect present "wouldn't be usual or unusual. I've meet [sic] with attorneys on dozens and dozens of times regarding clients in various investigations."

Mr. Puckett then recalled that he interviewed Larry Davis on March 22, the day after interviewing the Petitioner. Mr. Puckett recalled that during this statement, Mr. Davis recounted a conversation he had with either the Petitioner or Mr. Mathews in the Montgomery County Jail. Mr. Puckett said that Mr. McMillan was not present for this meeting, although in Mr. Davis's statement Mr. Davis claimed that he met with Mr.

McMillan (whom he claimed represented him) on March 16. In his statement, Mr. Davis recounted that he talked to Mr. Mathews in the Montgomery County Jail, and that during this interview Mr. Mathews said that "if he had to do it over again he would do it different[ly]," although Mr. Mathews "was not specific as to what he would do different[ly]. Mathews said he was the only one in there. . . . Mathews said when he got off work early he stayed. Mathews was not specific as to what he meant." Later in the statement, Mr. Davis recalled, "When Mathews said he did it by himself, he said he robbed them by himself."

Mr. Puckett acknowledged that Mr. Davis's statement was important because it represented "an admission by Courtney Mathews according to Larry Davis." Mr. Puckett said that he was unaware of what happened to Mr. Davis after the interview or whether the State decided to use Mr. Davis's information in prosecuting the case. Specifically, he said, "The prosecutors would determine" whether certain information would be used in prosecuting the case, and that Mr. Puckett was "[s]ometimes" involved in those determinations. Mr. Puckett said that he did not remember comparing any of the Petitioner's later statements to Mr. Davis's statement and noting any inconsistencies.

Mr. Puckett recalled taking a statement from Michael Miller in which Mr. Miller said that he was the Petitioner's childhood friend and had not seen him for several years until seeing him in the Montgomery County Jail. Mr. Puckett said that in his statement Mr. Miller said that "Housler had admitted some involvement to him regarding Taco bell and his involvement in the Taco Bell . . . he had explained to Miller where the shotgun was buried

behind Courtney Mathews' house in plastic." Mr. Puckett said that he did not recall whether he asked the Petitioner about Mr. Miller's statement in March 1994.

Mr. Puckett acknowledged that he interviewed Sulyn Ulangca in July 1995 and in that interview she "stated that she had no independent recollection of whether she was with David Housler on the night of the homicides or whether she was somewhere else." He did not recall whether Ms. Ulangca had previously told investigators that she was with the Petitioner the night of the Taco Bell offenses.

Mr. Puckett said that he took part in the two interrogations of the Petitioner in October 1995. Mr. Puckett said that he "probably" did most of the questioning during these sessions. He said that he probably did not discuss the "strategy" of the interview with the others before the interview, although he "may have talked to them about pertinent facts of things that I thought were important[.]" Mr. Puckett said that he did not recall the specific questions he asked the Petitioner, although he said that he and the other State agents probably reviewed the Petitioner's earlier statements with the Petitioner. He also said that the Petitioner was not issued Miranda warnings before the October 1995 interrogations. Mr. Puckett said that he did not show crime scene photographs to the Petitioner; he said that "photos [were] present," but he could not recall "what was depicted in the photos."

Mr. Puckett acknowledged that the October 19 interview session lasted eight to ten hours and that he, the Petitioner, Mr. Carney, Mr. Garrett, Mr. Bush, Mr. Charvis, and Mr. McMillan were all present. Mr. Puckett did not recall whether he asked the Petitioner about the Michael Miller statement during this interview.

Mr. Puckett said that he was not involved in drafting the proffer agreement and did not recall the circumstances which led to the drafting of the agreement. Mr. Puckett recalled someone—Mr. Puckett could not recall who, but he was "certain that it would have ben Housler"—using the phrase "gassed up"; in Mr. Puckett's view, the use of this phrase was an "important change" because it reflected "that [the Petitioner] had more than just a cursory knowledge, he had some involvement in encouraging the crime to be committed."

Mr. Puckett said that questioning of the Petitioner resumed the day after the proffer agreement was signed; he said that after the agreement was signed, he "expected to hear more involvement" from the Petitioner. Mr. Puckett said that he recorded two interviews that day; the first interview was an oral interview in which Mr. McMillan was present. Mr. Puckett's report concerning the interview reflected that the Petitioner briefly consulted with Mr. McMillan, after which time the interview continued. Mr. Puckett said that he did not recall the reason this consultation occurred. The interview continued, and in the interview the Petitioner told the assembled State agents that while at a trailer party, the Petitioner told Mr. Mathews "that he would go with Mathews if Mathews had the balls to go do the robbery." Mr. Puckett recalled that after a while, the interview ended because "a subsequent interview was going to be taken, a more in-depth interview."

Mr. Puckett's report of the oral interview also indicates that he spoke with the Petitioner outside Mr. McMillan's presence, asking him whether the Petitioner "was telling me the truth about this conversation[.]" According to the report, the Petitioner replied that "he [was] the one that put the idea in Mathews' mind to leave no witnesses or kill the

witnesses." Mr. Puckett testified that he asked the Petitioner this question because he "was just concerned that I wanted the truth, that I felt like that there was being some—hesitation, and I just wanted to make sure that I was getting the truth." Mr. Puckett denied using "other, more colorful words . . . to communicate that same thought[.]" Mr. Puckett said that he told the other State agents about the Petitioner's comment, although he did not recall their reaction to this comment.

Mr. Puckett said that toward the end of the oral interview, the Petitioner gave several accounts of a gun which he supposedly had. The Petitioner initially said that he had thrown his gun into the river, but after being told that divers would search for the gun, the Petitioner said that he had sold the gun. Mr. Puckett said that the Petitioner's changing details about the gun were indicative of the Petitioner's "evolving" story about his involvement with the Taco Bell murders.

Mr. Puckett said that the oral interview probably took no more than an hour and was finished by time TBI Agent Lanny Wilder administered a polygraph examination at 12:40 that afternoon. Mr. Puckett acknowledged that he had requested this polygraph examination "to prove the veracity of [the Petitioner's] statement." Mr. Puckett said that he was "sure" that he assisted Mr. Wilder in drafting the polygraph questions. He recalled that the test results were inconclusive. Mr. Puckett acknowledged that Mr. Wilder's notes indicated that the Petitioner was "really nervous" during the polygraph examination but that he (Mr. Puckett) did not recall the Petitioner being nervous at that time.

After the polygraph examination, the Petitioner was interviewed again, with Mr. Charvis, Mr. Carney, Mr. Garrett, and Mr. Bush present, although some of these persons may have been "in and out" during the October 20 afternoon interview. Mr. Puckett said that Mr. McMillan was "consistently" present for this second interview, although he acknowledged that at the Petitioner's trial he had testified that Mr. McMillan was not present when the proffer statement was "reduced to writing," which Mr. Puckett interpreted as the final writing of the Petitioner's entire statement after he had finished talking with the State's investigators. Mr. Puckett acknowledged that the written version of the proffer statement did not indicate that Mr. McMillan was present when the statement was written by Mr. Puckett and adopted by the Petitioner. However, Mr. Puckett insisted that Mr. McMillan was present while the State questioned the Petitioner regarding the substance of the proffer statement, a process which Mr. Puckett said took "hours" to complete.

Mr. Puckett then reviewed the proffer statement with post-conviction counsel. Mr. Puckett acknowledged that the statement contained several inaccuracies and discrepancies with previous statements:

- The statement recounted the Petitioner bragging about the Grandpa's robbery on a date before the robbery actually occurred.
- Although the Petitioner previously told Mr. Puckett that he (the Petitioner) told Mr. Mathews to "leave no witnesses," in the proffer statement the Petitioner said that Mr. Mathews actually made this comment.

- The proffer statement also indicated that a certain Mr. Brown made the statement about Mr. Mathews "not having the balls" to commit the offenses, whereas the Petitioner had previously told the State's investigators that he had made this comment.
- In the proffer statement, the Petitioner said that Mr. Mathews was already at the party trailer when he arrived there the night of the murders. In the oral interview taken the morning of October 20, the Petitioner said that he arrived at the trailer first.
- The Petitioner recounted buying ammunition from "Hippy Dude," a person whom the State's investigators were unable to identify.
- The Petitioner implicated Mr. Tween, Ms. Darwish, Ms. Ulagnca, and Ms. Corley in the offenses—none of whom he had implicated before the proffer statement. Mr. Puckett acknowledged that later investigation revealed that Ms. Ulangca was not involved in the Taco Bell offenses.
- The Petitioner recalled buying beer and cigarettes at a Minit Mart convenience store. He had not mentioned this detail before the proffer statement, and subsequent police investigation revealed that the Petitioner did not stop at the market the night of the offenses.

Mr. Puckett said that he did not recall whether anyone—either State agents or Mr. McMillan—pointed out these or other inaccuracies during the October 20 interview. He also did not remember Mr. McMillan making any formal objections to Mr. Puckett's questions, although Mr. Puckett did "remember the interview being stopped during portions."

Mr. Puckett said that the phrase "gassed up" did not appear in the reports

memorializing either the oral interview or written proffer statement. He said that he did not recall why the term did not appear in his reports.

On cross-examination, Mr. Puckett said that he read to the Petitioner "every word" that he had written to be incorporated in the proffer statement. Regarding the Michael Miller statement, Mr. Puckett said that he did not recall talking about the Miller statement with Mr. McMillan and did not recall any connection between Mr. McMillan and Mr. Miller.

TBI Agent Lanny Wilder

TBI Assistant Director Lanny Wilder testified that he had conducted polygraph examinations "on and off since 1974." When conducting an examination, his practice is first to meet with the field agent, who would provide him with "a brief explanation of the case" and a list of potential questions to ask the examinee. After this meeting, Mr. Wilder would advise the examinee of his rights and give the examinee two forms to sign: a Miranda rights waiver and a form agreeing to the polygraph examination itself. Mr. Wilder would then conduct a "pretest interview" with the examinee, which Mr. Wilder said "consists of basically learning the background of subjects to give some comparison questions formulated and determine what their background is, to determine if they are in physical condition to take a polygraph test [and] to make sure that they understand what the questions are[.]" Mr. Wilder said that he does not connect the examinee to the polygraph machine during the pretest interview and that only he and the examinee are present for the pretest interview and the examination itself. Mr. Wilder testified that during the pretest interview, he reviews with

the examinee the questions to be asked during the polygraph examination and that the examination questions can be changed during the pretest interview.

Mr. Wilder then explained the procedure for the polygraph examination:

> I tell them the exam is about ready to begin, then I explain the attachments that I place on them. Once that is on, I try to start the test as quickly as possible because it is a little uncomfortable with the blood pressure cuff on, so I like to leave it off as long as I can and pump it up and run the test and take it off and we do a minimum of three charts, which is the same questions . . . they could be in a different order, but it would be the exact same questions.

After completing the test, Mr. Wilder would remove the machine attachments and review the charts "so that I can go back and give them the results and see if they have any explanations if the results are not in their favor. Mr. Wilder said that sometimes he can provide the examinee with the test results "five to fifteen minutes, [although] if it is a really close examination, it could take hours." After providing the test results to the examinee, "I ask if there [are] any explanations . . .[or] reactions . . . [if] there [are] no reactions, then that is the end of the conversation." Mr. Wilder said that his practice was to tell the examinee about the test results before informing law enforcement officials.

Mr. Wilder testified that he administered two polygraph examinations to the Petitioner. After reviewing a "Polygraph Data Sheet" prepared in connection with the first examination, given March 10, 1994, Mr. Wilder recalled that during the pretest interview, the Petitioner said that he had gotten "very little" sleep and said that "he had a cold for a couple of days." Mr. Wilder said that although no witness's signature appears on the data form, he said that it was not standard practice for the data sheet to bear a witness's signature

unless the examinee was a minor. The record reflects that the Petitioner signed a Consent to Polygraph Examination" form, and that the form indicated that the questions would concern "Robberies in Montgomery County, Tennessee," which Mr. Wilder understood to mean both Taco Bell and Grandpa's. The record also reflected that the Petitioner signed a Miranda waiver.

The list of questions from the March 10 polygraph examination indicates that the first three questions asked of the Petitioner concerned the Taco Bell offenses: (1) "Prior to the robbery, did you discuss robbing the Taco Bell with anyone at Red's trailer?"; (2) "Were you in any way involved in the robbery at Taco Bell?"; and (3) "Did you know Courtney Mathews before the Taco Bell Robbery?" The Petitioner answered these questions in the negative. Mr. Wilder also said that when he asked the Petitioner, "Were you involved in the robbery at the pay phone in front of Grandpa's?" the Petitioner refused to answer the question. Mr. Wilder's report concerning the polygraph examination stated that during the pretest interview, the Petitioner "stated that he had no involvement in any robberies that had occurred in Montgomery County, Tennessee," but in the posttest interview the Petitioner "acknowledged that he had been involved in robberies prior to the occurrence of the robberies in Montgomery County, Tennessee."

Mr. Wilder said before the posttest interview, "I don't think [the Petitioner] mentioned the word 'Grandpa's', that he was saying there were other robberies and then it was after I asked what could have caused the deception on the other questions, that he brought up

Grandpa's." Mr. Wilder acknowledged that the "other questions" referenced the Taco Bell offenses.

Mr. Wilder testified that Mr. Puckett requested the second polygraph examination of the Petitioner, which took place on October 20, 1995, because he "needed to have some testing done to verify some statements that had been given[.]" Mr. Wilder said Mr. Puckett requested that he conduct the examination because "[i]t would have been normal procedure that whoever had run the first test, would run any additional testing." The "Polygraph Examination Worksheet" which Mr. Wilder completed before the examination indicated that Mr. Wilder found the Petitioner to be "really nervous" before the examination. Another form indicated that the Petitioner was asked, "Do you know why you have been asked to take a polygraph exam today?", to which the Petitioner replied, "Verify truthfulness and not shooter." Mr. Wilder acknowledged that TBI file did not contain a signed Miranda waiver from the Petitioner, although he produced a signed Miranda waiver from his personal records—a document which counsel for both sides said that they had never seen before Mr. Wilder's testimony at the evidentiary hearing.

Mr. Wilder testified that he discussed the polygraph examination questions with Mr. McMillan and the Petitioner before the examination, although he did not know whether they reviewed a written version of the questions. The record reflects that during the examination the Petitioner was asked four questions concerning Taco Bell, the last two of which were "Do you know where the guns used in the Taco bell homicides were disposed of?" and "Is there

anyone involved that you know of in the Taco Bell homicides that you have not told investigators about?" The Petitioner answered "no" to these questions.

Mr. Wilder recalled that he told both Mr. Puckett and Mr. McMillan about the test results, which were inconclusive. When asked about the above-listed questions during his posttest interview, the Petitioner told Mr. Wider "that he did not know anyone else that was involved in the Taco Bell homicides, nor did he know what happened to the guns that were used."

Former Army CID Agent Robert Inserra

Robert Inserra, a middle school teacher, testified that at the time of the Taco Bell murders he was the supervising Special Agent in Charge of the CID Office at Fort Campbell. He said that CID agents would routinely document their investigations via Agent Activity Reports, and that the CID agent would compile a concluding report, which often summarized the earlier Activity Reports, when CID concluded its investigation.

Mr. Inserra said that suspects in military custody were guaranteed certain rights akin those provided in Miranda warnings via Article 31 of the Uniform Code of Military Justice. He said that a suspect's Article 31 rights included the right to counsel, either through the suspect's hiring a civilian attorney or being provided a military Trial Defense Service attorney. Mr. Inserra said that if a suspect invoked his Article 31 rights, the questioning agents would end their questions; if the suspect wished to waive his Article 31 rights, the

agents obtained a written waiver. Mr. Inserra insisted that CID was "pretty strict" about obtaining a written waiver rather than an oral waiver.

Mr. Inserra said that Fort Campbell had "nothing resembling a stockade or an actual jail"; rather, a suspect being detained would be held in a detention cell at the post's Military Police (MP) station. He said that a suspect could be held "a couple of hours, maybe overnight" in the cell, but that he did not recall anyone being held in the cell for two days. Mr. Inserra said he never saw the MP holding cell at the Fort Campbell.

Mr. Inserra said that in cases such as this one, where a soldier was suspected in an off-post crime, CID would first "call the lead agency. It was mostly . . . us, acquiring enough information [from the civilian agency to keep our chain of command informed of what is going on[.]" He said that if the civilian investigators "needed to interview other unit members or something of this nature, they might come through us and ask us to arrange to have that person available for them and that kind of thing." When asked whether he sat in on interviews conducted by civilian police, Mr. Inserra replied, "I have no specific recollection, but I imagine I might have[.]"

Mr. Inserra said that in the Courtney Mathews case, after Mr. Mathews was arrested, CID obtained Mr. Mathews's fingerprints and certain medical records. Mr. Inserra acknowledged that although the Taco Bell case was considered a joint investigation, civilian law enforcement agencies "did the bulk of the work" and that CID learned about the information contained in its concluding report from civilian law enforcement agencies. Mr. Inserra testified that CID Agent Carter Smith was assigned to the case and that he composed

most of the CID's concluding report, although he left Fort Campbell before the CID investigation was closed in September 1994. He further testified that CID closed its investigation because "there was sufficient evidence to warrant closing it" and the civilian agencies were not requesting "anything else" from CID.

Mr. Inserra testified that nobody from the State or the Petitioner's defense team contacted him regarding the Petitioner's trial or Mr. Mathews's trial. On cross-examination, Mr. Inserra acknowledged that "it would have been the normal procedure for the prosecution to have contacted [CID] about the [concluding] report, if they had it[.]"

Army CID Agent Carter Smith

Carter Smith, the lead CID investigator in the Taco Bell case, testified that he worked with the Clarksville Police Department (through Mr. Charvis) and TBI (through Mr. Puckett) in this case, although he did not recall interacting with the District Attorney's Office. Mr. Smith said that this investigation was a "joint investigation," but that CID's investigation was not a "detailed" one because the offenses occurred off post. Mr. Smith said that TBI and the police continued to keep CID abreast of developments in the case, developments which Mr. Smith detailed in his Agent Activity Reports.

Like Mr. Inserra before him, Mr. Smith explained the Article 31 rights available to military personnel suspected of a crime. Mr. Smith testified that a waiver of the suspect's Article 31 rights was required to be in writing. Mr. Smith said that if a civilian police officer

was interviewing a suspect on base, it was not necessary for a CID agent or an MP officer to be present.

Mr. Smith acknowledged that "a substantial portion" of the information contained in the concluding report CID issued when it closed its investigation into the Petitioner's case came from civilian agents. He also testified that he went to Korea before CID closed its investigation in the Petitioner's case, so he did not write certain parts of the concluding report, including the concluding paragraph which stated that the Petitioner was not suspected to have taken part in the Taco Bell offenses. Mr. Smith acknowledged that he testified at the Petitioner's trial.

On cross-examination, Mr. Smith testified that the end paragraph of the CID's concluding report in this case was "completed by an agent who wasn't as familiar with the case as I was[.]" He also acknowledged that CID closed its investigation in September 1994, over a year before the Petitioner was indicted in this case. Regarding a suspect's waiver of Article 31 rights, Mr. Inserra said, "If they aren't in custody, and I am not going to interrogate them, they ain't getting the rights waiver." He added that it was "rare" that a CID agent did not have a waiver form with him at the time of questioning, and if such an event happened, "we backed it up with a written confirmation of the waiver as soon thereafter as we could[.]"

Petitioner's Pretrial Counsel, Laurence McMillan

Laurence M. McMillan, Jr., who represented the Petitioner between March 1994 and January 1996, testified that he had little criminal defense experience when he was appointed to represent the Petitioner; specifically, Mr. McMillan said that he had participated in "one or two" felony trials, and no murder trials, before his appointment. Mr. McMillan said that he and Mr. Carney practiced together for about six months before Mr. Carney was appointed District Attorney in summer 1993. Mr. McMillan said that the firm was not an equity partnership but rather an association held out as a partnership. Mr. McMillan testified that the attorneys did not share or refer business to other attorneys; rather, "pretty much whoever got the call . . . got the particular case." Mr. McMillan said that he was friends with Mr. Carney "to the extent that you can be friends with someone who has been working with you for six months," although he did acknowledge that at the Petitioner's 1997 suppression hearing, he had testified that he was "friends with everyone in the DA's office and that . . . the person that [he] was closest to was General Carney." Mr. McMillan said that he never told the Petitioner about his former business association with Mr. Carney.

Mr. McMillan said that when he was appointed to represent the Petitioner, the Petitioner was charged only with the Grandpa's robbery. However, Mr. McMillan recalled that before he was appointed to the Petitioner's case, he was approached by Billy South with the Clarksville Police Department, who asked Mr. McMillan if he "would be interested in representing someone who may be connected with the Taco Bell situation[.]" Thus, Mr. McMillan testified that when he first met with the Petitioner, Mr. McMillan said to the Petitioner "something like everyone is talking about Taco Bell," and he also told the

Petitioner that "they are saying that you were at this trailer where it was planned[.]" Mr. McMillan said that the Petitioner replied, "why is everybody wanting to talk about Taco Bell? I don't know anything about Taco Bell." Mr. McMillan recalled that at his initial meeting with the Petitioner, the Petitioner appeared "animated," "very hyper," and "stressed out," and that he was adamant in denying that he knew anything about the Taco Bell crimes. Mr. McMillan did not recall whether he asked the Petitioner about the Grandpa's robbery during this initial meeting.

Mr. McMillan did not recall the Petitioner telling him anything during this initial meeting about his detention at Fort Campbell, but the record reflects that at the 1997 suppression hearing, Mr. McMillan testified that the Petitioner had told him about "CID finally having gotten to him;" specifically, the Petitioner told Mr. McMillan that he had not slept for two or three days while at CID, and that the CID investigators had kept the lights on him "all the time[.]" The record also reflects that at the suppression hearing, Mr. McMillan testified that he was concerned over the conditions at CID and the voluntariness of the statements resulting from the Petitioner's CID questioning. However, at the instant evidentiary hearing Mr. McMillan testified that he did not recall asking anyone associated with the prosecution about the Petitioner's CID questioning. Mr. McMillan said that he did not recall what actions he took in representing the Petitioner in the Grandpa's case, but he was certain that he did not file a motion to suppress the CID statements. Mr. McMillan testified that in his view, "the State did not show much interest in prosecuting him on that charge at that time[.]" Mr. McMillan surmised that the State's apparent lack of interest in

prosecuting the Grandpa's robbery likely prevented him from seeking a plea agreement in the Grandpa's case—particularly after the Petitioner made bond.

The record reflects that the Petitioner waived a preliminary hearing on April 18, 1994, and that Mr. McMillan agreed to said waiver. At the beginning of his testimony, Mr. McMillan said that he did not recall waiving the preliminary hearing; when presented with the waiver form, he said that he did not recall his reasons for waiving the preliminary hearing, although he surmised that he did so in return for a bond reduction. Mr. McMillan said that his normal practice would have been not to waive a preliminary hearing in criminal cases because he "usually did not like to give up that discovery option."

Upon reviewing records pertaining to the Grandpa's case, Mr. McMillan and Mr. Hemmersbaugh acknowledged some difficulty in determining the Petitioner's initial bail in the Grandpa's case. After reviewing the records, Mr. McMillan testified that "initial bond may have been fifty thousand dollars[.]" Mr. McMillan said that this bond did not appear to be high for a robbery case pending in Montgomery County; he acknowledged that it would not have surprised him had the bond actually been $100,000. Mr. McMillan denied that the bond, which he did not challenge initially, was designed to keep the Petitioner in jail "to put pressure on him" in the Taco Bell case; rather the high bond was representative "of the routine practice in this community of having extraordinarily high bail."

Mr. McMillan acknowledged that on March 21, 1994, he was present when the Petitioner gave a statement in connection with the Taco Bell case. Mr. McMillan recalled talking to the Petitioner about the statement before it was given, recalled talking to Mr.

Carney, and remembered the Petitioner uttering the term "1-8-7" and saying something about leaving no witnesses, but Mr. McMillan recalled little else from the meeting. Mr. McMillan testified that he had "no idea" why the Petitioner, who had previously denied any involvement in the Taco Bell case, changed his story, although Mr. McMillan said that he had no "recollection that David exhibited anything to me to suggest that he didn't know exactly what he was doing, with regard to giving this statement[.]"

Mr. McMillan recalled representing Larry Davis in a rape case and that a plea agreement was reached in the case after Mr. Davis gave a statement related to the Taco Bell crimes. Mr. McMillan acknowledged that the deal in the Davis case was "pretty good" and that Mr. Davis came by Mr. McMillan's office after his release attempting to thank Mr. McMillan, who did not meet with Mr. Davis on these occasions.

Mr. McMillan acknowledged that he was present when Mr. Davis gave his statement to Mr. Puckett on March 16, 1994. In the statement, Mr. Davis recalled a jailhouse conversation with Courtney Mathews in which Mr. Mathews said, among other things, that "if he had to do it over again, he would do it different," and that "he was the only one in there." Mr. McMillan acknowledged that the Petitioner's name did not appear in the Davis statement.

Mr. McMillan testified that he did not recall Michael Miller or his statement, which Mr. McMillan acknowledged implicated the Petitioner in the Taco Bell offenses; specifically, Mr. McMillan said that his understanding of the Miller statement was that it "said that [the Petitioner] was there [at Taco Bell] but not inside, which is consistent with the story that

David told following the proffer." Mr. McMillan also did not recall the Petitioner being confronted with the Miller statement in April 1994.

Mr. McMillan testified that he did not recall the process in which the Petitioner's bond was reduced, although he acknowledged that the Petitioner made bond in September 1994. Mr. McMillan testified that he did not recall whether he did any work on the case between April and September 1994, nor did he recall talking to the Petitioner between September 1994 and October 1995, when the Petitioner returned to Clarksville. Mr. McMillan said he did not recall why the Petitioner was recalled to Clarksville or what he told the Petitioner before the Petitioner came back to Montgomery County.

Mr. McMillan acknowledged that the Army CID report, issued in September 1994, concluded that the Petitioner "was not suspected" to have participated in the Taco Bell offenses. Mr. McMillan said that he had never seen the CID report before the instant evidentiary hearing and that had he known about the report, such knowledge would not have affected his representation of the Petitioner because he "was dealing directly with David and relying upon David to tell me the truth."

Mr. McMillan summarized what he told the Petitioner before the State's questioning of the Petitioner resumed in October 1995:

> I told him that David they are doing this to you, not for you. Is there anything that we need to be worried about here? Do you have any involvement—remember they were trying to say that you were participating in the planning of this thing? You first said that you didn't even know Courtney Mathews. You didn't knew this, you didn't know that. Then you made a statement that you were there and overheard this business, you know,

> it is very important not to volunteer any information. If there [is] any information that needs to be given that is new, you need to talk to me first.

Mr. McMillan testified that he also told the Petitioner that he could end the interview at any time and that he should ask the State for the chance to consult with his attorney if needed.

Mr. McMillan said that "there were often many people" representing the State present for the interrogations, including Mr. Carney, Mr. Garrett, Mr. Puckett, Mr. Charvis, and Mr. Bush, although Mr. McMillan said that some of these persons were "in and out" during the interview. Mr. McMillan denied that the number of State representatives was "overwhelming" and said that he did not object to the number of persons representing the State during the interview. Mr. McMillan said that he did not discuss any "ground rules" with the prosecutors before the interview because he knew that "we were all going to behave ourselves professionally, period."

Mr. McMillan testified that he did not object to any questions the State asked during the first day of interviews and that the only instance which he found objectionable—Mr. Bush showing the Petitioner photographs of the victims at the crime scene—did not occur on the first day of questioning. Mr. McMillan said that the incident with the photographs occurred "at the end of the longest day" of questioning and that the questioning ended when he objected to the question. Mr. McMillan recalled that the Petitioner refused to look at the photographs and became "real animated" when Mr. Bush presented them. Mr. McMillan said that he did not recall anyone telling the Petitioner that he faced a twenty-year sentence

in the Grandpa's case and did not recall anyone telling the Petitioner that "everyone involved in the Taco Bell crimes would get the death penalty and fry[.]"

Mr. McMillan said that the version of events which the Petitioner gave on the first day of questioning in October 1995 was consistent with his March 1994 statement. Mr. McMillan said that he remembered few details regarding the second day of questioning—October 19, 1995—and specifically did not recall any conversation between the Petitioner and Mr. Puckett occurring outside his presence. However, Mr. McMillan did recall that at one point, the Petitioner "volunteered . . . facts that made him a participant in the planning of the Taco Bell robbery." Mr. McMillan explained:

> It wasn't something as simple as oh yeah, I gassed him up[.] He vomited that he actively participat[ed] in the planning of the Taco Bell robberies with Courtney Mathews at that trailer as I had told him that there were witnesses out there that—according to law enforcement that had made him do that, excuse me—that had put him there doing that, to which he had always denied to me.

Mr. McMillan added that he "ran everybody out of the room right then," and that he and the Petitioner had a "heated" discussion in which Mr. McMillan expressed his displeasure with the Petitioner. Mr. McMillan said that although he could not recall the Petitioner's comments with specificity, "it was enough that in my legal opinion he had just given to them[,] without telling me first, enough to convict him of four counts of . . . conspiracy to commit first-degree murder[.]"

Mr. McMillan said that after he was "sure" that he told the Petitioner that he was facing four Class A felonies, each of which carried a potential twenty-five year sentence, after the Petitioner volunteered information which Mr. McMillan believed implicated the

Petitioner in conspiracy to commit murder charges. However, he doubted that he told the Petitioner that the Taco Bell offenses were eligible for the death penalty, and he also doubted that he warned the Petitioner that his cooperation with the State could have led him to implicate himself in a capital crime.

Mr. McMillan testified that he did not end the questioning after the Petitioner made the statement implicating himself in the Taco Bell offenses, and that after the Petitioner made this statement, negotiations related to the proffer agreement began. At one point during the examination, the following exchange occurred:

> Q [Mr. Hemmersbaugh]: In your view, given what Mr. Housler said and the dramatic effect, and given who your client was and his propensities, and he's demonstrated—pliability with respect to his story, given all of that, would it have been constitutionally ineffective assistance of counsel to allow the interrogation to continue after that point
>
> A [Mr. McMillan]: I think so. Now, I should say this, you said propensities? I have no idea exactly what you are talking about because you could pull this propensity, that propensity, I am not agreeing with you that based on his propensity, it was, but once you have someone who in my opinion implicated [him]self in a very serious matter, there should have been no more questioning until we were going to try to determine what we were going to do about this problem.

Mr. McMillan testified that he told the Petitioner about his intention to negotiate a proffer agreement with the State. He added that the written proffer agreement was Mr. Garrett's idea, and that the proffer agreement was necessary because Mr. McMillan "thought

David had just gotten himself way in over his head and we needed to attempt to get out of it." Mr. McMillan testified that he did not recall the exact manner in which the proffer agreement was formulated, but he did recall negotiating the terms of the agreement with Mr. Garrett and that the written proffer agreement represented the actual terms upon which he and Mr. Garrett agreed.

Mr. McMillan testified that he had never entered into a written proffer agreement before the instant case and that he did not recall discussing the Howington case with anyone before entering into the proffer agreement.

Mr. McMillan testified that under the agreement, the Petitioner would plead guilty to one count of conspiracy to commit first degree murder and would receive a sentence of fifteen years as a range I, standard offender, and that the Petitioner would be eligible for release after serving thirty percent of his sentence, or 4.5 years. He believed that the Petitioner would also serve eight years as a range I, standard offender, for aggravated robbery, with the Petitioner being eligible for release after serving 2.4 years of his sentence. Mr. McMillan testified that he believed that this eight-year sentence for aggravated robbery in connection with the Taco Bell offenses, and therefore the Petitioner would not be eligible for release until serving 6.9 years. Even after reviewing the proffer agreement, Mr. McMillan testified that he did not believe that the Petitioner's sentence for the Grandpa's robbery was contemplated in the proffer agreement. When asked whether the Petitioner understood the terms of the agreement, Mr. McMillan testified that there was "no question in my mind [that] he should have and did understand what he signed." Mr. McMillan also

admitted that "[t]here are some things in that proffer that . . . may not have protected [the Petitioner] to the extent that he needed protection.

In reviewing the terms of the proffer agreement, Mr. McMillan acknowledged that the agreement did not provide a date on which the Petitioner would plead guilty for conspiracy to commit murder. Mr. McMillan said that the term providing that the Petitioner would remain on his present bond provided a benefit because "otherwise, there would be potentially an increased bond that he would have to make new." Mr. McMillan also said that although the term whereby the State would provide witness protection and relocation financial assistance tom the Petitioner did not specify the amount of assistance or the place to which he would be located, the parties who participated in the negotiation understood that this term "had to do with the trailer, trying to get him a spot where he couldn't be found until he testified."

Mr. McMillan testified that under the terms of the agreement, the State had the unilateral power to determine whether the Petitioner had breached the agreement, but that in such an instance, the trial court would decide whether a statement taken pursuant to the breached agreement could be used against the Petitioner at trial. Mr. McMillan said that he was concerned that the State had the unilateral power to declare breach, and that he expressed this concern to the Petitioner, but Mr. McMillan told his client "he would have to tell the truth and if he did, we would be fine."

Mr. McMillan testified that under the terms of the agreement, if the Petitioner offered trial testimony that was "materially different from what he had given to them, it would be

deemed a breach" and that in such an instance "he could be charged with some greater charges or a greater charge." He also said that if the State were to declare a breach of the proffer agreement in any respect, "I would be certain there would be litigation to follow and ultimately" the issue of whether the breach was material would be decided by a court.

Mr. McMillan testified that based on the terms of the proffer agreement, he believed that if the Petitioner would have provided truthful information to the State but that the State decided not to use the information, the Petitioner would still face a prison sentence as provided in the proffer agreement.

Mr. McMillan testified that the proffer agreement was signed the evening of October 19, 1995. He said that he did not recall whether there was any additional questioning the next day; to the best of his recollection, Mr. McMillan said that the Petitioner had given an oral statement the evening of October 19 and that the substance of this statement was recorded in written form the next day. Mr. McMillan said that he did not recall the Petitioner submitting to a polygraph examination the next day, and upon learning that the Petitioner actually submitted to such an exam, he insisted that he neither approved of nor knew about the polygraph examination. Mr. McMillan also said that he did not stay for the formal recording of the proffer statement on October 20 because "it was to be consistent with the very long and extremely detailed statement David had given the night before, pursuant to the proffer." When showed Mr. Puckett's report detailing an oral statement which the Petitioner gave the morning of October 20—a report which stated that Mr. McMillan was present—Mr. McMillan said, "I started out being present, but as the statement was going to be actually put

down, I was not." When asked whether it was important for him to have been present when the Petitioner wrote out the proffer statement, Mr. McMillan replied, "Is it important? Yes. If David had been truthful and consistent, we wouldn't be here today." However, Mr. McMillan said that he considered the Petitioner's oral version of events given the evening of October 19 to be the "final" version of the proffer statement—not the written statement recorded October 20.

Mr. McMillan testified that he did not recall the reason why the Petitioner was recalled to Clarksville in November 1995. He said that his recollection of the meeting between the Petitioner and the State that day—at the conclusion of which the Petitioner was arrested—was based largely on a memorandum which he had composed shortly after the meeting. His testimony regarding the events of November 7 was as follows:

> My independent recollection is . . . David and I were in the conference room. I believe John Carney told me that he had—here, I am trying to get past, I did read that statement the last couple of days, so I am trying to honestly say what is my recollection? And my recollection is there was a request for David to confront this Sulyn person, who is my understanding, I was told, right through the wall, in the next room. And that she had been investigat[ed], . . . I don't know if I remember the lie detector portion of it[.] I know that's in the memo. And my recollection was as I told Mr. Baugh the other day, David wanted to talk to her out of the presence of everybody[.] And that was denied. If that had happened, I would have put that in the memo . . . . But if that's when those statements between David and I—I mean, just utter disbelief and I told him I thought he was really—and he said what are you worried about? You are going home tonight[.] If that's when that happened—and then I remember I was still upstairs and I remember there was a commotion. There was some running. And I think I saw David being escorted from the building in handcuffs. That's my independent recollection today. . . . I went back to my office, I sat down utterly shocked at what had just occurred, . . . picked up our dictaphone equipment . . . and dictated that memo.

Mr. McMillan said that he recalled the Petitioner being "real[ly] shocked" about the State wanting him to confront Ms. Ulangca. He acknowledged that his memorandum stated that the Petitioner refused to confront or be confronted by Ms. Ulangca, and that Mr. Carney told Mr. McMillan that the Petitioner's refusal to confront Ms. Ulangca constituted a breach of the proffer agreement. The memorandum also details that the district attorney told Mr. McMillan that the Petitioner breached the agreement "based upon the DA's belief of the story of Sulyn in not being present on the premise as well as the possibility that [the Petitioner's] initial statement had been untruthful." Mr. McMillan's memorandum also stated that Ms. Ulangca had informed the State that she could not provide an alibi for the Petitioner the night of the Taco Bell murders.

Mr. McMillan testified that Mr. Carney informed him of the Petitioner's breach outside the Petitioner's presence. Mr. McMillan said that he did not remember telling the Petitioner about the State's declaration of breach, but he assumed that he did tell the Petitioner about the State's declaration. Mr. McMillan acknowledged that he left the district attorney's office upon the Petitioner's arrest because Mr. McMillan did not believe that he had the power to change the Petitioner's predicament at that point.

Mr. McMillan said that between the Petitioner's arrest and January 19, 1996, the date on which he withdrew as counsel, he "[did not] remember taking any affirmative step as [the Petitioner's] lawyer in connection with the defense of the Taco Bell [offenses]. . . . [T]here may be a time entry where I talked to him again or something . . . I don't know if I talked to him or not[.]" Mr. McMillan said that during a break in the April 1997 suppression hearing,

he did talk to the Petitioner, in the presence of Mr. Terry and Ms. Gore, about waiving the attorney-client privilege so that he (Mr. McMillan) could testify regarding privileged communications, but he did not remember whether he advised the Petitioner to waive the privilege.

On cross-examination, Mr. McMillan claimed that he represented the Petitioner competently, denied committing any constitutional violations during the time he represented the Petitioner, and insisted that the Petitioner participated in the decision-making process during the time he represented the Petitioner. Mr. McMillan also did not recall the Petitioner expressing any concern about Mr. McMillan's representation. Mr. McMillan also denied that his representation of the Petitioner, by itself, led to the Petitioner's convictions; he noted, "Certainly what occurred on my watch led to [the Petitioner] being convicted. Had it not been me, had it been someone else and the facts would have been the way they were with me, I think it would have happened on someone else's watch[.]" Mr. McMillan insisted that had the Petitioner told him that he (the Petitioner) had driven Courtney Mathews to the Taco Bell the night of the murders, he would not have allowed the Petitioner to make a statement in this case. At the end of redirect examination, Mr. McMillan recalled that the State declared breach in part because the Petitioner implicated Sulyn Ulangca in the Taco Bell offenses. On redirect examination, when asked what part of the proffer agreement implicated Ms. Ulangca, Mr. McMillan recalled that the Petitioner "put Sulyn in a car that was going down Boot Hill, which is real close to the Taco Bell[.]" When advised that in the written proffer statement, the Petitioner detailed Ms. Ulangca "protesting" and saying that she did not want

to be there, Mr. McMillan acknowledged that he did not challenge the State's assertion that the Petitioner breached the agreement by falsely implicating Ms. Ulangca.

Mr. McMillan testified that information derived from an "investigative interrogation" would be admissible at court, while information derived from plea negotiations would be inadmissible. Regarding Mr. Davis, Mr. McMillan acknowledged that his general practice would have been to withdraw had he represented one client who implicated another client, but he did not withdraw in Mr. Davis's case because he did not "see a conflict there. Davis had been there from the beginning and we are going to the end, I mean the target at that stage was Courtney Mathews," not the Petitioner.

Petitioner's Lead Trial Counsel, Michael Terry

Michael Terry testified that he had been licensed to practice law for twenty-one years when he was appointed as lead counsel for the Petitioner in December 1995. Mr. Terry testified that before the April 1997 suppression hearing he and Ms. Gore became aware of "allegations that . . . the[] conditions in—at CID were not good." Specifically, Mr. Terry recalled that the Petitioner was interviewed on several occasions during his four-day detention at CID. Mr. Terry said that he believed no lawyer was present on the Petitioner's behalf and that he had "no specific recollection that [the Petitioner] received Miranda warnings"—Mr. Terry insisted that he saw no written Miranda waiver from the Petitioner's CID interrogations, nor did he remember any evidence that the Petitioner had been given

Miranda warnings before any of his October 1995 interrogations. A Miranda waiver did exist for a March 10, 1994 polygraph examination taken at CID.

Mr. Terry testified that before the April 1997 suppression hearing he was aware of voluntariness problems with the CID statements, as well as with the Petitioner's other statements to State agents. In addition to the lack of Miranda warnings, Mr. Terry recalled that he believed Mr. McMillan was not present for some of the Petitioner's interrogations. However, Mr. Terry said that at the suppression hearing he and Ms. Gore focused mainly on the lack of truthfulness of the Petitioner's statements; Mr. Terry said that he raised a voluntariness argument, but that such argument was not as sufficient as it could have been. Mr. Terry said that he and Ms. Gore erred by not attacking in great detail the involuntariness of the Petitioner's statements:

> . . . . [W]e were too distracted or too focused on the facts. The facts were impossible; the facts were not true; and there was a - - there was probably a shorter - - more shorter course by simply starting with the Miranda principles and working through these statements, and raising the fruit of the poisonous tree argument that we would have had.
>
> . . . .
>
> . . . . We put the statements in the binder and took them to the suppression hearing and tried to use them to show that the final statement was not true, which is something I believe 110 percent. But . . . there was . . . another course that we could have pursued at the same time, and that would have been that they were - - they were coerced, not voluntary, not Mirandized.

In reviewing the terms of the proffer agreement, Mr. Terry acknowledged that there was nothing in the proffer agreement preventing the Petitioner from entering a guilty plea at the time the agreement was reached. Regarding the term under which if the Petitioner breached the agreement, the Petitioner's statements could be used against him in court in a

proceeding for offenses other than perjury or false statement, Mr. Terry testified that this term was inconsistent with state and federal law. He also said that the proffer agreement was "ambiguous" as to whether the agreement authorized the State to do such a thing. Regarding the term under which the "value" of the Petitioner's information was to be determined by the District Attorney's office in its sole discretion, Mr. Terry said, "I don't think that's unusual. I think typically the prosecutor's going to reserve some discretion in what recommendation he makes on the sentence based on a performance of the cooperating defendant."

Mr. Terry also testified that were the Petitioner to have acted in good faith in providing information to the State only to have the State find the Petitioner's information to be of no value, the State would still have been obligated under the terms of the proffer agreement to recommend an effective fifteen-year sentence as part of the plea agreement. Mr. Terry added that "if the State determined that [the Petitioner] was lying, that he was not credible," the remedy would have been "back to your corners, okay; back to the place where you came from[,] not take the statement to the Grand Jury and indict him with Courtney's indictment." Mr. Terry also testified that he believed the proffer statement resulted from plea negotiations, and that pursuant to Rule 410 of the Tennessee Rules of Evidence, evidence of plea negotiations is inadmissible at trial. Nevertheless, Mr. Terry acknowledged that he did not seek to dismiss the indictment or exclude the underlying proffer statement based upon contract principles or Rule 410. He said that his failure to do so prejudiced the Petitioner.

Regarding the Petitioner's assertion that the proffer agreement was unenforceable because the State knew or should have known that the Petitioner's statements regarding the Taco Bell offenses were false, Mr. Terry said,

> When they entered into the agreement I don't know what they knew, but I know that from the suppression hearing we had in April of '97 that Agent Puckett, John Carney, Steve Garrett, and I don't know if there were others, but at least those three people testified that provisions of the Housler final statement were not true, and that, as General Carney said when I asked him did you inform the Grand Jury that indicted him that provisions of this statement were not true, and he said - - I said did anyone, and he said I didn't. So I don't think there was any redaction and I think that false evidence was admitted to the Grand Jury and false evidence was admitted at the trial.

According to Mr. Terry, these inaccuracies included, but were not limited to: (1) the Petitioner's assertion that Mr. Mathews was at the party trailer on January 21, 1994, when Mr. Mathews was actually at work; (2) the Petitioner's statement that Mr. Mathews was at the party trailer the day of the offenses, when in fact Mr. Mathews was at work that day before coming home and returning to work; (3) Melanie Darwish bragging about the Grandpa's robbery at the January 21 party, when the robbery did not occur until January 23, 1994.

Mr. Terry also commented upon why he believed the final proffer statement contained much greater detail than did the earlier statements and that the new statement also contradicted the previous statements in certain respects:

> David was tested by a woman by Pamela Auble I believe, and I think there was some analysis testing by Dr. Burnett [sic]. And I think in that, his analysis, there was some findings of - - that he was an impulsive young man and that he had some problems with short-term attention, that type of thing. But he was - - you know, I'm just getting into my opinion to go any further,

> but he's just not equipped to deal with a room full of skilled prosecutors. And I think that this - - that a lot of this is simple suggestion and nodding of the head, yeah, yeah, yeah. When you ask about what was Sulyn wearing, maybe he - - he just reaches back and says, you know, she's wearing a stripped [sic] shirt with stockings and whatever. It would be kind of phenomenal if he remembered that detail; if anybody remembered that detail. I mean, the detail in itself is almost a suggestion of the falseness of it.

Mr. Terry acknowledged that he did not seek to dismiss the indictment based upon the proffer statement's inaccuracies, and that his failure to do so prejudiced the Petitioner.

Mr. Terry acknowledged that shortly before the suppression hearing, the Tennessee Supreme Court released its Howington opinion, and that pursuant to this opinion the State would have been required to prove a material breach of a plea agreement before declaring said breach. Nevertheless, Mr. Terry did not seek to challenge the proffer agreement or indictment based on Howington, nor seek to enforce the agreement. He stated that his failure to do so prejudiced the Petitioner. Mr. Terry acknowledged that the proffer statement constituted the State's "entire case" against the Petitioner and testified that the evidence used at trial to corroborate the proffer statement would not have been sufficient to convict the Petitioner absent the proffer statement.

Mr. Terry testified that after the Petitioner was indicted in the Taco Bell case he did not have any discussions with Mr. Radford about a potential plea agreement because Mr. Radford "wasn't going to settle this case. . . . [H]e wasn't hired to settle this case. He was hired to prosecute it." Furthermore, Mr. Terry said that getting discovery from Mr. Radford's office was an ongoing struggle:

> [I]n order to get something from General Radford, and I know you could say you had to describe it specifically, very specifically, and often had to come to court to get it. And so you - - you almost had to find out that it existed before you could describe it and go get an order to get it.

Mr. Terry said that he did not see the Army CID report until after trial; had he had the report at trial, he would have used it to cross-examine witnesses, particularly Carter Smith. He also stated that at the time of trial he was unaware of any letter from Larry Underhill to Gus Radford in which Mr. Underhill discussed Mr. Radford's potentially writing letters to the parole board on Mr. Underhill's behalf.

Mr. Terry said that he retained Dr. Ofshe, intending to call him at trial. Mr. Terry testified that although Dr. Ofshe had been retained before the April 1997 suppression hearing, and although Dr. Ofshe's potential testimony at the suppression hearing could have helped established that the Petitioner's confession to these offenses was false, Mr. Terry did not call Dr. Ofshe to testify at the suppression hearing. Mr. Terry admitted that his failure to call Dr. Ofshe at the suppression hearing was a mistake. Mr. Terry also said that he did not call Dr. Ofshe to testify at trial, despite telling the jury during his opening statement that Dr. Ofshe would testify. Mr. Terry said that his decision not to call Dr. Ofshe ultimately resulted from funding and scheduling difficulties—particularly scheduling:

> [By] the time we got to the end of trial, I remember being on the telephone and Ofshe's somewhere in the United States and wanted a two-day lead on getting here; and I couldn't give him a two-day lead. And when I put that phone down I said . . . I've got enough fires to put out without dealing with this guy that needed two days.

Mr. Terry said that Dr. Ofshe's status as a Berkeley academic did not factor into the decision.

Mr. Terry said that he had planned to call Dr. Bernet as part of a "package deal" along with Dr. Ofshe, although Mr. Terry admitted that "there was information that Burnett [sic] could have provided without Ofshe that would have helped [the Petitioner]; and I think it was a mistake not to call Burnett [sic]. And he was available."

Mr. Terry said that he convinced the Petitioner to waive his attorney-client privilege as to Mr. McMillan so that Mr. McMillan could testify regarding conversations he had with the Petitioner. Although Mr. Terry knew that Mr. McMillan, who was called as a State witness at the suppression hearing, believed the Petitioner was involved in the Taco Bell offenses, Mr. Terry wanted Mr. McMillan to testify

> [b]ecause we were trying to develop the facts with this - - this statement that grew from a denial to what it did. And he - - McMillian [sic] was there for a lot of that. And I still believe that McMillian [sic] was the first person that suggested to Housler that if you know something about Taco Bell it could help you. . . .
>
> So those facts we were trying to develop with his testimony - - and like I said, we should have done it in a more sophisticated way. We should have tried to build a wall around the privilege and gotten the other testimony in.

Mr. Terry recalled a meeting he and Ms. Gore had with Mr. Gant and Mr. Simmons following the Courtney Mathews trial. Mr. Terry acknowledged that Mr. Gant had told him that the Petitioner was innocent and that Ms. Gore asked how he (Mr. Gant) could have known that. Mr. Terry said that he remembered Mr. Gant "looking up in the air. And I realized that the reason he knew [that the Petitioner was innocent] was because Courtney Mathews had told him." Mr. Terry said that he then communicated this belief to Ms. Gore.

Mr. Terry said that he left this meeting "completely convinced" that the Petitioner was not involved in the Taco Bell offenses.

Mr. Terry said that he retained Inquisitor to work on the Petitioner's case and that Ms. Shettles was the primary Inquisitor employee who worked on the case. Mr. Terry said that Ms. Shettles worked on "what[ever] was the next thing that needed to be done" and that her work was not limited to mitigation investigation. Mr. Terry said that the potential conflict of interest involved with Inquisitor's work on Mr. Mathews' case "was not an issue with us. . . . [W]e needed resources, and [Ms. Shettles] was a good one." Mr. Terry said that he knew Ms. Shettles and other Inquisitor employees knew that the Petitioner was not involved in the Taco Bell offenses—and, furthermore, that Mr. Mathews had said that the Petitioner was not involved—based upon the unredacted timeline which detailed conversations between Mr. Mathews and Inquisitor employees. Mr. Terry said that he was aware that the "RLL" and "GJS" annotations on the timeline represented Mr. Lax's and Ms. Shettles' initials. Mr. Terry said that he and Ms. Gore attempted to "use" the timeline in their investigation and at trial but did not attempt to introduce it into evidence and did not call Ms. Shettles or Mr. Lax to testify.[5] Mr. Terry said that these failures prejudiced the Petitioner.

When shown the memoranda underlying the unredacted timeline, Mr. Terry stated that the memoranda were "totally consistent" with his theory that Mr. Mathews committed the Taco Bell offenses alone and that the Petitioner was not involved. Mr. Terry stated that he

[5]Mr. Terry subpoenaed Mr. Lax, Ms. Shettles, and Mr. Simmons to testify at trial. The trial court quashed the subpoena as to Mr. Simmons but denied the State's motion to quash the subpoenas issued to the Inquisitor investigators. Still, Mr. Terry did not call the investigators to testify at trial.

had "no doubt that if David Housler was involved in the Taco Bell crime . . . [such information] would be in" the memoranda. Mr. Terry admitted that he and Ms. Gore should have been "more tenacious" in seeking to introduce the unredacted timeline and the related documents into evidence at trial, despite any potential hearsay problems. He also stated that he should have attempted to argue that the attorney-client privilege between Mr. Mathews and his attorneys had been waived.

Regarding the Miller statement, Mr. Terry recalled that "[t]he day before trial and on the way into the courthouse I grabbed Gus Radford and I said you got Miller on your list; Miller's recanted." Mr. Miller testified anyway, and Mr. Terry objected to Mr. Miller's testimony on the grounds that he had recanted. Mr. Terry said that the trial court issued an instruction to disregard Mr. Miller's testimony but that the damage had been done:

> I do know this: That when Miller sat down in the box we should have brought the recant to the attention of Judge Gasaway and had the testimony excluded at that point. It was a mistake to allow it to come in under any circumstance; it was a mistake to require the judge to have to instruct the jury on testimony that should have been excluded and not allowed in the courtroom.
>
> And I think it was prejudicial. I think it's the . . . old, you know, once it's said it's said; however you want to say it; horse out of the barn, or whatever.

Mr. Miller said that he should have moved for a mistrial but he did not think that one would have been granted.

Mr. Terry recalled that he did not call Kevin Tween, whom the Petitioner's proffer statement referenced as accompanying Mr. Mathews into the Taco Bell when Mr. Matthews committed the murders, to testify at trial. Mr. Terry acknowledged that Mr. Tween was the

"only purported accomplice" in the proffer statement who did not testify at trial. Mr. Terry testified that he did not call Mr. Tween because "Tween was hostile . . . not because he had anything incriminating to say but he just didn't want to be involved in Taco Bell any more." Mr. Terry also said that "when it came time to find people we couldn't find him."

Mr. Terry stated that he did not present any mitigation evidence at the sentencing hearing at which the trial court imposed consecutive sentences. Mr. Terry said that he did not present mitigation evidence, such as testimony from the victim's family, would not have been effective in this case.

Mr. Terry acknowledged that during the hearing on the Petitioner's motion for new trial, he did state to the trial court that his failure to seek to have certain portions of the proffer statement stricken constituted ineffective assistance of counsel. However, he said that this statement resulted from his belief that "we have . . . an innocent man whose [sic] been convicted of something he didn't do so a new trial on any basis would be a good thing[.]" He added, "that conclusion, ineffective assistance of counsel, is not for me to draw."

On cross-examination, Mr. Terry said that he did not think he and Ms. Gore had any difficulty communicating with the Petitioner. He said that he believed the evidence that the State presented to corroborate the Petitioner's proffer statement to be "concocted." He also said that while he was familiar with the concept of "attenuation," in which an intervening event would "purge the taint" of an impermissible statement, he was not sure whether the fifteen months that passed between the CID interrogations and the October 1995 statements constituted such attenuation. Mr. Terry acknowledged that the timeline contained

"statements by Courtney [Mathews] that contradict[ed] other statements by Courtney," but that the timeline also contained "credible . . . statements that are corroborated by the forensic evidence and the witnesses in this case."

Petitioner's Trial Co-Counsel, Stephanie Gore

Stephanie Gore testified that she was appointed as co-counsel for the Petitioner in December 1995, eight months after passing the Tennessee bar exam. She said that during the case, she interviewed witnesses, performed legal research, and worked with the State in acquiring discovery, but major decisions regarding the Petitioner's representation were made by Mr. Terry in his role as lead counsel. Ms. Gore said that Mr. Terry examined witnesses, made opening and closing arguments, and argued pretrial motions.

Ms. Gore testified that Larry Wallace, a licensed attorney and law school classmate of hers, was retained as an investigator. Ms. Gore said that Mr. Wallace's duties were "to make sure that we received all of the discovery, to go through it, to write a synopsis or memorandums on the discovery and to log every piece of paper that he obtained from the State." Ms. Gore testified that after Mr. Wallace would receive discovery, he would "go through everything with me, . . . and then I would go through everything and put it into a file for trial. Ms. Gore said that Mr. Wallace worked mainly with Ms. Young and Mr. Garrett at the District Attorney's office in obtaining discovery.

When asked whether she and Mr. Terry had "issues" in obtaining discovery from the State, she replied, "Absolutely, yes." Ms. Gore described these difficulties:

> We first requested written discovery, then we would follow up usually in writing. We would send Larry [Wallace] out to get what we thought we were supposed to have and then usually we would learn from—a lot of times, from the Mathews' [sic] [d]efense [t]eam, that there was information out there that we weren't getting; that there were statements that we weren't getting; that there were notes from General Garrett that we weren't getting; that there were memos regarding our client that we were not receiving, and so we then would come to Court and the Court would order that we would receive all of the information and all of the discovery, especially any statement that our client had given to any law enforcement agency.

Ms. Gore said that she and Mr. Terry filed a motion for the State to file written responses to all defense motions because "[w]e would file motions and we would never get a response to our motion until we would come to the hearing and the State would have . . . nothing in writing whatsoever," but even after the trial court granted the motion, "it was still laborious trying to get the State to put anything down in writing and to respond to anything in writing to us." Ms. Gore also noted that after the Court granted the Petitioner's motion ordering the State to submit under seal and have the Court review in camera any material that the State deemed was not discoverable, the State did not comply with the court's order.

Ms. Gore testified that she did not see the Army CID report—which stated in pertinent part, "It was not suspected that he participated in the commission of crimes identified in this report. The robberies are also believed to be minor in nature."—before trial. Ms. Gore said that had she seen the report before trial, she"[a]bsolutely" would have used it at trial. She also said that the Petitioner's defense team did not receive the two letters sent from Larry Underhill to Gus Radford—one sent October 15, 1997 (before trial), and one sent May 17, 1998 (after trial)—during the time she and Mr. Terry represented the Petitioner. Ms. Gore

said that she would have used Mr. Underhill's first letter to impeach Mr. Underhill's testimony at trial.

Ms. Gore said that she and Mr. Terry consulted with Mr. Mathews's attorneys, Isaiah "Skip" Gant and James Simmons, as well as their retained investigator, Mr. Lax. Ms. Gore recalled that she and Mr. Terry first met with Mr. Gant and Mr. Simmons shortly after she and Mr. Terry were appointed to represent the Petitioner. She said that Mr. Gant and Mr. Simmons requested the meeting "to inform us that we were representing an innocent man." Ms. Gore recalled that she said, "How do you know that?" According to Ms. Gore, Mr. Terry "leaned over to me and said[,] ['']Stephanie, his client has told him. He can't tell us—he is telling us as best he can, his client has told him he knows how the murders were committed.['']" Ms. Gore testified that Mr. Gant then made a gesture, which the Court described as "the palms of both hands up in a gesture form." Ms. Gore said that "[e]veryone in the room understood it but me . . it just took me a little bit of time to understand it," and she said that Mr. Gant and Mr. Simmons's information represented "a significant impact, to understand that we were representing an innocent man."

Ms. Gore testified that Mr. Gant and Mr. Simmons told her and Mr. Terry that they "were entitled to anything that we needed" in the Mathews defense team's files "to help us in our defense of David Housler. It was . . . overwhelming evidence against Courtney Mathews and so they basically gave us their files." Ms. Gore said that she would go through the files in Mr. Simmons's law firm and make copies of them as needed. She testified that at first, she would call Mr. Simmons and notify him that she wished to review his files, but

that "later on, it got to where if I got there before they were closed, then I was able to just go in and Jim a lot of times was not even there."

Ms. Gore said that the Mathews materials were kept in the law library at Mr. Simmons's firm, and that neither Mr. Simmons nor Mr. Gant placed any restrictions on Ms. Gore's ability to review those documents. Ms. Terry also said that she reviewed Mathews documents which Mr. Simmons kept in his personal office. She said that Mr. Simmons also kept documents from other clients in his office. Ms. Gore said that she did not have to inventory those Mathews files which she copied from Mr. Simmons's files.

Ms. Gore said that at one point, Mr. Simmons provided her with a timeline which Inquisitor employees had prepared in the Mathews case. Ms. Terry described the timeline as "basically starting from before the Taco Bell murders were committed . . . what Courtney was doing days before the murders were committed, what he was doing while the murders were committed, and what happened after the murders were committed." Mr. Simmons told Ms. Gore that, per Mr. Gant's request, he had redacted certain portions of the timeline. However, Ms. Gore later found an unredacted version of the timeline among Mr. Simmons's Mathews files. Ms. Gore described the process which led to her discovering the unredacted timeline:

> It was . . . late at night, I do know that. Jim Simmons had been there earlier and we were talking—I wanted to make sure—it was right towards the end where I felt like I had gotten just about everything I needed from [Mr. Simmons and Mr. Gant] and I wanted to make sure that I had not missed anything, so I asked Jim to come into the room with me and you know, basically around the four corners of the room, ask Jim have I missed anything on this particular wall? Is there anything over in this file cabinet? No, no. I

said is there anything over on that wall? And that wall that I was pointing to is where the book shelves were, and he said, I don't know[.] There's a bunch of documents over there. Is there any problem with me looking at anything over there? No, anything you find, you are welcome to copy.

At that point, Ms. Gore began "going through piles of documents that were on the bottom shelf of this book shelf." Eventually, she found the unredacted version of the timeline, which "explained what Courtney Mathews did, exactly who he killed, how he killed them, what he was doing before he killed them, [and] what he did after he killed the people at Taco Bell." Ms. Gore said that when she found the unredacted timeline, "[t]here was no one else in the law office at that time . . . everyone was gone, it was late." She attempted to contact Mr. Terry but was unable to do so. When she spoke with Mr. Terry about the unredacted timeline, he told Ms. Gore that she "did the right thing" in copying the unredacted timeline. Ms. Gore said that she "did not have any concerns of whether or not I should have it[.]" She added, "I felt I had permission—I had been told I had permission to take anything especially, specifically where I found it, I was told that I could copy and take anything that I needed." Ms. Gore testified that she not tell anyone else that she had the unredacted timeline at that time and did not tell the Petitioner about the timeline until after trial.

Ms. Gore testified that she "knew [the unredacted timeline] was vital for my client, David Housler" because "we had heard how the [Mathews] [d]efense [t]eam thought that the murders were committed, about Mathews climbing up in the ceiling, and it was completely exactly how we had been told how the murders were committed, just verbatim."

Ms. Gore said that she and Mr. Terry did not attempt to use the timeline at trial because "we did not believe that we would be able to use it . . . [b]ecause it was privileged." She added that she and Mr. Terry did not consider arguing that the document was not privileged until the hearing on the Petitioner's motion for new trial. Ms. Gore said that she did not recall why she and Mr. Terry decided to raise the "lack of privilege" argument at that time.

Ms. Gore testified that eventually, she and Mr. Terry retained the investigative services of Inquisitor, and that Ms. Shettles was the primary person whom worked on the Petitioner's case. Ms. Gore said that Inquisitor was retained because she and Mr. Terry

> were having difficulty interviewing all the witnesses and locating all the witnesses that we needed to locate. They had terrific resources at that time and I was mainly calling Glori or [Danese] Banks . . . or whoever was over at Inquisitor, and asking for certain addresses and telephone numbers and they were helping us find witnesses because they had found them before in Courtney Mathews and oftentimes, they would ask me if we get in touch with a witness, do you want us to interview them for you? And I said sure. And so it—through that, we . . . asked the Court to please appoint Glori Shettles to help us in mitigation evidence for David Housler[.]

Although Ms. Gore was aware that Inquisitor had provided investigative services in Mr. Matthews's case, she did not recognize the potential conflict of interest associated with retaining Inquisitor in the Petitioner's case.

Ms. Gore said that Ms. Shettles acknowledged that she had been present for interviews in which Mr. Mathews explained how he had killed the Taco Bell victims. Ms. Gore also testified that Ms. Shettles had contacted a certain Florence Butts, who told Ms. Shettles that "she did not believe that David had anything to do with Taco Bell," and that Ms.

Shettles also wrote a letter to Mr. Terry and Ms. Gore in which she stated, "Both Courtney and David Housler deny that they have ever met . . . ." Ms. Gore acknowledged that Ms. Shettles's letter reflected that she "had some personal knowledge of Mr. Mathews' position regarding Mr. Housler." Ms. Gore also acknowledged that, in her view, this statement "impl[ied] that Mr. Mathews told Ms. Shettles this information[.]" However, Ms. Gore also acknowledged that before the Petitioner's trial, she did not ask Ms. Shettles whether she had spoken to Mr. Mathews.

Ms. Gore testified that Mr. Terry spoke with Mr. Simmons about Mr. Mathews completing an affidavit related to the Petitioner's case. She said that she eventually spoke with Mr. Simmons, who "relayed to me exactly what his client would be willing to sign in an affidavit, testify to . . . ." Ms. Gore then sent the affidavit to Mr. Simmons via facsimile, with the intention that Mr. Simmons would then provide the affidavit to Mr. Mathews for his signature. The proposed affidavit, dated September 9, 1997, states in pertinent part that: (1) Mr. Mathews was not with and did not see the Petitioner on January 29, 30, or 31, 1994; (2) although Mr. Mathews may have met the Petitioner at a party before January 30, 1994, the Petitioner did not recall such a meeting; (3) Mr. Mathews met the Petitioner while they were both held in the Montgomery County Jail in March 1994; and (4) the Petitioner had "no knowledge of David Housler other than the aforementioned contact." The proposed affidavit further states that the Petitioner had "never had any discussions with David Housler whatsoever about Taco Bell before or since January 30th, 1994. The only words I remember passing between myself and David Housler is something to the effect of hello, nice to meet

you." Ms. Gore insisted that "[t]he information that is in this affidavit came from Jim Simmons, which came from Courtney Mathews." Mr. Simmons later informed Ms. Gore that Mr. Mathews refused to sign the affidavit.

Ms. Gore testified that Mr. Terry subpoenaed Mr. Simmons but that the trial court quashed the subpoena. She also said that Mr. Lax was subpoenaed but not called to testify at trial. She also said that Ms. Shettles and Mr. Gant did not testify at the Petitioner's trial.

On cross-examination, Ms. Gore testified that she met with the Petitioner fewer than ten times before trial. She said that she and Mr. Terry consulted with the Petitioner "[a] little" during jury selection and that she talked with the Petitioner during trial about witness testimony and about any motions that she and Mr. Terry had filed. She said that she and Mr. Terry spoke with the Petitioner about testifying, although she was unsure whether the Petitioner understood he had the right not to testify. Ms. Gore denied that she forced the Petitioner do anything during the trial.

Ms. Gore said that she talked to Dr. Ofshe about testifying, and that she and Mr. Terry intended to call Dr. Ofshe as a witness at trial. She testified that Dr. Ofshe was not called to testify because "he was very hostile towards the [d]efense] [t]eam, I believe he lived in California and it was not pleasant calling Dr. Ofshe and trying to maneuver his flight here to Clarksville. Ms. Gore said that "by the time that we were able to present him as a witness, I believe it came sooner than we expected and we decided not to [call] Dr. Ofshe." Ms. Gore insisted that Dr. Ofshe's status as a "Berkeley academic" did not figure into the attorneys' decision not to call him as a witness.

Ms. Gore testified that at the suppression hearing, the Petitioner waived the attorney-client privilege between himself and Mr. McMillan after she and Mr. Terry advised him to do so. Ms. Gore said that she and Mr. Terry wanted Mr. McMillan to testify

> because Mr. McMillan had not been in the meeting, the ten plus hours of meeting with Mr. Housler when he signed that statement . . . [Mr. McMillan's] records reflected that he had not spent much time whatsoever with Mr. Housler . . . it was in David's best interest . . . to get Mr. McMillan's time sheets into the record.

Ms. Gore acknowledged that the "seminal piece of evidence against Mr. Housler" at trial was the Petitioner's proffer statement, which Ms. Gore claimed the Petitioner signed without counsel present. Ms. Gore also acknowledged that at trial, Mr. Underhill testified that Mr. Housler claimed he had been in the Taco Bell and had actually shot the victims. Ms. Gore testified that she did not recall any information that Mr. Underhill later "told everyone that he was having hallucinations[.]"

Ms. Gore testified that she "had access to whatever Mr. Simmons had in his office . . . except what was in his personal office." She denied that she was ever told not to look at any particular files, and she also acknowledged that she did not contact Mr. Simmons after she found the unredacted timeline in his office. Ms. Gore said that the unredacted timeline contained more information than did the proposed affidavit that Ms. Gore composed pursuant to her conversations with Mr. Simmons (but which Mr. Mathews refused to sign). Ms. Gore said that she used the timeline before trial to organize witnesses but did not display it to the Petitioner in the courtroom. Ms. Gore said that she did not realize that the initials "GJS" on the Mathews timeline were Ms. Shettles's initials; she said that had she known these initials

belonged to Ms. Shettles, Ms. Gore would have known that Ms. Shettles had interviewed Mr. Mathews and that "she would have information of [the Petitioner's] innocence and Courtney Mathews' guilt and how the murders were committed."

Ms. Gore said that she "hoped" that the jury would find the petitioner not guilty and was surprised when the jury returned guilty verdicts against him. She said in her view, the State had failed to prove the Petitioner's guilt beyond a reasonable doubt. When asked why she believed the jury found the Petitioner guilty, she said,

> I think that the jury . . . got confused, that they didn't think that the State of Tennessee would bring an innocent man and put him through trial[.] And I believe that they went back in the jury room and found David Housler guilty not on the evidence the State put forth, but because they wanted to find him guilty because the State said he was guilty.

Ms. Gore acknowledged that her representation of the Petitioner was deficient and that she performed in an "incompetent" fashion. She testified that she did not recall the Petitioner expressing any dissatisfaction with her and Mr. Terry's representation and said that the Petitioner never requested another attorney in Ms. Gore's presence.

On redirect examination, Ms. Gore testified that the Petitioner was "confused" when she showed him the unredacted timeline after trial. Ms. Gore acknowledged that when she and Mr. Terry declined to call Dr. Ofshe, they had no other expert witness available to testify regarding false confessions. She also testified that Mr. McMillan believed the Petitioner was guilty of the Taco Bell offenses and that she knew of no other reason why Mr. McMillan was called, other than to get his time records into evidence.

Dr. Richard Ofshe

Richard Ofshe, PhD., a Professor Emeritus in the University of California's Sociology Department, testified that he had focused his professional career over the past two decades on the study of police interrogation techniques. He said that he did not consider himself an expert on false confessions because a false confession was one possible result of a coercive confession. He also testified that in the over two hundred cases in which he had testified, he had never given his opinion as to whether the confession at issue was false because "I don't necessarily know all the evidence. It is not my job to do that . . . [i]t is my job to assist the jury in understanding the phenomenon, and enable them to better analyze the evidence in the case at hand."

Near the beginning of his testimony Dr. Ofshe acknowledged that he "receive[d] a very biased sample of cases. An attorney has to believe that there is some reason to think it's either a false confession or coerced statement[.]" He also testified that there is nothing problematic with either the two-part structure of the common police interrogation—in the first part, the subject admits to the offense; in the second, the police "collect[] the detailed account of the person's role in the crime"—or the controlled setting in which the interrogation takes place. Dr. Ofshe testified that police interrogations incorporate three variables which are designed to lead to a suspect's confession. The first is the setting, which "create . . . a playing field that is intended not to be level. It is intended to confer an advantage on the interrogator[.]" The second variable is the "evidence ploy," which Dr. Ofshe described as "any assertion made by an interrogator, which [if] true, would link the

person to the crime." He added that an evidence ploy, which could be true or false, was designed to "drive the suspect's confidence that they are going to be okay from high down to practically zero." The third variable is a "motivator," or "[a] reason why you should shift from denial to admission." Dr. Ofshe testified that there is nothing necessarily wrong with evidence ploys and motivators, but in those instances where the "motivator" is a threat, a promise of a lenient sentence, or a choice between life and death, the interrogation can become psychologically coercive. Dr. Ofshe insisted that coercive interrogation techniques can result in both true and false confessions. In the case of a false confession, a subject who is motivated by a plea deal may be given to guess about the details of the offense because "they have been promised a deal and now they are asked questions and they quickly learn that telling the interrogator I don't know, is not a satisfactory answer[.]"

Dr. Ofshe testified that generally, he begins his trial testimony by "educat[ing] a jury as to the existence of the phenomenon of false confession." He would then "explain to a jury how interrogation really works, because interrogation . . . is a mystery." Ultimately, his role would be "helping in that education and helping to lead [the jury] through the facts of the case and show them how it plugs into the model and giving them a standard that they can use or reject; it's up to them." He added,

> Attorneys in my experience . . . don't have a well-developed intellectual understanding of the dynamics of interrogation. Therefore, they don't know how to cross-examine, they don't know how to develop the discovery even from their own client as to the details of interrogation. I read testimony in [a]ppellate cases of what happened at trial with respect to what was put before the jury about the interrogation and I find it frightening. It is so simplistic, so shortened down for something that is in my judgment, an extremely important

> element that must be understood before a jury can act intelligently and . . . in my experience, [attorneys] are not provided with enough understanding of interrogation or even facts about the interrogation. . . . [T]hey don't know how to examine a police officer about interrogation and they let stand things that I find to be laughable. . . .

In this case, Dr. Ofshe was retained by Mr. Terry and Ms. Gore in December 1996. As part of his work on the case, he reviewed documents, including the Petitioner's statements to police, and interviewed both Mr. McMillan and the Petitioner. Dr. Ofshe testified that he concluded that the Petitioner's October 1995 interviews was psychologically coercive and could have produced a false confession. Dr. Ofshe explained the bases for his conclusions:

> Mr. Housler, in the interviews that I did with him, reported that prior to his giving the last statement, he was threatened that he would fry on two occasions, that he was told that there was overwhelming evidence—and these are my words—overwhelming evidence showing that he was actually involved in the Taco bell robbery and murders. Special evidence ploys were used, assertions were made about these pieces of evidence. All of the things that I have talked about—the elements of moving someone down that confidence scale to a state of hopelessness and then he was also threatened that they had him and that if he was involved in this, as they knew he was, he would fry, meaning he would receive the death penalty.
>
> In the alternative, he was offered a deal. The deal had certain parameters to it. If he satisfied that deal, he would not fry, which sets up exactly the circumstance that I am talking about. If you don't talk, we have got you. You are going to fry. If you talk—meaning tell us what we are telling you we know to be true, there were other people involved, you had more involvement in it than just being at the party, then the deal is available. So—that put him in a position of having to choose between life or death, and that's the kind of psychologically coercive choice that can precipitate a false confession.

Although Dr. Ofshe characterized the CID interrogations as "vigorous[]" and "powerful," he said that [t]here was no report by Mr. Housler or anyone else that he was coerced, he was exposed to psychological coercion during that period. . . . [H]e [did] not

move one bit in his denial of involvement in Taco Bell[.]" Regarding the Petitioner's time in the Clarksville jail, Dr. Ofshe described the jail environment as a "snitch culture" in which the Petitioner first became aware of "the idea that he could get a benefit if he was able to provide information about Taco Bell to start with." Dr. Ofshe said that Mr. McMillan's actions in encouraging the Petitioner to make a deal in return for Taco Bell information, his comment that the Petitioner had implicated himself in a conspiracy to commit murder, and his inaction during the October 1995 interrogations—which served as a "taci[t] agreement" that reinforced the State's "threat" against the Petitioner were he not to cooperate—made the effects of the State's interrogation all the more powerful.

When asked about the inaccuracies in the Petitioner's statement, Dr. Ofshe replied,

> As I have said before, the fact that there are inaccuracies in the statement is consistent with someone guessing as opposed to speaking from experience. The more there are of those, the more central they are, the stronger the conclusion that this is consistent . . . with the person making up the statement. When you have this many mistakes, it has got to be a major red flag for any competent investigator, saying this statement is garbage and when it is produced through the use of a threat of a death penalty and an offer of a deal . . . there is a clear explanation for why someone would do this. The available evidence says this is what they probably did. All of this is consistent and all of this goes to how you should categorize the confession. Is it evidence of innocence or is it evidence of guilt and how much weight should we give it? That's for the trier of fact to do. I mean, my whole exercise is to educate the trier of fact to behave intelligently and rationally with the evidence presented rather than the prejudice that gets introduced the minute it is said someone confessed to the crime.

When asked why a person who read the Petitioner's proffer statement, discounting those parts of the statement that were proven untrue, would be unable to view the statement as a confession to participating in the Taco Bell offenses, Dr. Ofshe replied,

> Because the purpose is to get information that can be verified so there is no verification for his being at the Taco bell from any source. He says it, but it's uncorroborated by anyone and there is—I mean, those are useless—in a sense, those are useless statements. They can't be corroborated. You can't do anything more with it than to simply say it exists. Can't use it as a basis for an inference of anything. It's simply a statement and everyone is capable of making things up. So, you have to eliminate statements that cannot be evaluated. You have to eliminate things that could be known through contamination and that's why you focus on what is volunteered that is provable. You have already taken what is volunteered that is provable and pretty much thrown out all of it, which means there's essentially nothing left.

Dr. Ofshe said that he was not asked to testify at the suppression hearing, even though he had worked on the Petitioner's case before the hearing was held. He also said that although he expected to testify at the Petitioner's trial and would have been willing to rearrange his schedule to testify, he was never called to testify. Dr. Ofshe said that Mr. Terry never told him why he was not called to testify.

On cross-examination, Dr. Ofshe testified that "if someone is threatened with the death penalty, if someone is offered a deal . . . take[s] a deal and then gives a statement that fails to corroborate their involvement in the crime, that looks like something that is consistent with someone having been coerced into giving an unreliable statement." He denied that his testimony informs the jury that police officers are trained in a manner to produce false confessions; rather, his testimony instructed the jury that "sometimes psychological coercion is used" during police interrogations, and that this coercion can result in both true and false confessions. In this particular case, Dr. Ofshe would have testified regarding both the Petitioner's and the State's versions of the October 1995 interrogations and that "those two versions cannot be reconciled[.]"

Dr. Ofshe testified that although what he viewed as the coercive interrogation tactics occurred before October 20, 1995, the date on which the Petitioner gave the proffer statement, he believed that the proffer statement resulted from coercion because "the techniques flow from the introduction of psychological coercion which preceded that date and were never withdrawn and so in a sense, it is fruit of the poisonous tree."

Dr. William Bernet

William Bernet, M.D., a forensic psychiatrist, testified that when the Petitioner's trial counsel first contacted him, "they asked me if I could conduct a psychiatric evaluation of Mr. housler and to see whether or not he had any mental condition or psychological factors that might have a bearing on whether he would make a false confession[.]" Dr. Bernet testified that he interviewed the Petitioner for four hours and reviewed "about seven statements that Mr. Housler had made," as well as other documents the defense team had acquired during its investigation. Dr. Bernet said that these documents included interviews with the Petitioner's family and earlier psychological testing conducted by Dr. Pamela Auble.

After reviewing the above-referenced material, Dr. Bernet did not prepare a written report, although he said that "I was intending to testify . . . and so I prepared an outline of what I was going to testify about." Upon reviewing his outline, Dr. Bernet recalled he diagnosed the Petitioner with "adjustment disorder with anxious mood, history of [cannabis] abuse, which refers to previous use of marijuana, and also anti-social and schizoid personality traits." Dr. Bernet said that an anti-social personality trait was "not a full-

fledge[d] disorder. . . . I thought Mr. Housler had some maladaptive personality traits in that he did some things that were anti-social and he also had some schizoid personality traits." Dr. Bernet said that the Petitioner's anti-social personality was evidenced by "his conduct over the years in high school and beyond, he had done things that did not comply with the rules," such as skipping school, being arrested for shoplifting, and his being AWOL with the army. Dr. Bernet added that "[s]chizoid personality traits refer to people who have difficulty relating to other people. In other words, they tend to form superficial relationships with other people rather than deep relationships."

Dr. Bernet testified that the Petitioner had "several personality traits that made [the Petitioner] vulnerable to being more suggestible than an average person and therefore, more vulnerable to making a false confession[.]" Dr. Bernet identified six specific personality traits; first, Dr. Bernet said that the Petitioner "had a tendency towards being deceptive and manipulative", which Dr. Bernet explained as follows:

> [A]t times, [the Petitioner] was dishonest and lied about things and did things that did not involve following the rules. I think in this situation, he basically was trying to fool the police. . . . [H]e felt that he could outwit the police and he thought that he could fool them, and so he lied to them because he thought by doing so, he could get a better deal."

Dr. Bernet said that he would not describe the Petitioner as a "habitual liar," but that the Petitioner "lied when the occasion suited him, where he thought he could get a better deal."

Second, Dr. Bernet said that the Petitioner had impulsive tendencies, which meant that the Petitioner "tended to do things based on the short term consequences and he would totally ignore the long term consequences . . . he basically would try to do something that fit the

needs of the moment, rather than to think about in the future." Third, Dr. Bernet concluded that the Petitioner did not function well under stress. Fourth, Dr. Bernet said that the Petitioner "was a compliant person who was easily influenced by other people," which meant that the Petitioner "was not assertive and so in order to get along with other people, he would try to do what the other people wanted done, and frequently, that got him into trouble." Fifth, Dr. Bernet said that the Petitioner "was socially distant from other people," and finally, Dr. Bernet said that the Petitioner "was involved with fantasy than most people are."

Dr. Bernet recalled that the Court approved funding for his involvement in the case on December 31, 1996, and that Mr. Terry and Ms. Gore sent him additional records in Summer 1997, which led him to interview the Petitioner on September 4 and September 11, 1997. Dr. Bernet said that he planned to testify at the Petitioner's trial, and that he discussed his potential testimony with the Petitioner's trial counsel, but on November 16, 1997, he received a facsimile message from Mr. Terry informing him that Mr. Terry and Ms. Gore intended to call only one expert witness at trial: Dr. Ofshe. Dr. Bernet said that he was unclear why the Petitioner's attorneys decided not to call him as a witness. Dr. Bernet testified that his trial testimony would have differed from Dr. Ofshe's testimony in that Dr. Ofshe "was going to talk about the research and the theoretical aspects of why people make confessions and . . . I was going to talk about Mr. Housler specifically, about his personality traits as to why he would have been more vulnerable to make a false confession."

On cross-examination, Dr. Bernet testified that Dr. Auble's testing indicated that the Petitioner "had average intelligence" and suffered from no thought disorder that would have

affected his ability to process information. Dr. Bernet acknowledged that the Petitioner was logical in thought, coherent, and goal-oriented, but that the phrase "goal-oriented" referenced the Petitioner's ability to carry on a conversation, rather than "being goal-directed in terms of one's life." In describing what he meant when he wrote that the Petitioner "appears to have good insight into the circumstances that led to his false statements," Dr. Bernet said that the Petitioner "was able to explain that during that process, he was trying to figure out what the investigators wanted to hear and then he would try to conform his statement to what he thought they wanted to hear[.]" Specifically, Dr. Bernet said that in this case, the Petitioner "thought he could get a better deal by telling the investigators what they seemed to be looking for[.]"

Inquisitor Owner/Investigator Ron Lax

Ron Lax testified that he had been a private investigator since 1971 and had owned and operated Inquisitor, Incorporated, since 1978. Mr. Lax said that in 1996 and 1997, he supervised between thirteen and fifteen employees, including Glori Shettles and Danese Banks, both of whom testified at the evidentiary hearing. He testified that his agency is retained to provide investigative services in both the guilt/innocence phase and mitigation phase of trial. Mr. Lax said that in the regular course of Inquisitor's business, investigators with the agency will prepare memoranda contemporaneously with client interviews, and that the agency routinely composes time lines based upon the client interviews and resulting memoranda.

Over the objection of Mr. Lax's counsel, Mr. Lax testified regarding a May 10, 1994 memorandum he prepared memorializing his April 28, 1994 interview with Courtney Mathews. As part of his testimony, Mr. Lax read the memorandum into the record. According to the memorandum, on that day Mr. Mathews told Mr. Lax several details about the Taco Bell killings. Mr. Mathews told the investigator that the day before the victims' bodies were discovered at the Taco Bell,[6] he worked from 2:00 p.m. until 9:15 or 10:15 p.m. After clocking out, he sat outside the restaurant, where another employee saw him. Mr. Matthews told this other employee, "you don't see me." Mr. Matthews ultimately left the restaurant and returned to his residence.

According to Mr. Lax's memorandum, when Mr. Matthews returned home, several other people were present. After Mr. Matthews spoke on the telephone with his father and another man, he began collecting and loading several guns which he would use in the shooting. Mr. Matthews placed the guns on his bed. At one point, two men—Mr. Matthews' roommate Carl Ward and another man nicknamed "Coop" entered the room, saw the guns, and asked Mr. Matthews about them. Mr. Mathews told the men that he was going to Nashville to sell the guns to a man named Peghee. Mr. Matthews declined the men's request to accompany him on the supposed sale. Mr. Matthews placed the guns in a book bag and grabbed a bowling bag. When asked why he was taking a bowling bag with him, Mr. Matthews responded that he needed the bag because if he was stopped by police, he could

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[6]The memorandum references this date as "Saturday, January 30, 1994." However, the record clearly establishes that January 30, 1994—the date on which the bodies were discovered" was a Sunday; thus, the Saturday date referenced in this memorandum was Saturday, January 29, 1994.

tell the police that he was going bowling. Mr. Matthews told Mr. Lax that he left his residence and arrived at the Taco Bell at 11:30 p.m. Mr. Matthews drove around the restaurant and then left. Mr. Matthews told the investigator that he did not intend to rob the Taco Bell but that he instead intended to destroy an electrical box supplying power to a nearby automated teller machine (ATM), which he would rob. However, Mr. Mathews abandoned his plans to rob the ATM because there were too many people around the electrical box. Mr. Matthews then returned to the Taco Bell, arriving at 11:50 p.m.

Upon arriving at the Taco Bell, Mr. Matthews parked between two white vans. He entered the restaurant unnoticed and went to the bathroom. He pushed aside a ceiling tile, breaking off a piece of a vent, and climbed into the ceiling. Mr. Matthews told Mr. Lax that he was wearing gloves at the time but that his fingerprints were on the ceiling tile because he had "looked into the ceiling" earlier that day, while he was at work.

Mr. Lax's memorandum summarized Mr. Matthews' subsequent actions as follows:

> Courtney came out of the ceiling at 2:30 a.m. wearing a ski mask. He walked from the men's bathroom, turned left in the hallway and entered the back room through the open door. The outside doors were locked at this time. None of the four victims saw him approaching and he began firing as he entered. After shooting all four victims, he went into the office area, sat down and thought about what he had done. He then went back into the ceiling with the intent to commit suicide and he had the automatic with him. The automatic had a thumb safety and he was rubbing it back and forth on his leg. He did this several times and picked up the gun and put it to his head and pulled the trigger, but the safety was on.
>
> At this time Courtney heard one of the victims, who he thought was Patricia, began screaming and it startled him. He climbed down from the ceiling and tried to exit the front door of the building, but it was locked. He returned to where Patricia was lying and shot her two more times, but he did not look at

her. Shortly afterward Courtney thought he saw the police drive by and he went into the front area with his guns to "shoot it out" and die. After realizing the cops were not outside, he re-entered the office, sat down and started to call the police, but did not. He then shot at the safe with the shotgun, but it would not open. He collected all the money he could find and left. . . .

I asked Courtney from what distance he shot the victims and he stated he shot at least once from three to four inches away, but not every shot hit the victims. It was his recollection Marsha was shot first, then Kevin, Patricia and, finally, Angela.

Courtney knew he had left one unfired shotgun shell and one fired shotgun shell behind, along with the fired, ejected .9mm shells. He also wrote his Social Security number backward on a piece of paper and left it at the back door as he exited.

. . . .

It was approximately 3:00 a.m. when he left the restaurant and entered his car. He first thought he would drive directly to the police station. As he was driving he saw a police officer parked on the street. He loaded his .9mm and all three clips and exited his vehicle. He walked through the bushes toward the police officer, planning to sneak up on him and enter into a gunfight with him; however, the officer drove away when Courtney came within 30 feet.

Courtney took I-24 East toward Nashville and threw out the jacket and latex gloves into what he thought was a river. He then threw out the receiver to the .9mm somewhere off the right side. Further down he discarded the unfired shells along with a purple Taco Bell hat, which he had picked up at the restaurant. As he continued driving, he discarded the keys to the restaurant off to the right and made a U-turn in the median. Shortly afterward he stopped on the side of the road and counted the money, which totaled approximately $1,700 to $1,800, and placed the money in the bowling bag. He continued driving and took out his knife and cut his shirt and himself for his alibi. He threw the barrel and the spring into the median of the interstate and threw the upper part of the pistol off the road toward the right.

Courtney exited I-24 at approximately 4:30 a.m. and drove to McDonald's where he placed shotgun slugs and ammo boxes in a food sack and threw it in a dumpster behind McDonald's. He stated he was not wearing gloves at this time.

> At approximately 5:00 a.m. he arrived home and saw Kendra [Corley]. He told her he had been attacked in Nashville and the weapons had been stolen from him. She gave him some sympathy and returned to bed. After she went to sleep, Courtney took the shot gun and the remaining accessories to the back yard, placed them in a plastic bag and put them under the couch, which is located approximately 15 to 25 feet behind the house. He threw the other bag containing the accessories off toward the left and there were numerous coin wrappers also in this bag.
>
> When Courtney returned to the house, he put the coins he stole from the restaurant into a paper bag, wrote "July '92" on the bag and put them in the closet. He then left the house at approximately 6:30 a.m. and disposed of the **leather (not latex?)** gloves, pants, and boots with the bag into a dumpster behind the Winn Dixie or the Foodlion on Lafayette. He drove by Taco Bell and saw the police cars in the parking lot. He returned home and went to sleep.

(Emphasis in original).

Mr. Lax said that although this interview represented Mr. Matthews' most detailed account of the Taco Bell offenses, Mr. Matthews and Inquisitor employees spoke several times about the crimes. Mr. Lax said that as Inquisitor's involvement in the case continued, Mr. Mathews "became more and more detailed. To begin with, he had told us this Mr. Peghee was also involved, and changed that story, and in later conversations, he changed his story about going back up into the ceiling and there were little discrepancies," which were immaterial.

Mr. Lax also read into the record a portion of a memorandum he prepared detailing a March 23, 1994 meeting with Mr. Mathews, at which Mr. Mathews "stated he was not familiar with a man named David Housler." The memorandum details that Mr. Mathews eventually told Mr. Lax that he had met the Petitioner at a party and had seen the Petitioner

in the Montgomery County Jail shortly before the March 23 meeting. A memorandum detailing a July 13, 1994 meeting between Mr. Lax and Mr. Mathews was also read into the record; the memorandum details that at one point, Mr. Mathews "was adamant [that] he had not discussed Taco Bell with anyone" before the offenses occurred. Mr. Lax also reviewed a memorandum detailing a November 8, 1995 meeting between Mr. Mathews and Danese Banks, another Inquisitor investigator. The memorandum states that Mr. Mathews "admitted . . . that he had previously lied about several facts in his rendition of what occurred the night of the murders"; however, Mr. Lax said that nothing in Mr. Mathews's revised account of events affected Mr. Lax's conclusion that the Petitioner had not participated in the Taco Bell offenses.

Mr. Lax also recalled a later conversation with Mr. Mathews in which Mr. Mathews said that the decision to rob the Taco Bell was a "last minute decision[.]" Mr. Lax acknowledged that "the fact that it was a last minute decision would make it impossible for Mr. Housler to have participated in the planning of these crimes[.]"

Inquisitor employees eventually prepared a "guilt/innocence timeline" based upon the various conversations between Inquisitor employees and Mr. Mathews. In these conversations, Mr. Matthews did not mention the Petitioner, other than to say that the Petitioner's statements regarding his involvement in these offenses were untrue. According to Mr. Lax, Mr. Mathews also "said there was a possibility he may have met [the Petitioner] at one time." Mr. Lax said that Mr. Matthews never mentioned the Petitioner's being involved in the planning or commission of these offenses; when asked specifically whether

Mr. Matthews' accounts of the Taco Bell crimes excluded any involvement by the Petitioner, Mr. Lax replied, "Yes, sir, they do."

Mr. Lax said that Mr. Mathews "probably" told only him about how the Taco Bell crimes were committed. He said that Mr. Mathews "possibly" could have told Ms. Shettles this information as well, although such conversations between Mr. Mathews and Ms. Shettles were "[p]robably not in detail[.] She would have been talking to him more about how he felt at the time, what was going through his mind, what triggered him, how he felt immediately afterwards[.]"

Mr. Lax testified that Inquisitor spent 2500 and 3000 hours working on Mr. Mathews' case. He recalled that after Mr. Matthews' trial concluded, one of the Petitioner's attorneys contacted him about conducting the mitigation investigation for the Petitioner's case. Mr. Lax initially declined the request, citing his firm's earlier work with Mr. Mathews, but after Mr. Gant and Mr. Simmons told him that there would be no conflict if Mr. Lax disclosed nothing regarding the conversations with Mr. Mathews, Mr. Lax changed his mind. Mr. Lax said that Inquisitor was not appointed to conduct guilt/innocence investigation because Mr. Wallace had been appointed to conduct this investigation.

Mr. Lax read into the record Chapter 1175-4-.05(3) of the Rules of Tennessee Private Investigation and Polygraph Commission—Chapter 1175-4 is known collectively as the Rules of Professional Conduct and Standards of Practice— in effect at the time Inquisitor worked on the Petitioner's case:

> The licensee shall avoid all known conflicts of interest with his/her employer or client, and shall promptly inform his/her employer or client of any business association, interest or circumstance which could influence his/her judgment or the quality of his/her services. When such a conflict is unavoidable the licensee shall forthwith disclose his circumstances to his/her employer or client.

Mr. Lax testified that had Inquisitor not disclosed to the Petitioner that Inquisitor had worked for Mr. Mathews in the Taco Bell case, there would have been a conflict of interest because "if you work for two different clients on the same case there's a possibility of conflict of interest." When asked whether that conflict of interest would have forced Mr. Lax to "make a choice between helping one client or the other," Mr. Lax replied,

> In this situation no, I don't think so. . . . Mr. Terry and M[s]. Gore knew we had worked extensively for Courtney Mathews. Mr. Gant and Mr. Simmons sat in the office with Ms. Gore and Mr. Terry and told them that their client was innocent. It was agreed that we would work with them under the understanding that nothing Mr. Mathews had to say to us was divulged.
>
> Then an affidavit was prepared, and an order was given—or a motion was made in the court, and the Court approved us to provide investigative services. I felt that with notification to everyone, and acceptance, and everyone was in agreement.

Mr. Lax testified that he prepared a redacted version of the Mathews timeline, removing all references to conversations between Mr. Mathews and Inquisitor employees. Mr. Lax also said that although he gave the Petitioner's trial counsel "copies of all facets of [Inquisitor's] investigation," Mr. Lax did not give the attorneys "any memorandum documenting conversations or interviews we had with Courtney Mathews." When asked whether Mr. Lax disclosed "any knowledge [he] had of how the Taco Bell crimes were committed" to either Mr. Terry or Ms. Gore, Mr. Lax replied, "No." Mr. Lax said that he

was present at the meeting at which Mr. Gant and Mr. Simmons informed Mr. Terry and Ms. Gore that their client was innocent.

Mr. Lax testified that Ms. Shettles did most of the work on the Petitioner's case, although Danese Banks and Alison Frazier also did some work. Mr. Lax said that although Inquisitor was not appointed to conduct guilt/innocence investigation, "Ms. Shettles . . . did do some interviews toward the end just before trial to help Mr. Wallace[.]" Mr. Lax said he also worked on the case slightly, attending "one meeting with Ms. Gore, Mr. Terry, and Jim Simmons," contacting Mr. Terry and Ms. Gore on the telephone, and accompanying Mr. Wallace on one witness interview. Mr. Lax said that he interviewed Mr. Mathews once in connection with the Petitioner's case.

Mr. Lax said that he had a duty of loyalty to his clients, which to him meant that he was required "[t]o do the very best I possibly can." He also said that investigators generally have a duty "[t]o investigate everything they possibly can and to keep their confidence." Mr. Lax said that he had a duty to share information, and when asked whether that included a duty to share information that his client was innocent, he agreed, "[u]nless there is a prior agreement otherwise[.]" Mr. Lax said that in this case, "it was sort of a wink and a nod that everyone knew that the information was there, and it was not to be shared. That was Mr. Housler's attorneys and they agreed to that."

Mr. Lax testified that any potential conflict of interest associated with Inquisitor's work with Mr. Mathews "was resolved whenever the attorneys agreed that we could [work with the Petitioner's attorneys] and had us appointed by the Court." However, he also noted

that "when death was removed, Ms. Shettles should have stopped at that point, and not provided any other assistance." Mr. Lax said that had he wanted to work on the case himself, he would have felt "uncomfortable" yet "free" to do so.

Mr. Lax acknowledged that under the Rules of Professional Conduct for private investigators, a private investigator could not "accept compensation . . . from more than one party for services on or pertaining to the same investigation rendered in the same timeframe unless the circumstances are fully disclosed to and agreed to by all interested parties." Mr. Lax said that although he believed that he could not disclose to the Petitioner any confidential communications between Inquisitor employees and Mr. Mathews, in his view he believed he did make the required full disclosure to the Petitioner in this case.

Mr. Lax concluded his direct examination testimony by stating that based upon his investigation in the Courtney Mathews case, "there was no evidence that I found, no witness that I found that implicated Mr. Housler's involvement. There were individuals who made statements against [the Petitioner], who I found to be untruthful and the information they gave was not substantiated."

On cross-examination, Mr. Lax acknowledged that several witnesses who testified at the Taco Bell trials, including Yowanda Maurizzio, Frankie Sanford, Jacqueline Dickinson, and Damian Cromartie, were not mentioned in the Mathews timeline; perhaps because "these were witnesses [who] were developed late or provided to us late by the State[.]" Mr. Lax said that he did not recall whether he interviewed Mr. Miller, although he insisted that there was no indication that Mr. Mathews told Mr. Miller where the weapons were hidden. Mr. Lax

acknowledged that he was aware of statements made by certain individuals indicating that the Taco Bell offenses were discussed at the party trailer and that Mr. Mathews met the Petitioner at the party trailer before the Taco Bell offenses took place. Mr. Lax also said that he was aware of a statement by a certain Mr. Kennedy that placed Mr. Mathews and the Petitioner together, but that he disregarded it.

On redirect examination, Mr. Lax testified that at the time he was investigating the Mathews case, he was aware of many "wild" stories concerning the Taco Bell offenses. Mr. Lax said that he focused on the stories he deemed credible and that none of the credible stories gave him the impression that the Petitioner was involved in the Taco Bell offenses. Mr. Lax said that he was unaware of any evidence, other than the Miller statement, which he discounted, that the Petitioner knew about the location of the gun used in the shootings. Mr. Lax added that his investigation led him to conclude that "Mr. Miller's statement was not consistent with the actual facts documented in the document given to us by the state as to the recovery of the gun."

Inquisitor Investigator Glori Shettles

Glori Shettles, a mitigation investigator with Inquisitor, testified that although she conducted mitigation investigation in the Petitioner's case, she did not recall participating in the Petitioner's sentencing hearing or being contacted by the Petitioner's trial counsel about her investigation. She testified that when she first became involved in the Petitioner's case, she "spent what I would call a fairly extensive period of time with him, and . . . I went

literally from there to Kentucky to meet his family and begin working on his case and interviewing his family members and friends, [and] former employers[.]" She recalled that the Petitioner's family "loved and cared about him very much; they were very concerned about him; and they were more than willing to be cooperative with me to assist him." Ms. Shettles also recalled that the Petitioner was forthcoming in describing his relationship with his family and that "he was not making excuses for himself."

Ms. Shettles explained that her investigation revealed information that "would have been positive to present in [a] sentencing hearing." She explained that such information included, "the fact that he has skills, that he educated himself, that he can be productive in prison and get along with others. . . . I realize he's not perfect, but slow to anger, and not one where he certainly perceives himself as violent toward others." She also explained that a statement from one of the Petitioner's former superior officers that the Petitioner "was a bright young man who had a future" was indicative of the Petitioner's "undeveloped potential . . . [to] be very productive in society wherever he might be." Ms. Shettles also emphasized that, through her interviews with the Petitioner's parents, siblings, and then-wife, she learned that the Petitioner "took responsibility for [his] child, [and] that he loved the child," which would have been important to present as mitigation evidence.

Ms. Shettles testified that although she was hired to conduct mitigation investigation, Inquisitor also assisted Mr. Wallace with his guilt/innocence investigation. She said that the goal of the guilt/innocence investigation was "showing that Mr. Housler had no involvement in the crime whatsoever; to prove his innocence, if you will."

Ms. Shettles testified that she also conducted a mitigation investigation in the Courtney Mathews case. As part of her investigation, she met with Mr. Mathews three or four times; she recalled that Mr. Mathews recounted the details of the Taco Bell killings, although she testified that the only details she remembered from Mr. Mathews's accounts were his description of "hiding in the ceiling tiles, and at some point coming out of the ceiling tiles and killing the victims[.]" She also did not recall whether Mr. Mathews mentioned anything about planning the offenses, although she acknowledged that at the time she worked on the Mathews case, based on her investigation, "[t]here was no reason for me to ever believe that Mr. Mathews acted with anyone else[.]" She also said that the Mathews guilt-innocence timeline was compiled in part from memoranda she had prepared while working on the case.

Ms. Shettles acknowledged that during her investigation in the Petitioner's case, she did not tell the Petitioner's trial counsel about her conversations with Mr. Mathews or discuss with them "how the crimes were actually committed. There was certainly a knowledge that Mr. Housler was not with Mr. Mathews. I don't think it was discussed; it was known; it was a given. . . . I just assumed, and was told, that they knew" that the Petitioner was innocent. Ms. Shettles recalled that at the time she began working on the Petitioner's case, Mr. Lax told her not to discuss any conversations between herself and Mr. Mathews. She added, "I wasn't told to wall off any information, only not to literally say what Courtney Mathews had told me about what he did."

Ms. Shettles said that her mitigation investigation "probably could have been more thorough," although she said that she had "never completed an investigation that I didn't feel like more could have been done" and added that her investigation in the Petitioner's case "was fairly adequate[.]"

Former Inquisitor Investigator Danese Banks

Danese Banks testified that she has been a licensed attorney since 1996, and that between 1996 and 2000, she worked as an investigator with Inquisitor. She said that as part of her work on the Courtney Mathews case, she interviewed Mr. Mathews regarding the Taco Bell murders. She said that she did not recall the details of those conversations, but she added that she did receive information regarding the commission of the killings, although she did not remember from whom she received this information. Ms. Banks recalled that based on her work, she concluded that Mr. Mathews acted alone. She further testified that she did not recall "anything that would lead me to believe that Mr. Housler was involved[.]" Ms. Banks also read into the record a memorandum detailing a meeting between her, Mr. Lax, and Mr. Mathews:

> Upon our arrival Courtney was in good spirits and seemingly very cooperative. He initially appeared to be somewhat nervous, but I was later told that his behavior was typical. Ron [Lax] initially asked questions about the possible involvement of David Housler, which Courtney vehemently denied; however, Courtney seemed extremely concerned about the type of evidence that was used to arrest and indict Housler. . . .
>
> Courtney also discounted the fact that Miller knew where the shotgun was hidden based on the conversation that Miller had with Housler as a lucky guess. In addition to the possibility that Housler could have been involved

> Ron also inquired as to whether Courtney had discussed his plans to rob Taco Bell or what happened after the murders [took] place. Courtney denied doing either except for the comment that he made to Big E prior to the e vent.
>
> While Courtney admits that he was at one of the trailer parties prior to the murders and that there were discussions of criminal activity during this party, he insists that he did not speak about anything related to any plans to rob Taco Bell.
>
> . . . .
>
> Also while discussing the night of the murders Courtney also continues to insist that it was a last minute plan to rob Taco Bell after his initial plan to rob the ATM machine failed. . . .

Ms. Banks acknowledged that Mr. Mathews' last-minute plan to rob the Taco Bell precluded the possibility that he discussed the robbery with anyone, including the Petitioner.

Ms. Banks testified that she composed the Mathews guilt/innocence timeline "based on documents that I would have received, such as interviews of different witnesses, or records that I would have reviewed, or things that were provided to me during the course of an interview that I may have done." She said that she would make entries on the timeline "close in time if not at the same time" she received any relevant information. Ms. Banks said that the timelines were kept in the regular course of Inquisitor's business.

Former Lead Counsel for Courtney Mathews, Skip Gant

Isaiah "Skip" Gant, former lead counsel for Courtney Mathews, testified that over the course of his investigation in Mr. Mathews's case, which he acknowledged was "exhaustive" and included numerous interviews with both potential witnesses and Mr. Mathews, he never encountered any credible evidence that the Petitioner participated in, planned, committed, or covered up the Taco Bell offenses. Mr. Gant acknowledged that Mr. Mathews said that

he (Mr. Mathews) "[d]ecided that he was going to go in, hide, secrete himself until the place closed; [and] when the placed closed he was going to rob them." Mr. Gant testified that Mr. Mathews told him that he never discussed the Taco Bell offenses with anyone before they occurred and denied having help from anyone in committing the offenses. Mr. Gant further acknowledged that Mr. Mathews told him that he drove himself toward the Taco Bell intending to commit another crime but that he did not commit this other crime; rather, Mr. Mathews went to the Taco Bell, hid in the ceiling, committed the murders, and left, driving away himself. Mr. Gant also recalled that Mr. Mathews said that he had placed shotgun shells in a dumpster behind a McDonald's.

After reviewing Ron Lax's memorandum of the May 10, 1994 meeting between Mr. Lax and Mr. Mathews and Ms. Banks's memorandum detailing a November 8, 1994 meeting between her and Mr. Mathews, Mr. Gant said that the results of his investigation comported with Mr. Mathews's discussions with the Inquisitor investigators. He also said that Inquisitor's unredacted Mathews timeline also comported with his conclusions about how Mr. Mathews committed these offenses.

Mr. Gant testified that the district attorney's office never told him that they believed that the Petitioner was not involved in the Taco Bell offenses. Mr. Gant added that the State "had documents that they gave to me as part of the discovery; and anybody who read those documents, read the interviews, read the reports of law-enforcement, and they just put them there in front of you, could see there's something wrong here, this [proffer statement] can't

be true." Mr. Gant said that he reached this conclusion "[s]eparate[ly] and apart from any information based upon [what] Courtney Mathews" had related to him.

At the end of his direct examination testimony, Mr. Gant was asked whether, based on his investigation, he reached the conclusion that the Petitioner was not involved in the Taco Bell offenses. Mr. Gant replied, "Absolutely. I reached that conclusion based upon my investigation, by interviews with witnesses, further conversations with a definitive source that Mr. Housler in no way had anything to do with this."

On cross-examination, Mr. Gant said that the "definitive source" for his information about the case was Mr. Mathews, but that his conclusion that the Petitioner was not involved in the Taco Bell offenses was not based solely on his discussions with Mr. Mathews. He said that this conclusion was also based on "physical evidence, and the interviews of other witnesses who either sa[id] they were there and then recanted, or who sa[id] I saw him when he left." For instance, when asked about James Bowen's statement that Kendra Corley had brought Mr. Mathews to a party and that Mr. Bowen had overheard Mr. Mathews discussing a robbery with the Petitioner, Mr. Gant said that "Courtney couldn't have been at the party discussing it, because I have records that show he was at work." Mr. Gant also said that one could reach the conclusion that the Petitioner was involved in the Taco Bell offenses "if you didn't investigate the case, if you didn't interview witnesses, if you just wanted to close your eyes to what was so clear."

Mr. Gant said that he gave Mr. Terry and Ms. Gore complete access to his file in the Mathews case except for any statements Mr. Mathews had made. Mr. Gant said that

"Michael Terry knew that when they were invited to come talk about the case that there was going to be certain things we [could not] talk about." He also acknowledged that he instructed Mr. Lax to make a redacted version of the Mathews timeline. Mr. Gant admitted that he told Mr. Terry and Ms. Gore that "you got an innocent client, you got the tougher case," and that "based upon our independent investigation, our review of all the discovery, our interviews with prosecution and defense witnesses there's no way in the world David Housler was involved."

Mr. Gant cited Michael Miller as an example of a witness who recanted. Although Mr. Gant acknowledged that Mr. Miller's statement that the gun was behind the house was correct, Mr. Gant said that Mr. Miller "could have found out [where the gun was buried] a number of ways." Mr. Gant said that he believed somebody other than Mr. Mathews told Mr. Miller about the gun's whereabouts.

When asked whether Mr. Mathews gave conflicting statements regarding Taco Bell, Mr. Gant said, "I don't want to call them conflicting. Clearly there was evolving of what it is that he told us, because once there was a relationship among the client he felt more comfortable in talking to us." Mr. Gant said that he believed Mr. Mathews's final statement "[p]robably more than the previous statements;" he added, "I don't know if I took it as completely truthful, but those portions of what he told me that I was able to corroborate through what I was able to find out about the case without him allowed me to say . . . this is true or that's not."

On redirect examination, Mr. Gant testified "by the time we got to trial I had no reason, and to this day I have no reason to believe that [Mr. Mathews] withheld information from me up to, including the trial of this case."

Petitioner's Father, David Housler

David Gene Housler, the Petitioner's father, testified that he served twenty years in the army, during which time his family moved around often. Mr. Housler said that the Petitioner was the fifth of sixth children and that the Petitioner was closest to his sister Daniella, who was born ten years after the Petitioner. Mr. Housler described his family's life as "active," and he said that the family ate supper together every night and also participated in a family activity one day each weekend. Mr. Housler described the Petitioner as a "compassionate" child and that he did not remember the Petitioner getting into much trouble when he was younger. He described his petitioner as "the negotiator, the class clown, everybody liked him." Mr. Housler said that his son was not a violent child but that the Petitioner did not enjoy high school and was expelled from school after "mouthing off at a teacher[.]" However, the Petitioner later received his GED.

Mr. Housler said that the Petitioner married his wife Missy after she became pregnant with the couple's child at age sixteen. The Petitioner enlisted in the army after his marriage but before his child was born, and the Petitioner requested to be stationed at Fort Campbell because it was the closest post to where his family lived.

Mr. Housler said that he "couldn't believe it" when the Petitioner was arrested. After the Petitioner's arrest, Mr. Housler told the Petitioner that "the truth can't hurt you," but he acknowledged that "if you cornered [the Petitioner] and got him where he was wrong and knew he was wrong, or he thought it was the best answer, he would give you the answer that you were looking for." Mr. Housler said that his family still kept in touch with and supported the Petitioner, and he closed his testimony by stating that "I just don't believe that [the Petitioner] had anything to do with this."

Petitioner's Mother, Lislatta Housler

Lislatta Housler, the Petitioner's mother, also testified, with the substance of her testimony largely mirroring her husband's. Like Mr. Housler, Mrs. Housler described the Petitioner as someone who got along well with others growing up and was particularly close to his family. Mrs. Housler denied that the Petitioner was aggressive, hostile, or violent. She also said that the Petitioner would often lie in the face of conflict "[j]ust to be left alone. . . . He usually lied to me when he was scared."

Petitioner's Friend, Victor Keel

Victor Keel, the Petitioner's childhood friend, testified that as a child the Petitioner got along "[g]reat" with others and was a "fun person to be around, he made you feel good . . . he was a good kid." Like the Petitioner's parents, Mr. Keel testified that the Petitioner

was known to say things that were not true. He also said that he did not recall the Petitioner being involved in any fights or threatening anyone.

III. Findings Regarding Waiver of Attorney/Client Privilege

Before reviewing the Petitioner's claims stated in his petition for relief, the Court will issue detailed findings of fact and conclusions of law relative to its finding that the attorney-client privilege between Courtney Mathews and his trial counsel has been waived. To review, prior to the evidentiary hearing the Petitioner subpoenaed Courtney Mathews' trial counsel, Skip Gant and James Simmons, and also issued subpoenas duces tecum upon Ron Lax and Inquisitor, Inc., moving that they provide all documents related to their representation of Courtney Matthews. Counsel for Messrs. Gant and Simmons, Mr. Lax, and Courtney Mathews all filed motions to quash the subpoenas, basing their motions upon the grounds of the attorney-client privilege that existed between Mr. Mathews and trial counsel, a privilege which counsel for Mr. Mathews represented he did not waive.

The Court held a hearing on this issue during the evidentiary hearing. Larry Wilks, counsel for Mr. Lax and Inquisitor, made several procedural and substantive objections to the subpoenas. Regarding the substantive objections, Mr. Wilks argued that the materials sought by the Petitioner—i.e., materials related to conversations between Mr. Mathews and members of his defense team—were inadmissible. He argued that to any extent that Mr. Mathews' statements could be construed as declarations against penal interest, the statements would be inadmissible because the Rule of Evidence allowing for the admissibility of

statements against interest, Rule 804(b)(3), requires that the declarant be unavailable, and Mr. Mathews could not be considered "unavailable" in this case. Mr. Wilks also argued that the materials sought by the Petitioner could not be released because the files belonged to Mr. Mathews, not Mr. Lax or Mr. Mathews's former attorneys. When asked by the Court, "Which is [Mr. Lax's] greater duty? His duty to honor Mr. Mathews' privilege or his duty to represent Mr. Housler to the best of his ability, and why?" Mr. Wilks replied that Inquisitor's duty is to Mr. Mathews, by whom Mr. Lax was asked to assert the attorney-client privilege.

Robert Marlow, counsel for Mr. Mathews, argued that because Mr. Mathews had not waived the attorney-client privilege personally, it could not be considered waived. Mr. Marlow argued that

> there were extraordinary steps taken by Mr. Mathews' defense counsel to remove from all the material that they were going to allow Mr. Housler's team to look at, anything that dealt with communications they received directly from Mr. Mathews, and as part of that assumption and my belief is that they went a step to redact the time line that redacted only those things that were obtained directly from their client, Mr. Mathews.

When asked by the Court whether any inadvertent disclosure of privileged communications by Mr. Mathews's trial attorneys operated as a complete waiver of the attorney-client privilege, Mr. Marlow responded that "if his agent unbeknownst . . . to him, either inadvertently or overtly waived some or all of the privilege, then to the extent that what has been disclosed has been disclosed . . . it is not all or nothing."

John Oliva, counsel for Mr. Gant and Mr. Simmons, argued that Mr. Mathews's attorneys "were bluntly on the horns of an ethical dilemma. As they interpreted the Rules of Professional Responsibility, they had an obligation to disclose information to prevent a reasonably certain death or bodily injury," particularly the execution of the Petitioner. Thus, Mr. Gant and Mr. Simmons disclosed to the trial court that they believed that the Petitioner was innocent. Mr. Oliva argued that "because it was not a voluntary disclosure . . . they should not be held to the same standard as someone who voluntarily discloses privileged or confidential information." Mr. Oliva also argued that the state of the law concerning whether a partial waiver of the attorney-client privilege exists is unsettled, and some case law provides for a partial waiver of the privilege. He particularly noted that Mr. Gant and Mr. Simmons took measures to prevent disclosure of privileged communications between Mr. Mathews and his attorneys—measures which were successful, save for one inadvertent disclosure—and that Mr. Mathews did not utter the words contained in the proposed affidavit composed by Ms. Gore. Mr. Oliva argued that Inquisitor should not have turned over the substance of any conversations between Mr. Mathews and Inquisitor employees because Mr. Terry and Ms. Gore were aware that Inquisitor held a duty of loyalty to Mr. Mathews.

Mr. Hemmersbaugh argued that the documents the Petitioner sought in this case were relevant and admissible. He added that the Petitioner sought only Mr. Mathews' statements to Inquisitor employees as they related to this case and that any concerns Mr. Mathews might have regarding the effect that disclosing documents in the Petitioner's case might have in Mr. Mathews's case was "just not relevant."

Mr. Bachman argued that regardless of any mandates placed upon Mr. Gant and Mr. Simmons to disclose their views regarding the Petitioner's guilt or innocence, other disclosures occurred which served to waive the attorney-client privilege. Mr. Bachman argued that the law in the Sixth Circuit and the Tennessee state courts clearly rejected the concept of limited waiver and that "where there is a waiver of that privilege, it goes to the subject matter of that discussion . . . it waives the attorney/client privilege as to all communications on that subject matter . . . ." Mr. Bachman also argued that because "the law presumes that an attorney acts with the authority of the client," an attorney's actions can waive the attorney-client privilege even if the client himself does not authorize such a waiver.

At the end of the hearing, the Court found that Mr. Matthews's attorney-client privilege had been waived and therefore denied the motions to quash.

Analysis

By statute and common law, Tennessee recognizes an evidentiary privilege by which an attorney may not disclose client communications. The statute codifying the privilege provides:

> No attorney, solicitor or counselor shall be permitted, in giving testimony against a client or person who consulted the attorney, solicitor or counsel professionally, to disclose any communication made to the attorney, solicitor or counsel as such by such person during the pendency of the suit, before or afterward, to the person's injury.

Tenn. Code Ann. § 23-1-105. "[T]he purpose of the privilege is to shelter the confidences a client shares with his or her attorney when seeking legal advice, in the interest of protecting

a relationship that is a mainstay of our system of justice." Bryan v. State, 848 S.W.2d 72, 79 (Tenn. Crim. App. 1992).

Regarding a client's communications with an investigator or other agents of the client's attorney, Tennessee law provides that communications between the attorney and a private detective and investigator hired by the attorney are privileged. See Tenn. Code Ann. § 24-1-209. This law does not extend to conversations between attorney's client and the investigator. However, as the Petitioner acknowledges, "[a]lthough the Tennessee legislature has not provided special legal protection to investigator-client communications, when such communications come within the context of legal representation, they are sometimes afforded some special protection." See generally United States v. McPartlin, 595 F.2d 1321, 1337 (7th Cir. 1979); United States v. Kovel, 296 F.2d 918, 912-22 (2d. Cir. 1961). Although Tennessee's appellate courts have yet to issue an opinion announcing this principle, the conclusion that communications between a client and an investigator acting as an agent of the client's attorney are privileged appears to be a reasonable one.

However, the privilege does not apply to all attorney-client communications. "For the privilege to apply, the client has the burden of showing that the communications were made in the confidence of the attorney-client relationship. That is, not only must the communication have occurred pursuant to the attorney-client relationship, it must have been made with the intention of confidentiality." Bryan, 848 S.W.2d at 80. Furthermore, the privilege may be waived, "either by communicating in the presence of others who are not bound by the privilege . . . or by voluntarily divulging the communication to third parties."

Boyd v. Comdata Network, Inc., 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002) (citing Hazlett v. Bryant, 241 S.W.2d 121, 123 (Tenn. 1951) and Taylor v. State, 814 S.W.2d 374, 377 (Tenn. Crim. App. 1991)).

Nature of Waiver

Three questions are particularly relevant to the Court's determination of the privilege issue in the instant case. The first question concerns whether the attorney-client privilege can be waived only in cases of intentional disclosures of privileged information. The Petitioner contends that inadvertent or careless disclosures can also serve to waive the privilege.

In support of his argument, the Petitioner acknowledges that the federal courts have taken a variety of stances on the issue. Some courts have held that parties who do not take sufficient precautions to protect privileged communications cannot be afforded the protection of the attorney-client privilege in case of inadvertent disclosure. See generally In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989); Parmian Corp. v. United States,665 F.2d 1214, 1222 (D.C. Cir. 1981); In re Horowitz, 482 F.2d 72, 82 (2d Cir. 1973). Other courts have held that truly inadvertent disclosures do not result in the waiver if the attorney-client privilege. See Gray v. Bickness, 86 F.3d 1472, 1483 (8th Cir. 1996) (collecting cases). A third approach can best be described as an "intermediate" approach in which the court applies a balancing test after considering several factors. Under the intermediate approach, the court considers these five factors:

> (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) the promptness of measures taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving the party of its error.

Edwards v. Whitaker, 868 F. Supp. 226, 229 (M.D. Tenn. 1994) (other citations omitted); see also Ciba-Geigy Corp. v. Sandoz Ltd., 916 F. Supp. 404, 411 (D.N.J. 1995); United States v. Keystone Sanitation Co., 885 F. Supp. 672, 676 (M.D. Pa. 1994); Nova Southeastern Univ. v. Jacobson, 25 So. 3d 82, 86 (Fla. Dist. Ct. App. 2009); Elkton Care Ctr. Assocs. v. Quality Care Mgmt., Inc., 805 A.2d 1177, 1184 (Md. Ct. Spec. App. 2002); Hartman v. El Paso Natural Gas Co., 763 P.2d 1144, 1152 (N.M. 1988); Carbis Walker, LLP, v. Hill, Barth & King, LLC, 930 A.2d 573, 582 (Pa. Super. Ct. 2007).

In the Court's view, the intermediate "balancing test" adopted by the court in Edwards and other federal and state courts is the best means of assessing whether an inadvertent disclosure of confidential communication serves as a waiver of the attorney-client privilege. However, the Court places particular emphasis on the first factor, which focuses on the precautions taken to prevent inadvertent disclosure. As one federal court has observed, "the attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality." Pariman, 665 F.2d at 1222; see also In re Horowitz, 482 F.2d at 82 (if the party wishes "to preserve the privilege under such circumstances, he must take some affirmative action to preserve confidentiality."). In other words, a party wishing to assert that inadvertently-disclosed

communications were privileged must establish reasonable measures existed to prevent against inadvertent disclosure and protect the privileged nature of the communication.

Applying the above principles to the facts of the instant case, the Court first finds that the only disclosure that can be deemed "inadvertent" in this case is Ms. Gore's discovery of the unredacted Mathews guilt/innocence timeline. In applying the five-part balancing test for determining whether an inadvertent disclosure can be deemed as a waiver of attorney-client privilege, the Court first finds that Mr. Gant and Mr. Simmons did not rigorously safeguard all confidential communications related to the Taco Bell offenses between themselves and Mr. Mathews. Rather than reviewing his files to ensure that no confidential or privileged information made it into Mr. Terry's or Ms. Gore's hands, Mr. Simmons placed an unredacted copy of the guilt/innocence timeline—which contained Mr. Mathews' privileged statements to Inquisitor employees (who served as agents to Mr. Mathews attorneys) regarding the circumstances surrounding the Taco Bell offenses—in with a group of nonprivileged documents. Furthermore, rather than monitoring Ms. Gore's review of the Petitioner's case file to further protect against inadvertent disclosure, Mr. Simmons allowed Ms. Gore to review the files without supervision and without documenting which parts of the file she copied. Thus, the measures Mr. Simmons and Mr. Gant took to prevent against confidential communications cannot be deemed "reasonable" under the circumstances of this case.

The second and fourth factors do not weigh in the Petitioner's favor, as the discovery of the timeline constitutes the only inadvertent disclosure, and Mr. Gant and Mr. Simmons

challenged disclosure of the timeline at the hearing on the Petitioner's motion for new trial. However, the other two factors weigh in favor of a finding of waiver. In the Court's view, although in this case only one disclosure occurred, the extent of the disclosure was significant, for the timeline presents significant disclosures by Mr. Mathews concerning the manner in which he planned and committed the crimes, as well as his actions after the offenses. Finally, the interests of justice in this case are such that a finding that privilege has been waived would allow the Petitioner to better pursue his coram nobis claim. Thus, the Court finds that Mr. Mathews' counsel's actions in inadvertently disclosing the timeline to Mr. Terry and Ms. Gore serve as a waiver of the attorney-client privilege between Mr. Mathews and his former counsel.

Extent of Waiver

A second question concerns the extent of the waiver of attorney-client privilege. Does a purported waiver of the privilege apply only to the particular privileged communication at issue, or does the waiver extend to all communications related to the subject matter of the disclosed communication? The Tennessee Court of Appeals, citing to numerous federal cases, has concluded that "[p]artial waiver of work product as well as attorney/client privilege can act to waive the entire privilege." Arnold v. City of Chattanooga, 19 S.W.3d 779, 787 (Tenn. Ct. App. 1999). As the court explained,

> Courts have universally held that a party is prevented from invoking the work product doctrine immunity as both "sword and shield". In Wardleigh v. Second Judicial Dist. Ct., 891 P.2d 1180 (Nev. 1995), the Supreme Court of

> Nevada held that the doctrine of waiver was intended as a shield, not a sword. "[W]here a party seeks an advantage in litigation by revealing part of a privileged communication, the party shall be deemed to have waived the entire attorney-client privilege as it relates to the subject matter of that which was partially disclosed. (Citing United States v. Jones, 696 F.3d 1069, 1072 (4th Cir. 1982)); accord In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982); S.T. Assistance Corp. v. Maryland Nat. Bank, 684 A.2d 32 (MD. App. 1995). Also see, e.g., In re Kidder Peabody Sec. Litig., 168 F.R.D. 459, 473 (S.D.N.Y. 1996); Hartz Mountain Indus. Inc. v. Commissioner, 93 T.C. 521, 527 (U.S. Tax Ct. 1989). Disclosure need not be made to the party's adversary in litigation to constitute waiver. It can be made extra-judicially, as in disclosure to the public of part of the confidential material. See Bassett v. Newton, 658 So. 2d 398 (Ala. 1995).
>
> Id.

In the instant case, the court acknowledges that counsel for Mr. Mathews did not disclose the memoranda, referenced in the unredacted timeline, that Inquisitor workers prepared memorializing their conversations with Mr. Mathews. Furthermore, the proposed memorandum prepared by Ms. Gore does not state that Mr. Mathews acted alone in committing the Taco Bell offenses—or that Mr. Mathews committed them at all. However, in both instances privileged information concerning the Taco Bell offenses was disclosed, and as stated above, the concept of "selective" waiver of attorney-client privilege is not consistent with state and federal case law. Rather, a partial disclosure serves to waive "the entire attorney-client privilege as it relates to the subject matter of that which was partially disclosed." Arnold, 19 S.W.3d at 787 (citations omitted). Thus, the actions by Mr. Gant and Mr. Simmons would serve to waive the attorney-client privilege as to all communications regarding the Taco Bell offenses and would not be limited to the timeline and proposed affidavit.

Attorney's Ability to Waive Privilege on Client's Behalf

A third question is whether someone other than the client can waive the privilege on the client's behalf without the client's approval. This issue has proven somewhat difficult for the Court to resolve given the paucity of cases directly on point with the facts of this case. However, the Tennessee Supreme Court has noted that an attorney is presumed to act with "the apparent authority" of his client. See Givens v. Mullikin, 75 S.W.3d 383, 397 (Tenn. 2002); see also Simmons v. O'Charley's, Inc., 914 S.W.2d 895, 902 (Tenn Ct. App. 1995) ("Lawyers are agents and have prima facie authority to speak for their client[s] . . . ."). This principle was also stated in a leading treatise:

> Since the attorney has implied authority from the client . . . to make admissions and otherwise to act in all that concerns the management of the cause, all disclosures (oral or written) voluntarily made to the opposing party . . . are receivable as being made under an implied waiver of privilege, giving authority to disclose the confidences when necessary in the opinion of the attorney.

8 Wigmore, Evidence § 2325 (McNaughton ed. 1961). Given that attorneys are presumed to act with the authority of the client, the Court concludes that an attorney's actions can waive the attorney-client privilege even if the client does not authorize the disclosure.

In sum, the Court acknowledges the difficulties associated with its resolution of the privilege issue. Particularly, the Court is aware that present counsel for Mr. Mathews has expressed concern over the ability of any communications for which the attorney-client privilege has been deemed waived in this case to be used in any future proceedings involving

Mr. Mathews. The resolution of that issue must wait for another day, as the Court has recused itself from all proceedings in which Mr. Mathews is a party. However, in the instant case, the Court finds that through their leaving the unredacted timeline where Ms. Gore could find it easily and informing Mr. Terry and Ms. Gore about certain privileged communications during the drafting of a proposed affidavit, Mr. Gant and Mr. Simmons did not safeguard privileged communications between themselves and Mr. Mathews. In the Court's view, these actions waived the attorney-client privilege as to all information pertaining to Taco Bell, and the Petitioner cannot be prevented from using this information in advancing the claims contained in his amended petition for relief.

IV. Standard of Review: Post-Conviction Proceedings

Pursuant to the Tennessee Post-Conviction Procedure Act, a petitioner is entitled to relief if the petitioner can establish that "the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103 (2006). The burden in a post-conviction proceeding is on the petitioner to prove the factual allegations contained in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); State v. Dellinger, 279 S.W.3d 282, 296 (Tenn. 2009). "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 that 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 constitution requires retroactive application of that right; or (2) the failure to present the ground was the result of state action in violation of the federal or state constitution. 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, regardless of whether the petitioner actually introduced any evidence. Id.

V. Ineffective Assistance of Counsel (Petitioner's Claims 1-10)

The petitioner first argues that he received the ineffective assistance of counsel before trial, during trial, and on appeal. 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 that (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 that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that 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 that 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 that 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 that "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. "The probable result need not be an acquittal. A reasonable probability of being found guilty of a lesser charge, or a shorter

sentence, satisfies the second prong in Strickland." Brimmer v. State, 29 S.W.3d 497, 508-09 (Tenn. Crim. App. 1998). Failure to satisfy either prong results in the denial of relief. Strickland, 466 U.S. 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).

The petitioner raises numerous specific factual allegations in support of his ineffective assistance of counsel claim. The Court will now address these specific allegations.[7]

(A) Counsel's Failure to Challenge Proffer Agreement, Resulting Statement, and State's Declaration of Breach (Petitioner's Claims 1, 2, and 5.6)

The Petitioner raises several allegations supporting his assertion that both pretrial counsel and trial counsel were ineffective for failing to challenge the proffer Agreement and the Petitioner's statement resulting from the agreement. The Petitioner argues that counsel were ineffective for (1) not challenging the State's declaration of breach; (2) not

[7]To facilitate the Court's analysis, the Court has re-ordered and re-numbered the issues as presented in the post-conviction petition.

challenging the agreement in that it gave the State the unilateral power to declare breach; (3) not challenging the State's use of the Petitioner's statements on the grounds that such remedy was not authorized by the statement and of "dubious legality"; and (4) not challenging the Proffer Agreement and resulting statement because the State knew that the Petitioner's earlier statements to police were untrue.

Agreements between the State and an accused regarding a charge, plea, or sentence are construed according to principles of contract law. See State v. Howington, 907 S.W.2d 403, 407-08 (Tenn. 1995). Such agreements "are enforceable once the condition precedent is met; that is, the trial judge accepts the agreement." Id. at 407. "This is consistent with basic contract principles that an agreement does not become binding until the condition precedent has been met." Id. (citations omitted). Furthermore, "even though the plea agreement is not enforceable until it has been accepted by the trial judge, the trial judge must allow the defendant to withdraw his guilty plea in the event that it is not accepted. This prevents the defendant from being unfairly prejudiced." Id. at 407 n.8; see also Tenn. R. Crim. P. 11(c)(5).

The court in Howington stated that "in contract law there is a general preference against finding a term to be a condition precedent." Id. at 409. The court cited to this section of the Restatement of the Law of Contracts:

> In resolving doubts as to whether an event is made a condition of an obligor's duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is

> within the obligee's control or the circumstances indicate that he has assumed the risk.

Id. at 409 (citing Restatement (Second) of Contracts § 227 (1981)). The court further noted that an agreement such as the one at issue here "is different from the average commercial contract as it involves a criminal prosecution where due process rights must be fiercely protected. . . . [A]mbiguities in the agreement must be construed against the State." Id. at 410.

The court in Howington continued, "the State must be held to a high evidentiary standard as it attempts to avoid an agreement made with an accused where the accused has already acted in reliance on the agreement." Id. Specifically, for the State to establish breach, it must prove beyond a reasonable doubt that the accused failed to satisfy a condition precedent to the agreement's performance. Id. at 409. Furthermore, such breach must be material. Id. at 410. The court stated that the following circumstances are "significant" in determining whether a breach is material:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id. at 411 (citing Restatement (Second) of Contracts § 241). Additionally, the court held that "in the area of informal immunity agreements where a criminal defendant is necessarily involved, 'the most important consideration is the incriminating nature of the [proffered] statements, not the amount of information provided to the government.'" Id. (quoting United States v. Fitch, 964 F.2d 571, 574 (6th Cir. 1992); other citations omitted).

As an initial matter, the Court finds that the proffer agreement, which provided that the Petitioner would plead guilty to reduced charges in return for providing information regarding the Taco Bell crimes, was a plea agreement, and that the negotiations leading to the proffer agreement constituted plea negotiations. The Court now addresses the Petitioner's issues relative to the proffer agreement

(1) State's Declaration of Breach

The Petitioner first contends that both pretrial counsel and trial counsel were ineffective for failing to challenge the State's unilateral declaration of breach, which he claims violated his Due Process rights. The Court agrees. Had counsel challenged the State's declaration of breach, the State would have been required to prove beyond a reasonable doubt that the Petitioner breached the agreement by providing untruthful information, and that such breach was material. The State would have been unable to prove a material breach in this instance. It appears that the State based its declaration of breach in part on its determination that the Petitioner falsely implicated Sulyn Ulangca in the Taco Bell

offenses. This fact, standing alone, would not have deprived the State of the benefit of the Petitioner's statement—even without those parts of the proffer statement implicating Ms. Ulangca, the statement still contained other information incriminating Courtney Mathews.

Furthermore, as the Petitioner states in his brief, had the State been able to establish a material breach, it would have been unable to establish "how the alleged falsities in the Proffer Statement were so egregious as to render the breach material, but somehow not so egregious that the Constitution would allow the State to indict and prosecute Petitioner for murder almost entirely on the basis of [the] same statement." Rather, had the State established material breach, it would have been faced with one of two options: specific performance (i.e., agreeing to the effective fifteen-year term) or recission, which would have put the parties in the same position as they were before the proffer agreement was reached. Mr. McMillan testified at the evidentiary hearing that the ultimate decision of whether the Petitioner had breached the agreement—and whether that breach was material—was to be made by the Court, but neither he nor trial counsel challenged the State's declaration of breach. In the Court's view, these actions on the part of pretrial counsel and trial counsel constituted deficient performance, and such deficiencies prejudiced the Petitioner. Thus, the Court finds that the Petitioner received the ineffective assistance of counsel as to this issue and is entitled to a new trial.

Although the Court's finding as to this issue entitles the Petitioner to a new trial, the Court will review the Petitioner's remaining issues to facilitate appellate review, if pursued.

(2) State's Unilateral Power to Declare Breach

The Petitioner also contends that the proffer agreement was void and illusory in that it gave the State the unilateral power to declare breach. Quoting section 2(E) of the Restatement (Second) of Contracts, the Petitioner argues that the State's sole discretion to determine whether the Petitioner offered truthful testimony rendered the State's "performance entirely optional" and was therefore "the hallmark of an illusory contract."

In the instant case, the Petitioner entered into an agreement which explicitly stated, "Whether or not he has told the truth is an issue that [the District Attorney's] office shall decide in its sole discretion." While the State could argue that the Petitioner knowingly assumed the risk that the State would determine his testimony to be untruthful and pursue other charges accordingly, "'[P]lea agreements . . . are unique contracts in which special due process concerns for fairness and the adequacy of procedural safeguards obtain.'" State v. Mellon, 118 S.W.3d 340, 346 (Tenn. 2003) (quoting United States v. Ready, 82 F.3d 551, 558 (2d. Cir. 1996)). In light of these due process concerns, it is unlikely that the trial court would have upheld the validity of an agreement in which the State could declare breach without a judicial declaration that a breach had occurred. Thus, had counsel challenged this provision of the agreement, it would have led to the Court declaring that this provision rendered the entire agreement void. Counsel's failure to do so constituted deficient performance, and this deficiency prejudiced the Petitioner. Accordingly, the Court finds that

the Petitioner received the ineffective assistance of counsel as to this issue, thus necessitating a new trial.

(3) Authorization and Legality of State's Chosen Remedy

The Petitioner also asserts that the State's chosen remedy for the Petitioner's breach of the proffer agreement—indicting the Petitioner for murder and using the Petitioner's statement obtained pursuant to the proffer agreement as evidence against him in the murder prosecution—"was not authorized by or envisioned in the four corners of the agreement." The Court cannot agree with the Petitioner's assertion. Included in item number one under the heading "Agreed Upon," the following phrase appears:

> If your client violates the terms of the agreement, any such testimony or other information provided by your client to attorneys or law enforcement officers of the government, State grand jury, or the Court may and will be used against him for any purpose, including prosecution for crimes other than perjury.

(Emphasis added). In the Court's view, this language clearly indicated to the parties that if the Petitioner breached the proffer agreement, the Petitioner faced prosecution for "any purpose," including prosecution for the Taco Bell offenses, and that the Petitioner's own words could be used against him at trial.

However, this provision would not have been valid under Tennessee law. Rule 410 of the Tennessee Rules of Evidence, entitled "Inadmissibility of Pleas, Plea Discussions, and Related Statements," provides, in pertinent part:

> Except as otherwise provided in this rule, evidence of the following is not, in any . . . criminal proceeding, admissible against the party who made the plea or was a participant in the plea discussions:
>
> . . . .
>
> (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty . . . . Such a statement is admissible, however, in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

Additionally, at the time of the proffer statement, Rule 11(e)(6) of the Tennessee Rules of Criminal Procedure provided that "evidence of a plea of guilty, later withdrawn . . . or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer."

In State v. Hinton, 42 S.W.3d 113, 121-22 (Tenn. Crim. App. 2000), the Tennessee Court of Criminal Appeals stated:

> Federal courts have considered what constitutes plea negotiations or discussions for purposes of Rules 410 and 11(e)(6). The Tennessee rules are identical to the federal rules by design. See Tenn. R. Crim. P. 11 Advisory Comm'n Comments. When the source of our rules is the federal rule, federal developments are instructive. See State v. Hicks, 618 S.W.2d 510, 514 (Tenn. Crim. App. 1981). In United States v. Robertson, 582 F.2d 1356, 1365 (5th Cir. 1978), the court stated that "not every discussion between an accused and agents for the government is a plea negotiation," concluding that courts must consider the totality of the circumstances and determine whether the defendant exhibited an actual subjective expectation to negotiate a plea at the time of the discussion and whether the expectation was reasonable. Id. at 1366. Other courts have applied this standard. See United States v. Grant, 622 F.2d 308, 312 (8th Cir. 1980); United States v. O'Brien, 618 F.2d 1234, 1240-41 (7th Cir. 1980); United States v. Pantohan, 602 F.2d 855, 857 (9th Cir. 1979).

The court in Hinton further stated that "[t]he rules do not encompass statements made during the preliminary investigation process." Id. at 122 (citing State v. James Wayne Butler, No. 01C01-9301-CR-00023, Davidson County, slip op. at 6-7 (Tenn. Crim. App. Sept. 9, 1993)). In James Wayne Butler, the Court of Criminal Appeals concluded that the defendant's statements made to a police officer regarding "cooperation" in a drug case were inadmissible for two reasons: "First, Butler had not been charged with a criminal offense when the conversation took place. Second, the police officer could not enter into a plea bargain agreement with Butler."[8]

This Court does not, however, interpret the appellate court's conclusion in Butler as a rule that any statement relative to a potential plea agreement is not covered by Rule 410 if the statement was made before the suspect was charged with a particular offense. Hinton and the federal cases cited therein emphasize that statements made "during the preliminary investigation process" cannot be considered plea negotiations under Rule 410. Hinton, 42 S.W.3d at 121. For example, Butler's discussions with officers occurred shortly after a large amount of drugs were found at Butler's business. In the Petitioner's case, the Petitioner's post-proffer agreement statements to the district attorney and law enforcement officers were made well over a year and a half after the Taco Bell offenses had occurred and after the

[8]Although a suspect's statements to a police officer are generally not covered by Rule 410 because the officer lacks the authority to engage in plea bargaining, "when a law enforcement officer acts under the express authorization of the prosecuting attorney, statements made by a defendant to the officer are to be viewed as if they had been made directly to a prosecuting attorney." Hinton, 42 S.W.3d at 123. The police in Butler were not acting under the district attorney's authority when they discussed "cooperation" regarding Butler's potential charges.

police had spoken with the Petitioner extensively about his knowledge of the case. Thus, the Petitioner's statements cannot be considered to have occurred during preliminary investigation.

Furthermore, in at least one federal case a suspect's discussions with FBI agents (acting on the authority of the United States Attorney's Office) regarding a potential plea were considered plea negotiations for purposes of Federal Rule of Evidence 410, which is substantially similar to the Tennessee rule. In United States v. Grant, 622 F.2d 308, 310 (8th Cir. 1980), FBI agents informed the defendant on March 22, 1979, that he was suspect in a criminal investigation. The defendant gave an inculpatory statement to FBI agents; before the defendant signed an agent's summary of the statement, the agents "told him that the United States Attorney would let him plead to a one count indictment in exchange for his 'cooperation'", and that he should speak to a particular Assistant United States Attorney (AUSA) by March 30 "if he was interested in this arrangement[.]" Id. The defendant visited the AUSA the next day, where he made further inculpatory statements. Id. at 311. The appeals court concluded, "While it is clearly inferable from the record that appellee may have gone to the interview without any intention to enter a plea bargain, his actions upon learning of the offer unquestionably reflected his desire to enter into the bargain." Id. at 314. The court added, "we cannot agree that appellee had no intent to enter a plea bargain." Id.[9] As

[9]The court also concluded that the FBI agents were acting under the authority of the AUSA, thus making the defendant's statements to the agents inadmissible. Id. at 314. The court also concluded that the defendant's subsequent statements to the AUSA were inadmissible under Rule 410. Id. at 415.

in Grant, the Petitioner's statements following his signing the proffer agreement evidenced his desire to enter into a plea agreement, and that factor, rather than the filing of charges, is the determining factor in the Court's conclusion that the Petitioner's statements fall under Rule 410's purview.

For the reasons stated above, the Court finds that the Petitioner's proffer statement (or "confession," as characterized by the Court of Criminal Appeals) resulted from "plea discussions with [the State] which [did] not result in a plea of guilty[.]" Tenn. R. Evid. 410(4). Rule 410 provides that in limited cases statements made during plea negotiations may be introduced in a trial for perjury, but in this case the State sought to introduce the Petitioner's statements in a murder trial, which is not permitted under the Rule. Although the provisions of Rules 410 and 11(e)(6) can be waived if such waiver is made knowingly and voluntarily, see Hinton, 42 S.W.3d at 123-24, there is no evidence in the record by which the Court could find that the Petitioner knowingly and voluntarily waived his rights under the applicable evidentiary and procedural rules. Accordingly, the proffer statement would have been ruled inadmissible at trial had trial counsel filed a motion to exclude the statement. Trial counsel's failure to file a motion to suppress or otherwise exclude the proffer statement therefore constituted deficient performance.

The Court also finds that counsel's deficient performance prejudiced the Petitioner. The evidence corroborating the Petitioner's proffer statement was slight. Such evidence was sufficient to corroborate the Petitioner's confession. See State v. Ervin, 731 S.W.2d 70, 72

(Tenn. Crim. App. 1987) ("Only slight evidence of the corpus deliciti is necessary to corroborate a confession and thus sustain a conviction."). However, such evidence, in the absence of the proffer statement, would not have been sufficient to convict the Petitioner of the Taco Bell offenses beyond a reasonable doubt. Thus, trial counsel's failure to raise a Rule 410-based challenge to the proffer statement constitutes ineffective assistance of counsel and requires a new trial.

(4) Truthfulness of Petitioner's Earlier Statements to Police

The Petitioner also asserts that the proffer agreement was void and illusory because the State knew that the resulting proffer statement would be untrue. As the Petitioner agues in his amended petition:

> A contract or a proffer agreement is void and illusory if one of the parties offers no consideration, and "a conditional promise is not consideration if the promisor knows at the time of making the promise that the condition cannot occur." Restatement (Second) of Contracts § 76 (1981). Petitioner's Proffer Agreement was illusory because it was contingent on a conditional promise by Petitioner—a complete and truthful statement—that the State knew would never be fulfilled. The State thus offered no consideration because it knew that Petitioner's then-existing statement was a lie . . . and as a result, the State's officials knew that they would never have to fulfill their half of the bargain.

Although the Court agrees with the Petitioner that the proffer agreement would have been invalid if the State was aware that the Petitioner was unable to provide a truthful statement, the Court declines to apply the Petitioner's logic. Assuming arguendo that the

State knew that the Petitioner's previous statements regarding the Taco Bell offenses were untrue, that fact, standing alone, did not necessarily mean that the State knew that the Petitioner's future statements would also be untrue. The Petitioner is not entitled to relief on this issue.

(B) Pretrial Counsel's Conflicts of Interest (Petitioner's Claim 3)

The Petitioner next asserts that he was prejudiced by pretrial counsel's "undisclosed conflicts of interest [that] affected his performance[.]" The Petitioner argues that Mr. McMillan was encumbered by conflicts of interest and appearances of impropriety based upon: (1) his former representation of Michael Miller, who gave a statement (later recanted) implicating the Petitioner in the Taco Bell offenses; (2) his former representation of Larry Davis, who gave a statement in which he said that "Mathews said he did it by himself"; and (3) his former association in a law firm with Mr. Carney.

Prejudice is presumed in those cases where a petitioner establishes that his trial counsel "'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" Strickland, 466 U.S. at 692 (quoting Cuyler v. Sullivan), 466 U.S. 335, 348, 350 (1980). As the Supreme Court explained in Strickland,

> [I]t is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, it is reasonable for the criminal

> justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.

Id. "[A]n actual conflict of interest includes any circumstances in which an attorney cannot exercise his or her independent professional judgment free of 'compromising interests and loyalties.'" State v. White, 114 S.W.3d 469, 476 (Tenn. 2003) (citing State v. Culbreath, 30 S.W.3d 309, 312-13 (Tenn. 2000) (quoting Tenn. R. Sup. Ct. 8, EC 5-1 (repealed 2003))). "Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests." McCullough v. State, 144 S.W.3d 382, 385 (Tenn. Crim. App. 2003) (citing Tenn. R. Sup. Ct. 8, DR 5-101(A) (repealed 2003)).

A showing that an actual conflict of interest existed is not, by itself, adequate to entitled the Petitioner to relief. Rather, "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). This Court finds the following analysis, provided by the Second Circuit Court of Appeals, helpful in determining whether a conflict of interest affected an attorney's representation:

> To show that such a conflict adversely affected his counsel's performance, [a petitioner] must establish "an actual lapse in representation that resulted from the conflict. Cuyler, 446 U.S. at 349, 100 S. Ct. 1708. This is a two part showing. First, [the petitioner] must demonstrate the existence of some "plausible alternative defense strategy not taken up by counsel." United States v. Moree, 220 F.3d 65, 69 (2d Cir. 2000) (internal quotation

> marks and citations omitted). In this regard [the petitioner] does not need to show that the alternative defense "would necessarily have been successful." Id. (internal quotation marks and citations omitted). It would be sufficient to show that the alternative strategy "possessed sufficient substance to be [ ] viable . . . ." Id. (internal quotation marks and citations omitted). Second, [the petitioner] must show "causation"—i.e., that the alternative defense was "inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." Id. (internal quotation marks and citations omitted). In other words, he must show that "trial counsel chose not to undertake [the alternative strategy] because of his conflict." Winkler[v. Keane], 7 F.3d [304,] 309 [2d Cir. 1993].

LoCascio v. United States, 395 F.3d 51, 56-57 (2d Cir. 2005) (some alterations added).

In the instant case, the Petitioner argues that an actual conflict of interest existed as to Mr. McMillan's former representation of Mr. Miller and Mr. Davis because pretrial counsel's representation of multiple defendants who gave statements related to the Taco Bell offenses gave rise to competing interests and competing loyalties that prevented Mr. McMillan from representing the Petitioner's interests. Regarding Mr. McMillan's former work in the same law firm as Mr. Carney, the Petitioner asserts that Mr. McMillan's "personal and professional relationship" with Mr. Carney prevented him from exercising professional judgment in the Petitioner's case. However, the Court is not convinced that Mr. McMillan's deficiencies in representing the Petitioner were the direct result of either Mr. McMillan's former representation of Mr. Davis and Mr. Miller or Mr. McMillan's former law firm association with Mr. Carney. Regarding Mr. Miller, at the Petitioner's trial Mr. Miller testified that when he attempted to give his Taco Bell-related statement to the police, Mr. McMillan told Mr. Miller that he represented the Petitioner and obtained alternate counsel for Mr. Miller. Mr. Davis gave his Taco Bell statement long before the Petitioner's

proffer statement, so it is unlikely that Mr. McMillan believed he had some obligation to Mr. Davis at the time of the Petitioner's proffer statement. Regarding Mr. Carney, at the evidentiary hearing both Mr. Carney and Mr. McMillan testified that the two men's former law firm association did not affect their representation of the respective parties, as the two men were not close social acquaintances. Thus, to any extent that Mr. McMillan may have been encumbered by an actual conflict of interest, the Court finds that there is insufficient evidence to establish that these conflicts affected Mr. McMillan's representation of the Petitioner.

However, this finding does not end the Court's inquiry. The Tennessee Supreme Court has stated, "The mere appearance of impropriety is just as egregious as any actual or real conflict." Clinard v. Blackwood, 46 S.W.3d 177, 186 (Tenn. 2001) (quotation omitted). Accordingly, "If there is no actual conflict of interest, the court must nonetheless consider whether conduct has created an appearance of impropriety." Culbreath, 30 S.W.3d at 312-13 (citing Tenn. R. Sup. Ct., EC 9-1 and 9-6). An appearance of impropriety exists "in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that . . . the representation poses substantial risk of disservice to either the public interest or the interest of one of the clients." Clinard, 46 S.W.3d at 187. The appearance of impropriety standard is objective and therefore must be "determined from the perspective of a reasonable layperson" who "is deemed to have been informed of all the facts." Id. (citations omitted).

Turning to the facts of the instant case, a "reasonable layperson . . . informed of all the facts" of this case may well have concluded that an attorney's past or present representation of multiple persons potentially involved in the Taco Bell offenses without divulging the multiple representation to the involved parties would "pose[] substantial risk of disservice" to the involved clients. Similarly, a reasonable layperson may well have concluded that a situation in which a defendant is represented by a former colleague of a judicial district's lead prosecutor, and in which the attorney fails to disclose such a former work relationship, "poses substantial risk of disservice to . . . the public interest." These conclusions are supported by the Petitioner's evidentiary hearing testimony that he was unaware of Mr. McMillan's representation of Mr. Miller and Mr. Davis, or of Mr. McMillan's former work relationship with Mr. Carney, and had the Petitioner known about any of these facts, he would have sought replacement counsel.

However, despite the difficulties associated with Mr. McMillan's former work association with Mr. Carney and his former representation of Mr. Davis and Mr. Miller, the facts of this case are such that the Petitioner is not entitled to relief based upon the appearance of impropriety. The three cases cited by the Petitioner in his brief (Clinard, Culbreath, and White) all address challenges to an attorney's representation of a party that were made before the respective cases went to trial. The Petitioner is correct that the Tennessee Supreme Court ordered the dismissal of the indictment in Culbreath, a case in which a private prosecutor retained by district attorney's office was paid by a special interest

group. However, the appellate court ordered the dismissal of the indictments—in addition to the usual remedy of disqualifying the district attorney's office—not merely because of the appearance of impropriety, but because the actions by the DA's office in retaining an attorney paid by a special interest group constituted prosecutorial misconduct that "tainted the entire prosecution of the case well before the charges were ever presented to the grand jury." Culbreath, 30 S.W.3d at 318. In this case, Mr. McMillan's representation of the Petitioner certainly did not constitute prosecutorial misconduct.

In White, the other criminal case cited by the Petitioner, the State sought the recusal of a defense attorney who also served as a part-time prosecutor; the appellate court granted the recusal order because disqualification was "necessary to avoid a violation of [the defendant's] constitutional right to counsel." White, 114 S.W.3d at 479. In this case, certainly the Petitioner would have been justified in seeking the removal of either Mr. McMillan or Mr. Carney from this case based upon the appearance of impropriety. Had either of these attorneys been counsel of record at trial, an appellate court, or this Court on post-conviction, may well have been justified in finding such service to be reversible error. However, both attorneys were removed from the Petitioner's case before trial, thus lessening any difficulties associated with Mr. McMillan's representation of the Petitioner.

The Court recognizes that reasonable persons may have determined that Mr. McMillan's representation of the Petitioner without informing him of the above-referenced issues created the appearance of impropriety. However, the Court is not convinced that this

potential appearance of impropriety contributed to any deficiencies in Mr. McMillan's performance—and as stated elsewhere in this order, the Court does find that Mr. McMillan rendered ineffective assistance as to certain issues. Accordingly, the Court finds that the Petitioner is not entitled to relief on this issue.

(C) Trial Counsel's Failure to Challenge Voluntariness of Petitioner's Statements (Petitioner's Claim 4)

The Petitioner next argues that trial counsel rendered ineffective assistance at the hearing on the Petitioner's motion to suppress the statement given pursuant to the proffer agreement for failing to argue that the statement was given in violation of his right to counsel and protection against self-incrimination.

Both the Fifth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution protect a person against compelled self-incrimination. The Supreme Court has held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444 (1966). "Pursuant toMiranda, custodial interrogation entails 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" State v. Goss, 995 S.W.2d 617, 628 (Tenn. Crim. App. 1998) (quoting Miranda, 384 U.S. at 444).

The protections provided under Miranda do not apply in every instance where a police officer questions a suspect; rather, these protections only apply "when the defendant is in custody and is subjected to questioning or its functional equivalent." State v. Walton, 41 S.W.3d 75, 82 (Tenn. 2001) (emphasis added) (citing Rhode Island v. Innis, 446 U.S. 291 (1980)). "Absent either one of these prerequisites, the requirements of Miranda are not implicated." Id.

Furthermore, the Supreme Court has held that a confession which is the product of coercive State action is involuntary. See, e.g., Colorado v. Connelly, 479 U.S. 157, 163-64, (1986). "The test of voluntariness for confessions under article I, § 9 of the Tennessee Constitution is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment." State v. Smith, 933 S.W.2d 450, 455 (Tenn. 1996) (citing State v. Stephenson, 878 S.W.2d 530, 544 (Tenn.1994)). A confession may be considered voluntary if it is not the product of "'any sort of threats or violence, . . . any direct or implied promises, however slight, nor by the exertion of any improper influence.'" State v. Smith, 42 S.W.3d 101, 109 (Tenn. Crim. App. 2000) (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)). However, "[a] defendant's subjective perception alone is not sufficient to justify a conclusion of involuntariness in the constitutional sense." State v. Berry, 154 S.W.3d 549, 577 (Tenn. 2004) (citing Smith, 933 S.W.2d at 455). Rather, the essential question is "'whether the behavior of the State's law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-

determined . . . .'" State v. Kelly, 603 S.W.2d 726, 728 (1980) (quoting Rogers v. Richmond, 365 U.S. 534, 544 (1961)). As relevant to this determination, our supreme court has held, "'The Fifth Amendment does not condemn all promise-induced admissions and confessions; it condemns only those which are compelled by promises of leniency.'" Kelly, 603 S.W.2d at 728 (quoting Hunter v. Swenson, 372 F. Supp. 287, 300-01 (D. Mo. 1974) (emphasis added)).

(1) Proffer Statement Inadmissible as Fruit of Earlier Involuntary Statements (Claim 4.1)

The Petitioner first argues that because his March 1994 statements to police (the March 10, 1994 statement at Fort Campbell and the March 21, 1994 statement at the Clarksville jail) were involuntary, the proffer statement, which the Petitioner claims was the direct result of these earlier statements, should be excluded under the "fruit of the poisonous tree" doctrine. In the instant case, even if the Court were to assume that the March 1994 statements resulted from coercive police behavior, that situation, standing alone, would not render the Petitioner's October 1995 statements to police inadmissible:

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession may always be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

United States v. Bayer, 331 U.S. 532, 540-41 (1947). See also Oregon v. Elstad, 470 U.S. 298, 311-12 (1985) ("Even in . . . extreme cases . . . in which police forced a full confession from the accused through unconscionable methods of interrogation, the Court has assumed that the coercive effect of the confession could, with time, be dissipated.").

The record reflects that over a year and a half passed between the Petitioner's initial statements to police and the proffer agreement. This period was sufficient to alleviate any problems associated with the Petitioner's initial statements to police. Thus, trial counsel's failure to challenge the proffer statement on the basis that the Petitioner's March 1994 statements were involuntary did not constitute ineffective assistance of counsel.

(2) Failure to Challenge Proffer Statement as Involuntary (Claim 4.2)

The Petitioner also asserts that his October 1995 statement given pursuant to the proffer agreement was involuntary, and therefore trial counsel were ineffective for failing to challenge the statement on this ground. The Court agrees.

At the evidentiary hearing, Mr. Carney testified that the Petitioner was likely not given Miranda warnings because he was not "in custody" at the time. Mr. Puckett offered testimony consistent with Mr. Carney's testimony as to this issue. Furthermore, the Petitioner testified that he was not given Miranda warnings before the October 1995 interviews. Although the Petitioner was not under arrest at the time of the proffer agreement, a suspect need not be under arrest to be considered "in custody" for Miranda purposes.

Rather, in determining whether an individual is "in custody" and therefore entitled to Miranda warnings, our supreme court has held:

> the appropriate inquiry . . . is whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of movement to a degree associated with a formal arrest. The test is objective from the viewpoint of the suspect, and the unarticulated subjective view of law enforcement officials that the individual being questioned is or is not a suspect does not bear upon the question.

State v. Anderson, 937 S.W.2d at 851, 855 (Tenn. 1996) (emphasis added). The court in Anderson provided a non-exclusive list of factors that may be used to evaluate whether a person is in custody for Miranda purposes. These factors include

> the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.

Id. (citations omitted). The determination of whether a person was in custody is a highly "fact specific inquiry." Id.

In this case, the record reflects that the Petitioner came to Clarksville from his Kentucky home to be questioned. It is unclear from the record how many officers questioned the Petitioner, but at the very least, Mr. Carney, Mr. Garrett, Mr. Bush, and Mr. Puckett were

present for the questioning, which Mr. Garrett characterized "intense" and "profane." According to the Petitioner, the State's agents repeatedly challenged the Petitioner's statements, asking the Petitioner for additional information even after the Petitioner had made particular statements to them. The Petitioner claimed that Mr. Puckett told him that he would "fry" for his part in the killings unless he told the truth. The record also reflects that Mr. McMillan was not present during part of the interview, as both Mr. Carney and the Petitioner said that Mr. Puckett and the Petitioner were left alone for a brief period, Mr. McMillan acknowledged that he was not present during the writing of the formal proffer statement, and the Petitioner claimed that Mr. McMillan was also "in and out" of the interview room during the October 19-20 interviews. The Petitioner also claims that he asked for the questioning to end on several occasions but that his requests were denied. Finally, the record reflects that the questioning lasted several hours each day, with the parties generally agreeing that few breaks were taken during that time.

In light of this evidence, the trial court would have found, given the totality of the circumstances, that the Petitioner was "in custody" for Miranda purposes at the time of the proffer statement, and that the State's failure to advise the Petitioner of his Miranda rights—especially during those times in which the Petitioner was subjected to questioning without counsel present—coupled with the State's other coercive behavior, rendered the proffer statement inadmissible.

At the evidentiary hearing TBI Agent Lanny Wilder, who administered the Petitioner's polygraph examination on October 20, 1995, produced a Miranda waiver—which neither the parties nor the Court had seen prior to Mr. Wilder's evidentiary hearing testimony—that the Petitioner signed before the examination began. However, this waiver was ineffective to render the proffer statement voluntary.

Generally, a "valid waiver of Miranda rights remains valid unless the circumstances change so seriously that the suspect's answers to interrogation are no longer voluntary." State v. Rogers, 188 S.W.3d 593, 606 (Tenn. 2006). Courts must examine the "totality of the circumstances to determine whether renewed warnings are required." Id. Factors to be considered when assessing the totality of the circumstances include:

(1) the amount of time that has passed since the waiver;
(2) any change in the identity of the interrogator, the location of the interview, or the subject matter of the questioning;
(3) any official reminder of the prior advisement;
(4) the suspect's sophistication or past experience with law enforcement; and
(5) any indicia that the suspect subjectively understands or waives his rights.

Id.

In this case, the record reflects that relatively little time passed between the conclusion of the polygraph examination and the resumption of questioning by the other State agents. However, the other factors identified in Rogers preponderate against a finding that the Miranda warning given before the polygraph exam was valid for the Petitioner's post-

polygraph questioning. Mr. Wilder was the only person present during the polygraph examination, but after the exam ended, the Petitioner faced questioning by several state agents. The relatively unsophisticated Petitioner was not advised of his Miranda rights after the examination ended, so the Petitioner had no opportunity to express to his questioners that he understood or waived his rights. Under the totality of the circumstances, the Court finds that the Miranda waiver which the Petitioner signed before the polygraph examination was limited to the unique context of the examination and was not effective within the context of the questioning which the Petitioner faced once the examination ended. Thus, as stated above, the pre-polygraph Miranda waiver did not render the proffer statement voluntary.

Counsel's failure to argue that the proffer statement was involuntary—even after prompted to do so by the trial court during the suppression hearing—constituted deficient performance, and given that the proffer statement formed the core of the evidence against the Petitioner at trial, counsel's deficiencies prejudiced the Petitioner. Accordingly, the Court finds that the Petitioner received the ineffective assistance of counsel as to this issue, necessitating a new trial.

(D) Trial Counsel's Ineffectiveness at Suppression Hearing (Petitioner's Claim 5)

(1) Waiver of Attorney-Client Privilege as to Pretrial Counsel (Claim 5.1)

In the first of several assertions regarding the Petitioner's claim that trial counsel rendered ineffective assistance at the hearing on the motion to suppress the proffer statement,

the Petitioner argues that counsel were ineffective for convincing him to waive his attorney-client privilege as to pretrial counsel.

The record reflects that at the suppression hearing, the State called pretrial counsel as a witness. Pretrial counsel testified as to the plea negotiations between himself, the Petitioner, and members of the District Attorney's Office. Pretrial counsel insisted that he was present for all questioning which led to the proffer agreement and statement given thereto, that the Petitioner was advised of his Miranda rights, and that his statements were otherwise knowingly, intelligently, and voluntarily given. At the conclusion of the State's direct examination, the trial court took a recess, after which the Petitioner waived the attorney-client privilege as to pretrial counsel. On cross-examination, pretrial counsel testified regarding communications between the Petitioner and him.

The Petitioner asserts that trial counsel's convincing him to waive the attorney-client privilege prejudiced him because it allowed the trial court to hear testimony implicating himself in the Taco Bell offenses and supporting the State's position that the Petitioner breached the plea agreement. However, as the Tennessee Supreme Court held on the Petitioner's direct appeal, a trial court's determination regarding a suspect's motion to suppress his statement to police concerns the voluntariness of the suspect's statements rather than the statement's truth:

> We recognize that Housler's confession contained many known factual falsehoods—such as the precise date Mathews and Housler planned the crime during a party at the trailer park, the time of the killings, and (perhaps) who acquired the ammunition used in the killings. In answer to the Appellant's

argument that these known falsehoods rendered the confession constitutionally infirm as evidence, we think it apparent that Due Process here merely required (1) the trial judge to find, by a preponderance of the evidence, that the defendant confessed voluntarily and (2) the confession be minimally corroborated as required by Opper v. United States, 348 U.S. 84 (1954), Smith v. United States, 348 U.S. 147 (1954), Wong Sun v. United States, 371 U.S. 471 (1963), and the attendant Tennessee cases cited below. Once these two conditions were satisfied, the truth or falsity of the Appellant's confession, despite the known factual errors it contained, was a determination for the jury. Wynn v. State, 181 S.W.2d 332, 329 (Tenn. 1944) ("A confession being admitted, its weight is of course a matter for the jury. That is, the jury is to determine whether defendant made the confession and whether the statements contained in it are true.").

"It is a fundamental doctrine of substantive criminal law that the confessions . . . of a criminal defendant, assuming that they are voluntary, are admissible in evidence." Laumer v. U.S., 409 A.2d 190, 197 (D.C. 1979) (citing Wong Sun, 371 U.S. at 488-89; Smith, 348 U.S. 147; Opper, 348 U.S. at 88-90). Of course, the admissibility of evidence is a question for the trial judge, not the jury, Lego v. Twomey, 404 U.S. 477, 490 (1972), and in making the voluntariness determination, the trial judge is to be "uninfluenced by the truth or falsity of the confession." Lego, 404 U.S. at 484. In other words, "the exclusion of unreliable confessions is not the purpose that a voluntariness hearing is designed to serve. The sole issue . . . is whether a confession was coerced. Whether it be true or false is irrelevant; indeed, such an inquiry is forbidden." Lego, 404 U.S. at 484 n.12. Rather, the voluntariness determination "was designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances." Lego, 404 U.S. at 485. The Court made clear in Lego that, while the trial judge determines whether the confession was given voluntarily, *the jury assesses the truth or falsity of the statements made*:

> [The voluntariness inquiry] [i]s not aimed at reducing the possibility of convicting innocent men . . . [nor is it] based in the slightest on the fear that juries might misjudge the accuracy of confessions and arrive at erroneous determinations of guilt or innocence. . . . *Nothing [in the voluntariness inquiry] question[s] the province or capacity of juries to assess the truthfulness of confessions.* . . .

> 92 U.S. at 484-85 (emphasis added). The trial court found that the Appellant's confession here was voluntarily given, a ruling that was affirmed on appeal and that the Appellant does not now dispute. Therefore, the voluntariness prong of the inquiry is satisfied, and we thus hold that the Appellant's confession was properly admitted into evidence.

Housler, 193 S.W.3d at 488-90.

Even if the Petitioner had not waived the attorney-client privilege as to pretrial counsel, the statement still would have been admitted, as pretrial counsel's direct examination testimony and the testimony of the other witnesses at the suppression hearing would have supported the trial court's finding that the Petitioner's statements were knowingly, voluntarily, and intelligently given, in light of the absence of evidence to the contrary. Thus, the Court finds that trial counsel's convincing the Petitioner to waive his attorney-client privilege as to pretrial counsel did not constitute ineffective assistance.

(2) Failure to Call Dr. Ofshe (Claim 5.2)

The Petitioner next argues that trial counsel were ineffective for failing to call Dr. Ofshe as a witness at the suppression hearing. The Petitioner argues that Dr. Ofshe's testimony would have "support[ed] [the] Petitioner's claims that his Proffer Statement was not made voluntarily[.]"

Initially, the Court recognizes that had Dr. Ofshe been called by trial counsel as part of a wide-ranging attack on the voluntariness of the Petitioner's proffer statement, Dr.

Ofshe's testimony would have supported the Petitioner's assertion that the proffer statement was coerced and involuntary. As stated above, the Court agrees with the Petitioner that had such a challenge been raised, the proffer statement would have been suppressed, and counsel were therefore ineffective for not raising such a challenge at the suppression hearing. However, within the context of the present issue, the Court will consider the issue only within the context of the evidence actually presented at the suppression hearing.

At the evidentiary hearing, Dr. Ofshe testified that his conclusion that the Petitioner's confession was coerced was based in part on evidence including: (1) the Petitioner's being told that he would "fry" for his role in the Taco Bell offenses; (2) the "snitch culture" that permeated the Montgomery County jail; and (3) the coercive nature of the setting of the Petitioner's interviews which resulted in the proffer statement. However, based upon trial counsel's improper focus at the suppression hearing[10] on the truthfulness of the Petitioner's statements, very little evidence concerning the voluntariness of the statements was introduced. At the suppression hearing, Mr. McMillan and Mr. Bush denied that the death penalty was discussed during the October 1995 statements, and Mr. Carney denied threatening the Petitioner at that time, so there was no evidence to support Dr. Ofshe's suggestion that the Petitioner was told that he would "fry." Also, no evidence was put forth regarding any cultural factors at the Montgomery County Jail which would have led the Petitioner to believe, as Dr. Ofshe testified at the evidentiary hearing, that the Petitioner knew

[10]See the Court's analysis of issue 8.3 below.

that he would have gotten a better deal had he offered a statement—even an untrue one—regarding the Taco Bell offenses. Furthermore, although several of the suppression hearing witnesses testified that there were several State representatives present at the October 19 and 20 interrogations and that the October 19 interrogation lasted several hours, there was no evidence presented that the Petitioner was threatened during the interrogation or that the interrogation was aggressive or hostile in nature. Furthermore, no evidence was presented regarding how the Petitioner's mental or social history would have made him susceptible to giving a coerced confession.

As stated above, trial counsel's attack on the admissibility of the proffer statement was limited to counsel's assertion that the proffer statement was untrue. Given the nature of trial counsel's attack on the admissibility of the proffer statement, very little evidence concerning the voluntariness of the proffer statement was presented at the suppression hearing. Much of the evidence regarding voluntariness that was presented favored the State, and thus Dr. Ofshe's assertions would not have been supported by the evidence. Therefore, the Court finds that trial counsel's failure to call Dr. Ofshe during the suppression hearing, without a wider attack on the voluntariness of the proffer statement, did not constitute ineffective assistance of counsel.

(3) Failure to Move to Strike Portions of Proffer Statement (Claim 5.3)

The Petitioner next argues that trial counsel were ineffective for not moving the trial court to exclude those portions of the proffer statement that were "undisputedly false[.]" As stated in the Tennessee Supreme Court's opinion, State witnesses including Mr. Puckett and Mr. Carney acknowledged that their investigations led them to believe that parts of the Petitioner's statement were untrue. The Petitioner argues that had trial counsel moved to exclude the challenged sections of the proffer statement, the statement "would have been rendered illogical and nearly incoherent" and "would have so undermined its credibility that the jury would not likely have believed any of its contents." However, the Court disagrees. None of the jurors testified at trial, so it is unclear what effect the jury's hearing of those false portions of the proffer statement had on the jury. Also, the Supreme Court held that the Petitioner's statement was corroborated by the testimony of several witnesses, none of whom testified at the evidentiary hearing. Accordingly, the Court must find that trial counsel's failure to redact the proffer statement did not prejudice him.

(4) Failure to Challenge Conflict of Interest Regarding Mr. Garrett(Claim 5.4)

The record reflects that at the April 21, 1997 suppression hearing, Mr. Radford informed the trial court that he had hired Mr. Garrett as an Assistant District Attorney for the Twenty-Fourth Judicial District, effective June 1, 1997. Mr. Radford stated that he did not believe hiring Mr. Garrett would create a conflict of interest; he said, "I have communicated with him concerning the case, and I don't know that I would continue to do so—but he has

been my source of information prior to this time on this case." Mr. Terry noted that "General Garrett is a potential [trial] witness and an important witness from our viewpoint;" however, when the trial court stated, "I can't think of any legal problems, either by way of conflict or by way of ethical considerations. . . . [T]he fact that [Mr. Garrett and Mr. Radford] have a relationship, I don't see as a concern," Mr. Terry replied, "We agree."

The Petitioner asserts that, contrary to the conclusions reached by the trial court, Mr. Mr. Radford, and Mr. Terry, Mr. Radford's hiring Mr. Garrett created a conflict of interest. The Petitioner states that "the appearance of impropriety stems not from the disclosure of confidential information by [Mr.] Garrett, but rather from the biased manner in which he would be expected to testify at trial to serve the interests of his employer." Thus, the Petitioner argues that Mr. Garrett's biased testimony prejudiced him and that trial counsel were therefore ineffective for not challenging Mr. Radford's hiring Mr. Garrett.

As the Petitioner states in his amended petitioner, a conflict of interest "does not require automatic vicarious disqualification of that attorney's law firm." Clinard v. Blackwood, 46 S.W.3d 177, 178 (Tenn. 2001). Rather, the court in Clinard held that "[w]hen an attorney has a conflict of interest resulting from former representation, adequate procedures to screen that attorney can rebut the presumption of shared confidences." Id.

One case similar to this one is State v. Tate, 925 S.W.2d 548 (Tenn. Crim. App. 1995), in which the Court of Criminal Appeals reversed a defendant's conviction by concluding that an appearance of impropriety existed when the district attorney who had

served as a trial judge and had signed motions in Mr. Tate's case before being appointed district attorney had been exposed to "confidential communications in the statutorily authorized ex parte proceedings." The facts of the instant case are slightly different from those in Tate, as Mr. Garrett did not assist Mr. Radford in prosecuting the Petitioner, unlike the judge-turned-district-attorney in Tate. Furthermore, the Petitioner does not appear to challenge the potential "free flow of information" between Mr. Garrett—who likely would have been exposed to confidential information regarding the Petitioner's case during his time as lead prosecutor in the Taco Bell cases—and Mr. Radford, but rather the supposedly biased nature of the testimony offered by Mr. Garrett in the face of questioning by his employer.

Mr. Garrett's work for Mr. Radford's office after Mr. Garrett, as a member of Mr. Carney's office, had been recused from the case, coupled with the lack of announced screening measures, are troubling. Nevertheless, the Court must find that any potential difficulties associated with Mr. Garrett's work for Mr. Radford's office did not prejudice the defendant in this case. The Court cannot find that the reasonable probability exists that had trial counsel objected to Mr. Garrett's work with Mr. Radford, the outcome of the Petitioner's trial would have been different. Had trial counsel objected to Mr. Garrett's involvement, the trial court likely would have faced three options: requiring the development of screening procedures, precluding Mr. Garrett from testifying, or recusing Mr. Radford from this case. In the first instance, Mr. Radford could have developed procedures that would have allowed for Mr. Garrett's testimony. Had Mr. Garrett not testified, the substance

of his testimony still would have been presented through other witnesses. And this Court can only speculate as to what the outcome of the Petitioner's trial would have been had another attorney prosecuted the case. Accordingly, the Court finds that counsel were not ineffective for not objecting to Mr. Radford's hiring Mr. Garrett.

(5) Failure to Seek to Enforce Proffer Agreement or Argue that the Agreement was Void, Illusory, and Unconscionable (Claims 5.5 and 5.6)

The Petitioner claims that trial counsel were ineffective for failing, at the suppression hearing, to either seek to enforce the proffer agreement or argue that the proffer agreement was void, illusory, and unconscionable. As examined above, had the proffer agreement been challenged under Howington and the applicable principles of contract law, the State would have been forced to prove beyond a reasonable doubt that the Petitioner materially breached the proffer agreement. Had the State been able to establish a material breach, the parties would have been returned to the same positions in which they found themselves before the proffer agreement was reached. Had the State been unable to prove breach, the State would have been obligated to perform the terms of the agreement. Thus, trial counsel's failure to either challenge the proffer statement as unconscionable or seek to enforce the agreement constituted ineffective assistance and necessitates a new trial.

(E) Trial Counsel's Reliance on Ineffective and Conflicted Investigators (Petitioner's Claims 6 and 7)

The Petitioner next argues that trial counsel were ineffective because they retained and relied upon ineffective and conflicted investigators. Specifically, the Petitioner asserts that Larry Wallace, whom counsel initially retained as an investigator, had no experience as a criminal investigator, failed to investigate certain inconsistencies in the Petitioner's statements to State agents, failed to produce exculpatory evidence, and provided trial counsel with poor information regarding a potential defense witness, Kevin Tween. The Petitioner also argues that because Inquisitor, Inc., had provided investigatory services in Courtney Mathews' trial, the agency and its investigators suffered from a conflict of interest that prevented them from investigating the Petitioner's case properly. In a related issue, the Petitioner asserts that the trial court's appointing Inquisitor despite the apparent conflict of interest denied the Petitioner the tools of an adequate defense.

"A key aspect of counsel's performance . . . is counsel's duty to investigate. Defense counsel 'must conduct appropriate investigations, both factual and legal,' and 'must assert them in a proper and timely manner.'" Nichols v. State, 90 S.W.3d 576, 587 (Tenn. 2002) (quoting Baxter v. Rose, 523 S.W.2d 930, 932, 935 (Tenn. 1975)). "[C]ounsel has the duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. "Although a defendant's statements or confessions do not eliminate counsel's duty to investigate, the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.'" Nichols, 90 S.W.3d at 587 (quoting Strickland, 466 U.S. at 691).

In the instant case, the Petitioner asserts that counsel rendered ineffective assistance by retaining Larry Wallace, whom the Petitioner claims was an inexperienced and ineffective investigator whose work did not meet the standards for investigation established by Strickland, Nichols, and related cases. However, the Court disagrees. As part of his allegation regarding Mr. Wallace's ineffectiveness, the Petitioner argues that Mr. Wallace improperly advised trial counsel not to call Kevin Tween as a witness at trial and failed to advise trial counsel of the existence of Larry Davis, both of whom the Petitioner claims would have provided exculpatory testimony. However, neither Tween nor Davis testified at the evidentiary hearing, so this Court can only speculate as to what their testimony might have been.

The Petitioner's assertions regarding the supposed inconsistencies in his proffer statement have been explored elsewhere and will not be revisited here. As stated above, the main witness in support of the Petitioner's contention that his statement was inaccurate was the Petitioner himself; as other witnesses who could have supported the Petitioner's assertions did not testify at the evidentiary hearing, any assertion that Mr. Wallace's failure to produce evidence in support of the Petitioner's assertions regarding the proffer statement cannot be supported.

Regarding Mr. Wallace's supposed failure to produce exculpatory evidence, the Court notes that the Petitioner's brief points to two items of evidence that post-conviction counsel were able to discover through "limited" discovery: the Army CID report and letters between

Larry Underhill and Gus Radford purporting to establish some sort of "deal" between Mr. Underhill and the prosecutor. However, as stated elsewhere in this order, the Petitioner has not established by clear and convincing evidence that any deal existed between Mr. Radford and Mr. Underhill. Regarding the Army CID report, trial counsel requested all exculpatory information but the State neglected to turn over the CID report—information which Mr. Radford testified he did not have but which the Court finds he should have had and turned over to the Petitioner. Furthermore, as stated later in this order, although the CID report was exculpatory, it was not "material" evidence, and therefore the State's failure to present the report to the Petitioner did not constitute a Brady violation. This contention is, therefore, without merit.

Trial counsel ultimately attempted to remedy any deficiencies associated with Mr. Wallace's investigative services by seeking the services of Inquisitor. The agency was hired to conduct a mitigation investigation, but the record reflects that Inquisitor also assisted trial counsel with their guilt/innocence investigation. However, Inquisitor's investigators were restrained in their ability to communicate with the Petitioner and his defense team given their earlier work on Mr. Matthews' case. Trial counsel either knew or should have been aware of these limitations at the time they retained Inquisitor's services. Inquisitor's ongoing duties and privileges associated with their work on Mr. Matthews' case prevented them from sharing vital information with the Petitioner—specifically, that Mr. Matthews had told Mr. Lax and other Inquisitor employees that he had acted alone in committing the Taco Bell

offenses. Mr. Lax and Ms. Shettles testified that they shared all the information they had uncovered during the course of their work on the Matthews case (except for the contents of the conversations between Mr. Matthews and Inquisitor employees), but given Inquisitor's divided loyalties, the Court cannot be certain of the accuracy of this testimony. In short, trial counsel's reliance upon investigators who were limited in their ability to work for the Petitioner, given the investigators' conflicts of interest, constituted deficient performance and prejudiced the Petitioner. Accordingly, the Court finds that trial counsel's retaining Ms. Shettles and Inquisitor constituted ineffective assistance of counsel and requires a new trial.

(F) Trial Counsel's Failure to Call Certain Witnesses and Prevent Michael Miller from Testifying (Petitioner's Claim 8)

(1) Testimony of Michael Miller (Claim 8.1)

The Petitioner argues that trial counsel were ineffective for failing to prevent Michael Miller from testifying at trial. On direct appeal, the Petitioner argued that the State's use of Mr. Miller as a witness constituted prosecutorial misconduct. The Court of Criminal Appeals denied the Petitioner relief on the issue. The court reviewed the issue as follows:

> The proof established that Miller and the Appellant were inmates in the Montgomery County Jail shortly after the Taco Bell crimes. During their incarceration, the Appellant confided in Miller that he and others participated in the Taco Bell robbery and murders. Miller advised the authorities of this fact, resulting in a two-page signed statement to the T.B.I. detailing the Appellant's conversations with Miller. Approximately six weeks prior to the scheduled trial, Miller, who was then incarcerated in a Kentucky penitentiary,

was contacted by the T.B.I. regarding his statement. Miller reaffirmed his prior statement to the T.B.I.

During opening statements on November 12, 1997, the attorney general made reference to Miller and the fact that he would be called as a State's witness. In the opening statement by the defense, defense counsel informed the jury:

> [DEFENSE COUNSEL]: I want you to remember what the Attorney General told you about Michael Miller. The Attorney General told you that Michael Miller was going to come in here and tell you that David Housler told him a whole bunch of things about this shotgun, and you remember plastic bag, where it was, and all of that? You remember that on November 12th, you were told that. You remember that next week when we come back up here?

On the second day of trial, Miller was called to testify. Before taking the stand, Miller informed the attorney general that his March 1994 statement to the T.B.I. was false. The attorney general advised the court of this fact and that if a recantation occurred, he would ask that the witness be declared a hostile witness. No objection was entered by defense counsel. During his testimony, Miller denied that he had ever talked to the Appellant about the "Taco Bell murders." He admitted that he gave the statement to the T.B.I. but explained that he either made the facts up, read about the facts in the newspaper, or was told what to say by the T.B.I. agent. Early into direct-examination, defense counsel posed an objection as to the attorney general's manner of impeachment. A bench conference was held. The record of this conference reflects that defense counsel's objections stemmed from the fact that "[the attorney general] has never asked this man what he said in the statement? If he puts that in, then he can say how did you know this? Why did you change - -." The trial court agreed with defense counsel's recommendations, which were followed by the attorney general during the remainder of direct examination. The State concluded its examination without introducing the witness' prior inconsistent statement or requesting that the witness be declared hostile. During cross-examination, defense counsel moved for introduction of the witness' signed statement as an exhibit and conducted

an extensive line-by-line impeachment of its contents.[11] Upon conclusion of Miller's testimony, the trial court voiced concerns as to its use by the jury. Another bench conference was held, during which defense counsel suggested that the attorney general's actions in calling Miller to testify constituted reversible error because the State did not provide notice of his recantation to the Appellant. The attorney general responded that he had informed the court and defense counsel of the witness' potential for recantation upon learning of this fact. Moreover, the attorney general noted that, although the State learned of the witness' recantation that same morning, the testimony of Miller indicated that Miller had informed defense counsel investigators that he was recanting "two or three days" prior, during their visit with him at the penitentiary. Defense counsel responded, "He's right, that we interviewed this witness and this witness told us that his statement was not true, but as the witness testified, he had told the [T.B.I.] six weeks ago that it was true." The attorney general also asserted that he was disturbed by defense counsel's opening remarks to the jury which "challenged me to deliver on Miller," when he knew at the time that Miller would be recanting. With regard to the facts in dispute, the trial court found:

> THE COURT: . . . My recollection at the sidebar was that [the attorney general] wanted to -- brought to the Court's attention that the witness, Michael Miller, who he was about to call, may very well become a hostile witness and [the attorney general] was seeking to have him treated as a hostile witness under Rule 611, so that he could lead him.
>
> . . .
>
> And I so instructed Counsel to do that and Mr. Terry agreed that that's the way it ought to be done.

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[11]The State conceded at trial that portions of Miller's statement were possibly false; however, these statements were not inculpatory in nature and no questions were asked of the witness regarding these particular statements. In contrast, these statements were fully explored and capitalized on by the Appellant during his examination of Miller.

> At that point in time though, I don't suppose anyone knew - - first of all, whether he was going to say that his statement was false, or if he was going to say that, was he going to say that it was entirely false or only partially false?
>
> . . .
>
> . . . [The attorney general] is correct, that after [he] finished examining the witness, then the cross examination by the Defense was to go over the statement again, line by line. So not only was there no objection from the Defense, the examination conducted by the Defense would act as a waiver in terms of complaining about the fact that the witness was allowed to testify.

Nonetheless, the trial court noted that it wanted to reflect further upon the question of whether a proper limiting instruction could be given under the circumstances or whether Miller's entire testimony should be stricken. Before recessing the jury for the day, the trial court instructed the jury as follows:

> As a matter of law, the Court has ordered the testimony of Michael Miller stricken from the record. That means that the testimony of Mr. Miller must be disregarded by you in its entirety and treated as though you never heard it. If you have notes in your notebook regarding the testimony of Mr. Miller, I am now instructing you to separate those notes from your notebooks and tender those separated Miller notes to the Court.
>
> You may not place any significance on either the testimony of Mr. Miller or draw any inferences from this instruction or this proceeding. If you will just take a moment and separate your notes from your notebook, if you have them? It may mean that you have a portion

> of a page that is separated from your notebook and I am sure you will be able to keep up with it.

The record indicates the jurors complied with this request.

Tennessee Rule of Evidence 607 allows a party to impeach its own witness, and Rule 611 allows the use of leading questions on direct examination of a hostile witness. Tenn. R. Evid. 607, 611(c). Moreover a party may impeach a hostile witness by asking the witness whether they previously made certain prior inconsistent statements. Tenn. R. Evid. 613(a), NEIL P. COHEN ET AL., TENNESSEE LAW OF EVIDENCE § 6.13[2] (4th ed 2000). At trial there are limits on the State's power to impeach its own witnesses by presenting the witnesses' prior inconsistent statement. *See Mays v. State*, 495 S.W.2d 833 (Tenn. Crim. App. 1972). Impeachment cannot be a "mere ruse" to present to the jury prejudicial or improper testimony. *State v. Roy L. Payne*, No. 03C01-9202-CR-00045 (Tenn. Crim. App. At Knoxville, Feb. 2, 1993). In *United States v. Webster*, 734 F.2d 1191 (7th Cir. 1984), the court explained:

> [I]t would be an abuse of [Federal Rule of Evidence 607], in a criminal case, for the prosecution to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence–or, if it didn't miss it, would ignore it. The purpose would not be to impeach the witness but to put in hearsay as substantive evidence against the defendant, which Rule 607 does not contemplate or authorize.

Webster, 734 F.2d at 1192.

. . . .

. . . . Central to this issue is whether the introduction of Miller's hearsay statement by the State to impeach its own witness was motivated solely by the

desire to put the statement before the jury. The fact that the attorney general was not surprised by Miller's testimony at trial does not indicate bad faith. Rule 607 does not require that the party calling the witness be surprised before the witness can be impeached. Tenn. R. Evid. 607. As has already been observed, the attorney general's use of the statement was limited in scope, as opposed to the Appellant's, and focused primarily upon the Appellant's statements regarding the location of the discarded shotgun. The record reflects that the shotgun was located by law enforcement officers based upon information supplied in Miller's statement. As such, the attorney general explained that he was primarily attempting to lay the foundation for those officers and the forensic proof which was to follow.

Based upon the record before us, we are unable to conclude that the State's impeachment by use of the Appellant's prior inconsistent statement was employed for the primary purpose of placing before the jury evidence which was not otherwise admissible. *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1995). Indeed, the record reflects that the Appellant was equally interested, for his own tactical reasons, in placing Miller's testimony before the jury, as at times his testimony tended to damage the State's case. For these reasons, any examination under Rule 403, Tennessee Rules of Evidence, is unnecessary.[12]

Finally, we disagree with the Appellant's characterization of the attorney general's actions in calling Miller as a witness as "prosecutorial misconduct." The defense and the State were both equally aware of Miller's potential for recantation; however, it was the State who informed the trial court of this possibility. This issue is without merit.

Housler CCA Opinion, slip op. at 14-17 (some alterations added). Given the appellate court's prior conclusion that the Petitioner was not prejudiced by Mr. Miller's testimony, the

[12]In this regard, [the appellate court] note[d] that certain portions of Miller's testimony on direct-examination, *i.e.*, location of the shotgun, was corroborated by other witnesses. Furthermore, the testimony was stricken from the record following the Appellant's objection to the testimony, which only occurred after Miller's testimony was concluded and the trial court voiced its concerns as to its use. Therefore, [the court] conclude[d] that the Appellant suffered no prejudice from the State's examination of Miller.

Court cannot find that trial counsel were ineffective for failing to prevent Mr. Miller from testifying. The Petitioner is not entitled to relief on this issue.

(2) Failure to call Kevin Tween (Claim 8.2)

The Petitioner next argues that trial counsel were ineffective for failing to call Kevin Tween to testify at trial. The record reflects that Mr. Terry, during his opening statement, told the jury that Mr. Tween would testify, but that Mr. Terry never called Mr. Tween as a witness and did not explain this decision to the jury. The Petitioner argues that "[t]he jury was curious about Tween's conspicuous absence, and this absence likely influenced the jury's perception of the case. Moreover, but for this absence, the jury would have known that every purported 'accomplice' implicated in the Proffer Statement denied any involvement in the Taco Bell murders."

Although Mr. Tween's potential testimony is addressed in the petition, Mr. Tween did not testify at the evidentiary hearing. Tennessee's appellate courts have long held that when a post-conviction petitioner alleges that defense counsel was deficient in failing to call witnesses, "the petitioner is not entitled to relief from his conviction on this ground unless he can produce a material witness [at the evidentiary hearing] who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called." Black v. State, 794 S.W.2d 752, 758 (Tenn. Crim. App. 1990). Given Mr. Tween's lack of testimony at the evidentiary hearing, the Court can only speculate as to

whether Mr. Tween would have testified favorably for the Petitioner at trial. Accordingly, the Court finds that the Petitioner is not entitled to relief on this issue.

(3) Failure to call Dr. Ofshe and Dr. Bernet (Claim 8.3)

The petitioner next asserts that trial counsel were ineffective for not calling Dr. Ofshe and Dr. Bernet to testify at trial. The Petitioner states that "Dr. Ofshe would have testified to the existence of false confessions and to police tactics and pressures that produce them in individuals with normal psychologies and with average personality traits," while Dr. Bernet "could have testified that Petitioner's psychology and specific personality traits made him particularly susceptible to those police tactics and pressures." In other words, the witnesses' testimony would have supported the Petitioner's theory that he his "confession," i.e., the proffer statement, was false.

Initially, the Court clarifies the subject area about which the witnesses could have testified. "[I]n determining the admissibility of a criminal defendant's confession, the initial decision as to its voluntariness is to be made by the trial judge alone." State v. Pursley, 550 S.W.2d 949, 950 (Tenn. 1977) (citing Wynn v. State, 181 S.W.2d 332 (Tenn. 1944)). "[T]he admissibility of a confession is not a proper matter for submission to the jury[;] however, once admitted, the weight to be given a confession does become a matter for the jury's submission." Pursley, 550 S.W.2d at 950. In other words, the defendant may present evidence that allows the jury "to determine whether [the] defendant made the confession and

whether the statements contained in it are true. To aid them in resolving these questions the jury may hear evidence of the circumstances under which the confession was procured." Wynn, 181 S.W.2d at 333.

In the instant case, although the experts' proposed testimony arguably could have been construed as evidence regarding the voluntariness of the Petitioner's statements—evidence which would have been inadmissible at trial—the Court is satisfied that Dr. Ofshe and Dr. Bernet would have offered testimony regarding the circumstances surrounding the Petitioner's making the proffer statement. This testimony would have been admissible at trial. However, even assuming that trial counsel were deficient in not calling Dr. Ofshe or Dr. Bernet, the Court cannot find that counsel's decision prejudiced the Petitioner. As the Petitioner acknowledges in his amended motion, State witnesses acknowledged that several portions of the Petitioner's statement were untrue, and the Petitioner testified that he concocted the proffer statement—which he admitted was riddled with untruths— so that he could get a reduced sentence in the Grandpa's robbery. The jury heard extensive testimony that the Petitioner's statement was untrue (in part or in whole), and it still chose to convict the Petitioner, as was its prerogative. The Court cannot conclude that it is more likely than not that additional testimony concerning the truth or falsity of the Petitioner's statement, standing alone, would have affected the outcome of the Petitioner's trial. The Court therefore finds that trial counsel did not render ineffective assistance as to this issue.

(3) Failure to call Courtney Mathews (Claim 8.4)

The record reflects that Courtney Mathews was called as a witness at trial, but that he asserted his Fifth Amendment privilege against self-incrimination and did not testify. The Petitioner argues that counsel were ineffective for failing to compel Mr. Mathews' testimony through the grant of judicial use immunity. The Court disagrees.

The Tennessee Court of Criminal Appeals has examined judicial use immunity as follows:

> Use immunity generally refers to a federal prosecutor's discretionary authority to grant a witness immunity from prosecution based upon his compelled testimony, when doing so is in the public interest. See 18 U.S.C. §§ 6002 et seq.; United States v. Mohney, 949 F.2d 1397, 1401 (6th Cir. 1991). Some states have recognized use immunity as a matter of state law. See generally Robert M. Schoenhaus, Prosecutor's Power to Grant Prosecution Witness Immunity from Prosecution, 4 A.L.R.4th 1221. In Tennessee, immunity agreements are enforceable via principles of contract law. State v. Howington, 907 S.W.2d 403 (Tenn. 1995).
>
> The criminal defendant has no discretion of his own to immunize those witnesses who might offer favorable testimony for the defense were it not for their own concerns about self-incrimination. It is foreseeable that in certain situations, the prosecution's power to grant immunity to its witnesses, without the defense having companion power for immunizing its witnesses, might result in the prosecution having the ability to intentionally distort the fact-finding process, or at a minimum, having far superior access to evidence as compared with the defense. See Mohney, 949 F.2d at 1402. Thus, some jurisdictions have recognized either or both of two theories by which use immunity may be conferred upon defense witnesses – when it is necessary so that the defendant may mount an effective defense and/or when it is necessary to overcome prosecutorial misconduct.[13] See United States v. Pennell, 737

[13]In the former situation, the court would order the prosecutor to confer immunity on the prospective defense witness, whereas in the latter situation, the court itself would exercise its inherent authority to confer the immunity to effectuate the defendant's compulsory process right. See Virgin Islands v. Smith, 615 F.2d 964, 969 (3d Cir. 1980).

F.2d 521, 526 (6th Cir. 1984). The basis for such a grant of immunity is due process. Id. at 526-27.

. . . .

Tennessee law provides guidance for review of claims of violation of a criminal defendant's constitutional right to present a defense. The factors to be considered are whether

1. the excluded evidence is critical to the defense;
2. the evidence bears sufficient indicia of reliability; and
3. the interest supporting exclusion of the evidence is substantially important.

State v. Brown, 29 S.W.3d 427, 433-34 (Tenn. 2000) (citing Chambers v. Mississippi, 410 U.S. 284, 298-301, 93 S. Ct. 1038 (1973)); see also State v. Powers, 101 S.W.3d 383, 397 (Tenn.), cert. denied, 538 U.S. 1038, 123 S. Ct. 2083 (2003).

State v. Summers, 159 S.W.3d 586, 594-95 (Tenn. Crim. App. 2004).

In Summers, a case decided after the Petitioner's trial, the appellate court declined to resolve the question of the existence of use immunity for defense witnesses in Tennessee, given the facts of the case. Id. at 595-96. Applying the "right to present a defense" factors established in Chambers and Brown, the court in Summers held that the proposed testimony of a potential defense witness was not critical to the defense. Id. at 596. Similarly, the Court finds that the Petitioner cannot establish the prerequisites to a constitutional claim regarding Mathews' proposed testimony. Mr. Mathews did not testify at the evidentiary hearing, and although Mr. Gant and three Inquisitor employees testified at the evidentiary hearing that Mr.

Mathews had told them that he acted alone in committing the Taco Bell offenses, no testimony was offered that Mr. Mathews was willing to testify at the Petitioner's trial. Nor was there any other evidence regarding what Mr. Mathews' proposed trial testimony would have been. In short, the Petitioner has not established any indicia of reliability regarding the substance of Mr. Mathews' testimony were he to have testified at the Petitioner's trial. The Petitioner is not entitled to relief on this issue.

(G) Trial Counsel's Failure to Introduce Material Exculpatory Evidence (Petitioner's Claim 9)

The Petitioner argues that trial counsel were ineffective for not introducing the unredacted timeline or the testimony of Glori Shettles or other Inquisitor employees—both of which he deems to be material and exculpatory evidence—at trial. The Court disagrees.

(1) Mathews Timeline (Claim 9.1)

The Petitioner argues that trial counsel erred by not introducing the unredacted timeline prepared by Inquisitor in the Courtney Mathews case into evidence. As an initial matter, the Court agrees with the Petitioner that the timeline was not privileged, as trial counsel had obtained it before trial. However, the Court cannot agree with the Petitioner's assertion that the timeline was admissible.

First, the Court finds that the timeline was hearsay. The Tennessee Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Hearsay is not admissible unless an exception to the hearsay rule applies. Tenn. R. Evid. 802. Where the proposed testimony involves "hearsay within hearsay," such as in the instant case, a recognized hearsay exception must apply to each "level" of the statement for the testimony to be admissible. See Tenn. R. Evid. 805.

The Petitioner makes several arguments supporting his assertion that the timeline falls under exceptions to the hearsay rules. First, the Petitioner argues that the timeline is admissible to the Business Records Exception of Rule 803(6). That rule provides, in pertinent part, that the following records are exempt from the rule against hearsay:

> Records of Regularly Conducted Activity.--A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, profession, occupation, and calling of every kind, whether or not conducted for profit.

The Court agrees that the timeline constitutes a "business record" as contemplated by the Rule. However, this finding does not conclude the Court's analysis, as the individual statements within the timeline also constitute hearsay and would be inadmissible absent an

exception to the hearsay rules. Addressing those parts of the timeline purporting to be statements by Courtney Mathews to Inquisitor employees, the Petitioner argues that those statements should be admissible because they were inculpatory statements made against his penal interest and should therefore be admissible under the Statement Against Interest hearsay exception. See Tenn. R. Evid. 804(b)(3). The Statement Against Interest exception allows the admission of

> [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Id. The Petitioner argues that Courtney Mathews' statements to Inquisitor employees were inculpatory and therefore were against his interest, but the Court disagrees. Mr. Mathews' statements contained in the timeline were made not to State agents or innocent third parties, but to investigators retained by his trial counsel in the furtherance of his defense. The hallmark of any attorney-client relationship is honest communication between the client and his attorney (and the attorney's agents). Given the privileged nature of the communication between lawyer (and the lawyer's agents) and client, and the client's inclination to provide his attorney with sufficient information so that the attorney can pursue an appropriate defense, the Court cannot conclude that Mr. Matthews' admissions of guilt to Inquisitor employees—which would certainly be inculpatory and considered to be given against his penal interest if given to most persons—qualify as "statements against interest" for purposes of Rule 804(b)(3).

Alternatively, the Petitioner asserts that the Mathews statements contained in the timeline were not hearsay because they would not have been offered for the truth of the matter asserted. As the Petitioner states in his amended petition, "the evidence would [have] be[en] introduced not to proved that the declarant perpetrated the Taco Bell murder, but merely to prove that [Mr. Mathews] did not implicate the Petitioner . . . ." However, in the Court's view, the Petitioner's assertion that the Mathews timeline establishes that the Petitioner did not participate the Taco Bell offenses cannot be supported without also asserting that Mr. Mathews committed the offenses alone. Thus, the Court rejects the Petitioner's argument that the Mathews statements contained in the timeline were not hearsay.

Finally, the Court notes other problems associated with the timeline's admissibility. The timeline contains (1) inconsistent information; (2) irrelevant information; and (3) numerous other hearsay statements which are not covered by a hearsay exception. Furthermore, at the time of trial, trial counsel would not have had access to the testimony of Courtney Mathews or any other evidence substantiating his claims to Inquisitor employees. Thus, counsel's ability to substantiate Mathews' statements listed in the timeline would have been limited. Accordingly, the Court finds that trial counsel were not ineffective for not introducing the Mathews timeline at the Petitioner's trial.

(2) Glori Shettles and/or other Inquisitor Employees (Claim 9.2)

The Petitioner also argues that trial counsel were ineffective for not calling Glori Shettles or other Inquisitor employees at trial. He asserts that these witnesses could have testified in support of the Petitioner's theory that he did not commit the Taco Bell offenses because they "directly heard Courtney Mathews describe the Taco Bell crimes in a manner that made it clear that Petitioner was not involved in any way." However, the Court finds that the testimony of Ms. Shettles or other Inquisitor employees would not be admissible at trial. Her testimony would have been hearsay, see Tenn. R. Evid. 801, 802, and would not have been subject to any recognized hearsay exception. Furthermore, as Courtney Mathews would have been unavailable to testify at trial given that he asserted his Fifth Amendment privilege, the reliability of any Inquisitor employee's testimony would have been limited, given the testimony's inability to be corroborated. The Court cannot conclude that it is more likely than not that the testimony of Ms. Shettles or Mr. Lax, without more, would have affected the jury's verdict in the instant case. Counsel were therefore not ineffective for not calling Inquisitor employees to testify at trial.

(H) Trial Counsel's Failure to Introduce Mitigation Evidence at Sentencing (Petitioner's Claim 10)

The Petitioner argues that trial counsel were ineffective for failing to introduce any mitigating evidence during either the penalty phase of trial, in which the jury considered whether the Petitioner's life sentences would be served with or without the possibility of

parole, or the post-trial sentencing hearing, in which the trial court determined whether the Petitioner would serve his four life sentences concurrently or consecutively. The Petitioner argues that had counsel presented "the mitigating evidence that Trial Counsel and their investigator had developed on behalf of Petitioner—including his youth, immaturity, and background—there is a reasonable probability that the judge would have found the Petitioner was not a continuing danger to the public," and thus would have imposed concurred sentences.[14] The Court disagrees.

Consecutive sentencing is guided by Tennessee Code Annotated section 40-35-115(b), which states in pertinent part that the trial court may order sentences to run consecutively if it finds by a preponderance of the evidence that "[t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." Tenn. Code Ann. § 40-35-115(b)(4). When imposing consecutive sentences based on the defendant's status as a dangerous offender, the trial court must, "in addition to the application of general principles of sentencing," find "that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed." State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995). In all cases where consecutive sentences are imposed, the trial court is

[14]Although trial counsel did not present any mitigating evidence during the penalty phase of trial, the jury imposed four sentences of life imprisonment with the possibility of parole, thus rejecting the State's argument for enhanced punishment. Thus, the Petitioner was not prejudiced by counsel's failure to present mitigating evidence during the penalty phase.

required to "specifically recite [on the record] the reasons" behind imposition of consecutive sentences. See Tenn. R. Crim. P. 32(c)(1); see, e.g., State v. Palmer, 10 S.W.3d 638, 647-48 (Tenn. Crim. App. 1999) (noting the requirements of Rule 32(c)(1) for purposes of consecutive sentencing).

As part of any sentencing hearing, the trial court is required to consider "[e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114[.]" Tenn. Code Ann. § 40-35-210(b)(5) (2006).[15] Although the mitigating factors provided in section 40-35-113 are most commonly applied in determining the length of a defendant's sentence for an individual offense, a situation not applicable in the instant case, such factors are also relevant in determining whether consecutive sentencing is appropriate. The Court of Criminal Appeals has suggested that such factors are particularly relevant in determining whether a defendant constitutes a "dangerous offender" for purposes of section 40-35-115(b)(4):

> This court has suggested that "[a]menability to rehabilitation relates directly to [the] protection of the public factor and may, on occasion, be determinative of whether the concurrent or the consecutive sentence should be imposed." State v. Donald Mitchell Boshears and Ronald Dewaine Morrow, III, No. 01C01-9412-CR-00402, 1995 WL 676402, at *5 (Tenn. Crim. App. Nov. 15, 1995) (citing Tenn. Code Ann. § 40-35-103). The defendant's youthfulness and lack of a criminal record may also establish that the defendant is not a threat for continued criminal behavior—and, therefore, that an extended sentence is not necessary to protect the public from the defendant. State v. Tadaryl Darnell Shipp, No. 03C01-9907-CR-00312, 2000 WL 290964, at *4 (Tenn. Crim. App. Mar. 21, 2000). However, "otherwise favorable factors"

[15]The content of this subsection is identical to the 1990 version of the statute in effect at the time the Taco Bell killings occurred.

> supporting a defendant's assertion that he does not present a continued threat to the public "may be offset in an appropriate case by the circumstances of the offense and the dangerous offender's lack of remorse." Id. (citing State v. Pike, 978 S.W.2d 904, 928 (Tenn. 1998) (appendix); State v. Martin Palmer Jones, No. 03C01-9803-CR-00084, 1999 WL 93144, at *6 (Tenn. Crim. App. Feb. 25, 1999)).

State v. Jonathan Lee Adams, No. E2008-00400-CCA-R3-CD, Knox County, slip op. at 8 (Tenn. Crim. App. July 22, 2009), no perm. app. filed.

In this case, had trial counsel called the Petitioner's family members and Dr. Bernet to testify at the sentencing hearing, their testimony certainly would have been relevant to the mitigating factors identified in section 40-35-113. However, given the circumstances of the offenses, evidence of which was accredited by the jury through its guilty verdict, and the discretion afforded a trial court in its sentencing function, the Court cannot conclude that there is a reasonable probability that the proposed mitigating evidence would have offset evidence supporting the trial court's application of the "dangerous offender" factor and imposition of consecutive sentences. The Court therefore finds that the Petitioner was not prejudiced by trial counsel's failure to present mitigating evidence during the sentencing hearing.

(I) Ineffective Assistance of Appellate Counsel (Petitioner's Claim 11)

In his final assertion regarding ineffective assistance of counsel, the Petitioner argues that Mr. Terry, who represented the Petitioner on appeal, provided ineffective assistance on

appeal. The Petitioner bases his assertion on two grounds. First, he argues that appellate counsel should have argued that the Petitioner's October 1995 proffer statement was involuntary, rather than "false" and "unreliable," as counsel argued on appeal. Secondly, the Petitioner argues that appellate counsel was ineffective for failing to challenge "the constitutionally impermissible delays in the adjudication of [the] petitioner's new trial motion."

(1) Involuntariness of Proffer Statement

The record reflects that the Petitioner did not challenge the voluntariness of the proffer statement in any of his motions for new trial. Thus, the issue would have been treated as waived on appeal, see Tenn. R. App. P. 3(e), and he would have been entitled to relief only via plain error review, see Tenn. R. App. P. 36(b). To establish plain error review, the Petitioner would have been required to establish the following five factors:

> (a) The record . . . clearly establish[es] what occurred in the trial court;
> (b) a clear and unequivocal rule of law [has] been breached;
> (c) a substantial right of the accused [has] been adversely affected;
> (d) the accused did not waive the issue for tactical reasons; and
> (e) consideration of the error is "necessary to do substantial justice."

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)).

In the Court's view, had Mr. Terry raised this issue on appeal, there is a reasonable probability that he would have been able to establish the existence of the first three plain error factors. However, counsel would have been unable to establish that he did not waive the issue for tactical reasons. During the suppression hearing, the trial court admonished Mr. Terry that the proper focus of a suppression hearing was the voluntariness of the Petitioner's statement, and despite that admonition, counsel declined to address that issue and instead focused on his assertion that the proffer statement was inadmissible because it was false. Because the Petitioner would not have been entitled to plain error relief, the Court finds that Mr. Terry's failure to raise the voluntariness issue on appeal did constitute ineffective assistance of counsel.

(2) Post-Trial Delays

The record reflects that the Petitioner filed a timely motion for new trial on December 22, 1997. The Petitioner filed a renewed motion for new trial on November 3, 1999. The trial court held a hearing on the Petitioner's new trial motion beginning March 16, 2000 and ending on April 21, 2000. The trial court denied the motion on February 5, 2002. The Court expresses regret over the four-year delay between the filing of the motion for the new trial and the issuance of the order denying the motion. However, after reviewing the record, the Court finds that appellate counsel's failure to assert this issue on appeal did not constitute ineffective assistance.

Tennessee's appellate courts have long applied the four-factor speedy trial analysis set forth in Barker v. Wingo, 407 U.S. 514 (1972) in reviewing trial delays. See State v. Baker, 614 S.W.2d 352, 353 (Tenn. 1981); State v. Bishop, 493 S.W.2d 81, 83-85 (Tenn. 1973). The Sixth Circuit Court of Appeals has also applied (with some minor changes) the Barker factors for determining a speedy trial violation in determining whether an appellant's due process rights are violated by a delay in the appellate process. See United States v. Smith, 94 F.3d 204, 208 (6th Cir. 1996). The four factors the court must balance are: (1) the length of delay; (2) the reason for delay; (3) whether the appellant asserted his right to a timely appeal; and (4) whether the appellant was prejudiced by the delay. Id. at 207. Tennessee's appellate courts have cited to Smith with approval. See State v. Billy Joe Baggett, No. 01C01-9604-CC-00160, Dickson County, slip op. at 12 (Tenn. Crim. App. Apr. 3, 1997).

The Tennessee Supreme Court has identified the fourth Barker factor, prejudice, as "the single most important factor in the balancing test." State v. Baker, 614 S.W.2d 352, 356 (Tenn. 1981). As relevant to delays in appeal, the Sixth Circuit in Smith identified three factors to consider in determining whether such a delay prejudices the appellant: (1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limiting the possibility that a convicted person's grounds for appeal, or his defenses in case of a reversal and retrial, might be impaired. Smith, 94 F.3d at 207 (citing Harris v. Champion, 15 F.3d 1538, 1559

(10th Cir. 1994)). "[T]he most serious factor in analyzing prejudice is the third one[.]" Smith, 94 F.3d at 211 (citing Barker, 407 U.S. at 532, and Harris, 15 F.3d at 1563).

In the instant case, the four-year delay between the filing of the new trial motion and the order denying the motion was more than sufficient to trigger the Barker/Harris analysis, Mr. Terry, through his inquiries into the status of the new trial motion, asserted the Petitioner's right to a timely appeal. Assuming arguendo that the "reasons for delay" factor also weighed in the Petitioner's favor, the Petitioner still is not entitled to relief on this issue because he cannot establish that the delay in his appeal prejudiced him.

In support of the first Harris prejudice element, the Petitioner argues that his incarceration pending appeal was "doubly oppressive" because "[trial] counsel's ineffective representation violated his constitutional rights and also led to the denial of his new trial motion." Regarding the second element, the Petitioner argues that his "anxiety and concern are extraordinary because, in addition to the natural anxiety resulting from four years' post-conviction incarceration . . . Petitioner is factually innocent and learned that his Trial Counsel had possessed clearly exculpatory evidence even before his trial . . . but had failed to even attempt to introduce this evidence in his defense." The Court finds these arguments unavailing. The elements of the claims the Petitioner raises on post-conviction existed independently of the delay in resolving the new trial motion. Although a more prompt resolution of the Petitioner's appeal would have hastened the filing of the instant post-conviction proceedings, the delay did not, by itself, exacerbate his claims.

Regarding the third, and most important, prejudice factor—the potential limits on the Petitioner's ability to assert his arguments on appeal and his defenses in event of retrial or resentencing—the Petitioner argues that the delays in this case prejudiced him because (1) the tornado which struck downtown Clarksville in 1999 "destroyed untold pieces of evidence and portions of the Petitioner's record" and (2) during the pendency of the petitioner's direct appeals, Larry Wallace, one of the Petitioner's investigators, and the Hon. Charles Bush, who in October 1995 was an assistant district attorney involved in this case, died. The Petitioner argues that "these witnesses were critical for purposes of establishing Initial Counsel and Trial Counsel's ineffective assistance and the State's prosecutorial misconduct."

Regarding the first component of the Petitioner's prejudice claim, although the Petitioner asserts in the context of this issue that the January 1999 tornado destroyed "untold" portions of the clerk's records in the instant case, elsewhere in his petition the Petitioner states that "[m]ost of the Court files from Housler's cases were preserved[.]" The only specific parts of the record that the Petitioner claims are missing are the transcript and orders from the hearing on Mr. Simmons' motions to quash the subpoenas issued to him, Mr. Lax, and Mr. Mathews. As will be explained below, the Court finds that the missing records do not prejudice the Petitioner. Regarding the deaths of Mr. Wallace and Mr. Bush, while the death of a witness is inherently prejudicial to a party, the Petitioner was still able to assert the issues associated with each witness—Mr. Wallace's alleged ineffectiveness as an investigator and the alleged constitutional infirmities with the proffer statement—through

other witnesses. Thus, while the delay in these proceedings was troubling, the Court finds that appellate counsel was not ineffective for failing to raise on appeal the issue of the delay.

VI. Missing Material Records (Petitioner's Claim 12)

On November 6, 1997, the trial court held a hearing regarding several pretrial matters. Among the motions considered by the trial court were motions to quash subpoenas upon Jim Simmons, Ron Lax, and Courtney Mathews, all filed by Mr. Simmons on behalf of Mr. Mathews. Based upon handwritten notes discovered in court archives, the record reflects that the trial court granted the motion to quash as to Mr. Simmons but denied the other two motions to quash. However, through no fault of the Petitioner's, no transcript of the hearing or written orders issued pursuant to the hearing exist.

In his petition, the Petitioner asserts that these missing records prevent him

> from challenging any failure by Trial Counsel to do the following: (1) raise any necessary and reasonable legal arguments during the hearing; (2) call Ron Lax at trial; (3) require Courtney Mathews to assert his Fifth Amendment privilege with particularity; (4) probe the scope of Mathews' privilege; [and] (5) appeal the Court's order respecting James Simmons.

Accordingly, the Petitioner argues that the missing records implicate his due process rights and entitle him to post-conviction relief.

The Petitioner argued the issue extensively in his brief; however, while post-conviction counsel for the Petitioner made several brief references to the missing records during the evidentiary hearing, counsel did not advance further the earlier argument that the

missing records entitle him to a new trial. The Court finds that the Petitioner is not entitled to a new trial on the basis of missing records.

Tennessee's appellate courts have long held that "[w]hen a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate, and complete account of what transpired with respect to the issues forming the basis of the appeal." State v. Ballard, 855 S.W.2d 557,560 (Tenn. 1993) (citing State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983)). "Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue." Ballard, 855 S.W.2d at 560-61 (citing State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988)). Tennessee's courts have not addressed specifically a situation in which records cannot be located,[16] and those states which have addressed this issue have done so in the context of a direct appeal, rather than a collateral appeal.

"Most jurisdictions require an appellant to demonstrate specific prejudice flowing from an incomplete or reconstructed record." State v. Ladson, 644 S.E.2d 271, 273-74 (S.C. Ct. App. 2007); see generally State v. Williams, 629 A.2d 402, 406 (1993) (appellant must show "specific prejudice that results from having to address his claims on appeal with the reconstructed record"); Jones v. State, 923 So. 2d 486, 489 (Fla. 2006) (appellant must point

[16]Rule 24(c) of the Tennessee Rules of Appellate Procedure allows an appellant to prepare a statement of the evidence if "no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available." However, the Rules of Appellate Procedure are generally inapplicable in post-conviction proceedings, and furthermore, given the length of time that has elapsed since the Petitioner's trial, compiling such a document would prove highly difficult in this case.

to prejudice resulting from missing portions of trial transcript); State v. Dupris, 373 N.W.2d 446, 449 (S.D. 1985) (appellant must show "specific error or prejudice recording from failure to record entire proceedings of trial); State v. Neal, 304 S.E.2d 342, 345 (W. Va. 1983) ("Generally, the failure to report some part of the proceeding will not alone constitute reversible error[;] [s]ome identifiable error or prejudice must be shown by the defendant."). In the Court's view, the Petitioner cannot establish prejudice based upon the missing records.

Despite the missing records from the hearing on the motion to quash, the Petitioner was still able to assert the issues associated with the three witnesses at issue in the subpoenas. As stated above, the Petitioner made extensive arguments that counsel were ineffective for failing to call Ron Lax and other Inquisitor employees at trial, and the Petitioner was also able to argue that trial counsel should have sought to have Courtney Mathews invoke his Fifth Amendment privilege in front of the jury—or, that trial counsel should have sought to produce Mr. Mathews' testimony via judicial use immunity. Any issues regarding Mr. Simmons' potential testimony were obviated by the Petitioner's successfully arguing that through their actions, Mr. Simmons and Mr. Gant had waived Mr. Matthews' attorney-client privilege. As such, the Court finds that the Petitioner is not entitled to post-conviction relief based upon the missing records.

VII. *BRADY* VIOLATION (PETITIONER'S CLAIM 13)

The Petitioner next claims that the State violated his Due Process rights by not disclosing two evidentiary items: a report by the United States Army's Criminal Investigative Division (hereinafter "CID") and letters by State witness Larry Underhill to District Attorney pro tempore Gus Radford. The Petitioner argues that these items were exculpatory, and therefore the State's withholding these items violated his rights as interpreted by Brady v. Maryland, 373 U.S. 83 (1963).

It is unquestioned that the State has a constitutional duty to furnish a defendant with exculpatory evidence pertaining to the defendant's guilt or innocence or to the potential punishment faced by the defendant. See Brady, 373 U.S. at 87. The Tennessee Supreme Court has held that to establish a Brady violation, a defendant must show that (1) he requested the information (unless the evidence is obviously exculpatory, in which case the State is obligated to release the information regardless of whether it was requested); (2) the State suppressed the information; (3) the information was favorable to the defendant; and (4) the information was material. State v. Edgin, 902 S.W.2d 387, 390 (Tenn. 1995). The appellant bears the burden of proving a Brady violation by a preponderance of the evidence. Id.

The United States Supreme Court has held that evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). "The existence of 'reasonable probability' centers around whether the court has confidence

in the verdict of the case despite the non-disclosure of exculpatory evidence." State v. Cecil C. Johnson, Jr., No. 01C01-9610-CR-00442 (Tenn. Crim. App. at Nashville, Nov. 25, 1997) (quoting Bagley, 473 U.S. at 682). "The court must view the suppressed evidence collectively in the context of the entire record to determine whether the evidence is material under Bagley." Id. (footnote omitted).

(A) Army CID Report (Claim 13.1)

On September 14, 1994, the Army's Criminal Investigation Division issued a report based upon a joint investigation of the Taco Bell offenses by several law enforcement agencies, including CID, TBI, and the Clarksville Police Department. The report essentially concludes that Courtney Mathews acted alone in committing the offenses and that the Petitioner "was not suspected [to have] participated in the commission of the crimes identified . . . ."

In reviewing the four Edgin factors for determining whether a Brady violation exists relative to the CID report, the report was favorable to the defendant, and the numerous discovery requests filed by trial counsel indicate that the Petitioner requested all exculpatory evidence, such as this report. Regarding whether the State withheld the evidence from the Petitioner, Mr. Radford testified that he was unaware of the CID report's existence before trial. However, the fact that the report was not contained in the prosecutor's files did not relieve the State of its duty to disclose the CID report to the Petitioner. The State is

responsible for providing a criminal defendant with any favorable evidence known to others acting on the State's behalf, including the police. See Kyles v. Whitley, 514 U.S. 419, 437 (1995); Sample v. State, 82 S.W.3d 267, 270 n.3 (Tenn. 2002). The CID report's distribution list includes the TBI and the Clarksville Police Department; thus, the prosecution's failure to provide the Petitioner with the CID report ran afoul of the requirements of Brady.

The only question to be resolved, then, is whether the CID report was material; that is, whether there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682. The Court finds that the evidence was not material. The CID report essentially restated information from other law enforcement agencies—information to which the Petitioner had gained access through discovery. The Court bases this conclusion on the testimony of: (1) Mr. Inserra, who testified that the civilian law enforcement agencies conducted "the bulk" of the work in this case; (2) Mr. Smith, who testified that CID's investigation was not a "detailed" one; and (3) Mr. Garrett, who testified that he spoke rarely with CID agents and that the conclusions stated in the report were likely based upon Mr. Smith's conversations with Mr. Puckett and Mr. Charvis. Trial counsel for the Petitioner could have used the information contained in TBI and Clarksville Police Department records to cross-examine those officials as to why they shifted their focus to the Petitioner in light of the Petitioner's initial statements that he was not involved in the Taco Bell offenses. Although trial counsel did not cross-examine Carter Smith, who prepared the CID report, the jury could have

reasonably concluded that Mr. Smith's initial conclusion—one which Mr. Garrett testified accurately reflected the State's views at that point in the investigation—was based upon limited information provided by the Petitioner in the early stages of the investigation. Had CID had access to the Petitioner's later statements, CID may well have reached a different conclusion regarding the Petitioner's involvement. As such, although the State should have disclosed the CID report to the Petitioner, the State's failure to do so did not ultimately constitute a Due Process violation under Brady. The Petitioner is not entitled to relief on this issue.

(B) Letters from Larry Underhill to Gus Radford (Claim 13.2)

The Petitioner argues that the State should have disclosed letters sent by Larry Underhill to Gus Radford in which Mr. Underhill referenced supposed deals between the witness and the prosecutor in which Mr. Radford (1) would guarantee that Mr. Underhill would not lose his present jail cell while testifying in the Petitioner's case and (2) write letters to the parole board on Mr. Underhill's behalf in an attempt to secure Mr. Underhill's release from prison. The Court finds that the State's failure to disclose the letters did not constitute a Brady violation.

The Court acknowledges that impeachment evidence falls within the dictates of Brady. See, e.g., Giglio v. United States, 405 U.S. 150, 154 (1972). Furthermore, "Promises made by the state to a witness in exchange for his testimony relate directly to the credibility

of the witness. A prosecutor has a duty to disclose evidence of any promises made by the state in exchange for his testimony." Hartman v. State, 896 S.W.2d 94, 101 (Tenn. 1995). However, although Mr. Underhill testified at the motion for new trial hearing that Mr. Radford had promised to write letters on his behalf, at trial Mr. Underhill testified that he "ha[d] not been promised anything in the way of any consideration pertaining to my sentence or otherwise by the prosecution in this case." Furthermore, Mr. Underhill did not testify at the evidentiary hearing, and at the evidentiary hearing Mr. Radford testified that no such deals existed between he and Mr. Underhill. The Petitioner has not established the existence of a deal by clear and convincing evidence, and as such the Court cannot find that the State was at fault for not disclosing such a deal to the Petitioner.

Even assuming that such a deal existed, and therefore that the State should have disclosed Mr. Underhill's letters to the prosecutor, the evidence ultimately was not material. Trial counsel cross-examined the witness extensively, thus impeaching his credibility. The Petitioner is not entitled to relief on this issue.

(C) Reports and Waivers Related to Polygraph Examinations

In his proposed findings of fact, the Petitioner argues that the State also violated Brady by not submitting certain documents related to the Petitioner's two polygraph examinations. The Petitioner did not raise this issue in his petition, but given that the Petitioner did not find out about the existence of the documents at issue until long after the

petition was filed—one document was disclosed by the District Attorney pro tempore during a motions hearing on November 24, 2009, and two other documents were disclosed by State witnesses during the evidentiary hearing—the Court will review this issue here.

(1) March 1994 Polygraph "Data Sheet"

At the November 24 motions hearing, Mr. Baugh produced the entire file related to the Petitioner's March 10, 1994 polygraph examination—the Petitioner stated in his proposed findings of fact that "[p]rior to receiving the entire document at that moment, all of Petitioner's current and former attorneys had received only the first two pages of [the report.]" Part of the information that the Petitioner received for the first time in November 2009 was the "data sheet" completed by Mr. Wilder at the time of the examination. The data sheet indicated the Petitioner was "very nervous" at the time of the examination and that in the two days leading up to the examination the Petitioner had been cold and gotten "very little" sleep.

The Petitioner argues that this information was impeachment material that could have "helped Trial Counsel prove that Petitioner's March 10, 1994 Statement indeed was involuntary, elicited while petitioner was sleep-deprived, extremely nervous, anxious, and had been incarcerated in uncomfortable conditions for several days." Although the polygraph examination and resulting statement addressed the Grandpa's robbery rather than the Taco Bell crimes, the Petitioner argues that the Petitioner's October 1995 statements

regarding the Taco Bell crimes ultimately resulted from the "involuntary" March 1994 CID statement and should therefore be excluded. The Court agrees with the Petitioner that this evidence was favorable to the Petitioner, and as it could have impeached any State testimony denying that the Petitioner's CID statement was voluntarily given, the evidence fell squarely within the dictates of Brady. However, although the evidence could be considered exculpatory, because the Court has previously rejected the Petitioner's "fruit of the poisonous tree" argument, the evidence cannot be considered material. This Court has cited to copious evidence undermining its confidence in the outcome of the Petitioner's trial, but the non-disclosure of the data sheet does not constitute such evidence. The Petitioner is not entitled to relief on this issue.

(2) October 1995 Polygraph "Data Sheet"

During his evidentiary hearing testimony, Mr. Carney produced the full polygraph file (except for the Miranda waiver produced during Mr. Wilder's testimony) from the Petitioner's October 20, 1995 polygraph examination. As was the case with the March 1994 polygraph, the Petitioner claimed that he had only received the first two pages of the October 1995 polygraph file before Mr. Carney's testimony. Among the documents which the Petitioner viewed for the first time at the evidentiary hearing was the data sheet prepared by Mr. Wilder shortly before the examination; this form indicated that the Petitioner was "really nervous" at the time of the polygraph examination. The Petitioner argues that the evidence

was "material impeaching evidence" that corroborated his claim that "the Proffer Statement—which was developed and written shortly after this polygraph was taken—was involuntary and false."

The Court agrees with the Petitioner that had trial counsel attacked the voluntariness of the Petitioner's statement at the suppression hearing, the polygraph data sheet could have been used to impeach the State's assertions that the Petitioner's proffer statement was knowingly and voluntarily given. However, although there was much evidence that, if presented at the suppression hearing, would have established that the Petitioner's statements were involuntary, it is unlikely that this evidence, standing alone, would have refuted the State's assertions that the Petitioner gave his statements voluntarily. The fact that a suspect was nervous during a custodial interrogation is not, by itself, sufficient to establish that the resulting statement was involuntary. The Petitioner is not entitled to relief on this issue.

(3) October 1995 Polygraph Miranda Waiver

During Mr. Wilder's evidentiary hearing testimony, the TBI agent produced a Miranda waiver that the Petitioner signed shortly before his October 20, 1995 polygraph examination. Counsel for both parties stated that they had not seen this form before the evidentiary hearing. The Petitioner contends, "Although the document is not exculpatory or impeachment material, the State's inexcusably late production of this important document . . . is yet another demonstration of the State's lack of care and diligence in complying with

its discovery obligations . . . ." The Petitioner adds that [t]he ongoing disclosure, during the course of this proceeding, of significant evidence not produced prior to Petitioner's trial further erodes the Court's confidence in the verdict in this case." Although the Court agrees that the late disclosure of this document is troubling, the Court also agrees with the Petitioner's concession that the document is neither exculpatory nor impeachment material. Thus, the late disclosure of the Miranda waiver form does not constitute a Brady violation. The Petitioner is not entitled to relief on this issue.

VIII. ACTUAL INNOCENCE (PETITIONER'S CLAIM 14)

In his final issue, the Petitioner argues that because newly discovered or newly available evidence establishes that he is actually innocent of the charges for which he was convicted, he is entitled to a new trial. In his petition, the Petitioner argued that this newly available evidence would be Courtney Mathews' testimony. Mr. Mathews did not testify at the evidentiary hearing; however, at the hearing the Petitioner argued that the testimony of Mr. Mathews' former attorney, Mr. Gant, and Inquisitor employees—testimony in which the witnesses stated that Mr. Mathews said that he acted alone in the Taco Bell offenses and never mentioned that the Petitioner was involved—constitutes the newly discovered evidence for purposes of this issue. The Petitioner argues that his further incarceration violates his due process rights under the state and federal constitutions, and therefore he is entitled to relief

under the Post-Conviction Procedure Act. In the alternative, the Petitioner argues that the new evidence entitles him to a new trial via a writ of error coram nobis.

The Petitioner correctly notes that several states have held that a free-standing claim of actual innocence is cognizable in a state habeas corpus or post-conviction proceeding. See generally In re Hardy, 163 P.3d 853, 879 (Cal. 2007); Summerville v. Warden, 641 A.2d 1356, 1369 (Conn. 1994); People v. Washington, 668 N.E.2d 1330, 1337 (Ill. 1996); Montoya v. Ulibarri, 163 P.3d 476, 478 (N.M. 2007); Ex parte Elizondo, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996) (en banc) (superseded on other grounds by statute). However, the ability of a petitioner in Tennessee to assert a claim of actual innocence appears limited. It is unquestioned that the Post-Conviction Procedure Act provides that a petitioner may assert a claim of actual innocence based upon newly discovered scientific evidence even after the one-year statute of limitation expires. See Tenn. Code Ann. § 40-30-102(b)(2) (2006); Dellinger v. State, 279 S.W.3d 282, 291 (Tenn. 2009). However, the court in Dellinger declined to resolve the broader question of whether an actual innocence claim may be pursued, based on constitutional grounds, in a post-conviction petition. See Dellinger, 279 S.W.3d at 290-291; id. at 291 n.4 (noting that the question of "[w]hether the execution of an innocent person violates the federal constitution has not been decided by the United States Supreme Court"; citing House v. Bell, 547 U.S. 518, 554-55 (2006) and Herrera v. Collins, 506 U.S. 390 (1993)).

The court in Dellinger also noted,

> Claims of actual innocence not based on new scientific evidence may be brought in a petition for writ of error coram nobis, Tenn. Code Ann. § 40-26-105 (2006), within one year after the judgment of conviction in the trial court becomes final, State v. Mixon, 983 S.W.2d 661, 670 (Tenn. 1999), or later if the petitioner shows that due process precludes application of the statute of limitations, Workman v. State, 41 S.W.3d 100, 103 (Tenn. 2001). Such a claim may also be brought in an application for executive clemency once "all possible state judicial remedies" have been exhausted. Tenn. Code Ann. § 40-27-109 (2006).

Dellinger, 279 S.W.3d at 291 n.7. The Court of Criminal Appeals has interpreted Dellinger as a "conclu[sion] that a claim of actual innocence not based on scientific evidence may not be raised in a petition for post-conviction relief." Perry Anthony Cribbs v. State, No. W2006-01381-CCA-R3-PD, Shelby County, slip op. at 42 (Tenn. Crim. App. July 1, 2009), perm. app. denied, (Tenn. Dec. 21, 2009). In light of these cases, the Court must find that the Petitioner is not entitled to pursue his actual innocence claim in a post-conviction proceeding because the newly available evidence is not scientific in nature.

The same conclusion cannot be reached regarding the Petitioner's coram nobis claim. Tennessee Code Annotated section 40-26-105 establishes the procedures for filing a writ of error coram nobis, whereby a convicted defendant may seek relief from his convictions and sentences on the basis of newly discovered evidence. Specifically, the statute provides that a petitioner may seek relief from errors that were not or could not have been previously litigated; or, upon a showing that the petitioner was without fault in failing to present certain evidence at the proper time, a petitioner may seek a writ of error coram nobis based on newly discovered evidence relating to matters which were litigated at the trial if the trial judge

determines such evidence may have resulted in a different judgment had it been presented at trial. See Tenn. Code Ann. § 40-26-105(b) (2006).[17]

In interpreting the coram nobis statute the Tennessee Supreme Court "has consistently followed the plain language of the legislation, upholding the 'may have' or 'might have' language." State v. Vasques, 221 S.W.3d 514, 527 (Tenn. 2007) (citing Workman v. State, 41 S.W.3d 100, 104 (Tenn. 2001); State v. Mixon, 983 S.W.2d 661, 666-68 (Tenn. 1999)). However, the court in Vasques also acknowledged that

> the "may have" standard, if interpreted literally, is too lenient in the common law context of writ of error coram nobis. . . . If based upon mere "possibility," coram nobis relief would be available to any defendant who, within one year of his conviction and sentence, discovers new evidence even if only slightly favorable to his defense.

Vasques, 221 S.W.3d at 527. Accordingly, the court held that "in a coram nobis proceeding, the trial judge must first consider the newly discovered evidence and be 'reasonably well satisfied' with its veracity" before performing the statutory analysis. Id. The Tennessee Court of Criminal Appeals has also noted that the coram nobis statute "presupposes that the evidence (a) would be admissible pursuant to the applicable rules of evidence, and (b) is

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[17]Generally, coram nobis petitions must be filed within one year of the judgment of conviction becoming final in the trial court. See Tenn. Code Ann. § 27-7-103; State v. Mixon, 983 S.W.2d 661, 670 (Tenn. 1999). However, this limitations period may be tolled based upon due process concerns. See Workman v. State, 41 S.W.3d 100, 102-04 (Tenn. 2001). In a previous order, the Court found that due process concerns necessitated tolling the limitations period in this case. Although this ruling was based upon the newly discovered evidence being Mr. Mathews' proposed testimony, these due process concerns also apply to the testimony of Mr. Gant and the Inquisitor employees.

material to the issues or grounds raised in the petition." State v. Hart, 911S.W.2d 371, 375 (Tenn. Crim. App. 1995).

In this case, the Petitioner can establish many of the requirements of the statute and Vasques. First, the Court finds that the evidence is trustworthy. Although the statements regarding Mr. Matthews' involvement in the Taco Bell offenses are hearsay, the declarants in this case are the Petitioner's attorney, Mr. Gant, as well as Mr. Lax, Ms. Shettles, and other Inquisitor employees. The Court finds these witnesses credible. Mr. Mathews' statements to these witnesses were made in the context of privileged communications, so the Court finds them to be reliable.

Regarding the requirements of the coram nobis statute, the Court finds that the testimony of Mr. Gant and the Inquisitor employees "could not have been previously litigated" and that the Petitioner was "without fault in failing to present certain evidence at the proper time." Trial counsel subpoenaed Mr. Simmons to testify at trial, but the trial court quashed the subpoena. Although the trial court denied the motions to quash as to Mr. Lax, it is reasonable to assume that the trial court would have upheld any assertion by Mr. Lax or other Inquisitor employees that, based upon the attorney-client privilege, Inquisitor employees were prevented from divulging the contents of any conversation between Mr. Mathews and Inquisitor employees. This testimony did not become available to the Petitioner until post-conviction counsel successfully sought a ruling by the Court during the

instant proceedings that the attorney-client privilege between Mr. Mathews and his attorneys had been waived—a ruling which extended to Inquisitor.

In assessing whether the evidence may have led to a different judgment had it been presented at trial, the Court notes that this evidence, had it been presented, would have supported the Petitioner's assertion that he was not involved in the Taco Bell offenses. The Petitioner presented evidence of this theory during trial, but other than cross-examining the State's witnesses, the evidence in support of the Petitioner's theory consisted solely of his own testimony and that of his former girlfriend, Sulyn Ulangca. Testimony by credible witnesses that Mr. Mathews, within the context of attorney-client discussions, did not implicate the Petitioner in these offenses would have been helpful to the Petitioner's case and may have led the jury to acquit the Petitioner.

The Court acknowledges that the proposed testimony would be hearsay that does not fall under any hearsay exception. See Tenn. R. Evid. 801(c), 803. However, otherwise inadmissible hearsay evidence may be presented pursuant to a defendant's right to present a defense at trial. "The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment clearly guarantee a criminal defendant the right to present a defense which includes the right to present witnesses favorable to the defense." State v. Brown, 29 S.W.3d 427, 432 (Tenn. 2000); see Taylor v. Illinois, 484 U.S. 400, 408 (1988); Washington v. Texas, 388 U.S. 14, 23 (1976). However, this right is not absolute: "In the exercise of this right, the accused, as is required of the State, must comply with established rules of

procedure and evidence. . . ." Chambers v. Mississippi, 410 U.S.284, 302 (1973). "Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Brown, 29 S.W.3d at 432 (citations omitted). In determining whether a trial court's evidentiary ruling violates the defendant's constitutionally-protected right to present a defense, an appellate court must consider whether: (1) the excluded evidence is critical to the defense; (2) the evidence bears sufficient indicia of reliability; and (3) the interest supporting the exclusion of the evidence is substantially important. Id. at 433-34.

In reviewing whether the evidence was critical to the defense, our supreme court has suggested that for evidence to be considered critical to the defense, the evidence must have some probative value and "exclusion of the evidence would undermine an element of a particular defense." See State v. Flood, 219 S.W.3d 307, 316-17 (Tenn. 2007). This evidence does contain probative value, and as stated above, although the Petitioner was able to present evidence in support of his innocence theory at trial, the proposed testimony would have made the case stronger. As stated above, the Court finds the evidence reliable. Regarding the third prong of the test, although both preservation of the attorney-client privilege and the exclusion of unreliable hearsay are significant interests, such interests do not apply in this case given the reliability of the hearsay and the Court's finding that Mathews' attorney-client privilege has been waived. As such, the Court finds that this evidence, although hearsay, would be admissible at trial.

In consideration of the foregoing, the Court finds that the Petitioner has met his burden in establishing the reasons for issuing the writ. Although the Court is granting the Petitioner a new trial on other grounds, the Court also issues a writ of error coram nobis and grants the Petitioner a new trial on the basis of the newly available evidence outlined above.[18]

Conclusion

In consideration of the foregoing and the record as a whole, both the petition for post-conviction relief and the petition for writ of error coram nobis are hereby GRANTED. The Petitioner's previous convictions are vacated, the judgments set aside, and the Petitioner is granted a new trial.

IT IS SO ORDERED this the 23rd day of September, 2010.

John H. Gasaway III

Hon. John H. Gasaway, III
Circuit Court Judge

[18]Although writs of error coram nobis concern a petitioner's actual innocence claim, nothing in the coram nobis statute requires a court, in issuing the writ, to determine the merits of a petitioner's actual innocence claim. As such, the Court emphasizes that it in issuing the writ, it is not stating that the Petitioner is actually innocent of these offenses.