IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE	§	
	§	
vs.	§	No. E1982-00075-SC-DDT-DD
	§	
DAVID EARL MILLER	§	

RESPONSE OPPOSING MOTION TO SET EXECUTION DATE AND REQUESTING A CERTIFICATE OF COMMUTATION

Comes now David Earl Miller, through undersigned counsel, pursuant to Tenn. S. Ct. Rule 12.4(A), and opposes the State's motion to schedule his execution date and respectfully requests that the Court issue a certificate of commutation.

I. This Court should exercise its equitable authority and recommend to the Governor that Mr. Miller be granted clemency.

Tennessee's governor is vested with the authority to commute a death sentence. Tenn. Const. art. III, §6. Complementing the Governor's constitutional clemency power, however, Tennessee law directs this Court, with its unique expertise and familiarity with death penalty cases, to play an important role by certifying that clemency is appropriate when uncontroverted, extenuating circumstances are present in a particular case. Tenn. Code Ann. § 40-27-106; *Workman v. State*, 22 S.W.3d 807, 808 (Tenn. 2000); *id.* at 816-17 (Birch, J., concurring in part and dissenting in part).

When invoked by a request for a certificate of commutation, Tennessee law assigns this Court the duty to make a *recommendation* whether the Governor ought to commute a condemned inmate's punishment from death to life imprisonment. This act is different from executive clemency *decisions* which "are outside the domain of the courts[.]" *Workman*, 22 S.W.3d at 813 (Drowota, J., concurring). In other words, this Court's certification under Tenn. Code Ann. § 40-27-106, "serves, simply, as a vehicle through which the Court may ethically and on the record communicate with the Governor in aid of his exclusive exercise of the power to commute sentences." *Workman*, 22 S.W.3d at 817 (Birch, J., dissenting).[1]

David Miller is worthy of this Court's recommendation for clemency. There is little doubt that his crime was neither a manifestation of his lack of character, nor of his lack of humanity, but of the profound and unconquerable mental illness left behind by a childhood of unspeakable and depraved abuse. There is no doubt that the jury that sentenced David Miller to death was never given the slightest hint of what drove the inexplicable acts that ended the life of Lee Standifer. An execution date should not be scheduled because Mr. Miller's death sentence undermines the principles of Fairness and Due Process and offends our own humanity.

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[1] Clemency is not "entirely distinct from judicial proceedings." *Harbison v. Bell*, 556 U.S. 180, 192 (2009). It "is deeply rooted in our Anglo-American tradition of law," and "[f]ar from regarding clemency as a matter of mercy alone" it is "the 'fail safe' in our criminal justice system." *Id.* quoting *Herrera v. Collins*, 505 U.S. 390, 411-12, 415 (1993). Clemency operates to address the "unalterable fact that our judicial system, like the human beings who administer it, is fallible[.]" *Herrera*, 505 U.S. at 415.

II. A certificate of commutation should issue.

Mr. Miller should not be executed because his conduct took place while he was insane and/or unable to form the specific intent required to convict him of first-degree murder, rendering his case not among "the worst of the worst" for which the death penalty is reserved. Because Mr. Miller's trial was held before the United States Supreme Court issued its decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), his guilt-phase jury was denied the opportunity to consider readily available evidence of his insanity and/or his inability to form the required specific intent. This Court therefore is now presented with the only opportunity that any Tennessee courts will have to consider the overwhelming evidence that Mr. Miller was not guilty of any offense for which a sentence of death may, or should, be imposed.

The unspeakable horror which was Mr. Miller's childhood has never been disputed. Born of parents who both were hospitalized for psychiatric disorders, raped twice by dominant females, including his own mother, turned over by his grandfather to another man who molested him, specifically targeted for a period of over ten years for violent beatings by his sadistic stepfather, and shuffled between a filthy home and a mother who did nothing to meet his physical and emotional needs and an ever-changing array of social service placements (some of which were themselves marred by violence and degradation). Mr. Miller was left permanently scarred by chronic and severe post-traumatic stress disorder. The condition manifested itself through a lifetime of psychosis (including both auditory and visual hallucinations), recurrent and intrusive distressing images, thoughts, and

perceptions, hallucinations and dissociative flashback episodes (both associated and un-associated with intoxication), and dissociation in response to both internal and external stimuli. (Attachment A, Dr. Pablo Stewart Declaration ¶¶ 12, 14-27, 33-38; Attachment B, Dr. David Lisak Declaration ¶¶ 5-35).

From his pre-teen years forward, Mr. Miller self-medicated his profound and yet untreated mental illness with prescription drugs used to control his seizures, Seconal, yellow jackets, and Tuinal, a multi-colored pill known as Christmas Trees, LSD, and alcohol, which he consumed on a daily basis, even while at work. This crime occurred during a period of dissociation in response to the external stimulus of Ms. Standifer physically attempting to prevent him from leaving her, that was exacerbated by his ingestion of alcohol and LSD. (Attachment A, Dr. Stewart Declaration ¶¶ 39-42, ¶¶ 44-51).

The facts of the case presented at trial indicated the influence of Mr. Miller's mental illness on his conduct the evening she died. Described by the federal district court as "macabre" and "strange," (*Miller v. Bell*, 655 F. Supp. 2d 838, 852 (E.D. Tenn. 2009)) the circumstances of the murder reflected a spontaneous and unplanned event. Mr. Miller and Ms. Standifer were acquaintances and had made plans for an evening out. They were seen together throughout the evening by multiple witnesses in multiple locations behaving in much the same manner as any other couple would behave. They were seen together immediately before the murder at the local bus station by a law enforcement officer and, though inebriated, there was nothing in either's behavior which caused the officer to believe that

anything was amiss. In fact, Mr. Miller and the officer had an uneventful conversation (Attachment C, TT Vol.5 pp.421-24, 426-31, 439-45, 452-56[2]; *id.*, Vol.11 pp.1079-81, 1089-90, 1096-97; *id.*, Vol.12 pp.1114-15).

According to the officer, Mr. Miller and Ms. Standifer left the bus station in a taxi cab at approximately 9:40 p.m. (*id.*, pp.439, 442). The taxi driver testified that the couple arrived at a location about fifteen minutes later (*i.e.*, 9:55 p.m.) which was later identified as the home of Calvin Thomas, a local minister with whom Mr. Miller resided, (*id.*, pp.468-69). As the district court observed, Mr. Miller knew that Reverend Thomas returned "like clockwork" every evening between 10:00 p.m. and 10:15 p.m., and Thomas followed that pattern on the night of the murder, arriving shortly after 10:00 p.m. *Miller*, 655 F. Supp. 2d at 860. When Reverend Thomas arrived, Mr. Miller was cleaning up the house. Ms. Standifer's body was found near the Thomas driveway, stripped of clothing, displaying two fatal wounds to the head. In addition, she had a number of knife wounds inflicted after her death (Attachment C, TT Vol. 9 pp.874-75).

The circumstances of the offense were considered by Dr. Stewart, who provided expert assistance to Mr. Miller during district court proceedings. Dr. Stewart found:

> Several factors concerning the offense reflect chaotic, unplanned action. The crime scene itself, as described by the preacher, indicated frenzied rather that cautious, deliberate actions. The body and

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[2]Citations to portions of the transcript from Mr. Miller's trial are designated by "TT__ Vol.__ pp.__" and are attached for the convenience of the Court.

clothing were discovered along side the driveway in an easily visible location, indicating that David did not plan how to avoid detection. After the offense occurred, David followed the preacher's instructions to remain in the house for one night rather than fleeing immediately. David left Knoxville the day after the offense only when the preacher drove him to a highway out of town and forced him to leave.

David's use of intoxicants exacerbated his underlying symptoms of posttraumatic stress disorder. When his girlfriend, Lee Standifer, grabbed him, dug her fingernails into him, and said she would not let him leave her, it triggered an exaggerated response that was reminiscent of earlier forced experiences at the hands of his mother and stepfather. David's memory of events following his girlfriend's grabbing him is fractured. Although the victim was stabbed multiple times, David has no memory of stabbing her.

(Attachment A, Dr. Stewart Declaration ¶¶ 48-49).

Dr. Stewart went on to conclude:

It is my professional opinion, which I hold to a reasonable degree of medical certainty, that David Miller suffers from multiple neurocognitive disorders. Each and all of these mental diseases and defects were present and acute at the time of the offense for which Mr. Miller was convicted, rendering him unable to appreciate the criminality of his acts as well as LSD (lysergic acid diethylamide) can induce illusions, hallucinations, delusions, paranoid ideations and other alterations of mood and thinking rendering him unable to conform his conduct to the requirements of the law. Mr. Miller was under extreme emotional stress at the time of the offense. At the time of the homicide, Mr. Miller responded to the victim's [sic] grabbing his arm and sudden movement without plan, thought, or recognition of the consequences of his actions. He harbored no intent to kill or malice for the victim, and his actions were taken without premeditation and without understanding or knowledge about the difference between right and wrong

(*Id.*, at ¶50, emphasis added).[3]

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[3]Dr. Thomas Hyde's neurological examination of Mr. Miller (Attachment D) revealed that Mr. Miller also suffered from multiple neurological and psychiatric factors, which tied into his criminal behavior. "[W]ithin a reasonable degree of medical certainty, [] David E. Miller suffered from frontal and temporal lobe dysfunction and polysubstance abuse at the time of the offense. . . . These factors . .

In the many years since this Court last had an opportunity to deliver justice to be done in Mr. Miller's case, the truth has been revealed. No expert, other than those retained by Mr. Miller during federal habeas corpus proceedings, has rendered an opinion on his sanity after first being fully informed of all of the facts necessary to render such an opinion.[4] This Court's resolution of the State's request for an execution date presents the first, and only, opportunity for the state courts to do justice in light of the truth. Mr. Miller was insane, or lacked the requisite mental state to be guilty of an offense for which a sentence of death may be imposed. Miller's sentence of death should be modified to life imprisonment or a certificate of commutation should issue.

III. If the Court grants the State's motion, the scheduling of an execution date should take into account the realities of the present circumstances.

If this Court decides to schedule Mr. Miller's execution date, then it is respectfully requested that the Court factor in the inordinate burden placed upon Mr. Miller's counsel as a result of representing multiple clients with execution dates and, consequently, the detrimental effect upon the adequacy of Mr. Miller's legal representation. In addition, when scheduling an execution date for Mr. Miller, the

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directly impact[ed] his ability to conform his conduct to the requirements of the law." *Id.*

[4]The neutral experts appointed at the time of trial were not informed about the horrific trauma suffered by Miller. When Mr. Miller presented the opinions of Drs. Stewart, Lisak, and Hyde during federal habeas corpus proceedings, the State of Tennessee either did not, or could not, present any contrary opinions. Mr. Miller's experts' opinions are, accordingly, uncontested.

Court should account for pending litigation about Tennessee's lethal injection protocol in order to provide an adequate opportunity for such litigation and to minimize the need for additional or last-minute filings with this Court.

A. Mr. Miller will be denied the meaningful assistance of counsel if his legal team is overwhelmed by multiple, overlapping, consecutive execution dates.

Undersigned lead counsel represents Gregory Lott, a condemned inmate scheduled to be executed by the State of Ohio on March 19, 2014.[5] (Attachment E, *Ohio v. Lott*, No. 1989-0846, Order (Ohio Aug. 17, 2012); and Attachment F, *Lott v. Bagley*, No. 1:04-cv-822, R.100, Marginal Entry Order (N.D. Ohio Apr. 1, 2013); Related No. 1:95-cv-02642, R.156). A majority of counsel's time is currently consumed by representing Mr. Lott.

Beginning in January 2014, most, if not all, of counsel's time will be devoted to Mr. Lott's case. Ohio has a structured clemency process and Lott is scheduled for an interview with the Ohio Parole Board on February 5, 2014. A clemency hearing is scheduled for February 19, 2014, one month before Lott's execution date. Thus, during the first three months of 2014, counsel will be focused, almost exclusively, on Lott's case. Representing Lott during that time will require extensive out-of-state travel and a significant amount of time spent in Ohio.[6] Setting aside the amount of

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[5]Attorney Stephen A. Ferrell is co-counsel in this case.

[6] Gregory Lott's case originates from Cleveland, Ohio, where his family still resides. Clemency proceedings are conducted in Columbus, Ohio. Mr. Lott is housed in Chillicothe, Ohio, located about one hour southeast of Columbus. Ohio's execution chamber is in Lucasville, Ohio, about one hour south of Chillicothe.

time that will necessarily be devoted to Lott's case, counsel cannot foresee, logistically, how she can simultaneously, actively represent Mr. Lott and Mr. Miller during this time period.

Representing clients with overlapping warrant periods presents extreme challenges. Undoubtedly, representing clients with pending execution dates is part and parcel of undersigned counsel's "job."[7] However, the State's act of simultaneously requesting execution dates for four clients represented by counsel's office is unprecedented.[8]

After the March 19, 2014 execution date for Mr. Lott, counsel will then begin preparing for the clemency process for her Tennessee clients with scheduled execution dates. Along with Mr. Miller, counsel Chavis also represents Olen Hutchison, for whom the State of Tennessee is currently seeking an execution date.

In addition, undersigned co-counsel Kissinger, who represented Mr. Miller throughout federal court proceedings and is invaluable to the preparation of his case for clemency, is also lead counsel in the currently pending, and facially meritorious, suit for declaratory relief in the Chancery Court for Davidson County

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[7] Counsel must prioritize any client who is facing an execution date, however an execution date does not dispel deadlines in counsel's other cases. The burden of an execution date upon a pre-existing caseload is expected. The undue burden of *multiple* execution dates upon counsel's caseload is extremely difficult to manage.

[8] It appears the State created the current situation when it decided, in part, not to seek execution dates until state officials obtained legislation to keep secret how it will obtain its lethal injection drug. (Attachment G, Brian Haas, *Tennessee's death penalty is back on track*, The Tennessean, Oct. 23, 2013).

challenging the constitutionality of Tennessee's newly-adopted Lethal Injection Protocol and amendments to its public records act.

Preparing for the clemency process requires a thorough examination of all prior phases of the case and independent investigation to tailor the clemency presentation to the characteristics of the client, case and jurisdiction. Counsel must also ensure that consideration of Mr. Miller's clemency application is substantively and procedurally just. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.15.2: Duties of Clemency Counsel (Feb. 2003).

With respect to Mr. Miller, adequate preparation of the case for clemency is especially important because he has never faced an execution date not subject to an automatic stay. Moreover, the demand for clemency is great. "[T]he clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider." *Dretke v. Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting). Thus, it is imperative that counsel be afforded sufficient time to prepare and present Mr. Miller's case for clemency.

Scheduling David Miller's execution less than four months from the March 2014 execution date of Gregory Lott would: (a) unduly strain the resources of counsel's office ("FDSET");[9] (b) require an inordinate amount of counsel's time; and,

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[9] The reduction in office resources, in particular overtime pay for non-exempt employees, is already a significant issue given the office's sequester-level funding. This obstacle to providing adequate legal representation is exacerbated by the State's simultaneous requests for execution dates for four FDSET clients.

(c) significantly decrease the quality of representation afforded Mr. Miller. Accordingly, counsel prays that any execution date for David Miller be scheduled no earlier than four months time after Mr. Lott's March 19, 2014 execution date, and/or the conclusion of Mr. Miller's suit for declaratory judgment, whichever is later.

B. Pending litigation should be considered when scheduling an execution date.

1. Facially meritorious constitutional and equitable challenges to Tennessee's newly adopted Lethal Injection Protocol and amendments to its public record laws is currently pending.

On September 27, 2013, the State instituted a new lethal injection protocol that differs substantially in both the number and type of drugs used. On November 20, 2013, Mr. Miller filed suit in the Chancery Court for Davidson County, case number 13-1627-I, seeking a declaratory judgment that Tennessee's lethal injection protocol constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and the Tennessee Constitution article 1, § 16. The suit also seeks a declaration that Tennessee's recent amendments to its public records act, adopted for the purpose of concealing relevant facts regarding that protocol, similarly violates both the state and federal constitutions.

The lawsuit is meritorious because the new lethal injection protocol, as written and as applied, constitutes a substantial risk of unnecessary pain to which the defendants have exhibited deliberate indifference. Also, the amendments to

Tennessee's public records act denies inmates, such as Mr. Miller, who seek to prevent their execution by unconstitutional means, their rights to access to the courts and procedural due process.

When presented with a previous constitutional challenge to Tennessee's execution protocol, this Court determined that adequate time must be afforded the parties to litigate the issue. It held:

> Decisions involving such profoundly important and sensitive issues such as the ones involved in this case are best decided on evidence that has been presented, tested, and weighed in an adversarial hearing such as the one that was held by the United States District Court for the Middle District of Tennessee in *Harbison v. Little*[.]

West v. Ray, No. M2010-02275-SC-R11-CV, 2010 Tenn. LEXIS 1072, at *3 (Tenn. Nov. 6, 2010). *See also id.* at *4 (The parties "should be afforded an opportunity to present evidence supporting their respective positions to the Chancery Court and that the Chancery Court should be afforded an opportunity to make findings of fact and conclusions of law with regard to the issues presented by the parties.").

The expedited trial court litigation in *Harbison v. Little* lasted ten months from the filing of the initial complaint and included a four-day bench trial. (Three months after the complaint was filed the State adopted a new lethal injection protocol thus requiring further discovery and an amended complaint). That litigation resulted in injunctive relief barring the State from executing plaintiff Harbison under its lethal injection protocol because that protocol was unconstitutional. 511 F. Supp. 2d 872, 903 (M.D. Tenn. 2007).

A separate challenge to Tennessee's lethal injection protocol, which built

upon the existing record in *Harbison*, *supra*, consisted of a six-month period of expedited trial court litigation. *West v. Schofield*, 380 S.W.3d 105, 108-111 (Tenn. Ct. App. 2012) (describing the course of litigation). During that time period, the Chancery Court presided over a two-day hearing and, thereafter, declared that Tennessee's lethal injection protocol violated the prohibition against cruel and unusual punishment. (Attachment H, *West v. Ray*, No. 10-1675-I, Order p. 2 (Tenn. Chancery Ct. Nov. 22, 2010)). The State, during the course of appellate litigation, again changed its execution protocol. (Attachment I, *State v. West*, No. M1987-000130-SC-DPE-DD, Order p. 1 (Tenn. Nov. 29, 2010)).

Although both proclamations regarding the unconstitutionality of Tennessee's lethal injection protocol were eventually reversed, three important points remain. The first is that lethal injection litigation is not frivolous but, instead, has been meritorious and has resulted in fundamental changes in Tennessee's execution protocols.

The second enduring point is that, although this litigation can be expedited, it does require a reasonable amount of time for the parties to develop and present evidence. This Court has explained:

> The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges to acts of the Executive and Legislative Branches be considered in light of a fully developed record addressing the specific merits of the challenge. The requirement of a fully developed record envisions a trial on the merits during which both sides have an opportunity to develop the facts that have a bearing on the constitutionality of the challenged provision.

Id., p. 3.

The third point is that once this Court sets an execution date, "the Chancery Court does not have the authority to stay this Court's execution order." *West v. Ray*, 2010 Tenn. LEXIS 1072, at *3. Only this Court can modify or vacate its order setting an execution date.

Past litigation of a substantially different lethal injection protocol required ten months and six months, respectively. During those prior cases, both parties advocated for a merits determination. The current litigation contains a complication not present in the prior litigation; that is, a new law designed to keep secret how the State will obtain its lethal injection drugs. Depending on the strength of the State's fight against discovery, First Amendment and Due Process challenges to being kept in the dark regarding the manner in which the State seeks to execute Tennessee's condemned inmates could prolong an actual ruling on the merits of the Eighth Amendment violations alleged in the case.

Accordingly, David Miller requests that the Court schedule his execution far enough into 2014 so as to afford him a sufficient amount of time to litigate his pending lawsuit and to avoid last-minute motions for extensions of time from this Court in order to do so.

2. David Miller has not completed the standard three-tier appeal process, therefore, the State's request for an execution date is premature.

By design and effect, Tenn. Sup. Ct. Rule 12.4(A) preserves and maintains an orderly system of carrying out sentences of death by preventing foreseeable conflicts between the legitimate functions of the executive branch of the State of Tennessee,

the state courts of Tennessee, and the federal courts. In so doing, it protects this Court's orders setting execution dates from unnecessary interference by the federal courts, while at the same time promoting respect for the federal court's role in vindicating those rights guaranteed by the laws, treaties, and Constitution of the United States. To accomplish these ends, Rule 12.4(A) states that a request for an execution date must contain a statement demonstrating that the "standard three-tier appeals process" has been completed.

It goes without saying that, among those three tiers of appeals, is federal habeas corpus review. It also goes without saying that federal review is governed by its own set of rules designed to prevent prolonged, unnecessary, and repetitive litigation. *See, e.g.*, 28 U.S.C. § 2244 (b) (providing strict limitations on successive petitions for writ of habeas corpus) and *Calderon v. Thompson*, 523 U.S. 538 (1998) (limiting the discretion normally afforded federal circuit courts to recall their mandate in proceedings in habeas corpus). Notwithstanding the federal court's dedication to promoting finality in death penalty cases, *id.* at 555, the federal courts have recognized there are certain narrow and exceptional circumstances where federal habeas corpus proceedings are not complete even though certiorari review has been denied. *See Klapprott v. United States*, 335 U.S. 601, 614-15 (1949) (recognizing how Rule 60(b)(6) promotes respect for the finality of judgments while insuring that justice is done).

At the time the State of Tennessee represented to this Court that the three-tier process in David Miller's case was complete, Mr. Miller had already asked the

district court to reopen his habeas corpus proceedings (part of the three-tier appeals process) pursuant to Rule 60(b)(6), *see Miller v. Bell*, No. 3:01-cv-487 (E.D. Tenn.) Motion for Order Granting Relief From Judgment Pursuant to Fed. R. Civ. P. 60(b), R.112, filed Sept. 20, 2013 (Attachment J).[10] Furthermore, at least one federal court had reopened habeas corpus proceedings under circumstances almost identical to those present in Mr. Miller's case. *See Landrum v. Anderson*, No. 1:96-cv-641, 2012 WL 6022810 (S.D. Ohio Dec. 4, 2012) adopting *Landrum v. Anderson*, No. 1:96-cv-641, 2012 WL 3637365 (S.D. Ohio Aug. 22, 2012) and *Landrum v. Anderson*, No. 1:96-cv-641, 2012 WL 5309223 (S.D. Ohio Oct. 26, 2012). Moreover, another federal District Court had expressly acknowledged that, at the very least, the question of whether an inmate's habeas corpus proceedings should be reopened under circumstances similar to Mr. Miller's was in dispute and that the prisoner was entitled to a certificate of appealability. See *West v. Carpenter*, No. 3:01-cv-00091 (E.D. Tenn.) Memorandum R.237 pp. 14-15 filed September 23, 2013 (Attachment L). Until Mr. Miller's motion is resolved, his case is one which has not completed the three-tier appellate process. The State's motion should therefore be denied, or, in the alternative, held in abeyance until such time as the federal courts have completed review of Mr. Miller's case.

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[10]The day after asking this Court to set Mr. Miller's execution date, the State of Tennessee responded to that motion. *See Miller v. Bell*, No. 3:01-cv-487 (E.D. Tenn.) Respondent's Opposition to Motion for Relief from Judgment R.115 filed Oct. 4, 2013 (Attachment K).

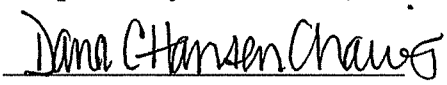
IV. Prayer for Relief

WHEREFORE, Mr. Miller respectfully requests that the Court deny the State's motion and issue a certificate of commutation;

IN THE ALTERNATIVE, Mr. Miller respectfully requests that the Court deny the State's motion as prematurely filed;

IN THE ALTERNATIVE, if the Court grants the State's motion, and grants and/or denies a certificate of commutation, it is requested that David Miller's execution date be scheduled no earlier than four months time after (1) Mr. Lott's execution date of March 19, 2014; (2) the conclusion of Mr. Miller's suit for declaratory judgment; and/or (3) the conclusion of Mr. Miller's federal court proceedings, whichever is later.

Respectfully submitted,



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Designation of Attorney of Record

Dana C. Hansen Chavis is Mr. Miller's attorney of record upon whom service shall be made. Counsel's contact information is:

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Certificate of Service

I hereby certify that a copy of the foregoing document is being delivered to the Court via Federal-Express for delivery on November 22, 2013, and via Email and U.S. Mail first-class to:

Jennifer L. Smith
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this the 21st day of November, 2013.

Dana C. Hansen Chavis

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UNREPORTED CASES AND ATTACHMENTS TO RESPONSE OPPOSING MOTION TO SET EXECUTION DATE AND REQUESTING A CERTIFICATE OF COMMUTATION

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STEPHEN MICHAEL WEST v. GAYLE RAY, ET AL.

No. M2010-02275-SC-R11-CV

SUPREME COURT OF TENNESSEE, AT NASHVILLE

2010 Tenn. LEXIS 1072

November 6, 2010, Filed

SUBSEQUENT HISTORY: Appeal after remand at *West v. Schofield, 2012 Tenn. App. LEXIS 232 (Tenn. Ct. App., Apr. 11, 2012)*

PRIOR HISTORY: [*1]

Chancery Court for Davidson County. No. 10-1675-I. *State v. West, 767 S.W.2d 387, 1989 Tenn. LEXIS 28 (Tenn., 1989)*

OPINION

ORDER

On July 15, 2010, this Court set the execution of the applicant, Stephen Michael West, for November 9, 2010. On October 25, 2010, Mr. West filed in the Chancery Court for Davidson County, Tennessee, an Amended Complaint for Declaratory Judgment and Injunctive Relief, and a Motion for Temporary Injunction.

Mr. West contended that injunctive relief was appropriate because the method of lethal injection by which the defendants intend to execute him would constitute cruel and unusual punishment under the *Eighth* and *Fourteenth Amendments to the United States Constitution*, and *Article 1, section 16 of the Tennessee Constitution*. Mr. West maintained that under Tennessee's existing three-drug lethal injection protocol, the dosage of the first drug administered, sodium thiopental, is insufficient to render the prisoner unconscious. Therefore, he maintained, inmates are likely awake and conscious when the second and third drugs, which paralyze the muscles and cause cardiac arrest, are administered.

Mr. West supported this claim with two affidavits from Dr. David Lubarsky. In the April 22, 2010 affidavit, Dr. Lubarsky attested that he had reviewed **[*2]** the autopsy reports from three other condemned inmates who were executed under Tennessee's current three-drug lethal injection protocol. According to Dr. Lubarsky, these autopsy reports show that the postmortem levels of the initial anesthetic drug used, sodium thiopental, were not sufficient to produce unconsciousness or anesthesia. Dr. Lubarsky opined that as a result, all three of these inmates would have suffocated and suffered pain during the execution process. The State did not introduce any proof on this issue.

On October 28, 2010, the Chancery Court found that the injunctive relief sought by Mr. West would necessarily require issuance of a stay of execution and held that it did not have jurisdiction to supersede a valid order of the Supreme Court. Accordingly, the court denied the Motion for Injunction and immediately granted Mr. West's motion for permission to take an interlocutory appeal under *Tenn. R. App. P. 9*, Mr. West promptly filed an application for an interlocutory appeal in the Court of Appeals. On November 3, 2010, the Court of Appeals denied permission to appeal. The matter is now before this Court on Mr. West's application for permission to appeal pursuant to *Tenn. R. App. P. 11*

[*3] or, in the alternative, a motion to vacate or modify the order setting execution.

We agree with both the Chancery Court and the Court of Appeals that the Chancery Court does not have the authority to stay this Court's execution order. *See Robert Glen Coe v. Sundquist*, No. M2000-00897-SC-R9-CV (Tenn. Apr. 19, 2000) (Order). However, we do not agree that the time constraints created by the pending execution necessarily prevented the Chancery Court from taking proof and issuing a declaratory judgment on the issue of whether Tennessee's three-drug protocol constitutes cruel and unusual punishment because the manner in which the sodium thiopental is prepared and administered fails to produce unconsciousness or anesthesia prior to the administration of the other two drugs.

Decisions involving such profoundly important and sensitive issues such as the ones involved in this case are best decided on evidence that has been presented, tested, and weighed in an adversarial hearing such as the one that was held by the United States District Court for the Middle District of Tennessee in *Harbison v. Little, No. 3:06-cv-01206, 723 F. Supp. 2d 1032, 2010 U.S. Dist. LEXIS 69338, 2010 WL 2736077 (M.D. Tenn. July 12, 2010)*. The current record in this case **[*4]** contains no such evidence. Accordingly, we have determined that both Mr. West and the State of Tennessee should be afforded an opportunity to present evidence supporting their respective positions to the Chancery Court and that the Chancery Court should be afforded an opportunity to make findings of fact and conclusions of law with regard to the issues presented by the parties.

Accordingly, we grant Mr. West's application for permission to appeal and, dispensing with further briefing and argument in accordance with *Tenn. R. App. P. 2*, we vacate the Chancery Court's October 28, 2010 order and remand the case to the Chancery Court for further proceedings consistent with this order. Because of the shortness of the time between the entry of this order and the current date of Mr. West's execution, we also grant Mr. West's motion to modify our July 15, 2010 execution order and reset the date of Mr. West's execution for November 30, 2010.

In order to assist the parties and the Chancery Court in identifying and focusing on the issues to be addressed following the remand of this case, we note that the United States Supreme Court addressed Kentucky's three-drug lethal injection protocol in *Baze v. Rees, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008)*. **[*5]** The Court issued several opinions in that case, including Chief Justice Roberts' plurality opinion (writing for two other justices), one concurring opinion, four other opinions concurring in the judgment, and one dissenting opinion. Under these circumstances, Chief Justice Roberts' plurality opinion is controlling. *See Harbison v. Little, 571 F. 3d 531, 535 (6th Cir. 2009)*; *Emmett v. Johnson, 532 F.3d 291, 298 n. 4 (4th Cir. 2008)*; see also *Walker v. Epps, 287 Fed. App'x 371, 375 (5th Cir.2008)* (relying on plurality opinion for controlling legal standard), In *Baze*, the United States Supreme stated that to prevail on an *Eighth Amendment* claim there must be proof of a "substantial risk of serious harm," an "objectively intolerable risk of harm" qualifying as cruel and unusual punishment. *Baze, 553 U.S. at 50* (plurality opinion). "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." *Id.* Rather, to prevail on an *Eighth Amendment* claim, there must be "a demonstrated risk of severe pain . . . [that] is substantial when **[*6]** compared to the known and available alternatives." *Id. at 61*. The same standard applies under *Article 1, section 16 of the Tennessee Constitution. Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 314 (Tenn. 2005)*. Therefore, to prevail on a claim of cruel and unusual punishment under *Article 1, section 16 of the Tennessee Constitution*, the inmate must also introduce proof that there is an objectively intolerable risk of harm or suffering that would qualify as cruel and unusual punishment. The heavy burden of proving this risk is on the party challenging the protocol. *Baze v. Rees, 553 U.S. at 53*.

The plurality opinion in *Baze*, in addressing the constitutionality of Kentucky's similar three-drug lethal injection protocol, noted that the intent behind administration of the first drug, sodium thiopental, is to ensure that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs. *Id. at 44*. Even viewing the uncontroverted affidavit of Dr. Lubarsky as true, [1] we note that there is no objective proof in the record regarding what level of sodium thiopental is necessary to ensure that a prisoner is at a level of unconsciousness **[*7]** where he or she will be unable to feel severe pain at the time the second and third drugs are administered. Furthermore, although Dr. Lubarsky opined that the

sodium thiopental serum levels present in the three executed inmates were not high enough to ensure unconsciousness, there is no evidence in the record as to what serum level (and concomitant dosage) would induce a level of unconsciousness to assure that the inmate does not suffer severe pain. Accordingly, there is currently no evidence upon which to base a decision of what procedures are required to ensure an execution by lethal injection is free of risk of suffering. Furthermore, the State has not yet been afforded an opportunity to present evidence countering the currently uncontested opinion testimony of Dr. Lubarsky. At present, there is no evidence in the record in defense of the adequacy of existing procedures to ensure that inmates are unconscious before the pancuronium bromide and potassium chloride are administered. Without such evidence, we cannot determine whether lethal injection under the current protocol, specifically the portion of the protocol that sets out the proper amount and concentration for sodium thiopental, **[*8]** constitutes cruel and unusual punishment.

> 1 In reaching the conclusion that Tennessee's lethal injection procedures do not render those being executed in Tennessee unconscious before the pancuronium bromide and potassium chloride are administered, Dr. Lubarsky relied upon the findings set forth in an article titled *Inadequate Anaesthesia in Lethal Injection for Execution* that he co-authored with Drs. Leonidas G. Koniaris, Teresa A. Zimmers, and Jonathan P. Sheldon and which was published in the British medical journal *The Lancet* in April 2005 ("Lancet study"). In *State v. Hester, 324 S.W.3d 1, 2010 Tenn. LEXIS 897, 2010 WL 3893760, at *63 (Tenn. 2010)*, this Court joined the United States Supreme Court and other jurisdictions in declining to afford constitutional weight to the Lancet Study as a basis for rejecting the three-drug lethal injection protocol.

Accordingly, on remand, the parties and the Chancery Court should, in addition to any of the other matters properly raised by the parties, particularly address:

> (1) The scientific basis for and reliability of Dr. Lubarsky's or any other expert's opinion under the standards of *Tennessee Rules of Evidence 702* and *703* and *McDaniel v. CSX Transp., Inc., 955 S.W.2d 257 (Tenn. 1997)*;
>
> (2) **[*9]** Whether the current amount and concentration of sodium thiopental mandated by Tennessee's current lethal injection protocol are insufficient to ensure unconsciousness so as to create an objectively intolerable risk of severe suffering or pain during the execution process; and if so
>
> (3) At what level sodium thiopental is sufficient to ensure unconsciousness so as to negate the objectively intolerable risk of severe suffering or pain during the execution process,

It is further ordered that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law at 10:00 p.m. on the 30th day of November, 2010, or as soon as possible thereafter within the following twenty-four hours, unless otherwise ordered by this Court or other appropriate authority.

Counsel for Mr. West shall provide a copy of any order staying execution of this order to the Office of the Clerk of the Appellate Court in Nashville. The Clerk shall expeditiously furnish a copy of any order of stay to the Warden of the Riverbend Maximum Security Institution.

The costs of these proceedings are taxed to the State of Tennessee.

IT IS SO ORDERED.

PER CURIAM

Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Western Division at Cincinnati.
Lawrence LANDRUM, Petitioner,
v.
Carl S. ANDERSON, Warden, Respondent.

No. 1:96 CV 641.
Aug. 22, 2012.

Gerald William Simmons, Thompson, Hine & Flory, Cincinnati, OH, David Bodiker, Randall Lee Porter, Ohio Public Defender's Office, Columbus, OH, for Petitioner.

REPORT AND RECOMMENDATIONS

MICHAEL R. MERZ, United States Magistrate Judge.

*1 This case is before the Court on Petitioner's Motion for Relief from Judgment Pursuant to Civ. R. 60(b) (Doc. No. 235). The Warden has opposed the Motion (Doc. No. 238) and Petitioner has filed a Reply in support (Doc. No. 239). Post-judgment motions such as those under Fed.R.Civ.P. 60(b) are deemed referred to the Magistrate Judge under 28 U.S.C. § 636(b)(3) for a report and recommendations.

Procedural History

Among other claims of ineffective assistance of trial counsel, Petitioner Lawrence Landrum asserted his trial attorney should have sought admission of testimony from Rameal Coffenberger that co-perpetrator Grant Swackhammer admitted to being the principal offender (hereinafter the "Coffenberger Claim"). The District Court found this claim meritorious and granted a conditional writ requiring that Landrum be released unless he was retried and again convicted. *Landrum v. Anderson,* 2006 U.S. Dist. LEXIS 27510, 2006 WL 1027738 (Apr. 17, 2006).

The Court of Appeals reversed. *Landrum v. Mitchell,* 625 F.3d 905 (6th Cir.2010). It found that this claim was procedurally defaulted on two bases. To the extent the claim should havebeen raised on direct appeal under Ohio law, appellate counsel's failure to do so might have been ineffective assistance of appellate counsel, but the ineffective assistance of appellate counsel claim was itself procedurally defaulted by failure to timely file an application to reopen the direct appeal under Ohio R.App. P. 26(B), a so-called *Murnahan* proceeding.[FN1] *Id.* at 916–918. To the extent the claim could have been raised in post-conviction, it was procedurally defaulted by post-conviction counsels' failure to do so properly. *Id.* at 918–919. Ineffective assistance of post-conviction counsel could not excuse that default "because there is no constitutional right to an attorney in post-conviction proceedings." *Id.* at 919, *citing Coleman v. Thompson,* 501 U.S. 722, 752–53, 111 S.Ct. 2546, 115 L.Ed.2d 640 and *Pennsylvania v. Finley,* 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The United States Supreme Court denied certiorari in October, 2011. *Landrum v. Mitchell,* —— U.S. ——, 132 S.Ct. 127, 181 L.Ed.2d 49 (2011).

FN1. Ohio R.App. P. 26(B) as amended effective July 1, 1993, was drafted by the Ohio Supreme Court rules Advisory Committee at the express direction of the Ohio Supreme Court in *State v. Murnahan,* 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), which held that claims of ineffective assistance of appellate counsel must be raised in the courts of appeals rather than in trial court post-conviction proceedings under Ohio Revised Code § 2953.21.

The Decision in *Martinez v. Ryan*

Landrum now seeks to have the judgment reopened, not to correct any error this Court made, but because of an intervening change in the law the Sixth Circuit applied. That change was wrought by *Martinez v. Ryan,* 566 U.S. ——, 132 S.Ct. 1309,

182 L.Ed.2d 272 (2012), decided March 12, 2012, five months after certiorari was denied in this case.

In *Coleman v. Thompson,* 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), the Supreme Court had held that an attorney's ignorance or inadvertence in a post-conviction proceeding did not qualify as cause to excuse a procedural default. *Coleman* remained the law for twenty years and the District Court in *Martinez* and the Ninth Circuit on appeal in that case applied *Coleman* to bar consideration of an ineffective assistance of trial counsel claim which had been procedurally defaulted by failure to raise the claim in the first proceeding where it could have been raised. The Supreme Court reversed, holding:

> ***2** 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.

132 S.Ct. at 1315. The Court noted that Arizona "does not permit a convicted person alleging ineffective assistance of trial counsel to raise that claim on direct review. Instead, the prisoner must bring the claim in state collateral proceedings." *Id.* at 1313. As the Court noted, citing *Massaro v. United States,* 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003), Arizona parallels the federal system in this regard: federal court claims of ineffective assistance of trial counsel cannot be raised on direct appeal even if they depend on the record; they must be raised by motion to vacate under 28 U.S.C. § 2255. Because a collateral petition was the only proceeding in which an ineffective assistance of trial counsel claim could be raised in Arizona, the Supreme Court thought it should be made more like the situation where a claim of ineffective assistance of trial counsel can be raised on direct appeal, where a defendant is constitutionally guaranteed the effective assistance of counsel, so that a defective representation on direct appeal can provide excusing cause. See discussion, *Martinez,* 132 S.Ct. at 1317.

The precise holding in *Martinez* is

> [W]hen a State requires a prisoner to raise an ineffectiveassistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Cf. Miller–El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (describing standards for certificates of appealability to issue).

Id. at 1318–1319. The Court emphasized the narrowness of the new rule. "*Coleman* held that an attorney's negligence in a post-conviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial." *Id.* at 1319. "The rule of *Coleman* governs in all but the limited circumstances recognized here." *Id.* at 1320. The Sixth Circuit relied on *Coleman* to find that ineffective assistance of Landrum's post-conviction counsel could not excuse his procedural default in those proceedings. *Landrum,* 625 F.3d at 919.

*3 The Supreme Court did not grant habeas relief in *Martinez,* but remanded for decision of (1) "whether Martinez's attorney in his first collateral proceeding was ineffective," (2) "whether his claim of ineffective assistance of trial counsel is substantial," and (3) "the question of prejudice." *Id.* at 1321. Those same considerations must be applied here.

Analysis

To prevail on his instant Motion, Petitioner must show:

1. That Ohio is sufficiently like Arizona in its treatment of ineffective assistance of trial counsel claims to make *Martinez* applicable at all;

2. That failure to present on initial post-conviction review the ineffective assistance of trial counsel claim accepted by this Court but rejected by the Court of Appeals itself meets the standard of *Strickland v. Washington, supra,* i.e., that it was unreasonably deficient performance and prejudiced the Petitioner;

3. That the ineffective assistance of trial counsel claim is "substantial" or "has some merit"; and

4. That the Motion otherwise meets the requirements of Fed.R.Civ.P. 60(b)(6).

1. Comparing the Ohio and Arizona Procedures for Raising Ineffective Assistance of Trial Counsel Claims

In *Martinez* the Supreme Court noted that Arizona requires ineffective assistance of trial counsel claims to be raised in collateral proceedings. Ohio law is more complex, as described by the Sixth Circuit in *Williams v. Anderson,* 460 F.3d 789, 799 (6th Cir.2006):

> Ohio law requires criminal defendants to bring ineffective assistance of counsel claims on direct review if the defendant has new counsel on appeal, and the trial court record contains sufficient evidence to support the claim. *State v. Cole,* 2 Ohio St.3d 112, 443 N.E.2d 169, 171 (1982). Where the trial court record does not contain sufficient evidence to support the claim, however, the defendant must instead bring the claim in post-conviction proceedings. *See State v. Cooperrider,* 4 Ohio St.3d 226, 4 Ohio B. 580, 4 Ohio St.3d 226, 448 N.E.2d 452, 454 (Ohio 1983). Unlike on direct review, in post-conviction proceedings a petitioner may introduce evidence outside the trial court record to support the claim. *See id.* If a defendant chooses to bring an ineffective assistance of counsel claim on direct review, however, Ohio's "res judicata" rule precludes the defendant from re-raising the claim in post-conviction proceedings. *Id.*

In the instant case, Petitioner chose to bring his ineffective assistance of counsel claim on direct review, thereby foregoing the opportunity to present evidence outside the trial court record to support his claim. Ohio has finality and judicial economy interests in enforcing its prohibition on re-litigation of ineffective assistance of counsel claims in post-conviction proceedings. *State v. Saxon,* 846 N.E.2d 824, 109 Ohio St.3d 176, 2006 WL 759668, at *5 (2006). Thus, normally, we would respect the Ohio court's decision to enforce "res judicata" and decline to consider a petitioner's evidence where the petitioner chose to raise his or her ineffective assistance of counsel claim on direct review. *Cf. Coleman v. Thompson,* 501 U.S. 722, 730–31, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (stating that procedurally defaulted claims are not reviewed for comity and federalism reasons).

*4 460 F.3d at 799.

Landrum relies on an exception to the Ohio direct review requirement for defendants represented on appeal by the same attorney as at trial. His trial attorney, Thomas Phillips, continued to represent him in both the Ross County Court of Appeals and in the Ohio Supreme Court (Motion, Doc. No. 235, PageID 1091, citing record proof of that fact). In *State v. Lentz,* 70 Ohio St.3d 527, 639 N.E.2d 784 (1994), the Ohio Supreme Court made explicit what

had been implicit in *State v. Cole,* 2 Ohio St.3d 112, 443 N.E.2d 169 (1982): Ohio's criminal *res judicata* doctrine, announced in *State v. Perry,* 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), does not bar raising an ineffective assistance of trial counsel claim in post-conviction, even if it could have been raised on direct appeal, when trial and appellate counsel are the same. *Lentz,* 70 Ohio St.3d at 530, 639 N.E.2d 784.

The Warden recognizes this as current Ohio law, but argues that it does not save Landrum's claim. Because he had an opportunity to raise the claim on direct appeal, the Warden asserts, he was not required to raise it in a collateral proceeding (Memo in Opp., Doc. No. 238, PageID 1123). The Warden argues this takes Landrum's case outside the holding in *Martinez.*

The Magistrate Judge agrees that the holding in *Martinez* does not reach quite to this case, but the rationale certainly does. The Supreme Court in *Martinez* was very concerned that a criminal defendant have effective assistance in raising serious ineffective assistance of trial counsel claims. When the same attorney has the case on appeal as at trial, he or she cannot reasonably be expected to assert his own inadequacy or incompetence. *State v. Carter,* 36 Ohio Misc. 170, 304 N.E.2d 415 (Mont.Cty.C.P.1973) (Rice, J., now of this Court). Under those circumstances, Ohio law practically requires the claim be made in post-conviction, although it does not do so by statute or Supreme Court rule. This Court reads *Martinez* as reaching a case such as this one where an ineffective assistance of trial counsel claim had to be raised in post-conviction because the same attorney represented the petitioner at trial and on appeal.

Landrum faced another procedural default ruling in the Sixth Circuit. As noted, his direct appeal counsel did not raise the Coffenberger Claim. The only way to raise a claim that it was ineffective assistance of appellate counsel not to include the Coffenberger Claim on direct appeal was to file an application to reopen the direct appeal under Ohio R.App. P. 26(B). As the Sixth Circuit recognized, ineffective assistance of appellate counsel can excuse failure to raise an ineffective assistance of trial counsel claim, but only if the ineffective assistance of appellate counsel claim is itself not defaulted. *Landrum,* 625 F.3d at 916, *citing Edwards v. Carpenter,* 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000). But the Sixth Circuit found this ineffective assistance of appellate counsel claim was itself defaulted by missing the filing deadline for such motions by about five years. *Id.* at 916–917. It also found the timeliness rule was an adequate and independent state ground of decision. *Id.*

***5** Landrum now asserts that the ineffectiveness of counsel in not filing a timely Rule 26(B) application can be excusing cause under *Martinez* (Motion, Doc. No. 235, PageID 1096–1099). This Court disagrees. Justice Kennedy makes it clear that the *Martinez* exception to *Coleman* is limited to claims of ineffective assistance at trial. He notes the distinction between initial-review collateral proceedings and other collateral proceedings and notes that the exception is carved from *Coleman* only for the former. 132 S.Ct. at 1316. In discussing possible *stare decisis* objections to *Martinez,* Justice Kennedy wrote:

> Coleman held that an attorney's negligence in a post-conviction proceeding does not establish cause, and this remains true **except** as to initial-review collateral proceedings **for claims of ineffective assistance of counsel at trial.** Coleman itself did not involve an occasion when an attorney erred in an initial-review collateral proceeding with respect to a claim of ineffective trial counsel; and in the 20 years since Coleman was decided, we have not held Coleman applies in circumstances like this one.

132 S.Ct. at 1319 (emphasis added). Finally, at the end of his opinion, he stated:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from

> hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.
>
> 132 S.Ct. 1320.

Ineffective assistance by 26(B) counsel does not come within *Martinez* because 26(B) applications can raise only ineffective assistance of appellate counsel claims, not ineffective assistance of trial counsel claims. Including an ineffective assistance of trial counsel claim as an underlying claim to a claim of ineffective assistance of appellate counsel does not preserve the underlying claim for habeas merit review. *Lott v. Coyle,* 261 F.3d 594 (6th Cir.2001).

Landrum relies on *Williams v. Alabama,* No. 1:07–cv–1276, 2012 U.S. Dist. LEXIS 51850, 2012 WL 1339905 (N.D.Ala. Apr. 12, 2012), which read *Martinez* broadly enough to encompass all ineffective assistance of counsel claims, rather than just trial counsel. In support of that reading, Landrum cites Justice Scalia's dissent in *Martinez.* Whatever the logic of that position, it did not command a majority of the Supreme Court, which limited its holding to ineffective assistance of trial counsel claims.

2. Was it Ineffective Assistance of Post–Conviction Counsel to fail to Include the Coffenberger Claim in the Petition for Post–Conviction Relief?

To succeed on his Motion, Landrum must also show that failure to present the Coffenberger Claim on initial post-conviction review itself meets the standard of *Strickland v. Washington, supra, i.e.,* that it was unreasonably deficient performance and prejudiced the Petitioner.

***6** The Supreme Court in *Martinez* did little to adumbrate a standard for ineffective assistance of post-conviction counsel beyond saying *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), would provide the governing standard. *Martinez,* 132 S.Ct. at 1318. Ineffective assistance of appellate counsel claims are also governed by *Strickland. Smith v. Robbins,* 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); *Burger v. Kemp,* 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987). However, the tasks to be performed and the possibilities of prejudice are quite different on appeal than at trial, so the *Strickland* standard is applied to different conduct and decisions when ineffective assistance of appellate counsel claims are being considered. See, e .g., *Mapes v. Coyle,* 171 F.3d 408 (6th Cir.1999).

Rather than attempting to create a detailed general standard in this first case the Court has confronted in applying this branch of *Martinez,* it is more appropriate to proceed in common law fashion to consider just the conduct exhibited here. Landrum provides no assistance on this question, as his Motion argues only the ineffective assistance of *Murnahan* counsel claim (Motion, Doc. No. 235, PageID 1099–1100).

As a reminder, the governing standard for ineffective assistance of counsel in *Strickland* is

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687. In other words, to establish ineffective assistance, a defendant must show both deficient performance and prejudice. *Berghuis v. Thompkins,* —— U.S. ——, ——, 130 S.Ct. 2250,

2255, 176 L.Ed.2d 1098 (2010), *citing Knowles v. Mirzayance,* 556 U.S. 111, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009).

In this case, the procedural default in post-conviction which the state courts enforced against Landrum and to which the Sixth Circuit deferred was failure to include the Coffenberger Claim in the post-conviction petition itself, although it was included in an attached affidavit:

> Although Landrum did raise an ineffective assistance of trial counsel claim in his post-conviction petition, he did not include the allegation about introducing Coffenberger's testimony in the guilt phase. In this court, Landrum argues that his general allegation of ineffective assistance of counsel, along with affidavits from his trial counsel and another attorney that were attached to his post-conviction petition, sufficed to have presented the claim to the post-conviction trial court. Landrum's trial counsel's affidavit recited that additional time was needed to develop background information regarding Swackhammer's relative culpability. In the other affidavit, an attorney not involved in the trial opined that Landrum's trial counsel was deficient for failing to present Coffenberger's testimony in the trial phase. Reference to Coffenberger in Landrum's post-conviction petition itself can only be fairly read as a reference to the penalty phase of the trial, not the guilt phase. The affidavits on which Landrum relies did not present the factual basis for the ineffective assistance claim raised here because no corresponding claim was made in the state post-conviction petition and, thus, the state court would have had to read beyond the petition to discover it. See *Baldwin [v. Reese],* 541 U.S. at 32; *Pillette [v. Foltz],* 824 F.2d at 497–98.
>
> *7 *Landrum,* 625 F.3d at 918–919.

In other words, post-conviction counsel recognized the Coffenberger Claim and presented it twice in affidavits attached to the post-conviction petition, but did not actually plead the claim in the body of the petition. This Court finds that to be deficient performance. That it was prejudicial can be inferred from the fact that this Court found the Coffenberger Claim meritorious but the Sixth Circuit declined to reach the merits because of this procedural default.

3. The Coffenberger Claim is Substantial

The third branch of the *Martinez* test requires that the ineffective assistance of trial counsel claim be "substantial" or have "some merit."

In the Report and Recommendations, the Magistrate Judge found the Coffenberger Claim sufficiently meritorious as to warrant a conditional writ (Report and Recommendations, Doc. No. 205). In particular, I concluded "Trial counsel had in Coffenberger's testimony an admission of principal offender status by an admitted co-perpetrator which admission, if believed by the jury, would have prevented imposition of a death sentence." *Id.* at PageID 641.

The Sixth Circuit found this was error. It noted "The district court was incorrect in believing that Landum could not receive the death penalty if a jury believed Swackhammer's admission that he slit White's throat." *Landrum,* 625 F.3d at 915, n. 3. It continued:

> Moreover, Ohio does not require a defendant to be the principal offender to receive a death specification. See *Ohio v. Herring,* 94 Ohio St.3d 246, 2002 Ohio 796, 762 N.E.2d 940, 949–50 (Ohio 2002).

Id. at 919. Finally it held:

> Even if the jury believed that Landrum did not personally slit the victim's throat, Landrum would still likely have been convicted of aggravated murder and aggravated burglary, either as an aider and abettor or based on the felony-murder rule. See Ohio Rev.Code. §§ 2923.03, 2903.01(B). The district court was simply incorrect in its observation that Swackhammer's admission, if believed, would have prevented Landrum from be-

ing sentenced to death.

Id. at 919, n. 4.

In *State v. Herring, supra,* the jury found the defendant guilty of the capital specification in Ohio Revised Code § 2929.04(A)(5) which provides in pertinent part that "the offense at bar was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons by the offender." Justice Pfeiffer, principal sponsor of Ohio's current death penalty statute, wrote the majority opinion in *Herring.* He wrote:

> In his third proposition of law, Herring argues that the term "offender" in the (A)(5) multiple-murder specification means the principal offender—i.e., the actual killer. He argues that since the jury did not find him to be the actual killer in any of the three murders, he cannot be guilty of this specification.
>
> We reject this contention. As he must, Herring concedes that R.C. 2929.04(A)(5) contains neither an express requirement of prior calculation and design nor an express requirement that the offender be the actual killer. R.C. 2929.04(A)(5) uses the unadorned term "offender," rather than "principal offender." Nor does the term "prior calculation and design" appear therein.
>
> ***8** Nevertheless, Herring attempts to read a principal-offender requirement into our precedents. He cites *State v. Smith* (1997), 80 Ohio St.3d 89, 117, 684 N.E.2d 668, 693, and *State v. Sneed* (1992), 63 Ohio St.3d 3, 10–11, 584 N.E.2d 1160, 1168, fn. 3, as supporting his claim. These cases do not support Herring's argument. Smith holds that the Eighth Amendment permits a state to sentence to death one who aids and abets a killing with prior calculation and design. It does not hold, or even suggest, that prior calculation and design is necessary to convict an aider and abettor of the (A)(5) specification. *Sneed* involved the felony-murder specification of R.C. 2929.04(A)(7), not the (A)(5) multiple-murder specification. Unlike the (A)(5) specification, R.C. 2929.04(A)(7) specifically requires that "either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design."
>
> Herring's third proposition of law is overruled.

94 Ohio St.3d at 252, 762 N.E.2d 940. There were three deceased victims in *Herring,* but only one in Landrum's case, Robert White. In *Herring* the Ohio Supreme Court distinguished the Ohio Revised Code § 2929.04(A)(5) death specification from that in Ohio Revised Code § 2929.04(A)(7), the felony murder death specification, where there must be a jury finding that the defendant is the principal offender or acted with prior calculation and design. Landrum was charged under both the (A)(3) specification ("purpose of escaping detection") and also the (A)(7) section and was convicted of both, so that he could have been sentenced to death on either conviction.

Thus *Herring* is inapposite because it interprets only the multiple victim specification. However, Landrum was convicted of the Ohio Revised Code § 2929.04(A)(3) specification as well as the (A)(7) specification; a principal offender finding is necessary for the latter but not for the former.

Even if the Sixth Circuit was incorrect in its conclusion that a principal offender finding was not necessary for the (A)(7) conviction, its conclusion to the contrary is the law of the case. Under the doctrine of law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation. *United States v. Moored,* 38 F.3d 1419, 1421 (6th Cir.1994), *citing United States v. Bell,* 988 F.2d 247, 250 (1st Cir.1993). "As most commonly defined, the doctrine [of law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v.*

California, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983), *citing* 1B Moore's Federal Practice ¶ 0.404 (1982); *Patterson v. Haskins,* 470 F.3d 643, 660–61 (6th Cir.2006); *United States v. City of Detroit,* 401 F.3d 448, 452 (6th Cir.2005). "While the 'law of the case' doctrine is not an inexorable command, a decision of a legal issue establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *White v. Murtha,* 377 F.2d 428 (5th Cir.1967), *quoted approvingly in Association of Frigidaire Model Makers v. General Motors Corp.,* 51 F.3d 271, 1995 U.S.App. LEXIS 7615, *12 (for full text) (6th Cir.1995). The purpose of the doctrine is twofold: (1) to prevent the continued litigation of settled issues; and (2) to assure compliance by inferior courts with the decisions of superior courts. *United States v. Todd,* 920 F.2d 399 (6th Cir.1990), *citing* Moore's Federal Practice.

***9** If Coffenberger's testimony had been heard by the jury during the guilt phase, there is a reasonable probability that at least one juror would have concluded Landrum was not the principal offender and therefore he could not have been convicted on the (A)(7) specification. However, there was sufficient evidence to support a conviction on the (A)(3) specification. The Court concludes that the Coffenberger Claim is substantial, but not determinative.

4. Does the Motion Otherwise Meet the Requirements of Fed.R.Civ.P. 60(b)(6)?

Relief should be granted under Fed.R.Civ.P. 60(b)(6) only in unusual circumstances where principles of equity mandate relief, *Olle v. Henry & Wright Corp.,* 910 F.2d 357, 365 (6th Cir.1990), and the district court's discretion under 60(b)(6) is particularly broad. *Johnson v. Dellatifa,* 357 F.3d 539 (6th Cir.2004); *McDowell v. Dynamics Corp.,* 931 F.2d 380, 383 (6th Cir.1991); *Hopper v. Euclid Manor Nursing Home, Inc.,* 867 F.2d 291, 294 (6th Cir.1989). Relief is warranted only in exceptional or extraordinary circumstances not addressed by the other numbered clauses of Rule 60. *Dellatifa,* supra; *Hopper v. Euclid Manor Nursing Home, Inc.,* 867 F.2d 291, 294 (6th Cir.1989). A change in decisional law is usually not, by itself, an extraordinary circumstance. *Agostini v. Felton,* 521 U.S. 203, 239, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund,* 249 F.3d 519, 524 (6th Cir.2001). Subsection (b)(6) is properly invoked only in "unusual and extreme situations where principles of equity mandate relief." *Frontier Ins. Co. v. Blaty,* 454 F.3d 590, 597 (6th Cir.2006) (internal quotation marks omitted).

Landrum argues that the following extraordinary circumstances exist in this case. First, it is a death penalty case (Motion, Doc. No. 235, PageID 1106). Second, the "change in law in *Martinez* precisely addresses the default issues that the Sixth Circuit found barred it from reaching the merits of the Coffenberger issue" *Id.* "Third, Landrum's *Martinez* cause and prejudice claim is strong" because without relief from judgment his ineffective assistance of trial counsel claim will never have been heard on the merits by any court. *Id.* at 1107.

Stokes v. Williams, 475 F.3d 732 (6th Cir.2007) , cited by Landrum, is a habeas case in which the petition had been dismissed as untimely under circuit law as it existed before *Abela v. Martin,* 348 F.3d 164 (6th Cir.2003). The petition would have been timely under *Abela* and the petitioner sought relief from judgment under Fed.R.Civ.P. 60(b)(6). Affirming denial of relief from judgment and summarizing the standard under Fed.R.Civ.P. 60(b)(6), the Sixth Circuit wrote:

> As recognized by the district judge in this case, in evaluating claims for relief pursuant to Rule 60(b)(6), federal courts have consistently held "that a change in decisional law is usually not, by itself, an 'extraordinary circumstance' meriting

> Rule 60(b)(6) relief." *Blue Diamond Coal Co.,* 249 F.3d at 524. See also *Gonzalez v. Crosby,* 545 U.S. 524, 125 S.Ct. 2641, 2650, 162 L.Ed.2d 480 (2005); *Agostini v. Felton,* 521 U.S. 203, 239, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *Overbee,* 765 F.2d at 580. The respondent in this case in fact cites this line of decisions in opposing Stokes's claim for relief based upon the en banc *Abela* ruling. Especially prominent in his appellate argument is his reliance upon *Gonzalez,* a case in which the United States Supreme Court ruled that a change in the way the applicable habeas corpus statute-of-limitations period could be tolled did not resurrect a habeas petition that had been dismissed as untimely in accordance with earlier precedent. As stated by the Court, "The District Court's interpretation was by all appearances correct under the Eleventh Circuit's then-prevailing interpretation of 28 U.S.C. § 2244(d)(2). It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation." *Gonzalez,* 125 S.Ct. at 2650.

***10** 475 F.3d at 735–736. The *Stokes* court particularly noted that a change in decisional law is less supportive of 60(b)(6) relief when the judgment has become final, as has the judgment in this case with issuance of the mandate. *Id.* at 736. Although *Stokes* was not a capital case, the petitioner was serving a life sentence for rape. The effect of denying 60(b)(6) relief was that the petitioner never got federal court consideration of any of his habeas corpus claims, not just the one claim asserted here. The *Stokes* court quoted with approval the test under 60(b)(6) enunciated in *Blue Diamond Coal Co., supra:* "[T]he decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the 'incessant command of the court's conscience that justice be done in light of all the facts.' " 249 F.3d at 529 (*quoting Griffin v. Swim–Tech Corp.,* 722 F.2d 677, 680 (11th Cir.1984)).

Although this is a death penalty case, that fact cuts both ways with respect to the instant Motion. This case has been thoroughly considered by the Ohio and federal courts. It is always in the interest of a death row inmate to seek further review because further review delays execution of sentence. In his typically trenchant fashion, Justice Scalia spelled out the likely dynamics in his dissent in *Martinez:*

> Whether counsel appointed for state collateral review raises the ineffective-assistance-of-trial-counsel claim or not, federal habeas review will proceed. In practical effect, that may not make much difference in noncapital cases (except for the squandering of state taxpayers' money): The defendant will stay in prison, continuing to serve his sentence, while federal habeas review grinds on. But in capital cases, it will effectively reduce the sentence, giving the defendant as many more years to live, beyond the lives of the innocent victims whose life he snuffed out, as the process of federal habeas may consume. I guarantee that an assertion of ineffective assistance of trial counsel will be made in all capital cases from this date on, causing (because of today's holding) execution of the sentence to be deferred until either that claim, or the claim that appointed counsel was ineffective in failing to make that claim, has worked its way through the federal system.

132 S.Ct. at 1323–1324. Thus the fact that this is a death penalty case does not weigh unequivocally in favor of reopening the judgment.

Second, contrary to Landrum's assertion, the change in law in *Martinez* does not "precisely address[ ] the issue with Landrum's IAC claim." (Motion, Doc. No. 235, PageID 1106.) As pointed out at length above, Ohio is not a State like Arizona in which all claims of ineffective assistance of trial counsel must be brought in post-conviction. In fact, the "fit" of the change of law with a habeas petitioner's claims was much closer in *Stokes, supra,* and in *Gonzalez v. Crosby,* 545 U.S. 524, 125 S.Ct.

2641, 162 L.Ed.2d 480 (2005), but relief under Fed.R.Civ.P. 60(b)(6) was denied in both of those cases.

***11** Third, however, Landrum's *Martinez* claim is strong. It was on the basis of *Coleman, supra,* that the Sixth Circuit denied the writ when this Court had granted it. Had *Martinez* been the law at the time the Sixth Circuit decided the case, the ineffective assistance of post-conviction counsel in not pleading the Coffenberger Claim in the body of the Ohio Revised Code § 2953.21 petition would have been available as excusing cause.

Conclusion

Having weighed the factors required under Fed.R.Civ.P. 60(b) (6), the Magistrate Judge concludes the Motion should be granted. This Court can then reconsider the Coffenberger Claim in light of the Sixth Circuit's decision. This will allow the Sixth Circuit on appeal to reconsider its decision in light of *Martinez.*

S.D.Ohio,2012.
Landrum v. Anderson
Not Reported in F.Supp.2d, 2012 WL 3637365 (S.D.Ohio)

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Western Division at Cincinnati.
Lawrence LANDRUM, Petitioner,
v.
Carl S. ANDERSON, Warden, Respondent.

No. 1:96–cv–641.
Oct. 26, 2012.

Gerald William Simmons, Thompson, Hine & Flory, Cincinnati, OH, David Bodiker, Randall Lee Porter, Ohio Public Defender Office, Columbus, OH, for Petitioner.

SUPPLEMENTAL REPORT AND RECOMMENDATIONS

MICHAEL R. MERZ, United States Magistrate Judge.

***1** This case is before the Court on the Warden's Objections (Doc. No. 243) to the Magistrate Judge's Report and Recommendations (the "Report," Doc. No. 240 [FN1]) recommending that Petitioner's Motion for Relief from Judgment (Doc. No. 235) be granted. Petitioner has responded to the Objections (Doc. No. 245) and Judge Rose has recommitted the matter to the Magistrate Judge for reconsideration in light of the Objections (Doc. No. 244).

FN1. Reported at *Landrum v. Anderson,* 2012 U.S. Dist. LEXIS 118501, 2012 WL 3637365 (S.D.Ohio Aug. 22, 2012).

The Warden raises five objections to the Report which will be considered seriatim. The Warden correctly asserts that the standard of review is *de novo* (Objections, Doc. No. 243, PageID 1173–1174).

Objection 1: *Martinez v. Ryan* is Inapplicable

In *Martinez v. Ryan,* 566 U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), the Supreme Court held that ineffective assistance of post-conviction counsel could act as excusing cause for a procedural default in presenting an ineffective assistance of trial counsel claim in post-conviction in States such as Arizona where a defendant was required to present ineffective assistance of trial counsel claims in a collateral proceeding. In the Report I concluded that "Ohio law is more complex" than Arizona's, requiring ineffective assistance of trial counsel claims dependent solely on the appellate record to be presented on direct appeal and claims dependent on evidence outside the appellate record to be presented in post-conviction proceedings under Ohio Revised Code § 2953.21 (Report, Doc. No. 240, PageID 1140). Because Landrum had the same counsel at trial and on direct appeal, I concluded he was practically required to raise his ineffective assistance of trial counsel claims in post-conviction and that, while this was a slight extension of the holding in *Martinez,* it was within the Supreme Court's rationale. *Id.* at 1141.

The Warden objects that *Martinez* is inapplicable in Ohio because "[i]t is well-established that *Martinez v. Ryan* is limited to states in which claims of ineffective assistance of trial counsel *cannot* be raised on direct appeal." (Objections, Doc. No. 243, emphasis sic, relying on *Ibarra v. Thaler,* 687 F.3d 222 (5th Cir.2012) (Jones, Ch. J.); *Taylor v. McKee,* 649 F.3d 446 (6th Cir.2011); and *Sowards v. Attorney General of Ohio,* 2012 U .S. Dist LEXIS 55370, 2012 WL 1365728 (S.D.Ohio Apr. 19, 2012) (Kemp, Ch. M.J.).

In *Ibarra,* petitioner sought an extension of *Martinez* to cover "(1) an ineffectiveassistance-of-trial-counsel claim; (2) a claim of mental retardation under *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); and (3) a claim that the prosecution violated his rights under the Vienna Convention on Consular Relations." 687 F.3d at 224. The first two claims were summarily dismissed. As to the ineffective assistance of trial

counsel claim, Judge Jones noted that it had first been presented by Ibarra in his **fourth** state habeas petition. She then contrasted Arizona's procedures at issue in *Martinez* with Texas procedure:

> ***2** Contrast these procedures with Texas's rules governing ineffectiveness claims. The TCCA [Texas Court of Criminal Appeals] made clear that state habeas petition is the preferred vehicle for developing ineffectiveness claims. *Robinson v. State,* 16 S.W.3d 808, 809–10 (Tex.Crim.App.2000). Yet Texas defendants may first raise ineffectiveness claims before the trial court following conviction via a motion for new trial, when practicable, and the trial court abuses its discretion by failing to hold a hearing on an ineffectiveness claim predicated on matters not determinable from the record. *Holden v. State,* 201 S.W.3d 761, 762–63 (Tex.Crim.App.2003). A prisoner who develops such a record through a new trial motion can of course pursue the denial of an ineffectiveness claim through direct appeal, but the TCCA has indicated that a new trial motion is neither a sufficient nor necessary condition to secure review of an ineffectiveness claim on direct appeal. Indeed, an ineffectiveness claim may simply be raised on direct appeal without the benefit of a motion for new trial. *Robinson,* 16 S.W.3d at 813. As a result, both Texas intermediate courts and the TCCA sometimes reach the merits of ineffectiveness claims on direct appeal. *Thompson v. State,* 9 S.W.3d 808, 813–14 (Tex.Crim.App.1999). Where they do not, Texas habeas procedures remain open to convicted defendants. *Ex parte Nailor,* 149 S.W.3d 125, 129, 131 (Tex.Crim.App.2004). In short, Texas procedures do not mandate that ineffectiveness claims be heard in the first instance in habeas proceedings, and they do not by law deprive Texas defendants of counsel-and courtdriven guidance in pursuing ineffectiveness claims.
>
> Accordingly, Ibarra is not entitled to the benefit of *Martinez* for his ineffectiveness claims, as Texas procedures entitled him to review through counselled motions for new trial and direct appeal. *Id.* at 227. Thus Texas has far more avenues available to raise ineffective assistance of trial counsel claims than Ohio where such a claim dependent on evidence outside the record must be raised in post-conviction.

Taylor v. McKee, 649 F.3d 446 (6th Cir.2011), was handed down while Martinez was pending on certiorari but before it was decided. The court opined:

> "There is no constitutional right to an attorney in state postconviction proceedings," *Coleman v. Thompson,* 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), which means that Taylor did not have a right to appellate counsel on collateral review. Even if the Supreme Court determines that such a right exists in a state post-conviction proceeding that is the first opportunity to present an ineffective-assistance-of-counsel claim, see *Martinez v. Ryan,* —— U.S. ——, 131 S.Ct. 2960, 180 L.Ed.2d 244, 2011 WL 380903 (2011) (grant of certiorari), that right would not apply here, since defendants in Michigan may bring ineffectiveassistance claims on direct appeal, see, e.g., *People v. Taylor,* 275 Mich.App. 177, 737 N.W.2d 790, 796 (Mich.App.2007). Thus the ineffectiveness of appellate counsel at this point in the proceedings does not present a constitutional violation sufficient to establish cause and prejudice for a procedural default.

***3** *Id.* at 452. Taylor arose from a Michigan conviction and Judge Rogers does not describe in detail the Michigan procedures for raising ineffective assistance of trial counsel claims, merely noting that they can be raised on direct appeal. In any event it is doubtful that such a "preinterpretation" of the then-awaited decision in Martinez should be given controlling weight in deciding what the Supreme Court eventually decided.

In *Sowards,* Chief Magistrate Judge Kemp held that *Martinez* is not applicable to excuse a procedural default in raising a claim of ineffective assist-

ance of appellate counsel in an Ohio R.App. P. 26(B) proceeding. There is not even dicta in *Sowards* about the issue presented here.

Thus none of the case law cited by the Warden speaks to the precise issue presented here: what impact does *Martinez* have in Ohio where some ineffective assistance of trial counsel claims must be presented on direct appeal and some must be presented in a collateral attack. The Warden concludes that because *Martinez* does not speak directly to the Ohio situation, it has no application here. Some day the Sixth Circuit or the Supreme Court may reach that conclusion, but neither has done so thus far. In the meantime, it is our duty to give *Martinez* a fair reading and apply its rationale: defendants should have effective counsel in post-conviction, as they do on direct appeal, to raise ineffective assistance of trial counsel claims.

In any event, the Warden argues, this particular claim (as contrasted with ineffective assistance of trial counsel claims in general) is one which should have been raised on direct appeal, citing the Ohio court of appeals conclusion to that effect (Objections, Doc. No. 243, PageID 1176). However, as the Warden admits, the Sixth Circuit rejected that holding. *Landrum v. Mitchell,* 625 F.3d 905, 920 (6th Cir.2010), citing *State v. Hutton,* 100 Ohio St.3d 176, 797 N.E.2d 948 (2003). The Warden argues that the Sixth Circuit misread *Hutton* (Objections, Doc. No. 243, PageID 1176). Whether or not that is so as an abstract matter, the Sixth Circuit's reading of *Hutton* is now the law of this case.

Objection 2: Post–Conviction Counsel Was Not Ineffective

In the Report, I concluded that post-conviction counsel was ineffective because the claim relating to the Coffenberger testimony was included in an affidavit attached to the postconviction petition, but not directly pleaded in the petition (Report, Doc. No. 240, PageID 1143–1145). The Warden argues this was not ineffective assistance because actually pleading the claim would have invited the state courts to invoke *res judicata* rather than reaching the merits (Objections, Doc. No. 243, PageID 1177). This argument is unpersuasive for the reasons given by Petitioner in his Response (Doc. No. 2456, PageID 1190–1191).

Objection 3: Landrum's Ineffective Assistance of Trial Counsel Claim is Not Substantial

In order to succeed on a *Martinez* claim, a habeas petitioner must demonstrated that the underlying claim of ineffective assistance of trial counsel is "substantial." The Warden argues the claim is not substantial because Landrum was convicted of two separate capital specifications and the asserted error would have had no impact on the "murder to escape detection" verdict (Objections, Doc. No. 243, PageID 1179–1180).

*4 As Landrum points out in his Response, this Court has already held the claim is meritorious and it is therefore, *a fortiori,* substantial.

Objection 4: This Case Does Not Present the Unusual Circumstances Required for Relief Under Fed.R.Civ.P. 60(b)(6).

No further analysis is required on this point beyond that made in the original Report.

Objection 5: This Court Lacks Subject Matter Jurisdiction to Grant the Motion

In his last Objection, the Warden essentially argues that Landrum's Rule 60(b)(6) Motion constitutes a second or successive habeas petition. If that were so, the Court would indeed lack subject matter jurisdiction to consider it. *Burton v. Stewart,* 549 U.S. 147, 127 S.Ct. 793, 166 L.Ed.2d 628 (2007). The Warden concedes that the Supreme Court in *Gonzalez v. Crosby,* 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005), found no violation of 28 U.S.C. § 2244(b) when a Rule 60 motion was used to obtain reconsideration of a statute of limitations ruling which turned out to be erroneous under new law. The Warden also concedes that *Gonzalez* in dictum suggested the same would be true for reconsideration of a procedural default ruling which turned out to be erroneous on the basis of new law.

The Warden then argues the claim now made is essentially a new claim because Landrum could previously have made the argument which turned out to be successful in *Martinez.* Note, however, that *Coleman v. Thompson,* 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), had been the firm law for more than twenty years until *Martinez* was decided. Pleadings in capital habeas corpus cases are already sufficiently prolix without requiring petitioners to plead claims well outside settled law on the hope the law may change in their case. *Martinez* was unexpected at the time this case was litigated in this Court. Landrum should not be penalized for having failed to predict it.

Conclusion

Having reexamined the matter in light of the Warden's Objections, the Magistrate Judge again recommends the Motion for Relief from Judgment be granted.

S.D.Ohio,2012.
Landrum v. Anderson
Not Reported in F.Supp.2d, 2012 WL 5309223 (S.D.Ohio)

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Not Reported in F.Supp.2d, 2012 WL 6022810 (S.D.Ohio)
(Cite as: 2012 WL 6022810 (S.D.Ohio))

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Only the Westlaw citation is currently available.

United States District Court, S.D. Ohio, Western Division.
Lawrence LANDRUM, Petitioner,
v.
Carl S. ANDERSON, Warden, Respondent.

No. 1:96–cv–641.
Dec. 4, 2012.

Gerald William Simmons, Thompson, Hine & Flory, Cincinnati, OH, David Bodiker, Randall Lee Porter, Ohio Public Defender Office, Columbus, OH, for Petitioner.

Charles L. Wille, Office of the Ohio Attorney General, Columbus, OH, Daniel R. Ranke, U.S. Attorney's Office, Cleveland, OH, Stephen E. Maher, Thomas E. Madden, Office of the Ohio Attorney General, Columbus, OH, for Respondent.

ENTRY AND ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS (Doc. # 240) AND SUPPLEMENTAL REPORT AND RECOMMENDATIONS (Doc. # 246) IN THEIR ENTIRETY AND GRANTING LANDRUM'S RULE 60(b) MOTION

THOMAS M. ROSE, District Judge.

*1 On August 22, 2012, Magistrate Judge Merz issued a Report and Recommendations (doc. # 240) finding that Lawrence Landrum's ("Landrum's") Rule 60(b) Motion should be granted. The Warden objected (doc. # 243), and this Court then recommitted this matter to Magistrate Judge Merz (doc. # 244). After this Court's recommittal, Landrum responded to the Warden's Objections. (Doc. # 245.) Magistrate Judge Merz next issued a Supplemental Report and Recommendations with the same finding to which the Warden again objected (doc. # 246) and Landrum responded to the Warden's Objections (doc. # 251.) The Warden's objections to both the Report and Recommendations and the Supplemental Report and Recommendations are, therefore, ripe for decision.

As required by 28 U.S.C. § 636(b) and Federal Rules of Civil Procedure Rule 72(b), the District Judge has made a de novo review of the record in this case. Upon said review, the Court finds that the Warden's Objections to the Magistrate Judge's Report and Recommendations and the Warden's Objections to the Magistrate Judge's Supplemental Report and Recommendations are not well-taken, and they are hereby OVERRULED. The Magistrate Judge's Report and Recommendations and Supplemental Report and Recommendations are adopted in their entirety. Landrum's Rule 60(b) Motion is GRANTED.

DONE and **ORDERED.**

S.D.Ohio,2012.
Landrum v. Anderson
Not Reported in F.Supp.2d, 2012 WL 6022810 (S.D.Ohio)

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Attachment A

to David Miller's Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation

Declaration of Pablo Stewart, M.D.

DECLARATION OF PABLO STEWART, M.D.

I, Pablo Stewart, M.D., declare as follows:

1. I am a physician licensed to practice in California and Hawai'i, with a specialty in clinical and forensic psychiatry. I have extensive clinical, research, and academic experience in the diagnosis, treatment, and prevention of substance abuse and related disorders, including the management of patients with dual diagnoses and the use of psychotropic medication and diagnostic, treatment, and community care programs for persons with Posttraumatic Stress Disorder. I have written and published numerous articles in peer review journals on topics that include dual diagnoses, psychopharmacology and the treatment of psychotic disorders and substance abuse. I have designed and taught courses on protocols for identifying and treating psychiatric patients with substance abuse histories and have supervised psychiatric residents in teaching hospitals. I have worked closely with local and state governmental bodies in designing and presenting educational programs about psychiatry, substance abuse, and preventative medicine.

2. I received my Bachelor of Science from the United States Naval Academy, Annapolis, Maryland, in 1973, with a major in chemistry. I received my Doctor of Medicine Degree from the University of California, San Francisco, School of Medicine in 1982.

3. I have served as Medical Director of the Comprehensive Homeless Center, Department of Veterans Affairs Medical Center in San Francisco where I had overall responsibility for the medical and psychiatric services at the Homeless Center; Chief of the Intensive Psychiatric Community Care Program, Department of Veterans Affairs Medical Center in San Francisco, a community based case management program that is social work managed; Chief of the Substance

Abuse Inpatient Unit, Department of Veterans Affairs Medical Center in San Francisco, where I had overall clinical and administrative responsibilities for the unit; and Psychiatrist, Substance Abuse Inpatient Unit, where I provided consultation to the Medical/Surgical Units regarding patients with substance abuse issues. I am currently the Chief of Psychiatric Services at Haight Ashbury Free Clinic, a position I have held since 1991. I served as a Physician Specialist to the Westside Crisis Center, San Francisco from 1984 to 1987 and the Mission Mental Health Crisis Center from 1983 to 1984.

4. In addition to my clinical and teaching responsibilities, I have experience in forensic psychiatry. From 1988 to 1989, I was Director, Forensic Psychiatric Services for the City and County of San Francisco where I had administrative and clinical responsibilities for psychiatric services provided to the inmate population of San Francisco. My duties included direct clinical and administrative responsibility for the Jail Psychiatric Services and the Forensic Unit at San Francisco General Hospital. From 1986 to 1990, I was Senior Attending Psychiatrist, Forensic Unit, University of California, San Francisco General Hospital, where I was responsible for a 12-bed maximum-security psychiatric ward. One of my duties was advising the San Francisco City Attorney on issues pertaining to forensic psychiatry.

5. I am also serving as medical and psychiatric consultant to the monitors of the agreement between the United States and Georgia to improve the quality of juvenile justice facilities, critical mental health, medical and educational services, and treatment programs. The monitor is the Institute of Crime, Justice and Corrections at George Washington University. I have qualified and testified as a Psychiatric Expert witness in federal court cases regarding the implementation of constitutionally mandated psychiatric care to California's inmate population at

different maximum security and psychiatric care facilities. I serve as a Technical Assistance Consultant to the Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration, Department of Health and Human Services; and Psychiatric Consultant to the San Francisco Drug Court.

6. In 1985, I received the Mead-Johnson American Psychiatric Association Fellowship for demonstrated commitment to public sector psychiatry and was selected as the Outstanding Psychiatric Resident by the graduating class of the University of California, San Francisco, School of Medicine. In 1985 - 1986, I was the Chief Resident, Department of Psychiatry, University of California San Francisco General Hospital and had direct clinical supervision of seven psychiatric residents and three to six medical students.

7. I have served as an Examiner for the American Board of Psychiatry and Neurology and am a Diplomate of the same Board. I am active in several professional associations and have served as the President, Secretary-Treasurer and Councilor-at-large of the Alumni-Faculty Association, University of California, San Francisco, School of Medicine; Vice President of the Northern California Area, Alumni-Faculty Association, University of California, San Francisco; and Associate Clinical Member of the American Group Psychotherapy Association.

8. I have held academic appointments as Associate Clinical Professor, Assistant Clinical Professor, and Clinical Instructor in the Department of Psychiatry, University of California, San Francisco, School of Medicine, since 1989. I received the Henry J. Kaiser Award for Excellence in Teaching in 1987 and was selected by the graduating class of the University of California, San Francisco, School of Medicine as one of the top ten faculty members for the academic year 1994 - 1995, 1990 - 1992, and 1988 - 1989. I designed, planned and taught "Drug Alcohol

Abuse" and "Alcoholism," one unit courses covering major aspects of drug and alcohol abuse; supervised fourth year medical students in the care of dual diagnostic patients at the Psychiatric Continuity Clinic, Haight Ashbury Free Clinic; facilitated a weekly psychiatric intern seminar on "Psychiatric Aspects of Medicine;" and lectured on addictionology and substance abuse to the School of Pharmacy, UCSF.

Referral Questions

9. At the request of counsel for David Miller[1], I conducted a psychiatric assessment of Mr. Miller to determine his mental status at the time of the offense for which he has been sentenced to death; the presence and effect of any mental disease or defect he had at the time of the offense; the effect of intoxication on his behavior at the time of the offense and its relationship to his ability to form a premeditated and deliberate design to kill; and the presence of extreme mental or emotional disturbance at the time of the offense.

Materials Reviewed

10. In order to answer the questions asked of me, I conducted a clinical interview of Mr. Miller and reviewed extensive material relating to the legal proceedings against him and his social and medical history, including academic records, child protective service records, affidavits and testimony of family members, statements to law enforcement and testimony, and excerpts of legal proceedings. These are the kinds of materials routinely relied upon by members of my profession in providing expert opinions.

Interview

[1] In the interest of clarity, Mr. Miller and his family members will be referred to by their first names.

11. I interviewed David Miller on August 26, 2002, at the Riverbend Maximum Security Institute, where he is a death-sentenced prisoner. David is a quiet, well-groomed 45-year-old Caucasian male who appears his stated age. He was pleasant and cooperative throughout the interview. He was alert and oriented. Although cooperative, he was somewhat guarded, vigilant and anxious during the interview but became less tense as the interview progressed. David had a somewhat flat affect and explained that he hides from his emotions in order to avoid them. David made a sincere effort to answers questions even when they involved distressing content about his abuse and neglect during childhood. He is especially ashamed of his mother's inappropriate sexual behavior towards him but provided answers to my questions in spite of his obvious feeling of humiliation.

12. David has a remarkable history of recurrent episodes of psychosis. He experienced frequent auditory hallucinations that involved conversations with ghosts. He also experienced visual hallucinations, which he described as illusions of people. All of these episodes occurred prior to his being incarcerated for the current offense. Some occurred during periods of intoxication, while others occurred when he was not intoxicated. David never received any medication for these episodes.

13. David had seizures from the age of 10 to 14 or 15. He described them as grand mal in nature, accompanied by loss of consciousness and tonic clonic movements. As a child, EEG's were administered to him, and he was prescribed barbiturates for his seizures. He is not aware of seizure activity as an adult. He also reports being treated for a heart murmur and having chest and heart pains as a preteen. He experienced several episodes of sleepwalking, night terrors, and nightmares as a child, especially around the age of six or seven.

Social and Medical History

14. David experienced severe and prolonged maltreatment by those entrusted with his care at every stage of his development. His mother drank alcohol during her pregnancy with him. His mother and stepfather beat him as an infant, child, and adolescent. His mother sexually abused him for several years, beginning when he was eight and nine years old. He was removed from the home and placed in foster care facilities and with extended family members when he was 14. When he was 16, the Ohio Youth Commission placed him in an overcrowded and dangerous juvenile facility where he was further traumatized. As a young adult he was coerced into a sexually abusive relationship with a Baptist minister who rescued David when he was homeless.

15. Instability marked David's life from its very beginning. David was born July 16, 1957, in Bowling Green, Ohio, the oldest of six children born to his mother, Loretta Jean Winkelman. Loretta met David's biological father, Earl Miller, in a bar. They never married or lived together. Loretta drank throughout her pregnancy with David. In 1958, when David was ten months old, Loretta married John E. Miller, Jr., an alcoholic welder with an eighth grade education. Although the two had a common last name, John Miller was no relation to Earl Miller, David's father. According to county welfare workers, John initiated divorce proceedings against Loretta in 1969, after a "stormy marriage" that resulted in one son, Randy Evan (11/17/58), and three daughters -- Cindy Marie (11/11/59), Johnna Jean (8/18/62), and Barbara (7/30/66). Loretta had another daughter, Misty Rae (9/22/72), by a different father. One of the daughters is deceased.

16. David was reared in the chaotic, unsafe home of his stepfather, John Miller, and

mother, Loretta. Most of David's formative years were spent in North Baltimore, Ohio. David did not learn that his stepfather was not his biological father until David was around 11 years old. David's biological father is deceased.

17. David's family was plagued with mental disease and impairments. His mother was diagnosed with brain disease secondary to toxin exposure to solvents used in plastics manufacturing. David's mother was exposed to the solvents when she was employed as an assembly line worker. Both David and his brother were exposed to alcohol in utero and demonstrate symptoms associated with Fetal Alcohol Spectrum Disorder.[2] David's brother has mental retardation.

18. David's stepfather, John, was a heavy drinker who, according to welfare workers, "could never see" the children's needs. He assaulted David without provocation. He selected David for the most severe punishment and beat him, according to David, "whenever he felt like it." His stepfather used razor straps, 2' by 4's, and what ever was handy to beat David for little or no reason. David remembers that his stepfather beat him for the slightest thing that set him off. Family members reported that the beatings were severe and resulted in open wounds, bruises "that would be evident for weeks," and loss of consciousness. John knocked David out of a chair, hit him with a board, threw him into a refrigerator with such force it dented the refrigerator and bloodied David's head, dragged him through the house by his hair, and twice ran David's head through the wall. John attempted to break David's arm by twisting it. John

[2] Fetal Alcohol Spectrum Disorder is a grave developmental disability caused by a fetus's exposure to alcohol ingested by the mother. The disorder has lifelong consequences for mental functioning and physical well being. Children born to mothers who drank heavily during their pregnancies often demonstrate impaired judgment, emotional lability, compromised intellectual functioning, attentional deficits, and low adaptive living skills.

kicked, punched, slapped, and strangled David. John hit David with his fists and other objects in the face, mouth, head, abdomen, genitals, and buttocks. David lived in fear that his stepfather was going to beat him to death.

19. David's stepfather reigned the home with terror. He beat Loretta and the other children. Loretta, who had been beaten as a child, offered David and her other children no sanctuary or protection from the abuse of his stepfather. David felt powerless to protect himself, his mother, or his siblings from the abuse. Loretta physically attacked David, although less often than his step father. An aunt reported that as an infant David had scratches and scrapes on his face from being hit by his parents. The aunt also described how Loretta and John bound David in his crib to prevent him from moving. By the time David was 8 years old, the county's Department of Human Services intervened after it received reports "of the children having suspicious bruises, a cluttered and dirty home, marital problems, stresses of having a mentally handicapped child, and a husband that was abusive to the children -- apparently particularly to David."

20. In 1970, Loretta and David began sessions at the Mental Health Center. Loretta humiliated David by cursing him and calling him derogatory names. His mother, who was an alcoholic, coerced David into sexual behavior with her. She forced David to perform sexually with her beginning between the ages of eight or nine until he was finally removed from the home. David reported that her behavior was especially bizarre when she was intoxicated. She became sexually provocative, attempted to seduce David, and became enraged when he tried to ignore or escape her sexual advances. Behavior by David's siblings reflects the inappropriate sexual boundaries of the home. David's mentally retarded brother wore girl's underwear, and David's

half sister became a go-go dancer when she was only 16.

21. Social welfare records refer to Loretta's inappropriate sexual behavior. A social worker that assisted Loretta in 1974 urged Loretta to "not have boyfriends spending the night or behav[e] inappropriately in the presence of the children" and "not have married men who are boyfriends visiting the home when the children are present." The social worker also warned Loretta that "the children should not be sent to their rooms or outside so that Loretta can entertain boyfriends." One of David's caseworkers described Loretta as a hooker, and another offered a more charitable description of Loretta as someone who "is very fond of the night life in the low class bars and the companionship of the men who are always available there." A caseworker who knew Loretta for "many years," reported that Loretta's "habits and morals will not change."

22. By all accounts, Loretta's multiple impairments interfered with her ability to meet her children's basic daily needs. Children in the home were filthy and malnourished. Their home was only partially constructed and in deplorable condition, according to an investigation conducted by a county caseworker. Although there was "a room in the house for a possible bath" the family used "an outhouse." Only the kitchen had running water. In 1971, caseworkers described a new trailer occupied by Loretta and the children as "deteriorated almost beyond belief." due to Loretta's "housekeeping standards." David's girlfriend reported that his mother's home smelled bad and was over run with trash.

23. Chronic abuse in the home took its toll on David's academic performance. By the third grade, he "lost interest" in school, a characteristic manner in which children describe the effect of depression. Although David is of average intelligence, his achievement test scores

suggest learning disabilities or brain damage. His achievement scores, which measure his actual performance, show a wide disparity between his performance and his ability, especially in math. He attended special classes for his difficulty in reading. His GED scores show a significant disparity between his writing skills, where he performed in the lowest 14th percentile, and other tested areas, where he performed in the average range. Persons with fetal alcohol spectrum disorder often have difficulty with basic mathematics and frequently have learning disabilities.

24. David repeatedly fled his home in unsuccessful efforts to prevent his stepfather from beating him and his mother from sexually assaulting him. He hid in public parks and abandoned cars, but was found by police who returned him first to juvenile facilities and then to his home, where his stepfather continued to beat him and his mother continued to sexually assault him. David sought refuge at his grandparents' house, but during one stay with them his grandfather's friend sexually assaulted David. David's school performance plummeted. His last full year of school was in the eighth or ninth grade.

25. David began to experience seizures and recurrent episodes of loss of contact with reality when he reached the age of 10. On one occasion when he was 13 he awoke in a tool shed at home. His last memory was having been in school. On other occasions, he found himself in places without realizing how he came to be there. He had amnesia for pre and post ictal stages of the seizures. Physicians prescribed phenobarbital[3] and dilantin[4] for his seizures; he became

[3] Phenobarbital is a highly addictive barbiturate with anti-convulsant properties. Its low toxicity and low cost made it one of the more widely used anti-epileptics for generalized tonic-clonic and partial seizures in children, but its tendency to disturb the behavior of children has reduced its use as a primary agent.

addicted to both these medications.

26. After Loretta and John divorced, all the children in the home were removed from Loretta's custody in April 1971 when Loretta "agreed to place the children after many complaints of neglect, rather than have the case brought to court." Caseworkers reported they "had enough evidence of neglect to send her [Loretta] to prison if the Judge saw fit." David was placed with a foster family, placed with his maternal aunt on two occasions, and was finally sent a reformatory notorious for overcrowding and maltreatment of boys.

27. Terror, rampant sexual abuse, physical assaults, and coercive control defined the atmosphere at the boys' school and further traumatized David. A former superintendent of the facility acknowledged that the institution operated under a "deeply entrenched destructive regime of control and security that had dominated Fairfield for so many decades" at the time David was placed there. The superintendent acknowledged that "[t]reatment and/or rehabilitation was not possible to any degree," that it "would not be unusual for a child to be held in isolation for as long as 20 days," and that "a rubber hose devise known as "red jake" was also used to inflict punishment." A "small portion of the staff" sexually abused the children," and "any abuses . . .went unreported because the children were intimidated to be quiet and not complain."

28. When David was 17, he was placed with a foster family that managed a local hotel in Findley. David also attended a welding school and successfully completed its training program. David was able to obtain a job at Differential Car Company, where his caseworker confirmed he

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[4]Dilantin (phenytoin) is effective against all types of partial and tonic-clonic seizures but not absence seizures. It exerts antiseizure activity without causing general depression of the central nervous system. Behavioral effects of over dosage include hyperactivity, confusion, dullness, drowsiness, and hallucinations.

was a good worker.

29. In 1974, when he was only 17, David joined the U.S. Marine Corps. He wanted to be sent to Vietnam. He was a slight youth who had experienced chronic health problems. During boot camp, he was so determined to succeed that he sustained stress fractures in his legs and was put on light duty. After he completed boot camp, he was assigned to a motor transport unit rather than Vietnam. David became despondent when he learned he was not assigned to go to Vietnam and went AWOL. Although David had brought his drug and alcohol use under control during his training, he returned to inhaling organic solvents (huffing gasoline) when he learned he was not going to Vietnam. He was administratively discharged around September 1976.

30. David began dating Laurie Street in mid-1978 and became infatuated with her. Although David drank an excessive amount of beer when he dated Laurie, he was never physically abusive. Laurie became pregnant and gave birth to David's daughter, Stephanie Lee. David wanted Laurie to marry him, but Laurie married someone else even though she had tender feelings for David. Laurie described David as someone who "was good to" her and who "was nice" to her and their daughter. David "would buy" things for Stephanie. After Laurie married someone else, David moved to Texas. He told Laurie "he wanted to see" his daughter and he "wanted to write," but Laurie "told him not to" interfere with her marriage. David respected Laurie's request. In Texas, David found employment as a welder and bar tender in Houston. He remained in Texas for six to seven months and returned to Ohio in May or June, 1979. He visited his daughter and Laurie, but Laurie again asked him not to contact her because she was "trying to make her marriage work." David was hurt "very much," according to Laurie, and he left Ohio

for Tennessee. David has maintained a close relationship with his daughter since his death row confinement.

31. At the end of 1979, David arrived in Tennessee homeless, unemployed, and depressed. David was hitchhiking on the edge of town when a 50 plus year old Baptist preacher, the Rev. Benjamin Calvin Thomas, gave David a ride to the preacher's home. The preacher exchanged room and board for sexual activity and began a coercive relationship with David that lasted until the current offense. The preacher routinely sought out sexual relationships with young men and kept his homosexuality hidden from church members. According to David, the preacher was extremely jealous, labile, and possessive. The preacher controlled all aspects of David's life, belittling and threatening to expel David if David did not comply with whatever demands made of him. David held a series of low paying jobs but grew increasingly dependent on the preacher. David, like other chronically traumatized people, became hypervigilant and lived in a state of constant arousal, acutely tuned to following the coercive demands of the preacher. David felt intense despair and hopelessness, was very depressed and considered suicide. The current offense occurred when David brought a girl friend to the preacher's house and attacked her during the course of an argument.

32. David was arrested May 30, 1981, in Columbus, Ohio, and authorities returned him to Knoxville, Tennessee, where he was confined in the county jail for the duration of proceedings against him. He remained in the county jail during his pre trial incarceration. According to staff at the jail, David's adjustment was satisfactory and he caused no problem to other inmates or staff. He had suicidal ideation during his pre trial incarceration and considered cutting his wrists. He experienced sleep disruption, nightmares and severe anxiety during his pretrial incarceration

and trial proceedings. Since his confinement on death row, his satisfactory adjustment has continued.

Long Term Consequences of Trauma

33. David Miller suffers from Posttraumatic Stress Disorder (PTSD), chronic, severe. He experienced, witnessed, or was confronted with events that involved actual and threatened death and serious injury, as well as a threat to the physical integrity of himself and his siblings. He responded to the sexual abuse, threats to kill, and physical assaults with intense fear, helplessness, and horror. David persistently reexperiences the trauma in recurrent and intrusive distressing images, thoughts, and perceptions. To this day, he continues to have recurrent distressing dreams of the abuse. He reported acting or feeling as if he were reliving the experiences he survived as a child. He had hallucinations and dissociative flashback episodes upon awakening, when intoxicated, and when he was not intoxicated prior to his incarceration.

34. David becomes extremely anxious and dissociates at internal or external cues that remind him of aspects of his mother's sexual assaults and his stepfather's physical attacks on him. He continues to demonstrate physiologic responses of increased heart and pulse rate, trembling, perspiration, and dizziness when exposed to cues that resemble an aspect of the trauma he survived. He attempts to avoid any stimuli associated with the trauma and generalized numbing of responsiveness. His reluctance to discuss his mother's sexual abuse and his abuse of alcohol and drugs to obliterate memories of the trauma are examples of his attempt to avoid thoughts or feelings associated with the trauma. His feelings of detachment and estrangement and his restricted range of affect also reflect his avoidance of the trauma. He demonstrates persistent symptoms of increased arousal as indicated by his difficulty falling and staying asleep,

hypervigilance, and exaggerated startle response.

35. David dissociated during much of the trauma he survived, another indication of the severity of the trauma.

> Dissociation is another response to trauma. One of the best predictors of the ultimate development of posttraumatic stress disorder is dissociation at the moment of the trauma. Through dissociation trauma victims symbolically remove themselves from the trauma by depersonalizing or perceiving the incident as though it is happening to someone else rather than to them. Dissociation is also connected with affect dysregulation, and this difficulty modulating various affects states, including anxiety, has led the disorder to be grouped among the anxiety disorders...Trauma shatters the individual's view of the world as a place that is safe, predictable, and controllable and forces a confrontation with one's own vulnerability. Consequently, a variety of defense mechanisms are activated to deal with it. Many of these defenses marshaled by the ego in the face of trauma are those commonly thought to be primitive or immature. Hence there is frequently a regression to developmentally earlier modes of dealing with helplessness, vulnerability, fear, and anger. (Gabbard, MD, Glen. "Chapter 15.5 Anxiety Disorder: Psychodynamic Aspects." *Kaplan and Sadock's Comprehensive Textbook of Psychiatry.* CD-ROM. 1999.)

36. PTSD causes physiological changes in brain function that affect responses to auditory stimuli, temperature, pain, and sudden tactile stimuli. The threshold of stimulation is lowered, as it was at the time of the offense:

Posttraumatic stress disorder represents a perilous lowering of the neural setpoint for alarm, such that an individual reacts to life's ordinary moments as though they were emergencies. The more brutal, shocking, and horrendous the events, the more indelible the memory. The neural basis for these memories appears to be a transformation in brain chemistry set in motion by a single instance of overwhelming terror. The main symptoms of posttraumatic stress disorder—the most intense kind of learned fearfulness—can be accounted for by changes in the limbic circuitry focusing on the amygdala. Some of the key changes are in the locus ceruleus, a structure that regulates the brain's secretion of catecholamines. These neurochemicals mobilize the body for an emergency; the same catecholamine surge stamps memories with special strength. In posttraumatic stress disorder this system becomes hyperreactive, secreting extra-large doses of these brain chemicals in response to situations that hold little or no threat but somehow trigger memories of the original trauma. The locus ceruleus and the amygdala are closely linked, along with other limbic structures such as the hippocampus and hypothalamus; the circuitry for the catecholamines extends into the cortex. Changes in these circuits are thought to underlie posttraumatic stress disorder symptoms like anxiety, fear, hypervigilance, being easily upset and aroused, readiness for fight or flight, and the indelible encoding of intense emotional memories. One study found that Vietnam veterans with posttraumatic stress disorder had 40 percent fewer catecholamine-inhibiting receptors than did men without the symptoms—suggesting that their brains had undergone a lasting

change and that their catecholamine secretion was poorly controlled.

> Other changes occur in the circuit linking the limbic brain with the pituitary gland, which regulates release of CRF, the main stress hormone the body secretes to mobilize the emergency fight-or-flight response. The changes lead this hormone to be oversecreted—particularly in the amygdala, hippocampus, and locus ceruleus—alerting the body for an emergency that really does not exist. Hypersecretion of CRF causes an overreactive startle response; individuals with too much CRF do not habituate to stressful stimuli...In posttraumatic stress disorders spontaneous relearning fails to occur. This may be because of the brain changes of posttraumatic stress disorders, which are so strong that the amygdala hijacking occurs every time something even vaguely reminiscent of the original trauma comes along, thereby strengthening the fear pathway. This means that there is never a time when what is feared is paired with a feeling of calm; the amygdala never relearns a more mild reaction. Extinguishing the fear appears to involve an active adjustment process that is itself impaired in people with posttraumatic stress disorders, leading to the abnormal persistence of maladaptive responses. (Goldman Daniel, Ph.D. "Chapter 3.6: "Emotional Intelligence." *Kaplan and Sadock's Comprehensive Textbook of Psychiatry, VIIth Edition.* CD-ROM, 1999.)

37. David Miller's PTSD was the foundational mental disease of the multiple disorders he suffered --and continues to suffer -- from. He also suffered from severe depression all his life.

A combination of mental disorders, called co-morbid disorders, is common, particularly between PTSD, an anxiety disorder, and depression, a mood disorder.

> Anxiety symptoms including panic attacks, morbid fears, and obsessions are common during depressive disorders, and depression is a common complication of anxiety states...(Akiskal, MD, Hagop S. "Chapter 14.6 Mood Disorders: Clinical Features." *Kaplan and Sadock's Comprehensive Textbook of Psychiatry, VIIth Edition.* CD-ROM. 1999.)

38. David reported he was in a depressed mood most of the day, nearly every day, lost interest in school and other activities by the time he was in the third grade, had disturbed sleep, and felt fatigued and exhausted over the course of his life. He felt worthless and responsible for the abuse he survived, was unable to think clearly or decisively, and ruminated about his life circumstances. He considered suicide and had recurrent thoughts of death from late adolescence on. At the time of the offense, the depression was characterized by marked functional impairment, morbid preoccupation with worthlessness, suicidal ideation, and psychotic symptoms, including auditory and visual hallucinations.

Substance Use

39. David's family has a significant history of substance abuse. His mother is an alcoholic who drank alcohol during her pregnancy with David. David's stepfather was an alcoholic, and David's biological father was an alcoholic. At the time David was conceived, his father was in the U.S. Air Force and was being treated for alcoholism. At least one of David's half brothers is an alcoholic.

40. David learned at an early age that alcohol sedated the extreme anxiety he

experienced as a result of exposure to chronic threats of physical assault.[5] David began drinking alcohol around the age of 10 ½ to 11 when a bunch of his buddies gave him liquor at a friend's house. David drank until he passed out. After this episode, he began to drink more regularly. When he was 12, his school principal wrote his mother that David had drunk three bottles of beer and was somewhat intoxicated at school. By the age of 13, David drank weekly. After the age of 13, he drank alcohol with increasing frequency. During the time he lived with his aunt and uncle, his drinking increased dramatically. His uncle was a heavy drinker. Around the time of the offense, David was drinking beer and liquor daily. He was working at the Trailways Bus Depot as a short order chef and general handy man. He drank while on the job.

41. David's early alcohol and drug use was rooted in his effort to quell distressing and overwhelming symptoms of anxiety and depression. He was first prescribed barbiturates (phenobarbital) to treat his seizure disorder and learned that it also reduced his anxiety. He began to use Seconals, yellow jackets, and Tuinals, a multi colored pill known as Christmas Trees. He mixed these barbiturates with liquor in an effort to titrate the effect. He also smoked marijuana four to five times weekly by the age of 13. The barbiturates made him nod all day long, which afforded him some relief from his acute symptoms. David also used LSD. He first took LSD in his early teens. On two occasions he experienced episodes of violent behavior after he took LSD. David ingested LSD at the time of the offense, but purchased the LSD from a person who assured him it would not make him violent like it had in the past. Although he did not like the negative effects of LSD such as paranoia, he thought its speedy feeling helped him combat

[5] Prolonged ingestion of alcohol, especially during critical developmental periods, can result in deleterious changes to brain structure and function, as well as other body organs. Brain changes associated with alcoholism include lower white-matter volume, enlarged ventricles and sulci, and lower brain weight. It can also cause abnormalities in

depression.

42. David's use of drugs and alcohol increased in response to the abuse he survived. The relationship between intoxicants and depression was particularly strong in David's teenage and early adult years, when the use of these substances represented self-medication for the mood instability.

> The high comorbidity of alcohol and substance use disorders with mood disorders cannot be explained as merely the chance occurrence of two prevalent disorders. Self-medication for mood disorders is insufficiently appreciated by both psychiatrists and other professionals who deal with addiction. Given the clinical dangers of missing an otherwise treatable disorder, mood disorder should be seriously considered as the primary diagnosis if marked affective manifestations persist or escalate after detoxification (e.g. 1 month) (Akiskal, MD, Hagop S. "Chapter 14.6: Mood Disorders: Clinical Features." *Kaplan and Sadock's Comprehensive Textbook of Psychiatry.* CD-ROM. 1999.)

43. David's type of substance use is consistent with the neuropsychiatric literature on the relationship between substance use and impulsivity:

> A neuropsychological study of sons of alcoholics who at age 12 showed signs of anxiety such as a heightened heart rate in response to stress as well as impulsivity found that the boys also had poor frontal lobe functioning. Thus the brain areas that might have helped ease their anxiety or control their impulsiveness helped

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brain function including lowered brain metabolism, impaired memory and other cognitive deficits.

them less than the brain areas of other boys. The prefrontal lobes also handle working memory—which stores the consequences of various routes of action considered when making a decision—their deficit could cause these boys to slide into alcoholism by helping them ignore the long-term drawbacks of drinking, even as they found an immediate sedation from anxiety through alcohol. This craving for calm seems to be an emotional marker of a genetic susceptibility to alcohol abuse and dependence. A study of 1300 relatives of alcoholics found that the children of alcoholics who were most at risk for becoming alcoholics themselves were those who reported having chronically high levels of anxiety. Indeed, the researchers concluded that alcoholism develops in such people as "self-medication of anxiety symptoms." *Kaplan and Sadock's Comprehensive Textbook of Psychiatry.* CD-ROM. 1999.)

44. The severity and consistency of David Miller's substance abuse speaks to self-medication of his severe anxiety and depressive symptomatology throughout his life, rather than a simplistic perspective of David as a primary addict. Therefore, what is seen clinically is a person who attempted to use alcohol as a mediator for the extreme anxiety, affective dysregulation, dissociation, depression, and impaired executive function that were part of his environmental heritage. (Goleman, Daniel, Ph.D. "Chapter 3.6 "Emotional Intelligence." *Kaplan and Sadock's Comprehensive Textbook of Psychiatry, VIIth Edition.* CD-ROM, 1999.)

Mental Status at the Time of the Offense

45. David experienced auditory and visual hallucinations in the time period immediately preceding to the offense. The symptoms were extremely distressful, frightening and confusing to

him. David began to perseverate on biblical teaching concerning the preacher's homosexuality. David also became convinced something in his brain was not working properly and that he could find out what was wrong with his brain if he found the appropriate book at the public library. He went to the library and searched for books with answers to his questions. David reported clear symptoms of psychosis and dissociation. In particular, he was missing part of the day, hearing voices, talking to ghosts, suffering panic attacks, having memory problems, and having episodes during which his mind went blank. David experienced another similar symptom complex approximately six months prior to the offense.

46. David drank the entire day of the offense and ingested 1 1/2 blotters of LSD,[6] a powerful hallucinogen. He invited the victim, a young woman, to accompany him to the preacher's home. Once they were inside the home, David reported that they started to argue and she grabbed his arm. This emotional trigger brought to the fore the fear and terror that had been deeply imbedded into him. David noted that, consistent with his life long PTSD symptoms, he found himself experiencing flashbacks of his mother seducing and terrorizing him and his stepfather assaulting him. He discussed how his memory of events after the victim grabbed him is based on what he was told by police officers who interrogated him.

47. The essence of Mr. Miller's mental state at the time of the offense reflects the psychological and physical hyperreactivity pathognomonic of PTSD. This emotional reactivity, called affective dysregulation, is commonly seen in persons suffering from traumatic stress, particularly when the trauma has occurred early in life, and has been perpetuated by those very persons entrusted to teach the child coping mechanisms, his parents. Children who have become

traumatized are frequently unable to modulate their emotional responses, often over or under responding, with little ability to respond appropriately to stimuli.

48. Several factors concerning the offense reflect chaotic, unplanned action. The crime scene itself, as described by the preacher, indicated frenzied rather than cautious, deliberate actions. The body and clothing were discovered along side the driveway in an easily visible location, indicating that David did not plan how to avoid detection. After the offense occurred, David followed the preacher's instructions to remain in the house for one night rather than fleeing immediately. David left Knoxville the day after the offense only when the preacher drove him to a highway out of town and forced him to leave.

49. David's use of intoxicants exacerbated his underlying symptoms of posttraumatic stress disorder. When his girlfriend, Lee Standifer, grabbed him, dug her fingernails into him, and said she would not let him leave her, it triggered an exaggerated response that was reminiscent of earlier forced experiences at the hands of his mother and stepfather. David's memory of events following his girlfriend's grabbing him is fractured. Although the victim was stabbed multiple times, David has no memory of stabbing her.

Conclusions

50. It is my professional opinion, which I hold to a reasonable degree of medical certainty, that David Miller suffers from multiple neurocognitive disorders. Each and all of these mental diseases and defects were present and acute at the time of the offense for which Mr. Miller was convicted, rendering him unable to appreciate the criminality of his acts as well as

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[6] LSD (lysergic acid diethylamide) can induce illusions, hallucinations, delusions, paranoid ideations and other alterations of mood and thinking.

unable to conform his conduct to the requirements of the law. Mr. Miller was under extreme emotional stress at the time of the offense. At the time of the homicide, Mr. Miller responded to the victim's grabbing his arm and sudden movement without plan, thought, or recognition of the consequences of his actions. He harbored no intent to kill or malice for the victim, and his actions were taken without premeditation and without understanding or knowledge about the difference between right and wrong.

51. I have also been asked to offer my opinion about Mr. Miller's intoxication at the time of the offense. David was intoxicated due to ingestion of alcohol and LSD at the time of the offense, secondary to the chronic symptoms of posttraumatic stress disorder and depression he experienced. Alcohol causes impaired judgment, reasoning, and insight. In sufficient quantities, such as the amount David consumed over a relatively short period of time, alcohol causes mental confusion and altered states of consciousness. LSD induces states of altered perception, thought, and feeling that are observed in spontaneous psychosis. It is my professional opinion, which I hold to a reasonable degree of medical certainty, that David's intoxication at the time of the offense exacerbated David's underlying mental impairments and further eroded his ability to understand and conform his conduct to that required by the law.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct. Executed on February 28, 2003.

Pablo Stewart, MD

PABLO STEWART, M.D.

Attachment B

to David Miller's Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation

Declaration of David Lisak, Ph.D

Declaration of Dr. David Lisak

1. I am a clinical psychologist and associate professor of psychology at the University of Massachusetts Boston, where I teach, and conduct and supervise research in the doctoral program in clinical psychology. For the past 17 years I have been researching the causes and consequences of interpersonal violence perpetrated by men. In particular, I have studied the long term impact of childhood sexual and physical abuse on male development. My research has been published in numerous scholarly journals, and I have presented scores of papers, symposia and workshops at conferences throughout the United States and Canada. I am an active member in good standing and a Fellow of the American Psychological Association (APA), and I am the founding editor of the journal, *Psychology of Men and Masculinity*, a scholarly journal published by APA. In addition, I am a founding member of the National Organization on Male Sexual Victimization, now re-named *Male Survivor*.

2. I am a licensed health care provider in the State of Massachusetts, and I maintain a small private practice focused on the treatment of traumatized men, particularly men who experienced sexual and physical abuse as children.

3. I have served as a consultant and expert in a variety of forensic contexts. I have been qualified as an expert on psychological trauma and childhood abuse and have testified in both state and federal courts. I have conducted detailed evaluations of inmates at prisons and jails across the country. I have served as faculty at judicial and prosecutor training conferences on sexual aggression across the country, and have consulted to the U.S. Justice Department, to the Federal Bureau of Investigation, to local police departments, and

to individual judges and prosecutors on matters pertaining to perpetrators of non-stranger sexual aggression, and to the psychological and neurobiological consequences of trauma.

4. I was asked by the attorneys representing David Earl Miller to evaluate and report on the presence and consequences of childhood trauma in Mr. Miller's life. To accomplish this, I interviewed Mr. Miller on three occasions, June 10 & 11, 2002 and February 10, 2003, for a total of approximately 14 hours. In addition, I interviewed Mr. Miller's mother (Mrs. Hutchison) and aunt (Alice Hartman) in Findlay, Ohio, on July 17, 2002. I requested a follow-up interview with Mr. Miller's mother in late February, 2003, to discuss Mr. Miller's disclosures to me, but his mother declined to talk to me. In addition to these interviews, I reviewed the following documents which were supplied to me by Mr. Miller's attorneys:

a. Memoranda of client interviews with Andru Volinksy on 6/3/81; 6/12/81; and 6/16/81;

b. Memorandum of interview with Vergie Street on 10/22/81;

c. Memorandum of interview with Leonard Nye on 10/22/81;

d. Memorandum re: Wayne's Place/counterfeiting incident of 10/23/81;

e. Memorandum of background information of 2/4/82;

f. North Baltimore school records;

g. Wood County DHS records;

h. David Miller juvenile records;

i. Psychological evaluation records (Child & Adult Clinical Associates and Helen Ross McNabb Center;

j. TDOC Admission Summary;

k. Rape arrest warrants (Shirley Hall 9/3/80);

l. Transcript of 5/3/81 KPD interview of David Earl Miller and mug shot;

m. Transcript of KPD interviews of Rev. Calvin Thomas;

n. KPD initial report of Lee Standifer murder and interview of Rev. Thomas;

o. List of David Miller personal property retrieved from Rev. Thomas; house;

p. Certificate awarded to David Miller from Knoxville Manpower Training Center;

q. David Miller GED records;

r. Defense Exhibit 78 – photograph of David Miller with step-father's grandmother;

s. Defense Exhibit 79 – photographs of Loretta Gorman and her daughter, Stephanie (David's daughter);

t. Loretta Gorman's trial testimony;

u. Loretta Gorman's resentencing testimony;

v. Loretta Miller's trial testimony;

w. Loretta Miller's resentencing testimony;

x. Tennessee Supreme Court opinion 5/29/84;

y. Tennessee Supreme Court opinion 4/24/89;

z. Motion to suppress books and results of polygraph examination;

aa. Tennessee murder statute;

bb. Rules for expert witnesses and reports.

Summary of Opinion

5. Mr. Miller suffered severe physical and sexual abuse as a child, as well as severe emotional neglect. He was exposed to rampant violence in the home, as well as alcohol abuse. As a consequence of these early and pervasive traumas, Mr. Miller himself became an alcoholic and drug abuser, and was never able to adapt successfully to adult life. While he made some fledgling attempts to do so, these efforts were ultimately undone by his

meager reservoir of coping resources, by the tragic death of his grandfather, and by the deep wellspring of rage that he harbored. This rage, that was periodically directed at women and that ultimately was directed at Lee Standifer, stemmed directly from the incestuous abuse he suffered at the hands of his mother, and from the brutal physical abuse he suffered at the hands of his step-father.

David Earl Miller's Family Background

6. To avoid confusion, David Earl Miller will be referred to throughout this report as "Mr. Miller." His biological father and step-father will be referred to as Earl Miller and John Miller, respectively.

7. Mr. Miller was born into a family that was rife with alcoholism, violence and mental illness. Mr. Miller's mother was only 17 years old and unwed when she gave birth to him. His father was a man named Earl Miller who never played a part in Mr. Miller's upbringing. Earl Miller was apparently hospitalized for psychiatric treatment at some point, as was his mother [Interview: Mrs. Hutchison]. Thus, to the degree that there is a heritable component to the mental disorders which afflicted Mr. Miller's progenitors, Mr. Miller would be vulnerable from both his maternal and paternal sides.

8. When Mr. Miller was eight months old his mother met and began living with John Miller, a violent ex-Marine who would severely beat both Mr. Miller, his siblings, and his mother. Mr. Miller believed that John Miller was his biological father until his mother's separation from John Miller when Mr. Miller was entering adolescence.

9. The home of Mr. Miller's upbringing was one characterized by neglect and abuse. The house itself was unfinished. There was running water only in the kitchen, and despite the fact that modern bathroom facilities could easily have been installed, the family instead used an outhouse. Mr. Miller's mother, an alcoholic, spent little or no time with

upkeep or cleaning; the home was described as filthy, unkempt, and cluttered by her sister (Mr. Miller's aunt Alice), by Mr. Miller's former girlfriend Lori, by social services employees who visited the house at various times during Mr. Miller's childhood, and by Mrs. Miller herself during her trial testimony.

10. This physical neglect mirrored the psychological and emotional neglect that Mr. Miller's parents subjected him to. Mr. Miller felt, and by others' descriptions he seems to have been, an unloved child. The attention he received from his mother and step-father alternated between verbal and severe and physical abuse, wholesale neglect (of his emotional and educational needs), and sexual abuse, in which he was used as a vehicle for the sexual gratification of his mother.

11. Mr. Miller cannot remember a single instance of his mother telling him that she loved him, a fact that was echoed by his aunt Alice, who referred to Mr. Miller as an "unloved child," and to Mrs. Miller as a teenaged mother too caught up in her own needs to adequately parent a child.

12. Mr. Miller's mother was so derelict in her caretaking responsibilities that the Wood County Department of Human Services kept an open case file on the family between 1965 and 1974. In 1969, a caseworker described the house this way:

> "The roof is half-finished as are the walls and floors with only the insulation and masonite on...Sheets were clean although one of the girls had wet the bed the night before. There is a room in the house for possible bath but as of now they use an outhouse. The house was quite cluttered and in each room you had to step over toys, clothes, stuffed animals, etc. There are no closets...so clothes are stacked on the floor and several clothes bars."

13. Three years later, another report details Mrs. Miller's "lack of interest in the home and her inability to settle down and accept the responsibilities of a home and children and one man. She is very fond of the night life in the low class bars and the companionship of the men who are always available there." Concluding that "this home has deteriorated almost beyond belief," in 1972 the County removed the children from Mrs. Miller's custody and placed them in foster homes.

14. By neglecting Mr. Miller's most basic needs as a child, by brutalizing him physically and emotionally, and by exploiting him sexually, his parents deprived Mr. Miller of the most basic ingredients necessary for a successful adaptation to life. While some children subjected to such conditions, miraculously, do successfully navigate themselves into successful adaptations to work, to relationships, and sometimes to both, the majority of such afflicted children suffer scars, never-healing wounds and profound handicaps.

Mr. Miller's Experiences of Childhood Trauma

15. From the age of eight months, until his parents' separation when he was 11 years old, Mr. Miller was subject to the unpredictable and unbridled brutality of his step-father, John Miller. Mr. Miller's mother described John Miller as "mean" and "cruel." His violence and need for overwhelming control over everyone in the household was directed both at herself and at his children, but it was particularly focused on Mr. Miller, his step-son. This perception – that Mr. Miller was uniquely targeted by John Miller – was shared by Mr. Miller's mother, by his Aunt Alice, and it is even noted in the Wood County Human Services records.

16. During my interview with Mr. Miller's mother, she stated that she did not have power to protect her children from John Miller's abuses. "If I stuck my nose in he'd

beat on me. He'd tell me, 'if you stick your nose in this you'll get a bloody nose,' and he did, he gave me a bloody nose." Mr. Miller's mother felt powerless to protect him, and powerless to protect Mr. Miller's mentally retarded half-brother, Randy. Perhaps because of his vulnerability, Randy too was frequently targeted by John Miller. When Randy would cry John Miller would wrap him in a blanket and pin the blanket to the crib, creating a straight jacket, leaving Randy to scream in helplessness. Although he has no independent memories of such treatment, Mr. Miller was himself apparently also "straight-jacketed" when he was an infant, according to his aunt Alice.

17. John Miller's violence was pervasive in the home. Mr. Miller's mother stated: "John knew we were all afraid of him and I think he really liked that; to have that kind of power and control over us." When something triggered his rage, he would yell and curse abusively and kick and beat her. She would end up with black and blue marks on her arms and face, and frequently a bloody nose, but he would never allow her to get medical treatment.

18. Nor did John Miller stop at such beatings. She recalled one occasion when she challenged his control and asked him to leave. He responded by pointing a gun at her and ordering her: "Get yourself back in that fucking bed before I blow your fucking head off." His terrorization of the household was so pervasive that for five years following their separation Mr. Miller's mother had recurrent nightmares that he was chasing her with a gun around the house.

19. Mr. Miller was a constant witness to this violence, and to the control-by-terror practiced by his step-father. Just as his mother felt helpless to protect him, so was he helpless to protect her.

20. But Mr. Miller was also the direct target and recipient of John Miller's violence, humiliation and control. Being beaten by his step-father is the earliest memory that Mr. Miller can recall, and beatings are the rhythm of his childhood. Being backhanded in the mouth – often hard enough to cause bleeding – being hit in the head, either with open hand or with a closed fist – these were utterly routine occurrences. One of Mr. Miller's earliest memories is of a time when he got up early on Sunday morning to make ice coffee for his John Miller. In doing so, he accidentally spilled some water. His step-father reacted by taking Mr. Miller's toy bow and arrow, breaking the bow and using it to beat Mr. Miller on his back, his buttocks and his legs.

21. "He would beat me with boards, two by four's, whatever was handy. My gym teacher once saw me with black and blue marks and he said to me, 'Be glad it was just your ass'."

22. Of course it was rarely "just" Mr. Miller's buttocks that were being beaten. A particularly savage beaten was recalled vividly by Mr. Miller, and its aftereffects witnessed and remembered by both his mother and his aunt. John Miller attacked Mr. Miller in a rage, bouncing Mr. Miller's head against the refrigerator and the walls of the house, causing dents in both. Mr. Miller's mother stated that John Miller would take Mr. Miller to the garage whenever he felt like beating him, and that she would never hear Mr. Miller scream or cry, this despite the savagery of the beatings and the fact that they permeated Mr. Miller's childhood from its earliest years until the age of 11.

23. Learning not to cry or to show any sign of "weakness" during these beatings became Mr. Miller's chief goal. He recalled:

> "She [his mother] wanted me to be passive toward him. If he spanked me I was supposed to cry, because, she said, it would make him feel better. I could

never understand that, but I refused to cry. I just got it into my head: "I'm not going to cry no matter how much it hurts me." That really frustrated him. He would still be mad when he walked away. I heard him mumble one time, "...get rid of your ass."

24. Throughout this decade of terrorization and beatings at John Miller's hands, Mr. Miller believed that John Miller was his biological father. Then, without warning, his mother finally left John Miller and soon after she told Mr. Miller that the man he had thought of us as his father his entire life was actually not. "I was confused and mad," Mr. Miller recalled during the interview.

"It was a huge conflict because I couldn't understand how I could call him Daddy all those years if he weren't. And it seemed everybody knew it except for me. I didn't want to talk to my mother about it. She let him beat on me like that, and him not even my father. Damn right I was angry."

25. Mr. Miller's anger at his mother had and continues to have many sources. In addition to never protecting him from John Miller's savagery, his mother was herself capable of severe physical abuse. If Mr. Miller disobeyed her she would "grab a belt, extension cord, wire coat hanger or umbrella" and she'd whip him, usually across the back and shoulders.

26. In 1969, when Mr. Miller was 11 years old, his mother and step-father separated. Tragically, rather than heralding a period of peace and stability in Mr. Miller's life, the divorce brought increasing instability, and even greater trauma. In the wake of the separation, Mr. Miller's mother's alcoholism became even more acute. She drank at home, and she regularly went out drinking in the local bars. Often she brought men home with her to spend the night. Mr. Miller began to hear comments from other children that his mother was a prostitute, something he now believes was true.

27. The whisperings about his mother being a "whore" were particularly scarring to Mr. Miller, whose childhood sexuality had already been scarred by two traumatic abuses. The first occurred when Mr. Miller was between 4 ½ and 5 years old. His older cousin, Kathy, was babysitting him. He remembers her taking him into the bedroom, taking his clothes off, and then trying to have sex with him. She lay back naked and put the five year old Mr. Miller on top of her and tried to have him insert his penis into her vagina. It didn't work, so she then took his hand, in fact his whole arm, and inserted it into herself. David remembers feeling very confused by the whole episode. The next morning he overheard Kathy tell her mother about it, and her mother saying, "Don't worry, he'll forget about it." He knew that was his cue to keep his mouth shut.

28. Society continues to manifest considerable confusion about the impact of these kinds of abusive sexual experiences – that is, when the victim is a boy and the perpetrator is a woman (in this case a teenager). Many people have difficulty understanding just how damaging and traumatizing these experiences are, because they believe that a male, no matter how young he is, will automatically enjoy any sexual experience. The truth is quite different from these misconceptions. The abuse committed by Mr. Miller's cousin was severely damaging, instilling in Mr. Miller childlike fears about sexuality and women, childlike fantasies about the power of women and childlike fantasies about how he could possibly regain some measure of control himself over women. The abuse also instilled a deep-seated anger at women that Mr. Miller would manifest throughout his later life.

29. But the abuse by his cousin was not the only episode of sexual abuse that Mr. Miller was scarred by. At the age of 12, Mr. Miller's grandfather took Mr. Miller with him to a local bar. There, a "friend" of his grandfather offered to take the 12-year-old fishing. It was a ruse. Instead, he took Mr. Miller up to a little cabin, and there he forced the boy to

manually masturbate him. Mr. Miller was very scared, being totally isolated and under the control of this stranger. It was yet another traumatizing experience of being helpless and out of control, and of having his sexuality coercively used by another person for their own gratification.

30. Tragically, the sexual abuse perpetrated by Mr. Miller's cousin and that perpetrated by the friend of the grandfather were the lesser of the traumatic abuses that Mr. Miller would suffer. Beginning at approximately the age of 14, and continuing until Mr. Miller's permanent departure from the home at the age of 15 ½ , Mr. Miller was sexually abused by his own mother. This incestuous abuse, by far the most damaging abuse suffered by Mr. Miller, scarred him to his core, and instilled in him a rage at his mother that endures to the present day. His rage has also been enacted on many other innocent "stand-in's" for his mother.

31. Men are typically quite reluctant to disclose sexual abuse experiences. However, with appropriate care and preparation, the humiliation and guilt that typically inhibit them can be lessened to the point where disclosure is possible. In Mr. Miller's case, the breakthrough to his disclosure was triggered by my confronting him about a bizarre and violent incident that occurred when Mr. Miller was 16 years old, in which Mr. Miller attempted to rape his mother at knife point.

32. Mr. Miller's mother had given me the following account:

> "I was sleeping in my housecoat. I woke up feeling somebody next to me and I think it's John Hutchison but it was David. He hit me on the head several times and says, "Get your clothes off." I said, "If you want sex I'll go get Carol." He said, "No, it's you."

33. In the ensuing altercation, she twice attempted to escape, the second time successfully, but only after being beaten and kicked by Mr. Miller hard enough to have received numerous facial cuts and loosened teeth.

34. When I confronted Mr. Miller about this incident he immediately became extremely agitated and tense. When I pressed him for an explanation of why he assaulted his mother, of why he would attempt to rape her, he began to literally vibrate with anger, his face turned a vivid red, and he seemed very close to simply exploding with rage. Instead, he blurted out the following words: "I bet she didn't tell you who started all that!" I asked him what he meant by "all of that." He yelled, "It was she that started all that, not me!!" I again asked him what he meant by "all of that." He then became even more agitated, began to get up out of his chair, and finally started demonstrating something with his hands while his face was contorted with rage and pain and he couldn't find words to say. Finally he said, "having me dance with her, and putting my hand here (he demonstrated his hand at his mother's breast) and putting my hand there (he demonstrates his hand at his mother's genitals)." At this point Mr. Miller's breathing was so fast and his face so flushed that I gave him several moments to calm down. I then asked him how often this had happened. He said she would listen to music often and at least once or twice a week she would make him get up and dance with her, and then she would turn the dancing into sexual fondling.

35. At this point, Mr. Miller tried to collect himself and he told me vehemently that what he had told me was "nobody's business" and that he was not going to permit the prosecution to bring this up. He was now shaking with anger. I again worked hard to settle him down, and I assured him that I would not disclose what he had told me to anyone without his approval to do so. Finally, he agreed to answer a few more questions. I asked him if his mother would also fondle his genitals, and he indicated that yes she had. I asked

him if it had ever led to completed sexual intercourse, and he said that it had, on at least three occasions. At this point Mr. Miller indicated that he was through answering questions about the incest.

36. As a professional, and as an expert on male abuse survivors, I found Mr. Miller's disclosure of incestuous abuse by his mother to be extremely credible. The disclosure came during my third interview with Mr. Miller, an interview that had not been specifically planned during my previous visit. Thus, Mr. Miller had no way of knowing that I would return for the third interview, and that he would have the opportunity of making the disclosure. The disclosure itself came in a fit of rage provoked by my confronting him about his attempted rape of his mother. Mr. Miller was barely in control of himself when he blurted out the first elements of the disclosure. Once it was out, his rage was immediately mixed with mortification that he had spoken of the incest. Seeing his extreme discomfort with having made the disclosure, I gave Mr. Miller the opportunity to retract his permission that I use the information. He very nearly did so. Indeed, it took about an hour's discussion before he very grudgingly gave his permission.

37. Mr. Miller's extreme discomfort with disclosing the incest was also evident in the sparing details he would provide me. I asked several detailed questions about the specific nature of the sexual activity that his mother subjected him to. He answered a few of these questions, but soon became enraged with me for asking them and essentially told me to mind my own business. Nevertheless, the details that he did provide are very consistent with the kind of incestuous "grooming" that typifies these cases. The fact that they occurred when his mother was drunk, thereby having her impulse control lowered; the fact that she preceded overt sexual abuse with a more covert action – getting him to dance with her – is a common sequence used by incestuous parents; the fact that she controlled him – physically

taking his hand and placing it on her breasts and genitals, thereby forcibly and physically taking her son across the incest taboo; the fact that she then sexually aroused him herself before proceeding to initiating actual sexual intercourse. The highly typical nature of this sequence lends enormous to the credibility of Mr. Miller's disclosure.

38. Finally, male sexual abuse survivors are typically very reluctant to disclose their abuse history. This reluctance is magnified tremendously when the abuse is incest perpetrated by the male's biological mother. Mr. Miller's disclosure, embedded as it was in a state of rage and humiliation, is highly consistent and highly credible.

Impact of Childhood Trauma on Mr. Miller's Development

39. When a child suffers the kind of pervasive and multi-faceted trauma that characterized Mr. Miller's childhood, the consequences are typically equally pervasive. Often, if not typically, the impact of the neglect and abuse is seen in multiple domains of the child's life, an impact that then broadens as the child enters adolescence. This pattern is easily discernible in Mr. Miller's life.

40. It is important to understand that the impact of neglect and severe abuse is not "simply" a matter of psychological symptoms and intensely negative feelings. The abused and neglected child is affected at a neurodevelopmental level. That is, chronic trauma and neglect have a pronounced impact on the development of the child's brain.

41. The development and socialization of a child hinges on the development of an increasingly sophisticated interweaving of neural connections. Neural circuits emanating from the "limbic" areas of the brain – the area of the brain from which intense and "primitive" emotions emerge – gradually connect with neural circuitry located in the cortical regions of the brain – the area of the brain capable of sophisticated learning and association.

In essence, the cortex learns to modify, channel and suppress the impulses and emotions emerging from the limbic areas.

42. This process is the essence of socialization of children. When a parent tells an angry toddler who is about to strike out in frustration and anger, "use your word," the parent is actually making an intervention. It is an intervention that will be required thousands of times, but the end result will be a child whose neural circuitry will eventually permit him to restrain his impulses, and to turn frustration and anger into appropriate language.

43. The impact of neglect and abuse on this delicate but crucial developmental process is twofold. First, in the absence of loving and supportive emotional engagement, the child is deprived of the desperately needed learning experiences that form the foundation of this kind of learning – of the formation of neural circuitry connecting the limbic areas to the cortex. Second, the experiences of abuse represent abnormally intense emotional experiences – terror not fear; rage not anger; paralyzing humiliation not shame. All of these intense emotional experiences become part of the child's daily experience. They well up like "limbic storms" into a brain that has been simultaneously deprived of adequate learning and socialization experiences. Thus, the child cannot contain the impulses; he cannot channel them. He is much more prone to acting them out. Or, faced with overwhelming impulses, he may appear "shut down" entirely, presenting a façade of apparent normality beneath which is an uncontrolled storm of intense emotions.

44. In either case, the child's nervous system is poorly equipped to help him through the challenges of childhood. It is a nervous system that is highly attuned to threat and anger in his environment. In essence, he has been trained to scan his environment for an angry face, or anything that he has learned will precede a beating. It is also a dysregulated nervous system. That is, is highly reactive – it takes very little to evoke a very strong state of

arousal (increased heart rate, higher blood pressure, etc.) – and once aroused, it is likely to remain so for an abnormally long period of time. This of course makes paying attention in school a daunting challenge. The normal banter among peers becomes potentially threatening and arousing, attention is deflected, and then it is difficult to restore.

45. It is not surprising then that Mr. Miller's school records reflect poor academic achievement, as well as other problems. Although the records are incomplete, by the age of 12 Mr. Miller's grades were mostly in the D and F range, and he was already beginning to skip school. His mother's negligence in other domains seems to have extended here, as there are repeated letters sent to her from the school complaining of Mr. Miller's truancy. Mr. Miller's own recollections of school are dismal. He found the classroom to be an overwhelming environment – too many children, too much noise and distraction – and he felt unable to focus or concentrate. His description fits perfectly the phenomenon of the traumatized child whose nervous system is in a constant state of hyper-vigilance and hyper-activation, and who therefore has enormous difficulty with concentration.

46. Nor did Mr. Miller receive any help for his academic troubles at home. When I asked him if either his mother or his father ever monitored his homework, helped him with it or took an interest, he could not understand what I was asking. Parental concern and interest in his schooling was such a foreign concept to him that my question made no sense to him.

47. Like so many neglected and abused boys, Mr. Miller began increasingly to withdraw into himself. During my interviews with Mr. Miller, it was difficult for him to recall his childhood moods; in part, this seemed to reflect the fact that he was so pervasively withdrawn that it seemed like a totally natural state of being. However, his aunt Alice told me that she perceived Mr. Miller, as a child, to be "always off to himself." He never talked,

and was "so withdrawn and quiet, you could tell there was something wrong. You could tell he needed help." She recalled that by the age of seven or eight he "seemed more and more withdrawn, worse and worse, and he stayed that way."

48. The increasing withdrawal and isolation that characterized Mr. Miller's childhood reflected the combined impact of the traumas he was experiencing, and the emotional neglect that was the pervasive backdrop of his upbringing. There were simply no adults in his life to provide him with the support and external resources he needed to cope with what was happening to him, so he did what all children do in such circumstances, he withdrew into a shell in the hope of simply surviving his ordeal.

49. Children who are subjected to the type of pervasive abuse and neglect that Mr. Miller suffered are almost inevitably forced to harden themselves simply to survive. Mr. Miller described this process eloquently, if tragically, when he described how he steeled himself against John Miller's beatings, refusing to let himself cry or to show any sign of weakness. Since he was powerless to prevent his step-father from brutalizing him, he garnered the only form of control left available to him, he controlled his emotional response to the brutalization. This kind of emotional hardening can be crucial for a child's survival when the circumstances of their life are so depraved. However, there can and often are unfortunate consequences of this hardening. By learning how to cut themselves off from their own fear and suffering, they almost inevitably learn to cut themselves off from the fear and suffering of others. Ultimately, this can seriously curtail their capacity for empathy.

50. Virtually alone with his suffering – physically abused by the man he believed to be his father, sexually abused by his mother, and neglected by both – it is not surprising that Mr. Miller became suicidal. As a testament to the severity of the abusive conditions of his childhood, Mr. Miller's suicidal behavior dates back into childhood, which is unusual. He

apparently made a serious suicide attempt when he was still a child, attempting to hang himself with a piece of rope from a clothes line. His attempt was interrupted by two of his cousins. While I was unable to contact these cousins, the occurrence of this suicide attempt was confirmed both by his aunt Alice and by his mother. His mother recalled telling him, "you could have killed yourself," and Mr. Miller responding, "well I'd a just gotten a beating anyway."

51. What is perhaps most telling about this incident, underscoring the neglect that Mr. Miller suffered, is that his suicide attempt did not prompt any type of response from his mother – no visit to a psychologist or psychiatrist, no evaluation, no help for the family. A six or seven year old boy tries to hang himself and no one in his life seems to think that this warrants any intervention or help for either the child or the family.

52. Mr. Miller described a second suicide attempt when he was just shy of his 10th birthday. He put a plastic bag around his head and taped it around his neck, but he punched a hole in it before he blacked out. He said he "chickened out."

53. With no help to be had from anyone within either his family or community, and being surrounded by adults who coped with life by drinking alcohol, it is not at all surprising that Mr. Miller would soon learn the anesthetizing properties of liquor. Like so many abused and neglected children, Mr. Miller learned early that alcohol and drugs held the promise of at least brief respites from the emotional pain of their existence.

54. Mr. Miller tried alcohol for the first time when he was 10 years old. He drank enough to make himself puke. By a couple of years later, he was stealing beer off of the local beer delivery truck, and otherwise he would drink whenever the opportunity presented itself, and he would drink anything at all – beer, wine, or whiskey.

"It made my belly warm and I didn't give a shit about what was going on. It was about forgetting, whatever was bothering me. I'd drink my worries away, but when I sobered up they'd come back but I didn't realize that. I think I believed that if I just kept drinking, they'd go away and stay away."

55. By his late teens Mr. Miller was clearly already an alcoholic; by his statement, "drinking seriously." His drinking was then nightly, usually beer, with "harder stuff" on the weekends. He would always drink enough to get drunk, and once drunk how he acted depended on his mood. Sometimes he would "be an ass," sometimes he would act "weird," and sometimes he would "do crazy shit" that he would later not be able to remember, like getting into fights and raising hell.

56. He also soon learned that pills and alcohol were an even more effective way of obliterating feelings that alcohol alone. He would take "phenobarb's" or whatever else he could get his hands on – speed, acid, "black beauties."

"Two cans and pills, you're gonna be pretty laid back. You're drunk. You have less of a headache when you wake up and you just don't give a shit. You have nothing to worry about. You're really able to function."

57. Especially when he combined alcohol and speed Mr. Miller would get himself into serious trouble. He would get into serious bar fights, or he would "play chicken" with cars on the road. In this version of the game, Mr. Miller would stand in the middle of the road and challenge an oncoming car to see who would get out of the way first. When I asked him whether he would now consider such behavior suicidal, he acknowledged that underneath his drinking he was feeling utter despair.

58. In fact Mr. Miller's despair was profound, and had he been evaluated during his teens and young adulthood, he would likely have been diagnosed as depressed. At the

beginning of my second interview with Mr. Miller, on June 11, 2002, he told me that the night before, after our first meeting, he had realized that he had often been suicidal, and that in fact it had been so often that it seemed to be a permanent part of his psychological state. He then acknowledged that twice, between the ages of 19 and 22, he had played "Russian Roulette" with loaded revolvers. He also admitted to taking large quantities off "barb's" in the hope that he would not wake up, but then waking up a day or two later.

59. While drugs and alcohol might provide temporary relief from despair, they do nothing at all to change the conditions, either internal or external, that cause it. One of the great tragedies of substance addiction, is that the addicted person not only suffers the immediate consequences of the abuse, they are also robbed in a more permanent sense. By turning to alcohol and drugs to quell anxiety, to erase fears, to deaden chronic anger, the boy and later the adolescent and later still the adult is robbed of the opportunities to discover and learn new and more sophisticated ways of coping with life's challenges. Instead of learning that he has undiscovered inner resources, or that there trustworthy people who can be turned to, the addicted adolescent becomes addicted, both psychologically and physically, to substances that do nothing to alter the circumstances of their lives or their ability to change them. In essence, substance addiction freezes psychological development.

60. Mr. Miller, from a very early age, harbored a simmering rage. He hated his step-father for the brutality and humiliation he was subjected to, and he loathed his mother for first failing to protect him from his step-father, and later for turning him into her sexual play-thing. Mr. Miller's rage simmered within him, and it appears that it would only be unleashed under the effects of alcohol. And, while it occasionally was directed at men, almost exclusively in bar fights, the primary target of his rage – when it was unleashed – were women.

61. It is very difficult to establish the frequency of these outbursts of violence directed at women. Mr. Miller states that he cannot remember most of the incidents that I asked him about. However, there are at least five verifiable incidents, in addition to the murder of which he was convicted.

62. Mr. Miller's former girlfriend, Lori, described an incident in which Mr. Miller forcibly drove her to an isolated country road, pulled out a gun and pointed it at her, and told her that they were going to have sex. "It was crazy. Then he became upset and ordered me to walk away, that he was going to kill himself. I convinced him to put the gun in the trunk." Among the "crazy" aspects of this incident was the fact that Lori and Mr. Miller were already having consensual sex.

63. Lori described a second incident that occurred later in their relationship, after Mr. Miller had returned from a six month period in Houston. Lori believes that he had thought they would become a couple again and was very upset that she would not agree to. He got drunk, took some acid, and then assaulted her. "He was choking me to the point I thought I would pass out." Then another man who was present said something and Mr. Miller stopped. "David was screaming and crying one minute and screaming the next. Later he got into my car and threatened to ram the trailer...the acid made him totally crazy."

64. During the time that Mr. Miller lived in Knoxville, in March and then in September, 1980, he was arrested twice for allegedly raping women. Neither case was prosecuted. Mr. Miller told me that one of the alleged assaults was "bullshit;" that the woman threatened to charge him with rape as a means of trying to extort money from him. However, he essentially acknowledged the veracity of the other incident. They had been making out in his car. He was drunk. She said "no" to further sexual contact and he became enraged and pulled out a knife threateningly until she submitted.

65. The fourth verifiable incident was the assault on his mother. Mr. Miller recalls being drunk and enraged. Although he did not connect his assault on her to the incest she had perpetrated against him, it seems highly probable that the two were indeed connected. Indeed, it seems very likely that the sexual violence that Mr. Miller has committed against women is rooted in the sexual violation he was subjected to – first by his female cousin, but most prominently by his mother.

66. Finally, Mr. Miller's apparent behavior during the murder of Lee Standifer is also consistent with an outburst of unbridled rage and aggression, an outburst associated once again with heavy drinking and the consumption of acid. That Mr. Miller committed the crime in a fit of rage is suggested most strongly by the nature of the wounds inflicted on the victim, wounds that far exceeded what would have been necessary to kill her, wounds that are most commonly associated with "rage murders."

Institutionalization

67. Mr. Miller was born into a family that was abusive and neglectful, and clearly incapable of providing him with even the minimum necessary to ensure his successful development. That much is attested to by the ongoing involvement of the Department of Human Services in the affairs of the family, and by the ultimate judgment of the Department that Mr. Miller's mother was incapable of parenting her children. Twice Mr. Miller was temporarily placed in the care of his aunt Alice. Finally, in June, 1973 he was placed in a formal foster home with his brother Randy. The Richmond's, who took in Mr. Miller and his brother, apparently did their best to provide a home for these two already troubled youths. However, the demands may have exceeded their training or preparation. Mr. Miller said he could not tolerate the way Ken Richmond disciplined his brother. He would "beat" Randy – Mr. Miller was quick to acknowledge that these beating were "discipline" – but Mr. Miller

could tolerate the fact that they did not understand his brother's retardation; that they expected him to do things that he was incapable of, and then would "discipline" him when he could not. Finally, Mr. Miller rebelled against the Richmonds, doing so in a manner that was already a part of his nature. He stole a fifth of whiskey, got drunk, and took the Richmond's car. He was gone two or three days before he was arrested.

68. The car theft led to Mr. Miller's first institutionalization. In August, 1973 he was sent to the Fairfield School for Boys. The Fairfield school was a troubled institution and extremely overcrowded. Nevertheless, Mr. Miller recalls his time there in neutral terms. He stated that he was not abused by the staff nor did he receive more than his share of targeting from other youths. However, nor did the school provide the intensive treatment or structure that might have turned around Mr. Miller's already troubled development.

69. At the age of 17 Mr. Miller enlisted in the Marine Corps. He stated simply: "I enlisted because I wanted to go over to Vietnam and kill some of those Vietnamese." It seems evident that to the adolescent Mr. Miller, brimming with rage, the Vietnam War was an opportunity to vent aggression that he could otherwise barely control. However, disillusionment came quickly. He found basic training difficult not because of the physical tests, or because of the yelling ("I was used to being yelled at"), but because of the enforced discipline. The Marine Corps discipline ran into Mr. Miller's simmering rage and clashed. And then came the disillusionment: Mr. Miller discovered that the American involvement in the Vietnam War was winding down and that he would not be sent overseas. This discovery stripped away any motivation he had to tolerate the hated discipline, and Mr. Miller went AWOL.

Mr. Miller's Derailed Development into Adulthood

70. Mr. Miller's abortive attempt at becoming a Marine attested to the fact that he was wholly unprepared to make the transition from adolescence into adulthood. This is a difficult and often troubled transition for most young people. It is a time when hidden vulnerabilities often rise to the surface, and it is a time when all of a person's resources are typically called upon to make the transition successfully. For Mr. Miller, it was to be far more difficult than for most. He was woefully unprepared for the challenges of adulthood – to establish adult relationships, and to establish and sustain a meaningful livelihood. He was unprepared because his childhood of abuse and neglect had deprived him of the kinds of experiences and relationships that are the foundation for meeting and mastering these challenges.

71. After a series of AWOL's Mr. Miller was dishonorably discharged from the Marines. He returned to Ohio, and to his constant drinking, and within a short time was arrested for car theft. This time he received jail time and he was incarcerated for approximately one year.

72. When Mr. Miller was paroled in 1977 he was released to a halfway house, and with the guidance of his parole officer, he enrolled in a welding course. He did well at the school, and upon completion he was hired as a welder at the Differential Corporation, a manufacturer of railroad cars. This period of Mr. Miller's life was, in retrospect, his last chance at making a successful adaptation to adult life. For a brief period, he had the ingredients in place, but the vulnerabilities that were the legacy of his abusive childhood ultimately undid him.

73. From the halfway house, new job in hand, Mr. Miller moved in with his now elderly grandfather in Findlay, Ohio. His grandfather was the person with whom Mr. Miller

felt the closest. He was the only person from whom Mr. Miller felt unconditional love. He remembered that as a child, his grandfather would take him out to get the mail from the post office, and "just the way he acted I knew that he cared about me." Most tellingly, his grandfather was the only person in Mr. Miller's life who he can recall ever telling him – once or twice – that he loved him.

74. Working at Differential and living with his grandfather, Mr. Miller began to make plans. He wanted to save money to buy a house closer to town so that his grandfather could get around more easily. While he never gave up drinking entirely, Mr. Miller found he could confine it to the weekends, remaining sober during the week.

75. Mr. Miller's fledgling attempt to put a life together came to a sudden and tragic end one day after work. He returned to the house after a day at Differential and discovered his grandfather dead. He had died some time during that day, and his body was already stiff and cold. It was a horrifying loss for Mr. Miller, and it was one that he never really recovered from. When he talked about this during the interview he became teary, the only time this occurred. Nearly a quarter century after his grandfather's death, Mr. Miller still felt the grief.

76. Almost immediately he began drinking more heavily. Alcohol was the only coping mechanism he had. No one had ever modeled for Mr. Miller what to do with intense feelings, how to manage grief, how to find help, or whom to turn to. So he turned to alcohol and was soon drinking every night after work, and each weekend. He couldn't stand to remain in the house where he lived with his grandfather, so he moved into a boarding house. Soon he was drinking during his lunch breaks. His drinking soon cost him his job at Differential, where he was terminated for "excessive absenteeism."

77. It was during this period that Mr. Miller met Lori. Their relationship was tempestuous from the start, and fraught with difficulties. To start with, Lori was involved in a committed relationship with another man, who was in prison when she and Mr. Miller met. Despite this, they were involved for a number of months. Mr. Miller was chronically jealous, both because of Lori's ex-boyfriend and because he suspected that she was "running around" with other men.

78. After a series of low-paying jobs, Mr. Miller managed to get himself re-hired at Differential, but this too was short-lived. This time, the uncertainty of his relationship with Lori proved too much for him, and in late 1979 he quit his job and moved to Houston to get away from Lori, his jealousies and his fears that he would hurt her.

79. Mr. Miller lived in Houston for a number of months, working, but spending most of his spare time drinking in bars. Soon he was drinking both day and night and using "barb's" as well whenever he could get them. He returned to Findlay after approximately six months, because, he stated, Lori promised that she would get a divorce and that they could get back together if he did. When he returned to Findlay he discovered that this would not be the case. He drifted from job to job, lived in a boarding house, and drank daily and nightly. Finally, he could no longer stand to live in the same town as Lori, so he left Findlay and began hitchhiking.

80. Eventually, he found himself in Knoxville, and was taken in by Calvin Thomas, a reverend and self-described "latent homosexual." It was evidently Mr. Thomas' hope that Mr. Miller would engage in a homosexual relationship with him. However, after several sexual encounters, Mr. Miller refused further sexual contact. Nevertheless, he lived with Mr. Thomas, off and on, for many months. Otherwise, his life in Knoxville assumed many of the characteristics of the deteriorating life in Findlay that he had escaped from.

Although he made some attempts to weave together a sustainable life – he enrolled in another welding course to become certified as a welder in Tennessee; he dated a woman seriously for several months – ultimately Mr. Miller's drug and alcohol addiction and his small reservoir of personal coping resources undid these positive efforts. He still harbored within him, untreated, profound levels of rage that he directed at women; rage that stemmed from the confluence of his step-father's brutality, and his mother's incestuous abuse.

81. The degree to which Mr. Miller's history of violent abuse and incest has haunted him into his adult life is perhaps most eloquently described by a nightmare that he told me about during one of the interviews. It is a nightmare that he has had several times during the past years of incarceration on death row:

> "I'm at my execution, strapped to the gurney so I can't move at all, and my step-father is present. I see him sitting in the viewing gallery. I don't see any expression on his face, but I hear him say this to me: "I hope you have nightmares about this you sorry bastard!"

82. It is as though Mr. Miller fully expects to be tormented by his step-father right through to the final seconds of his life.

83. Further affiant sayeth naught.

David Lisak

March 7, 2003

David Lisak, Ph.D. Date

Attachment C

to David Miller's Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation

Portions of the Transcript from David Miller's Trial

A No, sir.

Q Now, directing your attention, Miss Sharp, to May 20, 1981, did you have occasion to come in contact with Miss Standifer that day?

A Yes.

Q Would you tell us about that, please.

A You want me to start in the afternoon or--

Q Yes, ma'am, if you would.

A Okay. Earlier in the afternoon about three or four, I was in our resident director's office, and Lee had just left the office and she was out in the hall. She had put in a call to the Hideaway and left a message for David Miller to call her back.

MR. OLIVE: Your Honor, I'm going to have to object to any hearsay testimony henceforth and request--and request a cautionary instruction.

THE COURT: All right. I sustain the objection as to any hearsay statements.

Ladies and gentlemen of the jury, the Court sustains the objection to hearsay evidence unless it qualifies under some of the exceptions to the hearsay rule, the theory being that the person to whom a statement is attributed is not before the Court for the attorneys to cross-examine, so I have sustained that objection. You will hear the term "hearsay" mentioned from time to time, so that's the basis

of the Court's ruling on the objection.

Of course, General Dake, you may ask this witness what she observed and what she did as a result of those observations, if any.

MR. OLIVE: Thank you, your Honor.

Q Miss Sharp, do you know of your own personal knowledge whether or not she placed a call or to whom a call might have been placed?

A Yes.

Q Okay. And did you see her place that call?

A No.

Q But you did see her there in the business office or in the vicinity of the business office?

A Yes, uh-huh.

Q All right. And about what time of day was that?

A It was about three or four.

Q Okay. And did the two of you remain there for a period of time, or what happened?

A I talked to the resident director--

Q Okay. Now, don't say what anybody said.

A Okay. I talked to her for a while, and then I went to my room.

Q Okay. And where was Lee Standifer when you went to your room?

A She was in the hall. She had been called to the

ne; she was on the phone.

Okay. And when you went to your room, what, if anything, did you do?

A I--well, I ate some supper, and I got ready to go to church.

Q Okay. And what time were you to go to church?

A Some people were supposed to pick me up at seven.

Q 7 o'clock p.m.--

A Right.

Q --on May the 20th, 1981?

A Right.

Did you go back down to another portion of the YWCA?

I went at about a quarter--about twenty--well, about twenty of seven I went to the lobby.

Q And did you see anybody at that time in the lobby?

A Yeah, Lee was in the lobby.

Q And did you have any conversations with her? And again, don't say what she said, but did you--

A Well, we had--we stopped in the lobby, and then we decided--I can't say what she said?

Q Okay. Well, what did you do?

A Well, we decided to go outdoors and wait for--

Okay. That--

She was waiting for her date, and I was waiting for my ride.

Q Okay. And that was Lee Standifer and yourself?
A Right, uh-huh.
Q How long did you stand outside waiting, Miss Sharp?
A Well, when we got out there, the little--the bank said it was fifteen before seven, and we stood there together until seven, straight up seven.
Q Okay. And what happened, if anything?
A Well, we were standing there, talking, and it started out--I asked her--I asked her--
Q Well, don't--don't go into the conversation. You stood there and you had a conversation?
A Right.
Q Okay. Don't go into what was said.
A Okay.
Q But did anything happen around 7 o'clock that evening?
A Yeah.
Q All right. What happened?
A Her friend came after her.
Q Okay. Now, who did you see?
A I saw David Miller.
Q All right. And where did you see him? When you first saw him, where was he?
A He was stand--he was there on the corner of Clinch there where the Valley Fidelity Bank was.
Q Okay. And what was he doing?

A No, sir.

Q Did you notice anything unusual about the way he walked?

A No.

Q What happened next, Miss Sharp?

A Lee walked out and came even with him, and they walked down to the corner there of Clinch and Walnut and turned and walked up north toward the Park Hotel there.

Q Did you watch him walk from where you were standing down to the corner?

A Right. Until they were out of sight, yeah.

Q Okay. And then, I take it, they turned the corner and disappeared from your sight?

A Right. They walked up that street there past the place where they sell glasses and--

Q And during the time he walked down through there, did you notice anything unusual about his--the way he was acting and the way he was walking?

A No.

Q While you were standing there, did he say anything to you or--

A No. I spoke to him, and he nodded and he smiled, but he didn't say anything.

Q Now, did you notice how Lee Standifer was dressed that evening?

A She had on a brown coat with sheep skin lining and I think she had blue jeans.

MR. DAKE: Your Honor, may I approach the witness?

THE COURT: You may.

Q Miss Sharp, I'll show you what's previously been marked as Exhibit No. 8 for identification purposes, a bag and its contents. If I may remove this and show it to you. Do you recognize the contents of that bag?

A Yes.

Q What is that?

A That's the coat Lee was wearing.

Q And this was on May the 20th--

A Right.

Q --1981, at approximately 7 o'clock p.m.?

A Right.

(Whereupon, there was a brief pause in the proceedings.)

Q Now, prior to this occasion, had you ever seen David Miller before?

A No.

Q Do you see the person that met Lee Standifer in front of the YWCA that night, May the 20th, in the courtroom today?

A Yes, I think--

Q Would you please stand up and point him out?

A Yes. He's right there in the striped shirt and the

maroon tie.

MR. DAKE: Your Honor, may the record reflect that Miss Sharp has identified the defendant, David Earl Miller.

THE COURT: Very well. Thank you.

Q Miss Sharp, after that evening, did you ever see Lee Standifer again?

A No, sir.

MR. DAKE: No further questions.

MR. OLIVE: If it please the Court.

THE COURT: Mr. Olive.

CROSS-EXAMINATION

BY MR. OLIVE:

Q Miss Sharp, you remember speaking with Mrs. Judy McCarthy and myself a couple of weeks ago about this case, do you not? Do you remember that?

A Yes, I do.

Q And you also remember, do you not, calling my office and speaking with Mr. Volinsky about this case sometime last summer? Do you remember that?

A Yeah.

Q All right. You stated--correct me if I'm wrong--that David walked up to you and smiled at you and nodded at you there in front of the Y?

A I spoke to him, and his response was to smile and nod, uh-huh.

Q And he was standing there in front of you, you stated, five feet away, is that right?
A Yes, approximately. I--
Q And he stood there for about fifteen seconds at the most, five feet away from you?
A At the most, yeah.
Q It could have been less than fifteen seconds, as a matter of fact. Is that right?
A Right.
Q And from five feet away you noticed no odor of alcohol about him, is that correct?
A No.
Q And from five feet away you didn't notice bloodshot or blurred eyes?
A No.
Q And he didn't say a word to you, did he?
A No. His only response was to smile and nod.
Q Okay. And that was the first time you had ever seen him standing in front of you or walking down the street?
A Well, I watched him the whole block as he walked down.
Q And you'd never seen him walk before either, had you?
A No, sir.
Q That was the first time you ever saw David Miller do a thing in his life?

A Right.

Q And he and Lee greeted each other, is that correct?

A No. She--they didn't greet each other. She just--she just left where she was standing and started walking even with him, you know--

Q Okay.

A --and they didn't--

Q Okay. Go ahead, go ahead. Just started walking--

A I didn't hear either one say hello to each other.

Q Okay.

A They just walked away together.

Q And they walked away?

A Uh-huh.

Q And they weren't--you didn't hear them speak to each other, is that correct?

A No, sir.

Q So you didn't hear Mr. Miller say a thing?

A No, sir.

Q And they walked away together, and they weren't fighting, were they?

A No, sir.

Q They weren't arguing with each other?

A No, sir.

Q They apparently weren't mad at each other or angry with each other, that you could tell?

A Not that I could tell.

Q And they walked away from the library--

A Yes.

Q --is that correct?

A Yeah.

Q Not toward--

A Not toward the library.

Q All right. Now, you don't happen to know whether thirty minutes before this incident Mr. Miller took LSD, do you?

A No, sir.

Q You don't know whether six hours before you saw him he had been drinking any alcohol--

A No.

Q --do you? And would it be safe to say or incorrect to say that you had not ever looked at anyone who you knew was on LSD, or have you?

A I've looked at people who were messed up on drugs, but I couldn't identify it as LSD or PCP or whatever.

Q So you could not say to us that you have ever in your life looked at a person who you knew was high on LSD. Isn't that correct?

A No. Just people who were messed up, yeah.

Q Okay. Thank you.

REDIRECT EXAMINATION

A Yes, sir. During the course of his employment, as well as when he wasn't employed and coming into the station.

Q Had you observed him on those prior occasions, had time to look at him?

A Yes, sir, I had.

Q Had you talked to him?

A Yes, sir, quite often.

Q Did you see him that night, on the 20th of May of 1981?

A Yes, sir, I did.

Q What time did you see him?

A It was right at 9:30 or right in that area.

Q Where were you located when you saw him?

A In the cafeteria of Trailways.

Q Where in the cafeteria?

A Approximately the west end of the cafeteria and near the serving line, which would be, basically, around the center area there.

Q And was anyone with you at that time?

A Yes, sir.

Q Who was that?

A Mr. Shooks.

Q And what were you and Mr. Shooks doing?

A I was having tea and reading a book, and Mr. Shooks had come in to have coffee.

Q And you recall this to be approximately 9:30?
A Yes, sir.
Q Now, at that point in time, what did Mr. Miller do?
A I--when I first observed him, he came in from the lobby area into the cafeteria. He was with a girl, and I had never seen the girl before. He left the girl standing near a pylon where she was, basically, out of my view--
Q Now, a "pylon," what do you mean by a "pylon"?
A Just one of the posts that holds up part of the roof.
Q A post that would come from the ceiling to the floor?
A Right.
Q And you say that Mr. Miller left this girl where?
A Standing beside it, out of my view.
Q And how far in distance was she where she was left from you at that point in time behind the pylon?
A About 10 to 15 feet at the most.
Q All right. What did Mr. Miller do then?
A Came over to the table where we were sitting and was talking to Mr. Shooks about getting a ride home in Mr. Shooks's cab.
Q Now, would you tell--do you recall specifically about what Mr. Miller said to Mr. Shooks?
A Yes, sir, I do.
Q Would you tell us what you recall the defendant saying at that point in time.

He had asked Mr. Shooks to give him a ride in his cab out to South Knoxville to the--near the Palace Bowling Lanes, and Mr. Shooks stated that it would be five dollars fare, flat fee. Mr. Miller at the time said he only had three dollars, and that he would, you know, work something out about paying the next day, and they haggled over the price there for a little while.

Q Okay. And what happened then?

A They reached some type of an agreement, and Mr. Shooks headed toward the cab. At that time Mr. Miller went back and got the girl that was waiting and helped her out to the cab.

Q Now by "helped her," what did he do to the girl?

A He had to support her somewhat and lead her out to the cab.

Q Did you see that girl?

A Yes, sir, I did.

Q Would you describe to the jury her appearance.

A She appeared to me to be heavily--either intoxicated or under the influence of drugs. She was not able to really move on her own that well.

Q Did you see her clothes?

A Yes, sir, I did.

Would you describe what you saw and observed in reference to her clothes.

A She had on a pair of jeans. That was one of the main things I noticed. And where she had been standing there in the station, she had urinated on herself. You could see the tracks of the urine down the legs of the jeans.

Q And which portion of the legs are you referring to, the back or the rear--

A The inner-thigh area and down to the cuffs.

Q Now, how long was David Earl Miller in your presence inside the bus station there when you saw him?

A Approximately ten minutes.

Q During that time, did you--were you able to see him?

A Yes, sir.

Q Did you hear him talk?

A Yes, sir.

Q Did you talk with him?

A Yes, sir, I did.

Q Did you have adequate lighting to be able to observe him?

A Yes, sir.

Q Did you observe his walk?

A Yes, sir.

Q Do you have an opinion, based upon your prior experience as a police officer, based upon your observations that night, as to whether or not David Earl Miller was under the influence of an intoxicant?

A From the actions I observed that night and talking with him, he appeared to be in a normal state, as he usually was when he came into work.

Q Did he appear any different that night than on the other times when you had seen him at the bus station at work?

A No, sir.

Q Did he do anything unusual while he was there in the bus station that you recall, that you would consider to be abnormal conduct?

A No, sir, not that I can recall.

Q Did he talk in a loud or normal voice?

A Quite normal.

Q Who was doing the negotiating on the price?

A Mr. Miller.

Q Do you know an individual by the name of Carolyn Jane Daniels? Gann, I believe, now.

A I believe she was the one that was working at the food service that night. I'm not positive, but I believe she was.

Q Have you ever known her to date David Earl Miller?

A Yes, sir, I have.

Q Was she there that night?

A I believe she was; I believe she was working that night, supposed to get off around 10 o'clock or 11.

Q Now, other than the time you saw Mr. Miller there with

the girl, had you seen him there or that girl there earlier that night?

A No, sir. Like I say, I'd never seen the girl before in the area. This was my first encounter with her. As far as Mr. Miller, I hadn't seen him any--any time earlier that night.

Q I'll show you what's been filed as Exhibit No. 3 and ask if you can identify that photograph?

A Yes, sir. That's the girl that was with Mr. Miller that night.

Q Are you positive?

A Yes, sir. The hair is a little bit different, but other than that, it's the same girl.

Q The same body and build and--

A Yes, sir.

Q --the way you recall her?

A Yes, sir.

Q At any time while you were there in the cafeteria, were you ever face to face--face to face with that girl?

A No, sir, he wouldn't let me get close to her. He knew if I did that I would arrest her.

MR. OLIVE: Object to what he knew, your Honor.

THE COURT: Sustain the objection as to the conclusion.

Q Who put her over there behind the pylon?

A Mr. Miller.

Q Based upon your prior knowledge of Mr. Miller, did he know that you were a police officer?
A Yes, sir, he did. I also was in uniform.
Q The standard uniform of the Knoxville Police Department?
A Yes, sir.
Q Out of the two, the girl or David Earl Miller, who were you face to face with that night, if anyone?
A Mr. Miller.
Q How close were you to him at the closest point in time?
A As far as from here to the microphone.
Q And for the record, you're talking about the distance of how far?
A Two feet maximum.
Q Did you see Mr. Shook, the cabdriver, again that evening?
A Yes, sir, I did.
Q And where was it that you saw him again?
A He returned back to Trailways where he was expecting a bus to come in with some passengers.
Q All right. And did you see him again?
A Yes, sir. It was approximately 9:45.
Q At that point in time, did you see David Earl Miller or this girl again that evening?

THE COURT: Very well. Of course in the absence of the jury Mr. Olive and his co-counsel may put it on the record for the protection of his client, and that's what he has asked. I'm quite sure he understands the ruling of the Court, that this--this witness stands presumed to be innocent of any charges pending; but nonetheless, the Court has allowed the questions to be asked for the state of the record.

MR. OLIVE: Thank you, your Honor.

THE COURT: They will not be asked in the presence of the jury, however.

MR. OLIVE: Certainly.

THE COURT: All right. The jury may return.

(Whereupon, the jury returned to open court and the call of the jury was waived by both parties; after which, the further following proceedings were had, to-wit:)

THE COURT: You may continue.

MR. OLIVE: Thank you, your Honor.

CROSS-EXAMINATION (Continued)

BY MR. OLIVE:

Q Mr. Stout, you were a police officer for how many years?

A Two and a half years.

Q You ever been a police officer before you were one in Knoxville and in Knox County?

A No, sir, I was not.
Q And during that two and a half years or before that two and a half years you were a police officer, you were trained, were you not, on how to write up reports about incidents that have occurred, is that correct?
A Correct.
Q And you were trained, I believe, sir, to make those reports as detailed and as accurate and as complete as you possibly could, is that correct?
A Basically.
Q Because what that does, when you get to a trial, is assist you in your recollection of what happened, the date, or the events that you described in the paper that you were writing, isn't that correct?
A True.
Q You can look back and see that?
A Right.
Q You signed the statement regarding this offense, or this alleged offense, sometime after the evening you testified about, isn't that correct?
A That's correct.
Q And as a police officer and as an officer assisting the police in an investigation, it was your desire to give as complete, full, and accurate a statement as you possibly could, isn't that true?

A As I can remember, yes.
Q And you did that, is that right?
A That's correct.
Q Now, you were employed at that time by Trailways, also, is that correct?
A As an off-duty job, yes, sir.
Q Pardon?
A As an off-duty job.
Q And part of that off-duty job, in fact all of that off-duty job, was to keep undesirables and drunks away from the premises?
A That's correct.
Q Now, if David Earl Miller was drunk on those premises and revealed to you that he was drunk, you would have arrested him on the spot, wouldn't you?
A I would have.
Q Now, if he was drunk on the spot, intoxicated, and you did not arrest him--all right?--and your supervisor found out about that, you'd lose your job, is that correct?
A If I didn't lose my job, I'd be severely reprimanded. Some action would be taken.
Q Very well. Now, you stated on your direct examination that Mr. Miller left Lee Standifer by a pylon, is that correct?
A That's correct.
Q And you also looked at a photograph and identified

that as the person who was standing beside the pylon, is that correct?

A Yes, sir.

Q So she wasn't hidden from your view at all, was she?

A She was hidden at first. I noticed her when he went back and got her.

Q How many feet away was she from you?

A I'd say about 12, 15 feet.

Q And when he walked away from you, he knew you were behind him, is that correct?

A That's correct.

Q And he walked straight to her, is that--

A Yes, sir, he did.

Q And then you saw her. And from that view, you were able to identify her?

A Yes, sir. When he moved out beside me, I could see her face.

Q Okay. Did you see Mrs. Gann there that night? Did you say you did? Miss Daniels, now Mrs. Gann.

A Right. She was an employee there at Trailways.

Q All right. Was it raining that night?

A No, sir, I don't believe it was.

Q Had you been outside in the last hour or so before Mr. Miller arrived?

A Yes, sir. I had been out approximately fifteen

minutes earlier.

Q All right. You state that Miss Standifer appeared intoxicated or under the influence of drugs, is that right?

A That's correct. She appeared to be intoxicated or under the influence of some type of intoxicant, which she just really wasn't able to move and comprehend things on her own.

Q You didn't arrest her, did you?

A No, sir. I didn't see her at first.

Q You saw her intoxicated, didn't you?

A Only as they started to leave.

Q They were in the Trailways Bus Station, weren't they?

A Yes, sir. She was accompanied by Mr. Miller.

Q So there was one intoxicated person in the Trailways Bus Station that you did not arrest, even though that is your job, is that correct?

A That's correct.

Q You said that Mr. Miller had to help her out to the car. Do you remember saying that?

A Yes, sir, I do.

Q Do you remember giving a statement on May 25, 1981, to Lieutenant Jim Winston? Do you remember doing that?

A Yes, sir. I remember having gone up and given a statement.

A I didn't know him personally, but he was a frequent library user.

Q And to see him, you would recognize him by face. Is that a fair statement?

A Yes.

Q Do you recall whether or not on the evening of May 20th, 1981, you saw Mr. Miller?

A Yes, I did.

Q Do you have any idea what time it was?

A It was around 8 o'clock.

Q Could you relate to the ladies and gentlemen of the jury what Mr. Miller did and what you did when you saw him.

A He--it was very busy and there were a lot of people checking out materials, and I was working with Miss Baker and we were both busy checking out people's materials. And he just came up to the desk and told me that he couldn't find a particular section and asked me where it was, and I told him that it was on the second floor. And he told me that he had been up there and couldn't find it, and he didn't--I believe he said he didn't think it was there. And I told him that--I knew that's where it was, so I told him that I knew that that's where he would find it, that it couldn't be any place else in the building. And then I sort of looked over at Miss Baker because I thought that the people were getting--the other patrons were getting impatient, because there were so

many of them. And she just suggested that he go upstairs to the Fine Arts Department and have the librarian there take him to where the section was.

Q Was Mr. Miller by himself?

A No. He was with a young lady.

Q And could you describe her to the best of your memory.

A She was about--she wasn't tall. She was about 5 feet 6, I guess. And I just remember glimpsing her face, and she had--I believe she had short black hair and large dark eyes, and that's really all I remember.

Q Sir, during your lifetime, have you ever had the opportunity to see individuals under the influence of an intoxicant like alcohol?

A Yes.

Q And would you say yes or no that you can tell--or form an opinion whether someone is intoxicated or not?

A Yes.

Q Did you form any such opinion regarding Mr. Miller?

A Yes. In my opinion he was intoxicated.

Q Would you tell the ladies and gentlemen of the jury what that opinion is based on.

A Well, when he was asking about this particular section of books, he was leaning against the desk; then, after I told him that they were upstairs, he took a step back and then

another step back, and he seemed to noticeably stagger. And then he took a step forward and told me that that's--he didn't think they were there, that he had already been up there and couldn't find them. And that's when I looked over at Miss Baker. I glanced at the girl, and then I looked over at Miss Baker.

Q When you glanced at the girl, did you form an opinion as to whether she was intoxicated or not?

A No. She--not really, because I just glanced at her face for a second. But she had sort of a vacant stare, and she was smiling slightly.

Q All right. Did you ever see Mr. Miller walk, either to you or away from you?

A No. All I saw was when he stepped back, took a few steps back and then stepped forward again--

Q What is--excuse me.

A --to say something else.

Q What is the closest he ever got to you?

A The closest he ever got was leaning on the desk right in front of me, so that would be about a foot and a half, two feet.

Q All right. And how long a period of time did that last?

A The whole thing lasted only a minute and a half or two minutes at the most.

Circulation just had three.

Q Very well. On that evening do you remember whether you saw David Miller or didn't see David Miller?

A I did.

Q And about what time was that?

A I don't remember. I wouldn't--couldn't be clear.

Q And can you explain to the ladies and gentlemen of the jury the circumstances under which you saw Mr. Miller?

A We were busy at the time and had two long lines of people waiting to check out books. And Doug Keeling was on one side of the machine which we check out books and I was on the other, and David Miller came up with the girl and wanted a book--a number or a book, I don't know--and was very loud because he couldn't find the book.

Q Who was he speaking to first?

A Doug.

Q All right. And was Mr. Keeling trying to take care of it?

A Yes. He was trying to take care of it, and it just got louder and louder, and he--David Miller got more belligerent, and I just stepped over sort of behind Doug and said to David Miller, "If you would like to go to the top of the stairs, there's a man upstairs that will help you find the book."

Q Had you seen Mr. Miller ever before?

A Yes. He came in the library quite a bit.

Q Had you seen the young lady that was with him ever before?

A Yes. She also came in the library.

Q All right. Ma'am, have you ever during your life had, perhaps, the misfortune to see people who were intoxicated?

A Yes.

Q And are you able and do you form opinions when seeing people as to whether or not they are intoxicated?

A Generally, yes.

Q When you looked at David Miller and you saw what he was doing that night, did you form any kind of opinion about whether or not he was intoxicated?

A I smelled it on his breath, but that was about all.

Q All right. And how close to you did he come?

A I guess I was about 4 feet.

Q All right. And did you look at the woman that was with him?

A Yes.

Q And did you form any kind of opinion at all as to whether she was intoxicated?

A No. She never said a word.

Q All right. So you did not form an opinion as to her?

A No, huh-uh.

Q Or as to whether she had been drinking or not?

A No, huh-uh.

Q You see my client, David Miller, seated here. Did you see him--can you see him? You can stand up, if you like. Did you see Mr. Miller that night?

A I am told that I do, although I do not know Mr. Miller. He was a frequent user of the library, I'm told. But there are a great number of people who use the library that never come upstairs. Then if you use it in the daytime, I wouldn't know them anyway.

Q I understand that. Did you see Mr. Miller upstairs this night that we're talking about?

A He was sent upstairs to ask a question of me, because I was the only librarian on the second floor. And I do not remember that, yes, he was up there, but I was told by Miss Baker--or Doug, probably Doug--Doug does not have a car, so, generally, I would run him home on my way home--that he was there.

Q Do you remember if Mr. Miller was with anyone?

A Yes. He was with the girl.

Q Do you remember what this girl looked like at all?

A No, I don't. She too was a library user, but I assume that possibly she used the facilities downstairs.

Q Would you tell--I know it's been a while, but would you tell the members of the jury what you remember on that night regarding Mr. Miller and this girl.

A They came upstairs. I don't remember what the

specific request was that they had, what they wanted. She did not speak, and I assume he spoke or had a call slip. Anyway, they asked me for some help, and I took them back into the stacks. The desk at which I work has money in it, so I try never to leave that desk long, because in a public building, the money can disappear very quickly, and particularly at the library. So when somebody asked me a question, then I get up from my desk and I would take them back into the stacks, but I would always lead the way, because if they have to ask me a question, they don't know where they're going, and I don't have time to kind of wonder around. So I would lead them back into the stacks, and to the best of my remembrance, I'd led them into the 900's or the late 800's, which would be relatively close to my desk, and I don't remember going way back into the library. And the only reason I remember this is because the next day people called it to my attention, what had happened, and, naturally, I remembered it when it was more fresh to my mind. Had this just suddenly brought out of the blue, I wouldn't remember anything.

Q What kind of books are kept in the 800's to 900's?

A 800 is literature, 900 is geography and history.

Q Do you remember anything in particular about Mr. Miller? Hearing what he may have said, anything?

A No, I don't. I noticed that when we went back in the stacks--Lawson McGee is somewhat crowded and the stacks are

Q Before May 20th or before today?
A Before May 20th.
Q Would you consider yourself to be a friend, an acquaintance, or an enemy of Mr. Miller?
A A friend.
Q Do you remember the events now of May 20th, 1981, there at the Trailways?
A Yes, sir.
Q Did you see Mr. Miller that evening?
A Yes, sir.
Q Would you have any idea what time of night it was?
A Between--to the best of my knowledge, between 8 and 8:30.
Q Are you--you say to the best of your knowledge. Is that--are you certain, or do you know, or what?
A I'm not positive.
Q All right. And was he alone or was he with someone else?
A No, he was with a girl.
Q And do you know who that girl was?
A Lee Standifer.
Q Had you ever seen her before that night?
A Yes, sir.
Q When had you seen her?
A A few nights before that, he brought her into the

restaurant.

Q Who he?

A David.

Q If you would, tell the ladies and gentlemen of the jury what Mr. Miller and the lady did when they came into the cafeteria.

A They came up to the counter and got a cup of coffee and a Coke.

Q Did Mr. Miller do this purchase or did the woman with him do the purchase?

A He did.

Q And what happened after that?

A Then they went back to one of the booths and sat down.

Q They?

A Mr. Miller and Lee.

Q Was there anything at all unusual about David's actions while he was there in the cafeteria?

A Yes, sir. I complained to him because he spilled his coffee from the register back to the table all over the floor.

Q How far would that be? If you could estimate something in the courtroom that is how far he would have walked.

A Maybe here from where to you're standing.

Q And you said he and Miss Standifer sat in a booth, is that--they went to a booth. Did they sit in the booth?

Q How long did you have that conversation with David at the table?
A I guess about ten minutes.
Q Okay. What happened then?
A I decided to go ahead and take him out there. He went back and got the young lady and led her out to the car and put her in the car.
Q Did you see that young lady then?
A Yes, I did.
Q Would you describe how she appeared.
A Well, she was wearing blue jeans and had a small black jacket on. She acted kinda disoriented to me, and she'd wet her pants.
Q All right. Where did you go?
A Went to the corner of Stone Road and Wise Hills.
Q And where is that located?
A It's off of Chapman Highway right past the 8 Days Inn out there.
Q What happened at that intersection of Stone Road and Wise Hills?
A Well, I stopped the car, and David gave me the three dollars. And he opened the door and helped the young lady out and started leading her off up the hill, and I returned to the bus station.
Q Do you recall how long it took you to go from the bus

station to the intersection of Stone Road and Wise Hills Road?
A Approximately fifteen minutes.
Q Did you go back to the bus station?
A I went straight back to the bus station.
Q Would you describe David Earl Miller's condition as you saw and observed him at the bus station and in the cab.
A Well, he acted normal to me, just as he always had.
Q Did you see any indication that he was under the influence of an intoxicant that affected him in any way that you knew of?
A No, I didn't.
Q Did you listen to his speech that night?
A Yes.
Q Did he have any trouble talking?
A No. He was very rational.
Q How long have you been a cabdriver?
A Since December of that year.
Q What is it that makes you think he wasn't under the influence of an intoxicant?
A I've hauled a lot of drunks around in a cab, and you can determine someone that's intoxicated almost by the time they get in the cab. If they've been drinking, you can smell it as soon as you get in.
Q What did David Earl Miller do that night to make you think that he was not intoxicated?

have been necessary to inflect those injuries that you have described with the instrument that you have described?

A Well, two of these wounds actually passed through the boney rib. So I think it--again, it would have required considerable force relative to human strength, let us say.

Q And would the injuries that you found be again consistent with someone taking the instrument that you described and driving that through the body with a hammer?

A Yes, sir, it could have been done that way, yes, sir.

Q All right. If you would proceed to the other injuries, please.

A There were two stab wounds of the back -- those I noted on the right-hand side--and another of the abdomen which is located down on the left-hand diagram. Again, the abdominal wound passed approximately seven to eight inches deep into the body down along the backbone.

With regard to the two wounds in the back, they were shallower wounds. And the one on the right side, again, passed through one of the boney ribs breaking the rib as it went. The one on the left side hit the shoulder blade and, thus, did not penetrate to any greater depth than the shoulder blade itself which was approximately an inch deep.

Q Now, Doctor, with regard to the wounds in the chest area--the front chest area and the abdomen and the stab wounds to the back, do you have an opinion as to whether or not those

were inflicted--when were those inflicted in relation to time of death?

A Well, it was my opinion that they very likely were done after death or at least after blood pressure had fallen considerably. I didn't--again, I did not find a lot of bleeding in these wounds, and that's the reason for--the reason I felt that they were probably done after death.

Now, on the left-hand diagram there are marked what I have called scrapes and again over the posterior lower spine scrapes. This was an area where the skin had been scraped off. Again, there was no bleeding; and, it was my feeling this could have been done after death--or it was my opinion it was done after death. It's the type of injury that would have resulted from dragging over a rough surface or dragging a rough surface over the body or something like that.

Q Would that be consistent with dragging a body over concrete?

A Yes, in my opinion. Of course, you remember that both the front and the back have been--were involved here.

Q Or asphalt?

A Any rough, abrasive surface, sir. (Pause) I believe that is all I have noted on this page.

Q All right. Doctor, now turning to the second page of this exhibit, did you examine the limbs for injuries?

A Yes. I have noted on--this diagram is primarily the

Attachment D

to David Miller's Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation

Neurology Consultation Report of Thomas M. Hyde, M.D., Ph.D

THOMAS M. HYDE, M.D., PH.D.
4701 WILLARD AVENUE, SUITE 233
CHEVY CHASE, MARYLAND 20815
(301) 652-8777

Patient: David E. Miller

Date of Birth: 7-16-57

Date of Evaluation: 3-18-02

Referral Source: Stephen M. Kissinger, Assistant Federal Community Defender

Consulting Physician: Thomas M. Hyde, M.D., Ph.D.

Neurology Consultation Report

History: David E. Miller is a 44 year-old right-handed Caucasian male referred for a forensic neuropsychiatric evaluation.

Developmental History: Developmental history was obtained from the patient's records. David was born at Wood County Hospital in Bowling Green, Ohio on July 16, 1957. His biological mother and father were not married. His mother married his stepfather, John E. Miller, Jr. in 1958. David recalls living in Ohio until about 17 years of age.

David attended public elementary school in Ohio. He recalls being a below average student with difficulty, particularly in English. Review of his school records reveal a variable academic performance ranging from B's to F's. He had no difficulty advancing each year despite his variable academic performance. According to David he was never suspended or expelled from elementary school. He was never diagnosed with a formal learning disability. He was never held back in elementary school. He does not recall receiving tutoring or special education assistance.

David attended public junior high school for 7th and 8th grades. His grades were worse in junior high school than in elementary school. In the 7th grade he failed two subjects. In the 8th grade he failed 4 subjects and had to repeat the year. He was suspended in 7th and 8th grade for truancy. He was never diagnosed with a learning disability despite his academic difficulties in junior high school. He never received tutoring or special education assistance.

David attended a variety of academic programs for high school. In the 9th grade he failed 3 subjects at North Baltimore Senior High School. In the 10th grade his grades were a little bit better. In the 11th grade his grades markedly improved at the C. A. Wilson Senior High School. He dropped out of school in the 11th grade and enlisted in the United States Marine Corps.

David was in the United States Marine Corps for 3-1/2 months. Records indicated that he went AWOL after basic training and received a
less than honorable discharge.

David denies any psychiatric treatment or psychiatric hospitalizations prior to his arrest on this offense.

David has suffered from intermittent depression since childhood. He has had recurrent suicidal ideation since that time. He stated that he has attempted suicide on three occasions. At 6 years of age he tried to hang himself and was found by an aunt who cut him down. He did not receive counseling or hospitalization. At 19 years of age when a girlfriend broke up with him he planned to drown himself, but could not follow through. At 22 years of age he was going to shoot himself, but his gun did not work. When he is depressed he feels that no one cares about him and he does not care about anything. His sleep is disturbed and restless. He has a decreased appetite and may go as long as 2 to 3 days without eating when depressed. However, he does not usually cry when depressed. He often socially isolates himself when depressed. He has not experienced problems with anxiety or panic attacks. His outlook on the future usually is guarded. He can be optimistic and pessimistic depending upon his mood.

David also has suffered from several manic episodes. These episodes can last anywhere from several days to several weeks. They are often accompanied by or precipitated by illicit drug abuse. During these episodes he will spend money excessively and consume lots of drugs and alcohol. He "raises hell" and gets into a lot of fights. He usually sleeps poorly during these episodes. He denies any history of grandiose delusions. However, his thoughts are racing and he is extremely disorganized during these episodes.

David stated that he has experienced auditory hallucinations, beginning at 6 or 7 years of age. These have been intermittent and he last heard voices in 1981. The voices can be male or female and usually call his name. On occasion these voices threaten him and command him to do things. He has followed through on their commands on only one occasion. They have never told him to hurt or kill himself or others. He does not know who these voices represent. He has heard these voices when depressed, but also when his mood was normal. He also used to talk to ghosts on several occasions. He feels that he is most likely to hallucinate when he has been binging on drugs or alcohol. David also reported that he has experienced visual hallucinations intermittently since 6 or 7 years of age. He has seen ghosts, boxes, shapes, shadows, and people. He last experienced visual hallucinations around 1980. They have been an infrequent occurrence. He has had gustatory and olfactory hallucinations on rare occasions as an adult. He also has had tactile hallucinations of people touching him on rare occasions as an adult. He denies any persistent beliefs in mind reading, thought control, thought insertion, thought broadcasting, or ideas of reference. Although extremely suspicious, he denies any history of paranoid delusions, somatic delusions, or grandiose delusions. He is not very religious and does not keep a diary or a journal. He denies any obsessive thoughts or compulsive behaviors.

According to the Helen Ross McNab Mental Health Center Forensic Service Program Psychological Screening Summary of November 3, 1981, David gave a history of auditory hallucinations, hearing voices calling his name. The report also documented his suicidal ideation and history of alcohol and drug abuse. The Adult Services Tennessee Department of Correction Initial Classification Psychological Summary by Jon Loranger, Ed. D. dated April 2, 1985 noted his suspiciousness and blunted affect.

David reports an extensive history of abuse primarily from his stepfather and biological mother. He reported that this abuse began at around 3 years of age. He was beaten repeatedly with a toy boat, pieces of wood, wire hangers, and shoes. He was often hit in the head and face. He believes that he was knocked unconscious on at least one occasion from one of these beatings, but never was hospitalized or taken to the Emergency Room. He also endured chronic verbal abuse, primarily from his mother. His mother often told him that she wished he were never born. This verbal abuse occurred on a daily basis from early childhood until he left home.

As recounted in the investigative report of Mark Olive dated February 4, 1982, according to Alice Hartman, David's maternal aunt, David's mother and stepfather abused him as an infant. David was beaten repeatedly by his stepfather as confirmed by Ms. Hartman. He was hit on the head on several occasions. Some of the beatings were quite violent. At least on one occasion he was thrown forcefully into a refrigerator, denting the refrigerator. A Social Services report on February 24, 1972 composed by Beatrice French, a caseworker with the Wood County Department of Welfare, noted that Mr. Miller was chronically abusive to his stepson and other children, often leaving bruises that would last for weeks.

Although David was uncertain of any traumatic losses of consciousness, he did note that he was beaten repeatedly about the head by his stepfather. After the episode where he was thrown into the refrigerator, he had blurred vision and memory problems for at least several weeks afterward. He never received any medical attention for these head injuries. David also reported that he developed seizures somewhere between 10 and 14 years of age. He had several convulsions, but never was hospitalized. A physician evaluated David for these convulsions and prescribed phenobarbital. During these episodes he would lose consciousness and start jerking after getting a copper or metallic taste in his mouth. He would feel "hung over" for about 30 minutes afterwards. It is uncertain what precipitated these events. They usually were not associated with tongue, lip, or cheek biting, incontinence, or vomiting. He denies any history of such events recently. These events were witnessed by family members and he believes his aunt once took him to a doctor for evaluation and treatment. Now and again he still "blanks out". These episodes of "blanking out" last 2 to 3 minutes and come on without warning. They started at around 6 years of age and last occurred 3 to 4 months ago. He loses track of time for up to several hours associated with these episodes. According to the report of Mark Olive of February 4, 1982, David has a history of unusual spells. The psychiatric report of George L. Gee Jr., M.D. of June 12, 1981 noted that David was in an automobile accident in which a car went through a brick wall in 1974. A further report from Dr. Gee dated December 9, 1981 notes that David claimed he has had seizures at 12 to 13 years of age, took medication and outgrew these episodes.

David denies any recent history of fainting, passing out, or unexplained losses of consciousness, nocturnal urinary incontinence, meningitis, or encephalitis. He has not been complaining of frequent or severe headaches or migraines.

Past Medical History:

Medical: There is no history of diabetes or hypertension. He stated that he was diagnosed with a heart murmur in childhood. There is no history of tuberculosis, asthma, peptic ulcer disease, hepatitis, renal disease, or thyroid disease.

Surgical: Denied.

Medications: None.

Allergies: No known drug allergies.

Habits:

Tobacco Use: One and one-half packs per day for 34 years.

Alcohol Use: The patient started drinking at 11 years of age and dramatically increased his intake around 14 years of age. He was primarily a binge drinker. He averaged one binge of intoxication per week since about 14 years of age. He has had both alcohol related blackouts and withdrawal tremors. He has never been in an alcohol detoxification treatment program.

Drug Abuse: David has an extensive history of drug abuse. He used phenobarbital abusively beginning at 13 years of age and continued until 24 years of age, about 3 times a week

in order to "relax". He also claims that he abused Dilantinon several occasions between 23 and 24 years of age in order to relax. He has tried a wide variety of other intoxicants and illicit substances over the years. The psychiatric report of George L. Gee Jr., M.D. dated June 12, 1981, noted that David has an extensive history of marijuana and LSD abuse. Helen Ross McNab Mental Health Center Forensic Service Programpsychological screening summary of November 3, 1981 reported that David had a history of chronic LSD and amphetamine abuse.

David also had a history of inhalant abuse, especially glue, gasoline, and nail polish remover. He would sniff these substances one to two times a month, particularly during the summer between 9 and 14 years of age. The report of Mark Olive dated February 4, 1982 notes the history of "huffing".

Social History: The patient's mother is 61 years of age and lives in Ohio. She has had no contact with David in over 15 years. David never met his biological father, who never married his mother. David had a chaotic upbringing. As mentioned previously, David's biological mother married his stepfather, John E. Miller Jr. in 1958. David was initially raised in his paternal step-grandmother's house in North Baltimore, Ohio. The family then moved to Michigan and then back to their own house in Ohio. His mother had one son and four daughters by John E. Miller Jr. David's stepfather was a welder. His mother worked on a car assembly line and then was on welfare. Mr. Miller divorced David's mother in 1972 or 1973. All of the children were placed in foster care after the divorce when she was found to be an unfit mother. It is unclear how long the children resided in foster care. David has a 42 year-old half-brother who is mentally retarded and lives in a group home. One of his half-sisters died in a train accident in her 20's. His other three sisters are 36, 31, and 29 years of age and live in Ohio. He has no contact with his half-sisters.

David is single and unmarried. He stated that he has a 23 year-old daughter with whom he has infrequent contact.

David claims that he has worked as a short order cook and a welder. Records indicate that he completed a course in welding on February 15, 1980. He received his General Education Development (GED) on April 17, 1980.

Family History: Half-brother – mental retardation. Biological father – alcoholism. Biological mother – possible alcoholism.

Physical Examination:

Neurological Examination:

Mental Status Examination: The patient was awake, alert and attentive, with normal expressive and comprehensive language functions in the course of the interview and examination. There was normal naming of objects and their component parts. Repetition of the phrase "No ifs, ands, or buts" was performed without difficulty. The patient was able to spell the word "world" correctly forwards and backwards. Right/left differentiation was normal and the patient crossed the midline. Simple addition, subtraction, multiplication, and division were performed normally. He had difficulty performing serial three's. The patient was oriented to person, place, date, season, and knew the current president. The patient was able to draw an alternating figure and three-dimensional figure without difficulty. He had marked difficulty copying a complex geometric figure. Instant recall was excellent and the patient remembered zero out of three objects at five minutes without prompting and three out of three objects at five minutes with prompting. He scored 30 out of 30 on a formal mini-mental state examination.

Cranial Nerves: Cranial nerves II-XII were symmetric and intact on detailed testing;

fundiscopic examination was benign bilaterally.

Motor System Examination: The patient had normal tone, bulk, and strength proximally and distally in all four limbs. The patient had normal finger-nose testing, rapid alternating hand movements, and finger repetitive movements bilaterally. He had clumsy finger consecutive maneuvers bilaterally and clumsy complex motor sequencing in the hands bilaterally. There also was normal heel-shin testing and foot tapping bilaterally. No involuntary movements were noted. Deep tendon reflexes were normal and symmetric throughout and no Babinski signs or clonus were noted. He had one frontal release sign, a right palmomental reflex.

Gait: The patient had a normal gait with normal heel, toe, and tandem walking.

Sensory System Examination: The patient had normal perception of pinprick, temperature, light touch, vibration, and position sense proximally and distally in all four limbs. The patient also had normal stereognosis and graphesthesia on the palms of the hands bilaterally. No Romberg sign was present.

General Physical Examination:

Head: Normal without evidence of trauma or deformity.
Neck: Full range of motion without bruits.
Skin: There are no significant hyperpigmented spots, rashes or lesions of note.
Cardiovascular: Regular rhythm and rate without loud murmurs.

Impression: David's neurological examination was notable for attentional difficulties as noted by difficulty performing serial three's and copying elements of a complex geometric figure. He also had mild memory deficits. Several subtle neurological abnormalities also were present including clumsy finger consecutive maneuvers bilaterally, poor complex motor sequencing of the hands bilaterally, and a right palmomental reflex.

David's attentional deficits are consistent with developmental or acquired frontal lobe dysfunction. He also has several subtle findings on his elemental neurological examination including clumsy finger consecutive maneuvers bilaterally and poor complex motor sequencing of the hands bilaterally along with one frontal release sign, a right palmomental reflex. These subtle neurological abnormalities are indicative of bifrontal dysfunction, either developmental or acquired. Several environmental factors could have caused or contributed to his frontal lobe dysfunction. David has a significant history of closed head injury as a child. In addition, he has a history of inhalant and alcohol abuse from a young age, which may have contributed to his frontal lobe dysfunction. As this history existed prior to the time of his trial in 1982 and re-sentencing trial in 1987, this frontal lobe dysfunction was operative prior to those events.

The presence of frontal lobe dysfunction is extremely important in David's case. Individuals with frontal lobe dysfunction often have difficulty with impulse control, prioritization, judgment, reasoning, and anger management. Pharmacological treatment of his frontal lobe dysfunction may have led David to a higher functional status and away from impulsive and violent behaviors. However, he never received any psychiatric treatment.

David had evidence of memory problems on neurological testing. This memory dysfunction suggests bilateral temporal lobe pathology. This temporal lobe dysfunction may be related to his history of alcohol abuse from a young age. The temporal lobes are particularly sensitive to the toxic effects of chronic alcohol abuse that begins in early adolescence. Such temporal lobe dysfunction may have contributed to David's impulsive and ill-considered behaviors.

In addition to the abnormalities noted on examination, David has an extensive history of affective instability. By history he meets the criteria for bipolar disorder with both depressed and manic episodes. His polysubstance abuse was probably an attempt to self-medicate for his affective

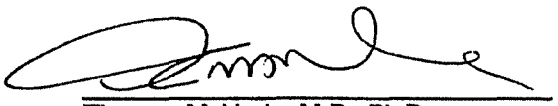
instability. Individuals with bipolar disorder are particularly susceptible to impulsive and inappropriate behavior under periods of emotional distress. When hypomanic or manic they often consume large amounts of alcohol or illicit drugs, compounding their propensity towards impulsive and violent behavior. Appropriate diagnosis and treatment of his mood disorder may have led to a different functional outcome.

David had a long history of physical and emotional abuse and a chaotic upbringing beginning in early childhood. The physical and emotional abuse coupled with a deprived upbringing contributed to David's poor judgment and difficulty maintaining meaningful relationships. This history may also have contributed towards his propensity towards the development of a significant mood disorder and polysubstance abuse.

On the day of the murder, David admits to abuse of alcohol, LSD, phenobarbital, and Dilantin. The combination of these substances would cloud David's sensorium and markedly impair his judgment and reasoning. In addition, barbiturates and alcohol are often disinhibiting agents, particularly when used in combination with a known hallucinogen such as LSD. Individuals engaging in this form of polysubstance abuse often behave in bizarre and irrational ways. The combination of polysubstance abuse and an underlying mood disorder produces markedly pathological behaviors. When coupled with his pre-existing frontal and temporal lobe dysfunction, this form of polysubstance abuse would be particularly disinhibiting. This combination of factors played a significant role in David's criminal behavior.

In summary, David has multiple neurological and psychiatric factors, which tie into his criminal behavior. It is my opinion, within a reasonable degree of medical certainty, that David E. Miller suffered from frontal and temporal lobe dysfunction and polysubstance abuse at the time of the offense for which he is incarcerated on death row. These factors should be considered in any legal proceedings concerning David, because they directly impact his ability to conform his conduct to the requirements of the law.

Thank you for this interesting referral. If you have any questions concerning my evaluation or report regarding David E. Miller, please feel free to contact me at (301) 652-8777.



Thomas M. Hyde, M.D., Ph.D.
Behavioral Neurologist

Attachment E

to David Miller's Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation

Ohio v. Lott, No. 1989-0846, Order (Ohio Aug. 17, 2012)

The Supreme Court of Ohio

State of Ohio

v.

Gregory Lott

Case No. 1989-0846

ENTRY

This cause came on for further consideration upon appellee's motion to set an execution date.

Upon consideration thereof, it is ordered by the court that the motion is granted.

It is further ordered that Gregory Lott's sentence be carried into execution by the Warden of the Southern Ohio Correctional Facility, or in his absence, by the Deputy Warden on Wednesday, the 19th day of March, 2014, in accordance with the statutes so provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this court be duly certified to the Warden of the Southern Ohio Correctional Facility and that said Warden shall make due return thereof to the Clerk of the Court of Common Pleas of Cuyahoga County.

(Cuyahoga County Court of Appeals; No. 54537)

Maureen O'Connor
Chief Justice

Attachment F

to David Miller's Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation

Lott v. Bagley, No. 1:04-cv-822
R.100, Marginal Entry Order
(N.D. Ohio Apr.1, 2013)

Motion granted 4/1/13. Attorney Stephen A. Ferrell and Dana Hansen Chavis shall enter an appearance upon receipt of this order.
s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GREGORY LOTT,

Petitioner,

v.

MARGARET BAGLEY, Warden,

Respondent.

Case No. 1:04cv822
Related to Case No.
1:95cv02642

DEATH PENALTY CASE

PETITIONER LOTT'S MOTION TO WITHDRAW COUNSEL FROM THE OHIO PUBLIC DEFENDER'S OFFICE AND TO APPOINT COUNSEL FROM THE CAPITAL HABEAS UNIT OF THE FEDERAL DEFENDER'S OFFICE IN THE EASTERN DISTRICT OF TENNESSEE

Now comes Petitioner Lott, and moves this court to permit his current counsel, Gregory W. Meyers, Senior Assistant Ohio Public Defender, to withdraw from representing Petitioner and to appoint new counsel for him. Petitioner respectfully asks this Court to appoint Stephen A. Ferrell and Dana Hansen Chavis of the Capital Habeas Unit, Federal Public Defender's Office of Eastern Tennessee. The reasons for this motion are set forth in the attached Memorandum.

Respectfully submitted,
OFFICE OF THE OHIO PUBLIC DEFENDER

/s/ Gregory W. Meyers
GREGORY W. MEYERS (0014887)
Chief Trial Counsel
Ohio Public Defender
250 East Broad Street – Suite 1400
Columbus, Ohio 43215

Attachment G

to David Miller's Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation

Brian Haas, *Tennessee's death penalty is back on track*, The Tennessean, Oct. 23, 2013.

THE TENNESSEAN

October 23, 2013

Tennessee's death penalty is back on track

State hasn't put a prisoner to death in 4 years. A new drug could change that, but it's in short supply, too.

By Brian Haas
| The Tennessean

Tennessee's barely functioning death penalty is on the verge of revival after state officials finally settled on a new lethal injection drug and scheduled a man to die for the first time in more than a year.

But the state's new method is already running into trouble in other states, thanks to new problems acquiring drugs for executions.

The state hasn't had any drugs to perform lethal injections since its supply of sodium thiopental was seized by federal law enforcement agencies in April 2011 over questions about how it was obtained. It hasn't put anyone to death in nearly four years and hadn't had an execution scheduled since February 2012.

But last month, the state said it had solved its lethal injection drug problem by switching to pentobarbital, an anesthetic most commonly used to euthanize pets. State officials scheduled Nickolus Johnson, convicted of killing a policeman in Bristol in 2004, to die on April 22, 2014, at 7:10 p.m.

That year-and-a-half delay came in part so Tennessee corrections officials could see how the new drug stood up to challenges in states such as Ohio and Texas. State officials also were waiting for a law to keep information about how the state obtained its lethal injection drugs secret from the public.

If Tennessee were to clear those legal hurdles, it would open the door to begin the process of putting Johnson and 78 other convicted murderers to death. The condemned — 78 men and one woman — have been waiting on death row an average of just under 20 years, seven of them for more than three decades.

So far, only Johnson's execution has been scheduled.

"I can tell you we had been considering all options and working to get legislation passed to broaden the confidentiality exemption under the public records act to include a person or entity involved in procuring or providing the chemicals necessary to carry out lethal injection," said Dorinda Carter, spokeswoman for the Tennessee Department of Correction. "The reason for this particular drug is it has been used in other states and upheld in court challenges."

Tennessee hasn't executed a prisoner since Cecil Johnson was put to death by lethal injection Dec. 2, 2009, and it has executed only six people since 1960.

Constitutional concerns

Death penalty states were forced to scramble in 2010 when the main anesthetic used in lethal injections, sodium thiopental, was pulled from the market by its manufacturer over moral concerns about its use in executions. The drug, typically part of a three-drug cocktail, was important to lethal injections because it was supposed to render executions painless to the condemned — the key to overcoming concerns it was "cruel and unusual punishment" and therefore unconstitutional. Last-ditch attempts by several states — including Tennessee — to acquire thiopental from a questionable overseas source were foiled when federal officials seized stocks as having possibly been imported illegally.

In the interim, states began exploring other drugs. Ohio and Texas in 2011 turned to a one-drug method using pentobarbital, a barbituate used in animal euthanasia and in physician-assisted suicides in the Netherlands. But shortly after hearing pentobarbital was being used in executions, Danish manufacturer Lundbeck announced it also would ban the importation of the drug for such purposes.

The supply shortage has forced Ohio and Texas to look at alternative drugs or to compounding pharmacies to make pentobarbital from scratch. Texas earlier this month paid a compounding pharmacy to make pentobarbital, but the company asked for the drugs back when it was outed as a supplier for lethal injection drugs. Texas is now mulling over yet another switch, to propofol, a powerful anesthetic.

Despite problems in those states and others, Tennessee corrections officials are sticking with pentobarbital.

"We are not looking at alternatives at this time," Carter said. "Additionally, I can only say we are confident we will be able to secure the necessary chemicals."

She declined to elaborate on how the state would acquire the drug.

A 'broken' system

The lethal injection drug problems have given many death penalty opponents a break from their frantic efforts to stop executions. It only shows how broken the state's death penalty is, said the Rev. Stacy Rector, executive director of Tennesseans for Alternatives to the Death Penalty.

"Obviously we feel like the lethal injection debacle is only symptomatic of the larger debacle of the death penalty. Everything about the system is broken," she said. "We've had six executions since 1960 and probably spent millions of dollars to do that."

But the switch to pentobarbital has opponents worried that the state's death penalty is gearing up yet again.

That's a good thing, said Michael Rushford, president of the Sacramento, Calif.-based Criminal Justice Legal Foundation, which supports the death penalty. He said compounding pharmacies could solve the ongoing supply problems.

"I think the compounding approach will probably be the new 'hip' thing to do. That will solve that problem," he said. "This may be the end of this kind of challenge."

If not, he said, states should turn to the gas chamber as a method that would be simpler and less likely to be challenged.

'Waiting for justice'

Johnson, the man condemned to die in April, initially agreed to an interview with The Tennessean but later changed his mind. Johnson ambushed Bristol police officer Mark Vance on Nov. 27, 2004, amid an investigation into a domestic dispute between Johnson and a 17-year-old girl he had gotten pregnant. As Vance went upstairs in the girl's home, Johnson popped out and shot him in the head, killing him.

The officer's mother, Karen Vance, who lives on the Virginia side of Bristol, said she was tired of the delays and appeals.

"It's taken a long time, and we're just waiting for justice," she said. "Then I can finally say I've kind of got closure, once I see him gone."

Attachment H

to David Miller's Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation

West v. Ray, No. 10-1675-I
Order Granting Declaratory Judgment
(Tenn. Chancery Ct. Nov. 22, 2010)

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

STEPHEN MICHAEL WEST,	)
Plaintiff	)
BILLY RAY IRICK,	)
Plaintiff/Intervener	)
v.	)
GAYLE RAY, in her official capacity as Tennessee's Commissioner of Correction, et al,	)
Defendants	)

FOIA

No. 10-1675-I
DEATH PENALTY CASE

Chancellor Bonnyman
EXECUTION SCHEDULED: November 30, 2010

ORDER GRANTING DECLARATORY JUDGMENT

This matter comes before the Court upon the Plaintiff's Amended Complaint for Declaratory Judgment and Injunctive Relief; his Motion for Temporary Injunction; and pursuant to the November 6, 2010, order of the Supreme Court of Tennessee in Case No. M2010-02275-SC-R11-CV, to, "tak[e] proof and issu[e] a declaratory judgment on the issue of whether Tennessee's three-drug protocol constitutes cruel and unusual punishment because the manner in which the sodium thiopental is prepared and administered fails to produce unconsciousness or anesthesia prior to the administration of the other two drugs." The Court subsequently granted without objection the motion to intervene of Plaintiff/Intervener Billy Ray Irick.

On November 19-20, 2010, an evidentiary hearing was held in this matter. After weighing the evidence presented therein and considering the arguments of counsel, the Court

issued its bench ruling, a certified copy of which is attached hereto. For the reasons stated in its bench ruling, which are hereby fully incorporated herein, the Court finds and declares that Tennessee's three-drug protocol violates the prohibition against cruel and unusual punishment contained in Article 1, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution.

Pursuant to TENN. R. APP. P. 9(b), the Court finds that this matter is of great public importance and that review upon final judgment will be ineffective.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Tennessee's three-drug protocol violates the prohibition against cruel and unusual punishment contained in Article 1, section 16 of the Tennessee Constitution and the Eighth Amendment of the United States Constitution.

CLAUDIA C. BONNYMAN,
Chancellor, Part I

Entered: _____

Attachment I

to David Miller's Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation

State v. West, Order No. M1987-000130-SC-DPE-DD (Tenn. Nov. 29, 2010)

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V. STEPHEN MICHAEL WEST

Circuit Court for Union County
No. 415A

No. M1987-000130-SC-DPE-DD[1]

ORDER

On November 6, 2010, this Court reset the execution date for Stephen Michael West to November 30, 2010, pending an evidentiary hearing and ruling in a declaratory judgment action filed by Mr. West challenging the constitutionality of Tennessee's three-drug protocol for lethal injection. On November 22, 2010, the trial court entered an order granting a declaratory judgment to Mr. West. To date, no appeal has been lodged.

Also on November 22, 2010, Mr. West filed in this Court a "Motion to Vacate or Further Modify Court's Order Scheduling Mr. West's Execution." A transcript of the trial court's ruling was included with the filing, but not a transcript of the evidence. On November 24, 2010, the State filed a response in opposition to Mr. West's Motion and attached to the response a copy of a revised protocol. Later that same day, this Court denied Mr. West's motion to vacate or further modify his execution date because the revised protocol appeared to address the basis of the trial court's conclusion that the previous protocol was unconstitutional. However, we specified that the denial of Mr. West's motion was without prejudice to his ability to seek further relief in this or any other court.

On November 26, 2010, Mr. West filed in this Court a motion to reconsider or in the alternative a renewed motion to vacate or further modify the order scheduling his execution for November 30, 2010. Mr. West forcefully asserts that reconsideration is warranted because he was not afforded an opportunity to reply to the State's response and to address

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[1]Mr. West styled his motion *Stephen Michael West et al. v. Gayle Ray et al.*, and referred to the number of the declaratory judgment action pending in the Chancery Court for Davidson County. As previously stated, to date no appeal has been lodged in the declaratory judgment action. Because Mr. West's motion asks this Court to modify a scheduled execution, it is more properly filed under the style of the order initially setting Mr. West's execution, listed above.

the trial court on the issues of whether the revised protocol eliminates the constitutional deficiencies in the prior protocol and whether the revised protocol is constitutional. In support of his motion, Mr. West has submitted the transcript of the testimony presented at the two-day hearing in the trial court. This Court has now received and fully reviewed the motion and the transcript.

The evidence presented in this case differs from the evidence presented in *Abdur'Rahman v. State*, 181 S.W.3d 292 (Tenn. 2005). The inmate's primary challenge to the three-drug protocol in *Abdur'Rahman* was that the inclusion of pancuronium bromide in the three-drug protocol rendered the protocol unconstitutional. We determined that the use of the pancuronium bromide did not undermine the constitutionality of the protocol because it was preceded by the administration of a dose of sodium thiopental sufficient to render the inmate unconscious. *Abdur'Rahman v. State*, 181 S.W.3d at 307-08. The inmate in *Abdur'Rahman* did not produce evidence that the required dose of sodium thiopental would fail to render the inmate unconscious.

Proper administration of an adequate amount of sodium thiopental is essential to the constitutionality of Tennessee's three-drug protocol. Chief Justice Roberts has noted that "[i]t is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Baze v. Rees*, 553 U.S. 35, 53 (2008). Echoing Chief Justice Roberts, the trial court in this case found that Tennessee's lethal injection protocol was unconstitutional because it "allows . . . death by suffocation while the prisoner is conscious." Following this finding, the trial court also determined feasible and readily available alternative procedures existed to insure unconsciousness and to negate any objectively intolerable risk of severe suffering or pain.[2]

After the trial court's findings and conclusions, on November 24, 2010, the State revised its three-drug execution protocol to include a process to assess the consciousness of the inmate following the administration of the sodium thiopental and to provide for the administration of additional sodium thiopental should the inmate be conscious following the administration of the first dose of the drug.

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[2]The trial court stated:

It appears to this Court that there are feasible and readily available alternative procedures which could be supplied at execution to insure unconsciousness and negate any objectively intolerable risk of severe suffering or pain. This Court should not say or find which of those it would recommend, but I think the Court's finding of fact regarding the ways – the various ways that unconsciousness can be checked should be left to the State.

The principles of constitutional adjudication and procedural fairness require that decisions regarding constitutional challenges to acts of the Executive and Legislative Branches be considered in light of a fully developed record addressing the specific merits of the challenge. The requirement of a fully developed record envisions a trial on the merits during which both sides have an opportunity to develop the facts that have a bearing on the constitutionality of the challenged provision. Mr. West is correct that the trial court has not been given the opportunity to consider in the first instance whether the revised protocol eliminates the constitutional deficiencies the trial court identified in the prior protocol and whether the revised protocol is constitutional.

Upon due consideration, Mr. West's Motion is GRANTED, and his November 30, 2010 execution is stayed. Additionally, the State is directed to file a motion in the trial court presenting for determination in the first instance the issues of whether the revised protocol eliminates the constitutional deficiencies the trial court identified in the prior protocol and whether the revised protocol is constitutional. *See* Tenn. R. Civ. P. 52.02; 59.04. The trial court shall afford the parties an opportunity to submit argument or evidence on the revised protocol. The trial court shall render its final, appealable judgment expeditiously, but in no event later than ninety (90) days from the date of the entry of this Order.

In any proceedings on remand, the standards enunciated in the plurality opinion in *Baze v. Rees*, 553 U.S. 35, 51 (2008) apply. The burden is on Mr. West to prove that the revised protocol creates an "objectively intolerable risk of harm that qualifies as cruel and unusual." *Baze v. Rees*, 553 U.S. at 52. In order to carry this heavy burden, he must demonstrate that the revised protocol imposes a substantial risk of serious harm, *and* he must either propose an alternative method of execution that is feasible, readily implemented, and which significantly reduces the substantial risk of severe pain, *Baze v. Rees*, 553 U.S. at 52-53, or demonstrate that no lethal injection protocol can significantly reduce the substantial risk of severe pain.

The stay granted herein shall remain in effect throughout the pendency of any appeal of the trial court's final judgment in the declaratory judgment action and until the State files a motion to reset the execution date pursuant to Tennessee Supreme Court Rule 12.4.

The final resolution of the issues in this case impacts the scheduled executions of Billy Ray Irick, Edmund Zagorski, and Edward Jerome Harbison. Accordingly, entered contemporaneously herewith are orders staying the executions of Mr. Irick, Mr. Zagorski, and Mr. Harbison.

It is so ORDERED.

PER CURIAM

Attachment J

to David Miller's Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation

Miller v. Bell, No. 3:01-cv-487 (E.D. Tenn.)
Motion for Order Granting Relief From Judgment Pursuant to Fed. R. Civ. P. 60(b) filed Sept. 20, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

DAVID EARL MILLER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 3:01-cv-487
	)	(Jordan/Carter)
RICKY BELL, Warden,	)	**DEATH PENALTY CASE**
	)	
Respondent.	)	

MOTION FOR ORDER GRANTING RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 60(b)

Pursuant to Fed. R. Civ. P. 60(b)(6), and this Court's inherent authority over its judgments, Mr. Miller seeks relief from this Court's order denying his habeas petition. (R.85, Memorandum Opinion; R.86, Order).

I. INTRODUCTION

In *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005), the United States Supreme Court held that a habeas petitioner may seek relief from an inequitable judgment pursuant to Fed. R. Civ. P. 60(b) ("Rule 60(b)"), if the petitioner can show defects "in the integrity of the federal habeas proceedings." Post-conviction counsel's ineffective representation of David Miller prevented the court from reaching the merits of his substantial claim of ineffective assistance of trial counsel at his re-sentencing proceeding (Claim XIII). This Court found that claim was procedurally barred based on the inadequacies of post-conviction counsel. (R.85, Memorandum Opinion, p. 27).

Under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), ineffective assistance of post-conviction counsel in presenting

"substantial" claims of trial counsel ineffectiveness in states like Tennessee constitutes cause to excuse procedural default. Subsequent to *Trevino*, the Sixth Circuit amended its opinion in *Hodges v. Colson*, 711 F.3d 589 (6th Cir. 2013). In its amended opinion, the court excised language holding that ineffective assistance of post-conviction counsel did not constitute "cause" excusing procedural default in Tennessee cases. *Hodges v. Colson*, No. 09-5021, 2013 WL 4414811 (6th Cir. Aug. 14, 2013). The amended *Hodges* opinion removed the final obstacle to this Court's consideration of David Miller's substantial claim.

Insofar as Rule 60(b)(6) is itself an equitable remedy requiring the district court to balance the equities of the parties before it, and insofar as the equities clearly favor at least one review of the merits of Mr. Miller's substantial claim of ineffective assistance of trial counsel, Miller's motion should be granted, and the court should proceed to address that claim on the merits.

II. STATEMENT OF THE CASE

David Miller filed his amended habeas petition on September 27, 2002. (R.18). This Court granted the state's motion for summary judgment on March 25, 2005. (R.85). The Sixth Circuit denied relief in a 2-1 vote on September 13, 2012. *Miller v. Colson*, 694 F.3d 691 (6th Cir. 2012). The United States Supreme Court denied certiorari on May 28, 2013, *Miller v. Colson*, 133 S. Ct. 2739 (2013). On May 30, 2013, the Sixth Circuit issued its mandate and relinquished jurisdiction, thereby returning jurisdiction over the instant judgment to this Court.

III. *GONZALEZ v. CROSBY* AND RULE 60(b).

Rule 60(b)(6) provides that "the court may relieve a party . . . from a final judgment, order, or proceeding for . . . any other reason that justifies relief." In *Gonzalez*, 545 U.S. at 528-29, the Supreme Court conclusively held that a habeas petitioner, under Rule 60(b), may request the reopening of his case and seek relief from the judgment dismissing his case on procedural grounds.

The petitioner in *Gonzalez* received a 99-year sentence in 1982. *Gonzalez*, 545 U.S. at 526. In 1997, he filed a habeas petition, which the federal district court dismissed as barred by AEDPA's statute of limitations. Subsequent Supreme Court case law revealed that the district court erroneously applied the statute of limitations. *Gonzalez*, 545 U.S. at 526-27. Gonzalez filed in district court a motion under Rule 60(b)(6) for relief from the judgment, arguing the district court's time-bar ruling was incorrect. *Id.* at 527. The Eleventh Circuit dismissed the pleading as an impermissible successor petition. *Id.* at 528.

The Supreme Court unanimously held that *Gonzalez* stated a permissible Rule 60(b) motion attacking defects in the integrity of the federal habeas proceedings. *Id.* at 539 (Stevens, J., dissenting but observing the Court was "unanimous" in its holding that a 60(b) motion may be brought in federal habeas). The Court explained that a Rule 60(b) motion only runs afoul of AEDPA's successor petition requirements if it tries to directly bring a new claim or present new evidence to support a claim previously decided on its merits. *Id.* at 531-32. A proper Rule 60(b) attacks the integrity of the decision making in the federal habeas proceedings. When there is an important

mistake in the decision-making process, "Rule 60(b) has an unquestionably valid role to play in habeas cases." *Id.* at 534.

IV. DAVID MILLER IS ENTITLED TO RELIEF UNDER RULE 60(b)(6).

A. Under *Martinez v. Ryan* and *Trevino v. Thaler*, this Court's procedural bar was erroneously imposed.

The *Gonzalez* Court specified that a Rule 60(b) motion may "assert[] that a previous ruling which precluded a merits determination was in error–for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." 545 U.S. at 532, n.4. In this case, the previous imposition of a procedural default erroneously precluded a merits determination of Miller's ineffective assistance of trial counsel claim.

In *Martinez*, 132 S. Ct. at 1317, the Supreme Court recognized that the effective assistance of trial counsel is a "bedrock principle" of our adversarial system of justice and is critical in protecting the rights of the accused. The Court concluded an ineffective assistance of trial counsel claim should not be procedurally barred if the counsel initially litigating that claim were ineffective. *Id.* at 1316-19. Recently, in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the Court determined that, where, "as a matter of procedural design and systematic operation, [defendants are denied] a meaningful opportunity to [present a claim of ineffective assistance of trial counsel prior to state post-conviction proceeding][,]" equity demands that the federal court consider the claim on its merits. *Id.* at 1921. Therefore, courts should analyze post-conviction counsel's performance to determine whether it constitutes "cause" before imposing a procedural bar to merits review of such a Sixth Amendment claim.

1. David Miller received ineffective assistance from his post-conviction counsel.

David Miller was represented during state post-conviction proceedings by the Knox County Public Defender's Office. In describing its presentation of Miller's ineffective assistance of re-sentencing counsel claim, this Court stated:

> The record also indicates that [Miller] moved for an expert to assist him in developing his post-conviction claim that his attorney gave him ineffective assistance by failing to present mental health experts at trial. However, there is no indication in the record that the post-conviction court ever ruled on that motion, that Miller ever called this omission to the state court's attention, or that he pressed for such a ruling.
>
> Moreover, when the appellate court remanded Miller's post-conviction petition for an evidentiary hearing, the record does not show that he renewed his motion for an expert or asked the post-conviction court to rule on his earlier motion. Instead, the transcript of the evidentiary hearing reveals that he voluntarily dismissed the claim that his attorneys gave him ineffective assistance for failing to present expert testimony with respect to his mental condition; that he failed to present any testimony by his attorneys or anyone else on his behalf; and that he offered no new evidence, but chose to rely on the trial and appellate record, which had already been considered by the state courts.

Miller v. Bell, 655 F. Supp. 2d 838, 864-65 (E.D. Tenn. 2009).

The affidavit of post-conviction counsel (Attachment A, Halstead Affidavit), demonstrates that post-conviction counsel did not adequately investigate David Miller's history of sexual abuse, physical abuse, or assorted head trauma. Post-conviction counsel did not retain a mental health expert to assist in demonstrating that such an investigation would have produced evidence sufficient to meet *Strickland's* prejudice prong. Post-conviction counsel's lack of action was not motivated by any strategy, but by the mistaken belief that re-sentencing counsel's presentation of some mitigating evidence foreclosed a claim of ineffective assistance of counsel. However, "counsel's

effort to present *some* mitigation evidence [doesn't] foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears v. Upton*, 130 S. Ct. 3259, 3266 (2010) (emphasis supplied).

2. Mr. Miller's Underlying Claim of Ineffective Assistance of Trial Counsel at His Re-sentencing Proceeding is Substantial.

David Miller was denied the effective assistance of counsel during his capital re-sentencing by trial counsel's failure to present compelling evidence that Miller's actions in the murder of Lee Standifer were directly attributable to his profound mental illness at the time of the offense and that his mental illness was directly attributable to the almost unspeakable physical and sexual trauma he suffered as a child, and/or organic brain damage. (R.18, Amended Petition, Claim XIII, pp. 88-89). *See also* R. 24, Motion for Expansion of the Record, Exhibit A (Petitioner's Initial Expert Witness Disclosure) and attachments thereto: Attachment A (Declaration of Dr. Pablo Stewart), Attachment E (Neurology Consultation Report by Dr. Thomas Hyde) and Attachment I (Declaration of Dr. David Lisak); R.26, Memorandum in Support of Motion to Expand the Record, p. 2; R.28, Order (granting motion to expand the record), pp. 1-2. This Court refused to consider the merits of Claim XIII, finding that it was procedurally barred (R.85, Memorandum Opinion, p. 27).

David Miller was represented at his 1982 trial by Mark E. Olive and Andru Volinsky. (Add. 3, Trial Tech. Rec. Vol. 1, p. 7).[1] At the time of trial, counsel sought the assistance of a mental health expert, pointing to Miller's use of the hallucinogen LSD on

[1]The state court record filed by the State of Tennessee is contained in R.9, unless otherwise indicated.

the night of the offense and numerous indicia of severe mental illness within the circumstances of the offense. (*Id.*, pp. 10-11). In response, the trial court ordered that Miller would be examined by a neutral expert. (*Id.*, pp. 12-13).

During its case in chief, the prosecution called Dr. Gee, the psychiatrist who examined Mr. Miller. (Add. 4, Trial Trans. Vol. 10, p. 930). Mr. Miller's counsel immediately objected, both on the grounds of lack of formal notice and that evidence of Mr. Miller's sanity was relevant only when a defense of insanity has been fairly raised by the evidence. (*Id.*, p. 931). The prosecution, citing the aforementioned reports from Mr. Miller's competency examination as well as trial counsel's elicitation of evidence relative to his ingestion of LSD, argued that the issue of Mr. Miller's mental health had indeed been fairly raised by the evidence. (*Id.*, pp. 932-33). Dr. Gee admitted on cross-examination that Mr. Miller reported hearing voices which would call his name and "say go outside and check on this and check on that[,]" but dismissed them as not indicative of psychosis. (*Id.*, p. 949). Dr. Gee also acknowledged that a person on LSD might be detached from reality to the point that they believed that they were encountering "gods or demons." (Add. 4, Trial Trans. Vol. 10, pp. 952-53). Finally, he conceded that his opinions were just opinions and, "equally qualified physicians who are presented with the same data about an individual could, and often do, come to different results and conclusions based on that information[.]" (*Id.*, p. 945). David Miller was convicted and sentenced to death.

Miller's death sentence, however, was overturned on appeal and his case was remanded for re-sentencing. At re-sentencing, David Miller was again represented by

Mr. Olive. Counsel failed to present any expert psychiatric testimony establishing that Miller was under the influence of extreme mental or emotional disturbance, a statutory mitigating factor under Tennessee law. In fact, when counsel requested that the jury be instructed on the factor, the following colloquy occurred:

> THE COURT: All right. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> MR. OLIVE: Yes, sir.
>
> THE COURT: You're relying on that.
>
> MR. OLIVE: We'd like to have the jury instructed on it, yes, sir.
>
> MR. JOLLEY: Your Honor, we feel there's no proof in the record on that particular mitigating circumstance.
>
> MR. OLIVE: The record shows--well. . . .
>
> THE COURT: It's difficult to see, but I believe I'll instruct it.

(Add. 7, Re-sentencing Trans. Vol. 9, pp. 718-19).

Trial counsel's affidavit (Attachment B, Olive Affidavit), reveals that, at the time of re-sentencing, he was aware: (a) Mr. Miller's mother consumed copious amounts of alcohol while she was pregnant with him; (b) Mr. Miller was abandoned by his father; (c) Mr. Miller grew up in an alcoholic household; (d); Mr. Miller suffered severe physical abuse; (e) Mr. Miller suffered from severe neglect from his mother; (f) Mr. Miller was sexually abused by a friend of his grandfather; (g) Mr. Miller was removed from his mother's care and placed in a group home and, from there, into juvenile detention; (h) the juvenile detention facility into which Mr. Miller was placed was notorious for pervasive physical and sexual abuse of the boys in its care; (i) Mr. Miller suffered repeated severe head trauma; (j) Mr. Miller had a history of hearing voices; (k) Mr. Miller

had a long history of "black outs" during which he would take actions that he later could not recall; (l) Mr. Miller recalled that the victim had dug her fingernails into Mr. Miller's arm when, immediately after intercourse, he had informed her that he was leaving town; (m) following this event, Mr. Miller was unable to recall the actual events that led to the victim's death; and, (n) in addition to Miller's lack of memory, the circumstances of the crime were irrational and inexplicable. Counsel also knew that the prosecution intended to argue that Mr. Miller had lured the victim to the crime scene with the intent of raping her, that he had committed that rape, that he had intentionally murdered the victim during the course of that rape (a statutory aggravating circumstance under Tennessee law) and that he had intentionally done so in a manner supporting Tennessee's "heinous, atrocious, or cruel" statutory aggravating circumstance.

Counsel nonetheless failed to adequately investigate Miller's history of childhood trauma and its affect on his future behavior. Counsel failed to consult with a mental health expert regarding the fact that Miller had been sexually traumatized by a friend of his grandfather and failed to retain an expert to examine Miller in order to determine the full extent and/or effect of the childhood sexual trauma suffered by Miller. Furthermore, counsel failed to investigate Miller's history of head trauma or to consult with a psychological expert regarding Miller's head injuries and to examine Miller in order to determine full extent and/or effect of the head injuries suffered by Miller. Trial counsel had no strategic reason for the failure to fully investigate and present this evidence.

Counsel's function is to accord defendants an "ample opportunity to meet the case of the prosecution" and "to make the adversarial testing process work in the particular case." *Strickland v. Washington*, 466 U.S. 668, 685, 690 (1984) (quotations,

citations omitted). This is achieved by investigative efforts "to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Rompilla v. Beard*, 545 U.S. 374, 387, n.7 (2005) (citing *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting 1989 ABA Guideline 11.4.1(C))).

Here, Miller's report of being raped as a child, the prosecution's stated intention to argue rape as an aggravating circumstance, and Miller's history of head trauma were only some of the "red flags" alerting counsel that a more thorough investigation was needed. In short, counsel "ignored pertinent avenues for investigation" described by their own client. *Porter v. McCollum*, 558 U.S. 30, 40 (2009). As a result, counsel presented, at best, a "superficially reasonable mitigation theory." *Sears v. Upton*, 130 S. Ct. at 3266; *Porter*, 558 U.S. at 32 (counsel told the jury that Porter "has other handicaps" and wasn't "mentally healthy" but did not put on evidence to this effect). Had counsel conducted a thorough investigation of their client's history of sexual abuse and head trauma and obtained the assistance of appropriate experts, there is a reasonable probability of a different that the outcome. *Strickland*, 466 U.S. at 695-96.

Constitutionally sufficient representation at the time of re-sentencing would have presented a far different story to Mr. Miller's re-sentencing jury. David Miller was not merely the victim of an abusive stepfather, but also a victim of profound mental illness engendered in the pervasive sexual abuse he suffered at the hands of the very person trial counsel called to tell his life history, his mother, Loretta Miller and the predators to whom she handed him over. David Miller's brain was damaged at a young age as a

result of physical, sexual and emotional trauma. He suffered childhood physical and sexual trauma so pervasive and so extreme that it is almost unspeakable. Almost immediately abandoned by his biological father, David's stepfather beat him without provocation and with whatever was handy, including 2 x 4's. (R.24, Att. A, Declaration of Pablo Stewart, M.D., pp. 6-7). Sometimes the beatings continued until David was rendered unconscious. (*Id.*, p. 7). The beatings left open wounds and bruises that lasted for weeks. (*Id.*). Twice, his head was rammed through the wall. David grew up in constant fear of death. (*Id.*, p. 8).

Beatings and physical abuse were not the only source of David's trauma. His mother, who engaged in sexual acts with an endless series of different men in his presence, also forced David to engage in sexual intercourse with her. (*Id.*, pp. 8-9). If he tried to refuse, she would fly into a rage. (*Id.*, p. 8). If he tried to flee, he would be apprehended by law enforcement and returned home where he received additional beatings from his stepfather and rapes by his mother. (*Id.*, p. 10). By the time he was placed in foster care around age 14, where he was again physically abused, he had already begun to experience seizures and episodes where he would lose contact with reality. (*Id.*, pp. 10-11).

Other long-lasting results of the physical and sexual trauma is that Miller suffers from severe and chronic Post Traumatic Stress Disorder. (R.24, Att. A, Declaration of Pablo Stewart, M.D., p. 14). Both before and after the murder, he re-experiences the trauma of his childhood through intrusive and distressing thoughts, images, dreams and

perceptions. (*Id.*). He has periods of extreme anxiety, affective dysregulation, dissociation, depression, and impaired executive function. (*Id.*, p. 21).

Each of the bizarre aspects of Ms. Standifer's murder are consistent with these symptoms. As the psychological expert Miller received for federal habeas purposes explained:

> The essence of Mr. Miller's mental state at the time of the offense reflects the psychological and physical hyperreactivity pathognomonic of PTSD.
>
> . . .
>
> It is my professional opinion, which I hold to a reasonable degree of medical certainty, that David Miller suffers from multiple neurocognitive disorders. Each and all of these mental diseases and defects were present and acute at the time of the offense for which Mr. Miller was convicted, rendering him unable to appreciate the criminality of his acts as well as unable to conform his conduct to the requirements of the law. Mr. Miller was under extreme emotional stress at the time of the offense. At the time of the homicide, Mr. Miller responded to the victim's grabbing his arm and sudden movement without plan, thought, or recognition of the consequences of his actions. He harbored no intent to kill or malice for the victim, and his actions were taken without premeditation and without understanding or knowledge about the difference between right and wrong.

(R.24, Att. A, Declaration of Pablo Stewart, M.D., pp. 22-24).

This evidence would have altered the evidentiary picture of the trial, *Strickland*, 466 U.S. at 696, and resulted in a compelling argument to persuade a jury to spare Miller's life. Although "[t]his evidence might not have made [Miller] any more likable to the jury, [] it might well have helped the jury understand [Miller], and his horrendous acts. . . ." *Sears*, 130 S. Ct. at 3264. Under Tennessee law, it only takes one juror to vote against death. Tenn. Code Ann. § 39-13-204(i) (1989). Had the jurors been able to consider the full extent of Miller's tragic life history, and how his resulting mental illness led directly to the death of Ms. Standifer, there is a reasonable probability that

the jury "would have struck a different balance." *Porter*, 558 U.S. at 42 (citation omitted).

Martinez/Trevino demonstrate that the previous procedural default determination was in error.

B. Extraordinary circumstances support the re-opening of this case.

The *Gonzalez* Court noted that a Rule 60(b) motion based upon subpart (6), ("any other reason justifying relief"), should demonstrate "extraordinary circumstances." *Gonzalez*, 545 U.S. at 534-35 (quoting *Ackermann v. United States*, 340 U.S. 193, 200-01 (1950) (comparing petitioner's deliberate choice not to pursue his adjudicated claims to avoid the cost of sacrificing his home with extraordinary circumstances in *Klapprott v. United States*, 335 U.S. 601 (1949), where outside forces caused petitioner's claims to be defaulted)). The Sixth Circuit has explained that extraordinary circumstances "are defined as those 'unusual and extreme situations where principles of equity mandate relief.' *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 387 (6th Cir. 2001) (citations and emphases omitted)." *Export-Import Bank of U.S. v. Advanced Polymer Sciences, Inc.*, 604 F.3d 242, 247 (6th Cir. 2010).

Under *Martinez* and *Trevino*, equity requires an opportunity for merits review of Miller's fundamental Sixth Amendment claim.

> 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).
>
> . . .
>
> Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim. From this it follows that, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984), 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Martinez, 132 S. Ct. at 1317-18.

Where such circumstances are present, the petitioner's interest in the resolution of the merits of his Sixth Amendment claim outweigh the State's interest in finality. The Supreme Court has held that the *Martinez* exception allowing for such merits review "does not implicate the usual concerns with upsetting reliance interests protected by *stare decisis* principles." *Id.* at 1319. Neither does the *Martinez* exception "put a significant strain on state resources." *Id.*

> When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.*, it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.

Id.

Adding to the equitable principles in Miller's favor under *Martinez/Trevino*, the Sixth Circuit has also directly addressed how the balancing of equities required under Rule 60(b)(6) in a capital case favors the condemned inmate:

> We recognize that where the judgment the movant seeks to reopen has already become final, courts are often reluctant to find an abuse of discretion in a district court's denial of the Rule 60(b) motion. *See, e.g., Stokes v. Williams*, 475 F.3d 732, 736-37 (6th Cir. 2007). However, we must also heed the Supreme Court's admonition that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders v. United States*, 373 U.S. 1, 8, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963). Courts addressing Rule 60(b) motions must consider the equities, and "the incessant command of the court's conscience that justice be done in light of all the facts." *Blue Diamond* [*Coal Co. v. Trustees of UMWA Combined Benefits Fund*, 249 F.3d 519, 529 (6th Cir. 2001)]; *see also Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986) (Rule 60(b) "confers broad discretion on the trial court to grant relief when appropriate to accomplish justice; it constitutes a grand reservoir of equitable power to do justice in a particular case .... and should be liberally construed when substantial justice will thus be served.") (internal citations and quotations omitted). In this case, the finality of the judgment . . . must be balanced against the more irreversible finality of his execution[.]
>
> *Thompson v. Bell*, 580 F.3d 423, 444 (6th Cir. 2009).

Here, David Miller stands to lose his life, notwithstanding his facially meritorious claim that he was deprived of "the foundation [of] our adversary system[,]" *Martinez*, 132 S. Ct. at 1317, without any review of the merits of that claim. His case is one of the rare cases which "cries out for the exercise of that 'equitable power to do justice.'" *Nat'l Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 266 (4th Cir. 1993) (granting relief from

judgment). The courts have long-recognized in capital habeas cases that the petitioner's right to life carries substantial – if not controlling – weight when a court exercises its equitable powers. *See, e.g., Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001) (using equitable powers to allow consideration of petition because "[i]n a capital case such as this, the consequences of error are terminal[.] . . . We elect to exercise this leniency under the facts of this capital case[.]"); *Calderon v. United States District Court*, 128 F.3d 1283, 1288 n.4 (9th Cir. 1997) ("'[O]ccasional' injustices . . . are decidedly not an acceptable cost of doing business in death penalty cases.").

In addition, Miller's diligence in bringing his motion before the court is beyond question. First, Miller filed his motion within 120 days of being denied *certiorari* review and within 120 days of the Supreme Court's decision in *Trevino* extending the holding in *Martinez* to states other than those where claims of trial counsel ineffectiveness could be raised only during state post-conviction proceeding. *See Ruiz v. Quarterman*, 504 F.3d 523, 525, 528-32 (5th Cir. 2007) (noting that Mr. Ruiz filed ninety days after the denial of certiorari review and that his diligence weighed in favor of his Rule 60(b)(6) motion). Second, and even more importantly, he filed it within six weeks of the Sixth Circuit's withdrawal of its opinion in *Hodges v. Colson*, 711 F.3d 589 (6th Cir. 2013) (where the Court had held that *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), does not apply to Tennessee) and the issuance of a new opinion eliminating that barrier to Miller's motion. *See Hodges v. Colson*, 2013 WL 4414811 (6th Cir. Aug. 14, 2013).

These extraordinary circumstances demonstrate that the equities lie in favor of re-opening Mr. Miller's case and the court's consideration of his claim of ineffective assistance of re-sentencing counsel.

PRAYER FOR RELIEF

David Miller respectfully requests this Court reopen its judgment dated March 25, 2005 (R.85), for the purpose of providing merits review to Claim XIII of his petition. Once the judgment is reopened, Miller requests this Court enter a scheduling order so that the parties may have the opportunity to fully brief the issues and offer evidence.

Miller specifically objects to any characterization of this motion as a successor habeas petition. Should this Court determine the motion is a successor petition, Miller requests the Court to issue a certificate of appealability on that determination. Further, Miller requests the opportunity to decide whether to withdraw the motion or to allow a transfer of the motion to the Sixth Circuit. *Castro v. United States*, 540 U.S. 375 (2003); *Alley v. Bell*, 392 F.3d 822, 833-34 (6th Cir. 2004), *amended on reh'g*, 405 F.3d 371 (6th Cir. 2005).

Additionally, should this Court deny Mr. Miller's motion, he requests the opportunity for briefing and argument on the propriety of a certificate of appealability. Should the Court deny Mr. Miller's 60(b) motion and deny briefing on the grant of a certificate of appealability, Miller respectfully requests the Court issue a certificate of appealability.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

s/ Stephen M. Kissinger
Stephen M. Kissinger
Assistant Federal Community Defender
800 S. Gay Street, Suite 2400
Knoxville, TN 37929
(865) 637-7979

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2013, a copy of the foregoing Motion for Order Granting Relief from Judgment Pursuant to Fed. R. Civ. Pro. 60(b) 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/ Stephen M. Kissinger
Stephen M. Kissinger

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

DAVID EARL MILLER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 3:01-cv-487
	)	(Jordan/Carter)
RICKY BELL, Warden,	)	**DEATH PENALTY CASE**
	)	
Respondent.	)	
	)	

AFFIDAVIT OF JOHN R. HALSTEAD

COMES NOW John R. Halstead, after being duly sworn according to law, and says as follows:

1. I am a duly licensed attorney in the State of Tennessee, Board of Professional Responsibility No. 016392. I have worked at the Knox County Public Defender's Office since November of 1994.

2. I have been contacted by Stephen M. Kissinger with regard to my representation of David Earl Miller during state post-conviction proceedings in *State of Tennessee vs. David Earl Miller*, Case No. 47700, Criminal Court, Division II, Knox County, Tennessee. I have reviewed my file in this case in connection with preparing this affidavit.

3. I began representing Mr. Miller in 1994, at which time I reviewed the court record. The record of the case was voluminous because it included the original trial, direct appeal, and a re-sentencing proceeding followed by another direct appeal. I also spoke with Mr. Miller's trial attorney about the case.

4. I, however, had difficulty obtaining trial counsel's file, and I did not obtain the file until approximately May, 1997, after the petition for post-conviction relief had been remanded for an evidentiary hearing by the Court of Criminal Appeals, but prior to any such hearing.

5. Upon reviewing Mr. Miller's case, speaking with trial counsel, and receiving trial counsel's files, I became aware that Mr. Miller's mental impairment was a primary factor in the commission of the crime. Trial counsel's initial investigation revealed: (a) Mr. Miller's mother consumed copious amounts of alcohol while she was pregnant with him; (b) Mr. Miller lived in an alcoholic household; (c) Mr. Miller suffered severe physical abuse; (d) Mr. Miller was abandoned by his father; (e) Mr. Miller suffered from severe neglect from his mother; (f) Mr. Miller was sexually abused by a friend of his grandfather; (g) Mr. Miller was placed in foster care; (h) Mr. Miller suffered severe head trauma; (i) Mr. Miller had a history of hearing voices; (j) Mr. Miller was unable to recall the actual acts that led to the victim's death; and, (k) the nature of the crime itself was bizarre.

6. I recognized those facts to be indicia that Mr. Miller was mentally ill, and/or impaired by organic brain damage, at the time of the crime.

7. From reviewing Mr. Miller's case, it appeared there was a sexual component related to the crime that required investigation. Mr. Miller's background was positive for sexual abuse. In his confession, Mr. Miller recalled that the victim had dug her fingernails into Mr. Miller's arm when, immediately after intercourse, he had informed her that he was leaving town. What followed was Mr. Miller's assault upon the victim and the period of partial memory loss that accompanied the assault.

8. From reviewing Mr. Miller's case, it was obvious that trial counsel knew that, at the re-sentencing proceeding, the prosecutor would be able to establish that Mr. Miller and the victim had engaged in sexual intercourse shortly before her death. Trial counsel also knew the prosecutor would argue that Mr. Miller had intentionally killed the victim after raping her to demonstrate the "during the course of a felony" statutory aggravating factor, as well as to rebut trial counsel's argument in mitigation that Mr. Miller had killed the victim while not being in control of his mental facilities.

9. From reviewing Mr. Miller's case, I saw no indication that, at the time of trial, trial counsel had performed a follow-up investigation of the physical trauma, sexual trauma, and brain injury he had discovered.

10. From reviewing Mr. Miller's case, I learned that the trial court had appointed the Helen Ross McNabb Center (including Dr. Gee who testified at trial) to examine Mr. Miller and provide a report regarding his competency to stand trial and his sanity at the time of the offense. The Helen Ross McNabb Center provided a psychological assessment of Mr. Miller. In reviewing the files from the Helen Ross McNabb Center, I determined that trial counsel had not informed the Helen Ross McNabb Center, and the Helen Ross McNabb Center was not otherwise aware of those facts set out herein in paragraph 5, or of any additional facts relative to Mr. Miller's history of physical trauma, sexual trauma, and brain injury. The reports from the Helen Ross McNabb Center do not indicate that any such facts were provided to them. Further, the reports do not refer to any such facts, even though they clearly would have been relevant to their examinations.

11. From reviewing Mr. Miller's case, I learned that Mr. Miller's file from the Helen Ross McNabb Center had been reviewed by a Stephen Friedlander, Ph.D. of the Psychological Clinic at the University of Tennessee. Dr. Friedlander, however, had not performed an independent psychological assessment of Mr. Miller. In reviewing a letter from Dr. Friedlander, I determined that trial counsel had not provided him, and that he was not otherwise aware of, those facts set out herein in paragraph 5, or of any additional facts relative to Mr. Miller's history of physical trauma, sexual trauma, and brain injury. His letter does not indicate that any such facts were provided to him. Further, his letter indicates that he had been provided only Mr. Miller's file from the Helen Ross McNabb Center.

12. From reviewing Mr. Miller's case, I learned that Dr. Gee testified at trial. He testified: (a) Mr. Miller was competent to stand trial; (b) Mr. Miller was not insane at the time of the crime; (c) despite the fact that Mr. Miller experienced auditory hallucinations, he was not mentally ill; but, (d) another mental health expert could reasonably disagree with the conclusion that Mr. Miller was not insane or mentally ill.

13. In short, from reviewing Mr. Miller's case, it was clear that trial counsel failed to adequately investigate the full extent of physical and sexual trauma suffered by Mr. Miller at the time of trial. It was also clear that trial counsel had not informed the psychological experts that were available to him at the time of trial of the many indicia of Mr. Miller's history of physical trauma, sexual trauma, and brain injury.

14. From reviewing Mr. Miller's case, I learned that trial counsel performed only limited mitigation investigation after Mr. Miller's case was remanded for re-sentencing. Trial counsel's post-remand investigation consisted of obtaining records from the Wood County Department of Human Services (the agency responsible for supervising Loretta Miller, David, and her other children) as well as certified copies of his school records. Those records revealed not only further evidence of Mr. Miller's abuse by his stepfather, but his mother's extreme neglect of David and her other children and her sexually inappropriate behavior in their presence. In addition, trial counsel discovered that the detention home where Mr. Miller had been sent, the Fairfield School for Boys, was rife with physical and sexual abuse by staff members of the children in its care.

15. These facts were indicia that Mr. Miller had experienced a childhood filled with sexual abuse and/or misconduct. Trial counsel, however, did nothing further to investigate Mr. Miller's history of sexual abuse or its relationship to his crime other than to write letters to obtain the aforementioned records.

16. At the time of re-sentencing trial counsel did not seek the assistance of any mental health expert to determine the psychological effects of Mr. Miller's history of physical trauma, sexual trauma, and brain injury and the relationship between such trauma, and/or the psychological effects thereof, and the murder of the victim in this case.

17. From reviewing Mr. Miller's case, it was also clear that trial counsel failed to adequately investigate the extent of Mr. Miller's head injuries. Nor did trial counsel seek the assistance of any mental health expert to determine the physical and mental consequences of such trauma (including brain damage) and the relationship between such injuries, and/or the effects thereof, to the murder of the victim in this case.

18. In short, I knew at the time of Mr. Miller's state post-conviction proceeding that trial counsel had failed to adequately investigate two important areas of mitigation – childhood trauma and organic brain damage – had failed to provide facts regarding the obvious indicia of the presence of those areas of mitigation to the experts available at the time of trial, and had failed to obtain expert assistance in order to develop mitigating evidence and present it to Mr. Miller's jury at the time of his re-sentencing hearing.

19. During post-conviction proceedings, I did not conduct any further investigation into Mr. Miller's history of physical trauma, sexual trauma, and brain injury. Though I filed a motion for funds to hire psychological experts, I abandoned that motion after discovering that trial counsel had made some effort to develop psychological evidence. Accordingly, I did not obtain expert assistance to determine the consequences of Mr. Miller's history of physical trauma, sexual trauma, and brain injury to any trauma-related mental disorders and/or organic mental defects and the relationship such disorders and defects to the murder of the victim in this case.

20. I had no strategic basis for not investigating these aspects of Mr. Miller's social history or for not obtaining the assistance of experts. I believed that trial counsel's efforts in investigating, and presenting evidence of, the physical abuse Miller had suffered as a child, would foreclose any claim of ineffective assistance of counsel.

21. I have since recognized that my belief was wrong. Even if counsel had adequately investigated some mitigating aspects of Mr. Miller's life, it was unreasonable not to investigate areas of Mr. Miller's life where there were clear indications of problems, in particular, his history of physical trauma, sexual trauma, and brain injury.

22. I have been provided with expert reports on Mr. Miller by Pablo Stewart, M.D., Thomas M. Hyde, M.D., Ph.D., and David Lisak, Ph.D., and have reviewed the same.

23. At the time of Mr. Miller's post-conviction proceeding, had I conducted the investigation that was warranted in this case, I am confident that I would have obtained expert assistance and uncovered the same type of information as contained in the expert reports referenced in paragraph 21. In turn, I would have presented that information in support of the ineffective assistance of trial counsel claim.

24. Further affiant saith not.

Dated this 16th day of September, 2013.

John R. Halstead

STATE OF TENNESSEE)
)
COUNTY OF KNOX)

Subscribed, sworn to and acknowledged before me by John R. Halstead on this 16 day of September, 2013.

Bridget L. Stucky
Notary Public

My Commission Expires: 9/2/2014

BRIDGET L. STUCKY STATE OF TENNESSEE NOTARY PUBLIC KNOX COUNTY

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

DAVID EARL MILLER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 3:01-cv-487
	)	(Jordan/Carter)
RICKY BELL, Warden,	)	**DEATH PENALTY CASE**
	)	
Respondent.	)	
	)	

AFFIDAVIT OF MARK EVAN OLIVE

COMES NOW Mark Evan Olive, after being duly sworn according to law, and says as follows:

1. I am a duly licensed attorney in the State of Tennessee, Board of Professional Responsibility No. 006020. I have represented persons charged with, and/or convicted of, capital crimes for more than three decades.

2. I have been contacted by Stephen M. Kissinger with regard to my representation of David Earl Miller during his capital re-sentencing in *State of Tennessee vs. David Earl Miller*, Case No. 12080, Criminal Court of Tennessee at Knoxville, Sixth Judicial District. I have reviewed my file in this case in connection with preparing this affidavit.

3. I was first appointed to represent Mr. Miller in his capital murder case in 1981.

4. In preparation for Mr. Miller's original capital trial, I personally interviewed witnesses and collected documents regarding Mr. Miller's background. Through the same, I became aware: (a) Mr. Miller's mother consumed copious amounts of alcohol while she was pregnant with him; (b) Mr. Miller was abandoned by his father; (c) Mr. Miller grew up in an alcoholic household; (d); Mr. Miller suffered severe physical abuse; (e) Mr. Miller suffered from severe neglect from his mother; (f) Mr. Miller was sexually abused by a friend of his grandfather; (g) Mr. Miller was removed from his mother's care and placed in a group home and, from there, into juvenile detention; (h) Mr. Miller suffered repeated severe head trauma; (i) Mr. Miller had a history of hearing voices; (j) Mr. Miller had a long history of "black outs" during which he would take actions that he later could not recall; (k) Mr. Miller recalled that the victim had dug her fingernails into Mr. Miller's arm when, immediately after intercourse, he had informed her that he was leaving town; (l) following this event, Mr. Miller was unable to recall the actual events that led to the victim's death; and, (m) in addition to Miller's lack of memory, the circumstances of the crime were irrational and inexplicable.

5. From the time Mr. Miller was originally charged forward, the State had taken the position that he had lured the victim to the crime scene with the intent of raping her, that he had committed that rape, that he had intentionally murdered the victim during the course of that rape (a statutory aggravating circumstance under Tennessee law) and that he had intentionally done so in a manner supporting Tennessee's "heinous, atrocious, or cruel" statutory aggravating circumstance. The State introduced evidence that Mr. Miller had provided the victim with alcohol and/or drugs and he and the victim had engaged in sexual intercourse shortly before her death

to support the inference that she had been raped. The State introduced evidence that Mr. Miller had checked out a library book containing sadomasochistic images and text to support the inference that he had a morbid interest in sex consistent with the circumstances of the murder itself, as well as his post-mortem treatment of the victim's body. Furthermore, the State introduced evidence that Mr. Miller had been arrested, and then released, on two occasions shortly before the murder wherein he had been accused of attempted sexual assault.

6. Though Miller's background was positive for physical and sexual trauma, head injury, blackouts, and psychosis, I performed no further investigation into his history of traumatic injuries.

7. I understand that physical and sexual trauma, head injury, blackouts, and psychosis, were red flags of organic brain injury, mental disease, and/or mental defect that could constitute powerful mitigating evidence during any penalty phase in Mr. Miller's capital trial. I understand that such evidence could also substantially rebut the only two factors upon which the State would rely to support its argument in favor of the imposition of a death sentence, the "during the course of a felony" and the "heinous, atrocious, or cruel" statutory aggravating circumstances. I did not provide any of the information I had learned from the initial investigation to the non-independent psychological expert(s) appointed to examine Mr. Miller at the time of trial, or to any other psychological expert.

8. I had no strategic reason for failing to more fully investigate Mr. Miller's history of physical abuse, sexual abuse, and head injuries. I ceased my investigation upon locating a witness, Loretta Miller, Mr. Miller's mother, who would testify at trial about the physical abuse Mr. Miller had suffered at the hands of his step-father.

9. I had no strategic reason for failing to provide Mr. Miller's history of physical abuse, sexual abuse, and head injuries to the psychological expert(s) appointed to examine Mr. Miller at the time of trial, or to any other psychological expert.

10. Mr. Miller's jury sentenced him to death. On appeal, the Tennessee Supreme Court overturned his death sentence and remanded the case for a new sentencing hearing. I continued to represent Mr. Miller during his capital re-sentencing.

11. At the time I was representing Mr. Miller in re-sentencing, I was employed as the Litigation Director of the Office of the Capital Collateral Representative in Tallahassee, Florida ("CCR"). CCR was charged with the representation of well over 100 Florida death row inmates in state post-conviction proceedings, federal habeas corpus, and clemency. In addition, I was representing capital clients in other states, including, but not limited to, North Carolina. On the date on which Mr. Miller's pre-trial (re-sentencing) motions were argued, I was responsible for personally representing and/or supervising the representation of all of CCR's clients. This included two cases in Florida where death warrants had been signed and executions were imminent. Although the re-sentencing court allowed a continuance of Mr. Miller's hearing to make my continued representation of Mr. Miller possible, I was extremely overworked through his re-sentencing.

12. Following the remand of Miller's case, I obtained records from the Wood County Department of Human Services (the agency responsible for supervising Loretta Miller, David, and her other children) as well as certified copies of his school records. Those records revealed not only further evidence of Mr. Miller's abuse by his stepfather, but his mother's extreme neglect of David and her other children and her sexually inappropriate behavior in their presence. In addition, I discovered that the detention home where Mr. Miller had been sent, the Fairfield School for Boys, was rife with physical and sexual abuse by staff members of the children in its care.

13. These facts were additional red flags that Mr. Miller had not only been sexually assaulted by a friend of his grandfather, but, had experienced a childhood filled with sexual abuse and/or misconduct. I did nothing further to investigate Mr. Miller's history of sexual abuse or its relationship to his crime. I did not provide any of the information I had learned about the sexual and physical trauma suffered by Mr. Miller to any psychological expert. In fact, I was unable to obtain the assistance of any independent psychological expert to assist me in the presentation of Mr. Miller's mitigation case at re-sentencing.

14. In addition, I continued to not investigate the extent of Mr. Miller's head trauma, and I did not seek the assistance of any mental health expert to determine the physical and mental consequences of such trauma (including brain damage) and the relationship between such trauma, and/or the effects thereof, to the murder of the victim in this case.

15. I had no strategic basis for not investigating these areas of Mr. Miller's social history or for not obtaining the assistance of experts. Presenting evidence of these areas of mitigation was completely consistent with the re-sentencing strategy. In addition, I had every reason to believe that the prosecution would again attempt to argue that Mr. Miller had lured the victim to the crime scene with the intent of raping her, that he had committed that rape, that he had intentionally murdered the victim during the course of that rape and that he had intentionally done so in a manner supporting Tennessee's "heinous, atrocious, or cruel" statutory aggravating circumstance.

16. I have been provided with expert reports on Mr. Miller by Pablo Stewart, M.D., Thomas M. Hyde, M.D., Ph.D., and David Lisak, Ph.D., and have reviewed the same.

17. At the time of Mr. Miller's re-sentencing, had I obtained expert assistance and uncovered the same type of information as contained in the expert reports referenced in paragraph 16, I would have presented that evidence to Mr. Miller's re-sentencing jury.

18. In my opinion, based on my 35 years of capital criminal defense, the expert testimony that was developed post-trial is precisely the type of mitigating evidence that would have led at least one juror to reject the sentence of death. The testimony provided a far more sympathetic explanation for the crime and significantly rebutted the aggravating inferences that the prosecution argued to the jury.

19. Further affiant saith not.

Dated this 18th day of September, 2013.

Mark Evan Olive

STATE OF Florida)
)
COUNTY OF Leon)

Subscribed, sworn to and acknowledged before me by Mark Evan Olive on this 18th day of September, 2013.

Notary Public

My Commission Expires:

May 11, 2016

STEPHANIE N. CIMMINO
Notary Public - State of Florida
My Comm. Expires May 11, 2016
Commission # EE 182609
Bonded Through National Notary Assn.

Attachment K

to David Miller's Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation

Miller v. Bell, No. 3:01-cv-487 (E.D. Tenn.)
Respondent's opposition to motion for relief from judgment filed Oct. 4, 2013

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

DAVID EARL MILLER,	)	
	)	
Petitioner,	)	
	)	**No. 3:01-cv-487**
v.	)	**Judge Jordan/Carter**
	)	
RICKY BELL, WARDEN,	)	
	)	
Respondent.	)	

RESPONDENT'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT

The petitioner's pending motion [D.E. No. 112] for relief from judgment pursuant to Rule 60(b) motion contends that the United States Supreme Court's decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and *Trevino v. Thaler*, No. 11-10189, 133 S.Ct. 1911 (U.S. May 28, 2013), represents an intervening change in controlling law that provides grounds for relief from judgment in the respondent's favor. Specifically, Miller contends that *Martinez* and *Trevino* require consideration of his defaulted ineffective-assistance claims on their merits because those cases recognized ineffective assistance of post-conviction counsel as cause to overcome procedural default as to such claims. This contention fails because neither *Martinez* and nor *Trevino* provide an exceptional circumstance necessary to form the basis for Rule 60 relief, they do not apply in Tennessee, and, in any event, he has not shown his post-conviction counsel was ineffective or that his underlying ineffectiveness claim is substantial.

I. Miller is not Entitled to Rule 60 Relief Because the *Martinez* Line of Cases Is Not an "Exceptional Circumstance" for Purposes of Rule 60.

Fed. R. Civ. P. 60(b) provides six grounds under which a party may seek relief from a judgment or order. The petitioner requests relief under Rule 60(b)(6): "any other reason justifying relief from the operation of the judgment." However, "Rule 60(b)(6) should apply 'only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule.'" *Olle v. Henry & Wright Corporation,* 910 F.2d 357, 365 (6th Cir. 1990). It is invoked only in those "unusual and extreme situations where principles of equity *mandate* relief." *Id.* (emphasis in original). Rule 60(b)(6) exists to allow courts to vacate judgments whenever such action is appropriate to accomplish justice in extraordinary circumstances. *Klapprott v. United States,* 335 U.S. 601, 614-15 (1949). A change in decisional law is not ordinarily sufficient cause for a Rule 60(b)(6) motion to be granted. *Agostini v. Felton*, 521 U.S. 203, 239 (1997).

Numerous courts, including this district, have found that *Martinez* is not an "extraordinary circumstance" sufficient to cause to grant a petitioner's Rule 60(b)(6) motion. Most recently, this district held, "the Court is not persuaded the equitable ruling of *Martinez*, alone or in conjunction with other factors considered by the Court *infra*, meets the Rule 60(b)(6) 'exceptional circumstance' standard under Supreme Court or Sixth Circuit precedent." *West v. Bell*, No. 3:01-cv-91, 2013 WL 5350627, at *4 (E.D. Tenn. Sept. 23, 2013). In so holding, this Court noted, "neither the Supreme Court nor the Sixth Circuit has instructed that *Martinez* may constitute exceptional circumstances for purposes of Rule 60(b) relief. *Id.* at *5. The Western District has held similarly. "Therefore, this change in decisional law does not embody the type of extraordinary or special circumstance that warrants relief under Rule 60(b)(6)." *Johnson v. Bell*, No. 97-3052, at 6 (W.D. Tenn. Apr. 17, 2013) (Fowlkes, J.) (copy attached as "Ex. A")

As the United States Court of Appeals for the Fifth Circuit stated, "the *Martinez* decision is simply a change in decisional law and is not the kind of extraordinary circumstance that warrants relief under Rule 60(b)(6)." *Adams v. Thaler*, 679 F.3d 312, 320 (2012). Indeed, *Martinez* specifically states that it creates no new constitutional right, but is merely an alteration of the Court's procedural default doctrine. As a sister district court stated, "(v)irtually every court to have examined the impact of *Martinez* in the context of a request for Rule 60(b)(6) relief has rejected the notion that *Martinez* constitutes the 'sea change in the law' maintained by Petitioner or satisfies Rule 60(b)(6)'s 'extraordinary circumstances' requirement." *Sheppard v. Robinson*, 2013 WL 146342, *11 (S.D. Ohio Jan. 14, 2013); *See also Foley v. White*, 2013 WL 375185 at *5-*6 (E.D. Ky. Jan. 30, 2013) (holding *Martinez* does not apply in Kentucky, and is not a proper basis for Rule 60 relief in any event); *Post v. Bradshaw*, 2012 WL 5830468, *11 (N.D. Ohio 2012); *Bender v. Wynder*, 2012 WL 6737840 (W.D. Pa. 2012); *Vogt v. Coleman*, 2012 WL 2930871, *3-4 (W.D. Pa. 2012); *Brown v. Wenerowicz*, 2012 WL 6151191, *3 (E.D. Pa. 2012); *McGuire v. Warden, Chillicothe Corr. Inst.*, 2012 WL 5303804 (S.D. Ohio Oct. 25, 2012); *Horton v. Sheets*, 2012 WL 3777431, *2 (S.D. Ohio 2012); *Arthur v. Thomas*, 2012 WL 2357919, *8-10 (N.D. Ala. 2012).

While Miller argues that the equities dictate that Rule 60 relief be granted because his is a capital case. However, *West* was also a capital case. In denying the petitioner's Rule 60 motion, Chief Judge Varlan noted that the interests of the State's and victims' interests in finality balanced out the petitioner's interests. *West*, 2013 WL 5350627, at *5. A capital defendant's Martinez-based Rule 60 motion was also denied by the Western District. *See Johnson*, No. 97-3052 at p. 6 (holding *Martinez* not the basis for a Rule 60 motion, in a capital case). While Miller contends his defaulted claims are meritorious, this contention does not separate him from the scores of other defendants

who have unsuccessfully sought Rule 60 relief. Thus, the petitioner is not entitled to Rule 60 relief merely because he challenges a capital conviction.

Moreover, the petitioner's *Martinez* argument is waived in this case, because he did not previously raise ineffectiveness of post-conviction counsel as grounds to overcome his default. Instead, as this Court noted, the petitioner argued that his claims were not defaulted because the state rules prohibiting untimely or successive petitions were not regularly applied. *See* D.E. No. 61, Petitioner's Response to Summary Judgment, at pp. 85-87; D.E. No.85, Order, at pp. 25-27. Because Miller has not previously raised a *Martinez* issue, his motion should also be denied as waived.

II. Miller is not Entitled to Relief because *Martinez* does not Apply in Tennessee.

Even if *Martinez* were grounds for Rule 60 relief, the petitioner's motion is still without merit because *Martinez* and *Trevino* do not apply in Tennessee.

A. *Martinez* itself is inapplicable in Tennessee because Tennessee does not require defendants to bring trial-ineffectiveness claims on collateral review.

Martinez recognized a "narrow" exception to the rule in *Coleman v. Thompson*, 501 U.S. 722 (1991), that an attorney's ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default. *Martinez*, 132 S. Ct. at 1315. That exception is as follows:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 1320.

Martinez arose in Arizona, which "does not permit a convicted person alleging ineffective assistance of trial counsel to raise that claim on direct review." *Id.* at 1313; *see also State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002) (in which the Supreme Court of Arizona legally forbade prisoners

from bringing ineffective assistance of counsel claims on direct appeal, decreeing that such claims, "henceforth, will not be addressed by appellate courts regardless of merit"). However, *Martinez* held that this rule only applies where a post-conviction proceeding presents the first opportunity for a defendant to raise such a claim. *Id.* The rationale for this limitation was that when states barred defendants from raising an ineffectiveness claim in direct proceedings, defendants must rely on post-conviction counsel to raise such a claim. *Id.* at 1315.

The Sixth Circuit has stated that *Martinez* itself does not apply in Tennessee, which, unlike Arizona, does not prohibit ineffectiveness claims. In *Hodges v. Colson*, the Court specifically stated this holding:

> *Martinez* held that where the state courts do not permit ineffective assistance of trial counsel claims to be brought on direct appeal but require they be brought on collateral attack, ineffective assistance of collateral counsel can provide cause to excuse procedural default. *See Martinez*, 132 S. Ct. at 1315-16. But Tennessee does *not* require prisoners to bring ineffective assistance of trial counsel claims on collateral attack—prisoners may bring them on direct appeal. *See State v. Honeycutt*, 54 S.W.3d 762, 766 & n.6 (Tenn. 2001); *State v. Anderson*, 835 S.W.2d 600, 607 (Tenn. Crim. App. 1992); *State v. Smith*, 2011 Tenn. Crim. App. LEXIS 830, at *33-35 (Tenn. Crim. App. Nov. 14, 2011). Tennessee's system does not implicate the same concerns as those that triggered the rule in *Martinez* because in Tennessee a collateral proceeding is not "the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial." *Martinez*, 132 S. Ct. at 1320. *** Accordingly, the *Coleman* rule still applies, and ineffective assistance of post-conviction counsel may not provide cause to excuse default of [the petitioner's claims].

Hodges v. Colson, No. 09-5021, 2013 WL 1196660, at *19 (6th Cir. Mar. 26, 2013) *vacated by Hodges v. Heidle*, 2013 WL 4414811 (6th Cir. Aug. 14, 2013).

Similarly, each district in this state held that *Martinez* does not apply to excuse default in another Tennessee case because the petitioner "was permitted under state law" to raise ineffective assistance claims on direct appeal. *Leberry v. Howerton*, 2012 WL 2999775 at *1 (M.D. Tenn. July 23, 2012). The United States District Court for the Western District of Tennessee held that *Martinez*

does not apply in Tennessee because a petitioner is entitled to raise an ineffectiveness claim on direct review. *Dance v. Parker*, 2012 WL 392464 at *5 (W.D. Tenn. Jan. 31, 2013). The Eastern District of Tennessee, in denying a Rule 59 motion, also held that *Martinez* does not apply. As that court stated, "*Martinez* applies only to 'a prisoner's procedural default of a claim of ineffective assistance at trial,'" 132 S. Ct. at 1315, and only when "'the State barred the defendant from raising the claims on direct appeal,'" so that post-conviction proceedings are the petitioner's first opportunity to present the claim. *Sutton v. Bell*, No. 07-30 Doc. Entry No. 42 at 5-6, citing *Martinez*, 132 S.Ct. at 1320. (copy attached as "Ex. B.") Recognizing that Tennessee law permits a defendant to assert his claim of ineffective assistance of trial counsel on direct appeal, the court held that *Martinez* did not apply.

The great weight of authority therefore recognizes the plain fact that Tennessee does not prohibit trial-ineffectiveness claims on direct review. As a result, *Martinez's* exception to *Coleman* did not, without more, reach Tennessee.

B. *Trevino* does not apply in Tennessee, because the concerns that prompted its application in Texas are not applicable here.

In *Trevino*, the Court extended the *Martinez* rationale to Texas because in that state it was "virtually impossible for appellate counsel to adequately present an ineffective assistance claim of trial counsel on direct review." *Trevino*, 133 S.Ct. at 1918. In Tennessee, it is not virtually impossible to present an ineffectiveness claim, so *Trevino* does not apply.

In *Trevino*, the Supreme Court considered Texas' procedural framework and concluded, "where, as here, state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in *Martinez* applies." *Id.* This was because Texas's "motion-for-new-trial vehicle is often inadequate because of time constraints"

requiring a motion for new trial to be disposed of within 75 days of sentencing, at which point "the trial record has generally not been transcribed." *Id.* The Supreme Court noted that litigating ineffectiveness claims on direct appeal in Texas was not practical because, after filing a motion for new trial, new counsel would have only 45 days to prepare the case for a hearing, often without the benefit of a trial transcript. *Id. Trevino* also applied *Martinez* to Texas because it found that Texas court had directed defendants not to bring ineffectiveness claims on direct review. *Id.* at 1919. As a result, the Supreme Court held that Texas did not provide a "meaningful opportunity" for a defendant to raise an ineffectiveness claim on direct appeal.

Based on the differences between the procedural schemes of Texas and Tennessee, a sister district has held that *Trevino* is inapplicable to Tennessee. In *Rahman v.Carpenter,* No. 96-380, 2013 WL 3865071, at *4 (M.D. Tenn. July 25, 2013) the United States Court for the Middle District of Tennessee held that due to procedural difference between Texas and Tennessee, the holding in *Trevino* does not apply in Tennessee. As the court stated, "(t)his Court is persuaded that the Tennessee courts offer a meaningful opportunity for defendants to raise ineffective assistance claims during the direct appeal process, and therefore, the decisions in *Martinez/Trevino* do not apply to the Tennessee courts." *Id.*

The court noted that in many cases ineffectiveness claims have been litigated on appeal in Tennessee after a fully developed record from a hearing on the claim in a petitioner's motion for new trial hearing. *Id.* While not binding authority on this Court, the Middle District's recognition that the state in which it is located provides a realistic opportunity to litigate an ineffectiveness claim on direct appeal is illustrative of the state's procedural scheme and thus relevant to this Court's determination of the application of *Trevino*. Both Tennessee's procedural scheme and its pattern of practice reveals that litigating a motion for new trial is not "virtually impossible" as in Texas and the

state's procedural scheme provides for meaningful review of such claims. Accordingly, *Trevino* does not impact prior precedent that *Martinez* is inapplicable in Tennessee.

In *Trevino*, in explaining why the design of the Texas procedural framework does not give defendants a meaningful opportunity to raise trial-ineffectiveness claims on direct review, the Supreme Court sets its sights squarely on a set of Texas procedural rules that combine to prevent Texas defendants from sufficiently developing the record at the motion for new trial stage. *Id.* Texas Rules of Appellate Procedure 35.2(b) and 35.3(c) require a trial transcript to be prepared within 120 days of sentencing, a deadline which can be extended. Crucially, the court also discussed Texas Rule of Appellate Procedure 21.8(a), which requires Texas courts to "rule on a motion for new trial within 75 days after imposing or suspending sentence in open court," and Rule 21.8(c), which deems a motion for new trial denied if the 75-day period ends without a ruling. In connection with Texas Rule of Appellate Procedure 21.4, which requires a motion for new trial to be made within 30 days of sentencing, this 75-day deadline for disposition of the motion did not present a meaningful opportunity to fairly present the claim.

Texas courts have recognized that these rules have grave consequences for defendants wishing to advance trial-ineffectiveness claims on direct review. They "generally" deprive defendants of "a realistic opportunity to adequately develop the record in post-trial motions." *Robinson*, 16 S.W.3d at 810-11. They "make it virtually impossible for appellate counsel to adequately present an ineffective assistance claim to the trial court." *Id.* *Trevino* deems pertinent those Texas cases which discuss these rules' effect on the *adequacy of the record*, such as the Texas Court of Criminal Appeals' observation that "in the vast majority of cases, the underdeveloped record on direct appeal will be insufficient for an appellant to satisfy the dual prongs of *Strickland*." *Thompson v. State*, 9S.W.3d 808, 813-14 (Tex. Crim. App. 1999). In Texas, the underdeveloped

record is not a defendant's fault, as Texas rules prevent defendants from adequately developing the record as a matter of design.

This 75-day rule, in particular, is the hinge on which the *Trevino* decision turns. After reviewing the Texas case law discussed above, the Supreme Court explains "why [Texas] does not" provide for "meaningful review of a claim of ineffective assistance of trial counsel" on direct review: because the 75-day rule does not give Texas defendants enough time. *Trevino*, 133 S.Ct. at 1918. Specifically,

> The trial court appointed new counsel for Trevino eight days after sentencing. Counsel thus had 22 days to decide whether, and on what grounds, to make a motion for a new trial. She then may have had an additional 45 days to provide support for the motion but without the help of a transcript (which did not become available until much later—seven months after the trial). It would have been difficult, perhaps impossible, within that time frame to investigate Trevino's background, determine whether trial counsel had adequately done so, and then develop evidence about additional mitigating background circumstances.
>
> *Id.*

The holding in *Trevino* does not affect the precedent that *Martinez* does not apply, because Texas's procedural scheme varies from Tennessee in several ways. The limitations considered in Texas do not apply in Tennessee, where there is no artificial deadline rushing the disposition of motions for new trial, motions for new trial may be amended after their filing and the evidentiary hearing on the motion may not occur for many months after its filing. Rule 33(c) of the Tennessee Rules of Criminal Procedure authorizes a defendant to present "testimony in open court on issues raised in the motion for a new trial." While an initial new trial motion must be filed within 30 days, "the court shall liberally grant motions to amend the motion for new trial until the day of the hearing on the motion." Tenn. R. Crim. P. 33(b).

This procedure allows defendants an opportunity to research ineffectiveness claims and insert them into amended new trial motion in a manner not feasible in Texas, where motions for new trial must be disposed of within 75 days of sentencing. For example, in *State v. Monroe*, the defendant filed a motion for new trial on February 16, 2010, amended it to allege ineffectiveness claims on March 9, 2010, and September 1, 2010, and presented them at an evidentiary hearing on January 4, 2011. *State v. Jake Monroe*, 2012 WL 2367401, at *1-2 (Tenn. Crim. App. June 12, 2012) *perm. app. denied* (Tenn. Nov. 27, 2012). Such a procedure allows sufficient time for new counsel to obtain the transcript and prepare for a hearing. In *State v. Lowe-Kelley*, the Tennessee Supreme Court held that Rule 33 allowed departing counsel, withdrawing due to a conflict of interest, to file a "placeholder" motion for new trial, which new counsel was allowed to amend months later with specific allegations. *State v. Lowe-Kelly*, 380 S.W. 3d 30, 33-34 (Tenn. 2012).

Tennessee procedural scheme also allows a procedure for the appointment of new counsel in a motion for new trial hearing. A petitioner wishing to litigate an ineffectiveness claim may seek relief under Tenn. Code Ann. § 40-14-205(a), which states, "(t)he court may, upon good cause shown, permit an attorney appointed under this part to withdraw as counsel of record for the accused. If any attorney is permitted to withdraw, the court shall . . . immediately appoint another attorney in the former attorney's place."[1] A defendant may show good cause because the Tennessee Rules of Professional Conduct require counsel to withdraw where "the representation will result in a violation

1 While Tenn. Sup. Ct. Rule 13(e)(5) states that "appointed counsel shall continue to represent an indigent party throughout the proceedings, . . . until the case has been concluded or counsel has been allowed to withdraw by the court," nothing in this rule prevents a conflicted attorney from requesting to withdraw, and the purpose of this rule is not to bind a dissatisfied defendant from requesting a new attorney, but to bind counsel from withdrawing on a whim. *See* Tenn. Sup. Ct. R. 13(e)(5), Explanatory Comment ("Section 1(e)(5) clarifies that *appointed counsel is obligated* to represent the indigent party until a court allows counsel to withdraw.") (emphasis added). Similarly, Subsection (f)(1)'s directive that "(i)ndigent parties shall not have the right to select appointed counsel" does not prevent a conflicted counsel from requesting to withdraw from a case. While an indigent defendant might not get to select their new counsel to replace a conflicted attorney, the conflicted attorney must still request to withdraw pursuant to Rule 8, RPC 1.16.

of the Rules of Professional Conduct," which include a prohibition against conflicts of interest. See Tenn. Sup. Ct. R. 8, RPC 1.16.(a)(1), 1.7-8. As a comment to Rule 1.7 states, "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client objective advice." Tenn. Sup. Ct. R. 8, RPC 1.7, Comment 10. Thus, where a defendant wishes to raise an ineffectiveness claim as to their own counsel in a motion for new trial, that attorney must move to withdraw and the trial court must appoint new counsel if it grants the motion. As shown below, this procedure has occurred repeatedly in Tennessee criminal cases.

Accordingly, unlike in Texas, in Tennessee it is not "virtually impossible" to litigate ineffectiveness claims through evidentiary hearings as part of motions for new trial in direct proceedings in which a new counsel undertakes the representation. *See Honeycutt*, 54 S.W.3d at 766 (granting relief on direct appeal as to ineffectiveness claim developed at evidentiary hearing on motion for new trial held seven months after sentencing); *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999) (same); *State v. Marie Urbano-Uriostegui*, No. M2012-235-CCA-R3-CD, 2013 WL 1896931, at *15 (Tenn. Crim. App. May 6, 2013) (hearing on motion for new trial held 10 months after sentencing); *Monroe*, 2012 WL 2367401, at *1; *Nelson Troglin v. State*, No. E2010-1838-CCA-R3-PC, 2011 WL 4790943, at *12 (Tenn. Crim. App. Oct. 11, 2011); *State v. Kristi Smith*, No. E2010-549-CCA-R3-CD, 2011 WL 5517646, at *3, *12 (Tenn. Crim. App. Nov. 14, 2011); *State v. James Johnson*, No. E2008-2555-CCA-R3-CD, 2010 WL 3565761, at *8 (Tenn. Crim. App. Sept. 15, 2010); *State v. Randy Norman*, No. M2009-1246-CCA-R3-CD, 2010 WL 3448108, at *8 (Tenn. Crim. App. Sept. 2, 2010) *perm. app. denied* (Tenn. Dec. 8, 2010); *State v. Richard Beheler*, No. E2009-120-CCA-R3-CD, 2010 WL 271284, at *1 (Tenn. Crim. App. Jan. 25, 2010) *perm. app.*

denied (Tenn. June 17, 2010) (noting that trial court granted motion for new trial based on ineffectiveness claim); *State v. Jeremy Crosby*, No. M2005-548-CCA-R3-CD, 2007 WL 189384, at *3 (Tenn. Crim. App. Jan. 26, 2007); *State v. Marvin Norton*, No. M2002-2906-CCA-R3-CD, 2005 WL 1950295, at *4-5 (Tenn. Crim. App. Aug. 12, 2005) *perm. app. denied* (Tenn. Dec. 19, 2005); *State v. Gregory Lance*, No. M2001-2507-CCA-R3-CD, 2003 WL 1960270, at *8 (Tenn. Crim. App. Apr. 28, 2003) *perm. app. denied* (Tenn. Oct. 27, 2003); *State v. Carlos Waters*, No. E2001-882-CCA-R3-CD, 2003 WL 824278, at *7 (Tenn. Crim. App. Mar. 6, 2003) *perm. app. denied* (Tenn. July. 21, 2003); *State v. Ricky Brandon*, No. M2002-073-CCA-R3-CD, 2002 WL 31373479, at *2 (Tenn. Crim. App. Oct. 15, 2002) *perm. app. denied* (Tenn. Feb. 24, 2003).

The Supreme Court's concerns about the design of Texas' procedural framework are therefore inapplicable in Tennessee. Tennessee "'offers a realistic opportunity to adequately develop the record for appeal in post trial motions.'" *Trevino*, 2013 WL 2300805, at *8 (quoting *Robinson*, 16 S.W.3d at 810-11). Tennessee allows defendants to avoid the problem of an "'underdeveloped record on direct appeal.'" *Id.* at *8 (quoting *Thompson*, 9 S.W.3d 813-14). Texas fails to offer the required "meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal" because its 75-day rule, in preventing adequate development of the record, renders the adequate advancement of such a claim "virtually impossible"; Tennessee offers a system in which the advancement of such claims is not only possible, but in which they are not impeded by reasons of the procedural framework's design. *Trevino*, 133 S.Ct at 1918.

After resting its holding on the "virtual impossibility" created by the 75-day rule, the Supreme Court also considered the nature of Texas' system in practical operation, finding it significant that Texas' appellate courts have routinely discouraged trial-ineffectiveness claims on direct appeal. *Id.* at 1919. The court opined that declining to extend *Martinez* to Texas would create

"significant unfairness" in that it would penalize the criminal defense bar for taking Texas appellate courts' "strong judicial advice" not to advance trial-ineffectiveness claims on direct review. *Id.*

Crucially, the "judicial advice" cited by the Supreme Court is also a natural outflow of the "virtual impossibility" created by the 75-day rule, because it also focuses on a Texas defendant's inability to adequately develop the record on direct review. *Id.* (reviewing additional Texas cases discouraging trial-ineffectiveness claims on direct review). In *Lopez v. State*, the Texas Court of Criminal Appeals noted that "[o]n direct appeal, the record is usually inadequately developed and "cannot adequately reflect the failings of trial counsel" for an appellate court "to fairly evaluate the merits of such a serious allegation." 343 S.W.3d 137, 143 (Tex. Crim. App. 2011) (citing *Bone v. State*, 77 S.W.3d 828, 833 n.13 (Tex. Crim. App. 2002)). In *Sprouse v. State*, failure to raise an ineffective assistance claim on direct review did not constitute ineffective assistance of counsel because "the reporter did not finish transcribing the record in the case until . . . more than sixty days after the time had expired to file a motion for new trial." 2007 WL 283152, at *7 (Tex. Crim. App. Jan. 31, 2007). Because of the 75-day rule and lack of a trial transcript, "had [new counsel] been appointed during the period in which he could have filed a motion for new trial, he would not have had the benefit of the written record on which to base his motion." *Id.* Finally, *Mata v. State* favorably quoted a previous concurring opinion declaring that "[a]s a general rule, one should *not* raise an issue of ineffective assistance of counsel on direct appeal. This is so because a trial record is generally insufficient to address claims of ineffective assistance of counsel in light of the strong presumption that (trial) counsel's conduct falls within the wide range of reasonable professional assistance." *Mata v. State*, 226 S. W. 3d 425, 430, n. 14 (Tex. Crim. App. 2007) (quoting *Jackson v. State*, 877 S.W.2d 768, 772 (Tex. Crim. App. 1994) (Baird, J., concurring) (internal quotation marks omitted).

In using these additional authorities to bolster its conclusion, the Supreme Court used language later imported into its final holding, noting that direct review of trial-ineffectiveness claims is "in the typical case all but impossible" in Texas. *Trevino.*, 2013 WL 2300805, at *9. Again, such review is not remotely impossible in the typical Tennessee case.

Criminal defendants and the criminal bar have received no such "judicial advice" from Tennessee's appellate courts. Texas has discouraged such claims as a result of the time limits that render their successful litigation "virtually impossible." *Robinson*, 16 S.W.3d at 810-11. The Tennessee Court of Criminal Appeals has merely admonished defendants for advancing trial-ineffectiveness claims after *failing* to avail themselves of the meaningful procedural opportunity Tennessee provides. Specifically, the Tennessee Court of Criminal Appeals has only declined to consider trial-ineffectiveness claims on direct appeal where: (1) the defendant has conceded the issue;[2] (2) the record does not contain a transcript of the motion for new trial hearing,[3] or; (3) the defendant waived the issue under Tennessee Rule of Appellate Procedure 3(e) by failing to include the issue in his or her motion for new trial, or by presenting the issue for the first time on appeal.[4]

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2 *State v. Leonard Allen*, 2011 WL 1344462, at *8 (Tenn. Crim. App. Apr. 15, 2011); *State v. Michael E. Lones*, 2007 WL 674630, at *5 (Tenn. Crim. App. Mar. 6, 2007).

3 *State v. Gregory D. Roberts*, 2011 WL 1220097, at *4 (Tenn. Crim. App. Mar. 30, 2011).

4 *State v. Ronnie Lee Johnson*, No. M2008-2848-CCA-R3-CD, 2010 WL 565667 (Tenn. Crim. App. Feb. 18, 2010); *State v. Jim Gerhardt*, No. W2006-2589-CCA-R3-CD, 2009 WL 160930, at *19 (Tenn. Crim. App. Jan. 23, 2009); *State v. Michael J. McCann*, No. M2000-2990-CCA-R3-CD, 2001 WL 1246383, at *13 (Tenn. Crim. App. Oct. 17, 2001) (in which a defendant was "in no position to present proof" because he failed to raise the ineffectiveness issue in his motion for a new trial, not because Tennessee deprived him of a meaningful opportunity to do so); *State v. Slater Belcher*, No. 03C01-9608-CC-299, 1997 WL 749932, at *6 (Tenn. Crim. App. Nov. 26, 1997); *State v. Richard Madkins*, 1997 No. 02C01-9511-CR-351, 1997 WL 476698, at *5 (Tenn. Crim. App. Aug. 22, 1997); *State v. J.Y. Sepulveda*, No. 03C01-9402-CR-000069, 1997 WL 351107, at *6 (Tenn. Crim. App. June 26, 1997); *State v. Jimmy L. Sluder*, No. 1236, 1990 WL 26552 at *7 (Tenn. Crim. App. Mar. 14, 1990).

While Tennessee courts have stated that raising ineffectiveness claims on direct review is "fraught with peril" the rationale for this warning only applies when a defendant fails to call witness in an evidentiary hearing. Such a defendant risks a determinative ruling on an ineffective assistance claim without the benefit of a hearing to develop a record supporting the claim. *See State v. Billie Joe Welch*, 2006 WL 2737830, at *7 (Tenn. Crim. App. Sept. 26, 2006) *perm. app. denied* (Feb. 26, 2007) ("the defendant runs the risk of having the issue resolved without an evidentiary hearing, which, if held, might be the only way that harm could be shown—a prerequisite in ineffective trial counsel claims") However, where the claim is presented in an evidentiary hearing on a motion for new trial, this concern "is mitigated" because the trial court may use "the motion for new trial hearing as an evidentiary hearing for appellant's claim of ineffective assistance." *Urbano-Uriostegui*, 2013 WL 1896931, at *15.

Accordingly, a defendant who chooses to litigate an ineffectiveness claim through an evidentiary hearing at a motion for a new trial rather than through a post-conviction proceeding is in no way disadvantaged for so choosing, and the reviewing court employs the same standard of review of determining such a claim as if the claim were brought in a post-conviction petition. *Burns*, 6 S.W.3d at 461-62. Indeed, the Tennessee Court of Criminal Appeals has repeatedly stated "insertion of ineffective assistance of counsel claims within a motion for new trial essentially transforms the hearing on the motion into a post-conviction petition." *State v. Kathy Jane Giles*, No. W2001-1468-CCA-R3-CD, 2002 WL 1732336 (Apr. 2, 2002); *See also Norton*, 2005 WL 1950295, at *5 (same); *State v. David Akers*, No. W2003-010-CCA-R3-CD, 2004 WL 1686604, at *4 (Tenn. Crim. App. July 26, 2004) *perm. app. denied* (Tenn. Dec. 28, 2004) (same); *Lance*, 2003 WL 1960270, at *8 (same).

Because the Tennessee Court of Criminal Appeals has stated that litigating an ineffectiveness claim through a motion for new trial is the equivalent of litigating the claim through the filing of a post-conviction petition, it cannot be said that Tennessee fails to afford less "meaningful review" to such claims than those brought initially in post-conviction.

In fact, raising the claim on direct appeal may benefit a defendant in several regards. First, doing so prevents defendants from having to spend years in prison awaiting the conclusion of the direct appeal process before raising what might be their most meritorious claim. Second, raising such a claim closer to the time of trial results in witnesses having fresher recollections of the events at issue. Litigating an ineffectiveness claim through a newly appointed counsel at a motion for new trial, whose performance is subject to review at a state post-conviction proceeding, provides defendants with an extra layer of review for their ineffectiveness claims. Additionally, while Tennessee's post-conviction scheme prevents a court from appointing court-funded investigators or experts in non-capital cases, the rule does not apply to cases on direct review. *See* Tenn. Sup. Ct. R. 13, § 5(a)(2). Thus, the rationale for applying *Trevino* to Texas, where there is no "meaningful review" of ineffective assistance claims on direct appeal, does not exist in Tennessee where bringing such claims are entirely feasible and may in fact be advantageous. Interpreting *Trevino* narrowly will also uphold the federalism concerns upon which the procedural default doctrine rests by preventing capital defendants from intentionally withholding ineffectiveness claims until federal habeas review in order to circumvent the usual deference afforded to state-court decisions.

The petitioner's argument for relief from judgment in light of *Martinez* is without merit because *Martinez*, does not apply to states such as Tennessee, where a defendant may feasibly raise ineffective-assistance claims on direct appeal and the courts have stated that doing so through a motion for new trial is the substantial equivalent of filing a post-conviction petition.

III. Miller's Contentions are not Substantial in any Event

Even if *Martinez* was grounds for Rule 60 relief, and the case did apply in Tennessee, Miller has also failed to show that Martinez applies to his case because his claim is not substantial. Even in states where *Martinez* does apply, it only excuses procedural default if the underlying claim of ineffective assistance of trial counsel is "substantial," and the allegation of ineffective assistance of post-conviction counsel is meritorious. *Martinez*, 1309 S.Ct. at 1320. Here, Miller alleges trial counsel was ineffective for failing to present mental health mitigation evidence, and that post-conviction counsel was ineffective to failing to present such an ineffectiveness theory concerning trial counsel. The petitioner has elsewhere alleged that trial counsel attempted to hire an expert to present such a defense, but that the trial court wrongfully denied him this expert. As the petitioner alleged, "(a)t the time of trial, Mr. Miller requested funds with which to hire an independent psychological expert to assist trial counsel in preparation for trial and sentencing. (T.R. Vol.1, pp. 46-49)." [D.E. No. 18, Amended Petition at p. 17.] Count 1 of the amended petition alleges error in the trial court's denial of this request. *Id.* at pp. 17-19. Trial counsel was not ineffective for failing to present a mental health expert that he was not allowed funds to retain. Post-conviction counsel was not ineffective for failing to raise such a self-defeating claim concerning trial counsel's failure to pursue a defense for which the trial court would not authorize funding. The petitioner's ineffectiveness claim is not substantial, and he is not entitled to relief, even if *Martinez* otherwise applied.

Thus, for the foregoing reasons, the petitioner's motion should be denied.

Respectfully submitted,

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Attorney General and Reporter

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CERTIFICATE OF SERVICE

A copy of the foregoing was served on all ECF users through the Electronic Filing System, including petitioner's counsel: Stephen Kissinger, Federal Defenders Services, 800 S. Gay St., Ste 2400, Knoxville, Tennessee 37929, on this the 4th day of October, 2013.

/s/ Andrew H. Smith
Assistant Attorney General

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DONNIE E. JOHNSON, Petitioner, RICKY BELL, Warden, RIVERBEND MAXIMUM SECURITY INSTITUTION, Respondent.	Case No. 2:97-cv-03052-JTF

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

On March 8, 2013, Petitioner Donnie E. Johnson, through counsel, filed a motion styled "Motion for Relief from Judgment" pursuant to Fed. R. Civ. P. 60(b)(6). (Electronic Case Filing ("ECF") No. 160.) On March 25, 2013, Respondent Ricky Bell filed a response to Petitioner's motion. (ECF No. 163.) On March 27, 2013, Respondent filed a notice of supplemental authority in support of his response to Petitioner's Rule 60(b) motion. (ECF No. 164.)

A. PROCEDURAL HISTORY

In October 1985, Petitioner was convicted for the first-degree murder of his wife Connie Johnson and sentenced to death by electrocution. Johnson v. State, 1993 WL 61728, at *1 (Tenn. Mar. 8, 1993). On November 14, 1997, Petitioner filed his petition pursuant to 28 U.S.C. § 2254, in this Court. (ECF No. 1.) On February 28, 2001, the Court granted Respondent's motion for summary judgment and dismissed the petition. *See* Johnson v. Bell, No. 97-3052-DO, 2001 U.S. Dist. LEXIS 25420 (W.D. Tenn. Feb. 28, 2001). On September 10, 2003, the United States Court of Appeals for the Sixth Circuit affirmed the dismissal. Johnson v. Bell, 344 F.3d 567 (6th Cir.

2003), reh'g and reh'g en banc denied, (6th Cir. Nov. 25, 2003). In 2004, the United States Supreme Court denied the petition for writ of certiorari and the petition for rehearing. Johnson v. Bell, 541 U.S. 1010, 124 S. Ct. 2074, 158 L. Ed. 2d 621 (2004), reh'g denied, 542 U.S. 946, 124 S. Ct. 2930, 159 L. Ed. 829 (2004).

Petitioner filed two motions for equitable relief related to his federal habeas case in 2004, which were both denied. Johnson v. Bell, 605 F.3d 333, 335 (6th Cir. May 17, 2010), reh'g and reh'g en banc denied, (6th Cir. Sept. 10, 2010). On May 17, 2010, the Sixth Circuit dismissed the appeal of one motion for failure to first obtain leave to file a successive petition, and the district court's decision was affirmed with regard to the other motion. *See* id. at 339, 341. The Supreme Court denied the petition for writ of certiorari on May 23, 2011. Johnson v. Bell, 131 S. Ct. 2902, 179 L. Ed. 2d 1246 (2011).

B. ANALYSIS

Petitioner seeks to reopen the habeas proceeding to consider the merits of his claims that trial counsel had a conflict of interest and rendered ineffective assistance of counsel at sentencing. (ECF No. 160 at 1.) He argues that he is entitled to relief because the Court denied habeas relief for a procedural reason and subsequent events establish that the court's procedural ruling was erroneous. (Id. at 1-2.) He relies on Gonzalez v. Crosby, 545 U.S. 524 (2005), for the proposition that a habeas petitioner can seek relief from judgment under Fed. R. Civ. P. 60(b) if he challenges a "defect in the integrity of the federal habeas proceedings" and does not seek to relitigate the merits of the claims. (Id. at 2.)

Petitioner seeks relief under Fed. R. Civ. P. 60(b), which provides as follows:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or other misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Id.

Petitioner has not specified under which subparagraph of Rule 60(b) he seeks relief, and no subparagraph other than Rule 60(b)(6) appears applicable. A movant seeking relief under Rule 60(b)(6) is required "to show 'extraordinary circumstances' justifying the reopening of a final judgment. Such circumstances will rarely occur in the habeas context." Gonzalez, 545 U.S. at 535 (internal citations omitted).

Petitioner argues that he is entitled to Rule 60(b) relief based on the recent Supreme Court decision in Martinez v. Ryan, 132 S. Ct. 1309 (2012). (ECF No. 160 at 1.) He contends that Martinez reveals defects in the integrity of the Court's prior rulings and that procedural default precluded the Court from considering the merits of his claims of conflict of interest and ineffective assistance of counsel ("IAC") at sentencing. (Id. at 1-2.) He asserts that Martinez is applicable to his case because Martinez applies where the initial review collateral proceedings is the first designated proceeding for a prisoner to raise an IAC claim. (Id. at 3.) Petitioner contends that Martinez is applicable because Tennessee courts have routinely prohibited consideration of

IAC at trial claims on direct appeal and ordered the claims to be raised for the first time in post-conviction proceedings. (Id. at 3-5.) Petitioner asserts that he can establish cause for the procedural default of his conflict of interest[1] and IAC at sentencing[2] claims. (Id. at 5.)

In Martinez, the Supreme Court recognized a narrow exception to the rule stated in Coleman v. Thompson, 501 U.S. 722, 729-30 (1991), "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding . . . ." Martinez, 132 S. Ct. at 1320. In such cases, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Id., 132 S. Ct. at 1320. The Supreme Court also emphasized that "[t]he rule of Coleman governs in all but the limited circumstances recognized here. . . . It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial. . . ." Id., 132 S. Ct. at 1320.

Martinez arose under an Arizona law that does not permit IAC claims to be raised on direct appeal. 132 S. Ct. at 1313. However, "Tennessee does not require prisoners to bring ineffective assistance of trial counsel claims on collateral attack - prisoners may bring them on direct appeal." Hodges v. Colson, No. 09-5021, 2013 WL 1196660, at *19 (6th Cir. Mar. 26, 2013). *See* Leberry v. Howerton, No. 3:10-00624, 2012 WL 2999775, at *1 (M.D. Tenn. July 23, 2012) ("[I]n Tennessee, 'there is no prohibition against litigation of ineffective counsel claims on

[1] The Court made an alternative merits determination on Petitioner's conflict of interest claim. *See* Johnson, 2001 U.S. Dist. LEXIS 25420, at **61-76, **97-106. The Court found that the evidence did not support a conclusion that trial counsel was actively representing competing interests. *See* id. at *102.

[2] The Court made a merits determination on Petitioner's IAC sentencing claim. *See* Johnson, 2001 U.S. Dist. LEXIS 25420, at **247-281. However, certain factual allegations were considered procedurally barred because they were not presented in the state court. *See* id. at **266-29.

direct appeal, as opposed to collateral proceedings.'") (internal quotation marks omitted). Although IAC claims are usually raised in post-conviction proceedings in Tennessee, the Sixth Circuit in Hodges determined that Tennessee's system does not implicate the same concerns that triggered the rule in Martinez.[3] Hodges, 2103 WL 1196660, at *19; *see* Leberry, 2012 Wl 2999775, at *2 (declining to extend the reasoning of Martinez).

"Virtually every court to have examined the import of *Martinez* in the context of a request for Rule 60(b)(6) relief has rejected the notion that *Martinez* constitutes the 'sea change in law' maintained by Petitioner or satisfies Rule 60(b)(6)'s 'extraordinary circumstances' requirement." Sheppard v. Robinson, No. 1:00-CV-493, 2013 WL 146342, at *11 (S.D. Ohio Jan. 14, 2013) (internal citations omitted) (agreeing that Martinez amounts to a limited change in decisional law and citing Adams v. Thaler, 679 F.3d 312, 320 (5th Cir. 2012) (concluding that Martinez's crafting of a narrow, equitable exception to Coleman is hardly extraordinary)); Jackson v. Ercole, No. 09-CV-1054, 2012 WL 5949359, at *4 (W.D. N.Y. Nov. 28, 2012); Fitzgerald v. Klopotoski, No. 09-1379, 2012 WL 5463677, at *3 (W.D. Pa. Nov. 8, 2012); Haynes v. Thaler, No. H-05-3424, 2012 WL 4739541, at *4 (S.D. Tex. Oct.3, 2012); Gale v. Wetzel, No. 1:12-CV-1315, 2012 WL 5467540, at *9 (M.D. Pa. Sept. 27, 2012); Vogt v. Coleman, No. 08-530, 2012 WL 2930871, at *3-4 (W.D. Pa. July 18, 2012) (characterizing Martinez as simply a change in decisional law). *But see* Lopez v. Ryan, 678 F.3d 1131, 1136 (9th Cir. 2012); and Cook v. Ryan, No. CV-97-00146-PHX-RCB, 2012 WL 2798789, at *6 (D. Ariz. July 9, 2012)

[3] The United States Supreme Court granted certiorari to address the question of whether Martinez applies where either the courts discourage and/or make it practically impossible to effectively bring an IAC at trial claim on direct appeal. *See* Trevino v. Thaler, 499 F. App'x 415 (5th Cir. 2011), cert. granted, 133 S. Ct. 524 (U.S. Oct. 29, 2012) (No. 11-10189). Oral argument was heard on February 25, 2013. *See* http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalFeb2013.pdf (last accessed Apr. 15, 2013).

(concluding that the nature of the change in law heralded by Martinez was a remarkable, albeit limited, development weighing slightly in favor of 60(b)(6) relief).

The Supreme Court announced that its ruling in Martinez was an equitable ruling, which does not rise to the level of a constitutional ruling. Martinez, 132 S. Ct. at 1319–20. The Martinez Court explicitly declined to confront the constitutional question left open in Coleman of whether a prisoner has a right to effective counsel in collateral proceedings, which provide the first occasion to raise a claim of ineffective assistance at trial. *See* id., 132 S. Ct. at 1315 (noting that given the facts presented, "this is not the case ... to resolve whether that exception exists as a constitutional matter"). Therefore, this change in decisional law does not embody the type of extraordinary or special circumstance that warrants relief under Rule 60(b)(6).

Petitioner's motion for relief from judgment (ECF No. 160) is DENIED.

C. APPEAL RIGHTS

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. Miller-El v. Cockrell, 537 U.S. 322, 335 (2003); Bradley v. Birkett, 156 F. App'x 771, 772 (6th Cir. 2005). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, Section 2254 Rules. The petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & (3). A "substantial showing" is made when the petitioner demonstrates that "'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented

were 'adequate to deserve encouragement to proceed further.'" Miller-El, 537 U.S. at 336 (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)); Henley v. Bell, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (same), cert. denied, ___ U.S. ___, 129 S. Ct. 1057 (2009). A COA does not require a showing that the appeal will succeed. Miller, 537 U.S. at 337, 123 S. Ct. at 1039; Caldwell v. Lewis, 414 F. App'x 809, 814-15 (6th Cir. 2011) (same). Courts should not issue a COA as a matter of course. Bradley, 156 F. App'x at 773 (quoting Slack, 537 U.S. at 337, 123 S. Ct. at 1039).

In this case, jurists of reason would not disagree that Petitioner is not entitled to relief from judgment. Because any appeal by Petitioner does not deserve attention, the Court DENIES a certificate of appealability.

Rule 24(a)(1) of the Federal Rules of Appellate Procedure provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. However, if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the prisoner must file his motion to proceed *in forma pauperis* in the appellate court. *See* Fed. R. App. P. 24(a) (4)-(5). In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter would not be taken in good faith, and leave to appeal *in forma pauperis* is DENIED.[4]

[4] If Petitioner files a notice of appeal, he must pay the full $455 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty (30) days of the date of entry of this order. *See* Fed. R. App. P. 24(a)(5).

IT IS SO ORDERED this 17th of April, 2013.

BY THE COURT:

/s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

GARY WAYNE SUTTON, Petitioner, v. ROLAND COLSON, WARDEN, Riverbend Maximum Security Institution,[1] Respondent.	)	No.: 3:07-cv-30 (VARLAN/SHIRLEY)

MEMORANDUM AND ORDER

Petitioner Gary Wayne Sutton ("Petitioner") filed a petition pursuant to 28 U.S.C. § 2254, which the Court dismissed on the merits and on the basis of procedural default by order entered on September 29, 2011 [Docs. 28, 29]. Petitioner subsequently brought two motions: (1) a motion requesting the Court to stay proceedings in this matter [Doc. 30], and (2) a motion to alter or amend the Court's judgment dismissing his § 2254 petition [Doc. 31]. The Court denied the motion to stay the proceeding and reserved ruling on Petitioner's request to alter or amend the judgment dismissing his habeas petition in light of *Maples v. Thomas*, ___ U.S. ___, 132 S. Ct. 912 (2012), and *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012) [Docs. 30, 31]. The Court permitted the parties to brief the application of *Maples* and *Martinez* to Petitioner's procedurally defaulted ineffective assistance of trial

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

counsel claims. This matter is before the Court on Petitioner's brief, Respondent's response brief, and Petitioner's reply brief [Docs. 37, 38, 39].

I. Request for Reconsideration in Light of *Martinez v. Ryan*

In his brief, Petitioner places his reliance on *Martinez* rather than *Maples*,[2] maintaining that *Martinez* permits the Court to fully "review the fundamental fairness of [Petitioner's] trial" and address his defaulted ineffective assistance of trial counsel claims. Petitioner argues the Court must review, in light of *Martinez*, the three ineffective assistance of counsel claims that it dismissed as procedurally barred because claims of ineffective assistance of counsel cannot be raised on direct appeal in Tennessee and the first and only opportunity to raise a meaningful challenge to trial counsel's ineffectiveness is during state post-conviction proceedings [Doc. 37].

Respondent maintains *Martinez* does not apply to states such as Tennessee, where a defendant may raise ineffective assistance of counsel claims on direct appeal. In support of his contention, Respondent notes the Tennessee Court of Criminal Appeals has specifically stated that such ineffective assistance of counsel claims are authorized:

> This court has been hesitant to address claims of ineffective assistance of counsel raised on direct appeal, instead of in post-conviction proceedings. *See, e.g., Thompson v. State*, 958 S.W.2d 156, 161 (Tenn. Crim. App. 1997); *State v. Anderson*, 835 S.W.2d 600, 606-07 (Tenn.

[2]*Maples* held that a habeas petitioner showed cause that excused his procedural default under state law when the state post-conviction attorneys representing him abandoned him without notice, and thereby caused the default. 132 S. Ct. at 922. Under that circumstance, the abandonment severed the principal-agent relationship and the attorneys no longer acted, or failed to act, as Maples's representatives, so the attorneys' error was not attributable to their client. *Id.* at 923. Because Petitioner fails to make a similar claim, the Court finds *Maples* is not applicable.

> Crim. App. 1992). Nevertheless, there is no prohibition against litigation of ineffective assistance of counsel claims in conviction, as opposed to collateral, proceedings. *See, e.g., State v. Burns*, 6 S.W.3d 453, 461-63 (Tenn. 1999) (granting relief in direct appeal on ineffective assistance of counsel claim).

[Doc. 38 (citing *State v. Johnson*, No. E2008-2555-CCA-R3-CD, 2010 WL 3565761, at *17 (Tenn. Crim. App. Sept. 15, 2010))].

II. Analysis

Martinez considered the Arizona law that does not permit a claim "on direct appeal that trial counsel was ineffective," but "instead requires that claims of ineffective assistance at trial to be reserved for state collateral proceedings." 132 S. Ct. at 1314. The Supreme Court held that where a claim for ineffective assistance of trial counsel cannot be raised on direct appeal, but must be presented in the first instance in an initial-review collateral proceeding, "[i]nadequate 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 1315. The Court explained that, under these circumstances, "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 1317.

Prior to *Martinez,* to overcome a regularly applied state procedural default, which ordinarily bars federal habeas review of a defaulted issue, a federal habeas petitioner was required to demonstrate both cause, objectively external to his defense, and prejudice or demonstrate that failure to consider the claims would result in a fundamental miscarriage of justice. *Coleman v. Thompson,* 501 U.S. 722, 750 (1991). *Martinez*, however, created a

narrow exception to the traditional procedural default rules as applied to ineffective assistance of counsel claims in situations where the state bars a defendant from raising an ineffective assistance of trial counsel claim on direct appeal. Specifically, *Martinez* modifies "the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default[,]" and "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." *Martinez*, 132 S. Ct. at 1315.[3]

The Court also noted that its holding "addresses only the constitutional claims presented in this case, where the *State barred* the defendant from raising the claims on direct appeal." *Id.* at 1320 (emphasis added). It "does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial[.]" *Id.* at 1320. In other words, the Court announced that "[t]he rule of *Coleman* governs in all but the limited circumstances recognized here." *Id.* at 1320; *see also id.* at 1319 ("*Coleman* held that an attorney's negligence in a post-conviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial.").

[3]The *Martinez* Court explained that for purposes of its opinion, initial-review collateral proceedings are collateral proceedings that provide the first occasion to raise a claim of ineffective assistance at trial.

In contrast to Arizona, in Tennessee, "'there is no prohibition against litigation of ineffective counsel claims on direct appeal, as opposed to collateral proceedings.'" *Leberry v. Howerton*, No. 3:10-00624, 2012 WL 2999775, at *1 (M.D. Tenn. July 23, 2012) (quoting *State v. Monroe*, No. E2011-00315-CCA-R3-CD, 2012 WL 2367401, at *4 (Tenn. Crim. App. June 22, 2012)); *see also State v. Johnson*, 2010 WL 3565761, at *17 (noting that, while the Tennessee Court of Criminal Appeals "has been hesitant to address claims of ineffective assistance of counsel raised on direct appeal," there is "no prohibition against litigation of ineffective assistance of counsel claims in conviction, as opposed to collateral, proceedings"). Petitioner cites *State v. Allen*, No. M2007-02581-CCA-R3-CD, 2011 WL 1344462 (Tenn. Crim. App. July 14, 2011), for the proposition that claims of ineffective assistance of counsel cannot be raised on direct appeal. *Allen*, however, does not stand for this proposition. *See* 2011 WL 1344462, at *8 (after the defendant conceded that the appellate court should not address his ineffective assistance of counsel claims, finding that, "[g]iven that the trial court refused to make findings of fact or rule on the appellant's ineffective assistance of counsel issues, we agree that it would be inappropriate for us to consider the issues").

In sum, *Martinez* applies only to "a prisoner's procedural default of a claim of ineffective assistance at trial," 132 S. Ct. at 1315, and only when "the State barred the defendant from raising the claims on direct appeal," so that post-conviction proceedings are the petitioner's first opportunity to present the claim, *id.* at 1320. Because Tennessee law permits a defendant to assert his claim of ineffective assistance of trial counsel on direct

appeal, *Martinez* does not apply. *Accord Banks v. Workman*, ___ F.3d ___, No. 10-5125, 2012 WL 3834733, at *12-13 (10th Cir. Sept. 5, 2012) (*Martinez* not applicable because Oklahoma law permitted Banks to raise ineffective assistance of trial counsel on direct appeal).

The Court recognizes that *Martinez* involved an equitable, rather than a constitutional, ruling. The Court's research, however, has not revealed a case where the equitable concerns in *Martinez* have been extended to situations where, as here, a petitioner, although represented on direct appeal by trial counsel, is not prohibited from raising the ineffectiveness of trial counsel claim on direct appeal. *See Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir. 2012) ("Ibarra is not entitled to the benefit of *Martinez* for his ineffectiveness claims, as Texas procedures entitled him to review through counselled [sic] motions for new trial and direct appeal."); *Dansby v. Norris*, 682 F.3d 711, 729 (8th Cir. 2012) ("*Martinez* does not apply here, because Arkansas does not bar a defendant from raising claims of ineffective assistance of trial counsel on direct appeal."); *Balentine v. Thaler*, No. 2:03-cv-039-J, 2012 WL 3263908, at *1 (N.D. Tex. Aug. 10, 2012) (concluding binding circuit precedent has determined *Martinez* does not apply to Texas cases); *Gill v. Atchison*, No 11 C 7868, 2012 WL 2597873, at *5 (N.D. Ill. July 2, 2012) (denying relief based on *Martinez* because Illinois permits defendants to raise ineffective assistance of trial counsel claims on direct appeal or in a *pro se* post-trial motion); *Authur v. Thomas*, No. 2:01-cv-0983-LSC, 2012 WL 2357919, at *9 (N.D. Ala. June 20, 2012) (noting that *Martinez* does not apply where a petitioner can raise his ineffective assistance of counsel claim not only on direct

review but also in his counseled first collateral challenge). Hence, the Court declines to do so here.

Accordingly, Petitioner's motion to alter or amend the Court's memorandum opinion in light of *Martinez* is **DENIED** [Doc. 31]. Were the Court to find otherwise, its ruling could allow every Tennessee applicant for federal habeas corpus relief who had procedurally defaulted an ineffective assistance of trial counsel claim during his post-conviction proceedings to pass through the "narrow" exception created by *Martinez*. The Court declines to broaden *Martinez* in this manner without direction from the Sixth Circuit or the Supreme Court.

III. Certificate of Appealability ("COA") and *In Forma Pauperis* Status

To grant a COA, the Court must find a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). When a claim has been dismissed on the merits, a substantial showing is made if jurists of reason would find the district court's assessment of the constitutional claims debatable or wrong, or if jurists could conclude the issues raised are adequate to deserve further review. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 & 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a claim has been dismissed on procedural grounds, a substantial showing is demonstrated when it is shown reasonable jurists would debate whether a valid claim has been stated and whether the court's procedural ruling is correct.

The law regarding the applicability of *Martinez* is evolving. The Court's research did not reveal any controlling authority as to its applicability in Tennessee or a published Sixth

Circuit opinion considering *Martinez's* applicability to Tennessee or a state with similar procedures. Considering these two circumstances and the record in this case as a whole, the Court finds that reasonable jurists could find it debatable whether the Court is correct in its ruling regarding the application of *Martinez* under the specific facts of this case. *See* Fed. R. App. P. 22(b); Rule 11(a), Rules Governing Section 2254 Cases; 28 U.S.C. § 2253(c); *see also Slack*, 529 U.S. at 484.

Accordingly, if any appeal is taken from this action, such notice will be treated as an application for a certificate of appealability, which is hereby **GRANTED** on the question of whether the recent Supreme Court decision in *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), is applicable to Petitioner's three procedurally defaulted ineffective assistance of trial counsel claims. 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b). If Petitioner files a notice of appeal from the denial of his motion to alter or amend, he may therefore proceed *in forma pauperis*. 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24.

IT IS SO ORDERED.

ENTER:

s/ Thomas A. Varlan
UNITED STATES DISTRICT JUDGE

Attachment L

to David Miller's Response Opposing Motion to Set Execution Date and Requesting a Certificate of Commutation

West v. Carpenter,
No. 3:01-cv-00091 (E.D. Tenn.)
Memorandum, Pages 14-15
filed Sept. 23, 2013

obtain relief."). Consequently, weighing the Supreme Court's decision in *Martinez* (i.e, the uncertainty of its application) and these additional factors, the Court does not find "exceptional circumstances" meriting relief under Rule 60(b)(6).

These two intervening Supreme Court decisions, both of which were federal habeas appeals, have injected uncertainty as to their exact application. The Court's research has not revealed Supreme Court or Sixth Circuit precedent extending *Martinez* and *Trevino* to Rule 60(b) motions or Tennessee cases.[7] Accordingly, absent instruction from the Sixth Circuit or Supreme Court that *Martinez* and *Trevino* may constitute "extraordinary circumstances" meriting Rule 60(b)(6) relief, the Court declines to find that these cases extend to claims raised in a Rule 60(b) motion.

IV. CONCLUSION

For the reasons set forth above, Petitioner's Rule 60(b) motion is **DENIED** [Doc. 226]. Because the case law on effective assistance of post-conviction counsel is evolving, reasonable jurists could disagree on whether this Court's denial of the Rule 60(b)(6) motion

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[7] The Court's research revealed that only one district court in Tennessee has ruled on a Rule 60(b) motion relying on *Martinez* and *Trevino*. *See Rahman v. Carpenter*, No. 3:96-0980, 2013 WL 3865071 (M.D. Tenn. July 25, 2013). In that case, the respondent argued the petitioner failed to demonstrate the "'exceptional circumstances' required for Rule 60 relief; and the *Martinez/Trevino* decisions do not apply to Tennessee criminal court proceedings." *Id.* at *2. The court concluded "that Petitioner's request to reconsider his claims, under Rule 60 or otherwise, should be denied because the *Martinez/Trevino* decisions do not apply to reverse the findings of procedural default." *Id.* at *3. Notably, in the federal habeas case of *Smith v. Colson*, 381 F. App'x 547 (6th Cir. 2010), the Supreme Court of the United States granted *certiorari*, vacated the Sixth Circuit Court of Appeals decision, and remanded the case to the Sixth Circuit for further consideration in light of *Martinez*. The Sixth Circuit remanded the case to the district court on June 25, 2013. Thus, the issue of *Martinez*'s application to Tennessee cases remains an open question.

is adequate to deserve further review. Therefore, Petitioner will be **GRANTED** a certificate of appealability on two issues: (1) whether *Martinez*, as expanded by *Trevino*, may constitute extraordinary circumstances meriting Rule 60(b)(6) relief, and (2) whether *Martinez*, as expanded by *Trevino*, is applicable to Tennessee cases.

An appropriate order will enter.

s/ Thomas A. Varlan
CHIEF UNITED STATES DISTRICT JUDGE