Fed Ex 10-10-13

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

2013 OCT 11 AM 10:01

APPELLATE COURT CLERK
NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Movant,	)	
	)	No. M1987-00131-SC-DPE-DD
v.	)	
	)	
BILLY RAY IRICK,	)	
	)	
Defendant,	)	

INITIAL REPONSE TO STATE'S MOTION TO RESET EXECUTION DATE OR IN THE ALTERNATIVE A MOTION FOR ADDITIONAL TIME TO FILE SUPPLEMENTAL RESPONSE AS TO DEFENDANT'S PRESENT COMPETENCY – ORAL ARGUMENT REQUESTED

Comes the defendant, Billy Ray Irick, and provides the following initial response to the state's motion to reset his execution date. In the alternative, he respectfully moves this court for additional time in which to file a supplemental response regarding his present competency to be executed. Prior to a decision being rendered, defendant requests the opportunity to present his arguments orally before this honorable court.

Introduction:

As more fully explained below, the state's motion should be denied/deferred at this time because important constitutional and/or equitable issues which may void his verdict of guilt and/or sentence of death are currently being litigated in the

Federal District Court in the Eastern District of Tennessee. (3:98-cv-666). These federal claims are made pursuant to a motion to reopen his federal habeas corpus proceedings in light of recent developments announced by *Martinez v. Ryan*, 132 S.Ct. 1309, 182 L.Ed.2d 272 (March 20, 2012) and its progeny. (See, e.g. Exhibit 1 which is defendant's initial pleading raising said issues.) In the alternative, defendant requests additional time in which to consult with and determine Irick's current competency to be executed.

Current federal habeas proceedings:

On July 3, 2012, Irick moved to reopen his federal habeas corpus proceedings based on developments brought about by the Supreme Court's decision in *Martinez* as well as subsequent cases such as *Trevino v. Thaler*, 133 S.Ct. 1911 (May 28, 2013). In allowing certain defendants to bring otherwise defaulted claims, the *Martinez* line of cases presents a realistic opportunity for Irick to present for the first time eye-witness testimony *from members of the victim's own family* that Irick was hallucinating and showing other indisputable signs of psychosis at the time of the offenses. This evidence, which was first discovered during Irick's federal habeas proceedings, is summarized in three affidavits (the "Jeffers affidavits) which are attached to this pleading as Exhibits 2-4. If allowed to consider this evidence, any responsible jury would, at the very

least, reject a penalty of death if not guilty by reason of insanity. (See, Exhibit 1 for an extensive argument as to these issues.)

Presently, Irick is presenting the federal district court with a set of extraordinary circumstances which include:

> (1) Affidavit testimony *from the victim's family* ("the Jeffers' affidavits) establishing that at the time of the offenses and for some period of time before, the petitioner was "talking with the devil," "hearing voices," "taking instructions from the devil," trying to kill his best and perhaps only friend Kenny Jeffers, chasing a school-aged child down a public street in broad daylight with a drawn machete threatening to kill her, and petitioner's confiding that "[t]he only person that tells me what to do is the voice."
>
> (2) None of the victim's family members in question were interviewed by either trial or post-conviction counsel; nevertheless, the habeas federal investigator made the contact and obtained much crucial information on the first day of his investigation while only travelling approximately 2.5 miles from the offices of petitioner's trial attorney. (Post-conviction counsel was and is also located in Knoxville, TN.). (Affidavit of William Dipillo, Exhibit 5).
>
> (3) A*ll* experts who have reviewed the Jeffers' affidavits (five in total), *including those for the state*, have concluded that petitioner did indeed experience "command hallucinations" and "persecutory hallucinations" as recounted in the Jeffers' affidavits including Dr. Bruce Seidner, a state witness, who examined petitioner for his competency to be executed in August 2010, as well as Dr. Clifton Tennison who initially examined petitioner for competency to stand trial. After reviewing the Jeffers' affidavits, Dr. Tennison concluded, in part, "...no confidence should be placed in Mr. Irick's 1985 evaluations to competency to stand trial and mental condition at the time of the alleged offense."
>
> (4) The jury that sentenced petitioner to death never heard any argument or evidence pertaining to petitioner's mental health after the

age of eight and was unaware of the petitioner's mental state as described in the Jeffers' affidavits.

(5) Petitioner has diligently sought review utilizing counsel's (Howell Clements') own personal funds to hire experts to initially review the case in light of the information contained in the Jeffers' affidavits.

(6) Petitioner is under a sentence of death.

(7) Petitioner had no recollection of the events contained within the Jeffers affidavits and has resisted admitting any mental illness.[1]

This on-going federal litigation preceded the state's motion to reset an execution date by exactly one year and three months. It was filed during a time period during which no execution date was pending, and therefore it cannot be plausibly argued that the litigation was instituted for purposes of delay. Other similarly situated federal habeas petitioners such as Martinez and Trevino have obtained relief pursuant to these new developments in federal habeas law, and Irick should be afforded that same opportunity.

Furthermore, *Martinez* represents a new area or development of the law arising subsequent to all of Irick's previous proceedings in state and federal courts and whose parameters may not yet be fully delineated. No better example could

[1] Dr. Seidner, the state's witness, found that petitioner had experienced "dissociative episodes" in the past which he defined as "...where an individual is conscious and behaving, but has no self-experience of that period of being conscious and behaving." He confirmed that the victim of such dissociative episodes would have no memory of them. He also concurred with Dr. Brown that there was no evidence of malingering or faking of symptoms and that petitioner avoided referring to himself as mentally ill and further denied experiencing hallucinations.

exist as to the dynamic nature of this area of the law than the expansion of *Martinez* as announced in *Trevino v. Thaler*. After reviewing Irick's motion to reopen and associated pleadings, the district court ordered the State to file a response by September 9, 2013 (see Exhibit 6) which has been accomplished. No decision on the motion to reopen has been rendered at the time of filing this pleading. Nevertheless, based on the above quoted extraordinary circumstances, especially those facts which relate to the ease of discovering the very reliable evidence of defendant's psychosis and/or hallucinatory experiences (federal investigator discovered evidence on his first day of investigation in Knoxville by travelling only 2.5 miles from trial counsel's office) and the unanimity of the experts' conclusions that Irick was experiencing persecution and command hallucinations at the time of the offenses, Irick stands a very strong chance of prevailing.

Finally, it should be noted that this response and the relief it seeks does not contravene the holding of *Coe v. State*, 17 S.W.3d 251 (Tenn.2000) since an execution date has not been determined. This court certainly has discretion in setting an execution date, and it is only appropriate that the setting be deferred until the effect of the important and historic developments of *Martinez* can be determined as to defendant's case.

Competency:

Currently, Irick is being held at the Riverbend Maximum Security Institution in Nashville Tennessee. His attorneys are currently, and have always been, residents of Hamilton County, Tennessee. Therefore counsels' visits with Irick have been on an "as needed basis." Prior to the filing of the motion to reset an execution date, it had been several months since Irick's attorneys have met with him.[2] As this Court well knows, Tennessee's former three-drug execution protocol had been the subject of prolonged litigation, and ultimately the protocol was amended with an announcement to the public only on or about September 27, 2013. Given the uncertainty of a valid and/or disputed execution protocol for such a long period of time, equitable principals should allow Irick sufficient time to verify whether or not he is competent to be executed. A claim of incompetency to be executed only becomes ripe when the execution is imminent. *Stewart v. Martinez–Villareal*, 523 U.S. 637, 640, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998); *Panetti v. Quarterman*, 551 U.S. 930, 945, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007).

Therefore, Irick requests that any decision to set an execution date be deferred for a period of at least sixty (60) days to allow his attorneys sufficient

[2] On Tuesday, October 8, 2013, the undersigned met with Irick to explain that the state was seeking to set another execution date and to preliminarily gauge his mental capacity.

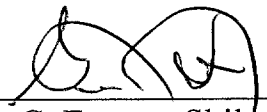
time to evaluate his present competency to be executed pursuant to the Eighth Amendment to the U.S. Constitution, *Ford v. Wainwright*, 477 U.S. 399 (1986), *Panetti v. Quaterman*, 551 U.S. 930 (2007) and their progeny. Given the history of this case and capital cases in general, there can be no discernible or significant prejudice to the state over such a brief delay.

CONCLUSION

Based on the foregoing, Irick respectfully requests that the state's motion to reset an execution date be denied as premature in light of the on-going federal litigation described above. The *Martinez* decision has already provided relief to other similarly situated federal habeas defendants, and Irick should be permitted to fully litigate this issue, especially when said litigation was instituted fifteen (15) months prior to the state's motion. *In the alternative*, Irick prays that any decision to reset an execution date be deferred for at least another sixty (60) to allow his attorneys to examine his competency and to file any necessary supplemental pleadings as to his proposed execution. Irick requests the opportunity to present oral argument as to the matters herein.

Respectfully submitted,

SPEARS, MOORE, REBMAN & WILLIAMS, P.C.

By: 

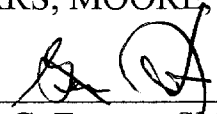
C. Eugene Shiles, Jr. (BPR# 11678)
Attorney for Billy Ray Irick
(email: ces@smrw.com)
801 Broad Street, 6th Floor
P. O. Box 1749
Chattanooga, TN 37401-1749
Telephone: (423) 756-7000
Fax: (423) 756-4801

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Initial Response to State's Motion to Set Execution Date has been forwarded via facsimile 615-532-4892 and U.S. mail, first-class postage prepaid, on October 10, 2013 to:

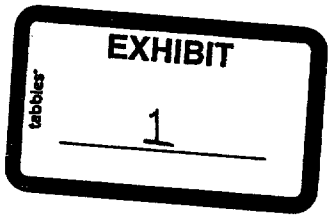
Jennifer L. Smith, Deputy Attorney General
William E. Young, Solicitor General
Robert E. Cooper, Jr., Attorney General & Reporter
Office of Tennessee Attorney General
500 Charlotte Avenue
P. O. Box 20207
Nashville, TN 37202-0207

SPEARS, MOORE, REBMAN & WILLIAMS, P.C.

By: 

C. Eugene Shiles, Jr.

File# 129555-00004
319151.docx



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

BILLY IRICK Petitioner vs. RICKY BELL, Warden	* * * * * * * * * *	USDC Number: 3:98-cv-666 Judge Curtis L. Collier DEATH PENALTY

MOTION TO REOPEN HABEAS CORPUS PROCEEDINGS

Comes the Petitioner, Billy Ray Irick, and pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and/or the federal common law of coram nobis and respectfully moves this Court to reopen his habeas corpus proceedings.

Introduction

By this pleading and pursuant to *Martinez v. Ryan*, 132 S.Ct. 1309, 182 L.Ed. 2d 272 (decided March 20, 2012), petitioner files the present motion to request that this court consider *on the merits* his claim of ineffective assistance of counsel based on trial counsels' failure to investigate and present to the jury *any* evidence of the profound mental

disturbance he suffered during his adult life. Though raised in his initial habeas petition before this court, his claim of ineffective assistance of trial counsel was ruled to have been procedurally defaulted pursuant to *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) and, on that basis, was dismissed. However, based on the recent decision of the United States Supreme in *Martinez v. Ryan*, which held that inadequate assistance of counsel *by post-conviction* counsel may establish cause for a prisoner's procedural default of a claim of ineffective assistance of trial counsel – petitioner submits that he has "cause" for his procedural default based on this new watershed rule of criminal/habeas procedure and that pursuant thereto he is entitled to habeas relief.

Summary of Relevant Procedural History

Petitioner's underlying conviction was from a state court jury verdict of felony murder and two counts of rape of Paula Dyer, a minor, resulting in a sentence of death and two concurrent sentences of forty (40) years. His convictions were affirmed in *State v. Irick*, 762 S.W.2d 121 (Tenn.1988), and his application for certiorari to the United States Supreme Court was denied. *Irick v. Tennessee*, 489 U.S. 1072, 109 S.Ct. 1357, 103 L.Ed.2d 825 (1989).

On May 3, 1989, petitioner filed a post-conviction petition in the Knox County Criminal Court (Case No. 36992) raising numerous issues including claims of ineffective assistance of counsel. Petitioner was subsequently appointed new counsel for said post-conviction proceedings. Relief was denied as to all issues on April 1, 1996, and the Tennessee Court of Appeals affirmed. *Irick v. State*, 973 S.W.2d 643 (Tenn. Crim. App. 1998). Petitioner sought review in the Tennessee Supreme Court which was denied, as was his application for *certiorari* to the United States Supreme Court. *Irick v. Tennessee*, 525 U.S. 895, 119 S.Ct. 219, 142 L.Ed. 180 (1998).

On January 22, 1999, this Court appointed Howell G. Clements and, subsequently, C. Eugene Shiles of Spears, Moore, Rebman & Williams to represent Petitioner Ray Irick in his federal habeas corpus petition. In his original and amended habeas petitioners, petitioner raised numerous claims including, but not limited to, ineffective assistance of trial and post-conviction counsel. (R. 57, Petition and R. 95, Amended Petition). On March 30, 2001, this Court granted the State of Tennessee's two motions for summary judgment ruling, in part, that Petitioner's claims for ineffective assistance of counsel had been procedurally defaulted. (See, R. 146, Memorandum & Order, p. 151). The Court then dismissed the habeas

petitions without an evidentiary hearing while further denying a certificate of appealability and pauper's oath status. (R. 147, Order).

Petitioner appealed and was eventually granted a partial certificate of appealability from the Sixth Circuit Court of Appeals on two issues – neither of which concerned the ineffective assistance of counsel issues. Subsequently, the Sixth Circuit denied relief upholding this Court's granting of summary dismissal. See, *Irick v. Bell*, 565 F.3d 315 (6th Cir. 2009). Petitioner then sought certiorari review by the United States Supreme Court, which was denied on February 22, 2010 (*Irick v. Bell*, 2010 WL 596620), as well as petitioner's motion to rehear on April 19, 2010.

On May 10, 2010, the State of Tennessee moved to set an execution date with the Tennessee Supreme Court. Subsequently, on May 27, 2010, the petitioner filed a response seeking commutation of his death sentence and arguing incompetency to be executed. On July 19, 2010, the Tennessee Supreme Court denied petitioner's request for commutation and set an execution date of December 7, 2010 but nevertheless remanded to the Knox County Criminal Court the issue of petitioner's competency to be executed. On July 22, 2010, petitioner filed a Petition to Determine Competency to be Executed arguing that he did not have a present rational understanding of the reason for his execution and separately that his severe present and past

mental illness should preclude his execution as cruel and unusual pursuant to the Eighth and Fourteenth Amendments to the United States Constitution.

On August 16 and 17, 2010, the Knox County Criminal Court held a competency hearing during which petitioner called Dr. Peter Brown and Nina Lunn as witnesses to testify as to his present incompetency to be executed. Testifying on behalf of the state was Dr. Bruce Seidner. The court found petitioner to be competent to be executed in a judgment issued on August 20, 2010. The Tennessee Supreme Court affirmed in *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010), and the U.S. Supreme Court denied *certiorari*. *Irick v. Tennessee*, 131 S.Ct. 916, 178 L.Ed.2d 765 (2011).

On July 20, 2010, the Sixth Circuit Court of Appeals remanded petitioner's Rule 60(b) motion for relief from judgment which had been originally filed with the district court and pending since November 20, 2001. (Motion, R. 159; *see also* Order, R. 163, transferring motion from district court to 6th Circuit Court of Appeals for resolution.) Pursuant to that remand order, this Court reopened portions of the habeas proceedings as to the following issues: (1) felony murder aggravating circumstance; (2) flight instruction; (3) jury instruction to have no prejudice or sympathy; and (4) an additional Brady claim regarding evidence of petitioner's intoxication. However, this Court denied petitioner's request to reopen his two previously

dismissed ineffective assistance of counsel claims without reaching the merits of those claims. (Memorandum and Order, R. 195). Petitioner moved for reconsideration of the court's denial of his ineffective assistance of counsel claims arguing, in part, that his actual innocence excused the procedural default and was a separate basis for relief. (Motion to Reconsider, R. 202). Petitioner's motion to reconsider was subsequently denied, again without reaching the merits. (Order, R. 206).

After allowing the parties to further brief the reopened issues, the district court dismissed the remaining issues and preemptively denied a certificate of appealability. (Memorandum, R. 209 and Judgment Order, R. 210). On November 22, 2010, the Sixth Circuit affirmed, and the U.S. Supreme Court denied *certiorari*.[1]

ARGUMENT

I. Present proceeding is a continuation of his first habeas petition and not a second or successive petition.

[1] In addition to the proceedings discussed above, Petitioner has also litigated and continues to litigate other matters in state courts, including but not limited to, whether the State of Tennessee's method of execution violates the Eighth Amendment, and whether there are new medical/scientific grounds for reopening state proceedings based on Petitioner's insanity at the time of the offenses. *See, e.g.* West v. Schofield, 2012 WL 1253197 (Tenn. Ct. App. 2012) denying relief as to method of execution and Irick v. State, 2011 WL 1991671 (Tenn. Crim. App. 2011) denying petition for error coram nobis based on later arising evidence of insanity, application for review by Tennessee Supreme Court denied August 25, 2011.

Not every subsequent petition or pleading is considered a second or successive petition for purposes of AEDPA. *Stewart v. Martinez-Villard*, 523 U.S. 637, 643-46, 118 S.Ct. 1618, 140 L.Ed. 2d 849 (1998). For instance, where the later "petition" raises the same grounds as the original petition which had been dismissed for failure to exhaust state remedies, the later petition will not be found to be successive. *Slack v. Daniel*, 529 U.S. 473, 485-86, 120 S.Ct. 1595, 1604-05, 146 L.Ed.2d 542 (2000). Similarly, where the earlier petition was terminated without a judgment on the merits, courts will not find the pleading to be a second or successive habeas petition. *Pratt v. United States*, 129 F3d 54, 60 (1st Cir. 1997). *See also*, *Sustache-Rivera v. United States*, 221 F.3d 8 (1st Cir. 2000).

The present pleading fits into the above exceptions. Petitioner's original habeas petitions raised the claim of ineffective assistance of trial (as well as post-conviction) counsel for failing to investigate and present evidence of Petitioner's mental health condition in both the guilt and sentencing phases of the trial. (*See, e.g.* R. 57, pp. 60-63 and R. 95, pp. 2-3, and 29). Petitioner especially emphasized the evidence discovered during the habeas proceedings of Petitioner's bizarre and floridly psychotic behavior in the days immediately before the offenses. However, this Court never

reached the merits of these claims and dismissed them on the basis of procedural default.[2]

As explained more fully below, *Martinez* represents a new watershed rule of procedure allowing for consideration of Petitioner's claim at this time.

II. As a new watershed rule of procedure, Martinez provides a basis and the necessity of reconsidering petitioner's ineffective assistance of counsel claims

A. Scope of Martinez Decision

In his original and amended habeas petitions, Petitioner claimed that trial and post-conviction counsel were ineffective for failing to fully investigate and present evidence of his mental condition during his original trial and sentencing. In particular, Petitioner, through appointed habeas counsel, presented *for the first time* evidence of his floridly psychotic behavior during the days immediately before the offenses. However, this

[2] Petitioner continued to maintain his claim of ineffective assistance of counsel before the Sixth Circuit Court of Appeals in his Application for Certificate of Appealability, Petitioner's Second Supplement to Previously-Filed Application for Certificate of Appealability, Petitioner's Reply to Warden Ricky Bell's Response to Application for Certificate of Appealability, Petition for Panel Rehearing and/or Hearing *En Banc*, as well as his application for *writ of certiorari* filed with the United States Supreme Court.

Court ruled that the claim had been abandoned at the state level and was therefore procedurally defaulted. (R. 146, Memorandum & Order, p. 148).[3]

In ruling that the claim had been defaulted, this Court cited *Coleman* for the general proposition that criminal defendants have no constitutional right to counsel in collateral proceedings. (*Id,* at p. 144). Therefore, the Court held that "[b]ecause ineffective assistance of counsel will serve as cause only when it rises to the level of constitutional violation and because there is not constitutional violation here, [Irick] cannot claim the representation of post-conviction counsel constitutes cause [for the default of his ineffective assistance of trial counsel claim]." *Id.* The Court's decision as to this issue was in accord with all precedent and subsequent decisions *until* the Supreme Court issued its opinion in *Martinez v. Ryan*, 132 S.Ct. 1309, 182 L.Ed.2d 272 (March 20, 2012).

In *Martinez*, the habeas petitioner was convicted of sexual conduct with a person under the age of fifteen. He was appointed new appellate counsel for his direct appeal. However in addition to filing a direct appeal, appellate counsel also filed a separate state collateral proceeding in which she made no claim that Martinez's trial counsel had been ineffective. She would later inform the post-conviction court that she could find no colorable

[3] This Court noted the State's argument that the post-conviction trial court found that the failure to investigate claim "lacked supporting proof." *Id.* at p. 148.

claim of any description, and the post-conviction proceeding was, not surprisingly, dismissed.

About one and one-half years later, a third attorney filed a second state post-conviction proceeding claiming ineffective assistance of trial counsel. This second petition was found procedurally barred and dismissed based on Martinez's failure to raise the claim in the first collateral proceeding. The appellate court confirmed, and the Arizona Supreme Court declined review.

In his federal habeas proceeding, Martinez claimed that his failure to raise an ineffective assistance counsel claim during his first collateral proceeding should be excused for cause – that being the ineffective assistance of post-conviction counsel in failing to raise the claim. Ruling as did this Court, the district court held that, absent a right to counsel in a collateral proceeding, an attorney's errors in a post-conviction proceeding cannot establish "cause" for a procedural default. The district court then dismissed the claim, and the Ninth Circuit affirmed.

In reviewing Martinez's procedural history, the U.S. Supreme Court deemed his first state post-conviction proceeding as the "initial review collateral proceeding" for filing ineffective assistance of counsel claims, noting that Arizona prohibits ineffective assistance of counsel claims from

being raised on direct review. *Id.* at 1316-1317. Finding that the result of attorney error in an initial review proceeding is likely to mean that "no state court at any level will hear the prisoner's claim," the Supreme Court found that such errors are not different from attorney errors during an appeal on direct review which *Coleman* had recognized as providing cause to excuse a procedural default. *Id* .

While noting that Coleman had left open the issue of whether a prisoner has a constitutional right to effective assistance of counsel in collateral proceedings which provide the first occasion to raise an ineffective assistance of counsel claim, the U.S. Supreme Court held:

> This is not the case, however, to resolve whether that exception exists as a constitutional matter. The precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding. To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary *to modify* the unqualified statement in Coleman that an attorney's ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default. This opinion qualifies Coleman by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.
>
> *Id.* at 1317 (Emphasis supplied.)

In conclusion, the Supreme Court held that a defendant may establish cause for a default of an ineffective assistance of counsel claim in two circumstances, including where appointed counsel in the initial review collateral proceeding is ineffective under the standards of Strickland. *Id.* at 1318.

B. The Martinez Holding Applies to this Case

i. Petitioner's Post-Conviction Hearing was the initial review collateral proceeding

As in Martinez, petitioner's first opportunity to raise a claim of ineffective assistance of trial counsel was in his post-conviction proceedings where he was appointed new counsel. And while Tennessee does not categorically prohibit a claim of ineffective assistance of counsel on direct review, the appellate courts have so discouraged the practice as to practically foreclose such claims on direct review except for those who would willingly or ignorantly contravene the strongest of admonitions of Tennessee's highest courts.[4] The courts have literally "warned defendants and their counsel of the dangers of raising the issue of ineffective assistance of trial counsel on direct appeal because of the significant amount of development and fact finding such an issue entails." Kendricks v. State, 13 S.W.3d 401, 405

[4] Tennessee appellate courts have consistently stressed that claims of ineffective assistance of counsel are more appropriately raised in a petition for post-conviction relief rather than on direct appeal. *See*, State v. Carruthers, 35 S.W.3d 516, 551 (Tenn.2000).

(Tenn.Crim.App.1999). Raising the issue of ineffective assistance of counsel on direct appeal is "a practice fraught with peril." *State v. Thompson*, 958 S.W.2d 156, 161 (Tenn.Crim.App.1997).

Furthermore, and *unlike* in *Martinez*, Petitioner's trial counsel continued to represent him throughout the direct review process, including a petition for certiorari to the U.S. Supreme Court, making it a virtual certitude that trial counsel would not raise a claim that *they* were ineffective at trial. In other words, the first opportunity to effectively raise trial counsel's ineffectiveness was in his post-conviction proceeding, and therefore petitioner's situation is legally indistinguishable from that of *Martinez*.

ii. Post-conviction counsel was ineffective under the standards of Strickland.

Post-conviction counsel raised several ineffective assistance of counsel claims including the following:

1. "Petitioner, Billy Ray Irick, has been denied his constitutional right under the Sixth and Fourteenth Amendments to the United States Constitution to reasonably effective assistance of counsel at both the trial and sentencing phase of his trial, and on appeal, in that counsel representing petitioner was not within the 'range of competence demanded of attorneys in criminal cases' and trial and appellate counsel's performance was deficient and said performance prejudiced the defense. Counsel's assistance to petitioner was so defective as to require reversal of the conviction or, in the alternative, reversal of the sentence imposed at the separate sentencing hearing." (Petition for Post-conviction Relief, ¶ 6, May 5, 1989. IRICK-383).

2. "Trial counsel failed to conduct an adequate or effective pre-trial investigation of the case." (Petition for Post-conviction Relief, ¶ 9(d), May 5, 1989, IRICK-383).

3. "Trial counsel failed to conduct proper, adequate or effective strategy and tactics with regard to the case." (Petition for Post-conviction Relief, ¶ 9(e), May 5, 1989, *Id.*).

4. "Trial counsel did not investigate and interview all necessary and essential witnesses." (Petition for Post-conviction Relief, ¶ 9(g), May 5, 1989, *Id.*).

5. "Counsel failed to investigate for witnesses and/or prepare and present them during the penalty phase of trial to demonstrate all aspects of defendant's character and background that would support a sentence less than death." (Amendment to Petition for Post-conviction Relief, ¶ 9(q), September 8, 1989, IRICK-387).

6. "Counsel failed to prepare adequately for either the guilt/innocence phase or the penalty phase of trail and to develop and present to the jury a coherent theory of defense at either phase." (Amendment to Petition for Post-conviction Relief, ¶ 9(r), September 8, 1989, *Id.*).

7. "Counsel for the defendant failed to have a neurological examination done of the defendant even though there is evidence of a severe head injury to the defendant during his childhood." (Amendment to Petition for Post-conviction Relief, ¶ 9(u), September 8, 1989, IRICK-388).

8. "Counsel for the defendant at trial did not properly investigate the case for trial. ABA standards relating to the defense function, 4.1." (Amendment to Petition for Post-conviction Relief, ¶ 9(ff), September 8, 1989, IRICK-389).

However, *the only* mental health evidence presented and/or tendered by post-conviction counsel to support these claims was the testimony of Dr.

Pamela Auble. [5] Dr. Auble stated that, in preparation for her examination of the Petitioner and her testimony at the post-conviction hearing, she had reviewed various medical and mental health records, including records from the Knoxville Mental Health Center/Helen Ross McNabb Center (discussed above), Eastern State/Lakeshore Hospital (discussed above), United States Army (discussed above), his "GED," West Knoxville Neurological Associates, and prison records in preparation for her testimony. (P.C. Transcript, pp. 96-98, IRICK 454-56). In response to a challenge to her testimony, post-conviction counsel stated:

> Your Honor, we would be willing to stipulate that all of Dr. McCoy's records were available to trial counsel in this case. I – I don't think there's *any* question about that.
>
> Post-conviction trial testimony, p. 123, IRICK-467(h). (Emphasis supplied.)

In other words, Dr. Auble's testimony which was the sole support for the ineffective assistance of trial counsel claims made in the post-conviction

[5] Dr. Auble testified that she evaluated petitioner in January and February of 1990 at the Riverbend facility, administering 15 tests and spending approximately 21 hours with him. (P.C. Transcript, p. 96, IRICK 454). After describing the various tests that she administered and recounting some of Petitioner's childhood history, Dr. Auble opined that Petitioner suffered from "a serious mixed personality disorder" with strong paranoia features, possible schizoid features and brain damage could not be ruled out. (P.C. Transcript, pp. 112-113, IRICK 466-467). Nevertheless, her opinions were ruled "irrelevant" by the post-conviction court which found that any testing conducted after Petitioner's original trial was unreliable and therefore her testimony was offered only as a proffer. (IRICK-459-461). Her testimony, and thus the sole basis for the ineffective assistance of counsel claims, was never considered on the merits by the state courts.

proceedings, was based on the very same facts as developed and relied upon by trial counsel. Post-conviction counsel discovered *no* new evidence or facts. (It is not even clear that post-conviction counsel conducted a factual investigation.)

The state post-conviction trial court made an explicit finding that post-conviction counsel had failed *to allege* or present any facts in support of his conclusory allegations of ineffective assistance of counsel. The trial court found in part:

> Allegations of ineffective assistance contained in the original petition filed May 5, 1989, are conclusions unsupported by allegations of fact or proof. In addition, the amendment to the original petition contains charges numbers (l)-(jj). These contained no allegations of fact or proof of facts but only conclusions with regard to the result to the petitioner as a result of the alleged breach of duty to the petitioner. Also allegations contained under due process grounds (*id.* Kkbbb) contain no factual allegations in support.
>
> The amendment to the original petition numbered (ccc, l-xv) likewise contained legal objections unfettered by factual allegation. Whenever these matters appear in subsequent amendments, the question of ineffective assistance will be discussed in conjunction with that particular allegation where it seems appropriate. Otherwise all allegations of ineffective assistance of counsel are not borne out by proof and are dismissed.
>
> Order, IRICK - 509.

For the reasons stated in more detail below in Section III A, post-conviction counsel's failure to investigate and present factual evidence of petitioner's mental state as an adult and at the time of the offenses in order to support his claim of ineffective assistance of counsel was constitutionally deficient under *Strickland*. Where – as in this case – post-conviction counsel is ineffective, Petitioner may rely on the holding in *Martinez* to show cause for his default of ineffective assistance of counsel claims.

C. *Martinez is a new watershed habeas or procedural rule and may be applied "retroactively"*

Though Petitioner's habeas petition has been previously dismissed and the appeals concluded, nevertheless, federal law allows him to reopen his initial habeas proceedings and to obtain relief consistent with its holding. As the U.S. Supreme Court has ruled:

> New constitutional rules announced by this Court that place certain kinds of primary individual conduct beyond the power of the States to proscribe, as well as "watershed" rules of criminal procedure, *must* be applied in all future trials, all cases pending on direct review, and all federal habeas corpus proceedings. All other new rules of criminal procedure must be applied in future trials and in cases pending on direct review, but may not provide the basis for a federal collateral attack on a state-court conviction. This is the substance of the "Teague rule" described by Justice O'Connor in her plurality opinion in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Danforth v. Minnesota, 552 U.S. 264, 266,128 S.Ct. 1029, 169 L.Ed.2d 859 (2008). (Emphasis supplied.)

In further delineating when a new Supreme Court decision will be given retroactive effect, the *Danforth* court further stated:

> Justice O'Connor endorsed a general rule of nonretroactivity for cases on collateral review, stating that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S., at 310, 109 S.Ct. 1060 (plurality opinion). The opinion defined two exceptions: rules that render types of primary conduct " 'beyond the power of the criminal law-making authority to proscribe,' " id., at 311, 109 S.Ct. 1060, and "watershed" rules that "implicate the fundamental fairness of the trial," id., at 311, 312, 313, 109 S.Ct. 1060.

Id. at 274-75, 1037-38.

Certainly, the decision is *Martinez* represents a "new" decision or rule. Speaking of its decision in *Crawford*,[6] the U.S. Supreme Court stated that a rule is "new" as the term is defined in *Teague* when the decision "was not dictated by precedent existing at the time the defendant's conviction became final...." *Danforth*, 552 U.S. at 270-271, 128 S.Ct. 1029. Prior to *Martinez*, no court had held that errors by post-conviction counsel could qualify as "cause" excusing a procedural default of an ineffective assistance

[6] *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 77 (2004).

of counsel claim. Therefore, the *Martinez* decision was not dictated by precedent and represents a "new rule."

Martinez also represents a "watershed" rule that "implicate[s] the fundamental fairness of [Petitioner's] trial" by allowing defendants such as petitioner to have their ineffective assistance of counsel claims heard, at least once, on the merits. Furthermore, it cannot be doubted that competent and effective assistance of trial counsel in a death penalty case is essential and that without such there can be no fundamental fairness. In *Martinez*, the U.S. Supreme Court stated:

> A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an "obvious truth" the idea that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Indeed, the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 68–69, 53 S.Ct. 55, 77 L.Ed. 158 (1932) ("[The defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence"). Effective trial counsel preserves claims to be considered on appeal, see, e.g., Fed.

Rule Crim. Proc. 52(b), and in federal habeas proceedings, *Edwards v. Carpenter*, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000).

Martinez, 132 S.Ct. at 1417-18.

With the *Martinez* decision constituting a new "watershed rule" that implicates the fundamental fairness of Petitioner's trial, its holding can be applied retroactively to Petitioner's case.

III. Trial and post-conviction counsel were constitutionally ineffective

The Supreme Court has held that to prevail on an ineffective-assistance-of-counsel claim, a defendant must show that his counsel's representation was deficient and that this deficient representation prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to satisfy the deficiency prong, the defendant must show that his "counsel's representation fell below an objective standard of reasonableness" as embodied in "prevailing professional norms." *Id.* at 687-88, 104 S.Ct. 2052. With respect to the prejudice prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

For the reasons stated below, Petitioner argues that trial counsel's failure to present all the available evidence of his disturbed mental condition amounted to ineffective assistance of counsel with clear prejudice to his defense by ensuring that the most cogent evidence militating against a sentence of death was never heard by the jury. Similarly and for the same reasons, he argues that post-conviction counsel's representation was constitutionally deficient and that he was again prejudiced by post-conviction counsel's failure to investigate the important facts of his case relating to his mental condition and present those facts in a claim of ineffective assistance of trial counsel during Petitioner's state post-conviction proceeding.

A. *Trial and post-conviction counsels' representation was constitutionally deficient*

Mitigation evidence in a death penalty case is critically important and often is the only evidence standing between the defendant and a sentence of death. In *Lockett v. Ohio*, the Supreme Court stated that "the sentence" must not "be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as basis for a sentence less than death." 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *See also*, *Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998).

In many – if not most - capital cases, mitigation evidence will be in the form of mental health evidence. The ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases notes that mental health mitigation evidence is extremely important to capital sentencing juries. *See,* Commentary to ABA Guideline 4.1 stating that "mental health experts are essential to defending capital cases." Furthermore, the Supreme Court has "long referred [to the ABA Guidelines] as 'guides to determining what is reasonable.'" *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). The Sixth Circuit has advised defense counsel to introduce evidence "'that would be explanatory of the offense(s) for which the client is being sentenced'" as well providing insights "' into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offenses.'" *Johnson v. Bagley*, 544 F3d 592, 599 (6th Cir. 2008).

Petitioner's claim of ineffective assistance of counsel is based on: (1) trial counsel's failure to investigate and present any facts concerning petitioner's mental health occurring after the age of eight and one-half, and (2) post-conviction counsel's failure to investigate and present any facts concerning petitioner's mental health occurring after the age of thirteen or

fourteen to support his claims of ineffective assistance of trial counsel.[7] *See e.g.*, *Williams v. Taylor*, 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000) (holding that counsel was ineffective because they "failed to conduct an investigation that would have uncovered extensive records graphically describing William's nightmarish childhood..."); *Strickland*, 466 U.S. at 689-91, 104 S.Ct. 2052 (stating that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" and that "strategic choices made after less than complete investigation are reasonable" only "to the extent that reasonable professional judgments support the limitations on investigation.")

Given that the proof of actual guilt of two counts of rape and the homicide of a seven-year old girl was overwhelming, Petitioner's only realistic chance in avoiding the death penalty was convincing the jury that he was either insane so as to obviate guilt or otherwise so mentally disturbed so as to mitigate punishment. Nevertheless, the jury had little or no factual

[7] While post-conviction counsel would call Dr. Pamela Auble to testify as to her *opinions* of Petitioner's mental health at the post-conviction hearing, post-conviction counsel would proffer almost no new facts from Petitioner's life not already presented at his initial trial and completely failed to provide Dr. Auble with *any* new information for her consideration. While Dr. Auble referred briefly to Petitioner's behavior in 1972 when he was thirteen (described below) and which had not been introduced at trial, nevertheless, this information was not *new* but instead had been known by trial counsel - but for some reason not presented to the jury. Post-conviction transcript, pp. 109, 124-25, IRICK-00461f and IRICK-00467(i) and (j). In fact, post-conviction counsel would acknowledge that all the records reviewed by Dr. Auble were supplied to her by Dr. McCoy and would *stipulate* that all of Dr. McCoy's records were available to trial counsel. Post-conviction transcript, p. 123, IRICK-00467(h).

evidence from which to even infer that Petitioner might have been suffering from a serious mental disability at the time of the offenses. Similarly, until the discovery of the "habeas evidence," none of the mental health experts had an accurate picture of the Petitioner or his personal history thereby calling into question their conclusions regarding his mental states.[8]

As the Court will recall, and is described again below, there was a wealth of information which demonstrates Petitioner's psychotic state at the time of the offenses, giving rise to a compelling basis for not invoking a sentence of death. Furthermore, this evidence is highly reliable coming as it does from the hostile members of the victim's step-family.

The substance of the evidence presented by trial counsel has been previously submitted and discussed by the Court in, among other documents, it's Memorandum & Order (R. 146) and will not be repeated in its entirety here. Suffice it to say that there was strong evidence that Petitioner was mentally disturbed between the approximate ages of six and eight and one-half years which would have led a reasonable investigator to diligently search for evidence of Petitioner's mental condition at the time of the offenses. "In assessing the reasonableness of an attorney's mitigation

[8] Dr. Brown opined that Petitioner's previous examiners had not "failed to connect the dots" but instead were faced with a situation where several critical pieces of the puzzle were missing. *See, supra.*

investigation, the court considers 'not only the quantum of evidence already known to counsel,' but also whether that evidence should have led 'a reasonable attorney to investigate further." *Jalowiec v. Bradshaw*, 657 F.3d 293 319 (6th Cir.2011) (quoting *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.E2d 471 (2003). Nevertheless, the investigation and proof ended without any attempt to link the observations and diagnoses of Petitioner as an eight year old child with the Petitioner as a twenty-six year old man on trial for his life.

There are two sets of critical facts that trial counsel failed to present to the jury. The first set concerns those facts known to trial counsel but for whatever reason were not presented. These facts concern Petitioner's behavior from approximately age eight to fourteen. Post-conviction counsel was also aware of these facts, some - though not all of which, were touched upon in Dr. Auble's testimony at the post-conviction hearing.[9] The second set concerns facts discovered during federal habeas proceedings (sometimes referred to as the "habeas facts" or "habeas evidence") and which were neither presented to the jury or post-conviction trial judge nor even known by any previous counsel.

i. Mental health evidence not presented at trial

[9] Nevertheless, even this testimony was not considered on the merits by the state courts. *See*, note no. 5 above.

In addition to the mental health center records introduced at trial, trial counsel had also obtained a limited number of records from the Church of God Home ("the Children's Home") where Petitioner resided from age eight through age thirteen. In addition, trial counsel had obtained but did not introduce certain records from Eastern State Hospital which dealt with his hospitalization, treatment and, among other circumstances, a series of incidents in June of 1972 that led to his removal from the Children's Home and return to Eastern State for hospitalization, as well as other records from the McNabb Center. A summary of this information is provided below.

When Petitioner was still approximately six years old, Dr. Carpenter of the McNabb Center in Knoxville Tennessee wrote the staff at Eastern State Hospital urging Petitioner's admission. The letter states, in part:

> Please admit this patient at your earliest convenience. He has been under treatment at the Mental Health Center for the past six (6) months and we feel that because of his mother's condition and Billie's [sic] *psychosis* that a period of hospitalization would be helpful. Nina Lunn, Billie's [sic] therapist here, will attempt to continue with him at least on a weekly basis...
>
> IRICK 16. (Emphasis supplied).

The letter also goes on to state that Petitioner's medication included Mellaril (25 mg q.i.d.) and Stelazine (2 mg b.i.d.) which are both anti-psychotic and

anti-anxiety medications. *Id.* In yet another letter dated October 25, 1966, Ms. Lunn had told Eastern State officials:

> At times, he is definitely out of contact; there are comments of a hallucinatory quality. However, these have not been dealt with too seriously in view of this boy's age and tendency toward fantasy...Petitioner for the most part functions at his mother's will and functions on his mother's emotionality. His ego strengths are quite limited and he is impulse driven...when threatened, he becomes quite negative which is seen as his fear, but deep resentment and hostility are not seen as a part of this child's makeup as much so as they are part of the mother's. Mrs. Irick has recently become more intensely disturbed...we are recommending hospitalization at this time due to the apparent need for more extensive care for this child. The mother's condition very likely could become worse and if so, it is possible that she too will need hospitalization. The mother's use of this child in expressing her own deep personal and emotional conflicts is seen as a very real factor in any changes that the boy might be able to make.
>
> IRICK 17.

It should be noted that Eastern State began treating Petitioner with Thorazine, a strong anti-psychotic medication, on his first full day at the hospital, which was October 25, 1966[10]. His next dosage of Thorazine appears to be 50 mg on October 28. Beginning the next day, October 29, the

[10] Dr. Auble mentioned that Petitioner had been administered Thorazine in her testimony, referring to it as a "major tranquilizer." IRICK-472. However, she did not describe the frequency or doses.

records reflect that he was put on a daily regimen of 12.5 mg of Thorazine. (See Nurses' Notes beginning at IRICK 98).

On December 1, 1966, Dr. Stanley Webster, Chief Clinical Psychologist of Eastern State, reported, after concluding the first set of comprehensive examinations of Petitioner, that his psychomotor functioning had considerably "regressed." He found that there were indications of "emotional lability, low frustration tolerance and explosiveness." (IRICK 28-29). After being asked to draw human figures, Petitioner, according to the report, "stated his intention to draw a naked figure [in the case of the female figure], but then changed his mind and added a dress." The report goes on to state that:

> Other than the clothes, the only difference between the two figures was that the male possessed teeth and the female didn't. This suggests that the patient's father may not be the passive individual that the records indicate.
>
> IRICK 29.

Dr. Webster's diagnosis was "psychoneurotic anxiety reaction, moderate, with possible brain damage." *Id.* After having his Thorazine dosage doubled to 25 mg per day beginning on December 8, 1966 (IRICK 100), Petitioner was re-examined on January 12, 1967. At that time, a different physician changed Petitioner's diagnosis to "situational reaction of

childhood." (IRICK 34; see also IRICK 40). Nevertheless, on April 16, 1967, his dosage was once again doubled to 50 mg per day until his discharge. (IRICK 101-104). Therefore, while ultimately amending its previous finding of psychosis, Eastern State placed Petitioner on daily doses of an anti-psychotic and twice doubled his dosage, while sometimes exceeding 50 mg per day when the boy became "agitated."[11] (See letter of Susan Tollerson on this page below).

On August 30, 1967, at the age of eight, Petitioner was "conditionally discharged" from Eastern State to the children's home which meant that he could return to Eastern State without further admission procedures. In a letter from Susan Tollerson, a psychiatric social worker with Eastern State to Paul Duncan of the children's home, she stated, in part:

> Petitioner Ray's medication at discharge was Thorazine 50 mg. q.i.d. This prescription may be refilled three times by sending the pink duplicate copy to the Cashier: Eastern State Psychiatric Hospital. A prescription must be obtained following that, but his medication can still be obtained through the hospital if you prefer since this will be at no cost. Often, with the doctor's permission, Petitioner Ray's medication has been slightly increased when he becomes agitated and we have found this procedure most helpful...
>
> (IRICK 42).

[11] No mention was made by post-conviction counsel or Dr. Auble about the increasing doses of Thorazine.

During these years, between the ages of eight and thirteen, Petitioner was rarely, if ever, visited by his parents. However, in June of 1972, the Children's Home arranged a rare visit to his parents' home for Petitioner, who was now thirteen years of age. However, the visit and its aftermath went very badly. During the visit, Petitioner used an axe to destroy the family television set, clubbed flowers in the flower bed, and, in a very disturbing incident, used a razor to cut up the pajamas that his younger sister was wearing as she slept. The razor was later found in his sister's bed. (IRICK-49).[12]

On July 25, 1972 and back at the Children's Home, Petitioner broke a window in one of the dormitories and gained access to a girl's bedroom. As the young girl slept, Petitioner was found hovering over her and was promptly removed after she began screaming. Later, a "butcher knife" was found in the girl's bed. Petitioner was still just thirteen years old. On that same day, Petitioner was expelled from the Children's Home and returned to Eastern State as an inpatient.[13] *Id.*

Back at Eastern State, Petitioner was placed once again on 50 mg of Thorazine. Medical records from this date of his re-admission on July 25,

[12] The information contained in this paragraph was referred to by Dr. Auble during her post-conviction testimony. *See*, IRICK-00461(f) and IRICK-00467(i) and (j).
[13] The information contained in this paragraph was referred to by Dr. Auble during her post-conviction testimony. *See*, IRICK-00461(f) and IRICK-00467(i) and (j).

1972 state, "It is now thought that boy may be really dangerous had been taken off psychotropic drugs at the Children's Home."[14] (IRICK 90). Petitioner remained as an inpatient until March 2, 1973 when, at the age of fourteen, he was discharged to his parents' home with a diagnosis of "adjustment reaction to adolescence" with a "guarded" prognosis. (IRICK 79-80). There is no indication of any follow-up treatment or even a subsequent examination of Petitioner until he was examined for competency to stand trial for the underlying offense.

Petitioner joined the Army in November 1975 at the age of seventeen but was discharged within a short period of time for unstated reasons. (IRICK 141-146). After his discharge from the Army, Petitioner's life seemed to be one of roaming, though there are few, if any, records to provide any detail.

ii. Facts discovered during federal habeas corpus proceedings (the "habeas facts")

Shortly after the initiation of the habeas proceedings, a habeas investigator traveled to Knoxville, Tennessee to interview potential witnesses and among those individuals interviewed was Inez M. Prigmore. Ms. Prigmore had become acquainted with Petitioner and his family when

[14] No mention was made by post-conviction counsel or Dr. Auble concerning this finding or conclusion.

Petitioner was approximately fourteen or fifteen years old and living on Bakertown Road in Knoxville, Tennessee. During that period of time Ms. Prigmore lived, on a part time basis, two doors from the Irick home.

In her affidavit, Ms. Primore testifies that she observed Petitioner's father, Clifford Irick, to be an excessive drinker and a brutal man. She could frequently hear Clifford Irick swearing at his wife and children within the Irick residence approximately 1000 feet away. (IRICK 865). She also heard children being struck within the home and observed Petitioner, his mother and one or more sisters at various times with bruises on their bodies which she suspected were the result of Mr. Irick's violent behavior towards his own family. On one occasion, she witnessed Clifford Irick hit one of his daughters, who was pregnant at the time, knocking her to the ground. *Id.*

Finally, she relates that she observed Petitioner Ray's father hit him in the back of the head with a piece of lumber, knocking Petitioner to the ground. At the time of the incident, Petitioner was approximately fifteen years of age. When Petitioner was approximately seventeen years of age, she heard Clifford Irick tell Petitioner to leave the house and never return. *Id.*

Investigators also found that no one involved in the case had interviewed Ramsey and Linda Jeffers or their daughter, Cathy Jeffers (the

victim's mother's name is Kathy Jeffers), all of whom had lived with the petitioner in the weeks just preceding Paula Dyer's death. (*See,* IRICK 859, 862, 864). While interviewing these unsympathetic witnesses, the investigator learned that Petitioner, just days or weeks before the offense, was caught stalking through Kenny's parents' home late one night after everyone was in bed with a bared machete. Kenny's father, Ramsey, who was also the step-grandfather of the victim, stopped Petitioner and asked him what he was doing. Petitioner stated unabashedly that he was going down the hall "to kill" Ramsey Jeffers' son, Kenny, with the machete. Mr. Jeffers convinced Petitioner to put down the machete and return to his room, but apparently no legal action was taken. Ramsey Jeffers knew of no explanation or possible motivation for Petitioner's bizarre behavior. (*See,* IRICK 859).

In that same period of time, Petitioner chased a young school aged girl with the same machete down a Knoxville public street in broad daylight with the explanation that he "didn't like her looks." (*Id.*) Mr. and Mrs. Ramsey Jeffers, along with their daughter, Cathy Jeffers, who was also living at home, stated in affidavits that Petitioner was frequently "talking with the devil," "hearing voices," and "taking instructions from the devil." (IRICK 858-862). In her affidavit, Cathy Jeffers stated that the petitioner told her,

"[t]he only person that tells me what to do is the voice." (IRICK 864). She also recalled an evening when petitioner was frantic that the police would enter the home and kill them with chainsaws. (*Id.*) This highly revelatory evidence had never been discovered by previous counsel nor had it ever been discussed, alluded to or even admitted by petitioner to the knowledge of habeas counsel.

iii. Trial and post-conviction counsel's efforts relating to the investigation and presentation of mental health evidence for trial/sentencing and ineffective assistance of counsel claims were deficient

The undisclosed evidence described in the two previous subsections is clearly relevant to the determination of his sentence, if not his guilt/innocence, and also to whether his trial counsel were ineffective. The Sixth Circuit had held that counsels' actions must be reviewed in light of the American Bar Association's guidelines. Those guidelines provide in part that any investigation for the sentencing phase of capital case should include, but not be limited to:

> ...medical history, (mental and physical illness or injury, alcohol and drug use, birth trauma, and developmental delays); educational history (achievement, performance and behavior) special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record;

> prior correctional experience (including conduct on supervision and in the institution, education or training, and clinical services); and religious and cultural influences.

Hamblin v. Mitchell, 354 F.3d 482, 487 n.2 (6th Cir. 2003) quoting ABA Guidelines at 11.4.1.(2)(B) (1989).

Evidence in the possession of both trail and post-conviction counsel should have prompted a thorough and exhaustive search for mental health evidence. Yet neither trial nor post-conviction counsel discovered any of the habeas evidence and presented no facts concerning Petitioner's mental health as an adult.

As previously described, mental health experts opined that Petitioner, as a child, suffered from various mental health conditions including but not limited to psychoses. He was placed on anti-psychotic medications and considered "really dangerous" when not on them. Both sets of counsel were aware that Petitioner, at the age of thirteen, had been stopped while in the act of cutting the pajamas off his younger sister with a razor and breaking into the girls' dormitory at the children's home while in possession of a "butcher knife." The butcher knife was subsequently found in the bed of one of the girls after the Petitioner had been taken away.

Such evidence would have spurred reasonable counsel to further investigation. "In assessing the reasonableness of an attorney's mitigation investigation, the court considers 'not only the quantum of evidence already

known to counsel,' but also whether that evidence should have led 'a reasonable attorney to investigate further." *Jalowiec v. Bradshaw*, 657 F.3d 293 319 (6th Cir.2011) (quoting *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.E2d 471 (2003). Yet the most important evidence in the entire case was left undiscovered until a habeas investigator interviewed the victim's step-grandparents where the Petitioner had been living in the weeks just prior to the offenses. A counsel's failure to investigate and present mitigating evidence is unreasonable. *Wiggins*, 539 U.S. at 516-17, 123 S.Ct. 2527.

The "habeas evidence" – that evidence relating to Petitioner's adult mental condition - was also readily available. The Jeffers were all located within downtown Knoxville and probably within two or three miles from the crime scene. The habeas investigator who first located the Jeffers found them with little or no difficulty. Yet neither trial counsel nor post-conviction counsel had ever spoken to them. See, *Titlow v. Burt*, 680 F.3d 577, 590 (6ht Cir. 2012) (finding that failure to perform "a rather easy task" is "totally inconsistent with a reasonable investigation"). Nor is counsel permitted to rely solely on information provided by the defendant and/or family in conducting a proper investigation. *Rompilla*, 545 U.S. at 388-89, 125 S.Ct. 2456.

Failure by trial counsel to investigate and present evidence of Petitioner's mental condition deprived the jury of the most compelling and cogent evidence of why Petitioner should not be put to death. Similarly, failure by post-conviction counsel to investigate and present evidence of Petitioner's mental condition deprived the post-conviction trial court of the most compelling and cogent evidence of why trial counsel had been ineffective. Unfortunately, both trial and post-conviction counsels' efforts were constitutionally deficient. *See, Jells v. Mitchell*, 538 F.3d 478, 478 (6th Cir. 2008) (holding that counsel was ineffective where he failed to investigate and locate files revealing defendant's unstable and abusive home or to present such information to the examining psychologist); *Harries v. Bell*, 417 F.3d 631, 638 (6th Cir. 2005) (finding counsel deficient when he failed to follow leads indicating a troubled childhood and further ruling that counsel had duty to pursue said investigation even when defendant refused to cooperate).

B. Trial and post-conviction counsels' deficient representations resulted in prejudice

To demonstrate prejudice, a defendant claiming ineffective assistance of counsel must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *Campbell v.*

Bradshaw, 674 F.3d 578, 586 C.A.6 (6rh Cir. 2012). The Sixth Circuit has also held that the additional evidence which previous counsel failed to introduce must differ "in a substantial way – in strength and subject matter – from the evidence actually presented at sentencing." *Faunterberry v. Mitchell*, 515 F.3d 614, 626 (6th Cir. 2008) (quoting *Clark v. Mitchell*, 425 F.3d 270, 286 (6th Cir. 2005); *see also*, *Jalowiec v. Bradshaw*, 657 F3d 293 (6th Cir. 2011).

If the reactions of the examining experts, including those for the state, to the habeas information are any indication, then there can be no doubt that the result of Petitioner's original trial would have been different. As described below, every expert who has reviewed the habeas evidence has not only concluded that Petitioner suffered from a severe mental disturbance at the time of the offenses – but has also described Petitioner's mental state in starkly different terms than those used by mental health experts who had been deprived of this evidence . These experts include Dr. Tennison, who at the original trial, opined that Petitioner was competent at the time of the offense and to stand trial, as well as Dr. Seidner who testified for the state at Petitioner's competency hearing in August of 2011.

i. The undisclosed evidence is not cumulative and differs substantially in strength and subject matter from the evidence presented at trial

The impact of the undisclosed evidence on Petitioner's culpability either at the guilt or penalty phase is immediate, compelling and transformative. Its strength is apparent from the reaction of the experts who have reviewed it. As discussed in subsequent sections, all the experts who have reviewed the undisclosed evidence, including expert witnesses for the state, have testified that Petitioner was undoubtedly suffering from severe psychiatric disorders, if not outright insanity, at the time of the offenses[15]. Dr. Tennison, who testified at the original trial that Petitioner was competent at the time of the offenses and at trial, has recanted his earlier opinions. (*See, infra.*) Dr. Seidner, who would examine Petitioner for competency to be executed on behalf of the State of Tennessee in August of 2010, stated that there was "no question" but that Petitioner experienced "command hallucinations" and "persecutory hallucinations" as described in the Jeffers affidavits at or near the time of the offenses. (*See, infra.*)

And while the subject of Petitioner's mental state *as a child* was raised at trial, the habeas evidence is the only evidence ever discovered that

[15] When Petitioner committed his offenses, Tennessee law required the state to prove a defendant's sanity once the issue was raised at trial – whether from evidence produced by the defendant *or* the state. As held by Tennessee's Supreme Court, "[i]f the evidence adduced either by the defendant or the State raises a reasonable doubt as to the defendant's sanity, the burden of proof on that issue shifts to the State. The State must then establish the defendant's sanity to the satisfaction of the jury and beyond a reasonable doubt." Graham v. State, 547 S.W.2d 531, 544 (Tenn. 1977), citing Collins v. State, 506 S.W.2d 179 (Tenn.Cr.App.1973) and Covey v. State, 504 S.W.2d 387 (Tenn.Cr.App.1973).

concerns Petitioner's mental condition as an adult. Even the undisclosed evidence from Petitioner's childhood raises different subject matters in that it reveals for the first time the doses and frequency of psychotic medications used to treat Petitioner and the belief by his mental health providers that Petitioner was dangerous, even at the age of thirteen, without those medications! (*See, infra.*)

This evidence – coming as it does from hostile witnesses – is not only relevant but highly credible. It demonstrates that at the time of the offenses, Petitioner was acting irrationally – lashing out at friends and strangers alike – without any intelligible cause or explanation. The evidence further demonstrates that his irrational behavior resulted from a severe mental disturbance at the time of the offenses – explaining and mitigating the culpability of his actions. Its importance to a death penalty deliberation is beyond question. Failing to present significant mitigating evidence concerning a capital defendant's mental capacity is ineffective. Rompilla v. Beard, 545 U.S. 374, 383, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005).

ii. Impact of habeas evidence on reviewing experts

Upon discovery of this later arising evidence, habeas counsel, Howell Clements, using his own funds (a total of $1,750.00), provided the Prigmore and three Jeffers affidavits to two Chattanooga psychologists, Dr. Kenneth

S. Nickerson and Dr. William F. Blackerby for their review, along with some of the other records described above. Petitioner was of course in the custody of the Riverbend Maximum Security Institution in Nashville. Given that the funds were out of Mr. Clements' own pocket and were limited, there were insufficient funds available at that time to have either of the two physicians travel to Nashville to personally examine petitioner or to administer any tests.

After reviewing the three Jeffers' affidavits and substantial portions of petitioner's mental health history, Dr. Blackerby opined in an affidavit dated September 14, 1999 that petitioner "suffered at the very least from a dissociative disorder, and probably was schizophrenic or intermittently psychotic." (IRICK 868-69). Dr. Nickerson concurred with Dr. Blackerby's conclusions in an affidavit signed November 17, 1999. (IRICK 875-76). They disputed the validity of the earlier evaluations and further opined that the petitioner should be reevaluated based on the newly discovered factual evidence as well as the advances of the mental health sciences relevant to patients such as the petitioner.

Subsequent to the dismissal of the habeas petition and while the case was on appeal before the Sixth Circuit and United States Supreme Court, counsel contacted Dr. Clifton Tennison who had performed the initial mental

health screening before petitioner's trial and found him competent at the time of the offense and to stand trial. After reviewing the three Jeffers' affidavits, he stated in his affidavit that he could no longer have confidence in his earlier evaluation because he had not been provided all material evidence. He states, in part:

> The information contained within the attached affidavits [the three Jeffers affidavits] raises a serious and troubling issue of whether Mr. Irick was *psychotic on the date of the offense* and at any previous and subsequent time. That is, this historical information would have been essential to a determination of a role of a severe mental illness - a mental disease or defect - in his ability to have appreciated the nature and wrongfulness of his behavior, and therefore, to the formation of an opinion with regard to support for the insanity defense. ... The fact that this information was not provided to me prior to my evaluation of Mr. Irick is very troubling to me as a medical professional and as a citizen with regard to issues of ethics, humanitarian concern, and clinical accuracy. I am concerned that in the light of this new evidence, my previous evaluation and the resulting opinion were incomplete and therefore not accurate.... I further note that behavioral health science greatly advanced since 1985 and especially within the last five to ten years. While the basis screening and assessment procedures for forensic evaluations have remained consistent in principal, diagnostic criteria and categories have changed, scientific data and testing instruments have been improved and expanded, and the clinical handling of evidence and standards for opinions and testimony have changed. Because of such changes and advances, and especially in the light of this new information, it is my professional opinion to a reasonable degree of medical certainty that without further testing and

> evaluation, no confidence should be placed in Mr. Irick's 1985 evaluations of competency to stand trial and mental condition at the time of the alleged offense.
>
> (IRICK 896-99)(Emphasis supplied).

Beginning in late 2009, habeas counsel approached Dr. Peter Brown for further assistance in evaluating the petitioner. Again, using his own funds, Attorney Howell Clements arranged for the petitioner to be examined by Dr. Malcolm Spica and Dr. Peter Brown. Subsequently, in November and December of 2009, and still during the pendency of petitioner's federal habeas case, Dr. Malcolm Spica administered approximately two dozen psychiatric tests to the petitioner and prepared a report of his findings. *See*, pp. 2-3 to the competency hearing transcript, IRICK 1090-1091, for list of tests and results). On December 7, 2009 and January 21, 2010, the petitioner was interviewed by Dr. Peter Brown. Based on his review of historical documents, the testing performed by Dr. Spica, and his own interviews, Dr. Brown prepared the report which begins at page IRICK 906 and admitted as Exhibit 3 to the competency hearing.

Dr. Brown's report describes a history of "chronic and severe psychiatric disorder" in petitioner's family, including his mother, who had a long history of psychiatric disturbances and treatment with "heavy medication," as well as an aunt or cousin. (*Id.* at p. 25, IRICK 931).

(Petitioner also reported to Dr. Brown that his mother is a "practicing witch" who regularly uses spells and witchcraft directed against others. (*Id.* at p. 6, IRICK 912)). Since his arrest for the offense, petitioner's mother has been, at best, apathetic towards her son and his attorneys, when not openly hostile. He further reported that the petitioner was, at the time of the offense, consuming marijuana and alcohol and that chronic use of these substances can worsen emotional and cognitive problems. "In particular, the combination may have combined to heighten paranoid thinking patterns." (*Id.* at p. 13, IRICK 919).

Dr. Brown found no evidence "whatsoever" of malingering or symptom exaggeration. (*Id.* at pp.12, 15 and 16, IRICK 918, 921 and 922). Dr. Brown has provided the following diagnoses:

AXIS I:	a.	Cognitive disorder NOS
	b.	Psychotic Disorder NOS, by history, rule out Schizophrenia, Paranoid Type
AXIS II:	Paranoid Personality Disorder; Schizoid Personality Disorder	
AXIS III:	No diagnosis	
AXIS IV:	Stressors (severely/prolonged): Post-Conviction 1st Degree Murder, Incarceration	
AXIS V:	GAF = 48/48 (severe symptoms or impairments)	

(*Id.* at p. 20, IRICK 926)

In regard to his diagnosis of a cognitive disorder, Dr. Brown described evidence of gross impairment of the executive function, in other words, the capacity to plan, premeditate, weigh out consequences and carry out plans. He states that the evidence of impairment in executive functioning was particularly evident during more complex tasks with profound deficits in petitioner's verbal fluency. Dr. Brown further explained:

> The deficits in verbal fluency and executive function are likely to interact in a vicious cycle during times of stress. His anxiety will mount as he is unable to formulate a plan or to organize his thinking in words. Coupled with his difficulties in restraining his behavior this will likely lead to worsening anxiety, bizarre thinking and impulsive behavior.
>
> His deficits are further complicated by marked paranoia and, possibly, intermittently florid psychotic symptoms. He is unable to maintain himself as is typical for many paranoid individuals through by avoiding all but the most perfunctory social contacts.
>
> This pattern appears to have been present since early childhood with documentation of a gross failure of formal social development both at home and at school, prolonged psychiatric hospitalizations, repeated school failure, premature discharge from the military, a prolonged period of time when he was a vagrant and his tenuous adaptation to present life through extreme isolation.
>
> *Id.* at p. 13, IRICK-919.

The deficits described above led Dr. Brown to conclude that the past and present test results are "in fact over estimates" of his cognitive abilities, explaining that petitioner's abilities in real life situations will be significantly worse than his performance on paper and pencil tests because "deficits in integrating knowledge into actual thinking and behavior will be disproportionately compromised and complicated and emotionally stressful real-life situations." Even so, he concludes that test results were approximately consistent with the social and emotional levels of a 7 - 9 year old child. *Id.* at p. 26, IRICK-932.

Dr. Brown's second AXIS I diagnosis was "psychotic disorder NOS or "not otherwise specified." He judged the information obtained from the Jeffers as strong evidence of a severe psychiatric illness, such as paranoid psychosis, though he left his diagnosis at the more general level of "not otherwise specified" as provided and permitted in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition. He found numerous factors increasing the risk of a psychotic disorder in the petitioner. Among these factors were the following: a childhood history of parental rejection and physical abuse; documented lack of coping skills; lack of overall support system; substance abuse; and psychological stress, such as being thrown out of the home and living and returning to a highly contentious setting on the

day of the offenses of Paula Dyer. He also found evidence of genetic predisposition to psychotic disorders, noting severe psychiatric illnesses in his mother and a cousin. He reviewed and documented the long history of mental health treatment beginning at age six which included ever increasing doses of Thorazine, an anti-psychotic medication. *Id.* at p. 23, IRICK-929.

Dr. Brown also expressed the following opinion regarding petitioner's condition and circumstances at the time of the offense:

> The combination of impaired ability to control behavior, command hallucinations and related paranoid delusions constitutes one of the most severe psychiatric emergencies. In this case there is evidence that he reported on multiple occasions in the weeks prior to his arrest that his behavior was being controlled by the devil, that police were coming to kill him and that he had to take action to save himself. This coincided with a dramatic impairment in hygiene and self-care. He was observed planning to attack or chasing other individuals with a knife. Chasing a total stranger down the street while screaming and brandishing a machete is not only consistent with other reported symptoms but clearly demonstrates a severe, acute incapacity to control behavior.
>
> *Id.*

Dr. Brown found that petitioner's severe impairments would have existed continuously from childhood and been present "both at the time of the offense and at the time of his trial and are present now." Dr. Brown noted that the pre-trial examination of the Petitioner was not a situation where the examiners "failed to connect the dots" but rather was a situation

where several critical pieces of the puzzle were missing. (*Id.* at p. 19, IRICK 925). In characterizing the information provided by the three Jeffers family members, Dr. Brown states:

> In the final stages, several adults who lived with him [the Jeffers] reported evidence of the most severe and dangerous, psychotic symptoms: command hallucinations of violence accompanied by persecutory delusions.

(*Id.* at p. 13, IRICK 919).

He predicts that had the previous examiners been provided the information found in the Jeffers and Inez Prigmore affidavits, they would have dramatically altered their conclusions and recommendations. In his opinion, they would have certainly recommended, "at a minimum," psychiatric hospitalization for close assessment and evaluation. (*Id.* at p. 20, IRICK 926). He further states:

> It is important to remember that rather than claiming a psychiatric illness, Mr. Irick consistently denied psychiatric disturbance. In the absence of the information from the Jeffers family, they [the previous examiners] were left with a hostile and unsympathetic individual who denied any significant psychiatric symptoms and evidently claimed to be unable to remember the events in question.
>
> *Id.*

Under the circumstances that existed at the time of the offense, Dr. Brown found that the petitioner suffered a gross impairment in his capacity

to refrain or control his behavior. Concluding to a reasonable degree of medical certainty, Dr. Brown states:

> There is insufficient information to conclude that Mr. Irick was capable of forming specific intent in the commission of his offense, as defined by Tennessee statute. There is evidence of severe mental illness at the time of the offense and his sanity at the time cannot be established beyond a reasonable doubt.
>
> Specifically, the weight of the available information indicates that Mr. Irick, more likely than not, lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform that conduct to the requirements of the law due to a severe mental illness. It is more likely than not that he lacks substantial capacity to appreciate the wrongfulness of his acts.
>
> Neuropsychological testing and developmental history indicate that the claimant has severe deficits in his capacity to premeditate, appreciate, make judgments or conform his behavior. It is more likely than not that these deficits have been present since childhood and have continued unchanged throughout his adult life. Test results are approximately consistent with those of a seven to nine year child. His severe impairments would have existed continuously from childhood and have been present both at the time of the offense and at the time of his trial and are present now.
>
> *Id.* at p. 1, IRICK-907

During Petitioner's competency hearing, Dr. Brown discussed his four diagnoses, including petitioner's psychiatric disorder which has historically included the symptoms of hallucinations and delusions defined as "fixed

beliefs...that are patently false in our culture" though he found no evidence of psychotic episodes since 1985, which occurred at or near the time of the offense. (Comp. Tr., pp. 23 and 66, IRICK 958 and 1001). According to the testing, petitioner shares many of the same attributes of a person suffering chronic schizophrenia. (Comp. Tr., pp. 36-37, IRICK 971-972).

Dr. Brown testified that the hallucinations and delusions experienced by the petitioner were episodic and brought on by emotional conflict. (Comp. Tr., pp. 31-32, IRICK 966-967). He cited the events described in the three Jeffers' affidavits as the best examples of episodic hallucinations experienced by petitioner. (Comp. Tr., pp. 23-24, IRICK 958-959). However, he also testified that the testimony of Kathy Jeffers (Paula Dyer's mother) concerning petitioner's behavior on the day of the offense (which included descriptions of mumbling, and talking to himself when no one was there), Ms. Jeffers' statement to Detective Don Wiser in which she described petitioner as "drunk and talking crazy," petitioner's loss of his job on the day of the offense, and his having been chased out of the Jeffers' home by Linda Jeffers (the step grandmother of the victim) as examples and/or symptoms of emotional conflict capable of triggering an episode of florid psychosis. (Comp. Tr., pp. 40-43, IRICK 975-978).

Many of the Dr. Brown's findings and conclusions were shared by Dr. Bruce Seidner who examined Petitioner on behalf of the State of Tennessee for the competency to-be-executed hearing held in August of 2010. Called as a witness for the state, Dr. Seidner described the petitioner as "very disturbed, dis-inhibited and out of control" as a child and having long suffered from "major psychiatric illness and substance abuse" *during the rest of his life.* (Comp. Tr., pp. 96 and 120, IRICK 1034 and 1058). He described the petitioner as "entirely cooperative" and using his "best effort." (See Comp. Tr. p. 99, IRICK 1037). Petitioner had "no hesitation" consenting to the evaluation and, according to Dr. Seidner, knew and articulated the purpose of the evaluation. (Comp. Tr., p. 100, IRICK 1038). In his report, Dr. Seidner generally described the petitioner this way:

> While Mr. Irick is currently stable and does not demonstrate any cognitive or affective defects that impair his functional abilities or competence, his history of conduct problems and mental illness is well documented. The stability and consistency of prison life has allowed him to develop control over the affect storms dissociative experience, and psychiatric disorders that clearly drove the majority of his pre incarceration living.

(Exh. 6 to Comp. Tr., p. 5, IRICK 1110).

Dr. Seidner further testified there was "no question" that petitioner had experienced "command hallucinations" and "persecutory hallucinations" in the past as recounted in the Jeffers' affidavits. (Comp. Tr., pp. 129-130,

IRICK 1067-1068). He stated that because of petitioner's psychiatric condition, he was susceptible to being overwhelmed and impulsive when not in a structured and relatively solitary environment without obligations. (Comp. Tr., p. 120, IRICK 1058).

Dr. Seidner further found that petitioner had experienced "dissociative episodes" in the past which he defined as "...where an individual is conscious and behaving, *but has no self-experience of that period of being conscious and behaving.*" (Comp. Tr., p. 136, IRICK-1054) (Emphasis supplied.) Dr. Seidner confirmed that the victim of such dissociative episodes would have *no memory* of them. *Id.* He concurred with Dr. Brown that there was no evidence of malingering or faking. (Comp. Tr., pp. 99-100, 111, IRICK-1037, 1038, and 1049). He also found, as did Dr. Brown, that petitioner avoided referring to himself as mentally ill and further denied experiencing hallucinations. (Comp. Tr., pp. 99, 115 and 122, IRICK 1037, 1053 and 1060).

iii. The result of Petitioner's trial would have been different

Given the dramatic effect that the above described evidence had on all medical experts who reviewed it, including but not limited to Dr. Tennison who actually came to disavow his own previous evaluation of the Petitioner on behalf of the state and Dr. Seidner who testified that Petitioner suffered

from, amoung other conditions, dissociative episodes during which he would have no memory of his actions, there is *more* than a reasonable probability that but for previous counsels' errors, the result of Petitioner's trial would have been different. See, *Darden v. Wainwright*, 477 U.S. 168, 184, 106 S.Ct., 91 L.Ed. 2d 144 (1986). "When a [petitioner] challenges a death sentence ... the question is whether there is a reasonable probability that, absent the errors, the sentence ... would have concluded that the balance of aggravating and migrating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. Given that Petitioner had lived with and cared for the victim for approximately two years and given what we now know about his very serious – and untreated – medical condition, a fair and reasonable jury could not have, *in good conscience*, voted for his death.

Conclusion

Based on the foregoing, Petitioner respectfully requests that his habeas corpus proceeding be reopened and that this Court review its ineffective assistance of counsel claim in light of new Supreme Court precedent in the form if *Martinez v. Ryan*. He further submits that he has presented evidence sufficient to establish ineffective assistance of trial and post-conviction counsel necessitating relief from his sentence of death.

SPEARS, MOORE, REBMAN & WILLIAMS, P.C.

By: /s/ C. Eugene Shiles, Jr.
BPR #011678
P. O. Box 1749
Chattanooga, TN 37401-1749
(423) 756-7000

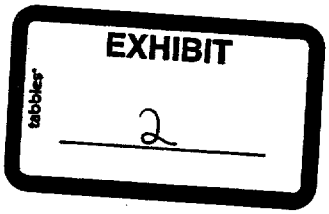
/s/ Howell G. Clements
BPR# 001574
1010 Market Street, Suite 404
Chattanooga, TN 37402
(423) 757-5003

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2012, a copy of the foregoing motion to reopen habeas corpus proceedings was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

s/ C. Eugene Shiles, Jr.

F:\Library\users\CLIENTS\129555\0001\DISTRICT COURT\motion reopen habeas corpus proceedings.docx



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
CHATTANOOGA DIVISION

BILLY RAY IRICK,
Petitioner,

vs.

No: 3:98-CV-666
Collier / Powers

RICKY BELL, WARDEN,
Riverbend Maximum Security Institution

Respondent,

AFFIDAVIT OF CATHY JEFFERS

I, Cathy Jeffers, age 38, daughter of Linda and Ramsey Jeffers and the sister of Kenneth Jeffers, residing in Knoxville, Tennessee, do solemnly swear to the following as true and correct:

1) I am the sister of Kenneth Michael Jeffers. Kenneth was formerly married to Kathy Jeffers. On or about April 15, 1985, Kenneth and Kathy Jeffers were legally married and were the parents of five (5) children; including seven (7) year old Paula Kaye Dyer. To the best of my knowledge, on and for weeks previous to April 15, 1985, Kenneth and Kathy Jeffers were separated . My brother then resided with our parents at their Virginia Ave., Knoxville, Tennessee apartment and Kathy, in the care and company of the five (5) children, resided at 1205 Exeter Street, Knoxville, Tennessee.

2) On and for several weeks previous to April 15, 1985, my brother and his friend, Billy Ray Irick, continuously resided with my parents at their Virginia Avenue, Knoxville, Tennessee apartment. I was acquainted with Billy Ray Irick previous to that time as I had met him when he lived with Kenneth, Kathy and their children at their former residence in Clinton, Tennessee.

3) To the best of my recall, in and prior to April of 1985, I was married to Steven Miller and we resided in Knoxville, Tennessee. I had been to my parents apartment approximately three (3) to four (4) times in April of 1985 when Kenneth and Billy Ray Irick temporarily resided with them . I distinctly observed the behavior and language of Billy Ray Irick as follows:

A) Billy Ray Irick's personal hygiene was atrocious. He had a horrible body odor. His clothes smelled awful as did his room where he slept.

B) Billy Ray Irick continuously mumbled to himself. I remember asking Mr. Irick what he was saying or to whom he was talking too. I distinctly remember that Billy Ray Irick told me that he was listening and talking to " a voice". He continued by commenting in a stern voice / firm conviction that " the only person that tells me what to do is the voice". I remember that he had a very strange look on his face when he told me about "the voice". Upon hearing this information, I purposely had no further conversations with Mr. Irick about this matter.

C) I had slept at my parent's apartment during one evening in April, 1985, when Billy Ray Irick awoke at night , walked and mumbled through the apartment and woke me up to warn me that the police were in the apartment and that they were there to kill us with chainsaws. I told Billy Ray Irick that such was not the case and that he should go back to sleep.

4) To the best of my recall, on or about April 15, 1985, I was told by my parents that they had evicted Billy Ray Irick from their home after my mother and Mr. Irick were involved in a heated argument. Later on that same evening, Mr. Irick was at the Exeter Street residence of my then sister-in-law, Kathy Jeffers and her five (5) children, when Paula Kaye Dyer was raped and murdered.

5) I have never been contacted by the Knoxville District Attorney, Knoxville Police Department or any of the defense attorneys for Mr. Irick as to what I knew of and observed about Billy Ray Irick, previous to my July, 1999 conversation with attorney Howell Clements and investigator Bill DiPillo, when I informed them of the abovementioned information.

AFFIANT SAYS NOTHING FURTHER...

Kathy Jeffers

CATHY JEFFERS

11-3-99

DATE

Sworn and subscribed before me
this 3rd day of November, 1999.

William J. Pillo

Notary at Large

My Commission Expires: 5/20/2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
CHATTANOOGA DIVISION

EXHIBIT
tabbies
3

BILLY RAY IRICK,
Petitioner,

vs.

No: 3:98-- CV--666
Collier / Powers

RICKY BELL, WARDEN,
Riverbend Maximum Security Institution

Respondent

AFFIDAVIT OF RAMSEY JEFFERS

I, Ramsey Jeffers, age 75, retired, married to Linda Ramsey for over sixty three years , the father of ten (10) children and grandfather of numerous grandchildren, residing at 1102 Virginia Avenue, Apartment # 580, Knoxville, Tennessee, 37921, 423-637-0904, do solemnly swear to the following as true and correct:

1) I am the father of Kenneth Michael Jeffers. Kenneth was formerly married to Kathy Jeffers . On or about April 15, 1985, Kenneth and Kathy Jeffers were legally married and were the parents of five (5) children between them; including seven (7) year old Paula Kaye Dyer. On or about April 15, 1985, Kenneth and Kathy Jeffers were separated with Kenneth then residing at our Virginia Avenue residence and Kathy, in the company of the five (5) children, resided at 1205 Exeter Street, Knoxville, Tennessee.

2) On and for several weeks previous to April 15, 1985, my son, Kenneth and his friend, Billy Ray Irick, resided continuously at our Virginia Avenue residence. I was acquainted with Billy Ray Irick previous to April, 1985 as he had lived with Kenneth, Kathy and the children at their former residence in Clinton, Tennessee.

3) On and for several weeks previous to April 15, 1985, while Billy Ray Irick resided at our residence, I observed his behavior and language as follows:

A) Billy Ray Irick's personal hygiene was atrocious. He had a horrible body odor. He rarely took a bath and did not clean his clothes or his room where he slept.

B) Billy Ray Irick repeatedly said that he did not believe in God. He repeatedly told me that he talked every night to the devil and that the devil and / or voices told him what to do.

C) Billy Ray Irick repeatedly told me that his voices would tell him to kill people. As evidence of such, I personally observed the following:

C-1) I personally observed that Billy Ray Irick walked through our apartment and mumbled to himself. When I asked him what he was saying or to whom he was talking too, he would tell me that he was talking to his voices.

C-2) Sometime immediately before April 15, 1985, sometime at or before midnight, I stopped Billy Ray Irick in our apartment hallway as he walked mumbling to himself and towards my son's bedroom with a long bladed machete in his hand. I asked him what he was doing to which he said, "I'm gonna kill Kenny". I was able to take the machete away from him and stopped him from hurting my son.

C-3) Sometime immediately before April 15, 1985, I observed that Billy Ray Irick chased a young girl down Virginia Avenue and he had the same previously mentioned machete in his hand. To the best of my knowledge, he chased her into a nearby apartment and screamed that he wanted to kill her. When I asked him what he was doing, to the best of my recall, Billy told me that he chased the young girl with the machete and wanted to kill her because " I don't like her looks".

C-4) I distinctly recall that on several occasions, when I was in the company of Billy Ray Irick at my apartment, he would mumble to himself and then comment that he wanted to kill people. He would make these comments about total strangers that happened to walk past my apartment.

4) On April 15, 1985, sometime in the afternoon,. Billy Ray Irick and my wife, Linda Jeffers, were involved in a heated argument when she chased Irick with a broomstick and told him to remove himself from our apartment. On that date, Irick removed himself and all of his belongings from our apartment. Later on that same date, Irick reportedly was at the Exeter Street residence of Kathy Jeffers and her children when our granddaughter, young Paula Kaye Dyer, was raped and murdered.

5) I have never been contacted by any of the defense attorneys for Billy Ray Irick concerning what I knew of and observed about Mr. Irick, previous to my July, 1999 conversations with attorney Howell Clements and investigator, Bill DiPillo, when I informed them of the abovementioned information.

AFFIANT SAYS NOTHING FURTHER...

11.3.99

RAMSEY JEFFERS — DATE

Linda Jefferies - Witness

Sworn and subscribed before me this
3rd day of November, 1999.

William Hillo
Notary at Large

My Commission Expires: 5/20/2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
CHATTANOOGA DIVISION

EXHIBIT
tabbies 4

BILLY RAY IRICK,
Petitioner,

vs.

No: 3:98-CV-666
Collier / Powers

RICKY BELL, WARDEN,
Riverbend Maximum Security Institution

Respondent

AFFIDAVIT OF LINDA JEFFERS

I, Linda Jeffers, age 75, housewife, married to Ramsey Jeffers for over sixty three years, the mother of ten (10) children and grandmother of numerous grandchildren, residing at 1102 Virginia Avenue, Apartment # 580, Knoxville, Tennessee, 37921, 423-637-0904, do solemnly swear to the following as true and correct:

1) I am the mother of Kenneth Michael Jeffers. Kenneth was formerly married to Kathy Jeffers. On or about April 15, 1985, Kenneth and Kathy Jeffers were legally married and were the parents of five (5) children between them; including seven (7) year old Paula Kaye Dyer. On or about April 15, 1985, Kenneth and Kathy Jeffers were separated with Kenneth then residing at our Virginia Avenue residence and Kathy, in the care and company of the five (5) children, resided at 1205 Exeter Street, Knoxville, Tennessee.

2) On and for several weeks previous to April 15, 1985, my son, Kenneth and his friend, Billy Ray Irick, resided continuously at our Virginia Avenue residence. I was acquainted with Billy Ray Irick previous to April 15, 1985 as he had lived with Kenneth, Kathy and the children at their former residence in Clinton, Tennessee.

3) On and for several weeks previous to April 15, 1985, while Billy Ray Irick resided at our residence, I observed his behavior and language as follows:

A) Billy Ray Irick's personal hygience was atrocious. He had a horrible body odor. He rarely took a bath and did not clean his clothes or his room where he slept.

B) . Billy Ray Irick repeatedly said that he did not believe in God. He repeatedly told me that he talked every day to the devil and that the devil and / or "voices" told him what to do.

C) Billy Ray Irick repeatedly told me that his " voices " would tell him to kill people. As evidence of such, I personally observed the following:

C-1) I personally observed that Billy Ray Irick walked through our apartment and mumbled to himself. When I asked him what he was saying or to whom he was talking too, he would answer by stating that he was listening and talking to his "voices."

C-2) Sometime immediately before April 15, 1985, I observed that Billy Ray Irick chased a young girl down Virginia Avenue, holding a machete, screaming that he was going to kill the child. He chased her to a nearby apartment where the child entered and fled for safety. When Billy returned to our apartment, I asked him what he was doing and why he chased the child with a machete ? To the best of my recall, he told me that he chased the child with a machete because he wanted to kill her because " I don't like her looks".

C-3) I distinctly recall that on several occassions, when I was in the company of Billy Ray Irick at our apartment, he would mumble to himself that he wanted to kill people . He would make these comments about total strangers that happened to walk past our apartment.

4) On April 15, 1985, sometime in the afternoon, I had a heated argument with Billy Ray Irick. Irick had made some bad remarks about my son Kenneth and I told him that I would not tolerate his comments and bad language. Our argument grew to the extent that I told Irick that he had to immediately remove himself and his belongings from our apartment. Later on that same date, Irick reportedly was the the Exeter Street residence of Kathy Jeffers and her children when our granddaugther, young Paula Kaye Dyer, was raped and murdered.

5) I have never been contacted by any of the defense attorneys for Billy Ray Irick about what I knew of and observed about Billy Ray Irick, previous to my July , 1999 conversations with attorney Howell Clements and investigator Bill DiPillo, when I informed them of the abovementioned information.

AFFIANT SAYS NOTHING FURTHER...

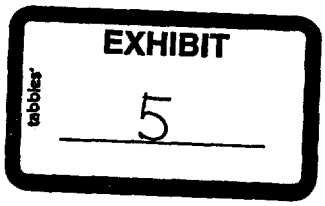
Linda Jeffers
LINDA JEFFERS

11. 3. 99
DATE

Sworn and subscribed before me
this 3rd day of November, 1999.

William Dills
Notary at Large

My Commission Expires: 5/20/2000



CRIMINAL COURT OF KNOX COUNTY, TENNESSEE

BILLY RAY IRICK Petitioner vs. STATE OF TENNESSEE Respondent	* * * * * *	No. _____ (POST CONVICTION) DEATH PENALTY CASE

AFFIDAVIT OF WILLIAM D. DIPILLO

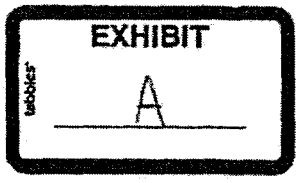
STATE OF TENNESSEE)
COUNTY OF HAMILTON)

After first being duly sworn and based on my own personal knowledge, I, William D. DiPillo, do hereby state as follows:

1. In 1999, my firm, DiPillo and Associates, was appointed by the United States District Court for the Eastern District of Tennessee at Chattanooga as the investigator for Billy Ray Irick in his federal habeas corpus proceedings in said court.

2. While meeting with petitioner's trial counsel, Kenneth A Miller, at his office located at 531 Gay Street, Knoxville, Tennessee on July 1, 1999 and obtaining copies of portions of his file, I learned, among other things, of the address of Ramsey and Linda Jeffers, namely 1102 Virginia Avenue, Knoxville, Tennessee – where petitioner had stayed in the weeks just prior to Paula's death.

3. Realizing that the Jeffers' address on Virginia Avenue was only a short distance from where I was meeting with trial counsel (see attached map, marked as **Exhibit 1** thereto), I



traveled there the same day after the meeting with trial counsel to see if the Jeffers still resided there and, if so, to speak with them.

4. The information that I learned from my interview and Ramsey and Linda Jeffers on July 1, 1999 and the separate interviews of Ramsey and Linda Jeffers, as well as their daughter Kathy Jeffers, on July 14, 1999 can be found in the affidavit which I executed on September 14, 1999 and which is attached hereto as **Exhibit 2.** I also learned that no one, including any one representing Billy Irick, had ever spoken with the Jeffers.

5. I had no difficulty in locating Ramsey and Linda Jeffers nor their residence on Virginia Avenue since they had continued to reside at the same address since the time of the offenses against Paula Dyer. Please also see, Exhibit 1.

William D. DiPillo

Sworn to and subscribed before me
This 7 day of Oct, 2012.

Notary Public

My Commission Expires: 3/4/14

ARVIN H. REINGOLD STATE OF TENNESSEE NOTARY PUBLIC HAMILTON COUNTY

F:\Library\users\CLIENTS\129555\0001\POST-CONVICTION\Affidavit of DiPillo, William.docx

Google

Directions to 1102 Virginia Ave NW, Knoxville, TN 37921
2.5 mi – about 6 mins

602 S Gay St, Knoxville, TN 37902

	1. Head **northwest** on **S Gay St** toward **Clinch Ave W**	go 20 ft total 20 ft
	2. Take the 1st left onto **Clinch Ave W** About 1 min	go 0.3 mi total 0.3 mi
	3. Turn right onto **Henley St**	go 397 ft total 0.3 mi
	4. Take the ramp to **Nashville/Lexington** About 48 secs	go 0.6 mi total 0.9 mi
	5. Follow signs for **I-275 N/Lexington** and merge onto **I-275 N** About 52 secs	go 0.8 mi total 1.8 mi
	6. Take exit **1B** for **Oldham Ave/Woodland Ave**	go 0.2 mi total 1.9 mi
	7. Turn left onto **W Oldham Ave** About 2 mins	go 0.4 mi total 2.3 mi
	8. Take the 3rd right onto **McSpadden St**	go 0.2 mi total 2.5 mi
	9. Turn left onto **Virginia Ave NW** Destination will be on the left	go 56 ft total 2.5 mi

1102 Virginia Ave NW, Knoxville, TN 37921

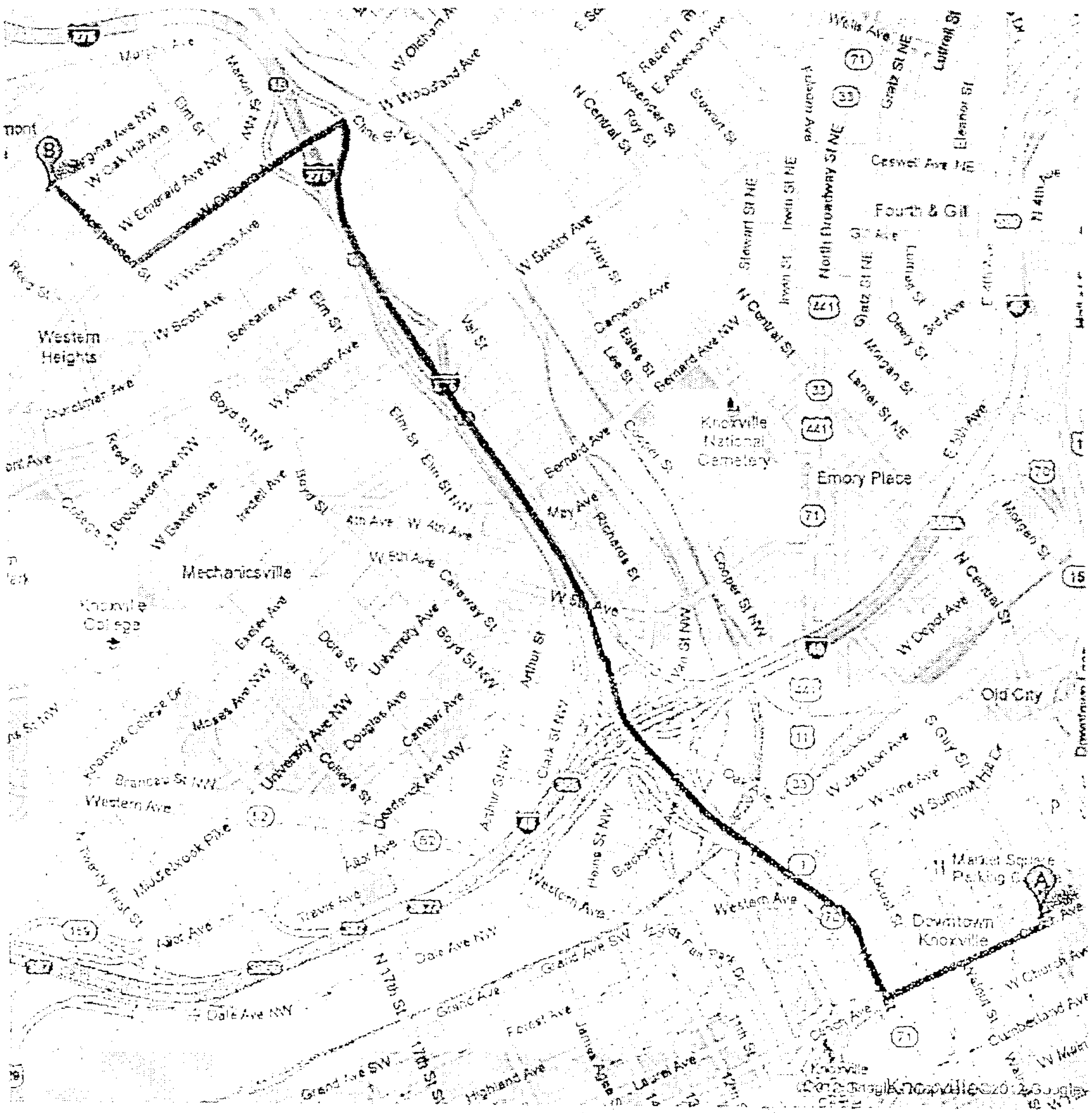
These directions are for planning purposes only. You may find that construction projects, traffic, weather, or other events may cause conditions to differ from the map results, and you should plan your route accordingly. You must obey all signs or notices regarding your route.

Directions weren't right? Please find your route on www.google.com and click "Report a problem" at the bottom left.

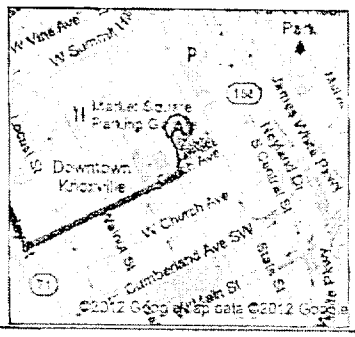
EXHIBIT
tabbies
1

Google

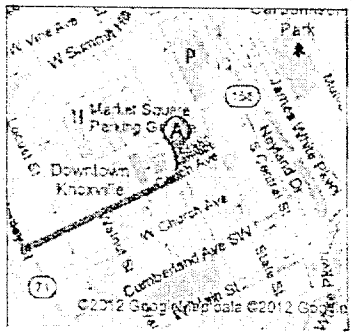
Directions to 1102 Virginia Ave NW, Knoxville, TN 37921
2.5 mi – about 6 mins



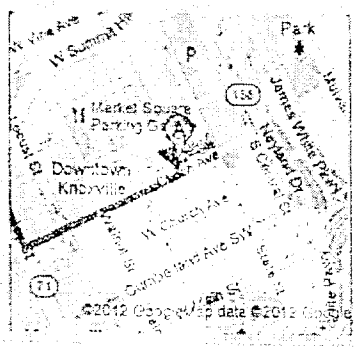
A 531 S Gay St, Knoxville, TN 37902



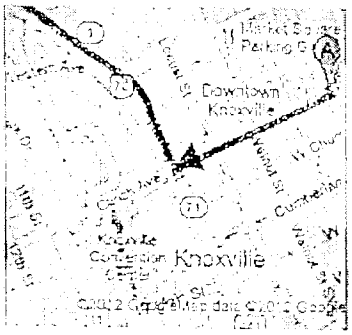
1. Head southeast on **S Gay St** toward Clinch Ave W — go 46 ft, total 46 ft



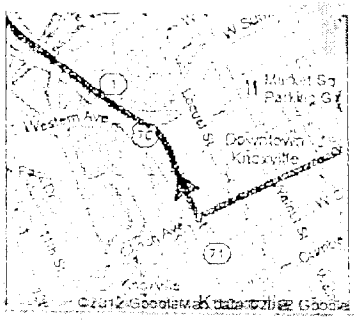
2. Take the 1st right onto **Clinch Ave W**
About 48 secs — go 0.3 mi, total 0.3 mi



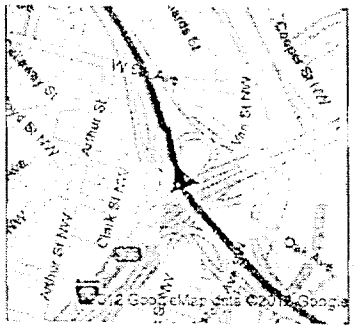
3. Turn right onto **Henley St** — go 397 ft, total 0.3 mi



4. Take the ramp to **Nashville/Lexington**
About 46 secs — go 0.6 mi, total 0.9 mi

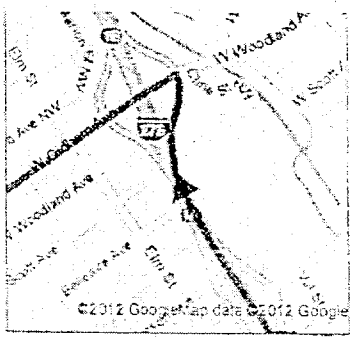


5. Follow signs for I-275 N/Lexington and merge onto I-275 N
About 52 secs



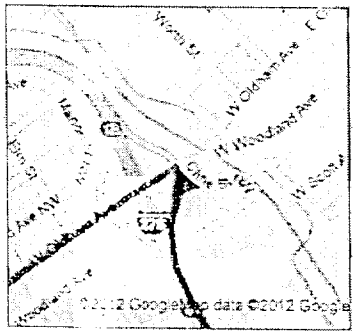
go 0.8 mi
total 1.8 mi

6. Take exit 1B for Oldham Ave/Woodland Ave



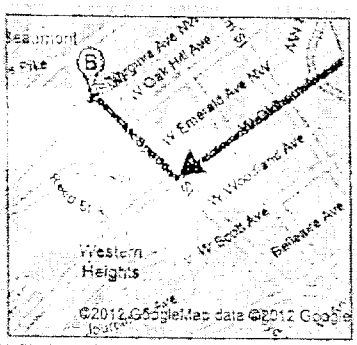
go 0.2 mi
total 1.9 mi

7. Turn left onto W Oldham Ave
About 2 mins



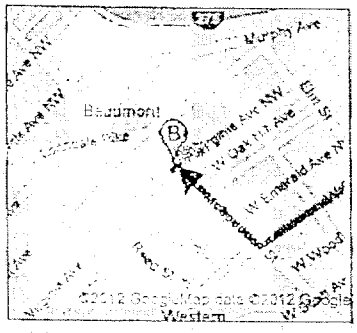
go 0.4 mi
total 2.3 mi

8. Take the 3rd right onto McSpadden St



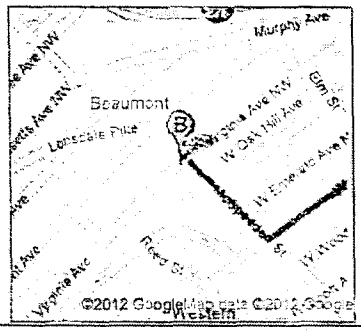
go 0.2 mi
total 2.5 mi

9. Turn left onto Virginia Ave NW
Destination will be on the left



go 56 ft
total 2.5 mi

1102 Virginia Ave NW, Knoxville, TN 37921



These directions are for planning purposes only. You may find that construction projects, traffic, weather, or other events may cause conditions to differ from the map results, and you should plan your route accordingly. You must obey all signs or notices regarding your route.

Map data ©2012 Google

Directions weren't right? Please find your route on maps.google.com and click "Report a problem" at the bottom left.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

BILLY RAY IRICK,	)	
	)	
Petitioner,	)	
	)	No. 3:98-cr-666
vs.	)	
	)	Judge Curtis L. Collier
RICKY BELL, Warden,	)	
	)	
Respondent.	)	

AFFIDAVIT

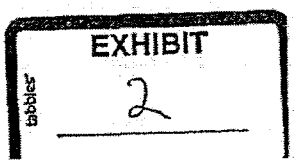
After first being duly sworn and based on my own personal knowledge, I, William D. DiPillo, do hereby state as follows:

1. That my firm DiPillo and Associates are the court appointed investigators for Billy Irick, petitioner in the above captioned matter.

2. On July 1 and 14, 1999 I interviewed Ramsey and Linda Jeffers at their home on Virginia Avenue in Knoxville, Tennessee. On July 14, 199 I, along with Howell Clements, re-interviewed Ramsey and Linda Jeffers along with their daughter, Kathy Jeffers, at their home in Knoxville.

3. Ramsey and Linda Jeffers are the parents of Kenny Jeffers, step-father of the victim "Paula". Kathy Jeffers is the sister of Kenny Jeffers and the daughter of Linda and Ramsey Jeffers. For clarification, Kenny Jeffers' wife was also named Kathy Jeffers.

4. My interview on July 1, 1999 at the Jeffers' home consisted of interviewing Ramsey and Linda Jeffers. On July 14, 1999 Ramsey and Linda Jeffers were interviewed along with their daughter Kathy Jeffers.



5. Ramsey and Linda Jeffers related to me on both interviews of July 1, 1999 and July 14, 1999 the following:

(a) That before the murder on April 15, 1985, Billy Irick had lived continuously with the Jeffers in their apartment on Virginia Avenue for a period of six or seven weeks.

(b) That he talked to the devil every day.

(c) Irick heard the devil a lot and the devil gave him instructions on what to do.

(d) Irick told Linda Jeffers he belonged to the devil.

(e) Linda Jeffers said Irick would wake up and hear imaginary voices;

(f) Kathy Jeffers, sister of Kenny Jeffers, said Irick would wake up and hear voices telling him to go to the truckstop and kill drivers.

(g) Late in the evenings Billy Irick would walk the hall of the Jeffers' home aimlessly through the apartment with machete in hand and had several unsuccessful attempts to attack Kenny Jeffers. The motive was to kill Kenny Jeffers so that Irick could have Kathy Jeffers to himself.

(h) Irick said he was going to kill Kenny Jeffers with a machete.

(i) Irick on many occasions was known to drink alcoholic beverages and smoke marijuana.

(j) One time shortly before the murder, approximately two weeks, Irick was observed chasing a small child down the street with a machete stating that he was going to kill

her. The young girl had done nothing other than to come to the apartment.

(k) The hygiene of Irick was horrible. He emitted strong personal odors. Further, the odor was so bad or repugnant that their daughter Kathy Jeffers stuck newspapers between the crack of the door and the floor in an effort to try to prevent the odors from seeping into the apartment.

(l) Irick talked constantly about killing people. He would see someone walking on the street and say "boy I'd like to kill them." He would also respond "I mean what I say."

(m) Irick constantly talked about Kenny having no sex with Kathy and that he, Irick, wanted to have sex with her and wanted Kenny out of the way.

(n) On one occasion Irick had a machete and he and Kenny had an argument. Irick was mumbling drunk and said was going to kill Kenny. Ramsey helped put him to bed. The machete was in the back pack. A couple days later the Jeffers' grandkids came and Billy said that he was going to take care of the problem. Said send them all to my room. This was two days before the murder.

(o) Linda Jeffers finally kicks Irick out of the house the morning before the murder that night.

6. Kathy Jeffers, sister of Kenny Jeffers, also verified many of the things that her parents said. She likewise reiterated Irick's poor hygiene, talking to the devil and hearing the devil. He once advised Kathy Jeffers to hush your mother because he was talking to the devil.

FURTHER, THIS AFFIANT SAITH NOT.

William D. DiPillo

William D. DiPillo

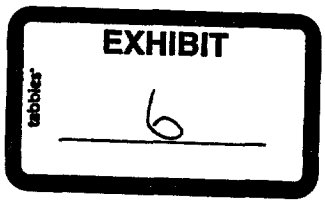
Sworn to and subscribed before me

this 14th day of September, 1999.

Cynthia Larkin

NOTARY PUBLIC

My Commission Expires: 10/9/2002



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

BILLY IRICK,	)	
	)	
Petitioner,	)	
v.	)	No. 3:98-cv-666
	)	*Judge Curtis L. Collier*
ROLAND COLSON, WARDEN,[1]	)	
	)	
Respondent.	)	

ORDER

Pending before the Court are death row inmate Billy Irick's motion to reopen his habeas corpus proceedings, Respondent's response to the motion to reopen, and Petitioner's status report and supplemental memorandum of law (Court File Nos. 225, 228, & 238). Respondent **SHALL** file a response to Petitioner's supplemental memorandum on or before **Monday, September 9, 2013.**

SO ORDERED.

ENTER:

/s/
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

[1] Warden Roland Colson was named Warden of Riverbend Maximum Security Institution on April 1, 2011. Accordingly, the Clerk if **DIRECTED** to change the name of Respondent to Roland Colson on the Court's CM/ECF docket sheet.