No. _____

In the Supreme Court of the United States

BRUCE WESTBROOKS, Warden,
Petitioner,

v.

ANDREW LEE THOMAS, JR.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

A Tennessee jury convicted Andrew Thomas of first-degree murder for a shooting that caused the victim's death two years later. Before the victim died and before Thomas's state murder trial, Thomas had been convicted of federal robbery and firearm charges arising from the same shooting. In both the state and federal trials, Thomas's former girlfriend, Angela Jackson, provided testimony implicating Thomas as the shooter. Jackson's testimony at the state trial was consistent with her testimony at the federal trial and with a written statement she had given to federal investigators before the federal trial.

Ten years after Thomas's state-court conviction, Thomas learned that Jackson had received a $750 payment from the FBI after his federal trial concluded, but before his state murder trial. The FBI did not promise Jackson a payment or discuss a possible payment before she testified at the federal trial.

Thomas sought habeas relief from his state murder conviction on the ground that state prosecutors had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the payment. A divided panel of the Sixth Circuit granted Thomas relief, holding that evidence of the payment was material for purposes of *Brady*.

The question presented is:

Did the Sixth Circuit contravene this Court's precedents regarding the materiality standard for *Brady* claims when it held that evidence of the FBI's payment to Jackson was material?

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PETITION FOR A WRIT OF CERTIORARI

Bruce Westbrooks, Warden of Riverbend Maximum Security Institution, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

PARTIES TO THE PROCEEDING

The petitioner is Bruce Westbrooks, the Warden of Riverbend Maximum Security Institution. The respondent is Andrew Thomas, an inmate in Warden Westbrook's custody at Riverbend Maximum Security Institution.

OPINIONS BELOW

The opinion of the Sixth Circuit, App. 1-22, is reported at 849 F.3d 659 (6th Cir. 2017). The opinion of the district court, App. 23-255, is not reported but is available at 2015 WL 13091647. The opinion of the Tennessee Supreme Court affirming Thomas's state conviction on direct appeal, App. 256-357, is reported at 158 S.W.3d 361 (Tenn. 2005). The opinion of the Sixth Circuit in a companion case denying Thomas habeas relief from his federal convictions, App. 358-375, is reported at 849 F.3d 669 (6th Cir. 2017).

JURISDICTION

The Sixth Circuit entered its opinion and judgment on February 24, 2017. The Sixth Circuit denied the Warden's petition for panel rehearing on April 4, 2017, App. 376-377, and for rehearing en banc on April 19, 2017, App. 378. On July 10, 2017, Justice Kagan

extended the time to file this petition to August 17, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In 2001, a Tennessee jury convicted Andrew Thomas of first-degree felony murder and sentenced him to death for shooting an armored-car courier named James Day in the back of the head during a money pickup from a Walgreens drug store in 1997. Day died from injuries related to the shooting two years later. In 1998, before Day died, Thomas was convicted in federal court of robbery and firearm offenses arising from the same incident and sentenced to life in prison plus five years. App. 2-3, 360-361.

In the decision below, a divided panel of the Sixth Circuit granted Thomas habeas relief from his state murder conviction after concluding that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose to Thomas that one of the government's witnesses in the state trial, Angela Jackson, had received a $750 payment from the FBI after testifying in Thomas's earlier federal trial. App. 7-15. The Sixth Circuit held that the evidence was material even though Jackson was unaware of the payment when she testified in the federal trial, and even though Jackson's testimony in the state trial was consistent with her testimony in the federal trial,

consistent with an earlier written statement she gave to the FBI, and corroborated by other witnesses. App. 19-21. Meanwhile, in the habeas proceedings arising from Thomas's federal convictions, the same Sixth Circuit panel rejected Thomas's *Brady* claim in that case because there was no evidence that Jackson knew about the payment or expected any kind of deal with the prosecution when she testified in the federal trial. App. 372-375.

A. State Proceedings

In 2000, a Tennessee grand jury indicted Thomas and his co-defendant, Anthony Bond, for the first-degree felony murder of James Day, a courier for the Loomis-Fargo armored-car company. App. 25, 257. Day was shot in the back of the head while picking up a money-deposit bag from a Walgreens drug store in Memphis, Tennessee. The shooting damaged Day's spinal cord and eventually caused his death two years later.

The State's theory at the joint trial was that Thomas and Bond perpetrated the crime together, with Thomas shooting Day and taking his deposit bag, and Bond driving the getaway car. App. 257-261. Thomas's defense theory was that the shooting had not actually caused Day's death or, in the alternative, that the crime was perpetrated by Bond and a third party. App. 274.

At the time of the state murder trial in 2001, Thomas and Bond had already been convicted of federal charges arising from the same incident. Thomas stood trial in federal court in 1998 and was convicted of robbery affecting commerce, using a

firearm during a crime of violence, and being a felon in possession of a firearm. He was sentenced to life in prison plus five years. Bond pleaded guilty to robbery and was sentenced to twelve years' imprisonment. App. 3-4; *see also United States v. Thomas*, 29 F. App'x 241 (6th Cir. 2002).[1]

The evidence at the murder trial established that at around 12:30 p.m. on April 21, 1997, Day left Walgreens with a deposit bag containing over $18,000 in cash, checks, and food stamps. As Day carried the deposit bag to his armored car, Thomas shot him in the back of the head, grabbed the bag, and jumped into the passenger seat of a stolen white car being driven by Bond. The two men sped away from the scene, abandoned the white car on a street just behind Walgreens, jumped into a red car that Thomas had borrowed from his then-girlfriend, Angela Jackson, and drove away. App. 258.

Jackson was one of the witnesses who implicated Thomas. She testified that Thomas borrowed her car on the morning of the shooting and told her that he was going to pick up Bond, who was a friend of Thomas's. Later that afternoon, Thomas and Bond came to her apartment "excited" and "out of breath." App. 259. While at her apartment, Thomas instructed Bond to get rid of the gun; began removing money, checks, and food stamps from small white envelopes that had been in Bond's jacket; and divided the money with Bond. Thomas told Jackson that she had to keep what she

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[1] Bond's guilty plea in the federal case was introduced in the state murder trial. App. 60-61. Bond's earlier confession to law enforcement officials was also introduced, but with the portions implicating Thomas redacted. App. 113, 125.

had seen a secret, and Jackson was scared that Thomas would harm her or her two daughters if she told anyone. App. 61-62, 259.

Jackson recalled that Thomas did not own a car at the time of the shooting, but he wanted one and would "always say that he got to get that money." App. 61. She also recalled that, "whenever [Thomas and Jackson were] behind an armored truck" while they were out driving, Thomas would say, "I got to get that money." *Id.*

Later on the day of the shooting, Thomas and Jackson visited a custom car shop called Auto Additions, where Thomas purchased a pink box Chevy with "gold plates and spoke wheels" for $3,975 in cash. App. 63, 259. At Thomas's urging, the two parked Jackson's red car at the back of her apartment building and drove the new pink car to a hotel for the evening. App. 64. While watching a news report about the shooting at the hotel, Thomas told Jackson that he had "grabbed the nigger by the throat and shot him." *Id*.

The next day, Jackson opened a bank account in her name at First American Bank and deposited $2,401.48 in cash. Thomas told her to open the account and gave her the cash; he could not open the account himself because he did not have any identification. When Thomas needed to make a withdrawal, Jackson would accompany him to the bank. App. 65, 259.

Two days later, Jackson bought a shotgun from a pawn shop because Thomas told her they needed it "for protection." App. 65, 259. Jackson falsely stated on the firearm purchase form that she was buying the shotgun for herself, when it was actually for Thomas.

App. 64. Thomas later bought a gold necklace for himself and wedding rings for him and Jackson. Thomas and Jackson married in May but separated only two months later. App. 259-260.

Surveillance cameras at Walgreens captured the shooting on video. The video footage was played for the jury, and Jackson identified Thomas as the gunman from a still image made from the footage. App. 66-67, 261. Several eyewitnesses, including employees of Walgreens and neighboring businesses, described the white and red cars that were used in the getaway and identified the occupants of the cars as two black men. App. 57-58. One of the witnesses, Richard Fisher, testified that the white car passed within four feet of him, and he was "very sure" that the man in the passenger seat was Thomas because of his "distinctive" eyes. App. 59-60.[2]

Other witnesses corroborated Jackson's testimony about Thomas's use of the robbery proceeds. Two employees of Auto Additions testified that Thomas paid $3,975 in cash for a "hot pink" box Chevy with "gold plates" and "spoke wheels" on the afternoon of the shooting. One of the employees knew Thomas because he had been to Auto Additions previously to browse. App. 58. An employee of First American Bank testified that Jackson opened a savings account the day after the shooting and deposited $2,401.48 in cash. Twelve withdrawals were made from the account over the next thirty days, leaving a balance of only fifty-eight cents.

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[2] Fisher initially identified Bond as the man in the passenger seat. After being allowed to approach Bond and Thomas in the courtroom, however, Fisher testified that he was "very sure" that Thomas was the passenger and not Bond. App. 59-60.

Id. Finally, the owner of North Watkins Pawn and Jeweler testified that Jackson purchased a shotgun from his store the day after the shooting. *Id.*

The prosecution questioned Jackson about her motives for testifying. Jackson stated that she did not report the robbery or shooting to the police at the time it occurred because she was scared of Thomas and did not want him to harm her two daughters. She did not tell anyone what she knew until federal investigators knocked on her door in November 1997, seven months after the shooting, and asked her to answer some questions. At that time, Jackson told investigators the same thing she told the jury. App. 62-63. The prosecution inquired whether Jackson asked investigators for her "reward money," and whether she ever got any "reward money," and Jackson answered, "No." App. 5, 63. Jackson acknowledged that she lied when she purchased the shotgun. App. 64.

Thomas's counsel conducted a lengthy cross-examination of Jackson. He asked Jackson whether she was testifying because "it was the right thing to do," to which she replied, "Yes." App. 6. He asked whether Jackson had received a "reward for any of this" or "any deals to testify," to which she replied, "No." App. 6. He asked Jackson why, if she was so scared of Thomas, she let him stay at her apartment with her two daughters and ended up marrying him. App. 68-69. Thomas's counsel also attempted to undermine Jackson's credibility by purporting to identify minor inconsistencies between her earlier testimony and her testimony at the state trial, by pointing out that Jackson had lied when she purchased the shotgun, and by suggesting that Jackson was

testifying against Thomas to get back at him for having other girlfriends and for accusing her of being cruel to his son. App. 63-64, 69, 70.

Thomas's counsel called three witnesses, all of whom were friends of Thomas. Each of them testified that, after Thomas and Jackson separated, Jackson threatened that she was "gonna pay [Thomas] back." App. 53-54; 311-312. Thomas did not testify at trial, and he did not present an alibi.

Jackson's testimony at the state murder trial was consistent with her earlier testimony at Thomas's federal trial in November 1998. App. 72. It was also consistent with the written statement she gave to federal investigators in November 1997. App. 70-72.

The jury convicted Thomas of first-degree felony murder and, after the penalty phase of the trial, sentenced him to death. App. 4. The Tennessee Court of Criminal Appeals and Tennessee Supreme Court affirmed Thomas's conviction and death sentence on direct appeal. *State v. Thomas*, No. W2001-02701-CCA-R3-DD, 2004 WL 370297, at *54 (Tenn. Crim. App. Feb. 27, 2004); App. 256-357.[3]

[3] The jury also convicted Bond of first-degree felony murder and sentenced him to life in prison, but his conviction was later reversed on direct appeal because the trial court had failed to instruct the jury on a lesser-included offense. App. 258. After a retrial, Bond was again convicted and sentenced to life in prison, and his conviction and sentence were affirmed on direct appeal. *See State v. Bond*, No. W2005-01392-CCA-R3-CD, 2006 WL 2689688 (Tenn. Crim. App. Sept. 20, 2006), *perm. appeal denied* (Tenn. Jan. 29, 2007).

B. Discovery of the FBI's Payment to Jackson

At an evidentiary hearing held in 2011 in connection with Thomas's petition under 28 U.S.C. § 2255 for relief from his federal convictions, Thomas discovered that Jackson had received a payment of $750 from the FBI's Safe Streets Task Force on December 18, 1998, after she testified in Thomas's federal trial. App. 4, 45. The lead investigator on the case, Scott Sanders, testified that the payment "was not anticipated, planned, or discussed with [Jackson] at all prior to the payment being made" and was not even authorized by the FBI until after Thomas was convicted. App. 81; R. 15-1, at 2-3.[4]

Sanders also testified that "[a]t no time was Jackson ever informed that she had criminal liability related to this case," or "threatened with prosecution if she did not cooperate." R. 15-1, at 2. When federal investigators first spoke with Jackson at her apartment on November 4, 1997, and obtained her written statement, "no agent offered any sort of immunity in exchange for her truthful statement or subsequent testimony." R. 15-1, at 2.

C. Federal Habeas Proceedings

In 2012, Thomas filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 seeking relief from his state murder conviction and death sentence. App. 23-24. Among other claims for relief, Thomas contended that state prosecutors had violated his due process

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[4] Record citations are to the district court record in Thomas's federal habeas proceedings arising from his state murder conviction. *See Thomas v. Carpenter*, No. 12-2333 (W.D. Tenn.).

rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose that the FBI had paid Jackson $750 after she testified at Thomas's federal trial. App. 44.

The parties stipulated that Thomas did not discover information about the payment until October 11, 2011, and that there was now no meaningful avenue under Tennessee law for Thomas to present claims related to that payment to the state courts. R. 23, at 1-2. Pursuant to 28 U.S.C. § 2254(b)(3), the State expressly waived the exhaustion requirement with respect to those claims. *Id.* at 2. Because the state courts did not adjudicate Thomas's *Brady* claim, that claim was subject to de novo review rather than the deferential standard that ordinarily applies on habeas review under 28 U.S.C. § 2254(d).

The parties also stipulated to certain facts related to the payment. As relevant here, the parties stipulated that members of the FBI's Safe Streets Task Force, which included federal and state law enforcement officers, had participated in Thomas's state murder prosecution and that "[k]nowledge of the $750 payment to Angela Jackson is imputed to the state prosecutors for purposes of Petitioner's claim under *Brady*." App. 50.[5] The parties also stipulated

[5] The Warden did not stipulate or otherwise concede that state prosecutors had *actual* knowledge of the payment, and there is no evidence in the record to support a finding of actual knowledge. In the decision below, the Sixth Circuit stated that the "parties agree[d] that the file for Thomas's case "contained a receipt documenting the FBI's payment to Jackson," App. 5, but the parties never agreed that the case file contained any information about the payment. The Sixth Circuit was also mistaken that the state prosecutor had "acknowledged possession of evidence of the payment before trial." App. 5.

that "[h]ad [Thomas's] state trial counsel known about the $750 payment, he would have used this information in cross examining Angela Jackson," and that the payment "constitutes exculpatory evidence under *Brady*." *Id.* The parties agreed that "the only remaining question" for purposes of Thomas's *Brady* claim was "whether the undisclosed payment is material." *Id.*

The district court denied Thomas habeas relief. App. 252. With respect to Thomas's *Brady* claim, the district court concluded that the undisclosed payment to Jackson after Thomas's federal trial was not material. App. 77. "The consistency of Jackson's statements, the reliability of her testimony as measured in light of the corroborating testimony, and Thomas's inability to impeach her statements related to his participation in the crime, despite extensive, focused attempts by his trial counsel" convinced the district court that there was no "reasonable probability" that disclosure of the payment would have changed the outcome of the trial. App. 76-77. Although Thomas had argued that the undisclosed evidence would have shown that "Jackson was induced to lie in exchange for a $750 payment," the district court rejected that argument because "Jackson's statement in November 1997, when the FBI came to her house, and her testimony at the federal trial and the state trial were consistent," and "the statement and the federal testimony were given before the payment was made." App. 75. The district court also noted that "[t]here was substantial evidence linking Thomas to the crime other than Jackson's testimony," including Richard Fisher's identification of Thomas and

testimony about Thomas's purchases after the shooting. App. 74.

A divided panel of the Sixth Circuit reversed. The majority held that Thomas's *Brady* claim entitled him to relief because evidence of the FBI's payment to Jackson was material. App. 7.[6] The majority acknowledged that "[t]he dispositive question" was "whether the guilty verdict entered against Thomas is worthy of confidence in the absence of the suppressed evidence." App. 8. The majority concluded that the materiality standard was satisfied "[b]ecause of the importance of Jackson's testimony to the State's case against Thomas and because the jury was not presented with any other evidence of Jackson's pecuniary bias." App. 14.

The majority found that Jackson's testimony was "pivotal to the State's case against Thomas" because, in its view, Jackson had "provided the only credible identification placing Thomas at the scene of the

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[6] The majority did not rule on Thomas's other claims for habeas relief, but it briefly discussed Thomas's related claim that the prosecution had violated his due process rights by knowingly failing to correct Jackson's testimony that she had not received a reward. The majority suggested that, if it were to reach that claim, it might find that the state prosecutor had actual knowledge of the payment. App. 16. As explained above, however, *see* p. 10, *supra*, there is no evidence in the record that would support a finding of actual knowledge. In any event, Thomas's prosecutorial misconduct claim fails because Jackson's testimony that she never received a "reward" for "any of this" was not actually false. As the district court explained, it was ambiguous whether the payment Jackson received was a "reward," and it was also ambiguous whether "any of this" included Jackson's testimony in the earlier federal trial. App. 81-82.

crime," "the only testimony linking Thomas to Bond . . . on the day of the shooting," and the "only testimony affirmatively attributing Thomas with responsibility for the transactions cited by the State as circumstantial evidence of his involvement in the shooting." App. 10. To reach that conclusion, the majority dismissed Richard Fisher's eyewitness identification of Thomas as "lack[ing] credibility." App. 10. The majority also discounted evidence corroborating Jackson's testimony about Thomas's use of the robbery proceeds. According to the majority, that evidence merely showed that "either Thomas or Jackson came into substantial wealth around the time of the shooting." App. 11.

The majority next concluded that evidence of the payment demonstrated Jackson's "pecuniary bias" and therefore could have been used to undermine Jackson's credibility. App. 11. The majority relied heavily on the Sixth Circuit's earlier decision in *Robinson v. Mills*, 592 F.3d 730 (6th Cir. 2010), which held that the government's failure to disclose a government witness's history as a paid confidential informant violated *Brady*. In *Robinson*, the majority noted, the Sixth Circuit had observed that "ordinary decent people are predisposed to dislike, distrust, and frequently despise criminals who 'sell out' and become prosecution witnesses." App. 12. The majority found Jackson indistinguishable from the paid confidential informant in *Robinson* and concluded that, "if the jury had been presented with evidence of an unusual payment to an individual who can be fairly characterized as an accessory after the fact, it might well have chosen to disregard her testimony against Thomas as untrustworthy and unreliable for the reasons discussed in *Robinson*." App. 13.

Finally, the majority rejected the Warden's argument that evidence of the payment would have been cumulative of other impeachment evidence, reasoning that "impeachment on the basis of pecuniary bias is fundamentally different than impeachment on the basis of character for dishonesty or other bad acts." App. 13. "[T]he fact that Jackson had been thoroughly impeached on other grounds" did not render evidence of the payment "cumulative," because "there was no evidence presented at trial that Jackson had a financial interest in the outcome of the case." App. 14.

Judge Siler dissented. In his view, the payment to Jackson was not material. Judge Siler explained that, long before Jackson testified at the federal or state trial or "received any money from the federal agents," Jackson had given a statement to the FBI "describing the events on the day of the crime and her knowledge of Thomas's involvement," and that statement was "consistent with her testimony at the federal trial in November 1998 and the state trial in 2001." App. 19. Moreover, Richard Fisher's identification of Thomas as the shooter and independent evidence about the purchases Thomas and Jackson made following the shooting corroborated Jackson's testimony. App. 20. Jackson was also "thoroughly impeached" at trial, including about "allegations by Thomas that she had been cruel to his son, suggesting a bias by Jackson against Thomas." *Id.*

The same day the Sixth Circuit granted Thomas habeas relief from his state murder conviction, it denied Thomas's petition under 28 U.S.C. § 2255 for relief from his related federal convictions. App. 359. In that decision, the same panel of the Sixth Circuit

rejected Thomas's claim that federal prosecutors violated *Brady* by failing to disclose their eventual payment to Jackson. The court found that Thomas was "unable to present evidence that Angela Jackson had knowledge before her federal testimony that she would receive the money, or that she made a deal to testify in lieu of being prosecuted." App. 374. To the contrary, Sanders had testified that investigators did not "anticipate, plan, or discuss" the payment with Jackson or "inform her ahead of time that she would be compensated for her cooperation or that she was at risk of facing prosecution for assisting Thomas." App. 373. The court concluded that the "Government had no obligation to disclose to [Thomas] whether it was considering the eventual payment to Jackson." App. 374.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted because the decision below conflicts with this Court's precedents regarding the materiality standard for *Brady* claims in three ways. *First*, the Sixth Circuit's materiality holding conflicts with this Court's instruction that undisclosed evidence is material for *Brady* purposes only if there is a *reasonable probability* that the evidence would have led to a different outcome at trial. Rather than meaningfully apply that standard, the Sixth Circuit based on its materiality holding on unjustified speculation that the FBI's payment "might well" have caused the jury to find Jackson's testimony untrustworthy and that the jury would have disregarded other evidence corroborating Jackson's testimony.

Second, the decision below conflicts with this Court's precedents holding that the materiality of undisclosed evidence must be evaluated in light of the *entire record*. The majority reached its conclusion that evidence of the payment might have damaged Jackson's credibility only by failing to consider the consistency of Jackson's testimony and the timing of the FBI's payment.

Third, the Sixth Circuit ignored this Court's instruction that undisclosed impeachment evidence is not material when it is merely *cumulative* of other impeachment evidence. Evidence of the payment was cumulative because Thomas's counsel had already attempted to impeach Jackson by accusing her of testifying against Thomas to get back at him or to obtain a deal from the prosecution.

At the very least, this Court should grant the petition, vacate the Sixth Circuit's decision, and remand for reconsideration in light of this Court's decision in *Turner v. United States*, 137 S. Ct. 1885 (2017).

I. Certiorari Is Warranted Because the Sixth Circuit's Materiality Holding Conflicts with This Court's Precedents.

It is well settled that the government's failure to disclose evidence that is favorable to the defense violates the Due Process Clause only if the evidence is "'*material* to the defendant's guilt or punishment.'" *Turner*, 137 S. Ct. at 1888 (quoting *Smith v. Cain*, 565 U.S. 73, 75 (2012)). This Court has made clear that undisclosed evidence is material only if there is a "reasonable *probability*" that disclosure of the evidence

would have led to a different verdict. *Strickler v. Greene*, 527 U.S. 263, 291 (1999). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-110 (1976). Rather, to satisfy the "reasonable probability" standard, a criminal defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). In determining whether that standard is met, a court must evaluate the undisclosed evidence "'in the context of the entire record.'" *Turner*, 137 S. Ct. at 1893 (quoting *Agurs*, 427 U.S. at 112). When the record shows that undisclosed impeachment evidence is "largely cumulative" of other impeachment evidence that was already used at trial, the materiality standard will not be satisfied. *Id.* at 1895.

The decision below conflicts with this Court's precedents concerning the *Brady* materiality standard in three important respects. *First*, although the Sixth Circuit articulated the correct *Brady* materiality test at various points in it opinion, the court in fact applied a significantly watered-down version of the governing "reasonable probability" standard. The majority's analysis reveals that its materiality holding is premised on nothing more than unjustified speculation that, had the payment been disclosed, the jury might have found Jackson's testimony untrustworthy and discounted other evidence of Thomas's guilt.

The majority first speculated that, if the jury had been presented with evidence of the FBI's payment to

Jackson, it "*might well* have chosen to disregard her testimony against Thomas as untrustworthy and unreliable." App. 13 (emphasis added). As explained below, *see* pp. 18-20, *infra*, that speculation was unwarranted because the timing of the FBI's payment and the consistency of Jackson's testimony made it highly unlikely that the jury would have discredited Jackson's testimony. In any event, even if it were true that evidence of the payment *might* have caused the jury to find Jackson's testimony untrustworthy, it does not follow that the verdict would have changed.

To reach that conclusion, the majority had to engage in further unjustified speculation that the jury might have disregarded other evidence of Thomas's guilt. The majority surmised that the jury would have disregarded Richard Fisher's eyewitness identification of Thomas, even though Fisher had testified that he was "very sure" Thomas was the man he saw in the passenger seat of the getaway car. App. 10-11. Even more unlikely, the jury might have viewed the extensive evidence corroborating Jackson's testimony about Thomas's use of the robbery proceeds as nothing more than evidence that "either Thomas or Jackson came into substantial wealth around the time of the shooting." App. 11. The Sixth Circuit's analysis makes clear that, at best, it was applying precisely the sort of "mere possibility" standard that this Court has rejected. *See Agurs*, 427 U.S. at 109-110.

Second, and equally troubling, the Sixth Circuit flouted this Court's instruction that the materiality of the undisclosed evidence must be evaluated "in the context of the entire record." *Turner*, 137 S. Ct. at 1893 (internal quotation marks omitted). When the entire

record is examined, it is readily apparent that disclosure of the FBI's $750 payment to Jackson would not have undermined her credibility as a witness and thus could not possibly have led to a different verdict. The record establishes that Jackson provided information to the FBI only after investigators sought her out seven months after the shooting. Investigators never told Jackson that she faced criminal liability, never threatened her with prosecution if she did not cooperate, and never offered her immunity in exchange for her testimony. The payment Jackson ultimately received after Thomas's federal trial was not "anticipated, planned, or discussed" with her before it was made. And Jackson's testimony at Thomas's state trial in 2001 was consistent with her earlier testimony at Thomas's federal trial in 1998, as well as the written statement she gave to the FBI in 1997. *See* App. 70-72, 81, 374.

If the payment to Jackson had been disclosed, any attempt by Thomas's counsel to suggest that the payment induced Jackson to testify falsely against Thomas would have fallen flat. The consistency of Jackson's testimony and the timing of the FBI's payment easily distinguish Jackson from paid confidential informants and other individuals who "'sell out and become prosecution witnesses.'" App. 12 (quoting *Robinson*, 592 F.3d at 737)). Indeed, the net effect of any reference to the payment may have been to bolster Jackson's credibility, because the prosecution surely would have rehabilitated Jackson by underscoring the consistency of her testimony before and after the payment.

Remarkably, the majority completely failed to consider the consistency of Jackson's testimony and the timing of the payment in evaluating the possible impeachment value of the undisclosed evidence. That failure is especially egregious considering the Sixth Circuit's rejection of Thomas's *Brady* claim in his companion habeas case arising from his federal convictions. That decision turned on the fact that the timing and circumstances of the payment to Jackson precluded any inference that the payment had influenced Jackson's testimony. App. 373-374. Had the majority considered the entire record, as this Court's precedents require, it could not have concluded that the payment to Jackson was material.

Third, the Sixth Circuit also failed to meaningfully consider whether evidence of the payment to Jackson would be "cumulative of impeachment evidence [Thomas] already had and used at trial." *Turner*, 137 S. Ct. at 1894. The Warden argued that evidence of the payment was cumulative because Jackson had already been extensively cross-examined about her motives for testifying, including with questions suggesting that she was testifying to avoid criminal charges and to get back at Thomas. The Sixth Circuit dismissed that argument by declaring that "impeachment on the basis of pecuniary bias is fundamentally different." App. 13.

But this Court has never suggested that undisclosed evidence of pecuniary bias is entitled to some sort of special status. The materiality of evidence of pecuniary bias, like any other undisclosed evidence, must be considered in light of the whole record, which includes other impeachment evidence. Given the complete lack of evidence that the FBI's payment actually induced

Jackson's testimony against Thomas, any attempt by Thomas's counsel to impeach Jackson with that information would have been largely cumulative of his other efforts to impugn Jackson's motives for testifying.

The Sixth Circuit's failure to adhere to this Court's precedents led to an erroneous result in this case. This Court has explained that a conviction may be upset on *Brady* grounds only "if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *United States v. Bagley*, 473 U.S. 667, 678 (1985). The government's failure to disclose the FBI's payment to Jackson provides no reason to lack confidence in the jury's verdict that Thomas was guilty of first-degree murder. Given the timing of the FBI's payment to Jackson and the consistency of her testimony, it is neither reasonably probable nor even plausible that disclosure of that payment would have caused the jury to discredit Jackson's testimony or to find Thomas not guilty. The majority concluded otherwise only by applying a materiality standard that bears little resemblance to the one required under this Court's precedents. Certiorari is therefore warranted.

II. This Court Should Grant the Petition, Vacate the Sixth Circuit's Decision, and Remand for Further Consideration in Light of this Court's Decision in *Turner v. United States*.

This Court has explained that a GVR order may be appropriate "[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may

determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). "[T]he GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review." *Id.* at 168.

This Court decided *Turner v. United States*, 137 S. Ct. 1885, on June 22, 2017, after the Sixth Circuit issued its opinion in this case on February 24, 2017, and denied rehearing en banc on April 19, 2017. *Turner* is this Court's most recent decision discussing and applying the *Brady* materiality standard. Although *Turner* did not alter the *Brady* materiality standard, this Court's opinion in *Turner* made clear that, when undisclosed evidence is "too little, too weak, or too distant from the main evidentiary points," a defendant will be unable to show a "reasonable probability" of a different outcome. *Turner*, 137 S. Ct. at 1894. The undisclosed evidence in *Turner* consisted of seven specific pieces of evidence, including alternative suspect and impeachment evidence, and even when all of that evidence was considered cumulatively, it still was not enough to satisfy the bar for *Brady* materiality.

Judge Siler already concluded that evidence of the FBI's payment to Jackson was not material. It is likely that, if given the opportunity to reconsider that issue in light of *Turner*, at least one other member of the panel will conclude that, when evaluated in light of the entire record—including evidence that Jackson was not told about or promised any payment before testifying and that Jackson has testified consistently all

along—evidence of the payment to Jackson is far "too weak" to surmount the materiality threshold.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Herbert H. Slatery III
Attorney General and Reporter
State of Tennessee

Andrée S. Blumstein
Solicitor General

Jennifer L. Smith
Associate Solicitor General

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APPENDIX

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 17a0045p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-5399

[Filed February 24, 2017]

ANDREW LEE THOMAS, JR., *Petitioner-Appellant*,

v.

BRUCE WESTBROOKS, Warden, *Respondent-Appellee*.

Appeal from the United States District Court for the Western District of Tennessee at Memphis.
No. 2:12-cv-02333—Samuel H. Mays, Jr., District Judge.

Argued: November 2, 2016

Decided and Filed: February 24, 2017

Before: MERRITT, SILER, and DONALD, Circuit Judges

COUNSEL

ARGUED: Robert L. Hutton, GLANKLER BROWN, PLLC, Memphis, Tennessee, for Appellant. Michael M. Stahl, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Robert L. Hutton, GLANKLER BROWN, PLLC, Memphis, Tennessee, Kevin Wallace, Elizabeth Cate, Mollie Richardson, WINSTON & STRAWN LLP, New York, New York, for Appellant. Michael M. Stahl, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. Mark A. Fulks, BAKER DONELSON BEARMAN CALDWELL & BERKOWTIZ, P.C., Johnson City, Tennessee, for Amicus Curiae.

MERRITT, J., delivered the opinion of the court in which DONALD, J., joined. SILER, J. (pp. 13–15), delivered a separate dissenting opinion.

OPINION

MERRITT, Circuit Judge. In this Tennessee death penalty case, Petitioner Andrew Lee Thomas, Jr., appeals the district court's denial of his petition for habeas corpus under 28 U.S.C. § 2254.[1] Thomas's

[1] In a companion case to this one, Thomas also appeals the district court's denial of habeas from his federal conviction arising from similar facts. One factual difference between the two cases is important: Angela Jackson's testimony about her receipt of reward money in the federal case does not appear to have been false since the payment in dispute was made after the conclusion of the federal trial. In a separate opinion also entered today, we affirm the district court's denial of the writ in that case. *Thomas v. United States*, No. 15-6200 (6th Cir. Feb. 24, 2017).

primary claim on appeal is that the State violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), when it suppressed evidence that the key witness against him had been paid $750 by the Federal Bureau of Investigation prior to trial. We agree that the prosecutor had a duty to disclose this payment rather than allow the witness to commit perjury by denying its existence, and we **REVERSE** and **REMAND** the district court's denial of the writ.

I. Background

While our decision today is based upon Thomas's procedural rights as a criminal defendant—as opposed to the substantive charges against him—a brief summary of the underlying facts provides helpful context. On April 21, 1997, James Day, an armored truck driver in Memphis, was shot as he was moving a bag of cash into his armored truck from a Walgreens store. The shooter took the bag of cash and left in a getaway car. Day survived the shooting, but died two years later as a result of complications from his injuries. Authorities later identified Thomas as the shooter and Anthony Bond, Thomas's friend and co-defendant, as the driver of the getaway car. For a more complete factual statement, see *Tennessee v. Thomas*, 158 S.W.3d 361, 373-75 (Tenn. 2005).

Thomas was convicted of offenses arising from those facts in both federal and state court. In a federal trial prior to Day's death, Thomas was convicted of interfering with interstate commerce, carrying a firearm in relation to a crime of violence, and being a felon in possession of a firearm. The federal court

sentenced him to life in prison.[2] After Day died of complications from his injuries, the State of Tennessee charged Thomas with felony murder. A Tennessee state jury convicted Thomas and sentenced him to death. The Supreme Court of Tennessee affirmed Thomas's conviction and death sentence on direct appeal. *Id.* at 383. Thomas then exhausted his post-conviction remedies under Tennessee law.

Angela Jackson, Thomas's girlfriend at the time of the shooting, was the pivotal witness in both trials. Indeed, Jackson provided the only reliable testimony placing Thomas at the scene of the shooting. Her testimony also provided an important link between Thomas and various pieces of circumstantial evidence in the case. A more detailed account of the evidence presented at trial can be found in the district court's opinion and order.

After the federal trial was concluded but before the state murder prosecution had commenced, the FBI paid Jackson $750 on behalf of the Safe Streets Task Force—a joint federal-state working group charged with investigating and prosecuting gang-related crime. Thomas was never notified of this payment and only discovered it years later during a hearing on his petition for habeas from his federal conviction.

When Tennessee moved to prosecute Thomas for murder, the federal authorities provided the State with

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[2] This court affirmed that conviction and sentence on direct appeal. *United States v. Thomas*, 29 F. App'x 241 (6th Cir. 2002). The companion case to this one denies Thomas's petition for relief from his federal conviction. *Thomas v. United States*, 15-6200 (6th Cir. Feb. 24, 2017).

relevant evidence and documentation from the federal case. The parties agree that the file contained a receipt documenting the FBI's payment to Jackson and that knowledge of the $750 payment must be "imputed" to the State's prosecutors. Despite the State's concession that its prosecutors had "imputed" knowledge of the payment, they argue they should not be charged with "actual" knowledge. We discuss this argument in Section IV below.

Despite her acknowledged possession of evidence of the payment before trial, the State's prosecutor did not inform Thomas of the payment. The prosecutor's failure to disclose the evidence was particularly egregious in light of the State's repeated emphasis of Jackson's high-minded reasons for testifying—that is, that she was testifying because it was the "right thing to do." This is all made even worse by the fact that the prosecutor failed to correct the record even after Jackson squarely denied receiving any "reward" money in exchange for her testimony against Thomas.

The relevant portion of Jackson's direct examination went as follows:

Q: When did the FBI agents come to your house?
A: I don't remember the date, but it was in November of '97
Q: Did you ask them for your reward money?
A: No.
Q: Did you ever get any reward money?
A: No.

On cross-examination, Ms. Jackson testified:

> Q: You said you were here today to testify because it was the right thing to do. Is that correct?
> A: Yes.
> Q: And that's your only motivation in testifying today. Is that right?
> A: Yes, sir.
> Q: You haven't receiving [sic] a reward for any of this?
> A: No.

Finally, on redirect, Jackson testified as follows:

> Q: Have you collected one red cent for this?
> A: No, ma'am, I have not.

After exhausting his post-conviction remedies in state court, Thomas petitioned the district court for a writ of habeas corpus under 28 U.S.C. § 2254. The district court rejected each of his claims and denied the petition in its entirety. The district court specifically rejected Thomas's *Brady* claim, reasoning that the fact of the payment was not sufficiently "material."

This appeal followed.

II. Standard of Review

This court reviews the district court's dismissal of a § 2254 petition de novo, but we must defer to the district court's factual findings unless they are clearly erroneous. *Jones v. Bagley*, 696 F.3d 475, 482 (6th Cir. 2012). When the state court is unable or refuses to review a claim presented in a petition brought under § 2254, the highly deferential standard prescribed in

the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) does not apply. *See Henley v. Bell*, 487 F.3d 379, 390 (6th Cir. 2007). Since both parties concede that the Tennessee state courts were unable to review Thomas's *Brady* claim, we review the district court's denial of those claims de novo.

III. *Brady* Claim

Thomas's first argument on appeal is that the State violated his due process rights as articulated in *Brady v. Maryland* when the prosecution failed to inform him that Jackson had received $750 from the FBI prior to trial. We agree and hold that this claim merits issuance of the writ.

A prosecutor's suppression of evidence violates a criminal defendant's due process rights when the evidence is favorable to the accused and material either to guilt or punishment. *Brady*, 373 U.S. at 87. *Brady*'s rule has been interpreted to require disclosure of all material evidence even if it is only relevant for the purpose of impeaching a government witness at trial. *Bell v. Bell*, 512 F.3d 223, 232 (6th Cir. 2008) (citing *United States v. Bagley*, 473 U.S. 667, 676-77 (1985)).

"A successful *Brady* claim requires a three-part showing: (1) that the evidence in question [is] favorable; (2) that the state suppressed the relevant evidence, either purposefully or inadvertently; (3) and that the state's actions resulted in prejudice." *Id.* at 231 (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). This court finds prejudice in the *Brady* context whenever the suppressed evidence is "material." *See Robinson v. Mills*, 592 F.3d 730, 735 (6th Cir. 2010) (equating the prejudice prong of *Brady* with

materiality). On appeal, the State concedes that it suppressed the evidence in question and that the evidence was favorable to Thomas. Thus, the only issue remaining for decision is whether the evidence of the FBI's payment was sufficiently material to warrant relief under *Brady*.

Evidence is "material" for *Brady* purposes when, in view of all relevant evidence, its absence deprives the defendant of a fair trial, "'understood as a trial resulting in a verdict worthy of confidence.'" *Montgomery v. Bobby*, 654 F.3d 668, 678-79 (6th Cir. 2011) (en banc) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). Satisfying that standard requires more than a mere "possibility" but less than proof "by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id.* at 679 (quoting *Kyles*, 514 U.S. at 434).

Below, the district court rejected Thomas's argument that the suppressed evidence of Jackson's receipt of $750 from the FBI was material because "there was substantial evidence linking Thomas to the crime, other than Jackson's testimony" and because Jackson's testimony in both the state and federal cases was consistent. To the extent that these reasons appear to deny relief because there was sufficient evidence to support Thomas's conviction, they mischaracterize the materiality inquiry under *Brady*. *See id.* (quoting *Kyles*, 514 U.S. at 434) ("*Brady* materiality 'is not a sufficiency of evidence test.'"). The dispositive question, instead, is whether the guilty verdict entered against Thomas is worthy of confidence in the absence of the

suppressed evidence. Under the circumstances, we hold that it is not.

In *Robinson v. Mills*, we addressed materiality in a factually similar case. In that case, the petitioner, Robinson, had been convicted in state court of first-degree murder after shooting a drug dealer in the back of the head. *Robinson*, 592 F.3d at 733. At trial, Robinson sought to mitigate his offense by claiming that he shot the victim in self-defense. *Id.* Kim Sims, an eyewitness, testified against Robinson at trial; hers was the only testimony that tended to negate Robinson's claim of self-defense. *Id.* at 736. Robinson's attorneys attempted to impeach Sims as a witness by questioning her about her history of drug addiction and significant disparities between her trial testimony and her testimony at a pretrial hearing. *Id.* at 734. Despite Robinson's efforts to impeach Sims, the jury convicted him of murder. *Id.* at 731-32.

Unknown to Robinson, Sims had accepted $70 from the prosecuting jurisdiction's police department in exchange for her cooperation as a confidential informant in an unrelated prosecution against the murder victim's sister. *Id.* at 734. Sims had also served as a paid confidential informant for the police department at least seven other times. *Id.* Despite the state's recognition that Sims's substantial connection to local law enforcement required appointment of a special prosecutor, the state never informed Robinson of Sims's status as a paid confidential informant. *Id.*

Reviewing Robinson's petition for habeas, this court held that the prosecution's failure to inform Robinson of Sims's receipt of payment for her services as a confidential informant warranted relief under *Brady*.

Id. at 738. In reaching that conclusion, the panel held that the evidence was "material" because Sims's status as a paid informant was relevant to demonstrate bias in order to "call into question Sims'[s] credibility and truthfulness." *Id.* We reached that conclusion even though Sims's services to the police were rendered in cases entirely unrelated to Robinson's. *Id.*

Like Sims's testimony in *Robinson*, Jackson's testimony was pivotal to the State's case against Thomas. Jackson provided the only credible identification placing Thomas at the scene of the crime. She provided the only testimony linking Thomas to Bond, his co-defendant, on the day of the shooting. And she provided the only testimony affirmatively attributing Thomas with responsibility for the transactions cited by the State as circumstantial evidence of his involvement in the shooting. Without Jackson's testimony linking Thomas to the events surrounding Day's shooting, the State would have had a very difficult time proving its case. As such, we conclude—contrary to the State's arguments—that Jackson's testimony was vital to the State's case-in-chief against Thomas.

In opposition to this conclusion, the State contends that Richard Fisher's testimony independently placed Thomas in the passenger seat of the getaway car. However, Fisher's testimony lacked credibility. When asked at trial whether he saw the person he observed in the passenger seat in the courtroom, Fisher first identified Anthony Bond—Thomas's co-defendant—despite the State's theory that Bond had been the *driver* of the getaway car. When he was cross-examined by Bond's attorney, Fisher was asked to take a very

close look at the two defendants without his glasses. After doing so, Fisher recanted his earlier testimony that Bond had been in the passenger seat and then identified Thomas—the only other defendant—as the passenger in the getaway car. Fisher said he was "very sure" about his second identification, but a reasonable juror would likely have taken that confidence with a grain of salt.

The State further contends that independent, circumstantial evidence tying Thomas to several large expenditures and bank deposits following the shooting would have provided a sufficient basis for confidence in the verdict. This evidence tended to show that Thomas had accompanied Jackson when she purchased a pink Chevrolet with gold wheels in her own name, that he drove the vehicle off the lot, that the two stayed in a motel the night of the shooting, and that Jackson deposited a large sum of cash into a new account shortly after the shooting. However, none of that evidence overwhelmingly suggests that Thomas was the shooter; at most, it suggests that either Thomas or Jackson came into substantial wealth around the time of the shooting. Without Jackson's testimony linking Thomas to Bond on the day of the shooting, it is much less persuasive evidence of Thomas's guilt. As such, we reject the State's claims that Jackson's testimony was not important to the jury's decision to convict Thomas.

As a criminal defendant, Thomas has the right to impeach the State's witnesses against him on the grounds of pecuniary bias in the case. *Robinson*, 592 F.3d at 737 (citing *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974)). This right is especially important when, as here, the case "hinge[s] on the jury's critique" of a

key witness. *Id.* at 736. Without evidence of the FBI's payment, Thomas had no basis upon which to impeach Jackson on the basis of her possible financial interest in the case. In *Robinson*, this court found that the defendant's right to impeach the government's witnesses had been unduly abridged when he was not informed that the key witness had received $70 in connection with an entirely unrelated case because it prevented him from demonstrating the witness's pecuniary bias against him. *Id.* at 738. The facts here are even worse: The relevant payment was more than ten times larger than the payment at issue in *Robinson*. And, unlike the payment in *Robinson*, it was made in connection with a case against the same defendant involving the exact same facts. If the suppression of evidence of the payment in *Robinson* rendered the verdict against the defendant fundamentally unfair, then suppression of the payment here did as well.

The fact that the payment in *Robinson* was made as part of a confidential informant arrangement does not distinguish this case. While there is no allegation that Jackson formally served as a confidential informant to the FBI and the record does not disclose how the payment in question arose, counsel for the United States in the companion case to this one indicated at oral argument that a payment of this nature is "rare." In justifying its finding of materiality, the *Robinson* panel noted: "Ordinary decent people are predisposed to dislike, distrust, and frequently despise criminals who 'sell out' and become prosecution witnesses. Jurors suspect their motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and

unreliable." *Id.* at 737 (citation and internal quotation marks omitted). Jackson falls squarely within this reasoning even if she was not serving specifically as a confidential informant. Jackson clearly committed criminal acts in the aftermath of the shooting—housing a fugitive, lying on a federal firearms purchase form, and disposing of stolen assets, to name just a few. Thus, if the jury had been presented with evidence of an unusual payment to an individual who can be fairly characterized as an accessory after the fact, it might well have chosen to disregard her testimony against Thomas as untrustworthy and unreliable for the reasons discussed in *Robinson*.

The State also argues that the payment was immaterial because any impeachment value would have been duplicative since Jackson had already been extensively cross-examined and her motives for testifying had been undermined as a result. *See id.* at 736 ("[W]here the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material." (internal quotation marks omitted) (alteration original)). But this assertion ignores the clear lesson of *Robinson* that impeachment on the basis of pecuniary bias is fundamentally different than impeachment on the basis of character for dishonesty or other bad acts. Indeed, the witness in *Robinson*—like the witness here—had been thoroughly impeached on the basis of inconsistent testimony and past bad acts, but this court nonetheless held that evidence of her financial relationship with the prosecuting jurisdiction was

"material" for *Brady* purposes. *Id.* at 736-38 ("Although Robinson attempted to demonstrate that Sims' trial testimony differed from her testimony at the preliminary hearing, the undisclosed information was different in kind because the suppressed materials would have offered insight into why Sims' testimony at trial differed from her testimony at the preliminary hearing."). Since there was no evidence presented at trial that Jackson had a financial interest in the outcome of the case, this evidence cannot be properly considered "cumulative" as that term is used in *Robinson*. In short, the fact that Jackson had been thoroughly impeached on other grounds is no bar to a finding that evidence of her pecuniary bias against Thomas is material under *Brady*.

Because of the importance of Jackson's testimony to the State's case against Thomas and because the jury was not presented with any other evidence of Jackson's pecuniary bias, we find the FBI's $750 payment to Jackson was material to the jury's determination of Thomas's guilt. Accordingly, we reverse the district court's judgment and hold that the State's suppression of the payment violated Thomas's due process rights as articulated in *Brady*.

We pause to emphasize that our ruling today takes root in Thomas's right to a fair trial. We neither review nor dispute the facts articulated by the Supreme Court of Tennessee on direct appeal. In the context of a *Brady* claim, the reviewing court does not ask whether there was sufficient evidence to convict the defendant without the tainted evidence. *See Kyles*, 514 U.S. at 434. Rather, we ask whether the purported *Brady* violation rendered the defendant's trial fundamentally

unfair. *See Strickler*, 527 U.S. at 289-90. By focusing on the fairness of the defendant's trial, we protect his constitutional right to present a complete and full-throated defense. As the Supreme Court noted in *Brady*: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87.

IV. Prosecutorial Misconduct Claim

In addition to his *Brady* claim, Thomas also claims the State committed prosecutorial misconduct when it knowingly failed to correct Jackson's false testimony about her receipt of reward money.

The Supreme Court has long held that a prosecutor violates a criminal defendant's due process rights when she knowingly allows perjured testimony to be introduced without correction. *See United States v. Agurs*, 427 U.S. 97, 103 (1976). Judged against a less exacting "materiality" standard than standalone *Brady* claims, *see Rosencrantz v. Lafler*, 568 F.3d 577, 584 (6th Cir. 2009), claims of prosecutorial misconduct require an additional showing that the prosecuting attorney or one of his subordinates actually knew that the testimony was perjured at the time of trial. *Giglio v. United States*, 405 U.S. 150, 154 (1972) (finding misconduct when the prosecuting attorney did not know of the perjury, but one of his subordinates did).

The State's briefing seems confused about the requisite standard of knowledge applicable to claims of prosecutorial misconduct. At times, the State concedes "imputed" knowledge sufficient to support a prosecutorial misconduct claim under *Giglio*. However,

at oral argument, the State seemed to say that the doctrine is a legal fiction and strongly denied that any of its prosecutors had *actual* knowledge that Jackson's testimony was perjured.

The latter view finds no support in the Supreme Court's decision in *Giglio*. While *Giglio* never uses the phrase "imputed knowledge," *Black's Law Dictionary* defines it as a "bridge" to facilitate claims "against a principal in which knowledge is a necessary element" on the basis of facts known by the principal's agents. *Doctrine of Imputed Knowledge*, Black's Law Dictionary (10th ed. 2014). Consistent with that definition, the Supreme Court in *Giglio* held that a prosecuting attorney may be charged with the actual knowledge possessed by his subordinates at the time of trial under basic principles of agency law. *See Giglio*, 405 U.S. at 154. The Court did not adopt a recklessness-based, "knew or should have known" standard for knowledge in the context of prosecutorial misconduct claims. *Id.* Absent actual knowledge on the part of someone in the prosecutor's office that a witness had perjured himself, there can be no finding of intentional prosecutorial misconduct under *Giglio*.

The State's unelaborated concession that the prosecuting attorney had "imputed" knowledge might be read either way on the issue of actual knowledge. Were we to reach the merits of the prosecutorial misconduct claim, we might well charge the state prosecutor with actual knowledge that Jackson's testimony about her receipt of reward money was perjured. Given the importance of Jackson's testimony to the State's case and the State's repeated questioning about her purportedly high-minded reasons for

testifying, it seems that any competent prosecutor would have carefully reviewed the case file for evidence that Jackson might have been testifying for some less-than-altruistic reason in order to guard against the risk of impeachment. This seems especially true in a case like this one where the witness had already testified against the same defendant in a related federal proceeding. Had the prosecutor done so, the parties agree that she would have come across a document indicating that Jackson had received a significant payment from the FBI after the conclusion of the federal trial. Thus, were we to presume that the State's prosecutor engaged in diligent preparation for trial, we would conclude that she knew of the payment at trial. However, we need not conclusively decide that issue here because we hold that Thomas is independently entitled to relief based upon his *Brady* claim.

V. Conclusion

For the foregoing reasons, we hold that Thomas's *Brady* claim in this case entitles him to relief from his Tennessee state court conviction under 28 U.S.C. § 2254.[3] Accordingly, we pretermit our discussion of the remaining issues raised in his petition. The judgment of the district court is **REVERSED** and we **REMAND** the case to the district court with directions to issue the writ of habeas corpus unless the State affords Petitioner a new trial within a period of time to be established.

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[3] In an opinion also entered today, we deny Thomas's companion petition for habeas relief from his federal conviction and sentence in its entirety. *Thomas v. United States*, No. 15-6200 (6th Cir. Feb. 24, 2017).

DISSENT

SILER, Circuit Judge, dissenting. I concur with the facts as related by the majority opinion in this case, but I respectfully dissent from the final conclusion that the *Brady* claim entitles the petitioner, Andrew Lee Thomas, Jr., to a writ of habeas corpus for the reasons stated herein.

First, I agree with the parties and with the majority that the *Brady* claim was not decided by the Tennessee state courts, so our review is de novo. I also agree with the majority that the State conceded that knowledge of the payment of $750.00 to Angela Jackson is imputed to the state prosecutors for purposes of Thomas's claim under *Brady*. It is not material that the state prosecutor did not find the receipt of $750.00 to Jackson in the file, nor that the state prosecutor was told of that payment. As the majority indicates, it would seem logical that the state prosecutor would have found something in the case file about the payment, but that is not in our record before this court. Thomas has benefited from the assumption under law that the successor prosecutor has the imputed knowledge that Jackson was paid the $750.00 and did not admit it later when questioned. However, I part from the majority at this point. As the majority states, "a successful *Brady* claim requires a showing . . . that the state's actions resulted in prejudice." *Bell v. Bell*, 512 F.3d 223, 231 (6th Cir. 2008)(citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Prejudice results whenever the suppressed evidence is "material." *Robinson v. Mills*, 592 F.3d 730, 735 (6th Cir. 2010).

As the majority relates, evidence is material for *Brady* purposes when, in view of all relevant evidence, its absence deprives the defendant of a fair trial, "understood as a trial resulting in a verdict worthy of confidence." *Montgomery v. Bobby*, 654 F.3d 668, 678-79 (6th Cir. 2011) (en banc) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). The majority opinion depends upon our prior decision in *Robinson*, 592 F.3d at 738. However, in *Robinson*, the prosecution depended upon an informant, Sims, who had been used by the prosecution in many investigations, whereas, in the present case, Jackson was an important witness, but she was not present at the robbery or the homicide of James Day, the armored truck driver. She had never been a paid informant in other cases. Certainly, Jackson's evidence was material, because she related the fact that Thomas came to Jackson's apartment with a large amount of money and that Anthony Bond, the codefendant, was with him and was carrying a gun. She also related the fact that she and Thomas took Thomas's money and bought a car and other items. Thomas also admitted to her that he shot the driver (Day) and that the money was from the robbery.

There is one significant difference in the proof in this case and the proof in *Robinson*. Here, Jackson gave a statement to federal agents long before either trial, describing the events on the day of the crime and her knowledge of Thomas's involvement. Her statements in 1997 are consistent with her testimony at the federal trial in November 1998 and the state trial in 2001. Her statements were given before she ever received any money from the federal agents, because she received the $750.00 after the completion of the first trial in 1997. In *Robinson*, the paid witness

had not given earlier consistent statements. She had testified at a preliminary hearing a year before trial, but her testimony at the preliminary hearing differed substantially from the testimony later at the trial.

Moreover, additional evidence introduced at trial placed Thomas at the crime scene. Several witnesses observed Bond and another man get into the car and drive away after the shooting. One of those witnesses, Richard Fisher, testified that he was close to the getaway car as it drove by and he was able to provide in-court identification that Thomas was the passenger in the car. As the majority points out, Fisher originally pointed to Bond as the person in the passenger seat, but as he got closer to Thomas in the courtroom, he identified Thomas as the passenger. The majority is very skeptical about that, but, had the jury believed Fisher's statement that Thomas was the passenger in the car, it could have found Thomas guilty, because the jury decides the credibility of the witnesses.

Other evidence at the trial corroborated Jackson's testimony. For instance, there was evidence about how Jackson and Thomas bought a car with cash soon after the robbery. There was also proof about Jackson's opening a bank account and depositing a large sum of cash in it.

In addition, Jackson was thoroughly impeached during her testimony during trial. She was cross-examined on alleged inconsistent statements to law enforcement and her relationship with Thomas, including allegations by Thomas that she had been cruel to his son, suggesting a bias by Jackson against Thomas. She was also questioned about purchasing a

gun for Thomas and opening a bank account with proceeds from the robbery.

I agree that under *Brady*, the state was required to reveal to defense counsel the payment of $750.00 to Jackson before the state trial. However, because that payment was not prejudicial under *Brady*, the writ of habeas corpus should not be granted. I would affirm the district court in denying the writ.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-5399

[Filed February 24, 2017]

ANDREW LEE THOMAS, JR., Petitioner-Appellant,	)
v.	)
BRUCE WESTBROOKS, Warden, Respondent-Appellee.	)

Before: MERRITT, SILER, and DONALD, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED, and the case is REMANDED with directions to issue the writ of habeas corpus unless the State affords Petitioner a new trial within a period of time to be established.

ENTERED BY ORDER OF THE COURT

s/_____
Deborah S. Hunt, Clerk

APPENDIX B

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

No. 12-2333-SHM-tmp

[Filed March 30, 2015]

ANDREW THOMAS,	)
	)
Petitioner,	)
	)
vs.	)
	)
WAYNE CARPENTER, Warden, Riverbend Maximum Security Institution,	)
	)
Respondent.	)

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ORDER DENYING PETITION PURSUANT TO 28 U.S.C. § 2254 ORDER DENYING CERTIFICATE OF APPEALABILITY ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH AND ORDER DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

On April 27, 2012, Petitioner Andrew Thomas, through counsel, filed a petition for writ of habeas

corpus. (Electronic Case Filing ("ECF") No. 1.) On August 6, 2012, Respondent filed the state court record. (ECF Nos. 12-14.) On August 6, 2012, Respondent filed his answer to the petition. (ECF No. 15.) On August 14, 2012, Respondent manually filed videotape exhibits from the state court trial. (*See* ECF No. 16.) On August 15, 2012, the Court granted Respondent's motion for leave to supplement the answer. (ECF No. 19.) On August 31, 2012, the parties entered into a stipulation related to Claims 1 through 3 of the petition. (ECF No. 23.) On October 4, 2012, Petitioner filed a reply in support of the petition. (ECF No. 24.) On March 24, 2014, the parties entered into stipulations related to expansion of the record. (ECF Nos. 58-60.)

On April 16, 2014, Respondent Wayne Carpenter filed a motion for summary judgment. (ECF No. 63.)[1] On June 26, 2014, Petitioner filed a response to the motion. (ECF No. 75.) On July 18, 2014, Respondent filed a reply in support of summary judgment. (ECF No. 76.) On September 3, 2014, the parties entered into a joint stipulation. (ECF No. 78.) Petitioner requested and the Court allowed supplemental briefing on the materiality of a payment to Angela Jackson, an issue relevant to Claims 1 and 3. (*See* ECF No. 81.) On November 10, 2014, Petitioner filed a supplemental brief. (ECF No. 91.) On December 10, 2014, Respondent filed a response to the supplemental brief. (ECF No. 92.) On January 21, 2015, the Court entered an order directing the parties to clarify issues related to Claim 2. (ECF No. 94.) On February 3, 2015, Respondent filed

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[1] On April 17, 2014, Petitioner filed a motion for evidentiary hearing related to Claims 1 through 3 of the petition. (ECF No. 66.) That motion was denied. (ECF No. 97.)

a brief. (ECF No. 95.) On February 4, 2015, Petitioner filed a brief addressing Claim 2. (ECF No. 96.) Petitioner requested and the Court granted permission to file a supplemental brief on the issues of actual falsity and materiality as it relates to Claim 2. (*See id.* at 3; ECF No. 97.) On February 27, 2015, Petitioner filed a supplemental brief. (ECF No. 98.) On March 20, 2015, Respondent filed a response. (ECF No. 99.)

I. STATE COURT PROCEDURAL HISTORY[2]

On March 21, 2000, indictments were returned in the Criminal Court of Shelby County, Tennessee charging Thomas and his co-defendant Anthony Bond[3] with murder during the perpetration of a felony

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[2] Thomas was found guilty on three federal counts related to this incident: (1) interference with commerce by threats of violence, in violation of 18 U.S.C. § 1951; and aiding and abetting, in violation of 18 U.S.C. § 2; (2) carry and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924 (c); and (3) felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). (No. 98-20100, see ECF Nos. 79 & 81.) Thomas was sentenced to life imprisonment on the federal charges. (*Id.*) Thomas has a pending motion to vacate sentence in this Court, No. 03-2416.

[3] Bond confessed to being the driver of the getaway car, and testified at Thomas's 1998 federal trial. *Thomas v. State*, No. W2008-01941-CCA-R3-PD, 2011 WL 675936, at *6 (Tenn. Crim. App. Feb. 23, 2011). Bond entered a guilty plea to one count of robbery affecting commerce in federal court and was sentenced to twelve years in prison. *Id.* at *6 n.1. He was convicted of first-degree felony murder in the state court and received life without the possibility of parole. *State v. Thomas*, No. W2001-02701-CCA-R3-DD, 2004 WL 370297, at *1 (Tenn. Crim. App. Feb. 27, 2004). The Tennessee Court of Criminal Appeals vacated Bond's murder conviction and remanded for a new trial. *Thomas*, 2011 WL 370297, at *55.

pursuant to Tenn. Code Ann. § 39-13-202. (ECF No. 12-1 at PageID 262-265.)[4] On March 30, 2000, Michael Scholl was appointed counsel for Thomas. (*Id.* at PageID 267.) Jeffery Glatstein was Scholl's co-counsel. (*See* ECF No. 12-13 at PageID 948.) The trial was held from September 17, 2001, through September 26, 2001, before Judge Joseph B. Dailey. (*See* ECF No. 12-13 at PageID 947.) On September 25, 2001, the jury returned a guilty verdict for both defendants. (ECF No. 13-2 at PageID 3004-3005.) On September 26, 2001, the jury sentenced Thomas to death. (ECF No. 13-4 at PageID 3368-3369.)[5]

On December 14, 2001, Robert Brooks was appointed second chair co-counsel to assist Scholl in representing Thomas on appeal. (ECF No. 12-6 at PageID 627-628.) On January 8, 2002, Thomas filed a notice of appeal. (ECF No. 12-6 at PageID 630.) On February 27, 2004, the Tennessee Court of Criminal Appeals affirmed the jury's verdict as to Thomas. *See State v. Thomas*, No. W2001-02701-CCA-R3-DD, 2004 WL 370297, at *1, 55 (Tenn. Crim. App. Feb. 27, 2004). (ECF No. 13-23.) On March 4, 2005, the Tennessee Supreme Court affirmed. *State v. Thomas*, 158 S.W.3d 361, 383-384 (Tenn. 2005). (ECF No. 13-26 at PageID 4316.)

On January 26, 2006, Thomas filed a petition for relief from conviction or sentence. (ECF No. 14-1 at PageID 4420-4434.) On May 9, 2006, Arthur E. Quinn

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[4] "PageID" citations are used for ease of location of documents within the state court record and exhibits.

[5] Bond was sentenced to life imprisonment without parole. (ECF No. 13-4 at PageID 3368.)

was appointed counsel for Thomas. (*Id.* at PageID 4435-4436)[6] On November 13, 2006, Thomas filed an amended petition for writ of error coram nobis and amended petition for relief from conviction or sentence. (ECF No. 14-3 at PageID 4673-4764.) A post-conviction evidentiary hearing was held October 1-4, 2007. (*See* ECF No. 14-10 at PageID 5583-5585, 5588.) On August 4, 2008, the Court entered an order denying post-conviction relief and denying the petition for writ of error coram nobis. (ECF No. 14-2 at PageID 4555-4667.)

On August 28, 2008, Thomas filed a notice of appeal. (*Id.* at PageID 4668-4669.) On February 23, 2011, the Tennessee Court of Criminal Appeals affirmed the judgment of the post-conviction court. *Thomas v. State*, No. W2008-01941-CCA-R3-PD, 2011 WL 675936 (Tenn. Crim. App. Feb. 23, 2011) (ECF NO. 14-24 at PageID 7046-7087). Thomas filed a petition for rehearing. (ECF No. 14-25.) On April 5, 2011, the court denied the petition. (ECF No. 14-26 at PageID 7109.) Thomas filed an application for permission to appeal to the Tennessee Supreme Court (ECF No. 14-27), which was denied on August 25, 2011.

Thomas filed a petition for writ of certiorari in the United States Supreme Court. (ECF No. 14-31.) On March 5, 2012, the United States Supreme Court denied the petition. *Thomas v. Tennessee*, 132 S. Ct. 1713 (2012) (ECF No. 14-34).

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[6] In addition to Arthur E. Quinn, several out-of-state counsel associated with the law firm of Winston & Strawn LLP assisted in representing Thomas in the post-conviction proceedings. (*See* ECF No. 14-1 at PageID 4444, 4452, 4460, 4468, 4492, 4498, 4505, 4511.)

II. PROOF FOUND BY THE TENNESSEE SUPREME COURT

The Tennessee Supreme Court summarized the proof as follows:

> The defendant, Andrew Thomas, and his co-defendant, Anthony Bond, were indicted for the felony murder of the victim, James Day. The following evidence was presented at the joint trial of the defendant and Bond.
>
> **Guilt Phase**
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> Shortly after 12:30 p.m. on April 21, 1997, the defendant and his co-defendant, Bond, saw an armored truck guard with a money deposit bag leaving a Walgreens drug store on Summer Avenue in Memphis, Tennessee. The defendant ran up, shot the guard in the back of the head, grabbed the deposit bag, and jumped into a white car being driven by Bond. The defendant and Bond abandoned the white car on a street behind Walgreens, got into a red car that the defendant had borrowed from his girlfriend, and drove away.
>
> Betty Gay, a Walgreens' employee, heard the gunshot and then saw the armored truck guard, James Day, lying in the parking lot. She saw a man running from the scene with a gun and the deposit bag. Charles Young, the assistant manager of Walgreens, ran outside and saw Day lying face down in a pool of blood. Day, who was conscious, told Young, "Call my wife." Day remained conscious and continued to talk until an ambulance arrived.

Several witnesses described the cars used by the defendant and Bond and gave descriptions of the occupants to the police. One witness, Richard Fisher, testified that he saw a white car "speed" around the armored truck in the front of the store and that the car was within four feet of him. Fisher later identified the defendant as the passenger in the white car.

Later on the afternoon of April 21st, the defendant and Bond arrived at the apartment of Angela Jackson, who was then the defendant's girlfriend. According to Jackson, the two men were "excited" and "out of breath." After telling Bond to get rid of the gun, the defendant began taking money, checks, and food stamps from small white envelopes that had been in Bond's jacket. The defendant and Bond divided the money.

Jackson testified that later that same day, the defendant bought a customized car with gold plates and spoke wheels for $3,975 in cash. The car was titled in Jackson's name. Afterward, the defendant told Jackson that they needed to get a hotel room. While watching a news report that evening at the hotel about the shooting, the defendant told Jackson that the victim "did not struggle for his life" and that he had "grabbed the nigger by the throat and shot him."

On the day after the shooting, Jackson opened a bank account in her name and deposited $2,401.48 in cash. Two days later, she bought a shotgun because the defendant said they needed it "for protection." According to

Jackson, the defendant later bought a gold necklace for himself and wedding rings for both of them. After getting married in May, the couple separated two months later. The defendant told Jackson not to tell police about the robbery.

The victim, James Day, did not immediately die from the gunshot wound to the back of his head. Instead, the gunshot damaged his spinal cord and resulted in paraparesis (a profound weakness in one's abdomen and legs) and neurogenic bladder (a loss of bladder and bowel control due to nerve damage). Faye Day Cain, the victim's widow, testified that her husband underwent numerous surgeries, needed constant care and medical attention, and was unable to work. He was confined to one room, was unable to use the bathroom, and became depressed. In late September of 1999, Day was rushed to the hospital for emergency surgery after his bladder ruptured. The condition caused an infection; Day's condition continued to worsen, and he finally died on October 2, 1999.

The medical examiner for Shelby County, Tennessee, Dr. O.C. Smith, testified that the cause of Day's death was sepsis, "secondary to the rupture of his bladder resulting from spinal cord injury caused by the gunshot wound to his head." Dr. Smith considered Day's death a homicide, and he stated that the "infection from the ruptured bladder" could be "directly related back to [the] gunshot wound." Dr. Smith conceded that Day suffered from heart disease,

high blood pressure, diabetes, and obesity, but he stated that these conditions did not cause the death. Dr. Smith's assistant, Dr. Cynthia Gardner, likewise testified that Day's death resulted from the injuries caused by the gunshot wound.

A videotape of the shooting captured by Walgreens' surveillance cameras was played for the jury. A videotape made from the original was also played for the jury at a slower speed. Angela Jackson identified the defendant as the gunman who shot the guard in the back of the head from a still photograph that had been made from the videotape.

After considering the evidence, the jury convicted the defendant of felony murder based on the killing of the victim "during an attempt to perpetrate robbery as charged in the indictment." The trial court then held a sentencing hearing for the jury to determine the punishment.

Penalty Phase

To support the prior violent felony aggravating circumstance, the prosecution introduced evidence that the defendant had prior convictions for felony offenses whose statutory elements involved the use of violence to the person. See Tenn. Code Ann. § 39–13–204(i)(2) (2003). The proof showed that in September of 1994, the defendant was convicted of seven counts of aggravated robbery and one count of robbery. In January of 1994,

the defendant was convicted of one count of aggravated robbery.

The indictments underlying the defendant's prior convictions for aggravated robbery revealed that the offenses involved the defendant's use of a firearm and involved different victims. On January 4, 1993, he used a firearm in taking between $1,000 and $10,000 from Michael Osborne. On February 1, 1993, he used a firearm in taking between $1,000 and $10,000 from Booker Sanders, and he used a handgun in taking money and food stamps totaling $1,000 to $10,000 from Lee Harris. On March 8, 1993, he used a firearm in taking money and checks totaling $500 to $1,000 from Amos Kirby. On March 12, 1993, he used a firearm in taking checks valued under $500 from Carl Hutchinson. On March 15, 1993, he used a firearm in taking money and checks totaling $500 to $1,000 from Onie Massey, and he used a firearm in taking between $500 and $1,000 from Dewayne McCoy. On June 25, 1993, he used a pistol in taking jewelry valued at $1,000 to $10,000 from Gary Smallwood.

The prosecution also introduced the testimony of Faye Day Cain, the widow of the victim, James Day. She testified that her husband had worked two jobs to support his family before he was shot and that she was unable to work due to a medical condition known as thrombophlebitis. She testified that since her husband's death, she and the couple's minor son lived on disability payments and social security

benefits. Ms. Cain testified that the victim had been her husband, confidant, lover, and best friend. After the shooting, however, she and her husband could no longer have physical contact or intimacy. The victim "couldn't stand to be touched" and "the least little noise would turn him into a frenzy." She testified that she had suffered great emotional pain, that she was no longer a happy person, and that she cried often.

According to Ms. Cain, the couple's son, Cedric, was twelve when his father was shot. They had enjoyed riding motorcycles, having breakfast, and doing "father and son" things. After the shooting, however, Cedric became "hurt and angry."

After the prosecution rested, the defendant presented evidence of mitigating circumstances. The defendant's mother, Luella Barber, testified that the defendant was born in February of 1973. She said the defendant's father, Andrew Thomas, Sr., did not visit the family regularly; he abused drugs, abused her in the defendant's presence, and was often in jail. Ms. Barber divorced Andrew Thomas, Sr., in 1977, and she later married William Barber. She said that the defendant's stepfather, Barber, also abused her in front of the children and became involved with drugs.

According to Ms. Barber, the defendant started getting into trouble for stealing when he was fourteen. Although the defendant dropped out of school, he received his GED and a certificate as a residential plumber's helper

while in jail. Ms. Barber said that she loved her son and that her life would not be the same without him.

Several other family members also testified on behalf of the defendant. Alacia Bolden, the mother of the defendant's eight-year-old son, testified that their son loved his father and continued to have a close relationship with him. Andre Barber, the defendant's brother, testified that he had always looked up to the defendant, that they had a close relationship, and that they talked often. He said that losing the defendant would "devastate" their mother. Similarly, Stephanie Williams and Tamara Weeks, the defendant's cousins, testified that they had close relationships with the defendant. Williams said that she did not want to see the defendant die, and Weeks believed that the defendant was an important male figure in his son's life despite his incarceration.

The jury imposed the death penalty after finding that the evidence supporting the sole aggravating circumstance outweighed the evidence of mitigating circumstances beyond a reasonable doubt. On appeal, the Court of Criminal Appeals affirmed the conviction and the death sentence after concluding that twenty-two issues raised by the defendant were without merit.

State v. Thomas, 158 S.W.3d 361, 373-376 (Tenn. 2005) (footnotes omitted).

III. PETITIONER'S FEDERAL HABEAS CLAIMS

Thomas presents the following claims in his federal habeas petition:

> Claim No. 1: The State violated Thomas's constitutional rights by failing to comply with its discovery obligations under *Brady v. Maryland*.
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> Claim No. 2: The State violated Andrew Thomas's constitutional rights by presenting Angela Jackson's false testimony.
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> Claim No. 3: Thomas is actually innocent of Day's felony murder.
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> Claim No. 4: Andrew Thomas was denied effective assistance of counsel throughout the state court proceedings.
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> Claim No. 5: The jury should have been instructed on lesser included offenses of felony murder.
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> Claim No. 6: The court erred in allowing the prosecutor to repeatedly argue that Thomas and Bond were "greed" and "evil."
>
> Claim No. 7: The trial court's erroneous jury instruction relieved the State of proving proximate causation and would result in an arbitrary and capricious execution.
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> Claim No. 8: The court improperly struck for cause a potential juror who expressed concerns about the death penalty, but who would not have

> been substantially impaired in performing his duties.
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> Claim No. 9: The State should not have tried Thomas capitally for a crime for which he had already been tried and convicted in federal court.
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> Claim No. 10: The death penalty violates treaties ratified by the United States and is inconsistent with international laws and norms.
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> Claim No. 11: The death penalty system is so broken and fraught with errors that the imposition of death in this case violates the Constitution.

(*See* ECF No. 1 at i-v.)

IV. THE LEGAL STANDARD

The statutory authority for federal courts to grant habeas corpus relief to persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). A federal court may grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

A. Procedural Default

Twenty-eight U.S.C. §§ 2254(b) and (c) provide that a federal court may not grant a writ of habeas corpus on behalf of a state prisoner unless, with certain exceptions, the prisoner has exhausted available state remedies by presenting the same claim sought to be redressed in a federal habeas court to the state courts.

Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011). The petitioner must "fairly present"[7]each claim to all levels of state court review, up to and including the state's highest court on discretionary review, *Baldwin v. Reese*, 541 U.S. 27, 29 (2004), except where the state has explicitly disavowed state supreme court review as an available state remedy, *O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999). Tennessee Supreme Court Rule 39, effective June 28, 2001, eliminated the need to seek review in the Tennessee Supreme Court to "be deemed to have exhausted all available state remedies." *Adams v. Holland*, 330 F.3d 398, 402 (6th Cir. 2003); *see Smith v. Morgan*, 371 F. App'x 575, 579 (6th Cir. 2010) (the *Adams* holding promotes comity by requiring that state courts have the first opportunity to review and evaluate claims and by mandating that federal courts respect the duly promulgated rule of the Tennessee Supreme Court that recognizes that court's law and policy-making function and its desire not to be entangled in the business of simple error correction).

The procedural default doctrine is ancillary to the exhaustion requirement. *See Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000) (noting the interplay between the exhaustion rule and the procedural default doctrine). If the state court decides a claim on an independent and adequate state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, a

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[7] For a claim to be exhausted, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam). Nor is it enough to make a general appeal to a broad constitutional guarantee. *Gray v. Netherland*, 518 U.S. 152, 163 (1996).

petitioner ordinarily is barred from seeking federal habeas review. *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977); *see Walker v. Martin*, 131 S. Ct. 1120, 1127 (2011) ("A federal habeas court will not review a claim rejected by a state court if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment"); *see Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991) (same).[8] If a claim has never been presented to the state courts, but a state court remedy is no longer available (*e.g.*, when an applicable statute of limitations bars a claim), the claim is technically exhausted, but procedurally barred. *Coleman*, 501 U.S. at 731-732; *see Hicks v. Straub*, 377 F.3d 538, 551 (6th Cir. 2004) (the procedural default doctrine prevents circumvention of the exhaustion doctrine).

Under either scenario, a petitioner must show "cause" to excuse his failure to present the claim fairly and "actual prejudice" stemming from the constitutional violation or, alternatively, that a failure to review the claim will result in a fundamental miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 320-322 (1995); *Coleman*, 501 U.S. at 75. The latter showing requires a petitioner to establish that a

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[8] The state-law ground may be a substantive rule dispositive of the case, or a procedural barrier to adjudication of the claim on the merits. *Walker*, 131 S. Ct. at 1127. A state rule is an "adequate" procedural ground if it is "firmly established and regularly followed." *Id.* (quoting *Beard v. Kindler*, 130 S. Ct. 612, 618 (2009)). "A discretionary state procedural rule . . . can serve as an adequate ground to bar federal habeas review . . . even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Id.* at 1128 (quoting *Kindler*, 130 S. Ct. at 618) (internal citations and quotation marks omitted).

constitutional error has probably resulted in the conviction of a person who is actually innocent of the crime. *Schlup*, 513 U.S. at 321-323; *see House v. Bell*, 547 U.S. 518, 536-39 (2006) (restating the ways to overcome procedural default and further explaining the actual innocence exception).

B. Merits Review

Section 2254(d) establishes the standard for addressing claims that have been adjudicated in state courts on the merits:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). The petitioner carries the burden of proof for this "difficult to meet" and "highly deferential [AEDPA] standard," which "demands that state-court decisions be given the benefit of the doubt." *Pinholster*, 131 S. Ct. at 1398 (internal quotation

marks and citations omitted).[9] These limited bases for granting the writ "reflect[ ] the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n. 5 (1979) (Stevens, J., concurring)). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fair-minded jurists could disagree' on the correctness of that decision." *Id.* (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). A petitioner must show that the state court's ruling on the federal habeas claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786–787; *see Abby v. Howe*, 742 F.3d 221, 226 (6th Cir. 2014) (same).

Review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. *Pinholster*, 131 S. Ct. at 1399. A state court's decision is "contrary" to federal law when it "arrives at a conclusion opposite to that reached" by the Supreme Court on a question of law or "decides a case differently than" the Supreme Court has "on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).[10] An "unreasonable

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[9] The AEDPA standard creates "a substantially higher threshold" for obtaining relief than a de novo review of whether the state court's determination was incorrect. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

[10] The "contrary to" standard does not require citation of Supreme Court cases "so long as neither the reasoning nor the result of the

application" of federal law occurs when the state court "identifies the correct governing legal principle from" the Supreme Court's decisions "but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 412-413. The state court's application of clearly established federal law must be "objectively unreasonable." *Id.* at 409. The writ may not issue merely because the habeas court, in its independent judgment, determines that the state court decision applied clearly established federal law erroneously or incorrectly. *Renico v. Lett*, 559 U.S. 766, 773 (2010); *Williams*, 529 U.S. at 411.

There is little case law addressing the standard in § 2254(d)(2) that a decision was based on "an unreasonable determination of facts." However, in *Wood v. Allen*, 558 U.S. 290, 301 (2010), the Supreme Court stated that a state-court factual determination is not "unreasonable" merely because the federal habeas court would have reached a different conclusion. In *Rice v. Collins*, 546 U.S. 333, 341-342 (2006), the Court explained that "[r]easonable minds reviewing the record might disagree" about the factual finding in question, "but on habeas review that does not suffice to supersede the trial court's . . . determination."[11]

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state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam); *see Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (same); *Treesh v. Bagley*, 612 F.3d 424, 429 (6th Cir. 2010) (same).

[11] In *Wood*, 558 U.S. at 293, 299, the Supreme Court granted certiorari to resolve whether, to satisfy § 2254(d)(2), a petitioner must establish only that the state-court factual determination on which the decision was based was "unreasonable," or whether § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and

"Notwithstanding the presumption of correctness, the Supreme Court has explained that the standard of § 2254(d)(2) is 'demanding but not insatiable.' Accordingly, '[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review.'" *Harris v. Haeberlin*, 526 F.3d 903, 910 (6th Cir. 2008) (internal citations omitted). A state court adjudication will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding. *Ayers v. Hudson*, 623 F.3d 301, 308 (6th Cir. 2010); *see Hudson v. Lafler*, 421 F. App'x 619, 624 (6th Cir. 2011) (same).

There is no AEDPA deference and the standards of § 2254(d) do not apply if a habeas claim is fairly presented in the state courts but not adjudicated on the merits. *Montes v. Trombley*, 599 F.3d 490, 494 (6th Cir. 2010); *see Thompson v. Warden, Belmont Corr. Inst.*, 598 F.3d 281, 285 (6th Cir. 2010) (a claim that is fairly presented in the state court but not addressed is subject to de novo review by the habeas court). The pre-AEDPA de novo review standard applies for questions of law and mixed questions of law and fact, and the clear error standard applies to factual findings. *Montes*, 599 F.3d at 494.

C. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56, on motion of a party, the court "shall grant summary judgment if

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convincing evidence. The Court ultimately found it unnecessary to reach that issue. *See id*. at 300, 304-05. In *Rice*, 546 U.S. at 339, the Court recognized that it is unsettled whether there are some factual disputes where § 2254(e)(1) is inapplicable.

the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party moving for summary judgment "bears the initial burden of demonstrating the absence of any genuine issue of material fact." *Mosholder v. Barnhardt*, 679 F.3d 443, 448 (6th Cir. 2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "Once the moving party satisfies its initial burden, the burden shifts to the nonmoving party to set forth specific facts showing a triable issue of material fact." *Id.* at 448-449 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

"In considering a motion for summary judgment, [a court] must draw all reasonable inferences in favor of the nonmoving party." *Phelps v. State Farm Mut. Auto. Ins. Co.*, 680 F.3d 725, 730 (6th Cir. 2012) (citing *Matsushita Elec.*, 475 U.S. at 587). "The central issue is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Id.* (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986)). "[A] mere 'scintilla' of evidence in support of the non-moving party's position is insufficient to defeat summary judgment; rather, the non-moving party must present evidence upon which a reasonable jury could find in [his] favor." *Tingle v. Arbors at Hilliard*, 692 F.3d 523, 529 (6th Cir. 2012) (quoting *Anderson*, 477 U.S. at 252).

Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") permits federal courts to apply the Federal Rules of Civil Procedure to petitions for habeas corpus "to the

extent that they are not inconsistent with any statutory provision of these rules." Habeas Rule 12; *see Townsend v. Hoffner*, No. 2:13-CV-14187, 2014 WL 2967949, at *2 (E.D. Mich. July 1, 2014). The AEDPA's significant deference to a state court's resolution of factual issues guides summary judgment review in habeas cases. A federal habeas court must presume the underlying factual determinations of the state court to be correct, unless the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see Malone v. Fortner*, No. 3:09-0949, 2013 WL 1099799, at *2 n.3 (M.D. Tenn. Mar. 14, 2013) ("summary judgment rules in evaluating the evidence do not apply given the statutory presumption of correctness of facts found by the state courts"). The Court applies general summary judgment standards on federal habeas review only insofar as they do not conflict with the language and intent of the AEDPA.

V. ANALYSIS OF PETITIONER'S CLAIMS

A. *Brady* (Claim 1)

Thomas alleges that the State violated his constitutional rights by failing to comply with discovery obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). (ECF No. 1 at 17.) He asserts that evidence that U.S. Marshal Scott Sanders paid $750 to the state's witness Angela Jackson, Thomas's girlfriend at the time or the robbery and wife at the time of the trial, in connection with her federal testimony is favorable evidence that was required to be produced under *Brady* and *United States v. Bagley*, 473 U.S. 667, 676 (1985). (*Id.* at 2, 17; *see* ECF No. 12-17 at PageID 1717.) Thomas argues that the State suppressed this

favorable impeachment evidence, and there is a reasonable probability that the result of his trial would have been different if this evidence had been disclosed. (ECF No. 1 at 2, 17-18, 21.) He alleges that, despite repeated assurances that his trial counsel would receive any exculpatory or impeachment evidence, the State withheld evidence of the payment. (*Id.* at 20.) Thomas asserts that, at trial, Jackson testified that she did not receive either a reward or deal in exchange for her testimony or cooperation with the investigation. (*Id.*) The payment was discovered in October 2011, during an evidentiary hearing in the United States District Court related to Thomas's federal sentence. (*Id.*) Thomas alleges that Sanders, the lead investigator of the shooting and robbery, publicly acknowledged for the first time that he had personally given Angela Jackson a $750.00 FBI-funded payment in connection with her testimony at the federal trial. (*Id* at 20-21.) Thomas asserts that Sanders's and the FBI's knowledge of the payment is to be imputed to the prosecutors for *Brady* purposes. (*Id.* at 21.)

Thomas asserts that there is a reasonable probability that the result of the trial would have been different if evidence of the payment had been disclosed. (*Id.* at 21-22.) He contends that the State had "virtually no evidence" against him aside from Jackson's testimony, and the State's case was based almost entirely on "circumstantial evidence, with much conflicting and contradictory testimony." (*Id.* at 22-23.) Thomas states that there was "absolutely no forensic evidence" linking him to the crime. (*Id.* at 23.) He argues that Richard Fisher was the only eyewitness at the scene who identified Thomas as a participant, and Fisher's identification lacks credibility because Fisher

first identified two other people. (*Id.; see* ECF No. 75 at 11.) At trial, Fisher only identified Thomas after being asked by Bond's counsel to come down from the witness chair, take off his glasses, and stand at defense counsel's table. (ECF No. 1 at 23-24.)

Thomas asserts that the State's case "turned almost exclusively on the jury's perception of Angela Jackson's credibility." (*Id.* at 25.) He contends that Jackson's testimony was "a rerun of testimony she had been paid for" in the federal trial, without the jury knowing about the payment. (*Id.* at 26.) Thomas contends that the evidence would have exposed Jackson's bias and motive for testifying against him had the jury known of the importance of the $750 payment to Jackson "whose car had already been repossessed when FBI investigators first interrogated her and who, at the time of trial, was still making payments on the legal fees from her divorce from Thomas,". (*Id.* at 26-27.) Thomas asserts that there is a reasonable probability that the jury would not have convicted him or sentenced him to death if this evidence had been disclosed. (*Id.* at 27.)

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that the Due Process Clause is violated when prosecutors withhold from the defense evidence favorable to the accused where the evidence is material either to guilt or punishment. This duty to disclose "is applicable even though there has been no request by the accused . . , and . . . the duty encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citation omitted). *Brady* is inapplicable where the information at issue is known to the defendant. "[W]here the defendant was 'aware of the

essential facts that would enable him to take advantage of the exculpatory evidence,' the government's failure to disclose it did not violate *Brady*." *Spirko v. Mitchell*, 368 F.3d 603, 610 (6th Cir. 2004) (quoting *United States v. Todd*, 920 F.2d 399, 405 (6th Cir. 1990)).

Brady violation has three components: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler,* 527 U.S. at 281-282. A showing of prejudice requires that the suppressed evidence be material. Evidence is "material" for *Brady* purposes if "there is a reasonable probability that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense." *Strickler*, 527 U.S. at 289 (internal quotation marks omitted); *see United States v. Bagley*, 473 U.S. 667, 682 (1985) ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.") (internal quotation marks omitted).

> [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate

> the defendant). *Bagley*'s touchstone of materiality is a reasonable probability of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial.

Kyles v. Whitley, 514 U.S. 419, 434 (1995) (internal quotation marks and citations omitted).[12] This standard is similar to the "prejudice" component of an ineffective assistance of counsel claim. *Id.* at 436; *Bagley*, 473 U.S. at 682; *cf. United States v. Agurs*, 427 U.S. 97, 112-13 (1976) ("The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no

[12] The Supreme Court has emphasized that this standard is not satisfied by a showing that the suppressed evidence "might" have changed the outcome of the trial. *Strickler*, 527 U.S. at 289; *see id.* at 291 (a petitioner must establish a reasonable probability, rather than a reasonable possibility, of a different result).

justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.") (footnotes omitted). The Court must consider the effect of the suppressed evidence "collectively." *Cone v. Bell*, 556 U.S. 449, 473-474 (2009) (quoting *Kyles*, 514 U.S. at 436).

The parties have stipulated to the following issues relevant to this claim:

> 1. On or about December 18, 1998 Angela Jackson was paid $750.00 by the Federal Government in connection with her testimony in Petitioner's federal criminal trial involving the robbery and shooting of Loomis-Fargo armored car courier James Day, in a case styled *United States of America v. Andrew Thomas*, Dk# 2:98-cr-20100-JPM (W.D. Tenn).
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> 2. The $750 payment was requested by Deputy U.S. Marshal Scott Sanders, a Safe Streets Task Force member. The Safe Streets Task Force investigated and assisted in the prosecution of Petitioner in the federal trial.
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> 3. After Petitioner's federal trial concluded, Mr. James Day died. Petitioner was subsequently tried in the Criminal Court of Shelby County, Tennessee in September 2001 for the murder of James Day, in *State of Tennessee v. Andrew Thomas*, Dk # 00-03095.
>
> 4. Members of the Safe Streets Task Force investigated and participated in the state trial as well.

> 5. The Safe Streets Task Force is a multi-agency task force, composed of federal and state law enforcement officers.
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> 6. Angela Jackson testified for the State of Tennessee in Petitioner's state trial.
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> 7. Neither Petitioner nor his state trial counsel were informed of, nor did they have knowledge of, the $750 payment to Angela Jackson.
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> 8. Had Petitioner's state trial counsel known about the $750 payment, he would have used this information in cross examining Angela Jackson.
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> 9. Knowledge of the payment of $750 to Angela Jackson is imputed to the state prosecutors for purposes of Petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963).
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> 10. The $750 payment to Angela Jackson constitutes exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963).
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> 11. With respect to Petitioner's *Brady* claim, set forth as Claim 1 in the Petition for Writ of Habeas Corpus, the only remaining question for this Court is whether the undisclosed payment is material; i.e. whether there is a reasonable probability that, had the suppressed evidence been disclosed, the result of the proceeding would have been different.

(ECF No. 78 at 1-2.)

The Court need only address the materiality of the $750 payment because the parties have stipulated to

the other elements of the *Brady* claim. (*See* ECF No. 78 at 2.) Respondent argues that the evidence of a payment to Jackson is not material. (ECF No. 63-1 at 29.) He asserts that Thomas cannot connect Jackson's testimony in his federal trial to the state proceedings and does not allege any motive for testifying in the state court trial in 2001 or the post-conviction proceeding. (*Id.*) Respondent further notes that Jackson made a substantially similar statement before Sanders authorized the payment to Jackson. (*Id.*) Respondent contends that the substance of Jackson's testimony about Thomas's involvement in the felony murder has "remained unchanged both before and after this payment is alleged to have occurred." (*Id.*) Respondent argues that the payment in a separate case against Thomas is not material in this case in light of "the eyewitness accounts and video evidence showing Thomas commit[ted] this murder and robbery, and the fact that he bought a car and, with Jackson's assistance, used the proceeds . . . to open a banking account two days later." (*Id.*; *see* ECF No. 92 at 3.)

Respondent contends that there is no reasonable probability of that the verdict would have been different because:

> (1) Jackson's testimony at the petitioner's State trial was consistent with statements she had made before receiving the payment; (2) Jackson's testimony was corroborated by the testimony of other witnesses, and, moreover, was not essential to the petitioner's conviction; and (3) Jackson was impeached at the petitioner's criminal trial.

(*Id*.) Respondent asserts that the payment made by federal agents to Jackson had no bearing on her testimony at Thomas's state trial because it was consistent with both her previous statement and testimony before the payment, going back as far as 1997, and subsequent to her receipt of payment in December 1998. (*Id.* at 4.) Respondent asserts that Jackson's consistency "renders remote any possibility" that the state court jury in 2001, would have thought that Jackson fabricated or changed her story in return for those benefits. (*Id.*) Respondent, relying on *Bell v. Bell,* 512 F.3d 223 (6th Cir. 2008), asserts that testimony is not material for *Brady* purposes when there was a nondisclosure about a story and events that did not change after the alleged inducement. (*Id.*) He argues that Thomas was not deprived of a fair trial due to the non-disclosure of the federal witness payment to Jackson in December 1998, and asserts that it is not reasonably probable that the 2001 jury would have changed its verdict had it known of the payment. (*Id.* at 4-5.)

Respondent argues that Jackson's testimony was corroborated by other witnesses and not essential to Thomas's conviction. (ECF No. 92 at 5.) Respondent argues that it is undisputed that Bond and another man took part in a robbery of a Loomis Fargo truck at a Walgreen's store in Memphis on April 21, 1997. (*Id.*) Thomas notes that that the car identified as belonging to Jackson, Thomas's ex-wife, was seen parked a short distance from the crime scene, and Bond and the other man were observed by witnesses Betty Gay, Christopher Sains, Gary Craig, and Richard Fisher getting into the car and driving away. (*Id.*) Respondent argues that Fisher's statement that the car came

within four feet of him and that Thomas was the passenger in the car is consistent with Jackson's statement that Thomas was the shooter. (*Id.*) Respondent asserts that Fisher's testimony and Jackson's statement were corroborated by the surveillance videotape which was reduced to still photographs so that jurors could more closely identify the shooter. (*Id.* at 5-6.)

Thomas argues that information about government payments to key fact witnesses plainly constitutes material evidence. (ECF No. 75 at 9; ECF No. 91 at 3.) He relies on *Banks v. Dretke*, 540 U.S. 668 (2004), finding that a petitioner was denied a fair trial when the key prosecution witness was paid $200 in exchange for his cooperation with law enforcement. (*Id.* at 3-4.) Respondent relies on *Robinson v. Mills*, 592 F.3d 730, 736 (6th Cir. 2010), for the proposition that "[w]here the undisclosed evidence merely furnishes an additional basis on which to challenge a witness . . . who is subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative, and hence not material." (ECF No. 92 at 6.) Respondent contends that Jackson was extensively cross-examined on her alleged inconsistent statements and impeached on her violations of state law for knowingly purchasing a gun for Thomas using the proceeds of the robbery. (*Id.*; *see* ECF No. 12 at PageID 1809-1810.) Respondent points out that Jackson was cross-examined on her volatile relationship with Thomas and that Thomas's counsel attempted to establish several possible reasons for Jackson's bias against Thomas. (ECF No. 92 at 6; *see* ECF No 12-17 at PageID1813.) Respondent notes that other witnesses including William Upchurch and Russell Carpenter testified to impeach Jackson stating

that she threatened to "pay him back." (ECF No. 92 at 7; *see* ECF No. 13-1 at PageID 2778, 2784-2785.) Respondent further notes, that had the jury learned that Jackson had received the payment three years earlier, the jury would have learned that Jackson had not received any payments from the State in any way, weakening the idea that the jury would have given weight to the payments as material to Jackson's trial testimony. (ECF No. 92 at 7.) Respondent notes that Thomas's counsel avoided asking Jackson whether her testimony was false and argues that there is no indication that Jackson lied under oath. (*Id.* at 8.) Respondent argues that, in light of the other impeachment evidence presented against Jackson, the evidence of the payment would have been merely cumulative, and there is no reasonable probability that the disclosure would have produced a different result at trial. (ECF No. 92 at 6-8.)

Thomas asserts that Jackson had "a clear motive to make her state-trial testimony against Thomas consistent with her testimony in the federal trial: to avoid exposing herself to perjury charges." (ECF No. 75 at 10.) Thomas argues that "from the very first moment that Jackson spun her story," she was committed and "bound to repeat it." (*Id.*) Thomas asserts that it "defies reason" to assume that the FBI would issue a gratuitous payment to a key fact witness without prior discussion or insinuation. (*Id.*; *see* ECF No. 91 at 6 ("simply not plausible that the FBI unilaterally decided to issue a gratuitous payment")) Thomas contends that it is "incredible" that Jackson did not recall being paid the equivalent of two weeks of her wages only three years afterward. (ECF No. 75 at 10.) Thomas believes that it would have been reasonable for the jury to infer

that Jackson was lying when she testified at the state trial that she did not receive the payment. (*Id.* at 10-11.)

Thomas contends that Respondent's argument that Jackson understood the word "reward" to refer to payment from the bank does not make sense. (*Id.* at 11; *see* ECF No. 54 at PageID 8316.)[13] Thomas contends that, when Jackson was asked about reward money in the context of the FBI agents' visit to her home in November 1997, "the only reasonable interpretation of that question would have been whether she received something in recognition of her assistance with the FBI's investigation and her related testimony at the federal and state trials." (ECF No. 75 at 11.) Thomas asserts that, under *Bagley v. Lumpkin*, 798 F.2d 1297, 1301 (9th Cir. 1986), impeachment evidence is material as a matter of law. (ECF No. 91 at 6.) Thomas contends that it is "simply incredible that Jackson did not recall being paid $750, . . . regardless of how she interpreted the word 'reward'." (*Id.* at 7.)

Thomas asserts that the State's witnesses have admitted that the State's case hinged on Jackson's testimony against Thomas. (ECF No. 91 at 4.) Thomas contends that Jackson testified about Thomas's clothing on the day of the robbery which provided a link to his codefendant's description of the shooter in his confession. (*Id* at 5.) The state relied on Jackson to identify Thomas in the surveillance video from "inside the Walgreens (where the crime did not occur)." (*Id.*) Jackson provided circumstantial evidence of

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[13] This testimony relates to reward money coming from the armored car company, not the bank. (*See* ECF No. 54 at PageID 8316.)

statements that Thomas allegedly made about the crime and how the money that was allegedly obtained from the robbery was spent. (*Id.*)

Thomas disputes the value of the other evidence presented at trial in establishing his guilt. He again notes that Richard Fisher was the only eyewitness to identify Thomas. (ECF No. 75 at 11; ECF No. 91 at 5.) Thomas asserts that the evidentiary value of the video evidence is dependent on Jackson's credibility because the video image was so poor that the State needed Jackson to identify the individual seen in the video. (ECF No. 75 at 11.) He contends that the fact that Jackson opened a bank account with proceeds from the robbery or with money given to her by Thomas is evidence that came solely from Jackson and is dependent on her credibility. (*Id.* at 12.)

Thomas asserts that the jury needed the evidence of the payment to meaningfully evaluate Jackson's credibility. (ECF No. 91 at 5.) Thomas contends that the jury could have reasonably inferred that Jackson "understood, from the very first time that she spoke to investigators, that she would be rewarded for her cooperation if she inculpated Thomas at his federal trial." (*Id.* at 6.) Thomas asserts that the result of the proceeding might have been different because the evidence might have persuaded at least one juror to consider the evidence differently. (*Id.*)

The Court must look at the totality of the evidence presented against Thomas at trial with specific attention paid to Jackson's statements and testimony to determine whether evidence of the $750 payment would undermine confidence in the verdict.

Thirty witnesses testified in the guilt stage of the trial. The State presented testimony from Betty Gay, Charles Young, Darren Goods, Tony Arvin, David Little, William L. Sanders, Christopher Sains, Gary Craig, Lajunta Kay Sikes, James Hibbler, Jason Fleming, Angela Jackson, Tanya Monger, Treveous Garrett, Kelvin McClain, Laudeemer Leadres, R. Hulley, Carol Wilson, Jerry Sims, Richard Fisher, Chad Golden, Faye Day Cain, Dr. O. C. Smith, and Dr. Cynthia Gardner. (*See* ECF No. 12-13 at PageID 951-58.) Gay testified that Day's shooter was "a black man" who had on a light blue jacket and khaki pants or shorts. (ECF No. 12-15 at PageID 1422, 1429-1430.)

Sains was a commercial driver for Coca-Cola who testified that, while he was unloading, he noticed a fast-moving four-door white vehicle coming from the Walgreens' lot with two people inside. (*Id.* at PageID 1640, 1643-1644.) Crain lived on Novarese Street behind the Walgreens and testified that a white car pulled up and a man got out and ran over and lay down in the front seat of the red car. (ECF No. 12-16 at PageID 1651-1653.) Laudemer Leadres worked as an officer at the Memphis Police Department in the central precinct and received a call to go to Walgreens about a four-door light colored vehicle on Novarese Street, about a block north of Walgreens. (ECF No. 12-18 at PageID 1920-1921.) Carol Wilson testified that her father-in-law Jack Wilson owned a white Pontiac Bonneville that was stolen from the parking lot of his retirement home on South Highland. (ECF No. 12-18 at PageID 1956-1958.)

As to the proceeds of the robbery, Lajunta Sikes worked at Auto Additions and sold a box Chevy, hot

pink with gold plates, and spoke wheels to Thomas, who paid $3975 in cash for the car. (ECF No. 12-17 at PageID 1688-1692.) Sikes testified that Angela Jackson was on the bill of sale. (*Id.* at PageID 1693.) Hibbler was the owner of Auto Additions, and he remembered Thomas because he had come in browsing a couple of times before he bought the pink Chevrolet. (*Id.* at PageID 1698-1701.) Fleming was a security officer at AmSouth who handled fraudulent or criminal activity and testified that Jackson's account was opened with $2401.48 cash, and there was only 58 cents left at the end of the thirty-day period. (*Id.* at PageID 1711, 1714.) Little was the owner of North Watkins Pawn and Jeweler and testified about the sale of a Mossberg shotgun to Angela Lavette Jackson on April 24, 1997. (ECF No. 12-16 at Page ID 1619-1622.)

Monger was Bond's girlfriend, and she testified that she knew Thomas through Bond and that Bond showed her "some thousands" on the day of the robbery, that they went shopping at Southland Mall, and that Bond bought a box Chevy that day and asked her to put the car in her name. (ECF No. 12-18 at PageID 1865-1866, 1871-1877, 1879.) McClain was a manager at McClain Motors, and he testified that Monger purchased the box Chevy there for $4,806 cash on April 21, 1997. (*Id.* at PageID 1916-1919.)

Richard Fisher testified that he saw a car come from the front of Walgreens around the Loomis armored car and speed past him. (ECF No. 12-19 at PageID 2031, 2034.) He heard the gunshot, and the car came past him about four or five feet away. (*Id.* at PageID 2035-2036.) There were two black men inside the car. (*Id.* at PageID 2037.) Fisher only saw the

passenger who had on a baseball cap, and his eyes were "very distinctive." (*Id.* at PageID 2061-2062.) Fisher previously pointed out Bond, but he did not believe that it was Bond that he saw. (*Id.* at PageID 2065.) Fisher then identified Thomas as the passenger:

> Q If you could, please, tell me who it is that you saw in the passenger seat of that vehicle?
>
> A This gentleman right here.
>
> Q To what degree of confidence do you have in making that identification in this courtroom here today?
>
> A I'm very sure.
>
> Q What is it specifically about him that makes you that very sure?
>
> A It's the eyes. I can't say why. It's just something about his eyes that I noticed. I don't know how to put it into words.
>
> Q And from back there, were you not able to get that clean of a look from that distance?
>
> A It wasn't that, it was he had on glasses earlier, and I put him out of my mind. I wasn't thinking about it. I just kind of immediately didn't think about it. And the day it happened, he did not have glasses on.
>
> Q In looking again at Mr. Bond, my client, the man in the striped shirt that you picked out, can you now say, with any degree of certainty, that he was not the person you saw?

> A I don't believe he was-to the best of my knowledge.

(*Id.* at PageID 2065-2066.) On cross-examination by Michael Scholl, Thomas's counsel, Fisher testified:

> A I'm quite sure that it was the other fellow -- the fellow on the left over there.
>
> Q The man you identified –
>
> A That has the glasses on now.
>
> Q So now you think it's Mr. Thomas. Is that right?
>
> A Yeah. Yes, sir. It's been five years.

(*Id.* at PageID 2067.)

Goods was a Memphis Police Department Safe Streets Taskforce officer who testified about the surveillance videotape and how it was altered to get still frames. (ECF No. 12-16 at PageID 1524-1527.) The still frames were marked as Exhibits 11-22 at trial. (*Id.* at PageID 1527.) The videotape (Exhibit 23) was played for the jury. (*Id.* at PageID 1534.) The gunman was wearing some type of hat in Exhibit 17. (*Id.* at PageID 1537.) Exhibits 18 and 19 show the gunman standing completely in the open doorway. (*Id.* at PageID 1538.)

Arvin is an Assistant United States Attorney who participated in Thomas's federal trial and introduced a transcript of James Day's sworn testimony from the federal trial in the state court proceedings as Exhibit 24. (*Id.* at PageID 1540, 1542-1544.) The transcript noted that Bond entered a guilty plea to robbery in the federal proceedings on November 4, 1998. (*Id.* at

PageID 1591.) Day's transcript stated that he had knowledge of a man named Andrew Thomas, and Day identified him in the courtroom at the federal trial. (*Id.* at PageID 1591-1592.) Further, Bonds' counsel clarified through Arvin's testimony that in Bond's guilty plea, Bond acknowledged that: (1) a firearm was discharged; (2) that Day was seriously wounded; and (3) that an amount of at least $10,000 but not more than $50,000 was loss. (*Id.* at PageID 1616.)

In the federal trial, Angela Jackson testified. (ECF No. 12-17 at PageID 1715.) Jackson testified that she was Thomas's girlfriend in April 1997, and that they had been dating a couple of months. (*Id.*) Jackson had a red Suzuki Swift that she identified as the car in Exhibit 42, and she testified that it was repossessed in 1997. (*Id.* at PageID 1719-1720.) She testified that on the morning of April 21, 1997, she was sick at home. (*Id.* at PageID 1720.) Thomas was wearing a striped shirt and some shorts. (*Id.* at PageID 1734.) Jackson's daughters were in bed; she let them stay home from school. (*Id.* at PageID 1721.) Thomas left her house that morning about 8:00 or 8:30 to pick up Bond. (*Id.* at PageID 1721-1722.) Thomas got the keys off her dresser and took the red car. (*Id.* at PageID 1723.) He did not have a car and was not working at the time. (*Id.*)

Jackson testified that Thomas wanted a car and would "always say that he got to get that money." (*Id.* at PageID 1724-1725.) She testified that several times "we used to be driving, and we always used to be behind – whenever we was behind an armored truck, he used to say, 'I got to get that money.'" (*Id.* at PageID 1725.)

Jackson testified that she next saw Thomas about noon that day. (*Id.* at PageID 1725-1726.) Thomas was beating on the door; Bond was with him. (*Id.* at PageID 1726.) "They was like out of breath. Their eyes was excited. They was like, you, 'Let me in.'" (*Id.*) Bond unzipped his jacket, and a lot of small white envelopes fell on the floor. (*Id.* at PageID 1726-1727.) Thomas began opening the envelopes and taking a lot of money from them. (*Id.* at PageID 1727.) Jackson stated it was about $10,000 or more. (*Id.* at PageID 1727.) Thomas and Bond split the money 50/50. (*Id.* at PageID 1733, 1757.) She testified that Thomas "asked me to ball the envelopes up, and I did." (*Id.* at PageID 1729-1730.) Thomas told Jackson, "I don't need a shaky, mother fucker around me." (*Id.* at PageID 1820, 1827-1828.) There were checks and food stamps inside the envelopes. (*Id.* at PageID 1730.) Jackson was asked whether she helped them steal the money, shoot a man on Summer Avenue, and whether she was in the car; she responded negatively to each question. (*Id.* at PageID 1731.)

Jackson stated that Bond and Thomas had a "silver[-] looking" gun. (*Id.* at PageID 1728, 1731.) Thomas told Bond to get rid of the gun. (*Id.* at PageID 1728.) Bond took the gun with him when he left. (*Id.* at PageID 1731.)

Jackson testified that she was scared and "just stood there and looked." (*Id.* at PageID 1727-1728.) She did not call anyone because she was afraid "[t]hat something would happen to me and my children." (*Id.* at PageID 1729.) Jackson did not want to testify. (*Id.* at PageID 1729.) She "was afraid because Anthony [Bond] had told me that it had to be a secret – I couldn't tell

anybody about it. It had to be our secret. . . About the money that they had." (*Id.* at PageID 1731; *see* ECF No. 60-3 at PageID 10197.) Jackson kept the secret "[u]ntil there was federal FBIs that knocked on my door one day and showed me some pictures and said that they needed to ask me some questions." (ECF No. 12-17 at PageID 1732.) She testified that she told the FBI the same thing that she stated in court. (*Id.*) Jackson was afraid of Thomas at the time the FBI came to her house and when she testified in state court. (*Id.* at PageID 1732-1733, 1741.)

Jackson did not ask the FBI for reward money, and she testified that she did not get any reward money. (*Id.* at PageID 1732.) She said she had not received a reward for any of this and had not received a deal to testify. (*Id.* at PageID 1764, 1826-1827.) She said that she did not get a deal related to the purchase of the gun. (*Id.* at PageID 1764-1765, 1826.) Jackson testified that she would have never reported to the FBI on her own and that she had not collected anything for testifying. (*Id.* at PageID 1824.)

After Bond left, Thomas, Jackson, and her daughters went to Elvis Presley Boulevard to look for a car. (*Id.* at PageID 1734.) Thomas got a "pink-looking Chevy", a "fancy car" with gold rims. (*Id.* at PageID 1735, 1737.) He made Jackson carry the money. (*Id.* at PageID 1735)[14] Thomas's name was not on the bill of sale (Exhibit 43) "[b]ecause he didn't have any license, and he said that he would get everything turned over

[14] Jackson was cross-examined about Thomas getting money out of the account to put gold specks in the paint on the car. (ECF No. 12-17 at PageID 1799-1802.)

in his name once he got his license." (*Id.* at PageID 1736-1737.)

They went back to Jackson's house and got some clothes to leave. (*Id.* at PageID 1737.) Thomas told her that they had to park her car and go to a hotel "so that the police wouldn't be looking for a red car." (*Id.* at PageID 1737-1738.) They parked the car in the back of the apartments and went to a hotel on State Line Road. (*Id.* at PageID 1738.) Thomas had the cash, and he went across the street to get some clothes. (*Id.* at PageID 1739.)[15] On the news that night, they talked about an armored truck and a man struggling for life. (*Id.* at PageID 1740.) Thomas "said that [the news] was lying; that [Day] did not struggle for his life; he grabbed the nigger by the throat and shot him." (*Id.*) Thomas told Jackson that Bond was not a killer. (*Id.* at PageID 1759.) Thomas told Jackson her that he shot the security guard, and she was scared of Thomas. (*Id.* at PageID 1823-1824.) They went back to the apartment the next day. (*Id.* at PageID 1741.)

Jackson testified that she bought a shotgun on April 24, 1997, because Thomas said they needed protection at the house. (*Id.* at PageID 1741-1742.) Thomas wanted protection for the pink car he bought – to keep people from stealing it. (*Id.* at PageID 1821, 1827.) Jackson lied to the pawn broker and said the gun was for her, when it was for Thomas. (*Id.* at PageID 1743.)

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[15] On cross-examination, Jackson was questioned about the clothes that Thomas bought for her at K-mart – "two dresses, some two pair of shorts, and maybe two tops." (ECF No. 12-17 at PageID 1794-1795.)

Jackson opened a savings account at First American Bank on Winchester with $2400 from Thomas. (*Id.* at PageID 1744.) Thomas told her to open the account; he was in the car. (*Id.* at PageID 1744-1745.) When Thomas needed money for himself, she would go with him to take it out. (*Id.* at PageID 1746.) Thomas did not have any identification to open an account. (*Id.*) Jackson never took money out for her or the girls. (*Id.*)

Jackson married Thomas on May 7, 1997, because she thought she loved him. (*Id.* at PageID 1748.) Her car was repossessed before they got married. (*Id.* at PageID 1748-1749.) She did not take any of the money in the bank because it was not hers. (*Id.* at PageID 1749.) Thomas would not have been understanding and would not have forgiven her for taking his money. (*Id.*) They lived in the house together about two months. (*Id.*) "He wasn't staying home a lot. He was always out. We never could get along." (*Id.*) After he moved out, she claimed that she did not call the police because "I was afraid. I was just glad that he was out." (*Id.* at PageID 1750.) Jackson had her locks changed because Thomas got a key after they married. (*Id.* at PageID 1820-1821.)

Jackson was asked if she was testifying against Thomas because he was not nice enough to her or he stayed out too late, and she responded "No." (*Id.* at PageID 1750-1751.) Jackson said that she gave him the wedding ring and that he wanted the title to the pink car, but she did not have it. (*Id.* at PageID 1751-1752.) She was asked if she was testifying because she was mad that he did not share the car with her, and she responded, "No, ma'am." (*Id.* at PageID 1752.) She claimed that she gave Thomas the title to the car. (*Id.*)

Thomas did not leave Jackson's home quietly:

> The day when he asked for the ring back, I gave him the ring. And he told me that he could have something done to me and my children without anybody knowing anything about it. And he also said if I tried to go to the police and tell them what happened, I was too late because somebody else already took the charge.

(*Id.* at PageID 1752-1753.) Her girls were five and seven, and she took Thomas at his word. (*Id.*)

Jackson looked at the picture at Exhibit 18 and testified that it was a picture of Thomas. (*Id.* at PageID 1754.) Scholl had Jackson point to the person she identified as Thomas. (*Id.* at PageID 1816.) Scholl asked:

> Q That figure – why don't you step right around here and see it right here on this TV screen – this figure right here that's blown up like that, you can look at that – and I'm going to ask you this question, and I want you to remember you're under oath today and that you know you're subject to the penalties of perjury today. You know that. Now, I want you to sit there and tell me that you can identify that as Andrew Thomas?
>
> A Yes, sir.
>
> Q That young man sitting right back there.
>
> A Yes, sir.
>
> Q What side of that is that person – is that his back or is that his front?

A That's his back.

Q That's his back.

A He's turned –

Q So his back is turned to the camera?

A Yes.

Q This person's back is turned to the camera and faced away from the camera, isn't it?

A Yes, sir.

Q So you can't – that black spot right there in that fuzzy picture of that back turned away from the camera facing the other direction, you're going to testify, under oath, that you can identify him as Andrew Thomas?

A Yes, sir.

Q Is he wearing long pants?

A No, sir.

Q So you can't tell – does that not look like long pants to you? No, sir, he has on some shorts. He has on shorts there? Yes, sir. It comes to his knee. They come to his knees?

A Yes, sir.

(*Id.* at PageID 1816-1818.) On redirect, Jackson testified that Thomas was wearing a hat in the picture, and that he usually wore a baseball cap. (*Id.* at PageID 1819.)

Jackson was asked about her testimony in the federal courtroom proceedings in 1998. (*Id.* at PageID 1765-1766.) She was asked about why she let Thomas, who talked about taking money from armored cars, stay at her house and did not say anything to anybody. (*Id.* at PageID 1768-1770.) She was asked why, after realizing that Thomas had shot and killed somebody, she did not try to tell someone at the car dealership "Look, this man just robbed and killed somebody." (*Id.* at PageID 1788.) She was cross-examined about why she did not drive off in her car with her kids after Thomas purchased the pink Chevy. (*Id.* at PageID 1790-1791.) Thomas's counsel asked:

> Q Okay. Now, you all are supposedly at a hotel, you're in a K-Mart, all these places, and all the time you're scared of Andrew Thomas. Is that right?
>
> A That's correct.
>
> Q He's not holding any gun to your head, is he?
>
> A That's correct.
>
> Q And he doesn't have a gun with him, does he?
>
> A No, sir.
>
> Q And you could have stopped anywhere, gone to the police. You didn't have to stay with him that night, did you?
>
> A No, sir.
>
> Q You could have stayed anywhere you wanted to that night, couldn't you?
>
> A That's correct.

> Q You just testified that you could have stayed anywhere you wanted; but because of the safety of your kids, you decided to stay with a man that you were scared of?
>
> A Yes, sir.

(*Id.* at PageID 1795-1796.)

On cross-examination, Scholl, Thomas's counsel, pointed out that all the time Thomas had asked Jackson to do stuff, open an account etc., he was not holding a gun to her head, and Jackson could voluntarily go where she wanted. (*Id.* at PageID 1797, 1804.) Scholl pointed out that Thomas had no access to the money in the bank account because his name was not on the account. (*Id.* at PageID 1807-1808.)

Scholl pointed out that Jackson had filled out the form at the pawn shop to buy the gun saying that she was the "actual buyer" and that it was illegal to sign the form if she was not the buyer. (*Id.* at PageID 1809-1810.) Scholl questioned Jackson about knowingly committing a felony by purchasing the gun:

> Q So knowing – knowing that you were committing a felony, you go ahead and you purchase that weapon, don't you?
>
> A Yes, sir.
>
> Q Ma'am, would you get up and lie about your testimony knowing that you're committing a felony right now?
>
> A No, sir.
>
> Q What's the difference?

A (No audible response.)

Q A felony is a felony, isn't it?

A Yes, sir.

(*Id.* at PageID 1811-1812.) Jackson testified that Thomas told her to say that she was the "actual buyer" of the gun. (*Id.* at PageID 1823.) Thomas carried the shotgun out the store, and he took the shotgun when he moved from her apartment. (*Id.*)

Scholl questioned Jackson about her relationship with Thomas. He noted that Thomas had other girlfriends before the marriage, and Jackson agreed that she was upset by that. (*Id.* at PageID 1812.) Thomas testified that the way she treated Thomas's son was not part of why they got a divorce, although she admitted that Thomas had confronted her about it on one occasion. (*Id.* at PageID 1813.) Jackson denied that she told people she was going to get Thomas back and make sure he went to jail. (*Id.* at PageID 1813-1814.) She testified that she had not been sitting on the stand testifying for the last few hours because Thomas told her she was being mean to his son. (*Id.* at PageID 1821.)

Jackson testified that she was not lying in court that day. (*Id.* at PageID 1743.) She was testifying because she was subpoenaed and "I know it's the right thing to do is to be here," although it was not the easiest thing to do. (*Id.* at PageID 1747, 1764.) Jackson told the police and FBI the same things she told the jury. (*Id.* at PageID 1753.)

Prior to trial, on November 4, 1997, Jackson gave the following signed statement to the FBI:

"On April 21, 1997, I Angela L. Jackson, date of birth: [redacted], SSAN: [redacted], [redacted] was residing with Andrew Thomas. I stayed home sick from work that day. Andrew left our apartment at about 8:30 a.m. He said he was going to pick up his friend, Anthony Bonds. He left in my car, a 1994 Suzuki MPV, TN lisc[.] 720TVV."

"Between 12:00 noon and 1:00 p.m. Andrew and Anthony returned to the apartments. They were both very excited. They threw a large amount of money on the floor of my living room. It had to be at least $10,000.00 or maybe even more. Also there was some checks, food stamps, & envelop[e]s which I bundled up for Andrew along with the jacket Anthony was wearing. Andrew then threw these items in the trash. After counting & splitting the money, Anthony called his girlfriend and later he was picked up at our apartment."

"When Anthony and Andrew arrived with the money, Anthony had a handgun. Andrew told him to get rid of the gun and Anthony took it with him when he left. Andrew and I left the apartment and went to a car dealership and bought a car for Andrew. We paid cash from the money they brought to the apartment. Andrew bought clothes, a shotgun, a gold chain, and our wedding rings, which he later pawned. He also put several thousand dollars in cash in my account, but later took it all out and spent it on himself."

> "Later that evening when the news reported about the armored carrier being robbed & shot, Andrew admitted shooting the carrier, and that the money was from the robbery. He told me he had used my car and that I should not tell anyone or I would get in trouble. Anthony had warned us earlier that day that the money was our little secret. I have read this 2 page statement and it is true and correct."

(ECF No. 60-3 at PageID 10196-10197; *see id.* at PageID 10244-10247.) In the federal trial, Jackson provided similar testimony related to Thomas's involvement in the crime. *United States v. Thomas*, No. 97-20100-Ml, Trial Transcript, ECF No. 100, Vol. III, pp. 403-496.

Jackson testified at a deposition taken on December 13, 2014, that she had never received any payments from the Safe Streets Task Force. (ECF No. 54 at PageID 8286.) Jackson testified that she did not receive any payment from the federal government or any federal state agency after she testified in the federal case. (*Id.* at PageID 8291.) She was asked:

> Q. Did you receive a check for $750 from Agent Sanders on or about December the 18th of 1998 after your testimony in the federal trial?
>
> A. No.

(*Id.* at PageID 8291.) Jackson testified that the only check she recalled was with the subpoena for the deposition. (*Id.* at PageID 8291-8292.) Jackson did not recall seeing a document from William Carter stating that she received payment for services in the amount of $750 and disputed that she signed her name as "Angela

L. Jackson" because she always signs it as "Angela Jackson." (*Id.* at PageID 8293-8294.) Because there has been a stipulation about the payment, the Court will not go into further detail about Jackson's 2014 recollection of the payment itself.

The Supreme Court and the Sixth Circuit have both said that a defendant suffers prejudice from the withholding of favorable impeachment evidence when the prosecution's case hinges on the testimony of one witness. *Harris v. Lafler*, 553 F.3d 1028, 1034 (6th Cir. 2009); see *Barton v. Kern*, No. 1:09-CV-353, 2012 WL 404693, at *4-5 (S.D. Ohio Feb. 8, 2012) (finding additional impeachment evidence to be cumulative). Impeachment evidence is generally material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case. *United States v. Payne,* 63 F.3d 1200, 1210 (2d Cir. 1995); *Bales v. Bell*, No. 2:10-CV-13480, 2013 WL 5539592, at *8 (E.D. Mich. Oct. 8, 2013). If the undisclosed evidence merely furnishes an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who was subject to extensive attack by reason of other evidence, the undisclosed evidence may be cumulative and not material. *Robinson v. Mills*, 592 F.3d 730, 736 (6th Cir. 2010); *see Jalowiec v. Bradshaw*, 657 F.3d 293, 313 (6th Cir. 2011) (finding potentially impeaching evidence to be of marginal significance).

The impeachment evidence at issue in this case is that Jackson was paid $750 by Deputy U.S. Marshal Scott Sanders on or about December 18, 1998, after

Thomas's federal trial. There was substantial evidence linking Thomas to the crime other than Jackson's testimony. Fisher identified Thomas as the passenger in the car speeding away from the crime scene. Although he was the only eyewitness who identified Thomas at the crime scene, Fisher was thoroughly cross-examined at trial so that the jury could determine the credibility and weight that should be given to his testimony, *see* supra pp. 28-29. In addition to Fisher's testimony, there was substantial testimony linking Thomas to the crime, including the proceeds with which Thomas purchased the car and gun and funded the bank account in Jackson's name.

Although Thomas seeks to attack Jackson's credibility to imply that she was the one who made these purchases, there was testimony about Thomas's presence at Auto Additions, that he had previously been there looking for a car, and that he drove the car home. Jackson testified about Thomas's desire to have a shotgun to protect his customized car with gold rims. To the extent Thomas contends that Jackson made these purchases and controlled the bank account, Thomas has made no effort to demonstrate how Jackson obtained this money. It would make no sense that Jackson's car would be repossessed when she had come into so much money. Jackson was thoroughly cross-examined about her motives, and to the extent she identified Thomas in the surveillance stills, the jury was able to view those stills, view Thomas in person in the courtroom, and make a determination about the reliability of Jackson's identification.

Thomas's counsel attempted to impugn Jackson's testimony by establishing that she had the opportunity

to report Thomas's involvement in the crime and that, if she were truly afraid of Thomas, Jackson would not have kept the secret about the robbery, stayed with him, and married him. Thomas's counsel pointed out that Jackson had accepted the clothing items that Thomas purchased at Kmart with the proceeds of the robbery and that she had committed a felony by posing as the actual buyer of the gun. The jury apparently found Jackson's explanation for her action and inaction truthful, if unwise. *See Jalowiec,* 657 F.3d at 313 (the fact that a prosecution witness is not a "model citizen" does not cause the impeachment evidence to be material under *Brady*).

The consistency of Jackson's statements related to Thomas's guilt is relevant. Thomas argues that Jackson was consistent because her 1998 testimony was induced by the promise of payment, and therefore, Jackson had to testify consistently in 2001. Thomas has not demonstrated that Jackson was induced to lie in exchange for a $750 payment, especially as to the state court trial, which was three years after the payment. The evidence indicates that Jackson's statement in November 1997, when the FBI came to her house, and her testimony at the federal trial and the state trial were consistent. The statement and the federal testimony were given before the payment was made. Although Thomas has tried to establish that Jackson had a bad motive for presenting her testimony, he has failed to demonstrate that any of the testimony about his participation in the robbery, the shooting, and spending the proceeds of the robbery is false.

In *Mastracchio v. Vose*, 274 F.3d 590, 604 (1st Cir. 2001), the First Circuit said that a payment to a

witness does not make the nondisclosure material where the witness's statement has been consistent:

> On reflection, we do not believe that disclosure of the cash payments prior to trial conceivably could have affected the verdict. As the state supreme court observed, Gilbert told a consistent story all along. *Mastracchio v. Moran*, 698 A.2d at 718. The fact that Gilbert had staked out his position well before he received any emoluments renders remote any possibility that the jury would have thought that he had fabricated his story in return for cash.

See Kenney v. United States, No. Civ. 97-603-B, 2002 WL 1012925, at *7 (D.N.H. May 15, 2002) (denying habeas relief where "[t]he court considered the fact that the witness's testimony had been consistent, and that his 'credibility was a major focus of the trial, and the jury knew that he was no choirboy.'") Where a witness has been subjected to extensive cross-examination and impeached with inconsistencies and questions about her motive for testifying, a mere additional basis for impeachment in asserting that payment was the motivator is not sufficiently material to change the outcome of the trial. *See Bales v. Bell*, No. 2:10-CV-13480, 2013 WL 5539592, at *8-9 (E.D. Mich. Oct. 8, 2013) (the additional cumulative impeachment evidence did not put the case in such a different light as to undermine confidence in the outcome).

The consistency of Jackson's statements, the reliability of her testimony as measured in light of the corroborating testimony, and Thomas's inability to impeach her statements related to his participation in the crime, despite extensive, focused attempts by his

trial counsel convince this Court, that the failure to disclose the $750 payment to Jackson in December 1998, almost three years before Thomas's 2001 state court trial, does not create a reasonable probability that the outcome of the trial would have changed had the disclosure been made. The fact of the payment does not undermine confidence in the verdict. The nondisclosure was not material for *Brady* purposes. Claim 1 is without merit. Summary judgment is GRANTED, and Claim 1 is DENIED.

B. False Testimony (Claim 2)

Thomas alleges that the State violated his constitutional right by presenting Angela Jackson's false testimony that she had never received any payment or benefit in connection with her testimony against Thomas. (ECF No. 1 at 29.) Thomas asserts that the facts are undisputed that United States Marshal Scott Sanders of the Safe Streets task Force paid $750 to Angela Jackson after her testimony for the prosecution in Thomas's federal trial in December 1998. (ECF No. 98 at 1-2.) The State did not disclose that payment at the state trial in 2001. (*Id.* at 2.) During the state trial, Thomas testified that she had not received a "reward" in connection with her involvement in the case. (*Id.*) Thomas discovered the payment in October 2011, when Sanders testified at an evidentiary hearing in federal court. (*Id.*)

To establish prosecutorial misconduct or denial of due process, a defendant must show (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false. *Brooks v. Tenn.*, 626 F.3d 878, 894-95 (6th Cir. 2010). The burden is on the defendant to show that the testimony was actually

perjured, and mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony. *Id.* at 895*; see also Peoples v. Lafler*, 734 F.3d 503, 515-16 (6th Cir. 2013) (same). The only issues to be addressed by this Court, after the parties have entered the joint stipulation, are whether Jackson's testimony was false and whether it was material. (*Id.* at 2-3; *see* ECF Nos. 95 & 96.) If Thomas satisfies the elements of the false testimony claim, the Court must determine whether any constitutional error was harmless. *See Stumpf v. Robinson*, 722 F.3d 739, 752 (6th Cir. 2013) (stating that harmless-error analysis is appropriate for addressing a false testimony claim).

1. Falsity

Thomas asserts that Jackson "unequivocally testified" that she had never received "reward money" in connection with her involvement in Thomas's federal trial. (ECF No. 98 at 3.) He asserts that, on cross-examination, Jackson replied that she had not received "a reward for any of this." (*Id.*) Thomas submits that a reasonable interpretation of the testimony is that Jackson did not receive payment in connection with her involvement in any of Thomas's cases arising from the Walgreens robbery and the Day shooting. (*Id.*) Thomas asserts that a witness's subjective understanding of trial examination questions is irrelevant for the purposes of a false testimony claim and that the key question for determining falsity is whether the jury reasonably could have been misled. (*Id.* at 4.)

Respondent argues that Thomas has not proven that Jackson's testimony was "indisputably false."

(ECF No. 99 at 2.) Respondent asserts that there has been no proof that Jackson received any reward for her testimony at Thomas's state court trial. (*Id.*) Respondent contends that Jackson answered honestly when asked if she remembered receiving any reward money in connection with her state testimony. (*Id.* at 2-3.) Respondent notes that Jackson testified at the state court trial that her motivation for testifying was that "it was the right thing to do." (*Id.* at 3.) Jackson testified that he she had not received any reward for any of this and that she had not cut any deals concerning the illegal purchase of the gun, *see* supra pp. 32-33. (*Id.*) Respondent asserts that Thomas has made no showing that Jackson received any money in exchange for her testimony at Thomas's state trial "where the payment at issue was disbursed to Ms. Jackson nearly three years prior (in December 1998), and where that payment was made by a federal agent solely in connection with petitioner's federal trial." (*Id.*) Respondent contends that Thomas has not demonstrated how the record indisputably establishes that Jackson considered the December 1998 payment to be a reward. (*Id.*) Respondent argues that there has been neither evidence nor a concession that the witness entered into any agreement with the state prosecutors for her testimony contingent on payment or that Jackson was promised anything by either federal or state prosecuting officials. (*Id.* at 4.) Respondent further contends that, even were the Court to find Jackson's testimony about the payment to be inaccurate, the more reasonable conclusion is that Jackson's omission is an unintentional memory lapse given the length of time between the payment and the state court trial and the lack of specificity of defense counsel's questions. (*Id.*)

Jackson was questioned by Thomas's trial counsel about her motive for testifying:

> Q Okay. Now, I want to back up just a little bit. You said you were here today to testify because it was the right thing to do. Is that correct?
>
> A Yes.
>
> Q And that's your only motivation in testifying today. Is that right?
>
> A Yes, sir.
>
> Q You haven't receiv[ed] a reward for any of this?
>
> A No.
>
> Q You're not receiving any deals to testify?
>
> A No, sir.
>
> Q Any deals about -- you did purchase a weapon. Is that correct? -- with Mr. Thomas? Is that what you testified to earlier?
>
> A Would you repeat that.
>
> Q You purchased a weapon with Mr. Thomas earlier. Is that correct? You testified to that. You didn't cut any deals surrounding that purchase of any type?
>
> A No, sir.

(ECF No. 12-17 at PageID 1764-1765.)

The Sixth Circuit has held that under the first factor of its false-testimony assessment, there must be

a finding that the statement is "indisputably false, rather than merely misleading." *United States v. Silva-Garcia*, 527 F. App'x 379, 382 (6th Cir. 2013). Thomas argues that Jackson's alleged misunderstanding of the word "reward" defies common sense and the plain language reflected in the transcript. (ECF No. 98 at 4.) Thomas asserts that Jackson's repeated denials of receiving any such "reward" misled the jury into believing that she did not receive *any* payments in connection with her testimony. (*Id.* at 5.) Thomas argues that, because the state prosecutors had imputed knowledge of the $750 payment, they were bound to correct the jury's impression that no payment had been made. (*Id.*)

Sanders has testified about the payment to Jackson for "services rendered", and the parties have entered into a stipulation about the payment. (*See* ECF No. 78 at 1.) It is not clear from any of the testimony that Jackson perceived the payment as a reward. Sanders stated that the $750 payment "was not anticipated, planned, or discussed with her at all prior to the payment being made." (ECF No. 15-1 at PageID 7846.) None of the documentation provided by Sanders clearly indicates that the payment is a "reward." (*See* ECF No. 15-1.) Although Scholl asked if Jackson had received a reward for "any of this," the Court cannot determine whether Jackson perceived "any of this" to mean both the federal and state proceedings. The more likely conclusion is that she interpreted the question to mean whether she had received something for her participation in the state court trial in which she was testifying. The fact that the arguments in this case rely on dictionary definitions and purported understandings

of the testimony demonstrates that Jackson's testimony is not indisputably false.

2. Materiality

False testimony is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Agurs*, 427 U.S. at 104 (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). Perjury is excused as immaterial only if "no reasonable jury could have been affected by the undisclosed information." *Rosencrantz v. Lafler*, 568 F.3d 577, 587 (6th Cir. 2009). The standard for materiality with false testimony is "lower," "more favorable to the defendant," and "hostile to the prosecution." *Id.* The Sixth Circuit has stated that "under *Giglio*'s friendly-to-the-accused standard, 'in most cases involving perjury or its equivalent [the result will likely be] a finding of constitutional error.'" *Id.* (quoting *Gilday v. Callahan*, 59 F.3d 257, 268 (1st Cir. 1995)).

Thomas argues, based on *Giglio*, that false testimony is material if it could "in any reasonable likelihood have affected the judgment of the jury." (ECF No. 98 at 5.) Thomas contends that the Sixth Circuit has held that concealment of payments to witnesses at trial violates *Giglio* and *Napue*[16] and that testimony is material where the witnesses were denied special treatment or benefits or promised benefits or plea agreement deals. (*Id.* at 6-7.) Thomas contends that the facts of this case are "on all fours with this compelling precedent." (*Id.* at 7.) He argues that the federal prosecutor and lead investigator admitted that

[16] *Napue v. Illinois*, 360 U.S. 264 (1959).

Jackson's testimony was essential to Thomas's prosecution. (*Id.*) He contends that the State's case was based almost entirely on circumstantial evidence, much of which was conflicting and contradictory. (*Id.*) Thomas asserts that no physical evidence linked him to the crime and that Richard Fisher identified two other people as the perpetrator before pointing out Thomas at trial at the urging of Bond's counsel. (*Id.*) Thomas argues that, with no credible eyewitness testimony and no forensic evidence, Jackson's testimony was key to the conviction. (*Id.*) He contends that, in light of the totality of the evidence, it is "beyond dispute that the jury's perception of Jackson's credibility was crucial to the State's case." (*Id.* at 8.) He asserts that it is "impossible to say that failure to disclose evidence of the payment was harmless beyond a reasonable doubt." (*Id.* at 9.)

Respondent argues that the statement was not material because the testimony could not, in any reasonable likelihood, have affected the judgment of the jury. (ECF No. 99 at 4.) Respondent states that, when taken in light of the evidence as a whole, the disclosure of single 1998 payment would not have affected the jury's judgment because Jackson's credibility had already been substantially impeached, her testimony was consistent with statements made prior to receiving the payment, and her testimony was independently corroborated through the testimony of Betty Gay, Christopher Sains, Gary Craig, and Richard Fisher and the Walgreens surveillance tape and stills. (*Id.* at 5, 7-8.) Respondent contends that the undisclosed impeached evidence is merely cumulative. (*Id.* at 5) *See Davis v. Booker*, 589 F.3d 302, 309 (6th Cir. 2009) ("undisclosed impeachment evidence is

cumulative when the witness has already been sufficiently impeached at trial"). Respondent points out the cross-examination of Jackson on her purchase of the gun, her volatile relationship with Thomas, and her bias against Thomas for accusations that she was cruel to his son. (*Id.* at 5-6.) Respondent points out that William Upchurch and Russell Carpenter were presented as witnesses to impeach Jackson's credibility and establish that she had threated to "pay [Thomas] back." (*Id.* at 6.) Respondent argues that, in light of the eyewitness accounts and video evidence, there is not a reasonable likelihood that the allegedly false testimony could have affected the judgment of the jury. (*Id.* at 8.)

In *Carter v. Mitchell*¸ 443 F.3d 517, 537 (6th Cir. 2006), the court found no reasonable likelihood that the false testimony affected the jury's decision. The court in *Carter* determined that the witness's testimony was not the keystone of the prosecution's case and that the jury had testimony from other eyewitnesses. *Id.* at 537. The Sixth Circuit determined that any constitutional error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (the harmless error standard applies to "constitutional error of the trial type").

In *Rosencrantz,* the Sixth Circuit elaborated on the *Brecht* harmless error standard:

> Under *Brecht*, a knowing-presentation error harms the accused when the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637, 113 S. Ct. 1710. The state bears responsibility for showing that the error had no effect on the verdict. *Gilday*, 59 F.3d at 268 n. 11

> (citing *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S. Ct. 992, 130 L.Ed.2d 947 (1995)). If "the matter is so evenly balanced that [the judge] feels himself in virtual equipoise as to the harmlessness of the error," then courts may not excuse the error as harmless. *O'Neal*, 513 U.S. at 435, 115 S. Ct. 992.

Rosencrantz, 568 F.3d at 590.[17] In finding harmless error, the court considered the independent and compelling identification evidence that the witness had consistently made from the initial report of the crime, the absence of evidence that the witness has been persuaded, coached, or coerced into offering certain testimony, the many ways defense counsel had impeached the witness and impugned her character, and the jury's ultimate determination that the defendant was guilty even after the witness's credibility and character had been thoroughly impugned by the defense. *Id.* at 591.

In the instant case, Angela Jackson was an important witness at trial. Her testimony was not the only evidence that led to a determination of Thomas's guilt. There was Richard Fisher's in-court identification, testimony describing the perpetrator's clothing, and the surveillance video. The Court notes

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[17] Recently, the Sixth Circuit has confirmed that for analyzing harmless error under AEDPA, *Brecht* is "always the test, and there is no reason to ask both whether the state court 'unreasonably' applied [clearly established federal law] under the AEDPA and, further, whether the constitutional error had a 'substantial and injurious' effect on the jury's verdict." *Blackston v. Rapelje*, No. 12-2668, 2015 WL 652665, at *16 (6th Cir. Feb. 17, 2015) (quoting *Ruelas v. Wolfenbarger*, 580 F.3d 403, 412 (6th Cir. 2009)).

that: (1) Jackson's credibility was thoroughly tested in the state court proceedings; (2) Jackson's testimony has been consistent throughout all the proceedings in which she has testified; (3) there is no credible, reliable evidence to dispute Jackson's version of events; (4) there is corroborating evidence for Jackson's testimony about the purchase of the pink car; (5) both a federal jury and this state jury have found Thomas guilty based on the same incident; (6) the payment was made after the statement and the federal trial with none of the parties able to foresee that a second state court trial would be held more than two years later; and (7) there is no clear nexus between the payment and Jackson's testimony at the second trial. Any false testimony was not associated with Thomas's guilt, but Jackson's motive for testifying, which was thoroughly addressed at trial.

The Court finds that Jackson's testimony was neither indisputably false nor material. Claim 2 is without merit. Summary judgment is GRANTED, and Claim 2 is DENIED.

C. Actual Innocence (Claim 3)

Thomas alleges that he makes "a truly persuasive demonstration" of actual innocence under *Herrera v. Collins*, 506 U.S. 390, 419 (1993). (ECF No. 1 at 36.) He asserts that he is factually innocent because Bobby Jackson was Bond's accomplice. (*Id.* at 36-37.) Thomas contends that Bobby Jackson drove the getaway car and that Bond shot and robbed Day. (*Id.* at 37.) Thomas claims that Bobby Jackson met the eyewitness descriptions of a heavy set man in his '30s and was identified twice as the driver of the getaway vehicle in a photographic spread. (*Id.* at 37-38.) Thomas relies on

the fact that, on July 21, 1997, Bobby Jackson was arrested and convicted for the robbery of a Loomis Fargo armored truck at the Southbrook Mall. (*Id.* at 38.) Thomas asserts that Bobby Jackson, while incarcerated, admitted to another inmate that the Southbrook Mall robbery was not the first time that Jackson had robbed an armored car. (*Id.*)

Thomas asserts that evidence reveals that Bond shot day and that he has never fully accepted responsibility for his role in the robbery. (*Id.* at 39.) Thomas argues that Bond's "string-bean frame" does not fit the description of the driver as a broad-shouldered man seen driving the white Pontiac Bonneville. (*Id*.) Thomas contends that this "compels the conclusion that Bond was the person who rode in the passenger seat alongside Bobby Jackson and that Bond was the person who shot and robbed Day." (*Id.*) Thomas contends that several eyewitnesses gave descriptions of the shooter that matched Bond, but not Thomas who was approximately 5'9" and 150 pounds. (*Id*. at 39-40.) Thomas asserts that Bond's fingerprints were on the passenger side of the door of the getaway vehicle, but none of Thomas's fingerprints were found. (*Id.* at 40.)[18] Thomas argues that Bond had "ample motivation" to say that he was the getaway driver because it allowed him to strike a deal in the federal case and receive a recommendation for a lighter sentence. (*Id.*)

Thomas argues that the newly discovered evidence establishes that Angela Jackson testified against him to collect reward money, to protect Bobby Jackson, and

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[18] A latent fingerprint check revealed Bond's fingerprints on the car. (*See* ECF No. 60-3 at PageID 10046-10047.)

to avenge Thomas's infidelity. (*Id.* at 41.) Thomas asserts that, for falsely implicating Thomas, Angela Jackson was not charged with any criminal activity. (*Id.* at 42.) Thomas asserts that Jackson's anger about his philandering and her own involvement with Bobby Jackson provided ample incentive for her to implicate Thomas. (*Id.* at 43.)

Thomas asserts that some of the damaging evidence at trial, the description of his clothes, was not provided to officers during Jackson's initial interview and was a detail that occurred for the first time when she testified at the federal trial. (*Id.* at 43-44.) Thomas contends that Jackson's identification of him based on the grainy, black and white surveillance video is "laughable." (*Id.* at 44.) He asserts that Jackson's testimony about the purchases made after the robbery have diminished in inculpatory value since trial because he obtained the money from other (unspecified) sources. (*Id.*)

Thomas argues that Bond recanted his confession and federal testimony in a letter dated January 10, 2002, in which Bond asserts that he accused Thomas of being the shooter because he had pursued Bond's girlfriend sexually. (*Id.* at 44.) The letter dated January 10, 2002, stated:

> Me and your bitch Angie played you playa. It's a cold game and a cold world and we in both of them so its freezing. . . . Bolegg I'm gone let you see how cold [t]his game is. When you was fucking all them hoes on Angie she was fucking off too and then she lied on you about the Walgreens case. The hoe was fucking . . . Bobby Jackson the whole time . . . . Anyway Angie

> knew that me and Bobby hit the Fargo truck but the bitch lied about me comin[g] back to her house. . . . White Boy Scott Sanders from the Feds who had the Walgreens case was gone [sic] fuck me off because of my finger prints on the Bonneville. He told me all he wanted was a shooter so I gave them you. The reason why I didn't tell on Bobby was because he didn't try to fuck my hoe like you did. Since you tried to cross me, I crossed you. It was either you or me, so it had to be you. Angie didn't snitch on Bobby even though she [k]new the business. . . . I hate that shit went down like that but its every man for himself.

(*Id.* at 44-45; *see* ECF No. 1-3 at PageID 138-139.) Thomas notes the state court's findings disregarding the Bond letter, but he disagrees that there was no evidence to corroborate the truthfulness of the letter. (ECF No. 1 at 45-46.) Thomas argues that this evidence greatly diminishes the credibility and strength of Jackson's testimony. (*Id.* at 46.)

Thomas alleges that he is factually innocent because the bullet did not cause Day's death. (*Id*. at 46.) Thomas asserts that, even if he had been involved in the robbery, the medical evidence shows other causes killed Day. (*Id.*) Thomas alleges that Day's death resulted, in part, from a chain of events that began with a lesion on Day's lower spinal cord. (*Id.* at 47.) Thomas contends, based on the testimony of neurologist Steven Horowitz, that the lesion was caused by the Regional Medical Center's ("the Med") grossly negligent administration of anti-hypertensive medications to Day. (*Id*. at 47-50.) Thomas asserts that

Day died from sepsis and that Horowitz identified diabetes and toxic levels of Coumadin as the causes of the infections. (*Id*. at 51-53.) Thomas argues that the Med's gross negligence makes him legally innocent because it was a superseding cause of Day's death under Tennessee law. (*Id.* at 53-56.) Thomas asserts that he cannot constitutionally be executed under the Eighth Amendment because the state courts' rulings demonstrate that Tennessee law defines "legal cause" so broadly that the prosecution's need to prove proximate cause in a homicide trial is essentially eliminated. (*Id.* at 57-58.)

Respondent argues that the claim that Thomas is actually and legally innocent is without merit. (ECF No. 63-1 at 31.) He asserts that an actual innocence claim has never been recognized as cognizable by the United States Supreme Court, and even if it were cognizable, Thomas has not shown sufficient evidence to obtain relief. (*Id.*) Respondent contends that the Bolegg letter is of suspect authenticity and reliability because it "purports to be written years after Thomas'[s] trial, purports to show hostility to the defendant while simultaneously absolving him of guilt . . ., and is all-too-conveniently comprehensive in including allegations of bias to witness Jackson." (*Id.* at 31-32.) Respondent further notes that the letter was not filed with a court until years after its supposed authorship. (*Id.* at 32.) Respondent notes a prior ruling of this district court stating that the letter was "suspicious in its timing, comprehensive content, and the manner in which it is crafted." (*Id.*) *See Thomas*, No. 03-2416-JPM, ECF No. 52, at 15 (W.D. Tenn. July 9, 2007). Respondent asserts that the Tennessee Court of Criminal Appeals did not find Bond's letter to be a

"pervasive showing of innocence." (*Id.* at 32.) *See Thomas*, 2011 WL 675936, at *40 (noting the lower court's determination that Bond's recantation letter was merely a conflicting statement and did not create a reasonable probability that the outcome at trial would have been different). Respondent argues that Thomas has not provided a coherent explanation for his failure to present Bond's letter until five years after its alleged receipt. (*Id.*) Respondent asserts that, in light of the evidence identifying Thomas as the perpetrator, Thomas's claim of actual innocence is without merit. (*Id.*) *See Thomas*, 158 S.W.3d at 388-39. Respondent contends that the actual innocence claim is a sufficiency of the evidence claim that does not rely on new evidence and fails as a matter of law. (*Id.* at 33.) He argues that the claim is procedurally defaulted and that legal innocence is not a basis on which relief can be granted. (*Id.* at 33-34.)

In response, Thomas disputes that he has not made a sufficient showing of actual innocence. (ECF No. 75 at 13.) He contends that the claim is not procedurally defaulted because he only learned of the payment to Jackson two months after the state court proceedings, and there is "certainly a reasonable probability that disclosure of the payment to the jury would have caused at least one juror to have a reasonable doubt of guilt." (*Id.* at 14.) Thomas asserts that the state court found that Bond wrote the letter, a fact that was uncontested at the State post-conviction evidentiary hearing. (*Id*. at 15.)[19] Thomas contends that, with the

[19] The opinion testimony of Grant Sperry, a forensic document examiner, has been presented in the § 2255 proceedings disputing

revelation of the payment to Jackson, the credibility and strength of her testimony is greatly diminished and the Bond letter should be re-evaluated accordingly. (*Id.*) Thomas cites *Jackson v. Virginia*, 443 U.S. 307, 321 (1979), for the proposition that legal innocence is a ground for habeas relief, and the claim must be reviewed by the federal habeas court. (*Id.* at 15-16.)

"A claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 506 U.S. 390, 404 (1993); *Muntaser v. Bradshaw*, 429 F. App'x 515, 521 (6th Cir. 2011) ("an actual innocence claim operates only to excuse a procedural default so that a petitioner may bring an independent constitutional challenge"). The actual innocence exception is very narrow in scope and requires proof of factual innocence, not just legal insufficiency. *Bouseley v. United States*, 523 U.S. 614, 623 (1998) ("It is important to note . . . that 'actual innocence' means factual innocence, not mere legal insufficiency."). The *Herrera* court noted that "a truly persuasive demonstration of 'actual innocence' made after a trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Herrera*, 506 U.S. at 417; *Wright v. Stegall*, 247 F. App'x 709, 711-12 (6th Cir. 2007). The threshold showing for such a right would "necessarily be extraordinarily high." *Wright*, 247 F. App'x at 712. The Supreme Court declined to decide whether

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that Bond wrote the letter. (*See* Thomas, No. 03-2416, ECF No. 132 at PageID 1843-1935.)

free-standing innocence claims in death penalty cases are possible. *House v. Bell*, 547 U.S. 518, 554-55 (2006). The Sixth Circuit has held that a free-standing claim on the grounds of actual innocence is not cognizable. *Muntaser*, 429 F. App'x at 521. The Sixth Circuit has rejected free-standing actual innocence claims based on newly discovered evidence where the evidence falls short of the "extraordinarily high" threshold set by *Hererra*. *See Legrone v. Birkett*, 571 F. App'x 417, 421 (6th Cir. 2014) (rejecting a claim of actual innocence where "the evidence offered . . . consisted of no more than affidavits executed a decade and a half after trial and was offered without adequate explanation as to the delay"); *see also Thomas v. Perry*, 553 F. App'x 485, 487 (6th Cir. 2014) (rejecting freestanding claim of actual innocence based on newly discovered evidence in the form of an affidavit). Claim 3 is without merit. Summary judgment is GRANTED, and Claim 3 is DENIED.

D. Ineffective Assistance of Counsel (Claim 4)

Thomas alleges ineffective assistance of trial counsel and of appellate counsel as follows:

A. Trial counsel was ineffective for failing to present a medical causation defense.

B. Trial counsel was ineffective due to Glatstein's *de facto* withdrawal and Scholl's *de facto* solo representation.

C. Trial Counsel was ineffective for his failures as to the admission and use of Bond's confession as evidence against Thomas.

D. Trial counsel was ineffective for failing to object to the prosecutor's repeated argument that Thomas and Bond were "Greed" And "Evil."

E. Appellate counsel was ineffective for failing to raise the Confrontation Clause violation on appeal.

F. Trial counsel was ineffective for failing to object to the trial court's erroneous jury instruction on causation.

G. Trial counsel was ineffective for failing to present evidence that another individual, Bobby Jackson, committed the Walgreens robbery with Anthony Bond.

(*See* ECF No. 1 at 60-92.)

A claim that ineffective assistance of counsel has deprived a habeas petitioner of his Sixth Amendment right to counsel is controlled by the standards stated in *Strickland v. Washington*, 466 U.S. 668 (1984). To demonstrate deficient performance by counsel, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687–688. "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Richter*, 131 S. Ct. 770 (citing *Strickland*, 466 U.S. at 689). "The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Id.* (quoting *Strickland*, 466 U.S. at 687). To demonstrate prejudice, a prisoner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." *Strickland*, 466 U.S. at 694.[20] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Richter*, 131 S. Ct. at 787–88 (quoting *Strickland*, 466 U.S. at 693). "Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.* (quoting *Strickland*, 466 U.S. at 687). "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

1. Failure to Present a Medical Causation Defense (Claim 4A)

Thomas alleges that a crucial issue at trial was whether the State had proven beyond a reasonable doubt that the gunshot wound that Day sustained to the back of his head on April 21, 1997, ultimately caused his death from a bladder infection two-and-a-half years later. (ECF No. 1 at 3, 61.) Thomas alleges that his trial counsel Michael Scholl and Jeffery Glatstein failed to adequately investigate and present a medical causation defense. (*Id.* at 61-62.) Thomas alleges that his trial counsel committed the following errors:

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[20] "[A] court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant." *Strickland*, 466 U.S. at 697. If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. *Id.*

1. Scholl delegated responsibility for the medical defense to Glatstein, who had constructively withdrawn as counsel;

2. Scholl and Glatstein failed to consult with a qualified expert to assist in challenging the State's causation;

3. Counsel failed to present any witnesses to challenge the State's causation although they had evidence demonstrating that Day did not die as a result of the gunshot wound;

4. Counsel failed to object to the cumulative testimony of the State's two medical witnesses;

5. Counsel failed to properly cross-examine Dr. O.C. Smith and Dr. Cynthia Gardner with key evidence contradicting the State's theory of causation; and

6. Scholl, in front of the jury, agreed with Gardner that the gunshot wound caused Day's neurological injuries.

(*Id.* at 62; *see* ECF No. 75 at 17-18.) Thomas asserts that the State's cumulative evidence that Day's gunshot wound caused his paralysis and bladder problems, which in turn resulted in his death, went effectively unchallenged as a result of counsel's errors. (ECF No. 1 at 62.)

Respondent argues that all six of these theories were rejected by the Tennessee Court of Criminal Appeals which "lumped" these claims into three theories for relief. (ECF No. 63-1 at 34.) Respondent asserts that, in sum, the Court of Criminal Appeals

found that Thomas did not have a valid causation defense, that he was not prejudiced, and that counsel's attempts to establish a causation defense were not deficient. (*Id.*)

On appeal of the denial of post-conviction relief, the Tennessee Court of Criminal Appeals opined:

> Petitioner's challenge to counsel's performance is three-fold. First, Petitioner maintains that counsel failed to present the testimony of a medical expert. Second, he asserts that counsel failed to object to cumulative testimony and/or failed to properly examine the State's two medical experts. Third, Petitioner asserts that counsel improperly relied on his co-counsel with respect to the medical issues at the heart of the case.
>
> Petitioner's last argument is without merit and is discussed more thoroughly in subsection 4 of this section. Accordingly, we determine that addressing this issue again in this context is unnecessary. Thus, our review focuses on whether counsel was ineffective for failing to retain an independent medical expert and whether counsel competently challenged the State's medical evidence during Petitioner's trial.
>
> Petitioner asserts that counsel failed to retain a neurologist to rebut the testimony of the State's medical experts. At the post-conviction evidentiary hearing, Mr. Scholl stated that the defense team had consulted with Dr. Haney, a pathologist, and Dr. Alabaster, a urologist. He

stated that these doctors agreed with the opinions offered by the State's experts. Although these experts were consulted, Petitioner maintains that the failure to consult with a neurologist specifically constituted deficient performance. In support of his claim, Petitioner relies, in part, on Dr. Haney's recommendation to counsel that he consult with a neurologist. Petitioner maintains that had counsel consulted with a neurologist, he would have been able to present a proper defense on causation.

We start with a review of the medical proof at Petitioner's trial, the "new" evidence presented at the post-conviction hearing, and the standard of proof necessary to prove causation. The following synopsis is excerpted from our supreme court's decision:

Both Drs. Smith and Gardner concluded that the victim died from sepsis due to a rupture of the bladder resulting from a gunshot wound to the head. The alleged discrepancy in their testimony arises in their disparate opinions as to how the bacteria that resulted in sepsis was introduced to the victim's body.

Dr. O.C. Smith testified that he had no opinion as to where the bacteria came from and that there were several potential sources for the bacteria. Dr. Smith surmised that the bacteria leading to the infection could have existed prior to the rupture of the bladder, could have been a result of the catheterization, or could have been the result of an infection of the urinary tract near the skin opening. However, Dr. Smith

concluded that the "neurogenic bladder and ... the fact that he has problems with bladder control ... combined with the requirement for catheterization ... predispose[d] [the victim] ... to have a high risk of colonization and an increased risk of infection." Dr. Cynthia Gardner, Dr. Smith's assistant, testified that "[i]t probably was—I would say with ninety-nine percent certainty, the bacteria was introduced into the bladder through catheterization." Defendant Thomas contends that this "discrepancy" raises sufficient doubt as to the cause of death of the victim. We disagree.

Both doctors testified as to the injuries sustained by the victim when he was shot and the impact of the injuries upon the victim during the intervening period until his death. Any alleged "conflict" as to the source of the bacteria is insignificant. From the testimony of both medical examiners, it appears to this Court that the infection would not have occurred but for the victim's medical condition directly caused by the shooting of the victim on April 21, 1997. That is, the uncontradicted medical testimony established that the victim eventually died as a result of the gunshot wound inflicted during the robbery. Accordingly, the evidence of causation is sufficient to support the verdict of guilt and this issue is without merit.

Thomas, 158 S.W.3d at 389.

Next, we review the testimony presented at the post-conviction evidentiary hearing. Dr. Horowitz testified extensively as to the cause of

Mr. Day's paralysis. To succinctly summarize his testimony, Dr. Horowitz opined that the paralysis was caused by medically-induced hypotension as a result of a breach in the standard of medical care by the attending staff at The Med. Dr. Horowitz concluded that there was no connection between the bullet wound and Mr. Day's subsequent neurological deficits and ultimate death. He added that the cause of Mr. Day's death was "[a]n overwhelming infection, uncontrollable diabetes with the state of diabetic ketoacidosis and an inability to clot because of the Cumadin toxicity." Dr. Horowitz admitted, however, that had Mr. Day not been shot on April 21, 1997, there would have been no reason for him to die on October 2, 1999.

The State had the burden of proof of establishing causation beyond a reasonable doubt. The evidence must establish that the defendant's actions or conduct caused the requisite harm. In a homicide prosecution, this is established by establishing that the victim's death was the natural and probable result of the defendant's unlawful act. *See State v. Barnes*, 703 S.W.2d 611, 614–15 (Tenn. 1985); *State v. Randolph*, 676 S.W.2d 943, 948 (Tenn. 1984); *Letner v. State*, 156 Tenn. 68, 299 S.W. 1049, 1051 (Tenn. 1927); *Copeland v. State,* 154 Tenn. 7, 285 S.W. 565, 566 (Tenn.1926); *Odeneal v. State*, 128 Tenn. 60, 157 S.W. 419, 421 (Tenn. 1913). That is, "[o]ne who unlawfully inflicts a dangerous wound upon another is held for the consequences flowing from such injury." *Odeneal*, 157 S.W. at 421. The person is

responsible whether the result is "direct or through the operation of intermediate agencies dependent upon and arising out of the original cause." *Id.*

The question arises when an intervening act interrupts the causal chain. Indeed, intervening acts with which the defendant was in no way connected and, but for which the death would not have occurred, provide a good defense to the charge of homicide. *See Letner*, 299 S.W. at 1050–52. The intervening act may relieve the defendant of responsibility except when the intervening act is the natural result of the defendant's act. *Id.* The unlawful act need not be the sole cause of death. If the injury caused by the defendant contributed to the death, the defendant is responsible. The injury inflicted by the defendant need not be the immediate cause of death. A defendant is responsible if the direct cause of death naturally emanates from his conduct. *Id.* That is, a defendant cannot escape the consequences of his wrongful act by relying upon a supervening cause when such cause naturally resulted from his wrongful act. *Id.* In order for the defendant to be insulated from criminal responsibility, the death must be "so unexpected, unforeseeable or remote" that the defendant's actions could not legally be the cause of the death. *See Randolph*, 676 S.W.2d at 948.

At the post-conviction hearing, Dr. Horowitz attributed the victim's paralysis not to the gunshot wound but to hypotension resulting

from wrongful medical treatment. He opined that this paralysis eventually led to the victim's neurogenic bladder and eventual death. Petitioner asserts that had trial counsel consulted a neurologist, Petitioner could have presented testimony which would have broken the causal chain. The question then becomes whether the improper medical treatment at The Med was a sufficient intervening act as to break the causal chain.

An intervening cause must not be reasonably foreseeable. Simple negligent medical treatment, although hopefully unusual, is sufficiently ordinary that we consider it foreseeable. *See People v. Saavedra–Rodriguez*, 971 P.2d 223, 226 (Colo. 1999).

> In the absence of a statute expressly dealing with the effect of the medical treatment of an alleged homicide victim's wound, an accused who has inflicted upon the victim an injury calculated to destroy or endanger life cannot exonerate himself or herself and thereby avoid the natural consequences flowing from the injury by showing that the victim's life might have been saved by more skillful medical treatment.

40 Am.Jur.2d Homicide § 18 (2008); *see United States v. Guillette*, 547 F.2d 743, 749 (2d Cir. 1976) (holding that when intervening events such as negligent medical treatment "are foreseeable and naturally result from a perpetrator's criminal conduct, the law considers

the chain of legal causation unbroken and holds the perpetrator criminally responsible for the resulting harm."). "The negligent treatment or neglect of an injury will not excuse a wrongdoer unless the treatment or neglect was the sole cause of death. 40 Am.Jur.2d Homicide § 18; *see Garcia v. Mathes*, 474 F.3d 1014, 1017–18 (8th Cir. 2007). However, thoroughly and extraordinarily incompetent care may break the chain of causation and absolve the defendant of criminal liability. If a third party's "independent act" "intervenes between the act of a criminal defendant and the harm to a victim, that act may only serve to cut off the defendant's criminal liability where the intervening act is the sole cause of harm." *People v. Bailey*, 451 Mich. 657, 549 N.W.2d 325, 334 (Mich. 1996) (emphasis added). In the medical treatment setting, evidence of grossly negligent treatment constitutes evidence of a sole, intervening cause of death where the initial wound would not have been fatal without treatment. *Saavedra–Rodriguez*, 971 P. 2d at 227. Anything less than that constitutes, at most, merely a contributory cause of death, in addition to the defendant's conduct. *Id.*

In the present case, this Court need not determine whether the alleged breach of care was simple negligent treatment or grossly negligent treatment. It is without dispute that, without medical treatment on April 21, 1997, Mr. Day would have died from the injuries sustained as a result of the gunshot wound. Thus, it was reasonably foreseeable that Mr.

Day would have died from the gunshot wound inflicted by Petitioner. Petitioner cannot establish any prejudice resulting from the alleged failure of counsel to consult a neurologist or otherwise more effectively challenge the State's expert witnesses.

Moreover, although we need not address the deficient performance prong of *Strickland*, we conclude that counsel was not deficient for failing to consult a neurologist and/or for failing to conduct a more effective cross-examination of the State's expert witnesses. The proof at the post-conviction hearing established that Mr. Scholl and Mr. Glatstein were aware of the import of the issue of causation, although causation relative to Petitioner was a secondary defense. Counsel did acknowledge that causation was Co-defendant Bond's primary defense. In this regard and in lieu of their collegial working relationship, counsel for Petitioner worked closely with counsel for Co-defendant Bond on the medical causation issue. The proof at the post-conviction hearing established that counsel for both Petitioner and Co-defendant Bond consulted other medical experts who reached the same or substantially similar conclusion as the State's experts. Counsel made a reasoned decision, with consideration of results, funding, and time, to stop investigating additional experts. Similarly, we do not find counsel's cross-examination of the State's experts deficient nor do we find counsel's failure to object to their testimony on the basis that the testimony was cumulative to be deficient. Mr.

> Scholl's cross-examination of the State's expert witnesses was thorough and focused upon the differences in their opinions. Petitioner is not entitled to relief on this issue.

Thomas, 2011 WL 675936, at *27-30.

Respondent argues that the decision of the Tennessee Court of Criminal Appeals is neither contrary to nor an unreasonable application of clearly established federal law and was based on a reasonable determination of the facts in light of the evidence presented. (ECF No. 63-1 at 38.) He contends that the Tennessee Court of Criminal Appeals cited and applied the correct standard in *Strickland* in rejecting Thomas's claim. (*Id.*) Respondent disputes Thomas's suggestion that the state court unreasonably applied *Strickland* by requiring "airtight" proof that a causation defense would have been successful. (*Id.*) Respondent asserts that the Tennessee Court of Criminal Appeals applied *Strickland*'s reasonable probability standard and contends that Thomas's theory that medical negligence was an intervening cause was legally invalid because Day's death was a foreseeable result of the shooting. (*Id.* at 38-39.) Respondent argues that Thomas's theory had "no chance of success whatsoever, as its premise was not germane to the salient issue of foreseeability." (*Id.* at 39.)

Thomas asserts that his trial counsel did not consult with an appropriate expert who was qualified to opine the cause of Day's paralysis and eventual death. (ECF No. 75 at 17.) Thomas argues that Scholl delegated this responsibility to Glatstein, who merely rode on the coattails of Bond's counsel to consult with a medical

expert. (*Id.* at 17-18.) Thomas contends that Bond's counsel Howard Manis did not consult with a neurosurgeon despite advice from Steven Hayne, a forensic pathologist, to do so. (*Id.* at 18; *see* ECF No. 1 at 64-65.)[21] Thomas asserts that Scholl and Glatstein did not present a single witness to challenge the state's case on causation, and Scholl failed to cross-examine Smith and Gardner at trial with any medical records that contradicted their theory, resulting in the jury hearing uncontroverted testimony that the gunshot wound was the cause of Day's death. (ECF No. 75 at 19.)

Thomas asserts that the state court's holding excusing Scholl's failure to consult with a neurologist and finding that he had conducted a reasonable investigation in making the decision not to consult with or call an expert witness was an unreasonable application of established Supreme Court precedent. (*Id.* at 18.) Thomas argues that the United State Supreme Court and courts of appeals have consistently held that counsel's failure to consult with a qualified expert constitutes deficient performance where the

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[21] In the petition, Thomas alleges that Hayne informed Manis that a neurosurgeon was the appropriate expert to consult. (ECF No. 1 at 3, 64-65.) Thomas does not address the failure to use a neurosurgeon in response to the motion for summary judgment. In response to the motion for summary judgment, Thomas addresses the state court's decision as it relates to counsel's failure to retain a neurologist and the post-conviction testimony of neurology expert Dr. Steven Horowitz. (ECF No. 75 at 18-20.) *See Thomas*, 2011 WL 675936, at * 27, 29-30. Thomas fails to make any argument that there was a specific need for a neurosurgeon as alleged in the petition. The Court will address this claim as it relates to the failure to retain an appropriate expert in neurology, as it was addressed in the state courts.

resolution of a critical legal issue depends on expert evidence. (*Id.*) Thomas asserts that the state court incorrectly determined that Thomas was not prejudiced by trial counsel's failure to consult with an expert regarding causation. (*Id*.) Thomas contends that the undisputed facts show that if Thomas's trial counsel had consulted with a qualified expert in the field of neurology like Horowitz, who testified at the post-conviction evidentiary hearing, at least one juror would have had reasonable doubt about the proximate cause of Day's death. (*Id.* at 19.)

The Tennessee Court of Criminal Appeals correctly stated the *Strickland* standard. *Thomas*, 2011 WL 675936, at *19-20. Thomas argues that counsel could not make a strategic decision not to present an expert witness without a reasonable investigation. Scholl and codefendant's counsel had consulted with a Haney, a pathologist, and Alabaster, a urologist, who agreed with the opinions offered by the State's experts. *Id.* at *27. Haney recommended that counsel contact a neurologist. *Id.* Neither Thomas's counsel nor Bond's counsel consulted with a neurologist.

The Tennessee Court of Criminal Appeals has recently addressed the nature of proximate cause related to murder and the "intervening factor" defense using much of the precedent previously applied in this case:

> we interpret the Petitioner's "intervening factor" defense as an attack on the proximate cause of the victim's death, which is a factual issue to be determined by the trier of fact based on the evidence at trial. *State v. Randolph*, 676 S.W.2d 943, 948 (Tenn. 1984). It has long been settled

> that a "defendant cannot escape the consequences of his wrongful act by relying upon a supervening cause when such cause naturally resulted from his wrongful act." *Letner v. State*, 156 Tenn. 68, 299 S.W. 1049, 1051 (1927) (citing Corpus Juris); *Odeneal v. State*, 128 Tenn. 60, 157 S.W. 419, 421 (1913). In addition, "[o]ne who unlawfully inflicts a dangerous wound upon another is held for the consequences flowing from such injury, whether the sequence be direct or through the operation of intermediate agencies dependent upon and arising out of the original cause." *Odeneal*, 157 S.W. at 421. When a defendant seeks to break the chain of causation based on a supervening cause, the victim's death must be so "unexpected, unforeseeable or remote" that the defendant's actions could not legally be the cause of the death. *Randolph*, 676 S.W.2d at 948. Negligent medical treatment received as a result of a defendant's criminal conduct is foreseeable and will not break the chain of causation. *Anthony Bond v. State*, No. W2011–02218–CCA–R3–PC, 2013 WL 275681 (Tenn. Crim. App. Jan 24, 2013) (citing *People v. Saavedra–Rodriguez*, 971 P.2d 223, 226 (Colo. 1999), *perm. app. denied* (Tenn. Jun 11, 2013)).

Pollard v. State, No. W2013-01398-CCA-R3PC, 2014 WL 4243767, at *7 (Tenn. Crim. App. Aug. 27, 2014). In the post-conviction proceedings, Horowitz, a neurologist, attributed Day's paralysis to hypotension resulting from negligent medical treatment, not the gunshot wound. *Thomas*, 2011 WL 675936, at *16-17, 29. Horowitz conceded that if Day had not been shot

that day, there would have been no reason for him to die on October 2, 1999. *Id.* at *18. Even considering Horowitz's testimony about the cause of his death, the legal defense of intervening causation requires that the death be unexpected, unforeseeable or remote. Day's death was a foreseeable consequence of being shot in the head, especially considering that Day's health never substantially improved after he left the hospital. Medical negligence is not an intervening cause, but a foreseeable result of the shooting. A neurologist's testimony would not have created a reasonable probability sufficient to undermine confidence in the outcome of the case, and Thomas cannot demonstrate prejudice as it relates to this claim.

2. *De Facto* Solo Representation (Claim 4B)

Thomas alleges that the American Bar Association ("ABA") standards serve as a guide for determining reasonable attorney conduct, and the standards in place at the time of Thomas's trial require that a defendant have one lead counsel and one co-counsel and that two competent attorneys are constitutionally required. (ECF No. 1 at 70.) Thomas contends that Glatstein's failure to engage fully in Thomas's trial and assist Scholl constituted deficient performance. (*Id.*) Thomas argues that Scholl's decision to proceed effectively as a solo attorney in the capital representation violated the applicable ABA standards for attorney conduct and constituted deficient representation. (*Id.*) Thomas argues that there can be no doubt that the deficiency was prejudicial because the burden of adequately representing a death penalty client is too great for a single attorney. (*Id.*) Thomas

asserts that, if Glatstein has been more invested in Thomas's defense, Scholl's delegation of the causation defense to Glatstein, would have led to "fewer serious errors." (*Id.* at 70-71.) He contends that, had Glatstein and Scholl both been fully engaged in the representation, the defense team might have properly investigation the medical causation defense and consulted with a qualified expert in the field of neurology, like Horowitz. (*Id.* at 71.) Thomas contends that Glatstein was "essentially unavailable" to assist in Thomas's defense and Scholl proved unable to handle the capital defense alone resulting in Thomas's being unduly prejudiced by: (1) Scholl's and Glatstein's failure to consult with a qualified expert to assist him in understanding and challenging the State's case on causation; (2) failure to present a single witness to challenge the State's case on causation; (3) failure to cross-examine the State's medical experts properly with key evidence contradicting their theory of causation; (4) failure to object to the cumulative testimony of the State's two medical witnesses; and (5) Scholl's agreement with Dr. Gardner that the gunshot wound caused Day's neurological injuries. (*Id.* at 71.)

The Tennessee Court of Criminal Appeals stated:

> Petitioner complains that co-counsel, Mr. Glatstein, failed to function as constitutionally effective counsel. In support of his claim, Petitioner relies upon testimony that, at the time of Petitioner's trial, Counselor Glatstein was attending school in a Masters program and was in the process of winding down his law practice. He cites Mr. Glatstein's admission that

he was "not too active in this case." Lead counsel, Mr. Scholl testified that Mr. Glatstein was in charge of the medical record. Petitioner implies that since Mr. Glatstein was in the process of winding down his law practice, Petitioner was deprived of the effective assistance of counsel as the medical issue was a critical issue in Petitioner's case.

Mr. Scholl testified that their primary defense was that Petitioner was not involved in the Walgreens robbery. Because Co-defendant Bond had provided a confession, Co-defendant Bond's primary defense was the medical causation issue. Mr. Scholl testified that he and Co-defendant Bond's lead counsel, Howard Manis, had a very close working relationship. Mr. Scholl testified that he, Mr. Manis, and Mr. Glatstein all worked together on the issue of causation. Mr. Scholl stated that he was ultimately responsible for Petitioner's causation defense.

Although Petitioner implies that co-counsel Glatstein's performance was deficient in relation to the medical records, Petitioner fails to assert "how" counsel's performance was deficient. Rather, Petitioner relies upon and assumes deficient performance from Mr. Glatstein's admission that he was winding down his law practice at the time of the trial. Ineffectiveness under *Strickland* requires more than just an assumption of deficient performance due to the personal circumstances of counsel. Rather, Petitioner must demonstrate with specificity

> that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Moreover, even if a defendant meets this threshold, he or she must also prove that such error prejudiced the defense. *Id.* Petitioner has failed to meet this threshold. Petitioner is not entitled to relief on this claim.

Thomas, 2011 WL 675936, at *31-32.

Respondent argues that the Tennessee Court of Criminal Appeals' decision is neither contrary to nor an unreasonable application of clearly established federal law and was based on a reasonable determination of the facts in light of the evidence presented. (ECF No. 63-1 at 39-40.) Thomas asserts that he has clearly demonstrated that in reality Scholl represented Thomas as a solo attorney due to Glatstein's *de facto* withdrawal from the case. (ECF No. 75 at 19.) Thomas contends that if Glatstein had been properly engaged in the medical causation defense and consulted with a qualified expert like Horowitz, the defense team might have properly investigated the medical causation defense and create a reasonable doubt as to proximate cause. (*Id.* at 20.)

The Court has found no prejudice from the failure to present a neurologist, *see* supra p. 68, and finds no prejudice from Glatstein's performance as it relates to the investigation and presentation of the medical causation defense. Thomas's claim of ineffective assistance of counsel based on *de facto* solo representation is without merit.

3. Bond's Confession (Claim 4C)

Bond gave a confession at or about the time of his arrest in November 1997, claiming that he was the driver of the getaway car and Thomas was the shooter in the Walgreens robbery. (ECF No. 1 at 71; *see* ECF No. 12-9 at PageID 751-754.) The State informed the court before trial that it intended to introduce Bond's confession. (*Id.* at 72.) Thomas argues that redaction of the confession was necessary to protect his Confrontation Clause rights and under *Bruton v. United States*, 391 U.S. 123 (1968). (ECF No. 1 at 71.) The trial court held a pre-trial conference to discuss the form and content of the redacted confession at which Scholl requested that Bond's description of his accomplice's clothing during the robbery remain unredacted. (*Id.*) Thomas argues that it was clear that Bond's accomplice, referred to as "the other person," was the shooter from the context of the rest of the redacted confession. (*Id.* at 72.)

Thomas asserts that Scholl did not object to the State's introduction or use of the confession against Thomas at trial or request a limiting instruction to the jury that Bond's confession could only be considered as evidence against Bond. (*Id.* at 72-73.) Thomas alleges that Scholl committed the following errors under *Strickland*:

1. Scholl failed to object to the improper introduction of Bond's confession at the joint trial despite the fact that even as redacted, Bond's confession implicated Thomas as the shooter in the Walgreens robbery in violation of *Bruton*;

2. Scholl failed to object to the State's repeated improper use of Bond's confession during its closing argument as proof of Thomas's participation and role in the Walgreens robbery; and

3. Scholl failed to request that a limiting instruction be given to the jury to inform them that Bond's confession could not be considered as evidence in determining the guilt or innocence of Thomas, or to object to the court's failure to issue any such instruction.

(*Id.* at 73.) Thomas alleges that these errors viewed individually or collectively, resulted in a violation of his rights of confrontation and to effective assistance of counsel and deeply prejudiced his defense. (*Id.*)

The Tennessee Court of Criminal Appeals opined:

> Mr. Scholl testified that his theory at trial was that the crime was committed by Co-defendant Bond and a third party. In this regard, "the other person" focused upon by Petitioner's defense was Mr. Jackson. Similarly, Mr. Scholl testified that he was adamant about leaving the description of the accomplice's clothing in the statement. He explained that there were various descriptions of what the second person was wearing. Mr. Scholl testified that the description in Co-defendant Bond's confession only served to amplify the inconsistencies in all of the descriptions. In this Court's opinion, there is no doubt that counsel made a strategic decision regarding the form and content of the redacted confession. Mr.

> Scholl's testimony evidences counsel's knowledge of the law, preparation, and sincere and conscious reflection and consideration of the best possible trial theory for Petitioner. Mr. Scholl's tactical decision was reasonable under the circumstances and does not demonstrate ineffective assistance of counsel. Petitioner does not overcome the presumption of reasonable performance or deference to tactical decisions of counsel in this claim. Notwithstanding, our deference to trial strategy does not extend to the failure to request a limiting instruction. We fathom no legitimate tactical reason to explain counsel's failure to request a limiting instruction. However, because we have determined that the *Bruton* error was harmless, Petitioner has failed to establish prejudice. Accordingly, Petitioner is not entitled to relief on this ground.

Thomas, 2011 WL 675936, at *25.

Thomas asserts that the Tennessee Court of Criminal Appeals correctly found that Bond's confession was improperly redacted and that the lack of a limiting instruction violated Thomas's constitutional right of confrontation when it held, on post-conviction appeal, that

> the law regarding redacted confessions under *Bruton* was in place well before Petitioner's trial. We can reach no conclusion other than that the redacted statement which replaced "Bowlegs" with "other person" violated the mandates of *Bruton* and its progeny. Moreover, the error is

> compounded by the fact that no limiting instruction was provided.

(ECF No. 1 at 73-74.) *See* Thomas, 2011 WL 675936, at *24.

Thomas contends that the Tennessee Court of Criminal Appeals also correctly found that Scholl was deficient for failing to request a limiting instruction. (*Id.* at 74.) The court stated:

> We fathom no legitimate tactical reason to explain counsel's failure to request a limiting instruction. However, because we have determined that the *Bruton* error was harmless, Petitioner has failed to establish prejudice. Accordingly, Petitioner is not entitled to relief on this ground.

(*Id.* at 75.) *See Thomas*, 2011 WL 675936, at *25.

Thomas alleges that the Confrontation Clause violations were the result of Scholl's deficient performance because Scholl did not object to the form or content and agreed that the redactions were properly made. (*Id.* at 74.) Scholl testified that he believed that a limiting instruction was merely recommended, and it was the judge's job to ensure a limiting instruction was given. (*Id*.) Thomas argues that the Tennessee Court of Criminal Appeals' finding that Scholl was not deficient for failure to object to the State's unconstitutional introduction and use of the Bond confession was contrary to and an unreasonable application of clearly established federal law. (*Id.* at 75.) Thomas asserts the court excused Scholl's failure as a "tactical decision" to leave the description of the accomplice's clothing in the statement to "amplify the

inconsistencies" of the various descriptions of the shooter. (*Id.*) Thomas argues that Scholl's purported strategy was the product of his unfamiliarity with the law on Confrontation Clause rights and his inattention to the facts of Thomas's case. (*Id.*) Thomas argues that the Tennessee Court of Criminal Appeals' finding that Scholl's strategy was "reasonable" and entitled to deference is contrary to and an unreasonable application of *Strickland*. (*Id*.)

Thomas, relying on *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986), asserts that a tactical decision is unreasonable if based on failure to research or understand the law. (*Id.* at 76.) He asserts that, where the failure to investigate thoroughly and understand the facts is due to inattention rather than a reasoned strategic judgment, a deficiency must be found. (*Id.*) Thomas argues that Scholl displayed a "remarkable lack of understanding of basic Confrontation Clause jurisprudence." (*Id.*)

Thomas contends that Scholl's purported strategy was contradicted by the record. Scholl claimed that no one matched the description Bond gave of the other person. (*Id.* at 77.) However, Angela Jackson said that Thomas wore a striped shirt and shorts on the day of the robbery matching Bond's description of the other person. (*Id.*) Thomas also notes that Scholl did not call the two eyewitnesses, Bobbie Fleming and Gail McDonald, whose descriptions of the shooter's clothing contradicted Bond's and Angela Jackson's accounts. (*Id.* at n.18.) Thomas asserts that, given the depth of legal incompetence and the unreasonableness of Scholl's purported strategy, Scholl's failure to object constituted deficient performance. (*Id.* at 78.)

Thomas asserts that the "sweeping conclusion" that he was not prejudiced by the *Bruton* errors because of the overwhelming evidence of Thomas's guilt was a clear misapplication of the *Strickland* prejudice standard. (*Id.* at 78-79.) Thomas argues that the Tennessee Court of Criminal Appeals' analysis of the prejudice that resulted from Scholl's deficiencies rehashed Angela Jackson's testimony and deemed it overwhelming evidence of Thomas's guilt, but did not analyze how the improper admission of Bond's confession affected the complete picture of the evidence before the jury. (*Id.* at 80.) Thomas asserts that a more complete look at the evidence shows how critical the confession was to the State's case because: (1) the State lacked any forensic evidence or credible identification placing Thomas at the scene; (2) the State leaned heavily on Angela Jackson's testimony; and (3) Bond's confession was the sole piece of evidence that could corroborate Jackson's identification of Thomas on the Walgreens surveillance video. (*Id.*) Thomas argues that, without the corroboration from Bond's confession, there is a reasonable probability that at least one juror would have questioned Thomas's guilt. (*Id.*) Thomas asserts that he was prejudiced when the prosecutor repeatedly linked Thomas to "the other person" in Bond's confession in the prosecution's summation. (*Id.* at 81.) Thomas contends that the cursory and unduly restrictive prejudice analysis conducted by the Tennessee Court of Criminal Appeals was contrary to, and an unreasonable application of, clearly established Supreme Court precedent. (*Id.*)

Respondent argues that the Tennessee Court of Criminal Appeals determined that any shortcoming on counsel's part was not reversible error because

Thomas's defense theory conceded the existence of an accomplice but contended that the "other person" was someone other than Thomas. (ECF No. 63-1 at 40.) Respondent asserts that Thomas's argument overlooks counsel's testimony that he made a strategic choice to include the description that Bond provided because it was "at odds" with other descriptions of the shooter. (ECF No. 76 at 5.) He asserts that the references to "the other person" were not prejudicial given that Thomas's defense theory was that Bond and Bobby Jackson, not Thomas, committed the crime. (*Id.*) Thomas, 2011 WL 675936, at *7, 25. Respondent argues that the decision of the Tennessee Court of Criminal Appeals is neither contrary to nor an unreasonable application of clearly established federal law and was based on a reasonable determination of the facts in light of the evidence presented. (*Id.* at 5-6.)

The Sixth Amendment's Confrontation Clause guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. Violations of the Confrontation Clause are subject to harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)); *Vasquez v. Jones*, 496 F.3d 564, 574 (6th Cir. 2007). To determine whether a Confrontation Clause violation is harmless, "courts must consider such factors as 'the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and, of course, the overall strength of the prosecution's case.'" *Stallings v. Bobby*, 464 F.3d 576, 582 (6th Cir. 2006) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684

(1986)); *see Peterson v. Warren*, 311 F. App'x 798, 805 (6th Cir. 2009) ("To determine the effect of the error under *Brecht*, we consider both the impact of the improperly admitted evidence and the overall weight of the evidence presented at trial.)

A criminal defendant is deprived of his constitutional right to confrontation when the confession of a non-testifying co-defendant that incriminates him is introduced at their joint trial, or when a properly redacted co-defendant's confession is admitted without a limiting instruction that informs the jury that the confession cannot be used as evidence of the nonconfessing co-defendant's guilt or innocence. *See Bruton*, 391 U.S. at 127-28, 135-37; *see also Gray v. Maryland*, 523 U.S. 185, 194, 201 (1998) (addressing the extension of *Bruton* to confessions that incriminate only by inference from other evidence with a limiting instruction); *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). The rule in *Bruton* does not apply where a confession does not inculpate the accused; such statements are inherently non-testimonial. *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir.2004) (discussing *Crawford v. Washington*, 541 U.S. 36 (2004), and defining the inquiry as "whether a reasonable person in the declarant's position would anticipate his statement being used against the accused"). The introduction of a defendant's self-incriminating, extra-judicial statement, in a joint trial, where the co-defendant's name is redacted and a neutral term is substituted," does not offend *Bruton* or the Sixth Amendment. *United States v. Vasilakos*, 508 F.3d 401, 407-408 (6th Cir. 2007).

Bond's redacted confession was presented at trial as Exhibit 58:

Q: Do you understand each of these rights I have explained to you?
A: Yes.

Q: Do you wish to make a statement now?
A: Yes.

Q: On Monday April 21, 1997 at about 12:36 pm did you participate in a robbery of a Loomis Wells Fargo Armored car which was making a pick up at Walgreens at 4522 Summer Memphis, Tn?
A: Yes.

Q: Was there anybody injured during this robbery?
A: Yes, dude that worked for Wells Fargo, he got shot.

Q: Where was the Loomis guard shot at on his body?
A: In the head.

Q: Describe the gun the guard was shot with?
A: A revolver, chrome, it was little with a short barrel.

Q: Were you armed during this robbery?
A: No.

Q: What did you do during the robbery?
A: Drive the getaway car. A white Pontiac Bonneville, four door.

Q: When was this robbery planned?
A: The day before.

Q: What were you wearing during the robbery?
A: Jeans and a blue, long-sleeved shirt.

Q: What was the other person wearing during the robbery?
A: A striped shirt, I think it was yellow and blue. And he might have had some shorts on.

Q: How much money was taken in the robbery?
A: About $14,000 or $15,000 cash I guess, I don't remember exactly. And some checks and food stamps were in there.

Q: How much of this money did you get?
A: About $6,000 or $7,000.

Q: Do you know where the pistol that was used is now?
. . .

Q: .What was the money and checks in when it was taken from the guard?
A: A brown bag.

Q: What did you do with the money you received from this robbery?
A: Bought a car, a white four door 1990 Chevrolet Caprice, for $4,800 from McClain Motors on Elvis Presley and blew the rest.

Q: Who was with you when the car was purchased?
A: My girlfriend, Tonya Monger, she put the car in her name.

Q: Did you have on a yellow and blue jacket?
A: Yes, I had on one.

Q: What happened to the yellow and blue jacket?
A: It was thr[own] away with the other stuff.

Q: What was your hairstyle like at the time of the robbery?
A: A long jerri curl.

Q: Is, there anything you would like to add to your statement?
A: No.

(ECF No. 12-9 at PageID 755-757.) The statement was read at trial by Officer Chad Golden. (ECF No. 12-19 at PageID 2113-2117.)

Nothing in Bond's statement other than the description of the other person as wearing a striped, blue and yellow shirt and possibly shorts would create an inference that the other person was Thomas. However, several descriptions of the shooter differed from that description. Scholl testified about the inconsistencies among the descriptions:

> Mr. Scholl explained that, at trial, he was adamant about having the description of the accomplice's clothing in the statement. The reason was there were varying descriptions of what the second person was wearing. Co-defendant Bond had described the person as having a striped shirt and shorts. Mr. Scholl wanted the description of the clothing in

evidence to establish the inconsistencies among all of the descriptions.

Mr. Scholl testified that, at the joint trial, witness Betty Gaye described the shooter as wearing khaki shorts or pants. Ms. Gaye also stated that the shooter wore a light-colored jacket. Mr. Scholl stated that this description was inconsistent with the description provided by Co-defendant Bond. Mr. Scholl stated that witness Christopher Sains testified that the shooter was wearing a baseball hat. Mr. Scholl stated that witness Richard Fisher testified that the driver of the getaway vehicle was wearing a baseball hat. He added that Ms. Jackson stated that Co-defendant Bond was wearing a yellow, light-colored jacket when he and Petitioner returned to her apartment. Mr. Scholl summarized that, during the trial, conflicting descriptions of the perpetrators were given by four witnesses.

Mr. Scholl identified an FBI report regarding Bobbie Fleming, a customer at Walgreens. The report reflected that Ms. Fleming identified the perpetrator as "a black male . . . medium height . . . twenty-five to thirty years of age with a slight beard, wearing a blue baseball cap and a tan shirt with horizontal red and blue stripes and blue pants." Mr. Scholl conceded that this description contradicted the description in both Ms. Jackson's testimony and Co-defendant Bond's confession. Mr. Scholl stated that Ms. Fleming was not called as a witness, and her identification was not used at trial. Mr. Scholl

explained that the FBI 302 report containing Ms. Fleming's identification of the perpetrator was inadmissible at trial.

Mr. Scholl also identified an FBI 302 report regarding Gail McDonald, another customer at Walgreens. Ms. McDonald identified the shooter as wearing a "blue baseball cap, blue and white short-sleeved, pinstriped shirt, light-blue jeans, and white tennis shoes." He admitted that this description was similar to the description provided by Ms. Fleming. Ms. McDonald was not called as a witness at trial. Mr. Scholl explained that he decided not to call Ms. McDonald and Ms. Fleming as witnesses out of concern that they would be able to identify Petitioner as the shooter in court.

Mr. Scholl agreed that the prosecution relied upon Co-defendant Bond's description of the shooter's clothing in their closing argument. In his opinion, the prosecution was attempting to draw a correlation between Co-defendant Bond's confession and Ms. Jackson's description. He did not object to this argument. He agreed that no limiting instruction was given by the judge regarding the redacted confession. Mr. Scholl stated that, in his opinion, the lack of a limiting instruction had no impact because "[y]ou either believed Ms. Jackson, or you didn't believe Ms. Jackson."

Thomas, 2011 WL 675936, at *7-8.

In *United States v. Winston*, 55 F. App'x 289, 295 (6th Cir. 2003), the Sixth Circuit determined that a

reference to the "other individual" in a redacted statement did not compel the jury to believe that the "other individual" was Winston. The Court found that any *Bruton* violation was harmless in light of the overwhelming evidence of Winston's guilt. *Id.* at 296.

In the instant case, Bond's statement was redacted using the term "the other person" in lieu of Thomas's name. The other evidence presented at trial did not compel the jury to believe that Thomas was the other person, especially given the various descriptions of the perpetrator's clothing. It was not unreasonable for counsel to leave the description of the other person's clothing in Bond's statement given the inconsistencies in the descriptions amongst the eyewitnesses. The clothing description was not crucial to Thomas's case or prejudicial given Jackson's identification of Thomas from the surveillance video stills and the jury's opportunity to view those stills. The evidence linking Thomas to the crime was sufficiently overwhelming that there was no prejudice to Thomas by any error in the redaction of the statement. *See United States v. Mendez*, 303 F. App'x 323, 326 (6th Cir. 2008) (where the references do not "facially incriminate the other codefendant[]", there is no *Bruton* violation).

The Tennessee Court of Criminal Appeals' decision was not contrary to or an unreasonable application of clearly established Supreme Court precedent. The court's decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 131 S. Ct. at 786–787.

4. The Prosecutor's Repeated Argument That Thomas & Bond Were "Greed" And "Evil" (Claim 4D)

Thomas alleges that during opening and closing arguments, the prosecutor referred to Bond and Thomas as "Greed" and "Evil" a total of 21 times. (ECF No. 1 at 82.) He argues that Michael Scholl failed to object to these abusive characterizations, and the trial court failed to issue a curative instruction. (*Id.*) Thomas argues that both the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court acknowledged that the comments were improper and that Scholl's performance was deficient, but the state court incorrectly and unreasonably concluded that the prosecutor's words, though "unseemly" and "improper", were harmless. (*Id.*) *See Thomas*, 158 S.W.3d at 373; *Thomas*, 2004 WL 370297, at *46.

Thomas relies on *Berger v. United States*, 295 U.S. 78, 88-89 (1935), to assert that a prosecutor's words carry weight with the jury and that if those words are pronounced and persistent, improper suggestions and insinuations can have a "probable cumulative effect upon the jury which cannot be disregarded as inconsequential." (*Id.* at 83.) Thomas asserts that, had Scholl objected to the prosecutor's use of these inflammatory epithets and had the court instructed the prosecutor to cease making such improper insinuations and/or issued a curative instruction, there is a reasonable probability that one juror might have been "better able" to weigh the evidence presented at trial impartially and "may have been more open" to considering the various inconsistencies and weaknesses of the State's case against Thomas. (*Id.*)

Respondent argues that this claim is procedurally defaulted for failure to present it to the Tennessee Court of Criminal Appeals. (ECF No. 15 at 39; ECF No. 63-1 at 41.) Thomas asserts that he has exhausted this claim and the remaining ineffective assistance of counsel claims. (ECF No. 24 at 19; ECF No. 75 at 25.)

In Thomas's Petition for Writ of Error Coram Nobis and Amended Petition for Relief from Conviction or Sentence filed on November 13, 2006, he alleged that his trial counsel's failure to object to the state's use of the epithets "greed" and "evil" was prejudicial error. (ECF No. 14-3 at PageID 4749.) On appeal of the denial of post-conviction relief, Thomas raised the claim in his brief before the Tennessee Court of Criminal Appeals. (ECF No. 14-16 at PageID 6377-6378.) The Tennessee Court of Criminal Appeals addressed the claim in 2011. (ECF No. 14-24 at PageID 7072-7073.) *See Thomas*, 2011 WL 675936, at *31. Thomas also raised the claim in his application for permission to appeal to the Tennessee Supreme Court. (ECF No. 14-27 at PageID 7220.) The claim is exhausted and entitled to merits review. Summary judgment based on procedural default is DENIED.

On the denial of post-conviction relief, the Tennessee Court of Criminal Appeals opined:

> **3. Trial counsel failed to object to the prosecution's use of "greed and evil."**
>
> As related in our supreme court's opinion on direct appeal, during Petitioner's trial:
>
> > The prosecutor for the State who made opening statement in this case began,

> "You can't hide from greed and evil. James Day learned that lesson on April 21st, 1997...." She continued: "James Day learned you can't hide from greed and evil," and "He walked into the path of greed and evil." Throughout opening statement, the prosecutor referred collectively to Defendant Thomas and Defendant Bond as "greed and evil." This theme was repeated during closing argument, in which both prosecutors made references that "James Day couldn't hide from greed and evil," "there was no hiding from or escaping the circle of greed and evil," and "greed and evil really didn't care that day whether he lived or died." The prosecutors referred to the Defendants as "greed and evil" a total of twenty-one times during the opening statement and closing arguments of the guilt phase of the trial.

Thomas, 158 S.W.3d at 413. No objection was made at trial. Mr. Scholl conceded that he failed to object to the prosecution's use of the epithet. He noted, however, that the issue was raised on direct appeal.

> In considering the issue on direct appeal, our supreme court held that "[t]he prosecutors' repeated references to Defendant Thomas and Defendant Bond as 'greed and evil' was improper." *Id.* at 414. The court noted that "[n]o curative instruction was provided primarily

because neither Defendant Thomas nor Defendant Bond objected to the characterization." *Id.* "Moreover, the State's case was strong and the effect of the error was insignificant." The supreme court determined that "the prosecutors' comments [were] unseemly but harmless in the context of the entire argument." *Id.* In short, the court held that "the State's improper argument did not undermine the fundamental fairness of the trial."

The post-conviction court, relying upon our supreme court's holdings, found that counsel was deficient for failing to object to the State's use of "greed and evil." However, the lower court declined to find that this deficient performance resulted in prejudice to Petitioner, relying upon the supreme court's conclusion that the error was "insignificant" and "did not undermine the fundamental fairness of the trial." We agree. The fact that this issue is now couched in terms of ineffective assistance of counsel terms does not alter the finding of our supreme court that the error was "insignificant." Our supreme court has found the use of the terms "greed and evil" in Petitioner's trial to be harmless error. Accordingly, Petitioner has failed to carry his burden in establishing that he suffered prejudice as a result of counsel's failure to object to

> the use of the terms. Petitioner is not entitled to relief on this claim.

Thomas, 2011 WL 675936, at *31.

For the reasons stated infra pp. 116-136 related to the prosecutor's comments in Claim 6, the Court finds that Thomas cannot demonstrate prejudice under *Strickland* for his counsel's failure to object to the prosecutor's remarks in closing argument. The Tennessee Court of Criminal Appeals' decision was not contrary to or an unreasonable application of Supreme Court precedent and was based on a reasonable determination of facts.

5. Ineffective Assistance of Appellate Counsel (Claim 4E)

Thomas alleges that Robert Brooks failed to raise on direct appeal any of the many Confrontation Clause violations based on the State's unconstitutional introduction and use of Bond's confession as evidence against Thomas. (ECF No. 1 at 84.) Thomas asserts that the Tennessee Court of Criminal Appeals correctly found that Brooks's failure to present any confrontation clause issues was deficient performance. (*Id.*) Thomas disputes the court's determination that the error was not prejudicial because the underlying *Bruton* violations were harmless. (*Id.* at 85.) Thomas asserts that the *Bruton* claims were meritorious and Brooks's failure to raise them was as prejudicial as Scholl's failure to object to the violations at trial. (*Id.*; *see* ECF No. 75 at 26.)

Respondent argues that this claim is procedurally defaulted for failure to present it to the Tennessee Court of Criminal Appeals. (ECF No. 15 at 39; ECF No.

63-1 at 41.) Thomas asserts that he has exhausted this claim by raising it before the Tennessee Court of Criminal Appeals on the denial of post-conviction relief and as part of the request for permission to appeal. (ECF No. 24 at 19; ECF No. 75 at 25; *see* ECF No. 14-16 at PageID 6336-6339; *see also* ECF No. 14-27 at PageID 7078-7079.) The Tennessee Court of Criminal Appeals ruled on the claims in affirming the denial of post-conviction relief. *See Thomas*, 2011 WL 675936, at *36-37. Thomas's claim is exhausted. Summary judgment based on procedural default is DENIED.

The Tennessee Court of Criminal Appeals opined:

> **C. Appellate Deficiencies**
>
> Petitioner asserts that counsel, Robert Brooks, was ineffective on appeal. Petitioner's argument in this regard is solely that counselor Brooks failed to raise any of the many Confrontation Clause issues arising from the introduction of Co-defendant Bond's redacted statement in Petitioner's direct appeal.
>
> The same principles apply in determining the effectiveness of both trial and appellate counsel. *Campbell v. State*, 904 S.W.2d 594, 596 (Tenn. 1995). A petitioner alleging ineffective assistance of appellate counsel must prove that: (1) appellate counsel acted objectively unreasonably in failing to raise a particular issue on appeal; and (2) absent counsel's deficient performance, there was a reasonable probability that defendant's appeal would have been successful before the state's highest court. *E.g., Smith v. Robbins*, 528 U.S. 259, 285, 120

S. Ct. 746, 764, 145 L. Ed. 2d 756 (2000); *Aparicio v. Artuz*, 269 F.3d 78, 95 (2d Cir. 2001); *Mayo v. Henderson*, 13 F.3d 528, 533–34 (2d Cir. 1994). To show that counsel was deficient for failing to raise an issue on direct appeal, the reviewing court must determine the merits of the issue. *Carpenter v. State*, 126 S.W.3d 879, 887 (Tenn. 2004) (citing *Kimmelman*, 477 U.S. at 375, 106 S. Ct. at 2583). "Obviously, if an issue has no merit or is weak, then appellate counsel's performance will not be deficient if counsel fails to raise it." *Id.* When an omitted issue is without merit, Petitioner suffers no prejudice from appellate counsel's failure to raise the issue on appeal and cannot prevail on an ineffective assistance of counsel claim. *Id.* at 887–88. Additionally, ineffectiveness is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal. One reason for this is that the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel.

In *Gray v. Greer*, 800 F.2d 644 (7th Cir.1986), [t]he Seventh Circuit Court of Appeals established the following test for determining whether counsel was deficient in *Strickland* terms for failing to raise particular claims on direct appeal:

> [S]ignificant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than

> those presented, will the presumption of effective counsel be overcome.

Gray, 800 F.2d at 646.

In *Carpenter v. State*, 126 S.W.3d 879 (Tenn. 2004), our supreme court refused to hold that the *Gray* standard was the conclusive test of finding deficient performance. *Carpenter*, 126 S.W.3d at 888. Our supreme court noted that the relative strength of the omitted issue is only one among many factors to be considered. Indeed, the court noted the numerous factors relied upon by the Sixth Circuit Court of Appeals in evaluating appellate counsel's failure to raise issues. *Id.* The non-exhaustive list includes:

1) Were the omitted issues significant and obvious?

2) Was there arguably contrary authority on the omitted issues?

3) Were the omitted issues clearly stronger than those presented?

4) Were the omitted issues objected to at trial?

5) Were the trial court's rulings subject to deference on appeal?

6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?

7) What was appellate counsel's level of experience and expertise?

8) Did Petitioner and appellate counsel meet and go over possible issues?

9) Is there evidence that counsel reviewed all the facts?

10) Were the omitted issues dealt with in other assignments of error?

11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Id. Our supreme court acknowledged that the Sixth Circuit's final factor reaches the ultimate issue under the first prong of *Strickland* and is, therefore, not helpful in deciding whether appellate counsel's performance was deficient.

At the post-conviction hearing, Counselor Brooks could not offer explanation as to why Confrontation Clause issues were not raised on direct appeal. He stated that "if there was a legitimate issue, it would definitely be error not to raise it." The lower court concluded that Counselor Brooks should have raised issues regarding the redacted confession on appeal. We are constrained to agree with the lower court in this respect. As found by the post-conviction court, we have determined that any *Bruton* error was harmless. We can hardly fault appellate counsel for failing to allege an error that was harmless. *See generally, United States v. Arena*, 180 F.3d 380, 396 (2d Cir. 1999) (stating that a

> "Failure to make a meritless argument does not amount to ineffective assistance"), *cert. denied*, 531 U.S. 811, 121 S. Ct. 33, 148 L. Ed. 2d 13 (2000); *United States v. Kirsch*, 54 F.3d 1062, 1071 (2d Cir.) (stating that "[T]he failure to make a meritless argument does not rise to the level of ineffective assistance"), *cert. denied*, 516 U.S. 927, 116 S. Ct. 330, 133 L. Ed. 2d 230 (1995); *United States v. DiPaolo*, 804 F.2d 225, 234 (2d Cir. 1986) (finding no ineffective assistance where attorney failed to make an objection that "appears without merit"). Accordingly, we decline to conclude that appellate counsel was deficient for not raising as plain error issues related to Co-defendant Bond's redacted statement. Petitioner is not entitled to relief on this ground.

Thomas, 2011 WL 675936, at *36-37.

An ineffective assistance of appellate counsel claim requires a petitioner to show that counsel's performance was deficient, and that the deficient performance was prejudicial. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). Appellate counsel need not raise every nonfrivolous claim, "but rather may select from among them in order to maximize the likelihood of success on appeal." *Id.* at 288 (citing *Jones v. Barnes*, 463 U.S. 745 (1983)). Generally, the presumption of effective assistance of counsel will not be overcome unless the ignored issues are clearly stronger than those presented on appeal. *Id.* To demonstrate prejudice, a petitioner must show a reasonable probability that his claims would have succeeded on appeal. *Id.* at 2852-286.

The Tennessee Court of Criminal Appeals applied the correct Supreme Court precedent for ineffective assistance of appellate counsel. Given this Court's determination that any *Bruton* error did not prejudice Thomas, *see* supra p. 81, Thomas's ineffective assistance of appellate counsel claim lacks merit. The Tennessee Court of Criminal Appeals' determination was not contrary to or an unreasonable application of clearly established Supreme Court precedent and is not based on an unreasonable determination of facts.

6. Failure to Object to the Trial Court's Causation Jury Instruction (Claim 4F)

Thomas argues that his trial counsel was ineffective for failing to object to the trial court's erroneous jury instruction on causation. (ECF No. 1 at 85.) Thomas asserts that the prosecution must prove every element of a crime being alleged at trial, and that, consistent with this requirement, Tennessee law requires that a criminal jury be instructed that the State must prove proximate cause beyond a reasonable doubt. (*Id.* at 85-86.) Thomas argues that despite the critical nature of this element of criminal procedure, the trial court failed to instruct that the State must prove proximate cause. (*Id.* at 86.) Thomas asserts that the instruction conveys to the jury that they are to presume proof of proximate causation unless the defendant can establish a break in the chain of causation thus impermissibly shifting the burden of proof on causation to the defendant. (*Id.*)

The trial court instructed the jury on proximate cause as follows:

> A fundamental principle of criminal law is that a person is held responsible for all consequences proximately caused by his criminal conduct. Under the law the defendant may be found guilty of Murder during the Perpetration of a Robbery even if death was not an immediate result and even if an intervening event contributed to or even caused the victim's death. Where such intervening events are foreseeable and naturally result from the defendant's criminal conduct, the law considers the chain of legal causation unbroken and holds the defendant criminally responsible for the resulting death. The defendant would be relieved of responsibility for the consequences of his acts only if the intervening act that caused death is not a natural and foreseeable result of the defendant's act.

(*Id.; see* ECF No. 1-16 at PageID 210.)

Thomas asserts that Scholl's failure to object to the instruction was deficient performance. (ECF No. 1 at 87.) Thomas alleges that there is a reasonable probability that counsel's objection to the trial court's unconstitutional instruction would have changed the outcome of the trial. (*Id.*) He asserts that, by allowing the trial court to instruct the jury that the State did not have to prove proximate cause, Scholl irreparably damaged Thomas's causation defense. (*Id.* at 87-88.)

Respondent argues that this claim is procedurally defaulted for failure to present it to the Tennessee Court of Criminal Appeals. (ECF No. 15 at 39; ECF No. 63-1 at 41.) Thomas asserts that he has exhausted this claim by raising it before the Tennessee Court of

Criminal Appeals as part of the Thomas's petition for rehearing of his appeal of the denial of post-conviction relief and as part of the request for permission to appeal. (ECF No. 24 at 20; *see* ECF No. 14-25 at PageID 7097-7080; *see also* ECF No. 14-27 at PageID 7206-7207.)

Thomas did not raise a claim of ineffective assistance for failure to object to the causation instruction in his petition for post-conviction relief or in his appellate brief on the denial of post-conviction relief. (*See* ECF 14-1 at PageID 4428-4430.) In a petition for rehearing, Thomas asserts that the court should revisit its determination that his trial counsel was not deficient in failing to consult with a neurologist on the causation issue. (ECF No. 14-25 at PageID 7095-7096.) In the context of that argument, Thomas asserts that, "even if it were true that Scholl conducted an effective cross-examination of the State's medical experts – which he did not – such cross-examination was completely undermined by his failure to object to the trial court's issuance of a legally incorrect jury instruction on causation." (*Id.* at PageID 7097.) Although a reference was made to the causation instruction in the context of the medical causation analysis, the present allegations were not enumerated and analyzed as an independent claim.

A petition to rehear will not be construed as a vehicle by which a petitioner may advocate a new position. *See State v. Pearson*, No. 87-157-III, 1988 WL 105728, *2 (Tenn. Crim. App. Oct. 11, 1988) ("[T]he office of the petition to rehear cannot be used to file supplemental briefs and present issues that should or could have been presented in the orderly issues of the

proceedings."); *see also Alexander v. Patrick*, 656 S.W.2d 376, 377 (Tenn. App. 1983) ("issue raised for the first time in a petition to rehear should not be considered by the Court"). The grant or denial of a petition to rehear remains solely in the discretion of the court. *Zarkani v. Mills*, No. W2005-01103-CCA-R3HC, 2006 WL 236935, at *2 (Tenn. Crim. App. Jan. 30, 2006) (per curiam).

Raising an issue in a petition for rehearing on appeal does not constitute exhaustion of state court remedies. *Weigand v. Wingo*, 380 F.2d 1022, 1023 (6th Cir. 1967); *see Cruz v. Warden of Dwight Correctional Center*, 907 F.2d 665, 669 (7th Cir.1990) ("Nor would it seem that presenting [a claim] to a state appellate court in a petition for rehearing would constitute a fair presentation either."); *see Nichols v. Morrow*, No. 1:09-CV-183, 2011 WL 976511, at *4 (E.D. Tenn. Mar. 17, 2011); *see Olson v. Little*, No. 12-6015, 2015 WL 1004461, at *12-13 (6th Cir. Mar. 9, 2015) (claim not fairly presented in the state courts when raised for the first time in a petition for rehearing).

Thomas did not raise a claim of ineffective assistance for failure to object to the causation instruction in his appellate brief on the denial of post-conviction relief. (*See* ECF No. 14-3 at PageID 4676, 4739-4747.) In Thomas's application for permission to appeal, he alleged that his trial counsel had failed to object to the causation jury instruction. (ECF No. 14-27 at PageID 7206-7206.) Raising a claim in a discretionary appeal without addressing it in the lower court does not satisfy the exhaustion requirement. *See Goldberg v. Maloney*, 692 F.3d 534, 538 (6th Cir. 2012) (citing *Richter*, 131 S. Ct. at

784–85); *see also Warlick v. Romanowski*, 367 F. App'x 634, 643 (6th Cir. 2010) (a claim is not fairly presented when raised for the first time on discretionary review).

Thomas's claim of ineffective assistance of counsel based on the causation jury instruction is procedurally defaulted. Thomas has made no argument to overcome procedural default. Summary judgment based on procedural default is GRANTED as it relates to this claim.

7. Failure to Present Evidence that Bobby Jackson Committed the Walgreens Robbery (Claim 4G)

Thomas alleges that Scholl failed to mount an adequate defense that Bobby Jackson was the true perpetrator of the Walgreens robbery. (ECF No. 1 at 88.) Thomas argues that Scholl failed to introduce the following highly probative, relevant and admissible evidence about Bobby Jackson:

- Robert Fisher identified Bobby Jackson as one of the perpetrators of the robbery on two different occasions, but Scholl only introduced one identification without mentioning Bobby Jackson's name and leaving the jury with only the information that Robert Fisher had identified someone other than Thomas as the perpetrator;
- Scholl did not call any of the multiple witnesses who gave descriptions of the getaway driver that matched Bobby Jackson and descriptions of the shooter that matched Bond;

- Although Scholl introduced some evidence that Angela Jackson and Bobby Jackson had been romantically involved, he offered no evidence that they were dating in 1997, when Angela Jackson gave her statement to investigators implicating Thomas and protecting Bobby Jackson or when Angela Jackson testified at Thomas's federal trial;

- Scholl failed to introduce evidence that Bobby Jackson attempted to rob another Loomis Fargo guard at the Southbrook Mall in Memphis, just three months after the Walgreens robbery;

- Scholl failed to call Terrance Lawrence, Bobby Jackson's accomplice in the Southbrook Mall robbery, to testify at Thomas's trial.

(*Id.* at 88-90.) Thomas asserts that the Court of Criminal Appeals' decision that Scholl's failure to mount an adequate defense that Bobby Jackson was the true perpetrator did not constitute deficient performance was contrary to and an unreasonable application of *Strickland*. (*Id.* at 91.) Thomas asserts that he was undeniably prejudiced by Scholl's failure to present evidence that Bobby Jackson committed the robbery. (*Id.*)

Respondent argues that this claim is procedurally defaulted for failure to present it to the Tennessee Court of Criminal Appeals. (ECF No. 15 at 39; ECF No. 63-1 at 41.) Thomas asserts that he has exhausted this claim by raising it before the Tennessee Court of Criminal Appeals as part of his appeal of the denial of post-conviction relief and as part of the request for permission to appeal the denial of post-conviction

relief. (ECF No. 24 at 21; *see* ECF No. 14-16 at PageID 6365-6374 *see also* ECF No. 14-27 at PageID 7207-7213.) Thomas's claim is exhausted and entitled to merits review. Summary judgment based on procedural default is DENIED.

The Tennessee Court of Criminal Appeals stated:

> **5. Trial counsel failed to introduce evidence that Mr. Jackson committed the crime.**
>
> The proof at the post-conviction evidentiary hearing revealed that, three months after the Walgreens robbery, Mr. Jackson attempted to rob a Loomis Fargo guard at the Southbrook Mall in Memphis. Petitioner's trial counsel, Mr. Scholl, stated that part of the defense strategy was that Co-defendant Bond was involved in the Walgreens robbery with another person, not Petitioner. He stated that the other person was Mr. Jackson. Mr. Scholl conceded that he was aware that Mr. Jackson had been involved in a similar robbery at Southbrook Mall. Petitioner contends that Mr. Scholl's performance was deficient and prejudicial in that he did not seek admission of evidence of Mr. Jackson's similar crime at the Southbrook Mall. Petitioner further complains that he was prejudiced by Mr. Scholl's failure to introduce testimony that Ms. Jackson dated Mr. Jackson.
>
> **a. Post–Conviction Court's Findings**
>
> The lower court entered the following findings of fact and conclusions of law as to this claim. Mr. Jackson testified that he had no

knowledge of the Walgreens robbery and stated that he did not know Ms. Jackson. Ms. Jackson testified that she did not know Mr. Jackson. The lower court found that, even had counsel called Mr. Jackson to testify at trial, there was no basis for questioning him regarding the robbery at the Southbrook Mall. Moreover, the court reasoned, that absent any additional proof tying Mr. Jackson to the Walgreens robbery, it was unlikely that the trial court would have permitted counsel to assert that the descriptions of the perpetrators provided by certain witnesses were more closely related to the physical features of Mr. Jackson than those of Petitioner. The lower court related that trial counsel testified that the case turned on whether the jury believed Ms. Jackson. Trial counsel attempted to make Ms. Jackson appear less credible. Moreover, counsel attempted to implicate Mr. Jackson, although there was only so far he could ethically pursue the Mr. Jackson defense. The lower court determined that trial counsel was not ineffective for failing to present proof to the jury. In so concluding, the lower court reasoned that there was a limited basis for attacking Mr. Jackson and, even had further investigation been conducted, there would have been little evidence linking Mr. Jackson and Ms. Jackson. Finally, the lower court questioned the admissibility of such proof.

b. Analysis

Petitioner's claim against counsel is three-fold. First, he asserts that counsel was ineffective for failing to introduce the circumstances of the

Southbrook Mall robbery involving Mr. Jackson. Next, he asserts that counsel was ineffective for failing to introduce evidence that Ms. Jackson and Mr. Jackson had a romantic relationship. Finally, Petitioner contends that counsel was ineffective for failing to introduce the testimony of eyewitnesses whose description of the perpetrator more closely matched that of Mr. Jackson than that of Petitioner.

Petitioner argues that evidence of Mr. Jackson's involvement in the Southbrook Mall robbery and evidence of Mr. Jackson's romantic involvement with Ms. Jackson would have provided the information to the jury to establish that it was Mr. Jackson who committed the Walgreens robbery. At Petitioner's trial, counsel did attempt to elicit testimony that Mr. Jackson and Ms. Jackson were involved in a romantic relationship. Mr. Scholl specifically questioned witness William Upchurch as to his knowledge of their relationship. At trial, the following colloquy occurred:

Q: And who do you know No. 3 is?

A: Bobby Knight

Q: Is that his real name?

A: That's his nickname.

Q: Why do they call him Bobby Knight?

A: He's got a knot—knot on his forehead.

Q: What is his real name.

A: Mr. Jackson.

Q: And how did you know Mr. Jackson?

A: Growed up and went to school with him.

Q: And do you know if Mr. Jackson knew Ms. Jackson?

A: Yes.

Q: In what way?

A: They was dating.

Mr. Scholl also questioned Stephanie Williams about the relationship. Ms. Williams testified that she and Mr. Jackson grew up together and went to school together. She stated that Mr. Jackson and Ms. Jackson used to date.

At the post-conviction evidentiary hearing, Petitioner introduced the testimony of Barry Brown, Tonya Gentry, and Ms. Williams, all of whom testified that Ms. Jackson and Mr. Jackson were dating. Mr. Brown was a life-long friend of Petitioner. He testified that Ms. Jackson dated Mr. Jackson at or near the same time that she dated Petitioner. Ms. Gentry, another long-time friend of Petitioner, testified that Ms. Jackson dated Mr. Jackson during her marriage to Petitioner. Ms. Williams, Petitioner's cousin, testified that Ms. Jackson dated Mr. Jackson in 1997. She explained that this may have occurred prior to Ms. Jackson's marriage to Petitioner. She stated that Ms. Jackson and Mr. Jackson dated again after Petitioner was incarcerated.

Mr. Jackson testified that he never dated Ms. Jackson. He further stated that he knew neither Ms. Jackson nor Petitioner. Ms. Jackson testified that she never was involved in a romantic relationship with Mr. Jackson. She stated that she did not know him personally, but she may have seen him in her apartment complex. Ms. Jackson denied any suggestion that she and Mr. Jackson had conceived the story implicating Petitioner's involvement in the Walgreens robbery.

Ms. Jackson had testified on numerous occasions relating to Petitioner's involvement in the Walgreens robbery. Ms. Jackson's testimony, over the years, has been consistent. The witnesses at the post-conviction hearing who testified to a romantic relationship between Mr. Jackson and Ms. Jackson all had a direct personal relationship with Petitioner. Moreover, the testimony of these witnesses as to the timing of the alleged romantic relationship was vague and was somewhat inconsistent. For example, Tonya Gentry testified that Ms. Jackson dated Mr. Jackson after her marriage to Petitioner. Ms. Jackson and Petitioner did not marry until *after* the Walgreens robbery.

We acknowledge that trial counsel did present testimony that Mr. Jackson and Ms. Jackson were involved in a romantic relationship. However, the post-conviction court obviously accredited the testimony of Ms. Jackson and Mr. Jackson refuting any indicia that the two were involved romantically.

Questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are resolved by the post-conviction judge, not the appellate courts. *Momon*, 18 S.W.3d at 156; *Henley*, 960 S.W.2d at 579. Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990).

Petitioner also complains that trial counsel failed to call witnesses who would have given a description which was more similar to the physical description of Mr. Jackson than Petitioner. At the post-conviction hearing, Mr. Scholl testified that he was afraid to bring witnesses into the courtroom who might, upon seeing his client for the first time, identify him as one of the perpetrators. Mr. Scholl explained that their primary defense at trial was that Petitioner was not involved in the robbery. Mr. Scholl did not want to jeopardize that defense with witnesses who could potentially identify his client. The post-conviction court found that:

> As to the identification by other witnesses, this court cannot find counsel was ineffective in failing to call Ms. McDonald, Mr. Roth or others, given that counsel had reason to believe these individuals could possibly identify his client.

The lower court noted that Mr. Scholl testified that he asked Petitioner whether he should have had the surveillance video enhanced, explaining to Petitioner that to do so would likely reveal the identity of the shooter. The lower court continued:

> Scholl testified that Petitioner informed him that he should not have the video enhanced. Correctly or incorrectly, Scholl implied that he took Petitioner's statements to mean that he may be implicated in the robbery. Thus, Scholl proceeded to prepare his defense with that caveat in mind. Under the circumstances, this court can[]not fault counsel for this assumption and does not find that tactical decisions made based upon this assumption amounted to ineffective representation.

Mr. Scholl also testified at the post-conviction evidentiary hearing that, during Petitioner's federal trial, one of the defense witnesses, who had not made an identification previously, walked into the courtroom and identified Petitioner as the shooter. Mr. Scholl rationalized that the fewer people who were called to make an identification the better. He stated that the prosecution's witnesses provided somewhat inconsistent identifications, and these inconsistencies would be his focus. Mr. Scholl testified:

> So the more people that I put—that get in there and that say we've got this thin guy

> that pulled a gun out there and shot him or the more people that come in and say, oh, no, now I do see him. I recognize who he is. That's the shooter. The worse off we're going to be. So you know I made decisions not to call those people, and I stand by that decision. I think it was the right one.

Mr. Scholl further explained:

> I've got enough out there that I can put Mr. Jackson out there as a suspect, but I've got a good idea that Mr. Jackson's not—potentially not the one that shot him, may have, may not have. I have enough to indicate that he's a suspect, but if I carry certain things too far and rule him completely out as a suspect, I would lose that whole defense altogether.

The federal courts have said the following about trial counsel's decision to call witnesses:

> A trial counsel's "decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial." Because of this inherently tactical nature, the decision not to call a particular witness generally should not be disturbed." *See United States v. DeJesus*, 57 Fed. Appx. 474, 478 (2d Cir. 2003) (quoting *United States v. Smith*, 198 F.3d 377, 386 (2d Cir. 1999)) (citation omitted).

Finally, Petitioner complains that counsel failed to enter into evidence the circumstances of Mr. Jackson's attempted robbery of the Loomis Fargo guard at the Southbrook Mall. At the conclusion of the post-conviction hearing, the lower court determined that the admissibility of such proof was questionable, finding that "there was no basis for questioning him regarding the robbery he was involved in at the Southbrook Mall." On appeal, Petitioner asserts that evidence that someone other than the accused committed the crime is relevant. In this regard, he asserts that evidence of a third party's bad acts are admissible to support the defendant's theory that a third party committed the crime in question.

Criminal defendants have a constitutional right, implicit in the Sixth Amendment, to present a defense, and this right is "a fundamental element of due process of law." *State v. Brown*, 29 S.W.3d 427, 432 (Tenn. 2000) (quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967)). In this regard, an accused is entitled to present evidence implicating others in the crime of which he is charged. *See State v. Powers*, 101 S.W.3d 383, 394 (Tenn. 2003) (citing *Sawyers v. State*, 83 Tenn. (15 Lea) 694, 695 (1885)). At the time of Petitioner's trial, the intermediate appellate courts of this state applied a "direct connection" test. *See Powers*, 101 S.W.3d at 395, n. 7 (citing *State v. Harvey D'Hati Moore,* No. 03C01–9704–CR–00131, 1998 WL 156908 (Tenn. Crim. App., at Knoxville, Mar. 18, 1998); *State v.*

Mark Peck, No. 958, 1991 WL 154534 (Tenn. Crim. App., at Knoxville, Aug. 15, 1991), *perm. app. denied*, (Tenn. Jan. 27, 1992)). Under the direct connection test, "the evidence must directly connect the third party with the substance of the crime and must clearly point out someone besides the accused as the guilty person in order to be admissible." *Id*; *Powers*, 101 S.W.3d at 395. In 2003, our supreme court rejected the "direct connection test," holding that "such a standard imposes too high a threshold for the admissibility of evidence concerning third-party culpability." *Id.* Our supreme court determined that "the Rules of Evidence are adequate to determine whether such evidence is admissible." Thus, under the current law, a third party's previous "crimes, wrongs, or bad acts" may be admissible if relevant. *State v. Stevens*, 78 S.W.3d 817, 837 (Tenn. 2002).

Despite the subsequent ruling by the supreme court, at the time of Petitioner's trial, the law guiding the admissibility of the acts of a third party was the "direct connection test." The "direct connection test" has been set out as follows:

> The evidence to establish that someone other than the defendant is the guilty party must be such evidence as would be relevant on the trial of the third party; and the evidence offered by the accused as to the commission of the crime by a third party must be limited to such facts as are inconsistent with the

> defendant's guilt, and to such facts as raise a reasonable inference or presumption as to the defendant's innocence. *Hensley v. State,* 28 Tenn. 243 (1848). To be admissible, the evidence must be such proof as directly connects the third party with the substance of the crime, and tends to clearly point out that someone besides the accused as the guilty person. Evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. 22A C.J.S. Criminal Law § 729 (1989).

State v. Mark Peck, No. 958, 1991 WL 154534, *7 (Tenn. Crim. App., at Knoxville, Aug. 15, 1991), *perm. app. denied*, (Tenn. Jan. 27, 1992).

The post-conviction court applied the law at the time of the trial and determined that no evidence directly implicated Mr. Jackson in the Walgreens robbery. We agree with the State's assertion that the fact that Mr. Jackson attempted an armored car robbery at the Southbrook Mall raises nothing more than "a conjectural inference" that he might be suspected of the earlier Walgreens crime. Clearly, applying the law at the time of the offense, the evidence of Mr. Jackson's involvement in the Southbrook Mall robbery would not have been admissible at trial. He has failed to establish that counsel was deficient in

> his performance. Petitioner is not entitled to relief on this claim.

Thomas, 2011 WL 675936, at *33-36.

In response to the motion for summary judgment, Thomas asserts that Scholl's primary defense was that Bond committed the robbery with another individual or Bobby Jackson. (ECF No. 75 at 27.) Thomas contends that despite significant evidence supporting this theory, Scholl failed to present any evidence supporting it. (*Id.*) Thomas asserts that the Tennessee Court of Criminal Appeals' decision was contrary to and an unreasonable application of *Strickland*.

Thomas argues that eyewitnesses described the getaway driver as a male black, heavyset and broad-shouldered, in his '30s, which met Bobby Jackson's build at six feet tall and 240 lbs. (ECF No. 1 at 37-38.) Thomas asserts that Robert Fisher identified Bobby Jackson in photo spreads as the getaway driver on two separate occasions. (*Id.* at 38.) Thomas points out that on July 21, 1997, Jackson and Terrance Lawrence attempted to rob a Loomis Fargo guard at the Southbrook Mall before fleeing the scene in a red vehicle, and Jackson testified that it was Jackson's idea. (*Id.*) Testimony at the post-conviction hearing revealed that Jackson had pled guilty to the Southbrook Mall robbery. *Thomas*, 2011 WL 675936, at *11. Thomas also asserts that another inmate, Steven Briscoe, claims that Jackson admitted to him that the Southbrook Mall robbery was not the first time Jackson had robbed an armored car. (*Id.*) Thomas contends, that based on the descriptions of Imogene Walls, Gail McDonald, and Bobbie Fleming, and the fingerprints on the passenger door of the getaway vehicle, Bond was

the person who shot and robbed Day. *(Id.* at 39-40, 89; *see* ECF No. 1-11.)

Thomas relies on the Bond letter written in 2002, stating that Bond committed the robbery with Bobby Jackson. (ECF No. 1 at 4, 44-46.) That letter is of questionable authenticity and reliability, *see* supra pp. 54-57.

Thomas also relies on assertions that Angela Jackson's testimony was a lie. (*Id.* at 41-44.) Angela Jackson's credibility was thoroughly tested in the trial court.

Thomas is 5' 9", 155 lbs. according to the FBI "prosecutive" report. (ECF No. 1-12 at PageID 186.) McDonald described a male, black, 20-25 years old, 5'6" to 5'7", and 130-150 lbs. with blue baseball cap, blue and white striped shirt, and light jeans. (ECF No. 1-11 at PageID 180-181.) Walls described a male, black, slim build, age 20. (*Id.* at PageID 182.) Fleming described a black male, medium height and build, 25-30 years old with blue baseball cap, tan shirt with horizontal red and blue stripes, and blue pants. (*Id.* at PageID 183.) Given these descriptions that could reasonably be interpreted as identifying Thomas, it seems reasonable that counsel would be cautious about calling these eyewitnesses in an attempt to prove that someone other than Thomas was the shooter. Thomas had been identified in the surveillance video and as wearing a baseball cap and striped shirt by Jackson and other witnesses. (*See* ECF No. 14-12 at PageID 6036-6037 (Scholl testified, "everybody knows one thing in the trial that the guy who shot Mr. Day in the back of the head was wearing a baseball hat. So now I've got a person that can describe Mr. Bond as wearing a

baseball hat, and I've got a video showing the shooter is wearing a baseball hat."); *see also id.* at PageID 6047-6048.) Scholl testified about Fleming and McDonald,

> I did not call [Fleming] to testify, and I think I remember why now. We were concerned that the ladies got a good look at the perpetrator, and to be honest with you, I was concerned they'd come in and ID'd him, stand up in court and say that's the guy who shot – I see him right there behind you.

(ECF No. 14-12 at PageID 6057.) Scholl stated that he "came to a conscious decision myself as to whether or not to call [each witness] and would have had – looking at my file can reflect as to why I did that." (*Id.* at PageID 6059; *see also* PageID 6079.) Scholl testified

> You know I did not want to run the risk in this case of having Mr. Thomas identified. We had gone so far as to even get a video person that was going to fine tune the video so we could see who the perpetrator was and after meeting with Mr. Thomas several times, we all felt that that would not be a good idea.

(*Id.* at PageID 6079-6080.)

Scholl explained to the court the dilemma that he had with the additional witness identifications:

> Judge, I do want to clarify something. In talking about these people that give descriptions, we're in a situation in this trial where I've got my client that's already been convicted of this robbery over in federal court.

> There are good indications throughout my conversations and everywhere else that he is -- very well could be involved in this robbery as the shooter. The fewer people that I can get in court to identify him the better. The state's witness list of who they were going to provide did not really put forth a person that could go out there and really identify that this is Andrew Thomas.
>
> So the more people that I put -- that get in there and that say we've got this thin guy that pulled a gun out there and shot him or the more people that come in and say, oh, no, now I do see him. I recognize who he is. That's the shooter. The worse off we're going to be.
>
> So you know I made decisions not to call those people, and I stand by that decision. I think it was the right one.
>
> . . .
>
> So this is not a case where I'm sitting out here flapping in the wind you know. This is a case where I'm trying to minimize what's going to come in to this trial because the less I have coming in that can point the finger to him, the more I have the ability to argue things away.

(*Id.* at PageID 6081-6083.)

Scholl also pointed that out that in addition to the testimony presented,

> I believe one of the Fishers (brothers) who didn't identify Thomas walked by the courtroom, and Mr. Thomas is sitting in the courtroom, and he

> looks through the window in federal court, and he goes there's the guy right there that I saw shoot the armored car driver.
>
> So we were aware of that . . . .

(*Id.* at PageID 6084.)

Scholl testified that it was his understanding that Bobby Jackson was alleged to have committed a similar crime at Southbrook Mall. (ECF No. 14-12 at PageID 6067.) Scholl recalled that there was a robbery with some similarities and a red car. (*Id.* at PageID 6068.) Scholl did not introduce evidence at the trial that Bobby Jackson held up a Loomis Armored car guard because Scholl made the determination that that type of evidence would not have been admissible. (*Id.*) Scholl testified:

> All I can tell you answering off the top of my head at this point is that the scenario surrounding Bobby Jackson was looked into. Whether it was Bobby Jackson had been convicted at that point or what the situation was, I made a determination that legally I could not get into that.
>
> If he hadn't been convicted, you can't introduce that. That's just – it's plain and simple. I'm not going to be able to get into non-convicted arrests. If he had been convicted, then it would have been near impossible in the same scenario because you're almost looking at a reverse MO situation, and then I'm going to have to convince a judge that every armored car robbery in Memphis is somehow relevant to this particular case.

> I just don't think either way you go the evidence can get in, but I do -- I can say this. We looked at that scenario. I knew about that scenario, and I made a decision that I did not think that it would be in Andrew's best interest or that we could either get it in legally and so the determination was made not to -- trial strategy was not to do that.

(*Id.* at PageID 6070-6071.)

Scholl's performance was reasonable in not calling other eyewitnesses because of a real concern that Thomas would be identified. As the Tennessee Court of Criminal Appeals has stated, introducing evidence of a third party's involvement in the crime required proof directly connecting the third party with the substance of the crime. *Thomas*, 2011 WL 675936, at *36. Thomas had no more than "a conjectural inference" that Bobby Jackson was involved in the Walgreens crime based on Jackson's then alleged involvement in the Southbrook Mall armored car robbery. *Id.* Counsel's performance in not presenting evidence related to Bobby Jackson other than the fact that he had been identified by an eyewitness was reasonable. The Tennessee Court of Criminal Appeal's decision was not contrary to or an unreasonable application of clearly established Supreme Court precedent and was based on a reasonable determination of facts.

8. Cumulative Effect

Thomas argues that the cumulative effect of counsel's errors constituted ineffective assistance of counsel. (ECF No. 75 at 28.) Thomas asserts that the mistakes that should have been recognized by the state

courts, viewed in their totality, altered the entire evidentiary picture and the outcome of the trial. (*Id.*)

Respondent argues that this claim is procedurally defaulted for failure to present it to the Tennessee Court of Criminal Appeals. (ECF No. 15 at 39; ECF No. 63-1 at 41.) Thomas asserts that he has exhausted this claim by raising it before the Tennessee Court of Criminal Appeals as part of his appeal of the denial of post-conviction relief and as part of the request for permission to appeal the denial of post-conviction relief. (ECF No. 24 at 21; *see* ECF No. 14-16 at PageID 6374-6378; *see also* ECF No. 14-27 at PageID 7216-7220.) The Tennessee Court of Criminal Appeals addressed this claim in its opinion on the denial of post-conviction relief. *Thomas*, 2011 WL 675936, at *36. Summary judgment based on procedural default is DENIED.

The Tennessee Court of Criminal Appeals stated:

> **6. Trial counsel's cumulative errors amounted to ineffective representation.**
>
> Petitioner asserts that his attorneys' performance was constitutionally deficient based upon the cumulative effect of the errors. We conclude Petitioner's attorneys did not afford him ineffective assistance of counsel based on any single alleged error or the cumulative effect thereof. Petitioner is not entitled to relief on this issue.

Id.

As this Court has not found that counsel's performance was ineffective on any of the asserted claims and has further found that the Tennessee Court

of Criminal Appeals' decision as it relates to Thomas's ineffective assistance claims was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," Thomas has not demonstrated that cumulative error requires habeas relief. *See* Richter, 131 S. Ct. at 786–787.

Thomas' ineffective assistance of counsel claims in Claim 4 are procedurally defaulted or without merit and DENIED.

E. Jury Instruction on Lesser Included Offenses (Claim 5)

Thomas alleges that the jury should have been instructed on lesser included offenses. (ECF No. 1 at 93.) He asserts that the state court's decision was contrary to, and involved and unreasonable application of, clearly established federal law as determined by the Supreme Court, and resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented. (*Id.* at 93-94.) Thomas relies on *Beck v. Alabama*, 447 U.S. 625, 638 (1980), to assert that a jury must be instructed on lesser included offenses when there is evidence to support the instruction. (*Id.* at 94.) He asserts that, at trial, the court only instructed the jury on felony murder and not the lesser included offenses of second degree murder, reckless homicide, or criminally negligent homicide. (*Id.*)

Thomas argues that, on direct appeal, the Tennessee courts correctly found and conceded that the failure to instruct the jury on lesser included offenses constituted constitutional error. (*Id.*) *See Thomas*, 158

S.W.3d at 380; *Thomas*, 2004 WL 370297, at *51-52. The state courts found that the failure to instruct was harmless. (*Id.)* Thomas asserts that the state courts' decision was contrary to and an unreasonable application of clearly established Supreme Court precedent and that the failure to give the instruction had a substantial and injurious effect or influence in determining the jury's verdict. (*Id.* at 94-95.)

Thomas argues that the Tennessee courts incorrectly limited their application of the harmless error standard to consideration of the prosecution's and defense's trial theories, specifically relying on Thomas's innocence defense and the purported strength of the evidence against Thomas. (*Id.* at 95.) He contends that the state courts blatantly ignored the substantial and injurious effect that the failure to provide lesser included offenses had on the jury's decision. (*Id.)* Thomas asserts that a reasonable jury could have found him guilty of a lesser included offense. (*Id.)* He argues that the Tennessee Supreme Court specifically found that "[t]here was evidence that reasonable minds could accept as to these lesser included offenses, and the evidence was legally sufficient to support a guilty verdict on these lesser included offenses." (*Id.*) *See Thomas*, 158 S.W.3d at 380. Thomas notes that the jury did not find that he had the intent to kill Day, but the verdict read: "We, the jury, find the defendants, Anthony M. Bond and Andrew L. Thomas guilty of unlawfully and with the intent to commit a robbery killing James Day during an attempt to perpetrate robbery as charged in the indictment." (*Id.*) Thomas further asserts that, even if the jury had been convinced that Thomas was involved, it was not bound to accept the prosecution's theory that Thomas was the

shooter. (*Id.* at 96.) Thomas asserts that there was evidence that Bond was the shooter because his fingerprints were found on the passenger side door and eyewitness descriptions of the shooter matched the clothes Bond admitted to wearing that day. (*Id.*)

Respondent argues that this claim fails because it was presented under a state law theory in state court and also because the Tennessee Supreme Court did not violate clearly established federal law or act unreasonably in rejecting the claims as presented. (ECF No. 63-1 at 41.) Respondent contends that the opportunity to present the claim under a federal theory is now foreclosed by the Tennessee one-year limitations period on post-conviction claims and the one petition rule. (*Id.* at 42.) Respondent asserts that the claims should be dismissed as procedurally defaulted. (*Id.*)

Thomas asserts that under *State v. Burns*, 6.S.W.3d 453, 466-467 (Tenn. 1999), the trial court was obligated to charge the jury with second degree murder, reckless homicide, and criminally negligent homicide, all of which require the same mental state as felony murder. (ECF No. 75 at 29.) Thomas asserts that the precedent he cited in the state court for the proposition that lesser-included offense instructions must be given to the jury is predicated on *Beck,* as well as Tennessee case law. (*Id.* at 30; *see* ECF No. 24 at 23.) Thomas contends that because his claim relied on Tennessee case law that directly considered federal case law and Constitutional analysis, it was fairly presented to the state courts. (ECF No. 75 at 30.) He asserts that his claim is identical under Tennessee law and federal law. (*Id.* at 31.)

Respondent argues that Thomas specifically articulated that his claim was based on state law theories. (ECF No. 76 at 6.) Respondent argues that the two state cases Thomas cited decided issues under state law. (*Id.*) He contends that "a more thorough presentation of constitutional claims that at least included the words 'due process' and secondary citations to federal cases has previously been found insufficient to exhaust federal theories." (*Id.*)

To determine whether a petitioner has fairly presented a federal constitutional claim to the state courts, a habeas court may consider whether: (1) the petitioner phrased the federal claim in terms of the pertinent constitutional law or in terms sufficiently particular to allege a denial of the specific constitutional right in question; (2) the petitioner relied upon federal cases employing the constitutional analysis in question; (3) the petitioner relied upon state cases employing the federal constitutional analysis in question; or (4) the petitioner alleged facts well within the mainstream of the pertinent constitutional law. *See Hicks v. Straub*, 377 F.3d 538, 553 (6th Cir. 2004) (citing *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000)). General allegations of the denial of rights to a "fair trial" and "due process" do not fairly present constitutional claims. *McMeans*, 228 F.3d at 681.

In Thomas's brief on direct appeal, he relied on *Burns* and *State v. Ely*, 48 S.W. 3d 710, 721-722 (Tenn. 2002). (ECF No. 13-19 at PageID 3894.) Thomas contends that these state court decisions rely on *Beck,* which noted that the unavailability of a lesser included offense instruction in capital cases enhances the risk of an unwarranted conviction. (ECF No. 75 at 30.) *See*

Beck, 447 U.S. at 638. The Tennessee Supreme Court in *Ely*, specifically addresses the fact that the right to instruction on lesser-included offenses should be deemed a constitutional right under certain circumstances and that the right has "both a statutory and a constitutional basis." *Ely*, 48 S.W. 3d at 725-727. Because Thomas has relied on state law that employs a constitutional analysis, the claim is fairly presented and entitled to merits review. Summary judgment based on procedural default is DENIED.

The Tennessee Supreme Court opined:

> ***Lesser Included Offenses***
>
> We next address the defendant's argument that the trial court committed reversible error in failing to instruct the jury on the lesser included offenses of felony murder, i.e., second degree murder, reckless homicide, and criminally negligent homicide. The State concedes that the trial court erred in failing to instruct the jury on these lesser included offenses, but it asserts that the trial court's error was harmless beyond a reasonable doubt.
>
> An instruction on a lesser included offense must be given if the trial court, viewing the evidence most favorably to the existence of the lesser included offense, concludes (a) that "evidence exists that reasonable minds could accept as to the lesser included offense," and (b) that the evidence "is legally sufficient to support a conviction for the lesser-included offense." *State v. Burns*, 6 S.W.3d 453, 469 (Tenn. 1999). The failure to instruct the jury on

lesser included offenses requires a reversal for a new trial unless a reviewing court determines that the error was harmless beyond a reasonable doubt. *State v. Ely*, 48 S.W.3d 710, 727 (Tenn. 2001). In making this determination, the reviewing court must "conduct a thorough examination of the record, including the evidence presented at trial, the defendant's theory of defense, and the verdict returned by the jury." *State v. Allen*, 69 S.W.3d 181, 191 (Tenn. 2002).

This Court has previously held that second degree murder, reckless homicide, and criminally negligent homicide are lesser included offenses of felony murder. *Ely*, 48 S.W.3d at 721. We explained:

> After comparing the respective elements of felony murder, second degree murder, reckless homicide, and criminally negligent homicide, it appears that the elements of the lesser offenses are a subset of the elements of the greater and otherwise differ only in the mental state required. We hold that because the mental states required for the lesser offenses differ only in the level of culpability attached to each in terms of seriousness and punishment, the offenses of second degree murder, reckless homicide, and criminally negligent homicide are lesser-included offenses of

> felony murder under part (b) of the *Burns* test.

Id. at 721–22.

We conclude, and the State concedes, that the record in this case demonstrates that the trial court erred in failing to instruct the jury on second degree murder, reckless homicide, and criminally negligent homicide. There was evidence that reasonable minds could accept as to these lesser included offenses, and the evidence was legally sufficient to support a guilty verdict on these lesser included offenses. *See id.* at 724–25 (holding that the trial court erred in failing to instruct on the lesser included offenses to felony murder); *see also Burns*, 6 S.W.3d at 467.

We further conclude, however, that the trial court's failure to instruct on these lesser included offenses was harmless beyond a reasonable doubt. The evidence at trial revealed that the defendant shot the victim, an armored truck guard, in the back of the head and stole the victim's Walgreens money deposit bag. The defendant was identified as one of two men fleeing from the scene in a white car. The defendant's criminal conduct was filmed by a surveillance camera, and the videotape of the crime was played for the jury. The defendant's ex-wife, Angela Jackson, identified the defendant from a still photograph made from the videotape. The defendant later divided the contents of the money deposit bag with his co-defendant, Anthony Bond, and he told

> Jackson that he had shot the guard. The testimony established that the victim suffered extensive injuries and later died as a result of these injuries. In sum, the evidence overwhelmingly established the elements of felony murder, i.e., the defendant's killing of another in the perpetration of a robbery. *See* Tenn. Code Ann. § 39–13–202(b) (2003).
>
> Moreover, the defendant's theory of defense was two-fold: (1) that he was not involved in the robbery, and (2) that the gunshot wound did not cause the victim's death. *See Allen*, 69 S.W.3d at 191 (reviewing court should analyze the defendant's theory of defense). The defendant did not concede that he was involved in the crime, and he did not argue that he was guilty of a lesser included offense or attempt to establish that he was guilty of a lesser included offense. *Compare id.* at 191–92 (theory of defense, in part, was that the defendant lacked the required mental state for the offense). In sum, we agree with the Court of Criminal Appeals' conclusion that the jury could not reasonably have concluded that the defendant was guilty of anything other than a killing in the perpetration of a robbery, i.e., felony murder.
>
> Accordingly, we hold that the trial court erred in failing to instruct the jury on the lesser included offenses of felony murder but that the error was harmless beyond a reasonable doubt.

Thomas, 158 S.W.3d at 379-380 (footnotes omitted).

Respondent argues that the state court's decision is neither contrary to nor an unreasonable application of clearly established federal law. (ECF No. 63-1 at 43.) He asserts that the court's decision is entitled to "additional deference" because the burden on a petitioner with regard to jury instructions is particularly heavy. (*Id.*) Respondent cites *Wood v. Marshall*, 709 F.2d 548, 551 (6th Cir. 1986), for the proposition that a petitioner must show that "the improper jury instructions . . . have infected the accused's trial to such a degree as to constitute a clear violation of due process" and that the instruction must be "undesirable, erroneous, or universally condemned." (*Id.*) Respondent argues that Thomas has not met this burden. (*Id.* at 44.)

Thomas asserts that Respondent is not entitled to summary judgment because the appellate courts' finding that the failure to instruct on these offenses is harmless and the trial court's underlying decision not to instruct the jury on the lesser-included offense were contrary to or an unreasonable application of federal law and had a substantial and injurious effect on the verdict. (*Id.* at 32.)

The Supreme Court set forth the standard habeas courts must use when evaluating claims of constitutional errors in jury instructions:

> The only question for us is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. . . . It is well established that the instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial

> record. . . . In addition, in reviewing an ambiguous instruction such as the one at issue here, we inquire whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. . . . And we also bear in mind our previous admonition that we have defined the category of infractions that violate fundamental fairness very narrowly.

Estelle v. McGuire, 502 U.S. 62, 72-73 (1991) (citations and internal quotation marks omitted); *see also Coe v. Bell*, 161 F.3d 320, 329 (6th Cir. 1998) ("To warrant habeas relief, the jury instructions must have been so infirm that they rendered the entire trial fundamentally unfair. An ambiguous, potentially erroneous instruction violates the Constitution only if there is a reasonable likelihood that the jury has applied the instruction erroneously.").

The burden on a habeas petitioner who challenges an erroneous jury instruction "is even greater than that required to demonstrate plain error on direct appeal." *Scott v. Mitchell*, 209 F.3d 854, 882 (6th Cir. 2000). "Allegations of 'trial error' raised in challenges to jury instructions are reviewed for whether they had a substantial and injurious effect or influence on the verdict, and are subject to harmless-error analysis." *Id.* (footnote omitted); *see also Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (the harmless error standard applies to "constitutional error of the trial type"); *Coe*, 161 F.3d at 335 (applying the *Brecht* harmless-error standard of a substantial and injurious effect on the verdict to determine whether habeas relief was required for a jury instruction).

Trial courts are not constitutionally required to instruct juries on offenses that are not lesser included offenses of the crime charged under state law. *Hopkins v. Reeves*, 524 U.S. 88, 94-96 (1998). When a lesser included offense does exist under state law in a capital case, an instruction on the lesser included offense is required under the Eighth and Fourteenth Amendments only when the evidence would warrant a finding of guilt on the lesser included offense, and an acquittal on the greater offense. *Hopper v. Evans*, 456 U.S. 605, 611-12 (1982); *Beck v. Alabama*, 447 U.S. 625, 627 (1980); *Bowling v. Parker*, 344 F.3d 487, 500 (6th Cir. 2003); *Campbell v. Coyle*, 260 F.3d 531, 540 (6th Cir. 2001). A lesser included offense instruction is not required when the evidence does not support it. *Goodwin v. Johnson*, 632 F.3d 301, 317-18 (6th Cir. 2011); *Bowling*, 344 F.3d at 500; *Campbell*, 260 F.3d at 541. So long as the state courts applied *Beck* and its progeny, the inquiry becomes whether the state court's denial of a lesser included instruction was objectively reasonable under 28 U.S.C. § 2254(d)(1). *Campbell*, 260 F.3d at 540.

Thomas's argument ignores the crucial part of the analysis related to the probability that the jury would choose the lesser offense based on the evidence rather the greater. Although the evidence might have been sufficient to support one of the lesser included offenses, the analysis goes further. *Hopper* states, "[t]he federal rule is that a lesser included offense instruction should be given 'if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater.'" *Hopper,* 456 U.S. at 612 (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973)); *see Palmer v. Bagley*, 330 F. App'x 92, 97-100

(6th Cir. 2009) (denying habeas relief for failure to charge involuntary manslaughter where the victims were killed execution-style); *see Abdus-Samad v. Bell,* 420 F.3d 614, 627-629 (6th Cir. 2005) (denying habeas relief for failure to charge voluntary and involuntary manslaughter); *see also Smith v. Bradshaw*, 591 F.3d 517, 523-527 (6th Cir. 2010) (denying habeas relief for failure to charge involuntary manslaughter related to the violent rape and murder of a six-month old baby).

The Tennessee Court of Criminal Appeals specifically related the evidence at trial to the lesser included offenses and explained why the instruction was not warranted:

> We turn now to whether the evidence supported a jury instruction on any of the lesser-included offenses of felony murder with respect to Defendant Thomas. Second degree murder is the "knowing killing of another." Tenn. Code Ann. § 39–13–210(a)(1). A defendant kills another person knowingly when he engages in conduct that he is aware is reasonably certain to cause death. *See id*. § 39–11–302(b). Deliberately shooting someone in the back of the head satisfies the definition of knowing conduct. In this case, a surveillance videotape from a store security camera showed Defendant Thomas approach the armored car guard from behind, shoot him in the back of the head, take the money bag, and flee without making any demand for money or engaging in any kind of struggle. James Day survived the initial shooting, but was paralyzed as a result thereof and required constant care from his wife,

including regular catheterization due to the neurogenic bladder resulting from the gunshot. Both Dr. Smith and Dr. Gardner testified that the sepsis causing the victim's death was a direct result of the gunshot wound inflicted by Defendant Thomas on April 21, 1997. This evidence supported an instruction on second degree murder as to Defendant Thomas.

The "next" lesser-included offense of felony murder is reckless homicide, which is the "reckless killing of another." *Id.* § 39–13–215(a). A reckless killing is committed when the defendant engages in conduct which he is aware creates a substantial and unjustifiable risk of death to the victim, but consciously disregards that risk. *See id*. § 39–11–302(c). Deliberately shooting someone in the back of the head from close range certainly creates a substantial and unjustifiable risk of death, and the jury was therefore also entitled to an instruction on reckless homicide as to Defendant Thomas. Similarly, the evidence justified an instruction on negligent homicide, which requires that the defendant engaged in criminally negligent conduct resulting in death of the victim. *See id*. § 39–13–212(a). Criminal negligence occurs when the defendant engages in conduct that creates a substantial and unjustifiable risk that the victim will be killed, but fails to perceive the risk. Again, the evidence in this case supported an instruction on this lesser-included offense as to Defendant Thomas. Accordingly, the trial court erred in refusing to charge the jury on these lesser-included offenses of felony murder.

Facilitation of felony murder is a lesser-included offense under part (c) of the *Burns* test. An instruction on facilitation of felony murder is required where the proof demonstrates that (1) a killing was committed in the perpetration of one of the felonies enumerated in the statute defining felony murder, (2) the defendant knew that another person intended to commit the underlying felony, but he did not have the intent to promote or assist the commission of the offense or to benefit in the proceeds or results of the offense, (3) the defendant furnished substantial assistance to that person in the commission of the felony, and (4) the defendant furnished such assistance knowingly. *See Ely,* 48 S.W.3d at 719–20. The proof in this case demonstrated that Defendant Thomas approached the victim from behind, shot him in the back of the head, grabbed the money carried by the victim, and ran to the getaway car. Thomas' theory of defense was twofold: (1) he was not involved in the robbery and (2) an intervening factor, and not the gunshot wound, was the cause of the victim's death. Thomas did not defend on the ground that he simply facilitated someone else in committing this crime. Moreover, there is no proof in the record to support a jury instruction on facilitation of felony murder with respect to Thomas. Accordingly, the trial court committed no error in refusing to charge the jury on this lesser-included offense.

We must now determine whether the trial court's failure to instruct the jury on the

lesser-included offenses of second degree murder, reckless homicide and criminally negligent homicide was reversible error as to Defendant Thomas. In *State v. Williams*, 977 S.W.2d 101, 105 (Tenn. 1998), our supreme court held that the erroneous failure to instruct on lesser-included offenses may be harmless under certain circumstances. The supreme court reexamined the standard to be applied when assessing whether a trial court's failure to provide lesser-included offense instructions constituted harmless error in *Ely*, 48 S.W.3d at 710. In *Ely*, our supreme court held that "when determining whether an erroneous failure to instruct on a lesser-included offense requires reversal, . . . the proper inquiry for an appellate court is whether the error is harmless beyond a reasonable doubt." *Id*. at 727. In conducting this inquiry, "the reviewing court must determine whether a reasonable jury would have convicted the defendant of the lesser-included offense instead of the charged offense." *Richmond*, 90 S.W.3d at 662. That is, "the reviewing court must determine whether it appears beyond a reasonable doubt that the trial court's failure to instruct on the lesser-included offense did not affect the outcome of the trial." *Id*. "In making this determination, a reviewing court should conduct a thorough examination of the record, including the evidence presented at trial, the defendant's theory of defense, and the verdict returned by the jury." *Allen,* 69 S.W.3d at 191.

In the present case, the proof overwhelmingly established Defendant Thomas' participation in

the robbery of James Day and his sharing in the proceeds thereof. The proof overwhelmingly established that Defendant Thomas employed a firearm to execute the robbery. It is uncontested that during the robbery, James Day was shot in the back of the head with the weapon. The victim, James Day, died over two years after the incident as a result of sepsis caused by the need for catheterization due to a neurogenic bladder which was the result of the gunshot. Defendant Thomas defended on two grounds: (1) he was not involved in the robbery at all and (2) an intervening factor, and not the gunshot wound, was the cause of the victim's death. Under the "it wasn't me" theory, the Defendant was guilty of no offense and the charging of lesser-included offenses would have had no impact on the verdict. Likewise, under the theory of the intervening factor causing James Day's death, no homicide whatsoever occurred. The jury found and the evidence overwhelmingly supports its finding that Defendant Thomas is guilty of first degree murder committed during the perpetration of a robbery. James Day was robbed and shot and he ultimately died as a result of that incident. Although lesser offenses as to other forms of homicide exist and, if found, can be supported by the evidence, the jury in this case would not have reasonably concluded that anything less than a murder in the perpetration of a robbery occurred. We therefore conclude that the trial court's failure to instruct on the lesser included offenses did not affect the outcome of the trial. Thus, any error as to the instructions on second degree murder,

> criminally negligent homicide, and reckless homicide is harmless beyond a reasonable doubt and Defendant Thomas is entitled to no relief on this ground.

Thomas, 2004 WL 370297, at *51-52 (footnote omitted).

Thomas's mode of executing this robbery was to hide, approach the guard Day from behind, and shoot him in the back of the head to disable him and take the money. Thomas was the primary actor in executing the robbery and the shooting; he did not merely facilitate the robbery. Thomas's actions, although reckless, were deliberate. The evidence does not support a conviction for criminally negligent homicide because Thomas perceived the risk of shooting someone in the back of the head. The evidence does not support a conclusion that a reasonable juror would acquit Thomas of felony murder, in lieu of a conviction for one of the lesser included offenses.

The Tennessee courts applied the legal principles from the relevant Supreme Court precedent in *Beck* and its progeny. The state courts' decision was not contrary to or an unreasonable application of clearly established Supreme Court precedent and was based on a reasonable determination of facts. Summary judgment is granted on the merits of the claim. Claim 5 is DENIED.

F. Trial Court Error Related to "Greed" and "Evil" (Claim 6)

The prosecutor's opening statement reads:

> You can't hide from **greed** and **evil**. James Day learned that lesson on April 21st, 1997,

because, see, on that day, he was employed by Loomis Fargo here in Memphis, Tennessee. He had a wife by the name of Faye Day, three children.

He reported to work that morning at Loomis Fargo to receive his assignment for the day. His assignment would involve riding in an armored truck, wearing a bullet-proof vest, carrying a gun, and picking up money deposits from businesses all over Shelby County. But [de]spite the armored truck, the policy that you always travel with a partner, the policy that you wear a bullet-proof vest, and the policy that you carry a gun, James Day learned you can't hide from **greed** and **evil**.

He walked into the path of **greed** and **evil** the afternoon of April 21st, 1997 at the Walgreens on Summer where **greed** and **evil** took the form of the defendants before you this afternoon. Unbeknownst to James Day and all of Loomis Fargo's protective measures that they take -- the armored truck, the bullet-proof vest, and the gun -- these defendants had a plan a big plan. And they'd been talking about it for some time thinking about it -- how they were going to do it -- how they were going to hit one of those trucks -- how they were going to get the money back.

And on April 21st, 1997, when James Day walked into the Walgreens on Summer and picked up the deposit of over $20,000 in the form of cash and checks and food stamps, he came out of the store wearing his bullet-proof vest,

carrying his gun on his belt, and headed for that armored truck where he would be let in by the driver. He didn't know that **greed** and **evil** were lurking in the shadows -- were waiting around the corner for him to come out with their quick money.

He remembers the lights going out, and he remembers hearing nothing but the air-conditioning units of the businesses around the Walgreens. He'd been shot in the back of the head. The money bag was taken, and he was left for dead at the front door of the Walgreens on Summer in Memphis, Tennessee.

Greed and **evil** got the bag of money, got back into the stolen white car they had driven to that location, sped out of the parking lot to a red car that had been left on Novarese. The red car belonged to the girlfriend of the defendant, Andrew Thomas. They switched the cars. They left the stolen white car, got into the red car, and got out of there while James Day was lying on the concrete at the front door of the Walgreens, and the employees of Walgreens were scrambling calling 911 trying to figure out what to do.

In two different parts of the city on that day; two very different things took place that afternoon. **Greed** and **evil** went home to Andrew Thomas' apartment, divided up the money, celebrated, carrying out their plan.

James Day was taken to the Regional Medical Center with a bullet in his head. His

wife met him there. And the long, slow, painful death of James Day began.

Fortunately or unfortunately, he lived for two and a half years after that day. They waited, initially, at The Med to see what they were going to do -- "Should we do surgery -- should we wait?" And you will hear all of this proof from his widow, Faye Day, and from the doctors in this case that will tell you about his condition that day and the days that followed until he finally died from complications from the gunshot wound to the back of his head that he received on April 21st, 1997, when he crossed the path of these defendants because he was carrying the bag full of money they had to have -- their ticket to Paradise.

And while he was at The Med with his wife and the team of doctors surrounding him, this defendant did what anybody does when they're happy with the way things have gone - - when they're pleased with how their plan has been executed. They bought cars, gold teeth, jewelry, new tennis shoes, new clothes, went out to restaurants, rented hotel rooms. They had a big time because the plan had been carried out beautifully.

"We shot him in the back of the head. He won't be able to ID us." You will hear from all of the witnesses in this case who can identify the defendants and tell you about the plan -- the before, the during, and the after. And just as, on April 21st, 1997, these two defendants set into motion the course of events that came full circle

> when James Day died on October 2nd, 1999. Just as this courtroom is in the shape of a circle, the time has come for these defendants to answer to that plan -- to answer to the course of conduct - the string of events that they planned, that they carried out, that they celebrated. And the circle will finally be complete when they are convicted, by you, of what they did, committing murder during the perpetration of a robbery. And we will ask you to fill in that circle at the end of this trial and convict them of that. Thank you.

(ECF No. 12-15 at PageID 1404-1408 (emphasis added).)

The prosecution's closing argument reads:

> On April 21st, 1997, James Day couldn't hide from **greed** and **evil**. [De]spite driving around in an armored truck, wearing a bullet-proof vest, with a gun on his hip and all of the extreme security measures that Loomis Fargo trained their employees to use, there was no hiding from or escaping the circle of **greed** and **evil**.
>
> He was leaving the Walgreens at 4522 Summer Avenue after 12:00 o'clock on that day when he was shot one time in the back of the head, execution style. All for a bag of money.
>
> And **greed** and **evil** really didn't care that day whether he lived or died but shooting someone in the back of the head, execution style, doesn't give them much chance of surviving. But he didn't die that day. Fortunately or unfortunately with the condition of life that he had following April 21st, 1997, he lived until

October 2nd, 1999. He was given two more years with his wife Faye and his son Cedric -- two pretty good reasons to hang on -- to fight.

But that wasn't good enough for **greed** and **evil**. They didn't just threaten him with the gun and take the money. They didn't just shoot him in the arm and take the money. They didn't just shoot him in the leg and take the money. **Greed** and **evil** get out behind a concrete barrier until James Day came out with a bag loaded with over $20,000 in cash. And to make sure the only eyewitness couldn't come to court and testify against him and point his finger at him, they shot him in the back of the head.

He was supposed to die that day. The circle that they began drawing the day before when they planned this robbery was supposed to be complete on April 21st , 1997, but James Day had two pretty good reasons to hang on -- his wife Lilly Faye, and his son, Cedric. So **greed** and **evil** just continued to shoot at him every day until October 2nd, 1999, when he took his last breath at Methodist Hospital. And then the circle that they began drawing when they planned this big robbery was complete.

"I got to get me that money. I've got to get me that money because I've got to have that pink car. I've got to have that pink Chevy."

And they sit here today, in the middle of this courtroom that is shaped in a circle. And try as they might to get out of that circle, they can't because the circle that is around them today is

the complete circle of truth - - the circle that the State of Tennessee began drawing for you last week. And try as they might to run outside that circle, they keep getting bounced back to the middle because truth wins out over **greed** and **evil** every time. Truth always wins. And that's what they're so afraid of. They had this so well planned. "We're going to steal a car, first of all, so that nobody can trace the tags back to one of us." So they stole Jack Wilson's car. You heard his daughter-in-law come in and tell you that the white Pontiac was her father-in-law's. He's now deceased. And it was stolen sometime between the night of April 20th, 1997, and the morning of the 21st. This is brilliant. This is brilliant. If they run these tags, they're going to think Jack Wilson robbed the Loomis Fargo. Boy are we smart."

Anthony Bond's fingerprints were on this white car. That white car was identified from everyone at the scene who saw the bits and pieces -- who saw the fragments of the truth -- who stepped into the circle of **greed** and **evil** on that day.

"And then what we'll do, we'll put Angela Jackson's car -- my dumb little girlfriend who lets me drive her car around everyday -- who's going to believe her anyway -- she's all of four feet tall, and if she comes in and says anything bad about me , what I'm going do is I'm going to rope her into the middle of this circle, take her with me everywhere I go, make her buy everything in her name, who's going to believe

her? And what we'll do is take her red car and park it on Novarese. We'll get out of there in the white car. We're going to go get in Angela's car. Who's going to believe Angela?"

Everyone on the scene on April 21st, 1997, saw that car on Novarese and saw two black males get out of the white car and get into the red car. "Who's going to believe Angela? She's just my dumb little girlfriend. And I'm going to have her so covered up with this crime, she'll be scared to talk to anybody. And I'm going to scare her so much, she won't talk if they do find her. What a brilliant plan."

"We'll hit on a Monday because then they'll have all the money left over from Sunday, so there will be extra cash for us. We can each go buy a car and whatever else we need. I'm going to sneak up to him on the back side so he can't see me -- so in case he doesn't die after I put a gun to the back of his head and pull the trigger so that the bullet enters his brain -- in case he survives, he won't be able to identify me."

There is no escaping the truth. But that's what they're trying to do. That's all that this is, and it is now your job to complete the circle of truth that the State of Tennessee began drawing last week. It is now your job to put the final touch connecting the beginning and the end and telling these defendants they are guilty of murder in the perpetration of a robbery; that when you sneak up on armored guards in Shelby County and put a gun to the back of their head and pull the trigger and leave them for dead on

the sidewalk of the neighborhood Walgreens, we're not going to stand for it -- you will not get out of the circle of truth.

We talked a lot, during voir dire, about the law in this particular case. What does it mean that these defendants are indicted from and have been proven guilty beyond a reasonable doubt of murder in the perpetration of a robbery. What does that mean?

First of all, did they intend to commit a robbery? Yes. You have heard unrefuted evidence. Anthony Bond confessed to it himself. "What were you doing that day, Anthony Bond?" "We went out to rob us a Loomis Fargo guy." He pled guilty to it. He pled guilty [to] it. He told Tanya Monger, "We robbed one of those Loomis Fargo guys." And then he laughed – ["]I'm just kidding." But since that time, he's confessed and pleaded guilty.

And what is robbery? Taking something from someone with fear or violence. Well, James Day, God love him, didn't have time to be afraid -- never had a chance to be afraid.

"Did you see anything, Mr. Day?" "No, sir." Do you remember hearing his testimony? Do you remember Tony Arvin with the U.S. Attorney's Office reading to you James Day's testimony? "Did you hear anybody behind you? "No. Something hit me, and I fell."

"What do you remember next?" "It was like I could hear all of the air-conditioning units of all

of the businesses in Shelby County. And the lights went out."

Anthony Bond confessed to his role in that robbery -- the shooting of James Day in the back of the head so he could get his bag of money and go buy him that pink car. Andrew Thomas beat him to it, though. Remember that? "That was supposed to be my car. Bowlegs -- Bowlegs got it first. He got that pink Chevy first." That was probably about the only part of the plan that didn't go off so well -- who was going to get that pink car first. So Anthony Bond pleaded guilty and confessed to this robbery.

What do we know about Andrew Thomas' involvement in this robbery? He bought the pink car. He was identified to you by Angela Jackson in this photo. That Wild, Wild West, execution-style killing -- and he had been telling Angela, for some time, "I've got to get me that money. I'm going to get me that money."

"Well, what was he talking about, Angela? Did he have a job?"

"No, ma'am."

"Did he have a car of his own?" "No, ma'am."

"I'm gonna get me that money. And I don't care who gets in my way, but I am going to get that pink car."

And he did. He did. Witnesses on the scene remember a baseball hat. They remember someone in that car having a baseball hat. They

remember shorts. Betty Gay told you, "I remember shorts. I do."

Anthony Bond told you the other person with him had on shorts and a striped shirt. Right there. Just like Angela Jackson told you, "That's him. That's Andrew Thomas." If Angela is lying -- if Angela, as Andrew Thomas wants you to believe, and you know, what else can he say at this point - - what else can he say but, "You can't believe my girlfriend. And, all right, if you believe my girlfriend, then James Day died from being overweight."

What else can he say? Anthony Bond confessed to it. But he's got nothing to say but, "James Day died from eating too much. James Day died because his bladder was a little bit bigger than other peoples. James Day died because he didn't like rolling around on a ball at physical therapy class." And I'll get back to all of that in a moment.

But if Angela is lying, as they want you to believe -- as Andrew Thomas wants so desperately for you to believe, that she masterminded all of this. Angela, you know, four feet tall. She was the brains behind the operation. If she is lying, why does everything that everybody else saw on the scene, and afterwards in the days that followed when they were whooping it up - - big guys on the town -- big guy at the mall with a wad of cash -- big men. Big men with cash to spend. Why is everything that everybody remembers fit together like pieces of a puzzle?

Because they're guilty, and you can't get out of the circle of truth. You can't hide anymore. They're guilty of the robbery. They intended to commit the robbery. They went to the Walgreens in the stolen car. You've got your get-away driver, you've got your gun. You've got the parked red car up here on Novarese that we're going to get into and throw the police off because everybody is going to see the white car, and we're not going to be in the white car. We're going to leave that white car. We're going to be in this red car of Angela's. And nobody is going to believe Angela. Don't worry about Angela. I'll take care of Angela.

Did they intend to kill James Day? Doesn't matter. Doesn't matter if they did in the state of Tennessee. But I would submit that when you take a gun, and you hide behind a concrete wall, and you sneak up behind a man who is working his job, doing his thing to support his family, and you put a gun to the back of his head, and you pull the trigger, yeah -- yeah, you intend to kill. But you don't have to worry about that because these defendants are charged with murder during a robbery. Okay. All they have to intend is the robbery -- taking the money. And when someone dies, as a result of you wanting that pink car -- when someone dies as a result of you wanting four golds on your teeth, the State of Tennessee calls that murder during the perpetration of a robbery; that no separate, distinct, or independent event caused James Day's death. And that's what this all boils down to. That's what this all comes down to.

So, we have proven to you, beyond a reasonable doubt, their guilt of the robbery -- their identification as the defendants in the robbery. Big get-away driver, big trigger man. "I'm gonna get those gold teeth. I'm gonna get that car. I'm gonna buy me a gun. I'm gonna buy some jewelry. We're gonna go to a hotel. We're gonna have a big time for a couple of days." Did James die? -- did James Day died as a result of that robbery? Of course he did, ladies and gentlemen. Of course he did.

If we were standing up here asking you to convict these defendants of murder during the perpetration of a robbery, and the facts were, as you have heard, except that on one of Mr. James Day's thousands of trips to the physical therapists -- and you heard Ms. – I've forgotten her name. Ms. Nadlicki who testified from the records from Health South - - she talked to you all Saturday – "When was the next time he came? When was the next time he came? When was the next time he came." The man went every day -- he went every day to physical therapy.

Okay. If, on one of those trips to the physical therapist's office, James Day and Faye Day had been in a car accident, and James Day died on the scene, we wouldn't be here, ladies and gentlemen. We wouldn't be here. We're not standing up here asking you to convict Andrew Thomas and his partner -- **greed** or **evil**, whichever you want to call him -- of murder during a robbery because they shot James Day

in the foot, and eventually, three years later, he died, and we have found some doctor to come in and tell you that he died as a result of that foot wound. He was supposed to die that day. He was supposed to die on the concrete in front of Walgreens, but he had two pretty good reasons to hang on -- Faye and Cedric.

He was rushed to the hospital with a bullet in the back of his head, his skull was fractured, and you heard the taped testimony of Dr. O.C. Smith, and Dr. Smith told you about what goes on in your body when a bullet enters your head. He was alert when he got there. He was talking. He could move. And then, all of a sudden, as a result of a gunshot wound to the head -- not as a result of a bad ambulance driver, not as a result of the Regional Medical Center being too far from the Walgreens on Summer not as a result of someone tripping him when he came in on a stretcher, but as a result of the bullet in his head. He had too much blood in his brain -- too much stuff in his head, and there was nowhere for it to go.

Well, what would have happened, Dr. Smith and Dr. Gardner, if they decided to just keep on waiting and watching because, you know, this could get kind of tricky here if we go on and do surgery and he lives but then dies later? – it's going to give these bad guys here a lot of wiggle room – they're going to have a lot of stuff to argue about. "Oh, it was bad food in the hospital that killed him. It was his wife. It was dirty toothbrushes." Why don't we just go on and let

him die from the gunshot wound right now? Is that reasonable? -- is that the medical care we want? No.

"What would have happened, Dr. Smith and Dr. Gardner, if they hadn't performed surgery when his blood pressure plummeted?"

"He would have died."

"From what?"

"The bullet to the back of his head."

We're not asking you to convict these defendants of murder during a robbery because James Day was hit and killed in a car accident six months later. That's not the proof we have. Those aren't the facts of this case. We are caught on video surveillance tape, and your girlfriend comes in here, reluctantly, and points the finger at you and tells this jury everything she knows about the before, during, and after this robbery and murder, and when you confessed and pleaded guilty before James Day died, what else are you going to say? What else are you going to say?

But you can say all you want and scream all you want and threaten all you want, you can't hide from the truth. You cannot escape the circle. The proof is unrefuted. I kept waiting for some doctor to come in and say, "Dr. Smith and Dr. Gardner, you guys have it all wrong. James Day didn't die from that gunshot wound to the back of the head. That was nothing. That was nothing. He died because he didn't cooperate

with his physical therapy. He died because he had diabetes. He died because one of his arteries was ninety-percent clogged. He died because he was overweight. He died because he was depressed." Any of those things. I kept waiting. Nobody -- nobody said that. The proof is consistent and unrefuted.

Dr. Gardner spent a long time explaining to defense counsel the diabetes, the ninety-percent clogged artery, the overweight, the depression -- all these things. But the very first thing she said before she started explaining all that -- and I don't know if you recall this:

"Yes, sir, I know what you're talking about. Those are the secondary series -- the secondary series of our findings."

"Well, what does that mean that they're secondary, Dr. Gardner?"

"That means they are unrelated -- not connected -- not part of the circle -- not part of the continuum -- the cause of death."

You heard me ask Dr. Smith: "Did he die from diabetes?"

"No, ma'am."

"Did he die from heart disease?" "No, ma'am."

"Did he die from being overweight?" "No, ma'am.""

"Did he die because he just didn't give it his all at physical therapy?"

"No. Uh-uh."

Dr. Smith drew you a circle. You can take it back in the jury room and look at it. But what happened on the 21st of April, 1997, to October 2nd, 1999, when James Day finally took his last breath on the ventilator at Methodist Hospital with his family around him; the autopsy was performed; the medical records were reviewed; and both Dr. Smith and Dr. Gardner came in and told you, in their opinion, what the cause of death was. And sure, you can ignore them. You can ignore them and believe that [M]artians came down and invaded his body and put some bacteria in there that caused his bladder to blow up.

But you won't. You took an oath. You took an oath to listen to the evidence all of it. And we're asking you to listen to all of it. Read all of those medical records. We've got nothing to hide -- nothing.

"Dr. Smith, was there anything, in your review of the medical records and in performing your autopsy, that separated the circle or broke the circle from the suffering of the gunshot wound on April 21 to James Day's death on October 2nd?

A "No, ma'am. In my medical opinion, this cycle continues on a continuum from the onset of the gunshot wound to his death two and a half years later."

Wait a minute. How can this be murder in the perpetration of a robbery if he didn't die

right there during the robbery? Dr. Smith just said he died two and a half years later. How can it be that?

A Because the law that Judge Dailey will give you tells you that for something to be during the perpetration of doesn't mean it has to happen like that. It doesn't mean James Day had to bleed to death out of his head in front of the concrete on Walgreens. Oh, don't touch him. Don't touch him because we want this to be a real easy murder-during-the-perpetration-of-a-robbery case, so you all just let him be -- let him die. The law allows for the battle -- the battle that Dr. Gardner talked to you about that James Day fought every day. The law allows for James Day to fight the fight and try to hang on for Faye and Cedric. But the killing was committed in the perpetration of or the attempt to perpetrate the robbery; that is that the killing was closely connected to the robbery and was not, separate, distinct, and independent event.

"Dr. Smith -- Dr. Gardner, is there anything that makes James Day's death disconnect from the gunshot wound?"

"No, ma'am. Nothing."

"And if something had broken the circle, would your opinion be different as to the cause of death of Mr. Day if there had been a separate, distinct, or independent event, like he was hit by a car on his way to physical therapy or robbers broke into his home and shot him in the head again or his house caught on fire and he couldn't

get out? Was there anything like that, Dr. Smith?"

"No, ma'am. In my medical opinion, if there had been something else -- if there had been something else that was responsible for the cause of his death, then the gunshot wound would have been an ancillary factor and would not have entered into his cause of death. The gunshot wound would have been ancillary and would not have entered into his cause of death."

Nothing in the proof -- in the facts -- in the circle of truth supports what they want you to do. But what else can they do? What else can they do but throw mud in the water and send smoke screens up? "Oh, boy, we have got ourselves a good one here. This guy -- look here, he had new onset diabetes -- look here, he was not in [O]lympic training shape -- he was overweight -- he had a clogged artery."

The proof is undisputed and beyond a reasonable doubt.

Okay. I want you to use your reason and your common sense. They want you to step back and focus on the secondary series that Dr. Gardner and Dr. Smith talked about; those things that, in their medical opinions, and based upon their years of expertise, and based upon their review of these thousands of pages of medical documents, and based upon their looking at the bladder of James Day, based upon their reviewing the outside of his body for hours, the

inside of his body for hours, had nothing to do with what killed him.

He was supposed to die April 21st, 1997, when he took a bullet to the head so that Anthony could go get four golds in his mouth and Andrew could go get that lovely pink Chevy. But he hung on, little by little, bit by bit, until good and **evil** came crashing together and **evil** won out on October 2nd, 1999.

All right. So if you believe Dr. Smith, where does that leave us? Angela. We can always blame Angela. You saw her, you watched her. You heard from her for two days -- a reluctant witness? Yes. A manipulative witness? No.

"Angela , do you want to be sitting up here today?"

"No, ma'am."

"Angela, why are you here?"

"Because you subpoenaed me."

"Well, wait a minute, Angela, they're trying to say you masterminded all of this. They're trying to say you're lying. They're trying to say you're just trying to save your own skin because you bought this gun in your name and you bought this car in your name, and you opened this bank account in your name. What do you mean you're here because I subpoenaed you[?] You're supposed to be here as the j[i]lted lover -- the angry woman, Cruella Deville. Why are you here, Angela? Because it's the right thing to do."

If you want to believe she masterminded all of this, go right ahead, but you won't because you took that oath, and you've listened to all of the facts. You've seen all the evidence. Take it back there with you, turn it inside out, twist it upside down, but when you do that, ask yourselves some of these questions about Angela:

If she is lying, as they want you to believe because, you know, if you believe Dr. Smith, we've got to fall back on something else. If she'[s] lying, let's take it in categories. First of all, she said, when she saw Anthony Bond that day -- later that day at her apartment when they came in wide-eyed and screaming and frantic and pulses were up, and everybody's frantic --- when she saw Anthony Bond that day in her apartment dividing the money he had on a yellow and blue jacket.

Anthony Bond, in his statement that Sergeant Chad Golden read to you - - he told you, -- he told you he had on a yellow and blue jacket.

Now, if Angela is out to get her ex-husband, how did she know that? She said Andrew Thomas had on shorts and a striped shirt that day. She pointed out the shorts on the surveillance picture for you. Betty Gay was the first witness the state called. A lady that worked at Walgreens that, ironically enough, the last words, probably, that James Day remembers anybody saying to him that day, "Have a good day." She was the one that said that to him. She

remembers the shorts. So if Angela is lying, she picks him out on the video surveillance, he's got shorts on. Betty Gay remembers shorts. And Anthony Bond, when he gave his confession before James Day died and this was just a robbery, he said, "The other person with me had on shorts and a striped shirt."

Angela -- you know, Cruella Deville -- big mastermind that she is, she said that Anthony – or Andrew, rather, always wore a baseball cap.

"Was it unusual, Angela, for Andrew Thomas to have on a baseball cap?" "No, ma'am, he always wore one."

And the surveillance picture, No. 18, that Angela identified. You can see a hat. And witnesses on the scene remember a baseball hat. One of the Fishers talks about a baseball hat, I think, and Mr. Sains – the Coke-A-Cola delivery gentleman -- the guy that was on the loading dock. He's back there at the loading dock doing his thing -- making his money, doing his job, and this white car comes flying through. And Mr. Sains, you know, "Do you recognize anybody in the court room that was in that car?"

"Oh, no, ma'am. No, ma'am, I couldn't do that."

"What do you remember?"

"I do remember a baseball cap."

So I guess Angela Jackson got a hold of Betty Gay and Chris Sains and Richard Fisher and all these people and said, "Here's what I want you

to say. This is what I want you to tell those good folks or that jury. This is what I want you to tell the police when they come out and talk to you."

Come on. This is real life.

The red car. If Angela is lying, how did her red car get there? The only thing she had in the world was that red car that got repossessed a few months after her boyfriend shot and killed the Loomis Fargo man and got out with about 9 or $10,000 of his own, but she was so in the middle of it all -- she was so mixed into this horrendous crime -- her hands were so dirty, she benefitted from this. That's what they wanted you to believe.

Well, how in the world did her car get repossessed?

"Angela, had you ever had a bank account before the day that Andrew Thomas made you drive and open one?"

"No, ma'am."

"Well, how did you pay your bills?"

"Cash or money orders? I worked. Cash or money orders."

Everybody on the scene remembers that red car that small hatchback of a red car. Angela's car that Andrew Thomas drove every day until he could put a gun to somebody's head, take their bag of money, and go get that pink car he'd had his eyes on.

Gary Craig was the man that lived on Novarese. He circled where his house was for you. Showed you where he was. He saw the white car come flying down the street and he had seen this red car parked. And that black circle is where Gary Craig lived. He remembers the red car and the white -- he identified them for you.

Angela Jackson got to him too? -- told him what to say? It's just nonsense, ladies and gentlemen. It's nothing but nonsense. But what else can you do? What else can you do? You've got to try all you can to get out of the circle. You've got to run like the dickens to go out of the circle before it closes on you and you're trapped by the truth and convicted of murder in the perpetration of a robbery.

Let's talk about the new car. And if Angela Jackson is lying, why do all of these things exist? Angela told you he bought a pink car on April 21st, 1997. She was with him, the kids were with him. It sounds odd to us sitting here. Of course it does. But we're not asking you to pass judgment on Angela Jackson, the lifestyle that she leads. You may like her or not like her. It may not be what you would have done -- or the rest of us in this court room would have done. We may have all picked up the phone and called the police that day, but you know, we didn't have Andrew Thomas living in our house. We didn't have Andrew Thomas telling us, "I can do something to you and your kids and no one will find out." That wasn't our home life. Do you

think maybe she was afraid of him because he had just told her he put a gun the back of a man's head, pulled the trigger and took his money?

That's a pretty good reason to be afraid of somebody. He bought a pink car on April 21st. But let's pretend she's lying. Well, then how did Tanya Monger - remember Tanya Monger -- Anthony Bond's girlfriend? -- went with them to get the gold teeth -- went with them to the mall -- bought Reeboks and jewelry -- got a hotel room, ordered pizza, just had a big time with it. She thought it was drug money like that makes it okay. But again, we're not asking you to judge these individuals. We're asking you to judge the proof, to evaluate the evidence. Okay. Tanya Monger saw Andrew Thomas sporting his pink car. She heard Anthony Bond, "Oh, man, that was supposed to be my car." I had my eyes on that car."

And James Day was supposed to walk through the front door at the end of work on April 21st, 1997, too. James Day was supposed to walk back home in the same condition that he had left home that morning. But that didn't happen. And poor Anthony Bond didn't get his pink car. Damn. Tough bounce. His buddy did, though -- **greed** or **evil** -- whatever you want to call him.

Tanya Monger saw him in it. Kay Sikes worked -- I don't even think we can call it a dealership. She worked at the business where Andrew Thomas bought his pink car. She

identified him for you. She pointed at him for you. "I remember him coming in."

"Well surely you got a license from him before you let him test-drive this car and buy it, didn't you?

You heard her. "It was a pink car on consignment. We wanted to get rid of it." And that they did.

"Well, who went with you to test-drive it?"
"Andrew Thomas."

"Who -- how was it paid for?"

"A big wad of cash."

"Who gave you the big wad of cash, Angela -- Cruella Deville, the mastermind?"

"Um, I remember Andrew Thomas giving me the big wad of cash."

"He's the big guy -- big guy in Memphis that day, wasn't he? Had his lady with him. She's scared to death of him. She's going to do whatever he tells her to do -- follow him wherever he tells her to follow him -- holding his wad of money, buying whatever catches his eye. What a fun day that must of been. What a way to celebrate.

"Well surely he filled out all of the appropriate forms and got his background check on him and a license check and did all of these things, didn't you, Ms. Sikes?"

"No. It was about the only car on the lot, and we wanted to get rid of it."

John Hibbler, the owner of the business, remembers coming in - he had been in Covington, I think he said, and he came back to work. He saw Andrew Thomas in there buying his pink car.

If Angela is lying, why do all the pieces of the puzzle fit together? Because it's the truth, and there no hiding from the truth. There is no more running. The circle is complete. It is now your job to seal the circle -- to make it permanent like the circle of the robbery that they planned and committed on April 21st, 1997 -- like the circle of the medical records that began on April 21st, 1997, and take us through to October 2nd, 1999.

"Where does diabetes fit in here?"

"It doesn't Ms. Weirich."

"Where does that ninety- percent clogged artery fit in here?"

"It doesn't."

"Obesity, depression, not cooperating with his physical therapist ?"

"It doesn't."

"Well, surely those things made him weaker and not in perfect health."

The law also allows for that, and I believe when you have heard from all the lawyers in this case, the judge will read to you several

charges. The one in particular is on proximate cause which is a fancy lawyer term. And what I think Judge Dailey will read to you is that:

"Under the law of the State of Tennessee, a defendant or defendants may be found guilty of murder in the perpetration of a robbery even if death was not an immediate result and even if -- even if an intervening event contributed to or even caused the victim's death." None of which did, though, but even if it did, it doesn't matter. ". . . Where such intervening events are foreseeable, reasonably flow from the first event, and naturally result from the defendant's criminal conduct, the law considers the chain of legal causation unbroken." The law considers the circle unbroken. The law considers the pyramid -- the continuum unbroken when these intervening events are foreseeable"

Now, what in the world does that mean?

Well, when you shoot somebody in the back of the head with a bullet, and they are rushed to the hospital and then their brain begins to fill up with blood and everything else, and their blood pressure plummets, and they begin to die, and so we do surgery to save them. But because their spinal cord was so damaged -- because their body went into shock from the bullet to the back of the head, they no longer have control over their bladder or their bowel or their lower extremities.

And you heard Dr. Gardner and Dr. Smith explain to you the spinal cord and what was

going on there and flow of blood, and if there's not enough blood getting down there, it's going to be broken. Well, did something go wrong in surgery? Is that what caused all these things? No, no, no, no. All of these things were caused from the bullet in the head and the brain filling up with fluid, and the fluid having nowhere to go. And his blood pressure dropping, and we had to do all we could to save him.

"Why?"

"Because he would have died that night."

The hospital wasn't Bond, snipers didn't come into the hospital and begin shooting patients, and that's what killed James Day, that would be unforeseeable, ladies and gentlemen. A bus didn't plow into his hospital room and kill him. That would be unforeseeable.

When everything that happened to him was a direct result of the bullet he took to the back of his head so that Anthony Bond could get four gold teeth and Andrew Thomas could get that pink car -- everything.

The State of Tennessee has proven to you, beyond a reasonable doubt, all of the essential elements of this case; that a robbery was committed by **greed** and **evil**; that someone died as a result of that robbery; that James Day didn't walk back home through the front door on the evening of the 21st of April, 1997, like he had left home on the morning of April 21st, 1997. And that for every day from April 21st, 1997, to October 2nd, 1999, **greed** and **evil**

> continued to take shots at him -- continued to shoot at him until he was good and dead.
>
> It is now your job to seal the circle and convict them of what they did -- convict them of what they planned and carried out so brilliantly -- tell them both, "Andrew Thomas and Anthony Bond , you've had your fair trial. We've listened to all of the proof on both sides. We've turned it upside down and inside out, and you can't run from the truth anymore. You are guilty of murder in the perpetration of a robbery." Thank you.

(ECF No. 13-1 at PageID 2836-2863 (emphasis added).)

The prosecution continued to use references to greed and evil in closing rebuttal argument:

> Mr. Scholl was making fun of my friend Amy Weirich when he was talking about **greed** and **evil** and the fact that she had used those terms, but you know what, James Day really couldn't escape from **greed** and **evil**. **Greed** that perhaps set this original robbery plan in motion from the time they both talked about it. Anthony Bond admits that it was planned the day before. To the stealing of the car and the being familiar enough with Walgreens and the fact that they had daily pickups that they would pickup to planting one car up on Novarese. And greed, maybe the desire -- the desire for new cars, for a white box Chevy and a pink Hooptie, and the desire for new gold teeth in your mouth, fancy tennis shoes, new herringbone chains, new clothes. That was greed. All of us want nice

> things I do. Don't you? And maybe that's **greed** in some people; maybe it's just human nature in others. But there's something that stops the rest of us from doing whatever it takes to satisfy the **evil** that's taken over in your body -- taken over in your mind because there's no other word for that. So he can make fun of me too when I say James Day couldn't escape **greed** and **evil**. But today -- before I say that and because he couldn't escape **greed** and **evil**, I have to say you can't make this right. I sure can't.

(ECF No. 13-2 at PageID 2993-2995.)

Thomas argues that the trial court erred in allowing the prosecutor to repeatedly argue that Thomas and Bond were "greed" and "evil." (ECF No. 1 at 97.) Thomas makes an argument for the trial court error claim similar to his argument for the related ineffective assistance of trial counsel claim. (*See id.* at 97-98.)

Respondent argues that this claim fails to establish reversible error. (ECF No. 63-1 at 44.) Respondent asserts that Thomas failed to make a contemporaneous objection to these statements, and thus the claim is deemed to be waived from all but plain error review. (*Id.*) Respondent further argues that the claim is without merit. (*Id.*) He asserts that the Tennessee Court of Criminal Appeals noted that the trial court did not have the opportunity to offer a corrective instruction to the jury because Thomas failed to object and that, taken in the context of the entire argument and the strong case against defendant, the references were insignificant and harmless. (*Id.*) Respondent compares this case to *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), where more personal references to a

defendant as an "animal" were found to be harmless. (*Id.*)

Prosecutorial misconduct must be so egregious as to deny petitioner a fundamentally fair trial before habeas corpus relief becomes available. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643-45 (1974); *see Gumm v. Mitchell*, 775 F.3d 345, 377-378 (6th Cir. 2014); *Hamblin v. Mitchell*, 354 F.3d 482, 494 (6th Cir. 2003); *Hutchison v. Bell*, 303 F.3d 720, 750 (6th Cir. 2002); *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982) (en banc). Thus, "[o]n habeas review, 'the relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the conviction a denial of due process.'" *Lundgren v. Mitchell*, 440 F.3d 754, 778 (6th Cir. 2006) The "touchstone" of the due process analysis is the fairness of the trial, not the culpability of the prosecutor. *Serra v. Mich. Dep't of Corr.*, 4 F.3d 1348, 1355 (6th Cir. 1993) (quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982)); *accord Smith v. Mitchell*, 348 F.3d 177, 210 (6th Cir. 2003). The Sixth Circuit takes into account "'the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they are isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proof to establish the guilt of the accused.'" *Hamblin,* 354 F.3d at 494-95 (quoting *Angel*, 682 F.2d at 608). "Claims of prosecutorial misconduct are reviewed deferentially on habeas review." *Millender v. Adams*, 376 F.3d 520, 528 (6th Cir. 2004); *see also Lundgren*, 440 F.3d at 778. The inquiry is directed to deciding whether the state court's determination of the issue was an unreasonable application of clearly established federal law. *Frazier*,

343 F.3d at 793; *Macias v. Makowski*, 291 F.3d 447, 453-54 (6th Cir. 2002).

This Court must determine whether the prosecutor's remarks in the context of the entire trial were sufficiently prejudicial to violate Thomas's due process rights." *Donnelly,* 416 U.S. at 639. The Sixth Circuit has employed a two-part test to determine whether prosecutorial misconduct requires a new trial. *Cristini v. McKee,* 526 F.3d 888, 899 (6th Cir.2008). The first step is to determine whether the challenged conduct and remarks by the prosecution were improper. *Boyle v. Million,* 201 F.3d 711, 717 (6th Cir.2000); *United States v. Collins,* 78 F.3d 1021, 1039 (6th Cir.1996). If the prosecutor's conduct was improper, the court seeks to determine whether the conduct was flagrant and warrants reversal. *Boyle,* 201 F.3d at 717. Four factors are considered: "1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of the evidence against the accused." *Gumm*, 775 F.3d at 380-81 (quoting *United States v. Francis,* 170 F.3d 546, 549–50 (6th Cir.1999)). The prejudice to the defendant incorporates consideration of whether the trial judge gave an appropriate cautionary instruction to the jury. *Id.* at 381. The court must view the totality of the circumstances. *Id.* In *Parker v. Matthews,* 132 S. Ct. 2148, 2155 (2012), the United States Supreme Court criticized the Sixth Circuit for relying on circuit precedent and using this test, stating that "[t]he highly generalized standard for evaluating claims of prosecutorial misconduct set forth in *Darden* bears

scant resemblance to the elaborate, multistep test employed by the Sixth Circuit here."

Both the prosecutor's opening and closing statements in the guilt phase, used the terms "greed" and "evil" in describing the motivation for the crimes at issue in Thomas's case. The references to greed and evil were a deliberate theme in the opening and closing statements, but were not extensive or flagrant. In the closing argument, the prosecutor's focus was not on characterizing the defendants as greed and evil, but on outlining the evidence and the credibility issues and testing the defense theories to demonstrate guilt beyond a reasonable doubt. As the prosecution stated, the motivation for Thomas's actions was not important, only that Thomas had committed the murder in the perpetration of a robbery. The prosecution set out to show how the evidence demonstrated that Thomas was one of the perpetrators.

The trial court instructed the jury:

> The Jury in no case should have any sympathy or prejudice or allow anything but the law and the evidence to have any influence upon them in determining their verdict. They should render their verdict with absolute fairness and impartiality as they think truth and justice dictate. Every fact and circumstance in the case you may consider in arriving at your verdict.
> . . .
>
> Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and applying the law, but they are not evidence. If any statements

> were made that you believe are not supported by the evidence, you should disregard them.

(ECF No. 12-12 at PageID 906-907.) A jury is presumed to follow its instructions. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *see Goff v. Bagley*, 601 F.3d 445, 480 (6th Cir. 2010) (denying relief for the prosecutor's remarks when a curative instruction was given and substantial evidence supported the death sentence).

Viewing the references to greed and evil in light to the totality of evidence presented in the case, this Court, like the Tennessee Supreme Court on direct appeal and the Tennessee Court of Criminal Appeals affirming the denial of post-conviction relief, *see* supra pp. 81-84, finds no prejudice. Thomas's right to a fair trial was not violated. The *Darden* standard is a very general one, leaving courts leeway in reaching outcomes in case-by-case determinations. *Parker*, 132 S. Ct. at 2155. The state court's determination is not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 131 S. Ct. at 786–787. Thomas's prosecutorial misconduct claim is without merit. Summary judgment is GRANTED, and Claim 6 is DENIED.

G. Jury Instruction on Causation (Claim 7)

Thomas argues that the trial court's jury instruction on proximate cause unconstitutionally shifted the burden of proof on causation to the defense. (ECF No. 1 at 98.) Thomas's argument to support his trial court error claim is similar to his argument for the related ineffective assistance of trial counsel claim, *see* supra pp. 88-91. (*See id.* at 98-99.)

Respondent argues that this claim is procedurally defaulted. (ECF No. 63-1 at 45.) He asserts that Thomas presented an ineffective–assistance claim in his post-conviction proceedings related to the causation defense, but he never presented a freestanding claim. (*Id.*) Relying on *Wong*, 142 F.3d at 322, Respondent asserts that presentation of a claim under a "related-but distinct theory" is insufficient for exhaustion. (*Id.*)

Thomas contends that the claim was raised in his petition to rehear his appeal of the denial of post-conviction relief and as part of his request for permission to appeal the denial of post-conviction relief. (ECF No. 75 at 35.) For the reasons stated supra pp.88-91 addressing Thomas's related ineffective assistance of counsel claim, this claim is procedurally defaulted. Respondent has not demonstrated cause and prejudice or actual innocence to overcome the procedural default. Summary judgment based on procedural default is GRANTED. Claim 7 is DENIED.

H. Improper Striking of Potential Juror (Claim 8)

Thomas alleges that the court improperly struck for cause a potential juror G.P.[22], who expressed concerns about the death penalty, but who would not have been substantially impaired in performing his duties. (ECF No. 1 at 99-100.) Thomas argues that G.P. should not have been excused for cause. (*Id.* at 100.) Thomas asserts that G.P. admitted that imposing the death penalty would be difficult due to the permanency of the punishment and concerns about the reliability of

[22] "G.P" is Gary Pannell, *see* infra p. 139.

witness testimony. (*Id.*) Thomas contends that G.P. never stated that he could not follow the law on the imposition of the death penalty, confirmed that there were some circumstances where he could impose the death penalty, and did not foreclose the possibility of the death penalty. (*Id.* at 100-101.) Thomas argues that G.P showed his willingness to impose the death penalty by identifying two potential situations in which he would impose the death penalty and explained that those were the only two situations that he could think of. (*Id*. at 101.) Those were situations where G.P. had witnessed the crime or heard a defendant's confession. (*Id.*) Thomas asserts that G.P.'s comments do not reflect an unwillingness to apply the law, but a general and well-founded concern over whether the State could meet the evidentiary burden of proving Thomas's guilt and death-eligibility beyond a reasonable doubt. (*Id.*) Thomas contends that, at most, G.P. indicated that he would evaluate the credibility of the witnesses. (*Id.*)

Respondent argues that the Tennessee Supreme Court's rejection of this claim was not contrary to or in violation of clearly established federal law. (ECF No. 63-1 at 46.)

The Tennessee Supreme Court opined:

> ***Excused Prospective Juror***
>
> We first review the defendant's argument that the trial court erred in excusing a prospective juror, Gary Pannell, based on his views regarding the death penalty. The State maintains that the trial court properly excused Pannell based on his statements and views about imposing a death sentence.

To place this issue into context, we will include the portions of the voir dire with respect to this prospective juror. First, the exchange between the assistant district attorney general and the prospective juror:

Q. Mr. Pannell, same question to you, if the State of Tennessee proves the aggravating circumstances, beyond a reasonable doubt, and proves that they weigh more than the mitigators, again, beyond a reasonable doubt, can you sentence one or both of the defendants to death?

A. I really don't think so.
....

A. I had a hard time dealing with it last night, soul searching and everything.

Q. All right.

A. And there have been articles in the paper recently about planted evidence and stuff like that, that it makes it hard for me to say that I would agree to a death sentence on something I didn't witness myself.

Q. That's fine.

A. Or to hear the person charged with the crime to personally admit to it himself.

Q. All right. So you couldn't follow the law in the State of Tennessee if what I have told you would be the law that you would have to follow according to [Judge] Dailey's instructions?

A. Well, you know you have to listen to witnesses.

Q. Yes, sir.

A. Okay. And that's where I would have a problem, is taking what they are saying, and saying, "Okay, what they are saying is true," which I don't know—

Q. All right.

A. And to me, death is—it's a permanent thing.

Q. Yes, sir. Thank you.

A. You don't come back with it.

Q. Thank you.

After the prosecution moved to excuse the prospective juror for cause, counsel for the defendant asked the following questions:

Q. Sir, let me ask you this: Are there circumstances where you feel you could give the death penalty? You mentioned you wouldn't feel comfortable doing it unless you actually saw it or unless you heard someone admit to it. Are there circumstances where you could give that punishment?

A. That's the only two that I can thin[k] of right now.

Q. So there are some circumstances where you could give that punishment if it actually showed, is that correct?

A. That's right.

Q. I have no further questions, Your Honor.

Finally, the trial court had the following exchange with the prospective juror:

Q. So you're not foreclosing the possibility of giving the death penalty. Is that correct, Mr. Pannell?

A. That's correct.

Q. You're just stating that you would have to see sufficient proof to satisfy you that the aggravating circumstances outweigh the mitigating circumstances.

A. Sufficient proof in my eyes would be what I witnessed myself or what the person charged with the crime—if they said that they did it, yes, I could go along with it.

Q. Let me ask you this: If you felt that the state had proven the aggravating circumstance that they allege—you're satisfied that they have proven that and that it outweighed the mitigation—the mitigating circumstances—but neither of these criteria that you set forth existed, are you saying, then, that even though you felt that the state had proven their aggravating circumstances, you still could not follow the law and impose the death penalty?

A. (No audible response)

Q. Do you follow what I'm saying?

A. (No audible response)

Q. You set up two criteria that you say are the only two by which you could consider voting for the death penalty, and I'm saying what happens if, in your mind, if you determine that the state has proven, beyond a reasonable doubt, the existence of the aggravating circumstance they allege, and you further find, in your mind, that that aggravating circumstance does, indeed, outweigh, beyond a reasonable doubt, any mitigating circumstances that have been presented—if you find that the law had been satisfied in that regard as it's set up by the legislature, but you find that these two circumstances that you set forth aren't part of this process—don't exist in this process, are you saying that because of that, you could not go forward an[d] impose the death penalty?

A. I would have a hard time taking what I would hear coming from witnesses' accounts and everything because, just like I said, just last week in the paper about some incidents down in Florida—

Q. Well, we wouldn't want to get into what was in the paper because we don't try cases in the paper or on TV.

A. Okay. It's planted evidence—

Q. Well—

A. —people can say anything—

Q. Okay. Thank you, Mr. Pannell....

After the State renewed its challenge to the prospective juror for cause, the trial court heard arguments from the parties. The trial court then excused the prospective juror for cause after concluding:

> I think that his responses, in their totality—he, at best, has given some sort of qualified statement that he could, under his own perceived limited circumstances follow the law; and under the law, that's not good enough. He conceded that if the state proved what they were required to prove under the statute but it didn't meet his self-appointed criteria, then he couldn't go forward and follow the law. And I don't think that's what our system requires of a juror. And I—that's just the way he feels, and that's fine; but I'll note your exception. I'm going to go ahead and excuse him.

The principles governing a trial court's decision to excuse a prospective juror challenged for cause are set out as follows. Under *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L.Ed.2d 841 (1985), prospective jurors may be excused for cause only if their views about the death penalty would "prevent or substantially impair" the performance of their duties as a juror in accordance with their instructions and their oath. *See also State v. Hutchison*, 898 S.W.2d 161, 167 (Tenn. 1994). However, a juror's bias need not be proven with

"unmistakable clarity" to justify a challenge for cause. *Id.*

A trial court must have the "definite impression that a prospective juror could not follow the law." *Hutchison*, 898 S.W.2d at 167; *see Wainwright*, 469 U.S. at 425–26, 105 S. Ct. 844. A trial court's findings "are accorded a presumption of correctness, and the [defendant] must establish by convincing evidence that the trial court's determination was erroneous before an appellate court will overturn that decision." *State v. Austin*, 87 S.W.3d 447, 473 (Tenn. 2002); *see also State v. Alley*, 776 S.W.2d 506, 518 (Tenn. 1989); *State v. Duncan*, 698 S.W.2d 63, 71 (Tenn. 1985).

A review of these principles as applied illustrates the broad discretion afforded to the trial court. In *Wainwright*, for instance, the Supreme Court concluded that a prospective juror was properly excused where she was "afraid" or "thought" that her views against the death penalty may interfere with her ability to determine the defendant's guilt. 469 U.S. at 426, 105 S. Ct. 844. In *Austin*, this Court agreed that the trial court had properly excused several prospective jurors who indicated that they would not consider or did not "believe" in imposing the death penalty. 87 S.W.3d at 473. In *Duncan*, a case very similar to the present case, this Court held that a prospective juror was properly excused where she believed that she could not impose the death penalty "unless she saw the crime committed," and where she stated that she

did not want to "judge another human being on the basis of what one says against what another person says." 698 S.W.2d at 71; *see also Alley*, 776 S.W.2d at 517–18 (prospective juror excused where he was "not sure" he could consider the death penalty).

In our view, the defendant has not met the burden of establishing by convincing evidence that the trial court erred in excusing prospective juror Pannell for cause. The prosecutor extensively questioned Pannell as to whether he could apply the law to the evidence and consider all forms of punishment in this case. Pannell consistently indicated that it would be "hard for [him] to say" that he would impose the death penalty for a crime he did not witness or for a crime to which the defendant had not confessed. *Cf. Duncan*, 698 S.W.2d at 71. In response to additional questioning by defense counsel, Pannell reiterated that he could impose the death penalty only in those circumstances where he had witnessed the crime or heard a defendant's confession. Finally, Pannell answered the trial court's questions by saying that he could not follow the law as to aggravating and mitigating circumstances unless his own criteria were satisfied.

In sum, the prospective juror was questioned extensively by both parties and the trial court. The trial court gave defense counsel ample opportunity to rehabilitate the prospective juror and gave full consideration to the arguments of the parties. The trial court asked its own

> questions to further explore the prospective juror's views. Accordingly, we conclude that the trial court did not err in excusing prospective juror Pannell.

Thomas, 158 S.W.3d at 376-379.

Respondent argues that the decision of the Tennessee Supreme Court was neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court and based on a reasonable determination of the facts. (ECF No. 63-1 at 50.) Thomas argues, based on *Wainwright*, that the proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's view would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. (ECF No. 75 at 36.) Thomas argues that the undisputed facts demonstrate the trial court improperly dismissed Pannell for cause because he expressed misgivings about the death penalty while also explaining that his misgivings would not substantially impair him in the performance of his duties. (*Id.* at 36-37.) Thomas argues that Pannell never stated that he could not follow the law with regard to the imposition of the death penalty and could impose the death penalty in two situations. (*Id.* at 37.) Thomas contends that Pannell did not foreclose other situations in which he could impose a death sentence and that his comments do not reflect an unwillingness to apply the law. (*Id.*) Thomas asserts that Pannell articulated "a general and well-founded concern over whether the State could bear the evidentiary burden of proving Thomas's guilt and

death-eligibility beyond a reasonable doubt and his intention to evaluate the credibility of witnesses." (*Id.*) Thomas contends that Pannell's comments do not demonstrate that he would have been substantially impaired in performing his duties and that his exclusion from the jury had a substantial and injurious effect on the verdict. (*Id.* at 37-38.)

A capital defendant's right to an impartial jury is balanced against the state's "strong interest" in having jurors who are able to apply capital punishment within the framework the law prescribes. *Uttecht v. Brown*, 551 U.S. 1, 9 (2007); *see United States v. Gabrion*, 719 F.3d 511, 526 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1934 (2014). A prospective juror who is categorically unwilling to impose a sentence of death in a capital case may be excused for cause. *See Lockhart v. McCree*, 476 U.S. 162 (1986); *see Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (permitting dismissal of a prospective juror where the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath"); *see Treesh*, 612 F.3d at 438 (same); *see also Beuke v. Houk*, 537 F.3d 618, 638 (6th Cir. 2008) (quoting *Morgan v. Illinois*, 504 U.S. 719, 728 (1992)) ("[A] juror who in no case would vote for capital punishment, regardless of his or her instructions, . . . must be removed for cause"). A prospective juror who does not favor the death penalty but is willing to set aside his personal views in accordance with the law may serve on a capital jury. *See McCree*, 476 U.S. at 176. If a juror is unwilling or unable to properly and impartially apply the law to the facts of the case during both the guilt and sentencing phases of a capital trial, the prospective juror may be excluded. *Id.* at 175-177. The Supreme

Court has held that juror bias is a factual issue and that reviewing courts must give the factual assessments of the trial judge a presumption of correctness. *See Thompson v. Keohane*, 516 U.S. 99, 111 (1995); *Greene v. Georgia*, 519 U.S. 145, 146 (1996) (same).

In the instant case, when asked if he could impose a death sentence if the state proved beyond a reasonable doubt that the aggravating circumstances weighed more than the mitigators, Pannell responded, "I really don't think so." He cited only two circumstances in which he thought he could impose the death penalty, neither of which specifically related to the law for imposing the death sentence. Sufficient proof for the death penalty, according to Pannell, was limited to his witnessing the crime or a confession by the defendant. Pannell's response shows a clear unwillingness to follow the law, and his views would have substantially impaired the performance of his duties as a juror. *See Bedford v. Collins*, 567 F.3d 225, 231 (6th Cir. 2009) (denying habeas relief where prospective jurors expressed views that substantially impaired their ability to impose a death sentence). Giving deference to the trial court's decision, Pannell's removal for cause was appropriate.

The Tennessee Supreme Court applied the clearly established Supreme Court precedent in *Wainwright*. *See Thomas*, 158 S.W. 3d at 378-379. The court's decision was not contrary to or an unreasonable application of clearly established Supreme Court precedent and was based on a reasonable determination of facts. The state court's determination is not "so lacking in justification that there was an

error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 131 S. Ct. at 786–787.

Summary judgment is GRANTED; Claim 8 is DENIED.

I. The State Should Not Have Tried Thomas Capitally (Claim 9)

Thomas alleges that the State should not have tried him capitally for a crime for which he had been tried and convicted in federal court. (ECF No. 1 at 101.) He contends that the adjudication of this claim in the state courts resulted in a decision contrary to and an unreasonable application of the Double Jeopardy Clause of the Fifth and Fourteenth Amendments. (*Id.*) Thomas argues that the re-prosecution for the robbery violated double jeopardy. (*Id.*) He asserts that the legal fiction of the dual-sovereignty doctrine is "woefully outdated" and predates recent increases in cooperation between federal and state law enforcement and the passage of federal law addressing criminal issues historically left to the states. (*Id.* at 102.) Thomas asserts that both of his prosecutions were the result of joint investigative efforts by state and federal law enforcement agencies. (*Id.*) Relying on *Bartkus v. Illinois,* 359 U.S. 121, 124 (1959), Thomas contends that his state prosecution was "in essential fact another federal prosecution" because the state had to re-prosecute the robbery to prove the felony murder charge. (*Id.* at 102-103; ECF No. 75 at 39.) Respondent argues that Thomas's claim fails as a matter of law based on *Heath v. Alabama*, 427 U.S. 82, 88 (1985), because it is well-established that prosecution by

distinct sovereign entities does not invoke double jeopardy concerns. (ECF No. 63-1 at 51.)

On direct appeal, the Tennessee Supreme Court addressed the issue of double jeopardy:

> Defendant Thomas asserts that his trial in state court violates the double jeopardy provisions of the Fifth Amendment to the United States Constitution, Article 1 section 10 of the Tennessee Constitution, and Article 14 section 7 of the International Covenant on Civil and Political Rights because the Defendant's federal charges arise from the same criminal event.
>
> It is a well-established principle that "a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one ... [P]rosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, 'subject [the defendant] for the same offence to be twice put in jeopardy.'" *United States v. Wheeler*, 435 U.S. 313, 317, 98 S. Ct. 1079, 1082–83, 55 L. Ed. 2d 303 (1978). Defendant Thomas argues, however, that the dual sovereignty doctrine is violative of the Tennessee constitution and argues for its abrogation. However, our supreme court has specifically upheld and determined to adhere to this doctrine of dual sovereignty, reasoning as follows:
>
> > There is no question but that such a procedure does not subject the defendant to double jeopardy insofar as the

> guaranty of due process in the 14th amendment of the federal constitution is concerned. *Bartkus v. Illinois*, 359 U.S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959). While the rationale of this case—that the state and federal governments are distinct sovereignties, and thus the punishment of a single act by [e]ach is not double jeopardy—has been criticized, a similar approach has provided the basis for a more recent case, which would imply that *Bartkus*' analysis of the issue is still valid. *See United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079, 55 L.Ed.2d 303 (1978). This court is bound by the decisions of the United States Supreme Court concerning the proper interpretation of the federal constitution. *Townsend v. Clover Bottom Hospital and School*, 560 S.W.2d 623 (Tenn. 1978).

The double jeopardy provision of the Tennessee constitution, Article I, § 10, affords the defendant no greater protection. In the past, this provision has been interpreted to permit successive state and federal prosecutions on the basis of the same "dual sovereignties" analysis employed in *Bartkus*, supra, and, given the need for stability in constitutional interpretation, we see insufficient cause to depart from that precedent now.

Lavon v. State, 586 S.W.2d 112, 113–14 (Tenn. 1979). The *Lavon* court further explained that any modification or abandonment of the dual

> sovereignty doctrine must be accomplished through legislative action. *See id*. at 115. Such legislative action has yet to take place; thus, the doctrine of dual sovereignty remains in effect.
>
> Additionally, Defendant Thomas asserts that the State's prosecution violates the International Covenant on Civil and Political Rights (ICCPR), which is an international treaty of governing nations. This Court addressed and rejected this identical claim in *State v. Carpenter*, 69 S.W.3d 568, 578–579 (Tenn. Crim. App. 2001), *cert. den.* 535 U.S. 995, 122 S. Ct. 1557, 152 L.Ed.2d 480 (2002). Defendant Thomas has not convinced this Court to sway from this decision. This claim is without merit.

Thomas, 158 S.W.3d at 391-392.

Successive state and federal prosecutions based on the same conduct do not violate the Double Jeopardy Clause because state and federal governments are separate sovereigns. *United States v. Lebreux*, No. 06-4448, 2009 WL 87505, at *1 (6th Cir. Jan. 13, 2009). In *United States v. Mardis,* 600 F.3d 693, 696 (2010), the Sixth Circuit addressed the issue of double jeopardy in the context of dual sovereignty and sham prosecutions:

> The Double Jeopardy Clause states that no person shall "be subject for the same offen[s]e to be twice put in jeopardy of life or limb...." U.S. Const. amend. V. Usually, prosecution in both state court and federal court for offenses that would otherwise constitute the same "offense" under the Fifth Amendment if tried successively

in the same forum is constitutional under the dual sovereignty doctrine. *Heath v. Alabama*, 474 U.S. 82, 88-89, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985). "The dual sovereignty doctrine holds that the double jeopardy clause does not apply to suits by separate sovereigns, even if both are criminal suits for the same offense." *United States v. Louisville Edible Oil Prods., Inc.*, 926 F.2d 584, 587 (6th Cir. 1991) (citation and internal quotation marks omitted).

Mardis first argues that the dual sovereignty doctrine itself should be reexamined in light of increases in inter-jurisdictional cooperation. However, as there is no basis on which we could embark upon a re-examination of "the legitimacy of the doctrine's rigid application in light of the modern criminal justice system" as Mardis requests, we decline the invitation.

Mardis also argues that the "sham prosecution" exception to the dual sovereignty doctrine applies in his case because "the actions of the federal and state authorities ... are so intertwined that they are indistinguishable as separate sovereigns." The Supreme Court suggested a very limited exception to the dual sovereignty doctrine in *Bartkus v. Illinois*, 359 U.S. 121, 79 S. Ct. 676, 3 L.Ed.2d 684 (1959), in the context of finding that a state prosecution for the same crime upon which the defendant had been acquitted in federal court was constitutional under the Fifth Amendment, as made applicable to the states under the Fourteenth Amendment. *Id*. at 123, 79 S. Ct.

676. In *Bartkus*, the defendant was tried and acquitted by a federal court and a state grand jury indicted him for the same conduct less than a month later. After the federal acquittal, federal investigators turned over their evidence and evidence acquired after the acquittal to the state prosecutors. The federal court also delayed sentencing two accomplices until they had testified at the state trial. The Supreme Court held that this level of cooperation and coordination was "conventional practice between the two sets of prosecutors throughout the country" and that "[t]he state and federal prosecutions were separately conducted [and] that the prosecution was undertaken by state prosecuting officials within their discretionary responsibility and on the basis of evidence that conduct contrary to the penal code of Illinois had occurred within their jurisdiction." *Id*. at 122-23, 79 S. Ct. 676. The Supreme Court articulated the "sham prosecution" exception in dicta:

> [The record] does not support the claim that the State of Illinois in bringing its prosecution was merely a tool of the federal authorities, who thereby avoided the prohibition of the Fifth Amendment against a retrial of a federal prosecution after an acquittal. It does not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution.

Id. at 123-24, 79 S. Ct. 676; *see also United States v. Deitz*, 577 F.3d 672, 686-87 (6th Cir.2009) (citing *United States v. Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984)). While no court has found that cooperation between sovereigns in the investigation and the timing and planning of successive prosecutions of an individual for related offenses violates the dual sovereignty doctrine, it is not impossible that it could occur. One can imagine a situation in which Sovereign A failed to secure a conviction and therefore takes its evidence and charges to Sovereign B for another bite at the apple in a way that does constitute a sham prosecution. Such circumstances, in which Sovereign A pulls the strings of Sovereign B's prosecution, may indeed violate the Fifth Amendment's ban on double jeopardy.

Here, however, the cooperation and coordination was less than that which took place in *Bartkus*, which the Supreme Court found not to constitute a sham prosecution. The agencies cooperated substantially in their investigations of the crimes and appear to have coordinated the timing of their prosecutions. While federal and state authorities cooperated in the investigation of Wright's disappearance, this is an admirable use of resources that the courts have found not to be problematic. *See, e.g., United States v. Angleton*, 314 F.3d 767, 774 (5th Cir. 2002) (holding that the facts that, after the defendant had been acquitted of murder charges in state court; (1) the district attorney's office itself had asked the U.S. Attorney's Office to investigate

> the case; (2) a joint task force of FBI agents and local police officers investigated the crime; (3) two state assistant district attorneys involved with the state prosecution assisted with the second federal investigation; and (4) FBI agents interviewed members of the state court jury that acquitted the defendant, did not defeat dual sovereignty).
>
> Moreover, based on the record and the testimony of those involved, the state and federal prosecutions proceeded independently. There is neither evidence that the federal prosecutor manipulated the state prosecutor nor of the reverse; indeed, Henderson stridently denied that the U.S. Attorney's Office had manipulated his prosecution in any way, stating that "[i]f they had, I would have punched them out and turned them in in that order." (May 27, 2009 Tr. at 238.) As in *Bartkus*, there is no evidence that the prosecutions were not conducted separately.

Mardis, 600 F.3d at 696-697. The Sixth Circuit has questioned whether the Supreme Court intended to create the "sham prosecution" exception. *United States v. Clark*, 254 F. App'x 528, 533-534 (6th Cir. 2007) (describing its "chimeral nature"); *see United States v. Norwood*, No. 12-CR-20287, 2013 WL 5965330, at *2 (E.D. Mich. Nov. 8, 2013) (to the extent the exception exists, it is a 'narrow one'"). One sovereign must have been a "tool" of or a "sham and a cover" for the other sovereign's prosecution for the exception to apply. *United States v. Carr*, 78 F.3d 585 (6th Cir. 1996).

Thomas has cited no authority—in the Sixth Circuit or otherwise—where the *Bartkus* exception influenced

the outcome of a case. Thomas has presented no evidence "that either sovereign retained little or no independent volition or decision-making in its prosecution" or a level of entanglement sufficient to invoke the exception. *See Norwood*, 2013 WL 5965330, at *3-6. The defendant in *Bartkus* was denied habeas relief because there was no violation of double jeopardy. *Bartkus*, 359 U.S. at 132-133. In addition to the lack of evidence of an entanglement between sovereigns in Thomas's case, the second state court prosecution for murder in the perpetration of a robbery was not prompted by the failure of the federal court prosecution for: (1) interference with commerce by threats of violence, in violation of 18 U.S.C. § 1951; and aiding and abetting, in violation of 18 U.S.C. § 2; (2) carry and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924 (c); and (3) felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), but by the death of the victim James Day after Thomas's federal conviction. Thomas has not demonstrated that the sham prosecution exception applies.

Thomas argues that the state prosecution violated the International Covenant on Civil and Political Rights ("ICCPR"), which the United States ratified in 1992, and which provides guarantees against double jeopardy within a single country. (ECF No. 1 at 103.) Thomas argues that the state/federal dual sovereignty rule is not recognized under this treaty. (ECF No. 75 at 39-40.) He contends that federal and state judges are bound by the terms of treaties to which the United States is a party. (*Id.* at 40.) Respondent does not address this argument.

"[T]he ICCPR does not create judicially-enforceable individual rights." *United States v. Duarte-Acero*, 296 F.3d. 1277 (11th Cir. 2002); *Hurtado v. U.S. Atty. Gen.,* 401 F. App'x 453, 456 (11th Cir. 2010) (same). Federal constitutional prohibitions against double jeopardy are not invoked when there are successive prosecutions on the same facts by separate sovereigns, which the federal and state governments are for this purpose, and nothing in the International Covenant on Civil and Political Rights (ICCPR) prevents successive federal-state prosecutions. *See Grandison v. Corcoran*, 78 F. Supp. 2d 499, 513 (D. Md. 2000).

The Tennessee Supreme Court's decision is not contrary to or an unreasonable application of clearly established Supreme Court precedent and is based on a reasonable determination of facts. Summary judgment is GRANTED. Claim 9 is without merit and DENIED.

J. The Death Penalty Violates Treaties and is Inconsistent with International Law (Claim 10)

Thomas alleges that his conviction and sentence were unconstitutionally imposed because the death penalty in Tennessee conflicts with the denunciation and proscription of the use of the death penalty in treaties signed and ratified by the United States, as well as in international laws and norms that reflect modern mores of civility and decency with regard to the imposition of sanctions for criminal activity. (ECF No. 1 at 103.)[23]

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[23] Specifically, Thomas argues that Tennessee's use of the death penalty violates the following international treaties: (1) the

The Tennessee Supreme Court opined:

XVI. Tennessee's Death Penalty Scheme Violates International Treaties

Defendant Thomas next asserts that Tennessee's imposition of a death penalty violates United States treaties and hence the federal constitution's Supremacy Clause. Defendant Thomas claims that the Supremacy Clause was violated when his rights under treaties and customary international law to which the United States is bound were disregarded. Specifically, his argument is based upon two primary grounds: (1) customary international law and specific international treaties prohibit capital punishment, and (2) customary international law and specific international treaties prohibit reinstatement of the death penalty by a governmental unit once it has been abolished. This identical argument has recently been rejected by panels of this Court in *State v. Richard Odom*, No. W2000–02301–CCA–R3–DD, 2002 WL 31322532, at *32–35 (Tenn. Crim. App., Jackson, Oct. 15, 2002), and *State v. Robert Faulkner*, No. W2001–02614–CCA–R3–DD, 2003 WL

ICCPR; (2) International Convention on the Elimination of All Forms of Racial Discrimination, and (3) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (ECF No. 1 at 104.) He asserts that the administration of the death penalty violates two agreements adopted by the United States – the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights. (*Id.*)

> 22220341, at *31 (Tenn. Crim. App., Jackson, Sept. 26, 2003). We see no viable reason to resolve this issue in a different manner in the present case. Defendant Thomas is not entitled to relief on this issue.

Thomas, 158 S.W.3d at 406 (footnote omitted).

Respondent asserts that these claims have repeatedly been rejected by the Sixth Circuit and are without merit as a matter of law. (ECF No. 63-1 at 51.) Thomas asserts that, because the death penalty in Tennessee is contrary to, or involved an unreasonable application of federal law and because the availability of the death penalty had a substantial and injurious effect on the verdict, Respondent is not entitled to judgment as a matter of law on these claims. (ECF No. 75 at 40.)

The Sixth Circuit has rejected claims of violation of constitutional rights based on international law, stating "Courts that have considered the question of whether international law bars capital punishment in the United States have uniformly concluded that it does not." *See Buell v. Mitchell*, 274 F. 3d 337, 370-376 (6th Cir. 2001); *see Coleman v. Mitchell*, 268 F.3d 417, 443 (6th Cir. 2001) (merits review of Petitioner's claims that the death sentence violates international treaties and customary international law would not have afforded petitioner habeas relief).

The Tennessee Supreme Court's decision is not contrary to or an unreasonable application of Supreme Court precedent and was based on a reasonable determination of facts. The state court's determination is not "so lacking in justification that there was an

error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 131 S. Ct. at 786–787.

Summary judgment is GRANTED. Claim 10 is without merit and DENIED.

K. The Death Penalty Violates the Constitution (Claim 11)

Thomas alleges that the death penalty system is so broken and fraught with errors that the imposition of death in this case violates the Constitution. (ECF No. 1 at 108.) Thomas alleges that Tennessee's death scheme fails to meaningfully narrow the class of eligible defendants. (*Id.* at 108-109.) Thomas asserts that death sentences are imposed arbitrarily and capriciously in Tennessee. (*Id.* at 109-112.) He alleges that Tennessee's appellate review process does not ensure that capital punishment is not imposed arbitrarily and capriciously. (*Id.* at 112-113.) Thomas asserts that the administration of lethal injection constitutes cruel and unusual punishment. (*Id.* at 113-114.)

Respondent asserts that these claims have repeatedly been rejected by the Sixth Circuit and are without merit as a matter of law. (ECF No. 63-1 at 51.) Thomas makes the same argument as in Claim 10, that because the death penalty in Tennessee is contrary to, or involved an unreasonable application of federal law and because the availability of the death penalty had a substantial and injurious effect on the verdict, Respondent is not entitled to judgment as a matter of law on these claims. (ECF No. 75 at 40.)

On direct appeal, the Tennessee Supreme Court addressed multiple assertions about the constitutional of Tennessee's death penalty scheme:

XVII. Tennessee's Death Penalty Scheme is Unconstitutional

> The Defendant raises numerous challenges to the constitutionality of Tennessee's death penalty provisions. Included within his claim that the Tennessee death penalty statutes violate the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Article I, Sections 8, 9, 16, and 17, and Article II, Section 2 of the Tennessee Constitution, are the following:
>
> > A. Tennessee's death penalty statutes fail to meaningfully narrow the class of death eligible defendants. Specifically, the statutory aggravating circumstance set forth in Tennessee Code Annotated section 39–2–203(i)(2), (i)(5), (i)(6), and (i)(7) have been so broadly interpreted whether viewed singly or collectively, that they fail to provide a meaningful basis for narrowing the population of those convicted of first degree murder to those eligible for the sentence of death.
>
> We note that factors (i)(5), (i)(6) and (i)(7) do not pertain to this case as they were not found by the jury. Thus, any individual claim with respect to these factors is without merit. *See, e.g., Hall*, 958 S.W.2d app. at 715; *State v. Brimmer*, 876 S.W.2d 75, 87 (Tenn.), *cert.*

denied, 513 U.S. 1020, 115 S. Ct. 585, 130 L.Ed.2d 499 (1994). Also, this argument has been rejected by our supreme court. *See Vann*, 976 S.W.2d app. at 117–118; State v. *Keen*, 926 S.W.2d 727, 742 (Tenn. 1994).

B. The death sentence is imposed capriciously and arbitrarily in that

(1) Unlimited discretion is vested in the prosecutor as to whether or not to seek the death penalty.

This argument has been rejected. *See State v. Hines*, 919 S.W.2d 573, 582 (Tenn. 1995), *cert. denied*, 519 U.S. 847, 117 S. Ct. 133, 136 L.Ed.2d 82 (1996).

(2) The death penalty is imposed in a discriminatory manner based upon race, geography, and gender.

This argument has been rejected. *See State v. Cazes*, 875 S.W.2d 253, 268 (Tenn. 1994), *cert. den*. 513 U.S. 1086, 115 S. Ct. 743, 130 L.Ed.2d 644 (1995).

C. There are no uniform standards or procedures for jury selection to insure open inquiry concerning potentially prejudicial subject matter.

This argument has been rejected. *See Cazes*, 875 S.W.2d at 269.

D. The death qualification process skews the make-up of the jury and results in a relatively prosecution-prone, guilt-prone jury.

This argument has been rejected. *See State v. Reid*, 91 S.W.3d 247 app. at 313 (Tenn. 2002), *cert. den.* 540 U.S. 828, 124 S. Ct. 56, 157 L.Ed.2d 52 (2003), and cases cited therein.

E. Defendants are prohibited from addressing misconceptions about matters relevant to sentencing.

This argument has been rejected. *See id.*

F. Requiring the jury to agree unanimously to a life verdict violates *McKoy v. North Carolina*, 494 U.S. 433, 110 S. Ct. 1227, 108 L.Ed.2d 369 (1990) and *Mills v. Maryland*, 486 U.S. 367, 108 S. Ct. 1860, 100 L.Ed.2d 384 (1988).

This argument has been rejected. *See Reid*, 91 S.W.3d app. at 313.

G. There is a reasonable likelihood that jurors believe they must unanimously agree as to the existence of mitigating circumstances because of the failure to instruct the jury on the meaning and function of mitigating circumstances.

This argument has been rejected. *See id.*

H. The jury is not required to make the ultimate determination that death is the appropriate penalty.

This argument has been rejected. *See id.*

I. The defendant is denied final closing argument in the penalty phase of the trial.

This argument has been rejected. *See id*.

> J. Mandatory introduction of victim impact evidence and mandatory introduction of other crime evidence upon the prosecutor's request violates separation of powers and injects arbitrariness and capriciousness into capital sentencing.
>
> This argument has been rejected by a panel of this Court. *See State v. Robert Faulkner*, No. W2001–02614–CCA–R3–DD, 2003 WL 22220341, at *36–37 (Tenn. Crim. App., Jackson, Sept. 26, 2003).
>
> K. The appellate review process in death penalty cases, including comparative proportionality review, is constitutionally inadequate.
>
> This argument has been rejected. *See Reid*, 91 S.W.3d app. at 313. Moreover, our supreme court has held that, while important as an additional safeguard against arbitrary or capricious sentencing, comparative proportionality review is not constitutionally required. *See State v. Bland*, 958 S.W.2d 651, 663 (Tenn. 1997), *cert. denied*, 523 U.S. 1083, 118 S. Ct. 1536, 140 L.Ed.2d 686 (1998).

Thomas, 159 S.W. 3d at 406-408.

Thomas claims that the Tennessee death penalty scheme fails to meaningfully narrow the class of persons eligible for the death penalty. The jury here found evidence that Thomas had been convicted of prior violent felonies. *Thomas*, 158 S.W. 3d at 373. A capital sentencing statute must "circumscribe the class of persons eligible for the death penalty" by permitting execution only where specified aggravating

circumstances are present. *Zant v. Stephens*, 462 U.S. 862, 878 (1983). The purpose behind statutory aggravating circumstances is to direct and limit sentencing discretion and thus minimize the risk of arbitrary and capricious imposition of the death penalty by providing a meaningful basis for distinguishing the few cases in which capital punishment may be imposed from the many cases in which it is inappropriate. *Id.* at 877. The Tennessee statute prescribes aggravators to limit the class of persons eligible for the death penalty. *See* Tenn. Code Ann. § 39-13-204(i)(1-15). The Sixth Circuit has held that Tennessee's felony murder aggravating circumstance "can function as a proper and permissible narrowing factor." *Coe*, 161 F.3d at 350; *see Irick v. Bell*, No. 3:98-CV-666, 2010 WL 4238768, at **8-9 (E.D. Tenn. Oct. 21, 2010) (rejecting a felony aggravator habeas claim). The United States Supreme Court has upheld the death penalty in a case with a felony murder aggravator. *See Tison v. Arizona*, 481 U.S. 137, 157-58, 107 S. Ct. 1676, 1687-88, 95 L. Ed. 2d 127 (1987) (the Eighth Amendment does not prohibit the death penalty as disproportionate where defendant is a major participant in a felony that results in murder and his mental state was one of reckless indifference*); see also Enmund v. Florida*, 458 U.S. 782, 797, 102 S. Ct. 3368, 3376, 73 L. Ed. 2d 1140 (1982) (the Eighth Amendment does not permit imposition of death penalty for defendant who aids and abets in felony which led to murder but who did not himself kill, attempt to kill, or intend for a killing to take place or that lethal force be employed). Generally, the Tennessee death penalty statute has withstood scrutiny when courts consider the constitutionality of its aggravating factors. Thomas has made no specific

argument and pointed to no relevant authority that Tennessee's death penalty scheme does not meaningfully narrow the class of persons eligible for the death penalty.

To the extent Thomas argues about the arbitrary and capricious imposition of the death penalty and prosecutorial discretion in Tennessee, the United States Supreme Court has refused to strike down various death penalty statutes on the ground that those laws grant prosecutors discretion in determining whether to seek the death penalty. *See Proffitt v. Florida*, 428 U.S. 242, 254 (1976) (rejecting argument that arbitrariness is inherent in the Florida criminal justice system because it allows discretion at each stage of a criminal proceeding); *see Gregg v. Georgia*, 428 U.S. 153, 199 (1976) ("that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense" does not indicate that the system is unconstitutional); *Campbell v. Kincheloe*, 829 F.2d 1453, 1465 (9th Cir. 1987) (Supreme Court has rejected argument that a death penalty statute is unconstitutional because it vests unbridled discretion in the prosecutor to decide when to seek the death penalty).

To the extent Thomas argues about the allowance of a victim's representative at trial, the Supreme Court in *Payne v. Tennessee*, 501 U.S. 808, 825 (1991), held, "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the

specific harm caused by the crime" and serves entirely legitimate purposes.[24]

> We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne, 501 U.S. at 827. The Supreme Court recognized that relief under the Due Process Clause would be appropriate if victim impact evidence introduced in the sentencing phase of a criminal case "is so unduly prejudicial that it renders the trial fundamentally unfair." *Id.* at 825.

Thomas claims that the Tennessee death penalty scheme discriminates on the basis of race. The Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987), rejected Equal Protection and Eighth Amendment claims challenging racially disproportionate imposition of capital punishment.

To the extent Thomas challenges the death-qualification process, the Supreme Court in *Lockhart*, 476 U.S. at 174, held that "death

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[24] With *Payne*, the Supreme Court overruled its prior decision in *Booth v. Maryland*, 482 U.S. 496 (1987), which held that victim impact evidence leads to the arbitrary imposition of the death penalty.

qualification" does not violate the fair cross-section requirement of the Sixth Amendment or the constitutional right to an impartial jury. *See Byrd v. Collins*, 209 F.3d 486, 528 (6th Cir. 2000) (noting that it is "not improper for jurors to be death-qualified"); *see also Williams v. Bagley*, 380 F.3d 932, 978 n. 1 (6th Cir. 2004) (Merritt, J., dissenting) (discussing the Supreme Court's changing standards for the death qualification of jurors).

Thomas claims to have been prohibited from presenting evidence relevant to sentencing. The Supreme Court, in *Lockett*, held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 568, 604 (1978) (emphasis omitted). That opinion does not limit a court's traditional authority "to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* n. 12. Matters relevant to determining whether the death penalty is a justified punishment and the circumstances under which it should be imposed are properly considered by the legislature. *See Roper v. Simmons*, 543 U.S. 551, 571 (2005) ("In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes"); *Gore v. United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy.").

Thomas has made no argument about the jury instructions related to his claim that jurors are required to unanimously agree other than this generalized attack on the Tennessee death penalty scheme. In the penalty phase, the jury was instructed, "There is no requirement of jury unanimity as to any particular mitigating circumstance, or that you agree on the same mitigating circumstance." (ECF No. 12-12 at PageID 933.)

The trial court instructed the jury:

> VERDICT - LIFE IMPRISONMENT OR LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE
>
> If you do not unanimously determine that a statutory aggravating circumstance has been proved by the state beyond a reasonable doubt, the sentence shall be life imprisonment. You will write your verdict upon the enclosed form attached hereto and made a part of this charge.
>
> The verdict shall be as follows:
>
> We, the jury, unanimously find that the punishment shall be life imprisonment.
>
> If you unanimously determine that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said statutory aggravating circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, you shall, in your considered discretion, sentence the defendant

either to imprisonment for life without possibility of parole or to imprisonment for life. In choosing between the sentences of imprisonment for life without possibility of parole and imprisonment for life, you shall weigh and consider the statutory aggravating circumstance or circumstances proven by the state beyond a reasonable doubt and any mitigating circumstance or circumstances. In your verdict you shall reduce to writing the statutory aggravating circumstance or circumstances so found and shall return your verdict upon the enclosed form attached hereto and made a part of this charge.

The verdict should be as follows:

We, the jury, unanimously find that the state has proven the following listed statutory aggravating circumstance or circumstances beyond a reasonable doubt;

We, the jury, unanimously find that such statutory aggravating circumstance or circumstances do not outweigh any mitigating circumstance or circumstances beyond a reasonable doubt, therefore;

You shall then indicate on the enclosed verdict form either:

We, the jury, unanimously agree that the defendant shall be sentenced to imprisonment for life without possibility of parole;

or

We, the jury, unanimously agree that the defendant shall be sentenced to imprisonment for life.

The verdict must be unanimous and signed by each juror.

VERDICT - DEATH

If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state, beyond a reasonable doubt, and said circumstance or circumstances have been proven by the state to outweigh any mitigating circumstance or circumstances, beyond a reasonable doubt the sentence shall be death. The jury shall reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating circumstances.

You will write your findings and verdict upon the enclosed form attached hereto and made a part of this charge. Your verdict shall be as follows:

> (1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances;
>
> . . .

> (2) We, the jury, unanimously find that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances so listed above outweigh any mitigating circumstances.
>
> (3) Therefore, we, the jury, unanimously find that the punishment shall be death.
> The verdict must be unanimous and signed by each juror.

(ECF No. 12-12 at PageID 934-935.)

Thomas argues that the practical effect is that the jury must unanimously agree to a life sentence for one to be imposed. (ECF No. 1 at 126.) That assertion is not reflected in the jury instructions at trial and before this Court. In *Abdur'Rahman v. Bell*, 226 F.3d 696, 711-13 (6th Cir. 2000), the Sixth Circuit rejected arguments based on a similar jury instruction because the instruction did not "create a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence." *See Nichols v. Heidle,* 725 F.3d 516, 543-546 (6th Cir. 2013) (upholding the constitutionality of a similar penalty phase jury instruction); *see Moore v. Mitchell*, 708 F.3d 760, 794 (6th Cir. 2013) (denying habeas relief because "nowhere did the court instruct or even intimate that the jury must first unanimously find that the death penalty was inappropriate before considering other sentences"); *but see Davis v. Mitchell*, 318 F.3d 682, 690 (6th Cir. 2003) (granting habeas relief where the trial court was "silent as to the different unanimity requirements for aggravating and mitigating circumstances, making no mention of the individual juror's power to prevent the death penalty

by giving effect to mitigating circumstances absent the agreement of the other jurors regarding the presence of those mitigating circumstances. Nor do they make clear that the jury need not be unanimous in rejecting death in order to render a verdict for life imprisonment.") Thomas has not demonstrated that the jury instructions on unanimity violate his constitutional rights in this case.

Thomas argues that the jury is not required to make the ultimate determination that death is or is not warranted under Tenn. Code Ann. § 39-13-204(g). (ECF No. 1 at 111.) There is nothing in the Constitution that requires imposition of a death sentence by a jury. *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). The Supreme Court only requires that the "discretion of the sentencing authority, whether judge or jury, must be limited and reviewable." *Id.* at 462; *see Middlebrooks v. Bell*, No. 3:03-0814, 2007 WL 760441, at *18 (M.D. Tenn. Mar. 8, 2007) (denying certificate of appealability because petitioner failed to show the denial of a constitutional right).

Thomas argues that he is entitled to habeas relief because the Tennessee statute denies the defendant final closing argument at the penalty phase of his capital trial. (ECF No. 1 at 111.) The order of argument did not violate the Fourteenth Amendment because the proceedings offered sufficient opportunity for Thomas to present his position. *See Herring v. New York*, 422 U.S. 853, 862-863 (1975). The order of argument did not implicate the Fourteenth Amendment through the Eighth Amendment because it did not cause the death penalty to be imposed in a random manner. *See Romano v. Oklahoma*, 512 U.S. 1, 6 (1994) (recognizing

Eighth Amendment concern that "the death penalty be both appropriate and not randomly imposed"); *see also Austin v. Bell*, 927 F. Supp. 1058, 1064 (M.D. Tenn. 1996) (denying habeas relief for petitioner's being denied final argument at sentencing). Thomas has cited no Supreme Court precedent establishing a right to make the final closing argument in the penalty phase of a capital case.

Thomas argues that Tennessee's appellate review process does not ensure that capital punishment is not imposed arbitrarily and capriciously. (ECF No. 1 at 112.) He argues that there is no meaningful appellate review, largely because the comparative proportionality review is constitutionally inadequate. (ECF No. 1 at 112-113) The Supreme Court has held that the Constitution requires only proportionality between the punishment and the crime, not between the punishment in this case and that exacted in other cases. *Pulley v. Harris*, 465 U.S. 37, 42-44 (1984) (Traditionally, "proportionality" refers to an "abstract evaluation of the appropriateness of a sentence for a particular crime." The Eighth Amendment does not require a state appellate court to conduct a proportionality review that compares the sentence in the case before it with penalties imposed in similar cases.). There is no constitutional requirement that a state appellate court conduct a comparative proportionality review. *Id*. at 49-50. "Since proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison"; therefore "limiting proportionality review to other cases already decided by the reviewing court in which the death penalty has

been imposed" falls within that wide latitude. *Williams v. Bagley*, 380 F.3d 932, 962-63 (6th Cir. 2004).

Thomas argues that the administration of lethal injection constitutes cruel and unusual punishment. (ECF No. 1 at 1130114.) Execution by lethal injection has not been deemed to constitute cruel and unusual punishment, despite concerns about lethal injection execution protocols. *See, e.g., Harbison v. Little*, 571 F.3d 531, 539 (6th Cir. 2009) (vacating a decision finding that the Tennessee lethal injection protocol violated the Eighth Amendment); *see also Irick v. Ray*, 628 F.3d 787, 789 (6th Cir. 2010) (denying § 1983 claim challenging Tennessee's lethal injection protocol as time-barred).

Thomas has failed to demonstrate that the Tennessee Supreme Court's decision was contrary to or an unreasonable application of clearly established Supreme Court precedent or based on an unreasonable determination of facts.

Summary judgment is GRANTED. Claim 11 is without merit and DENIED.

VI. CONCLUSION

Summary judgment based on the merits is GRANTED for Claims 1, 2, 3, 4A, 4B, 4C, 5, 6, 8, 9, 10, and 11.

Summary judgment based on procedural default is GRANTED for Claims 4F and 7.

Summary judgment based on procedural default is DENIED for Claims 4D, 4E, 4G, and 5. However, the

Court finds that these claims are not entitled to habeas relief.

The claims in Thomas's petition are procedurally defaulted or without merit and are DENIED.

VII. APPELLATE ISSUES

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003); *Bradley v. Birkett*, 156 F. App'x 771, 772 (6th Cir. 2005). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, Rules Governing Section 2254 Cases in the United States District Courts. A petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & 3. A "substantial showing" is made when the petitioner demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El*, 537 U.S. at 336 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *Henley v. Bell*, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (same). A COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337; *Caldwell v. Lewis*, 414 F. App'x 809, 814-15 (6th Cir. 2011) (same). Courts

should not issue a COA as a matter of course. *Bradley*, 156 F. App'x at 773 (quoting *Slack*, 537 U.S. at 337).

In this case, there can be no question that the petitioner's claims are without merit or procedurally defaulted. Because any appeal by Petitioner on the issues raised in this petition does not deserve attention, the Court DENIES a certificate of appealability.

In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter would not be taken in good faith, and leave to appeal *in forma pauperis* is DENIED.[25]

IT IS SO ORDERED this 30th day of March, 2015.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR
UNITED STATES DISTRICT JUDGE

[25] If Petitioner files a notice of appeal, he must pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty (30) days of the date of entry of this order. *See* Fed. R. App. P. 24(a)(5).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Cv. No. 12-2333-Ma

[Filed March 30, 2015]

ANDREW THOMAS,	)
	)
Petitioner,	)
	)
v.	)
	)
WAYNE CARPENTER, Warden, Riverbend Maximum Security Institution,	)
	)
Respondent.	)
	)

JUDGMENT

Decision by Court. This action came for consideration before the Court. The issues have been duly considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed in accordance with the Order, docketed March 30, 2015, granting in part and denying in part respondent's motion for summary judgment and denying petition pursuant to 28 U.S.C. § 2254. The issuance of a certificate of appealability under amended 28 U.S.C. § 2253 is denied. Any appeal in this matter by Petitioner, proceeding *in forma pauperis*, is not taken in good faith.

APPROVED:

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

March 30, 2015
DATE

THOMAS M. GOULD
CLERK

s/ Zandra Frazier
(By) DEPUTY CLERK

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE AT JACKSON

November 10, 2004 Session

No. W2001-02701-SC-DDT-DD

[Filed March 5, 2005]

STATE OF TENNESSEE	)
	)
v.	)
	)
ANDREW THOMAS, ET AL.	)
	)

Direct Appeal from the Court of Criminal Appeals
Circuit Court for Shelby County
No. 00-03095 Joseph B. Dailey, Judge

The defendant, Andrew Thomas, was convicted of felony murder. In imposing a death sentence, the jury found that evidence of one aggravating circumstance, i.e., the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person, outweighed the evidence of mitigating circumstances beyond a reasonable doubt. The Court of Criminal Appeals affirmed the conviction and the death sentence, and the case was automatically docketed in this Court. We entered an order identifying three issues for oral argument and now hold as follows: (1) the trial court did not err in excusing a prospective juror for cause; (2) the trial court erred in

refusing to instruct the jury on lesser included offenses of felony murder but the error was harmless beyond a reasonable doubt; and (3) the death sentence was not arbitrary, excessive, or disproportionate. We also agree with the Court of Criminal Appeals' conclusions with respect to the remaining issues, the relevant portions of which are included in the appendix to this opinion. Accordingly, the Court of Criminal Appeals' judgment is affirmed.

Tenn. Code Ann. § 39-13-206(a)(1); Judgment of the Court of Criminal Appeals Affirmed

E. RILEY ANDERSON, J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C.J., and JANICE M. HOLDER and WILLIAM M. BARKER, JJ., joined. ADOLPHO A. BIRCH, JR., J., concurring and dissenting.

Michael E. Scholl and Robert C. Brooks, Memphis, Tennessee, for the Appellant, Andrew Thomas.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Alice B. Lustre, Assistant Attorney General; William L. Gibbons, District Attorney General; and Amy Weirich and Jennifer Nichols, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

The defendant, Andrew Thomas, and his co-defendant, Anthony Bond, were indicted for the felony murder of the victim, James Day. The following

evidence was presented at the joint trial of the defendant and Bond.[1]

Guilt Phase

Shortly after 12:30 p.m. on April 21, 1997, the defendant and his co-defendant, Bond, saw an armored truck guard with a money deposit bag leaving a Walgreens drug store on Summer Avenue in Memphis, Tennessee. The defendant ran up, shot the guard in the back of the head, grabbed the deposit bag, and jumped into a white car being driven by Bond. The defendant and Bond abandoned the white car on a street behind Walgreens, got into a red car that the defendant had borrowed from his girlfriend, and drove away.

Betty Gay, a Walgreens' employee, heard the gunshot and then saw the armored truck guard, James Day, lying in the parking lot. She saw a man running from the scene with a gun and the deposit bag.[2] Charles Young, the assistant manager of Walgreens, ran outside and saw Day lying face down in a pool of blood. Day, who was conscious, told Young, "Call my wife." Day remained conscious and continued to talk until an ambulance arrived.

---

[1] Bond was convicted of felony murder and sentenced to life imprisonment; however, his conviction was reversed by the Court of Criminal Appeals based on the trial court's failure to charge the jury on the lesser included offense of facilitation of felony murder. The State's application for permission to appeal was denied on August 30, 2004. Accordingly, Bond's appeal is not before this Court.

[2] Gay testified that the deposit bag contained $18,843.01 in cash, checks, and food stamps.

Several witnesses described the cars used by the defendant and Bond and gave descriptions of the occupants to the police. One witness, Richard Fisher, testified that he saw a white car "speed" around the armored truck in the front of the store and that the car was within four feet of him. Fisher later identified the defendant as the passenger in the white car.

Later on the afternoon of April 21st, the defendant and Bond arrived at the apartment of Angela Jackson, who was then the defendant's girlfriend. According to Jackson, the two men were "excited" and "out of breath." After telling Bond to get rid of the gun, the defendant began taking money, checks, and food stamps from small white envelopes that had been in Bond's jacket. The defendant and Bond divided the money.

Jackson testified that later that same day, the defendant bought a customized car with gold plates and spoke wheels for $3,975 in cash. The car was titled in Jackson's name. Afterward, the defendant told Jackson that they needed to get a hotel room. While watching a news report that evening at the hotel about the shooting, the defendant told Jackson that the victim "did not struggle for his life" and that he had "grabbed the nigger by the throat and shot him."

On the day after the shooting, Jackson opened a bank account in her name and deposited $2,401.48 in cash. Two days later, she bought a shotgun because the defendant said they needed it "for protection." According to Jackson, the defendant later bought a gold necklace for himself and wedding rings for both of them. After getting married in May, the couple

separated two months later. The defendant told Jackson not to tell police about the robbery.

The victim, James Day, did not immediately die from the gunshot wound to the back of his head. Instead, the gunshot damaged his spinal cord and resulted in paraparesis (a profound weakness in one's abdomen and legs) and neurogenic bladder (a loss of bladder and bowel control due to nerve damage). Faye Day Cain, the victim's widow, testified that her husband underwent numerous surgeries, needed constant care and medical attention, and was unable to work. He was confined to one room, was unable to use the bathroom, and became depressed. In late September of 1999, Day was rushed to the hospital for emergency surgery after his bladder ruptured. The condition caused an infection; Day's condition continued to worsen, and he finally died on October 2, 1999.

The medical examiner for Shelby County, Tennessee, Dr. O. C. Smith, testified that the cause of Day's death was sepsis, "secondary to the rupture of his bladder resulting from spinal cord injury caused by the gunshot wound to his head." Dr. Smith considered Day's death a homicide, and he stated that the "infection from the ruptured bladder" could be "directly related back to [the] gunshot wound." Dr. Smith conceded that Day suffered from heart disease, high blood pressure, diabetes, and obesity, but he stated that these conditions did not cause the death. Dr. Smith's assistant, Dr. Cynthia Gardner, likewise testified that Day's death resulted from the injuries caused by the gunshot wound.

A videotape of the shooting captured by Walgreens' surveillance cameras was played for the jury. A videotape made from the original was also played for the jury at a slower speed. Angela Jackson identified the defendant as the gunman who shot the guard in the back of the head from a still photograph that had been made from the videotape.

After considering the evidence, the jury convicted the defendant of felony murder based on the killing of the victim "during an attempt to perpetrate robbery as charged in the indictment." The trial court then held a sentencing hearing for the jury to determine the punishment.

Penalty Phase

To support the prior violent felony aggravating circumstance, the prosecution introduced evidence that the defendant had prior convictions for felony offenses whose statutory elements involved the use of violence to the person. See Tenn. Code Ann. § 39-13-204(i)(2) (2003). The proof showed that in September of 1994, the defendant was convicted of seven counts of aggravated robbery and one count of robbery. In January of 1994, the defendant was convicted of one count of aggravated robbery.

The indictments underlying the defendant's prior convictions for aggravated robbery revealed that the offenses involved the defendant's use of a firearm and involved different victims. On January 4, 1993, he used a firearm in taking between $1,000 and $10,000 from Michael Osborne. On February 1, 1993, he used a firearm in taking between $1,000 and $10,000 from Booker Sanders, and he used a handgun in taking

money and food stamps totaling $1,000 to $10,000 from Lee Harris. On March 8, 1993, he used a firearm in taking money and checks totaling $500 to $1,000 from Amos Kirby. On March 12, 1993, he used a firearm in taking checks valued under $500 from Carl Hutchinson. On March 15, 1993, he used a firearm in taking money and checks totaling $500 to $1,000 from Onie Massey, and he used a firearm in taking between $500 and $1,000 from Dewayne McCoy. On June 25, 1993, he used a pistol in taking jewelry valued at $1,000 to $10,000 from Gary Smallwood.

The prosecution also introduced the testimony of Faye Day Cain, the widow of the victim, James Day. She testified that her husband had worked two jobs to support his family before he was shot and that she was unable to work due to a medical condition known as thrombophlebitis. She testified that since her husband's death, she and the couple's minor son lived on disability payments and social security benefits. Ms. Cain testified that the victim had been her husband, confidant, lover, and best friend. After the shooting, however, she and her husband could no longer have physical contact or intimacy. The victim "couldn't stand to be touched" and "the least little noise would turn him into a frenzy." She testified that she had suffered great emotional pain, that she was no longer a happy person, and that she cried often.

According to Ms. Cain, the couple's son, Cedric, was twelve when his father was shot. They had enjoyed riding motorcycles, having breakfast, and doing "father and son" things. After the shooting, however, Cedric became "hurt and angry."

After the prosecution rested, the defendant presented evidence of mitigating circumstances. The defendant's mother, Luella Barber, testified that the defendant was born in February of 1973. She said the defendant's father, Andrew Thomas, Sr., did not visit the family regularly; he abused drugs, abused her in the defendant's presence, and was often in jail. Ms. Barber divorced Andrew Thomas, Sr., in 1977, and she later married William Barber. She said that the defendant's stepfather, Barber, also abused her in front of the children and became involved with drugs.

According to Ms. Barber, the defendant started getting into trouble for stealing when he was fourteen. Although the defendant dropped out of school, he received his GED and a certificate as a residential plumber's helper while in jail. Ms. Barber said that she loved her son and that her life would not be the same without him.

Several other family members also testified on behalf of the defendant. Alacia Bolden, the mother of the defendant's eight-year-old son, testified that their son loved his father and continued to have a close relationship with him. Andre Barber, the defendant's brother, testified that he had always looked up to the defendant, that they had a close relationship, and that they talked often. He said that losing the defendant would "devastate" their mother. Similarly, Stephanie Williams and Tamara Weeks, the defendant's cousins, testified that they had close relationships with the defendant. Williams said that she did not want to see the defendant die, and Weeks believed that the defendant was an important male figure in his son's life despite his incarceration.

The jury imposed the death penalty after finding that the evidence supporting the sole aggravating circumstance outweighed the evidence of mitigating circumstances beyond a reasonable doubt. On appeal, the Court of Criminal Appeals affirmed the conviction and the death sentence after concluding that twenty-two issues raised by the defendant were without merit.

ANALYSIS

Excused Prospective Juror

We first review the defendant's argument that the trial court erred in excusing a prospective juror, Gary Pannell, based on his views regarding the death penalty. The State maintains that the trial court properly excused Pannell based on his statements and views about imposing a death sentence.

To place this issue into context, we will include the portions of the voir dire with respect to this prospective juror. First, the exchange between the assistant district attorney general and the prospective juror:

> Q. Mr. Pannell, same question to you, if the State of Tennessee proves the aggravating circumstances, beyond a reasonable doubt, and proves that they weigh more than the mitigators, again, beyond a reasonable doubt, can you sentence one or both of the defendants to death?
>
> A. I really don't think so..
>
> . . .

Q. I had a hard time dealing with it last night, soul searching and everything**.**

A. All right.

A. And there have been articles in the paper recently about planted evidence and stuff like that, that it makes it hard for me to say that I would agree to a death sentence on something I didn't witness myself.

Q. That's fine.

A. Or to hear the person charged with the crime to personally admit to it himself.

Q. All right. So you couldn't follow the law in the State of Tennessee if what I have told you would be the law that you would have to follow according to [Judge] Dailey's instructions?

A. Well, you know you have to listen to witnesses.

Q. Yes, sir.

A. Okay. And that's where I would have a problem, is taking what they are saying, and saying, "Okay, what they are saying is true," which I don't know –

Q. All right.

A. And to me, death is – it's a permanent thing.

Q. Yes, sir. Thank you.

A. You don't come back with it.

Q. Thank you.

After the prosecution moved to excuse the prospective juror for cause, counsel for the defendant asked the following questions:

Q. Sir, let me ask you this: Are there circumstances where you feel you could give the death penalty? You mentioned you wouldn't feel comfortable doing it unless you actually saw it or unless you heard someone admit to it. Are there circumstances where you could give that punishment?

A. That's the only two that I can thin[k] of right now.

Q. So there are some circumstances where you could give that punishment if it actually showed; is that correct?

A. That's right.

Q. I have no further questions, Your Honor.

Finally, the trial court had the following exchange with the prospective juror:

Q. So you're not foreclosing the possibility of giving the death penalty. Is that correct, Mr. Pannell?

A. That's correct.

Q. You're just stating that you would have to see sufficient proof to satisfy you that the aggravating circumstances outweigh the mitigating circumstances.

A. Sufficient proof in my eyes would be what I witnessed myself or what the person charged with the crime – if they said that they did it, yes, I could go along with it.

Q. Let me ask you this: If you felt that the state had proven the aggravating circumstance that they allege – you're satisfied that they have proven that and that it outweighed the mitigation – the mitigating circumstances – but neither of these criteria that you set forth existed, are you saying, then, that even though you felt that the state had proven their aggravating circumstances, you still could not follow the law and impose the death penalty?

A. (No audible response)

Q. Do you follow what I'm saying?

A. (No audible response)

Q. You set up two criteria that you say are the only two by which you could consider voting for the death penalty, and I'm saying what happens if, in your mind, if you determine that the state has proven, beyond a reasonable doubt, the existence of the aggravating circumstance they allege, and you further find, in your mind, that that aggravating circumstance does, indeed, outweigh, beyond a reasonable doubt, any mitigating circumstances that have been presented – if you find that the law had been satisfied in that regard as it's set up by the legislature, but you find that these two

> circumstances that you set forth aren't part of this process – don't exist in this process, are you saying that because of that, you could not go forward an[d] impose the death penalty?
>
> A. I would have a hard time taking what I would hear coming from witnesses' accounts and everything because, just like I said, just last week in the paper about some incidents down in Florida –
>
> Q. Well, we wouldn't want to get into what was in the paper because we don't try cases in the paper or on TV.
>
> A. Okay. It's planted evidence –
>
> Q. Well –
>
> A. – people can say anything –
>
> Q. Okay. Thank you, Mr. Pannell . . . .

After the State renewed its challenge to the prospective juror for cause, the trial court heard arguments from the parties. The trial court then excused the prospective juror for cause after concluding:

> I think that his responses, in their totality– he, at best, has given some sort of qualified statement that he could, under his own perceived limited circumstances follow the law; and under the law, that's not good enough. He conceded that if the state proved what they were required to prove under the statute but it didn't meet his self-appointed criteria, then he couldn't

> go forward and follow the law. And I don't think that's what our system requires of a juror. And I – that's just the way he feels, and that's fine; but I'll note your exception. I'm going to go ahead and excuse him.

The principles governing a trial court's decision to excuse a prospective juror challenged for cause are set out as follows. Under Wainwright v. Witt, 469 U.S. 412, 424 (1985), prospective jurors may be excused for cause only if their views about the death penalty would "prevent or substantially impair" the performance of their duties as a juror in accordance with their instructions and their oath. See also State v. Hutchison, 898 S.W.2d 161, 167 (Tenn. 1994). However, a juror's bias need not be proven with "unmistakable clarity" to justify a challenge for cause. Id.

A trial court must have the "definite impression that a prospective juror could not follow the law." Hutchison, 898 S.W.2d at 167; see Wainwright, 469 U.S. at 425-26. A trial court's findings "are accorded a presumption of correctness, and the [defendant] must establish by convincing evidence that the trial court's determination was erroneous before an appellate court will overturn that decision." State v. Austin, 87 S.W.3d 447, 473 (Tenn. 2002); see also State v. Alley, 776 S.W.2d 506, 518 (Tenn. 1989); State v. Duncan, 698 S.W.2d 63, 71 (Tenn. 1985).

A review of these principles as applied illustrates the broad discretion afforded to the trial court. In Wainwright, for instance, the Supreme Court concluded that a prospective juror was properly excused where she was "afraid" or "thought" that her

views against the death penalty may interfere with her ability to determine the defendant's guilt. 469 U.S. at 426. In Austin, this Court agreed that the trial court had properly excused several prospective jurors who indicated that they would not consider or did not "believe" in imposing the death penalty. 87 S.W.3d at 473. In Duncan, a case very similar to the present case, this Court held that a prospective juror was properly excused where she believed that she could not impose the death penalty "unless she saw the crime committed," and where she stated that she did not want to "judge another human being on the basis of what one says against what another person says." 698 S.W.2d at 71; see also Alley, 776 S.W.2d at 517-18 (prospective juror excused where he was "not sure" he could consider the death penalty).

In our view, the defendant has not met the burden of establishing by convincing evidence that the trial court erred in excusing prospective juror Pannell for cause. The prosecutor extensively questioned Pannell as to whether he could apply the law to the evidence and consider all forms of punishment in this case. Pannell consistently indicated that it would be "hard for [him] to say" that he would impose the death penalty for a crime he did not witness or for a crime to which the defendant had not confessed. Cf. Duncan, 698 S.W.2d at 71. In response to additional questioning by defense counsel, Pannell reiterated that he could impose the death penalty only in those circumstances where he had witnessed the crime or heard a defendant's confession. Finally, Pannell answered the trial court's questions by saying that he could not follow the law as to aggravating and mitigating circumstances unless his own criteria were satisfied.

In sum, the prospective juror was questioned extensively by both parties and the trial court. The trial court gave defense counsel ample opportunity to rehabilitate the prospective juror and gave full consideration to the arguments of the parties. The trial court asked its own questions to further explore the prospective juror's views. Accordingly, we conclude that the trial court did not err in excusing prospective juror Pannell.

Lesser Included Offenses

We next address the defendant's argument that the trial court committed reversible error in failing to instruct the jury on the lesser included offenses of felony murder, i.e., second degree murder, reckless homicide, and criminally negligent homicide.[3] The State concedes that the trial court erred in failing to instruct the jury on these lesser included offenses, but it asserts that the trial court's error was harmless beyond a reasonable doubt.[4]

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[3] Felony murder requires, in relevant part, evidence of "a killing of another committed in the perpetration of or attempt to perpetrate any . . . robbery . . . ." Tenn. Code Ann. § 39-13-202 (a)(2) (2003). Second degree murder requires evidence of "[a] knowing killing of another." Tenn. Code Ann. § 39-13-210(a) (2003). Reckless homicide requires evidence of "a reckless killing of another." Tenn. Code Ann. § 39-13-215(a) (2003). Criminally negligent homicide requires evidence that criminally negligent conduct "results in death." Tenn. Code Ann. § 39-13-212(a) (2003).

[4] The State asserts that the trial court did not err in failing to instruct the jury on the offense of facilitation of felony murder because there was no evidence to support such an instruction. See State v. Ely, 48 S.W.3d 710, 724 (Tenn. 2001) (evidence did not warrant an instruction on the lesser included offense of

An instruction on a lesser included offense must be given if the trial court, viewing the evidence most favorably to the existence of the lesser included offense, concludes (a) that "evidence exists that reasonable minds could accept as to the lesser included offense," and (b) that the evidence "is legally sufficient to support a conviction for the lesser-included offense." State v. Burns, 6 S.W.3d 453, 469 (Tenn. 1999). The failure to instruct the jury on lesser included offenses requires a reversal for a new trial unless a reviewing court determines that the error was harmless beyond a reasonable doubt. State v. Ely, 48 S.W.3d 710, 727 (Tenn. 2001). In making this determination, the reviewing court must "conduct a thorough examination of the record, including the evidence presented at trial, the defendant's theory of defense, and the verdict returned by the jury." State v. Allen, 69 S.W.3d 181, 191 (Tenn. 2002).

This Court has previously held that second degree murder, reckless homicide, and criminally negligent homicide are lesser included offenses of felony murder. Ely, 48 S.W.3d at 721. We explained:

> After comparing the respective elements of felony murder, second degree murder, reckless homicide, and criminally negligent homicide, it appears that the elements of the lesser offenses are a subset of the elements of the greater and otherwise differ only in the mental state required. We hold that because the mental states required for the lesser offenses differ only in the level of culpability attached to each in

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facilitation). The defendant in this case has not raised an issue as to facilitation as a lesser included offense in his brief.

> terms of seriousness and punishment, the offenses of second degree murder, reckless homicide, and criminally negligent homicide are lesser-included offenses of felony murder under part (b) of the Burns test.

Id. at 721-22.

We conclude, and the State concedes, that the record in this case demonstrates that the trial court erred in failing to instruct the jury on second degree murder, reckless homicide, and criminally negligent homicide. There was evidence that reasonable minds could accept as to these lesser included offenses, and the evidence was legally sufficient to support a guilty verdict on these lesser included offenses. See id. at 724-25 (holding that the trial court erred in failing to instruct on the lesser included offenses to felony murder); see also Burns, 6 S.W.3d at 467.

We further conclude, however, that the trial court's failure to instruct on these lesser included offenses was harmless beyond a reasonable doubt. The evidence at trial revealed that the defendant shot the victim, an armored truck guard, in the back of the head and stole the victim's Walgreens money deposit bag. The defendant was identified as one of two men fleeing from the scene in a white car. The defendant's criminal conduct was filmed by a surveillance camera, and the videotape of the crime was played for the jury. The defendant's ex-wife, Angela Jackson, identified the defendant from a still photograph made from the videotape. The defendant later divided the contents of the money deposit bag with his co-defendant, Anthony Bond, and he told Jackson that he had shot the guard. The testimony established that the victim suffered

extensive injuries and later died as a result of these injuries. In sum, the evidence overwhelmingly established the elements of felony murder, i.e., the defendant's killing of another in the perpetration o fa robbery. See Tenn. Code Ann. § 39-13-202(b) (2003).

Moreover, the defendant's theory of defense was two-fold: (1) that he was not involved in the robbery, and (2) that the gunshot wound did not cause the victim's death. See Allen, 69 S.W.3d at 191 (reviewing court should analyze the defendant's theory of defense). The defendant did not concede that he was involved in the crime, and he did not argue that he was guilty of a lesser included offense or attempt to establish that he was guilty of a lesser included offense. Compare id. at 191-92 (theory of defense, in part, was that the defendant lacked the required mental state for the offense). In sum, we agree with the Court of Criminal Appeals' conclusion that the jury could not reasonably have concluded that the defendant was guilty of anything other than a killing in the perpetration of a robbery, i.e., felony murder.

Accordingly, we hold that the trial court erred in failing to instruct the jury on the lesser included offenses of felony murder but that the error was harmless beyond a reasonable doubt.

Proportionality

Where a defendant has been sentenced to death, we must apply a comparative proportionality analysis pursuant to Tennessee Code Annotated section 39-13-206(c)(1)(D) (2003). The analysis is intended to identify aberrant, arbitrary, or capricious sentencing by determining whether the death sentence is

"'disproportionate to the punishment imposed on others convicted of the same crime.'" State v. Bland, 958 S.W.2d 651, 662 (Tenn. 1997) (quoting Pulley v. Harris, 465 U.S. 37, 42-43 (1984)).

In conducting this analysis, this Court employs the precedent-seeking method of comparative proportionality review, in which we compare a case with other cases involving similar defendants and similar crimes. See Bland, 958 S.W.2d at 665-67. While no defendants or crimes are alike, a death sentence is disproportionate if a case is "plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed." Id. at 668.

We have repeatedly held that the pool of cases considered by this Court in its proportionality review includes those first degree murder cases in which the State seeks the death penalty, a capital sentencing hearing is held, and the sentencing jury determines whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death. See State v. Godsey, 60 S.W.3d 759, 783 (Tenn. 2001). We have explained that the pool does not include first degree murder cases in which a plea bargain is reached with respect to the punishment or in which the State does not seek the death penalty:

> [C]onsideration of cases in which the State, for whatever reasons, did not seek the death penalty would necessarily require us to scrutinize what is ultimately a discretionary prosecutorial decision. We previously have declined to review the exercise of prosecutorial discretion, and it would be particularly inappropriate to do so in conducting comparative

> proportionality review, where our function is limited to identifying aberrant death sentences, not identifying *potential* capital cases.

Id. at 784 (citations omitted).

Accordingly, our comparative proportionality review of the applicable pool of cases considers numerous factors regarding the offense: (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the victim's age, physical condition, and psychological condition; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effect upon non-decedent victims. Bland, 958 S.W.2d at 667. We also consider numerous factors about the defendant: (1) prior criminal record, if any; (2) age, race, and gender; (3) mental, emotional, and physical condition; (4) role in the murder; (5) cooperation with authorities; (6) level of remorse; (7) knowledge of the victim's helplessness; and (8) potential for rehabilitation. Id.; see also State v. Bane, 57 S.W.3d 411, 428-29 (Tenn. 2001).

In this case, the evidence showed that the defendant shot the victim in the back of his head and stole the victim's Walgreens money deposit bag. The defendant was identified as one of two men fleeing from the scene, and the shooting was filmed by a surveillance camera and shown to the jury. Angela Jackson identified the defendant as the shooter from a still photograph made from the videotape. The defendant later divided the contents of the deposit bag with his co-defendant, and he told Jackson that he killed the guard. The evidence established that the victim suffered extensive injuries

and suffered extreme pain and disability from these injuries for over two years before his death.

The evidence also showed that the defendant was twenty-four years old at the time of this offense. He had eight prior convictions for aggravated robbery and a conviction for robbery. As discussed above, the prior aggravated robbery offenses took place from January to June of 1993 and involved the defendant's use of a firearm and several different victims. On January 4, 1993, for instance, the defendant used a firearm in taking between $1,000 and $10,000 from Michael Osborne. On February 1, 1993, he used a firearm in taking between $1,000 and $10,000 from Booker Sanders, and he used a handgun in taking money and food stamps totaling $1,000 to $10,000 from Lee Harris. On March 8, 1993, he used a firearm in taking money and checks totaling $500 to $1,000 from Amos Kirby. On March 12, 1993, he used a firearm in taking checks valued under $500 from Carl Hutchinson. On March 15, 1993, he used a firearm in taking money and checks totaling $500 to $1,000 from Onie Massey, and he used a firearm in taking $500 to $1,000 from Dewayne McCoy. Finally, on June 25, 1993, he used a pistol in taking jewelry valued at $1,000 to $10,000 from Gary Smallwood.

The defendant played the major role in the present case by shooting the victim and stealing the victim's deposit bag. The defendant told the co-defendant to get rid of the gun he had used to shoot the victim. The defendant showed absolutely no remorse for the offense; indeed, he divided the money with his co-defendant and immediately went on a shopping spree, buying a car, jewelry, and wedding rings. He

told Angela Jackson that "the victim did not struggle for his life" and that "he grabbed the nigger by the throat and shot him."

The defendant offered mitigating evidence regarding his family background from his mother, brother, and cousins. The defendant rarely saw his father as a child, and his father had been involved in drugs. The defendant's father and his stepfather abused the defendant's mother. The evidence showed that the defendant had the support of his family members, including his minor son, and that he had earlier earned his GED while in prison. There was no evidence, however, that the defendant had any physical, mental, or emotional difficulties that impaired his judgment or mitigated the offense he committed in any other way.

After reviewing the record, we conclude that the evidence in this case clearly supported the jury's finding that the aggravating circumstance, i.e., that the defendant had prior convictions for felonies whose elements involved violence to the person, was proven beyond a reasonable doubt. Similarly, the evidence supported the jury's finding that the evidence of this aggravating circumstance outweighed the evidence of mitigating circumstances beyond a reasonable doubt. Tenn. Code Ann. § 39-13-206(c)(1)(B) (2003).

We also conclude that the death sentence as applied to the defendant in this case was not arbitrary, excessive or disproportionate when compared to defendants in other cases. See Tenn. Code Ann. § 39-13-206(c)(1)(A), (C), and (D) (2003).

This Court has upheld the death sentence in similar cases where the defendant shot a victim at close range. See State v. McKinney, 74 S.W.3d 291, 312 (Tenn. 2002); State v. Henderson, 24 S.W.3d 307, 310 (Tenn. 2000); State v. Cribbs, 967 S.W.2d 773, 777 (Tenn. 1998). Similarly, this Court has upheld the death penalty in numerous cases in which the victim was shot in the course of a robbery or other felony offense. In State v. Reid, 91 S.W.3d 247, 260 (Tenn. 2002), for instance, the defendant received the death penalty for shooting two victims in the course of a robbery. In State v. Stout, 46 S.W.3d 689, 693-94 (Tenn. 2001), the defendant was sentenced to death for kidnapping the victim and shooting her in the head. Similarly, in State v. Sims, 45 S.W.3d 1, 5-6 (Tenn. 2001), the defendant was sentenced to death for shooting the victim in the course of a burglary. See also State v. Smith, 993 S.W.2d 6, 18 (Tenn. 1999) (victim shot during robbery); State v. Howell, 868 S.W.2d 238, 262 (Tenn. 1993) (victim shot in the head during robbery); State v. Boyd, 797 S.W.2d 589, 595 (Tenn. 1990) (victim shot during robbery).

In addition, this Court has upheld numerous death sentences in cases involving a defendant with previous convictions for felonies whose statutory elements involved the use of violence to the person, i.e., the aggravating circumstance in this case. See, e.g., Reid, 91 S.W.3d at 287; McKinney, 74 S.W.3d at 312; Stout, 46 S.W.3d at 694; Sims, 45 S.W.3d at 19-20; State v. Bates, 804 S.W.2d 868, 882-83 (Tenn. 1991). As this Court has said, this aggravating circumstance is "more qualitatively persuasive and objectively reliable than other[]" aggravating circumstances. Howell, 868 S.W.2d at 261. Indeed, we have upheld the death

sentence in cases in which this was the sole aggravating circumstance found by the jury. See McKinney, 74 S.W.3d at 312; State v. Chalmers, 28 S.W.3d 913, 919 (Tenn. 2000); State v. Keough, 18 S.W.3d 175, 184 (Tenn. 2000).

Finally, we note that numerous death penalty cases involved defendants who presented evidence of mitigating circumstances substantially similar to that presented by the defendant in this case. For example, several cases have involved defendants who were a similar age as the defendant. See State v. Davis, 141 S.W.3d 600, 621 (Tenn. 2004); State v. Pike, 978 S.W.2d 904, 922 (Tenn. 1998); Bland, 958 S.W.2d at 674. Likewise, numerous defendants have presented mitigating evidence of their backgrounds, poor childhood environments, parents who used drugs, and similar circumstances. Davis, 141 S.W.3d at 621; Stout, 46 S.W.3d at 708; Henderson, 24 S.W.3d at 318; Bland, 958 S.W.2d at 670.

Our task does not require a finding that this case is exactly like a prior case in every respect, nor does it require a determination that this case is "more or less" like other similar death penalty cases. See McKinney, 74 S.W.3d at 313. Instead, we must identify aberrant death sentences by determining whether a case plainly lacks circumstances similar to those cases in the relevant pool of cases in which a death sentence has been upheld. Id. Accordingly, the death sentence in this case is not arbitrary, excessive, or disproportionate.

CONCLUSION

After reviewing the entire record and applicable authority, we hold: (1) the trial court did not err in excusing a prospective juror for cause; (2) the trial court erred in refusing to instruct the jury on lesser included offenses of felony murder, but the error was harmless beyond a reasonable doubt; and (3) the death sentence was not arbitrary, excessive, or disproportionate. We also agree with the Court of Criminal Appeals' conclusions with respect to the remaining issues, the relevant portions of which are included in the appendix. Accordingly, the Court of Criminal Appeals' judgment is affirmed.

The defendant's sentence of death shall be carried out on the 10th day of August, 2005, unless otherwise ordered by this Court or other proper authority. It appearing that the defendant is indigent, costs of the appeal are taxed to the State.

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E. RILEY ANDERSON, JUSTICE

ADOLPHO A. BIRCH, JR., J., concurring and dissenting.

I concur in the conclusion of the majority that Thomas's conviction should be affirmed. As to the sentence of death, however, I respectfully dissent. As I have previously expressed in a long line of dissents, I believe that the comparative proportionality review protocol currently embraced by the majority is inadequate to shield defendants from the arbitrary and disproportionate imposition of the death penalty. See Tenn. Code Ann. § 39-13-206(c)(1)(D) (1995 Supp.). I have consistently expressed my displeasure with the current protocol since the time of its adoption in State v. Bland, 958 S.W.2d 651 (Tenn. 1997). See State v. Robinson, 146 S.W.3d 469, 529 (Tenn. 2004) (Birch, J., concurring and dissenting); State v. Leach, 148 S.W.3d, 42, 68 (Tenn. 2004) (Birch, J., concurring and dissenting); State v. Davis, 141 S.W.3d 600, 632 (Tenn. 2004) (Birch, J., concurring and dissenting); State v. Berry, 141 S.W.3d 549, 589 (Tenn. 2004) (Birch, J., concurring and dissenting); State v. Holton, 126 S.W.3d 845, 872 (Tenn. 2004) (Birch, J., concurring and dissenting); State v. Davidson, 121 S.W.3d 600, 629-36 (Tenn. 2003) (Birch, J., dissenting); State v. Carter, 114 S.W.3d 895, 910-11 (Tenn. 2003) (Birch, J., dissenting); State v. Reid, 91 S.W.3d 247, 288-89 (Tenn. 2002) (Birch, J., concurring and dissenting); State v. Austin, 87 S.W.3d 447, 467-68 (Tenn. 2002) (Birch, J., dissenting); State v. Stevens, 78 S.W.3d 817, 852 (Tenn. 2002) (Birch, J., concurring and dissenting); State v. McKinney, 74 S.W.3d 291, 320-22 (Tenn. 2002) (Birch, J., concurring and dissenting); State v. Bane, 57 S.W.3d 411, 431-32 (Tenn. 2001) (Birch, J., concurring and dissenting); State v. Stout, 46 S.W.3d 689, 720 (Tenn. 2001) (Birch, J., concurring and dissenting);

Terry v. State, 46 S.W.3d 147, 167 (Tenn. 2001) (Birch, J., dissenting); State v. Sims, 45 S.W.3d 1, 23-24 (Tenn. 2001) (Birch, J., concurring and dissenting); State v. Keen, 31 S.W.3d 196, 233-34 (Tenn. 2000) (Birch, J., dissenting). As previously discussed, I believe that the problem with the current proportionality analysis is threefold: (1) the proportionality test is overbroad,[1] (2) the pool of cases used for comparison is inadequate,[2] and (3) review is too subjective.[3] These flaws seriously undermine the reliability of the current proportionality protocol. See State v. Godsey, 60 S.W.3d at 793-800 (Birch, J., concurring and dissenting). In my view, the current comparative proportionality protocol is

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[1] I have urged adopting a protocol in which each case would be compared to factually similar cases in which *either* a life sentence or capital punishment was imposed to determine whether the case is more consistent with "life" cases or "death" cases. See State v. McKinney, 74 S.W.3d at 321 (Birch, J., concurring and dissenting). The current protocol allows a finding proportionality if the case is similar to existing *death penalty* cases. In other words, a case is disproportionate only if the case under review "is plainly lacking in circumstances consistent with those in similar cases in which the *death penalty* has been imposed." Bland, 958 S.W.2d at 665 (emphasis added).

[2] In my view, excluding from comparison that group of cases in which the State did not seek the death penalty, or in which no capital sentencing hearing was held, frustrates any meaningful comparison for proportionality purposes. See Bland, 958 S.W.2d at 679 (Birch, J., dissenting). This case, in particular, is a prime example of the arbitrariness of this protocol.

[3] As I stated in my concurring/dissenting opinion in State v. Godsey, "[t]he scope of the analysis employed by the majority appears to be rather amorphous and undefined–expanding, contracting, and shifting as the analysis moves from case to case." 60 S.W.3d 759, 797 (Tenn. 2001)(Birch, J., concurring and dissenting).

woefully inadequate to protect defendants from the arbitrary or disproportionate imposition of the death penalty.[4] Accordingly, I respectfully dissent from that portion of the majority opinion affirming the imposition of the penalty of death.

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ADOLPHO A. BIRCH, JR.

[4] I also note that in a recent study on the costs and the consequences of the death penalty conducted by the State Comptroller, one of the conclusions was that prosecutors across the state are inconsistent in their pursuit of the death penalty, a fact that also contributes to arbitrariness in the imposition of the death penalty. See John G. Morgan, Comptroller of the Treasury, Tennessee's Death Penalty: Costs and Consequences 13 (July 2004), *available at www.comptroller.state.tn.us/orea/reports*.

APPENDIX

(Excerpts from the Court of Criminal Appeals' Decision)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

November 4, 2003 Session

STATE OF TENNESSEE v. ANDREW THOMAS AND ANTHONY BOND

Direct Appeal from the Criminal Court for Shelby County No. 00-03095; Joseph B. Dailey, Judge

No. W2001-02701-CCA-R3-DD-
Filed February 27, 2004

Defendants Andrew Thomas and Anthony Bond appeal as of right their convictions for the first degree felony murder of Loomis Fargo employee, James Day, during the perpetration of a robbery. Following a separate sentencing hearing, the jury found, as to each defendant, that the proof supported one aggravating circumstance beyond a reasonable doubt, that is, the defendant had been previously convicted of one or more violent felonies. See Tenn. Code Ann. § 39-13-204(i)(2). With respect to Defendant Thomas, the jury further determined that the aggravating circumstance outweighed any mitigating circumstances beyond a reasonable doubt, and sentenced Defendant Thomas to death. As to Defendant Bond, the jury found that the aggravating circumstance did not outweigh the mitigating circumstances and imposed a sentence of life without the possibility of parole. The trial court

approved the sentencing verdicts. In this appeal as of right, Defendant Thomas raises the following issues for this Court's review: (1) the sufficiency of the evidence; (2) whether the trial court erred by denying various pre-trial motions; (3) whether the trial court erred by failing to continue the case after the events of September 11, 2001; (4) whether the trial court erred by excusing prospective juror Pannell for cause; (5) whether the trial court erred by admitting photographs of the victim; (6) whether the trial court erred by admitting items from Defendant's prior federal trial arising out of the robbery; (7) whether the trial court erred in restricting the Defendant's impeachment of Angela Jackson; (8) whether the trial court erred in failing to voir dire a prospective witness regarding her relationship with defense witness Russell Carpenter; (9) whether the trial court erred in sustaining an objection to the testimony of John Hibbler; (10) whether the trial court erred in permitting testimony regarding fingerprints despite stipulation; (11) whether the trial court erred in the admission of expert testimony; (12) whether the trial court erred by failing to charge lesser-included offenses of felony murder; (13) whether the trial court erred by failing to charge the jury with an accomplice instruction; (14) whether it was plain error for the State to refer to Thomas and Bond as "Greed and Evil" in opening statement and closing argument; (15) whether the trial court erred in permitting the State to argue that the jury had a job to find the Defendants guilty; (16) whether the trial court erred by not instructing on specific mitigating factors; (17) whether the trial court erred by permitting the State to cross-examine the Defendant's mother regarding disciplinary actions taken against the

Defendant while in prison; (18) whether the verdict of the jury was against the weight of the evidence; (19) whether the indictment failed to charge a capital offense; (20) whether the death penalty violates international treaties ratified by the United States; (21) whether the Tennessee death penalty scheme is unconstitutional; and (22) whether the sentence is proportionate. Defendant Bond raises the following issues: (1) whether it was error for the trial judge to fail to recuse himself for failure to follow Local Rule 4.01; (2) whether the trial court erred by overruling Bond's objection to the testimony of Dr. Smith; (3) whether the trial court erred by declaring Dr. Smith an expert in firearms identification; (4) whether the trial court erred by permitting the prosecution to engage in improper argument; (5) whether the trial court erred by permitting the prosecution to elicit testimony from Angela Jackson regarding her attendance at trial; and (6) whether the trial court erred by failing to instruct the jury as to lesser-included offenses of felony murder. After review of the record and the applicable law, we find no errors of law requiring reversal as to Defendant Thomas. Accordingly, we affirm the jury's verdict finding Defendant Thomas guilty of first degree murder. Additionally, we affirm the jury's imposition of the sentence of death as to Defendant Thomas. However, with respect to Defendant Bond, we are unable to conclude that the failure of the trial court to instruct the jury as to the lesser-included offenses of felony murder was harmless beyond a reasonable doubt. Accordingly, we vacate Defendant Bond's conviction for felony murder and accompanying sentence of life without the possibility of parole. With respect to Defendant Bond, this matter is remanded to the trial court for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed as to Defendant Thomas; Reversed and Remanded as to Defendant Bond

DAVID H. WELLES, J., delivered the opinion of the court, in Which JOHN EVERETT WILLIAMS, J., joined. JOE G. RILEY, J., filed an opinion concurring in part and dissenting in part.

Lorna S. McClusky and Howard Manis, Memphis, Tennessee (at trial and on appeal), for the appellant, Anthony Bond.

Michael E. Scholl and Jeffery Glatstein, Memphis, Tennessee (at trial), for the appellant, Andrew Thomas.

Robert Brooks, Memphis, Tennessee (on appeal), for the appellant, Andrew Thomas.

Paul G. Summers, Attorney General and Reporter; Alice B. Lustre, Assistant Attorney General; William L. Gibbons, District Attorney General; and Amy Weirich and Jennifer Nichols, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

[Deleted: Summary of Facts and Testimony]

Issues Raised by Defendant Thomas

I. Sufficiency of the Evidence

Defendant Thomas asserts that the trial court erred by failing to grant a motion for a directed verdict and judgment of acquittal following the conclusion of the State's proof and at the end of the trial. The duty of

the trial judge and the reviewing court on the determination of a motion for a judgment of acquittal is the same as on a motion for a directed verdict. See State v. Torrey, 880 S.W.2d 710, 712 (Tenn. Crim. App. 1993). This Court has observed that "[t]he standard by which the trial court determines a motion for judgment of acquittal at the end of all the proof is, in essence, the same standard which applies on appeal in determining the sufficiency of the evidence after a conviction." State v. Thompson, 88 S.W.3d 611, 614-15 (Tenn. Crim. App. 2000). Moreover, "[a] motion for a judgment of acquittal made at the conclusion of the proof by the state is waived when the defendant elects to present evidence on his own behalf." State v. Ball, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). Accordingly, we will address the Defendant's complaints as a challenge to the sufficiency of the evidence.

When an accused challenges the sufficiency of the evidence, the standard is whether, after reviewing the evidence in the light most favorableto the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). In its review of the evidence, an appellate court must afford the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by theevidence, are resolved by the trier of fact, not this court. See State v. Morris, 24 S.W.3d 788, 795 (Tenn. 2000). Moreover, we note that a guilty verdict can be based upon direct evidence,

circumstantial evidence, or a combination of direct and circumstantial evidence. See State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). Furthermore, while a guilty verdict may result from purely circumstantial evidence, in order to sustain the conviction the facts and circumstances of the offense "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971).

To obtain a conviction for first degree felony murder, the State must prove the "killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy[.]" Tenn. Code Ann. § 39-13-202(a) (1997). In this case, the proof at trial established that the victim, James Day, was shot in the back of the head during the commission of a robbery. The proof further established that the injuries sustained by the victim as a direct result of the gunshot wound ultimately led to the victim's death. Therefore, the crime of first degree felony murder was established.

Defendant Thomas' challenge to the sufficiencyof the evidence is three-fold. He asserts that (1) Angela Jackson's testimony establishing the identity of Defendant Thomas as the perpetrator is not reliable; (2) the discrepancy in the testimony of the State's medical experts as to the source of bacteria which eventually caused the death of the victim creates a reasonable doubt as to the causation of the victim's death; and (3) witness Richard Fisher identified Bond

and then Thomas as the passenger in the getaway vehicle. We will address the first and third of these assertions together, and then turn to Defendant Thomas' contention regarding causation.

A. Identification of Defendant Thomas as the perpetrator

Identification of a defendant as the person who committed the offense for which he or she is on trial is a question of fact for the jury's determination upon consideration of all competent proof. See State v. Strickland, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. See State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. See id.

Defendant Bond admitted that he and another person took part in the robbery of the Loomis Fargo truck and that James Day was shot during the robbery. It is undisputed that a car, matching the description of a vehicle belonging to Defendant Thomas' ex-wife, Angela Jackson, was seen parked a short distance from the crime scene and that Defendant Thomas and another person were observed getting into the vehicle and driving away. It is undisputed that Defendant Thomas, who was unemployed at the time, purchased a vehicle, jewelry, a shotgun, clothing, and opened a savings account within forty-eight hours of the robbery

of the Loomis Fargo carrier. Angela Jackson identified her ex-husband in stills taken from the surveillance tape of the shooting. Ms. Jackson related that, while watching a news report on the robbery, Defendant Thomas remarked that he "grabbed the nigger by the throat and shot him."

Defendant Thomas points to Ms. Jackson's testimony that he and Defendant Bond returned to her residence between noon and 12:30 p.m. on the day of the robbery. However, the State proved that Mr. Day was robbed and shot between 12:30 and 1:00 p.m. Thus, he argues, the same testimony identifying him as the perpetrator also makes it "factually impossible" for him to have committed the crime. We are not convinced. Any discrepancy in Ms. Jackson's testimony relating to her report of the time that Defendant Thomas and Defendant Bond arrived at her apartment with the proceeds from the robbery and the actual time of the robbery is not fatal to the identification of Defendant Thomas as the perpetrator. The choice of which witnesses to believe and which to disbelieve is a matter entrusted to the jury. See Bolin v. State, 405 S.W.2d 768, 771 (1966). Furthermore, the jury is free to believe portions of a witness' testimony and to disbelieve other portions. See Wilson v. State, 574 S.W.2d 52, 55 (Tenn. Crim. App. 1978). Additionally, Ms. Jackson's testimony as to the events immediately following the robbery were corroborated by other witnesses.

Moreover, while it is true that Mr. Fisher initially identified Defendant Bond as the person he observed in the passenger side of the white getaway car, Mr. Fisher, upon request, reexamined both defendants and

changed his identification to Defendant Thomas. Defendant Thomas challenged the identification on cross-examination. The jury was present during the identification and then the re-identification. The jury was in the best position to determine the credibility of this witness. Moreover, the identity of the shooter versus the driver is irrelevant, considering the theory of criminal responsibility, for purposes of determining guilt of the offense of felony murder. See Tenn. Code Ann. § 39-11-402. Irregardless of this identification, there was ample evidence from which any rational trier of fact could conclude, beyond a reasonable doubt, that Defendant Thomas was guilty of first degree felony murder committed during the perpetration of a robbery. This issue has no merit.

B. Cause of victim's death

Defendant Thomas claims that discrepancies between the testimony of Drs. Smith and Gardner mandate a reversal of his conviction for felony murder. Both Drs. Smith and Gardner concluded that the victim died from sepsis due to a rupture of the bladder resulting from a gunshot wound to the head. The alleged discrepancy in their testimony arises in their disparate opinions as to how the bacteria that resulted in sepsis was introduced to the victim's body.

Dr. O.C. Smith testified that he had no opinion as to where the bacteria came from and that there were several potential sources for the bacteria. Dr. Smith surmised that the bacteria leading to the infection could have existed prior to the rupture of the bladder, could have been a result of the catheterization, or could have been the result of an infection of the urinary tract near the skin opening. However, Dr. Smith concluded

that the "neurogenic bladder and . . . the fact that he has problems with bladder control . . . combined with the requirement for catheterization . . . predispose[d] [the victim] . . . to have a high risk of colonization and an increased risk of infection." Dr. Cynthia Gardner, Dr. Smith's assistant, testified that "[i]t probably was – I would say with ninety-nine percent certainty, the bacteria was introduced into the bladder through catheterization." Defendant Thomas contends that this "discrepancy" raises sufficient doubt as to the cause of death of the victim. We disagree.

Both doctors testified as to the injuries sustained by the victim when he was shot and the impact of the injuries upon the victim during the intervening period until his death. Any alleged "conflict" as to the source of the bacteria is insignificant. From the testimony of both medical examiners, it appears to this Court that the infection would not have occurred but for the victim's medical condition directly caused by the shooting of the victim on April 21, 1997. That is, the uncontradicted medical testimony established that the victim eventually died as a result of the gunshot wound inflicted during the robbery. Accordingly, the evidence of causation is sufficient to support the verdict of guilt and this issue is without merit.

II. Pretrial Motions

A. Motion to charge jury with presumption of sentencing

Defendant Thomas asserts that the trial court erred in refusing to charge the jury that it must presume that a life sentence would be served or that the death penalty would be carried out. He argues that absent

such an instruction there is a "substantial probability" that jurors would improperly speculate on the consequences of their verdict.

This is not a novel issue. Our supreme court has held that the after-effect of a verdict is not a proper consideration for the jury. See State v. Payne, 791 S.W.2d 10, 21 (Tenn.1990), aff'd, 501 U.S. 808, 111 S. Ct. 2597 (1991). The court has ruled that it is not error for a trial court to refuse to charge the jury with the very instruction requested by Defendant Thomas. See, e.g., State v. Caughron, 855 S.W.2d 526, 543 (Tenn.), cert. denied, 510 U.S. 979, 114 S. Ct. 475 (1993); Payne, 791 S.W.2d at 21. Accordingly, Defendant Thomas is entitled to no relief on this ground.

B. Motion for procedure governing jury composition

Defendant Thomas next contends that the trial court erred when it denied his motion for separate juries for the guilt and sentencing phases of trial. We disagree. The trial court does not have any discretion to grant a motion for separate juries for the guilt and sentencing phases of trial. See State v. Dellinger, 79 S.W.3d 458 app. at 478 n.1 (Tenn.), cert. den. 537 U.S. 1090, 123 S.Ct. 695 (2002). Indeed, Tennessee law specifically requires that following a conviction for first degree murder, a "sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt." Tenn. Code Ann. § 39-13-204(a). Moreover, our supreme court has previously rejected this argument. See Dellinger, 79 S.W.3d app. at 478-79; State v. Harbison, 704 S.W.2d 314, 318 (Tenn.), cert. denied, 476 U.S. 1153, 106 S. Ct. 2261 (1986) (rejecting the argument that a defendant

is denied a fair trial by the systematic exclusion of jurors who are against the death penalty); see also State v. Hall, 958 S.W.2d 679 app. at 717 (Tenn.1997) (rejecting the argument that the manner of selecting "death qualified" jurors results in juries that are prone to conviction).

Defendant Thomas also contends that a criminal defendant's constitutional rights are violated by excusing prospective jurors for cause when their personal beliefs concerning the death penalty would prevent or substantially impair their performance as a juror in accordance with their instructions and their oath. This issue, similarly, has been decided adversely to the Defendant. See Dellinger, 79 S.W.3d app. at 479 n.2; State v. Hutchison, 898 S.W.2d 161, 167 (Tenn.1994), cert. den. 516 U.S. 840, 116 S.Ct. 137 (1995), (citing Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 852 (1985)). Accordingly, Defendant Thomas is entitled to no relief on these grounds.

C. Motion to declare Victim's Rights Bill unconstitutional

Defendant Thomas asserts that Tennessee Code Annotated section 39-13-204(c), which allows the introduction at sentencing of "victim impact" evidence, violates the constitutional doctrine of separation of powers. This identical argument is raised by Defendant Thomas in his general challenge to the constitutionality of the Tennessee death penalty statutes. We reject this claim. See infra Section XVII (J).

D. Motion to dismiss indictment based on common law "one year and one day rule"

Defendant Thomas moved the trial court to dismiss the indictment based upon the common law year-and-a-day rule because the victim's death occurred more than one year and one day after the crime was committed. The common law rule no longer applies in Tennessee. See State v. Rogers, 992 S.W.2d 393, 401 (Tenn. 1999). This claim is without merit.

E. Motion to use jury questionnaires including specific questions about the death penalty

Defendant Thomas filed a motion for a jury questionnaire specifically including death penalty questions. The trial court permitted a jury questionnaire to be used but declined to include death penalty questions. Defendant Thomas claims that, in so doing, the trial court erred.

The trial court committed no error in denying Defendant Thomas' request. A trial court is vested with great discretion in determining how voir dire examination will be conducted, and the court's decision on how extensive a voir dire examination is required will not be overturned except for an abuse of the discretion. See State v. Howell, 868 S.W.2d 238, 247 (Tenn. 1993), cert. den. 510 U.S. 1215, 114 S.Ct. 1339 (1994); State v. Harris, 839 S.W.2d 54, 65 (Tenn. 1992), cert. den. 507 U.S. 954, 113 S.Ct. 1368 (1993). We find no abuse of discretion in the method of voir dire employed in this case.

F. Motion to dismiss on double jeopardy grounds

Defendant Thomas asserts that his trial in state court violates the double jeopardy provisions of the Fifth Amendment to the United States Constitution, Article 1 section 10 of the Tennessee Constitution, and Article 14 section 7 of the International Covenant on Civil and Political Rights because the Defendant's federal charges arise from the same criminal event.

It is a well-established principle that "a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one . . . [P]rosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, 'subject [the defendant] for the same offence to be twice put in jeopardy.'" United States v. Wheeler, 435 U.S. 313, 317, 98 S. Ct. 1079, 1082-83 (1978). Defendant Thomas argues, however, that the dual sovereigntydoctrine is violative of the Tennessee constitution and argues for its abrogation. However, our supreme court has specifically upheld and determined to adhere to this doctrine of dual sovereignty, reasoning as follows:

> There is no question but that such a procedure does not subject the defendant to double jeopardy insofar as the guaranty of due process in the 14th amendment of the federal constitution is concerned. Bartkus v. Illinois, 359 U.S. 121, 79 S. Ct. 676, 3 L.Ed.2d 684 (1959). While the rationale of this case— that the state and federal governments are distinct sovereignties, and thus the punishment of a single act by ach is not double jeopardy—has been criticized, a similar approach has provided

> the basis for a more recent case, which would imply that Bartkus' analysis of the issue is still valid. See United States v. Wheeler, 435 U.S. 313, 98 S. Ct. 1079, 55 L.Ed.2d 303 (1978). This court is bound by the decisions of the United States Supreme Court concerning the proper interpretation of the federal constitution. Townsend v. Clover Bottom Hospital and School, 560 S.W.2d 623 (Tenn. 1978).
>
> The double jeopardy provision of the Tennessee constitution, Article I, § 10, affords the defendant no greater protection. In the past, this provision has been interpreted to permit successive state and federal prosecutions on the basis of the same "dual sovereignties" analysis employed in Bartkus, supra, and, given the need for stability in constitutional interpretation, we see insufficient cause to depart from that precedent now.

Lavon v. State, 586 S.W.2d 112, 113-14 (Tenn. 1979). The Lavon court further explained that any modification or abandonment of the dual sovereignty doctrine must be accomplished through legislative action. See id. at 115. Such legislative action has yet to take place; thus, the doctrine of dual sovereignty remains in effect.

Additionally, Defendant Thomas asserts that the State's prosecution violates the International Covenant on Civil and Political Rights (ICCPR), which is an international treaty of governing nations. This Court addressed and rejected this identical claim in State v. Carpenter, 69 S.W.3d 568, 578-579 (Tenn. Crim. App. 2001), cert. den. 535 U.S. 995, 122 S.Ct. 1557 (2002).

Defendant Thomas has not convinced this Court to sway from this decision. This claim is without merit.

III. Continuance of Case Due to Events of September 11, 2001

On September 12, 2001, the trial court continued the trial in this matter until September 17, 2001. Defendant Thomas maintains that the trial court erred by failing to continue the matter for a longer period of time following the events of September 11, 2001.

The granting of a continuance rests within the sound discretion of the trial court. See State v. Russell, 10 S.W.3d 270, 275 (Tenn. Crim. App. 1999). We will reverse the denial of a continuance only if the trial court abused its discretion and the defendant was prejudiced by the denial. See id. "An abuse of discretion is demonstrated by showing that the failure to grant a continuance denied defendant a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted." State v. Hines, 919 S.W.2d 573, 579 (Tenn. 1995).

In the present case, the trial court's denial of a continuance was not error. The trial was scheduled to begin on September 10, 2001. On September 10, 2001, eleven jurors were tentatively selected and the matter continued to September 11 for a second day of jury selection. Although not evidenced by the record, September 11, 2001, is the date of the terrorist attacks on New York City and Washington, D.C. On September 11, 2001, eighteen jurors were tentatively selected. At some point on that day, defense counsel moved foracontinuance. The trial court continued the

trial until September 17. While the events of September 11, 2001, were of unquestionable national importance, Defendant Thomas fails to explain how those events affected his trial. Nothing in the record before us indicates that those events had any effect on the proceedings other than to delay them for one week. Thus, Defendant Thomas has failed to show how he was prejudiced by the trial court's refusal to grant a continuance for a longer period of time. We find neither error nor abuse of discretion. This issue is without merit.

IV. [Deleted: Excused Prospective Juror]

V. Photographs of Victim

A. Photograph of Victim While Alive

Defendant Thomas submits that it was error for the trial court to permit introduction of a photograph of the victim while alive. At trial, defense counsel objected to introduction of the photograph. The photograph was taken after the April 1997 shooting but prior to the victim's death in October 1999. The trial court overruled the objection stating:

> I think it's, first of all, relevant in that the state, of course, has the burden of proving that an individual—a living, breathing, human being was killed in these events. And the photograph, itself, is again, a very neutral one. It's black and white. It doesn't have family members around. He's not in a choir robe or a scout uniform or military uniform or anything of that sort. This is a very neutral sort of photograph—no wheelchair – nothing that would be designed to elicit sympathy . . . . I'll allow it to be used.

During the guilt phase of the trial, the photograph of the victim was introduced through the testimony of Betty Gay, an employee of Walgreens. On appeal, Defendant Thomas contends that admission of an 8 by 10 black and white photograph of the victim taken during his lifetime was introduced for the sole purpose of invoking the sympathy of the jury and was error. The State responds that the photograph was relevant to rebut Defendant Thomas' defense that it was Mr. Day's physical health, including obesity, that caused his death, rather than the gunshot.

The admission of photographs is generally discretionary with the trial court and absent an abuse of that discretion, will not result in the grant of a new trial. See State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). In State v. Nesbit, 978 S.W.2d 872 at app. 901-02 & n. 2 (Tenn. 1998), cert. den. 526 U.S. 1052, 119 S.Ct. 1359 (1999), a capital case involving almost the identical issue, our supreme court adopted this Court's conclusion that, although the requirement of a reasonable creature in being has been removed from the current criminal code, admission of a family portrait of the victim was not error because it was relevant to establish the corpus delicti, including the identity of the person alleged to have been killed. In Bolden v. State, 140 Tenn. 118, 120, 203 S.W. 755 (Tenn. 1918), our supreme court held that the evidence necessary "to establish the corpus delicti in cases of homicide must show that the life of a human being has been taken, which question involves the subordinate inquiry as to the identity of the person charged to have been killed . . . ." (emphasis added). Thus, the photograph was relevant and we find no reversible

error in its admission during the guilt phase of the trial.

B. Photographs of Victim Post-Mortem

During the re-direct examination of Faye Day, the victim's widow, the State introduced two post-mortem photographs depicting the victim's face and back respectively. The State asserted that the photographs were relevant in light of Mrs. Day's testimony describing how her husband "blew up" shortly before his death and in light of questions by defense counsel regarding the victim's obesity. The trial court, reflecting upon Mrs. Day's testimony, permitted introduction of the photographs, finding:

> I think in light of her testimony regarding his condition those last couple of days, I think they're relevant at this point—the probative value clearly outweighs whatever prejudicial effect there would be. There's nothing graphic or bloody[.]

Defendant Thomas now contends that admission of these photographs was error. Without reference to the specific photographs complained of and without argument to those photographs actually introduced, Defendant Thomas complains that the "gruesome photographs of the victim violates the Defendant's rights under the federal and state constitutions. . . ." The State properly argues that Defendant Thomas has waived this issue for failure to offer citation to the record. See Tenn. Ct. Crim. App. R. 10(b). Notwithstanding procedural waiver of this issue for noncompliance with the Rules of this Court, we elect to address the issue on its merits.

As previously stated, Tennessee courts have liberally allowed the admission of photographs in both civil and criminal cases. See Banks, 564 S.W.2d at 949. Accordingly, the admissibility of photographs lies within the discretion of the trial court whose ruling will not be overturned on appeal except upon a clear showing of an abuse of discretion. See id.; see also State v. Hall, 8 S.W.3d 593, 602 (Tenn. 1999), cert. denied, 531 U.S. 837, 121 S. Ct. 98 (2000). However, a photograph must be relevant to an issue that the jury must decide before it may be admitted into evidence. See State v. Vann, 976 S.W.2d 93, 102 (Tenn. 1998), cert. denied, 526 U.S. 1071, 119 S. Ct. 1467 (1999); State v. Braden, 867 S.W.2d 750, 758 (Tenn. Crim. App.1993); see also Tenn. R. Evid. 401, 402. Photographs of a corpse are admissible in murder prosecutions if they are relevant to the issues at trial, notwithstanding their gruesome and horrifying character. See Banks, 964 S.W.2d at 950-51.

Notwithstanding this broad interpretation of admissibility, evidence that is not relevant to prove some part of the prosecution's case should not be admitted solely to inflame the jury and prejudice the defendant. See id. Additionally, the probative value of the photograph must outweigh any unfair prejudicial effect that it mayhave upon the trier of fact. See Vann, 976 S.W.2d at 102-03; see also Tenn. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]"). In this respect, we note that photographs of a murder victim are prejudicial bytheir very nature. However, prejudicial evidence is not per se excluded; indeed, if this were true, all evidence of a crime would be excluded at trial. Rather,

what is excluded is evidence which is unfairly prejudicial, in other words, evidence which has an undue tendency to suggest a decision on an improper basis, frequently, though not necessarily, an emotional one. See Banks, 564 S.W.2d at 951.

The Defendant asserts that post-mortem photographs of the victim should not have been admitted because they were especially gruesome and inflammatory. The purpose for introducing photographs into evidence is to assist the trier of fact. "As a general rule, the introduction of photographs helps the trier of fact see for itself what is depicted in the photograph." State v. Griffis, 964 S.W.2d 577, 594 (Tenn. Crim. App. 1997). The trial court ultimately determined that the photographs were relevant to support Mrs. Day's testimony regarding the victim's condition during the last days of his life. Dr. Gardner, likewise, used the photographs during her testimony to illustrate that the victim suffered from extensive fluid retention at the time of his death. The photographs further refuted the theory of the defense that the victim's death was the result of his obesity. We conclude that the photographs were relevant to supplement the testimony of the victim's wife and the medical examiner. Although the photographs are not particularly pleasant to view, neither are they particularly gruesome. We find that the probative value of the photographs is not outweighed by their prejudicial effect and the trial court did not abuse its discretion in allowing their admission. See Banks, 564 S.W.2d at 949. Defendant Thomas is not entitled to relief on this issue.

VI. Evidence from Federal Proceedings

Defendant Thomas raises several claims of error arising from the admission of evidence that was also used in his prior federal trial. First, Defendant Thomas complains that the trial court erred in overruling his objection concerning the exhibit stickers placed on exhibits used in Defendant Thomas' prior federal trial and further erred by not providing the jury a curative instruction. Next, he asserts as error that the trial court erred by permitting introduction of the video of the crime even though the prosecution had failed to provide a proper foundation or chain of custody for the admission of the videotape. Third, Defendant Thomas contends that the trial court erred by permitting the jury to read a transcript of Mr. Day's previous testimony as Assistant United States Attorney Tony Arvin read the transcript aloud. Next, Defendant Thomas contends that the date of Defendant Bond's guilty plea and the later date of Mr. Day's testimony provided the inference that the federal proceeding went forward against Defendant Thomas without Defendant Bond. Finally, Defendant Thomas complains that the trial court erred by overruling his objections to Defendant Bond's counsel asking questions regarding Bond's guilty plea in federal court. As argument on these claims, Defendant Thomas makes the general assertion that this evidence was not relevant. The State asserts that Defendant Thomas has waived these claims for failing to make proper argument. See Tenn. Ct. Crim. App. R. 10(b). Additionally, the State contends that Defendant Thomas has failed to demonstrate that the trial court abused its discretion with respect to the admission of any of this evidence. The State's position is well-taken.

Nonetheless, we elect to review the admission of the contested evidence on its merits.

Rulings on the admissibility of evidence based on its relevance are entrusted to the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. See State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). "[A]n appellate court should find an abuse of discretion when it appears that a trial court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997).

A. Evidence stickers from federal proceeding.

Initially, we note that Defendant Thomas fails to reference the record regarding objections made to the introduction of exhibits that had been previously used during his federal trial. The State, noting this omission, also fails to cite to the objections, if any, made. Despite the reference made at the motion for new trial hearing that this issue was thoroughly addressed at trial, this Court has been unable to locate any objections to these exhibits, although examples of the trial court's curative measures are found. Irregardless, Defendant Thomas claims that the exhibits were prejudicial because they contained exhibit stickers from the previous trial. Numerous exhibits contain stickers indicating that they had previously been exhibits. No other information is provided on the exhibit tags. Assistant United States Attorney Arvin testified that there were proceedings in federal court. With regard to Defendant Thomas, the jury did not know where or how the exhibits were used previously, the name of any other defendant, or the

outcome of any hearing. In short, even if any prejudice resulted from the use of these exhibits, such prejudice was slight and did not substantially outweigh the probative value of this evidence. See Tenn. R. Evid. 403.

B. Videotape of the crime

A videotape of the incident was recorded by Walgreens' security camera and was introduced at trial through the testimony of Charles Young. Defendant Thomas objected, asserting lack of foundation and lack of chain of custody. The trial court found:

> Well, chain of custody is not relevant. It's just like with a photograph; if the witness can state that he's viewed this film, and it accurately reflects what it purports to show the[n] there is no chain of custody problem like there would be if you had drugs or something that you needed to maintain—preserve the integrity of the item. As far as foundation is concerned, [Charles Young] is the assistant manager of the store. He said he was familiar with the cameras and how they were pointed and how they operated, so I'll note your exception.

We agree with the trial court. This issue has no merit.

C. Providing jurors with transcript

During the State's case-in-chief, Assistant United Sates Attorney Tony Arvin read to the jury a transcript of Mr. Day's testimony given on November 9th during the federal proceedings. Simultaneously, the jurors were each provided a copy of the transcript to read. Although Defendant Thomas conceded that the reading

of Mr. Day's prior testimony was permissible, he objected to the handing of the transcript to the jury. The trial court responded, "this is not Mr. Day testifying; it's a bit harder for jurors, I think, to follow because it's some sort of neutral presentation of what is otherwise testimony; and so I think it will aid—in my opinion, it will aid the jury in following what is being read." Thus, the trial court overruled Defendant Thomas' objection. However, the trial court further determined that the jury was not to have a written copy with them in the jury room "because that would give undue weight to a written document which is, in essence, testimony—nothing more nothing less."

We find no abuse of discretion in the trial court's ruling on this matter. This issue is without merit.

D. Date of Bond's guilty plea and later date of Day's testimony, and

E. Questioning by Bond's counsel regarding guilty plea

Defendant Bond pled guilty in federal court on November 4, 1998, to the robbery of James Day. Mr. Day subsequently testified about the robbery on November 9, 1998. At trial, Defendant Thomas was concerned that the evidence of the two dates would lead to the inference that, as of November 9, 1998, "the [federal] proceeding went forward against [Defendant] Thomas without [Defendant] Bond." Following argument by defense counsel, the trial court found, "So long as you—as long as [it] is indicated to the jury; that up until November the 4, [Bond] was, indeed, a party to the [federal] proceeding. At that time he entered a guilty plea to these events. And so at the time that Mr.

Day testified on November the 9th, in light of the fact that [Bond] entered a guilty plea to these very events five days earlier, he was not, at that time, an actual party to the proceedings." With reference to an objection lodged by Defendant Thomas that this ruling "gives the indication that they were together in that proceeding and that [Defendant Bond] was able to plead guilty and that [Defendant Thomas] possibly disputed something," the trial court further found:

> First of all, the fact that the transcript contains references to the jury and even the court, I can only say that we made an effort . . . to avoid referring to the previous proceeding as a trial or what the outcome might have been, who the actual parties were, what the sentence might have been that these men received.
>
> The references to jury and court in the transcript . . . could have been addressed and could have been deleted. The entry of this testimony comes as no surprise to anyone in this courtroom. You all have had, of course, the transcript for years now, and we addressed the issue of the state's desire to enter Mr. Day's testimony . . . . So there's been time for you all to review and request that those matters—those references be deleted had you felt . . .that it was unduly prejudicial to leave them in.
>
> I don't think it's as prejudicial for them to have been in because we're still not referring to precisely what the proceedings [were], what the results were, or anything of that sort. . . .
>
> With regard to what [Defendant Bond] is asking to be allowed to ask, it's already in the record at this point. . . . Mr. Arvin has already

> testified to the date on which Mr. Bond entered his guilty plea to these events, not to a specific trial that was about to begin. . . . He's entered a guilty plea . . . on the 4th of November. . .and that Mr. Day's testimony . . . occurred on the 9th of November.
> . . .
> And so, . . . he's asking to . . . re-ask what's already in the record and already before the jury . . . and I don't know that there is any real prejudice to your client.

The trial court then limited the manner which Defendant Bond could make inquiry as to Defendant Bond's status in the proceeding at the time of Mr. Day's testimony.

Again, we see no abuse of discretion in the trial court's ruling on this matter. Defendant Thomas is not entitled to relief as to these claims.

VII. Restriction on Impeachment of Angela Jackson

Defendant Thomas complains that it was error for the court to refuse to allow Russell Carpenter and William Upchurch to testify that Angela Jackson had told them that she was going to make sure that Defendant Thomas went to jail. The State responds that this allegation is unsupported by the record.

A review of the direct examination of Russell Carpenter reveals that counsel for Defendant Thomas questioned Mr. Carpenter as to the status of the Thomas/Jackson relationship. Specifically, the following questions were posed of Mr. Carpenter:

Q: Mr. Carpenter, . . . Did [Angela Jackson] threaten . . . say she was going to pay Andrew Thomas back?

A: Yes, sir.

Q: Was she angry about their breakup?

A: Yes, sir.

Q: Did she make a comment that if she couldn't have him, no one else would?

A: Yes, sir.

Likewise, a review of the testimony of William Upchurch reveals that counsel for Defendant Thomas questioned Mr. Upchurch as to the status of the Thomas/Jackson relationship. Specifically, the following colloquy occurred:

Q: Did you ever hear Ms. Jackson make any statements regarding Andrew Thomas?

A: Yes.

Q: What statements?

A: Saying she were gonna pay him back.

The only objection noted in the record is the State's objection to the open-ended questions asked by defense counsel to Russell Carpenter, that is, "Did you . . . have any occasion to talk to Angela Jackson?" and "What did she say to you?" To the latter objection, the trial court stated,

I'm going to let you lead if he's going to say the same thing, basically, that others said; that she

> said she's going to pay him back. But to just ask an open-ended question, "What did she say?"—we might be here for three hours listening to all sorts of . . . things about a relationship that wouldn't be relevant. But with regard to that one narrow and specific comment that rebuts—or is purported to rebut what she testified to, I'll allow you to lead and get right to that.

No question was posed by defense counsel regarding Jackson's alleged threats to send Defendant Thomas to jail and the trial court did not limit the same. Any testimony of this nature was only briefly touched on by defense counsel on recross-examination of Angela Jackson. Called in rebuttal, Angela Jackson denied ever threatening to get Andrew Thomas. On recross-examination, defense counsel specifically asked Ms. Jackson regarding threats by Ms. Jackson that she would see that Defendant Thomas went to jail.

The record does not support Defendant Thomas' claim that the trial court improperly restricted his attempt to elicit impeachment evidence against Ms. Jackson. This claim is without merit.

VIII. Refusal to Voir Dire Juror Regarding Relationship with Witness

After the jury returned its verdicts but prior to the penalty phase, Defendant Thomas alerted the trial court that one of the jurors worked with defense witness Russell Carpenter. The trial judge responded that he

> [did not] think that the defense witnesses were mentioned during voir dire in terms of asking

> the jurors whether they knew potential witnesses.
> . . .
>
> And so that certainly can't be held against the juror. I mean she didn't refuse to reveal any knowledge of a relationship to any of your witnesses because those witnesses were never [identified] during voir dire. . . [f]or them to respond to. And if it's just a matter of her having worked with this witness, who wasn't actually a fact witness. His role was very minimal.

The following colloquy then occurred:

> MR. SCHOLL: Everybody stop just for a second. Not my client, the juror and one of the witnesses know each other. That came to me through my client – the information.
>
> MS. NICHOLS: Have you talked to Mr. Carpenter – how he found out or something that –
>
> MR. SCHOLL: Evidently Mr. Bond and Mr. Thomas both talked to Mr. Carpenter, and Mr. Carpenter said that he knew this person. And that's the extent of it.
>
> THE COURT: Okay. Just for the record, though, because I clearly

misunderstood you when you first—

MR. SCHOLL: I'm sorry.

THE COURT: I thought your client knew him. I thought your client's relatives knew them, I thought there was an actual relationship there. But none of that's true. The sole statement is that your witness, Russell Carpenter, who was the final witness for the defense . . . [w]orked with this juror at one time.

MR. SCHOLL: Right, and knows her.

THE COURT: And knows her and didn't particularly get along well with her.

MR. SCHOLL: Right.

. . .

MS. MCCLUSKEY: Anthony Bond talked to Mr. Carpenter on the phone last night, and Mr. Carpenter said he's apparently seen that woman before because one day when Mr. Carpenter was being dropped off at work or dropped off from work, Mr. Bond was there. And

> Mr. Carpenter was saying, "That woman doesn't like me, and she saw me with you before."

THE COURT: Well, that's—there's no mention, there again, of the witnesses during voir dire. There's nothing to suggest that this juror cannot be, has not been totally fair and impartial in this case, and so I'll note your statements for the record, but I don't think it has any bearing or effect, whatsoever, on this case.

Defendant Thomas now claims that the trial court erred in failing to conduct a voir dire of this juror. Specifically, Thomas alleges that this juror should have been individually voir dired regarding her knowledge of the defense witness and her ability to be impartial. The State responds: first, the issue is waived because Defendant Thomas never requested that the juror be individually voir dired, see Tenn. R. App. P. 36(a); second, the issue is waived for failing to preserve the issue in the motion for new trial, see Tenn. R. App. P. 3(e); and third, the issue is waived for failing to make an offer of proof through the testimony of Russell Carpenter, see Tenn. R. App. P. 36(a); State v. Powers, 101 S.W.3d 383, 415 n.5 (Tenn. 2003).

The State's position regarding waiver is well-taken. Additionally, Defendant Thomas, while stating general propositions of law regarding voir dire, fails to relate to

this Court why the trial court's failure to individually voir dire this juror is error. See Tenn. R. App. P. 27(a)(7). Notwithstanding waiver, there is nothing in the record to indicate that the juror withheld information from the court regarding an alleged relationship with witness Carpenter. Moreover, the relationship remains just that, an allegation. Defendant Thomas failed to make an offer of proof supporting his allegation. This issue is without merit.

IX. Testimony of John Hibbler

During its case-in-chief, the State called John Hibbler as a witness. Mr. Hibbler is the owner of the car lot where Defendant Thomas purchased his pink box Chevy immediately following the robbery and shooting of James Day. On cross-examination, Defendant Thomas sought to elicit information regarding problems he and Angela Jackson were having in their marriage. The State objected and Defendant Thomas responded that the testimony was relevant to rebut the anticipated testimony of Angela Jackson. The trial court found that, should Mr. Hibbler recall Defendant Thomas mentioning marital difficulties with Ms. Jackson, that testimony would be hearsay. The following questioning then occurred:

Q: Mr. Hibbler, as I was asking before, you had conversations with Mr. Thomas after the sale of this car. Is that right?

A: Yes. I had conversations with him.

Q: And the conversations with Mr. Thomas, he asked you if he could get a new title for that

car because he was having problems with the title. Is that correct?

MS. WEIRICH: Object, Your Honor, to hearsay.

THE COURT: Sustained. Isn't that what we just discussed?

A bench conference ensued, during which the trial court sustained its prior ruling that knowledge of marital difficulties between Defendant Thomas and Angela Jackson obtained during Mr. Hibbler's discussion with Thomas constituted hearsay.

On appeal, Defendant Thomas complains that the trial court erroneously concluded that Mr. Hibbler's testimony about Thomas' marital problems with Ms. Jackson was hearsay. Thomas asserts that such statements were not offered for the truth of the matter asserted but merely to show the subject of the conversation. The State responds that, if the testimony was offered to show the subject of the conversation, such statement was not relevant to any issue regarding the robbery and murder of James Day.

Our Rules of Evidence provide that "[h]earsay is not admissible except as provided by these rules or otherwise by law." Tenn. R. Evid. 802. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). If an out-of-court statement is not offered to prove the truth of the matter asserted, such as a statement offered for impeachment purposes, it is not hearsay. See State v. Howell, 868 S.W.2d 238, 252 (Tenn. 1993), cert. den. 510 U.S. 1215, 114 S.Ct. 1339 (1994). "The

determination of whether a statement is hearsay and whether it is admissible through an exception to the hearsay rule is left to the sound discretion of the trial court." State v. Stout, 46 S.W.3d 689, 697 (Tenn. 2001). Accordingly, this Court will not reverse a trial court's ruling regarding the admission or exclusion of hearsay evidence absent a clear showing that it abused its discretion. See id.

Testimony regarding possible bias of a witness is admissible pursuant to Tennessee Rule of Evidence 616 which provides that "A party may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness." Tenn. R. Evid. 616. However, although extrinsic evidence is admissible to prove bias or prejudice, Defendant Thomas cites no cases from any jurisdiction, and we have found none, holding that witness bias may be proven by hearsay. If the testimony of Mr. Hibbler was offered to establish Ms. Jackson's prejudice against Defendant Thomas, it was hearsay. Thus, the trial court did not abuse its discretion by refusing to permit introduction of hearsay testimony regarding marital difficulties between Defendant Thomas and Angela Jackson.

X. Fingerprint Testimony

As his next claim of error, Defendant Thomas asserts that the trial court erred in permitting Officer Sims to testify despite stipulation that the fingerprint found on the stolen getaway car matched Defendant Bond. Thomas asserts that, after the stipulation, any testimony by the fingerprint expert was cumulative. The State responds that Defendant Thomas has waived this issue by failing to enter a contemporaneous

objection to Officer Sims' testimony. See Tenn. R. App. P. 36(a). The State further contends that, although Defendant Bond did object to Officer Sims offering any testimony in lieu of the agreed upon stipulation, the objection by a co-defendant fails to preserve the issue on appeal for Defendant Thomas. See State v. Steve Bradford, No. 03C01-9607-CR-00278, 1998 WL 24417, at *6 (Tenn. Crim. App., Knoxville, Jan. 20, 1998). Although the State's position is well-taken, we elect to review the issue on its merits.

> The trial court, in response to the expressed objections of Defendant Bond, found:
>
> I think that the state has a definite interest in demonstrating to the jury not only the specific facts involved here—that the print does belong to your client, but also the larger fact that—who the police officers were that worked on the case, the fact that the police were working on the case, the fact that all of this was a coordinated effort by police officers, lest some suggestion be made, in final argument, that the police dropped the ball. . . . I think the state has an interest in putting on proof to satisfy the jury that things were done and done right by the proper personnel. And so to that extent, I think there is an interest . . . in at least putting a face with a name. By having Mr. Sims take the stand, the jury can see that Sergeant Hulley was accurate when she stated it was forwarded on to latent prints, and he can state—identify the exhibit as the one he examined. And then the stipulation can kick in, and he doesn't have to go any further than that.

After the stipulation was introduced, Officer Sims testified briefly to explain the nature of a latent print and the process by which he receives prints for review. He further related that not all prints that are lifted have value in the sense that they can be matched.

As previously indicated, "[t]he admissibility of evidence is generally within the broad discretion of the trial court; absent an abuse of that discretion, the trial court's decision will not be reversed." State v. Edison, 9 S.W.3d 75, 77 (Tenn. 1999). We review this issue, therefore, under an abuse of discretion standard.

Defendant Thomas complains that Officer Sims' testimony was cumulative with regard to the stipulation as to Defendant Bond's fingerprints. To the extent that Sims' testimony was cumulative, if at all, we cannot conclude that the testimony was unfairly prejudicial to Defendant Thomas. Accordingly, the trial court did not abuse its discretion in permitting introduction of the testimony.

XI. Failure to Charge Accomplice of Angela Jackson

Next, Defendant Thomas complains that the trial court erred by failing to instruct the jury with an instruction concerning accomplice testimony with regard to Angela Jackson. At the close of proof, defense counsel requested that an accomplice instruction be provided with regard to Angela Jackson. The trial court denied the request, finding that Angela Jackson failed to fit the legal definition of an accomplice, in that there was no proof that she united with Defendant Thomas in the commission of the crime. Although the court recognized that Ms. Jackson did participate in the

spending of the money after the fact, the court noted that this was not enough to elevate Ms. Jackson to accomplice status.

"An accomplice is one who knowingly, voluntarily, and with common intent unites with the principal offender in the commission of a crime." State v. Allen, 976 S.W.2d 661, 666 (Tenn. Crim. App. 1997). The test generally applied in determining whether a witness is an accomplice is whether the alleged accomplice could be indicted for the same offense charged against the defendant. See id. In this state, if the offense in question was not committed by the person's own conduct, the person may, nonetheless, be criminally responsible as a principal to theoffenseif the person solicits, directs, aids, or attempts to aid another person to commit the offense. See Tenn. Code Ann. § 39-11-402(2). The proof in this case fails to establish that Angela Jackson solicited, directed, aided, or attempted to aid the Defendant in committing murder and/or aggravated robbery. Her actions in allowing the Defendant into her home after the crimes were committed, going shopping with the stolen money and receiving part of the proceeds for herself, do not make her a principal to the offense of murder or robbery of the victim. Thus, the Defendant's argument that it was error for the trial court not to submit an accomplice instruction to the jury is without merit, because the facts do not demonstrate that Angela Jackson was an accomplice.

XII. Failure to Instruct on Specific Mitigators

Next, Defendant Thomas complains that the trial court declined to instruct the jury as to the following non-statutory mitigating circumstances: (1) residual

doubt as to the defendant's guilt; (2) the defendant was the product of a dysfunctional family subject to abuse; (3) the defendant had a history of family instability; (4) the defendant had a fundamental lack of a stable relationship with his parent or step-parent;(5) his parents were divorced; (6) any regret for his past acts; (7) his family could not feed itself on its own; and (8) any positive influence he may have had on others. A review of the charge submitted to the jury reveals that the trial court instructed the jury as to the following mitigating circumstances:

> (1) Whether he was the product of a dysfunctional family subject to abuse.
> (2) Any history of family instability.
> (3) Any proof of abandonment by a significant family member.
> (4) Any evidence to show that one [of] his parents was an abuser of drugs.
> (5) Any difficulty with parents' divorce or separation of parents.
> (6) Any active relationship that he may have with his child although in jail.
> (7) Any proof that shows that he has family members that will provide him with love and support while in prison.
> (8) Any proof that, although he is in jail, he provides love and support to other members of his family.
> (9) Any positive relationship that he had with other adults and children.
> (10) Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing; that is, you shall consider

> any aspect of the defendant's character or record, or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

The charge reveals that five out of the eight requested instructions were provided to the jury. The factors not specifically included in the charge are: (1) residual doubt, (2) the family's inability to feed itself, and (3) the Defendant's regret for past acts.

With respect to the first of these factors, the Eighth Amendment of the United States Constitution does not require a lingering or residual doubt instruction. See Franklin v. Lynaugh, 487 U.S. 164, 173-74, 108 S. Ct. 2320, 2326-28 (1988). In Franklin, the United States Supreme Court stated:

> Our decisions mandating jury consideration of mitigating circumstances provide no support for petitioner's claim because "residual doubt" about guilt is not a mitigating circumstance. We have defined mitigating circumstances as facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death. "Residual doubt" is not a fact about the defendant or the circumstances of the crime. It is instead a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." . . . Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing.

Id. at 188 (O'Connor, J., concurring) (citations omitted). See also State v. Bigbee, 885 S.W.2d 797, 813 (Tenn. 1994). Accordingly, the trial court did not commit a federal constitutional error in denying Defendant Thomas' request for an instruction on lingering or residual doubt.

Defendant Thomas argues that the trial court was required to grant his request for this instruction under state law. Our supreme court has determined that residual doubt is a nonstatuory mitigating circumstance. See State v. McKinney, 74 S.W.3d 291, 307 (Tenn. 2002); State v. Hartman, 42 S.W.3d 44, 55-56 (Tenn. 2001). Our criminal code provides, in relevant part, that

> The trial judge shall also include in the instructions for the jury to weigh and consider any mitigating circumstances raised by the evidence at either the guilt or sentencing hearing, or both, which shall include, but not be limited to, those circumstances set forth in subsection (j).

Tenn. Code Ann. § 39-13-204(e)(1).[2] Thus, where the issue of residual doubt is raised by the evidence, a jury instruction is appropriate. See State v. Odom, 928 S.W.2d 18, 30 (Tenn. 1996). Such evidence "may consist of proof . . . that indicates the defendant did not commit

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[2] On April 29, 1997, eight days after Defendant Thomas shot Mr. Day, this statute was amended to provide that this Court "shall not set aside a sentence of death . . . on the ground that the trial court did not specifically instruct the jury as to a requested mitigating factor that is not ennumerated in subsection (j)." Tenn. Code Ann. § 39-13-204(e)(1) (1997); see also State v. Hall, 958 S.W.2d 679, 694-95 (Tenn. 1997).

the offense, notwithstanding the jury's verdict following the guilt phase." McKinney, 74 S.W.3d at 307. In this case, Defendant Thomas testified that he did not commit the murder of James Day. Therefore, the trial court should have provided the jury an instruction on residual doubt.

Our supreme court has concluded that a convicted defendant's right to have the jury instructed on nonstatutory mitigating circumstances is statutory rather than constitutional in nature and thus, the failure to instruct the jury on nonstatutory mitigating circumstances when raised by the evidence issubject to harmless error analysis. See State v. Hodges, 944 S.W.2d 346, 351-52 (Tenn.), cert. den. 522 U.S. 999, 118 S.Ct. 567 (1997). "A charge should be considered prejudicially erroneous if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." Id. at 352. However, if "by their breadth, the instructions on nonstatutory mitigating circumstances encompassed all the evidence presented by the defense," the omission of an instruction on a specific mitigating circumstance is harmless. Id. at 356.

Here, the trial court instructed the jury to consider "any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence." This broad instruction encompassed Defendant Thomas' denial of guilt andserved to givethejury the opportunity and duty to consider any residual doubts about his culpability. Accordingly, we are confident that the trial court's failure to give a specific instruction on residual doubt had no effect on

the jury's verdict, and Defendant Thomas is therefore entitled to no relief on this claim.

With regard to Defendant Thomas' regret for past acts and his family members' alleged inability to feed themselves, the trial court found that the testimony did not demonstrate regret for past acts. Rather, Defendant Thomas' mother testified that he had apologized for bringing his family down. Additionally, when asked whether Thomas had ever spoken of bringing down Faye Day's family, Ms. Barber responded, "The only thing—he told me that he was charged with this armored driver and that a man died from it." The trial judge concluded, "I don't even really remember any any statements by the mother that he's shown any real regret for any past acts. . . . I didn't hear any inkling of remorse about any of those [prior aggravated robbery convictions]." Regarding the fact that his family members are unable to feed themselves, the trial court found there was no proof to support this instruction. Accordingly, these circumstances were not raised by the proof and the trial court did not err by failing to so instruct. Even assuming error, any such error was harmless given that the trial court did provide the jury with the catch-all instruction as to mitigating circumstances. It is clear that the trial court's refusal to instruct the jury as to Defendant Thomas' alleged regret for past acts and his family members' alleged inability to feed themselves did not result in an instruction that failed to fairly submit the legal issues or misled the jury as to the applicable law. Defendant Thomas is not entitled to relief on this claim.

XIII. Improper Cross-Examination of Defendant's Mother

During the penalty phase of the trial, the State sought to cross-examine Defendant Thomas' mother, Luella Barber, regarding a disciplinary write-up he received while in jail. The trial court permitted the questioning, finding, "I think that's appropriate because that has a direct bearing on what she's testified to with regard to him being a good person or whatever. . . . I'll allow you to ask about the jail incident." The State proceeded with the following questioning of Luella Barber:

Q: Okay. Are you aware of an incident that occurred in the jail back on June 7th of 2001 of this year?

A: An incident—

Q: Involving Andrew Thomas?

A: No, I'm not.

Q: Where he was part of a strip search that they do to the inmates, and they found a six-and-a-half-inch shank on him.

A: I don't work here, so I don't know.

Q: You didn't know anything about that?

A: No one ever notified me about that[.]

Mrs. Barber testified that knowledge of this incident would not change her opinion as to her son. Defendant Thomas complains that this line of questioning was error because it was more prejudicial than probative.

Our criminal code provides that the rules of evidence do not limit the admissibility of evidence in a capital sentencing proceeding. See Tenn. Code Ann. § 39-13-204(c). See also Stout, 46 S.W.3d at 702. The supreme court has interpreted section 39-13-204(c) as permitting trial judges wider discretion than would normally be allowed under the Tennessee Rules of Evidence in ruling on the admissibility of evidence at a capital sentencing hearing. See State v. Sims, 45 S.W.3d 1, 14 (Tenn.), cert. den. 534 U.S. 956, 122 S.Ct. 357 (2001). As the Sims court stated,

> The Rules of Evidence should not be applied to preclude introduction of otherwise reliable evidence that is relevant to the issue of punishment, as it relates to mitigating or aggravating circumstances, the nature and circumstances of the particular crime, or the character and background of the individual defendant. As our case history reveals, however, the discretion allowed judges and attorneys during sentencing in first degree murder cases is not unfettered. Our constitutional standards require inquiry into the reliability, relevance, value, and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the rights of both the defendant and the victim's family. The rules of evidence can in some instances be helpful guides in reaching these determinations of admissibility. Trial judges are not, however, required to adhere strictly to the rules of evidence. These rules are too restrictive and unwieldy in the arena of capital sentencing.

45 S.W.3d at 14. The questioning was relevant to rebut testimony about Defendant Thomas' positive character traits, including allegations by Mrs. Barber that Defendant Thomas attempted to improve himself while incarcerated. Thus, Defendant Thomas is not entitled to relief on this claim.

XIV. Failure to Act as 13th Juror

Defendant Thomas also argues that the verdict was contrary to the weight of the evidence and the trial court, acting as thirteenth juror, should have overturned the verdicts. Tennessee Rule of Criminal Procedure 33(f) provides that "[t]he trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence." Our supreme court has explained that "Rule 33(f) imposes upon a trial court judge the mandatory duty to serve as the thirteenth juror in every criminal case . . . ." State v. Carter, 896 S.W.2d 119, 122 (Tenn. 1995).

When the trial judge simply overrules a motion for new trial, this Court may presume that the trial judge has served as the thirteenth juror and approved the jury's verdict. See id.

In the instant case, the trial court simply overruled the Defendant's motion for new trial without making any comments regarding a dissatisfaction with the weight of the evidence. Thus, this Court presumes that the trial court acted as thirteenth juror and approved the verdicts of the jury. Because the record contains no statements by the trial court expressing dissatisfaction or disagreement with the weight of the evidence or the jury's verdict, or indicating that the trial court

misunderstood its role as thirteenth juror, this Court will not grant the defendant a new trial on this basis. See State v. Moats, 906 S.W.2d 431, 435-36 (Tenn. 1998).

XV. Indictment Failed to Charge Capital Offense

Defendant Thomas asserts that, pursuant to Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), the indictment against him did not charge a capital offense and that he cannot, therefore, be sentenced to more than life imprisonment. Defendant's argument is based upon the premise that first degree murder is not a capital offense unless accompanied by aggravating factors. Essentially, Defendant Thomas complains that the indictment returned by the grand jury charges non-capital first degree murder because the grand jury did not find any capital aggravating circumstances. That is, Defendant Thomas alleges that to satisfy the requirements of Apprendi, the indictment must include language of the statutory aggravating circumstances to elevate the offense to capital murder. Because of this omission in the indictment, he argues that the State was then precluded from filing a Rule 12.3 notice of intent to seek the death penalty, which provides that a notice of intent to seek the death penalty may be filed "[w]here a capital offense is charged in the indictment or presentment." Tenn. R. Crim. P. 12.3(b). Defendant Thomas asserts that, since a capital offense was not charged in the indictment, the State could not then rely upon aggravating factors to enhance his sentence to death.

Our supreme court has recently ruled that "the principles of Apprendi do not apply to Tennessee's

capital sentencing procedure. Neither the United States Constitution nor the Tennessee Constitution requires that the State charge in the indictment the aggravating factors to be relied upon by the State during sentencing in a first degree murder prosecution." Dellinger, 79 S.W.3d at 467. Thus, Defendant Thomas is not entitled to relief on this ground.

XVI. Tennessee's Death Penalty Scheme Violates International Treaties

Defendant Thomas next asserts that Tennessee's imposition of a death penalty violates United States treaties and hence the federal constitution's Supremacy Clause.[3] Defendant Thomas claims that the Supremacy Clause was violated when his rights under treaties and customary international law to which the United States is bound were disregarded. Specifically, his argument is based upon two primary grounds: (1) customary international law and specific international treaties prohibit capital punishment, and (2) customary international law and specific international treaties prohibit reinstatement of the death penalty by a governmental unit once it has been abolished. This identical argument has recentlybeen rejected by panels of this Court in State v. Richard Odom, No. W2000-02301-CCA-R3-DD, 2002 WL

[3] "This Constitution [of the United States of America], and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding." U.S.Const. Art. 6[2.].

31322532, at **32-35 (Tenn. Crim.App., Jackson, Oct. 15, 2002), and State v. Robert Faulkner, No. W2001-02614-CCA-R3-DD, 2003 WL 22220341, at *31 (Tenn. Crim. App., Jackson, Sept. 26, 2003). We see no viable reason to resolve this issue in a different manner in the present case. Defendant Thomas is not entitled to relief on this issue.

XVII. Tennessee's Death Penalty Scheme is Unconstitutional

The Defendant raises numerous challenges to the constitutionality of Tennessee's death penalty provisions. Included within his claim that the Tennessee death penalty statutes violate the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Article I, Sections 8, 9, 16, and 17, and Article II, Section 2 of the Tennessee Constitution, are the following:

> A. Tennessee's death penalty statutes fail to meaningfully narrow the class of death eligible defendants. Specifically, the statutory aggravating circumstance set forth in Tennessee Code Annotated section 39-2-203(i)(2), (i)(5), (i)(6), and (i)(7) have been so broadly interpreted whether viewed singly or collectively, that they fail to provide a meaningful basis for narrowing the population of those convicted of first degree murder to those eligible for the sentence of death.

We note that factors (i)(5), (i)(6) and (i)(7) do not pertain to this case as they were not found by the jury. Thus, any individual claim with respect to these factors is without merit. See, e.g., Hall, 958 S.W.2d app. at

715; State v. Brimmer, 876 S.W.2d 75, 87 (Tenn.), cert. denied, 513 U.S. 1020, 115 S. Ct. 585 (1994). Also, this argument has been rejected by our supreme court. See Vann, 976 S.W.2d app. at 117-118; State v. Keen, 926 S.W.2d 727, 742 (Tenn. 1994).

B. The death sentence is imposed capriciously and arbitrarily in that

(1) Unlimited discretion is vested in the prosecutor as to whether or not to seek the death penalty.

This argument has been rejected. See State v. Hines, 919 S.W.2d 573, 582 (Tenn.1995), cert. denied, 519 U.S. 847, 117 S. Ct. 133 (1996).

(2) The death penalty is imposed in a discriminatory manner based upon race, geography, and gender.

This argument has been rejected. See State v. Cazes, 875 S.W.2d 253, 268 (Tenn. 1994), cert. den. 513 U.S. 1086, 115 S.Ct. 743 (1995).

C. There are no uniform standards or procedures for jury selection to insure open inquiry concerning potentially prejudicial subject matter.

This argument has been rejected. See Cazes, 875 S.W.2d at 269.

D. The death qualification process skews the make-up of the jury and results in a relatively prosecution-prone, guilt-prone jury.

This argument has been rejected. See State v. Reid, 91 S.W.3d 247 app. at 313 (Tenn. 2002), cert. den. 72 USLW 3236, 124 S.Ct. 56 (2003), and cases cited therein.

> E. Defendants are prohibited from addressing misconceptions about matters relevant to sentencing.

This argument has been rejected. See id.

> F. Requiring the jury to agree unanimously to a life verdict violates McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227 (1990) and Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988).

This argument has been rejected. See Reid, 91 S.W.3d app. at 313.

> G. There is a reasonable likelihood that jurors believe they must unanimously agree as to the existence of mitigating circumstances because of the failure to instruct the jury on the meaning and function of mitigating circumstances.

This argument has been rejected. See id.

> H. The jury is not required to make the ultimate determination that death is the appropriate penalty.

This argument has been rejected. See id.

> I. The defendant is denied final closing argument in the penalty phase of the trial.

This argument has been rejected. See id.

J. Mandatory introduction of victim impact evidence and mandatory introduction of other crime evidence upon the prosecutor's request violates separation of powers and injects arbitrariness and capriciousness into capital sentencing.

This argument has been rejected by a panel of this Court. See State v. Robert Faulkner, No. W2001–02614–CCA-R3–DD, 2003 WL 22220341, at ** 36–37 (Tenn. Crim. App., Jackson, Sept. 26, 2003).

K. The appellate review process in death penalty cases, including comparative proportionality review, is constitutionally inadequate.

This argument has been rejected. See Reid, 91 S.W.3d app. at 313. Moreover, our supreme court has held that, while important as an additional safeguard against arbitrary or capricious sentencing, comparative proportionality review is not constitutionally required. See State v. Bland, 958 S.W.2d 651, 663 (Tenn. 1997), cert. denied, 523 U.S. 1083, 118 S. Ct. 1536 (1998).

XVIII. [Deleted: Mandatory Proportionality Review]

[Deleted: Issues Raised by Defendant Bond]

Issues Jointly Raised by Both Defendant Thomas and Defendant Bond

I. Unconstitutional Selective Prosecution

The major violators unit, MVU, was created by federal grant in the 1970s in response to a need in Shelby County to target repeat offenders. The judges of the Shelby County Criminal Court agreed that MVU

cases should be handled by a specific judge in a specific courtroom. Once an offender is designated MVU by the District Attorney General, the case is automatically assigned to Division V of the Shelby County Criminal Court. This program gives the District Attorney discretion to designate any defendant with multiple felony convictions an MVU case, after which one prosecutor is designated to remain with the case through final disposition. Rather than dividing the management and responsibility for a case among numerous prosecutors as it moves through pretrial and trial, this vertical method of prosecution avoids excessive delay and promotes the more efficient prosecution of repeat offenders. Under LEAA(Law Enforcement Assistance Agency) grants in the 1970s, one courtroom was established to handle MVU cases. One court was to handle the MVU cases for expediency and purposes of judicial economy.

Defendants Thomas and Bond raise several complaints arising from their designation as an MVU case. Specifically, Defendant Thomas asserts that, because his case was classified by the office of the District Attorney General as a major violator, multiple violator, or MVU case prior to indictment, the prosecution, in effect, directed the Shelby County Criminal Court Clerk's Office to assign this case to Division V of the Criminal Court. Accordingly, he alleges that the District Attorney engages in unconstitutional selective prosecution and is in violation of Rule 4 of the Rules of Practice and Procedure in the Criminal Courts of Shelby County. Defendant Bond claims that the trial court's failure to require assignment under Rule 4.01, Local Rules of Shelby County Criminal Court, violated his

constitutional rights. At the trial level, Defendant(s) sought relief in the form of (1) dismissal of the indictment due to unconstitutional selective prosecution, (2) recusal of the trial court due to acquiescence in the prosecution's disregard of Rule 4.01, and (3) removal of the District Attorney General for the 30th Judicial District. The trial court, in ruling on the Defendants' motions, found, in relevant part:

> I just truly believe that even taking all of the defendant's factual assertions as being completely true, that their motions are without merit, they're not well-taken, and that there's no purpose to be served by taking proof in this case. I'll accept everything they say as being true with regard to the procedures that are followed—in terms of designating cases for MVU in terms of having the grand jury funnel the MVU cases to Division V. But even with all of those facts being the case, I think the law is still very well settled that that procedure does not violate equal protection or due process in any regard.
> . . .
>
> But the same principle—so you don't have prosecutors running to ten or twelve different courts, prosecutors that handled [certain types of cases] can go to one or two courts. Those judges can familiarize themselves with sentencing alternatives. And it's that type of principle, I think, that has been in existence with regard to major violators since its inception in the mid to late 70s; and I think there are sound reasons for it, sound public-policy reasons, sound legal reasons; and absent any showing of specific denial of due process or equal protection,

> any specific prejudice resulting from the fact that these individuals are in this division of court set for trial, the process itself, I don't think, can be assailed given the case law that allows it and supports it and states that there is no constitutional deprivation with this type of system.

Local Rule 4.01, Rules of the Shelby County Criminal Court, provides:

> The following method will be employed by the Criminal Court Clerk's Office for the initial assignment of cases to the ten divisions of Court. The following types of cases will be assigned to the ten divisions of court in numerical order beginning with Division I through X as the indictments are filed in the Criminal Court Clerk's Office. This procedure shall be used in the following types of cases: Murder in the First Degree, Attempt Murder in the First Degree, Conspiracy to Commit First Degree Murder, Second Degree Murder, Aggravated Kidnapping, Especially Aggravated Robbery, Aggravated Rape, Aggravated Arson, Aggravated Robbery, Rape, Aggravated Sexual Battery, Voluntary Manslaughter, Vehicular Homicide, Kidnapping, Robbery, Spousal Rape and Incest. All other cases will be divided equally among the ten divisions of the Court. All salary petitions filed by the Criminal Court Clerk and the Sheriff will be heard by the Administrative Judge.

Rule 4.05, Rules of the Shelby County Criminal Court, provides:

> The judges may transfer cases among themselves by mutual consent. It is not necessary that the parties or their counsel consent to such transfer. A party requesting a transfer of a case from one division to another division shall obtain an order from the Court to which the case is assigned, transferring the case to another division.

Defendants contend that the MVU classification violates Rule 4.01. We conclude otherwise. Rule 4.05 specifically permits judges of the Shelby County Criminal Court to transfer cases among themselves by mutual consent. It appears from the findings of the trial court that the judges of Shelby County by mutual consent have had in place a system for more than twenty years in which MVU defendants would be tried in one particular division of the court. There is no right, constitutional or otherwise, bestowed upon a criminal defendant by Rule 4.01. Indeed, a defendant does not have the right to have his case heard by a particular judge, see Sinito v. United States, 750 F.2d 512, 515 (6th Cir. 1984), neither does he have the right to any particular procedure for the selection of a hearing judge, see Cruz v. Abbate, 812 F.2d 571, 574 (9th Cir. 1987), nor does he enjoy the right to have a judge selected by a random draw, see Sinito, 750 F.2d at 515. Rather, the rule appears to be an administrative rule created to ensure an even distribution of cases among the various divisions of the Shelby County Criminal Court.

Practical realities dictate the allocation of limited public resources. Accordingly, "our courts must afford public officials substantial discretion with regard to

law enforcement decisions." State v. Harton, 108 S.W.3d 253, 261 (Tenn. Crim. App. 2002) (citing Bordenkircherv. Hayes, 434 U.S. 357, 364, 98 S. Ct. 663 (1978)). We recognize, however, that the classification of a defendant as a major violator and the subsequent assignment of MVU cases to one division of court implicates issues of selective prosecution and due process on the judicial assignment phase of adjudication.

The Due Process Clause imposes strict neutrality requirements on officials performing judicial or quasi-judicial functions. See Schweiker v. McClure, 456 U.S. 188, 195, 102 S. Ct. 1665 (1982). Those requirements are not applicable to those acting in a prosecutorial or plaintiff-like capacity. See Marshall v. Jerrico, Inc.,446 U.S. 238, 248, 100 S. Ct. 1610 (1980). "In an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law." Id. When prosecutorial rather than judicial functions are involved, the constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated. See id.

In light of the role that prosecutors play as advocates, at least two state courts have concluded that judicial assignment systems allowing prosecutors to select the judge assigned to a particular case violate due process. In State v. Simpson, 551 So.2d 1303 (La. 1989) (per curiam), the defendant filed an application for a supervisory writ seeking reassignment of his case to another judge. Noting that the prosecutor and the defense attorney had stipulated that in the Louisiana district at issue, the prosecution was allowed to select

the judge who presided over criminal cases, the Louisiana Supreme Court granted the writ. The court reasoned:

> To meet due process requirements, capital and other felony cases must be allotted for trial to the various divisions of the court, or to judges assigned criminal court duty, on a random or rotating basis or under some other procedure adopted by the court which does not vest the district attorney with power to choose the judge to whom a particular case is assigned.

Id. at 1304 (footnotes omitted). The Simpson court based this conclusion on the concept that "[d]ue process of law requires fundamental fairness, i.e., a fair trial in a fair tribunal." Id. (citing Turner v. Louisiana, 379 U.S. 466, 85 S. Ct. 546, 13 L.Ed.2d 424 (1965); State v. Mejia, 250 La. 518, 197 So.2d 73 (1967)). The court noted decisions from other jurisdictions concluding that courts may utilize different methods of assigning criminal cases to judges, but observed that these decisions do not stand for the proposition that the prosecutor may assign cases to the judge of his or her choice. Id. at 1304 n.3.

In an earlier decision, a New York state court took a similar approach. In McDonald v. Goldstein, 191 Misc. 863, 83 N.Y.S.2d 620 (N.Y. Sup. Ct. 1948), the court rejected a district attorney's challenge to an order divesting his office of its long-accepted authority to select judges for criminal cases. See id. at 622 (noting that "[t]he District Attorney for some time past has selected the judge in each case by moving indictments for trial directly to the several parts of the court."). The court based its ruling on general principles of judicial

independence, noting that judges should be free from outside control, especially by any of the litigants. See id. at 625 ("It is the people's prerogative, not the District Attorney's to say who will preside over the County Court of Kings County.").

In contrast to Simpson and McDonald, most federal courts that have addressed the issue of prosecutorial involvement in judicial assignments have not found due process violations. In Tyson v. Trigg, 50 F.3d 436, 439–42 (7th Cir. 1995), cert. den. 516 U.S. 1041, 116 S.Ct. 697 (1996), (Tyson II), the most recent and thorough of these federal decisions, the Seventh Circuit rejected an argument raised in a habeas corpus proceeding that the case assignment system in an Indiana state court violated the defendant's due process rights. The system in question allowed the prosecutor to select one of six grand juries to which a proposed indictment would be presented. Each grand jury was assigned to a specific judge, and thus, by selecting the grand jury, prosecutors implicitly chose the judge to which the case would be assigned. The habeas petitioner in Tyson II did not argue that the assigned judge was prejudiced against him. Instead, he asserted that to allow the prosecutor to pick the judge so greatly stacks the deck against the defendant as to make the trial unfair—so unfair as to deny due process of law. Id. at 439.

The Seventh Circuit rejected that argument.[4] First, it noted a lack of precedent holding that prosecutorial

[4] The Seventh Circuit did note, however, that '[t]he practice of allowing the prosecutor to choose the grand jury and hence the trial judge is certainly unsightly" and "lack[s] the appearance of impartiality." 50 F.3d at 442.

steering could constitute a due process violation warranting the reversal of a conviction. Additionally, it concluded that the fact that the prosecutor might gain a certain advantage over the defendant in being allowed to select the judge did not render the trial fundamentally unfair. See id. at 440–41. It reasoned that the American system of criminal procedure is not balanced equally between the prosecution and the defense at every stage, but rather represents an aggregate of imbalances. Id. at 440. Thus, prosecutors have certain advantages in the investigative stage and in impeaching witnesses, while the rules on burdens of proof favor defendants. See id. Absent any allegation that the judge selected by the prosecutor was actually biased against the defendant, the imbalance caused by the Indiana system was not so egregious as to affect the fairness of the trial.

Several other federal courts have held that, in order to establish a due process violation for prosecutorial judge-shopping, a defendant must demonstrate actual prejudice by the assignment of a particular judge to his case. For example, in United States v. Gallo, 763 F.2d 1504, 1532 (6th Cir. 1985), cert. den. 474 U.S. 1068, 106 S.Ct 826 (1986), the Sixth Circuit rejected the defendant's argument that he was entitled to a new trial because the prosecutors had engaged in a pattern of steering significant criminal cases to the judges of their choice. See id. The court relied on its earlier decision in Sinito v. United States, supra, in which it had held that due process concerns were not implicated by a clerical error resulting in the assignment of a case to a different judge than would have sat absent the error. See Gallo, 763 F.2d at 1532. The Sinito panel had concluded that "a defendant does not have the

right to have his case heard by a particular judge," does not "have the right to have his judge selected by a random draw," and "is not denied due process [when the selection process is not operated in compliance with local rules] . . . unless he can point to some resulting prejudice." Sinito, 750 F.2d at 515. The Gallo panel found this reasoning dispositive, rejecting the defendant's argument because he had not alleged that the trial judge was in any way disqualified to hear his case. 763 F.2d at 1532. Several other decisions have similarly required a showing of prejudice. See, e.g., United States v. Erwin, 155 F.3d 818, 825 (6th Cir. 1998), cert. den. 525 U.S. 1123, 119 S.Ct. 906 (1999); United States v. Osum, 943 F.2d 1394, 1401 (5th Cir. 1991).

Although all of these decisions offer helpful and relevant analysis, they differ from the instant case. First, we hesitate to conclude that the designation of a criminal defendant as a major violator by the District Attorney General and his Assistants constitutes judge-shopping. Once a defendant is determined to qualify as a major violator, the District Attorney does not select what division to which the case will be assigned. Rather, it appears that the judges of the Shelby County Criminal Court specifically designated Division V to hear such cases. Notwithstanding, even if we were to consider this process judge-shopping, we are also cognizant that the judge assigned to MVU cases has been sworn to uphold the law and defend the Constitution, and his or her conduct can be scrutinized through appellate review. We presume honesty and integrity in those acting as adjudicators. See Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456 (1975). Thus, we refuse to presume that the judge assigned to MVU

designees acts as an agent of the prosecutor. Additionally, it does not appear to this Court that the designation of Division V as the MVU court necessarily results in a court in which the determination of guilt or innocence cannot reliably be made.

Finally, Defendants have failed to establish that they were prejudiced by the assignment of their case to Division V. Accordingly, we cannot conclude that the Defendants were deprived of a fair trial by assignment to Division V nor do we conclude that by assigning MVU defendants to Division V, the Shelby County Courts are in violation of Local Rule 4.01. This issue is without merit.[5]

II. Propriety of State's Argument to Jury

The Tennessee Supreme Court has recognized that "argument of counsel is a valuable privilege that should not be unduly restricted." Smith v. State, 527 S.W.2d 737, 739 (Tenn. 1975). Attorneys have great leeway in arguing before a jury, and the trial court's broad discretion in controlling their arguments will be reversed only upon an abuse of discretion. See Terry, 46 S.W.3d at 156. However, closing argument must be temperate, must be predicated on evidence introduced during the trial of the case and must be pertinent to the issues being tried. See Russell v. State, 532 S.W.2d 268, 271 (Tenn. 1976). The State is more limited in its prerogative due to the prosecutor's role as a seeker of

[5] In his reply brief, Defendant Thomas makes vague references to his equal protection rights having been violated upon his case's MVU designation. He cites us to no cases in support of this proposition, however. Accordingly, this "issue" is waived. See Tenn. Ct. Crim. App. R. 10(b).

justice, rather than a mere advocate. See Coker v. State, 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995), overruled on other grounds, State v. West, 19 S.W.3d 753 (Tenn. 2000). "Thus, the state must refrain from argument designed to inflame the jury and should restrict its commentary to matters in evidence or issues at trial." Id. Prosecutorial misconduct during argument does not constitute reversible error unless it appears that the outcome was affected to the defendant's prejudice. See State v. Bane, 57 S.W.3d 411, 425 (Tenn. 2001).

Both Defendants contend that the prosecutor's opening statement and closing arguments were so marred by misconduct as to require a new trial. We note first, however, that Defendant Thomas and Defendant Bond's failure to object to opening and closing argument at trial waives our consideration of this issue on appeal. See Tenn. R. App. P. 36(a) (providing that relief is not required for a party who failed to take reasonably available action to prevent or nullify an error); State v. Little, 854 S.W.2d 643, 651 (Tenn. Crim. App. 1992) (holding that the defendant's failure to object to the State's alleged misconduct during closing argument waives that issue). Thus, where a prosecuting attorney makes allegedly objectionable remarks during closing argument, but no contemporaneous objection is made, the complaining defendant is not entitled to relief on appeal unless the remarks constitute "plain error." See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(b); State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000). In determining whether an alleged trial error constitutes "plain error," we consider five factors: 1) the record must clearly establish what occurred at trial; 2) a clear and

unequivocal rule of law must have been breached; 3) a substantial right of the defendant must have been adversely affected; 4) the defendant did not waive the issue for tactical reasons; and 5) consideration of the error is "necessary to do substantial justice." See State v. Adkisson, 899 S.W.2d 626, 641–42 (Tenn. Crim. App. 1994). Ultimately, the error must have "had an unfair prejudicial impact which undermined the fundamental fairness of the trial." Id. at 642.

A. Greed and Evil

The prosecutor for the State who made opening statement in this case began, "You can't hide from greed and evil. James Day learned that lesson on April 21st, 1997 . . . ." She continued: "James Day learned you can't hide from greed and evil," and "He walked into the path of greed and evil." Throughout opening statement, the prosecutor referred collectively to Defendant Thomas and Defendant Bond as "greed and evil." This theme was repeated during closing argument, in which both prosecutors made references that "James Day couldn't hide from greed and evil," "there was no hiding from or escaping the circle of greed and evil," and "greed and evil really didn't care that day whether he lived or died." The prosecutors referred to the Defendants as "greed and evil" a total of twenty-one times during the opening statement and closing arguments of the guilt phase of the trial. Defendant Thomas and Defendant Bond, neither of whom entered a contemporaneous objection to these statements, ask this Court to find plain error in the State's conduct. See Tenn. R. Crim. P. 52(b).

It is improper for the prosecutor to use epithets to characterize a defendant. The prosecutors' repeated

references to Defendant Thomas and Defendant Bond as "greed and evil" was improper. See, e.g., Cauthern, 967 S.W.2d at 737 (evil one); State v. Bates, 804 S.W.2d 868, 881 (Tenn. 1991) (rabid dog); State v. Ladonte Montez Smith, No. M1997–00087–CCA–R3–CD, 1999 WL 1210813, at *12 (Tenn. Crim. App., Nashville, Dec. 17, 1999) (guilty dog); State v. Joel Guilds, No. 01C01–9804–CC–00182, 1999 WL333368, at * 5 (Tenn. Crim. App., Nashville, May 27, 1999) (this clown). When a prosecutor engages in improper argument, we must also consider the curative measures taken by the court and/or the prosecution; the prosecutor's intent in making the improper remarks; the cumulative effect of the erroneous statements and any other errors in the record; and the relative strength or weakness of the case. See Bigbee, 885 S.W.2d at 809; State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984).

Here, we find the prosecutors' comments unseemly but harmless in the context of the entire argument. No curative instruction was provided primarily because neither Defendant Thomas nor Defendant Bond objected to the characterization. Moreover, the State's case was strong and the effect of the error was insignificant. In short, the State's improper argument did not undermine the fundamental fairness of the trial, and we therefore conclude that this issue gains the Defendants no relief.

B. Don't Give Defendants a Freebie

During opening statement of the penalty phase, counsel for Defendant Thomas stated, "[Defendant] Thomas will never get out of jail. He'll be in there, at the earliest, until he's eighty." In response to this

statement, the prosecutor began her closing argument with,

> I'm going to start off this morning by apologizing . . . for wasting your time this week because you heard it, they're both doing a lot of time already. "Why in the world are we down here? Let's just forget this murder. I'm sorry, Ms. Day, James Day's death should be a freebie. I mean, they're already doing a lot of time."

Defendants contend that it was improper to argue that a defendant should be sentenced to death as additional punishment for a previous conviction. The State contends that this was a proper response to Defendant Thomas' attempt to minimize the current crime by emphasizing the penalties he already faced.

While community conscience arguments are generally improper, a prosecutor's closing argument must be evaluated in light of the defense argument that preceded it. See Darden v. Wainwright, 477 U.S. 168, 179, 106 S. Ct. 2464, 2470 (1986). Here, both Defendants ignore that it was defense counsel who first invoked community conscience by telling the jurors that Defendant Thomas had already been sentenced to a lengthy period of confinement. Obviously the prosecutor's comment was a response to that statement.

In Darden, supra, the Supreme Court considered the following factors in determining that the prosecutors' closing argument did not deprive the defendant of a fair trial:

> The prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate

> other specific rights of the accused such as the right to counsel or the right to remain silent. Much of the objectionable content was invited by or was responsive to the opening summation of the defense. . . . [T]he idea of "invited response" is used not to excuse improper comments, but to determine their effect on the trial as a whole. The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. The weight of the evidence against petitioner was heavy; the "overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges," reduced the likelihood that the jury's decision was influenced by argument. . . . "Darden's trial was not perfect—few are—but neither was it fundamentally unfair."

Id. at 181–83 (citations omitted). Similar factors are present here. Doubtless the testimony of the numerous witnesses and the admission by Defendant Bond did far more to seal their fate than a single abbreviated comment by the prosecutor during closing argument. As in Darden, the trial may not have been perfect, but it was fair and no reversible error can be predicated on the prosecutor's closing argument.

III. Admission of Expert Testimony

Defendant Thomas complains that the trial court committed several errors with regard to the admission of expert testimony. Specifically, Defendant Thomas complains (1) Dr. Gardner should not have been permitted to testify and make comments regarding the

victim's therapy, (2) Dr. Smith should not have been permitted to provide opinions as to the treatment of the victim immediately after the shooting, (3) Dr. Smith should not have been qualified as a ballistics expert, and (4) Dr. Smith should not have been permitted to testify about events in the hospital immediately after the victim was shot. Defendant Bond joins Defendant Thomas' complaints regarding (1) Dr. Smith's testimony regarding the diagnosis and treatment of the victim as a living patient and (2) Dr. Smith being qualified as an expert in ballistics.

A witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise, provided the scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue. See Tenn. R. Evid. 702. An expert may base his or her opinion upon facts or data imparted to or perceived by the expert prior to or at a hearing; the facts or data need not be admissible if they are the type of facts or data reasonably relied upon by experts. See Tenn. R. Evid. 703. If the underlying facts or data lack trustworthiness, the court shall disallow expert testimony based upon them. See id. Evidence and expert testimony regarding scientific theory must be both relevant and reliable before it maybe admitted. See McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 265 (Tenn. 1997). The trial court has broad discretion in resolving questions concerning the qualifications, admissibility, relevance, and competency of expert testimony. See State v. Stevens,78 S.W.3d 817, 832 (Tenn. 2002). An appellate court should not overturn a trial court's decision in admitting or excluding a

proposed expert's testimony unless it finds the trial court abused its discretion. See State v. Ballard, 855 S.W.2d 557, 562 (Tenn. 1993).

A. Dr. Cynthia Gardner

Defendant Thomas complains that Dr. Gardner's testimony concerning the victim's therapy should not have been allowed as it was outside her field of expertise. During Dr. Gardner's direct testimony, she was questioned as to the daily regimen of care for James Day by his wife. An objection was made on the basis that Dr. Gardneris "not a health-care provider, she's not a physical therapist, she's not—doesn't have any expertise in any of these areas." The trial court sustained the objection, and instructed the prosecutor to rephrase the line of questioning. No other objections were made to this line of questioning. The State submits that Defendant Thomas has, therefore, waived any challenge to Dr. Gardner's testimony on this issue.

Dr. Gardner is a licensed medical doctor in Tennessee and is currently employed as an assistant medical examiner for Shelby County. Dr. Gardner is also an instructor in pathology for the medical school. Dr. Gardner completed her residency in anatomic and clinical pathology following medical school, then completed a fellowship in forensic pathology. Based upon her training as a medical doctor, Dr. Gardner was qualified to testify regarding catheterization. The trial court did not abuse its discretion in admitting this testimony. This claim is without merit.

B. Dr. Smith

Defendant Thomas claims that "the trial court further erred by allowing Dr. O.C. Smith to give

opinions in several areas of medicine of which he was not an expert [,] [i]including, but not limited to, giving his opinion as to whether treatment was proper after the victim was shot." To the extent that Defendant Thomas fails to delineate specific grounds of error, those claims are waived. See Tenn R. App. P. 27(a); Tenn. Ct. Crim. App. R. 10(b). Specifically, Defendants Thomas and Bond assert two challenges to Dr. Smith's testimony: (1) Dr. Smith is not qualified to render opinions as to a living person, and (2) Dr. Smith should not have been qualified as an expert in ballistics.

(1) Living person

Dr. Smith was asked to render an opinion as to the cause of death of the victim and whether it related to the gunshot fired by Defendant Thomas two and one-half years earlier. Determining the cause of death is the type of opinion a medical examiner is called upon to make. Dr. Smith's review of the treatment records, including assessments of James Day's injuries, was necessary to the formation of that opinion. In this regard, Dr. Smith is a licensed medical doctor in the State of Tennessee and board certified in forensic pathology, anatomical pathology, and clinical pathology. Based upon his training as a medical doctor, Dr. Smith was qualified to testify regarding the gunshot wound inflicted upon the victim, the likely results of such an injury, and the course of treatment to the victim. The trial court did not abuse its discretion in admitting this testimony. This claim is without merit.

(2) Ballistics expert

During voir dire of Dr. Smith, Dr. Smith stated that he has previously testified as a ballistics expert. Defendant Bond objected, stating that the testimony of a ballistics expert was not relevant to the victim's cause of death. The objection was overruled. The trial court determined that a ballistics expert could "shed some light on the gunshot wound," recognizing that "the state is attempting . . . to demonstrate that the gunshot is the cause—the initial event that caused his death; and to that end, I think if this witness can be qualified as a ballistics expert, his opinion may be very helpful in shedding some light on the facts of the case[.]" Dr. Smith then continued to explain the role of a ballistics expert and the training necessary to become a forensic firearms examiner. He stated that he received training in forensic firearms examination by R.A. Stindler. Objection was again made by both Defendant Bond and Defendant Thomas, on the basis that such testimony was not relevant. On appeal, Defendants complain that the qualifications of Dr. Smith as a ballistics expert were irrelevant in that no knowledge of firearms identification and analysis was introduced with his opinion as to the cause and manner of death.

Defendants are correct that there was no direct challenge to the fact that the victim was wounded by a bullet. However, the effect of the shot was crucial to the defense and the State had the burden of proving beyond a reasonable doubt that the victim's death was the result of a gunshot wound inflicted during the robbery. Dr. Smith's training in forensic firearm identification, specifically his military training

involving traumatic injuries, permitted him to make the determination as to whether the shot was likely to be fatal. We cannot conclude that the trial court abused its discretion in permitting Dr. Smith to be qualified as a firearms expert. This claim is without merit.

IV. [Deleted: Lesser-included Offenses of Felony Murder]

Conclusion

Defendant Thomas

Having fully reviewed the record, the briefs and the applicable authority, we affirm Defendant Thomas' conviction for first degree felony murder. Additionally, in accordance with the mandate of Tennessee Code Annotated section 39–13–206(c)(1), and the principles adopted in prior decisions of the Tennessee Supreme Court, we have considered the entire record in this cause and find, with regard to Defendant Thomas, that the sentence of death was not imposed in any arbitrary fashion, that the evidence supports, as previously discussed, the jury's finding of the statutory aggravating circumstance, and the jury's finding that the aggravating circumstance outweighed mitigating circumstances beyond a reasonable doubt. Furthermore, our comparative proportionality review, considering both the nature of the crime and the defendant, convinces us that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. See id. § 39–13–206(c)(1)(D). Accordingly, we also affirm the sentence of death imposed on Defendant Thomas.

[Deleted: Defendant Bond]

s/_____
DAVID H. WELLES, JUDGE

JOE G. RILEY, J., concurring in part and dissenting in part.

I agree with the majority opinion in all respects with one exception. The majority opinion concludes the failure of the trial court to charge the lesser-included offense of facilitation of felony murder as to Defendant Bond was not harmless error. I respectfully disagree with this conclusion.

[Deleted]

APPENDIX D

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 17a0046p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-6200

[Filed February 24, 2017]

ANDREW LEE THOMAS, JR., *Petitioner-Appellant*,	)
v.	)
UNITED STATES OF AMERICA, *Respondent-Appellee*.	)

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
Nos. 2:98-cr-20100; 2:03-cv-02416—
Jon Phipps McCalla, District Judge.

Argued: November 2, 2016

Decided and Filed: February 24, 2017

Before: MERRITT, SILER, and DONALD,
Circuit Judges

COUNSEL

ARGUED: Kevin Wallace, WINSTON & STRAWN LLP, New York, New York, for Appellant. Tony R. Arvin, UNITED STATES ATTORNEY'S OFFICE, Memphis, Tennessee, for Appellee. **ON BRIEF:** Kevin Wallace, Elizabeth Cate, Mollie Richardson, WINSTON & STRAWN LLP, New York, New York, for Appellant. Tony R. Arvin, UNITED STATES ATTORNEY'S OFFICE, Memphis, Tennessee, for Appellee.

OPINION

MERRITT, Circuit Judge. Petitioner Andrew Lee Thomas, Jr. appeals the district court's order denying his habeas corpus petition under 28 U.S.C. § 2255 for relief from his federal court conviction. This case is a companion to *Andrew L. Thomas v. Westbrooks*, No. 15-5399 (6th Cir. Feb. 24, 2017), which addresses Thomas's habeas petition for relief from his state court conviction and sentence of death. These cases, while addressing similar facts, are different because the state case arises primarily from a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The *Brady* claim fails in the federal case due to the sequence of the trials. The *Brady* violation in the state case, that the government did not disclose that witness Angela Jackson had received compensation after her federal testimony, occurred after the conclusion of Thomas's federal trial. Accordingly we **AFFIRM** the district court's denial of the § 2255 motion.

I. Background

Thomas was convicted of robbing and shooting an armored car courier. On April 21, 1997, Loomis-Fargo courier James Day was shot in the back of the head by Thomas during a pick-up. Thomas grabbed the money and checks that Day had been transporting and left the scene with another suspect, later identified as Anthony Bond. After fleeing the scene in a stolen Pontiac, they abandoned that vehicle and drove off in a red Suzuki which belonged to Thomas's girlfriend at the time, Angela Jackson. Bond was later arrested on unrelated charges. Police subsequently matched Bond's fingerprints to a fingerprint from the stolen Pontiac. Eventually Bond confessed to the Loomis-Fargo robbery and implicated Thomas. FBI agents questioned Angela Jackson, who was then separated from Thomas. Jackson implicated Thomas in the robbery and also disclosed that he used the crime's proceeds to buy a Mossberg 12-gauge shotgun in violation of his felon status.

During Thomas's federal trial, the jury heard testimony from both Anthony Bond and Angela Jackson. After the federal trial concluded but before the state prosecution began, the FBI paid Jackson $750 on behalf of the Safe Streets Task Force—a joint federal-state law enforcement group charged with investigating and prosecuting gang-related crime.

On November 13, 1998, the federal jury convicted Thomas of robbery affecting commerce in violation of 18 U.S.C. § 1951 (count one), using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) (count two), and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) (count three). For

these crimes he was sentenced as an armed career criminal to life imprisonment plus five years, to be followed by five years supervised release. On direct appeal, the Sixth Circuit affirmed. *United States v. Thomas*, 29 F. App'x 241 (6th Cir. 2002).[1]

In 2003 Thomas filed an 18 U.S.C. § 2255 motion for habeas corpus relief. In the amended motion Thomas puts forward multiple ineffective assistance of counsel claims, and also argues that the government violated his due process rights as articulated in *Brady v. Maryland* by withholding evidence of a payment to witness Angela Jackson.

II. Analysis

A. Standard of Review

This court reviews a district court's dismissal of a § 2255 petition de novo, but will overturn a district court's factual findings only if they are clearly erroneous. *Braden v. United States*, 817 F.3d 926, 929 (6th Cir. 2016). For a § 2255 motion to succeed, the petitioner must demonstrate error of constitutional magnitude which had a substantial and injurious effect or influence on the jury's verdict. *Griffin v. United States*, 330 F.3d 733, 736 (6th Cir. 2003).

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[1] After Thomas's federal court conviction, the armored car courier died as a result of his injuries suffered during the robbery. In 2005, Thomas was convicted in Tennessee state court for felony murder and sentenced to death. *Tennessee v. Thomas*, 158 S.W.3d 361, 417 (Tenn. 2005). The district court dismissed his habeas motion for relief from his state convictions. This court addresses his appeal of that decision in the companion case, and grants the petition. *Thomas v. Westbrooks*, No. 15-5399 (6th Cir. Feb. 24, 2017).

B. Ineffective Assistance of Counsel as to Count Three (Felon-in-Possession)

1. Failure to Request a Severance

Thomas argues that his trial counsel erred by not moving to sever count three, felon-in-possession of a firearm, from the robbery counts. Specifically Thomas claims that his attorney should have filed a pretrial motion to sever count three as improperly joined under Federal Rule of Criminal Procedure 8(a) or filed a motion to sever due to prejudicial joinder under Rule 14(a). Thomas alleges that since a pistol formed the basis of counts one and two and a shotgun formed the basis of count three, it was improper to include count three in the indictment. Evidence was presented at trial that the shotgun forming the basis of count three was purchased with the proceeds from the robbery set forth in counts one and two, despite not being used during the robbery itself. The Government argues that count three was not misjoined, and argues alternatively that any error was harmless.

To prove deficient performance by counsel that violated the Sixth Amendment, Thomas must demonstrate that representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Huff v. United States*, 734 F.3d 600, 606 (6th Cir. 2013). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of a case, *Strickland*, 466 U.S. at 694, and this court must "indulge a strong presumption that counsel's conduct falls within the

wide range of reasonable professional assistance." *Id.* at 689.

Disputes of whether the counts of an indictment are to be joined or severed are governed by Federal Rules of Criminal Procedure 8 and 14. Rule 8(a) allows the joinder of two or more offenses in the same indictment or information if the offenses charged are "of the same or similar character," "based on the same act or transaction," or connected by a "common scheme or plan." Fed. R. Crim. P. 8(a). Whether a joinder was appropriate under Rule 8(a) is determined by the allegations on the face of the indictment. *United States v. Chavis*, 296 F.3d 450, 456-57 (6th Cir. 2002). Once a count has been joined, a district court may grant a Rule 14 motion to sever the count if the joinder "appears to prejudice a defendant." Fed. R. Crim. P. 14. To prevail on a request for severance the defendant must show compelling, specific, and actual prejudice. *United States v. Driver*, 535 F.3d 424, 427 (6th Cir. 2008).

In the present case, count three of the indictment is sufficiently related to the other counts of the indictment to warrant joinder. It is true that the purchasing of the shotgun was an event that took place three days after the armed robbery and shooting. However, the shotgun was illegally purchased with the proceeds of the armed robbery for the purpose of protecting property also bought with the same proceeds. The facts of the robbery are the facts that underlie the purchasing of the shotgun. The counts are not simply connected "in the abstract," but are linked by time and purpose. *See Chavis*, 296 F.3d at 458. Moreover, the trial evidence concerning the purchase of the shotgun was obtained in the process of

investigating the robbery, and comes from the same witness. Joinder is proper when the evidence of the counts is intertwined. *See United States v. Hang Le-Thy Tran*, 433 F.3d 472, 478 (6th Cir. 2006).

Even if count three was not sufficiently related, there is little compelling evidence that the joinder prejudiced the defendant and denied him a fair trial. A defendant is prejudiced by a joinder if the jury cannot "keep the evidence from each offense separate and [is] unable to render a fair and impartial verdict on each offense." *United States v. Rox*, 692 F.2d 453, 454 (6th Cir. 1982). The purpose of Rule 8(a) is "to promote the goals of trial convenience and judicial efficiency." *United States v. Wirsing*, 719 F.2d 859, 862 (6th Cir. 1983). Thomas fails to present compelling arguments that actual prejudice existed and outweighed the interests of the court. He does not articulate how a straightforward presentation of the evidence in the case would realistically confuse or prejudice a jury in issuing an impartial verdict. The arguments that "spillover evidence" from counts one and two convinced the jury to convict him of count three, and vice versa, are mere speculation, as is Thomas's claim that his list of prior offenses from count three prejudiced the jury to change the verdict. A spillover of evidence between counts does not require severance unless there is "substantial," "undue," or "compelling" prejudice. *United States v. Fields*, 763 F.3d 443, 457 (6th Cir. 2014); *see also United States v. Warner*, 971 F.2d 1189, 1196 (6th Cir. 1992).

The district court properly determined that the trial evidence demonstrated that the robbery and shooting were committed with a pistol, rather than with the

shotgun in count three. No reasonable juror could have confused which of the two weapons was used in the robbery. Prejudicial joinder is especially unlikely when the jury can adequately "compartmentalize and distinguish the evidence concerning the different offenses charged." *United States v. Cody*, 498 F.3d 582, 587 (6th Cir. 2007) (quoting *Chavis*, 296 F.3d at 462). Moreover, the district court clarified during the reading of the indictment and jury instruction that the jury must consider each charge separately.

Joining count three to the indictment promotes the interests of trial convenience and judicial efficiency. *Wirsing*, 719 F.2d at 862. The "significant overlap of [] witnesses presented on each offense" and intertwining evidence also allow joinder here. *Tran*, 433 F.3d at 478. Thomas's speculations about the influence of count three on the jury are insufficient to show a prejudicial effect from the joinder that his counsel would have been obligated to combat. As such Thomas's counsel was not deficient in failing to request severance of the counts, since there is no reason to think it would have affected the outcome of the proceeding.

2. Failure to Request a Limiting Jury Instruction

Thomas argues that the jury instruction was not sufficient to limit prejudice resulting from the joinder of count three. The Government argues that the district court, as well as counsel for both sides, emphasized that the gun was purchased after the robbery, and that the jury instruction sufficiently informed the jury to distinguish the evidence underlying the counts.

The district court jury instruction was as follows:

> The defendant in this case is charged with three crimes. The number of charges is no evidence of guilt and this should not influence your decision in this case in any way.
> It is your duty to separately consider the evidence that relates to each charge and to return a separate verdict for each one.
> For each charge, you must decide whether the government has presented proof beyond a reasonable doubt that the defendant is guilty of that particular charge. Your decision on one charge, whether it is ultimately guilty or not guilty, should not influence your decision on any of the other charges.

This court has upheld similar jury instructions about overcoming the prejudicial effect of an improper joinder. *See Cody*, 498 F.3d at 588; *see also Chavis*, 296 F.3d at 462. Misjoinder is almost always harmless if the court issues a careful limiting instruction to the jury concerning possible prejudice. *Cody*, 498 F.3d at 587.

Beyond speculation there is no evidence supported by the trial record that the jury was confused about the nature of the firearm counts. Thomas is unable to show a reasonable probability that the result of the trial would have been different had his counsel attempted to limit the jury instruction.

C. Ineffective Assistance of Counsel for Failure to Present Evidence that Another Individual Committed the Offense

Thomas contends that his counsel should have better investigated and presented evidence that Bobby Jackson was actually the getaway driver and Anthony Bond committed the robbery. Most of Thomas's arguments for this strategy are plausible, but legitimate reliability and admissibility concerns prevent Thomas from demonstrating that the decision not to pursue this strategy was unreasonable or prejudiced the outcome of the case. *See Strickland*, 466 U.S. at 688-89.

Thomas puts forward multiple arguments of varying strength that the robbery was actually committed by Jackson and Bond. First, he argues that defense counsel did not sufficiently emphasize at trial that Bobby Jackson was identified as the driver of the getaway vehicle on two separate occasions by a witness to the crime, Robert Fisher. Both identifications were made to the FBI based on a photographic array several months after the incident. At trial, defense counsel called Fisher and asked him to testify to the identification he made during the investigation. But during the testimony Fisher admitted that he could not definitively identify the driver or identify him in the courtroom: "Well, I was asked can you identify anybody. I told them at the time I couldn't definitely. I could say that one of them looked like the guy that I saw driving."

Thomas claims that his counsel should have emphasized during Fisher's testimony that Fisher identified the same picture in the photo array on two

separate occasions, and that defense counsel should have elicited the fact from Fisher that the person in the photo was Bobby Jackson. As the district court noted, the information was cumulative to the testimony that had been presented, and the language used by Fisher when he viewed the photo array was inadmissible as hearsay. Moreover, defense counsel could not have elicited from Fisher that the name of the person he identified was Bobby Jackson, as Fisher lacked any personal knowledge of Bobby Jackson. It is unclear what additional value Robert Fisher might have been able to provide to the credibility of Thomas's defense.

Second, Thomas claims his counsel failed to present the eyewitness testimony of Gail McDonald, and alleges that McDonald's description in her FBI statement of one of the suspects as "heavyset" and "wearing blue jeans" does not match Thomas. But McDonald's testimony would still have hurt Thomas. While she described one suspect as "heavyset," she described the other suspect's attributes fairly closely to Thomas's appearance. It is probable that Thomas's counsel might have found McDonald's testimony damaging to his client and decided not to call her. Thomas also makes cursory references to "numerous eye witnesses" like McDonald that he suggests would have been helpful for the Bobby Jackson defense, all of which the district court properly identifies as unhelpful or even harmful to the defense.

Third, Thomas identifies a letter that he allegedly received from Anthony Bond as proof that counsel should have more thoroughly investigated Bobby Jackson. The letter declares that Bond and Angela Jackson lied about Thomas's involvement in the

Walgreens robbery in order to protect Bobby Jackson, because Angela Jackson and Bobby Jackson had been in a romantic relationship when Angela was seeing Thomas. The evidence below shows the letter to be a forgery written after Thomas's federal convictions. Bond, through his post-conviction representation, has denied writing the letter. At trial the Government produced handwriting expert testimony that concluded the letter was a forgery. Even if the letter was not a forgery, "this court views with great suspicion the recantation testimony of trial witnesses in post-conviction proceedings." *Brooks v. Tennessee*, 626 F.3d 878, 897 (6th Cir. 2010). While it is possible that evidence of a romantic relationship with Bobby Jackson might have drawn Angela's credibility further into question, the district court found the testimony of witnesses to the romantic relationship extremely suspect.

Finally, Thomas argues that his counsel should have introduced evidence that Bobby Jackson had committed an armored car robbery at Southbrook Mall three months after the Walgreens robbery. The district court found that these two robberies were significantly different, and that there was no real evidence linking Jackson to the Walgreens robbery. Potential evidence that inmate Stephen Briscoe claimed Jackson had admitted committing other robberies offered no connection to the Walgreens robbery.

The claim that Thomas's counsel should have more aggressively pursued the "Bobby Jackson" strategy is questionable at best. All of the potential evidence Thomas presents of Bobby Jackson's involvement is riddled with reliability and admissibility issues.

Thomas fails to produce compelling evidence that his counsel was deficient in not presenting more evidence of Bobby Jackson as a suspect, and he fails to demonstrate prejudice resulting from the alleged deficiency.

D. Ineffective Assistance of Counsel for Failure to Investigate Alibi Testimony

The parties disagree as to whether this claim has been waived. In his initial brief on appeal, Thomas dedicates one footnote to the claim. Even if Thomas properly presented this claim, it is meritless. At trial the Government effectively rebutted testimony that the alibi witness, Thomas's girlfriend Dana Wiggins, was with Thomas at the time of the robbery by proving that Wiggins was lying. Before the trial, Thomas's counsel interviewed Wiggins and Thomas multiple times, and warned them of the harms in presenting a false alibi defense. Thomas's counsel also interviewed Thomas's mother, who corroborated Wiggins's story. The district court is correct that Thomas was entitled to a competent defense, but not a perfect one. *Crehore v. United States*, 127 F. App'x 792, 796 (6th Cir. 2005). Thomas's counsel was not deficient in failing to protect a client from the client's own deceit.

E. Ineffective Assistance of Counsel for "Cumulative Errors"

Whether an attorney's representation amounted to incompetence is a question of whether the attorney adhered to "prevailing professional norms," and not whether it deviated from best practices or most common custom. *Harrington v. Richter*, 562 U.S. 86, 105 (2011). As such, "[s]urmounting *Strickland*'s high

bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371-72 (2010). While it is true that multiple errors by trial counsel can cumulatively result in a Sixth Amendment violation, this is not the case at hand. *See Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004). Individually, each of Thomas's Sixth Amendment claims fail, and bundling them together does not increase their merit. *See id.*

Thomas argues that his trial attorney committed multiple errors, which cumulatively result in a violation of his right to effective counsel. The alleged errors include those discussed above: (i) failure to move to sever Count Three; (ii) failure to request a limiting instruction; (iii) failure to investigate and present the "Bobby Jackson" defense; and (iv) failure to sufficiently investigate the alibi testimony. Thomas then adds: (v) failure to present exculpatory evidence promised during the opening statement; and (vi) failure to object to the Government's repeated showing of the surveillance video that had little probative value, but was highly prejudicial to Thomas.

Thomas's arguments concerning the opening statement and the failure to object are not sufficiently supported to prove a Sixth Amendment claim. Thomas does not articulate how these actions specifically were deficient or how they specifically prejudiced the outcome of the case. Instead, they are tacked on to a list of the failed ineffective assistance of counsel arguments. A party waives issues that he adverts to in a perfunctory manner, unaccompanied by some effort at developed argumentation. *United States v. Fowler*, 819 F.3d 298, 309 (6th Cir. 2016). All of the cumulative errors Thomas cites are either waived or fail.

F. *Brady* Claim

Thomas asserts that his due process rights were violated when federal prosecutors did not disclose that Angela Jackson had been compensated for her testimony. *See Brady*, 373 U.S. at 87. At the district court, Thomas's *Brady* claim was denied in a non-final order. As the order was non-final, it was unnecessary at that time for the district court to indicate whether it granted a Certificate of Appealability (COA) for the claim. When the court determined in its final order which claims were or were not granted a COA, it did not address the *Brady* claim. Thomas eventually requested a COA on the issue of whether he was precluded from pursuing his *Brady* claim, which was granted. This court may elect to consider claims that both parties have extensively briefed. *United States v. Martin*, 438 F.3d 621, 628 (6th Cir. 2006). The district court's failure to address the appealability of the *Brady* claim appears to be an oversight. Thomas did not intend to waive his claim, nor is the Government prejudiced by allowing the claim to be presented.[2] The COA granted by this court was proper, and the *Brady* claim concerning Angela Thomas's testimony is not precluded.[3]

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[2] The Government requested that this court hear the *Brady* claim on the merits in the interest of judicial economy.

[3] While Thomas's *Brady* claim as to Angela Jackson's testimony is not waived, Thomas has waived the *Brady* claim argued at the district court that the Government did not disclose evidence of eyewitness Gail McDonald failing to identify Thomas in a photo array. As that argument is not presented in Thomas's brief, it is waived.

Although Thomas's remaining *Brady* claim is not waived, it ultimately fails on the merits. Under *Brady*, Thomas must show that the Government failed to share evidence favorable to the accused, and that the suppression of evidence prejudiced the defendant. *Montgomery v. Bobby*, 654 F.3d 668, 678 (6th Cir. 2011) (en banc). Thomas claims that the Government failed to disclose evidence that it intended to pay Angela Jackson for her federal testimony. Angela Jackson did receive $750 after Thomas's federal trial. *Brady* requires the disclosure of all material evidence to the defendant even if the evidence is only relevant for the purpose of impeaching government witnesses at trial. *Bell v. Bell*, 512 F.3d 223, 232 (6th Cir. 2008) (en banc) (citing *United States v. Bagley*, 473 U.S. 667, 676-77 (1985)). A defendant has the constitutional right to impeach a witness by showing bias. *Robinson v. Mills*, 592 F.3d 730, 737 (6th Cir. 2010).

The timing of the payment to Angela Jackson, which took place after the federal trial but before the state trial, causes Thomas's federal *Brady* claim to fail. U.S. Marshal Scott Sanders, who was part of the Safe Streets Task Force, submitted an affidavit that Angela Jackson had not been informed ahead of time that she would be compensated for her cooperation or that she was at risk of facing prosecution for assisting Thomas. While Sanders previously stated during an evidentiary hearing conducted by the district court that he believed Angela Jackson was informed during the investigation that she might have potential criminal liability, he also stated that no one suggested to Jackson that she would be subject to arrest. Sanders subsequently stated that investigators did not anticipate, plan, or discuss with

Angela Jackson a payment to be made to her after the federal trial.

Thomas is unable to present evidence that Angela Jackson had knowledge before her federal testimony that she would receive the money, or that she made a deal to testify in lieu of being prosecuted. Thomas argues that the circumstance of her not being prosecuted gives rise to the presumption that a "deal" was made with Jackson before the trial. But this inference alone is insufficient basis for a *Brady* claim. *See Jefferson v. United States*, 730 F.3d 537, 552 (6th Cir. 2013); *Mathews v. Ishee*, 486 F.3d 883, 895 (6th Cir. 2007) (explaining that an inference that the prosecution must have made a pre-trial deal with a witness in exchange for testimony is itself insufficient basis for a *Brady* claim). Nor does the fact that a witness was later compensated for her testimony give rise to a sufficient presumption for a *Brady* claim. *Bell*, 512 F.3d at 234. If the Government had the ability or obligation to disclose to Thomas the eventual compensation, it is plausible that the withholding of evidence might have affected the outcome of the case. But during the federal trial the Government had no obligation to disclose to the defendant whether it was considering the eventual payment to Jackson.

Finally, Thomas appeals the district court's denial of his request for additional discovery on the *Brady* claim. Here again the district court did not abuse its discretion, as the movant was unable to show good cause for more discovery. *See Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004). Rule 6(a) of the Rules Governing § 2255 Proceedings allows the district court to enable further discovery in a habeas proceeding

where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief. *Harris v. Nelson*, 394 U.S. 286, 300 (1969); *Cornell v. United States*, 472 F. App'x 352, 354 (6th Cir. 2012). Thomas's request for discovery fails for much the same reason that his *Brady* claim fails on the merits. Beyond mere speculation, Thomas provides no evidence that the Government withheld evidence that it was obligated to disclose. Bald assertions and conclusory allegations do not provide sufficient ground to warrant requiring the government to respond to discovery or to require an evidentiary hearing. *Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001).

Accordingly the district court's denial of the writ is **AFFIRMED**.

APPENDIX E

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 15-5399

[Filed April 4, 2017]

ANDREW LEE THOMAS, JR., Petitioner-Appellant,

v.

BRUCE WESTBROOKS, WARDEN, Respondent-Appellee.

ORDER DENYING PETITION FOR REHEARING

Before: MERRITT, SILER, and DONALD, Circuit Judges.

Lawyers for the State Attorney General's Office have filed a petition to rehear this panel's decision in this Tennessee death penalty case. They represent to the Court that the State prosecutor had no knowledge of the payment of $750 to the witness, Angela Jackson. This factual representation to this Court is inconsistent with the stipulation of the parties in the court below that knowledge of the payment was not an issue but

only its materiality remained as an issue. The "joint stipulation" is found at RE 78, page ID 11953-11954. It states:

> With respect to Petitioner's *Brady* claim, set forth as Claim 1 in the Petition for Writ of Habeas Corpus, the only remaining question for this Court is whether the undisclosed payment is material; i.e. whether there is a reasonable probability that, had the suppressed evidence been disclosed, the result of the proceeding would have been different.

Based upon this concession by the prosecutor, the district court denied as moot the evidentiary hearing that the petitioner Thomas had requested as to the "knowledge" prong of the claim. RE 97, Page ID 12050-12051. The district court stated in an order:

> The only issues to be addressed by this Court, after the parties have entered the joint stipulation, are whether Jackson's testimony was false and whether it was material.

RE 102, Page ID 12123.

Accordingly, the request for panel rehearing is denied. Judge Siler adheres to his dissenting opinion.

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

s/_____
Deborah S. Hunt, Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 15-5399

[Filed April 19, 2017]

ANDREW LEE THOMAS, JR., Petitioner-Appellant,	)
v.	)
BRUCE WESTBROOKS, WARDEN, Respondent-Appellee.	)

O R D E R

BEFORE: MERRITT, SILER, and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.[*] No judge has requested a vote on the suggestion for rehearing en banc.

[*] Judge Gibbons recused herself from participation in this ruling.

Therefore, the petition is denied. Judge Siler would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

s/_____
Deborah S. Hunt, Clerk