IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH SESSION, 1998

FILED

June 30, 1998

Cecil W. Crowson
Appellate Court
Clerk

OSCAR FRANKLIN SMITH, 00048	)	C.C.A. NO. 01C01-9702-CR-
	)	
Appellant,	)	
	)	
	)	DAVIDSON COUNTY
VS.	)	
	)	HON. J. RANDALL WYATT, JR.
STATE OF TENNESSEE,	)	JUDGE
	)	
Appellee.	)	(Post Conviction: Death Penalty)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF DAVIDSON COUNTY

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OPINION FILED _____

AFFIRMED
DAVID H. WELLES, JUDGE

OPINION

The petitioner was originally convicted of three counts of premeditated first degree murder and was sentenced to death on each. As to one count, the jury found that the murder was especially heinous, atrocious, or cruel and that the petitioner committed mass murder. In addition to these, the jury found two more aggravators on the remaining two counts: the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution and the murder was committed during the perpetration of the murder in the first count. The Supreme Court affirmed the convictions and sentences on direct appeal. State v. Smith, 868 S.W.2d 561 (Tenn. 1993).

The petitioner subsequently filed a petition for post-conviction relief which was denied by the trial court. In this appeal from that denial, the petitioner challenges the effectiveness of his trial and appellate counsel and raises several other issues regarding the proceedings at trial. Having reviewed the entire record on appeal, we find the petitioner has failed to

carry his burden on appeal and, therefore, we affirm the judgment of the trial court.

FACTS

The petitioner was convicted of murdering his estranged wife and her two minor sons. The most damaging pieces of evidence introduced at trial against the petitioner were a 911 call made by one of the younger victims, the petitioner's bloody palm print found next to his wife's body, and statements the petitioner made to co-workers expressing his intent to kill the victims. The petitioner relied primarily upon an alibi defense at trial. The facts surrounding the slayings were described by our Supreme Court in the opinion on direct appeal as follows:

> It appears that these tragic, brutal and bizarre murders occurred at approximately 11:20 p.m. on Sunday, October 1, 1989, when the Metropolitan Nashville Police Department received a 911 emergency call from 324 Lutie Street, Judy Smith's home in the Woodbine section of Nashville. On the tape of the call, which was later technically enhanced and played at trial, a young male voice, identified at trial as that of Jason Burnett, is heard crying, "Help me!" In the background another male, identified as Chad Burnett, is heard shouting "Frank, no. God, help me!" The call ended abruptly with Jason stating "324 Lutie Street." Officers dispatched to the scene arrived at the house five minutes later. They knocked on the

front door and received no answer. Everything appeared quiet so the officers assessed the situation as a “false call” and left.

It was not until 3:00 p.m. the next day, that the bodies of Judy, Jason and Chad were discovered. The body of Chad was found lying face up on the kitchen floor. The room was a wreck; the phone had been ripped off the wall and large quantities of blood were on the floor and wall. An awl, a tool similar to an ice pick and often used in leatherworking, was found in the room. Chad had been shot three times: in the right shoulder, the upper chest, and on the inside left eyebrow. The last two wounds were contact wounds and had been fatal. Chad had also been stabbed several times in his chest, back and abdomen with a sharp, needle-like weapon (such as an ice pick or awl) and with a knife. His neck had been slashed, and there were defensive wounds on his hands. All of his injuries had occurred before death.

Judy Smith’s body was found lying on its back on a bed in the front bedroom. There was blood splattered on the paneled wall next to the bed. She had been shot in the left arm and the neck. The latter wound, caused by a gun fired from a range within two feet, had severed her spinal cord and produced instant paralysis, rapid unconsciousness and death. Shortly after death, her neck and been slashed; and, like Chad, she had been stabbed with a knife and a weapon resembling an awl or ice pick. The medical examiner opined that both Judy and Chad had died from multiple gunshot and stab wounds.

The body of Jason, Judy’s youngest son, was discovered lying on its left side on the floor at the foot of the bed on which his mother lay. He had not been shot. There were numerous defensive wounds on his hands. His neck and been slashed, and he had been stabbed in the chest and abdomen. Two of the wounds to the abdomen had been fatal because they had cut

> major veins. His small bowel protruded from his body through these wounds. All of Jason's injuries had occurred before death. The medical examiner testified that Jason had bled to death over a period of several minutes as a result of the multiple stab wounds.
>
> The three victims had been dead at least twelve hours before they were found. There were no signs of forcible entry into the house. The back door had been left open. There were signs of a struggle in the house, particularly the kitchen, where a leg had been broken off the table. A .22 caliber cartridge was found on the rug in the den. An identical type of bullet was removed from the bodies of Judy and Chad who, ballistics experts determined, had been shot with the same gun. There were bullet holes in the walls of the front bedroom and the den. A path of splattered blood led from the den down the hall to the kitchen. Drops of blood in the bathroom indicated that someone had cleaned up in that room.

State v. Smith, 868 S.W.2d 561, 565-66 (Tenn. 1993).

Post-Conviction Hearing

Dr. Kris Lee Sperry, Deputy Chief Medical Examiner in Fulton County, Georgia, testified on behalf of the petitioner at the post-conviction hearing. Dr. Sperry testified that he reviewed the autopsy reports, investigation reports, photographs, and the trial testimony of the medical experts prior to the post-conviction hearing. From reviewing all this information, Dr. Sperry opined that the state sought to prove that the mother was killed first, and that her two children were killed subsequently.

Dr. Sperry testified that measuring the rigor mortis is the least predictable manner by which to determine the time of death. It usually takes about eight to twelve hours for rigor mortis to reach its maximum stiffness. The next least accurate measure, according to Dr. Sperry, is livor mortis, or the settling of blood in the body after death. Again, the peak point of livor mortis occurs eight to twelve hours after death. If a body is examined before the effects of rigor and livor mortis are complete, it is possible to determine that death occurred within eight hours. However, beyond eight to twelve hours after death, according to Dr. Sperry, it is almost impossible to pinpoint a time of death, because the effects of rigor and livor mortis do not change. The vitreous fluid potassium evaluation is another method used to determine time of death by measuring the potassium level in the eye fluid. In addition, the body temperature can give an indication of time of death. These two measurements, however, also decrease in reliability outside the twelve hour time-frame.

The bodies in this case were found at 4:00 p.m. on October 2, 1989, the medical examiner was notified at 4:30 p.m., and the

medical examiner viewed the bodies at 8:40 p.m. At the time of viewing in this case, both rigor and livor mortis were fixed, or complete. According to Dr. Sperry, therefore, the range for the time of death would be more than eight to twelve hours prior to the initial viewing of the bodies. It would have been impossible for the medical examiner to pinpoint a time of death beyond that time with only the benefit of rigor and livor mortis. Dr. Sperry testified that the defense should have asked more questions at trial in an attempt to show the inaccuracies of the time estimate; death could have occurred anytime prior to twelve hours before the viewing of the body. The trial testimony of the expert stated that the time of death was likely around 11:30 p.m. or midnight on October 1, 1989. Dr. Sperry acknowledges that this would be consistent with the evidence of the 911 call, which was made around 11:20 p.m., and he has no evidence to contradict the conclusion of the medical examiner. Dr. Sperry testified that a medical examiner would also look at other factors or evidence, such as witness statements or 911 calls, to help determine the time of death.

It has been Dr. Sperry's experience that defense attorneys sometime do not ask the medical examiner questions during trials. Dr. Sperry testified that he did not talk to the original medical examiners or the defense attorneys in this case prior to his testimony at the hearing. Thus, when he stated at the hearing that the defense could have made certain points on cross examination regarding the time of death, the pain sustained by the victims, the movement of Jason's body, and the amount of blood on the perpetrator, Dr. Sperry was not familiar with the defense trial strategy.

The evidence at trial also established that two of the victims had full stomachs of undigested pizza and therefore their deaths probably occurred within an hour to an hour and a half after they ate. Dr. Sperry testified that death could have occurred as late as approximately 6:00 a.m., which would mean that the victims would have had to have eaten pizza at 4:30 to 5:00 a.m., some five hours after making the 911 call. Dr. Sperry testified that defense counsel should have questioned the medical examiner about this possibility.

The medical examiner testified at trial that Jason (the youngest son) turned himself over within twelve hours of death. Dr. Sperry, however, does not think this would have been possible, and he believes that instead, the body was turned over by someone else after death. The victim would have lived only a few minutes after sustaining his wounds to the main veins in the pelvic area. However, some of the blood stain patterns on his leg indicate that the victim was in a different position for at least fifteen to thirty minutes (the time it would have taken the blood to dry in those patterns), and then moved to the position in which he was found. Also, a large blood stain on the carpet suggested he was originally in a different position. Dr. Sperry testified that the change in positions occurred within one to two hours after death, because rigor and livor mortis remained fixed in the position in which he was found. However, there were two different directions of blood flow on the victim's legs. Although Dr. Sperry did not believe the victim was alive when moved, given the blood flow patterns, he admitted that another medical examiner could conclude differently.

Given the nature of these murders, Dr. Sperry testified that the perpetrator would have had a great deal of blood on his or her person. It did not appear to Dr. Sperry that the defense attempted to address this fact during trial. However, a bloody palm print identified as the petitioner's was found on the bed sheet beside the mother's body. When asked if defense counsel should have explored that evidence more thoroughly, Dr. Sperry did not provide a definite answer. Dr. Sperry did testify, however, that he thought there would typically be more blood transfer marks on or near the victim other than the palm print, and that this possibly should have been explored.

Dr. Sperry testified that Judy Smith (the mother) remained alive for about three to four minutes after she sustained the fatal gunshot wound to her neck, but that she would have been rendered unconscious instantaneously. The medical examiner at trial said the victim could have remained conscious for a short time, and while Dr. Sperry does not discount this expert's conclusion, he testified that he believed otherwise. Dr. Sperry testified that defense counsel would have had this information

regarding the nature of the injury if they consulted with the medical examiner.

Chad Burnett (the older son) would have been rendered immediately unconscious upon sustaining the gunshot wound to his head. However, this was the last wound, and he also sustained a gunshot wound to the chest and stab wounds. Dr. Sperry testified that due to the limited amount of hemorrhaging around the stab wounds, the time interval between them and the gunshot wound to the head was fairly small. The gunshot wound to the chest resulted in a large amount of bleeding. Dr. Sperry testified that he agreed the medical examiner could have concluded the victim experienced pain while attempting to breathe. Dr. Sperry did not indicate whether it was possible to determine the amount of time between the chest wound and head wound. However, Dr. Sperry testified that Chad was probably not conscious long enough, probably three to five minutes, to experience any significant degree of pain from his injuries. In support of this opinion, Dr. Sperry noted that stab wounds are not painful unless they strike bones and cause bone injury because internal organs do not have pain receptors.

Given the wound to a major vein in the pelvic region, Jason Burnett would have been conscious from three to five minutes and would have remained alive for an additional five minutes thereafter. This information would have been available to defense through consultation with the medical examiner. Again, Dr. Sperry testified that, although Jason's intestines were protruding from his abdomen, the intestines do not have intrinsic pain receptors and thus that kind of injury is not painful in and of itself. Dr. Sperry stated that defense counsel should have pointed this out to the jury.

Karl Dean, who was then an Assistant Public Defender, was the lead counsel at trial, and Paul Newman, Mary Parson, and Joan Zeigler served as co-counsel. Also, Bill Shulman, Ross Alderman, and Jeff DeVasher worked on the case. Lisa Freeman was assigned as the main investigator. Newman, a former detective, also performed some investigation. The Public Defender's Office was not appointed until about five weeks after the murder and defense counsel began their investigation, including visiting the crime scene, immediately. Dean testified

that the scene had not been preserved and was being cleaned by the owner of the property.

Prior to this case, although he had served as lead on many murder cases, Dean had not been lead counsel on a capital case. Dean had been employed with the Public Defender's Office since 1983. He testified that he had attended several seminars on capital case litigation as well as numerous other trial technique seminars not dealing with the death penalty. Dean testified that he and Newman recorded 294 out-of-court hours and 135.4 in-court hours in this case. He did not have a record of the time spent by the other attorneys involved. Dean testified that the defense team also consulted with the Capital Case Resource Center on certain issues. Dean stated that he had not seen any other case in the Public Defender's Office that received more investigation or attention. The defense team made discovery requests and filed all the motions they considered pertinent to this case.

Dean testified that there was a question regarding the role of Lisa Freeman in this case. She was hired by the Public

Defender's Office as a paralegal but eventually gained the title of investigator. Dean stated that the petitioner expressed his dissatisfaction with some aspect of Freeman's work, but Dean could not recall exactly which aspect.

Apparently, a possible conflict of interest arose at one point when the state decided to introduce the testimony of a witness concerning a jailhouse confession made by the petitioner; the Public Defender had represented this witness in a separate matter. Dean acknowledged this was a rather significant development in the case. Dean stated he approached the petitioner regarding this and the petitioner stated that he never told this witness anything and that he wanted the Public Defender's Office to continue its representation. The petitioner eventually waived any conflict.

The defense team made the assumption early in the case, based upon hearing the 911 tape, that the attack, although not necessarily the time of death, happened at or around the time of the call. Dean testified that they never consulted an independent medical examiner or other expert to question the time of death.

Dean testified they contacted someone independently to review and enhance the 911 tape, and they determined that the tape recording could not be any clearer and that it had not been edited or "doctored." Dean testified they made all the relevant objections regarding the introduction of the tape. However, Dean further stated that they did not present any additional evidence to counter the state's position that the tape fell under the "excited utterance" exception to the hearsay rule. Dean also testified they objected to the introduction of the transcript of the tape because they believed it was more prejudicial to their client. Dean thought they made a persuasive argument on the issue, however, they did not call an expert to contest the introduction of the transcript. Dean admitted that expert testimony to the fact that a jury remembers what it reads more than what it hears would not have hurt the defense.

Dean testified that defense counsel did not introduce any testimony regarding how the state enhanced the recording of the 911 call. Nor did they introduce evidence concerning the transcription of the tape, even though several drafts were made: draft one, "Frank, Frank, stop"; draft two, "Frank, Frank, no"; draft

three, “Frank, no, stop. God, help me”; draft four, “Frank, no, God, no”; and “Frank, no. God, help me” (the last one apparently being shown to the jury). Dean could not say why they did not introduce the other drafts to the jury. Dean further testified that he does not remember if they were shown all of the transcripts of the 911 tape, but he stated that his habit would have been to request all the transcripts during discovery.

Dean testified it would have been possible to strengthen the alibi defense if counsel could have shown that the petitioner was not present when the officers responded within approximately five minutes of the 911 call. They did not, however, consult an expert regarding the time frame between the 911 call, the commission of the murders, and the time of death. Dean testified it was possible that any evidence the victims remained alive much longer after the 911 call would appear to make the murders much more heinous, atrocious, and cruel, and they did not want to take such a chance in front of the jury. Moreover, Dean stated that defense counsel did not want to focus too much on the events after the 911 call since they were asserting that the petitioner was never even at the crime scene.

The defense counsel did contact another attorney who had been trained in the area of fingerprints regarding the bloody palm print found at the scene. Because they relied on an alibi defense, Dean stated they did not contest the officers' opinions and conclusions of the crime scene as much as they possibly could have. Further, Dean testified that they did not have much evidence to counter the presence of the bloody palm print. Dean reiterated that they did not want to highlight damaging evidence in front of the jury.

Dean testified that the petitioner has adamantly professed his innocence from the outset of representation. The defense counsel contacted Dr. Gillian Blair, a clinical psychologist, very early in the case because they did not want to wait until the end to begin work on mitigation. Because, however, they were relying upon an alibi defense at the insistence of the petitioner, it was not feasible to suggest insanity, especially when the expert could not find any indication thereof. Dean believed before they went to trial that they would probably be in the sentencing phase within a week. The defense thought the jury

would most likely return a guilty verdict on the murder charge, and therefore, Dean made the decision to forego serving as lead counsel during the guilt phase and focus instead on sentencing. Dean testified that although members of the defense team spoke with the medical examiner, Dean himself did not, but relied instead upon the notes of the other members. The defense did not present any evidence during sentencing to contradict the testimony that the state elicited from the medical examiner concerning how long the victims lived.

Dean admitted that Dr. Sperry's opinion that someone else moved the body of one of the victims fifteen minutes after the infliction of the wounds would have been of interest and significance to the defense. This opinion would have been especially significant in light of the state's theory that the petitioner had left the scene by that time. However, Dean stated he would not have introduced testimony that the intestines do not have pain receptors, as Dr. Sperry recommended, because the jury would probably not have believed a person does not experience pain when trying to prevent intestines from protruding out of a wound to the abdomen.

The police originally identified two possible suspects in this case: the petitioner and Billy Fields, the victim's boyfriend. Although Fields denied being at the victim's residence the morning after the murder, there were apparently two witnesses who noticed his car there in the morning hours. Dean stated that he did not feel confident about presenting an alibi defense based solely upon testimony of family members. Dean testified, however, that he did not know why the defense did not call these two witnesses to contradict the statement of Fields and attempt to place him at the scene earlier than he admitted. There was some testimony, though, that one of the witnesses recanted his earlier statement regarding the presence of Fields' car.

Dean testified that he did not attempt to present any evidence to counter the state's theory that the petitioner indicated he killed the victims by referring to them in the past tense when first questioned by the police and before being informed they were dead. Dean stated he would not have thought to call an expert on linguistics to explain away the speech of the petitioner in this respect. Dean did testify, though, that defense counsel filed what they considered to be the

relevant motions to suppress the statements made by the petitioner, but all motions were denied.

Dean does not recall if he informed the petitioner that the defense did not intend to seek funds for expert testimony during the guilt phase of the trial. Dean admitted, however, that the petitioner would probably have wanted the defense to seek any possible experts to contest the state's evidence. The petitioner indicated to the defense team that he wanted "all the guns on the first stage" of the trial.

Dean stated that they did not object to jury instructions regarding reasonable doubt, premeditation and deliberation, malice, the aggravating circumstance, expert witnesses, or credibility of witnesses because they did not think they were erroneous or presented potential issues. Dean testified, however, that they requested approximately twelve special jury instructions. Dean also testified that he did not object to any of the prosecutor's closing argument. The state made reference in its close that a life sentence suggested the petitioner could be in prison for twenty or thirty years. Dean does not remember why

he did not object to this particular argument. Nor did Dean know why he did not object to the prosecutor's argument that the jury should "right the terrible wrong that's been done in this community . . . and start healing the wounds of this community." Dean also did not remember why he did not object to the prosecutor's statement that this was "one of the most horrible cases" they have been associated with. Dean testified that, although he did not object to any of the prosecutor's argument, he did not make the decision in advance of the argument not to object.

Part of the state's theory in the case was to prove that the petitioner had taken out several life insurance policies and would stand to receive a sum of money from the deaths. Dean testified that he did not remember the petitioner informing him that he was not the beneficiary on all of the policies and Dean did not remember if they investigated this any further. The petitioner did, however, testify during trial that he was not the beneficiary on all of them. Dean also testified that defense counsel filed a motion in limine to prevent the state from using the word "slaughterhouse" when referring to the petitioner's place of

employment but he stated they did not object to the prosecutor's use of the word during closing, either because they failed to notice it or because they did not want to interrupt the argument. In general, Dean testified that he does not always want to object to everything during closing because it would prolong the prosecutor's point and possibly emphasize the state's position.

Dean testified that he thought they had a good chance, apparently because of the statements of one of the jurors during voir dire, to obtain a hung jury during the sentencing phase. He stated the defense did not exercise any peremptory challenges because of this strategy, which they had discussed with their client. Going into trial, the defense believed the state had a very strong case. Dean testified they called approximately fifteen witnesses during mitigation. The petitioner did not want counsel to introduce too much proof of the mental evaluations or his family history. Dean said that he thought they did the best they could given the circumstances of this case.

Detective Terry McElroy was assigned as the lead police investigator in this case. Detective McElroy arrived at the crime

scene approximately 5:00 p.m. on October 2, 1989, and left around 10:00 p.m. Other officers were already present when he arrived. Detective McElroy testified that they did not check the attic or basement of the scene. However, they did check around the outside of the residence for all possible escape routes from the crime scene. They also looked for any foreign objects in the area, including possible weapons.

Detective McElroy discovered that the residence was owned by a woman from Texas and the victims had not lived there very long. Detective McElroy testified that the owner of the residence gave him a kitchen knife with a broken blade on November 15, 1989. The knife was apparently found underneath the house by utility workers after the crimes. There is some kind of substance on the knife, but the substance has never been identified. Detective McElroy testified that he placed the knife in the police property room on November 16, 1989, and he does not remember if he told the District Attorney about its existence. Detective McElroy stated that he must have thought the knife was insignificant because he did not think the substance on the knife was blood and remembered that the medical examiner said the

type of wounds were inconsistent with that type of knife. However, Detective McElroy testified that someone had opened the property bag containing the knife because he had sealed the bag upon taking it to the property room and the seal had since been broken by another person. As far as he remembered, he was never questioned about the knife during trial.

Detective McElroy testified that two pieces of notebook paper that were originally placed in the bag with the knife were missing. He further testified, however, that he did not remember anything about those two sheets of paper. Detective McElroy stated that he gave the prosecutors his entire file before trial. Detective McElroy also testified that he listened to the 911 tape and transcribed what he thought he heard. He was also instructed by the District Attorney's Office to locate the 911 operator and have her listen to the tape and state what she thought it said. She disagreed with a portion of the transcript of the tape and she corrected it to what she thought it said.

Detective McElroy testified that Paul Newman formerly worked as a detective in the Homicide Section of the Nashville

Police Department prior to obtaining his law license. Detective McElroy further testified that he trained Newman on homicide investigations. According to Detective McElroy, Newman was a good detective.

Detective McElroy testified that it looked as if Jason's body had been moved because of the presence of two different blood patterns. He did not remember, however, talking to Newman about the photographs of Jason's body. He also testified that Billy Fields, the victim's boyfriend, was identified as a suspect and was interviewed, but that upon further investigation Fields was no longer a suspect.

Dr. Bethany Kay Dumas, a linguist, testified on behalf of the petitioner. She was asked to consider whether the statements the petitioner made during his initial interview with the police, such as "things were looking good," "we were getting back together," and "we were going to a marriage counselor," necessarily meant that the petitioner knew for some reason these things could not continue to happen in the future. Dr. Dumas was of the opinion that the petitioner did not necessarily

make these sort of statements because he knew his wife was dead. She stated that the phrases contain the past progressive instead of the simple past tense ("were looking," "were getting," "were going" versus "looked," "got," "went"), which, among southern speakers, is not always past tense in meaning. Based upon the statements alone, however, Dr. Dumas testified that she could not determine what the petitioner meant by those statements. She testified that she would have to know more about the ordinary, conversational speaking habits of the petitioner. She stated an interview with the petitioner would be helpful in this respect. However, she also testified that the petitioner is the only source of information about the intended meaning of the statements and that any interview conducted after the petitioner had been arrested could be tainted because the petitioner would know the purpose of the interview.

Dr. H. Dale Nute, a forensic science consultant, was contacted by the petitioner to give his opinion on the time frame of the crimes. Dr. Nute testified, based upon the information he reviewed, that the officers' response time from the 911 call could have been three to seven minutes, but most likely five or six

minutes. There apparently was some dispute about the amount of time it took to dispatch the officers upon receipt of the 911 call, which, according to Dr. Nute, could have added another minute to the response time. He testified that he understood the prosecutor's theory of the crimes as follows: the assailant shot the mother; the assailant then started struggling with Chad and realized Jason was on the telephone; he pulled the phone out of the wall, stabbed Chad in the kitchen, followed Jason to the bedroom, killed him, and attacked the mother again; then he returned to the kitchen and attacked Chad again, washed up, and left the home. Based upon his reconstruction of these events, Dr. Nute opined that it would have taken the assailant a minimum of three minutes to accomplish the crimes, but because of variables like indecision and defensive or evasive actions that six or seven minutes would be a more reasonable estimate. He also stated, however, that it would have been possible to accomplish these acts before the police arrived on the scene in response to the 911 call.

Dr. Nute examined the broken knife found by Detective McElroy and stated that one of the stains on the blade had

characteristics of blood. He testified that he would have sent the knife to the crime lab for testing unless he had a very good reason otherwise. Dr. Nute testified that he would have suggested to the defense to investigate or explore the possibility that Jason's body had been moved. He would have also questioned the delay of approximately six weeks in the blood tests, especially the blood found in the bathroom, because after a certain amount of time it is hard to distinguish blood among different sources. Dr. Nute would have also suggested exploring in more depth the possible escape routes from the residence, the existence of the broken knife, the blood stains/patterns found on Chad's body, which lights were on/off when the officers responded to the 911 call and which lights were on/off when they first arrived at the scene the next day, and whether any of the first officers at the scene touched or disrupted anything. Dr. Nute testified that he is not an expert in blood splatter or fingerprint analysis.

Dr. Nute admitted on cross examination, however, that he had not reviewed the entire file or record in this case prior to drawing his conclusions. He also stated that he realizes the jury

can convict solely on the evidence presented without giving any attention to the state's theory espoused during argument. In fact, Dr. Nute testified that he did not read defense counsel's arguments and that there is no way to know for certain what happened the night of the murders; all of his conclusions were based on the evidence presented and his professional estimations.

The petitioner also called Timothy Webster Smith, Sr., to testify on his behalf. Smith is the brother of the petitioner. Smith testified that he was serving time for a sexual battery conviction during the investigation of his brother's case. Smith testified that he was questioned by Lisa Freeman about the victims. He testified that she stated they found a bloody palm print at the scene of the crime and they were attempting to get a life sentence instead of the death penalty. Smith stated that he realized she was asking questions for purposes of mitigation. Smith also stated that Freeman's line of questioning gave him the impression that the prosecution and defense were working together. Smith, however, never talked to any of the defense lawyers and was not present at trial and, therefore, knew nothing

about the evidence. Smith testified that he said if his brother did commit the crimes he should be held responsible. He wanted his brother to get a fair trial and he stated he was just frustrated at the possibility that he could have murdered the victims.

Dr. Ralph Norton Ohde, Associate Professor of Speech and Hearing Sciences at Vanderbilt University, testified on behalf of the petitioner. He opined that the jurors' perception of what they heard on the 911 tape was potentially influenced by knowledge they had beforehand from the transcript they were shown of what should have been on the tape. He also testified that the court's instruction to the jury that they should base their conclusions from the tape, not the transcript, was inadequate because the jury's perception had already been influenced. Dr. Ohde also testified that the jury's perception could have been influenced by virtue of knowing the defendant's name and knowing the names of the victims.

Jeff DeVasher, Assistant Public Defender, handled the appeal in the petitioner's case. DeVasher testified this was the second appellate brief he had prepared in a death penalty case,

but he had handled numerous other homicide appeals. He estimated that he spent at least a couple of hundred hours on the appeal. He stated that in a capital case versus a non-capital case he would not narrow the issues on appeal but, rather, would try to raise as many issues as possible. DeVasher testified he would have had some input on how the motion for new trial was drafted so that no issues were waived on appeal.

DeVasher stated that he challenged the admissibility of the 911 tape as well as the transcript of the recording. DeVasher testified that trial counsel presented no evidence during the hearing on the motion to exclude the transcript and he stated that testimony such as Dr. Ohde's would have provided additional support to his argument on appeal that the prejudicial effect of the transcript substantially outweighed its probative value. However, DeVasher stated that he was not aware of any case where the admission of a transcript had been successfully challenged by that type of testimony. DeVasher stated he did not challenge on appeal the reasonable doubt, expert witness, or credibility of a witness jury instructions because he believed the challenge would not be successful. Nor did he think the issue of

the trial court's refusal to give proposed or special jury instructions would be successful. DeVasher testified that he raised on appeal what he believed to be every legitimate issue. In fact, he raised twenty issues and several of those issues contained sub-issues.

DeVasher testified that he met with the petitioner three or four times during the appellate process. The petitioner wanted DeVasher to provide him a copy of the brief before it was filed, which DeVasher stated he did. The petitioner wanted DeVasher to focus more on the guilt and innocence issues rather than the sentencing issues. DeVasher testified that the petitioner complimented him on his appellate work in this case.

The petitioner testified on his own behalf. He said that he had served an eleven month and twenty-nine day sentence for a misdemeanor conviction in the early 1970s. He stated that he was drafted while he was in the eleventh grade and has never completed his GED. The petitioner testified that he learned shortly before trial that his counsel had the right to seek the assistance of expert services. He confronted counsel, but they

told him they did not see any particular need for experts in this case. The petitioner stated counsel was just planning on evading the issue of the bloody palm print. The petitioner testified that he would have wanted counsel to obtain the services of as many experts as possible to prove his innocence. The petitioner acknowledged, however, that counsel did file a motion for an expert to review the 911 tape. The petitioner testified that, although he was aware of the right to expert services in the post-conviction area, he did not request the services of a fingerprint expert to challenge the existence of the palm print.

The petitioner testified that upon learning about the existence of the broken knife from a report from Lisa Freeman prior to trial, he told Freeman to have counsel test the weapon to determine its relevance in his case. He said that Dean had seen the report and told the petitioner there was "nothing to" the knife. The petitioner testified that the first time he became aware that counsel was conceding the time of death was during trial. The petitioner further testified that he was upset that Dean was not going to present the defense during the guilt stage because the petitioner told him he was innocent and wanted the

defense to focus on the first stage of the trial. The petitioner stated he was shocked to learn just two days before trial that defense counsel thought the jury would not believe his alibi.

The petitioner stated that he was made aware of the potential conflict of interest the Public Defender's Office had with a potential witness. The petitioner agreed to wave the conflict at the time, but testified during the hearing that he would have made a different choice had he known the attitude of his defense counsel regarding his innocence. Moreover, the petitioner testified that Dean lied to him when he said he had received "favorable" results in capital cases. The petitioner testified that he would not have waived the conflict had he known that counsel failed to request certain expert assistance, failed to have the broken knife examined, and conceded the time of death. The petitioner testified that every time he suggested that a question be asked during trial his attorneys would ignore it.

The petitioner testified that, although the state argued he would receive a large sum of money from insurance proceeds, he told his attorneys he was not the beneficiary of all the policies

taken in his wife and children's names. He also asked his attorneys to check with the insurance agents to verify his complaint. The petitioner stated that the insurance agents testified during trial and that even he testified before the jury at length regarding the insurance proceeds and that he was not the beneficiary on all of the policies. The petitioner also asked his attorneys to impeach the testimony of one of the state's witnesses who testified that he and the petitioner fired a .22 pistol at a firing range prior to the murders. According to the petitioner, a picture taken when a search warrant was executed revealed that there was no .22 pistol present. The petitioner stated that he testified accurately during trial about the type of weapons he owned.

The petitioner testified that counsel never emphasized the fact that a hair sample found underneath the fingernails of Jason Burnett tested negative against the petitioner. According to the petitioner, this could have bolstered his defense. Nor, according to the petitioner, did the attorneys investigate the road conditions between Nashville and Morehead, Kentucky, when the state claimed there was bad visibility the night of the murder.

The petitioner also testified that his attorneys did not inquire, upon the petitioner's request, how long a hair dryer could run before turning off from overheating when a hair dryer was found running near Jason's body.

The petitioner was not pleased that counsel did not use any peremptory challenges during jury selection, especially when he told counsel that he wanted to challenge two jurors in particular. The petitioner testified that counsel did not confer with him at all during the jury selection process. The petitioner testified that counsel did not make specific objections which he requested during the prosecutor's arguments. He admitted, though, that he did not have any legal training and could not identify what particular legal arguments should have been raised by the objections. He testified that he spent approximately three and one half hours talking with DeVasher concerning the appeal. The petitioner stated that he tried to tell DeVasher to address every issue that was raised in the motion for new trial. According to the petitioner, however, this was not done. He did, however, congratulate counsel upon hearing a tape of his argument before the Supreme Court.

The petitioner stated that he is innocent, that he wanted to testify on his own behalf, and that he did not want to present any type of mental defense. The petitioner testified that he never informed the judge that he was not satisfied with counsel. The petitioner stated, though, that in retrospect he would have sought new counsel but was unfamiliar with the system at the time. The petitioner testified that his alibi was that he was nowhere near the crime scene at 11:20 p.m., the alleged time of the 911 call. And although he claimed he was not there, he still wanted defense counsel to challenge the time line proposed by the state. The petitioner admitted that counsel did challenge the crime scene as alleged by the state. The petitioner also testified that he was not really dissatisfied with the representation of counsel until he was placed on death row. He stated that upon looking back he did not think his lawyers were working for him.

The state called Dr. Charles Warren Harlan, Medical Examiner for Davidson County at the time of the trial in this case. Dr. Gretel Harlan, his wife and Assistant Medical Examiner of Davidson County, helped with the autopsies in this case and testified during trial. Dr. Charles Harlan testified that Dr. Sperry

did not contact him prior to the hearing or request access to the files of his office. Dr. Harlan testified that he arrived at the crime scene at 4:50 p.m. the day the bodies were discovered, but was not permitted into the residence to examine the bodies until about 8:40 p.m. Dr. Harlan examined all three bodies at the scene and took photographs thereof.

Dr. Harlan testified, based upon the nature of the blood splatter around the body, that Judy Smith received her fatal wounds while she was on the bed. He stated that the nature of the wounds to Judy produced more of an oozing of the blood rather than spurting, and therefore there was not more blood transfer on the sheet. Dr. Harlan also testified, based upon the blood patterns on and around Jason's body, that Jason was either moved or moved himself sometime after five minutes from the time of the infliction of the wounds. He stated that Jason could have lived five to fifteen minutes after receiving the injuries and was capable of turning himself over. He also opined, based upon his observations and experience, that it is more probable that Jason in fact moved himself before death.

During the hearing, Dr. Harlan examined the broken knife found under the residence and opined that it could not have produced the stab wounds inflicted upon the victims. The knife at issue had a dull point and had a serrated edge. The victims' wounds were not consistent with a serrated-blade knife. On cross examination, however, Dr. Harlan stated that some of the incision defensive wounds on the fingers of Chad and Jason and some of the slash wounds to the victims' necks could have been produced by an object similar to the broken knife.

Dr. Harlan testified that the vitreous potassium (examining the potassium level of the eye fluid) method of determining the time of death was not available to the Davidson County Medical Examiner's office at the time of the crimes in this case. However, he disagreed with Dr. Sperry's statement that this test should be done as close to the time of death as possible. Dr. Harlan testified that the potassium method is but one of many methods used to estimate the time of death. Based solely upon the anatomic changes when he viewed the bodies and the existence of the 911 call, Dr. Harlan estimated the range of time of death was between 11:30 p.m. and 2:30 a.m. However, Dr.

Harlan further testified that he agreed with his wife's opinion, based upon the status of the rigor mortis; livor mortis; the appearance of the bodies; the amount of drying of various portions of the body; the quality, quantity, and appearance of the blood at the scene; the stomach contents of the victims; as well as the other circumstances of the case; that death probably occurred between 11:23 p.m. and midnight. According to Dr. Harlan, it would have taken between eighteen and twenty-four hours for the type and quantity of blood found at the scene to dry. Dr. Harlan testified that Dr. Sperry was "absolutely wrong" when he opined that death could have occurred as late as 9:00 a.m.

Dr. Harlan testified, based upon the nature of the wounds, that each victim suffered pain. Chad would have lived about five minutes between the knife wounds to the lungs and gunshot wound to the head, would have been conscious and aware, and would have experienced trouble breathing prior to death. He stated again that Jason would have lived between five and fifteen minutes after receiving his wounds and he would have been in "exquisite" pain. And although Dr. Sperry was correct to state that cutting the intestines would not produce pain, the fact

that the skin was cut did produce pain. Judy was likely rendered unconscious upon the initial wound, but Dr. Harlan stated it is possible that she could have remained conscious for a short while.

The state also called James Paul Newman to testify. Newman was employed for about fourteen years with the Nashville Police Department before practicing law. He was assigned to the homicide division for seven years and has taught seminars on crime scene investigations. Newman had been practicing law for about six years prior to this case but had never worked on a capital case before. Newman testified that he has never seen another case receive more attention from the Public Defender's Office than this one. Newman began working on this case about six weeks prior to trial and testified that all the preliminary motions were filed beforehand. Dean asked Newman to look over the investigation aspect of the case and make sure everything that could be done had been done. Newman testified that he spent a lot of time with the petitioner discussing the circumstances of the case. He also stated that he reviewed the file, but he does not remember seeing Freeman's notebook.

Newman stated that Lisa Freeman was not an experienced investigator.

Newman testified that the defense was primarily based upon the alibi. He testified that they tried to establish that the petitioner was nowhere near the crime scene at the time the state alleged the murders occurred. Newman retraced the steps the petitioner claimed he took the night of the murders and reported back to him that they were a couple of hours off with the time frame; the investigators could not account for a couple of hours during the night. Newman stated, however, that they stuck with the alibi in part because the petitioner's family could state that he was at his trailer at 11:00 p.m. Newman testified that they did not contest the time of death because they saw no real issue with it as the petitioner claimed he was not even there. According to Newman, by contesting the time of death, they would have lost credibility in the alibi defense. Newman stated that they discussed the time issue with the petitioner and he agreed. Newman testified they were not surprised at all by the state's theory of the crimes, but they knew they would have a tough time convincing the jury of the petitioner's alleged

innocence because of the strong circumstantial evidence the state possessed. Newman conveyed these thoughts to the petitioner before trial.

Newman stated that the palm print was "absolutely devastating." Newman researched the alternate light source technique used to raise the palm print and asked Allen Barrett, a fingerprint expert for the F.B.I. and T.B.I., to review the fingerprint evidence in the presence of the petitioner. According to Newman, the petitioner was not contesting that the print was his; he was claiming that someone planted the print at the scene. Nonetheless, Barrett opined that the print was indeed the petitioner's. Newman testified, however, that Barrett informed him, because the print was in blood, as well as other factors, that it would have been improbable for someone to have planted it. Accordingly, they did not see the need to obtain other experts in this area. The defense figured that the only successful way to keep this piece of evidence out was to attack the technique used to confirm the print comparison.

Newman testified that they saw no reason to investigate if Jason moved himself or if someone else moved him. According to him, this evidence would have done nothing for their case. Moreover, they decided not to emphasize too much of the medical testimony because of fear of inflaming the jury. Nor did they explore the apparent presence of fingerprints on Chad's body because they appeared a little far apart and the petitioner's fingers are a little far apart. Newman testified that upon hearing Nute testify at the hearing he would not have used him as a witness. Newman did not think he would have impressed the jury and thought he raised too many collateral issues that were of no value. He further testified that Nute did not address anything they did not already consider.

Although the petitioner was initially opposed to a psychological expert, he ultimately agreed to using one in the penalty phase. Newman testified that they attempted to focus a lot of attention toward Billy Fields, Judy's boyfriend, because he was one of the two suspects. Newman testified that he knew about the existence of the broken knife prior to trial, but upon Dr. Harlan's opinion that the wounds were not caused by a serrated-

blade knife, he did not see any connection. Newman stated that they did not have the knife analyzed because they were not sure whose prints may appear on it, but mostly because his experience told him that finding both pieces of a broken knife in the same area usually means that the knife was broken where it was found. According to Newman, this piece of evidence, therefore, was probably not relevant in this case and was most likely used to pry something open. Newman did not investigate the fact that a hair dryer was running when the bodies were found, but he testified that this did not affect their defense.

Newman testified they did not see any reason to consult an independent medical examiner since they were not contesting the medical testimony and they did not want to emphasize this evidence in front of the jury. He stated that they would have never considered introducing testimony that the injuries were not painful because they would have lost credibility with the jury. He never considered consulting a linguist in this case. Newman stated that the petitioner explained to the jury that he said what he said to the police because he was nervous and frightened.

The petitioner also testified about the insurance policies and nothing the agents testified about surprised the defense team.

Newman testified that they discussed the jury selection process with the petitioner and that, based upon information provided at death penalty seminars Dean had attended, counsel decided not to use any peremptory challenges because they felt that one or two of the jurors in the first round could possibly hang the jury. Newman stated that the petitioner concurred with this strategy. Newman stated that they considered all suggestions the petitioner made, whether or not they followed them. He testified that the petitioner never expressed dissatisfaction with counsel's performance, and in fact the petitioner sent counsel a Christmas card.

Karl Dean was called on behalf of the state and testified that he never told the petitioner that he had tried a death penalty case and got an acquittal. Although Dean testified it was possible he considered the relevance of the broken knife, he stated that he did not remember anything about it. He also stated that all decisions were ultimately his as lead counsel.

W. Allen Barrett testified on behalf of the state. Before obtaining his law degree and practicing law, Barrett was a fingerprint examiner with the F.B.I. and the T.B.I., and has testified in the Tennessee courts as an expert in fingerprint analysis. Barrett testified that he compared the latent prints with the known impressions in this case and was of the opinion that the palm print found at the scene belonged to the petitioner. He stated that he conveyed his opinion to the petitioner. Barrett, however, was unfamiliar with the alternative light system used by the investigators, but he stated that the process by which the investigator obtained the latent print did not affect his comparison with the known impression.

ANALYSIS

After what appears to have been an exhaustive review of the original trial record, as well as the post-conviction hearing, the court below found that trial counsel were not ineffective in their representation of the petitioner during trial and found that there were no other errors of constitutional dimension.

It has long been established that the trial court's findings of fact and conclusions of law in post-conviction suits are afforded the weight of a jury verdict. See, e.g., Caruthers v. State, 814 S.W.2d 64, 67 (Tenn. Crim. App. 1991). "In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his petition by a preponderance of the evidence." McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983).[1] Furthermore, the trial court's findings of fact are conclusive on appeal unless the appellate court finds that the evidence preponderates against the findings. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

INEFFECTIVE ASSISTANCE OF COUNSEL

Our review of the post-conviction court's judgment is governed by several well-established principles. In order for the petitioner to be granted relief on grounds of ineffective assistance of counsel, he must establish that the advice given or

[1] Since this petition was filed prior to May 10, 1995, it is governed by T.C.A. § 40-30-101 et seq. (repealed 1995), rather than the recent Post-Conviction Procedure Act (T.C.A. § 40-30-210 et seq. (1997)). Under the current statute, the standard is "clear and convincing evidence." T.C.A. § 40-30-210(f) (1997).

the services rendered were not within the range of competence demanded of attorneys in criminal cases and that, but for his counsel's deficient performance, the result of his trial would have likely been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). Furthermore, this Court may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Trial counsel may not be deemed ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276 (Tenn. Crim. App. 1980). The reviewing courts must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance. Strickland, 466 U.S. at 690.

The petitioner alleges numerous instances of counsel's ineffectiveness. Initially, he claims that his defense team, which was comprised of employees of the Public Defender's Office, was unorganized, and he suggests that counsel could not agree on who maintained the various roles. The post-conviction testimony

reasonably demonstrates that Karl Dean was assigned as lead counsel and that he was assisted primarily by Paul Newman. As established by the evidence and found by the trial court, both of these attorneys were experienced and very capable of handling this type of case. Dean had attended numerous seminars on trial technique and capital case litigation. Dean also stated that they relied upon the resources of the Capital Case Resource Center. Moreover, at least five other attorneys from the Public Defender's Office had some input at various stages of the trial preparation and appeal. In all, during the approximately nine months prior to trial, Dean testified that he and Newman recorded 294 hours of preparation and spent about 135 hours in court during preliminary matters and the actual trial. Dean testified that the time spent by the other attorneys was not recorded. Both Dean and Newman testified that they had never known any other case to receive as much attention by their office as this case did.

Lisa Freeman was originally assigned to investigate the facts of the case. Although the petitioner asserts that Freeman was inexperienced, she had spent some time with the Capital Case Resource Center prior to being hired by the Public

Defender's Office. Nothing in the record demonstrates that Dean or Newman were responsible for hiring Freeman. And although Newman admitted that Freeman was not very experienced, Dean testified that he was satisfied with the work she had done on a previous death penalty case. Besides Freeman, the petitioner had the benefit of the experienced investigative techniques of Newman, who also assisted in the investigation in this case.

The petitioner maintained his innocence throughout this case, despite some rather damning evidence against him. The petitioner claims that the inexperience and lack of organization of his defense team hampered the presentation of a solid reasonable-doubt defense. The record before the Court simply fails to support the petitioner's contention in this respect. It is clear that the petitioner received substantial devotion from the members of the Public Defender's Office. Moreover, as noted by the post-conviction court and implied by the Supreme Court on direct appeal, State v. Smith, 868 S.W.2d 561, 583 (Tenn. 1993) (Reid, C.J., concurring), the members of the petitioner's defense team provided highly competent representation to the petitioner in this case.

The petitioner correctly asserts that counsel must conduct an adequate investigation of all possible defenses available. The petitioner in this case, however, insisted that counsel advance nothing but an alibi defense and adamantly refused to pursue the possibility of any mental defense. Counsel cannot fabricate any evidence to support the petitioner's alibi, and upon an exhaustive investigation of the petitioner's story, counsel was left with a defense that was open to attack. Counsel informed the petitioner of this, and the petitioner offered to rely upon the testimony of his family to support his position. Dean testified that he made the decision, based upon the petitioner's insistence of a somewhat questionable alibi defense and the unrefutable existence of the petitioner's bloody palm print, the 911 tape, and statements from witnesses that the petitioner had talked about killing his wife, to forego acting as lead counsel during the guilt phase of the trial and focus his attention on the sentencing phase in order to salvage credibility for the defense and save the petitioner's life.

Nevertheless, the petitioner claims that counsel was ineffective for failing to seek the investigative and expert

services available to the petitioner in this death penalty case. As a preliminary observation, the majority of the expert testimony introduced by the petitioner at the post-conviction hearing addressed the circumstances surrounding the deaths and the condition of the crime scene. As both defense attorneys testified, because they were asserting that the petitioner was not even present at the scene, they did not consider this information particularly relevant to their defense and did not want to belabor or emphasize this horrific crime scene in front of the jury. Even though the petitioner asserts that counsel should have done more to create a reasonable doubt concerning the state's analysis of the crime scene, counsel decided this approach would have hurt any credibility regarding the alibi defense, which the petitioner wanted to advance. Counsel's strategy appears to have been based upon more than adequate preparation and appears to be well within the range of competence demanded. Moreover, it appears reasonable to assume counsel likely could not have created a reasonable doubt by attacking the crime scene analysis when there was certain evidence they believed could not be disputed. Regardless, as shown below, the petitioner has failed to demonstrate how contesting the crime

scene analysis or the state's theory about the time of death would have changed the outcome of the trial.

(1) Use of an Independent Forensic Pathologist

First, the petitioner claims the testimony of an independent forensic pathologist could have rebutted, among other things, Dr. Harlan's testimony concerning the time of death. The petitioner argues, because defense counsel conceded the state's theory of when the murders occurred, they did not present any evidence to bolster a reasonable doubt. In response, the state argues that it was not counsel's failure to consult an independent pathologist that affected the outcome of his trial but, rather, the overwhelming physical evidence connecting him to the crimes.

Defense counsel testified they started with a "working presumption" that the deaths occurred contemporaneously with or shortly after the 911 call. Dr. Harlan opined at trial that the deaths occurred about 11:30 p.m. The petitioner claims, however, that based upon the testimony of Dr. Sperry, the time of death was a disputable issue. Dr. Sperry opined that it would

have been impossible for the medical examiner to pinpoint a time of death by observing only the rigor and livor mortis of the bodies. Dr. Sperry further opined that the deaths could have occurred as late as eight to twelve hours prior to the viewing of the bodies by the medical examiner (based upon the fixing of rigor and livor mortis), which would be sometime earlier than 8:40 a.m. to 12:40 p.m. the next day.

Dr. Sperry acknowledged, however, that he did not have any evidence to contradict Dr. Harlan's opinion that the time of death was around 11:30 p.m. Dr. Sperry did not review the 911 tape or the transcript therefrom. He stated that the medical examiner would consider all the circumstances of the case, not just the anatomical condition of the bodies, to draw an opinion as to time of death. He also stated that despite the stomach contents of the victims, which indicated they ate within an hour to an hour and a half prior to death, the victims could have died at 6:00 a.m. During the post-conviction hearing, however, Dr. Charles Harlan testified that Dr. Sperry was "absolutely wrong" when he opined that death could have occurred as late as 9:00 a.m.

Although the petitioner argues that the time of death was a disputable issue and that the defense erroneously conceded the state's theory thereon, the petitioner has not adequately explained how this approach could have produced a different result at trial. It has been the petitioner's contention from the outset of the case, even at the hearing below, that he was not present when the murders occurred. As the state notes, changing the time of death would not have bolstered the alibi defense, especially when a possibly later time of death could not erase the existence of the 911 call or the petitioner's bloody palm print. In fact, as counsel noted, challenging the time of death, when the petitioner was supposed to be driving to Kentucky, could possibly hurt the credibility of the alibi defense. Moreover, Dr. Sperry admitted that he could not refute with any evidence the medical examiner's conclusion, based on the 911 call and the stomach contents, that death occurred around 11:30 p.m.

As the post-conviction court found, "this proffered testimony of Dr. Sperry would have been questionable, if not incredulous, and would have almost certainly destroyed any credibility that

petitioner's attorneys were trying to maintain with the jury." The petitioner does not address on appeal Dr. Sperry's opinion that Jason would not have experienced pain as a result of his intestines protruding from his abdomen. He does argue, however, that Dr. Sperry's opinion that Chad did not experience a lot of pain would have been useful during cross examination during the penalty phase. Of course, as counsel suggested, putting this type of testimony before the jury, in the face of the nature and extent of the wounds suffered, would have been extremely detrimental to the defense. Moreover, it is reasonable to assume that defense counsel thought it was risky to suggest that the deceased children in this case ate as late as 4:00 a.m., after they were heard pleading in the 911 call. Because of the nature of the petitioner's defense, the petitioner has failed to demonstrate how the outcome of this case would have been different if counsel had attempted to dispute the alleged time of death. We do not find that counsel was deficient by failing to challenge the time of death.

As a result of conceding the time of death, the petitioner argues that defense counsel failed to investigate or consider

other factors which could have raised a reasonable doubt concerning the state's theory of the case. It was agreed by the experts that Jason's body was moved sometime after the infliction of the wounds. Dr. Sperry opined that the movement occurred after death, which would mean that someone moved him. Dr. Harlan testified, however, based upon his observations and experience, that Jason probably turned himself over before dying. Again, although there may have been a difference of opinion regarding when the body moved (Dr. Sperry admitted that the evidence could permit someone else to have a completely different opinion than his), the petitioner has failed to demonstrate how this fact could have changed the outcome at trial. The petitioner seems to suggest that the possibility that someone moved Jason's body is "inconsistent" with the state's theory that the petitioner left immediately after inflicting the fatal wounds. The petitioner, however, claimed he was not present. Accordingly, the fact that the murderer or someone other than the murderer moved the body would not bolster the petitioner's alibi defense in any way. Moreover, after viewing the crime scene photographs before trial, Newman testified that he

noticed that the body had been moved, but he did not think this was relevant to their defense.

Newman stated the defense counsel wanted to have as little medical evidence before the jury as possible in order to take the attention away from the gruesome nature of the killings. The petitioner has failed to show counsel's deficiency in this respect, or how the outcome would have differed. The petitioner argues that a reasonable-doubt defense should have been presented to support his alibi. The problem with this position is that a reasonable doubt as to the time of death or movement of the body could not have discounted the palm print, the 911 call, or the statements of witnesses that the petitioner wanted to kill his wife. The petition has not established counsel's ineffectiveness on this issue.

The petitioner claims that conceding the time of death affected counsel's ability to investigate other circumstances of the crime scene. The petitioner challenges counsel's failure to investigate whether or not a hair dryer that was found at the scene was turned on or off. The petitioner states that the

officers responding to the 911 call did not hear any noise coming from the house, but notes that the person who discovered the bodies supposedly heard a hair dryer. The petitioner does not suggest, however, how this played into his defense. The petitioner does not even argue why defense counsel was ineffective for failing to investigate this. There is nothing in the record to indicate the condition of the hair dryer could have bolstered the alibi defense or changed the outcome of the trial.

Similarly, the petitioner states that there was some discrepancy in the testimony of the witnesses regarding whether or not the lights were on inside the house. The petitioner suggests counsel was deficient for failing to further investigate. Again, however, the petitioner fails to show why counsel was deficient or how the outcome of the trial would have been different if this discrepancy was highlighted.

The petitioner notes that the police initially considered two individuals as suspects in this case: the petitioner and Billy Fields. The petitioner claims that counsel should have explored and emphasized in front of the jury the alleged inconsistencies

between Fields' testimony and that of other witnesses concerning the hair dryer, the lights, and also the number of visits Fields made to the residence that day before the bodies were discovered. As Dean testified, however, one of the witnesses placing Fields at the scene apparently recanted his or her testimony. Detective McElroy testified during the hearing below that upon further investigation, Fields was no longer considered a suspect by the police. Also, Newman testified that the defense did attempt to focus attention on Fields as a suspect, but apparently with little success. The petitioner simply has failed to show how the apparent inconsistencies in the testimony establish that Fields had any involvement in the murders. Nothing in the record suggests the outcome of the trial would have been different if counsel had highlighted this fact more than they did.

The petitioner places a good deal of emphasis on the broken kitchen knife that was found underneath the victim's house. The petitioner claims the knife should have been tested for the presence of blood and should have been introduced into evidence as a possible murder weapon. The petitioner relies upon the

post-conviction testimony of Dr. Harlan who acknowledged that, although this particular serrated-blade knife could not have produced most of the wounds, including the stab wounds, a knife of this sort could have caused several of the defensive wounds to the fingers and some of the slash wounds to the necks of the victims. The testimony of counsel and Detective McElroy, however, revealed that prior to trial the medical examiner did not have this same opinion. The petitioner relays that Dr. Nute testified one possible escape route the murderer could have taken was past the crawl space of the house, wherein this knife was found. The petitioner also observes that Dr. Nute commented that one of the stains on the blade had characteristics of blood. He could not state this with certainty, however, unless the stain was tested. Accordingly, the petitioner's characterization of this knife as "bloody" is tenuous. The petitioner never sought testing of this evidence during his post-conviction suit. The petitioner suggests the mere presence of this knife could have established a reasonable doubt to the state's theory of the crime. This suggestion, however, does not adequately demonstrate how this object would have altered the outcome of the trial, given the other evidence presented.

Detective McElroy testified that he immediately placed this piece of evidence in the property room. Although he acknowledged there was some substance on the blade, Detective McElroy did not believe this to be blood. Moreover, based upon the medical examiner's then-existing opinion that the wounds were caused by a straight-edged knife, Detective McElroy did not believe this object was particularly relevant. The petitioner's claim that Detective McElroy "buried" this piece of evidence is wholly unfounded. Detective McElroy appears to have followed the proper procedures for documenting the evidence and placing it in the property room. And although the petitioner points out that Dean did not have much recollection of this knife, Newman, a former homicide detective, testified that he examined the knife before trial. Based upon his experience that a broken knife is usually broken where it is found and the statement of the medical examiner that the knife which caused the wounds was not serrated, Newman also did not consider this object relevant. Newman also testified, despite his belief that the knife was irrelevant, that he made a tactical decision not to have the knife tested, in case the results were detrimental to his client.

Newman, a former homicide detective, appears to have made an informed and reasonable decision not to test the knife or introduce it into evidence before the jury. Although the petitioner insists that any unfavorable test results did not have to be revealed to the prosecutor, the petitioner has failed to adequately demonstrate how this knife would otherwise have changed the outcome of the trial, especially given the other evidence introduced. Regardless, counsel's actions were not deficient. As the state notes, counsel "had to weigh the potential benefits against the potential cost." Nothing counsel possessed at that time indicated the knife was relevant or could have rebutted the prosecutor's evidence at trial. Counsel testified that the medical examiner informed them before trial that the wounds were not caused by a serrated blade. As stated earlier, this Court will not second-guess counsel's informed strategy. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

Finally, with regard to the forensic pathologist, the petitioner claims that counsel was ineffective by failing to adequately cross examine the medical examiner. Specifically, the petitioner argues that consultation with an independent

pathologist could have raised questions regarding the blood transfer around Judy Smith's body, the length of time the victims lived, and the pain each victim suffered. The petitioner suggests that contesting the testimony of the medical examiner could have given the jury a better picture of what actually happened. What the petitioner tends to ignore, however, is that the defense was relying on an alibi. Counsel testified they did not want to emphasize the medical testimony of the events because it did nothing for their defense. This was a reasonable and informed trial strategy. Nothing the petitioner has suggested in this respect could have possibly changed the outcome of the trial. As the state notes, the lack of blood transfer does not necessarily exclude the petitioner as the perpetrator. Although Dr. Sperry opined the times of consciousness were somewhat less than the testimony introduced at trial, he still stated that the victims would have been conscious for some period of time.

As counsel has stated, they did not want to emphasize the brutality of these crimes, especially since they were claiming the petitioner did not commit them. Nonetheless, the petitioner has failed to show how this approach would have changed the jury's

verdict. Further, it seems very reasonable to assume, as counsel testified, that the defense would have lost credibility if they attempted to explain to the jury, as Dr. Sperry suggested, that the wounds inflicted upon the victims were not painful.

(2) Use of a Forensic Criminologist

The petitioner asserts that counsel was ineffective for failing to challenge the state's analysis of the crime scene. In this respect, the petitioner contends the use of a forensic criminologist could have assisted in the defense. The petitioner acknowledges in his brief that counsel decided not to challenge anything about the crime scene because it did not affect their alibi defense. However, the petitioner also asserts that counsel were relying upon this alibi defense even though they did not feel strongly about it. The petitioner insisted before trial and throughout trial, and he insists even now, that he did not commit these murders and was not present at the scene. It seems unreasonable, despite what the petitioner implies, that he would have wanted counsel to risk any credibility in his alibi defense by contesting and arguing with the crime scene analysis. In fact,

counsel decided this would not be wise. Given the petitioner's insistence and the circumstances of the case, we believe counsel made an informed and reasonable decision. Counsel stated that certain pieces of evidence, including the palm print, simply could not be contested. Accordingly, despite the alibi defense, it would not have been particularly helpful to the petitioner to contest some, but not all, of the crime scene evidence.

The petitioner elicited testimony from Dr. Nute, who opined that the perpetrator possibly, but not probably, could have committed the crimes within the amount of time it took the police to respond to the 911 call. Dr. Nute based his reconstruction of the crime upon the state's theory of how it happened. He admitted, however, that he was aware a jury can convict based upon the evidence presented without regard to the prosecutor's argument. Moreover, Dr. Nute testified that he did not review the entire file or the defense's arguments in this case. The petitioner contends that evidence of Dr. Nute's reconstruction could have controverted the state's theory. The petitioner apparently ignores the simple fact that Dr. Nute

testified that the perpetrator could have acted exactly as the state professed and left before the police arrived. Accordingly, this evidence would not likely have altered the outcome of the trial. Interestingly, the petitioner claims that witnesses like Dr. Nute would have been "much more viable" than the alibi defense, which the petitioner himself was so adamant to advance during trial.

The petitioner also challenges counsel's failure to contest the state's theory that the petitioner left a glove at the crime scene. Despite the fact that counsel did not want to address the crime scene, the petitioner has failed to show how the presence, or lack thereof, of this glove would have affected the outcome of the trial. The petitioner also relies upon Dr. Nute's suggestion that other areas of the crime scene should have been questioned. Of course, the petitioner's reliance on this expert must be premised with the fact that the petitioner himself insisted on an alibi defense. Counsel has testified that arguing about the movement of the body or the transfer of blood would not have buttressed their defense. If anything, challenging these aspects of the crime scene without having anything to contradict the

damning evidence of the palm print, which, interestingly enough, the petitioner does not even attack on appeal here (and as the trial court noted, expert services were available for this purpose), would more likely than not hurt their alibi defense. Deciding not to raise questions or cross examine about certain things when they knew they could not question other things about the crime scene was a reasonable and informed trial strategy on counsel's part.

(3) Use of a Expert Linguist

The petitioner argues that counsel should have utilized the expert testimony of a linguist to rebut the state's implication that the petitioner's use of the past tense when referring to his wife before being informed she was dead inferred guilt. Dr. Dumas testified that there are alternative explanations as to why the petitioner spoke in the past tense. She stated that she would have to conduct an interview of the petitioner to ascertain his particular speech patterns in order to determine what he meant by these statements. However, she further testified that the results of the interview would not necessarily be accurate

because the petitioner would have known the purpose of the interview beforehand.

Counsel stated that, although they filed all the pertinent pretrial motions to exclude the petitioner's statements to the police, they did not consider seeking the services of an expert linguist to address the verb tense of these statements. During trial, the petitioner was able to explain to the jury that he was nervous and frightened when he gave his statement to the police. The state appropriately argues that a reasonable attorney would have no reason to believe that consulting a linguist under these circumstances would be helpful. Moreover, after reviewing the testimony, the post-conviction court concluded that this expert testimony would not likely have produced a different result at trial. Accordingly, we find that the petitioner has failed to meet his burden in this instance.

(4) Use of a Speech Perception Expert

The petitioner also argues that counsel was ineffective by failing to proffer the testimony of a speech perception expert to

support their pretrial motion to exclude the admission of the transcript of the 911 call. During trial, the jury was provided with a transcript of the tape of the 911 call prior to hearing the tape. The petitioner introduced Dr. Ohde during the post-conviction hearing, who stated that the jury's perception of what they heard on the 911 tape was potentially influenced by knowledge they had from the transcript beforehand. Dr. Ohde testified that the trial court's limiting instruction regarding the transcript was inadequate and that the only way to have avoided any bias would have been to play the tape before the jury heard any information regarding the case, including the petitioner's name.

The post-conviction court, noting that counsel challenged the admission of the transcript at trial and on direct appeal to the Supreme Court, found that counsel's failure to consult with this type of expert did not constitute ineffective assistance. Counsel testified that they never considered using this type of expert in support of their pretrial motion. Counsel's actions in this instance did not fall below the range of competence demanded in criminal cases. Counsel did indeed complain that the transcript was prejudicial because the content of the tape was

in dispute, but the Supreme Court found no error, in part because the trial court properly instructed the jury that any discrepancies should be resolved in favor of the tape. As the state observes, because the trial court followed the proper legal procedures regarding the transcript, the testimony of Dr. Ohde would not have caused a different result. Moreover, Dr. Ohde admitted that the only way to be sure the jury relied solely upon what they heard on the tape would be to play the tape, in essence, before the trial started. It is highly unlikely any attorney could reasonably expect this type of concession from a trial court. The petitioner has simply failed to prove how counsel was ineffective in this respect.

In a related matter, the petitioner contends counsel were ineffective because they failed to discover that the state apparently made several drafts of the transcript of the 911 call. Although one counsel stated he did not remember if he was ever shown the different drafts of the transcript, he testified that they independently consulted someone who informed them that the tape recording could not be made any clearer and that it had not been doctored or edited. All of the drafts of the transcript at

issue contain the petitioner's name. We note that the petitioner did not seek to have the tape examined during the post-conviction proceeding to determine whether or not the petitioner's name appeared in the recording. The petitioner does not explain how the introduction of all the various drafts, each identifying him as the assailant, would have affected the outcome when the trial court instructed the jury that the tape itself, not the transcript, was the evidence, and when counsel had confirmed that the tape had not been altered.

(5) Communication Between Counsel and Petitioner

The petitioner states that he never intended to waive any issue at trial or on appeal. The petitioner suggests the "fact that [he] did not knowingly waive any issue demonstrates the prejudice prong of the ineffective assistance of counsel analysis." The petitioner claims he would not have waived the alleged conflict between the Public Defender's Office and a potential witness if he had known counsel was going to accept the crime scene analysis, concede the time of death, fail to use an independent medical examiner or forensic scientist, and fail

to have the broken knife tested. However, the petitioner has failed to demonstrate how his voluntary waiver of the potential conflict connotes ineffectiveness on behalf of counsel. Counsel testified that they provided the petitioner with the best possible defense given the circumstances of this case. Again, there is a strong presumption that counsel's conduct falls within the range of competence demanded, and the petitioner has simply failed to overcome the presumption in this respect. This claim is without merit.

(6) Failure to Object to Improper Arguments

The petitioner also alleges that counsel was ineffective for failing to object to certain improper and inflammatory statements the prosecutor made during opening and closing arguments. Counsel testified that they did not make the decision before trial not to object to any of the state's argument. However, counsel further testified that, although he does not remember why he did not object to specific statements, he does not always object during the state's argument because it merely prolongs the

prosecutor's argument and possibly emphasizes the state's position.

Nothing in the record demonstrates that counsel undertook an uninformed trial strategy in this case. Even though it is possible different counsel may have chosen another tactic, the petitioner has failed to show how counsel's lack of objections during argument in this case would have resulted in a different verdict. For example, the petitioner argues that counsel should have objected during argument to the prosecutor's description of the petitioner's former place of employment as a slaughterhouse. Counsel, however, testified that they unsuccessfully moved before trial to prevent the state from using this type of description. Moreover, the Supreme Court considered the propriety of these statements on direct appeal in this case and found no error. State v. Smith, 868 S.W.2d 561, 578-79 (Tenn. 1993). The jury was properly instructed on the law to be applied and was informed that counsel's argument should not be considered evidence. It is well-settled law that the jury is presumed to have followed these instructions. State v. Lawson, 695 S.W.2d 202, 204 (Tenn. Crim. App. 1985).

Despite his blanket allegations, the petitioner has simply failed to carry his burden in this instance. The petitioner has failed to adequately demonstrate that the prosecutor's brief and limited statements would require reversal of his sentence or conviction in light of the overwhelming evidence against him. See Harrington v. State, 385 S.W.2d 758, 759 (Tenn. 1965); State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984); see also State v. Cauthern, __ S.W.2d __, No. 02S01-9612-CC-00108 (Tenn. Mar. 23, 1998) (for publication) (isolated statements in present case are not as egregious as lengthy argument in Cauthern, which was not found to be reversible error).

(7) Failure to Object to Jury Instructions

Next, the petitioner contends that counsel was ineffective for failing to object to certain jury instructions given during the guilt and sentencing phases of the trial. Although the petitioner contends the jury instructions warrant reversal, he has failed to cite any relevant case law specifically holding these instructions erroneous. Below is a summary of the contested instructions, all of which have been upheld by the Tennessee Supreme Court:

heinous, atrocious, or cruel aggravating circumstance (State v. Black, 815 S.W.2d 166, 182 (Tenn. 1991)), reasonable doubt (State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994)), assessing credibility of witnesses, effect of mitigating evidence (State v. Smith, 857 S.W.2d 1, 16-17 (Tenn. 1994)), premeditation and deliberation (State v. Brown, 836 S.W.2d 530 (Tenn. 1992) (Court did not hold instruction unconstitutional)), expert testimony (State v. Harris, 834 S.W.2d 54, 70 (Tenn. 1992)), elements of underlying felony in felony murder (State v. Nichols, 877 S.W.2d 722, 735 (Tenn. 1994) (not error for failing to reinstruct)). Accordingly, counsel's performance in this respect was adequate.

(8) Appellate Counsel

Finally, in an apparent effort to avoid the waiver and previous determination provisions of the post-conviction statute, the petitioner claims that he is entitled to a new trial because his appellate counsel failed to raise issues regarding jury instructions, prosecutorial misconduct, and the constitutionality of the death penalty. The post-conviction court, noting that the

petitioner is bound by the action or inaction of counsel, found that these issues have been previously determined or waived. See House v. State, 911 S.W.2d 705, 710-14 (Tenn. 1995).

Appellate counsel testified that he spent at least two hundred hours on the appeal and met with the petitioner three or four times during the appellate process. And although counsel stated the petitioner wanted him to focus on issues pertaining to the guilt phase, counsel testified that he raised every legitimate issue on appeal. Of course, there is no constitutional requirement that an attorney argue every issue on appeal. State v. Draper, 800 S.W.2d 489, 498 (Tenn. Crim. App. 1990). As noted above, none of the contested instructions appear to be erroneous. Moreover, since counsel did not object to the instructions at trial, these issues would have been considered waived on appeal. See,e.g., State v. Black, 924 S.W.2d 912, 916 (Tenn. Crim. App. 1995), perm. to app. denied, (Tenn. 1996).

The petitioner also contends it was error for appellate counsel not to challenge the trial court's refusal to give the jury all of the petitioner's requested instructions, specifically:

consideration of mercy, life equals life, mitigating evidence is not an excuse, mitigation circumstance of lingering doubt, and that the petitioner's cooperation with the authorities should be considered as mitigating evidence. Counsel, however, testified that he did not think he would have succeeded by raising these issues on appeal. Moreover, the petitioner has failed to cite to any relevant authority holding that failure to provide these instructions was prejudicial. See, e.g., State v. Smith, 893 S.W.2d 908, 921 (Tenn. 1994) (mercy instruction not required); State v. Caughron, 855 S.W.2d 526, 543 (Tenn. 1993) (life equals life instruction not required); State v. Cazes, 875 S.W.2d 253, 268 (Tenn. 1994) (trial court not required to instruct on non-statutory mitigators). Again, the petitioner has failed to show how the appeal of his conviction and sentence would have differed had counsel raised these seemingly meritless issues.

The petitioner argues that appellate counsel was ineffective for failing to challenge the alleged improper conduct of the prosecutors. Of course, because trial counsel did not object to any of the prosecutor's argument, appellate counsel would have been precluded from raising the issues on appeal. See Tenn. R.

App. P. 36(a); State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993). Nonetheless, as stated above, appellate counsel testified that, even though he would raise more issues in a capital case versus a non-capital case, he raised every issue he deemed legitimate in this case. The direct appeal brief filed on behalf of the petitioner is almost two hundred pages long and raises twenty issues, some of which contain sub-issues. Counsel was obviously very thorough in his preparation of the appeal, and there is nothing to suggest counsel inadvertently omitted valid issues. Furthermore, even if some of the statements the petitioner complains about may have been improper, the petitioner has failed to adequately demonstrate that these brief and limited statements would require reversal of his sentence or conviction in light of the overwhelming evidence against him. See Harrington v. State, 385 S.W.2d 758, 759 (Tenn. 1965); State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984); see also State v. Cauthern, __ S.W.2d __, No. 02S01-9612-CC-00108 (Tenn. Mar. 23, 1998) (for publication) (isolated statements in present case are not as egregious as lengthy argument in Cauthern, which was not found to be reversible error).

The petitioner also claims appellate counsel was ineffective for failing to challenge the constitutionality of the death penalty statute. Contrary to the petitioner's claim, the brief filed on behalf of the petitioner on direct appeal did attack certain aspects of the death penalty statute. As the petitioner himself acknowledges, however, the courts of this state have repeatedly upheld the validity of the statute in the face of similar challenges. See, e.g., State v. Black, 815 S.W.2d 166 (Tenn. 1991).

"Judicial scrutiny of counsel's performance must be highly deferential." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). "A 'fair assessment . . . requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (quoting Strickland, 466 U.S. at 689). The mere failure of a particular tactic or strategy does not per se establish unreasonable representation. Id. "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, 466 U.S. at 686. The petitioner has failed to carry his burden in this case. After reviewing the entire record on appeal, we find that counsel was not ineffective in their representation of the petitioner in this case and the evidence does not, therefore, preponderate against the trial court's findings.

REMAINING ISSUES

To the extent the petitioner challenges the jury instructions, prosecution argument, and the constitutionality of the death penalty statute outside the scope of the ineffective assistance of appellate counsel claim, these issues have either been waived or previously determined. Tenn. Code Ann. § 40-30-112; House v. State, 911 S.W.2d 705 (Tenn. 1995). Nonetheless, as discussed above, there were no constitutional errors in the instructions, or lack thereof, or prosecution argument. Similarly, the petitioner's issues regarding admissibility of the transcript of the 911 tape, sufficiency of the evidence, and the issues raised in the direct

appeal have all been previously determined. Tenn. Code Ann. § 40-30-112; House v. State, 911 S.W.2d 705 (Tenn. 1995).

CONCLUSION

The record fully supports the post-conviction court's findings and conclusions. The petitioner has not met his burden of proof. We conclude, therefore, that the petition for post-conviction relief was properly denied. Accordingly, the judgment of the post-conviction court is affirmed.

The petitioner's sentence of death by electrocution shall be carried out on September 30, 1998, unless otherwise stayed by an appropriate order.

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DAVID H. WELLES, JUDGE

CONCUR:

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JOSEPH M. TIPTON, JUDGE

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JOE G. RILEY, JUDGE