IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE STEVE HENLEY	)	Jackson County
	)	No. 87-73-I
	)	M1987-00116-SC-DPE-DD

RESPONSE TO MOTION TO SET EXECUTION DATE

The number of Tennessee judges of who have concluded that Steve Henley was denied the effective assistance of counsel at his capital sentencing hearing *actually outnumbers* the number who have concluded otherwise: After the trial court denied relief on this claim, three (3) Tennessee Court of Criminal Appeals judges unanimously voted to grant relief;[1] and two (2) Tennessee Supreme Court Justices voted for relief[2] while 3 Justices disagreed.[3] Despite this 5-4 majority *in Henley's favor*,[4] the State now asks this Court to have Henley executed.

The death sentence in Tennessee, however, is reserved for the worst cases in which the courts legitimately agree that the sentence is not tainted. That cannot be said

[1] Henley v. State, No. 01C01-9506-CC-00193 (Tenn.Cr.App. May 9, 1996)(Judges John H. Peay, Joe B. Jones, Joseph H. Walker III).

[2] Henley v. State, 960 S.W.2d 572 (Tenn. 1997)(Justices Reid, Birch).

[3] Id. (Justices Drowota, Anderson, Holder).

[4] The United States Court of Appeals for the Sixth Circuit likewise divided (2-1) on this issue. Henley v. Bell, 487 F.3d 379 (6th Cir. 2007).

here, where numerous jurists in good faith simply cannot agree. Henley should only be executed if the sentence is unquestionably just. Just as Tennessee law provides that a defendant *cannot be executed* unless all jurors agree,[5] Steve Henley must not be executed, given the non-unanimity and stark division within the Tennessee judiciary concerning the constitutionality of his death sentence.

This Court, therefore, should not set an execution date. Rather, given the unique circumstances here, the Court should exercise its inherent judicial powers under Article VI §1 of the Tennessee Constitution and Tennessee law to modify the sentence to life or otherwise order a new sentencing hearing. Alternatively, the Court should issue a certificate of commutation, or otherwise deny the motion, pending the disposition of ongoing litigation in the Supreme Court and Sixth Circuit which will decide unresolved issues relating to the administration of capital punishment in Tennessee.

I.
THIS COURT SHOULD NOT SET AN EXECUTION DATE AND SHOULD GRANT A NEW SENTENCING HEARING AND/OR ISSUE A CERTIFICATE OF COMMUTATION

For over a decade, the question whether trial counsel provided Steve Henley effective assistance of counsel at sentencing has been the critical issue in this case. Various facts are not disputed. It is undisputed that had only one juror voted for life, Henley would have been sentenced to life imprisonment, not death. It is also

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[5] See Tenn. Code Ann. §39-13-204(f), (g), (h).

undisputed that trial counsel's preparation for the sentencing hearing was constitutionally deficient. Counsel did nothing to prepare for the sentencing hearing, which unquestionably constituted "deficient performance" under the Sixth Amendment.[6]

It is also undisputed that counsel, being totally unprepared, hastily called Steve's mother to the stand as the first witness. She stated in open court that she wanted to talk to counsel, she and counsel then left the courtroom, and she did not return to say anything favorable on Steve's behalf.[7] It is likewise undisputed that there were numerous other witnesses who would have testified in support of a life sentence but were never called to testify. What has been hotly disputed has been the effect of counsel's deficient performance. Justices and judges have been divided (5-4 in Henley's favor) on whether counsel's failure to call additional witnesses might have persuaded only one juror to vote for life.[8]

In particular, the courts of this State have wrestled with the effect of counsel's abortive attempt to have Steve's mother to testify. Five Justices and judges (Lyle Reid, Adolpho Birch, John Peay, Joe Jones, and Joseph Walker) agree that counsel's actions

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[6]See e.g., Rompilla v. Beard, 545 U.S. 374, 381-384 (2005); Wiggins v. Smith, 539 U.S. 510 (2003).

[7]Tr. 1448.

[8]Compare Henley v. State, 960 S.W.2d at 580-582 (majority opinion); with Id. at 584-585 (dissenting opinion) and Henley v. State, 1996 Tenn.Crim.App.Lexis 293 at *31-37.

severely prejudiced Henley because "we do not think it assuming too much to conclude that a jury is going to be prejudiced against a defendant upon that person's own mother refusing to testify on his or her behalf."[9] In concluding otherwise, three (3) Justices of this Court (Frank Drowota, E. Riley Anderson, Janice Holder) have noted that "Henley's mother did not refuse to testify," "at no time did she openly refuse to testify" and jurors were told to base their decision on the evidence.[10]

The question, though, is not whether she specifically "refused," but simply whether she testified at all, after being called as a witness. Whether or not Mrs. Henley "openly refused" to testify, once counsel called her to the stand, jurors legitimately expected her to say something on her son's behalf, yet she didn't. Once counsel created the expectation that she would testify, her ultimate silence spoke volumes against Henley *because she was his mother:* "Because of the special relationship between a mother and child, not having one's own mother testify on their behalf, when one's life is at stake, would surely affect a juror's decision." Henley v. Bell, 487 F.3d at 396 (Cole, J., dissenting).

Such an occurrence – because of its intangible, yet deep, impact on jurors – simply could not be remedied through a jury instruction, as a majority of this Court

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[9]Henley v. State, 960 S.W.2d at 584 (Reid, J., dissenting); Henley v. State, 1996 Tenn.Crim.App.Lexis 293 at *32.

[10]Henley v. State, 960 S.W.2d at 580-581.

previously concluded. Indeed, as the United States Supreme Court has recognized, certain prejudicial actions affect jurors on such a deep level that instructions cannot remedy the situation.[11] This is one such case. And, as a majority of Tennessee judges have concluded, there is a reasonable probability that at least one juror would have voted for life had Mrs. Henley (and other uncalled witnesses) testified. [12]

The Tennessee Justices and judges who have declared Henley's death sentence unconstitutional have been eminently reasonable in their conclusion. Those Justices who have voted to uphold his sentence have likewise been reasonable, but may have misapprehended the true human impact of the drama of Mrs. Henley's departure from the courtroom.

Ultimately, the Justices and judges of this state simply cannot agree about the fairness of Steve Henley's death sentence. There is no clear answer, as evidenced by the stark division of those jurists who have reviewed the case. Justices of this Court are not infallible, nor are judges of the Court of Criminal Appeals. Yet Steve Henley's life

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[11] See e.g., Bruton v. United States, 391 U.S. 123, 137 (1968).

[12] That intangible harm is evident when one considers the statement of a juror who actually sat on this case and imposed the death sentence: "If a man's own mother won't testify on his behalf then we know what we've got to do." To be sure, this particular affidavit was found to be inadmissible during post-conviction proceedings under Tenn.R.Evid. 606(b), which applies to Tennessee trial courts. Tenn.R.Evid. 101. Nevertheless, it may be considered now in this Court, especially where Henley is also seeking a certificate of commutation (clemency is not governed by strict evidentiary rules), and where his point is not that the affidavit proves prejudice, but rather the reasonableness of the conclusion of five judges that counsel's blunder inevitably led to the death sentence.

is on the line, and there is simply no room for fallibility, no margin for error, no room for any doubt about the fairness of his sentence.

Given these unique circumstances, and to insure the integrity of the judicial process, this Court must act *in favorem vitae* (in favor of life) and not allow the death sentence to be carried out. Indeed, "Every reasonable presumption should be indulged *in favorem vitae.*" Bearden v. State, 44 Ark. 331, 334 (Ark. 1884). "*In favorem vitae*, all doubt should be resolved against the state and in favor of the accused." Bell v. State, 72 Miss. 507, 515 (1895). Such grave doubt about the constitutionality of the sentence means that Steve Henley must not be executed.

Thus, the Court should not set an execution date. Rather, as the supreme judicial authority of Tennessee, this Court should exercise its inherent, supreme judicial power under Article VI §1 of the Tennessee Constitution (In Re: Burson, 909 S.W.2d 768, 772 (Tenn. 1995)) and its undisputed "broad conference of full, plenary, and discretionary inherent power" under Tenn. Code Ann. §§16-3-503 & 504 (Burson, 909 S.W.2d at 772-773) to vacate the death sentence and modify it to life, or otherwise order a new sentencing hearing.[13]

In fact, when faced with this same type of uncertainty and conflict among decisionmakers in the capital case of Ray v. State, 67 S.W. 553 (1901), this Court

[13] The Court could also recall the post-conviction mandate and grant post-conviction relief on Henley's ineffectiveness claim.

modified a death sentence to life imprisonment. There, two juries recommended that the defendant not be sentenced to death, yet the trial court still imposed death. With the decisionmakers being in conflict, this Court acknowledged that the juries' decisions for mercy were entitled to "grave consideration," and thus felt constrained to commute the punishment, which it did. Id. at 558.

As in *Ray*, the favorable decisions of two Tennessee Supreme Court Justices and three Court of Criminal Appeals judges are "grave consideration[s]" entitled to great weight. The views of those five judges mean that the death sentence must not be carried out. As in *Ray*, therefore, this Court should modify the sentence to life imprisonment. See also Poe v. State, 78 Tenn. 673 (1882)(modifying death sentence to life). Alternatively, the Court should order a new sentencing hearing, or otherwise issue a certificate of commutation under Tenn. Code Ann. §40-27-106.[14] See also Green v. State, 14 S.W. 489 (Tenn. 1889) (recommending commutation).

II.
THIS COURT SHOULD DENY THE MOTION OR DELAY RULING ON THE MOTION PENDING DISPOSITION OF CASES PENDING IN THE UNITED STATES SUPREME COURT AND SIXTH CIRCUIT

The United States Supreme Court is now considering a case from Tennessee asking whether, under 18 U.S.C. §3599, counsel's appointment by the federal court to

[14] This is likewise appropriate where Henley's co-defendant (Terry Flatt) was released from prison after serving only five years in prison – a fact which the jury never considered. This stark disparity in sentencing (death vs. 5 years) also provides legitimate grounds for Henley not being executed. See e.g., State v. Marlow, 786 P.2d 395 (Ariz. 1989) (reducing death sentence to life imprisonment where co-defendant was sentenced to only four (4) years in prison and sentencer failed to consider this disparity).

represent a death row inmate in federal habeas proceedings extends to state executive clemency proceedings. Harbison v. Bell, U.S. No. 07-8521, *cert. granted* 554 U.S. ___ (June 23, 2008). Resolution of that issue will affect the ability of Henley's counsel – both of whom were appointed by the federal courts – to represent him in executive clemency proceedings, were that necessary. Given the pendency of *Harbison* and its potential impact on any future application for executive clemency, this Court should await the resolution of *Harbison* before acting on the state's motion.

Likewise, in Harbison v. Little, 6th Cir. 07-6225, the Sixth Circuit is reviewing the constitutionality of Tennessee's lethal injection protocol, which was declared unconstitutional by the United States District Court for the Middle District of Tennessee. Harbison v. Little, 511 F.Supp.2d 872 (M.D.Tenn. 2007). Again, where Henley would be subject to that protocol, this Court should await resolution of that case before acting on the state's motion.

CONCLUSION

Exercising this Court's inherent constitutional authority as court of last resort, this Court should deny the state's motion and instead modify the death sentence to life, or otherwise order a new sentencing hearing. Alternatively, it should grant a certificate of commutation. Alternatively, it should deny the state's motion or abate proceedings

on the motion pending the Supreme Court's and Sixth Circuit's decisions in the *Harbison* cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was served by hand delivery upon Jennifer Smith, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243 this the 6th day of October, 2008.

Paul S. Davidson

DESIGNATION OF ATTORNEY OF RECORD

Counsel Paul S. Davidson is designated as attorney of record in these proceedings. Counsel's contact information is: Waller, Lansden, Dortch, & Davis, LLP, 511 Union Street, Suite 2700, Nashville, Tennessee 37219; Telephone: (615) 244-6380; Fax: (615) 244-6804; E-mail: Paul.Davidson@wallerlaw.com.

Counsel would request to be notified of opinions and orders of this Court by E-mail.

Mr. Reneau.

MR. RENEAU: Your Honor please, I'd like to call Dorothy Henley.

MRS. HENLEY: I want to talk to you first, Mr. Reneau.

MR. RENEAU: Excuse me just a minute, Judge.

THE COURT: Yes, sir.

(Mr. Reneau and Mrs. Henley leave the courtroom for a discussion, then the proceedings continued as follows:)

MR. RENEAU: Your Honor please, I need to call Bertha Henley.

* * *

MRS. BERTHA HENLEY,

was called as a witness, and having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY:

MR. RENEAU:

MR. RENEAU: Your name is Bertha Henley?

A Yes, sir.

Q Mrs. Henley, you testified here yesterday?

A Yes, sir.

Q All right. And you told me yesterday you were 75 years old.

A That's right.

LEXSEE 1996 TENN.CRIM.APP.LEXIS 293

STEVE HENLEY, Appellant, VS. STATE OF TENNESSEE, Appellee.

C.C.A. NO. 01C01-9506-CC-00193

COURT OF CRIMINAL APPEALS OF TENNESSEE, AT NASHVILLE

1996 Tenn. Crim. App. LEXIS 293

May 9, 1996, FILED

SUBSEQUENT HISTORY: [*1] Permission to Appeal Denied March 6, 2000.

PRIOR HISTORY: JACKSON COUNTY. HON. J. O. BOND, JUDGE. (Post-conviction).

DISPOSITION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant sought review of a judgment from a trial court (Tennessee), which denied his petition for post-conviction relief from his convictions for two counts of first-degree murder and one count of aggravated arson. For the murder convictions, defendant was given sentence of death by electrocution, and was sentenced to 20 years imprisonment for the arson offense.

OVERVIEW: Defendant was convicted of two counts of first-degree murder and one count of aggravated arson. For the murder convictions, he was given a sentence of death by electrocution, and was sentenced to 20 years imprisonment for the arson offense. After the convictions and sentences were affirmed on appeal, defendant filed a petition for post-conviction relief, which the trial court denied. Upon review of the denial, the court affirmed the convictions, reversed the sentences, and remanded for a new sentencing hearing. The court held that defendant did not receive effective assistance of counsel at the sentencing phase. The court found that defense counsel's failure to speak with family members before asking them to testify at the sentencing hearing, his failure to investigate aspects of defendant's past, and his failure to investigate defendant's mental health states, failed to meet the level of competence required. The court determined that counsel's deficient performance at the sentencing phase prejudiced defendant, in that there might have been a different outcome as to the sentencing had counsel effectively represented defendant.

OUTCOME: The court affirmed defendant's convictions. The court reversed defendant's sentences, and remanded for a new sentencing hearing.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Trials > Burdens of Proof > Defense
Criminal Law & Procedure > Postconviction Proceedings > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > General Overview
[HN1] In post-conviction relief proceedings a petitioner has the burden of proving the allegations in his or her petition by a preponderance of the evidence. Furthermore, the factual findings of a trial court in hearings are conclusive on appeal unless the evidence preponderates against the judgment.

Criminal Law & Procedure > Arrests > General Overview
Criminal Law & Procedure > Pretrial Motions & Procedures > Suppression of Evidence
[HN2] The fact that an accused has been unlawfully arrested only becomes relevant when evidence tainted by the unlawful arrest is sought to be introduced by the State.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor

Evidence > Relevance > Confusion, Prejudice & Waste of Time
[HN3] If an objection to the introduction of evidence is made, a trial court has to determined that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading a jury in order to rule it inadmissible. *Fed. R. Evid. 403.*

Criminal Law & Procedure > Appeals > Reversible Errors > General Overview
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor
[HN4] The improper admission or rejection of evidence is not grounds for reversal unless it shall affirmatively appear that the alleged error affected the result of a trial.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
Criminal Law & Procedure > Defenses > Insanity > Insanity Defense
[HN5] Once a criminal defendant moves to terminate administration of anti psychotic medication, the State becomes obligated to establish the need for it and the medical appropriateness of the drug.

Criminal Law & Procedure > Discovery & Inspection > Brady Materials > Brady Claims
Criminal Law & Procedure > Discovery & Inspection > Brady Materials > Duty of Disclosure
[HN6] Evidence required to be provided under Brady must be favorable to an accused, his defense, or the sentence that will be imposed if found guilty.

Criminal Law & Procedure > Discovery & Inspection > Brady Materials > General Overview
Healthcare Law > Treatment > General Overview
[HN7] The duty to disclose does not arise as to information that is not possessed by or under the control of the prosecution. Moreover, the duty to disclose does not arise as to information that an accused already possesses or is able to obtain.

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Death Penalty > General Overview
Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Credibility of Witnesses
Criminal Law & Procedure > Sentencing > Capital Punishment > Death-Qualified Jurors
[HN8] It is proper for a court to excuse jurors who indicate that they will not vote for the death penalty regardless of their instructions. Furthermore, a trial court's finding on this issue is to be accorded a presumption of correctness inasmuch as such findings involve a determination of demeanor and credibility particularly within the trial court's province, and the burden rests on a criminal defendant to establish by convincing evidence that the court's determination was erroneous.

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview
[HN9] Tennessee's death penalty statutes are constitutional.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Criminal Law & Procedure > Counsel > Effective Assistance > Trials
Criminal Law & Procedure > Appeals > General Overview
[HN10] In reviewing a defendant's Sixth Amendment claim of ineffective assistance of counsel, a reviewing court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. To prevail on a claim of ineffective counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that this performance prejudiced the defense. There must to be a reasonable probability that but for counsel's error the result of the proceeding would have been different. When deciding whether counsel's performance was deficient, every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. The reviewing court must defer to trial strategy and tactical choices when they are informed ones based upon adequate preparation. On appeal, the reviewing court is bound by the lower court's findings unless the defendant carries his burden of illustrating that the evidence preponderates against the judgment entered.

Criminal Law & Procedure > Counsel > Effective Assistance > Sentencing
[HN11] A lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general

emotional appeals or on the strength of statements made to the lawyer by a defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions.

Criminal Law & Procedure > Counsel > Effective Assistance > Trials
Criminal Law & Procedure > Appeals > Standards of Review > Deferential Review > Ineffective Assistance
[HN12] When a record shows a substantial deficiency in investigation, the normal deference afforded trial counsel's strategies is particularly inappropriate. A reviewing court will not credit a strategic choice by counsel when counsel did not even know what evidence was available.

COUNSEL: For APPELLANT: JACK E. SEAMAN, Nashville, TN. PAUL S. DAVIDSON, Nashville, TN.

For APPELLEE: CHARLES W. BURSON, Attorney General & Reporter. JOHN H. BAKER, Asst. Attorney General, Nashville, TN. TOM P. THOMPSON, District Attorney General. JOHN WOOTEN, Asst. District Attorney General, Hartsville, TN.

JUDGES: JOHN H. PEAY, Judge, CONCUR: JOE B. JONES, Judge, JOSEPH H. WALKER III, Special Judge

OPINION BY: JOHN H. PEAY

OPINION

OPINION

The petitioner was convicted by a jury of two counts of first-degree murder and one count of aggravated arson. The jury set the petitioner's punishment at death by electrocution for the murder convictions, and the court sentenced him to twenty years for the arson offense. The petitioner's convictions and sentences were affirmed by our Supreme Court on direct appeal. *State v. Henley, 774 S.W.2d 908 (Tenn. 1989)*. He then filed a petition for post-conviction relief which was denied after a hearing.

The petitioner now appeals, contending that the lower court erred in failing to find that:

> 1. His constitutional rights [*2] against unreasonable searches and seizures were violated when evidence of Terry Flatt's identity was obtained during a pretextual arrest and subsequently used at trial;
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> 2. His due process rights to a fair trial were violated when
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> > (a) the trial court admitted into evidence a pistol which was irrelevant and highly prejudicial;
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> > (b) the jury was informed that a criminal defendant serving a life sentence would be eligible to be considered for parole in thirty-five years;
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> > (c) the State provided antianxiety and narcotic medications to him during the course of his trial; and
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> > (d) the State withheld exculpatory information in violation of *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, when it failed to inform his counsel about the medications he was taking;
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> 3. The jury instructions given at the sentencing phase of his trial were unconstitutional;
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> 4. Tennessee's death penalty statutes are unconstitutional;
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> 5. His constitutional right to a trial by jury was denied when jurors opposed to the death penalty were excused by the trial court; and
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> 6. He was denied effective assistance of counsel at the guilt and sentencing [*3] phases of his trial and at the direct appeal of this matter.

We find the petitioner's complaint of ineffective assistance of counsel at the sentencing phase to be meritorious; we find no merit in any of his other allegations. We will address the petitioner's issues in the order given after a brief recitation of the facts.

On July 24, 1985, the petitioner and Terry Flatt were riding around together in the petitioner's truck attending

to some of Henley's business chores. Flatt testified that they had been drinking beer and taking Dilaudid (a narcotic). Early in the evening, they drove up Pine Lick Creek Road in Jackson County, where the petitioner's grandmother lived. The victims, Fred and Edna Stafford, lived on the same road. A short distance before his grandmother's house, but after passing the Stafford residence, Henley let Flatt out of the truck. Henley then proceeded to his grandmother's house where he spent some amount of time less than an hour. He then returned and picked Flatt up and they proceeded back down the road.

According to Flatt, Henley returned with a .22 rifle. Flatt testified that Henley had stopped the truck and loaded this rifle shortly before reaching [*4] the Stafford residence. Flatt testified that Henley had also poured some gasoline out of a five gallon can into a smaller plastic jug. They then proceeded to the Stafford house.

The Staffords were outside as the petitioner and Flatt reached their house. According to Flatt, Henley got out of the truck and told the Staffords that Flatt would kill him if they didn't give him money. He then told Flatt to bring the .22 as he walked the Staffords up their driveway. Flatt testified that, as they had all gotten closer to the house, Henley took the rifle away from him and told Flatt to "go back to my truck and get that gallon of gas." Flatt did as he was told and Henley and the Staffords entered the house.

As Flatt approached the house with the gasoline, he saw Henley shoot Mr. Stafford with the rifle. Henley next shot Mrs. Stafford with the rifle and then, Flatt testified, "he took out his pistol and he shot her a time or two with his pistol." After shooting the Staffords, Henley told Flatt to pour out the gas. Flatt poured out a small amount, and then stopped. Henley took the plastic jug containing the gas, poured the rest of it out, and then told Flatt to "light it." Flatt refused, and [*5] Henley struck a match and set fire to the house.

Henley and Flatt then ran to the truck and drove away. While they were driving, Henley pulled some money out of a pocket and told Flatt to count it. Flatt testified that he had not seen that money on Henley before. After they had driven some distance, Henley stopped the truck and got out and threw the rifle and pistol off to the side of the road. They then drove on.

The fire was reported, but the house was totally consumed by the flames. Only portions of Mr. and Mrs. Stafford's bodies were recovered. However, sufficient remains existed to determine that Mr. Stafford died of a bullet wound through the heart and Mrs. Stafford died of burns and inhalation of noxious gasses.

Pursuant to a plea bargain agreement, Flatt pled guilty to two counts of second-degree murder, two counts of armed robbery and one count of aggravated arson. Flatt was sentenced as a Range I offender to twenty-five years for each of the murders, ten years for each of the robberies, and ten years for the arson, all to run concurrently.

At trial, Henley testified that he had spent the day with Flatt but that he had not taken any Dilaudid nor been intoxicated with alcohol. [*6] He testified that he had asked Flatt to get out of his truck on the way to his grandmother's because of Flatt's intoxicated condition, and that Flatt had taken Henley's .22 rifle with him, ostensibly to hunt. Henley adamantly denied killing the Staffords and setting their house on fire.

[HN1] "In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his [or her] petition by a preponderance of the evidence." *McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983)*. Furthermore, the factual findings of the trial court in hearings "are conclusive on appeal unless the evidence preponderates against the judgment." *State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983)*.

The petitioner's claim that his arrest was pretextual rests on the grounds that he was first arrested during the early morning hours of Friday, July 26, 1985, pursuant to an outstanding warrant on a contempt of court charge. We first note that this issue was not raised in the trial, the direct appeal of this case, or in the post-conviction petition. Accordingly, it is waived. T.R.A.P. 36. However, even if this issue were not waived, the petitioner is not entitled to [*7] any relief on this ground.

[HN2] "The fact that an accused has been unlawfully arrested only becomes relevant when evidence tainted by the unlawful arrest is sought to be introduced by the state." *Caldwell v. State, 1994 Tenn. Crim. App. LEXIS 851*, No. 02C01-9405-CC-00099, p. 12, Madison County (Tenn. Crim. App. filed December 28, 1994, at Jackson). In this case, the petitioner contends that he was questioned about the fire while under arrest on the contempt of court charge, and that he then gave a statement including Terry Flatt's name. Accordingly, the petitioner argues, any evidence obtained from Flatt is tainted such that it must be suppressed. However, the record in this matter is unclear as to the petitioner's arrest status at the time he spoke of Flatt. The only written record of the petitioner's statement is dated July 30, 1985. Henley testified that he had first spoken to the fire inspector "within a couple of days" of his initial arrest. Henley's testimony at the post-conviction hearing also indicates that he was arrested a second time on August 1, 1985. However, there is no testimony as to when Henley was released after his first arrest. Thus, even assuming that Henley's arrest on the contempt of court charge [*8] was "pretextual," there is no dear proof in the record that the peti-

tioner was still under arrest for this charge at the time he informed the authorities about Flatt's identity. This issue is without merit.

The petitioner also complains that he was denied due process when a .380 pistol was introduced at trial. Although Flatt testified that Henley had used a pistol to shoot Mrs. Stafford, and although the pistol introduced at trial was recovered in the area where Flatt said Henley had thrown the guns, Flatt was not able to identify it. Nor were any bullets or shell casings recovered from the crime site that were fired from this pistol. The petitioner's trial counsel did not object to the introduction of the pistol into evidence.

This issue was not raised on direct appeal or in the post-conviction petition, and is therefore waived. Even if it were not waived, however, this issue is without merit.

Although Flatt was unable to identify the pistol as the one which Henley fired, it was found where Flatt had told authorities it would be found. It was also found in the vicinity of the .22 rifle. These facts were sufficient to meet the definition of "relevance" set forth in *Fed. R. Evid.* [*9] *401*, adopted by our Supreme Court in *State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978)*. Had an [HN3] objection been made, the trial court would had to have determined that the probative value of the pistol was substantially outweighed by the "danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." in order to rule it inadmissible. See *Fed. R. Evid. 403*, also adopted by our Supreme Court in *State v. Banks*. We do not think that it would have been an abuse of discretion for the trial court to have overruled an objection. That no bullets or shell casings matching the pistol were found at the remains of the Stafford residence, and Flatt's inability to identify the pistol, were matters for the jury to take into consideration in determining the weight of this particular piece of evidence.

Furthermore, even if the pistol should have been excluded, [HN4] the "improper admission or rejection of evidence is not grounds for reversal unless it shall affirmatively appear that the alleged error affected the result of the trial." *State v. Horne, 652 S.W.2d 916, 919 (Tenn. Crim. App. 1983)*. No such affirmative showing has been made here. Since there was sufficient proof [*10] at trial from which the jury could reasonably have concluded that Mr. Stafford had been killed by a shot from the rifle and that Mrs. Stafford had been killed by the fire, there was sufficient evidence, even absent the pistol, for the jury to convict Henley of two counts of first-degree murder.

The petitioner also complains that he was denied a fair trial when, during final arguments, the trial judge stated that a defendant serving a life sentence would be eligible to be considered for parole after serving thirty-five years. This issue was raised in the direct appeal and denied. Accordingly, we consider it previously determined and decline to re-examine it. *T.C.A. § 40-30-111* (1990).

As to the petitioner's contention that he was denied due process by the State's provision to him of certain medication during his trial, we find that this case is distinguishable from *Riggins v. Nevada, 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992)*, and that no denial of due process occurred. In *Riggins,* the defendant had been prescribed and was taking thioridazine, an antipsychotic drug. He was taking this drug at the time he was determined competent to stand trial. Following his [*11] competency hearing, the defendant filed a motion in the District Court for an order suspending administration of the drug, contending that its effect on his demeanor and mental state during his trial would deny him due process. The District Court denied the defendant's motion, with no explanation of its rationale, and the defendant continued to receive the drug throughout his trial.

The Supreme Court held that [HN5] "once Riggins moved to terminate administration of anti psychotic medication, the State became obligated to establish the need for [it] and the medical appropriateness of the drug." 504 U.S. at , 112 S. Ct. at 1815. Because the record before the Court contained no findings that would have supported a conclusion that the continued administration of the medication was necessary to accomplish an essential state policy, the defendant's convictions ware reversed and his case remanded.

In the case before us, Henley was taking Xanax and P.V. Tussin before and during the course of his trial. Xanax is an antianxiety medication and P.V. Tussin is a cough syrup which contained alcohol and "a narcotic cough suppressant." The expert testimony at the post-conviction hearing established [*12] that these drugs could have had an adverse effect on both the petitioner's demeanor and on his ability to fully participate in his own defense. However, there is no proof in the record that Henley was being medicated against his will. According to Dr. Byrne, the prescribing physician, the petitioner requested medication for his nervousness, anxiety and sleeplessness. Cf. *Groseclose v. Bell, 895 F. Supp. 935, 949 (M.D.Tenn. 1995)* ("[the defendant] did not request the medication . . ., there was no appointment requested by [the defendant] and [he] never asked for or indicated that he was having any trouble sleeping."). Henley specifically requested Valium, but Dr. Byrne prescribed Xanax instead because it did not have the dependency potential of Valium. The P.V. Tussin was prescribed in response to the petitioner's complaint of a cough and his specific request for a medication with hydrocodone, which P.V. Tussin contained.

On the record before us, we cannot find that Henley's own behavior in requesting and taking these medications violated his due process rights. [1] To do so would be to indicate that an accused could request medication on the grounds of having difficulty sleeping, [*13] excessive nervousness, high anxiety, depression, etc., and then claim that he was denied a fair trial because of the medication's impact on his ability to participate in his own defense and/or because of the medication's adverse effect on his credibility. If the State refused to administer such medication out of concern that the accused would make such a claim, the accused could then argue that he had been denied his due process rights to proper medical care. [2] In other words, granting Henley relief under the circumstances of this case would create an unacceptable risk of deliberate manipulation of State-provided health care services in an attempt to create grounds for attacking a conviction. Such a result is untenable and not required by our Constitutions.

1 Although there is proof in the record that Henley was taking more than the prescribed dosages, there is no proof in the record that he was being required to do so by his jailers.

2 Indeed, Henley filed a civil rights action about his pre-trial incarceration, complaining about the length of time he had to wait to be taken to the doctor.

[*14] As to the petitioner's contention that the State withheld exculpatory evidence in violation of *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, by not informing his trial counsel about the medication that he was taking, we also find this issue to be waived. Moreover, this issue fails on the merits. [HN6] Evidence required to be provided under Brady "must be favorable to the accused, his defense, or the sentence that will be imposed if found guilty." *State v. Marshall, 845 S.W.2d 228, 232 (Tenn. Crim. App. 1992)*. The petitioner argues that evidence of the medication he was taking during his trial was favorable because it explained his demeanor which, according to Henley's offer of proof at the post-conviction hearing, at least some of the jurors found objectionable.

However, there is no proof in the record that the prosecution was aware of the effects of these drugs, and it is only their effects which arguably constituted favorable evidence. Sheriff Mehaney testified at the post-conviction hearing that he knew nothing about the effects of the drugs his prisoner was taking. He also testified that he noticed no changes in Henley's behavior as a result of taking [*15] the drugs. The only person who arguably knew that the medication could affect Henley's credibility such that it was "exculpatory" to begin with, was the physician who prescribed it. However, there is no proof in the record that this person was under the control of the prosecution, and [HN7] the duty to disclose does not arise as to information "which is not possessed by or under the control of the prosecution." *State v. Marshall, 845 S.W.2d at 233*. Moreover, the duty to disclose does not arise as to information "that the accused already possesses or is able to obtain." Id. There is no contention here that Henley did not know he was taking the medication. Moreover, there is proof in the record that Henley understood the medication's soothing effects on him.

The petitioner claims he was denied his constitutional right to trial by jury because of the trial court's dismissal of jurors opposed to the death penalty. Because this issue was not raised on direct appeal, it is waived. T.R.A.P. 36. This issue is also without merit. [HN8] It is proper for a court to excuse jurors who indicate that they will not vote for the death penalty regardless of their instructions. *Morgan v. Illinois, 504 U.S.* [*16] *719, 728, 112 S. Ct. 2222, 2229, 119 L. Ed. 2d 492 (1992)*. Furthermore, "the trial court's finding on this issue is to be accorded a presumption of correctness inasmuch as such findings involve a determination of demeanor and credibility particularly within the trial court's province and . . . the burden rests on the [petitioner] to establish by convincing evidence that the court's determination was erroneous." *State v. Harris, 839 S.W.2d 54, 64 (Tenn. 1992)*. The petitioner has failed to meet this burden.

The petitioner also contends that the sole aggravating factor relied on by the State in this case was unconstitutional. In seeking the death penalty, the State argued that the murders of Fred and Edna Stafford were each "especially heinous, atrocious, or cruel in that [each] involved torture or depravity of mind." [3] T.C.A. § 39-2-203(i)(5) (1982). The petitioner's claim that this aggravating factor was unconstitutional was denied by our Supreme Court in the direct appeal of this case. Further, we are bound by our Supreme Court's subsequent holdings that this aggravating factor passes constitutional muster. *See, e.g., State v. Hines,* S.W.2d (Tenn. [*17] 1995), aff'd on reh'g, S.W.2d (1996); *State v. Keen,* S.W.2d (Tenn. 1994), reh'g granted; *State v. Black, 815 S.W.2d 166 (Tenn. 1991)*; *State v. Teel, 793 S.W.2d 236 (Tenn. 1990), cert. denied, 498 U.S. 1007, 112 L. Ed. 2d 577, 111 S. Ct. 571 (1990)*; *State v. Thompson, 768 S.W.2d 239 (Tenn. 1989), cert. denied, 497 U.S. 1031, 111 L. Ed. 2d 796, 110 S. Ct. 3288 (1990)*.

3 The trial court instructed the jury that "the word heinous means grossly wicked and reprehensible, abominable, atrocious and vile. Atrocious means extremely evil or cruel, monstrous, exceptionally bad, abominable. Cruel means disposed to inflict pain or suffering, causing suffer-

> ing, painful. Torture means, the infliction of severe physical pain as a means of punishment or coercion; the experience of this[;] mental anguish[;] any method or thing that causes such pain or anguish[;] to inflict would create [sic] physical or mental pain. Depravity means moral corruption, wicked, or preversed [sic] acts."

[*18] Henley also complains about the trial court's jury instructions concerning mitigating circumstances. Again, this issue was previously determined in the direct appeal of this case and we decline to readdress it here.

We also decline to disagree with our Supreme Court's repeated holdings that [HN9] Tennessee's death penalty statutes are constitutional. *See, e.g., State v. Howell, 868 S.W.2d 238 (Tenn. 1993), cert. denied, 127 L. Ed. 2d 687, 62 U.S.L.W. 3624, 114 S. Ct. 1339 (1994); State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993), cert. denied, 128 L. Ed. 2d 220, 62 U.S.L.W. 3691, 114 S. Ct. 1577 (1994); State v. Black, 815 S.W.2d 166 (Tenn. 1991).*

Resolution of the foregoing issues leaves us with the petitioners primary complaint, to-wit, that he received ineffective assistance of counsel at his trial. We must first note that James H. Reneau, III, who represented Henley at his trial and on direct appeal, died before he was able to testify in this proceeding. Accordingly, we are constrained in our ability to examine the reasons behind any of Mr. Reneau's actions. We do, however, have the benefit of a copy of Mr. Reneau's entire file in this matter.

Specifically, the [*19] petitioner claims that his counsel was ineffective in the following ways:

> 1. He failed to assemble a "defense team," including a second lawyer, a mental health expert, an investigator, an arson expert, and "others";
>
> 2. He did not conduct sufficient investigation into the case, including "appropriate" interviews with Henley;
>
> 3. There was no attempted negotiation toward a plea bargain;
>
> 4. He did not challenge Henley's arrest on the contempt of court charge;
>
> 5. He failed to keep out of evidence the pistol and mention of a polygraph exam;
>
> 6. He failed to move for a change of venue;
>
> 7. He did not attempt to rehabilitate jurors excused by the court because of their views on the death penalty;
>
> 8. He "never developed a strategy" in the case;
>
> 9. He made no opening statement to the jury;
>
> 10. He did not request a jury instruction on voluntary intoxication; and
>
> 11. He did not prepare adequately for the sentencing hearing, and did not effectively represent the petitioner at the sentencing hearing.

The petitioner also claims that Mr. Reneau was ineffective on the direct appeal of this matter.

[HN10] In reviewing the petitioner's Sixth [*20] Amendment claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).* To prevail on a claim of ineffective counsel, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness" and that this performance prejudiced the defense. There must to be a reasonable probability that but for counsel's error the result of the proceeding would have been different. *Strickland v. Washington, 466 U.S. 668, 687-36, 692, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985).*

When deciding whether counsel's performance was deficient, "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington, 466 U.S. at 689.* "Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support [*21] a claim of ineffective assistance." *Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).* We must defer to trial strategy and tactical choices when they are informed ones based upon adequate preparation. Id. *See also Hellard v. State, 629 S.W.2d 4 (Tenn. 1982).*

On appeal, we are bound by the lower court's findings unless the petitioner carries his burden of illustrating that the evidence preponderates against the judgment entered. *Black v. State, 794 S.W.2d 752 (Tenn. Crim. App. 1990).*

With respect to the petitioner's claim that his trial counsel was ineffective for failing to develop a trial strategy, we find that the record belies this assertion. It is obvious that trial counsel intended to discredit Flatt and to create reasonable doubt through attacking the State's case at every opportunity. This strategy included attacking Flatt's version of the events and his credibility; attacking the identification and/or the relevance of the guns; attacking the State's investigation of the fire; and presenting the testimony of the petitioner. That trial counsel's strategy was not successful does not mean that there was no strategy at all. The petitioner has failed to carry [*22] his burden of proving that the evidence preponderates against the lower court's findings in this regard.

Trial counsel's strategic decision not to move for a change of venue was a valid tactical choice. Henley testified that Mr. Reneau had told him that he wanted the trial to be where Henley had been born and raised. Obviously, Mr. Reneau considered, and rejected, attempting to move the trial. Similarly, counsel's choice not to make an opening statement was not shown to be ineffective. The State introduced expert evidence at the post-conviction hearing that experienced criminal defense attorneys occasionally choose not to make an opening statement for strategic reasons. Of course, the petitioner introduced expert testimony contending that an opening statement is crucial to the defense. Since it is the petitioner's burden of proving the ineffectiveness of his counsel, and since Henley has shown no prejudice attaching particularly to Mr. Reneau's failure to make an opening statement, we cannot find that, in this regard, the evidence preponderates against the lower court's decision that Henley received competent counsel at the trial.

Mr. Reneau's decision not to attempt to rehabilitate [*23] jurors excused by the court because of their views on the death penalty was also a valid choice. *See Cooper v. State, 847 S.W.2d 521, 535 (Tenn. Crim. App. 1992)* (Trial attorney "not faulted" for not attempting to rehabilitate prospective jurors who stated that they would not impose the death penalty regardless of the evidence.) Moreover, there is no proof in the record that any attempted rehabilitation would have been successful, hence no prejudice from Mr. Reneau's "omission" has been shown.

Trial counsel's decision not to request a jury instruction on the petitioner's alleged intoxication at the time of the offenses was also a valid tactical choice. The petitioner consistently and adamantly maintained that he had not been intoxicated at the time. Although trial counsel could legitimately have requested the jury instruction as a way of "hedging his bets" against the possibility that the jury would believe Flatt rather than his own client, we decline to find that his choice constituted deficient performance. Had Mr. Reneau argued voluntary intoxication, he ran the risk of being perceived as not believing his own client: a classic "damned if you do and damned if you don't" situation. [*24] Mr. Reneau's choice was reasonable under the circumstances.

The petitioner's complaint that Mr. Reneau was ineffective because he did not attempt to negotiate a plea is not supported by anything in the record indicating that such an attempt might have been successful. Attorney General Thompson, who also prosecuted the case against Henley, stated during the post-conviction hearing that a plea bargain "wasn't an option" and Henley testified that he would not have pled guilty to anything before his trial because he was innocent. Accordingly, the petitioner has failed to show any prejudice resulting from this alleged deficiency.

Similarly, as set forth above, the record does not support the petitioner's claim that tainted evidence was obtained during a pretextual arrest. Accordingly, no showing of prejudice has been made from trial counsel's failure to challenge this arrest.

As to Henley's claim that counsel was deficient in failing to keep out the pistol, we agree that an objection to its admissibility should have been made. [4] However, Mr. Reneau did an effective job of challenging the materiality of the pistol, and the record does not demonstrate that the result of the trial would [*25] probably have been different had the pistol been excluded. Accordingly, we find that the petitioner was not denied effective assistance of counsel in this regard.

> 4 Before the pistol was admitted into evidence, Mr. Reneau objected to the sheriff being questioned about where it was found on the basis of no personal knowledge. The trial court allowed the sheriff to testify about how he'd come into possession of it as it was shown to him by the prosecutor. When the pistol was later marked for identification, and subsequently entered into evidence, no objection was made.

Henley also fails to show how his trial counsel was deficient in failing to keep out Flatt's offhand reference to a period of time when he and Henley were waiting in a room "for the polygraph test." This reference could not have been anticipated from the question asked Flatt, and an objection arguably would simply have drawn more attention to it. Similarly, Chief Deputy Clifton Long's reference to a polygraph test was offhand and could not have [*26] been anticipated from the question asked. No witness testified that the tests had actually been administered, or as to the results of any polygraph tests. Counsel was not deficient in this regard.

Finally, we address Henley's contention that his trial counsel did not adequately investigate or prepare his case. With respect to the guilt phase of the trial, we do not find that the petitioner has carried his burden of overcoming the trial court's findings that Mr. Reneau was not deficient in his investigation and preparation of this case for failing to interview him more "appropriately," to request an additional lawyer on the case, or for failing to otherwise assemble what the petitioner calls a "defense team." Henley has not shown any prejudice stemming directly from Mr. Reneau's decision to try this case by himself. Additionally, while Mr. Reneau did not hire the arson expert that the petitioner's post-conviction counsel did, [5] Mr. Reneau did offer some effective expert testimony challenging the State's investigation of the fire. Mr. Reneau also did an effective job of cross-examining the State's witness who conducted the fire investigation.

5 We can only speculate as to what this expert's testimony would have been had he actually investigated the fire. It is possible that he would have found incriminating evidence.

[*27] As to Mr. Reneau's failure to discover and investigate the petitioner's medicated state during the trial, the record simply does not support a finding that Mr. Reneau was deficient because he did not notice that his client was under the influence of drugs. [6] The petitioner repeatedly denied abusing drugs, and never disclosed to Mr. Reneau that he was currently taking medication. Other than Henley's mother and ex-wife's testimony at the post-conviction hearing that he "just didn't act himself" and that he acted "like he was drugged" before the trial, the record is bereft of any proof that Henley was behaving in such a way that should have alerted his counsel to inquire as to his health. [7] Indeed, the sheriff in charge of the jail where Henley awaited trial testified that he hadn't noticed any change in Henley's behavior when he was taking the medication. Apparently, neither did Mr. Reneau, who had been meeting with Henley since August 1985. Henley started taking the medication at issue in December 1985.

6 Because Mr. Reneau died before he could testify in this proceeding, it is impossible to know for certain whether or not he was aware that Henley was taking Xanax and P.V. Tussin during the trial. It is possible that Mr. Reneau did know, and that he approved. However, the record supports the inference that Mr. Reneau was unaware that Henley was taking these drugs.

[*28]

7 Defense counsel's offer of proof at the post-conviction hearing about the jurors' perceptions of the petitioner's demeanor at trial does not establish that his demeanor there was significantly different from what it normally was. Only a person who was familiar with the defendant's demeanor, both while he was taking the medication at issue and while he was not, would be competent to offer testimony about any change which arguably should have triggered an investigation.

We are disturbed about the possible effects that the drugs had on the petitioner's demeanor at trial and that there was no testimony explaining these effects to the jury. We are similarly disturbed that the petitioner's attorney had no psychological or psychiatric evaluation done on his client before trial which might have resulted in Henley being taken off of the drugs, or at least in an explanation about their effects. We are disturbed that Henley's attorney, apparently, was not aware that his client was taking these drugs. However, we are unwilling to hold that Mr. Reneau's performance was deficient because he failed to discern [*29] or investigate his client's medicated state, particularly in a case such as this where there is reason to believe that the client might have lied upon simple inquiry. [8] Moreover, the petitioner has to bear some responsibility for his own failure to inform his attorney about the medications he was taking. *See, e.g., State v. Russell, 866 S.W.2d 578, 583 (Tenn. Crim. App. 1991)* (counsel not ineffective for failing to attack prior convictions on grounds that the defendant was under the influence of narcotics at the time she pled guilty where the defendant never told her attorney that she had been under the influence at the time.); Cf. *Groseclose v. Bell, 895 F. Supp. 935, 950 (M.D.Tenn. 1995)* (ineffective assistance where, among other things, the defendant told his lawyer that the State was giving him medication which he had never requested, but which had been prescribed, and counsel simply responded "then take it"). Finally, even if Mr. Reneau's performance in this regard was deficient, Henley has failed to show a reasonable probability that his medicated state had an adverse effect on the outcome of his trial. It is quite possible that Henley's demeanor while not on medication [*30] would have been equally unappealing to the jury. [9]

8 Although Henley steadfastly maintained at trial that he did not abuse drugs, Dr. Byrne testified that Henley had told him that he was "used to shooting four milligram[s] . . . [of] Dilaudid."

9 Given that Henley was also taking antianxiety medication at the post-conviction hearing, we can only infer that he has difficulty dealing with stressful situations without the benefit of such medication.

The record does not support a finding of deficient investigation into any other aspect of the guilt phase of Henley's trial.

As to Henley's contention that Mr. Reneau was also ineffective on the direct appeal of this matter, we find this issue without merit. We have addressed all of the issues which Henley claims should have been raised in the direct appeal, but weren't, and found that they do not afford him any grounds for relief. The petitioner therefore suffered no prejudice from Mr. Reneau's decision not to include them in the appeal. Accordingly, [*31] Henley's claim of ineffective assistance of counsel on appeal fails. *Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993).*

We affirm the lower court's judgment that Henley is not entitled to any post-conviction relief with respect to his convictions.

With respect to the sentencing phase of the trial, however, we find that Mr. Reneau's investigation and preparation were constitutionally deficient. Our Court has recognized that

> '[a] [HN11] lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions.'

Adkins v. State, 911 S.W.2d 334, No. 03C01-9106-CR-00164, pp. 42-3, Washington County (Tenn. Crim. App. filed December 2, 1994, at Knoxville) [*32] (citation omitted). Personal background and character information are highly relevant at a capital sentencing hearing "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown. 479 U.S. 538, 545, 93 L. Ed. 2d 934, 107 S. Ct. 837 (1987)* (O'Connor, J., concurring).

Although many of Henley's family members, including his mother, testified at the post-conviction hearing that they would have been willing to testify on Henley's behalf had they been asked, Mr. Reneau spoke to none of them prior to the sentencing hearing. Mr. Reneau called the petitioner's mother to the stand at the sentencing hearing without ever having spoken to her about testifying. Not understanding what was expected of her, she refused -- in front of the jury -- to testify. We do not think it is assuming too much to conclude that a jury is going to be prejudiced against a defendant upon that person's own mother refusing to testify on his or her behalf. [10]

> 10 In the petitioner's offer of proof at the post-conviction hearing, one juror was quoted as saying, "If a man's own mother won't testify on his behalf then we know what we've got to do."

[*33] Had they been prepared and called at the sentencing hearing, Henley's family members would have testified that they loved the petitioner; that he was a good and loving man; that he was not a violent man; that the offenses of which he was convicted were totally out of character for him; and that they were shocked by his arrest. They would have pled for his life. Additionally, the petitioner produced evidence at the post-conviction hearing that other potentially mitigating evidence existed that would have been discovered had Mr. Reneau conducted a more thorough investigation. Expert testimony indicated the possibility that Henley had suffered from depression, alcohol and drug abuse, and learning disabilities. In grade school, Henley's I.Q. tested at 89. He dropped out of high school after the tenth grade. Not long before the murders, Henley suffered severe financial losses, was forced to file bankruptcy, and lost the family farm. All of this would have been proper testimony for mitigation. *-Eddings v. Oklahoma, 455 U.S. 104, 117, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982)* (the Constitution requires the sentencer to "consider and weigh all of the mitigating evidence concerning the petitioner's [*34] family background and personal history.") (O'Connor, J., concurring); *Locket: v. Ohio, 438 U.S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978).*

In spite of all the mitigating evidence available, only two people testified on Henley's behalf at the sentencing hearing: Henley himself and his grandmother. The jury had already indicated that it did not believe Henley when it convicted him. Accordingly, it is reasonable to presume that Henley's testimony at his sentencing hearing would not have been particularly persuasive. It is also possible, if not likely, that Henley's grandmother was viewed with a certain amount of hostility because Flatt testified that it was on her behalf that Henley had felt compelled to attack the Staffords. Thus, of all the people that Mr. Reneau had available to him, the only two that testified were arguably the two least helpful.

[HN12] "When the record shows a substantial deficiency in investigation, the normal deference afforded trial counsel's strategies is particularly inappropriate.

[This] Court will not credit a strategic choice by counsel when counsel 'did not even know what evidence was available.'" *Cooper v. State, 847 S.W.2d at 530* (citation omitted). [*35] The record in this case shows such a substantial deficiency. No psychological or psychiatric evaluation was done on Henley. Other than Henley's grandmother, Mr. Reneau did not speak with Henley's family members prior to the sentencing hearing. There is no evidence from Mr. Reneau's file or otherwise that he investigated Henley's educational background, employment history, or that he spoke with members of the community familiar with Henley. He "'should have investigated his background, checked his school records, . . . his medical history, tried to find witnesses to demonstrate all aspects of his character. [He] should have requested a psychological evaluation.'" *Bell v. State, 1995 Tenn. Crim. App. LEXIS 221*, No. 03C01-9210-CR-00364, p. 42, Hamilton County (Tenn. Crim. App. filed March 15, 1995, at Knoxville), *cert. denied,* (quoting the court below).

While we have held that Mr. Reneau's failure to investigate his client's mental health was not ineffective assistance of counsel with respect to the guilt phase of this trial, we do find that it was ineffective with respect to the sentencing phase.

> "There is a qualitative difference between obtaining psychological information for the purpose of preparing [*36] a defense to the charges and using such evidence for the purpose of mitigating the punishment. Thus, it is not incompatible to present evidence of psychological or mental impairment during sentencing, even where a defense of factual innocence has been interposed at the guilt phase."

Bell v. State, supra at 46 (citation omitted). Combined with Mr. Reneau's failure to investigate Henley's family's availability and willingness to testify, and his failure to investigate other aspects of Henley's past, Mr. Reneau failed to meet the level of competence required by attorneys representing clients at the sentencing phase who are faced with the death penalty. *See State v. Terry, 813 S.W.2d 420, 425 (Tenn. 1991)* (the qualitative difference between the death penalty and all other punishments requires greater reliability in the sentencing determination).

We also find that Mr. Reneau's deficient performance at the sentencing phase prejudiced the petitioner. The petitioner made an offer of proof at the post-conviction hearing that the jury considered the fact that Henley's mother refused to testify on her son's behalf. Even without this offer of proof, we hold that the dearth of [*37] favorable testimony offered at the sentencing hearing, when significant amounts of favorable testimony were available, establishes a reasonable probability that, but for Mr. Reneau's deficient performance with respect to the sentencing phase of Henley's trial, the result of the proceeding would have been different. [11]

> 11 Unlike *State v. Melson, 772 S.W.2d 417 (Tenn. 1989)*, this was not a case where the available mitigation evidence had already been presented during the guilt phase of the petitioner's trial.

We find that the evidence preponderates against the lower court's finding that Henley received effective assistance of counsel at sentencing, and accordingly reverse that portion of the decision below, vacate the petitioner's death sentence and remand this matter for a new sentencing hearing.

JOHN H. PEAY, Judge

CONCUR:

JOE B. JONES, Judge

JOSEPH H. WALKER III, Special Judge