IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

IN RE: MICHAEL JOE BOYD,	*	**SHELBY COUNTY**
now known as Mika'eel Abdullah	*	**S. Ct. No.**
Abdus-Samad	*	**M1990-00011-SC-DPE-DD**

RESPONSE IN OPPOSITION TO MOTION TO SET EXECUTION DATE AND REQUEST FOR A CERTIFICATE OF COMMUTATION

Michael Joe Boyd (now known as Mika'eel Abdullah Abdus-Samad) requests this Court issue a Certificate of Commutation of his sentence of death, as authorized by T.C.A. §40-27-106 and Tennessee Supreme Court Rule 12.4(A). A certificate is needed in this case to prevent a horrible miscarriage of justice, since:

- Trial counsel never presented a case for life during the penalty phase of the trial.
- Neither this court nor the federal courts have reviewed the merits of Boyd's meritorious claim of trial counsel's failure to make a case for life, since post conviction counsel procedurally defaulted the claim.
- The facts of this case are not egregious. In fact, prior to trial, the district attorney offered Michael Boyd a 35 year plea bargain offer.
- The District Attorney who prosecuted Michael Boyd believes a 35 year sentence to be just and reasonable in light of the totality of the circumstances.
- Michael Boyd was never convicted of intentional murder. Rather, he was convicted of a felony murder in the perpetration of a robbery.
- There is only one aggravating circumstance supporting the sentence of death.
- A codefendant, Terry Yarber was tried separately arising out of the same series of events and was acquitted.
- Michael Boyd has a compelling mitigation case for life.

STANDARD

Tennessee law provides that the Governor may commute a death sentence to life imprisonment upon the certificate of the Supreme Court, if "there were extenuating circumstances attending the case, and that the punishment ought to be commuted." T.C.A. §40-27-106. When considering the recommendation, the court should consider only facts contained in the record or facts which are uncontroverted. *Workman v. State*, 22 S.W. 3d 807, 808 (Tenn. 2000).

As this response will demonstrate, there are extenuating facts and circumstances which are uncontroverted or supported by the record and warrant a certificate recommending a commutation of his sentence of death.

1. The underlying facts of Michael Boyd's case are not egregious.

During the early morning hours of November 8, 1986, William Price and David Hippen, both white drug dealers,[1] drove into an impoverished South Memphis neighborhood that was ninety-nine percent African American.[2] The men were seeking the services of two prostitutes. After inquiring from a stranger on the street, the two men drove to Raiford's Lounge and solicited prostitutes Barbara Lee and Renita Tate who got into the van with the men and directed them to the Lorraine Motel.[3] The men were tailed by a 98 Oldsmobile at the direction of

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[1] *See* 11-30-86 Memphis Police Department supplementary offense report detailing that federal authorities had placed Price and his father under suspicion for transporting drugs and also possibly guns, (Exhibit 1); Hippen was convicted of selling 63 pounds of cocaine valued at 4 million dollars – but Michael Boyd's jury was deprived of this information. Motion in Limine at Trial Transcript pp. 422-430 (Exhibit 2); *State v. Boyd*, 797 S.W. 2d 589, 592 (Tenn. 1990) (Exhibit 3).

[2] *See State v. Boyd*, 797 S.W. 2d at 592 (Tenn. 1990) (Exhibit 3); *see also* 1990 census data (Exhibit 4).

[3] *Boyd*, 797 S.W. 2d at 592 (Exhibit 3).

Michael Boyd who was Barbara Lee's "old man."[4] Boyd wanted to make sure the men didn't run off with the women.[5] Boyd was accompanied by Terry Yarber and Bruce Wright.[6]

Price drove the van to the Lorraine Motel, and produced a $100 bill to pay for two cheap motel rooms for the couples.[7] When the prostitutes offered to take the money inside the motel to get change, Price told them that one woman could leave with the money, but the other would have to stay in the van as security.[8] One of the prostitutes then yelled toward the 98 Oldsmobile to see whether anyone had change for the $100 bill.[9] Boyd responded he could make change, got out of the car, approached the passenger's side of Price's van, and extended himself into the passenger compartment of the van less than a foot from Hippen's face and pointed a pistol at Hippen in the driver's seat.[10] Boyd then said "I want your money or I'm going to kill you."[11] Hippen then gave Boyd his wallet containing thirty dollars.[12] Price then grabbed Boyd's arm and a struggle ensued in which Price was shot, fell out of the van and died.[13]

Michael Boyd was subsequently charged with premeditated murder, felony murder, and aggravated robbery.[14] Terry Yarber was also charged with aggravated robbery arising out of the

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[4] *Id.*; Trial Tr. (Renita Tate) p. 528 (Exhibit 5).

[5] Trial Tr. (Bruce Wright), pp. 576, 585 (Exhibit 6).

[6] *Boyd*, 797 S.W. 2d at 592 (Exhibit 3).

[7] *Id.*

[8] *Id.*; Trial Tr. (David Hippen) p. 477 (Exhibit 7).

[9] *Boyd*, 797 S.W. 2d at 592 (Exhibit 3).

[10] *Id.*; Trial Tr. (Bruce Wright) pp. 576-577 (Exhibit 6); *Boyd*, 797 S.W. 2d at 592 (Exhibit 3).

[11] *Boyd*, 797 S.W. 2d at 592 (Exhibit 3).

[12] *Id.*

[13] *Id.*

[14] Trial Technical Record, pp. 138-144 (Exhibit 8).

same set of facts, but tried by a separate jury.[15] The District Attorney offered Boyd a plea bargain of 35 years which remained in effect until the day of trial which he declined.[16] After trial, the jury acquitted Boyd of the first degree premeditated murder, but convicted him of felony murder (i.e. the killing of William Price in the perpetration of a robbery).[17] Boyd was sentenced to death.[18] Terry Yarber in his separate trial was acquitted by the jury.[19]

2. Only one aggravating circumstance supports the death sentence.

The sole aggravating circumstance supporting the death sentence, was a 1983 guilty plea by Mike Boyd to second degree murder resulting in a ten year sentence (parole eligibility after serving thirty percent).[20] On June 5, 1983 Michael Boyd (age 23) the rejected boyfriend of Margaret Lewis, came to her home in Memphis, and was arguing with her.[21] Herbert Woodland, the new boyfriend, came to the door of the bedroom and asked her to leave.[22] Boyd in a state of anger shot and killed Herbert Woodland. The facts of this prior case involve a heat of the moment argument over a girlfriend[23] – much more akin to voluntary manslaughter.

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[15] Criminal Court Clerk Record, *State v. Yarber* (Exhibit 9).

[16] Affidavit of James C. Beasley, Jr. (Exhibit 10).

[17] Trial Technical Record, p. 176 (Exhibit 8).

[18] *Boyd*, 797 S.W. 2d at 592 (Exhibit 3).

[19] Criminal Court Clerk Record, *State v. Yarber* (Exhibit 9).

[20] *See State v. Boyd*, 959 S.W. 2d 557 (Tenn. 1998) (Exhibit 11).

[21] 10-17-83 Transcript of Guilty Plea Hearing, p. 4 (Exhibit 12)

[22] *Id.*

[23] *Id.*

3. Michael Boyd was not convicted of intentional murder – rather the jury found him guilty of felony murder in the perpetration of a robbery.

Michael Boyd's jury considered charges of premeditated first degree murder, and intentional second degree murder which were charged but rejected by the jury.[24] Rather, the jury found Boyd guilty of felony murder in the perpetration of a robbery.[25] Thus the jury did not find an intent to kill William Price – only an intent to rob him.

4. The district attorney offered Michael Boyd a plea bargain of thirty-five years.

Judge James Beasley, the Division Ten Criminal Court Judge for Shelby County, at the time was the lead prosecutor in Michael Boyd's case. Beasley offered Boyd a thirty-five year sentence plea bargain, which remained in effect up until the commencement of the trial.[26] Beasley believes a thirty-five year sentence to be fair, just and reasonable in light of the totality of the circumstances.[27]

Judge Beasley's affidavit also states that as a prosecutor and a judge he has been involved in a lot of murder prosecutions – and the facts of Michael Boyd's case are not in the class of the worse cases he's seen. In fact, many cases Judge Beasley has been involved with that resulted in life sentences involved more egregious facts than those of Michael Boyd's case.[28]

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[24] TechRec pp. 176, (Exhibit 8).

[25] *Id.* at p. 176, (Exhibit 8).

[26] Affidavit of James C. Beasley, Jr. at ¶ 3, (Exhibit 10).

[27] Affidavit of James C. Beasley, Jr. at ¶ 5, (Exhibit 10).

[28] Affidavit of James C. Beasley, Jr. at ¶ 7, (Exhibit 10).

5. Michael Boyd's trial counsel failed to make a case for life

At the sentencing phase, Boyd's appointed counsel told the jury in an opening statement that they would "hear from people who knew him, and have known him for years and years, and know him as something a little bit different from what you would think. The people who nurtured him and cared for him, and that he cared for, when his own family didn't, and they will be here and testify."[29]

After Michael Boyd testified in the penalty phase, defense counsel called for "Anthony Boyce," in front of the jury, but Anthony Boyce did not answer.[30] The court then asked the defense to call their next witness. Mr. Thompson replied "your honor, the next witness is Ms. Withers, and she is not here either."[31] Thompson told the trial court that earlier in the day Ms. Withers had to leave to take her son to the doctor.[32] Thompson, who failed to have mitigation witnesses Anthony Boyce, Randy and Jean Withers under subpoena, and ready to testify, then presented no case for life. Defense counsel's actions thus transformed prospective mitigation witnesses into prosecution witnesses implying that not even those who should care most for Boyd showed any concern as to whether he lived or died.

This tragedy of errors caused defense counsel Ed Thompson to remark "Your Honor, this is one of the great distressing moments of my legal life."[33] The court then commented with respect to the witnesses' absence "apparently they're not too concerned, Mr. Thompson."[34]

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[29] Trial Transcript (Sentencing Opening Statement p. 827, (Exhibit 13).

[30] Trial Transcript, p. 867 (Exhibit 14).

[31] Trial Transcript, p. 868 (Exhibit 14).

[32] Trial Transcript, p. 868 (Exhibit 14).

[33] Trial Transcript, p. 868 (Exhibit 14)

[34] Trial Transcript, p. 869 (Exhibit 14).

Other than hearing from Michael Boyd himself, the jury heard no mitigation evidence – no case for life. As indicated in the attached affidavit, Anthony Boyce was more than willing to testify and make a case for life.[35] The failure to have witnesses under subpoena resulted in no case for life being presented.

A. A compelling case for life could have been presented to the jury.

Michael Boyd was born to a thirteen-year old, poor, under-educated mother.[36] Boyd's father was "just a passing stranger in the night."[37] His mother took him home to a three-room north Memphis apartment that housed twelve others.[38] A child facing such risk factors requires a strong compensatory force if he is to develop properly.[39] Fortunately for Michael Boyd, one of the persons in the crowded north Memphis apartment was his grandmother, Ora Boyd.

Ora Boyd became his primary caretaker.[40] Michael and Ora developed a positive, loving, relationship, and she provided the affectionate discipline necessary to counteract the risk factors that surrounded young Michael.[41] In Ora Boyd's care, despite the chaos that surrounded him, Michael was a well-behaved boy who rarely caused any problems.[42] At age nine, however,

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[35] 11/9/06 Affidavit of Anthony Boyce Canada ¶¶ 10-12, (Exhibit 15).

[36] (Exhibit 16), Michael Boyd Juvenile records at 08, 47 (demonstrating Boyd's mother born in 1947 and Boyd born in 1960).

[37] *Id.* at 03

[38] 3-19-99 Declaration of Mika'eel Abdullah Abdus-Samad at ¶3, (Exhibit 17).

[39] Sameroff, A., et al., "Intelligence Quotient Scores of 4-year-old children: Social-Environmental Risk Factors," Pediatrics, Mar. 1987; 79: 343-50.

[40] 3-11-99 Declaration of Jo Marie Boyd at ¶4 (Exhibit 18).

[41] *Id.* at ¶¶3-4, (Exhibit 18).

[42] *Id.* at ¶5, (Exhibit 18).

Michael's mother left Ora Boyd's house and took him to the Lemoyne Gardens housing project.[43]

By separating Michael from the person with whom he had bonded as his primary caretaker, Michael's mother subjected him to one of the most traumatic experiences a child can suffer.[44] By thereafter completely neglecting him in a violent, crime-filled housing project, she doomed him.

Over 99% of the persons living in the zip code serving Lemoyne Gardens residents were African-American,[45] and approximately 70% of households lived below the poverty line.[46] Over one-third of households in the Lemoyne Gardens area were headed by a single female who had at least one child under eighteen.[47] Over 25% of the residents did not complete the tenth grade,[48] and 61% of persons over twenty-five years old did not have a high school education.[49] Life in Lemoyne Gardens revolved around drugs and violence.

Older boys from neighboring areas came to Lemoyne Gardens to deal drugs and pick up girls.[50] They flaunted their expensive cars and clothes, and they turned children in Lemoyne Gardens into "dope boys" who would transact drug sales.[51] Michael's brother Mitch became a

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[43] *Id.* at ¶6, (Exhibit 18); Michael Boyd Juvenile Records at 05, (Exhibit 16).

[44] Garbarino, James, Kathleen Kosteln and Nancy Dubrow. Children in Danger: Coping with the Consequences of Community Violence. San Francisco: Jossey-Bass Inc., 1992.

[45] 1990 Census Data at 1, (Exhibit 4).

[46] *See Id.* at p. 35.

[47] *See Id.* at pp. 1, 11.

[48] *See Id.* at p. 23.

[49] *See Id.*

[50] 3-13-99 Declaration of Idella Thomas at ¶5, (Exhibit 19).

[51] *Id.*

drug dealer, and he attained "big time" status.[52] Soon Mitch also had expensive cars, clothes, and women, and Lemoyne Gardens became "turf" over which drug dealers and other criminals fought. Gunfire and stabbings were a regular occurrence.[53] Subjected to the risk factors that pervaded Lemoyne Gardens, and separated from the compensatory force that Ora Boyd had provided, Michael desperately required the attention of a strong stabilizing presence. What he received, however, was his mother's neglect.

In times of stress, children have an increased need for intense contact with parents or parental figures.[54] Michael's mother, however, exhibited no interest for him,[55] and she did not care about how late he was out, where he was, or with whom me was associating.[56] She was often absent from home and as a result, Michael and his brother Mitch were left to raise themselves.[57] She failed to discipline him or attempt any intervention when Michael began acting out.[58] At one point, she did not even open the door when a policeman who had Michael in custody for stealing a bicycle wanted to speak with her.[59] Given his mother's neglect and his separation from Ora Boyd, the older boys, including his brother Mitch, had influence over Michael and they exercised that influence in ways that were not positive.[60] Michael began

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[52] 3-21-99 Declaration of Anthony Boyce, at ¶7, (Exhibit 20).

[53] 3-13-99 Declaration of Idella Thomas at ¶6, (Exhibit 19).

[54] Garbarino, James, Kathleen Kosteln and Nancy Dubrow. Children in Danger: Coping with the Consequences of Community Violence. San Francisco: Jossey-Bass Inc., 1992.

[55] Michael Boyd Juvenile records at 08, (Exhibit 16).

[56] *Id.* at 38.

[57] 3-21-99 Declaration of Anthony Boyce at ¶6, (Exhibit 20).

[58] Michael Boyd Juvenile Records at 29, (Exhibit 16).

[59] *Id.* at 54.

[60] 3-21-99 Declaration of Anthony Boyce, at ¶¶6, 9 (Exhibit 20); Michael Boyd Juvenile Records, at 06 (Exhibit 16).

presenting a behavior problem.[61] He stopped going to school and was eventually expelled due to his total lack of attendance.[62] Not surprisingly, a counselor attributed his escalating delinquency problem to a lack of supervision and moral support in the home.[63]

Michael's delinquent behavior landed him in juvenile detention facilities where, like Lemoyne Gardens, violence was a regular occurrence. Staff beat him in the head with sticks, beat him with a paddle, beat him with fists, withheld food from him, placed him in solitary confinement for long periods of time, and subjected him to other forms of torture, such as handcuffing him to an overhead steam pipe in such a way that his toes barely touched the ground.[64] Developmental psychologists recognize that children subjected to such conditions become increasingly aggressive and, as a result, they are at risk for antisocial acts.[65] Consistent with these observations, when Michael returned home from training schools, he was more aggressive than before.[66]

As the above demonstrates, trial counsel had available information to explain why, at age nine, Michael started turning from the well-behaved boy he was in his grandmother's care to the delinquent he became due to his mother's neglect and physical abuse by juvenile facility staff. This mitigation evidence was never presented to the jury.

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[61] Michael Boyd Juvenile Records, at 54 (Exhibit 16).

[62] *Id.* at 64.

[63] *Id.* at 38.

[64] 3-19-99 Declaration of Mika'eel Abdullah Abdus-Samad at ¶¶4-7 (Exhibit 17).

[65] Kolko, David J., "Child Physical Abuse," The APSAC Handbook on Child Maltreatment. 2nd ed. Ed. John E.B. Myers, et al. Thousand Oaks: Sage, 2001. 30-31.

[66] 3-21-99 Declaration of Anthony Boyce, at ¶12 (Exhibit 20).

6. Michael Boyd's post conviction counsel did nothing, presented no evidence, and thus foreclosed any judicial review of claims of ineffective counsel at sentencing.

The post-conviction procedures act applicable to Michael Boyd's case provided that a convicted prisoner initiate a post-conviction proceeding by filing with the clerk of court a written petition.[67] If the petition was filed *pro se*, the court was required to appoint "competent" counsel and give counsel time to file an amended petition after researching and investigating the petitioner's potential claims.[68]

On April 1, 1991, Michael Boyd filed, *pro se*, a post-conviction petition and a request that the Shelby County Criminal Court stay his April 5, 1991, execution.[69] These documents were cut and paste photocopies of portions of other death row inmates' petitions and stay requests, held together by paperclips.[70] The allegations in the *pro se* petition were generic, some not even remotely applicable to Boyd's case.[71] Boyd filed that petition merely to initiate the post-conviction process, and he specifically requested that counsel be appointed to investigate his case and prepare an appropriate amended petition.[72]

Over two years after Boyd filed his *pro se* petition, the Criminal Court appointed Mr. Dan Seward to represent him.[73] At this time, Seward had no capital post-conviction

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[67] T.C.A. §40-30-103(a) (Michie) (repealed).

[68] T.C.A. §§40-30-121, 40-30-107, 40-14-202(a) (Michie) (repealed).

[69] Post Conviction Technical Record, pp. 34-45 (Exhibit 21).

[70] *See Id.* at 42, 44, (Exhibit 21).

[71] *See e.g. Id.* at 37 ¶15aa (prior counsel failed to raise an ineffective assistance of counsel claim in prior post-conviction proceedings); 40, ¶19p (trial court improperly admitted statements Boyd gave during a psychological examination) (Exhibit 20).

[72] *Id.* at 42, ¶¶3, 4, (Exhibit 21).

[73] Post Conviction Technical Record, pp. 52, 53, (Exhibit 21).

experience.[74] Boyd provided Seward with the names of numerous witnesses to interview who would provide evidence that trial counsel's failure to present mitigating evidence at sentencing prejudiced him.[75]

On January 21, 1994, the court held an evidentiary hearing. Seward initially requested a continuance but the trial court promptly denied that request.[76] Seward then announced "I'm ready to proceed."[77] The hearing that followed was a legal mockery. Seward called Boyd to the stand, handed Boyd his paper clipped *pro se* petition (which Seward never amended) and asked him to explain what he meant by each of the allegations, then rested.

Specifically, Seward called his first and only witness, Michael Boyd, and questioned him as follows:

> Q: Okay. You've since filed – since you've exhausted your state remedy, you've filed a *pro se* petition for post-conviction relief; is that correct?
>
> A: Right.
>
> Q: Okay. Do you have a copy of that petition in front of you, have you not? I provided you a copy of your own petition?
>
> A: Yeah.
>
> Q: Okay. In order to expedite matters I'm going to go down the list of your allegations. Are you ready, on page 2? You allege Subsection A. "Counsel failed to investigate the background and personal and medical history of petitioner for the existence of mitigating evidence and/or to present such evidence during the penalty phase of the trial." I'm going to ask you what you mean by that statement to the court.[78]

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[74] 4-21-94 *pro se* Motion for a new trial, at ¶3, (Exhibit 22).

[75] Boyd's *pro se* motion, p. 2 at ¶8, (Exhibit 22).

[76] Post Conviction Transcript, pp. 3 - 6, (Exhibit 23).

[77] *Id.* at 17, (Exhibit 23).

[78] Post Conviction Transcript, pp. 35, (Exhibit 23).

Given that Michael Boyd had an I.Q. that placed him in the borderline mentally retarded range,[79] that he had only a ninth grade education,[80] that Boyd had no access to the transcript of his trial,[81] and that Boyd had been incarcerated since his arrest, Boyd's answer was understandably obtuse.

> A: Well, you know, it's a, you know, before my trial started, you know, I was asking that the trial, you know, I was asking that the trial, you know, that it be investigated, my background, and, you know, so I could have mitigating witnesses come in and testify in the event that I was found guilty in trial, in my first phase of the trial, you know, for the mitigating circumstances, you know, to be presented. But due to the fact that no one went out ad talked to nobody, you know, it didn't happen.[82]

As Seward continued this line of questioning, and as Boyd valiantly attempted to explain concepts such as voir dire,[83] Boyd realized that his opportunity to obtain post-conviction relief had turned into a pathetic mockery that he was powerless to stop. His answers to counsel's questions asking, "What does this mean?" devolved to "Just want it says." As Michael Boyd's testimony came to a close, he lamented:

> Well you know, we're not properly ready. You see we ain't ready. Just go on. You know, it don't make no difference, you know. It ain't no big deal. Evidentially it is not, you know, he ain't even ready. He can't be ready.[84]

After the State cross-examined Boyd, Seward rested.[85] Seward's case thus was comprised solely of asking a borderline mentally retarded man who had a ninth-grade education

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[79] Standardized Test Record (Exhibit 24); Information from the ARC Web Site at 03, (Exhibit 25).

[80] Michael Boyd Juvenile Records, at 64, (Exhibit 16).

[81] *See* 4-21-94 *pro se* motion, p. 2 at ¶5, (Exhibit 22).

[82] Post Conviction Transcript, pp. 35-36, (Exhibit 23).

[83] Post Conviction Transcript, p. 50 and 51, (Exhibit 23).

[84] Post Conviction Transcript, p. 84, (Exhibit 23).

[85] Post Conviction Transcript, p. 105, (Exhibit 23).

and no access to his trial transcript to explain legal concepts. Seward did not bother seeking compensation for this effort.[86]

After the trial court issued its opinion which, not surprisingly, held that Boyd waived numerous issues by failing to put on any proof,[87] Boyd requested, *pro se*, a new hearing. Boyd informed the trial court that Seward did not follow his instructions, lied to him, and failed to prepare for the evidentiary hearing.[88] The clerk did not file Boyd's request until two and one half years after he served it.[89]

On appeal, the Court of Criminal Appeals affirmed that Seward waived various claims by failing to cite any legal authority to support them.[90] After that court issued its opinion, Michael Boyd informed the court of his problems with Seward and futilely requested that the court remove Seward from his case and remand that case to the trial court for a new hearing with different, competent, counsel.[91]

7. Because of the mockery of post conviction proceedings, no court has reviewed on the merits trial counsel's failure to make a case for life.

In order to prove ineffective assistance of counsel, Seward should have presented proof at post conviction demonstrating (1) trial counsel's deficient performance; and (2) prejudice.[92] Though it is somewhat evident that failure to subpoena and present mitigation witnesses in the

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[86] 3-16-99 Declaration of Libby Sykes at ¶4, (Exhibit 26).

[87] Post Conviction Technical Record at p. 123, (Exhibit 21).

[88] 4-21-94 *pro se* Motion for a new trial, (Exhibit 22).

[89] *Id.*

[90] *Boyd v. State*, 1996 WL 75351 at *2 (Tenn. Crim. App. 1996), (Exhibit 27).

[91] *See* 7-26-96 Affidavit of Michael Boyd, at ¶4, (Exhibit 28).

[92] *See Strickland v. Washington*, 466 U.S. 668 (1984).

penalty phase of a capital trial constitutes deficient performance, Seward should have presented evidence at post conviction as to what that mitigation case would be. At the very least, he should have presented the testimony of Anthony Boyce[93] and Jean Withers to show what mitigation proof trial counsel planned to, but failed to present. Because of counsel's failure to present any mitigation evidence, there was no evidence of prejudice in the record, and both the state court and federal courts held this claim procedurally defaulted due to the inaction of post conviction counsel.

8. Trial counsel's failure to present mitigating evidence prevented this court from conducting proper harmless error analysis due to *Middlebrooks* error.

At sentencing, the jury found two aggravating circumstances to be present: (1) a prior felony conviction for second degree murder, and (2) the murder occurred during the perpetration of a robbery. With the help of capital case resource attorneys, Boyd argued to this court that the jury's consideration of the felony murder circumstance violated *State v. Middlebrooks*, 840 S.W. 2d 317 (Tenn. 1992), since *Middlebrooks* held that if a defendant is convicted of felony murder, and not premeditated murder, then the jury is not allowed to consider the fact that the killing occurred in perpetration of a felony as an aggravating circumstance.

Thus, with half the case for death declared invalid, the Tennessee Supreme Court had to consider whether the error was harmless. In considering whether the error was harmless, the court considered "the nature, quality and strength of the mitigating evidence."[94] Not surprisingly, since trial counsel made no case for life, there was scant mitigation in the record for the court to consider – leading to a finding that the *Middlebrooks* error was harmless.

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[93] *See* Affidavit of Anthony Boyce Canada who was willing to testify (Exhibit 15).

[94] *State v. Boyd*, 959 SW 2d at 560 (Exhibit 11).

Thus, again the failure of trial counsel to put into the record evidence of mitigation, precluded Boyd from obtaining sentencing relief.

9. Codefendant Terry Yarber was acquitted in a trial by a separate jury.

Terry Yarber, who was jointly indicted for the robbery of David Hippen, was severed and tried by a separate jury. With the help of privately retained counsel Joe Brown, Yarber was acquitted.[95] This is true even though the same witnesses who testified in Boyd's case also testified against Yarber.

10. Because no court has reviewed the case for life on the merits, extenuating circumstances warrant issuing a certificate of commutation.

Tennessee law provides that the Governor may commute a death sentence to life imprisonment upon the certificate of the Supreme Court, if "there were extenuating circumstances attending the case, and that the punishment ought to be commuted." T.C.A. §40-27-106. When considering the recommendation, the court should consider only facts contained in the record or facts which are uncontraverted. *Workman v. State*, 22 S.W. 3d 807, 808 (Tenn. 2000).

Extenuating circumstances are not defined, but must certainly include cases, such as this, where due to inaction by appointed counsel, no court has reviewed on the merits Michael Boyd's claim of failure to present mitigating evidence at sentencing. Such a claim, should have been presented to the courts in a post conviction proceeding. The post conviction counsel should present evidence of trial counsel's deficient performance, and then demonstrate prejudice by putting in the record mitigation evidence that the trial counsel should have presented. *See*

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[95] *See State v. Yarber,* Record of Acquittal (Exhibit 9)

Strickland v. Washington, 466 U.S. 668 (1984). But in this case, the appointed post conviction counsel engaged in the worst excuse of advocacy imaginable. He did nothing, and because of his failures, both the state and federal courts held claims due to ineffective counsel at the penalty phase to be procedurally defaulted.

The ineffective counsel also resulted in a skewing of this courts harmless error analysis when it ruled one of the two aggravating circumstances to have been erroneously considered. *See State v. Boyd*, 959 S.W. 2d 557 (Tenn. 1998). Because trial counsel and post conviction counsel had presented little mitigating evidence in the record, the reweighing by this court of the sole aggravating circumstance against mitigating evidence was skewed. This calls into question the harmless error analysis previously conducted.

Extenuating circumstances are certainly present, when under the law a claim may not be reviewed due to inaction of court appointed counsel, but in the interests of justice a compelling argument for life is present. Michael Boyd's case is not one with the type of heinous facts that merit the death penalty. The jury did not find he ever intended to kill William Price. The prosecutor who tried Michael Boyd believed 35 years to be a just sentence. The co-defendant who was represented by competent counsel was acquitted. All of these factors are in the record, or are uncontroverted. If ever there were extenuating circumstances warranting issuance of a certificate of commutation, they are present in this case.

CONCLUSION

Mika'eel Abdullah Abdus-Samad prays this court recommend commutation to the Governor.

Respectfully submitted,

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DESIGNATION OF ATTORNEY OF RECORD

Mika'eel Abdullah Abdus-Samad (f/k/a Michael Boyd) designates Robert L. Hutton as attorney of record:

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Counsel prefers to be contacted by e-mail.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Response in Opposition to Motion to Set Execution Date and Request for a Certificate of Commutation has been sent via U.S. Mail to:

Jennifer Smith
Assistant Attorney General
425 5th Avenue North
Nashville, Tennessee 37243

this 11th day of May, 2007.

INDEX OF EXHIBITS TO
RESPONSE IN OPPOSITION TO MOTION TO SET
EXECUTION DATE

Exhibit No.

11-30-86 Memphis Police Department Supplementary Offense Report filed with *Response to Motion for Summary Judgment on Procedural Grounds*, filed on March 22, 1999 in *Abdus-Samad v. Bell*, Dk. #98-2756 (W.D. Tenn.), Exhibit 14, Tab 1, Bates Stamp 23 1

State v. Michael Joe Boyd, Trial Transcript, Volume IV, pp. 422-430 ("Motion in Limine by State") 2

State v. Boyd, 797 S.W. 2d 589 (Tenn. 1990) 3

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Michael Boyd juvenile records filed with the Response to Motion for Summary Judgment on Procedural Grounds, filed on March 22, 1999 in *Abdus-Samad v. Bell*, Dk. #98-2756 (W.D. Tenn.), Exhibit 7 16

March 3, 1999 Declaration of Mika'eel Abdullah Abdus-Samad filed with the Response to Motion for Summary Judgment on Procedural Grounds, filed on March 22, 1999 in *Abdus-Samad v. Bell*, Dk. #98-2756 (W.D. Tenn.), Exhibit 10 17

Declaration of Jo Marie Boyd filed with the Response to Motion for Summary Judgment on Procedural Grounds, filed on March 22, 1999 in *Abdus-Samad v. Bell*, Dk. #98-2756 (W.D. Tenn.), Exhibit 11 18

Declaration of Idella Thomas filed with the Response to Motion for Summary Judgment on Procedural Grounds, filed on March 22, 1999 in *Abdus-Samad v. Bell*, Dk. #98-2756 (W.D. Tenn.), Exhibit 13 19

3-21-99 Declaration of Anthony Boyce filed with the Response to Motion for Summary Judgment on Procedural Grounds, filed on March 22, 1999 in *Abdus-Samad v. Bell*, Dk. #98-2756 (W.D. Tenn.), Exhibit 31 20

Michael Boyd v. State, Post Conviction Technical Record pp. 34-45, 52-53 and 113-132 21

Pro se motion for a new trial filed in *Boyd v. State* filed with the Response to Motion for Summary Judgment on Procedural Grounds, filed on March 22, 1999 in *Abdus-Samad v. Bell*, Dk. #98-2756 (W.D. Tenn.), Exhibit 1 22

Michael Boyd v. State, Post Conviction Transcript pp. 3-6, 17, 35, 36, 50, 51, 84 and 105 23

Michael Boyd's standardized test scores from Memphis City School Records filed with the Response to Motion for Summary Judgment on Procedural Grounds, filed on March 22, 1999 in *Abdus-Samad v. Bell*, Dk. #98-2756 (W.D. Tenn.), Exhibit 5 24

Information from website of Association of Retarded Citizens filed with the Response to Motion for Summary Judgment on Procedural Grounds, filed March 22, 1999 in *Abdus-Samad v. Bell*, Dk. #98-2756 (W.D. Tenn.), Exhibit 6 25

Declaration of Libby Sykes filed with the Response to Motion for Summary Judgment on Procedural Grounds, filed on March 22, 1999 in *Abdus-Samad v. Bell*, Dk. #98-2756 (W.D. Tenn.), Exhibit 8 26

Boyd v. State, 1996 WL75351 (Tenn. Cr. App. 1996) 27

7-26-96 Affidavit of Michael Boyd filed with the Response to Motion for Summary Judgment on Procedural Grounds, filed on March 22, 1999 in *Abdus-Samad v. Bell*, Dk. #98-2756 (W.D. Tenn.), Exhibit 9 28

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On 11/14/86, at 9:30 a.m., the writer met Crime Scene Officers at the vehicle storage lot, at 51 S. Flicker. The officers were Lt. Reno Gordonto, Lt. Anderson, Sgt. [illegible] Brawner, and Sgt. Richard Mattingly. The victims van and Bruce Wright Oldsmobile were lasered for latent fingerprints. However, no money other than amount of change was found inside. All property from the van was tagged by Crime Scene Officers. Copies of Crime Scene Reports are attached to this file.

This writer had received information from the Alcohol, ~~Fire and Bombs~~ Tobacco and Firearms Agent, name, [illegible] Marquardt, of the Kansas City, Missouri office, phone number: 913-236-3987, that the victim and his father had been suspected for transporting drugs and also possibly guns. The ATF Agent believes that victims van may have a secret compartment somewhere inside and could possibly have drugs or firearms in this compartment. Another ATF Agent, John Holt of the Mississippi District, phone number: 601-234-3751 was assisting Mr. Marquardt in this investigation. However, no hidden compartments were found in this van. The ATF Agent, John Holt did come to Memphis and talked to the writer regarding their investigation. The information that had been received about the hidden compartment and other items were not conclusive and had been obtained by other people telling [illegible].

The other Latent Prints of value where raised from the victim's van and Bruce Wright's car. A request weas made to Latent Prints to compare the prints of Boyd, Yarber, [illegible] Jackson and Renita Collins from the Latent Prints of the vehicles. The results from Latent Prints are not known at this time.

On 11/15/86, at 11:00 a.m., the writer contacted the Vehicle Storage Lot and released the hold on the victim's van and on Bruce Wright's Oldsmobile.

On Sunday, 11/16/86, at 12:25 a.m., Dorothy Ficklin came to the Violent Crimes Office and picked out the photo of Barbara Jackson, alias Barbara Lee, booking number 862[illegible] as looking like the girl in Bruce's car, the night she went out and told them to come back a little later to pick Bruce up.

Upon checking it was learned that Terry Yarber was wanted on a Criminal Court Warrant for Aggravated Assault. At 1:00 p.m., on 11/16/86, Patrolman Joe ~~Horn~~ Hearn of the Uniform Patrol, West Precinct was given information on Terry Yarber and on the Criminal Court Warrant he was wanted on. Patrolman Horn was also advised that we needed to talk to Terry Yarber about the Criminal Homicide of William Price. He was advised that if he could locate him, to go ahead and arrest him on the warrant, place a hold on him for our office.

At 1:50 p.m., the writer received a telephone call from the Dispatcher advising that Patrolman ~~Horn~~ Hearn was at 885 LeMoyne Mall, Apt. E. Patrol ~~Horn~~ Hearn had Yarber in custody and he had also located a pistol at the apartment.

At 2:05 p.m., Sgt. Lewis and Sgt. C. H. Shettlesworth and Sgt. A. C. Speight met the cars on the scene, at 885 LeMoyne Mall, Apt. E. It was learned that this apartment was owned by a Tammy Denise Parrott, female black, 23, DOB: 12-06-62, who was also on the scene. Tammy Parrott had gotten out of jail on 10/05/86 and had been staying at her mother's house at 2879 Heber. It was also learned from uniformed officers that when they found Terry Yarber that he was hiding in a closet and that Tammy Parrot was upstairs in bed, hiding under some cover. Crime Scene Car 2314, with officers W. J. Lee processed and tagged the pistol, that was found in the apartment. This was a .38 caliber pistol, Smith[illegible]. ~~His~~ report is attached. Terry Yarber was transported to the Violent Crimes Office, by uniformed patrol. See the memo submitted by Patrolman ~~Horn~~ Hearn, injured in the arrest of Terry Yarber. Other officers on the scene are listed on the report. Tammy Parrott was transported to the Violent Crimes Office by the writer.

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THE COURT: Well, let's go to 6 o'clock, anyhow, the evening meal.

MR. BEASLEY: Then I can go on and let these other witnesses go and come back in the morning?

THE COURT: We'll stop at 6 o'clock, if not before.

MR. BEASLEY: Okay.

THE COURT: Anything else? Court stand in recess until 3 o'clock.

(Whereupon, court recessed for the luncheon period. Court resumed its session and the following proceedings were had out of the presence of the jury:)

MR. BEASLEY: Your Honor, is the Court bringing the jury in now?

THE COURT: Yes, sir.

MR. BEASLEY: Could we stop that for one second?

THE COURT: All right, sir.

MR. BEASLEY: If Your Honor, please, I don't know, but we would make at this time an oral motion in limine with regard to witness David Hippen. Mr. Hippen has been convict of a felony in Federal Court, he's presently serving a sentence. We do not think that it would be objectionable to bring out the fact that he has been convicted and what he has been convicted of. We would ask the Court to rule

[Jury out]

that it would be improper to get into the specifics of the crime for which he was convicted, and we would object to that and ask the Court, in a motion in limine, to prevent Defense counsel from --

THE COURT: I don't think that's admissible under any circumstances at any time.

MR. BEASLEY: Well, I just want to make that aware to the Court, and we would make that motion.

THE COURT: Well, that's not admissible at any time.

Mr. Thompson?

MR. THOMPSON: I'm not sure what the exact nomenclat of the offense that they -- I presume that they're going to bring that out in their examination about the offense, but if there's any question about whether or not it was possessi or about whether or not it was sale, or intent to sell, or that sort of thing, we think that could be brought out -- should be brought out to the jury.

THE COURT: Whatever his conviction was.

MR. THOMPSON: Correct.

MR. BEASLEY: Your Honor, to be specific, the conviction was Conspiracy to Distribute Cocaine. We will a him if that's what he's convicted of. Specifically, the amount of cocaine he was alleged to have conspired to distribute we do not feel is relevant and we would object to getting into the specifics.

[Jury out]

THE COURT: It's not admissible. If he was convicted of the charge of Conspiracy, then that's the charge.

What about it, Mr. Thompson?

MR. THOMPSON: And then the sentence.

THE COURT: No, sir, you don't even have to have the sentence. That's not admissible. How is that admissible

MR. THOMPSON: I think it would go to, again, the weight of --

THE COURT: How is it admissible?

MR. THOMPSON: Because --

THE COURT: Under Morgan?

MR. THOMPSON: Because under the same theory that he been convicted, he's been sentenced.

MR. BEASLEY: Well, Your Honor, I --

THE COURT: Well, he might have been convicted and he might have been sentenced, but I don't think the sentence is admissible under Morgan, nor is it admissible under the Federal rules.

MR. THOMPSON: Well, his present place of incarcera then, rather than probation or something of that sort.

MR.BEASLEY: Your Honor, I intend to get into all o that. I just don't want them to get into specifics of what he was accused of conspiring to do. I mean, I think it's going to be obvious that he is presently confined and I don have any objection to that being brought out,I intend to br

[Jury out]

it out. That's all.

THE COURT: Fine and dandy. His present location and residence, fine. But the length of sentence is not admissibl

MR. THOMPSON: There is, of course, an allegation of Murder During the Perpetration of a Robbery, Robbery by the Use of a Deadly Weapon, and obviously there's going to be so proof about shots being fired. The question of his dealing in drugs would certainly go to the question of whether or no he was armed at the time that this occurred.

MR. BEASLEY: Your Honor, I think they would be very proper in asking Mr. Hippen if he had a weapon.

THE COURT: You can ask him whether or not he was armed. You can do that.

MR. THOMPSON: Well, you know, we talked about credibility and weight of the evidence --

THE COURT: I say, you're allowed to do that, Mr. Thompson.

MR. THOMPSON: Well, I'm saying the amount of drugs that he deals in would go to the question of whether or not he would carry a pistol to, say, protect himself from being ripped off in a drug deal.

THE COURT: Well, --. How is the amount of drugs that he's carried, how is that material to the credibility of witness? If he goes armed, he goes armed.

MR. THOMPSON: Well,it would be more likely that

[Jury out]

somebody that dealt in large amounts of drugs would go armed

THE COURT: Well, that might very well be, but it's not admissible in evidence.

MR. THOMPSON: Well, this is under --

THE COURT: Anything is admissible that is not objected to, Mr. Thompson.

MR. THOMPSON: Well, I understand. This is not under Morgan, but to show another thing that it's likely if the man deals in that size amount -- large amounts of drugs, that it would be more likely that he would carry a weapon than if he were just indulging in individual sales.

THE COURT: No, sir. That's not even permitted under Morgan.

MR. THOMPSON; Well, we're talking under our -- what we would be prepared to ask him about two to four million dollars worth of drugs --

THE COURT: Was he armed, Mr. Beasley?

MR. BEASLEY: No, sir.

MR. HUGHES: No weapon was found.

MR. THOMPSON: Well, --

MR. HUGHES: Well, he didn't go anywhere, --

MR. BEASLEY: Well, Your Honor, I mean that's the whole point. Mr. Thompson is sitting here saying he wants to get in front of this jury some implication, because of th man's prior conviction, or conviction, that would imply that

he might have used one. There's no proof of that. If they' got some proof of that, then I think they'd be allowed to as that question. That's why we're objecting to it.

THE COURT: Not admissible. You can ask the questio Mr. Thompson, you can ask the question -- You can ask any question and it'd be admissible if it's not objected to. But if you know that it's not admissible and you ask an inadmissible question, then you're violating your code.

MR. THOMPSON: Well, all right.

THE COURT: If you know that the question that you' asking is inadmissible and you go ahead and do it, under those circumstances you're violating your code.

MR. THOMPSON: Well, all we ask is, and certainly the Court has ruled and we can't ask the amount of drugs that he was dealing with in the matter in which he was conv

THE COURT: You can ask anything you want to do. I've just announced that.

MR. BEASLEY: Your Honor, I'm objecting to that now I don't want him to ask that in front of the jury, and then I have to stand up and object.

MR. THOMPSON: I'm saying we will not ask about the amount that he dealt with on the conviction.

THE COURT: You can't do that.

MR. THOMPSON: All right. --

THE COURT: You can't go behind that conviction.

[Jury out]

conviction, and that's all that's allowed into evidence.

MR. THOMPSON: Well, this man is a witness, and we submit that we should be allowed. The Court has ruled, but we would like to note our exception. Because we would like to ask him if it wasn't true that in the past he has dealt in as much as twenty-three pounds of cocaine worth two to four million dollars on the street. Not as to conviction, but if he has not done that in the past.

THE COURT: Under what theory of law is that admissi

MR. THOMPSON: Previous bad acts.

THE COURT: Touching on what? Moral turpitude?

MR. THOMPSON: Yes, Your Honor. Cocaine.

THE COURT: How is it moral turpitude?

MR. THOMPSON: Cocaine?

THE COURT: Have you got some case law that that's moral turpitude?

MR. THOMPSON: I think it is, Your Honor, that's all I can say.

THE COURT: Well, what you think it is and what the law is -- Have you got any case law that says that dealing in cocaine involves moral turpitude?

MR. THOMPSON: We think it's bad acts under the rulings of the Tennessee Supreme Court and Morgan and subsequent cases. Previous bad acts of a witness.

THE COURT: State?

[Jury out]

MR. BEASLEY: Your Honor, our position is the law is clear. I think that they would be entitled to ask, or we could bring out, that he has been convicted of a certain felo offense. To go beyond that is doing nothing more than attempting to prejudice the jury against this witness. It ha no bearing in this trial. It doesn't have anything to do with Mr. Hippen's presence in this community. If they can show that through proof or from cross-examination, that's fine. But to be allowed to go back and attack an incident that occurred over a year prior to this killing by implying that Mr. Hippen, because he has done something in the past, was doing something at this time -- with no basis in fact for that -- would fly in the face of all justice in this cas Your Honor. We would object to it.

THE COURT: So I can get the picture now, Mr. Thomps I want to know exactly what we're talking about. If you're talking about the amount of drugs he was involved with and which resulted in a conviction for conspiracy to deliver or to sell, or whatever it was, --

What was the conviction?

MR. BEASLEY: Conspiracy to Distribute, Your Honor.

THE COURT: Well, if that amount of drugs that you'r talking about involved that conviction, then, no, you're not allowed to go into that.

MR. THOMPSON: The Court has ruled and we would like

[Jury out]

to note our exceptions to the ruling of the Court.

THE COURT: All right, sir.

MR. THOMPSON: Okay? Now, in addition to that, it's my understanding you may ask about the previous bad acts. And it's my position that he can be asked about distributing and my understanding is from Mr. Jones it's sixty-three pounds, not twenty-three, that he can be asked if in the past he has distributed or attempted to distribute sixty-three pounds of cocaine.

THE COURT: And is that the amount that was involved in the conspiracy conviction?

MR. THOMPSON: Yes, Your Honor.

THE COURT: You can not ask it.

MR. THOMPSON: Well, all right. But I want the Court to understand we would not connect that with the conviction.

THE COURT: You're going in the back door what you can't do in the front door.

MR. THOMPSON: Well, we submit that that is a previous bad act, and it doesn't amount --

THE COURT: Yes, a previous bad act that resulted in a conviction. Now, that's it.

MR. THOMPSON: That's true. It was a bad act, it did result in a conviction.

THE COURT: Well, then, that's the conviction. That

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(Cite as: 797 S.W.2d 589)

H

Supreme Court of Tennessee,
at Jackson.
STATE of Tennessee, Appellee,
v.
Michael Joe BOYD, Appellant.

Sept. 24, 1990.

Defendant was convicted in the Criminal Court, Shelby County, Joseph B. McCartie, J., of felony-murder and armed robbery, and was sentenced to death. Defendant appealed. The Supreme Court, O'Brien, J., held that: (1) evidence was sufficient to support conviction; (2) mug-shot photographs of defendant were admissible; and (3) imposition of death sentence was constitutional.

Affirmed.

West Headnotes

[1] Criminal Law ⚿742(1)
110k742(1) Most Cited Cases
Questions of credibility of witnesses are for the jury.

[2] Criminal Law ⚿1159.2(7)
110k1159.2(7) Most Cited Cases
Where sufficiency of the evidence is challenged, relevant question for appellate court is whether, after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found essential elements of crime beyond reasonable doubt. Rules App.Proc., Rule 13(e).

[3] Homicide ⚿1163
203k1163 Most Cited Cases
(Formerly 203k235)

[3] Robbery ⚿24.15(2)
342k24.15(2) Most Cited Cases
(Formerly 342k24.1(3))
Evidence that defendant fatally shot victim during robbery was sufficient to support defendant's convictions for robbery with deadly weapon and for felony-murder, although defendant challenged credibility of various prosecution witnesses by claiming they had motive to lie to police or were unworthy of belief. Rules App.Proc., Rule 13(e).

[4] Criminal Law ⚿814(20)
110k814(20) Most Cited Cases
While it is generally error in homicide case for trial court not to instruct jury on all lesser included offenses, where record clearly shows that defendant was guilty of greater offense and is devoid of any evidence permitting inference of guilt of lesser offense, it is not error to fail to charge on lesser included offense. T.C.A. § 40-18-110(a).

[5] Homicide ⚿1458
203k1458 Most Cited Cases
(Formerly 203k309(6))
Evidence that defendant shot victim five or six times during struggle for gun during robbery was insufficient to warrant jury instruction on lesser offenses of voluntary and involuntary manslaughter in prosecution for felony-murder. T.C.A. § 40-18-110(a).

[6] Witnesses ⚿396(1)
410k396(1) Most Cited Cases
Trial court did not improperly allow State to use evidence of prior consistent statements to rehabilitate impeached witness in felony-murder prosecution, where State was allowed to place in proper context supposedly inconsistent statements brought into evidence by defendant.

[7] Witnesses ⚿396(1)
410k396(1) Most Cited Cases
Where specific questions and answers taken out of context do not convey true picture of prior statement alleged to be inconsistent, it is unfair to permit reference to isolated, unexplained responses by witness and there is no error in allowing

statements to be placed in context.

[8] Criminal Law ⚿1170.5(1)
110k1170.5(1) Most Cited Cases
(Formerly 110k11701/2(1))
Any error arising when trial court disallowed evidence that witness had made statement inconsistent with his trial testimony was harmless in felony-murder prosecution; discrepancies concerning when witness gave defendant his wallet during robbery and chronological order of events were trivial, and witness' credibility was fully explored at trial.

[9] Criminal Law ⚿438(3)
110k438(3) Most Cited Cases
Probative value of mug-shot photographs of defendant outweighed their prejudicial effect in felony-murder prosecution, although witness was able to identify defendant in court without photographs.

[10] Homicide ⚿1034
203k1034 Most Cited Cases
(Formerly 203k178(1))
Pistol found in possession of one of defendant's companions on night of victim's fatal shooting was irrelevant in felony-murder prosecution; although there was some evidence that companion had shot at victim from outside of victim's van, there were no bullet holes on outside of van and there was no other evidence that companion's revolver was used during robbery or murder.

[11] Witnesses ⚿345(2)
410k345(2) Most Cited Cases
Precluding defense from questioning State witness about specifics of witness' prior conviction for conspiracy to distribute cocaine, including amount of cocaine involved in offense, was not abuse of discretion in felony-murder prosecution.

[12] Sentencing and Punishment ⚿1772
350Hk1772 Most Cited Cases
(Formerly 203k357(3))
Evidence in felony-murder prosecution was sufficient to establish that defendant had specific intent to kill when he fatally shot robbery victim, as required to support imposition of death penalty; evidence indicated that defendant announced intent to kill robbery victims if they resisted, and upon meeting with resistance, shot and killed one of the victims. U.S.C.A. Const.Amends. 8, 14.

[13] Sentencing and Punishment ⚿1681
350Hk1681 Most Cited Cases
(Formerly 203k357(7))
Death penalty imposed upon defendant who shot victim five or six times during armed robbery while defendant and victim struggled for defendant's gun was not arbitrary or excessive or disproportionate to sentence in other cases.
U.S.C.A. Const.Amend. 8; T.C.A. § 39-2-205(c) (Repealed); Sup.Ct.Rules, Rule 12.

[14] Sentencing and Punishment ⚿1626
350Hk1626 Most Cited Cases
(Formerly 110k1206.1(2))
Tennessee death penalty statute did not unconstitutionally place burden of proof upon defendant to prove that mitigating circumstances outweighed aggravating circumstances. T.C.A. § 39-2-203(f, g) (Repealed).

[15] Sentencing and Punishment ⚿1626
350Hk1626 Most Cited Cases
(Formerly 110k1206.1(2))
Tennessee death penalty statute did not impermissibly interfere with jury's discretion to impose sentence less than death by requiring jury to return verdict of death unless mitigating circumstances outweighed aggravating circumstances; statute did not impose "presumption of death" upon finding of one aggravating circumstance. T.C.A. § 39-2-203 (Repealed).

[16] Sentencing and Punishment ⚿1780(3)
350Hk1780(3) Most Cited Cases
(Formerly 203k311)
Instructing jury that sentence of death was mandated unless it found that mitigating circumstances outweighed aggravating circumstances did not improperly interfere with jury's discretion to decline death sentence and did not improperly place burden of proving mitigation or that mitigation outweighed aggravation upon

defendant, in Homicide prosecution. U.S.C.A. Const.Amend. 8; T.C.A. § 39-2-203 (Repealed).

[17] Sentencing and Punishment ⚿1658
350Hk1658 Most Cited Cases
(Formerly 110k1213.8(8))
Jury instructions during penalty phase of capital murder trial did not violate Eighth Amendment by improperly leading jury to believe they were required to vote for death penalty unless they unanimously agreed on particular mitigating circumstance which outweighed aggravating circumstances; neither trial court's instruction nor jury verdict forms required jury to list, much less agree on existence of any mitigating facts. U.S.C.A. Const.Amend. 8; T.C.A. § 39-2-203 (Repealed).

[18] Sentencing and Punishment ⚿1780(3)
350Hk1780(3) Most Cited Cases
(Formerly 203k311)
Trial court sufficiently instructed jury that reasonable-doubt standard applied to imposition of death penalty in homicide prosecution; court instructed jury that burden of proof was upon State to prove any statutory aggravating circumstances or circumstances beyond reasonable doubt to moral certainty, then gave specific instructions on definition of reasonable doubt. T.C.A. § 39-2-203(g) (Repealed).

[19] Sentencing and Punishment ⚿1780(3)
350Hk1780(3) Most Cited Cases
(Formerly 203k311)
Instructing jury that it was required to unanimously determine that at least one statutory aggravating circumstance was proved by State beyond reasonable doubt and was not outweighed by any mitigating circumstance in order to mandate death sentence adequately informed jury as to its discretion in sentencing process, in homicide prosecution. U.S.C.A. Const.Amend. 8; T.C.A. § 39- 2-203 (Repealed).

[20] Sentencing and Punishment ⚿1780(3)
350Hk1780(3) Most Cited Cases
(Formerly 203k311)
Instructing jury to not allow sympathy or prejudice to influence them in determining their verdict was not error during penalty phase of capital murder trial. U.S.C.A. Const.Amend. 8; T.C.A. § 39-2-203 (Repealed).

[21] Criminal Law ⚿1171.1(6)
110k1171.1(6) Most Cited Cases
Any error arising when prosecutor was allowed to state, during closing argument, that there had been nothing impugning murder victim's integrity was harmless, in view of overwhelming evidence of defendant's guilt.

[22] Sentencing and Punishment ⚿1611
350Hk1611 Most Cited Cases
(Formerly 203k351)
Nothing in either State or Federal Constitution precludes imposition of death penalty in accordance with procedures under circumstances provided for under Tennessee death penalty statutes. U.S.C.A. Const.Amend. 8; T.C.A. § 39- 2-203 (Repealed).
*592 Charles W. Burson, Atty. Gen. & Reporter, Norma Crippen Ballard, Asst. Atty. Gen., Nashville, for appellee.

W. Mark Ward, Asst. Shelby County Public Defender, Memphis, for appellant.

OPINION

O'BRIEN, Justice.

This is a direct appeal by defendant, Michael Joe Boyd from his conviction for felony murder and sentence of death imposed by the jury. Defendant was also convicted on two (2) charges of armed robbery. He received consecutive life sentences for those offenses. He was represented by the Shelby County Public Defender at the trial and also on this appeal.

Defendant has raised a number of issues which he insists warrant reversal. The first of these to be considered is his charge that the evidence is insufficient to sustain the verdict of the jury.

Defendant was convicted of the felony murder of William Price and of the armed robberies of Price

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and his companion, David Hippen, in Memphis during the early morning hours of 8 November 1986. On the night of November 7-8, Price and Hippen, who had come to the Memphis area from Kansas City to visit Price's father, drove in Price's Ford van to downtown Memphis to find a motel room. As they proceeded on this mission they decided to solicit some female companionship. They were directed by an individual they met along the way to Raiford's Lounge on Mulberry and Vance Streets, where two women, Barbara Lee and Renita Tate, agreed to accompany them and got into the van. Lee had been at the disco with her boyfriend, the defendant Boyd, and with two other men, Bruce Wright and Terry Yarber.

Price, Hippen and the two women drove to the parking lot of the Lorraine Motel, where Price started to give one of the women a $100 bill to rent two rooms. Because the men would not let both women leave the van at the same time, the two women began to argue about which of them would go to the office to pay for the rooms. At this time apparently all the doors of the van were open. Price was sitting in the driver's seat, Hippen in the passenger seat. Lee was standing outside the van on the passenger's side and Tate was standing outside on the driver's side. The lights were on in the parking lot, and the van's dome and side door lights were also on.

While the women were arguing, Wright, Yarber and the defendant drove up in Wright's gray 1982 Oldsmobile Regency 98 and parked adjacent to the van. Barbara Lee called to the men in the car and asked if they had change for a $100 bill. Defendant left the car, approached the van and reached into his back pocket as if getting his wallet. Barbara Lee was either pushed out of the way by defendant or ran away from the van. Defendant stepped into the van on the passenger side behind the driver's and passenger's seats. He then pointed a pistol toward Hippen's face and said, "I want your money or I'm going to kill you." He snatched the $100 bill from Price's hand. Hippen gave defendant his wallet, which contained $30.

As defendant leaned over Hippen, Price grabbed his arm and shoved it onto the console. Defendant fired a shot and the three men began to struggle over the gun. As the victim started the van and tried to drive away, the defendant "emptied" his gun at him. Injured, Price fell from the van, which crashed into a brick planter at the base of the Lorraine Motel sign.

Defendant jumped from the van and, carrying the gun, ran back to Wright's vehicle. The defendant told Wright to leave because he had some trouble and said "he had shot the dude" and thought he might have killed him. When asked what had happened, defendant said the men had been trying to take his gun.

After Wright's car left, Hippen ran to Price, who was already dead, and then summoned help. A pathologist testified that the cause of Price's death was multiple gunshot wounds. Five or six wounds were found in Price's body. Two of these, one to the heart and another to the spine, had been fatal. All of the bullets had *593 traveled into the body from right to left, indicating the shots had been fired from the right side of the victim. Hippen had received powder burn injuries to the inside of his legs during the struggle for the gun. Defendant was apprehended on 9 November 1986. At the time he was riding in Wright's automobile. Barbara Lee was driving. At a line-up the next day, Hippen immediately identified him as the assailant. Police found no drugs or weapons in or around Price or the van. No money was found in the van although, according to Hippen, Price had stuffed $500 under the driver's seat of the van because he was afraid the women might steal the money.

Defendant says that the trial jury was not justified in finding him guilty beyond a reasonable doubt because the State's proof was based upon the testimony of Hippen, who had previously been convicted of conspiracy to distribute cocaine. His theory was that, because Wright testified he saw no money or billfold on the defendant when he returned to the car, Hippen had lied about the robbery to conceal his having taken the $500. He attacked Tate's testimony on the basis that she was a prostitute and unworthy of belief. Wright's

credibility was attacked because supposedly, he was afraid his parole would be revoked and he had originally lied to the police.

[1][2][3] Questions of credibility of the witnesses are for the jury. *State v. Sheffield,* 676 S.W.2d 542, 547 (Tenn.1984). Where the sufficiency of the evidence is challenged, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 2782, 61 L.Ed.2d 560 (1979) ; T.R.A.P. 13(e). The evidence was clearly sufficient to support defendant's convictions of robbery with a deadly weapon and for the homicide of William Price.

Defendant says the trial judge erred in refusing to instruct the trial jury on the lesser offenses of voluntary and involuntary manslaughter. Defendant asserts that such instructions were mandated (1) because of Wright's hearsay testimony that Barbara Lee had told him, when she first got into his car at the time of the shooting, that the defendant and the men in the van were arguing; (2) because the homicide occurred during a struggle over the gun, possibly Hippen's gun; and (3) because of the general lack of credibility of the State's witnesses allowed differing inferences.

[4][5] T.C.A. § 40-18-110(a) requires a trial judge charging juries in cases of criminal prosecutions for any felony wherein two or more grades or classes of an offense may be included in the indictment, to charge the jury as to all the law of each offense included in the indictment. While it is generally error in a homicide case for the trial court not to instruct the jury on all lesser included offenses, see *Johnson v. State,* 531 S.W.2d 558 (Tenn.1975), where the record clearly shows that the defendant was guilty of the greater offense and is devoid of any evidence permitting an inference of guilt of the lesser offense, it is not error to fail to charge on a lesser offense. *State v. King,* 718 S.W.2d 241, 245 (Tenn.1986). The trial judge did charge second degree murder. He declined to charge the jury on the offenses of voluntary and involuntary manslaughter. There was clearly no evidence the killing was committed upon a sudden heat produced by adequate provocation; nor was there evidence supporting an involuntary manslaughter charge. As we previously noted, a pathologist testified that the death was caused by multiple gunshot wounds. There was a total of five or six shots to the victim's body. The jury found beyond a reasonable doubt that the defendant had committed armed robbery and felony murder. Any possible error in the jury instructions was completely harmless.

[6][7] Defendant's complaint that the trial judge erred in allowing proof of prior consistent statements is entirely without merit. The general rule is, subject to certain exceptions, that evidence of prior consistent statements may not be used to rehabilitate an impeached witness. This is not *594 what occurred in this case. The State was allowed to place in proper context supposedly inconsistent statements brought into evidence by defendant. Where specific questions and answers taken out of context do not convey the true picture of the prior statement alleged to be inconsistent, it is unfair to permit reference to isolated, unexplained responses by the witness and there is no error in allowing the statements to be placed in context. See *Cole v. State,* 498 S.W.2d 915, 917 (Tenn.Cr.App.1973).

[8] Defendant also says the trial judge erred in refusing to allow the defense to prove prior inconsistent statements. Defendant endeavored to prove through his counsel at a preliminary hearing that Hippen, one of the robbery victims, had made a statement inconsistent with his trial testimony. The trial court erroneously disallowed the testimony on the grounds that a proper predicate had not been laid. The inconsistent statement involved Hippen's prior testimony about when Price grabbed defendant's gun during the robbery. The statement was taken out of context and its true meaning is obscure. It dealt with whether Hippen gave the defendant his wallet or not, and the chronological order of events. The discrepancy is trivial or perhaps nonexistent. Hippen's credibility was fully explored at the trial. If any error occurred it was completely harmless.

[9] Defendant denounces the introduction into evidence of a police photograph of him portraying both a frontal and side view. All numbers and other marks of identification on the photo were covered. Defendant says that the probative value of the photo is outweighed by its prejudicial effect. The danger in admitting mugshot evidence is that the jury may infer that the photograph came from a prior criminal conviction. See *State v. Weeden,* 733 S.W.2d 124, 126 (Tenn.Cr.App.1987). It has been held, however, that mugshots standing alone are not likely to cause a jury to infer the existence of prior criminal convictions. *State v. Washington,* 658 S.W.2d 144, 146 (Tenn.Cr.App.1983); permission to appeal denied 1983; *United States v. Calarco,* 424 F.2d 657, 661 (2nd Cir.1970), cert. denied 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 53 (1970). The probative value of the admission of the photograph is questionable since the witness was able to identify the appellant in court without it. However the admission was not error and the issue is overruled.

[10] Defendant says it was error for the trial judge to refuse to allow into evidence a pistol found in the possession of Terry Yarber, one of the men in company with defendant the night of the homicide. The significance of the admission of the weapon into evidence escapes us. Although there was some evidence at trial that Yarber had come to the front of Price's van, pointed a pistol at him and began shooting, there was also testimony that there were no bullet holes on the outside of the van. There was no other evidence that Yarber's revolver was used in the robbery of Hippen or used in the commission of the murder of Price. There was nothing else to indicate the admission of the revolver would have any tendency to make the existence of any fact of consequence to the determination of the guilt or innocence of the defendant more or less probable than it would be without the evidence. See *State v. Banks,* 564 S.W.2d 947 (Tenn.1978). The issue is without merit.

[11] The next issue challenges the trial judge's action in precluding the defense from questioning a State witness concerning prior bad acts. This related to examining Hippen about the specifics of his prior conviction for conspiracy to distribute cocaine, and particularly the amount of cocaine involved in the offense. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than convictions of crime, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning his character for truthfulness or untruthfulness. We find no abuse of discretion on the part of the trial judge in denying admission of the evidence, and we find the issue to be without merit.

*595 [12] Defendant argues that his sentence violates the Eighth and Fourteenth Amendments under the holdings of *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); and *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), on the theory that he did not have the specific intent to kill and did not intentionally point the gun at the victim, or pull the trigger. The proof in this case clearly shows that the armed defendant announced his intent to kill his robbery victims if they resisted and upon meeting with resistance, shot and killed Price. There is nothing in the evidence in this case to bring it within the scope of the holdings in *Enmund* and *Tison,* that it is a violation of the Eighth Amendment to sentence to death one who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force be employed, or who does not possess the culpable mental state of reckless indifference to human life. This issue is without merit.

[13] Defendant says the sentence of death in this case is arbitrary and excessive or disproportionate to the penalty imposed in similar cases. Defendant asserts that the sentence cannot stand when subject to the proportionality review mandated by T.C.A. § 39-2-205(c). He also says the trial judge failed to provide the appropriate information required under Supreme Court Rule 12 to assist this Court in considering the proportionality issue. He further says that he is not aware of any other case in this

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State in which the death penalty has been imposed in similar circumstances. This observation is inaccurate. There are numerous cases involving similar circumstances in which the death sentence has been imposed. See, *e.g., State v. Laney,* 654 S.W.2d 383 (Tenn.1983); *State v. King,* 694 S.W.2d 941 (Tenn.1985); *State v. Smith,* 695 S.W.2d 954 (Tenn.1985); *State v. Sparks,* 727 S.W.2d 480 (Tenn.1987). It is true that in this case the Rule 12 report of the trial judge is inadequate to provide all of the information which would be desirable to aid the Court in carrying out its required statutory review. Under T.C.A. § 39-2-205(c) the court must examine the record to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant. The proof in this case clearly shows that the defendant, announced his intent to kill his robbery victims if they resisted him and that, although the first round might have been accidentally fired in the struggle, he subsequently emptied his gun, shooting Mr. Price five or six times, before he ran away. The sentence in this case was not arbitrary or excessive or disproportionate to the sentence in other cases under the standards of comparative review which the Court carefully enumerated in *State v. Barber,* 753 S.W.2d 659 (Tenn.1988).

[14] Defendant says the Tennessee death penalty statute is unconstitutional in that it places the burden of proof upon the defendant to prove that mitigating circumstances outweigh aggravating circumstances. He refers particularly to T.C.A. § 39-2-203(g) which provides:

> (g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death.

He says the statute provides no specific guidance as to whether the prosecution or the defense has the burden of proving whether the mitigation outweighs the aggravation. The statute cannot be taken out of context. T.C.A. § 39-2-203(f) integrates and complements sub-section (g) and specifically spells out where the burden of proof lies:

> (f) If the jury unanimously determines that no statutory aggravating circumstances have been *proved by the State beyond a reasonable doubt,* or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been *proved by the State beyond a reasonable doubt* but that said circumstance or circumstances ***596** are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. (Emphasis supplied.)

The statute, taken in context, clearly outlines where the burden of proof lies. This argument was rejected in *State v. Thompson,* 768 S.W.2d 239, 251-252 (Tenn.1989).

[15] Defendant further argues that the statute impermissibly interferes with the jury's discretion to impose a sentence less than death in that the jury is required to return a verdict of death unless mitigating circumstances outweigh the aggravating circumstances and so, a sentence of death is required where aggravating and mitigating circumstances are found to be evenly balanced. We think not. The statute, taken in its entirety, does not in any way unconstitutionally deprive the sentencer of the discretion mandated by the individualized sentence requirements of the constitution. The United States Supreme Court has noted in *Franklin v. Lynaugh,* 487 U.S. 164, 108 S.Ct. 2320, 2330, 101 L.Ed.2d 155 (1988) that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is not constitutionally required. In *Boyde v. California,* 494 U.S. 370, 110 S.Ct. 1190, 1196, 108 L.Ed.2d 316 (1990) the court had under consideration a mandatory statutory sentencing scheme similar to that utilized in Tennessee. The appellant in that case argued that the jury must have freedom to decline to impose the death penalty even if they decided that the aggravating circumstances outweigh the mitigating circumstances. The court held there is no constitutional requirement of unfettered sentencing discretion in the jury, and

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States are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty. The Tennessee statute does not require the defendant to assume the burden of proving mitigation or that mitigation outweighs aggravation. There is no reasonable likelihood a jury will apply the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. There is no likelihood that this statutory language imposes a "presumption of death" upon the finding of one aggravating circumstance. See *State v. Wright,* 756 S.W.2d 669, 674 (Tenn.1988); *State v. Teague,* 680 S.W.2d 785, 790 (Tenn.1984).

[16] Defendant has made a similar attack on the jury instructions at the sentencing phase of the proceedings citing *Blystone v. Pennsylvania,* 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990) . It is insisted that since a sentence of death is mandated unless the jury finds the mitigation to outweigh aggravation the statute interferes with the jury's discretion to decline the death sentence and since the jury instruction follows the statute, it too is constitutionally deficient.

The jury was instructed that in arriving at the determination whether the defendant should be punished by death or by imprisonment for life they were authorized to weigh and consider any mitigating circumstances, and any of the statutory aggravating circumstances which may have been raised by the evidence throughout the entire course of the trial, including the guilt phase as well as the sentencing phase or both.

They were more specifically instructed that if they unanimously determined that at least one statutory aggravating circumstance or several statutory aggravating circumstances had been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances were not outweighed by any mitigating circumstances, the sentence should be death. If they unanimously determined that no statutory aggravating circumstance had been proved by the State beyond a reasonable doubt or if the jury unanimously determined that a statutory aggravating circumstance or circumstances had been proved by the State beyond a reasonable doubt; but that said statutory aggravating circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence should be life imprisonment.

In *Blystone,* supra, the Pennsylvania death penalty statute provided that "[t]he verdict must be a sentence of death if the jury unanimously finds at least one aggravating ***597** circumstance ... and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." The Court found at p. 1082 of 110 S.Ct. that the Pennsylvania death penalty statute satisfied the requirement that a capital sentencing jury be allowed to consider and give effect to all relevant mitigating evidence.

More closely aligned with the facts in this case are those in *Boyde v. California,* supra. In that case the jury was told to consider all applicable aggravating and mitigating circumstances and further directed: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death. However if you determine that the mitigating circumstances outweigh the aggravating circumstances, you *shall impose* a sentence of confinement in the state prison for life without the possibility of parole." (Emphasis in original text). In *Boyde* at p. 1198 of 110 S.Ct., the court, in applying the reasonable likelihood standard commented that jurors do not sit in solitary isolation booths parsing instructions for a subtle shade of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with common sense understanding of the instructions in the light of all that has taken place at trial likely to prevail over technical hair splitting.

Assuming arguendo that the language of the statute as it existed at the time of defendant's trial, was couched in convoluted language, [FN1] as suggested by the defendant, we are of the opinion the statute does provide specific guidance to

establish that the burden of proof remains with the prosecution throughout the sentencing process. There is no reasonable likelihood the jury can infer that they are asked to assume that the defendant has the burden of proving mitigation, or proving that mitigation outweighs aggravation.

> FN1. The sentencing statute has been amended since defendant's trial and is now contained in T.C.A. § 39-13-204 which requires the jury to determine that the State has proved that any statutory aggravating circumstance outweighs any mitigating circumstances beyond a reasonable doubt before a sentence of death can be imposed.

[17] Defendant says the trial judge's instructions during the penalty phase could have led the jury to believe they were required to vote for the death penalty unless they unanimously agreed on a particular mitigating circumstance which outweighed the aggravating circumstances, in violation of the Eighth Amendment of the United States Constitution, citing *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

This precise issue was reviewed in *State v. Thompson,* supra. The Court held that the method employed by the trial court in instructing the jury did not include any of the objectional features of the instruction in *Mills,* supra. Likewise the instructions given in this case parallel the language and structure of T.C.A. § 39-2-203. Neither the trial court's instruction in the penalty phase nor the jury verdict form, required the jury to list, much less agree on the existence of any mitigating facts. The issue is without merit.

[18] Defendant charges the trial judge should have instructed the jury that the reasonable doubt standard applies to the imposition of the death penalty. The trial judge instructed the jury that the burden of proof is upon the State to prove any statutory aggravating circumstances or circumstances beyond a reasonable doubt to a moral certainty. He then gave specific instructions on the definition of reasonable doubt. The instruction given followed verbatim *Tennessee Pattern Jury Instruction,* T.P.I.--Crim. 20.03. The instruction in turn followed the statutory language of T.C.A. § 39-2-203(g), and we find it to be a sufficient and correct charge. See *State v. Porterfield,* 746 S.W.2d 441 (Tenn.1988).

[19] Defendant has isolated a single phrase, "the sentence shall be death" from the jury instructions and argues that the instruction does not adequately inform the jury as to its discretion in the sentencing process. The portion of the instruction deleted ***598** by the defendant provides that the jury must unanimously determine that at least one statutory aggravating circumstance ... be proved by the State, beyond a reasonable doubt, and not be outweighed by any mitigating circumstances in order to mandate the death sentence. In response to a similar complaint in *Blystone,* supra, the Court said at pp. 1082-93 of 110 S.Ct., "[d]eath is not automatically imposed upon conviction for certain types of murder. It is imposed only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances ... The presence of aggravating circumstances serves the purpose of limiting the class of death eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury ... The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." There is no merit to this issue.

[20] The defendant says it was error for the trial judge to instruct the jury during the penalty stage to have no sympathy for the defendant. The instruction objected to was as follows:

> The jury in no case, should have any sympathy or prejudice or allow anything but the law and evidence to have any influence upon them in determining their verdict.

In *Saffle v. Parks,* 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) complaint was made in reference to a similar instruction. It was argued that the Eighth Amendment requires the jurors be

allowed to base the sentencing decision upon the sympathy they feel for the defendant after hearing his mitigating evidence. After reviewing the decisions in *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the court observed that there is no dispute as to the precise holding in each of those two cases: "that the State cannot bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial." However, they went on to say, "There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision, and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision. We thus cannot say that the large majority of federal and state courts that have rejected challenges to antisympathy instructions similar to that given at Parks trial have been unreasonable in concluding that the instructions do not violate the rule of *Lockett* and *Eddings.* ... It is no doubt constitutionally permissible, if not constitutionally required, see *Gregg v. Georgia,* 428 U.S. 153, 189-195, 96 S.Ct. 2909, 2932-2935, 49 L.Ed.2d 859 (1976) ... for the state to insist that "the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence." *California v. Brown,* 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987); *Parks,* supra at 110 S.Ct. 1261-1262." The issue is without merit.

[21] Defendant complains of the State's closing argument at the guilt stage of the proceedings in which State's counsel said, "... and whether you like him or not, whether you think he was a sterling character or not--and there has been nothing in this courtroom that's ever been said about Bill Price (victim) to impugn his integrity." Defendant says these remarks violated the holding in *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) that the introduction of a "victim impact" statement at the *punishment phase* of a capital trial was improper. In *South Carolina v. Gathers,* 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), also cited by the defendant, the United States Supreme Court reaffirmed *Booth* reiterating that use of victim impact statements in capital sentencing proceedings violated the principle that a sentence of death must be related to the moral culpability of the defendant ***599** in that such statements introduced factors that might be wholly unrelated to the blame worthiness of a particular defendant. The prosecuting attorney's statements in this case were made during the guilt phase of the proceedings. He made no specific reference to the victim's character and the comment was not repeated during the sentencing phase. The United States Supreme Court has not applied the principles of *Booth* to the guilt phase of a capital trial. Moreover, the prosecutor's comments did not focus on the personal characteristics of the victim. There was no objection made to this comment during closing argument. If there was error at all, it was harmless in view of the overwhelming evidence of defendant's guilt. *Harrington v. California,* 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

[22] Defendant says the death penalty as imposed in this State is unconstitutional. Acknowledging that this Court has repeatedly found the death penalty imposed in Tennessee to be constitutional he preserves the issue for later review. There is nothing in either the State or Federal Constitution, historically or otherwise, which precludes the imposition of the death penalty in accordance with the procedures and under the circumstances provided for under the present statutes of this State. *State v. Austin,* 618 S.W.2d 738, 741 (Tenn.1981).

The defendants conviction of first degree murder and the sentence of death are affirmed. The death sentence will be carried out as provided by law on 1 December 1990, unless otherwise stayed or modified by appropriate authority. Costs are assessed against the defendant.

DROWOTA, C.J., and FONES, COOPER and HARBISON, JJ., concur.

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END OF DOCUMENT

4

1990 US Census Data
Database: **C90STF3B**
Summary Level: ZIP Code

Shelby County (pt.): ZIP=38126

PERSONS
Universe: Persons
Total.....16622
UNWEIGHTED SAMPLE COUNT OF PERSONS
Universe: Persons
Total.....2353
100-PERCENT COUNT OF PERSONS
Universe: Persons
Total.....16391
PERCENT OF PERSONS IN SAMPLE
Universe: Persons
Total.....14.4
FAMILIES
Universe: Families
Total.....3915
HOUSEHOLDS
Universe: Households
Total.....5902
URBAN AND RURAL
Universe: Persons
Urban:
  Inside urbanized area.....16622
  Outside urbanized area.....0
Rural:
  Farm.....0
  Nonfarm.....0
SEX
Universe: Persons
Male.....7127
Female.....9495
RACE
Universe: Persons
White.....105
Black.....16517
American Indian, Eskimo, or Aleut.....0
Asian or Pacific Islander.....0
Other race.....0
RACE
Universe: Persons
White (800-869, 971).....105
Black (870-934, 972).....16517
American Indian, Eskimo, or Aleut (000-599, 935-970, 973-975):
  American Indian (000-599, 973).....0
  Eskimo (935-940, 974).....0
  Aleut (941-970, 975).....0
Asian or Pacific Islander (600-699, 976-985):
  Asian (600-652, 976, 977, 979-982, 985):
    Chinese (605-607, 976).....0

JSEHOLD TYPE AND RELATIONSHIP
iverse: Persons 65 years and over
family households:
Householder.....475
Spouse.....159
Other relatives.....168
Nonrelatives.....42
nonfamily households:
Male householder:
Living alone.....277
Not living alone.....38
Female householder:
Living alone.....700
Not living alone.....6
Nonrelatives.....18
group quarters:
Institutionalized persons.....7
Other persons in group quarters.....18
ller.....

JSEHOLD TYPE AND PRESENCE AND AGE OF CHILDREN
iverse: Households
nily households:
Married-couple family:
With own children under 18 years.....277
No own children under 18 years.....382
Other family:
Male householder, no wife present:
With own children under 18 years.....73
No own children under 18 years.....174
Female householder, no husband present:
With own children under 18 years.....2127
No own children under 18 years.....882
nfamily households.....1987

E OF HOUSEHOLDER BY HOUSEHOLD TYPE AND PRESENCE AND AGE OF CHILDREN
iverse: Households
te:
Family households:
Married-couple family:
With own children under 18 years.....0
No own children under 18 years.....7
Other family:
Male householder, no wife present:
With own children under 18 years.....0
No own children under 18 years.....0
Female householder, no husband present:
With own children under 18 years.....13
No own children under 18 years.....0
Nonfamily households.....7
ck:
Family households:
Married-couple family:
With own children under 18 years.....277
No own children under 18 years.....375
Other family:
Male householder, no wife present:
With own children under 18 years.....73
No own children under 18 years.....174
Female householder, no husband present:
With own children under 18 years.....2114

Private school.....418
Not enrolled in school.....79
RACE BY SCHOOL ENROLLMENT
Universe: Persons 3 years and over
White:
Enrolled in preprimary school.....10120
Enrolled in elementary or high school.....0
Enrolled in college.....0
Not enrolled in school.....0
Black:
Enrolled in preprimary school.....85
Enrolled in elementary or high school.....359
Enrolled in college.....4256
Not enrolled in school.....497
American Indian, Eskimo, or Aleut:
Enrolled in preprimary school.....10035
Enrolled in elementary or high school.....0
Enrolled in college.....0
Not enrolled in school.....0
Asian or Pacific Islander:
Enrolled in preprimary school.....0
Enrolled in elementary or high school.....0
Enrolled in college.....0
Not enrolled in school.....0
Other race:
Enrolled in preprimary school.....0
Enrolled in elementary or high school.....0
Enrolled in college.....0
Not enrolled in school.....0
SCHOOL ENROLLMENT
Universe: Persons of Hispanic origin 3 years and over
Enrolled in preprimary school.....0
Enrolled in elementary or high school.....7
Enrolled in college.....4
Not enrolled in school.....7
EDUCATIONAL ATTAINMENT
Universe: Persons 25 years and over
Less than 9th grade.....2223
9th to 12th grade, no diploma.....2780
High school graduate (includes equivalency).....1865
Some college, no degree.....849
Associate degree.....147
Bachelor's degree.....127
Graduate or professional degree.....64
RACE BY EDUCATIONAL ATTAINMENT
Universe: Persons 25 years and over
White:
Less than 9th grade.....14
9th to 12th grade, no diploma.....24
High school graduate (includes equivalency).....8
Some college, no degree.....0
Associate degree.....7
Bachelor's degree.....0
Graduate or professional degree.....0
Black:
Less than 9th grade.....2209
9th to 12th grade, no diploma.....2756

nance, insurance, and real estate (700-720).....103
siness and repair services (721-760).....234
rsonal services (761-799).....384
tertainment and recreation services (800-811).....22
ofessional and related services (812-899):
Health services (812-840).....301
Educational services (842-860).....190
Other professional and related services (841, 861-899).....170
blic administration (900-939).....107

CUPATION

iverse: Employed persons 16 years and over

nagerial and professional specialty occupations (000-202):
Executive, administrative, and managerial occupations (000-042).....108
Professional specialty occupations (043-202).....164
chnical, sales, and administrative support occupations (203-402):
Technicians and related support occupations (203-242).....86
Sales occupations (243-302).....246
Administrative support occupations, including clerical (303-402).....357
rvice occupations (403-472):
Private household occupations (403-412).....153
Protective service occupations (413-432).....93
Service occupations, except protective and household (433-472).....891
rming, forestry, and fishing occupations (473-502).....27
recision production, craft, and repair occupations (503-702).....293
perators, fabricators, and laborers (703-902):
Machine operators, assemblers, and inspectors (703-802).....366
Transportation and material moving occupations (803-863).....201
Handlers, equipment cleaners, helpers, and laborers (864-902).....309

LASS OF WORKER

niverse: Employed persons 16 years and over

rivate for profit wage and salary workers.....2491
rivate not-for-profit wage and salary workers.....183
ocal government workers.....326
tate government workers.....118
ederal government workers.....89
elf-employed workers.....82
npaid family workers.....5

OUSEHOLD INCOME IN 1989

niverse: Households

ess than $5,000.....2727
5,000 to $9,999.....1450
10,000 to $12,499.....489
12,500 to $14,999.....284
15,000 to $17,499.....215
17,500 to $19,999.....128
20,000 to $22,499.....134
22,500 to $24,999.....86
25,000 to $27,499.....91
27,500 to $29,999.....31
30,000 to $32,499.....21
32,500 to $34,999.....61
35,000 to $37,499.....12
37,500 to $39,999.....16
40,000 to $42,499.....49
42,500 to $44,999.....11
45,000 to $47,499.....21
47,500 to $49,999.....0
50,000 to $54,999.....3

5

enough money, so I asked the driver, did he have any, you know, change, and he said, "No, only I have a few hundred dollar bills." And I went down to the driver's side and I talked to the driver, and he told me to go ahead and get in the van, that I was okay, and Barbara jumped into the van also. I got in first and she got in. I sat behind the driver and she sat behind the passenger. And she asked the guy that brought us over to the van, would he pass her old man her coat, and he said he didn't have time for that. So --

Q All right. Now, do you know who her old man was?

A Michael Boyd.

Q That's the individual you've identified in the courtroom?

A Yes.

Q All right. After the man said he wouldn't take her coat over to her old man, what did you all do?

A We talked about -- Barbara talked about going to the Hyatt Regency, or something like that, and I insiste that we did not, we go to the Lorraine.

Q All right. Had you been to the Lorraine before?

A Yes.

Q All right. Did you use the Lorraine?

A Yes.

Q Were you familiar then with the location and the a

6

Q Okay. Well, let me back you up. Do you know Renita Tate? Or know her as Rita Collins?

A Yes, sir.

Q Did you see her at Raiford's that night?

A Yes, sir.

Q And did you see whether she went anywhere with Barbara Lee?

A They got in the van.

Q All right. Did you see them get in the van?

A Yes,sir.

Q All right. What happened after they got in the van

A Mike asked me to trail the van, so -- you know, see was them dudes going to try to run off with -- you know, out-of-town dudes try to run off with them, you know.

Q Okay. Did you all know that they were from out of town?

A Yes, sir.

Q Okay. And you followed the van -- How did you find the van?

A We trailed them to the Lorraine lot.

Q Okay. And when you got to the Lorraine lot, what did you do?

A Pulled up on -- The van pulled up on the lot, we pulled up on the lot, and Barbara Lee ask if we have change for a hundred, you know, and Mike said he had change for a

So he got out to change the money.

Q All right. What were you doing then?

A Sitting in the car drinking.

Q You were still drinking cognac?

A Yes, sir.

Q Was anybody else in the car drinking?

A No, sir.

Q Nobody?

A Nobody.

Q Okay. Now, when Michael got out of the car -- what was he in the front seat or the back seat?

A Front seat.

Q Where was Terry Yarber?

A Back seat.

Q When Michael got out of the car, did he tell you why he was getting out of the car?

A I was thinking he was going to change the money.

Q All right. Had he ever said anything to you about committing a robbery?

A No, sir.

Q After Michael got out of the car, what did Terry Yarber do?

A He got out.

Q Okay. Did you see where he went?

A He was standing on the opposite side of -- on the

down Mulberry.

A Right.

Q And isn't it true that you followed them?

A Yes, sir.

Q You testified earlier, --

A Yes, sir.

Q -- you all were afraid, since it was an out of town van, that they'd kidnap them, or something?

A That they would probably try something like that.

Q And you were driving. Is that correct?

A Yes,sir.

Q You were high, weren't you?

A Yes, sir. Yes, sir.

Q You'd really been drinking a lot, hadn't you?

A I'd been drinking some Courvoisier, yeah.

Q You'd really been drinking, hadn't you?

A Not really. I mean, you know, I had been drinking, you know, I wasn't drunk.

Q Do you recall talking with me and with Mr. Ralph N on February 10th?

A Yes, sir.

Q Of this year?

A Yes,sir.

Q About a month ago?

A Probably less. Less than a month ago.

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A Okay, we came in -- We went around the motel, if I remember right, on the back side of it, and we came in, and there's a big sign that says, "Lorraine Motel" on it, I remember the sign. We pulled in that driveway there, and we pulled in, probably -- I don't know, twenty car lengths, fifteen car lengths, you know, the stalls, and we backed into the parking lot right there.

Q Okay. Now, once you backed into the parking lot, what, if anything, did you do?

A The girls was going to get us a room, and they told us it was going to be twenty some dollars for both of us, for two rooms. And I didn't have no money with me, and Bill gave a -- had a hundred dollar bill, and he had it up like this. Well, both girls wanted to go get the room, and he said, "No, that's not the way it's going to be, you know, one of you can go get the room and the other one stay here." Well, they were arguing, the girls were, because they both wanted to go. So, anyway, what happened next, was we noticed a car pulling up on our right side -- it was either a car or two lengths away from us right there, it was a silver car. I seen it pull up and I seen a guy get out of the back seat, on the passenger side -- the one on my side there -- and started walking around the c and the girl that was on my side on the van asked him if he had change for a hundred dollar bill.

8

HOMICIDE: FIRST DEGREE MURDER

IN PERPETRATION OF A ROBBERY

A person commits murder in the first degree if he kills any person during the perpetration of any robbery. Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear.

For you to find the defendant guilty of murder in the first degree in the perpetration of a robbery, the state must have proven beyond a reasonable doubt:

(1) that the defendant unlawfully killed the alleged victim;

(2) that the killing was committed during the alleged perpetration of the robbery; that is, that the killing was closely connected to the alleged robbery, and was not a separate, distinct and independent event; and

(3) that the defendant specifically intended to commit the alleged robbery.

If you should find that the above three elements exist beyond a reasonable doubt, it is not necessary that the state prove an intention to kill, or that the alleged killing was done willfully, deliberately, with premeditation, and with malice.

If you find from the proof beyond a reasonable doubt that the defendant is guilty of murder in the first degree in the perpetration of a robbery, you will so report and your verdict in that event shall be: "We, the jury, find the defendant guilty of murder in the first degree in the perpetration of a robbery."

If you so find, then it shall be your duty after a separate sentencing hearing to determine whether the defendant will be sentenced to death or life imprisonment, but you will not consider punishment for this offense at this time.

If you find the defendant is not guilty of murder in the first degree in the perpetration of a robbery, or if you have a reasonable doubt as to his guilt, then you must acquit him of this offense. You must then consider whether or not the defen-

dant is guilty of murder in the first degree as charged in the second count of this indictment.

HOMICIDE: FIRST DEGREE MURDER

Any person who willfully, deliberately, maliciously, and with premeditation kills another person is guilty of murder in the first degree.

For you to find the defendant guilty of murder in the first degree, the state must have proven beyond a reasonable doubt:

(1) that the defendant unlawfully killed the alleged victim;

(2) that the killing was malicious;

Malice is an essential ingredient of this offense, and it may be either express or implied. A case of homicide cannot be murder unless at and before the killing the wicked intent, constituting malice aforethought, exists in the mind of the slayer. Malice is an intent to do an injury to another, a design formed in the mind of doing mischief to another.

Express malice is actual malice against the party slain and exists where a person actually contemplates the injury or wrong he inflicts. Implied malice is malice not against the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved and malignant spirit, and a heart regardless of social duty and fatally bent on mischief.

Implied malice may be found to exist where the wrongdoer did not intend to slay the person killed but death resulted from a consciously unlawful act done intentionally and with knowledge on the wrongdoer's part that the act was directly perilous to human life. In this event there is implied such a high degree of conscious and willful recklessness as to amount to that malignity of heart constituting malice.

If the state has proven beyond a reasonable doubt that a killing has occurred, then you may infer that the killing was done maliciously, but this inference may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the defendant, or exists in the evidence of the state.

Malice cannot be inferred from deadly intent only, because the deadly intent may be justifiable under the law, as where one willfully kills another to save his own life or to save himself from great bodily harm and the danger is imminent and immediate, or when the intent to kill is produced by anger, for if it were sudden and upon reasonable provocation the killing might or might not be manslaughter, but it would not be murder.

(3) that the killing was willful; that is, that the defendant must have intended to take the life of the alleged victim;

(4) that the killing was deliberate; that is, with cool purpose; and

(5) that the killing was premeditated. This means that the intent to kill must have been formed prior to the act itself. Such intent or design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however short the interval. The mental state of the accused at the time he allegedly instigated the act which resulted in the alleged death of the deceased must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation. Passion does not always reduce the

crime below murder in the first degree, since a person may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time. If the design to kill was formed with deliberation and premeditation, it is immaterial that the accused may have been in a passion or excited when the design was carried into effect.

If you find from the proof beyond a reasonable doubt that the defendant is guilty of murder in the first degree, you will so report and your verdict in that event shall be: "We, the Jury, find the defendant guilty of murder in the first degree." If you so find, then it shall be your duty, after a separate sentencing hearing, to determine whether the defendant will be sentenced to death or life imprisonment, but you will not consider punishment for this offense at this time.

It you find the defendant is not guilty of murder in the first degree, or if you have a reasonable doubt as to his guilt of this offense, then in that event you must acquit him of this offense.

You must then consider whether or not the defendant is guilty of Murder in the Second Degree as included in the Second Count of the indictment.

HOMICIDE: SECOND DEGREE MURDER

Any person who kills another person with malice aforethought, either express or implied, is guilty of murder in the second degree.

For you to find the defendant guilty of murder in the second degree, the state must have proven beyond a reasonable doubt:

(1) that the defendant unlawfully and willfully killed the alleged victim; and

(2) that the killing was malicious;

Malice is an essential ingredient of this offense, and it may be either express or implied. A case of homicide cannot be murder unless at and before the killing the wicked intent, constituting malice aforethought, exists in the mind of the slayer. Malice is an intent to do an injury to another, a design formed in the mind of doing mischief to another.

Express malice is actual malice against the party slain and exists where a person actually contemplates the injury or wrong he inflicts. Implied malice is malice not against the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved and malignant spirit and heart regardless of social duty and fatally bent on mischief.

Implied malice may be found to exist where the wrongdoer did not intend to slay the person killed but death resulted from a consciously unlawful act done intentionally and with knowledge on the wrongdoer's part that the act was directly perilous to human life. In this event, there is implied such a high degree of conscious and willful recklessness as to the amount to that malignity of heart constituting malice.

If one person, upon a sudden impulse of passion, without adequate provocation, and disconnected with any previously formed design to kill, kills another willfully and maliciously, such killing is unlawful, and is murder in the second degree.

Malice cannot be inferred from deadly intent only, because the deadly intent may be justifiable under the law, as where one willfully kills another to save his own life or to save himself from great bodily harm and the danger is imminent and immediate, or when the intent to kill is produced by anger, for if it were sudden and upon reasonable provocation the killing might or might not be manslaughter but it would not be murder.

THURSDAY, MARCH 10, 1988

STATE OF TENNESSEE
VS-87-02458
MICHAEL JOE BOYD

UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO SELL AND DELIVER

It is ordered by the Court that the above cause be reset to MARCH 30, 1988 for Report.

- - -

STATE OF TENNESSEE
VS-87-02456-7-9
MICHAEL JOE BOYD

ROBBERY WITH A DEADLY WEAPON; MURDER DURING THE PERPETRATION OF ROBBERY, MURDER FIRST DEGREE

Comes the Attorney General on the part of the State and the defendant in proper person and by counsel of record, MR. ROBERT JONES, P.D. and MR. ED THOMPSON, P.D.; whereupon there comes into open Court the same Jury and Alternate Juror heretofore selected and sworn to try the above cause. Thereupon, and subsequent to the Charge of Law by the Court, it was ordered by the Court that the Alternate Thirteenth and Fourteenth Jurors, BENNY D. MASON, JR. and ROBERT B. WHITE, be EXCUSED AND DISMISSED. Whereupon the above cause was submitted to the remaining TWELVE (12) Jurors for their deliberation in the trial of the above cause, and upon the completion of their deliberation, the Jury upon their oath do say as to Indictment #87-02456: "WE, THE JURY, FIND THE DEFENDANT (MR. MICHAEL JOE BOYD) GUILTY OF ROBBERY BY THE USE OF A DEADLY WEAPON AS CHARGED IN THE INDICTMENT AGAINST MR. WILLIAM PRICE. As to Indictment #87-02457: "WE, THE JURY, FIND THE DEFENDANT GUILTY OF ROBBERY BY THE USE OF A DEADLY WEAPON AS CHARGED IN THE INDICTMENT." As to Indictment #87-02459: "WE, THE JURY, FIND THE DEFENDANT (MICHAEL JOE BOYD) GUILTY OF MURDER IN THE FIRST DEGREE IN THE PERPETRATION OF A ROBBERY AS CHARGED IN THE FIRST COUNT OF THE INDICTMENT. Thereupon counsel for the defendant moves the Court for a Motion For New Trial in Indictments #87-02456-7 and a Sentencing Date, which Motion For New Trial is set MARCH 31, 1988, with Sentence Date to be MARCH 30, 1988. Whereupon Court proceeds with the hearing of testimony in Indictment #87-02459 as to the SECOND PART of the trial as to the punishment of the defendant, the defendant having heretofore been found Guilty of MURDER IN THE FIRST DEGREE IN THE PERPETRATION OF ROBBERY AS CHARGED, and upon completion of the trial as to the punishment, the Jury upon their oath do say:

(1) WE, THE JURY, UNANIMOUSLY FIND THE FOLLOWING LISTED STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES:

2. THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ONE OR MORE FELONIES OTHER THAN THE PRESENT CHARGE, WHICH INVOLVE THE USE OF THREAT OR VIOLENCE TO THE PERSON.

7. THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN COMMITTING OR WAS AN ACCOMPLICE IN THE COMMISSION OF, OR WAS ATTEMPTING TO COMMITT, OR WAS FLEEING AFTER COMMITTING, OR ATTEMPTING TO COMMIT ANY FIRST DEGREE MURDER, ARSON, RAPE, ROBBERY, BURGLARY, LARCENY, KIDNAPPING, AIRCRAFT PIRACY, OR UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

(2) WE, THE JURY, UNANIMOUSLY FIND THAT THERE ARE NOT MITIGATING CIRCUMSTANCES SUFFICIENTLY SUBSTANTIAL TO OUTWEIGH THE STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES SO LISTED ABOVE.

(3) THEREFORE, WE, THE JURY, UNANIMOUSLY FIND THAT THE PUNISHMENT FOR THE DEFENDANT, MR. MICHAEL JOE BOYD, SHALL BE DEATH.

(CONTINUED TO NEXT PAGE)

9

(2)

No. 87-02457

Offense ROBBERY WITH A DEADLY WEAPON

4 ACQUIT. 7/88 YARBER

Defendant MICHAEL JOE BOYD
TERRY DEWAYNE YARBER

licted MAY Term 19 87

IL	☐ 11-16-86	BK # 86320768	
ND	☐	HTS. 12-23-86	
IL	☐	BK #	
ND	☐	HTS.	
IL	☐	BK #	
ND	☐	HTS.	
IL	☐	BK #	
ND	☐	HTS.	
IL	☐	BK #	
ND	☐	HTS.	

) Appointed	✓	Date	6-4	19 87
ias		Date		19
) Bond Fixed at $				
oy Indictment to Defendant in Jail				
oy Indictment to Attorney				
WRI & RSP		Date	6-4	19 87
) Set	5-28	19 87	For (J.A.)	B.A.
)		19		B.A.
)		19		A.H.

Reset 6-4-87 (JA)
Set 7-13-87 (R)
Motion of Atty to W/D Filed 6-19-87
Motion to W/D Granted 6-19-87
Ord. Substituting Counsel Ent. 6-19-87
Motion for Deft. Filed 6-29-87
Motion to Suppress Filed 6-29-87
Rule 16 Motion of Deft. Filed 6-29-87
Rule 37(a) Motion to W/D Filed 6-29-87
ppn def ye Reset 7-31-87 (R)

e O/C Bond Forfeiture:
) Capias Held Until
e O/C Capias & Scire Facias Issued:

Criminal Court of Shelby County Tennessee

O/C MNT Overruled
O/C Notice of Appeal Filed
O/C Appellants Cert. of Transcript Filed
O/C Order Approving Transcript of Evidence Filed
O/C CCA Affirmed
O/C Mandate & Opinion Filed

Defense Attorney /s/ Joe Brown, Jr.
Address 147 Jefferson, 1205
Phone 525-5771 Date 3/7/88
Board of Ethics No. 5211

Attorney General

R & I: 00043022
R & I:

DATE: 6-4-88
VERDICT: Not Guilty Status 1749

DISPOSED

JUDGMENT ENTERED DATE

O/C Pursuant to T C A. 40-3207, Fee of is assessed
Against Defendant:
Date

Confinement to:
Penitentiary
Correctional Center
Jail

10

AFFIDAVIT OF JUDGE JAMES C. BEASLEY, JR.

Comes now your affiant, and does declare under oath as follows:

1. My names is James C. Beasley, Jr. I am currently serving as Judge for Division Ten of the Criminal Court of Shelby County , Tennessee. Prior to being elected Judge, I served as an assistant District Attorney in Shelby County, Tennessee.

2. I was the lead attorney prosecuting Michael Joe Boyd for the death of William Price.

3. After his indictment, I offered Michael Boyd a thirty-five year sentence plea bargain, which would remain in effect up until the beginning of his trial.

4. After the first day of trial, Michael Boyd wanted to accept the thirty-five year offer. I told his counsel the thirty-five year offer was off the table, but he could have a fifty year offer. This offer was rejected, and ultimately Michael Boyd was convicted of felony murder during the perpetration of a robbery, and sentenced to death.

5. The thirty-five year offer which I made to Michael Joe Boyd, was in my view a reasonable and just offer and sentence in light of the totality of the facts surrounding Michael Boyd's case.

6. At the time, it was my custom and practice to write plea offers on the inside jacket of the District Attorney General's file. A true and accurate copy of the inside jacket of the District Attorney General's file, reflecting my plea offers to Michael Joe Boyd, is attached to this affidavit.

7. As a prosecutor and subsequently as a criminal court judge, I have been involved with several homicide cases. The facts of Michael Boyd's case are certainly not as egregious as those in other capital prosecutions in which I have been involved. I have known several defendants to

receive a sentence less than death, based upon facts similar to or more egregious than those in Michael Boyd's case.

Further affiant saith not.

James C. Beasley, Jr.

STATE OF TENNESSEE
COUNTY OF SHELBY

Sworn to and subscribed before me this 9th day of November, 2006.

Notary Public

MARILYN HATHAWAY
STATE OF TENNESSEE
NOTARY PUBLIC
COUNTY OF SHELBY
MY COMM. EXP. SEPT. 16, 2008

My Commission Expires:

Sept. 16, 2006

F:\CLIENTS\Boyd, Michael J. (11586)\Boyd v. Ricky Bell (warden) (24028)\Clemency\Affidavit of James C. Beasley, Jr..doc

ATE	DISPOSITION	ASSISTANT	DIV. NO.
/87	BA- Neely - Fof.	JPB	MC/8
	BA- Parrott - Fof. (Supposed to be in meth. Hosp. ~~AED~~ - Gunshot)		
	BA- Jordan - PD Appt. WRIPNG		
	Rep 7-13-87		
	JA- Boyd		
	JA- Yarber reset 6/4/87 to have Greg Gallagher		
	JA- Boyd reset 6/4/87 to have A C Wharton present		
87	JA- Boyd - PD Appt. WRIPNG Rep 7/13/87	JPB	MC/8
	JA- Yarber - PD Appt. WRIPNG Rep 7/13/87		
	BA- Parrott - WRIPNG Rep 7/13/87 Fof. Set aside cont	JPB	
	Waggerman substituted for PD on Yarber Case - by Ct. Appointment		
3/87	Jordan Announced Trial Case not severable Drug Case set for Trial 10/26/87 87-02458 (Complete)		
	Report on Boyd & Yarber reset 7/31/87		
1/87	Trial set 10-26-87	JPB	MC/8
7/87	motion to withdraw as Counsel		

CC

DEFENDANT Boyd, Michael Joe #00020984
Yarber, Terry Dewayne #00043022
Neely, Farley #00081637
Parrott, Vincent #00067110
Jordan, Terry #00044126

N 1390

CHARGE Murd. During Perp of a Robbery * MID * RWDW * UPCS w/int.

INDICTED MAY 19 1987 NO. 87-02456, 57, 58, 59 - prog

STATE'S ATTORNEY Beasley

DEFENSE ATTORNEY Boyd - PD -
Yarber - PD - Waggerman
Jordan - PD
Parrott - Gary Ball
Neeley - Joe Carney

REMARKS: 6-9-88 - Dismissed Warrant - MID - Terry Dewayne Yarber.
Beverly
529-6701
#86313035 @ Aga Arsor - MTS - Not to Be

E. H. CLARKE & BRO., NUMBERS

N 1390

Offered
Yarber
10 years
RWDW
8/1/87
JCB

BPOENA
ONS CRIMINAL COURT
BOOKING NO 86313035
F TENNESSEE

Boyd:
Offer was made pre-ind.
of 50 years & reduced to
40 years. Subsequently
offered 35 years up
thru trial date. The case
had improved drastically
after first day of jury selection
& wanted 35 years, I told
him he could have 50 years
& Gen. Stanton agreed. Deft.
again rejected the offer.
All defense motions were
filed & heard. Several sessions
of discovery w/ Jones & Thompson
pre-trial.

JCB
1/4/88

11

Westlaw.

959 S.W.2d 557

(Cite as: 959 S.W.2d 557)

H

Supreme Court of Tennessee,
at Jackson.
STATE of Tennessee, Appellee,
v.
Michael Joe BOYD, Appellant.

Jan. 5, 1998.
Rehearing Denied March 2, 1998.

Defendant's conviction of felony murder and death sentence were affirmed by the Supreme Court, 797 S.W.2d 589, and defendant petitioned for postconviction relief. Petition was dismissed by the Criminal Court, Shelby County, Joseph B. McCartie, J., and the Court of Criminal Appeals affirmed. Defendant appealed. The Supreme Court, Anderson, C.J., held that jury's reliance on duplicative felony-murder aggravating circumstance during sentencing phase was harmless.

Affirmed.

Reid, J., dissented and filed opinion.

West Headnotes

[1] Sentencing and Punishment ⚿1625
350Hk1625 Most Cited Cases
(Formerly 110k1213.8(8))

[1] Sentencing and Punishment ⚿1660
350Hk1660 Most Cited Cases
(Formerly 203k357(10))
Felony murder aggravating circumstance set forth in sentencing statute duplicated and mirrored elements of offense of felony murder and, when applied to felony murder, failed to narrow class of death eligible murderers as required by Eighth Amendment and Tennessee Constitution. U.S.C.A. Const.Amend. 8; West's Tenn.Code, Const. Art. 1, § 16; West's Tenn.Code, § 39-2-203(i)(7)(Repealed).

[2] Sentencing and Punishment ⚿1660
350Hk1660 Most Cited Cases
(Formerly 203k357(7))
Felony-murder aggravating factor may be used to support imposition of death penalty if defendant is convicted of premeditated murder, or if felony used for aggravating circumstance is different from and in addition to felony used for felony-murder offense.

[3] Criminal Law ⚿1556
110k1556 Most Cited Cases
(Formerly 110k998(11))
Jury's reliance on invalid felony-murder aggravating factor in sentencing defendant to death was constitutional error properly recognized in postconviction proceeding.

[4] Sentencing and Punishment ⚿1659
350Hk1659 Most Cited Cases
(Formerly 110k1208.1(5))

[4] Sentencing and Punishment ⚿1788(5)
350Hk1788(5) Most Cited Cases
(Formerly 110k1177, 110k1134(3))

[4] Sentencing and Punishment ⚿1788(10)
350Hk1788(10) Most Cited Cases
(Formerly 110k1134(3))
If jury considers invalid or improper aggravating circumstance, either constitutional harmless error analysis or reweighing at trial or appellate level suffices to guarantee that defendant received an individualized death sentence.

[5] Criminal Law ⚿1556
110k1556 Most Cited Cases
(Formerly 110k998(11))
Error in considering invalid felony-murder aggravating factor in sentencing defendant to death was harmless and did not require postconviction relief, where remaining aggravating factor relied upon by jury was that defendant had prior conviction for second-degree murder, a violent

felony, and prior violent felony conviction may be more qualitatively persuasive and objectively reliable than other factors. West's Tenn.Code, § 39-2-203(i)(2) (Repealed).

[6] Sentencing and Punishment ⚿1659
350Hk1659 Most Cited Cases
(Formerly 110k1208.1(5))
Verdict would have been the same had jury given no weight to invalid felony-murder aggravating factor in sentencing phase of defendant's murder trial, where mitigating evidence was limited to defendant's own testimony, and although defendant argued that he showed remorse, he did not accept responsibility for his part in offense, instead denying that he shot or robbed victim.

[7] Constitutional Law ⚿270.5
92k270.5 Most Cited Cases

[7] Jury ⚿37
230k37 Most Cited Cases
Any state or federal due process liberty interest in jury sentencing under
Tennessee statute did not preclude use of harmless error standard to deny postconviction relief on claim that trial court relied on invalid felony-murder aggravating factor in capital sentencing proceeding. U.S.C.A. Const.Amend. 8; West's Tenn.Code, § 39-2-203 (Repealed).

[8] Criminal Law ⚿1177
110k1177 Most Cited Cases
Constitutional harmless error analysis of sentencing phase of capital trial where jury has relied on invalid aggravating circumstance is appropriate provided that it preserves constitutional requirement of individualized sentencing.

[9] Criminal Law ⚿1177
110k1177 Most Cited Cases
Not every verdict based partly on unconstitutional or invalid aggravating circumstance requires resentencing, and error may be deemed harmless if it may be concluded beyond reasonable doubt that verdict would have been the same had jury given no weight to invalid factor.

[10] Constitutional Law ⚿203
92k203 Most Cited Cases

[10] Constitutional Law ⚿250.3(1)
92k250.3(1) Most Cited Cases

[10] Constitutional Law ⚿253(4)
92k253(4) Most Cited Cases

[10] Sentencing and Punishment ⚿1659
350Hk1659 Most Cited Cases
(Formerly 110k1208.1(5))
Retroactive application of Tennessee Supreme Court's *Howell* decision, analyzing situation where invalid aggravating factors have been considered by jury in capital cases, did not violate ex post facto, due process, and equal protection rights of defendant sentenced to death based on invalid felony-murder aggravating factor and valid factor, since, even prior to decision relied on, Supreme Court had upheld death sentences where jury had relied on invalid aggravating circumstances, and reasoning applied in defendant's appeal set forth principled means of review in manner that preserved individualized
sentencing. U.S.C.A. Const.Amend. 14; West's Tenn.Code, Const. Art. 1, § 16.
***558** Paul J. Morrow, Jr., Office of the Post-Conviction Defender, Nashville, Daniel A. Seward, Memphis, for Appellant.

John Knox Walkup, Attorney General and Reporter, Michael E. Moore, Solicitor General, Kathy Morante, Deputy Attorney General, Nashville, John W. Pierotti, District Attorney General (at Trial), Terry Harris, Assistant District Attorney (at Trial), Memphis, for Appellee.

OPINION

ANDERSON, Chief Justice.

The issue in this post-conviction death penalty appeal is whether the jury's reliance on an invalid aggravating circumstance was harmless error, or whether resentencing is required because there is reasonable doubt that the sentence would have been the same had the jury given no weight to the invalid

aggravating factor. The jury relied on a valid aggravating factor, that the defendant had a prior conviction for a violent felony offense (second-degree murder), and an invalid aggravating circumstance, that the victim was killed during the commission of a felony. [FN1]

> FN1. Although the appeal was also granted on the issue of who properly represents the defendant, i.e., his appointed counsel or the Post-Conviction Defender, the issue was rendered moot when appointed counsel requested and received an order from this Court allowing him to withdraw.

A majority of this Court held in *State v. Middlebrooks,* 840 S.W.2d 317 (Tenn.1992), that the felony murder aggravating factor found in Tenn.Code Ann. § 39-2-203(i)(7) duplicates and mirrors the elements of the offense of felony murder and therefore, when applied as an aggravating factor to a felony murder conviction, it fails to narrow the class of death eligible defendants as is required by article I, § 16 of the Tennessee Constitution. [FN2] After conducting a harmless error analysis, however, both the trial court and the Court of Criminal Appeals concluded beyond a reasonable doubt that under the facts of this case the sentence would have been the same had the jury given no weight to the invalid aggravating factor. Both courts denied the post-conviction petition. We agree and affirm the Court of Criminal Appeals' judgment.

> FN2. The *Middlebrooks* holding also applied to the felony murder aggravating circumstance as subsequently codified in Tenn.Code Ann. § 39-13-204(i)(7)(1990).

559 *BACKGROUND

The defendant, Michael Joe Boyd, was convicted of felony murder stemming from the shooting death of William Price during an armed robbery in November of 1986. Price and a companion, David Hippen, had solicited two women, Barbara Lee and Renita Tate, to accompany them to a Memphis motel. Upon their arrival at the Lorraine Motel, Price gave one of the women a $100 bill to rent two rooms. Michael Boyd, who was Lee's boyfriend, drove up to the scene with two other men and approached Price's van. Boyd pointed his pistol at Hippen and demanded money. Price grabbed Boyd's arm, Boyd fired the gun, and a struggle ensued. When Price tried to drive away from the scene, Boyd "emptied" the gun at him, striking him with five or six shots which caused his death.

The prosecution relied on three aggravating circumstances to seek the death penalty in the sentencing phase of the trial: (1) that the defendant had a prior conviction for a violent felony, (2) that the defendant knowingly created a risk of death to two or more persons other than the victim murdered, and (3) that the killing occurred in the perpetration of a felony. [FN3]

> FN3. Tenn.Code Ann. § 39-2-203(i)(2), (3), and (7)(1982)[now Tenn.Code Ann. § 39-13-204(i)(2), (3), and (7)(1997)].

A judgment showing that the defendant had been convicted in 1983 for second-degree murder was introduced by the prosecution to support the prior conviction for a violent felony aggravating circumstance. In mitigation, Boyd testified that someone asked for change for a $100 bill and he was going to make change when Hippen pulled a gun. He said a struggle took place, during which Price was shot. Boyd testified that he was sorry the victim had been killed but that he did not intend to rob or shoot the victim.

The jury returned the sentence of death based on two aggravating factors, prior conviction of a violent felony and felony murder, and the conviction and sentence were affirmed by this Court on appeal. *State v. Boyd,* 797 S.W.2d 589 (Tenn.1990), *cert. denied,* 498 U.S. 1074, 111 S.Ct. 800, 112 L.Ed.2d 861 (1991). The defendant filed a petition for post-conviction relief that alleged numerous constitutional errors, including the violation of article I, § 16 of the Tennessee Constitution under *State v. Middlebrooks.* Following an evidentiary hearing, the trial court denied the petition. The Court of Criminal Appeals affirmed the denial. We granted this appeal and

now affirm the Court of Criminal Appeals' judgment.

ANALYSIS

[1][2] In *Middlebrooks,* we determined that the felony murder aggravating circumstance set forth in Tenn.Code Ann. § 39-2-203(i)(7) duplicated and mirrored the elements of the offense of felony murder and, when applied to a felony murder, failed to narrow the class of death eligible murderers as required by article I, § 16 of the Tennessee Constitution and the Eighth Amendment to the United States Constitution. [FN4] We stressed that a proper narrowing device must provide

> a principled way to distinguish the case in which the death penalty was imposed from the many cases in which it was not ... and must differentiate a death penalty case in an objective, even-handed, and substantially rational way from the many murder cases in which the death penalty may not be imposed. As a result, a proper narrowing device insures that, even though some defendants who fall within the restricted class of death-eligible defendants manage to avoid the death penalty, those who receive it will be among the worst murderers--*560 those whose crimes are particularly serious, or for which the death penalty is particularly appropriate.

> FN4. At the time of this offense, felony murder included "[e]very murder committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb...." Tenn.Code Ann. § 39-2-202(a)(1982)[now Tenn.Code Ann. § 39-13-202(a)(2)(1997)]. The felony murder aggravating circumstance provided "the murder was committed while the defendant was engaged in committing ... any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb." Tenn.Code Ann. § 39-2-203(i)(7)(1982)[now Tenn.Code Ann. § 39-13- 204(i)(7)(1997)].

We concluded that it violates article I, § 16 of the Tennessee Constitution to use the felony murder aggravating circumstance to support imposition of the death penalty for a conviction of felony murder. 840 S.W.2d at 343-346. The felony murder aggravating factor may, of course, be used to support imposition of the death penalty if a defendant is convicted of premeditated murder, or if the felony used for the aggravating circumstance is different from and in addition to the felony used for the felony murder offense. *State v. Hines,* 919 S.W.2d 573, 583 (Tenn.1995), *cert. denied,* 519 U.S. 847, 117 S.Ct. 133, 136 L.Ed.2d 82 (1996).

[3] Because the *Middlebrooks* rule enhanced the integrity and reliability of the sentencing process, we have since applied the rule retroactively. *See Barber v. State,* 889 S.W.2d 185, 187 (Tenn.1994), *cert. denied,* 513 U.S. 1184, 115 S.Ct. 1177, 130 L.Ed.2d 1129 (1995). Accordingly, as both parties here recognize, the jury's reliance on the invalid felony murder aggravating factor was constitutional error properly recognized in this post-conviction proceeding.

[4] The critical inquiry, therefore, is whether the error was harmless and whether a resentencing hearing is required. To assist in this inquiry, we review the analytical framework first announced in *State v. Howell,* 868 S.W.2d 238 (Tenn.1993), *cert. denied,* 510 U.S. 1215, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994). There, we held that a *Middlebrooks* error does not require a resentencing hearing if the reviewing court concludes "beyond a reasonable doubt that the sentence would have been the same had the jury given no weight to the invalid felony murder aggravating factor." *Id.* at 262. Our holding was based on United States Supreme Court precedent in which that Court had said that if a jury considers an invalid or improper aggravating circumstance, either "constitutional harmless error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence." *Stringer v. Black,* 503 U.S. 222, 232, 112 S.Ct. 1130, 1137, 117 L.Ed.2d

367 (1992); *see also Richmond v. Lewis,* 506 U.S. 40, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992); *Clemons v. Mississippi,* 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

In *Howell,* we adopted a harmless error analysis that guarantees the precision that individualized sentencing demands and provides a principled explanation for our conclusion in each case. We also stressed the need "to completely examine the record for the presence of factors which potentially influence the sentence ultimately imposed." These factors include, but are not limited to, "the number and strength of remaining aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality, and strength of mitigating evidence." *Id.* at 260-61. Only after a thorough and critical consideration of these factors can a determination be made as to harmless error. *See, e.g., Sochor v. Florida,* 504 U.S. 527, 541, 112 S.Ct. 2114, 2123-24, 119 L.Ed.2d 326 (1992)(O'Connor, J., concurring)("appellate court's bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion.").

We have since applied the *Howell* harmless error analysis on numerous occasions in which the jury considered an invalid aggravating circumstance in conjunction with one or more valid aggravating circumstances. In the following cases, the error was found to be harmless and the sentence was affirmed. *State v. Hines,* 919 S.W.2d at 583; *State v. (Sylvester) Smith,* 893 S.W.2d 908 (Tenn.1994), *cert. denied,* 516 U.S. 829, 116 S.Ct. 99, 133 L.Ed.2d 53 (1995); *Barber v. State,* 889 S.W.2d at 187; *State v. Nichols,* 877 S.W.2d 722 (Tenn.1994) , *cert. denied,* 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995); *State v. Cazes,* 875 S.W.2d 253 (Tenn.1994), *cert. denied,* 513 U.S. 1086, 115 S.Ct. 743, 130 L.Ed.2d 644 (1995); *State v. Howell,* 868 S.W.2d at 262. Conversely, we concluded that the constitutional error required resentencing in *State v. Walker,* 910 S.W.2d 381 (Tenn.1995), *cert. denied,* 519 U.S. 826, 117 S.Ct. 88, 136 L.Ed.2d 45 (1996), and ***561** *Hartman v. State,* 896 S.W.2d 94 (Tenn.1995).

We disagree with the dissent's assertion that "the high standard for harmless error analysis set forth in *Howell* has been significantly compromised in some cases." On the contrary, the *Howell* analysis has been employed in the same manner in each case--the fact that some errors have been held to be harmless and others harmful underscores that an individualized determination must be made in each case. [FN5]

> FN5. Though this Court and the United States Supreme Court previously had recognized that errors occurring during the sentencing phase of a capital trial may be reviewed under the harmless error doctrine by an appellate court, it was not until 1992 that the United States Supreme Court completely delineated the proper analysis to be applied by an appellate court when an invalid aggravating circumstance has been relied upon by the initial sentencing authority. *See Stringer v. Black,* 503 U.S. at 232, 112 S.Ct. at 1137-38; *Sochor v. Florida,* 504 U.S. at 540-41, 112 S.Ct. at 2123-24. This Court's decision in *Howell* delineating the proper harmless error analysis for a *Middlebrooks* error was not rendered until after our decisions in *State v. Evans,* 838 S.W.2d 185 (Tenn.1992); *Sparks v. State,* 1993 WL 151324, 1993 Tenn. Lexis 187; No. 03S01-9212-CR-00105 (Tenn., May 10, 1993); *State v. Bane,* 853 S.W.2d 483 (Tenn.1993); *State v. Smith,* 857 S.W.2d 1 (Tenn.1993); and *State v. Middlebrooks,* 840 S.W.2d 317 (Tenn.1992). Therefore, since all these decisions predated *Howell,* the dissent's reliance upon these cases as examples of the proper application of the *Howell* analysis is unwarranted.
>
> Moreover, in each of the cases that the dissent contends were "significantly compromised," the *Howell* analysis yielded a conclusion that the *Middlebrooks* error was harmless beyond a reasonable doubt. In *State v. Cazes, supra,* there were two

> remaining aggravating factors, prior convictions for a violent felony and heinous, atrocious or cruel. The prior convictions were aggravated rape and assault; no additional evidence or undue emphasis had been placed on the invalid felony murder aggravator during sentencing. In *State v. Nichols, supra,* five rape convictions supported the remaining factor of prior convictions for a violent felony; no additional evidence or undue emphasis was placed on the invalid factor. In *State v. (Sylvester) Smith, supra,* there were two remaining aggravating factors, prior convictions for a violent felony and heinous, atrocious or cruel. The prior convictions included robbery with a deadly weapon, assault with intent to commit murder, and aggravated rape. Accordingly, our application of these factors, as well as the mitigating evidence offered by the defendants, led to the same conclusion-- that the error was harmless beyond a reasonable doubt.

[5] Applying the analysis in this case leads us to conclude that the error is harmless and does not require resentencing. The remaining aggravating factor relied upon by the jury was that the defendant had a prior conviction for second degree murder--a violent felony. We said in *Howell* that "even more critical than the sum of the remaining aggravating circumstances is the qualitative nature of each circumstance, its substance and persuasiveness, as well as the quantum of proof supporting it." Although the statute assigns no relative importance or weight to the aggravating circumstances, we observed that a prior violent felony conviction "may be more qualitatively persuasive and objectively reliable" than other factors. 868 S.W.2d at 261.

Accordingly, the defendant's prior conviction for second-degree murder is a significant element to be considered in our analysis; in fact, we have affirmed the death sentence in all but one previous case in which a prior violent felony conviction supported the aggravating factor in Tenn.Code Ann. § 39-2-203(i)(2). *See State v. Hines,* 919 S.W.2d at 584 (assault in the first-degree); *State v. Smith,* 893 S.W.2d at 926 (robbery, assault with intent to murder, and aggravated rape); *State v. Nichols,* 877 S.W.2d at 738 (rape); *State v. Cazes,* 875 S.W.2d at 270 (aggravated rape and assault with intent to murder); *State v. Howell,* 868 S.W.2d at 261 (murder, aggravated robbery). In the remaining case, *State v. Walker,* the conviction was for voluntary manslaughter, a lesser grade of offense than second-degree murder. 910 S.W.2d at 398.

Turning to the second *Howell* factor, the record reveals that the prosecution did not emphasize the felony murder aggravating factor, Tenn.Code Ann. § 39-2-203(i)(7), in the sentencing phase. No additional evidence was introduced in support of the factor, and relatively little reliance was placed on it during the prosecutor's argument. Instead, the prosecution stressed the defendant's prior conviction throughout its argument as demonstrated by the following passage:

> ***562** The law also says if you kill once and then you kill again, it's okay for you to suffer the consequences of the death penalty. What does it take, ladies and gentlemen? How many people have to die before we put a stop to [the defendant]. Do we have to wait until he kills and kills and kills again? He's killed twice. You would think ... after killing once that a man like that, if he's got any conscience at all, would want to get as far away from a pistol, an instrument of death, as he could ever get.... It's good for nothing other than to kill other human beings. Twice [the defendant] used the same instrument of death. It's time ... to put a stop to it.

Finally, the balance of the State's argument was devoted to arguing the aggravating factor in Tenn.Code Ann. § 39-2-203(i)(3), that the defendant knowingly created a risk of death to two or more persons during the victim's murder, and to discrediting the testimony and credibility of the defendant.

Similarly, applying the third *Howell* factor, we observe that no additional evidence was admitted to support the invalid felony murder aggravating circumstance; the prosecution merely relied upon the evidence in the guilt phase. As we said in

Howell, "an aggravating factor which duplicates the elements of the underlying crime has less relative tendency to prejudicially affect the sentence imposed than invalid aggravating factors which interject inadmissible evidence into the sentencing calculus, or which require the sentencing jury to draw additional conclusions from the guilt phase evidence." 868 S.W.2d at 261. Accordingly, the jury in this case heard no more evidence in support of the felony murder aggravating circumstance than had already been presented to prove the offense of felony murder during the guilt phase.

[6] Finally, we consider the final *Howell* factor--the nature, quality and strength of the mitigating evidence. In this case, the mitigating evidence was limited to the defendant's own testimony. Although the defendant argues on appeal that he showed remorse, it is significant that he did not accept responsibility for his part in the offense; instead he denied that he shot or robbed the victim. No other mitigating evidence was presented before the jury. We have considered all of the relevant *Howell* analytical factors in our review of the record, and have considered and applied the requirement for individualized sentencing and made a principled explanation for our conclusion. After doing so, we conclude beyond a reasonable doubt that the verdict would have been the same had the jury given no weight to the invalid aggravating factor.

The dissent concludes that a finding of harmless error cannot be based on objective facts and is therefore inappropriate. Notwithstanding evidence of a "set up" robbery and that the defendant "emptied" his gun while the victim tried to flee from the scene, the dissent contends that the killing occurred as a result of an altercation based on jealousy and that the defendant testified he did not intend to rob or shoot the victim. The dissent, however, does not apply the *Howell* factors that support an objective conclusion that the jury's verdict would have been the same even had it not considered the invalid factor. In particular, the dissent does not address the quality and strength of the remaining aggravator factor that was supported by the defendant's prior conviction for second-degree murder, nor, apparently, does the dissent place objective significance on the *Howell* factors that no additional evidence or emphasis was placed on the invalid felony murder aggravator during sentencing. Thus, the dissent takes issue solely with the majority's conclusion and not its methodology.

[7][8] Rejecting precedent, the defendant contends that our appellate review is improper for several reasons, all of which we have implicitly rejected in our formulation and continued application of *Howell.* First, he argues that he has a federal and state due process liberty interest to jury sentencing due to the mandatory language found in Tenn.Code Ann. § 39-2-203. [FN6] The case cited ***563** by the defendant in support of his argument, *Rickman v. Dutton,* 854 F.Supp. 1305 (M.D.Tenn.1994), however, recognizes that even if a due process liberty interest exists on the basis of these statutory provisions, constitutional harmless error analysis is not precluded. We, therefore, disagree with the defendant's assertion that these statutory provisions preclude appellate review of the sentence. Moreover, the United States Supreme Court has repeatedly held that constitutional harmless error analysis is appropriate in this context, provided that it preserves the constitutional requirement of individualized sentencing. *See, e.g., Stringer v. Black,* 503 U.S. at 232, 112 S.Ct. at 1137-38 (1992) ; *Clemons v. Mississippi,* 494 U.S. at 753, 110 S.Ct. at 1450-51. [FN7]

> FN6. The defendant cites, among other provisions, Tenn.Code Ann. § 39-2-203(a)(1982), the "jury shall fix punishment in a separate sentencing hearing", and Tenn.Code Ann. § 39-2-203(k)(1982), "a new trial on the issue of punishment alone shall be held by a new jury empaneled for said purpose."
>
> FN7. The Mississippi cases relied on by the defendant, *e.g., Wilcher v. State,* 635 So.2d 789 (Miss.1993), are specifically predicated on an interpretation of state law that is not controlling on this Court.

[9] The defendant also argues that *Howell* conflicts

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with the constitutional harmless error test set forth in *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and that, applying *Chapman,* the State cannot prove beyond a reasonable doubt that the error "did not contribute to the verdict obtained" because this jury did in fact rely on factors set out in Tenn.Code Ann. § 39-2-203(i)(7). Again we disagree. Our analysis in *Howell* is derived from relevant United States Supreme Court precedent that indicates not every verdict based partly on an unconstitutional or invalid aggravating circumstance requires resentencing, and that an error may be deemed harmless if it may be concluded beyond a reasonable doubt that the verdict would have been the same had the jury given no weight to the invalid factor. *See Stringer v. Black,* 503 U.S. at 232, 112 S.Ct. at 1137- 38; *Clemons v. Mississippi,* 494 U.S. at 753, 110 S.Ct. at 1450-52. We view these decisions, and the test set forth in *Howell,* as the appropriate analysis and consistent with the *Chapman* harmless error test.

[10] Finally, the defendant insists that application of *Howell* violates ex post facto, due process, and equal protection provisions of the Tennessee and United States Constitutions because it had not been decided at the time of this offense, and because prior cases in which only one aggravating factor remained were remanded for resentencing. It is clear, however, that pre-*Howell* cases, existing at the time of the defendant's offense, had upheld death penalty sentences where the jury had relied on an invalid aggravating circumstance. *See State v. Bobo,* 727 S.W.2d 945 (Tenn.), *cert. denied,* 484 U.S. 872, 108 S.Ct. 204, 98 L.Ed.2d 155 (1987); *State v. Workman,* 667 S.W.2d 44 (Tenn.), *cert. denied,* 469 U.S. 873, 105 S.Ct. 226, 83 L.Ed.2d 155 (1984); *State v. Cone,* 665 S.W.2d 87 (Tenn.), *cert. denied,* 467 U.S. 1210, 104 S.Ct. 2400, 81 L.Ed.2d 357 (1984); *State v. Campbell,* 664 S.W.2d 281 (Tenn.), *cert. denied,* 469 U.S. 920, 105 S.Ct. 302, 83 L.Ed.2d 236 (1984). Therefore, *Howell,* which sets forth a principled means of review in a manner that preserves individualized sentencing, does not violate ex post facto, due process, or equal protection provisions.

CONCLUSION

Our review of the record leads us to conclude beyond a reasonable doubt that the jury's verdict would have been the same had no weight been given to the invalid aggravating circumstance, and that the jury's consideration of the invalid aggravating circumstance was harmless error. Therefore, the jury's reliance on Tenn.Code Ann. § 39-2-203(i)(7), although constitutional error, does not require resentencing. Accordingly, we affirm the judgment of the Court of Criminal Appeals denying the post-conviction petition. The sentence of death will be carried out as provided by law on the 5th day of May, 1998, unless otherwise ordered by this Court, or other proper authorities.

The costs of this appeal are taxed to the defendant for which execution may issue.

DROWOTA, BIRCH and HOLDER, JJ., concur.

REID, J., dissents with separate dissent.

***564** REID, Justice, dissenting.

I dissent from the majority's holding that the jury's consideration of the invalid aggravating circumstance was harmless error. Though "not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a ... judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." *Zant v. Stephens,* 462 U.S. 862, 886, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235 (1983).

The facts of this case show that the victim was on his way to a motel room with the defendant's girlfriend when he was shot by the defendant. The evidence specifically showed that the victim and David Hippen drove in a van into downtown Memphis to find a motel room and solicit female companionship. At Raiford's Lounge, two women, Barbara Lee and Renita Tate, agreed to accompany them and got into the van. Lee had been at the lounge with the defendant who was her boyfriend, and with two other men, Bruce Wright and Terry Yarber. The two women, the victim and Hippen then drove to the parking lot of the Lorraine Motel

where the victim "started to give one of the women a $100 bill to rent two rooms." *State v. Boyd,* 797 S.W.2d 589, 592 (Tenn.1990), *cert. denied,* 498 U.S. 1074, 111 S.Ct. 800, 112 L.Ed.2d 861 (1991) . While it was being discussed who would go in to rent the rooms, Wright, Yarber, and the defendant drove up and parked next to the van. The circumstances of the murder are described in the opinion on the direct appeal of this case as follows:

> Defendant stepped into the van on the passenger side behind the driver's and passenger's seats. He then pointed a pistol toward Hippen's face and said, "I want your money or I'm going to kill you." He snatched the $100 bill from [the victim's] hand. Hippen gave defendant his wallet, which contained $30.
>
> As defendant leaned over Hippen, [the victim] grabbed his arm and shoved it onto the console. Defendant fired a shot and the three men began to struggle over the gun. As the victim started the van and tried to drive away, the defendant "emptied" his gun at him. Injured, [the victim] fell from the van ... [and died].

Id. The defendant was charged with felony murder, and a sentence of death was sought based on the aggravating factors of creating a risk of death to persons other than the victim, killing during the perpetration of a felony, and having a prior conviction for a violent felony. The jury rejected the danger of risking death to others as an aggravating factor and based the sentence of death on felony murder and the conviction of a prior violent felony.

In *State v. Middlebrooks,* 840 S.W.2d 317 (Tenn.1992), *cert. dismissed,* 510 U.S. 124, 114 S.Ct. 651, 126 L.Ed.2d 555 (1993), the Court found the use of felony murder as an aggravator when the conviction is based on felony murder, unconstitutional:

> We have determined that in light of the broad definition of felony murder and the duplicating language of the felony murder aggravating circumstance, no narrowing occurs under Tennessee's first-degree murder statute. We hold that, when the defendant is convicted of first-degree murder solely on the basis of felony murder, the aggravating circumstance set out in Tenn.Code Ann. §§ 39- 2-203(i)(7) (1982) and 39-13-204(i)(7) (1991), does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution because it duplicates the elements of the offense. As a result, we conclude that Tenn.Code Ann. § 39-2-203(i)(7) is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution where the death penalty is imposed for felony murder.

Id. at 346. All agree that in this case, the jury's use of felony murder as an aggravating factor was a violation of the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution. Nonetheless, the majority affirms the sentence of death on the finding that "beyond a reasonable doubt that the verdict would have been the same had the jury given no weight to the invalid aggravating factor." Majority Opinion at 562.

*565 The United States Supreme Court has held that "in a weighing State infection of the process with an invalid aggravating factor might require invalidation of the death sentence." *Stringer v. Black,* 503 U.S. 222, 231, 112 S.Ct. 1130, 1136, 117 L.Ed.2d 367 (1992). It has also held that "under such circumstances a state appellate court could reweigh the aggravating and mitigating circumstances or undertake harmless-error analysis" as long as the death sentence is not affirmed "without a thorough analysis of the role an invalid aggravating factor played in the sentencing process." *Id.*

This Court properly applied a harmless error analysis in *State v. Howell,* 868 S.W.2d 238 (Tenn.1993), *cert. denied,* 510 U.S. 1215, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994). In *Howell,* the victim was a convenience store clerk who was shot once in the forehead at close range. The jury sentenced the defendant to death based on the aggravators of felony murder and three prior violent felony convictions (armed robbery, first-degree murder, and armed robbery and attempted first-degree murder). The mitigating evidence was

that the defendant was brain damaged from four head injuries and grew up in a violent home environment. The Court stated:

> In order to guarantee the precision that individualized sentencing considerations demand and provide a principled explanation for our conclusion in each case, it is important, when conducting harmless error review, to completely examine the record for the presence of factors which potentially influence the sentence ultimately imposed. These include, but are not limited to, the number and strength of remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality and strength of mitigating evidence.

Id. at 260-61. The Court found that because this was not the defendant's first "cold-blooded execution-style murder", the prosecutor did not emphasize the felony murder aggravator, no additional evidence was introduced for the invalid aggravator, and no mitigating evidence of good character, it could conclude the sentence would have been the same had the jury given no weight to the invalid felony murder aggravating factor. The sentence of death was affirmed.

The constitutionally mandated purpose of the harmless error analysis set forth in *Howell,* is to insure that "beyond a reasonable doubt ... the error complained of did not contribute to the verdict obtained." *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967) (Scalia, J., concurring). The Court is "obliged to determine whether there [is] reasonable doubt as to whether the constitutional error contributed to the jury's decision to impose the sentence of death." *Tuggle v. Netherland,* 516 U.S. 10, 15, 116 S.Ct. 283, 286, 133 L.Ed.2d 251 (1995) (Scalia, J., concurring).

My concurrence in *Howell* was based on the conclusion, after considering the factors, that it was beyond a reasonable doubt that charging the invalid aggravating circumstance did not affect the jury's decision to impose the sentence of death. *State v. Howell,* 868 S.W.2d at 270-71 (Reid, C.J., concurring).

Based on the *Middlebrooks* decision, the Court has required a remand for sentencing in 6 subsequent cases involving the invalid use of the felony murder aggravator. [FN1] In *Middlebrooks,* where a 14 year old boy was beaten while his hands were tied behind his back with a knife, brass knuckles and a stick, was urinated on and in his mouth, burned with a lighter, and among other brutal acts, had an "X" cut into his chest while he was alive, the Court found that even though the other aggravating circumstance of torture was amply proved, it could not conclude that the elimination of the aggravating circumstance of felony murder was harmless error ***566** beyond a reasonable doubt. *State v. Middlebrooks,* 840 S.W.2d at 317. In *State v. Evans,* 838 S.W.2d 185 (Tenn.1992), *cert. denied,* 510 U.S. 1064, 114 S.Ct. 740, 126 L.Ed.2d 702 (1994), where the defendant was convicted of killing a grocery store clerk who he knew with a single gun shot to the back of the head, the opinion notes only that the jury found "aggravating circumstances" and that under *Middlebrooks* the sentence is set aside and the case is remanded. In *Sparks v. State,* 1993 WL 151324, 1993 Tenn. Lexis 187, No. 03S01-9212-CR-00105 (Tenn. May 10, 1993)(not published), where the defendant was convicted of armed robbery of a liquor store during which he shot and killed a delivery man, the Court remanded the case for resentencing, stating,

> FN1. *See also State v. Branam,* 855 S.W.2d 563 (Tenn.1993)(there were no valid aggravators and consequently, the sentence was set at life imprisonment); *State v. Bigbee,* 885 S.W.2d 797 (Tenn.1994)(The Court did not consider whether the error was harmless because the case was remanded for resentencing on an unrelated error); *State v. Keen,* 926 S.W.2d 727 (Tenn.1994)(though error under *Middlebrooks* was found, it was not necessary to conduct a harmless error analysis because remand for resentencing was required on other grounds).

> In prior cases, however, we have found harmless error analysis difficult to sustain in the absence of written findings by the jury concerning mitigating

circumstances. *See, e.g., State v. Terry,* 813 S.W.2d 420, 424- 25 (Tenn.1991). Considering the "heightened need for reliability in death cases," we refused in Terry to predict what the outcome of the case would have been in the absence of one of the aggravating circumstances. Similarly, in *State v. Pritchett,* 621 S.W.2d 127, 129 (Tenn.1981), we declined to "speculate" on what the jury's sentence would be when one of two aggravating circumstances was removed from consideration.

The current sentencing statute, T.C.A. § 39-13-204(g), like its predecessor, T.C.A. § 39-2-203(g), requires the jury to engage in a careful weighing process, balancing specified aggravating circumstances against any mitigating circumstances in the record. But, also like its predecessor, it does not require the jury to report in its verdict what mitigating factors were considered. Without a sufficient basis for reweighing the evidence in the record, we are disinclined to speculate in this instance about what verdict the jury might have returned based on proof of a single aggravating circumstance. Certainly, we cannot say that in the absence of the felony-murder aggravating circumstance, there is proof beyond a reasonable doubt that the defendant should be sentenced to execution.

Id. at 3-4. In *State v. Bane,* 853 S.W.2d 483 (Tenn.1993), the defendant was found guilty of premeditated murder and felony murder. The evidence showed a premeditated murder and robbery in which the victim was beaten, cut, strangled, gagged, and placed in a tub with a plastic bag over his head. The jury sentenced the defendant to death finding the aggravators of torture and felony murder. The Court held that *Middlebrooks* required that a jury reconsider the evidence "even though the evidence amply supports the aggravating circumstance of the murder to be especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." *Id.* at 490. In *State v. Smith,* 857 S.W.2d 1 (Tenn.1993), the defendant and an accomplice during the robbery of a store operated by an elderly couple, knocked down the man and fatally shot the woman when she resisted the robbery. Though other error also required resentencing, the Court stated, "The *Middlebrooks* rule establishes that elimination of the [felony murder aggravator] requires the jury to reconsider the evidence to determine if the sentence of death is appropriate in this case." *Id.* at 25. In *Hartman v. State,* 896 S.W.2d 94 (Tenn.1995), the victim was sixteen years old when she was kidnapped, raped, killed by four blows to the head, and raped again. In doing the harmless error analysis, the Court stated that though no additional evidence was introduced in support of the invalid aggravator, the prosecutor did not emphasize the invalid aggravator, and there was only minimal proof of mitigating circumstances, because the remaining aggravator of the heinous, atrocious or cruel nature of the offense was supported by testimony which was contested, the Court was "unable to conclude that the sentence would have been the same had the jury given no weight to the invalid aggravator." *Id.* at 104. In *State v. Walker,* 910 S.W.2d 381 (Tenn.1995), *cert. denied,* 519 U.S. 826, 117 S.Ct. 88, 136 L.Ed.2d 45 (1996), the victim was shot several times while sitting in her car in her driveway; she bled to death at the hospital. The defendant thought the victim would be carrying a lot of money. The jury found the defendant not guilty of premeditated murder, but guilty of *567 felony murder and sentenced the defendant to death based on the aggravators of felony murder, and the existence of a previous conviction of a violent felony (voluntary manslaughter). The Court found that the mitigating evidence was "inadequate" to overturn the sentence, but that the "prior violent felony aggravator was not nearly as positive" as that of armed robbery, first degree murder, and attempted first degree murder, found in *Howell. Id.* at 398. The Court remanded the case for resentencing.

On the other hand, the high standard for harmless error analysis set forth in *Howell* has been significantly compromised in some cases. For instance, in *State v. Cazes,* 875 S.W.2d 253 (Tenn.1994), *cert. denied,* 513 U.S. 1086, 115 S.Ct. 743, 130 L.Ed.2d 644 (1995), the victim, a sixty-eight year old woman, was killed by blows to the head, raped and bitten. The evidence was inconclusive as to whether the victim lost consciousness immediately or not. The victim and

the defendant knew each other, though the relationship between the defendant and the victim was not shown in the record. The jury sentenced the defendant to death based on the aggravators of felony murder, previous convictions of violent felonies (assault and aggravated rape), and an especially heinous, atrocious, or cruel murder in that it involved torture or depravity of mind. The Court affirmed the sentence stating that the other two aggravators were strongly supported by the evidence, no additional evidence was introduced in support of the invalid aggravator, the prosecutor did not emphasize the invalid aggravator, and the mitigation evidence of the defendant's childhood and work history did not outweigh the valid aggravating circumstances. In *State v. Nichols,* 877 S.W.2d 722 (Tenn.1994), *cert. denied,* 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995), this Court found a *Middlebrooks* error to be harmless stating that the defendant had committed five similar rapes in the months before the murder, no inadmissible evidence was introduced to establish the invalid felony-murder aggravator, the State did not put a great emphasis on the fact of the felony, and the mitigating proof was contested by the State. In *Nichols,* the defendant confessed and testified to raping the victim. The death resulted from the defendant's hitting the victim with a two-by-four during the struggle; the victim died two days later. The defendant expressed remorse. I dissented from the Court's conclusion that the allowance of the jury to use the felony murder aggravator was harmless error because the State failed to prove beyond a reasonable doubt that the jury was not influenced by the invalid aggravating circumstance. Indeed, the record suggested the opposite conclusion:

> The State relied on two aggravating circumstances to support the death penalty--previous convictions for aggravated rape, and the fact that the murder occurred during the commission of a violent felony. The jury was instructed to decide whether the aggravating circumstances were supported by the evidence, and whether they outweighed the mitigating evidence. At the sentencing hearing, evidence of the aggravating circumstances was offered, which included substantial emphasis on the circumstances of the crime itself. Evidence of mitigating circumstances was offered from the defendant, his family, co-workers, and friends as to his character, work background and attitude, and family history. He also submitted the testimony of a clinical psychologist who had diagnosed the defendant as having intermittent explosive disorder. The State's closing argument emphasized the felony murder aggravating circumstance at least as much as the aggravating circumstance of prior convictions.... [The] initial return of the juror death penalty verdict form ... [did not cite] aggravating circumstances concerning the defendant's record of convictions.
>
> ... There is at the very least a reasonable possibility that the injection of the invalid felony murder aggravating circumstance into the weighing process by the jury contributed to the death sentence....

Id. at 743-44 (Reid, C.J., dissenting). In *State v. Smith,* 893 S.W.2d 908 (Tenn.1994), *cert. denied,* 516 U.S. 829, 116 S.Ct. 99, 133 L.Ed.2d 53 (1995), the victim was an elderly woman who had been beaten, raped, her throat had been cut, and she had been drowned in the bathtub. The jury sentenced ***568** the defendant to death based on the aggravators of felony murder, previous convictions of violent felonies (robbery with a deadly weapon, assault with intent to commit first-degree murder, and aggravated rape), and the nature of the murder as especially heinous, atrocious, or cruel. The mitigating evidence was that the Defendant was mentally retarded. Because the evidence supported the remaining aggravators, no additional evidence was introduced in support of the invalid aggravator, and little emphasis was placed on the robbery by the prosecutor, the Court affirmed the sentence of death. In *Smith,* I dissented, stating,

> In this case, although the two remaining aggravating circumstances were proven, and no additional evidence was admitted in support of the invalid aggravating circumstance, the evidence of mental retardation is a strong mitigating factor whose weight could well be more persuasive against two aggravating circumstances than three. Because the existence of substantial mitigating evidence forces the jury in this case to make a very subjective decision as

> to weight, the State, which has the burden of proof, cannot show beyond a reasonable doubt that the ultimate decision to execute the defendant was not *influenced* by the submission of the invalid aggravating circumstance; therefore, the submission of this circumstance was not harmless error, and resentencing is required.

Id. at 932 (Reid, J. concurring in part & dissenting in part).

Sometimes, like in *Howell,* the finding of harmless error is justified. For instance, in *Barber v. State,* 889 S.W.2d 185 (Tenn.1994), *cert. denied,* 513 U.S. 1184, 115 S.Ct. 1177, 130 L.Ed.2d 1129 (1995), the victim who was seventy-five years old and in bad health, was killed by multiple blows to the head. She had bruises on her hands which were caused when the victim attempted to protect herself from the blows, and the evidence showed that the victim was alive and conscious during the beating. The defendant also made comments to others regarding the killing indicating the willfulness of his actions. The jury based it's sentence of death on the felony murder aggravator and on the fact that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind. Because the prosecutor mentioned the felony murder aggravator only once, no additional evidence was introduced to support the invalid aggravator, and no strong mitigating evidence was introduced, the Court found the error harmless. Though noting my disagreement with the analysis of the majority opinion, I concurred in the judgment that the sentence be affirmed. And in *State v. Hines,* 919 S.W.2d 573 (Tenn.1995), *cert. denied,* 519 U.S. 847, 117 S.Ct. 133, 136 L.Ed.2d 82 (1996), the victim was stabbed multiple times and at the time of death the victim was sexually brutalized. The jury sentenced the defendant to death based on the aggravators of felony murder, prior convictions (assault in the first degree) and the murder was especially heinous, atrocious, or cruel. In mitigation, the defendant introduced evidence of a bad childhood home environment, psychological problems, and his good behavior while in prison. The Court noted that the defendant was "found guilty of felony murder solely on the basis of armed robbery" and that "two felonies, larceny and rape, in addition to robbery, were used to support the felony murder circumstance." *Id.* at 583. The Court concluded that the felony murder aggravators, therefore, did perform the narrowing function required under the constitution. Doing a harmless error analysis for the portion of the felony murder aggravator attributable to the robbery, the Court found the error harmless because the remaining aggravating circumstances were strongly supported, the prosecutor did not emphasize the invalid aggravator and the evidence of mitigation did not outweigh the aggravators. Though I dissented on the basis of other significant errors, including the trial court's rejection of the plea agreement reached between the defendant and the District Attorney General's office, I would agree that the use of the invalid aggravator was harmless error under the record in that case.

However, comparison of the facts and circumstances of *Howell* and those in this case indicate a further lessening of the standard. The murder in this case resulted from an altercation based on jealousy. There was an ***569** argument followed by a fight and then a shooting. The only valid aggravator relied on by the jury is the prior conviction for second degree murder. The mitigating circumstances offered by the defendant are that he was sorry the victim had been killed, he did not intend to rob or shoot the victim, and the killing had happened because the victim pulled a gun on him. The evidence in the record is simply not persuasive enough to assume that without the consideration of the felony murder aggravator, the jury would have reached the same conclusion. In my view, the admission of the invalid circumstance was not harmless error under the *Howell* analysis.

> The issue is not the extent to which the aggravating and mitigating circumstances were supported by the evidence or whether the aggravating circumstances outweighed the mitigating circumstances. A finding that the evidence in support of the valid aggravating circumstance was overwhelming and the evidence in mitigation was meager may, ... support the jury's finding that beyond a reasonable doubt the aggravating circumstance outweighed the mitigating circumstances, but it does not

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> necessarily follow that the jury was not influenced by the invalid aggravating circumstance.

State v. Howell, 868 S.W.2d 238, 269 (Tenn.1993) (Reid, C.J.concurring). "[I]n all cases where the Court must make a subjective decision regarding the effect of the aggravating circumstance," a finding of harmless error is inappropriate. *Id.* at 268. In my view, the finding of harmless error cannot be based on objective facts in this case and, therefore, must be a subjective conclusion.

I would remand the case for resentencing.

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12

IN THE CRIMINAL COURT OF TENNESSEE FOR THE

THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

STATE OF TENNESSEE	)	
	)	
VS.	)	CASE NOS. 93006
	)	93007
	)	95310
MICHAEL JOE BOYD,	)	
Defendant.	)	

TRANSCRIPT OF GUILTY PLEA HEARING
OCTOBER 17, 1983

THE HONORABLE ARTHUR T. BENNETT, PRESIDING JUDGE

APPEARANCES

FOR THE STATE:

MR. RAY BAKER
Assistant District Attorney General
Shelby County Attorney General's Office
201 Poplar Avenue, Third Floor
Memphis, TN 38103

FOR THE DEFENDANT:

MR. JOHN C. HOUGH
Assistant Public Defender
Shelby County Public Defender's Office
201 Poplar Avenue, Second Floor
Memphis, TN 38103

IN THE CRIMINAL COURT OF TENNESSEE FOR THE

THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

DIVISION VII

STATE OF TENNESSEE	)	
	)	
	)	
	)	
VS.	)	CASE NOS. 95310
	)	93006
	)	93007
	)	
MICHAEL JOE BOYD,	)	
	)	
Defendant.	)	

This hearing came on to be heard on the 17th day of October, 1983, before the Honorable Arthur T. Bennett, Judge, holding the Criminal Court for Shelby County at Memphis, Tennessee.

The following has been transcribed as per order of the Court, to-wit:

THE COURT: Mr. Baker.

MR. BAKER: Yes, sir, Your Honor. We have the next matter for the Court's consideration, three cases on the defendant, Michael Joe Boyd. If it please the Court, those are shown on the Court's blotter as 93006 and 7, wherein the defendant is charged with larceny, receiving and concealing stolen property, and unlawful possession of

a controlled substance, and the last numbered indictment, 95310, wherein the defendant is charged with the offense of murder in the second degree.

Your Honor, we reached a negotiated agreement as to all three cases, which will be as follows.

In indictment number 93006, the defendant, Michael Joe Boyd, is entering a plea of guilty to the offense of unlawful possession of a controlled substance; that is, simple possession, of marijuana. The punishment recommendation is confinement for a period of thirty days in the Shelby County Workhouse.

In indictment number 93117, the defendant is entering a plea of guilty to the offense of petit larceny, which would be as charged, I believe, in the indictment. The punishment recommendation is confinement for six months in the Shelby County Workhouse.

THE COURT: All right.

MR. BAKER: In indictment number 95310, the defendant is entering a plea of guilty to the offense of murder in the second degree as charged in 95310, and the punishment recommendation, Your Honor, is confinement for a period of ten years in the State Penitentiary, standard offender within range one.

I have the negotiated plea agreements, petitions and waiver, and the judgment forms in each case, Your Honor.

May I pass them at this time to the Court? (Documents tendered.)

MR. BAKER: The facts giving rise to the indictments, respectively, Your Honor, I'll start with 93006. The facts giving rise to that indictment are essentially as follows; that on the 28th day of December of 19 -- it says '83, Your Honor, but it should be '1982. On the 29th day of December, 1982, a young lady by the name of Priscilla Coleman, employed down here at The Peabody Hotel, reported to the Memphis Police Department that her purse, in the nature of some type of a cosmetic purse, had been taken from her.

Officers responding to the call, Your Honor, were temporarily detained, temporarily detained the defendant, Michael Boyd, and he was stopped in the vicinity of Fourth and Gayoso. There were two suspects; one of them did escape. Suspect B, who was Michael Boyd, was arrested with the maroon purse under his jacket with the victim's I.D. inside.

Also found on the defendant at that time, Your Honor, was a marijuana cigarette, which was taken and tests were run and it did, in fact, turn out to be -- the test proved positive for marijuana.

The defendant was arrested and charged with petit larceny and unlawful possession of a controlled substance.

As to indictment number 95310, may it please the Court, the facts are that on June the 5th of 1983 at

approximately 9:30 a.m., the victim, Herbert Woodland, was shot one time by the defendant, Michael Boyd, and subsequently died on that date at 10:26 p.m.

The investigation revealed that on June the 5th of 1983, Michael Boyd, described as a rejected boyfriend of a one Margaret Lewis came to her home at 3032 McAdoo here in Memphis, Shelby County, Tennessee. He forced his way into her bedroom and was arguing with her when Herbert Woodland came to the open bedroom door and asked Margaret Lewis to leave with him, at which time the defendant, Michael Boyd, jumped up on the bed and fired four shots with a .38 caliber pistol. One shot struck the victim, Herbert Woodland, which, according to medical testimony and proof, the investigation would have shown, Your Honor, that this was the shot that caused the death of the defendant (sic).

Further investigation revealed that the defendant (sic) Woodland was not armed at the time of the shooting. There was another witness to the shooting. During the Memphis Police Department's investigation -- this other witness was Bobby Lewis, who I believe is the victim's -- excuse me, the brother of Margaret Lewis. A Memphis Police Department B and I color photgraphic spread was shown to him, seeking for him to point out the individual who was responsible for the shooting. He did, Your Honor, pick out the B of I photograph of the defendant, Michael Boyd.

Mr. Boyd was arrested and charged with the offense of murder in the second degree.

Those would have been the facts, Your Honor, of all the cases. I'd ask Mr. Hough to stipulate to the -- first of all, I don't know if I said it or not, but it is the recommendation that all of these sentences are to be run concurrently, or at the same time.

THE COURT: All right.

MR. HOUGH: Your Honor, we'd stipulate that those would be the facts of the two separate incidents here. We would ask the Court to accept the recommendation.

THE COURT: All right. Mr. Michael Joe Boyd, if you'll come around.

MICHAEL JOE BOYD was called, and after having been duly sworn, was examined and testified as follows:

EXAMINATION BY

THE COURT:

Q You're Mr. Michael Joe Boyd?

A Yes.

Q You're represented by Mr. Jack Hough?

A Yes.

Q You heard the statements given by Mr. Baker in regard to the facts?

A Yes.

Q And has the punishment by statute been explained to you for each of the offenses?

A Yes.

Q Do you understand, Mr. Boyd, you can plead not guilty to each of these charges and have a public and speedy trial by impartial jury on each case?

A Yes.

Q And at a trial by jury, the State would have the burden of proving you guilty beyond a reasonable doubt and to a moral certainty. You'd have the right to be present during the trial of each of these cases and confront any witnesses that the State would call to testify against you. You'd have a right to a lawyer at all stages, including the trial stage; do you understand?

A Yes.

Q And at trial, your lawyer would be there to handle your defense in each case and cross-examine any witnesses. You'd have the right to compel the production of the evidence in each of these cases and to use the Court process to subpoena any witnesses you wish to call to testify in your favor in each case; do you understand?

A Yes.

Q You could take the stand and testify in your own behalf in each case, if you wanted to, or if you chose not to testify, your failure to testify could not be brought out

against you in a trial of these matters; do you understand?

A Yes.

Q The jury would hear both sides, the State's proof as well as your proof in each case, and after the arguments, or summations, by the lawyers in each case and the charge given by the Court regarding the law, the jury would then be sent out to reach a verdict in each of these cases; do you understand?

A Yes.

Q The verdict of the jury could be either guilty or not guilty. If you're found guilty of some offense after a trial by jury, at that point your lawyer would have the right to make a motion to the Court for a new trial in the case or cases that you were found guilty of; do you understand?

A Yes.

Q And we'd have a hearing on the motion, and if the Court did not grant a new trial, you could then appeal to the Court of Criminal Appeals, the next highest Court; do you understand?

A Right.

Q If that Court ruled against you, you could still have your case presented to the State Supreme Court for review of the lower Court action, and the Supreme Court of Tennessee would make a determination in each of your cases; do you understand?

A Yes.

Q Are you waiving or giving up these rights to a trial by jury and rights of appeal that I have been explaining to you to enter a guilty plea in each of these cases?

A Yes.

Q Are you pleading guilty freely and voluntarily in each case?

A Yes.

Q Is anyone pressuring you, forcing you, coercing you or promising you anything to get you to plead guilty?

A No.

Q Do you understand there's no appeal from a voluntary guilty plea?

A Yes.

Q Did you sign this "Petition for Waiver of Trial by Jury and Request for Acceptance of a Guilty Plea" in each case?

A Yes.

Q All right. And did you also sign the negotiated plea agreements, each of these three agreements? This is unlawful possession of marijuana. Is that your signature on that?

A Yes.

Q And this is the petit larceny charge. That's your signature?

A Yes.

Q All right. And the murder second degree charge. Is that your signature?

A Yes.

Q And you're satisfied with Mr. Hough's investigation, preparation and presentation of each of these cases in Court?

A Yes.

THE COURT: The Court finds as a matter of fact and concludes as a matter of law the standards in the case of Baxter v. Rose are fully met and will accept the petition covering each of these cases.

Mr. Boyd, if you'll step down in front, the Court will sentence you. The Court finds you to be a standard offender, range one.

(DEFENDANT EXCUSED.)

THE COURT: In indictment 93006, upon your plea of guilty to the offense of unlawful possession of a controlled substance, to-wit, marijuana, as charged in the indictment, the Court finds you guilty and it's the judgment of this Court that you be taken by the sheriff and at his earliest convenience delivered to the keeper of the Shelby County Correctional Center, therein to serve a period of thirty days, and that you pay the costs of this cause, for which let mittimus and execution issue.

Mr. Michael Joe Boyd, in indictment 93007, upon your plea of guilty to the offense of petit larceny as charged in this indictment, the Court finds you guilty and it's the judgment of this Court that you be taken by the sheriff, committed to jail, and at his earliest convenience delivered to the keeper of the Shelby County Correctional Center, therein to serve a period of six months, and that you pay the costs of this cause, for which let mittimus and execution issue.

Mr. Michael Joe Boyd, in indictment 95310, upon your plea of guilty to this offense of murder in the second degree as charged in this indictment, the Court finds you guilty and it's the judgment of this Court that you be taken by the sheriff and committed to jail, and at his earliest convenience delivered to the warden of the State Penitentiary in Nashville, Tennessee, therein to serve a period of ten years, and that you pay the costs of this cause, for which let mittimus and execution issue.

Pursuant to Tennessee Code Annotated 40-32-07, the Court finds this to be a crime against persons and you are assessed an additional fee of twenty-one dollars over and above the regular costs, for which let mittimus and execution issue. Each of these sentences will run concurrently, or at the same time, in the State Penitentiary.

You may be seated.

00350

THIS WAS ALL THE EVIDENCE INTRODUCED AND PROCEEDINGS HAD RELATIVE TO THE APPEAL OF THE HEARING OF THE CAPTIONED CAUSE.

CERTIFICATE

I, the undersigned Denice C. Hudson, Official Court Reporter for the Thirtieth Judicial District of the State of Tennessee, do hereby certify that the foregoing is a true, accurate and complete transcript, to the best of my ability and knowledge, of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Criminal Courts of Shelby County, Tennessee, on the 17th day of October, 1983.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

This the 23rd day of March, 1989.

Denice C Hudson
Official Court Reporter

00351

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THE COURT: Mr. Thompson.

MR. THOMPSON: Ladies and gentlemen of the jury, I'm going to stand here right now and tell you that you will be justified under the proof of finding two aggravating circumstances; one is the Defendant has been previously convicted of a crime involving bodily harm, and that you hav already found by your verdict that he is guilty of Murder During the Perpetration of a Robbery.

You can also, under the law, consider the facts and circumstances of the case that you've just heard, and of course, we're not going to go through all of the proof again, but you can recall what you heard and you're entitled to rely on what you've heard. And you're entitled to once again evaluate the testimony of the witnesses that were calle at that part.

You will also hear from Mr. Boyd himself, Michael Joe Boyd, and you're going to hear why he didn't testify, and I think probably by now you can guess why he didn't testify. You're also going to hear from people who knew him, and have known him for years and years, and know him as something a little bit different from what you would think. The people who nurtured him and cared for him, and that he cared for, when his own family didn't,and they will be here and testify.

Now, as the Judge told you previously, you are t

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Q Now, you told us a while ago you don't know where Barbara Lee is. Is that right?

A No, I don't know where she at.

Q Isn't it a fact, and don't you know that she's sitting in the jail right now?

A I don't know nothing about her being in no jail.

Q How many times has she been to visit you since you've been in here?

A She come to visit me numerous of times.

Q And you told us you don't know where she is and how to get in touch with her?

A I don't know where she at. I know that she got another boyfriend. And the last time she came to see me he come and got her, so, you know, we not in contact with one another.

MR. BEASLEY: I don't have any more questions.

THE COURT: Any redirect?

MR. JONES: No, Your Honor.

THE COURT: Step down.

** (DEFENDANT EXCUSED FROM STAND) **

THE COURT: Call your next witness.

MR. THOMPSON: Anthony Boyce.

(ANTHONY BOYCE CALLED, DID NOT ANSWER)

MR. THOMPSON: Your Honor, he was outside a minute

Could we have a brief recess and let me run him down?

THE COURT: Call your next witness.

MR. THOMPSON: Your Honor, the next witness is Ms. Withers, and she is not here either. She's the one that had the child and had to go to the doctor. I'm sorry, I apologize. We had them lined up and I don't know what happened.

THE COURT: Take a five-minute recess.

(Whereupon, the jury retired from open court. A recess was had. Court resumed its session, and the following proceedings were had out of the presence of the jury:)

THE COURT: Is your witness available now?

MR. THOMPSON: Sir?

THE COURT: Is your witness available now?

MR. THOMPSON: Your Honor, this is one of the great distressing moments of my legal life. I had three witnesses and I talked to them this morning. They were here. One of them has been here -- He's an attorney from Baton Rouge. He has been here from the very beginning, and he was here when the verdict came in and he knew that we would be calling him in just a few minutes, and I can't find him. The other one was the lady I mentioned earlier, that I talked to this morning, and she left to take her daughter to the doctor cut

on Poplar Avenue and was going to return, and was going to le us know what the situation with her daughter was. So there they are. And I've already told the jury that we're going to hear from some other witnesses.

THE COURT: Well, maybe you will and maybe you won't hear from some other witnesses.

MR. THOMPSON: Well, --

THE COURT: A lawyer, of all people, ought to know that he's not allowed to leave. Is he under subpoena?

MR. THOMPSON: No, he was not under subpoena because he was from out of state. But he did voluntarily come up her because he's really a friend of the Defendant. They grew up together. They are relatives. Grew up and -- If the Cour will just give me a few more minutes and let me check downsta and see if the lady has called in. She was supposed to get i touch with our office and let us know what the situation was the doctor's. And these people were very concerned, I talkec to them for quite some time this morning.

THE COURT: Apparently, they're not too concerned, Mr. Thompson. Apparently not too concerned. I'll give you another ten minutes and then after that we're going to go to trial. Another ten minutes.

Tell the jury.

(Whereupon, court recessed. Court resumed its session, and the following proceedings were had out of the presence of the jury:)

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AFFIDAVIT OF ANTHONY BOYCE CANADA

Comes now your Affiant, and does declare under oath as follows:

1. My name is currently Anthony Boyce Canada. I used to be known as Anthony Boyce.

2. I currently reside at 3963 Otter Drive, Memphis, Tennessee. I am the General Sales Manager for Crossroads Ford.

3. I graduated from LeMoyne Owen College in 1983 with a Bachelor of Arts Degree. In 1987, I received my juris doctorate degree from Southern Law School in Baton Rouge, Louisiana.

4. I grew up with Michael Joe Boyd in LeMoyne Gardens housing project. I was a friend of Michael's and knew his family from age 9 to about age 17. Michael and I are the same age. We also attended some schools together.

5. Michael's mother, Peggy was thirteen when Michael was born. Peggy, being so young, acted more like a sister than a mother to Michael. Peggy never disciplined or gave guidance to Michael. Michael didn't ever call her "mom." Rather he called her Peggy.

6. Peggy was living with a man who didn't like Michael, and whom Michael was afraid of. Peggy was absent from home a lot. As a consequence, Michael and his brother Mitch basically raised themselves.

7. Without supervision, Michael became heavily influenced by Cedric Webb, a resident of LeMoyne Gardens at the time, who is presently serving a life sentence in New York.

8. I was fortunate that I had a loving mother and father who encouraged me to get an education, who disciplined me, and who kept me away from bad influences in the neighborhood. Michael Boyd was not as lucky as me. With no parents, left to fend for himself, he and his brother Mitch were easily led astray by bad influences in the projects.

9. Michael was clever, and had a compassionate heart. I never saw him angry.

10. I was more than willing to testify as a mitigation witness on Michael Boyd's behalf, and would have testified consistent with what is indicated above.

11. I was not present at Michael Boyd's trial, and wasn't even aware of specifically when it was occurring. I never was subpoenaed to testify at Michael Boyd's trial. I was never asked to voluntarily come to the trial – but I certainly would have if I had known about the trial.

12. At the time of Michael Boyd's trial (March 1988) I was living in Baton Rouge, Louisiana. I was never contacted by anyone with the defense team and asked to come to the trial, though I certainly would have if asked.

Further Affiant saith not.

Anthony Boyce Canada

STATE OF TENNESSEE
COUNTY OF SHELBY

Sworn to and subscribed before me this 9th day of November, 2006.

Notary Public

PENNE KING
STATE OF TENNESSEE NOTARY PUBLIC
COUNTY OF SHELBY

My Commission Expires:
February 10, 2010

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FAMILY BACKGROUND:

A. Father/Stepfather:

Lonnie Harris is about 30 years of age. He has not been previously married ____ times. He is employed by unknown. His income is approximately $ unknown per ____. He completed 7 years of education. His health status is considered to be good. He has not a previous police record for unknown. The father drinks unknown.

Remarks:

The mother's last contact with the father was in 1964. He was apparently just a passing stranger in the night.

B. Mother/Stepmother:

Peggy Ann Mays is 27 years of age. She has not been previously married ____ times. She is employed as a housewife. Her income is approximately $ N/A per ____. She completed (see below) years of education. Her health status is considered to be fair. She has not a previous police record for ____. The mother drinks not at all.

Remarks:

The mother was born and raised in Memphis. She suffers from asthma. She completed high school by taking the GED exam.

G. Home and Neighborhood:

Child's family resides in a/an apartment in which there are 4 rooms. It has 2 bedrooms. ____ people reside in the home. The home is located in a/an urban area where there is a very high rate of delinquency. The housekeeping standards appear to be good. Schools, churches, and recreational centers are/~~xxxxxxx~~ available.

Remarks:

The Goodwill Boys Club is down the street from the child's home. The child, in the past has participated in the club's activities. This summer the child showed no interest in the activities.

H. Religion:

The family's religious preference is Baptist. The family's attendance is irregular. The Child's present attendance is irregular.

DEVELOPMENTAL HISTORY OF CHILD:

A. Early Developmental History:

Child was born on (date) 4/23/60 in (POB) Memphis Tennessee. Youth was/~~xxxxxxx~~ a full term baby. Child developed at a normal rate except for N/A. Child was healthy except for asthma. Nutrition during infancy was adequate. Child lived with mother and grandparents during early years.

Remarks:

The mother and child moved from the grandparents' home in 1969.

B. Character Habits and Associations:

Child has a poor self image. Youth's personality could be best described as active and aggressive. Child does/~~does not~~ have leadership qualities. At unknown years of age, child had a marked change in habits, interests, and attitude. The family does/does not approve of his peer group.

Remarks:

The child has a penchant for hanging around with boys who have been to training school. The child is small for his age. He tends to take advantage of younger children in the same way older and larger boys take advantage of him.

C. Leisure, Recreation, and Group Activities:

Child has following interests:

The child has no inclination for sports. His mother stated that he has a general lack of interest in anything.

D. Education:

School	Grade	Date Attended	Passed/Retained
Hyde Park School	1-2-3	1966-69	failed 1st.
Cummings	4-6	1969-73	

Remarks:

The child represented a behavior problem during his fourth and fifth grade years. During the latter part of his sixth grade year his behavior again turned bad.

VII. SUMMARY, IMPRESSIONS OF CHILD, AND RECOMMENDATIONS:

The mother seems to be a partial cause of the boy's problems. One of his big problems is that he does not want to come home in the evenings. His mother expressed apprehension about him coming home on passes almost as if she did not want him to come home. His principal stated that he detected a lack of interest on the mother's part.

The mother is not mentally dull. She was very young when Michael was born and may be resentful of Michael.

A teacher told this counselor that Michael would do things he was not supposed to do and then lie about it even in the face of evidence to the contrary.

This child has developed into an antisocial being. He has actually expressed interest in being sent to training school, especially since his cousin, Reginald Boyd, was sent to Tennessee Youth Development Center a couple of months ago. His friends are allegedly boys who have already been to training school.

The child must somehow develop positive social values. Perhaps he could receive positive reinforcement when he does well in his school work or on a job.

IARY AND RECOMMENDATIONS
IAEL BOYD

ITMENT: On August 20, 1973 Michael was committed to the Department of ections for attempted robbery with a deadly weapon. He was found with .8" machette on his possesson at the time of the robbery. Michael pre- isly appeared before the court for vandalism and violation of curfew.

CAL AND DENTAL: Michael is in generally good health with only minor al problems. He is a 4'11" tall, 91 pound thirteen year old balck male is of a medium build.

AL HISTORY: On April 23, 1960 Michael was born in Shelby County. He is oldest of two sons born to Ms. Peggy Mayo. Ms. Mayo has never married supports her family through welfare benefits. The family is residing housing project which is located in a high delinquency area of Memphis. Mayo is very permissive with her son, and has a great deal of difficulty ipling him.

AVIORAL OBSERVATION: Michael is a very active youth who tries to pretend he is older than he actually is. Michael has difficulty forming close relationships and consistantly is frustrated when he is not granted own way in group activities. He is defiant in his attitude toward au- city figures and very suspicious.

CATIONAL AND VOCATIONAL: Michael attended Vance Junior High School, re he was enrolled as a seventh grade student. He is known to have been iscipline problem and has stated that he was frequently absent. On the e Range Achievement Test he scored a grade placement of 3.2 in reading in spelling and 6.3 in arithmetic. His mean score was 77.

LUATION: On the Peabody Picture Vocabulary Test Michael scored an IQ 92, and a mental age of 11-7. This places him within the average range intellectual ability. A personality assessment is not available.

OMMENDATIONS: Michael is in need of a very structured group setting re he can learn to relate properly with both peers and adults. He should placed at the third grade level in all courses related to reading and lish grammar. Sixth grade placement in mathmatics and science is gested. Emphasis should be placed on the reading labatory. A visual nination by a specialist should be made. All discipline should remain sistent and immediate.

CEMENT: TENNESSEE YOUTH DEVELOPMENT CENTER, SOMERVILLE

SOCIAL HISTORY

In February, 1976, Michael was arrested for Violation of Curfew. e charge was adjusted non-jdicially. He was allowed to remain at me under aftercare supervision.

Michael was arrested on March 6, 1976, and charged with Grand rceny from an Automobile. He admitted his participation in re- wing wheels from an automobile. His attitude was good after his rest and seemed to understand that he was going to have to be laced in a training school.

Michael has maintained a good attitude while under aftercare pervision. This counselor attributes Michael's delinquency pro- lems to the lack of supervision and moral support in the home. is mother never seemed very concerned about how late Michael stayed ut or where he was and who he was with when he was out. Michael as a good sense of humor and maintains a good disposition. This ounselor does not feel that Michael would be security risk where- ver he is placed. He could benefit from a program such as is ffered by Tall Trees Youth Guidance Center or from a half way ouse. In the event that no such placement is available this coun- elor would recommend Spencer Youth Center.

F:lb

6-16-77

Name of Institution | Address

BOYD, MICHAEL JOE #2017

Time Admitted 6/10/77

to Institution By Mr. Roberson

921 "G" Neptune Memphis, TN Phone 947-1600

e 4/23/60 Age 17 Eyes Brown Race Black Sex Male Ht 5'8"

140 Hair Black Marks, Scars, etc. None

Preference None Pastor

:e Memphis, TN Previous Address

Larceny of Automobile

County Shelby

Memphis, TN Judge Kenneth A. Turner Length of Commitment Indef.

or Property Recovered

Court Record Yes

Institutional Record TRGC-WYDC-Spencer-Tall Trees

iom Living at Time of Commitment Peggy Mayes-Mother

inal History: (as given by child)

ddress, and Date of School last attended Booker T. Washington Grade 10th

Principal

History: (as given by child)

Good Disabled to any degree No How

Doctor None Address

ization Insurance (Name — Address) Unknown

History: (as given by child)

Lonnie Harris Age Unknown

Los Angeles, California

Peggy Mayes Age 30

Same As Above

: Name (relationship) Address Age

ell Brother Same As Above 15

400027

VISIT AND CONTACT SHEET

NAME Mitchell (NMI) Boyd

FILE 59296

OFFICER Lieutenant Wilks, Jr.

975: Mitchell was given a Juvenile Summons by the police and charged with larceny of a bicycle after Marvin Teal complained that he, along with two other unidentified male blacks, jumped him at College and Walker and took his bicycle.

Friends of the victim told him where Mitchell lived and allegedly saw him take the bicycle home. It is unknown who these witnesses are at this time. Mitchell sternly denies the charge and states that he does not know anything about the incident.

The mother allegedly refused to open the door for the police officers and the victim when confronted with the allegations.

Recommendation: Strict probationary supervision.
Note: Mother cannot afford to pay support for child.
Officer: Lieutenant Wilks, Jr./ms

1975: Michael was given a Juvenile Summons on September 26, 1975 for shoplifting. Michael has admitted the offense. He stated that he did not have any shoes for school. This officer has observed him wearing houseshoes to school. He has no previous shoplifting charge.

Michael was released from Wilder Youth Development Center on June 5, 1974. He attends Vance Junior High School in the ninth grade. His attendance and school behavior have been good.

This counselor recommends that Michael be allowed to remain at home on aftercare supervision.
Officer: John Flaniken/js

1976: Michael was released from Tennessee Youth Development Center on June 4, 1974. He has been committed to training school once.

Michael was given a Juvenile Summons on December 12, 1975 for grand larceny of money, the property of Jackie Grey, Michael denies the charge.

Michael attends Porter Junior High School in the ninth grade. He was recently suspended from Vance Junior High School for fighting. His grades and attendance are poor.

Michael does not report to this counselor as he should. This counselor has to learn about trouble that Michael has gotten into from other sources.

Recommendation: If Michael is found guilty of the offense with which he is

Supplement to Social History

CHILD: Michael Joe Boyd

ADDRESS: 921 "G" Neptune, Memphis, TN 38126

MOTHER: Peggy Mays

ADDRESS: Same as child's

FATHER: Lonnie Harris

ADDRESS: Unknown

D.O.B. 5/23/60 AGE: 17 P.O.B. Memphis RACE/SEX: Male/Black

PREPARED BY: John Flanikan, Probation Counselor, Memphis Regional Office

DATE PREPARED: 6/10/77

Michael was released from Spencer Youth Center on November 30, 1976. He has previously been placed at Wilder Youth Development Center and Tall Trees Youth Guidance Center. Michael has had a total of 16 court complaints.

Michael began his last period of aftercare by not reporting to this counselor. He was arrested on 12/9/77 for larceny of carpet. He was caught in the act and admitted the charge. The judge allowed Michael to remain on aftercare because he had cooperated with the police.

Michael was then placed in the tenth grade at Booker T. Washington. The Board of Education awarded him some questionable credits when Michael insisted that he could do tenth grade work. Michael was expelled from the entire school system in March because of his poor attitude and almost total lack of attendance. The principal, Mose Walker, and the Pupil Service Director, Paul Drake, gave Michael several excellent chances which Michael refused to take advantage of. Michael is capable of doing regular school work if he wants to.

Michael's attitude toward aftercare was horrible. He refused to ever report when told to do so.

On May 17, 1977 Michael was arrested for auto theft. The theft occurred in April. Michael posed as a parking attendant and asked the victim to leave the keys in the car. When he was arrested in May he was trying to pull the same routine at another location nearby. It is believed that several cars were stolen by Michael and two accomplices in this fashion even though he was only accused of one such incident. Michael was seen riding in a car bearing the license plates of the stolen car by a man who found his car broken into and Michael standing nearby. When the man approached Michael, Michael jumped into the car with the stolen plates and the car sped off. A number of cars had been broken into that night at that location.

At the hearings the victim identified Michael positively as being the boy who posed as the parking attendant. The man mentioned above who has his car broken into also positively identified Michael. The first hearing was held June 2, 1977 and Michael filed for a rehearing on June 8, 1977. Michael was committed at both hearings.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MIKA'EEL ABDULLAH ABDUS-SAMAD, (formerly Michael J. Boyd),	)	
Petitioner,	)	
v.	)	No. 98-2756
RICKY BELL, Warden,	)	
Respondent.	)	

DECLARATION OF MIK'AEEL ABDULLAH ABDUS-SAMAD

Declarant Mika'eel Abdullah Abdus-Samad states as follows:

1. I am an adult resident citizen of Nashville, Davidson County, Tennessee. I make the following statements based on personal knowledge.

2. I am the petitioner in the above-styled action.

3. As a child I lived in a three-room North Memphis home in which approximately twelve others persons lived.

4. As a juvenile, I was placed in the Wilder Youth Center. At that center, staff beat me in the head with sticks and placed me in solitary confinement for approximately six months.

5. As a juvenile, I was placed in Tall Trees training school. At that school, staff beat me with a paddle.

6. As a juvenile, I was placed in Spencer Youth Center. At that center, staff withheld food from me and placed me in solitary confinement for three weeks.

7. As a juvenile, I was placed in Taft Youth Center. At that center, staff beat me with their fists and handcuffed me to an overhead hot pipe in such a way that my toes barely touched

the ground.

8. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Mika'eel Abdullah Abdus-Samad
Mika'eel Abdullah Abdus-Samad

3-19-99
Date

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MIKA'EEL ABDULLAH ABDUS SAMAD, (formerly Michael J. Boyd),	)	
Petitioner,	)	
v.	)	No. 98-2756
RICKY BELL, Warden,	)	
Respondent.	)	

DECLARATION OF JO MARIE BOYD

Declarant Jo Marie Boyd states as follows:

1. I am an adult resident citizen of Memphis, Shelby County, Tennessee. I make the following statements based on personal knowledge.

2. Peggy King is my sister. I am the material aunt of Michael Joe Boyd.

3. Ora Boyd was a housewife who did not work outside the home. Ora kept a nice home and provided it with affection and loving discipline.

4. Because of Peggy's young age, when Michael was born Ora became Michael's caretaker. She was crazy about Michael, and they had a positive, loving, relationship. Of all the persons in the home, Michael was Ora's favorite.

5. When Michael was in Ora's care, he was a well-behaved boy who rarely caused any problems. He was mindful of Ora and obeyed her.

6. When Michael was nine years old, Peggy King took him to live with her at Lemoyne Gardens.

7. On weekends, Michael would visit Ora. Ora became aware of the trouble that Michael

was getting into at Lemoyne Gardens, and she worried about his welfare. Because she was removed from Michael, however, she was unable to provide daily guidance and support for him.

8. On occasion, I visited Michael at Lemoyne Gardens. Violence and criminals pervaded that housing project. Because of that violence, I was fearful of going there.

9. When Ora died on October 15, 1985, the whole family was very upset. Due to the close relationship that Michael and Ora had when Michael was a child, Michael took Ora's death particularly hard.

10. I attended Michael's trial that resulted in his death sentence. If asked, I would have testified as to the matters contained in this declaration.

11. Until March 10, 1999, no person working on Michael's behalf contacted me respecting information I possess about Michael's background and character.

12. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Jo Marie Boyd

Jo Marie Boyd

3/11/99

Date

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MIKA'EEL ABDULLAH ABDUS SAMAD, (formerly Michael J. Boyd),	)	
Petitioner,	)	
v.	)	No. 98-2756
RICKY BELL, Warden,	)	
Respondent.	)	

DECLARATION OF IDA a/k/a F. T. THOMAS

Declarant Ida a/k/a F. T. Thomas states as follows:

1. I am an adult resident citizen of Memphis, Shelby County, Tennessee. I make the following statements based on personal knowledge.

2. I am the mother of three children.

3. I moved my family to Lemoyne Gardens ~~in~~ around 1975.

4. The children who lived in Lemoyne Gardens were, for the most part, good kids. Boys who did not have a family member who kept a close eye on them, however, fell prey to older boys from neighboring areas who came to Lemoyne Gardens to hang out.

5. The older boys would park their fancy cars on a street that ran through the middle of Lemoyne Gardens, pick up girls, and entice the younger boys with their fancy clothes and money. They brought drugs and violence to Lemoyne Gardens, and they turned children of Lemoyne Gardens who looked up to them into "dope boys" who would transact drug sales.

6. The Lemoyne Gardens neighborhood was "turf" over which drugs dealers and others fought. It became filled with violence, and gunfire and stabbings were a regular occurrence.

7. My son, Lopaka, was shot in the shoulder and leg at Lemoyne Gardens. The shoulder wound to my son was so gaping that you could see clear through him. The leg wound resulted in my son losing his leg.

8. In an effort to reduce the violence and crime that pervaded Lemoyne Gardens, the police attempted to establish a precinct in it. Like the young boys who lived in Lemoyne Gardens, however, the police who worked there fell prey to the surrounding environment. They became corrupt, and eventually the Memphis Police Department terminated the precinct it established in Lemoyne Gardens.

9. I knew Michael Joe Boyd when I lived at Lemoyne Gardens. In the midst of the violence and mayhem that prevailed, he attempted to help persons. For example, when Michael heard the gunshots that struck my son, he ran to the scene, picked up my son, and took him to the emergency room.

10. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Idella Thomas

Ida Thomas
a/k/a I. T.

3/13/99

Date

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MIKA'EEL ABDULLAH ABDUS SAMAD, (formerly Michael J. Boyd),	)	
Petitioner,	)	
v.	)	No. 98-2756
RICKY BELL, Warden,	)	
Respondent.	)	

DECLARATION OF ANTHONY BOYCE, ESQ.

Declarant Anthony Boyce states as follows:

1. I am an adult resident citizen of Memphis, Shelby County, State of Tennessee. I make the following statements based on personal knowledge.

2. I am an attorney and a NFLPA Sports Agent for ProSports.

3. I grew up with Michael and his other brothers, in the LeMoyne Gardens. I know both Michael and his family extremely well.

4. Michael and I are around the same age and were the closest during our pre-teen to teen years. Although as adults, we have traveled our separate ways, we have still kept in touch with one another and I consider him to be a friend of mine.

5. During the time in which we were growing up, we attended the same schools together (Georgia Avenue and Vance Jr. High).

6. I recalled Michael's mom, - "Ms. Peggy". She used to work a lot, especially at night. A lot of times, only Michael and his older brother, Mitch, would be at

home together and would have to take care of one another. Basically, they were raised by one another. Mitch, although only a year or so older than Michael, seemed to influence Michael in ways that were not necessarily positive.

7. Mitch was an enterprising young man in the community, - kind of like a "Robin Hood of the neighborhood" and a lot of the young men in the city, especially in Lemoyne Gardens, looked up to Mitch, including Michael, and considered him to be the "Prince of the City". Mitch had a lot of expensive cars, women, etc... which impressed a lot of young men in the Gardens that had not seen anything other than what the Gardens had to offer, which was not a lot. Mitch sold drugs and was considered to be "big time"; however, Michael never worked for Mitch. He did not have to; whatever he needed, he could get from Mitch.

8. Shortly after Michael was released from prison for the second degree murder charge, Michael went to Mitch's club and Mitch gave him fifty "one hundred dollar bills". This happened shortly before the incident in which Michael is presently on death row for. It is my opinion that Michael had money and everything else he wanted and did not need to rob anyone for anything. Additionally, Michael has relayed to me what happened that night and has told me that he did not shoot anyone. I believe him because he is a person with a "good heart", "compassionate" and I trust him. Also, I have never seen or known him to carry a gun.

9. Another influence in Michael's life that was not a positive one was a friend he had named Cedric Webb who is presently "doing life" in New York on a murder charge. They were really good friends and Michael seemed to follow him and look up to him a lot.

10. Although Michael and I were raised in a similar environment, I was fortunate due to the fact that, although my grandmother lived in the Gardens, I was raised outside of the Gardens by both my mother and father, and was exposed to an environment

outside of the projects that showed me that there was more to life that what the Gardens had to offer. However, his situation still "could have easily been mine."

11. The time frame in which Michael and I had to actually spend time together was cut short by the fact that he was in and out of youth centers. Michael has really spend the majority of his life incarcerated. He never had a chance to do anything positive, in my opinion, even when we were younger. For instance, one thing that was available to us was the "Boys Club" but Michael could not really be a part of that due to the fact that he was always being sent away for something.

12. When he would come home after being gone for long periods of time, I noticed a difference in him with respect to him being more aggressive. Although I have never known him to be violent, neither then or now, he did appear to be more aggressive towards people he did not know and more loyal to those he did.

12. I declare under penalty of perjury under the United States of America that the foregoing is true and correct to the best of my information and belief.

Anthony Boyce, Esq.

03-21-99

Date

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IN THE CRIMINAL COURT OF THE COUNTY OF ~~DAVIDSON~~ SHELBY

MICHAEL JOE **BOYD**,

Petitioner,

v.

STATE OF **TENNESSEE**,

Respondent.

FILED
1991 MAR 32 AM 9:33
M. J. JOE
BY:

PRO SE PETITION FOR POST-CONVICTION RELIEF

Petitioner Michael Joe Boyd submits, pro se, pursuant to T.C.A. § 40-30-101 et. seq. this Petition For Post-Conviction Relief.

In support thereof, petitioner would show as follows:

1. Petitioner is presently incarcerated at the River Bend Maximum Security Institution in Nashville, Tennessee.

2. Petitioner has a scheduled execution date of Friday, April 5, 1991.

3. Petitioner goes on "death watch" Monday, April 1, 1991.

4. Petitioner files this Petition For Post-Conviction Relief in order to secure a stay of execution that will keep petitioner from being placed on "death Watch" this Monday.

5. The indictment number was 87-02459.

6. Petitioner received a trial in Shelby County Tennessee and was sentenced to death by judgment of the trial court entered March 10, 1988.

7. Petitioner appealed his conviction and sentence to the Tennessee Supreme Court.

8. The Tennessee Supreme Court affirmed petitioner's conviction and sentence September 24, 1990. See State v. Boyd, 797 S.W.2d 589 (1990).

9. Petitioner filed a petition for A Writ of Certiorari in the United States Supreme Court.

10. The United States Supreme Court denied the petition.

11. Notwithstanding the above, petitioner believes that he should not be executed.

12. In support thereof, petitioner makes the following allegations.

13. Notwithstanding the above, the following constitute grounds to void the conviction(s) and sentence(s) in petitioner's case.

14. Petitioner's conviction(s) and sentence(s) were obtained in violation of his rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 7, 8, 9, 10, and 16 of the Constitution of the State of Tennessee. The basis for petitioner's claim that he is currently being restrained in violation of his federal and state constitutional rights under these amendments and sections include but is not limited to the following grounds.

15. Petitioner respectfully submits to the Court that his counsel was ineffective in his representation of him at trial, on appeal, and in his petition for post conviction relief, and that such representation deprived petitioner of his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Constitution of the State of Tennessee. Petitioner avers that his counsel was ineffective for the following non-exhaustive reasons:

a. Counsel failed to investigate the background and personal and medical history of petitioner for the existence of mitigating evidence and/or to present such evidence during the penalty phase of trial.

b. Counsel failed to request and obtain adequate expert and investigative assistance.

c. Counsel failed to develop a reasonable trial strategy or defense for petitioner.

d. Counsel failed to investigate and present all available evidence that would support petitioner's claims of innocence regarding all charges including, but not limited to, the first degree murder charge.

e. Counsel failed to properly rebut the State's case at either the guilt/innocence phase or the sentencing phase of trial.

f. Counsel failed to investigate for witnesses and/or prepare, and present them during the penalty phase of trial to demonstrate all aspects of petitioner's character and background that would support a sentence less than death.

g. Counsel failed to prepare adequately for either the guilt/innocence phase or the

penalty phase of trial and to develop and present to the jury a coherent theory of defense at either phase.

h. Counsel lacked the experience and knowledge necessary for effective representation of petitioner in a death penalty case.

i. Counsel failed to properly voir dire jurors.

j. Counsel failed to properly voir dire jurors for racial bias.

k. Counsel failed to object to the exclusion of jurors because of their general opposition to the death penalty.

l. Counsel failed to exclude jurors whose opinions would lead them to impose the death penalty in every case or those jurors whose views would prevent or substantially impair the performance of their duties as a juror.

m. Counsel failed to challenge for cause those jurors who by their answers showed some type of bias against the petitioner, his case or any group or class to which the petitioner belongs.

n. Counsel failed to file necessary motions before, during and after trial, on direct appeal or on post-conviction.

o. Counsel failed to adequately advise petitioner as to the consequences of his failure to testify and/or render advice sufficient to allow petitioner to make an informed and conscious choice not to testify at either the guilt/innocence or penalty phase of trial or any prior post-conviction proceedings.

p. Counsel failed to consult with petitioner at crucial stages during all prior proceedings.

q. Counsel failed to object to the prosecutor's improper, inflammatory, prejudicial, inappropriate and misleading or inaccurate statements concerning the law, the evidence or the petitioner during voir dire, opening, direct examination, cross examination, closing, and rebuttal closing at the guilt phase of petitoner's trial, and during opening, direct examination, cross examination, closing and rebuttal closing at the penalty phase of petitioner's trial.

r. Counsel failed to object to the State's unconstitutionally discriminatory exercise of peremptory challenges to remove blacks women, young people and other cognizable groups which petitioner was entitled to have as members of his jury under his right to a jury drawn from a fair cross section of the community and his rights to due process and equal protection.

s. Counsel failed to object to jury instructions which shifted the burden of proof on an element of the crime to the petitioner.

t. Counsel failed to object to jury instructions at the penalty phase which shifted the burden of proof to petitioner to show the existence of mitigating circumstances.

u. Counsel failed to object to inaccurate and misleading statements of law and comments by the trial judge.

v. Counsel failed to object to the jury's consideration of the impact of the crime on the victim, the victim's family, society and/or the victim's social, moral or religious worth.

w. Counsel failed to object to jury instructions which limited the jury's individualized consideration of mitigating factors including, but not limited to, sympathy.

x. Counsel failed to have the court instruct the jury on all lesser included offenses.

y. Counsel failed to have the court instruct the jury on the effect of their inability to agree on a sentence of death and/or on the meaning of a life sentence or the petitioner's eligibility for any release.

z. Counsel failed to object to the jury's consideration of unconstitutional statutory aggravating circumstances and non-statutory aggravating circumstances at the penalty phase.

aa. Counsel failed to raise the above ineffective assistance of counsel claims on motion for new trial, appeal or in prior post conviction proceedings.

16. Further, petitioner submits that his counsel was constitutionally ineffective in failing to raise and/or properly brief the following claims which petitioner now is compelled to raise in this petition for post conviction relief.

17. The jury instructions in this case at the guilt phase violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 16 , 8 and 9 of the Tennessee Constitution. These unconstitutional jury instructions include, but are not limited to, the following:

a. Instructions that sympathy should not be considered.

b. Definitions of premeditation, malice, reasonable doubt, the presumption of innocence and other terms or phrases which were inaccurate, incomplete, confusing,

inadequately defined or tended to mislead the jury.

c. Instructions which shifted the burden of proof on an element of the crime to petitioner.

d. Instructions which limited the jury's opportunity to consider evidence concerning reliability of a confession.

18. The jury instructions in this case at the penalty phase violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 16, 8 and 9 of the Tennessee Constitution. These unconstitutional jury instructions include, but are not limited to, the following:

a. Instructions that shifted the burden to petitioner to show the existence of mitigating circumstances.

b. Instructions on aggravating circumstances which failed to narrow the class of persons eligible for the death penalty.

c. Instructions which limited the jury's consideration of mitigating factors including, but not limited to, sympathy.

d. Instructions that diminished the jury's responsibility for imposing the death penalty.

e. Instructions on aggravating circumstances, which were vague and overbroad as applied in petitioner's case and which did not adequately channel the jury's discretion and invited arbitrary, capricious and inconsistent application of the death penalty.

f. Instructions on aggravating circumstances that duplicated an element of the crime itself.

g. Instructions which allow application of more than one aggravating circumstance to be based upon the same set of facts or "double counting" of aggravating circumstances.

19. Either before petitioner's trial, during the guilt/innocence phase or penalty phase of his trial, or during post trial or post conviction proceedings, the Court committed errors that violated petitioner's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment to the United States Constitution and Article I, Sections 7, 8, 9, 10 and 16 of the Tennessee Constitution. These unconstitutional errors include but are not limited to the following:

a. The Court denied petitioner's request for adequate funds to obtain expert and investigative assistance.

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b. The Court denied petitioner's pretrial, trial, post trial and post-conviction motions, including but not limited to such as motions: _____ .

c. The Court failed to instruct the jury on all lesser included offenses.

d. The Court kept relevant facts from the jury regarding petitioner's sentence.

e. The Court allowed the jury to consider the impact of the crime on the victim or the victim's family.

f. The Court denied petitioner an opportunity to rebut the State's case at either the guilt/innocence or penalty phase of trial.

g. The Court allowed the jury to consider non-statutory aggravating circumstances.

h. The Court allowed the jury to consider constitutionally invalid prior conviction(s) as aggravating factor(s) under T.C.A. §39-2-203 (i) (2).

i. The Court allowed the State to systematically exclude cognizable groups of jurors, such as blacks, women, young people, from the jury.

j. The Court failed to allow voir dire of the jury for racial bias or any other bias or prejudice prospective jurors might have.

k. The Court failed to allow voir dire of the jury concerning misconceptions they might have about parole and other relevant matters concerning sentencing.

l. The Court improperly excluded jurors based upon their attitudes toward the death penalty, the defendant, the offense , possible defenses , and aggravating and mitigating circumstances.

m. The Court improperly failed to exclude jurors based upon their attitudes toward the death penalty, the defendant, the offense , possible defenses , and aggravating and mitigating circumstances. whose views would prevent or substantially impair the performance of their duties as a juror.

n. The Court improperly limited defense inquiry into the jurors attitudes toward the death penalty, the defendant, the offense , possible defenses , and aggravating and mitigating circumstances.

o. The Court improperly allowed the prosecutor excessive latitude by permitting inquiry into the jurors attitudes toward the death penalty, the defendant, the offense , possible defenses , and aggravating and mitigating

circumstances.

p. The Court improperly admitted statements of petitioner given during a psychological examination or evaluation.

q. The Court improperly interpreted the statutory mitigating circumstances and/or the non-statutory mitigating circumstances so as improperly limit the ability of the defense to present mitigation.

r. The Court interpreted the statutory aggravating circumstances to allow the introduction of improper evidence.

20. Either before, during or after petitioner's trial, the State violated petitioner's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 8, 9 and 16 of the Tennessee Constitution. These unconstitutional violations include, but are not limited to, the following:

a. The State's argument and conduct diminished the jury's responsibility for imposing the death penalty.

b. The State's argument and conduct mistated or caused misstatements of facts in evidence and/or misled the jury.

c. The State's argument and conduct implicated and/or denigrated the petitioner's rights including, but not limited to, his right to remain silent and his right to counsel.

d. The State failed to disclose evidence to which the accused was entitled at either the guilt or penalty phase of the trial.

e. The State failed to reveal all promises, deals, agreements, understandings,tacit, explicit or implicit made by on or on behalf of the state to any witness or potential witness.

f. The State exercised its peremptory challenges in a manner to exclude member's of any cognizable group including, but not limited to, those based upon race, sex ,age, religion, ethnic origin, attitudes toward the death penalty, economic and geographic status or political beliefs.

21. The Tennessee Death Penalty statute, including T.C.A. §39-2-203 and T.C.A. §39-2-205, which allow for the imposition of the sentence of death upon conviction of murder in the first degree, violates petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections 8, 9, 10, 14 and 16 of the Tennessee Constitution and the Rules of Law as espoused and mandated by the United States Supreme Court. These violations include, but are not limited to, the following:

a. T.C.A. §39-2-203(f) and (g) provides insufficient guidance to the jury concerning who has the burden of proving whether mitigation outweighs aggravation and what standard of proof the jury should use in making that determination.

b. T.C.A. §39-2-203 does not sufficiently narrow the population of defendants, convicted of first degree murder, who are eligible for a sentence of death.

c. T.C.A. §39-2-203 does not sufficiently limit the exercise of the jury's discretion because, once the jury finds aggravation, it can impose the sentence of death no matter what mitigation is shown.

d. T.C.A. §39-2-203 insufficiently limits the exercise of the jury's discretion by mandatorily requiring the jury to impose a sentence of death if it finds the aggravating circumstances to outweigh the mitigating circumstances.

e. T.C.A. §39-2-203 allows the jury to accord too little weight to non-statutory mitigating factors and limits the jury's options to impose the sentence of life.

f. T.C.A. §39-2-203 does not require the jury to make the ultimate determination that death is the appropriate punishment.

g. T.C.A. §39-2-203 does not inform the jury of its ability to impose a life sentence out of mercy.

h. T.C.A. §39-2-203 provides no requirement that the jury make findings of facts as to the presence or absence of mitigating circumstances, thereby preventing effective review on appeal under T.C.A. §39-2-205(c).

i. The imposition of the sentence of death pursuant to T.C.A. §39-2-203 is cruel and unusual punishment.

j. The imposition of the sentence of death pursuant to T.C.A. §39-2-203 by electrocution is cruel and unusual punishment.

k. The imposition of the sentence of death pursuant to T.C.A. §39-2-203 has been imposed in Tennessee on the basis of race, sex, geographic region in the state, economic and political status of the defendant.

l. The proportionality and arbitrariness review conducted by the Tennessee Supreme Court pursuant to T.C.A. §39-2-205 is inadequate and deficient.

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m. T.C.A.§39-2-203(c), permits the introduction of relatively unreliable evidence in the State's proof of aggravation or rebuttal of mitigation.

n. T.C.A. §39-2-203(d) allows the State to make final closing arguments to the jury in the penalty phase.

o. T.C.A. §39-2-203(h) prohibited the jury from being informed of the consequences of its failure to reach a unanimous verdict in the penalty phase.

22. The above and foregoing constitute grounds to void imposition of the death penalty in petitioner's case.

23. The above and foregoing constitute grounds to void the conviction(s) in petitioner's case.

24. One or more of the above claims were not raised previously due to ineffective assistance of counsel, the law regarding a claim not being established at the time, or counsel's failure to apprise petitioner of the claim or its relevance to his case.

25. Petitioner is without funds to hire counsel or any support personnel.

WHEREFORE, petitioner prays:

1. That he be allowed to proceed in forma pauperis.

2. That a stay of execution be granted pending resolution of the issues presented in this petition

3. That counsel be appointed to represent petitioner.

4. That appointed counsel be given sufficient time to investigate petitioner's case and prepare an appropriate amended pleading setting forth such grounds as counsel deems proper and to supplement the grounds claimed herein.

5. That petitioner be provided sufficient funding for expert, investigative, mental health and other appropriate assistance.

6. That the Court hold an evidentiary hearing on the above matters.

7. That the Court grant petitioner relief herein.

Respectfully submitted,

Michael Joe Boyd
No.
River Bend Maximum Security Institution
7475 Cockrill Bend Industrial Road
Nashville, Tennessee 37209

[redacted]

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[redacted]

IN THE CRIMINAL COURT OF THE COUNTY OF ~~DAVIDSON~~ 30th DAY

91 APR -1 AM 9 34

M. J. JOHNSON, CLERK

BY: [signature]

MICHAEL JOE BOYD,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

MEMORANDUM IN SUPPORT OF MOTION FOR A STAY OF EXECUTION

Petitioner Michael Joe Boyd submits pro se this Memorandum in Support of his Motion For A Stay Of Execution.

1. Petitioner is scheduled to be executed Friday, April 5, 1991. Petitioner goes on "death watch" Monday, April 1, 1991. Petitioner has this day filed pro se a Petition For Post-Conviction Relief.

2. Pursuant to T.C.A. § 40-30-109 (b) this Court is authorized to issue a stay of execution so that this Court will be able to consider petitioner's Petition For Post-Conviction Relief.

3. Because of the substantiality of the claims raised in the petition for post-conviction relief, it is manifest that the petition cannot be fairly disposed of immediately or summarily. In particular, many of the claims raised by petitioner cannot be fully and fairly adjudicated without an evidentiary hearing since they "allege[] sufficient facts to establish that petitioner's conviction was void because of [the] denial of constitutional rights, state or federal." Baxter v. Rose, 523 S.W.2d 930, 939 (Tenn. 1979); see Skinner v. State, 472 S.W.2d 903 (Tenn. Ct. Cr. App. 1971); Moran v. State, 457 S.W.2d 886 (Tenn. Ct. Cr. App. 1970).

4. "[T]here would be a miscarrage of justice if the irremediable act of execution is taken," Modesto v. Nelson, 296 F. Supp. 1375, 1376-77 (N.D. Cal. 1969), before petitioner's challenge to his convictions and sentence of death can be "fairly heard and finally adjudicated." Hill v. Nelson, 273 F. Supp. 790, 795 (N.D. Cal. 1967). Accord, Evans v. Bennett, 440 U.S.1301 (1979) (Rehnquist J., Circuit Justice); Shaw v. Martin, 613 F.2d 487 (4th Cir. 1980)(Phillips, J., Single Circuit Judge).

For the foregoing reasons, petitioner respectfully requests that a stay of execution be granted pending the hearing and determination of his petition for post conviction relief.

Respectfully submitted,

Mikeal Abdullah Abdus-Samad

Michael Joe Boyd
No.
River Bend Maximum Security Institution
7475 Cockrill Bend Industrial Road
Nashville, Tennessee 37209

CERTIFICATE OF SERVICE

I, Michael Joe Boyd, hereby certify that the foregoing has been mailed, postage prepaid, to the District Attorney General, Shelby County Justice Center, 201 Poplar - Suite 301, Memphis, Tennessee 38103 on this the 1st day of April, 1991.

Mikā'il Abdullah Abdus-Samad
Michael Joe Boyd

THURSDAY, MAY 6, 1993

Court met pursuant to adjournment, the Honorable JOSEPH B. MCCARTIE, Judge presiding, whereupon the following proceedings were had to-wit:

MICHAEL J. BOYD
Petitioner,

VS. P-08888 PETITION FOR POST CONVICTION RELIEF

STATE OF TENNESSEE,
Respondent.

It is ordered by the Court that the above cause be reset to SEPTEMBER 23, 1993, for HEARING.

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THURSDAY, MAY 6, 1993

IN THE CRIMINAL COURTS OF SHELBY COUNTY, TENNESSEE

DIVISION 8

ORDER APPOINTING PRIVATE COUNSEL TO REPRESENT PETITIONER

STATE OF TENNESSEE

VS: NO. P 08888

Michael Boyd
PETITIONER

Be it remembered that the Court ascertained in the absence of the Petitioner, that the above petitioner is financially unable to employ counsel as a result of his present incarceration, and that it is incumbent upon the Court to appoint counsel to represent said Petitioner's interests in his absence.

And the Court is, therefore, of the opinion that the Public Defender of Shelby County, Tennessee, should not be appointed to represent the petitioner herein, for good cause shown.

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that M. Dan Seward, a licensed Attorney in the State of Tennessee, be appointed to represent the petitioner in the above captioned cause.

Enter this 6th day of May, 19 93.

JUDGE Joseph B. Mc Cartie

FILED 5-6-93
MINERVA J. JOHNICAN, CLERK
BY Carolyn Rucker D.C.

Whereupon Court adjourned until 9:30 a.m. tomorrow.

/s/ JOSEPH B. MCCARTIE
JUDGE

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IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS
DIVISION VIII

MICHAEL JOE BOYD, PETITIONER,	*	
VS.	*	CASE NO. P-8888
STATE OF TENNESSEE, RESPONDENT.	*	

FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON PETITION FOR POST-CONVICTION RELIEF

This matter comes before the Court on a Petition for Post-Conviction Relief and one (1) Amendment to the aforementioned Petition filed by Michael Joe Boyd, Petitioner.

FINDINGS OF FACT

MICHAEL JOE BOYD was convicted by jury of felony murder and two counts armed robbery in Division VIII of the Shelby County Criminal Court, Criminal Court of Tennessee for the Thirtieth Judicial District at Memphis. The Petitioner received the death sentence for the murder conviction and consecutive life sentences for the armed robbery convictions.

The petitioner was represented at the trial level by Robert Jones and Edward Thompson, Assistant Public Defenders for Shelby County. On the appeal of the his convictions, the Petitioner was represented by Mark Ward, under contract with the Office of the Public Defender for Shelby County to represent defendants on appeal.

The Tennessee Supreme Court affirmed the Petitioner's convictions and sentences on September 24, 1990. State of Tennessee v. Boyd, 797 S.W.2d 589 (1990). The United States Supreme Court denied the Petitioner's application for certiorari.

This is the first petition for post-conviction relief filed by the Petitioner, having exhausted his avenues of direct appeal at the State level. Post-conviction relief may be granted only if a

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conviction or sentence is void or voidable due to the violation of a constitutional right. Rhoden v. State, 816 S.W.2d 56 (Tenn. Crim. App. 1991). However, the Petitioner has failed to prove any of the allegations in his Petition and its Amendment by a preponderance of the evidence that will serve to change either the convictions or the sentences. State v. Kerley, 820 S.W.2d 753 (Tenn. Crim. App. 1991)

BASIS FOR RELIEF

The Petitioner's allegations of error in his convictions and sentences are listed in two (2) documents:

1) PRO SE PETITION FOR POST-CONVICTION RELIEF[1] (filed April 1, 1991); and

2) AMENDMENT TO PETITION FOR POST CONVICTION RELIEF[2] (filed January 21, 1994).

The Petition and the Amendment present a veritable "laundry list" of alleged errors that number almost one hundred (100). The averments in the Petitioner's application for post-conviction relief claim error in six (6) discernible areas:

1) Ineffective assistance of counsel at the trial level;

2) Improper jury instructions;

3) Constitutional errors by the Trial Court before and during the trial;

4) Improper conduct by the State in the prosecution of the case;

5) Ineffective assistance of counsel at the appellate level; and

6) The imposition of the death penalty.

While some of the averments contained in the Petition and the Amendment are redundant, the Court will address each of them in order to assure that the Petitioner cannot take issue as to the Court's thoroughness in the review of his case. All the averments

[1] PRO SE PETITION FOR POST-CONVICTION RELIEF hereinafter referred to as "Petition."

[2] AMENDMENT TO PETITION FOR POST CONVICTION RELIEF hereinafter referred to as "Amendment."

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that follow appear **exactly**[3] as they do in the Petition and its Amendment.

The PRO SE PETITION FOR POST-CONVICTION RELIEF contains the following averments that allege error:

> 15)Petitioner respectfully submits to the Court that his counsel was ineffective in his representation of him at trial, on appeal, and in his petition for post conviction relief, and that such representation deprived petitioner of his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Constitution of the State of Tennessee. Petitioner avers that his counsel was ineffective for the following non-exhaustive reasons:
>
> a) Counsel failed to investigate the background and personal and medical history of petitioner for the existence of mitigating evidence and/or to present such evidence during the penalty phase of the trial.
>
> b) Counsel failed to request and obtain adequate expert and investigative assistance.
>
> c) Counsel failed to develop a reasonable trial strategy or defense for petitioner.
>
> d) Counsel failed to investigate and present all available evidence that would support petitioner's claims of innocence regarding all charges including, but not limited to, the first degree murder charge.
>
> e) Counsel failed to properly rebut the State's case at either the guilt/innocence phase or the sentencing phase of trial.
>
> f) Counsel failed to investigate for witnesses and/or prepare and present them during the penalty phase of trial to demonstrate all aspects of petitioner's character and background that would support a sentence less than death.
>
> g) Counsel failed to prepare adequately for either the guilt/innocence phase or the penalty phase of trial and to develop and present to the jury a coherent theory of defense at either phase.
>
> h) Counsel lacked the experience and knowledge necessary for effective representation of petitioner in a death penalty case.
>
> i) Counsel failed to properly voir dire jurors.
>
> j) Counsel failed to properly voir dire jurors for racial bias.
>
> k) Counsel failed to object to the exclusion of jurors because of their general opposition to the death penalty.

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[3] The grammar, spelling, capitalization, and language of the Petition's averments appear in this opinion as they do in the original Petition and the Amendment; **the designation (sic) is not used to identify grammar**, spelling, and capitalization errors in the averments.

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l) Counsel failed to exclude jurors whose opinions would lead them to impose the death penalty in every case or those jurors whose views would prevent or substantially impair the performance of their duties as a juror.

m) Counsel failed to challenge for cause those jurors who by their answers showed some type of bias against the petitioner, his case or any group or class to which the petitioner belongs.

n) Counsel failed to file necessary motions before, during and after trial, on direct appeal or on post-conviction.

o) Counsel failed to adequately advise petitioner as to the consequences of his failure to testify and/or render advice sufficient to allow petitioner to make an informed and conscious choice not to testify at either the guilt/innocence or penalty phase of trial or any prior post-conviction proceedings.

p) Counsel failed to consult with petitioner at crucial stages during all prior proceedings.

q) Counsel failed to object to the prosecutor's improper, inflammatory, prejudicial, inappropriate and misleading or inaccurate statements concerning the law, the evidence or the petitioner during voir dire, opening, direct examination, cross examinations, closing, and rebuttal closing at the guilt phase of the petitioner's trial, and during opening, direct examination, cross examinations, closing, and rebuttal closing at the penalty phase of the petitioner's trial.

r) Counsel failed to object to the State's unconstitutionally discriminatory exercise of peremptory challenges to remove blacks women, young people and other cognizable groups which petitioner was entitled to have as members of his jury under his right to a jury drawn from a fair cross section of the community and his rights to due process and equal protection.

s) Counsel failed to object to jury instructions which shifted the burden of proof on an element of the crime to the petitioner.

t) Counsel failed to object to jury instructions at the penalty phase which shifted the burden of proof to petitioner to show the existence of mitigating circumstances,

u) Counsel failed to object to inaccurate and misleading statements of law and comments by the trial judge.

v) Counsel failed to object to the jury's consideration of the impact of the crime on the victim, the victim's family, society and/or the victim's social, moral, or religious worth.

w) Counsel failed to object to jury instructions which limited the jury's individualized consideration of mitigating factors including but not limited to, sympathy.

x) Counsel failed to have the court instruct the jury on all lesser included offenses.

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y) Counsel failed to have the court instruct the jury on the effect of their inability to agree on a sentence of death and/or on the meaning of a life sentence or the petitioner's eligibility for any release.

z) Counsel failed to object to the jury's consideration of unconstitutional statutory aggravating circumstances and non-statutory aggravating circumstances at the penalty phase.

aa) Counsel failed to raise the above ineffective assistance of counsel claims on motion for new trial, appeal or in prior post conviction proceedings.

16) Further, petitioner submits that his counsel was constitutionally ineffective in failing to raise and/or properly brief the following claims which petitioner now is compelled to raise in this petition for post conviction relief.

17) The jury instructions in this case at the guilt phase violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 16, 8 and 9 of the Tennessee Constitution. These unconstitutional jury instructions include, but are not limited to, the following:

a) Instructions that sympathy should not be considered.

b) Definitions of premeditation, malice, reasonable doubt, the presumption of innocence and other terms or phrases which were inaccurate, incomplete, confusing, inadequately defined or tended to mislead the jury.

c) Instructions which shifted the burden of proof on an element of the crime to petitioner.

d) Instructions which limited the jury's opportunity to consider evidence concerning reliability of a confession.

18) The jury instructions in this case at the penalty phase violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 16, 8 an 9 of the Tennessee Constitution. These unconstitutional jury instructions include, but are not limited to, the following:

a) Instructions that shifted the burden to petitioner to show the existence of mitigating circumstances.

b) Instructions on aggravating circumstances which failed to narrow the class of persons eligible for the death penalty.

c) Instructions which limited the jury's consideration of mitigating factors including, but not limited to, sympathy.

d) Instructions that diminished the jury's responsibility for imposing the death penalty.

e) Instructions on aggravating circumstances, which were vague and overbroad as applied in petitioner's case and which did not adequately channel jury's discretion and invited arbitrary, capricious and inconsistent application of the death penalty.

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f) Instructions on aggravating circumstances that duplicated an element of the crime itself.

g) Instructions which allow application of more than one aggravating circumstance to be based upon the same set of facts or "double counting" of aggravating circumstances.

19) Either before petitioner's trial, during the guilt/innocence phase or penalty phase of his trial, or during post trial or post conviction proceedings, the Court committed errors that violated petitioner's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment to the United States Constitution and Article I, Sections 7, 8, 9, 10 and 16 of the Tennessee Constitution. These unconstitutional errors include but are not limited to the following:

a) The Court denied petitioner's request for adequate funds to obtain expert and investigative assistance.

b) The Court denied petitioner's pretrial, trial, post trial and post-conviction motions, including but not limited to such as motions:_____ .

c) The Court failed to instruct the jury on all lesser included offenses.

d) The Court kept relevant facts from the jury regarding petitioner's sentence.

e) The Court allowed the jury to consider the impact of the crime on the victim or the victim's family.

f) The Court denied petitioner an opportunity to rebut the State's case at either the guilt/innocence or penalty phase of trial.

g) The Court allowed the jury to consider non-statutory aggravating circumstances.

h) The Court allowed the jury to consider constitutionally invalid prior conviction(s) as aggravating factor(s) under T.C.A. §39-2-203 (i) (2).

i) The Court allowed the State to systematically exclude cognizable groups of jurors, such as blacks, women, young people, from the jury.

j) The Court failed to allow voir dire of the jury for racial bias or any other bias or prejudice prospective jurors might have.

k) The Court failed to allow voir dire of the jury concerning misconceptions they might have about parole and other relevant matters concerning sentencing.

l) The Court improperly excluded jurors based upon their attitudes toward the death penalty, the defendant, the offense, possible defenses, and aggravating and mitigating circumstances.

m) The Court improperly failed to exclude jurors based upon their attitudes toward the death penalty, the defendant, the offense, possible defenses, and aggravating and mitigating circumstances. whose views would prevent or substantially impair the performance of their duties as a juror.

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n) The Court improperly limited defense inquiry into the jurors attitudes toward the death penalty, the defendant, the offense, possible defenses, and aggravating and mitigating circumstances.

o) The Court improperly allowed the prosecutor excessive latitude by permitting inquiry into the jurors attitudes toward the death penalty, the defendant, the offense, possible defenses, and aggravating and mitigating circumstances.

p) The Court improperly admitted statements of petitioner given during a psychological examination or evaluation.

q) The Court improperly interpreted the statutory mitigating circumstances and/or the non-statutory mitigating circumstances so as improperly limit the ability of the defense to present mitigation.

r) The Court interpreted the statutory aggravating circumstances to allow the introduction of improper evidence.

20) Either before, during or after petitioner's trial, the State violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 8, 9, 10, 14 and 16 of the Tennessee Constitution and the Rules of Law as espoused and mandated by the United States Supreme Court. These violations include, but are not limited to, the following:

a) T.C.A. §39-2-203(f) and (g) provides insufficient guidance to the jury concerning who has the burden of proving whether mitigation outweighs aggravation and what standard of proof the jury should use in making that determination.

b) T.C.A. §39-2-203 does not sufficiently narrow the population of defendants, convicted of first degree murder, who are eligible for a sentence of death.

c) T.C.A. §39-2-203 does not sufficiently limit the exercise of the jury's discretion because, once the jury finds aggravation, it can impose the sentence of death no matter what mitigation is shown.

d) T.C.A. §39-2-203 insufficiently limits the exercise of the jury's discretion by mandatorily requiring the jury to impose a sentence of death if it finds the aggravating circumstances to outweigh the mitigating circumstances.

e) T.C.A. §39-2-203 allow the jury to accord too little weight to non-statutory mitigating factors and limits the jury's options to impose the sentence of life.

f) T.C.A. §39-2-203 does not require the jury to make the ultimate determination that death is the appropriate punishment.

g) T.C.A. §39-2-203 does not inform the jury of its ability to impose a life sentence out of mercy.

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h) T.C.A. §39-2-203 provides no requirement that the jury make findings of facts as to the presence or absence of mitigating circumstances, thereby preventing effective review on appeal under T.C.A. §39-2-205(c).

i) The imposition of the sentence of death pursuant to T.C.A. §39-2-203 is cruel and unusual punishment.

j) The imposition of the sentence of death pursuant to T.C.A. §39-2-203 by electrocution is cruel and unusual punishment.

k) The imposition of the sentence of death pursuant to T.C.A. §39-2-203 has been imposed in Tennessee on the basis of race, sex, geographic region in the state, economic and political status of the defendant.

l) The proportionality and arbitrariness review conducted by the Tennessee Supreme Court pursuant to T.C.A. §39-2-205 is inadequate and deficient.

m) T.C.A. §39-2-203(c), permits the introduction of relatively unreliable evidence in the State's proof of aggravation or rebuttal of mitigation.

n) T.C.A. §39-2-203(d) allows the State to make final closing arguments to the jury in the penalty phase.

o) T.C.A. §39-2-203(h) prohibited the jury from being informed of the consequences of its failure to reach a unanimous verdict in the penalty phase.

24) One or more of the above claims were not raised previously due to ineffective assistance of counsel, the law regarding a claim not being established at the time, or counsel's failure to apprise petitioner of the claim or its relevance to his case.

The AMENDMENT TO PETITION FOR POST CONVICTION RELIEF contains the following averments that allege error:

10) Petitioner alleges that he was denied the effective assistance of counsel for his defense in the Trial Court and on Appeal by his appointed attorneys, in violation of Amendment Six and Fourteen of the United States Constitution and Article I, Section Eight and Nine of the Tennessee Constitution in the following particulars:

a) Trial counsel failed to adequately investigate and prepare cases for Trial and/or Appeal.

b) Petitioner alleges that his Trial Counsel's conduct as a whole and specifically, rendered ineffective assistance of counsel, including but not limited to counsel's performance at trial and sentencing hearing, investigate all witnesses for the defense and properly impeach the witnesses for the State at the Trial. Petitioner would also submit that the defense presented no mitigating evidence on behalf of the defendant/petitioner through no subpoenas being issued and resulting in loss of all evidence of mitigation.

c) Counsel for the petitioner at the Trial Court failed to object to certain irrelevant and inflammatory evidence during Boyd's trial.

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d) Counsel failed to object at gross prosecutorial misconduct evidence during the sentencing phase of Boyd's trial.

e) Michael Joe Boyd was denied the effective assistance of counsel on his direct appeal to the Tennessee Supreme Court.

f) Petitioner alleges that constitutional rights were violated when he received the Death Penalty in that his right to be free from cruel and unusual punishment under the Eighth and Fourtennth Amendments to the United States Constitution and Article I, Section 16 of the Tennessee Constitution. Further, Petitioner would submit that his right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 17 of the Tennessee Constitution were denied when his sentence of death was imposed without his having the benefit of Tennessee Code Ann, Section 39-13-203.

g) Boyd's Trial Counsel failed to present a consistent theory throughout the guilt phase and sentencing phase of the Trial.

h) Petitioner would allege that his Trial Counsel and his appointed attorney on appeal were respectfully ineffective in not objecting to the following and/or the errors are constitutional in nature and are proper grounds to vacate the aforementioned convictions:

1) The Petitioner was found guilty of First Degree Murder and Felony Murder by the jury. Jury was instructed that they could return guilty verdict on both premeditated and felony murder but the law limits a guilty verdict as to only one of those counts. The jury instruction was respectfully improper and the fact that the jury found both is error and the judgment of conviction should be vacated. This is an alleged ineffective act by trial counsel and a separate constitutional violation. This alleged error should also have been brought out on appeal to the Tennessee Supreme Court but was not and therefore improper and should be vacated.

2) Petitioner would further allege that an improper jury instruction was given as to First Degree Murder in violation of State v. Brown, with held that a deliberate act is one which is performed with a cool purpose. The jury instruction must demonstrate that deliberation and premeditation were separate "essential elements" and the Trial Court cannot respectfully charge that premeditation might be "formed in an instant." See transcript of the evidence, page 907. 836 S.W.2d 530 (Tenn. 1992). Further, in Meadows v. State, the Court held that a new state constitutional rule will be applied retroactively to a claim for post-conviction relief it is materially enhances the integrity and reliability of the fact finding process of the trial. 849 S.W.2d 748 (Tenn. 1993). Petitioner would allege that his Honorable counsel at the trial court and on appeal were respectfully ineffective for not objecting to and raising these issues on appeal and the violations are constitutional in nature and should be therefore vacated.

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3) Likewise, the same argument of ineffective assistance of trial counsel and counsel on appeal is made in regards to the failure to raise an objection to and preserve for appeal the issue raised in State v. Middlebrooks, 840 S.W.2d 317 (1992), in which the majority of the Tennessee Supreme Court held that T.C.A. Section 39-2-203 (i)(7) does not narrow class of death elgible murderers sufficiently by using felony murder as an aggravating circumstance. The Supreme Court of Tennessee held that it would require an aggravating circumstance other than that in T.C.A. Section 39-2-203 (i)(7) to support death penalty for felony murder. See also; State v. Tran, 18 TAM 40-1, 9-27-93, Memphis, Drowota. This argument is likewise, constitutional in nature and the death penalty should be vacated in this case.

4) Petitioner would allege that the Clerk of the Court of Criminal Court denied the petitioner equal protection and due process under the law as resulted in a constitutional violation to the petitioner when his petition for post-conviction relief was filed on April 1, 1991 but the Clerk did not assign the petition to a Division of Court to be heard until May, 1993. The petitioner's claim was on hold for two years while the Clerk of the Court did not properly assign the case to the appropriate division for a timely hearing pursuant to the post conviction act of Tennessee. Petitioner has been harmed by the lapse in time in fighting alleged constitutional violations and the fact that evidence which he might have presented may now be forever lost or witnesses not to be found at this late hour, resulting in prejudice to the petitioner.

5) Petitioner would state that no evidence aside from his testimony was presented at the sentencing hearing. Petitioner would allege that defense witnesses, who were not under subpoena, left or did not come to court and petitioner had no available remedy when Court ordered case to proceed.

6) Petitioner would allege that his prior conviction for second degree murder was under attack in another post-conviction petition at the time of this original trial along with petitioner's other prior record and it was a constitutional violation to proceed to trial while the post-conviction petition was pending. If affected Petitioner's decision not to testify at trial and was again used at the sentencing hearing to impeach the petitioner. Petitioner alleges a constitutional violation through the failure of his appointed attorneys to act upon this issue and preserve it for appeal and that it was constitutional in nature.

So that this Court may address meritorious issues, it must first dispose of those issues that were unsupported by proof or were previously determined.

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CONCLUSIONS OF LAW

I

ISSUES WAIVED FOR LACK OF PROOF OFFERED AT THE EVIDENTIARY HEARING ON PETITION FOR POST-CONVICTION RELIEF

The Petitioner included many allegations of error that were totally unsupported by any offer of proof at the Evidentiary Hearing. All issues that are not supported by proof will be dismissed by the Court. A large portion of the Evidentiary Hearing was spent with the Petitioner's attorney reading averments from the Petition during his questioning of the Petitioner. When ask to explain the basis of the claim made in a particular averment, Mr. Boyd often responded "I don't have a comment on that" or words with similar meaning.

This Court will not regard the mere recitation of language found in the Petition as an offer of proof sufficient to meet burden of proof by a preponderance of the evidence. State v. Kerley, 820 S.W.2d 753 (Tenn. Crim. App. 1991). During the Evidentiary Hearing on Petition for Post-Conviction Relief, the Petitioner did not offer sufficient proof on the following averments: **Petition** - averments: 15(l), 15(m), 15(o), 15(p), 15(q), 15(r), 15(u), 15(y), 15(z), 17(b), 17(c), 17(d), 18(b), 18(g), 19(a), 19(b), 19(d), 19(f), 19(g), 19(h), 19(i), 19(j), 19(k), 19(l), 19(m), 19(n), 19(o), 19(p), 19(q), 19(r), 20(a), 20(b), 20(c), 20(d), 20(e), 20(f), 21(e), 21(g), 21(h), 21(l), 21(m), 21(n), 21(o), and 24; **Amendment** - averments: 10(d), 10(h)(1), and 10(h)(4).

II

PREVIOUSLY DETERMINED ISSUES

T.C.A. § 40-30-111 states:

> The scope of the hearing shall extend to all grounds the petitioner may have, except those grounds which the court finds should be excluded because they have been previously determined, as herein defined.

(emphasis added). T.C.A. § 40-30-112 explains in relevant part that:

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(a) A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.

On direct appeal to the Tennessee Supreme Court, the Petitioner challenged: 1) the legal sufficiency of the convicting evidence; 2) trial judge error in refusing to instruct the trial jury on lesser offenses of voluntary and involuntary manslaughter; 3) trial judge error in allowing proof of prior consistent statements; 4) trial judge error in refusing to allow the defense to prove prior inconsistent statements; 5) trial judge error in refusing to suppress evidence of a police photograph of the defendant; 6) trial judge error in refusing to allow into evidence a pistol found in the possession of Terry Yarber; 7) trial judge error in precluding the defense from questioning a State witness concerning prior bad acts; 8) the validity of his sentence under the Eighth and Fourteenth Amendments; 9) the sentence of death in this case is arbitrary and excessive or disproportionate to the penalty imposed in similar cases; 10) the Tennessee death penalty statute is unconstitutional in that it places the burden of proof upon the defendant to prove that mitigating circumstances outweigh aggravating circumstances; 11) the Tennessee death penalty statute impermissibly interferes with the jury's discretion to impose a sentence less than death; 12) error in the jury instruction at the sentencing phase; 13) trial judge error in failing to instruct the jury that the reasonable doubt standard applies to the imposition of the death penalty; 14) trial judge error in instructing the jury during the penalty stage to have no sympathy for the defendant; 15) error in the language used by the State in closing argument; 16) the death penalty as imposed in Tennessee is unconstitutional.

The Tennessee Supreme Court affirmed both the murder conviction and the death sentence, holding that there was no reversible error at the trial court level. State of Tennessee v. Boyd, 797 S.W.2d 589 (1990). Because the Supreme Court has ruled on these issues and has affirmed the earlier determinations made by this Court, averments that revisit these subjects are determined to be "grounds which the court finds should be excluded because they have been previously determined." T.C.A. § 40-30-111.

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The Petitioner argues that "there are new facts which are relevant today which are different from the facts which existed [at the time of trial and are grounds] to set aside something and not declare it as previously litigated." With this the Court agrees. During the time since the Petitioner's appeal, the Tennessee Supreme Court has decided State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992). However, the Middlebrooks decision is the only "new fact" that has been brought to the attention of this Court and its impact will be discussed at length. Therefore, it is the determination of this Court that the following averments made by the Petitioner have been previously determined and are without merit: **Petition** - averments: 15(s), 15(t), 15(v), 15(w), 15(x), 17(a), 18(a), 18(c), 18(d), 18(e), 19(c), 19(e), 21(a), 21(c), 21(d), 21(f), 21(i), 21(j), and 21(k); **Amendment** - averments: 10(f) and 10(h)(2).

III

AGGRAVATING CIRCUMSTANCES AND THE EFFECT OF MIDDLEBROOKS

After Mr. Boyd was found guilty of the felony-murder, the jury unanimously found two (2) statutory aggravating circumstances[4] :

1) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.

2) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb.

It is the second aggravating circumstance that the Court now focuses its attention in light of the holding in State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992). In Middlebrooks, the Tennessee Supreme Court held that under the Tennessee Constitution, Article I, §16, it was unconstitutional to use the felony-murder aggravating circumstance[5] to support the imposition

[4] The aggravating circumstances the jury found were those provided for by the language of T.C.A. §39-2-203 as it read at the time of sentencing, March 10, 1988.

[5] The felony-murder aggravating circumstance at the time of the Middlebrooks decision was codified in T.C.A. §39-2-203(i)(7).

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of the death penalty for a conviction of felony-murder. The Court held that the use of the felony-murder as an aggravating circumstance served to duplicate the elements of the underlying crime, thus failing to narrow the class of death-eligible murderers as required by both the Tennessee Constitution and the United States Constitution. Id. This Court therefore accepts the Petitioner's argument that the felony-murder aggravating circumstance is not valid. However, the Court cannot agree with the Petitioner's argument that this serves to invalidate the sentence of death.

State v. Howell, 868 S.W.2d 238 (Tenn. 1993) provides an excellent parallel to this case. Like this case, the defendant in Howell was faced with the same aggravating circumstances as the Petitioner: 1) the felony-murder aggravating circumstance and 2) the previous violent felonies circumstance. In affirming the defendant's death sentence, the Court articulated the elements of harmless error review when examining aggravating circumstances in light of the Middlebrooks holding. Howell, 868 S.W.2d 238, 260. In Howell, the Court noted:

> In order to guarantee the precision that individualized sentencing considerations demand and provide a principled explanation for our conclusion in each case, it is important, when conducting harmless error review, to completely examine the record for the presence of factors which potentially influence the sentence ultimately imposed. These include but are not limited to:
>
> 1) the number and strength of the remaining valid aggravating circumstances,
>
> 2) the prosecutor's argument at sentencing,
>
> 3) the evidence admitted to establish the invalid aggravator, and
>
> 4) the nature, quality, and strength of mitigating evidence.

Id. at 261.

In some cases, striking an aggravating circumstance, thereby leaving only a single aggravating circumstance remaining, might require the resentencing of a defendant. That is not the case here. The Tennessee Supreme Court stated that it is necessary to consider:

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> . . . the number of remaining valid aggravating circumstances since the effect of aggravating circumstances on sentencing usually increases with the number of circumstances proven; but even more crucial than the sum of the remaining aggravating circumstances is the qualitative nature of each circumstance, its substance and persuasiveness, as well as the quantum of proof supporting it. . . . By their very nature, and under the proof in certain cases, however, some aggravating circumstances may be more qualitatively persuasive and objectively reliable than others. . . . That is particularly true of the aggravating circumstance remaining in this case.[4]

Id. This Court does not believe that the weighing of aggravating circumstances is a mere "game of numbers" where mathematical calculations mandate resentencing when only one valid aggravator remains. Even when an aggravating circumstance is invalidated, leaving only a single valid aggravating circumstance, the sentence of death can still stand in certain cases. This is such a case. This belief is further enforced in this case by the fact that the jury was unable to find any statutory mitigating circumstances.

The issue of the emphasis that the prosecutor placed on the invalid aggravating circumstance during closing argument is not the prime factor in the harmless error analysis. Howell, 868 S.W.2d 238, 261. This is especially true where the invalid aggravating circumstance, here the underlying felony itself, was by its very nature, virtually automatic. The very argument that served to invalidate this type of aggravating circumstance in Middlebrooks is the very reason prosecutors did not have to dwell on the aggravating circumstance at sentencing. The underlying felony aggravator tended to be self proving following a felony-murder conviction requiring little emphasis and argument from the prosecutor.

In a harmless error analysis where an aggravating circumstance has been invalidated, it is important to determine whether the invalid circumstance was "established by evidence that was materially inaccurate or admissible only to support the invalid aggravator." Howell, 868 S.W.2d 238, 261. As noted in Howell:

[4] The remaining aggravating circumstance in the Howell case, like the Petitioner's case, was T.C.A. §39-2-203(i)(2) as found in the 1982 code (previous convictions for felonies involving the use of violence to the person).

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> . . . an aggravating factor which duplicates the elements of the underlying crime has less relative tendency to prejudicially effect the sentence imposed than invalid aggravating factors which interject inadmissible evidence into the sentencing calculus, or which require the sentencing jury to draw additional conclusions from the guilt phase evidence.

Id. The invalid aggravating circumstance in this case did nothing to "taint" the jury because it was merely a consequence of the underlying felony, requiring no additional evidence above that used to convict the Petitioner of the murder.

The Petitioner argues that the other aggravating circumstance, the prior violent felony aggravator, is also invalid. The Petitioner asserts that the second degree murder conviction that gave rise to the aggravating circumstance in this case was under attack through a petition for post-conviction relief in another court. This Court cannot comprehend how that should have any bearing in this case. Until proven otherwise, the Petitioner's conviction of second degree murder that spawned the aggravating circumstance in this murder case is just that, a conviction. To allow a defendant to try to defeat the aggravating circumstance of previous convictions for violent felonies by merely attacking those prior convictions with petitions for post-conviction relief would all but negate that aggravating circumstance.[7]

In light of the "qualitatively persuasive and objectively reliable" nature of the remaining aggravating circumstance, this Court finds sentence of death valid. Therefore, the following averments are dismissed: **Petition** - averments: 18(f) and 21(b); **Amendment** - averments: 10(h)(3) and 10(h)(6).

IV

EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

The defendant in a criminal case has the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 9 of the Tennessee Constitution. Mr. Boyd received

[7] T.C.A. §39-2-203(i)(2) (1982), (previous convictions of felonies involving violence to a person).

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effective counsel as required by both Constitutions. The appropriate test for determining whether counsel provided effective assistance at trial is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). The burden is on the Petitioner to show a denial of competent counsel and that but for the deficient performance of counsel the result would have different. Campbell v. State, 1993 WL 122057, *1 (Tenn. Crim. App.) (*citing* State v. Zimmerman, 823 S.W.2d 220 (Tenn. Crim. App. 1991)).

The requirement of showing a failure to procure a defense, call witnesses, or otherwise performing adequately as a competent counsel, requires the petitioner to show these matters were significant, however, it does not require a positive showing that an acquittal would have resulted but for the omissions. The Petitioner fails to meet this standard. Campbell 1993 WL 122057 (*citing* Zimmerman). The language of Campbell reflects the holding of the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). In Strickland, the Court held that:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Strickland (emphasis added). Strickland gave rise to a two (2) prong test that the Petitioner must meet to prove ineffective assistance of counsel at trial:

> 1) the representation was deficient, requiring a showing that counsel made errors so serious that she or he was not functioning as "counsel" as guaranteed a defendant by the Sixth Amendment, and
>
> 2) the deficient representation prejudiced the defense to the point of depriving the defendant of a fair trial with a reliable result.'

' This Strickland test is the standard for Tennessee, being cited as recently as the opinion filed January 5, 1994 by Court of Criminal Appeals of Tennessee in the case of Brian Cox v. State C.A.A. No. 02C01-9208-CR-00182, p.10 (1994).

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The burden of proof under the Strickland test is on the Petitioner. The Petitioner must show that there is a "reasonable probability,"* that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. Cox v. State, C.A.A. No. 02C01-9208-CR-00182, p.10 (1994) *citing* Strickland 466 U.S. 668, 104 S.Ct. 2052 (1984). This burden will only be met where the Petitioner proves his allegations by a preponderance of the evidence. Long v. State, 510 S.W. 2d 83, 86 (Tenn. Crim. App. 1974). The Petitioner has failed to meet a single prong of the Strickland test, much less both.

Trial counsel has discretion in conducting the defense and must employ his or her best judgment in determining trial strategy; allegations of ineffective assistance of counsel relating to matters of trial strategy or tactics do not ordinarily provide a basis for post-conviction relief. *see* Taylor v. State, 814 S.W.2d 374, 378 (Tenn. Crim. App. 1991). In this case, it is evident that the Petitioner was represented by counsel experienced in the representation of murder suspects and well aware of the strategies and tactics necessary to mount a defense. This court will not use hindsight when reviewing every tactic used by the trial attorney. *see* State v. Martin, 627 S.W. 2d 139, 142 (Tenn. Crim. App. 1981).

The Petitioner also contends that his trial attorney failed to call witnesses that would have been beneficial at the sentencing phase of the trial. The Petitioner seems to argue that their presence would have helped him establish mitigating circumstances. However, the only proof offered by the Petitioner at the Evidentiary Hearing was that these "witnesses" would have testified that they "knew" the Petitioner. The Petitioner failed to show how there testimony would provide evidence of statutory mitigating circumstances.

A petitioner with an ineffective assistance of counsel claim who asserts that the attorney failed to use certain evidence must produce that evidence, not only to show the evidence is producible, but also to show that it would have been helpful to

* "Reasonable probability is a probability sufficient to undermine confidence in the outcome. Cox v. State, C.A.A. No. 02C01-9208-CR-00182, p.10 (1994).

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the case. State of Tennessee v. Walker, CCA No. 02C01-9203-CC-00068, 1993 WL 46545, *3 (Tenn. Crim. App., Feb. 24, 1993). The Court finds these averments to be totally baseless. Petitioner's trial counsel testified at the Evidentiary Hearing that the decision not to call certain witnesses was intentional, made because counsel feared that the witnesses in question would cause more harm to the Petitioner's case than any possible benefit they could confer. The conduct of the trial attorney in relationship to witness issues has not been proven to be anything other than an attorney's judgment of proper trial strategy and tactics.

The Petition's claims of ineffective assistance of counsel are not supported by the proof. Therefore, the following averments are without merit and are dismissed: **Petition** - averments: 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g), 15(h), 15(i), 15(j), 15(k), 15(n), and 16; **Amendment** - averments: 10(a), 10(b), 10(c), 10(g), and 10(h)(5).

IV

EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

The Petitioner claims that his appellate counsel was ineffective because it did not submit a voluminous list of alleged errors on appeal. The case of Fisher v. State, 1989 WL 113861 (Tenn. Cr. App.1989), provides valuable insight into this issue. In Fisher, the Court of Criminal Appeals of Tennessee, at Nashville hailed an attorney for limiting issues on appeal to those that were of merit stating:

> [The petitioner's] appellate counsel testified that he chose to appeal only the most meritorious issues. For this [the attorney] should be commended, not excoriated. . . The ability to discern between appellate issues which may be meritorious and frivolous issues which clearly will not be is an attribute of effective counsel, not ineffective counsel.

As in Fisher, this Court holds that the mark of effective counsel is the ability of that counsel to select only those issue for appeal that counsel believes to have merit. That is what occurred in this case. The Petitioner included a "catch-all" averment in his Petition that stated that appellate counsel erred

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by not including "the above ineffective assistance of counsel claims" on appeal. That language refers to 27 claims of error by trial counsel raised in this Petition. It was sound judgment for the appellate counsel to limit to scope of the appeal and to have done otherwise would have called into question the competence of counsel. Therefore, the following averments are without merit and are dismissed: **Petition** - averment: 15(aa); **Amendment** - averment: 10(e).

V

CONCLUSION

The burden of proving the allegations by a preponderance of the evidence in a petition for post-conviction relief lies solely with the Petitioner. **MICHAEL JOE BOYD** has not met this burden of proof.

The Court finds that the performance of the trial counsel and appellate counsel for the Petitioner was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). Further, the Middlebrooks holding, while serving to negated one of the aggravating circumstances, does not serve to void the sentence of death received by the Petitioner. IT IS, THEREFORE, ORDERED, ADJUDGED, and DECREED that the petition for post-conviction relief is DENIED.

Entered this 21st day of March, 1994.

JUDGE JOSEPH B. McCARTIE
DIVISION VIII

FILED 3-21-94
MINERVA J. JOHNICAN, CLERK
BY D.C.

Whereupon Court adjourned until 9:30 o'clock tomorrow.

00832

/s/ JOSEPH B. McCARTIE

JUDGE

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#02C01-9512-CR-00392

STATE OF TENNESSEE }
SHELBY COUNTY }

I, William R. Key, Clerk of the Criminal Court of the 30th Judicial Circuit at Memphis, do hereby certify that the forgoing **6** pages of writing contain a full, complete, true and perfect copy of the **MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, MOTION TO ALTER OR AMEND JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR FULL AND FAIR HEARING** in the case of:

MICHAEL BOYD

vs. Docket No. P-8888

STATE OF TENNESSEE

FILED
NOV 07 1996
Clerk of the Courts
Rec'd By KW

For **PETITION FOR POST CONVICTION RELIEF** as the same now appears on file, and of record in my office, and that I am the Custodian of said records and that all entries are presently under my care, custody and control.

WITNESS my hand and the seal of said Court, at office in Memphis, this the **5th** day of **NOVEMBER, 1996**.

WILLIAM R. KEY, Clerk

By: Sandra M. Cross **D.C.**

SEAL

IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTEENTH JUDICIAL DISTRICT
AT MEMPHIS
DIVISION VIII

FILED 7/29/96
WILLIAM R. KEY, CLERK
BY [signature] D.C.

MICHAEL BOYD, now known as, MIKAEEL ABDULLAH ABDUS-SAMAD
Appellant/Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

DEATH PENALTY
Post-conviction
Case No. P-8888

MOTION FOR NEW TRIAL
OR, IN THE ALTERNATIVE,
MOTION TO ALTER OR AMEND JUDGMENT
OR, IN THE ALTERNATIVE,
MOTION FOR FULL AND FAIR HEARING

MICHAEL BOYD, now known as, MIKAEEL ABDULLAH ABDUS-SAMAD, hereby moves for a new trial, or to alter and amend or to rehear in order to obtain a full and fair hearing from the final judgment entered in this cause on the 21st day of March, 1994. In support of this Motion, MIKAEEL ABDULLAH ABDUS-SAMAD, would show to the Court the following:

1. I filed a *pro se* petition for post-conviction relief. As far as I know, no answer was ever made to my petition and, to my knowledge, no action was taken on my petition until I was informed that Daniel Seward of the Shelby County Bar was appointed to handle my post-conviction death penalty case in the summer of 1993 (around June).

2. The delay hurt my case. For example, one of my witnesses, my brother, died during the delay.

3. Mr. Seward first visited me in late July (this was the first time I had heard from him) of 1993 for a very short time to introduce himself and I found out that he does not have any death penalty case experience. I do not know the law and I needed an attorney who would investigate and find out what all of the legal issues were in my case, especially on things like what a proper voir dire is, the legal grounds for challenging jurors, jury

instructions, what can properly be objected to, constitutional challenges to the death penalty itself, and what is a proper legal argument in a court of law.

4. Mr. Seward never asked the court to appoint co-counsel experienced in death penalty matters.

5. Mr. Seward never got a trial transcript of my case or any of my trial records even though I told him he would need those to understand my case and what my trial lawyers did and didn't do. Mr. Seward did ask the trial court for a transcript which apparently was denied but I do not know why he could not have gotten my records from the appeals court that last had it.

6. I told Mr. Seward when we first met that my case needed investigation and told him that an investigator experienced in death penalty cases, Ron Lax of Inquisitor, Inc., Memphis, Tennessee was willing to work on my case. I asked Mr. Seward to get in touch with Mr. Lax.

7. Sometime in late summer of 1993, Mr. Seward visited me for the second time told me that he had talked with Mr. Lax and that Mr. Lax said that since he was very busy and he was not getting paid anything to investigate my case that he could not work on it. When I told Mr. Lax this, he said that was not true and that he was willing to do some limited things on my case but Mr. Seward would have to ask the court for funds to pay him to do more.

8. Mr. Seward asked me if I had any names of any witnesses and I gave him lots of names of witnesses who could talk about the shooting and, particularly, about mitigation. I told him that I would get more names and I tried to call him to leave those names.

9. I told Mr. Seward that my trial attorneys did not investigate my background and personal and medical history so that they could present mitigating evidence and that they never had a sensible trial strategy. While I did not think it was fair to give me the death penalty unless I put on mitigation evidence, I wanted to put on whatever I could to show that I did not deserve the death penalty. As it turned out, all my trial lawyers put on at the sentencing hearing was me and they never really went into my

background and who I was.

10. I also believed that several jurors were biased or didn't do their job properly (one went to sleep at trial). It was my information that one juror talked to people out of court who were hostile to me while my trial was going on and another juror's boyfriend was the deputy jailer in Memphis.

11. My trial attorneys never consulted with me regarding pretrial motions and never developed the proof to show that I was financially well off at the time of the shooting and had no reason whatsoever to attempt to rob someone of a few hundred dollars.

12. I did not think that my trial judge was fair in the way he ruled on my case and when he accused me of threatening a witness, which I did not do.

13. Mr. Seward was told how especially important mitigation evidence was since, under Middlebrooks, one of my two aggravating circumstances was invalid and the court would have to look at the strength of the remaining aggravating circumstance in light of the mitigation evidence in my case. I told him that my trial lawyers had not put together any mitigation and only put me on the stand at sentencing.

14. I also told Mr. Seward about the circumstances of the remaining aggravating factor, a prior second degree murder, and that he needed the records in that case to show what really happened (the guy I shot had pulled a knife on me in a fight over an old girlfriend) so that the court in this case would know what happened and be able to figure out how much weight to put on it. I asked him to talk to my Memphis lawyer, Linda Kendall Garner, who was handling my post-conviction on that case but he apparently did not.

15. I called Mr. Seward often trying to talk to him and left messages with his receptionist since he did not appear to have a secretary. He did not return my telephone calls.

16. I next saw Mr. Seward after Thanksgiving and I told him that I had given Mr. Lax's person a lot of information to be checked out, including names of witnesses, information about medical

records, juvenile records, school records, and jail records and that I had signed numerous release forms for information. Mr. Lax and I both told Mr. Seward that these records and witnesses would be needed in order to present the case. The meeting was about 30 minutes long.

17. Mr. Seward met with me for about 30-40 minute after Christmas to tell me that he asked the court for time to do case and that he was waiting on Mr. Lax to investigate. I asked him if he had ever asked the court for money to hire Mr. Lax and he said he hadn't. Mr. Seward did indicate to me that he was going to ask court for funds for investigation but I was worried because the hearing was scheduled in a couple of weeks and it did not look like anything had been done. I told Mr. Seward again that all of the witnesses would need to be interviewed.

18. The few times that Mr. Seward and I did talk, I told him that I wanted all of my claims investigated and presented to the court. The post-conviction act says I am supposed to get a full and fair hearing and I told Mr. Seward that was what I wanted on all of my issues.

19. I told Mr. Seward that he should get some expert help to show that the crime did not happen the way the prosecutor said it did. I told Mr. Seward that my trial lawyers made a serious mistake and never asked for or got any expert help on reconstructing the crime scene or the paths of the bullets and that should be done to support what I said happened in the case.

20. In addition to not asking for money for an investigator, Mr. Seward never asked the court for any money for any expert help.

21. I was aware of a hearing date in early January of 1994 and, when I was not transported to court, I called Mr. Seward to find out what happened. As usual, I could not get him by telephone. He later came to see me briefly to tell me that the date had been postponed to January 21. Mr. Seward told me that I would have to testify if no one else showed up. Mr. Seward had not talked to the main witnesses whose names I gave him and did not talk to any of the mitigation witnesses.

22. I found out later that some of my witnesses showed up at the postponed hearing date. I gave Mr. Seward names of other witnesses but they were never contacted or called at my hearing. In fact, no witnesses were there for my actual hearing.

23. Mr. Seward never asked the court for funds for an investigator until the day of my hearing when he presented an affidavit (see attached copy) from Glori Shettles, an investigator with Mr. Lax's office saying that they would be available to investigate my case and had already begun to do a few things in anticipation that Mr. Seward would ask for funds from the court to pay them. Also, in spite of my repeated requests for Mr. Seward to pursue investigating my case, it was not clear on the day of my hearing whether Mr. Seward was asking for funds for an investigator or whether he was just saying that Mr. Lax and Ms. Shettles would be available to investigate.

24. It was clear to me that Mr. Seward never did any independent investigation of the claims in my case.

25. Mr. Seward filed some amendments to my petition but he did not discuss them with me before he did it and the first time that I saw the amendments was the day of my hearing.

26. Mr. Seward was completely unprepared to go to a hearing in my case and told the trial court that he was not ready, that he was just appointed. When my trial attorney was called to testify, it was clear that Mr. Seward was unprepared to cross-examine him since he had not investigated anything.

27. After the hearing, Mr. Seward would not speak with me. I wanted to tell him that I wanted to appeal. I had the same trouble getting him to talk with me after the hearing that I did before, he would not return my telephone calls even though I left messages. I finally wrote to him saying that I wanted to appeal and for him to file a Notice of Appeal. He would not respond so I had to file my own Notice of Appeal pro se.

28. I did not get a full and fair hearing on my claims. Mr. Seward was appointed by the State, he was not my choice, and I was stuck with him. He seemed to be working more for the State in this

case than for me. I did not think it was fair to put me on the stand at the hearing and ask me about legal claims or what I had done to investigate or support them; I have been locked up ever since before the trial of this case. Again, I am not a lawyer. It was his job, not mine, to put on proof to support my claims and he did not do so despite the fact that I repeatedly asked him to develop the proof. I did not waive or give up any claims and Mr. Seward never talked to me about giving up or waiving any claims.

29. Mr. Seward did not do the necessary background work to be able to present evidence on my behalf or to be able to cross-examine my trial and appellate attorney. He was inexperienced and the court forced him into a hearing before he had done what he should have done to prepare.

Wherefore, I ask this court to remand this case for a proper full and fair hearing, to appoint an additional or substitute attorney who has appropriate death penalty experience, who will investigate my claims, who will ask for the necessary money to present my case, and who will present proof to support all of my issues.

Respectfully submitted,

Mikaeel Abdullah Abdus Samad
MICHAEL BOYD, now known as,
MIKAEEL ABDULLAH ABDUS-SAMAD
pro se
#101137, Unit II
Riverbend Maximum Security Institution
7475 Cockrill Bend Industrial Road
Nashville, Tennessee 37243-0471

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Motion has been provided by U.S. Mail, postage pre-paid, to the Office of the District Attorney General, 30th Judicial District, 201 Poplar Avenue, Ste. 301, Memphis, TN 38103-1947 on this the 21 day of April, 1994.

Mikaeel Abdullah Abdus Samad
MICHAEL BOYD, now known as,
MIKAEEL ABDULLAH ABDUS-SAMAD

23

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE

DIVISION VIII

STATE OF TENNESSEE

Respondent,

vs Case No. P-8888

MICHAEL JOE BOYD

Petitioner.

This cause came on to be heard and was heard on the 21st day of January, 1994, before the Honorable Joseph B. McCartie, Judge, holding the Criminal Court for Shelby County, at Memphis, Tennessee, and the following proceedings were had to wit:

* * * *

THE COURT: All right. Let's proceed. Is the State ready?

MS. HARRIS: Yes, sir.

THE COURT: Defense ready?

MR. SEWARD: Yes, Your Honor. I need to address the court on a matter.

THE COURT: This is Michael Joe Boyd, Petition for Post-Conviction Relief.

MR. SEWARD: As a preliminary matter, may I take up one thing with the Court and have the Court rule on it? I believe -- Your Honor, if I could pass the motion to the Court, a Motion for Continuance on behalf of Mr. Boyd. And I believe it is already in the file.

THE COURT: When was it filed?

MR. SEWARD: It was filed this morning. And the reasons are stated inside the affidavit why it was filed this morning.

THE COURT: Why was it filed today?

MR. SEWARD: Your Honor, there is an affidavit attested to. I believe Mr. Boyd, prior or after his state remedies were exhausted --

THE COURT: Who filed it?

MR. SEWARD: I filed it, Your Honor, on behalf of Mr. Boyd. It was a sworn affidavit from the Inquisitor, Incorporated, a private investigative --

THE COURT: Wait a minute now. Wait a minute.

Where is the Motion for Continuance?

MR. SEWARD: There should be an

affidavit attached to it.

THE COURT: What is the Inquisitor?

MR. SEWARD: They're a private detective agency.

THE COURT: I'm sorry?

MR. SEWARD: I'm sorry. It's a private detective agency or investigative service located in Memphis. I believe they have an office in Nashville and Knoxville. There should be an affidavit of resume attached to that. I believe on the second or third page there's an affidavit from Inquisitor.

So the Court would understand what's going on, I believe after Mr. Boyd exhausted his appeals and received the death penalty and it was affirmed by the Tennessee Supreme Court, I believe the Inquisitor became involved in his case. At that point they did some, excuse me, some research or some work on his case on a limited basis. This is prior to me getting involved, Your Honor.

Once I did get involved, and I understand under Teague the Court's not going to approve any experts for Mr. Boyd, but they have done certain work according to the affidavit and they feel like it would be proof which would go to the prejudicial

effect of the sentencing hearing Mr. Boyd received in the fact that some evidence was available, was not offered to the Court at that time. And I believe that's what the affidavit would state. It's sworn to by Inquisitor.

THE COURT: So what's the purpose of the continuance?

MR. SEWARD: I believe the affidavit request that the fact they sent off for educational records and the former prison record of Mr. Boyd. It is in the affidavit that they won't be available, they didn't feel like, until March, April or June, I believe.

THE COURT: Denied.

MR. SEWARD: Just for the record, Your Honor, I submit it to the Court.

THE COURT: Who are these people?

MR. SEWARD: Your Honor, this is a private investigator firm out of Memphis. I believe they've done a lot of other work on other capital cases out of Shelby County is my understanding.

THE COURT: All right. Have you employed them?

MR. SEWARD: I have not employed them. No, Your Honor.

testimony. The mere fact that they recant it now is not relevant to this particular hearing.

THE COURT: Well, there's not any indication they have recanted it.

MR. HARRIS: That's true. As to the other, the witness who did not testify, the only relevance as to her would be the ineffective assistance of counsel argument is based on a failure to call her in the first trial. That's the only relevance she would have. What was her name, Barbara Lee?

MR. SEWARD: Barbara Lee, Your Honor. I would -- if Your Honor would allow me to address the Court. I believe in any post-conviction procedure, though, you have to show prejudice and if you can't show that there were some type of material fact which was done or was not done, I don't think -- if there was error regardless, it won't be reversed because there is no prejudice.

THE COURT: Motion for Continuance denied.

MR. SEWARD: Thank you, Your Honor, and I'm ready to proceed.

THE COURT: Let's proceed.

MR. HARRIS: All right. If the Court

A. That's correct.

Q. Okay. You've since filed -- since you've exhausted your state remedy, you've filed a pro se petition for post-conviction relief; is that correct?

A. Right.

Q. Okay. Do you have a copy of that petition in front of you, have you not? I provided you a copy of your own petition?

A. Yeah.

Q. Okay. In order to expedite matters I'm going to go down the list of your allegations. Are you ready, on Page 2?

You allege Subsection A. "Counsel failed to investigate the background and personal and medical history of Petitioner for the existence of mitigating evidence and/or to present such evidence during the penalty phase of the trial."

I'm going to ask you to explain what you mean by that statement to the Court.

A. Well, you know, it's a, you know, before my trial started, you know, I was asking that the trial, you know, that it be investigated, my background, and, you know, so I could have mitigating witnesses come in and testify in the

event that I was found guilty in trial, in my first phase of the trial, you know, for the mitigating circumstances, you know, to be presented. But due to the fact that no one went out and talked to nobody, you know, it didn't happen.

Q. Okay. The record -- one question I omitted. You were represented by Mr. Robert Jones, assistant public defender?

A. I think Mr. Ed Thompson, both of them represented me.

Q. That's correct. And on appeal you were represented by Mr. Mark Ward; is that correct?

A. That's right.

Q. Okay. All right. You basically, you said they didn't investigate the case. Did you give the names of any witnesses? Who are the people you said they didn't investigate?

A. Well, I wanted, you know, them to go and speak with some neighbors, a lot of neighbors, people that knew me as a child and knew me, you know, been knowing me through the years, you know that could come in and bring mitigating --

THE COURT: Now, is this on A?

MR. SEWARD: Yes, Your Honor. Well, it is statements that they failed to investigate the

representation of petitioner in a death penalty case."

Explain what you mean by that to the Court?

A. Because, you know, he was, you know, he didn't appear to me, you know, this is just -- he didn't appear to me as being able to handle such a case because of the magnitude of the case. He didn't have the time, you know, to do the work that he needed because he was involved in lot more cases, you know.

Q. Who are you referring to?

A. Mr. Jones.

Q. All right. Let's go to Number I. "Counsel failed to properly voir dire jurors."

Explain your (indiscernible) to the Court for that allegation?

A. Well, you know, the jurors, you know, needed to be -- I felt that the jurors needed to be asked you know, as to, you know, what, you know, type of, you know, how did they, you know, look, you know, if a person was a, you know, if a person was charged with murder like myself, you know, I wanted to know, you know, if they -- if the jurors, you know, if the jurors would -- I wanted to know if the jurors

wanted to, you know, would have found me guilty, you know, if my lawyer, you know, put forth the proof, you know, showing, you know, that I wasn't guilty, you know, I wanted him to ask them that, you know, if he could show, you know, because see, you know, it was never said if he could show that I wasn't guilty, you know, of this crime, you know. That is all I wanted. I just wanted them to ask them, you know, could they find me guilty because they were constantly saying if I was found guilty, if they could give me death penalty, you know, would they acquit me. You know, I wanted to know would they acquit me. You know, if I showed proof that I wasn't guilty. That is what I wanted to know.

Q. Okay. You made the allegations in Subsection J. "Counsel failed to properly voir dire jurors for racial bias."

Explain that to the Court.

A. Well, I never heard nobody ask it, you know. He never asked the juror, none of the jurors, you know, as to did they feel, you know, toward, you know, if they was, you know, by them, you know, they was a white juror or a juror that was a Christian, you know, how would they, you know, felt toward a black and a Muslim, you know. I wanted to know this

THE COURT: "N. Counsel failed to file necessary motions before, during and after trial on direct appeal." Is that one of them that you were talking about?

Well, I'm looking at it here.

THE COURT: On Page 3, N.

MR. SEWARD: I see it, Your Honor. I would ask him if that is what he is referring to. Is that one of the allegations you referred to at appellate court counsel? Do you have your pro se petition, Page 3, Number N.?

A. No, just go on, man.

THE COURT: Well, this is your day in court, Mr. Boyd.

THE WITNESS: Well, you know, we're not properly ready. You see we ain't ready. Just go on. You know, it don't make no difference, you know. It ain't no big deal. Evidentially it is not, you know, he ain't even ready. He can't be ready.

THE COURT: Go ahead.

MR. SEWARD: Yes, Your Honor. I would state to the Court any -- the next couple of pages all go to basically the fact. He made a statement, Your Honor, his prior counsel was

MR. SEWARD: At this time the petitioner will rest.

THE COURT: State.

MR. HARRIS: Judge, the State would call Robert Jones.

ROBERT JONES

Having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HARRIS:

Q. Please state your name.

A. Robert Jones.

Q. All right, sir. And how are you employed, Mr. Jones?

A. Deputy Administrator, Public Defender's Office.

Q. How long have you been with the Public Defender's Office?

A. Sixteen years.

Q. All right. In addition to being deputy administrator for the Public Defender's Office what other capacity do you serve that office in?

A. I am on the capital defense team. I help try capital murder cases.

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G 71-2692

MEMPHIS CITY SCHOOLS — CUMULATIVE RECORD

MEMPHIS, TENNESSEE

Boyd (Last Name) Michael (First) J (Middle) 2X-2698 (Student No.)

STUDENT DATA

(Birth Cert. No.) (Date of Birth) 4-23-60 (Place of Birth) Miss. Tenn.

B (Race) (Sex) Male (Social Security No.)

If recently moved to Memphis Give former Address: (City) (State)

If recently moved to Memphis give former school:

Date of first entry in Memphis Schools: 8-22-66

Age: 6 Years 4 Months Placed in 1-9 Grade

(Use Pencil) Date withdrawn from system: 5-16-76; 4-26-76 (10-22-77)

Reason for withdrawal: (Use Pencil) W- W-2; W4-1 (W-4)

When pupil moves from city give new address: (Use Pencil) Withdrew

	Street	City	State	Phone
Address Change:	2234 Eldridge	Memphis	Tenn	None
Address Change:	921 Neptune "G"	Memphis	Tenn	947-1600
Address Change:				
Address Change:				
Address Change:				
Address Change:				
Address Change:				
Address Change: (Use Pencil)				

FATHER'S NAME — MOTHER'S NAME Peggy Boyd — GUARDIAN'S NAME Gen. Del. Rt. 1

TRANSFER DATA

FROM	TO	THIS YEAR PRESENT	THIS YEAR ABSENT	DATE OF LAST ATTENDANCE	DATE THIS CARD SENT	GRADE	PRINCIPAL
CO	Booker T. Washington				1-10-77		
B.W.	C O	25	42	3-9-77	4-27-77	10-16	Mose Wade, Jr

Wade C.C. / / / 4-21-96

STANDARDIZED TEST RECORD

DATE	NAME OF TEST	FM	GR	C.A.	M.A.	I.Q.	Stanine	TGE	S.M.
9-13-66	Met. Readiness	A	1	6-5	31				55
4-16-67	Met. Achiev.	A	(Above	t.	)				
9-14-67	Met. Readiness	B	1-10	7-4				6.8	
4-23-24/68	Met. Achiev.	B	1-10	8-0				2.1	1.8
4-22-69	Met. Achiev.	A	2-5	9-0				2.5	2.8
10-20-69	Kuhlmann-Finch	III	3-7	9-7	8-4	83			
4-14-70	Metro. Ach.	B	3-7	10-0				3.3	3.8
4-20-71	Metro. Ach.	F	4-3	11-0				3.4	4.8
10-18-71	L. P. I. Q	A	5-4	11-6	9-02	76			
3-20-72	Metro-Ach.	G	5-4	11-11				4.6	5.8
3-20-73	" "	G	6-4	12-11				4.7	5.7
10/14/74	Large-Thorndike		8	14-06	10-02	71			

HEALTH DATA

Physical Disabilities:
(Use Pencil)

Date Recorded:

The Space Below Is Provided For Stick-On Labels.

25

The Home Arc Page

The Arc of the United States

a national organization on mental retardation

50 Years

The Arc

Service · Advocacy · Quality · Leadership

What is The Arc?

The Arc (formerly *Association for Retarded Citizens of the United States) is the country's largest voluntary* organization committed to the welfare of all children and adults with mental retardation and their families. The Arc is a 501 (c) (3) charitable non-profit organization supported by contributions from the general public. The Arc, with its rich history in advocacy and services, is comprised of individuals with mental retardation, family members, professionals in the field of disability and other concerned citizens. The Arc has adopted various positions on issues that affect people with mental retardation and their families, and the organization's mission statement forms the basis for the organization's activities.

New Whats New ! National Headquarters	On-Line Registrations Department of Research and Programs Services	Meet the Arc's Officers Department of Member, Chapter Communication Services
Department of Governmental Affairs	Government Reports (Updated Bi-Monthly)	Capitol Insider (Updated Weekly)
Publications Catalog & Promotional Products	Comments and Guest Book	Discussion Board
Question and Answer Fact Sheets	Local and State Home Pages	Search Engine
BarnesandNoble.com SEARCH Barnes and Noble Search	MAIL Email Us	Mental Retardation and Developmental Disability Web Si

You can join The Arc, or get the location of our chapter in your area, by contacting us at:

The Arc of the United States
500 East Border Street, Suite 300
Arlington, Texas 76010
(817)261-6003 (Voice)
(817)277-3491 (FAX)
(817)277-0553 TDD
thearc@metronet.com (e-mail)

Rated among the Top 5% of all Social Services sites on the WWW by Point Survey.

Introduction to Mental Retardation

What is mental retardation?

An individual is considered to have mental retardation based on the following three criteria: intellectual functioning level (IQ) is below 70-75; significant limitations exist in two or more adaptive skill areas; and the condition is present from childhood (defined as age 18 or less) (AAMR, 1992).

What are the adaptive skills essential for daily functioning?

Adaptive skill areas are those daily living skills needed to live, work and play in the community. They include communication, self-care, home living, social skills, leisure, health and safety, self-direction, functional academics (reading, writing, basic math), community use and work.

Adaptive skills are assessed in the person's typical environment across all aspects of an individual's life. A person with limits in intellectual functioning who does not have limits in adaptive skill areas may not be diagnosed as having mental retardation.

How many people are affected by mental retardation?

The Arc reviewed a number of prevalence studies in the early 1980s and concluded that 2.5 to 3 percent of the general population have mental retardation (The Arc, 1982).

Based on the 1990 census, an estimated 6.2 to 7.5 million people have mental retardation. Mental retardation is 10 times more common than cerebral palsy and 28 times more prevalent than neural tube defects such as spina bifida. It affects 25 times as many people as blindness (Batshaw, 1997).

Mental retardation cuts across the lines of racial, ethnic, educational, social and economic backgrounds. It can occur in any family. One out of ten American families is directly affected by mental retardation.

How does mental retardation affect individuals?

The effects of mental retardation vary considerably among people, just as the range of abilities varies considerably among people who do not have mental retardation. About 87 percent will be mildly affected and will be only a little slower than average in learning new information and skills. As children, their mental retardation is not readily apparent and may not be identified until they enter school. As adults, many will be able to lead independent lives in the community and will no longer be viewed as having mental retardation.

The remaining 13 percent of people with mental retardation, those with IQs under 50, will have serious limitations in functioning. However, with early intervention, a functional education and appropriate supports as an adult, all can lead satisfying lives in the community.

How is mental retardation diagnosed?

The AAMR process for diagnosing and classifying a person as having mental retardation contains three steps and describes the system of supports a person needs to overcome limits in adaptive skills.

The first step in diagnosis is to have a qualified person give one or more standardized intelligence tests and a standardized adaptive skills test, on an individual basis.

The second step is to describe the person's strengths and weaknesses across four dimensions. The four dimensions are:

1. Intellectual and adaptive behavior skills
2. Psychological/emotional considerations
3. Physical/health/etiological considerations
4. Environmental considerations

Strengths and weaknesses may be determined by formal testing, observations, interviewing key people in the individual's life, interviewing the individual, interacting with the person in his or her daily life or a combination of these approaches.

The third step requires an interdisciplinary team to determine needed supports across the four dimensions. Each support identified is assigned one of four levels of intensity - intermittent, limited, extensive, pervasive.

Intermittent support refers to support on an "as needed basis." An example would be support that is needed in order for a person to find a new job in the event of a job loss. Intermittent support may be needed occasionally by an individual over the lifespan, but not on a continuous daily basis.

Limited support may occur over a limited time span such as during transition from school to work or in time-limited job training. This type of support has a limit on the time that is needed to provide appropriate support for an individual.

Extensive support in a life area is assistance that an individual needs on a daily basis that is not limited by time. This may involve support in the home and/or support in work. Intermittent, limited and extensive supports may not be needed in all life areas for an individual.

Pervasive support refers to constant support across environments and life areas and may include life-sustaining measures. A person requiring pervasive support will need assistance on a daily basis across all life areas.

What does the term "mental age" mean when used to describe the person's functioning?

The term mental age is used in intelligence testing. It means that the individual received the same number of correct responses on a standardized IQ test as the average person of that age in the sample population.

Saying that an older person with mental retardation is like a person of a younger age or has the "mind" or "understanding" of a younger person is incorrect usage of the term. The mental age only refers to the intelligence test score. It does not describe the level and nature of the person's experience and functioning in aspects of community life.

What are the causes of mental retardation?

Mental retardation can be caused by any condition which impairs development of the brain before birth, during birth or in the childhood years. Several hundred causes have been discovered, but in about one-third of the people affected, the cause remains unknown. The three major known causes of mental retardation are Down syndrome, fetal alcohol syndrome and fragile X.

The causes can be categorized as follows:

- **Genetic conditions** - These result from abnormality of genes inherited from parents, errors when genes combine, or from other disorders of the genes caused during pregnancy by infections, overexposure to x-rays and other factors. More than 500 genetic diseases are associated with mental retardation. Some examples include PKU (phenylketonuria), a single gene disorder also referred to as an inborn error of metabolism because it is caused by a defective enzyme. Down syndrome is an example of a chromosomal disorder. Chromosomal disorders happen sporadically and are caused by too many or too few chromosomes, or by a

change in structure of a chromosome. Fragile X syndrome is a single gene disorder located on the X chromosome and is the leading inherited cause of mental retardation.

- **Problems during pregnancy** - Use of alcohol or drugs by the pregnant mother can cause mental retardation. Recent research has implicated smoking in increasing the risk of mental retardation. Other risks include malnutrition, certain environmental contaminants, and illnesses of the mother during pregnancy, such as toxoplasmosis, cytomegalovirus, rubella and syphillis. Pregnant women who are infected with HIV may pass the virus to their child, leading to future neurological damage.
- **Problems at birth** - Although any birth condition of unusual stress may injure the infant's brain, prematurity and low birth weight predict serious problems more often than any other conditions.
- **Problems after birth** - Childhood diseases such as whooping cough, chicken pox, measles, and Hib disease which may lead to meningitis and encephalitis can damage the brain, as can accidents such as a blow to the head or near drowning. Lead, mercury and other environmental toxins can cause irreparable damage to the brain and nervous system.
- **Poverty and cultural deprivation** - Children in poor families may become mentally retarded because of malnutrition, disease-producing conditions, inadequate medical care and environmental health hazards. Also, children in disadvantaged areas may be deprived of many common cultural and day-to-day experiences provided to other youngsters. Research suggests that such under-stimulation can result in irreversible damage and can serve as a cause of mental retardation.

Can mental retardation be prevented?

During the past 30 years, significant advances in research have prevented many cases of mental retardation. For example, every year in the United States, we prevent:

- 250 cases of mental retardation due to phenylketonuria (PKU) by newborn screening and dietary treatment;
- 1,000 cases of mental retardation due to congenital hypothyroidism thanks to newborn screening and thyroid hormone replacement therapy;
- 1,000 cases of mental retardation by use of anti-Rh immune-globulin to prevent Rh disease and severe jaundice in newborn infants;
- 5,000 cases of mental retardation caused by Hib diseases by using the Hib vaccine;
- 4,000 cases of mental retardation due to measles encephalitis thanks to measles vaccine; and
- untold numbers of cases of mental retardation caused by rubella during pregnancy thanks to rubella vaccine (Alexander, 1998).

Other interventions have reduced the chance of mental retardation. Removing lead from the environment reduces brain damage in children. Preventive interventions such as child safety seats and bicycle helmets reduce head trauma. Early intervention programs with high-risk infants and children have shown remarkable results in reducing the predicted incidence of subnormal intellectual functioning.

Finally, early comprehensive prenatal care and preventive measures prior to and during pregnancy increase a woman's chances of preventing mental retardation. Pediatric AIDS is being reduced by AZT treatment of the mother during pregnancy, and dietary supplementation with folic acid reduces the risk of neural tube defects.

Research continues on new ways to prevent mental retardation, including research on the development and function of the nervous system, a wide variety of fetal treatments, and gene therapy to correct the abnormality produced by defective genes.

References

American Association on Mental Retardation. (1992). *Mental Retardation: Definition,*

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MIKA'EEL ABDULLAH ABDUS SAMAD, (formerly Michael J. Boyd),	)	
Petitioner,	)	
v.	)	No. 98-2756
RICKY BELL, Warden,	)	
Respondent.	)	

DECLARATION OF LIBBY SYKES

Declarant Libby Sykes states as follows:

1. I am an adult resident citizen of Montgomery County, Tennessee. I make the following statements based on personal knowledge.

2. I work for Tennessee's Administrative Office of the Courts (AOC). As part of my work, I am the record custodian for time records that attorneys appointed in capital cases, including post-conviction cases, submit for payment.

3. If the State compensates an attorney for capital case representation, the form the attorney submits to obtain payment is filed under the name of the person represented.

4. I have reviewed the AOC's file on attorneys who represented Michael Boyd. No document indicates that an attorney named Daniel Seward sought compensation for any representation of Mr. Boyd.

5. The AOC does not have a file on attorneys who represented Mika'eel Abdullah Abdus-Samad.

6. I declare under penalty of perjury under the laws of the United States of America that

the foregoing is true and correct to the best of my information and belief.

Libby Sykes

Libby Sykes

3-16-99

Date

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Westlaw.

Not Reported in S.W.2d

Page 1

Not Reported in S.W.2d, 1996 WL 75351 (Tenn.Crim.App.)

(Cite as: 1996 WL 75351 (Tenn.Crim.App.))

H

Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee, at Jackson.
Michael J. BOYD, Appellant,
v.
STATE of Tennessee, Appellee.
No. 02C01-9406-CR-00131.

Feb. 21, 1996.
Permission to Appeal Granted Nov. 25, 1996.

Shelby County, Joseph B. McCartie, Judge. (Post-Conviction) (Capital Murder).

Daniel A. Seward, Pillow-McIntyre House, Memphis (on appeal), for Appellant.

Charles W. Burson, Attorney General and Reporter, Rebecca L. Gundt, Assistant Attorney General, Criminal Justice Division, Nashville, John W. Pierotti, District Attorney General, Terry Harris, Asst. District Attorney General, Memphis, for Appellee.

OPINION

HAYES, Judge.

*1 The appellant, Michael Joe Boyd, whose legal name is now Mika'eel Abdullah Abdus Samad, appeals as of right from the dismissal of his petition for post-conviction relief by the Criminal Court of Shelby County. On March 10, 1988, the appellant was convicted by a Shelby County jury of felony murder and two counts of robbery with a deadly weapon. The appellant was sentenced to death by electrocution for the murder conviction and to life imprisonment for each of the two counts of robbery with a deadly weapon. The trial court ordered that the sentences be served consecutively. On September 24, 1990, the Tennessee Supreme Court affirmed the appellant's convictions and sentences, *State v. Boyd,* 797 S.W.2d 589 (Tenn. 1990), and on January 22, 1991, the United States Supreme Court denied *certiorari , Boyd v. Tennessee,* 498 U.S. 1074, 111 S.Ct. 800 (1991).

On April 1, 1991, the appellant filed a petition for post-conviction relief. [FN1] On May 6, 1993, the court appointed Dan Seward to represent the appellant for post-conviction purposes. On January 21, 1994, the post-conviction court conducted an evidentiary hearing and, on March 21, 1994, entered its findings of facts and conclusions of law, denying the appellant's petition. The appellant immediately filed his notice of appeal.

The appellant presents the following eleven issues for our review:

(1) Whether the post-conviction court committed error during the post-conviction hearing by denying the appellant's motion and request for a copy of the trial transcript;
(2) Whether the post-conviction court committed error by denying the appellant's request for a continuance of the post-conviction hearing;
(3) Whether the appellant's trial counsel provided ineffective assistance;
(4) Whether the appellant's appellate counsel was ineffective;
(5) Whether the due process rights of the appellant were violated when the appellant was not appointed an attorney until more than two years after the filing of the petition;
(6) Whether the trial court committed error by giving improper jury instructions;
(7) Whether the trial court committed error at the trial level;

(8) Whether the appellant should have received the death penalty and whether the Tennessee death penalty is constitutional;
(9) Whether the appellant was entitled to expert services at his capital post-conviction hearing;
(10) Whether trial counsel was ineffective for failing to collaterally attack the appellant's prior conviction for second degree murder as this conviction was used as an aggravator at the penalty phase of the trial; and
(11) Whether the post-conviction court properly denied the appellant's right to a full hearing by ruling allegations in the petition to be previously determined without allowing any evidence from the appellant as to why the grounds raised have not been previously litigated.

After reviewing the record before us, we conclude that the findings of the post-conviction court are correct, and affirm the dismissal of the appellant's post-conviction petition.

I. FACTUAL BACKGROUND

*2 This proceeding arises from the appellant's collateral attack on his convictions for the November 8, 1986, armed robbery of William Price and David Hippen, which resulted in the murder of William Price. The evidence at trial established that Price and Hippen drove into downtown Memphis for the purpose of soliciting female companionship. *Boyd,* 797 S.W.2d at 592. An unknown individual directed them to Raiford's Lounge, where two women, Barbara Lee and Renita Tate, agreed to accompany them. *Id.* The foursome drove to the Lorraine Motel, where Price gave one of the women a $100 bill to rent two rooms. *Id.* The women began to argue about which one of them would go to the office to pay for the rooms. *Id.* While the women were arguing, the appellant (Lee's boyfriend) and two other men drove up alongside Price's van. *Id.* The appellant got out of his car, stepped up to the van, pointed a pistol towards Hippen's face and demanded money. *Id.* The appellant robbed Price and Hippen of approximately $130 dollars. *Id.* Price then grabbed the appellant's arm, the appellant fired the gun, and the three men began to struggle over the gun. As Price started the van and attempted to drive away, the appellant "emptied" his gun at him. *Id.* Five to six bullets struck Price's body resulting in his death. *Id.*

II. ANALYSIS

Initially, we note that the following issues have been waived since the appellant has failed to cite any authority in support of his arguments as required by Tenn. R. App. P. 27(a)(7) and Tenn. Ct. Crim. R. App. 10(b): (1) Issue # 5, "Due Process Rights violated by failure to appoint counsel until two years after filing of pro se petition;" (2) Issue #7, "Errors committed by the trial court;" (3) Issue #8, "Constitutionality of the Tennessee Death Penalty;" [FN2] (4) Issue #10, "A collateral attack should have been presented challenging the appellant's second degree murder conviction prior to the death penalty post-conviction;" and (5) Issue #11, "The post-conviction court erred in prohibiting evidence as to previously determined issues." [FN3] Because the appellant has waived these issues, we find it unnecessary to address these contentions in our analysis.

1. MOTION AND REQUEST FOR COPY OF TRANSCRIPT

On December 13, 1993, post-conviction counsel filed a "motion to have the clerk of court copy record and to deliver copy to petitioner." On December 14, 1993, the post-conviction court denied the motion. The appellant argues that this ruling is in error. We disagree and find this issue to be without merit.

There is no dispute that "an indigent defendant has a constitutional and statutory right ... to a free transcript in order to prosecute a claim for post-conviction relief where that is essential in order for him to demonstrate his right to such relief." *Jones v. State,* 457 S.W.2d 869, 870 (Tenn. Crim. App.), *cert. denied,* (Tenn. 1970); *see also Cauley v. State,* No. 01C01-9310- CR-00367 (Tenn. Crim. App. at Nashville, Mar. 2, 1995); *Pettigrew v. State,* No. 02C01-9203-CC-0065 (Tenn. Crim. App. at Jackson, Aug. 25, 1993). In order to establish entitlement to a "free transcript," a defendant must allege a constitutional ground for relief. The trial court, in turn, must determine whether the transcript is necessary to further meritorious claims.

*3 In the present case, the appellant had access to a "free transcript." In fact, the appellant conceded this point in a contemporaneous motion. In conjunction with the appellant's "motion to have the clerk of court copy record," the appellant filed a "motion to transcribe record of opening statement." In that motion, which was granted by the post-conviction court, the appellant stated "... all parts of the relevant record... have been transcribed and are available to Petitioner's attorney" with the exception of the opening statements. Additionally, we note that, on November 19, 1993, post-conviction counsel filed a motion with the Tennessee Supreme Court at Jackson "to have trial transcript and evidentiary hearings returned to original court of jurisdiction for sixty days." [FN4] On November 23, 1993, Justice Daughtrey granted this motion. The order specified that the original trial transcript and any transcript regarding evidentiary hearings, including all exhibits, were to be sent to the Clerk of the Criminal Court for the Thirtieth Judicial District of Shelby County.

Clearly, the appellant through his post-conviction counsel had access to all relevant parts of the transcript "necessary to further meritorious claims." [FN5] Thus, even if counsel was inconvenienced by not having a personal copy of the transcript, the appellant was not prejudiced by the post-conviction court's denial of this request. This issue is without merit.

2. MOTION FOR CONTINUANCE

The appellant contends that the post-conviction court erred in denying his motions for a continuance, which were filed and argued on the morning of the evidentiary hearing.

Immediately preceding the post-conviction hearing, the appellant moved for a continuance. The appellant argued that a continuance of about four months was necessary in order for Inquisitor, Inc., a private investigation firm, to complete research of the appellant's educational records and former prison record. This motion was denied. The appellant contends that the information from this investigation "would [have been] useful potentially at the hearing."

After this denial, the appellant requested a continuance in order to obtain witnesses for the hearing. Specifically, the appellant argued that certain witnesses either could not be found or did not respond to their subpoenas. This motion was likewise denied by the post-conviction court as there was little or no evidence of the materiality or relevance of these witnesses' testimony.

A decision whether to grant a continuance "rests within the discretion of the trial court." *State v. Morgan,* 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991). Moreover, a denial of a continuance will not be disturbed "unless it appears upon the face of the record that the trial judge abused his discretion and prejudice enured to the accused as a direct result of the trial judge's ruling." *State v. Dykes,* 803 S.W.2d 250, 257 (Tenn. Crim. App. 1990). Additionally, in the context of a post-conviction proceeding, the denial of a motion for continuance must implicate a constitutional right. "It is settled law that a habeas petitioner who claims that the state trial court's refusal to grant a continuance denied him due process of law must demonstrate, first that the trial court abused its discretion, and second, that its action rendered the petitioner's trial fundamentally unfair." *Conner v. Bowen,* 842 F.2d 279, 283 (11th Cir. 1988). "A ruling involving the grant or refusal of a continuance is addressed to the sound discretion of the trial court and rarely reaches constitutional proportions." *Knighton v. Maggio,* 740 F.2d 1344, 1351 (1984).

*4 We are not persuaded by the facts presented, that the post-conviction court's denial of the appellant's motion for additional time to investigate or to secure the presence of subpoenaed witnesses implicates due process. In determining whether the post-conviction court's action rendered the appellant's hearing fundamentally unfair, we must look for actual prejudice to the appellant. However, the appellant has failed to identify any prejudice affecting his conviction or sentence. Continuances may be granted for the purpose of securing the presence of identifiable witnesses if those witnesses' testimony is material and admissible. In this case, the appellant sought a continuance, hoping to secure witnesses, whose testimony was unknown, and to

gather useful information which, at the time of the motion, was also largely unknown. Accordingly, we conclude that the post-conviction court did not abuse its discretion by denying the appellant's motion for continuance. This issue is without merit.

3. INEFFECTIVENESS OF COUNSEL

The appellant next contends that he was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Tennessee Constitution. Specifically, the appellant contends that his counsel was ineffective for the following reasons:

(a) Counsel failed to investigate the personal background and medical history of the appellant for the existence of mitigating evidence and/or to present such evidence during the penalty phase of the trial;

(b) Counsel failed to request and obtain adequate expert and investigative assistance;

(c) Counsel failed to develop a reasonable trial strategy or defense for the appellant;

(d) Counsel failed to investigate and present all available evidence that would support the appellant's claims of innocence regarding all charges including, but not limited to, the first degree murder charge;

(e) Counsel failed to properly rebut the State's case at either the guilt/innocence phase or the sentencing phase of trial;

(f) Counsel failed to investigate for witnesses and/or prepare and present them during the penalty phase of trial to demonstrate all aspects of the appellant's character and background that would support a sentence less than death;

(g) Counsel failed to adequately prepare for either the guilt phase or the penalty phase of the trial and to develop and present to the jury a coherent theory of defense at either phase;

(h) Counsel lacked the experience and knowledge necessary for effective representation of the appellant in a death penalty case;

(i) Counsel failed to properly voir dire jurors;

(j) Counsel failed to properly voir dire jurors for racial bias;

(k) Counsel failed to object to the exclusion of jurors because of their general opposition to the death penalty;

(l) Counsel failed to file necessary motions before, during, and after trial, on direct appeal, or at post-conviction;

*5 (m) Counsel failed to present evidence at the sentencing hearing, other than the testimony of the appellant, and defense witnesses, who were not under subpoena, left or did not come to court, leaving the appellant with no available remedy as the court ordered the case to proceed.

(n) Counsel failed to raise and/or properly brief claims now raised in this petition for post-conviction relief;

(o) Counsel failed to adequately investigate and prepare the cases for trial and/or appeal;

(p) Counsel failed to investigate all witnesses for the defense and to properly impeach the witnesses for the State at trial;

(q) Counsel failed to present mitigating evidence, on behalf of the defendant, by not issuing subpoenas, resulting in loss of all evidence of mitigation;

(r) Counsel failed to object to certain irrelevant and inflammatory evidence during the appellant's trial;

(s) Counsel failed to present a consistent theory throughout the guilt phase and sentencing phase of the trial;

(t) The appellant was denied the effective assistance of counsel on his direct appeal to the Tennessee Supreme Court; and

(u) Counsel failed to raise the above ineffective assistance of counsel claims on motion for new trial, on appeal, or in prior post-conviction proceedings; [FN6]

In a post-conviction proceeding, the petitioner has the burden of proving the grounds raised in the petition by a preponderance of the evidence. *State v. Clark,* 800 S.W.2d 500, 506 (Tenn. Crim. App. 1990). Furthermore, the factual findings of the post-conviction court are conclusive unless the appellate court finds that the evidence preponderates against them. *Black v. State,* 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990); *Butler v. State,* 789 S.W.2d 898, 899 (Tenn. 1990); *State v. Swanson,* 680 S.W.2d 487, 490 (Tenn. Crim. App. 1984). Moreover, the uncorroborated

statements of the petitioner do not suffice to establish ineffective assistance of counsel. *State v. Kerley,* 820 S.W.2d 753, 757 (Tenn. Crim. App.), *perm. to appeal denied,* (Tenn. 1991).

When the appellant's post-conviction claim involves the Sixth Amendment right to effective assistance of counsel, this court must determine whether the performance of counsel was within the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose,* 523 S.W.2d 930, 936 (Tenn. 1975). In order to obtain a reversal on these grounds, the appellant must show by a preponderance of the evidence, *Taylor v. State,* 875 S.W.2d 684 (Tenn. Crim. App. 1993), *perm. to appeal denied,* (Tenn. 1994), that counsel's representation was deficient and that there was prejudice resulting from that deficiency. *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984). Counsel's representation is deficient if the errors were so serious as to deprive the appellant of representation guaranteed him by the Sixth Amendment. *Cox v. State,* 880 S.W.2d 713, 717 (Tenn. Crim. App. 1994). The deficient representation becomes prejudicial when the appellant is deprived of a fair trial with a reliable result. *Id.*

*6 Moreover, this court may first look at the prejudice prong of *Strickland.* If the court finds that the defendant suffered no prejudice, a deficiency if any, is considered harmless. *Strickland,* 466 U.S. at 693, 104 S.Ct. at 2067. Therefore, even if there are attorney errors, the appellant must show that " there is a reasonable probability that, but for, counsel's unprofessional errors, the result of the proceeding would have been different" in order to succeed on an ineffectiveness claim. *Id.* at 693, 104 S.Ct. at 2068.

A. Ineffectiveness of Trial Counsel

At the post-conviction hearing, the appellant was the only witness called by the defense. We note that the majority of the appellant's direct examination consisted of the appellant's post-conviction counsel reading the specific claims for post-conviction relief and the appellant responding that he had no comment and/or was relying on the allegations as described in the petition itself. [FN7] In any event, in support of his claim of ineffective assistance of counsel, the appellant testified that Robert Jones and Ed Thompson, both Shelby County Public Defenders, represented him at the trial level. The appellant observed that counsel "didn't appear to me as being able to handle such a case because of the magnitude of the case. He [Mr. Jones] didn't have the time, you know, to do the work that he needed because he was involved in a lot more cases, you know." Moreover, the appellant stated that trial counsel failed to properly investigate his case "because they didn't have no witnesses to come in and testify in my behalf, you know."

Specifically, the appellant testified that, in preparation for the sentencing hearing, his trial attorneys did not properly investigate his personal background and medical history for the existence of mitigating evidence. The appellant remarked that, at his sentencing hearing, he had wanted trial counsel to call people that knew him, e.g., Lenoir Patties, Sally Sykes, Ms. Wallace. The appellant added that he had given the names of Lenoir Patties and Sally Sykes to the investigator. He admitted that he did not know the addresses of these people. Nevertheless, according to the appellant, both of these individuals would have testified on the appellant's behalf. They were not called. The appellant also stated that his mother was willing to testify at the sentencing hearing, but she was not called. The appellant met with a psychologist, or "some fellow at the jail," but no witnesses were called regarding a mental evaluation. In fact, the only witness called at the sentencing hearing was Anthony Boyce, who voluntarily left the courtroom during the proceeding and was not heard because the court ordered the trial to proceed. As a result, the appellant was the only witness to testify at his sentencing hearing. [FN8]

The appellant further complained that, although he had been "locked up most of [his] life," his trial counsel failed to inquire about his criminal record. He also noted errors in the pre-sentence report, including the information that his father was deceased.

*7 With respect to the guilt phase of the trial, the appellant expressed his opinion that, "We didn't have no strategy in this courtroom." He added that "Barbara Lee ... gave a statement ... in regard to the fact that I never had a gun and Bruce Ryder alleged that I had a gun, so by them not bringing Barbara Lee in to testify to the fact that I never had a gun, that is what I was talking about here."

The appellant added that his attorneys did not conduct a proper jury voir dire. He claimed that he had wanted his attorneys to file a motion for individual voir dire and a motion for expert services, but neither motion was filed. The appellant further alleged that counsel failed to adequately advise him regarding his decision to testify and failed to object to the prosecutor's improper statements during the trial. Counsel also failed to object to the State's discriminatory exercise of peremptory challenges and to improper jury instructions.

At the post-conviction hearing, the State called Robert Jones as its first witness. Jones testified that he is a member of the capital defense team in Shelby County and has worked in that capacity for thirteen of his sixteen years with the Public Defender's Office. He added that he has handled "somewhere between five and six hundred [capital murder] cases."

Jones was appointed to represent the appellant at the preliminary hearing, where he replaced the appellant's private counsel, A.C. Wharton. Edward Thompson, who had twenty years capital case experience, was subsequently appointed co-counsel. Jones testified that he met personally with the appellant over twenty times prior to trial, and that, during these meetings, he obtained information from the appellant about the criminal charges. Jones further stated that the case was investigated by the Public Defender's Office. Because two investigators worked on the case, trial counsel concluded that expert services were not required for the appellant's defense.

Jones added that, based upon the appellant's statements, they relied upon the theory of self-defense. He explained that, at trial, they "tried to establish who had the guns. And to discredit witnesses that contradicted our defense." Jones noted that Barbara Lee was not cooperative, and that trial counsel decided not to use her because her statement kept "going backward and forward." He observed that Lee would have been impeachable due to her prior inconsistent statement.

Jones also testified that, although he could not remember the racial makeup of the jury, neither could he recall the systematic exclusion of any particular race. Moreover, he could not recall failing to comply with any request of the appellant during the trial. Finally, Jones concluded that he filed all necessary motions, numbering between twenty-five and thirty.

With respect to the penalty stage, Jones testified that he investigated the appellant's background through interviews with family, friends and neighbors. The appellant's mother and brother were serving sentences in federal correctional facilities at the time of the appellant's trial. However, Jones did talk with the appellant's grandfather and a cousin, who is an attorney and whom they planned to call at the penalty stage. Indeed, Jones testified that, at the penalty stage, the defense team had Jean Withers, Randy Withers, and Anthony Boyce ready to testify, but all three witnesses left the courtroom before they were called. After the trial, Jones confronted Boyce, who claimed that the appellant's brother, Mitchell Boyce, told the witnesses to leave the courtroom. Thus, only the appellant testified at the penalty stage. Additionally, Jones stated that he "was not aware of any medical information that would have been of benefit to [the appellant] in the trial."

*8 On cross-examination, Jones stated that he could not recall any mental evaluation of the appellant, since it was not relevant to the theory of self defense. Jones further conceded that he unsuccessfully attempted to impeach two State witnesses, Hippen and Wright, but had no basis or real evidence upon which to impeach.

The post-conviction court, in its thorough and

detailed "Findings of Fact and Conclusions of Law," found that the appellant "failed to meet a single prong of the *Strickland* test, much less both." Specifically, the post-conviction court noted:

> Trial counsel has discretion in conducting the defense and must employ his or her best judgment in determining trial strategy; allegations of ineffective assistance of counsel relating to matters of trial strategy or tactics do not ordinarily provide a basis for post-conviction relief. *See Taylor v. State,* 814 S.W.2d 374, 378 (Tenn. Crim. App. 1991). In this case, it is evident that the Petitioner was represented by counsel experienced in the representation of murder suspects and well aware of the strategies and tactics necessary to mount a defense. This court will not use hindsight when reviewing every tactic used by the trial attorney. *See State v. Martin,* 627 S.W.2d 139, 142 (Tenn. Crim. App. 1981).
>
> The Petitioner also contends that his trial attorney failed to call witnesses that would have been beneficial at the sentencing phase of the trial. The Petitioner seems to argue that their presence would have helped him establish mitigating circumstances. However, the only proof offered by the Petitioner at the Evidentiary Hearing was that these "witnesses" would have testified that they "knew" the Petitioner. The Petitioner has failed to show how there [sic] testimony would provide evidence of statutory mitigating circumstances.
>
> A petitioner ... who asserts that the attorney failed to use certain evidence must produce that evidence, not only to show the evidence is producible, but also to show that it would have been helpful to the case. *State of Tennessee v. Walker,* C.C.A. No. 02C01-9203-CC-00068 (Tenn. Crim. App. Feb. 24, 1993). The Court finds these averments to be totally baseless.... counsel testified ... that the decision not to call certain witnesses was intentional, made because counsel feared that the witnesses in question would cause more harm to the Petitioner's case than any possible benefit they could confer. The conduct of the trial attorney in relationship to witness issues has not been proven to be anything other than an attorney's judgment of proper trial strategy and tactics.

The court then stated that "[t]he Petition's claims of ineffective assistance of counsel are not supported by the proof," and, accordingly, dismissed all claims relating to this issue.

Having reviewed the record, we also conclude that the appellant has failed to demonstrate ineffective assistance of counsel at the trial level. Accordingly, we must uphold the decision of the post-conviction court.

B. Ineffectiveness of Appellate Counsel

*9 In support of his claim of ineffective assistance of appellate counsel, the appellant alleges that appellate counsel failed to raise the following issues: the ineffective assistance of counsel at trial; whether the jury should have been permitted to find the appellant guilty of both first degree murder and felony murder; whether the trial court erred by failing to sufficiently instruct the jury that deliberation and premeditation are separate essential elements of first degree murder, and by instructing the jury that premeditation can be formed in an instant. The appellant further argues that all of his attorneys were ineffective for failing to raise the issue that the felony murder aggravating factor is invalid, as announced in *State v. Middlebrooks,* 840 S.W.2d 317 (Tenn. 1992). He contends that all of his attorneys were ineffective for not attacking the appellant's prior conviction for second degree murder, since it is the only other aggravating factor supporting the death sentence of the appellant.

Mark Ward, appellate counsel, testified for the State at the post-conviction hearing. He stated that he was a private attorney in Memphis, but was under contract with the Public Defender's Office. He further testified that, during his eleven years as a contract attorney with the Public Defender's Office, he had prepared sixteen capital appeal cases. The appellant's case was his tenth capital appeal. Ward explained his procedure in preparing appeals, which includes reading the entire record and formulating a list of issues. He then reviewed the issues raised in the appellant's appeal. Ward stated that, if he failed to raise an issue, he did so because the issue was

without merit or not viable at that time. However, he agreed that, under the subsequent supreme court holding in *Middlebrooks,* the appellant would have an issue regarding the jury's consideration of the felony murder aggravator.

The post-conviction court, citing *Fisher v. State,* No. 88-226-III (Tenn. Crim. App. at Nashville, Sept. 29, 1989), *perm. to appeal denied,* (Tenn. 1990), found no merit to the appellant's assertion that appellate counsel was ineffective for failing to "submit a voluminous list of alleged errors on appeal." Moreover, the post-conviction court remarked that "It was sound judgment for the appellate counsel to limit to scope of the appeal and to have done otherwise would have called into question the competence of counsel." The post-conviction court then dismissed all allegations of ineffective assistance of counsel on appeal.

Again, the evidence presented by the appellant does not preponderate against the findings of the post-conviction court. Therefore, this issue is likewise without merit.

4. EXPERT SERVICES AT POST-CONVICTION HEARING

The appellant contends that he is entitled to an opportunity to demonstrate his need for expert services. The appellant cites the case of *Gaile K. Owens & Pervis Tyrone Payne v. State,* C.C.A. No. 02C01-9111-CR-00259 (Tenn. Crim. App. at Jackson, March 25, 1994), as authority for his position. [FN9] The appellant is correct in his assertion that a petitioner convicted of a capital offense is entitled to an *ex parte* hearing in order to establish a need for expert services at the post-conviction level. *See Owens and Payne,* 908 S.W.2d at 923. However, the supreme court, in *Owens and Payne,* held that, in order to obtain an *ex parte* hearing, a post-conviction petitioner must comply with the procedural guidelines set forth in Tenn. Sup. Ct. Rule 13 (2)(B)(10). *Id.* at 928. Moreover, "the trial court should grant the motion if, at the hearing, the petitioner demonstrates that investigative or expert services are necessary to ensure the protection of the petitioner's constitutional rights." *Id.* Specifically, "the petitioner must demonstrate by specific factual proof that the services of an expert or investigator are necessary to establish a ground for post-conviction relief, and that the petitioner is unable to establish that ground for post-conviction relief by other available evidence." *Id.*

***10** The record before us is devoid of any reference to a "particularized" need for expert services at the post-conviction level. In fact, the appellant did not submit a motion for expert services to the post-conviction court, nor did he request an *ex parte* hearing. Moreover, the appellant has not complied with the procedural requirements of Rule 13(2)(B)(10); he has not stated what expert services are necessary; and he has not asserted what constitutional rights would be protected by obtaining such services.

Furthermore, since this issue is raised for the first time on appeal and was not raised at the post-conviction hearing, it is presumed waived. *Butler,* 789 S.W.2d at 902; *Cone v. State,* 747 S.W.2d 353, 356 (Tenn. Crim. App. 1987); *Gribble v. State,* No. 02C01-9303-CC-00039 (Tenn. Crim. App. at Jackson, Feb. 8, 1995). Accordingly, this issue is without merit.

5. IMPROPER JURY INSTRUCTIONS

The appellant next argues that the trial court committed error by submitting improper instructions to the jury during the penalty phase of his trial, in violation of *State v. Middlebrooks,* 840 S.W.2d at 317. [FN10] During the penalty phase of the trial, the jury unanimously found two statutory aggravating factors: (1) "the defendant was previously convicted of one or more felonies ... which involve the use or threat of violence to the person;" and (2) "the murder was committed while the defendant was engaged in committing, ... any first degree murder, arson, rape, burglary, larceny, kidnapping, ..." The appellant, citing *Middlebrooks,* contests the use of this second aggravating factor to support his death sentence.

At the post-conviction hearing, the court accepted the appellant's argument that the felony murder aggravating circumstance is not valid, noting:

> In *Middlebrooks,* the Tennessee Supreme Court held that under the Tennessee Constitution, Article I, §16, it was unconstitutional to use the felony murder aggravating circumstance to support the imposition of the death penalty for a conviction of felony murder. The court held that the use of the felony murder aggravator served to duplicate the elements of the underlying crime, thus failing to narrow the class of death-eligible murderers as required by both the Tennessee Constitution and the United States Constitution.

However, the post-conviction court noted that "the Court cannot agree with the Petitioner's argument that this serves to invalidate the sentence of death."

The court compared the appellant's case to that of *State v. Howell,* 868 S.W.2d 238 (Tenn. 1993), and found that, pursuant to the test set forth in *Howell,* 868 S.W.2d at 260, the use of the felony murder aggravator in the appellant's case was harmless error. Since (1) the jury did not find any mitigating factors; (2) the appellant had a prior conviction for second degree murder; and (3) the invalidating aggravator did not "taint the jury because it was merely a consequence of the underlying felony, requiring no additional evidence above that used to convict the Petitioner of the murder," the post-conviction court found the death sentence to be valid.

*11 Neither the United States Constitution nor the Tennessee Constitution prohibit a reviewing court from upholding a death sentence that is based, in part, upon an invalid aggravating factor. *State v. Hartman,* 896 S.W.2d 94, 103 (Tenn. 1995). However, in order to guarantee the appellant an individualized sentence, the reviewing court must either reweigh the mitigating and aggravating evidence or conduct a harmless error review. *Id.* (citations omitted).

Before a jury's consideration of an invalid aggravating factor may be declared harmless error, "an appellate court must conclude, beyond a reasonable doubt, that the sentence would have been the same had the sentencing authority given no weight to the aggravating factor." *Barber v. State,* 889 S.W.2d 185, 187 (Tenn. 1994) (citation omitted). The procedure to be followed was announced by our supreme court in *State v. Howell,* 868 S.W.2d 238, 260-61 (Tenn. 1993):

> In order to guarantee the precision that individualized sentencing considerations demand and provide a principled explanation for our conclusion in each case, it is important, when conducting harmless error review, to completely examine the record for the presence of factors which potentially influence the sentence ultimately imposed. These include, but are not limited to, the number and strength of the remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality and strength of mitigating evidence.

Thus, even when an aggravating circumstance is invalidated, leaving only a single valid aggravating circumstance, the sentence of death can still stand in certain cases.

At the appellant's trial, the jury found one remaining aggravating circumstance, that "the defendant was previously convicted of one or more felonies which involve the use or threat of violence to the person." To reach this finding, the jury relied upon the State's proof at the penalty phase of the trial. This proof consisted of the testimony of Gloria Low, an employee of the Shelby County Criminal Court Clerk's Office. Ms. Low testified, in conjunction with the introduction of a certified copy of the judgment entered on indictment number 95310, that the appellant was convicted on October 17, 1983, of second degree murder. Beverly Sakyi, an employee of the State of Tennessee Parole Board, identified the appellant as being the Michael Joe Boyd who was convicted of second degree murder on October 17, 1983. We conclude that the evidence overwhelmingly supports the jury's finding that the appellant has a previous conviction for a violent offense.

We next consider the extent to which the prosecutor emphasized the felony murder aggravator during argument at the sentencing phase of the appellant's trial. During its opening statement, when listing the aggravating circumstances

supporting a penalty of death, the State only briefly mentioned the felony murder aggravator. A review of the prosecutors' closing statements reveal that the State focused primarily on the aggravator that "the appellant created a great risk of death to two or more persons, other than the victim, during his act of murder" [FN11] and the aggravator involving the second degree murder conviction. Again, the prosecution made only cursory reference to the felony murder aggravator, relying upon the finding of the jury at the guilt phase of the trial. [FN12]

*12 In *Howell,* the supreme court stated that "an aggravating factor which duplicates the elements of the underlying crime has less relative tendency to prejudicially affect the sentence imposed than invalid aggravating factors which interject inadmissible evidence into the sentencing calculus, or which require the sentencing jury to draw additional conclusions from the guilt phase evidence." *Howell,* 868 S.W.2d at 261. In the instant case, the State did not present any evidence at the sentencing hearing, but relied upon the proof presented during the guilt phase to establish the felony murder aggravating circumstance. Thus, no inadmissible evidence was "thrust into the sentencing calculus," and the jury was not required to draw additional conclusions from the guilt phase evidence. *See Barber,* 889 S.W.2d at 189. Finally, the jury was unable to find any statutory mitigating circumstances. After a review of the record, we agree with the jury's finding.

Based upon our thorough review of the record and after a careful analysis in conformity with *Howell,* we conclude, beyond a reasonable doubt, that the sentence would have been the same had the jury given no weight to the invalid felony murder aggravator. Therefore, since the invalid aggravating circumstance is harmless beyond a reasonable doubt, we affirm the sentence of death.

III. CONCLUSION

The record fully supports the post-conviction court's findings and conclusions. The appellant has clearly not met his burden of proof. We conclude that the petition for post-conviction relief was properly denied.

For the reasons we have stated, the judgment of the post-conviction court is affirmed.

PEAY and BARKER, JJ., concur.

FN1. At the post-conviction hearing, the appellant presented over one hundred alleged errors through his *pro se* petition and his amended petition for post-conviction relief. These errors can be categorized into six cognizable areas: ineffective assistance of trial counsel; improper jury instructions; constitutional errors by the trial court; improper conduct by the State; ineffective assistance of appellate counsel; and the imposition of the death penalty.

FN2. Additionally, issue #8 has been previously determined by the supreme court on direct appeal. *Boyd,* 797 S.W.2d at 595-96.

FN3. Issue #11 is without merit. The record indicates that the post-conviction court did *not* prevent the appellant from presenting evidence on issues that is found to be previously determined. Rather, when the State requested that numerous issues be dismissed because they had previously been determined on direct appeal, the post-conviction court allowed the petitioner to argue why those issues were not previously determined and to present his proof.

FN4. The entire case file, which included the transcript of the proceedings, exhibits, and the technical record, remained with the Supreme Court at Jackson following that court's review on direct appeal.

FN5. The record does not reflect whether the post-conviction court found that a copy of the transcript was "necessary to further meritorious claims."

FN6. Appellant's issues (a) through (s)

relate to his ineffectiveness of trial counsel claim; issues (t) and (u) relate to his ineffectiveness of appellate counsel claim.

FN7. At the hearing, in response to this manner of questioning, the post-conviction court stated, "This court will not regard the mere recitation of language found in the petition as an offer of proof sufficient to meet burden of proof by a preponderance of the evidence. *Kerley,* 820 S.W.2d at 757 ." Accordingly, the court found that numerous issues, not presented in this appeal, were waived.

FN8. At the sentencing hearing, the appellant testified that he had not intended to kill anyone. He further stated that, at the time of the murder, he was not in possession of a gun. The appellant asserted that the victim pulled a gun on him, and that the appellant was "just fighting for his life." He concluded that the victim died during a struggle. The appellant also very briefly told the jury about his second degree murder conviction, implying that the crime occurred during a fight over a woman.

FN9. We note that, since the filing of appellant's brief, the Tennessee Supreme Court has held that Tenn. Code Ann. § 40-14- 207(b) (1995 Supp.), authorizing special support services to indigent defendants, applies to post-conviction capital cases. *Owens and Payne v. State,* 908 S.W.2d 923, 928 (Tenn. 1995).

FN10. At the time of the appellant's trial, [four years before the release of the supreme court's decision in *Middlebrooks*], a jury could consider the felony murder aggravating factor in imposing the death penalty upon a defendant found guilty of felony murder. *See State v. Pritchett,* 621 S.W.2d 127, 140-41 (Tenn. 1981).

FN11. This aggravating circumstance was rejected by the jury.

FN12. Assistant District Attorney General Hughes remarked in closing, "There's no question that we've proven two of the aggravating circumstances: Murder in the Perpetration of a Robbery, and the fact that Mr. Boyd has killed before." In rebuttal to the appellant's closing statement, Assistant District Attorney General Beasley stated, "You've already found that it was a murder in the perpetration of a robbery, that Michael Boyd wanted to rob these people of their money and he killed one of them in the act."

Not Reported in S.W.2d, 1996 WL 75351 (Tenn.Crim.App.)

END OF DOCUMENT

28

STATE OF TENNESSEE)
) ss
COUNTY OF DAVIDSON)

AFFIDAVIT

I, MICHAEL JOE BOYD, now known as Mik'eel Abdullah Abdus-Samad, after having been duly sworn, aver and say as follows:

1. I, MICHAEL JOE BOYD, hereby declare and advise this Court that the Application for Permission to Appeal filed with this Court by my counsel of record, Paul J. Morrow, Jr., and only said Application has been authorized by me and is lawfully filed on my behalf. I express the unequivocal desire that the Application by Mr. Morrow be considered by this Court on my behalf.

2. The Application filed in this Court purportedly on my behalf by my former counsel, Daniel A. Seward, has been done against my express wishes and written objection and is without any validity whatsoever.

3. I expressly discharged Mr. Seward in writing as my counsel on or about March 12, 1996 (see attached copy of letter; cc. to: Tennessee Supreme Court; Tennessee Board of Professional Responsibility; Tennessee Bar Association; and, the Memphis Bar Association) following the initial decision of the Court of Criminal Appeals on February 21, 1996.

4. Because of Mr. Seward's history of poor representation of me and my ongoing inability to communicate or contact him, following the Court of Criminal Appeals decision in my case on February 21, 1996, I filed a *pro se* "Motion for Leave to File, and Petition for Rehearing, Discharge of Appointed Counsel, Appointment of Competent Post-Conviction Counsel, Remand for Further Proceedings With New Counsel, and Rebriefing of Issues on Appeal." I do not

know if Mr. Seward also filed a Petition to Rehear but, given his failure to properly represent me in the past, I could not take a chance on what he might or might not do. If Seward did file a Petition to Rehear purportedly on my behalf (against my wishes), he never sent me a copy of it.

5. The Court of Criminal Appeals filed an Order Dismissing Petition to Rehear on April 9, 1996 addressing the issues that I raised in my *pro se* "Motion for Leave to File, and Petition for Rehearing, Discharge of Appointed Counsel, Appointment of Competent Post-Conviction Counsel, Remand for Further Proceedings With New Counsel, and Rebriefing of Issues on Appeal."

6. I did not then and do not now want any involvement of Mr. Seward on my discretionary Application for Permission to Appeal to the Tennessee Supreme Court. (I also requested in my March 12, 1996 letter to him return of all papers and property to which I am entitled on my case; a request that, to date, has yet to be honored).

7. Following the above-mentioned letter of March 12, 1996 to Mr. Seward expressly discharging him in this case, he visited me at Riverbend Maximum Security Institution in Nashville. I again told him in person that he was discharged that I did not want him to do anything further on my case. He attempted to get me to sign my name and address on a blank sheet of paper but, given his past failure to represent me properly and my mistrust of his motives, I refused to sign. He then left the prison.

8. At or about the time of my discharge of Mr. Seward, I contacted Paul J. Morrow, Jr. to represent me and he agreed to file an Application for Permission to Appeal on my behalf. He did so in a timely manner.

9. At or about the time of the date for filing my Application for Permission to Appeal (c. June 11, 1996), Mr. Seward again came to Riverbend Maximum Security Institute in

Nashville apparently for the purpose of visiting with me. After being called out and seeing that the "attorney visitor" was not my lawyer, Paul J. Morrow, Jr., but was, rather, Mr. Seward, I yet again told him that he had been discharged, that I did not want him to do anything further on my case and I did not want to speak with him. He then left the prison.

10. I was completely surprised to discover at a later time that Seward had filed an (unauthorized) Application for Permission to Appeal. I have never received a copy of said Application in the mail and do not know its contents.

11. I am an indigent death row inmate who has had to rely upon counsel, Daniel A. Seward, appointed by the trial court in this post-conviction proceeding and appeal. I have repeatedy related to the courts in detail my ongoing problems with Mr. Seward's representation and his inability/unwillingness to investigate and properly present my issues. See, Application for Permission to Appeal submitted by Paul J. Morrow, Jr. June 11, 1996; my *pro se* "Motion for New Trial or, in the alternative, Motion to Alter or Amend Judgment or, in the alternative, Motion for Full and Fair Hearing" filed in the trial court April of 1994 (Appendix 3 to the Morrow Application for Permission to Appeal); and my *pro se*, "Motion for Leave to File, and Petition for Rehearing, Discharge of Appointed Counsel, Appointment of Competent Post-Conviction Counsel, Remand for Further Proceedings With New Counsel, and Rebriefing of Issues on Appeal" filed February 28, 1996 in the Court of Criminal Appeal (Appendix 4 to the Morrow Application for Permission to Appeal).

12. I know of no lawful or ethical justification for Seward's continuing to file papers purportedly on my behalf. He has no death penalty experience and failed to investigate and find out and present all the legal issues in my case. He has made statements to me that doing such a case was a financial strain on him indicating that he simply could not or would not do the

necessary work but he failed to ask the court to appoint co-counsel and failed utterly in requesting investigative assistance in this case. I can only conclude that his filing of an unauthorized Application for Permission is an attempt to keep from the court the relevant facts of his failure to properly represent me.

FURTHER THE AFFIANT SAITH NOT.

Mikaeel Abdullah Abdus Samad
MICHAEL JOE BOYD, Affiant

Sworn to and subscribed before me on this the 26th day of July, 1996.

Rowena Tanner
NOTARY PUBLIC

My Commission Expires: 9-18-99

Mika'eel Abdullah Abdus Samad # 101137
aka Michael Joe Boyd
RMSI, UNIT 2
7475 COCKRILL BEND IND. RD.
NASHVILLE, TN 37209-1010

March 12, 1996

Mr. Daniel A. Seward
Attorney at Law
P.O. Box 11207
Memphis, TN 38111-0207

RE: State of Tennessee v. Mika'eel Abdullah Abdus Samad
No. 02C01-9406-CR-00131

Dear Mr. Seward;

Pursuant to Tennessee Supreme Court Rule 8, and DR 2-110(B)(4), of the Code of Professional Responsibility, I hereby discharge you from any further representation of me in the above-styled matter. This discharge is based upon, among other things, the irreconcilable conflict of interest which exists and which has existed between us because you refuse to properly represent me, as well as your total refusal to communicate with me during your purported representation of me in this case. I do not trust you, you have done nothing but lie to me, and I know that you have done nothing but deliberately waive my legal issues and sell me out to the State in this case. I have the death penalty and, as a result, I need a real advocate to represent me. Obviously, you are not that person nor are you capable of such representation. You are only looking out for your own personal interests.

Because you are hereby discharged and terminated from any further representation of me in this matter, I further hereby demand that, pursuant to DR 2-110(A)(2), of the Code of Professional Responsibility, you deliver to me without delay all papers and property to which I am entitled, including all files, records and trial transcripts which belong to me.

Respectfully Submitted,

Mika'eel Abdullah Abdus Samad

Mika'eel Abdullah Abdus Samad

CC: Clerk, Tennessee Supreme Court
Justice Lyle Reid, Tennessee Supreme Court
Tennessee Board of Professional Responsibility
Memphis Bar Association
Tennessee Bar Association