

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
January 24, 2006 Session

**GARY WAYNE SUTTON v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Blount County**  
**No. C-14433 D. Kelly Thomas, Jr., Judge**

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**No. E2004-02305-CCA-R3-PD - Filed May 30, 2006**

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The petitioner, Gary Wayne Sutton, appeals as of right from the order of the Blount County Circuit Court denying his petition for post-conviction relief from his 1992 conviction for first degree murder and resulting death sentence. The petitioner claims (1) that he received the ineffective assistance of trial counsel because counsel (a) lacked the necessary experience and qualifications to handle a capital case, (b) were deficient in their choice of defense strategy and decision to share information and responsibilities with counsel for the co-defendant, (c) failed to present a coherent defense, (d) failed to obtain adequate expert assistance in his defense, and (e) failed to prepare adequately for the penalty phase of his trial; (2) that he received the ineffective assistance of appellate counsel because counsel (a) failed to challenge the trial court's denial of a requested jury instruction on residual doubt at sentencing and (b) failed to provide a complete record for purposes of appellate review as to whether the trial court complied procedurally with Tennessee Rule of Evidence 404(b) in admitting evidence of another crime at trial; (3) that the prosecution failed to disclose exculpatory evidence regarding another possible suspect; (4) that the failure to include in the indictment the aggravating circumstance that the petitioner had a previous felony conviction involving violence invalidates his death sentence; and (5) that the cumulative effect of errors at the trial violates his rights to due process. We conclude no reversible error of law exists, and we affirm the judgment of the trial court denying post-conviction relief.

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

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Susan E. Shipley and Gerald L. Gulley, Knoxville, Tennessee, for the appellant, Gary Wayne Sutton.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Alice B. Lustre, Senior Counsel; Michael L. Flynn, District Attorney General; and Rocky H. Young, Assistant District Attorney General, for the Appellee, State of Tennessee.

## OPINION

### Factual Background

In 1992, a Blount County jury convicted the petitioner and co-defendant James Dellinger for the premeditated first degree murder of Tommy Griffin. In the sentencing phase, the jury found the aggravating circumstance that the petitioner had a previous conviction involving violence. See T.C.A. § 39-13-204(i)(2). Finding the aggravating circumstance outweighed any mitigating circumstances beyond a reasonable doubt, the jury sentenced the petitioner to death. The Tennessee Supreme Court affirmed the judgment. See State v. Dellinger, 79 S.W.3d 458 (Tenn. 2002), cert. denied, Dellinger v. Tennessee, 537 U.S. 1090, 123 S. Ct. 695 (2002).

As set forth in our supreme court's opinion on direct appeal, the proof at the petitioner's trial established the following facts surrounding the murder of Tommy Griffin:

On the afternoon of February 21, 1992, Dellinger, Sutton, and Griffin spent several hours at Howie's Hideaway Lounge (Howie's) on Highway 321 in Maryville, Tennessee. The three men drank beer and played pool until approximately 7:00 p.m., when they left the bar in a dark-blue Camaro. Witnesses testified that there was no evidence of hostility among the men while they were in the bar.

Around 7:00 p.m. Cynthia and Kenneth Walker were traveling north on Alcoa Highway near the Hunt Road exit. They observed three men who appeared to be fighting in a dark-colored Camaro on the side of the road. Two of the men were standing outside of the car attempting to forcibly remove the third man from the back seat. Kenneth Walker used his portable radio to report the incident to the dispatcher for Rural Metro Blount County Ambulance.

Sharon Davis, who was also driving north on Alcoa Highway around the same time, observed a shirtless and shoeless man stumbling down the side of the road near the Hunt Road exit. When Davis passed the same area about thirty or forty minutes later, she saw two men standing outside of a dark-colored Camaro on the side of the road. They appeared to be looking for something.

At 7:11 p.m. Sandra Hicks, a dispatcher for Blount County 911, received a complaint about an altercation involving three men in a dark Camaro at the intersection of Alcoa Highway and Hunt Road. Officer Steve Brooks with the Alcoa Police Department was dispatched to the scene. While making an unrelated traffic stop, Officer Brooks noticed a vehicle with flashing headlights parked on

the side of Hunt Road. The officer sent his backup, Officer Drew Roberts, to investigate. Officer Roberts found two men, not Dellinger and Sutton, standing next to a pickup truck. A shirtless man sitting on the bed of the truck identified himself as Griffin. Griffin told the officer that his friends had put him out of a car. Griffin would not identify his friends or tell the officer what had happened. Officer Roberts arrested Griffin for public intoxication. Griffin was booked at the Blount County jail at 7:40 p.m. Dellinger arrived about forty-five minutes to an hour later to ask about Griffin's release. Sergeant Ray Herron explained to Dellinger that department policy required a minimum four-hour detention for public intoxication and advised him to come back at 10:30 or 11:00 p.m.

Alvin Henry was a resident of Bluff Heights Road, where Dellinger and Griffin both lived. At approximately 9:00 p.m., Henry looked out of his trailer window and saw Dellinger's white Dodge pickup truck. Henry saw someone enter the passenger side of the truck. The truck drove up the road and pulled into Dellinger's driveway. Henry then noticed fire shooting from Griffin's trailer down the road. Henry's wife reported the fire to the 911 operator at 9:02 p.m. Arson investigator Gary Clabo concluded that the fire was set intentionally with the use of a liquid-type accelerant and an open flame such as a match, candle, or cigarette lighter.

Jennifer Branam, Griffin's niece, ran to Dellinger's trailer when she learned that Griffin's trailer was on fire. Just as Dellinger's wife was telling Jennifer that Dellinger was not home, Dellinger and Sutton walked down the hall from the living room. The two men were still wearing their jackets, and their pants were wet up to the knees. Jennifer asked them if Griffin was in his burning trailer, and Sutton told her that Griffin was in Blount County with a girl. When Jennifer asked the men to accompany her to the trailer, Dellinger responded that they were already in enough trouble.

After returning home, Jennifer looked out the window and saw Dellinger remove an object wrapped in a sheet from his truck and place it into the back of his wife's Oldsmobile. Jennifer testified that the object resembled a shotgun. Herman Lewis, a relative of Jennifer, also observed Dellinger moving an object from his truck to his wife's car shortly after 10:00 p.m. Dellinger and Sutton then left in the Oldsmobile.

At around 11:25 p.m. Dellinger and Sutton returned to the Blount County jail. Dellinger paid a cash bond for Griffin. Officers in the jail lobby overheard one of the defendants tell Griffin that they needed to get him back to Sevier County. At 11:55 p.m. Jason McDonald and his mother, Brenda McKeehan, heard two gunshots fired from an area on the Little River in Blount County called the Blue Hole. The Blue Hole is approximately five hundred yards down the hill from McDonald's residence.

The next morning, February 22, Jennifer Branam saw Dellinger leave his trailer, remove the object he had placed in his wife's car the night before, and place the object under his trailer.

Around noon on February 22, Connie Branam, Jennifer's mother and Griffin's sister, informed her daughter Sandy of her intent to go to Blount County to look for Griffin. At about 2:00 p.m., Connie Branam went to Jerry Sullivan's grocery store in Townsend asking if anyone had seen her brother. Sullivan then saw Branam speaking with two men in a white Dodge pickup truck in the grocery store parking lot.

Later that afternoon, Connie Branam accompanied Dellinger and Sutton to Howie's. Branam told Jamie Carr, who worked as the afternoon bartender at Howie's, that she was looking for her brother. Responding to Dellinger's questioning, Carr repeatedly told them that she remembered Dellinger, Sutton, and Griffin from the night before. When Dellinger asked if Carr remembered with whom Griffin left, she responded that they were still at the bar when her shift ended. Dellinger told Carr that they last saw Griffin with a short, dark-haired, ugly woman. When Carr's shift ended at 5:00 p.m. on February 22, Branam, Dellinger, and Sutton were still drinking beer in the bar.

Terry Lilly Newman worked the shift following Carr's at Howie's. When she approached Branam, Dellinger, and Sutton to ask if they needed anything, Dellinger asked Newman if she remembered them from the night before. Newman responded that she recalled seeing Dellinger and Sutton with another man drinking beer and playing pool. Branam explained that she was looking for her brother and asked with whom he had left the bar. Newman became confused because she knew that Griffin had left with Dellinger and Sutton. Dellinger asked Newman if she remembered them returning to Howie's after they bailed Griffin out of jail, but Newman knew that the three had not returned to Howie's because she had worked until

closing. After unsuccessfully attempting to convince Newman to join them in their search for Griffin, Sutton asked Newman if she was married. When Newman responded that she was married, Sutton stated, "Well, your husband is going to be surprised whenever you're missing one morning, when he wakes up and you're missing." Dellinger, Sutton, and Branam left Howie's around 6:30 p.m.

About 8:00 p.m. that night, James and Barbara Gordon observed a fire in the woods near the Clear Fork area of Sevier County. The following morning, Barbara Gordon watched a white truck occupied by two men leave the woods and head toward the main road. She testified that the truck was traveling rapidly and that it came from the general area where they had observed the fire the night before.

On Monday, February 24, around 3:30 p.m. Griffin's body was discovered lying face-down on a bank at the Blue Hole. He had been shot in the back of the neck at the base of the skull with a shotgun. Two 12-gauge shotgun shell casings and beer cans were found near the body. The shotgun shells were fired from the same gun that fired shells later found in Dellinger's yard. Forensic pathologist Dr. Charles Harlan opined that Griffin had died between 6:00 p.m. on February 21 and 8:00 a.m. on February 22. Dr. Eric Ellington with the Blount County Medical Examiner's Office conducted the autopsy on Griffin's body. He concluded that the cause of death was the destruction of the brain stem from the shotgun wound. Ellington retrieved two metal pellets and two pieces of shotgun wadding from Griffin's brain. The pellets were consistent with pellets loaded in the 12-gauge "00" buckshot casings found near Griffin's body.

On Friday, February 28, Connie Branam's body was discovered in her burned vehicle in the wooded area where the Gordons had observed the fire on February 22. Arson investigator Gary Clabo determined that the fire had been set by human hands, started by an outside ignition source with the use of an accelerant. Branam's body was so badly burned that forensic anthropologist Dr. William Bass was unable to determine the cause or time of death. Dental records were necessary to identify the body. Investigators discovered a rifle shell in the burned vehicle that had been fired from the .303 rifle later found in Dellinger's trailer.

Based upon the above evidence, the jury convicted Dellinger and Sutton of the first degree premeditated murder of Griffin.

Dellinger, 79 S.W.3d at 462-465.

### **Post-Conviction Proceedings**

On March 3, 2003, the petitioner filed a pro se petition for post-conviction relief generally alleging ineffective assistance of trial counsel. In an amended petition, counsel raised numerous specific allegations of ineffective assistance of counsel, a Brady claim, and an Apprendi claim challenging the failure to include in the indictment the statutory aggravating circumstances supporting his sentence of death.

### **Post-Conviction Hearing**

Attorney John Goergen testified that he was licensed to practice law in 1992 and that he primarily handled divorces and bankruptcies at the time of his appointment to represent the petitioner. He stated that he had handled one prior criminal case, a misdemeanor, and that the petitioner's case was his first jury trial. He said that he represented the petitioner with the belief that the defense would receive certain expert assistance. He later moved to withdraw after the jury selection expert was denied, asserting in his motion that he was not qualified to pick a jury in a capital murder trial. Mr. Goergen testified that he met with the defendant three or four times before trial. He recalled some discussions during trial preparation about the petitioner's social background such as his alcohol abuse but did not recall any specific reports. He stated he focused on the guilt phase of the petitioner's trial and was not significantly involved in preparations for the penalty phase.

Mr. Goergen testified that he did not receive a report from the state indicating that detectives were investigating a man named Lester "Festus" Johnson as a possible suspect in the victim's murder, but he recalled that lead counsel, F.D. Gibson, had mentioned that Johnson was an associate of Dellinger. Mr. Goergen stated that the defense could not locate Johnson and that, based on the information he had, he did not believe it was "terribly important" to find Johnson. He stated that if the defense had been provided with information about other possible suspects, they likely would have investigated the information.

Mr. Goergen testified that he was aware that Dellinger was older than the petitioner and was the petitioner's uncle. He said that he was aware the petitioner and Dellinger had already been convicted for the first degree murder of Connie Branham in Sevier County before their trial for the victim's murder and that this would be a factor relevant to sentencing. He stated that they did not use a mitigation expert in the petitioner's case and that he was not aware of ABA guidelines recommending their use in capital cases. He agreed that the petitioner's attorneys and Dellinger's attorneys had an "open-file policy" with each other during the trial. He further testified that Mr. Gibson told Dellinger's counsel that once they reached the penalty phase, "we'll all be on our own" and saying "if I have to cut your guy's throat, I'll do it," meaning that any evidence helpful to the petitioner would be used, even against Dellinger.

Mr. Goergen testified that Mr. Gibson sought a severance because the physical evidence only linked Dellinger to the victim's murder, but the motion was denied. He said the state focused heavily on the fact that the petitioner, Dellinger, and the victim were together most of the weekend of the victim's murder. In response to the state's evidence, the defense teams pursued a strategy that both defendants were innocent. Mr. Goergen stated that he was familiar with the transcript of the trial for Branham's murder and that some witnesses had testified regarding other possible suspects, but he did not recall any efforts to have those witnesses testify at the trial for the victim's murder. He stated that the defense initially had the assistance of a jury selection expert but that after an initial mistrial, the trial court denied the expert's services in selecting a second jury.

Mr. Goergen testified that the defense sought to raise doubt that the defendants were together with the victim just before he was killed by challenging the date of the victim's death. The defense presented the testimony of Dr. Larry Wolfe, a family practitioner, in an effort to prove that the victim actually died a few days after the date suggested by the state's proof. In addition, Dr. Wolfe testified that Connie Branham may have fallen asleep as a result of consuming alcohol and prescription drugs and died accidentally after her car caught on fire. Mr. Goergen said the defense was aware that a shell casing matching a rifle linked to Dellinger was found in Branham's car after her death. He stated it was the defense's position that because no evidence showed that Branham was shot to death, the shell casing was irrelevant and a "moot point" that the petitioner's team did not attempt to counter with its own ballistics expert. He noted that Dr. William Bass, a forensic anthropologist, testified that he found no evidence of any foul play on Branham's body and could only state that she was consumed by fire. He testified that he and Mr. Gibson discussed the prejudicial effect of evidence of Branham's murder being used at the trial.

On cross-examination, Mr. Goergen testified that before becoming an attorney, he served as a military counter-intelligence officer for twenty-one years. He said that in working on the petitioner's case, he became aware of aspects of the petitioner's background, such as his being a heavy drinker and dropping out of school at an early age. He testified that his motion to withdraw was prompted by his lack of experience in selecting a jury and the trial court's decision not to allow the defense the aid of a jury selection expert. Regarding the victim's murder, Mr. Goergen stated that the "bullets" recovered from the victim's body were taken to a ballistics expert for examination, but the defendant did not call the expert to testify because his position was consistent with the state's theory of the murder.

Dr. Pamela Auble, a forensic and clinical neuropsychologist, testified that the role of a psychologist in the sentencing phase was primarily to help the jury understand the defendant's life and the factors that influenced him. Dr. Auble stated that in addition to a psychological evaluation, it was necessary to obtain a social history of the defendant, which was usually done by a mitigation specialist. She believed that the report of Dr. Eric Engum, a clinical psychologist who had evaluated the defendant, did not include an adequate social history and that, to be effective, his expert testimony should have been supported by the testimony of lay witnesses describing specific instances of abuse inflicted upon the petitioner. According to Dr. Auble, studies indicated that testimony from an expert about a defendant's life, without supporting testimony from lay witnesses, was generally

discounted by jurors. Dr. Auble testified that Dr. Engum's notes indicated that he conducted group interviews with the petitioner's family but did not conduct more in-depth interviews. She stated that Dr. Engum's notes did mention the petitioner's alcohol abuse and his exposure to alcohol by Dellinger and other family members as a child and that the petitioner's father was also an alcoholic. She noted that alcoholism was a relevant mitigation theme because it is often used as a form of self-medication and in the petitioner's case as a method of escaping emotional abuse. Dr. Auble testified that the fact that Dellinger was a much older, parental figure in the petitioner's life was relevant to mitigation.

Dr. Auble testified that she interviewed the petitioner, administered psychological tests, and reviewed prior reports and records, interviews of his family members, and the transcript of the sentencing phase of his trial. She said the petitioner essentially had no more than a sixth-grade education, a fact she said was not described in detail at his trial, and was chronically absent from school, indicating a lack of supervision or nurturing at home. She noted that Dellinger began interacting with the petitioner improperly at an early age by taking the petitioner out of school and giving him alcohol. She noted that the petitioner's personality tests supported that he was likely to be influenced and dominated by older persons, a fact relevant in mitigation. Dr. Auble testified that in working so closely with Dellinger's defense team, it would have made it difficult for the petitioner to use evidence that he may have feared Dellinger. According to Dr. Auble, studies showed that presenting only positive information about a defendant at a capital sentencing hearing is unlikely to carry much weight with jurors. Questioned by the court, Dr. Auble stated that proof of innocence carried the most weight, as well as proof of mental retardation or a brain injury. She testified that evidence of a negative childhood had some, but "not a great deal" of impact on jurors. Dr. Auble saw no reason to avoid presenting evidence of the petitioner's abuse or neglect and stated her opinion that it would have helped the jury understand "why he was vulnerable to both addiction and to being influenced by an older male relative" and "what made him tick" in general.

On cross-examination, Dr. Auble testified that her opinion that the defense's investigation of the petitioner's social history was lacking was based on the information she had been provided by post-conviction counsel. Her only personal interview was with the petitioner. She stated that she did not interview trial counsel or review their case files. She acknowledged that Dr. Engum had interviewed various family members but stated that she would have wanted to obtain more information from those people and others. She testified Dr. Engum's notes indicated that he was aware that family members, including Dellinger, had exposed the petitioner to alcohol and prostitutes and that the petitioner's father had once locked him out of the house and made him stay in a dog house. Dr. Auble stated she had testified in about twenty capital cases for the defense and never for the state.

Jimmy Sutton, the petitioner's older brother, testified that their parents divorced when the petitioner was about three years old. At that time, the petitioner lived with his mother, and Sutton lived with their father. When the petitioner was about six years old, he came to live with Sutton at their father's home. Sutton stated that after their father remarried a year later, there was "a bunch of hollering and screaming and arguing all the time" and that their stepmother treated the petitioner

badly. Sutton said that if their stepmother became mad, she would “beat on” the petitioner with coat hangers, sticks, and belts for no reason. Their father tried to intervene when he could, but he often was away at work. According to Sutton, the petitioner reported their stepmother’s behavior to their mother, but he did not recall anyone taking action.

Sutton stated that Dellinger was their mother’s brother. He recalled that when the petitioner was about twelve years old, Dellinger would frequently buy him and the petitioner alcohol and take them riding around. Sutton testified that their father would get the police to take the petitioner out of Dellinger’s car and bring him home, but Dellinger would come right back and take the petitioner out again. Sutton said he feared Dellinger because he had seen Dellinger fight. He said Dellinger was not a good influence on the petitioner. Sutton said that when the petitioner was about sixteen years old, the petitioner went with Dellinger to Georgia where Sutton and the petitioner were working, and there was an altercation in which Dellinger threw a knife and hit Sutton in the arm. Sutton stated that at the time, Dellinger had left Tennessee because he had as many as fifteen or twenty warrants issued against him from Sevier County. Sutton testified that the petitioner looked up to Dellinger when he was a child and that Dellinger paid a lot of attention to him. On cross-examination, Sutton testified that the length of time he and the petitioner lived in the same house with their father and stepmother was one or two years, when the petitioner was about nine years of age.

Diane Sutton, the petitioner’s step-sister, testified that her father, Darrell Morris, was married to the petitioner’s mother. She recalled that her father and the petitioner’s mother, Anna Morris, had been married for three years before she became aware of the petitioner because the petitioner’s mother apparently had no regular contact with the petitioner at the time. She testified that she and her husband at one point shared a house with the petitioner, his father, and his stepmother. She said that the only running water was in the kitchen and that the house was dirty. She said the petitioner was not properly cared for and was abused by his stepmother, who would hit the petitioner with her fist and kick him. According to Ms. Sutton, nothing in particular would prompt his stepmother to fight with the petitioner; she was simply unstable. Ms. Sutton testified that when the petitioner’s father went to work, he put the petitioner “out” and that the petitioner would go to his brother’s or grandmother’s house because “he couldn’t leave him alone” with his stepmother. She stated that his stepmother found reasons to “jump on” the petitioner. She said that the petitioner was normally unsupervised by his father and that his mother did not make any real effort to remove him from the situation with his stepmother. She testified that no one bought the petitioner clothes until he began working as a teenager and clothed himself. She said he did not receive regular medical or dental care and recalled him crying with toothaches. She said the petitioner was not forced to attend school regularly.

Ms. Sutton testified that Dellinger had a reputation as “somebody not to mess with” in Sevier County. She recalled that the sheriff once described Dellinger as “the type that would crawl on his belly for ten miles to get even with you if he had to.” She testified that the petitioner was about thirteen years old when Dellinger began to take him out drinking on a regular basis. She said the petitioner’s father was afraid of Dellinger and did little to keep the petitioner away from him. She

said Dellinger threatened the petitioner at times, shooting out his windshield and shooting up his car on different occasions. She described Dellinger as a “time bomb.” She said Dellinger paid a lot of attention to the petitioner and was a big influence on him. Ms. Sutton noted that for a time, her husband, Jimmy, also went out with Dellinger and gave the petitioner alcohol. Ms. Sutton testified that she witnessed the petitioner’s stepmother verbally abusing or physically mistreating the petitioner “several times,” including once pulling his hair. She said she never saw his stepmother hit him with any objects.

Anna Morris, the petitioner’s mother, testified that at age three, the petitioner lived with her and her second husband in Kentucky. She said they returned to Tennessee when the petitioner was about six years old. She said that at that time, the petitioner began living in the home his father and grandmother shared. She said that when the petitioner was about nine years old, his father remarried and that she became concerned about the treatment the petitioner reported receiving from his stepmother. Ms. Morris said the petitioner’s stepmother once admitted responsibility for a bite mark on the petitioner’s arm. She testified that when she went to confront the stepmother, they got into a physical fight and that a warrant was issued against Ms. Morris. She said she did not try to have the petitioner’s stepmother prosecuted because the petitioner still wanted to live with his father and brother. She said that she begged the petitioner to live with her again, but he declined, saying that his father had promised him a motorcycle if he would stay with him instead. Ms. Morris testified that she was unaware that Dellinger had taken the petitioner out drinking and riding around until the case was being prepared for trial. On questioning by the court, Ms. Morris testified that when the petitioner went with Dellinger to live in Georgia at age fifteen or sixteen, “there wasn’t really nothing” she could do about it because he was “working like a grown man down there at the time.” She said that she was not a good mother and that if she had it to do over, she would have watched the petitioner “a little closer” and “[t]hings would be a lot different.”

Darrell Morris, the petitioner’s stepfather, testified that the first time they met, the petitioner was nine years old and smoking a cigarette. He stated that the house the petitioner lived in with his father and stepmother was cluttered, messy, and in such disarray that an opossum and rats had come inside. He said the petitioner was about ten years old when he began “hanging around” with Dellinger. Morris said he believed that everyone around the petitioner felt unable to stop this or feared how Dellinger would react if they tried to interfere. He said that the petitioner was welcome to live with him and the petitioner’s mother but that he probably declined because spending time with Dellinger was “exciting to a young kid at that time.” On questioning from the court, Morris testified that after the petitioner returned from Georgia at about age sixteen, he lived the next several years with his father, his grandparents, and his brother and sister-in-law, and eventually resumed spending time with Dellinger again. Morris said the petitioner had always been a hard worker.

Pat Sutton testified that the petitioner was her husband’s nephew and that they lived near the house he shared with his father and stepmother. She stated that the petitioner’s stepmother was mean to him, yelling and cursing at him, pulling his hair, biting him, and scratching him, “anything she could do to . . . torment him.” She testified that at age ten, the petitioner lived in a camper in his father’s yard because his stepmother kept him out of the house. She said she witnessed the

petitioner's stepmother slap him when he asked for a food item in a grocery store and continue the altercation in the car on the way home as she and the petitioner's father tried to intervene. She testified to seeing bite marks and scratches on the petitioner's arms and face after hearing his stepmother yell at him. She said his stepmother was not disciplining the petitioner but "just doing it because she just didn't like him and didn't want him around." She recalled that a DHS worker once came to the house and made a report but never returned. Ms. Sutton stated that even when the petitioner had fluid in his ear and cried about an earache, he did not see a doctor unless someone other than his parents took him. She said the petitioner's father's house was "just a nasty house." She said the petitioner went to school very little and began going out with Dellinger from about age nine instead. She felt that if the petitioner "had been loved and taken care of, he wouldn't be where he's at today." On questioning by the court, Ms. Sutton testified that at age seventeen, the petitioner returned to Tennessee, married, and had a child. She said the petitioner had been back for about six years at the time of the victim's murder.

The petitioner testified that he moved to Georgia at age fourteen and lived in a trailer for about two years with Dellinger and Dellinger's wife and stepdaughter. The petitioner said he worked steadily doing construction and drank alcohol regularly. He said that he met his future wife there and that upon returning to Tennessee, they lived together and later married at the age of twenty-five. He said he and his wife bought property and a new trailer and settled in Kodak. The petitioner stated that before his incarceration, he had worked with his father at a lumber company for four years and for Goodin Homes for three years. He stated that at the time of the murder, his daughter was about two years old and that he and his wife had been separated for about six months. He said that his wife moved back to Georgia and that he traveled there nearly every weekend to see his daughter. The petitioner testified that in the five to seven years before the murder, his biggest problems were his separation from his wife and daughter and his drinking.

The petitioner testified that he was sixteen years old when Dellinger stabbed the petitioner's brother in the arm. He said that before that altercation, he was spending nearly every day drinking after work with Dellinger and the victim. The petitioner said he did not fear Dellinger until after that incident. The petitioner said that during the next four years, Dellinger went back and forth between Tennessee and Georgia and that the petitioner did not have contact with him other than "two or three times that he tried to kill me." The petitioner said that when Dellinger later moved back to Tennessee, the petitioner began to go drinking with him again on a frequent basis.

F.D. Gibson testified that he was appointed by the trial court as the petitioner's lead trial counsel. He said he had been a licensed attorney since 1967 and had practiced for twenty-nine years. He stated that at the time of his appointment to the petitioner's case, he had handled many criminal cases including "several homicide cases and a wide range of felony and misdemeanor" cases, but he had not worked on a capital case. He said he shared office space with Mr. Goergen who was appointed co-counsel after two other attorneys were allowed to withdraw. He said he and Mr. Goergen met with the trial court to discuss Mr. Goergen's appointment because he "didn't want to have another one bail out and have to bring another one up to standards, so to speak. . . ." He viewed

Mr. Goergen as the “detail man” who would organize information and cross-examine certain witnesses.

Mr. Gibson testified that he discussed with the petitioner and his brother the defense’s strategy of establishing the petitioner as a “good guy” if the penalty phase was reached. He said it was his decision to use Dr. Engum in a dual capacity as both a psychologist and a mitigation expert. He stated that he had worked successfully with Dr. Engum in previous cases and had “very good confidence” in him. He said he also secured the “free” services of a college senior who worked under the supervision of him and Dr. Engum and interviewed character witnesses to develop a family profile. He stated that the defense interviewed forty to fifty persons before selecting actual witnesses. He said that interviews were held with groups of family members and that he conducted some individual interviews. He said the two defense teams held joint meetings to discuss mitigation evidence. He said they relied heavily on Dr. Engum for the mitigation case. He said the investigator who assisted them at the trial also interviewed some witnesses for possible use at both the guilt phase and on mitigation matters.

Mr. Gibson testified that in preparing mitigation evidence, the defense team gathered information on negative aspects of the petitioner. He said counsel “have to know the good and the bad of a client so we can be prepared for it.” He stated that during the investigation, he became aware the petitioner was an alcoholic, came from a broken family, and depended heavily on other relatives. He said the petitioner was socially withdrawn, was a follower, did not finish high school, had a low IQ, and was easily persuaded by others. He said that before he and Dellinger’s defense team worked together, he contacted the Board of Professional Responsibility to ensure that there was no conflict of interest in counsel researching and sharing information on issues that affected both defendants. He said that when there was information that they did not want Dellinger’s attorneys to know about, they simply did not discuss it at the joint meetings. He said the teams also shared one case investigator which did not result in a conflict of interest because if any matter needed separate investigation, he or co-counsel took care of it.

Mr. Gibson testified that he considered filing an interlocutory appeal after his motion for severance was denied. He said that he did not do so because, in his experience, interlocutory appeals were rarely successful, the defendants wanted to proceed with the trial, and he felt it was better presented as an issue on direct appeal. He said the defense sought to establish that the victim died later than the date suggested by the state’s proof. He said that to that end, the defense called Dr. Larry Wolfe, a county coroner, to testify to the time of death based on the degree of rigor mortis at the time the body was discovered. Mr. Gibson described Dr. Wolfe as a friend and a “conscientious man” whose testimony he felt the jury would view positively because he was a country doctor who gave up a lucrative practice to work at a clinic for poor people. He said that he initially wanted a ballistics expert but that after the trial court held that the petitioner did not have standing to challenge the search of Dellinger’s home and the ballistics evidence seized there, the investigation of ballistics evidence was left to Dellinger’s team. As to jury selection, Mr. Gibson testified that he thought Mr. Goergen was doing a good job with the assistance of the jury selection expert and that he never intended to let Mr. Goergen select the jury by himself. He said he told Mr. Goergen to file his

motion to withdraw if he felt it ethically necessary to do so because of his lack of experience in jury selection. He said the defense's efforts to keep the petitioner's juvenile aggravated assault record from Georgia out of evidence was overruled. As to expert assistance, Mr. Gibson testified that in preparing the petitioner's case, he also consulted with other criminal defense attorneys, two other doctors, a sound specialist, and a "bug expert."

On cross-examination, Mr. Gibson testified that his experience with homicide trials included criminally negligent homicide, vehicular homicide, and second-degree murder cases. He stated he never attended any seminars or received certification in capital case work. He acknowledged that Mr. Goergen may not have been the best choice for co-counsel in a capital case considering his lack of litigation experience, stating, "Well, sure, theoretically he was not the best."

Mr. Gibson testified that he focused on trying to have the petitioner acquitted but also prepared for a sentencing hearing. He testified that in gathering mitigation evidence, some witnesses were interviewed for both phases of the trial. He said he made some notes but did not make written reports of witness interviews in order that they would not have to be turned over to the state. He said his focus in mitigation was to portray the petitioner in a positive light as a human being whose life had value and should be spared despite his conviction. He said the "main thrust" of the petitioner's negative history was covered by Dr. Engum, including the petitioner's drinking problem and broken home. He said he made the decision not to dwell on the petitioner's "disjointed childhood" noted by Dr. Engum before the same jury that had just convicted him. He said he wanted to present the petitioner as putting forward a positive foot in prison and not as a "misspent youth" offering his background as an excuse for his crime. He said he investigated the role of Dellinger during the petitioner's formative years and additionally attempted to persuade the jury that it was not likely that the petitioner was the "lead perpetrator" who actually shot the victim. Mr. Gibson stated that the worst aspect of the sentencing phase was the fact of the petitioner's prior first degree murder conviction. He said that although the petitioner never signed written waivers as to the two defense teams working together or sharing an investigator, the petitioner was kept apprised of such details and their work.

Mr. Gibson testified that it was his theory that the victim died later than the state alleged based on the testimony of the medical examiner who performed the victim's autopsy and the ambulance attendant who transported the victim's body. He agreed that Dr. Wolfe's theory that Connie Branham may have died accidentally would be inconsistent with a theory that someone other than the defendants killed her, but he stated that in a first degree murder case a defendant could present any number of theories inconsistent with his guilt.

### **Trial Court's Findings of Fact and Conclusions of Law**

The trial court addressed the petitioner's allegations of constitutional error as presented in the petitioner's amended post-conviction petition. The trial court considered the evidence presented at the post-conviction hearing and at trial and set forth its findings of fact and conclusions of law as follows:

The petitioner claimed that counsel were ineffective in their investigation and presentation of evidence and did not properly rebut the state's case at either phase of the trial. He claimed that counsel failed to develop reasonable trial or mitigation strategies and failed to investigate and use evidence of the petitioner's "intellectual impairments and organic brain damage." The petitioner also claimed that counsel failed to investigate thoroughly and present evidence of his background and personal history in mitigation, including their failure to explore Dellinger's domination and influence over the petitioner. The petitioner claimed that counsel were deficient in failing to obtain the assistance of a "mitigation investigation expert" to assist them in developing a coherent defense at sentencing. The trial court found that these claims were unsupported. The trial court found that counsel sought to show during the guilt phase that the petitioner was wrongfully accused of the victim's murder and, after his conviction, to show that the petitioner's life should be spared based on his background and social history. The trial court determined that "these strategies were both reasonable and coherent considering the circumstantial nature of the case and the petitioner's background." Specifically regarding the penalty phase, the trial court accredited Mr. Gibson's testimony that the defense thoroughly investigated the petitioner's background and interviewed the petitioner's family members, some of whom testified at trial, in order to obtain and present the petitioner's detailed social history. In addition, the trial court found that counsel were assisted by Dr. Eric Engum, a psychologist obtained by counsel to evaluate the petitioner and present information on the petitioner's psychological and intellectual capabilities as well as his social history. The trial court determined that most of the mitigating evidence including testimony regarding the petitioner's background and social history presented at the post-conviction hearing was cumulative to the evidence presented at trial. Lastly, the trial court noted testimony by the petitioner's expert psychologist indicating that evidence of mental illness, mental defect, or organic brain injury was persuasive with jurors with respect to their sentencing decision. The court found, however, that the "petitioner did not suffer from any brain dysfunction."

The petitioner alleged that counsel failed to obtain appropriate experts to assist them throughout the trial, including an investigator dedicated to the petitioner's case, a ballistics expert, a forensic pathologist, and a jury selection expert. The trial court accredited counsel's testimony that they sought all the expert assistance that they believed they needed. Specifically, counsel testified that they did not believe a ballistics expert could have refuted the testimony of the state's expert and that they decided to share a case investigator with the co-defendant only after determining no conflict of interest would arise. The trial court declined to consider any issues related to the use of a jury selection expert, concluding that they had been addressed on direct appeal. The trial court did not address separately the lack of a forensic pathologist but concluded that the record did not establish either deficient conduct or prejudice to the petitioner as to this claim.

The petitioner generally claimed that counsel failed to file "necessary motions" for "appropriate support services" and to appeal the denial of requested services. The trial court found that the petitioner failed to support this "broad allegation" with any evidence at the post-conviction hearing and was therefore entitled to no relief.

The petitioner claimed that both of his attorneys lacked the necessary experience to undertake representation of a capital case. He also claimed that his attorneys failed to consult with him at crucial stages of the trial. The trial court found that both attorneys “demonstrated extensive knowledge of the law and facts” and “presented themselves effectively to the Court and jury.” The trial court rejected the petitioner’s argument that his counsel failed to consult adequately with him as “disingenuous” in view of the petitioner’s refusal to attend the second day of the penalty phase of his trial.

The petitioner claimed that counsel were ineffective in failing to obtain a severance of his trial from that of his co-defendant and for failing to appeal the denial of the requested severance. The trial court found that counsel’s actions with respect to the severance issue were not deficient and did not prejudice the petitioner and that the “issue of severance was decided on direct appeal.”

The petitioner alleged that counsel were ineffective in their failure to present the testimony of witnesses who had testified at his Sevier County trial for the murder of Connie Branham in support of his claims of innocence at his trial for the victim’s murder. The trial court found that the testimony offered at the post-conviction hearing was an “extension” of the proof offered at trial and that there was no new evidence presented that would have outweighed the aggravating circumstance shown.

The petitioner claimed that counsel were ineffective for failing to object to the trial court’s instruction directing the sentencing jury not to consider residual doubt as a mitigating circumstance and for failing to raise the issue on appeal. The trial court rejected this claim, concluding that the petitioner failed to prove resulting prejudice.

The petitioner claimed that counsel failed to have transcribed the hearing on the admission of evidence under Tennessee Rule of Evidence 404(b), failed to object to the trial court’s procedural non-compliance with Rule 404(b), and failed to raise the trial court’s non-compliance with Rule 404(b) as an issue on appeal. The petitioner also claimed that counsel failed to object to the admission at the trial of hearsay evidence in the form of statements made by the victim and Branham and “missing person” reports allegedly filed by their mother. The trial court found that issues regarding the admission of evidence under Rule 404(b) were raised and previously determined on direct appeal and that the petitioner had failed to establish deficient conduct or resulting prejudice with respect to these claims.

The petitioner claimed that counsel failed to investigate or challenge thoroughly his juvenile conviction for aggravated assault in Georgia that was used as an aggravating circumstance at sentencing. The trial court found that the prior violent felony aggravating circumstance was not based on the petitioner’s aggravated assault conviction.

The petitioner alleged that counsel failed to obtain a transcript of the hearing on the motion for change of venue that was denied. The trial court found that the petitioner had failed to establish deficient performance by counsel or prejudice as to this allegation.

The petitioner claimed that counsel failed to object to the prosecutor's statements during closing argument and to the identification of Branham's corpse by forensic anthropologist Dr. William Bass. The trial court rejected these claims based on the petitioner's failure to present any supporting proof at the post-conviction hearing.

The petitioner claimed that the state failed to disclose to defense counsel exculpatory information regarding another suspect identified by law enforcement authorities before the trial. The trial court found that the information was "not particularly exculpatory" because it linked the petitioner to the suspect and provided the petitioner with an actual motive for killing the victim and because the evidence reflected that the other suspect was "otherwise occupied with his own trial" in another state on the day that the victim was killed. The trial court found that the petitioner had failed to prove any resulting prejudice from the state's failure to disclose the information to the petitioner.

The petitioner alleged that the indictment in his case was defective and void for its failure to include the aggravating circumstance used to support a death sentence. The trial court found that this issue had been previously determined and was without merit.

The petitioner alleged that the trial court committed reversible error as follows: The trial court denied the petitioner's requests for adequate funds to obtain expert and investigative services; failed to appoint experienced and qualified counsel to the petitioner at the trial; failed to grant a severance of the petitioner's trial from that of his co-defendant; refused to instruct the jury on residual doubt as a mitigating factor; denied the petitioner the opportunity to obtain the testimony of Joyce Tipton, a witness in the petitioner's trial for Branham's murder; failed to remove a juror who expressed predetermination as to the petitioner's guilt; failed to comply procedurally and substantively with Tennessee Rule of Evidence 404(b); refused to explain the effect of a life-sentence in response to a question from the jury; and allowed the use of conduct not charged in the indictment to enhance the petitioner's punishment to death in violation of the law as construed in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and its progeny. Addressing these allegations of error together, the trial court concluded that they were without merit in that many of the allegations had been waived or previously determined. In the same manner, the trial court rejected the petitioner's numerous challenges to the constitutionality of the death penalty statute in this state as being waived or previously determined and without merit.

### **Burden of Proof and Standard of Review**

The petitioner's post-conviction petition is governed by the Post-Conviction Procedure Act. See T.C.A. §§ 40-30-101 to -122. To obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. See T.C.A. § 40-30-103. The petitioner must establish the factual allegations contained in his petition by clear and convincing evidence. See T.C.A. § 40-30-110(2)(f). Evidence is clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from the evidence. Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

Findings of fact made by the trial court are conclusive on appeal unless the evidence preponderates against them. State v. Nichols, 90 S.W.3d 576, 586 (Tenn. 2002) (citing State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999)); Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993). Accordingly, on appeal we are bound to affirm the judgment unless the evidence in the record preponderates against the findings of the trial court. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). The burden of establishing that the evidence preponderates against the trial court's findings is on the petitioner. Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). The credibility of the witnesses and the weight and value to be afforded their testimony are questions to be resolved by the trial court. Bates v. State, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). Claims of ineffective assistance of counsel are regarded as mixed questions of law and fact. State v. Honeycutt, 54 S.W.3d 762, 766-67 (Tenn. 2001); Burns, 6 S.W.3d at 461. When reviewing issues of law, or a mixed question of law and fact, this court's review is de novo with no presumption of correctness. Nichols, 90 S.W.3d at 586 (citing Burns, 6 S.W.3d at 461)).

### **I. INEFFECTIVE ASSISTANCE OF COUNSEL - TRIAL**

The Sixth Amendment provides that “[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. Inherent in the right to counsel is the right to the effective assistance of counsel. Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S. Ct. 1708, 1716 (1980).

In Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984), the United States Supreme Court observed that the “benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” In addressing claims of ineffective assistance of counsel, the Tennessee Supreme Court has stated:

To prevail on a claim of ineffective counsel in this proceeding, the appellant must prove by a preponderance of the evidence that the advice given or services rendered by his counsel fell below the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). He must also demonstrate prejudice by showing a reasonable probability that but for counsel’s error, the result of the trial proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996).

King v. State, 989 S.W.2d 319, 330 (Tenn. 1999).

Our supreme court has emphasized that the failure of a petitioner to sustain his burden of proof under either prong of the Strickland test will result in the denial of relief. In Goad, the court stated:

Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

938 S.W.2d at 370.

#### A. Lack of Experience

The petitioner challenges the qualifications of his trial counsel based on the fact that neither attorney had any prior capital case experience. He asserts that neither attorney satisfied the recommended qualifications for attorneys undertaking capital case representation set forth in the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989).

Other than baldly asserting that counsel failed to undertake an adequate investigation of the petitioner's personal history, the petitioner does not point to any specific errors or omissions in counsel's performance. Instead, the petitioner essentially argues that counsel's inexperience and failure to meet the American Bar Association's recommended qualifications for capital case attorneys, alone, demonstrates that counsel were incompetent to represent him at trial. This court has held, however, that inexperience alone does not equate to the ineffective assistance of counsel. See Anthony J. Robinson v. State, No. 02C01-9707-CR-00275, Shelby County, slip op. at 4 (Tenn. Crim. App. Aug. 26, 1998). In view of the petitioner's failure to identify any specific, deficient conduct by his attorneys, we need not reach the actual prejudice prong of the Strickland test and conclude that the petitioner's claim fails as to this allegation.

#### B. Joint Defense

The petitioner contends that trial counsel were ineffective for undertaking a "joint defense approach" with that of co-defendant Dellinger. In particular, the petitioner asserts that his right to effective assistance of counsel was violated by his counsel's choice of a defense theory that sought to prove both defendants innocent and by counsel's "open file approach" of sharing information with Dellinger's counsel.

At trial, the state's theory was that the defendants shared a common purpose and actively participated in the events leading to the victim's murder beginning with their altercation with him on Alcoa Highway and ending when both defendants were present while one of them shot him to death. Trial counsel initially moved for a severance, but a request for separate juries and separate trials was denied. Mr. Gibson testified that after a severance was denied, he first contacted disciplinary counsel for the Board of Professional Responsibility to discuss the propriety of the two defense teams working together on some aspects of trial preparation. He stated that the idea was to

have the two defense teams meeting and sharing responsibility for work on the many issues that affected both defendants but that he wanted to ensure that no conflict of interest would arise in this approach. He testified as follows:

And we wanted to meet together to kind of assign things. Because there were issues that affected both, there were issues that affected one and issues that affected the other. So, we would periodically meet and assign tasks that, you know, research tasks, witness tasks, things of that nature, to get together and meet together and decide how best to use it to benefit both . . . .

Mr. Gibson stated that sharing responsibilities in this manner made sense because it helped to conserve the attorneys' time and resources to benefit both defendants. He said no ethical conflict of interest arose during the trial proceedings as a result. He explained that when certain issues directly pertaining only to the petitioner did arise, relevant information was not discussed at the joint defense meetings but was discussed by him and co-counsel separately. He said he and Mr. Goergen interviewed persons not divulged to Dellinger's attorneys and investigated possible defense theories for the petitioner on their own. He said that the two defense teams shared one case investigator but that he and Mr. Goergen investigated independently any matters they did not want the shared investigator to handle.

In challenging this arrangement as demonstrating counsel's ineffectiveness, the petitioner cites Griffin v. McVicar, 84 F.3d 880, 887 (7th Cir. 1996), in which the court held that an actual conflict of interest existed in counsel's multiple representation of two defendants that led counsel to make decisions advantageous to one defendant but detrimental to the other, resulting in ineffective assistance to the latter client. The petitioner states that ineffective assistance is demonstrated by "[i]nstances in which choices of strategy would have been made differently had there been separate representation" of each defendant. Griffin, 84 F.3d at 887. Significant, however, is the fact that the petitioner's case did not involve multiple representation and a true "joint defense" of co-defendants by one attorney. Rather, the petitioner's counsel chose to share certain responsibilities and information relevant to both defendants in a manner and in furtherance of a defense strategy which sought to exonerate both of them. The petitioner suggests that this arrangement prevented his counsel from pointing the finger at Dellinger as the likely shooter of the victim because they could not emphasize the fact that the physical evidence was indirectly linked only to Dellinger or take the position that Dellinger was a "corrupting and domineering force" on the petitioner.

As summarized in this court's opinion appended to our supreme court's opinion on direct appeal, voluminous evidence linked both defendants with the victim shortly before the time that the victim was last seen alive:

The State's theory of the case, which was supported by extensive proof, was that Dellinger and Sutton acted in unison with a common purpose and design to kill Griffin. Indeed, the State's theory was that

both Appellants fought with Griffin, attempted to bail Griffin out of jail, set fire to Griffin's trailer, transferred the murder weapon from a truck to a car, successfully bailed Griffin out of jail, and then were present while one of them fired the fatal shot. The defense theory for both Appellants was that neither one of them committed the murder. Indeed, much of the defense proof went to establishing that they were friends with Griffin and had no reason to kill him, that Griffin died long after he was last seen with Appellants, and that there were several other possible culprits in this case. Thus, the evidence in the record created an "all or nothing" situation in which Sutton and Dellinger both actively participated and promoted the murder of Griffin or neither one of them did.

Dellinger, 79 S.W.3d at 496-97 (Appendix).

Given the amount of evidence connecting the petitioner and Dellinger with each other and with the victim a short time before the victim's murder, we cannot agree that it was unreasonable for counsel to try to establish that neither defendant was responsible for his murder rather than trying to persuade the jury that Dellinger alone was guilty and the petitioner neither shot the victim nor played any role in his death. We conclude that the petitioner has failed to establish any deficiency in the performance of trial counsel.

### C. Failure to Present a Coherent Defense

The petitioner argues that given the admission of a great deal of evidence concerning Connie Branham's murder, counsel were prejudicially ineffective in failing to present a coherent defense theory to that crime at his trial for Griffin's murder. More specifically, the petitioner contends that defense counsel should have attempted to rebut the relevance of Branham's murder by presenting testimony suggesting an alternate suspect to that crime.

Part of the defense's strategy was to disprove the state's theory that Branham was killed because she was looking into her brother's disappearance and would eventually connect the petitioner and Dellinger to his death. The defense called Dr. Wolfe in an effort to establish that the victim actually died several days later than suggested by the state's proof and after Branham died. The defense attempted to buttress Dr. Wolfe's testimony with that of the medical examiner, who testified that the cause of Branham's death could not be determined because her body was virtually consumed when her car burned. In addition, witnesses detailed Branham's history of mental instability and treatment and episodes of depression and attempted suicide. The defense thus suggested the possibility that Branham may have died accidentally after consuming alcohol and prescription drugs which may have rendered her unconscious when her car caught on fire.

The petitioner insists that this theory was transparently weak and that trial counsel were deficient in their failure to pursue Bill Cogdill, another Sevier county resident, as an alternate suspect

in Branham's homicide. The petitioner contends that at the Branham murder trial, testimony from other witnesses, including Janice Reed and Joyce Tipton, was "exculpatory" in nature. The petitioner contends that the defense should have presented testimony from Reed, Tipton, and Cogdill in order to blame someone else for Branham's murder.

We believe the record reflects that counsel's decision not to pursue Cogdill was not uninformed. At the evidentiary hearing, Mr. Gibson testified that he attended the Branham murder trial in Sevier County and reviewed the transcript to determine which witnesses to call at trial. He stated that he personally interviewed Cogdill, whom he characterized as a "mountain man" type, and that he found Cogdill hard to understand and to be someone who would "just about agree with anything you tell him." Mr. Gibson concluded Cogdill would not be a favorable witness for the defense, but he hoped he could cross-examine him as a state's witness instead. He testified that he was aware that Joyce Tipton had testified in the Sevier County trial and attributed "some weird statements" to Cogdill, to the effect that Branham's body would be found "burned up somewhere," which may have been made before Branham's body was found. He said that the defense initially sought to have Tipton testify at the Blount County trial, but he recalled that he did not pursue her after she made efforts to avoid testifying because of her mental problems.

The record also reflects that when trial counsel did make some attempt to establish Cogdill as a possible suspect in Branham's murder, he was unsuccessful. On questioning regarding Branham's murder, Jack Sutton testified that Cogdill told him that "Connie would either be found in water or burned in a car." However, Sutton could not recall whether Cogdill made this statement before or after Sutton had learned that Branham's body had been found. On cross-examination, Sutton testified that he did not believe Cogdill's statement because he knew Cogdill to be a bragger or a liar and not one to be believed. In our view, such testimony supported counsel's decision not to call Cogdill as a defense witness.

The petitioner strenuously asserts that potential witnesses such as Cogdill, Tipton, and Reed could have established that someone other than the petitioner may have killed Branham and thereby lessened the impact of this prior conviction at the petitioner's sentencing for the victim's murder. However, the record does not include any evidence suggesting Cogdill or anyone else as a viable, alternate suspect in Branham's murder, and the petitioner did not present any witnesses having potentially exculpatory testimony at the post-conviction hearing. A petitioner should have such witnesses testify at the evidentiary hearing. See Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). "Typically, that is the only method of establishing prejudice" because absent testimony from a witness at the evidentiary hearing, "this court could only speculate as to what prejudice may have resulted by trial counsel's failure to subpoena . . . a witness" at trial. James Leath v. State, No. E2004-02708-CCA-R3-PC, Knox County, slip op. at 7, (Tenn. Crim. App. Dec. 28, 2005).

The record of the underlying trial for Griffin's murder reflects that counsel focused their efforts on creating doubt regarding the times of death of both Griffin and Branham in order to erase the petitioner's motive for killing Branham and to help to establish his innocence for the victim's murder. The petitioner has failed to present any evidence that counsel were deficient in failing to

pursue Cogdill or anyone else as a viable suspect in Branham's death. Without such evidence, trial counsel cannot be found deficient for failing to use their limited time and resources in pursuit of a theory that someone else killed Branham while defending the petitioner for the victim's murder. As a result, the petitioner has not established either prong of the test for effectiveness of counsel under Strickland and this claim must fail.

#### D. Failure to Obtain Qualified Experts

The petitioner asserts that trial counsel failed to obtain and use qualified experts to assist them at trial. They fault defense counsel for relying on Dr. Larry Wolfe, a family practitioner, to establish the victim's time of death. In addition, the petitioner contends that trial counsel should have sought their own ballistics expert. Lastly, the petitioner asserts that counsel were ineffective for failing to seek interlocutory review of the trial court's denial of continued funding for a jury selection expert.

##### 1. Dr. Larry Wolfe

Mr. Gibson testified that he had "very good confidence" in Dr. Wolfe, had worked successfully with him in past cases, and felt he would be well received by the jury despite his being a county coroner, not a board-certified pathologist. Through Dr. Wolfe's testimony the defense called into question the time of the victim's death and sought to raise doubt that the victim was killed on February 21, less than an hour after witnesses testified to last seeing him in the company of the petitioner and Dellinger. Based on the presence of rigor mortis and blood evidence, Dr. Wolfe estimated that the victim died at least two days later, closer to the time that his body was discovered on February 24. Mr. Gibson conceded at the post-conviction hearing that it may have been better to obtain a certified forensic pathologist for this purpose. He stated, however, that this conclusion was based on hindsight after the defense was met with the unexpected testimony of Dr. Charles Harlan, a certified medical examiner and forensic pathologist, on rebuttal. He testified that it was a trial tactic to call Dr. Wolfe as the defense's last witness and to hit the prosecution at the end of trial with the "most devastating" testimony they had by raising the possibility that the victim was not killed until much later than the state had suggested. At the post-conviction hearing, Mr. Gibson testified that "hindsight is 20/20," and had counsel been aware that a board-certified pathologist was among the potential prosecution witnesses, the defense would have obtained its own board-certified pathologist to testify in rebuttal. In evaluating counsel's conduct, the Strickland Court observed that a "fair assessment . . . requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; see also Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982) (stating counsel's conduct will not be measured by "20-20 hindsight").

In any event, the petitioner has failed to establish that as a medical doctor and coroner, Dr. Wolfe was not qualified to testify regarding the time of death based on the condition of the victim's body at the time of its discovery. The petitioner has presented nothing to show that a board-certified

forensic pathologist would have refuted Dr. Harlan's assessment of the time of death and thereby supported Dr. Wolfe's testimony and credentials. Under these circumstances, the petitioner has failed to establish that he was prejudiced by Dr. Wolfe's limited testimony estimating the time of the victim's death.

## 2. Ballistics Expert

The petitioner asserts that trial counsel were deficient in failing to obtain their own ballistics expert at trial. Mr. Gibson testified that ballistics evidence, consisting of shotgun hulls found near the victim's body and a shell casing found inside Connie Branham's burned car, was linked only to other shotgun hulls and a rifle belonging to Dellinger. He said the trial court had ruled that the petitioner had no standing to raise objections to the search of Dellinger's property and seizure of this evidence. He said that after this ruling, the responsibility for investigating the ballistics evidence was primarily left to Dellinger's team.

In view of the fact that the ballistics evidence indirectly implicated only Dellinger, giving him a strong motive to establish its lack of relevance to the murders, it was not necessarily unreasonable for petitioner's counsel to rely on Dellinger's team to this end rather than obtaining funding for their own ballistics expert. In any event, we note that the petitioner offered no testimony of a ballistics expert to challenge the ballistics evidence offered by the state at trial. We conclude that the petitioner has not demonstrated prejudice with respect to this claim.

## 3. Jury Selection Expert

Counsel testified that in selecting the first jury for petitioner's trial, they were assisted by a court-approved, state-funded jury selection expert, Margie Fargo. After the initial mistrial and in preparing to select the second jury, counsel were informed that further services of the jury selection expert were no longer authorized. The petitioner asserts that in view of counsel's lack of experience in selecting a capital case jury, their failure to seek interlocutory review of the denial of the jury selection expert constitutes ineffective assistance. The state correctly notes that the petitioner provides no citation to any authority in support of this claim.

In any event, we conclude that the petitioner has failed to establish prejudice. On direct appeal, trial counsel did challenge the trial court's ruling, and the issue was decided adversely to them. Our supreme court upheld the trial court's ruling, noting that the record failed to satisfy the required showing of a particularized need for the expert's continued services. The court stated:

There having been no entitlement to the jury selection expert in the first jury selection process, we find no error in the trial court's decision to deny funding for the continued use of the expert in the second jury selection process. We agree with the Court of Criminal Appeals that defense counsel had ample jury trial experience and had the further benefit of information gained from the use of Fargo during

the first jury selection process. Dellinger and Sutton cite no authority, and we find none, in support of their position that revoking funds for the jury selection expert violated their constitutional rights.

Dellinger, 79 S.W.3d at 469.

We conclude that the petitioner has failed to show that he was prejudiced as a result of counsel's failure to seek interlocutory review of this issue.

#### E. Failure to Prepare for Penalty Phase

The petitioner next asserts that his counsel were deficient in failing to prepare adequately for the penalty phase of the trial. In particular, the petitioner faults counsel for failing to obtain a specialist to assist them in developing mitigating evidence. The petitioner contends that counsel otherwise failed to obtain and present the petitioner's complete social and developmental history and unreasonably chose to present the petitioner in a positive light instead. As a result of these alleged deficiencies, the petitioner asserts that counsel failed to present any effective mitigation proof at sentencing.

To prevail on a claim that counsel were ineffective in the penalty phase of a capital trial, the petitioner must show "a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695, 104 S. Ct. at 2069. When the alleged prejudice involves counsel's failure to present sufficient mitigating evidence, we consider the following factors: (1) the nature and extent of the mitigating evidence that was available but not presented; (2) whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings; and (3) whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination. See Goad, 938 S.W.2d at 371.

Mr. Gibson testified that although he devoted the majority of his time to the guilt phase of the petitioner's trial, he also prepared for the penalty phase. As to expert assistance, he explained that he made the decision to use Dr. Engum, a psychologist who also had a law degree, in a dual capacity as an expert psychologist and a mitigation expert because he had worked with him in other felony cases and had "very good confidence in him." Mr. Gibson stated that his strategy at sentencing was to present the petitioner essentially as a good person and avoid dwelling on the negative aspects of his life to avoid the risk that the jury would view such information as an attempt to excuse his crime. He said the defense conducted interviews with some forty to fifty prospective witnesses before deciding whom to use as mitigation witnesses. In addition to relying on Dr Engum, he said he used information obtained from interviews that the case investigator had conducted and also secured the services of a college senior who interviewed and gathered information from family witnesses and others to create a family profile. He said he took into account that the petitioner's fate would be decided by the same jury that had just convicted him. He said he wanted to avoid focusing

on the negative aspects of his life and his “misspent youth” to avoid the impression that he was trying to make excuses for his crime.

At sentencing, the defense presented the majority of its evidence through the testimony of Dr. Engum. Dr. Engum testified that he evaluated and conducted tests of the petitioner over the course of three days. He said the petitioner had a low IQ, was “borderline mentally retarded,” and had “limited intellectual functioning,” scoring in the bottom 15% of that category. He said the petitioner was also limited in the areas of social judgment and knowledge, abstract reasoning, and vocabulary and had undiagnosed learning disabilities. Dr. Engum concluded that the petitioner was very limited in the “general knowledge that people need in order to navigate through life.” Concerning the petitioner’s background, Dr. Engum testified that his interviews of the petitioner and his family members revealed that the petitioner’s father was an alcoholic, which “set the stage” for the petitioner to become an alcohol abuser by age twelve. He noted that the petitioner came from a broken home and that both parents subjected the petitioner to “mind games” and tried to bribe him to live with one parent over the other. He said the petitioner had endured physical and mental abuse and characterized him as “one of the least favored of all the children” in the family. He said the petitioner’s “extremely poor” academic record, culminating in the petitioner’s quitting school in the eighth grade, was not unexpected given his life in a “highly dysfunctional” and “chaotic family background.” In summary, Dr. Engum described the petitioner’s family background as “fairly deplorable.”

Asked to describe the petitioner as an individual, Dr. Engum testified that the petitioner learned to distrust others from a young age and that his “self-protective mechanism” led to feelings of social isolation, aloneness, and depression. He said the petitioner used alcohol as well as marijuana as a form of self-anesthesia to lessen his pain. He said the petitioner was easily manipulated and became a follower, especially of persons older and more experienced than he was. Dr. Engum said the petitioner could be successful, as evidenced for a time by his marriage and his work history, as long as he could avoid alcohol because he was an alcoholic. Among his diagnoses, Dr. Engum noted the petitioner’s anti-social features and referred to his attempts to adapt to a world that “shunned and rejected him.” He said that the petitioner had done quite well in the structured prison environment and that the prison environment was “as good an environment as he has been in for many years.”

At the sentencing hearing, the petitioner’s family members, including his mother, sister-in-law, brother, niece, and other lay witnesses testified on his behalf. These witnesses generally testified to the petitioner’s positive character traits to the effect that the petitioner was a good, kind-hearted, and generous person who always got along well with children and had potential for rehabilitation in prison. The jury heard, for example, that the petitioner was a loving father to his own daughter and that he continued to visit and care for her even after he and his wife had separated and his daughter moved to Georgia. The jury heard that the petitioner once saved his niece from certain death in an explosion of her home and that he had cared for a close friend and her child when she had surgery. The petitioner’s brother testified regarding the petitioner’s aggravated assault conviction, that he, not the petitioner, had fired the gun and that despite being convicted, the

petitioner was simply an innocent bystander to the incident. The petitioner's mother testified that he made her cards in prison and continued his practice of sending money to family and friends in need whenever he could. She said the petitioner had demonstrated a potential for rehabilitation in prison. Other witnesses, including a long-time neighbor who served as a county constable, testified that the petitioner had never caused any trouble in his community, always demonstrated a positive work ethic, and was well-behaved in prison.

In asserting that trial counsel failed to present a proper case in mitigation, the petitioner faults counsel for failing to uncover and present more specific details of his background. According to Dr. Auble, obtaining a more comprehensive mitigation history would have led counsel to emphasize to the jury the petitioner's abuse and neglect as a child, his alcoholism, his poor performance and lack of attendance at school, and his personality traits that would help explain "why he was vulnerable to both addiction and to being influenced by an older male relative" and "what made him tick" in general. In line with Dr. Auble's testimony, the petitioner's family members testified at the post-conviction hearing that as a young boy, the petitioner lived in a filthy house where he was verbally and physically mistreated by an unstable stepmother for one to two years. Witnesses testified that neither of the petitioner's parents made any real efforts to remove him from the situation. The petitioner's father, brother, and sister-in-law all testified to the inappropriate attention paid to the petitioner by his much older uncle, Dellinger, noting that Dellinger frequently took the petitioner out driving and supplied him with alcohol.

The petitioner submits that counsel were deficient in failing to present such evidence of the petitioner's social and developmental history in mitigation. In support of his argument, he relies on cases in which trial counsel were adjudged ineffective based on their complete failure to investigate their clients' backgrounds and their family and social histories in particular. In Williams v. Taylor, the Court held that counsel's failure to introduce the "voluminous amount of evidence that did speak in Williams' favor" demonstrated counsel's ineffectiveness by their failure to conduct a thorough investigation of the defendant's background. 529 U.S. 362, 396, 120 S. Ct. 1495, 1514 (2002). Similarly, in Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003), the Court found trial counsel's conduct substandard based on their failure to obtain and introduce reasonably available mitigating evidence of the petitioner's abuse and neglect as a child. We conclude, however, that these cases are readily distinguishable from the case at bar. Contrary to the facts of both Williams and Wiggins, the record before us does not support the petitioner's assertion that counsel wholly failed to investigate his background and were thereby prevented by a lack of awareness from presenting any mitigating proof of his social and family history. The record indicates that counsel relied on information provided by their expert psychologist together with the information counsel gained from personally interviewing dozens of witnesses in deciding which information to present to the jury. Although counsel might have chosen to place greater emphasis on certain negative aspects of his background, the jury was certainly made aware of the petitioner's abuse and neglect, alcoholism, drug abuse, lack of education, limited intelligence, and tendency to be influenced by others. In short, the record supports the trial court's finding that much of the evidence the petitioner presented at the post-conviction hearing was cumulative and only "expanded" the evidence presented at trial.

At sentencing, the state relied on the petitioner's prior violent felony convictions in support of a sentence of death. Our supreme court has stated that the prior violent felony aggravating circumstance is "more qualitatively persuasive and objectively reliable than others." State v. McKinney, 74 S.W.3d 291, 313 (Tenn. 2002); State v. Howell, 868 S.W.2d 238, 261 (Tenn. 1993). In our view, this aggravating factor was all the more persuasive and difficult to overcome in the petitioner's case considering the fact that one of the petitioner's prior violent felony convictions was for the murder of the victim's sister. We are unpersuaded that being presented with more details or specific instances of the petitioner's abuse and neglect or his relationship with Dellinger would have led the jury to reach a different sentencing decision. Counsel's efforts to convince the jury not to return a sentence of death by emphasizing the petitioner's more positive attributes and by arguing that the petitioner's life had some value and should be spared despite his convictions were not unreasonable or uninformed. The fact the strategy was not successful does not, alone, establish that counsel were ineffective in preparing or presenting his case in mitigation. "The petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, 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). We conclude that the petitioner has failed to establish that counsel failed to investigate and present a proper mitigation case and that but for the cited deficiencies, the jury would have reached a different sentencing decision.

## **II. INEFFECTIVE ASSISTANCE OF COUNSEL - APPEAL**

The Fourteenth Amendment to the United States Constitution guarantees an indigent criminal defendant the right to counsel for his first appeal. Douglas v. California, 372 U.S. 353, 357, 83 S. Ct. 814, 816 (1963). The right to counsel on appeal necessarily encompasses the right to the effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387, 397, 105 S. Ct. 830, 837 (1985). "To determine whether appellate counsel was constitutionally effective, we use the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)—the same test that is applied to claims of ineffective assistance of trial counsel asserted under the Sixth Amendment to the United States Constitution." Carpenter v. State, 126 S.W.3d 879, 886 (Tenn. 2004); see also Smith v. Murray, 477 U.S. 527, 535-36, 106 S. Ct. 2661, 2667 (1986) (applying Strickland to a claim of attorney error on appeal).

### **A. Failure to Raise Denial of Residual Doubt Instruction on Appeal**

The petitioner asserts that counsel were ineffective in failing to raise on direct appeal the issue of the denial of a residual doubt jury instruction at sentencing. The petitioner summarily asserts that residual doubt was a mitigating circumstance fairly raised by the evidence and contends that the failure to challenge the denial of a requested jury instruction on appeal in and of itself establishes trial counsel's ineffectiveness.

In order to prevail on this claim, the petitioner must establish both that his appellate counsel's performance was deficient and that the petitioner was prejudiced as a result of the deficient

conduct. Porterfield v. State, 897 S.W.2d 672, 678 (Tenn. 1995); Cooper v. State, 849 S.W.2d 744, 746-47 (Tenn. 1993). The petitioner's failure to establish either prong of the Strickland test results in the denial of relief. Cooper, 849 S.W.2d at 747. "To prove a deficiency, a petitioner must show that counsel's acts or omissions were so serious as to fall below an objective standard of 'reasonableness under prevailing professional norms.'" Dean v. State, 59 S.W.3d 663, 667 (Tenn. 2001) (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). "To prove prejudice, a petitioner must establish a reasonable probability that but for counsel's errors the result of the proceeding would have been different." Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

The Tennessee Supreme Court has stated that residual doubt is a nonstatutory mitigating circumstance. State v. Thomas, 158 S.W.3d 361, 403 (Tenn. 2005) (citing McKinney, 74 S.W.3d at 307 (Tenn. 2002); State v. Hartman, 42 S.W.3d 44, 55-56 (Tenn. 2001)); see T.C.A. § 39-13-204(e)(1). "Thus, where the issue of residual doubt is raised by the evidence, a jury instruction is appropriate." Id. (citing State v. Odom, 928 S.W.2d 18, 30 (Tenn.1996)). Such evidence "may consist of proof . . . that indicates the defendant did not commit the offense, notwithstanding the jury's verdict following the guilt phase." McKinney, 74 S.W.3d at 307. In Thomas, the defendant testified that he did not commit the charged murder, and our supreme court determined that based on the defendant's testimony the trial court should have provided the jury an instruction on residual doubt. Thomas, 158 S.W.3d at 403. In the present case, the petitioner did not testify in his own defense at trial. He fails to note any particular evidence supporting a residual doubt instruction.

Our supreme court has also concluded that a convicted defendant's right to have the jury instructed on nonstatutory mitigating circumstances is not constitutional in nature and the failure to instruct the jury on nonstatutory mitigating circumstances when raised by the evidence is therefore subject to harmless error analysis. See State v. Hodges, 944 S.W.2d 346, 351-52 (Tenn. 1997), cert. denied, 522 U.S. 999, 118 S. Ct. 567 (1997); see also Tenn. R. Crim. P. 52(a); T.R.A.P. 36(b). A charge should be considered prejudicially erroneous if it fails to submit the legal issues fairly or if it misleads the jury as to the applicable law. Hodges, 944 S.W.2d at 352. "However, if 'by their breadth, the instructions on nonstatutory mitigating circumstances encompassed all the evidence presented by the defense,' the omission of an instruction on a specific mitigating circumstance is harmless." Thomas, 158 S.W.3d at 403 (quoting Hodges, 944 S.W.2d at 356). In the petitioner's case, as in Thomas, the trial court instructed the jury to consider in mitigation "any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence." This "catch-all" mitigating evidence instruction "served to give the jury the opportunity and duty to consider any residual doubts about his culpability." Id. at 403-04.

Based on the foregoing, we conclude that the trial court did not err in denying the requested residual doubt instruction and that, even if the evidence supported such an instruction, its omission was harmless in view of the trial court's general instruction encompassing any lingering doubt of the petitioner's guilt. Accordingly, the petitioner cannot establish prejudice as to this allegation that counsel provided ineffective assistance.

## B. Failure to Preserve Rule 404(b) Issue For Review

The petitioner contends that trial counsel were ineffective in failing to require procedural compliance with Tennessee Rule of Evidence 404(b) regarding the trial court's admission of evidence of other crimes at trial. In particular, the petitioner challenges counsel's failure to ensure that a transcript of the hearing admitting evidence of the Branham murder was included in the record to permit an appellate determination of whether the trial court complied with the procedural requirements of Rule 404(b) in admitting such evidence. See Tenn. R. Evid. 404(b).

On direct appeal, counsel unsuccessfully challenged the ruling of the trial court admitting evidence of the Branham murder as relevant for a purpose other than to establish that the defendants acted in conformity with a character trait and its finding that the probative value of the evidence was not outweighed by the danger of unfair prejudice. See Tenn. R. Evid. 404(b)(2),(3). In addressing the issue on direct appeal, this court stated in its opinion appended to the supreme court's opinion:

Although it is not clear, Appellants apparently do not challenge the trial court's compliance with the procedural aspects of Rule 404(b) and instead, they only challenge the trial court's conclusion that the evidence was relevant to issues other than Appellants' characters and that the probative value of the evidence was not outweighed by danger of unfair prejudice. Thus, we do not address the trial court's compliance with Rule 404(b)'s procedural requirements. Indeed, although the record indicates that the trial court conducted a hearing on this issue, the record only contains a brief excerpt of the hearing. Therefore, we would be precluded from reviewing the trial court's compliance with the procedural requirements even if Appellants had challenged it. It is the duty of the party seeking appellate review to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues raised by the party. State v. Ballard, 855 S.W.2d 557, 560-61 (Tenn. 1993); State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). When the record is incomplete, and does not contain a transcript of the proceedings relevant to an issue presented for review, this Court is precluded from considering the issue. State v. Matthews, 805 S.W.2d 776, 784 (Tenn. Crim. App. 1990).

Dellinger, 79 S.W.3d at 484, n.8 (Appendix).

At the post-conviction hearing, neither trial attorney could recall why a complete transcript of the hearing was not included in the record on appeal. Despite his contention that trial counsel were deficient in this regard, the petitioner has failed to present the transcript for this court's review. Without the transcript, the petitioner cannot establish prejudice regarding this issue.

### III. EXCULPATORY EVIDENCE

The petitioner contends that the state withheld exculpatory evidence in violation of due process by failing to disclose a 1992 Blount County Sheriff's Office memorandum discussing the investigation of a Lester "Festus" Johnson as a possible suspect in the homicides of the victim and Branham. The memorandum, prepared by Blount County Detective Dale Gourley based on information obtained from authorities in North Carolina, reported that Lester Johnson was tried in 1992 in North Carolina for an assault against Tina Hartman, a resident of Sevier County. According to the memorandum, Johnson was "supposedly a close associate of James Dellinger and Gary Sutton of Sevier [County]." The memorandum stated that both the victim and Branham were acquaintances of Hartman that she sought to have testify at Johnson's trial as "character witnesses" on her behalf. The memorandum stated that the victim did not appear at Johnson's trial and that Johnson was acquitted of the charges against him on February 21, 1992, the same day the victim disappeared. Detective Gourley ended the memorandum by targeting Johnson as a possible suspect in the murders of the victim and Branham, suggesting that their deaths "may have been contract/revenge killings in retaliation for the arrest of Lester Johnson."

At the post-conviction hearing, both of petitioner's attorneys denied being provided with a copy of the memorandum, although Mr. Goergen did recall something about someone named "Festus." Counsel stated that if they had received information regarding another possible suspect in the victim's murder, they would have thoroughly investigated the matter.

In Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963), the Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." See also State v. Marshall, 845 S.W. 2d 228, 232 (Tenn. Crim. App. 1992). Before an accused is entitled to relief under this theory, he must establish several prerequisites: (a) the prosecution must have suppressed the evidence; (b) the evidence suppressed must have been favorable to the accused; and (c) the evidence must have been material. See United States v. Bagley, 473 U.S. 667, 674-75, 105 S. Ct. 3375, 3379-80 (1985); Brady, 373 U.S. at 87, 83 S. Ct. at 1196-97; State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995).

In the present case, the state does not really dispute that the memorandum was not provided in requested discovery to the defense at trial or that it contained information somewhat favorable to the petitioner. Thus, the question becomes whether the undisclosed information was material to the petitioner's case. Evidence is considered material only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Edgin, 902 S.W.2d at 390 (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565 (1995)).

The petitioner summarily concludes that the memorandum was material in that it created reasonable doubt regarding the petitioner's prosecution for the victim's murder. At the same time, the petitioner submits that he cannot effectively prove or even investigate Johnson's role, if any, in

the murder these many years later. Although the memorandum suggested Johnson as a possible suspect in the victim's murder, it noted that the victim did not testify against Johnson at Johnson's trial and that Johnson was acquitted. In addition, the memorandum characterized Johnson as a "close associate" of both the petitioner and Dellinger and noted that Johnson was occupied with his own trial in North Carolina on the date of the victim's murder, thereby linking the petitioner to Johnson and providing the petitioner with a possible motive for killing on Johnson's behalf. Otherwise, in order for the jury to have considered Johnson as the likely killer, it was necessary for jurors to believe that immediately after being acquitted at his trial in North Carolina, Johnson traveled to Sevier County, located the victim, and killed him shortly after the petitioner and Dellinger bailed the victim out of jail. To the limited extent that the memorandum contained information favorable to him, we conclude the petitioner has not shown that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435, 115 S. Ct. at 1566. The petitioner is not entitled to relief on this issue.

#### IV. AGGRAVATING CIRCUMSTANCE NOT IN INDICTMENT

The petitioner challenges the failure to include in the indictment the statutory aggravating circumstance used to support his death sentence. The petitioner acknowledges Tennessee case law to the contrary, but he submits that the decisions are erroneous. On direct appeal, the petitioner argued that the indictment failed to comply with the law as set forth in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000). In Apprendi, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. 530 U.S. at 490, 120 S. Ct. at 2363. In direct appeal in the present case, the petitioner argued that the indictment failed to comply with the requirements of Apprendi because it contained no facts concerning the Branham murder, the conviction offense used as an aggravating factor in sentencing the petitioner to death for the victim's murder. See Dellinger, 79 S.W.3d at 466. Our supreme court rejected the challenge, holding that the principles of Apprendi did not invalidate Tennessee's capital sentencing structure. As the supreme court observed, "Neither the United States Constitution nor the Tennessee Constitution requires that the State charge in the indictment the aggravating factors to be relied upon by the State during sentencing in a first degree murder prosecution." Id. at 467. Moreover, upon consideration of the decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531(2004), our supreme court has determined that the Blakely holding does not change its analysis or prior holdings regarding whether aggravating factors must be pled in an indictment. See State v. Berry, 141 S.W.3d 549, 560 (Tenn. 2004).

In State v. Reid, 164 S.W.3d 286, 312 (Tenn. 2005), our supreme court reaffirmed its prior holdings on this issue as follows:

[T]his Court has consistently held that Apprendi does not affect capital sentencing in Tennessee and does not require aggravating circumstances to be pled in an indictment. See State v. Leach, 148 S.W.3d 42, 59 (Tenn. 2004); State v. Berry, 141 S.W.3d 549, 562

(Tenn. 2004); State v. Holton, 126 S.W.3d 845, 863 (Tenn. 2004); State v. Dellinger, 79 S.W.3d 458, 467 (Tenn. 2002). In addition, we have clarified that Ring, as well as the more recent decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, (2004), “do not change our analysis . . . regarding whether aggravating circumstances must be pled in the indictment.” Berry, 141 S.W.3d at 560; State v. Davis, 141 S.W.3d 600, 616 (Tenn. 2004). As we explained in Berry, “the focus in Apprendi, Ring, and Blakely was on the Sixth Amendment right to trial by jury,” and “the Court expressly declined to impose the Fifth Amendment right to presentment or grand jury indictment upon the States.” Berry, 141 S.W.3d at 560. Moreover, we emphasized that defendants in capital cases receive written notice of the State’s intent to seek the death penalty prior to trial, as well as written notice of the aggravating circumstances, under Rule 12.3 of the Tennessee Rules of Criminal Procedure. Id. at 562.

In short, we have held repeatedly that Tennessee’s capital sentencing scheme does not require that aggravating circumstances be included in an indictment.

(Footnote omitted). We are bound to apply the law, and we will not reverse the petitioner’s conviction on the ground that the failure to set forth the aggravating circumstance in the indictment violated his rights to grand jury indictment and due process under the Fifth and Sixth Amendments to the United States Constitution and Article I, sections 8 and 14 of the Tennessee Constitution. The petitioner is not entitled to relief on this issue.

## V. CUMULATIVE EFFECT OF ERRORS

Based on our review of the record, pleadings, and applicable law, we have found no errors to accumulate for our consideration. Accordingly, this issue is without merit.

## CONCLUSION

In consideration of the foregoing and the record as a whole, we affirm the judgment of the trial court.

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JOSEPH M. TIPTON, JUDGE