

**APPENDIX E TO STEPHEN WEST'S
RESPONSE TO STATE'S MOTION TO
SET EXECUTION DATE**

**OPINION OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF TENNESSEE (JUDGE
THOMAS A. VARLAN) DATED 9/30/04
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687; *United States v. Cronin*, 466 U.S. 648, 658, (1984); *McQueen*, 99 F.3d at 1310-11). The Court cannot indulge in hindsight but must instead evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors. *Strickland*, 466 U.S. at 690; *McQueen*, 99 F.3d at 1311. Trial counsel's tactical decisions are particularly difficult to attack. *McQueen*, 99 F.3d at 1311; *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994). A defendant's challenge to such decisions must overcome a presumption the challenged actions might be considered sound trial strategy. *McQueen*, 99 F.3d at 1311; *O'Hara*, 24 F.3d at 828. Effective assistance of counsel is presumed, and the Court will not generally question matters involving trial strategy. See *United States v. Chambers*, 944 F.2d 1253, 1272 (6th Cir. 1991). "[R]eviewing court[s] must remember that 'counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Wong v. Money*, 142 F.3d 313, 319 (6th Cir. 1998) (quoting *Strickland*, 466 U.S. at 690).

To establish the prejudice prong, a petitioner must show that absent his attorney's errors, the result of his trial would have been different. *Lynott v. Story*, 929 F.2d 228, 232 (6th Cir. 1991). The Court must make an independent judicial evaluation of counsel's performance and determine whether counsel acted reasonably under all the circumstances. *McQueen*, 99 F.3d at 1311; *O'Hara*, 24 F.3d at 828; *Ward v. United States*, 995 F.2d 1317, 1321-22 (6th Cir. 1993); *Sims*, 970 F.2d at 1580-81. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the [ultimate] judgment." *West*, 73 F.3d at 84 (quoting *Strickland*, 466 U.S. at 691 (further citation omitted)).

Respondent contends Petitioner has not fairly presented this claim to the Tennessee appellate courts because he has submitted facts which were not before the Tennessee courts. Respondent

asserts that numerous affidavits and reports relied upon by Petitioner in his federal habeas petition were not relied upon by him to support his ineffective assistance of counsel claim in his brief to the Tennessee Court of Appeals. Specifically, Respondent contends the affidavits of Keith Cruso, Debra West Harless, Karen West Bryant, Vestor West, Patty Rutherford, the record from Community Hospital, reports of Dr. Coleman and Dr. Dudley, and Petitioner's military Form DD-214, were not relied upon in state court. Respondent argues that since Petitioner has presented significant new factual allegations in support of his claim that counsel's failure to conduct a reasonable investigation of mitigating evidence, Petitioner did not fairly present this claim to the Tennessee appellate courts. Consequently, Respondent asserts, although technically exhausted, this claim is procedurally barred. The substance of federal habeas corpus claims are required first to be presented to the state courts. *Picard v. Connor*, 404 U.S. 270, 278 (1971). Petitioner has submitted affidavits and evidence that were not presented to the Tennessee state courts.²¹ Although Debra Gail Harless,²² Petitioner's oldest sister, testified during Petitioner's state post-conviction hearing, it does not appear that her affidavit was presented to the state courts. However, other than naming other parties with knowledge of the abuse, it appears that Ms. Harless's testimony during Petitioner's state post-conviction hearing was substantially the same as her affidavit.

²¹ The affidavits appear to be from relatives who did not testify in state court. The Court observes that Petitioner has failed to submit any medical records to support his allegations of abuse which allegedly led to medical surgeries. The Court inspected the records identified as Petitioner's medical records [Doc. 111, Attachment H], but was unable to determine if they are what Petitioner purports them to be.

²² At the time of Petitioner's state post-conviction hearing Ms. Harless was identified as Debbie West, Petitioner's oldest sister.