

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RONALD HARRIES

v.

RICKY BELL

)
) Judge Nixon

) Case No. 3:84-0579
)
)

MEMORANDUM

In this habeas corpus proceeding under 28 U.S.C. § 2254, Petitioner Ronald Harries challenges the constitutionality of his 1981 conviction and death sentence imposed by the Criminal Court of Sullivan County, Tennessee. Upon the evidence and arguments of counsel presented at a limited evidentiary hearing held about a year ago and the record as a whole, the Court makes the following Findings of Fact and Conclusions of Law, in accordance with Fed. R. Civ. P. 52(a).

LEGAL STANDARDS

I. Standard of Review

Petitioner's Habeas Corpus Petition was originally filed on June 6, 1984, approximately twelve years prior to the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). However, on December 9, 1999, Petitioner filed an Amended Petition, which created a dispute as to the proper standard of review for any new claims not presented in the original petition and any amendments to the original claims. (Doc. Nos. 525 at 5-6 and 548 at 2.) In its Memorandum entered on November 28, 2000,¹ the Court determined that the

¹ Title I of the AEDPA, entitled Habeas Corpus Reform, makes two sets of revisions to the federal habeas statutes: Sections 101 to 106 modify the existing Chapter 153 of the Judicial Code applicable to both capital and non-capital cases, and Section 107 added a new Chapter 154 applicable only in capital cases. In summary, the Court determined that under Lindh v. Murphy, 521 U.S. 320 (1997), Chapter 153 cannot be applied retroactively

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AEDPA standard does not govern this case, and that the petition should be considered in its entirety under pre-AEDPA standards.

II. Standard Applicable to the Finding of Facts

Another important preliminary issue relates to the weight the Court should assign to both the findings of fact at the state level and the facts presented at the federal evidentiary hearing held in July, 2001. Pursuant to 28 U.S.C. § 2254 (d) (repealed), in effect when this petition was filed, a federal court shall presume the correctness of certain state court determinations of fact.² Respondent argues the Court should consider evidence presented at the federal hearing solely as it relates to the competency issue, and disregard it as it relates to the ineffectiveness claim, because Petitioner has stated no reason for his failure to present such evidence at the state level. (Doc. No. 807 at 2, citing Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992)).

On the other hand, Petitioner argues that the Court should consider all evidence introduced at the federal hearing. First, he asserts that no presumption of correctness as to the state courts' finding of competency arises, because the state courts made no "determination" that was "supported by substantial evidence developed at a full and fair hearing." (Doc. No. 802 at 29, quoting Bundy v. Dugger, 816 F.2d 564, 566 (11th Cir. 1987)). Second, Petitioner also asserts that the presumption does not apply to the ineffectiveness claim, because that is a mixed question of law and fact that this

and its provisions "generally apply only to cases filed after the Act became effective." Id. at 336 (emphasis added). In capital cases, the Lindh Court concluded that "when a pending case is also an expedited capital case subject to chapter 154, the new provisions [in Chapter 153] will apply to that case." Id. at 335. However, before a petition is considered an expedited case, the state must meet certain conditions under §§ 2261 (a) and (c), which Respondent has not satisfied here. (Doc. No. 673 at 5, 8.)

² In Townsend v. Sain the Court stated that "issue of fact," means "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators.'" 372 U.S. 293, 309, n. 6 (1963) (quoting Brown v. Allen, 344 U.S. 443, 506 (1953))

Court must review *de novo*. (*Id.* at 45, citing Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995)).

Even if Petitioner inexcusably failed to develop the record at the state level, a district court has discretion to order an evidentiary hearing,³ which the Court did in this case. Nevertheless, the issue yet to be resolved is how the evidence submitted at the federal hearing is to be considered, whether the new facts support or rebut the presumption of correctness or merely supplement the post-conviction state findings. Abdur' Rahman v. Bell, 226 F.3d 696, 704 (6th Cir. 2000) (applying pre-AEDPA law). Section 2254 (d) provides that in a federal habeas proceeding,

... a determination after a hearing on the merits of a factual issue, made by a State court ... evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit - -

- (1) that the merits of the factual dispute were not resolved in the State court hearing;
- (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
- (3) that the material facts were not adequately developed at the State court hearing;
- (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
- (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
- (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
- (7) that the applicant was otherwise denied due process of law in the State court proceeding;
- (8) or unless ... the Federal court on a consideration of such part of the record as a

³ Keeney ruled that cause- and - prejudice is the proper standard to excuse a prisoner's failure to develop material facts in state court. 504 U.S. at 8. But relying on a footnote in Keeney stating that whether the presumption of correctness applies is a "distinct" issue from whether a hearing is required, the Sixth Circuit held that this "indicates the continuing viability of Townsend's statement that a district court may order an evidentiary hearing to settle disputed issues of material fact even following the adoption of ... § 2254(d)." Abdur' Rahman v. Bell, 226 F.3d 696, 705-706 (2000) (quoting Keeney, 504 U.S. at 10 n. 5). Thus, the Sixth Circuit upheld a district court's inherent discretion to order such hearing. *Id.* at 706 (citing Seidel v. Merkle, 146 F.3d 750, 755 (9th Cir. 1998); Clemmons v. Delo, 124 F.3d 944, 952 (8th Cir. 1997); Pagan v. Keane, 984 F.2d 61, 63-65 (2nd Cir. 1993), for this proposition). It also limited the cause- and- prejudice test espoused in Keeney and Mitchell v. Rees to the issue of whether a "habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing." *Id.* (emphasis added) (quoting Mitchell, 114 F.3d 571, 577 (6th Cir. 1997)).

whole concludes that such factual determination is not fairly supported by the record. 28 U.S.C. § 2254 (d) (repealed) (emphasis added). Thus, the presumption of correctness is not mandatory. However, in order to depart from the presumption “a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was not fairly supported by the record.” Sumner v. Mata, 449 U.S. 539, 551 (1981)(citations omitted).⁴

Under Strickland v. Washington, 466 U.S. 668 (1984) the ultimate question of the ineffective assistance of counsel is a mixed question of law and fact and it will be reviewed *de novo*, but the “state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d).” Id. at 698; see also Abdur’ Rahman, 226 F.3d at 702. Accordingly, where relevant and unless the Court otherwise specifies its reasons for disregarding them, the Court defers to the factual determinations reached by the state courts regarding Petitioner's ineffectiveness claim, as well as other claims. However, as it relates to competency, the Court finds that the presumption of correctness is inapplicable.

Although the trial court ordered two mental evaluations of Harries, the presumption of correctness did not arise, as the court made no “determination after a hearing on the merits of a

⁴ In upholding the district court's inherent power to order a hearing "despite the holding in Mitchell," and given the district court's duty to state its reason for disregarding the presumption of correctness under § 2254(d), the Abdur’Rahman Court merely moved forward in time the restriction imposed by the presumption. This is consistent with Habeas Rule 8 (a), which deals with evidentiary hearings. Rules-Section 2254 Cases (2001), Advisory Committee Notes to Rule 8(a) (explaining that the rules indicate when a "hearing is mandatory" and that in "all other cases where the material facts are in dispute, the holding of such hearing is in the discretion of the district judge.") This allows a federal court to make a determination on whether to hold a hearing after a review of the state record and pleadings submitted by the parties, and later determine whether any of the exceptions under § 2254(d) applies to the state findings, once it has reviewed the full record (including the state and the federal record). This is of utmost importance in habeas proceedings of capital cases, given the need for maintaining the integrity of the process by which the state takes life, which "differs dramatically from any other legitimate state action." Gardner v. Florida, 430 U.S. 349, 358 (1977); Cunningham v. Zant, 928 F.2d 1006, 1012 (11th Cir. 1991).

factual issue,” which was evidenced by a “reliable and adequate written indicia” under § 2254 (d). See e.g., Sena v. New Mexico State Prison, 109 F.3d 652, 655 n.1 (10th Cir. 1997) (no presumption in the absence of a “full, fair and adequate hearing” under § 2254(d) and (d)(6)); James v. Singletary, 957 F.2d 1562, 1574 (11th Cir. 1992). Cf. Maggio v. Fulford, 462 U.S. 111, 177 (1983) (holding the presumption of correctness attaches to a state court’s competence finding and a federal court must determine whether the finding is “fairly supported by the record”). Therefore, this opinion considers whether Mr. Harries was competent to stand trial, and whether the failure⁵ to more thoroughly address this issue at trial deprived Petitioner of his constitutional rights.

FINDINGS OF FACT⁶

I. Factual and Procedural History

1. Ronald Harries was convicted by a jury in Sullivan County, Tennessee, on August 8, 1981, of felony murder, and subsequently sentenced to death. According to the facts that were discovered at trial, Mr. Harries had left his home in Cleveland, Ohio and driven to Tennessee with Charles “Bud” Stapleton, who was an accomplice to the ensuing robbery. When Harries and the other accomplices arrived in Kingsport, Tennessee on January 22, 1981, they surveyed several stores. They targeted a Jiffy Market, which had been identified by Ralph Page, who also provided Harries with the gun used in the robbery. (Trial at 868-918, Stapleton); (id. at 960-1049, Harries).

⁵ The Court will consider both Counsel’s alleged failure (implicating Sixth Amendment concerns) and the allegation that the trial judge allowed Harries to be tried while incompetent (implicating Due Process concerns).

⁶ Citations to the record are made as follows:

Trial	(State trial transcript page)
PCT	(State post-conviction transcript page)
Doc. No.	(Docketed pleadings from the federal district court record)
FT	(Transcript from the federal evidentiary hearing)
FP or FR Ex.	(Exhibits submitted by either party as part of the hearing)

At about 9:30 p.m., Petitioner entered the store and pretended to shop until there were no customers in the store. He then approached the counter and pointed the gun at the store clerk, Rhonda Greene, in an attempt to intimidate her. During this robbery Mr. Harries shot and killed Ms. Greene.

2. Petitioner did not realize that there was another employee in the back of the store, Elizabeth Lane, who ran toward the scene following the shooting. Harries first shot at Ms. Lane and missed, and then ordered her to give him money. Ms. Lane gave him three bags from the safe containing checks, food stamps, and approximately fifteen hundred dollars in cash. She was not harmed. Petitioner fled the store and ran to a waiting car, which according to him,⁷ was driven by Ralph Page. Harries testified that Page drove him to Charles Stapleton's mother's house, where Petitioner and Stapleton had been staying. The following day Page, Stapleton, and Petitioner drove to North Carolina where Page had relatives. Page and Stapleton received part of the money taken in the robbery. Page and Petitioner drove onto Florida, where Petitioner was apprehended.

3. On September 19, 1983, on direct appeal the Tennessee Supreme Court affirmed Petitioner's conviction and sentence. State v. Harries, 657 S.W.2d 414 (Tenn. 1983). Petitioner did not seek permission for a writ of certiorari to the United States Supreme Court.

4. On March 19, 1986, Petitioner filed his first petition for post-conviction relief raising thirty-five issues, but following a three-day evidentiary hearing, the trial court denied relief. Harries appealed setting forth five issues, which included a claim that he was denied effective assistance of counsel throughout trial and on direct appeal, and that his conviction and sentence were the result

⁷ At trial, Petitioner testified he killed Rhonda Greene in the course of robbing a Jiffy Market. The only defense asserted by trial counsel was that Petitioner was a drug addict who was being manipulated by Page and Stapleton, his drug suppliers, and that Petitioner had shot and killed Rhonda accidentally. The defense insisted that Petitioner was guilty of second degree murder or a lesser degree of homicide.

of “fundamentally unreliable proceedings.” citing ineffectiveness, an inadequate mental evaluation, and other trial errors. The Tennessee Court of Criminal Appeals upheld the trial court’s decision, Harries, 1990 WL 125023 (Tenn. Crim. App., August 29, 1990), and it also denied Petitioner’s request for rehearing, Harries v. State, 1990 WL 163719 (Tenn. Crim. App., October 4, 1990).

5. On June 6, 1984, death row inmate William Groseclose and others filed a “next friend” petition in this Court, against Harries’ wishes, requesting a stay of the impending execution and alleging Petitioner’s incompetence. This Court found Petitioner to be incompetent and reaffirmed the stay of execution pending the final disposition of the “next friend” petition on August 17, 1984. In addition, as a result of the “next friend” petition and other related actions, this Court declared the living conditions on Tennessee’s death row to be in violation of the United States Constitution on May 24, 1985. Groseclose et al. v. Dutton, 609 F. Supp. 1432 (M.D. Tenn. 1985).

6. The State appealed this decision to the Sixth Circuit Court of Appeals, and on November 16, 1987, the Sixth Circuit remanded the “living conditions” portion of the case and ordered it to be consolidated with another case, Grubbs v. Bradley. The bifurcated habeas corpus portion of the original petition was remanded back to this Court. On July 18, 1988, this Court ordered a Guardian *ad litem* to represent Petitioner. Action on the original petition was held in abeyance on November 18, 1993, pending the outcome of Petitioner’s second state post-conviction petition challenging his death sentence under State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992).

7. In September 1993, Petitioner had filed a second petition for post-conviction relief, limited to allegations of constitutional error in the application of the felony-murder aggravating circumstance to his conviction for felony murder, but relief was again denied. The Court of Criminal Appeals affirmed that decision on July 30, 1997. Harries v. State, 958 S.W.2d 799 (Tenn. Crim.

App. 1997). The Tennessee Supreme Court again denied Petitioner's Application for Permission to Appeal in November, 1997. Harries, Order, S.Ct. at Knoxville, Case No. 03C01-9607-CR-00276.

8. On December 9, 1999, Petitioner filed his Amended Petition for a Writ of Habeas Corpus in this Court. (Doc. No. 516.) Respondent then filed its Answer and Motion for Summary Judgment, (Doc. No. 525), to which Petitioner filed his Traverse to Answer and Response to Motion for Summary Judgment, (Doc. No. 548). On November 28, 2000, the Court entered a Memorandum and Order disposing of these motions. (Doc. Nos. 673, 674.) In its Memorandum, the Court determined that, read liberally, Petitioner's § 2254 Motion had presented most grounds for relief with sufficient factual specificity to permit review. (Doc. No. 673 at 9-11.) The Court determined that Petitioner had exhausted his remedies in state court with regards to many of his claims in one of two manners: (1) by presenting them to the Tennessee Supreme Court via incorporation by reference from the Court of Criminal Appeals Brief attached to the Application for Permission to Appeal, (id. 12-18); or (2) via mandatory state review of the conviction and sentence pursuant to Tenn. Code Ann. ("T.C.A.") § 39-2406, (id. at 18-23). The Court then addressed the issue of procedural default, finding that several claims did not survive summary judgment on this basis, (id. at 23-30). Finally, the Court reviewed those claims that had been exhausted and had not been procedurally defaulted, and found that the claims raised in the following paragraphs had survived summary judgment, and were proper for federal review: ¶¶ 43-51, 60-61, 65, 70-72, 91-97, 100, 103, 106-07, 109-11. The remainder of the claims were dismissed.

9. Subsequently, Petitioner filed motions to reconsider the Court's decision to dismiss certain claims, and the Court revised its decision as to some claims while rejecting others, and added the following to the list of claims properly before it: ¶ 78 (Doc. No. 715) and ¶ 69 (Doc. No. 773).

Thus, Harries now challenges his conviction and sentence on the following grounds:

Ineffective Assistance Of Counsel

- (1) Counsel failed to conduct the necessary investigation to determine Petitioner's background that could be used in mitigation, or to evaluate his mental state.
- (2) Defense counsel also failed to ensure an adequate mental evaluation for Petitioner, and failed to challenge his competency to stand trial, in violation of Mr. Harries' Sixth Amendment right to counsel.
- (3) Petitioner was specifically denied effective assistance of counsel at the guilt stage of trial, because counsel failed to present an insanity and/or diminished mental capacity defense, and failed to object to and rebut the argument of the prosecution that Petitioner was a "cold-blooded killer."
- (4) Counsel was ineffective at the sentencing stage by failing to prepare and present any mitigation evidence, and failing to investigate Harries' prior convictions and prepare against the prosecution's proof supporting the only valid aggravating factor found by the jury under T.C.A. § 39-2404(i)(2): "prior violent conviction."
- (5) Trial counsel also failed to adequately represent Petitioner on appeal. The appeal brief to the Tennessee Supreme Court was prepared by lead counsel Miller. Appellate counsel failed to raise numerous claims reflected in the trial record and failed to adequately brief the claims that were raised.

Court Error

- (6) The trial court erroneously allowed Harries to be tried, convicted, and sentenced though he was incompetent, in violation of Petitioner's due process rights under the Fourteenth Amendment.
- (7) The trial court improperly allowed the prosecution to rely on and the jury to apply the "felony murder" aggravating circumstance, and the state post-conviction trial and appellate courts performed an improper harmless error analysis in violation of Petitioner's Fourteenth Amendment rights.
- (8) The State Supreme Court found the admission of the mail fraud conviction to be harmless error, but it did not consider the effect of the malicious entry conviction. The trial court had erroneously allowed into evidence the testimony of the only four prosecution witnesses at sentencing, who testified about these prior non-violent convictions. As they did not involve "the use or threat of violence," both the convictions and the underlying testimony were inadmissible.
- (9) Petitioner had a liberty interest in having a properly instructed jury determine his death sentence, but in his case the trial court (i) failed to instruct the jurors as to the effect of their inability to agree on a verdict pursuant to T.C.A. § 39-2404(h); (ii) it erroneously instructed the jury as to the statutory mitigating circumstances under T.C.A. § 39-2404(j)(8) and (2); and (iii) though there was no evidence to support them, the court erroneously instructed the jury as to all of the statutory

aggravating and mitigating circumstances under T.C.A. § 39-2404(i) and (j). Finally, the trial court's instructions on impaired capacity at sentencing were incomplete, confusing and erroneous.

- (10) Execution by electrocution is cruel and unusual and thus in violation of the Eighth Amendment of the United States Constitution.

Prosecutorial Errors

- (11) Harries' Eighth and Fourteenth Amendment rights were violated at the guilt stage of trial because the prosecution's improper statements in closing argument made the trial unfair. The State argued irrelevant facts that were not in evidence; it urged inflammatory, irrelevant and unconstitutional justifications for returning a guilty verdict; and argued that Harries was guilty of felony murder because the shooting was "a cold-blooded singular execution operation of killing a witness." At the sentencing stage, the State relied upon irrelevant "justifications" for the death penalty asking the jury to consider aggravation factors not listed in T.C.A. § 39-2-203(i). The prosecutor argued Petitioner had the burden of proof.

Cumulative Errors⁸

- (12) The trial errors in this case cumulate. At the outset, Petitioner was incompetent at the time of the trial and should never have been tried. Counsel did not investigate Petitioner's defenses to the crime charged. Though Petitioner had viable mental state defenses at the guilt stage of the trial, counsel did not present them, and, in fact, presented no defense at all. The sentencing stage of this trial was fatally flawed as well, from the opening statements to the court's instructions.

10. As part of this habeas petition, starting on July 16, 2001 the Court also held a five-day evidentiary hearing on those claims that required a presentation of proof by the parties.⁹

⁸ Petitioner's Amended Petition incorporates all facts and arguments presented in support of all identified constitutional errors at all stages of trial and all post-conviction proceedings.

⁹ Petitioner's presented the testimony of the following individuals: Catherine Yeager (social history expert), Chris Armstrong (investigator), several of Harries' relatives, Gordon Kamka (who inspected the Sullivan County Jail in 1984), Lester Wyman (Harries' former probation officer), Dr. Pincus (behavioral neurologist), Dr. Lewis (child psychiatrist), Dr. Woods (psychiatrist), Dr. Burr (expert in death penalty). Respondents presented the following testimony: Elizabeth Lane (store clerk on the date of the crime), Wolfgang Krawec (man who had an altercation with Harries), Carl Eilers (former trial counsel), Dr. Mathews (forensic psychiatrist) and Dr. Martell (clinical psychologist)

II. Facts Relevant to the Claims

A. Ineffective Assistance of Counsel

(1) Trial preparation: family history, background and mental state investigation

11. When Petitioner was taken into custody in Florida, after stating that he understood his legal rights, he gave a statement to the authorities and agreed to be extradited to Tennessee only on the condition that the Sullivan County Sheriff "call the Attorney General and get him to ask for the death penalty." (FP Ex. 36.) Harries was thus extradited to Tennessee, and attorneys Carl Eilers and Frank Miller were appointed to represent him on the pending murder charges. As the first post-conviction court found, "neither had ever participated in a capital murder case. Mr. Miller, who estimated that at the time of [Harries'] trial, 15 to 25 % of his practice was in the criminal law arena, was considered the lead counsel." Harries, 1990 WL 125023, at * 1. Eilers interviewed two state witnesses, Harries' mother, co-defendant Stapleton, and defendant himself. Id. at * 2.

12. Except for Harries' mother who was in Ohio, the investigation was confined to Kingsport, Tennessee, although Harries had only spent the few hours immediately prior to the crime there. (PCT 211, 411, 419-431, Eilers and Miller); (FT 68, Armstrong). The Court of Criminal Appeals found that "Mr. Eilers wrote to every prison facility where the appellant told him that he had been confined." Harries, supra at *3. "Reports were received from the Ohio Department of Rehabilitation and Corrections ["ODRC"] and the United States Bureau of Prisons, but neither revealed any history of mental illness." Id. Though these findings are presumed to be correct, see § 2254 (d), this Court also finds that defense counsel failed to follow up with these institutions and failed to contact at least one of the institutions where Harries advised counsel he had resided as a child, see infra n. 10. See Abdur Rahman, supra at 3 (supplementation of state record allowed).

13. In an interview on April 30, 1981, Harries gave counsel extensive information about his family and advised them that his relatives resided in Ohio. (FP Ex. 1 at 001.) Petitioner told them he was first arrested when he was nine, sent away to Starr Commonwealth until age twelve, and was next sent to the Cleveland Boys School. Harries also told them about his past crimes including the dates and the names of the youth and adult correctional facilities where he had been incarcerated, as well as other facts about his life. (Id. at 001-2.)¹⁰ On February 26, 1981, Harries' now-deceased mother sent a letter to Mr. Eilers telling him: "I have not been able to find records of [Harries] being a Paranoid Schizophrenic but I am sure if you wrote to the Hospital Staff at [illegible] Ohio you could get them." She also provided Mr. Eilers with her son's patient number at the time. (FP Ex. 4.)¹¹

14. Petitioner's social historian, Catherine Yeager, M.A., documented Mr. Harries' history based on available medical, school and juvenile records, various mental reports from his adulthood, and personal interviews with family members and some of the other experts. (FT at 9-55); (FP Ex. 103.) Petitioner's father, William Harries, had spent five years in a reformatory for theft prior to marrying Harries' teenage mother, Catherine Ody. Ms. Yeager testified that Petitioner's father spent long periods of time incarcerated for a variety of larceny and burglary offenses and parole violations.

¹⁰ The Court of Criminal Appeals first found that the attorneys had received no information indicating potential brain damage, and found that Harries had not provided them with the name and address of the home where he had been taken as a juvenile. Harries, 1990 WL 125023, at * 3. However, the state court later acknowledged that "in spite of Mr. Eilers' testimony, the record does support the appellant's contention that he told his counsel that he had been incarcerated as a juvenile [at Starr Commonwealth for Boys]." 1990 WL 163719, at *1 (denying petition to rehear).

¹¹ The Court of Criminal Appeals found that the report from the institution where Mr. Harries had been incarcerated between the ages of nine and twelve showed no possible brain damage, but just made "a cryptic reference to 'the possibility of a non-functional involvement.'" 1990 WL 163719 at * 1; 1990 WL 125023, at *5. The state court further concluded that mental evaluations conducted since that time "revealed no evidence of organic brain disease," and there was no proof that the outcome of the trial would have been different had the report been introduced. This Court will ignore these conclusions as erroneous, because (1) a mental expert would have understood the data as a sign of brain damage, i.e. verbal- performance IQ differential, see Fact # 46; and (2) the reports also show signs of mental and organic disorder at ages 11 and 14, see id. See 28 U.S.C. § 2254 (d)(8).

(Id. at 2.) He abused alcohol and would physically abuse Petitioner's mother. (Id. at 3.) Harries' mother also had a "fierce temper" and would hit her children. (Id. at 4.)

15. Harries was born in 1950. From age six until twelve Petitioner had nine school changes and would go back and forth between Youngstown and Cleveland, because his mother and paternal grandmother fought over his custody. (Id. at 15-16.) When Harries was ten, Blaine Dye, Catherine's common law husband, entered the household. (Id. at 13.) It is reported that he beat Catherine every time he drank, and Harries' siblings recall an episode when he crushed a lamp over her head when she was pregnant, tried to strangle her with the electrical cord, and but for the neighbors' intervention he might have killed her. (FT at 14.) However, it is not clear how much of his stepfather's violence Petitioner witnessed, as he was first sent to a juvenile facility at age eleven. (Id. at 17.) After a couple of runaways from a detention home, he was sent to Starr Commonwealth. As a juvenile, he was also sent to different institutions and continually ran away. (Id. at 17-20.)

16. Harries' medical records revealed that he had received several head injuries. Family members report that at age four he fell out of a moving car. (Id. at 21.) At age eleven Harries was admitted into an emergency room, after a severe choking that hemorrhaged both eyes, likely caused by Blaine Dye. At age twelve, during a physical exam at the juvenile detention facility, the staff noticed multiple newly-acquired scars on his skull. Also, the family reported Harries had tried to commit suicide by carbon monoxide asphyxiation after his wife left him. (Id. at 22-23.)

17. Chris Armstrong, a licensed private investigator, testified about his investigation of Mr. Harries' history and gave his opinion as to what evidence may have been available to trial counsel in 1981. (FT at 56-152.) He gathered the Ohio Juvenile Court records documenting Harries' court appearances and movements in the system between 1962 and 1967. Harries had been sent to Starr

Commonwealth, a home for emotionally disturbed children, and Mr. Armstrong was able to gather mental and health records, correspondence related to Harries, and other relevant information from this institution. (Id. at 58.) By contacting the ODRC, he collected Harries' health and psychiatric records from the Ohio prison system. He further retrieved Harries' federal prison records from 1977 to late 1980, and the Sullivan County jail logs from the pre-trial period. (Id. at 59-60.)

18. Mr. Armstrong gathered Petitioner's school records and some family records, such as birth certificates, marriage certificates, and criminal history cards. (Id. at 61.) Based on his review of the post-conviction record, he was asked to identify the records in possession of defense counsel in 1981. Armstrong explained that trial counsel's files revealed they had possession of: (1) a three-page progress report from the United States Bureau of Prisons from December 1st, 1980, when Harries was paroled from the federal prison (FP Ex. 10); (2) a one page psychological summary from the ODRC covering Harries' five-year stay at the Ohio Southern Correctional Facility (FP Ex. 11); and (3) a one page rules infraction ticket for throwing a syringe through the prison window dated July of 1977 (FT Ex. 40). (FT at 64-66.)

19. Mr. Armstrong also interviewed Harries' family, friends, and Ohio juvenile court officers. One of the officers, Lester Wyman, who was an officer when Harries first entered the system, "had Catherine Harries Dye sign the in loco parentis agreement for Ron to go to Starr Commonwealth back in 1962. And he also was a case worker on Ron's case." (Id. at 66-68.) He also interviewed Petitioner's probation officers and Thomas Mullen, the former director of the Ohio Youth Commission. When asked which persons relevant to mitigation were interviewed by trial counsel, the investigator stated they had interviewed now-deceased Petitioner's mother, and one of his sibling, Bill Harries, with whom counsel spoke for "less than five minutes" and asked him nothing

about Petitioner's family or up-bringing (FT at 188). Neither of these relatives testified, nor were they subpoenaed to testify at Mr. Harries' trial. (Id. at 68.)¹²

20. Richard Burr, an attorney specializing in death penalty litigation, testified on behalf of Petitioner. He testified that he had represented criminal defendants facing the death penalty since 1979, and he is counsel of record in collateral litigation in approximately 40 to 50 capital cases. (FT at 586 et al.) With respect to the performance of Petitioner's trial counsel, Mr. Burr testified that he had reviewed the transcript of Mr. Harries' trial proceedings, as well as relevant portions of the federal record, and concluded that the defense's performance fell short by failing to investigate leads provided by their client and his mother, failing to request an insanity evaluation as part of the court-ordered competency evaluation, and failing to pursue the competency issue in light of their client's litigation-related behavior.¹³

(2) Adequacy of the mental evaluation and Harries' competency determination

21. Prior to trial, Petitioner had two court-ordered mental state evaluations conducted by the Bristol Mental Health Center ("BMHC"), at the request of trial counsel. The first evaluation was ordered by the trial judge in February of 1981. (FP Ex. 49.) Herbert Bockian, M.D. and Jody Farra, M.A. performed the evaluation, and submitted to the court the following report, which almost

¹² There is a dispute in this area, because counsel testified they contacted both relatives on this matter. However, Petitioner submitted affidavits signed by the brother and the mother stating they were never contacted about testifying at Harries' trial, although they would have been available to do so. (Id. at 84); (FP Ex. 47 and 48.)

¹³ On post-conviction, Petitioner argued that counsel had been ineffective in "failing to perform a mitigation investigation," (Rule 11 Appl. at 13; Post-Conviction Pet. ¶ 40 (D)), failing to present to the jury information "about the circumstances of his life, his social history, background, thought and feelings," (Rule 11 Appl. at 24; CCA Brief at 21-22). During his first post-conviction he presented a report from Starr Commonwealth showing mental evaluations between ages 9-12, and Dr. Lewis's report. Harries, 1990 WL at *5. At the second-post conviction the court reviewed his history of drug and alcohol abuse, and evidence of brain damage. Harries, 958 S.W.2d at 806-08. Therefore, the Court observes that these findings either defer to the post-conviction findings or merely supplement those findings. See Abdur'Rahman, supra at 3.

duplicated the language in the court order:

After completion of the competency evaluation, we have concluded that [Harries'] condition is such that he is capable of defending himself in a court of law . . . we found that he understands the nature of the legal process; that he understands the charges pending against him and the consequences that can follow; and that he can advise his counsel and participate in his own defense. During the mental status evaluation, there was no sign or symptoms of any major psychiatric disorder, which would have prevented him from adhering to the requirements of the law at the time of the alleged crime.

(FP Ex. 50.) Subsequently, on August 3, 1981, on the first day of the trial and before the jury was selected, Harries' defense counsel presented an oral motion seeking a mental examination of their client, because of concerns of drug abuse. (Trial at 1-2, 08/03/1981.) A second evaluation, which included a drug screening was again conducted at the BMHC.

22. Defense counsel properly raised the competency issue. However, they neither provided any information about Petitioner to the evaluators, nor did they consult with the examiners.

At the first post-conviction hearing, Mr. Eilers testified regarding their dealings with the examiners:

Q: Did you and Mr. or Mr. Eilers talk to Dr. Bockian or the people who did the evaluation on Mr. Harries at the [BRMC]? . . .

A: I didn't. . .

Q: Did you do any research into the adequacy of the evaluation that he did receive. . .?

A: I took it at face value.

(PCT 436-37, 444.) When specifically asked about an independent evaluation Mr. Miller testified:

Q: Were there any requests for State assistance in regard to the supplying of psychologists or psychiatrists other than the request to have Mr. Harries evaluated for his competency to stand trial and sanity at the time of the offense?

A: The only other request was when the drug screening at the beginning of trial.

(Id. at 431-32.) Both evaluations combined lasted about two hours, and were solely based on the information provided by Mr. Harries who was "adamant[ly]" opposed to an insanity defense (id. at 444), and had been "angry and frustrated" and unwilling to discuss his life history with the examiners

(id. at 513, Dr. Farra). Also, most experts testifying at the federal hearing described Harries as an unreliable source. (FPT at 363, Dr. Pincus; at 811, Dr. Matthews); (FP Ex. 86, Dr. Lewis). Any other documents the examiners possessed came from the prosecution, though Dr. Farra noted the defense had an "opportunity to provide information that they feel pertinent, including previous psychiatric evaluations, psychological testing," which would have been helpful to a psychologist in making a "proper evaluation." (PCT at 512, Dr. Farra.)¹⁴

23. Based on the record developed both at trial and post-conviction, Petitioner's experts also testified as to the adequacy of the state-ordered evaluation during the July 2001 federal hearing.

Dorothy Lewis, M.D., found the evaluations to be "totally inadequate" because:

Neither evaluator took the time to obtain information relevant to Mr. Harries' mental condition. . . the first evaluation lasted less than an hour and consisted of a conversation among Dr. Bockian, M[s]. Farra, and Mr. Harries. The second evaluation lasted only a few minutes and consisted of a conversation between Mr. Harries and M[s]. Farra. . . It also included a drug screen that revealed just a trace of phenobarbital in Mr. Harries's system. . . [and thus,] the psychiatrist, the clinic coordinator, and the judge chose to discount his behavior all together. (FP Ex. 86 at 14.)

George Woods, M.D., similarly emphasized the "extremely poor quality" of the evaluations:

In fact, the confusion of roles between Dr. Bockian and Ms. Farra, in addition to the extremely limited time spent with Mr. Harries, brings into question the value of the competency evaluations. No family history was known. The attorneys for Mr. Harries did not communicate with Dr. Bockian and his assistant, Ms. Farra. . . Consequently, Mr. Harries defense team received no information from these pre-trial evaluations that would allow them to understand his behavior or for them to understand why he was not able to rationally assist them in their task.

(FP Ex. 88 at 8, Dr. Woods.)

¹⁴ It also appears that the second evaluation was conducted by Dr. Farra, who in 1981 was an "unlicensed clinic coordinator," while Dr. Bockian merely signed off on the letter to the court. (CPT at 391); (FP Ex. 86 at 14, Dr. Lewis Report).

24. Petitioner asserts counsel had at least four signs that should have raised concern about their client's competency: (1) Mr. Harries had agreed to waive extradition from Florida provided Tennessee asked for the death penalty (FP Ex. 36); (2) he rejected a change in venue as he believed he could win the jury's sympathy, which lead counsel to ask their client to sign a waiver on this matter (FP Ex. 7); (3) counsel noted Harries' hands were shaking, he was "highly nervous" and "very talkative," causing them to request a second evaluation just before trial commenced (Trial at 2-4); and (4) despite counsel's advice to the contrary, Harries insisted that co-defendant Stapleton testify at his trial, which again prompted the attorneys to have their client sign a waiver (FP Ex. 9). However, the interpretation of Petitioner's actions is disputed among the experts.

25. Mr. Filers' post-conviction testimony provides information on counsel's perspective:

Q: All right. There was some question apparently at the trial as to Mr. Harries' condition, was there not?

A: Based on the record I'd have to say that there was some question.

Q: And you and Mr. Miller interpreted that to be some sort of drug-related situation. Do you remember?

A: . . . I don't remember if I interpreted it that or if Frank Miller did or what.

Q: Let me ask you this. Instead of being a drug-related problem, do you know whether or not this was a psychological or organic brain syndrome problem?

A: I have no knowledge of that.

Q: In making the determination as to whether it was a drug problem or a psychological or organic brain syndrome problem, would a psychiatric evaluation, a competent psychiatric evaluation have been helpful to you as a defense attorney?

A: Well, I don't know because first of all I'd have to get somebody to define those terms before I could say who would be the proper person to make the interpretation. I would have to guess yes.

(PCT at 210-11.) Prior to trial, during an interview with counsel, Mr. Harries had revealed information about his life experience which, as an expert explained at the federal hearing, "was not within a normal healthy experience for children" and should have been "red flags to say, there is something wrong." (FT at 603.) Expert attorney Mr. Burr testified that defense counsel

failed to do any investigation of that [mental health] and failed as a result, to have any informed expert opinion. Certainly failed to seek their own defense experts but the more fundamental failure here was there were some experts that the Court-ordered. And they provided no information to those experts and the experts certainly didn't get the appropriate information on their own.

(Id. at 629.) However, the first post-conviction court found "[n]either attorney had any difficulty communicating with [Harries] prior to trial." 1990 WL 125023, at *3.

(3) Guilt-Phase of Trial: insanity and diminished capacity defenses

26. The Tennessee Supreme Court in this case found, and this Court agrees, that:

the only defense affirmatively asserted [by defense counsel] was that defendant was a drug addict, being manipulated by Ralph Page and Charles Stapleton, his drug suppliers, and that the bullet that killed the eighteen-year-old clerk in the Jiffy Market was fired by accident [which Harries still claims]

657 S.W.2d at 416. At the first post-conviction hearing, counsel testified that given the fact that their client had confessed to killing Rhonda Greene to several people, including Sheriff Gardner and reporters, the defense's theory "was based upon Ron's representation to us of his drug use and alcohol use on the particular day involved." (PCT 415) However, the defense presented no expert testimony to support this claim, and failed to raise an insanity defense by reason of mental disease or defect. Indeed, the Tennessee Supreme Court specifically stated that "Defendant's own testimony falls far short of establishing that he was intoxicated or drugged to the extent that he was incapable of forming an intent to rob or kill." Harries, 657 S.W.2d at 419.

27. At the federal hearing, Petitioner's experts submitted their opinion about his mental state at the time of the offense. Dr. Lewis reported the following:

It is my opinion to a reasonable degree of medical certainty that Mr. Harries was in a highly agitated, paranoid state as a result of [his brain dysfunction, mental illness and substance abuse]. The degree to which Mr. Harries understood the wrongfulness of robbing a convenience store can be debated. However, there is no question but that once

inside the store his judgment and his impulse control were severely impaired. Unquestionably, while in this state, Mr. Harries lacked substantial capacity to conform his conduct to the requirements of the law. He suddenly panicked, perhaps at the sight of a man in a police officer-like uniform, and he shot Ms. Greene, surprising even himself (e.g. even afterwards he couldn't believe she was dead).

(FP Ex. 86 at 11.) On cross-examination, Dr. Woods similarly expressed opinion that he had no doubt that Harries was incapable of conforming his conduct to the law, but he had not come to a conclusion as to whether he appreciated the wrongfulness of his actions at the Jiffy Market. (FT at 553.) Dr. Woods further explained that:

“capacity” in this particular circumstance is captured in Dr. Martell’s neuropsychological findings. Even though Mr. Harries may have this verbal ability to report back certain factual information, we clearly see that his capacity, his executive function, his ability to weigh and deliberate, his ability to sequence, his ability to adapt, those things that in Dr. Martell’s testing really were the most effective. Those speak to capacity. (Id. at 537.)

28. However, Dr. Woods’ testimony limited his insanity opinion to the act of shooting:

Q: Now, does that mean, and did I understand you correctly then, that he could conform his behavior to the requirements of the law as it relates to the robbery?

A: I believe that his ability to conform his behavior as it relates to the robbery was also impaired, but it did not rise to the level of the insanity statute. Certainly as it relates to the shooting it did rise to the level of the insanity statute.

...

A: Mr. Harries had been involved in multiple armed robberies. He knew that intimidation was a component of armed robberies. He knew that to cock the pistol and point it at someone had the effect of intimidating them. That is not the same as the offense, the moment of the shooting when - in fact, we know that at least the history that we have is that Mr. Harries had never shot anyone in the process of an armed robbery before, at least the history I am familiar with.

(Id. at 552, 555, Dr. Woods’ cross-examination.)

29. Respondent’s expert, Daniel Martell, M.D., also testified that if a person suffers from anxiety disorder and is exposed to a stressful situation such as a robbery, the stress will “exacerbate a difficulty in impulse control.” (FT at 934.) Indeed, the experts’ testimony was corroborated by

Elizabeth Lane, who could observe Petitioner at the time of the shooting:

Q: Ms. Lane, my question to you was: Would you please describe for Judge Nixon, as best as you can remember, Mr. Harries' demeanor and his facial expressions, his actions shortly before and up to the time that he shot at you?

A: When I came through the door, he was like - he was shocked, like scared. But I don't think he thought I was there. (Id. at 230.)

...

Q: After Mr. Harries shot at you, Ms. Lane, what did he do with the gun?

A: He just kept - he kept it - it was pointing at me. He kept pointing at me with it. (Id. at 232.)

...

Well, he just shot and killed her. And I mean, I was crazy because he done it, but he had just shot her. . . I just meant the gun is going, and he's just jumping around, and he's looking outside. And he's looking at her. Then he's keeping the gun on me. (Id. at 236.)

However, Respondent's expert witnesses, otherwise testified that Petitioner had been sane at the time of the offense. More specifically, Daryl Matthews, M.D., testified:

My opinion is that Mr. Harries did suffer from a mental illness at the time of the alleged offense, which is Anxiety Disorder Not Otherwise Specified, and his substance abuse. His Anti-Social Personality Disorder is a mental disorder, but not a mental illness And his mental disease did not cause him to lack substantial capacity to appreciate the wrongfulness of his conduct or to conform to the requirements of the law at that time.

(FT at 743.)

(4) Sentencing-Phase: case in mitigation, preparation against aggravating factors

30. A total of three witnesses were called by the defense during Harries' trial: Ronald Harries, his co-defendant Stapleton and another witness who had some checks stolen, all of whom were called at the guilt stage of his trial, while no witnesses were called at sentencing. (Trial, Vol. X-XII, Table of Contents.) As stated earlier, the theory of the defense consisted of convincing the jury that the shooting was not intentional because the Defendant was under the influence of drugs and alcohol and the gun was discharged accidentally. See Fact # 26. The sum total of evidence presented by counsel in the punishment stage occupies less than three pages of the trial transcript, and consists

of two documents: (1) a one page letter to the trial court from BMHC advising the court that a trace of phenobarbital had been found in Harries' blood sample (Trial at 1139-40), (FP Ex. 52); and (2) a 1977 disciplinary write-up from the Ohio correctional system, where Harries was cited for having a syringe and an unidentified pill (Trial at 1140-42), (FP Ex. 40).

31. On post-conviction, defense counsel Mr. Miller stated the following regarding their preparation and presentation of mitigation evidence:

Q: What investigation was done in preparation for the mitigation part of the trial or the sentencing phase by the defense?

...

A: Conversations with Mr. Harries concerning his background. Mr. Eilers talked with some family members in Ohio, and - -

...

Q: Okay. Was any subpoena ever issued for Mr. Harries' mother or brother?

A: No, they were not.

Q: Okay. What else was done in regard to preparation, investigation, and presentation of proof at mitigation for Mr. Harries?

A: Again, we were furnished with the documentation by the District Attorney relative to the aggravating circumstances that were to be presented. (PCT at 419-20.)

...

Q: All right. What investigation did you do into presenting proof in mitigation as to that circumstance [diminished capacity]?

A: I guess in answer to that question I would have to go back to the guilt-innocent phase and we had a discussion with Mr. Harries, I say "we," Mr. Eilers and I, as to one, whether or not he would take the stand, and, two, in what phase of the trial. And he definitely wanted to take the stand . . . it was agreed that Ron would testify in the guilt-innocent. . . it was one or both of our decisions not to put him back on the stand to rehash that which we had been over in the guilt-innocence phase of it. (Id. at 422.)

...

Q: Would it have been helpful to have more background information about him that what was brought out on the guilt-innocence part of the trial? . . .

A: Why, we knew about Ron's background if that's what your question is.

(Id. at 426.) Similarly, when asked about mitigation witnesses Mr. Eilers had testified:

Q: In regard to checking on Mr. Harries' family history and background, Mr. Eilers, what investigation did you do into that specifically?

A: Well, to start out with, we talked with Ron in some detail about the names and

people that would help us in our defense, and that was mother and brother that were basically the only names that Ron could give us that might help him. Now, specifically other than that we ran into a dead-end as far as finding other witnesses.

Q: . . . your theory was basically that this was an accidental shooting in large part because Mr. Harries was high on drugs at the time, drugs and alcohol?

A: That and because he was jostled by that second or third person in the store that caused the gun to go off.

(PCT at 180-81.)

32. At the federal evidentiary hearing, Petitioner's brother Bill Harries, his wife Sharon, his sister Cathy Harries IIg, his former probation officer Dr. Lester Wyman, and friends who spent the hours before the robbery with Harries such as Sharon Baran Bailey and Delores Shaver, all testified that they were willing and able to testify in Petitioner's Sullivan County trial. Their testimonies revealed they have much information regarding Petitioner's childhood, his family history, and his behavior and actions before the events at the Jiffy Market. The testimony of Mr. Harries' siblings was also helpful in describing the actions and reputation of other family members, such as substance abuse, domestic violence, gambling and other criminal activities.

33. When further asked about the defense theory of the case, including Mr. Harries' drug abuse, Mr. Eilers testified as follows:

Q: A major part of why - well, his direct examination dealt with his background and history of drug use, as well as his drug use during - in Cleveland, during the trip down and while here, didn't it?

A: That's correct.

Q: And one of the reasons all that was put on was because that was a major part of your theory.

A: That's correct.

Q: All right. Do you know the effect of speed or amphetamines upon a person's mind?

A: No, only what Ron told us that - the effect it had on his mind.

Q: Okay. Did you ever - you say you had a problem with it from that standpoint because his mind was so clear, his remembrance was so clear of the shooting. Is that correct?

A: That's correct.

Q: All right. Did you ever do any research into the affect [sic] of the use of amphetamines upon one's memory or the events, certain events in one's memory?

A: Not as far as interviewing a witness or anything, although I did read up on what they do, heighten your awareness, make you more - you think you're more aware of what's going on around you.

(PCT at 184- 185.) The lawyer also testified about the family history and mental state investigation:

Q: ... What else did you do besides talking to the mother and brother concerning investigation in Cleveland, Ohio, about family history and background for Mr. Harries?

A: I don't recall doing anything else. (Id. at 188.)

...

Q: Mr. Eilers, in regard to other institutional background and history, did you take a statement from Mr. Harries concerning his- where he spent time as a juvenile and as an adult?

A: I though we had taken a complete history. That's where I got the names of the institutions that I had written to.

...

Q: Let me ask you if it would have been relevant in your opinion to have information concerning Mr. Harries' past psychological history, especially as a juvenile?

A: It would seem to me it would be extremely relevant. (Id. at 192-96.)

...

Q: From your standpoint, what research was done in regard to obtaining a defense psychiatrist or psychologist in regard to the evaluation in Mr. Harries and presentation of evidence in mitigation, and possibly at guilt-innocence for him?

A: Well, as I recall Mr. Miller and I early on in this case talked with Ron and talked with him about a psychiatric evaluation. And as I recall at that time I think he was vehement about not wanting to plead as he put it insanity or something like that as a defense. He pretty well instructed us not to pursue that avenue. (Id. at 212.)

...

Q: Were any claims for assistance made to the Court in regard to the hiring of experts for the State to pay? Let's stick to the psychological and psychiatric types of experts at this point.

A: Well, again, I'm pretty sure there were none from the psychological aspects because we had been instructed not to pursue that avenue. (Id. at 214).

34. When questioned about the lack of evidence, attorney Mr. Miller stated the following:

... somebody, and I assume it was me, made the judgment that [Harris' family history and background] would not be helpful in the sentencing aspect. (Id. at 426.)

...

Q: In regard to the decision as to what would be helpful, who made the decision that the past drug use and abuse and alcohol abuse would be helpful as a mitigating circumstance?

A: I think that was a joint thing between Carl [Eilers] and I.

Q: Would it have been helpful to have had corroboration on the use and abuse of drugs concerning Mr. Harries?

A: Yes, it would have been helpful and I will say that I think Mr. Eilers made an effort to get some corroboration of that and was as I recall unsuccessful.

...
Q: Okay. Was there a time when Mr. Harries was telling you that he had been using drugs in the jail and then during the trial actually brought a syringe to the hearing so that he could show you that he could get drugs in the jail?

A: Yes.

Q: Why was that not introduced?

A: I have no idea, no independent recollection of why we didn't. (Id. at 428.)

...
Q: Were you aware of any time, Mr. Miller, prior to Mr. Harries' hearing, I should say trial, of any situation in his history where there may have been an indication that Mr. Harries was suffering from organic brain damage?

A: No.

Q: Okay. Would that have been the type of thing that might have been helpful to you as a defense attorney in putting on mitigation -- mitigation hearing for Harries? (Id. at 429) [Evidentiary issues discussed]

...
A: I think from a defense standpoint, yes, it would be, sure.

(Id. at 431.) Attorney Mr. Eilers specifically admitted that following Mr. Harries' testimony of his own drug abuse, "corroborative evidence" would have been "helpful" on the issue. (Id. at 200.)

35. At the federal hearing, Petitioner's expert attorney, Mr. Burr, also testified that Petitioner's history and background "would have been quite supportive of the view that it was [an] accidental [shooting]." (PT at 665.) On cross-examination, Respondent asked Mr. Burr regarding the advisability of introducing that type of mitigation evidence, which would have opened the doors for the prosecution to introduce Harries long criminal history, including the fact that he had once shot another individual believed to have been involved with his ex-wife. (Id.) In response, Mr. Burr explained that "the two patterns fall together. If you have a long history of misbehavior and a long

history of mental health problems, very often the two coincide and there is a way to understand the misbehavior through understanding the mental health problems." (Id. at 666.)

36. In its closing argument to the jury, the prosecution drew the following inferences:

Then number eight [statutory circumstance] comes up and this is the one they are going to try to crawl under. The capacity of the defendant to appreciate the wrongfulness of his conductor to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime, but which substantially affected his judgment. And they bring you two pieces of paper. . . . And they want to say these two documents explain away his responsibility for January 22, 1981. Ladies and gentlemen, if he was the drug addict they are claiming he was, if he was involved in methadone programs and all these other things he's come up with and told you on the witness stand, they would have had all those records down here and they would have shown them to you like they've shown you these two pieces of paper, but this is the best they can produce.

...
And I submit to you there's nothing in this man's history, because it would be clearly documented in the prison records if he in fact was a drug addict and had all these problems and couldn't control himself.

(Trial at 1153-54.) The prosecution concluded that "there [were] no substantial mitigating circumstances in this case." (Id. at 1174.) A conclusion that was also embraced by the trial judge, who in his Report of the Trial Judge, which was filed with the appellate record in the case, noted that none of the mitigating circumstances listed in the statute "were in evidence." (FP Ex. 41 at 163-64.)

37. On the other hand, the prosecution had presented certain proof in aggravation. In accordance with the prosecution's "open file" policy (PCT at 165, Mr. Eilers), prior to trial the prosecution gave the defense notice of the offenses, the convictions dates, and the names of the witnesses it intended to call in support of the "prior violent conviction" aggravating circumstance, see T.C.A. § 39-2404 (i)(2). At trial, the prosecution introduced into evidence certified copies of these five prior convictions (Trial at 1122-23), and it also introduced the testimony of four witnesses relating to the four incidents giving rise to those convictions. Edward Joecken testified about the

malicious entry conviction (id. at 1123-26); Linda Phelps testified regarding the robbery conviction (id. at 1126-29); Laura Ann Padgett, who was one of Defendant's victims, testified as to the events surrounding both the robbery and kidnaping conviction (id. at 1129-32); and Robert Chitwood testified concerning the mail fraud conviction (id. at 1132-34).

38. During the post-conviction hearing, Mr. Miller admitted he had interviewed none of the prosecution's witnesses prior to trial:

Q: And this would be listing the witnesses, the aggravation witnesses?

A: As I recall. . . .

Q: All right. Did you ever make any attempt before the trial to talk to any of these witnesses that they gave you, aggravation witnesses?

A: I did not. Whether or not Mr. Eilers did, I'm not sure.

(PCT at 422.) The record shows that Mr. Eilers "did not remember having pre-trial interviews with Edward Joecken or Linda Phelps." Harries, 1990 WL 125023 at * 4.

(5) Failure at the Appeal Stage

39. Petitioner's brief to the Tennessee Supreme Court consisted of twenty-eight pages, covering thirteen claims contained in merely nine and a half pages. Only a few of the claims were buttressed by citation to authority, in violation of the local rule T.R.A.P. 27 (a)(7). (FP Ex. 42, Pet. Appeal Brief). Joe Tipton, an attorney practicing criminal law in Tennessee, testified during the post-conviction proceedings that he had read the appellate brief filed in the Tennessee Supreme Court and opined that "the brief was not within the 'range of competence' demanded of attorneys in criminal cases." Harries, supra at * 3. The Tennessee Court of Criminal Appeals found that

in all cases where a defendant has received the death penalty, his sentence is automatically reviewed by the Tennessee Supreme Court. T.C.A. § 39-2-205(a). . . . We must assume that the members of the Tennessee Supreme Court took their duties seriously and reviewed each of appellant's issues with the utmost seriousness, thus fulfilling their statutory duty.

Id. at * 6. See also (Doc. No. 673 at 18-23).

B. Court Error

(6) Competency to stand trial

40. On the first day of trial, defense counsel were concerned that Harries was taking drugs. Mr. Eilers described to the trial judge the difficulties they had communicating with their client:

A: If Your Honor please, last week when I talked with Mr. Harries he was highly - - he appeared to be highly nervous. He had no problem in recalling facts that I was interviewing him about. He was highly - - - seemed to be agitated, nervous, more so that I had seen him in the past, and I asked him, if Your Honor please, about his prior drug use and the effect that the drugs that he was addicted to had on him. . . . I have reason to believe . . . that Mr. Harries is addicted to drug use. . .

(Id. at 2-3.)

Q: . . . But is that true today? As I understand your statement that's not his condition today.

A: No. His condition is not as severe as it was last week. . . . I've never seen him sober, so I didn't know what he was like. I don't know - - I don't know what Mr. Harries is like if he hasn't been using drugs, if Your Honor please. I just don't know. I don't know what he normally - - his normal demeanor would be. I've noticed today that his hands shake and that he's . . . talkative . . . but I don't know - - you know, I can't say whether he is or is not [on drugs today].

Q: Is he able to communicate with you?

A: Oh, he's always been able to communicate, if Your Honor please. . . .

Q: Do you think he has any difficulty understanding these proceedings?

A: If Your Honor please, I think - -

Q: Assisting in his defense?

A: I feel that he exhibits a certain nervousness and - - how can I say it - - a wandering of thoughts. I think that would be - - that would accurately describe what my impression is, that he would seem to go from one topic to the next, jump from one subject to the next. (Id. at 4.)

Q: . . . Now, today at this time is he able to communicate with you about the trial lucidly, intelligently?

A: Well, if Your Honor please, to my way of thinking and based upon my observation of him in the past, yes. But I don't know - - I have no basis to be able to tell the Court whether or not I feel that he's on any kind of a - - or has taken any kind of drug or anything today. I have no basis upon which to make that judgment. He's able to communicate, yes. I've never found that I had a problem communicating with Mr. Harries. (Id. at 5.)

41. The "drugs" mentioned in court included both prescribed and illicit drugs. A nurse from the Sullivan County Jail testified that both Benadryl and penicillin had been prescribed for Harries. (Id. at 7-9.) Mr. Harries had told the nurse that he had been on a methadone program, which is designed to help addicts stay away from "hard drugs" such as heroin. (Id. at 10-12.) The nurse also testified that Mr. Harries had purchased illegal drugs while incarcerated in the county jail. Though he stated he had no actual knowledge whether Harries had taken the drugs and that he had never seen "needle tracks" on his body. The nurse did testify that any kind of stimulants and tranquilizers could cause a person to be highly talkative and highly nervous. (Id. at 13-14.)

42. Defense counsel thus asked the court to have their client examined, and the judge acquiesced ordering a blood and urine test of Defendant. (Id. at 21.) The trial judge also ordered Bristol Center to perform a second mental evaluation of Harries. (FP Ex. 49.) Drs. Bockian and Farra submitted a report stating that Harries' blood had tested positive for barbiturates, although in an insignificant amount which would not have affected his capacity to relate with counsel. (FP Ex. 52.) Despite Harries' assertion that "he did shoot up Talwin, intravenously" various times, "there were no opiates present in his blood at the time of this blood screen." (Id.) The remaining language in the report was identical to that in the first report, both of which found that Harries was competent.

43. Since 1981, Petitioner has received several diagnoses of mental illness by the medical staff at the Tennessee Department of Correction ("TDOC"), including: bipolar mood disorder in 1993 (FP Ex. 67, 68), anxiety and depressed moods in 1994-99 (FP Ex. 69, 70, 71, 74-80), and Post-Traumatic Stress Disorder ("PTSD") in 1994 (FP Ex. 73). The issue of Petitioner's mental health was again argued and examined at the evidentiary hearing held before this Court in July of 2001. Doctors Lewis, Woods and Pincus testified on behalf of the Petitioner, while doctors Matthews and

Martell testified for Respondent.

44. Jonathan Pincus, M.D., conducted a neurological examination of Petitioner, finding brain damage “especially to the frontal lobes and their connections.” (FP Ex. 90, Dr. Pincus Report at 2.) At the hearing, Dr. Pincus explained that the “frontal lobes” are the part of the brain that:

has to do with judgment, insight, and the ability to plan properly, the ability to see the outcome of what one is doing and saying, caring about the outcome of what one is doing and saying. And to be able to inhibit . . . behavioral impulses that present themselves, if they are inappropriate, and to keep behavior within bounds of what society would consider appropriate.

(FT 303.) In his report, Dr. Pincus explained the relationship between his findings and the results of tests administered by Dr. Martell. Dr. Pincus concluded that his findings buttressed those of Dr. Lewis and Dr. Woods, and stated that:

The effect of the damage documented on my examination and Dr. Martell’s examination(s) would be to disinhibit his behavior. Impulses and urges created by his chaotic life and mental illness (see Dr. Lewis’ report) would not be controlled or modified. Dr. Lewis has diagnosed Ron as bipolar. Bipolar affective disorder (manic-depressive disorder), especially in the manic phase, would further disinhibit his behavior. The brain damage would have made his own spontaneous mood swings more intense and would have damaged his capacity to control his actions.

(FP Ex. 90 at 2.) Generally, in making their diagnosis, Petitioner’s expert witnesses emphasized the “synergistic” interrelation among the genetic, physiological, and environmental factors (such as his childhood and the conditions of confinement) affecting Harries. Both Dr. Pincus and Dr. Woods described the interplay between his bipolar disorder,¹⁵ brain impairment, substance abuse, and trauma-induced anxiety. (FT at 339); (FP Ex. 88 at 8). Dr. Lewis also explained that:

¹⁵ The disorder, better known as manic depression, is characterized by mood swings. “During the manic phase, the person can be loud, angry, violent, or grandiose. At the other extreme, the person would experience periods of extreme depression.” Bundy v. Dugger, 850 F.2d at 1409, n. 6.

not everybody with frontal lobe damage is necessarily violent. They may be impulsive and not think twice and not - - you know, and do things foolishly. But again, this kind of brain damage impairs your ability to control your impulses and to think ahead. And if a person with brain dysfunction, and particularly frontal lobe dysfunction, has been raised in a violent, abusive kind of atmosphere, and if that person also has this [genetic] predisposition to a Bipolar Disorder, you have there a recipe for violence.

(FT. at 405.)

45. In 1984, psychiatrist Dr. Lewis had examined and already diagnosed Mr. Harries as suffering from bipolar mood disorder. Dr. Lewis reiterated her diagnosis after examining Petitioner again in 1999, with the added benefit of having available his social history and the results of tests and examinations conducted from 1962 to the present. (FP Ex. 86 at 2.) She also found that Harries “suffers from significant brain dysfunction and brain damage.” (FT at 375.) Psychiatrist Dr. Woods agreed with this diagnosis, and he also found that Mr. Harries suffered from “severe trauma-induced anxiety symptoms, rule out PTSD.” (FP Ex. 88 at 22.) Both doctors also testified that mood disorders such as those allegedly affecting Petitioner are hereditary, and that in fact, these disorders were prevalent among many of Harries’ ascendants and most of his siblings. (FT at 396-404, Lewis); (FT 469-73, Woods); (FP Ex. 105, genealogical chart). See also (FT at 175, Bill Harries and at 203-205, Cathy Ilg).

46. At the evidentiary hearing, Dr. Lewis supported her brain dysfunction diagnosis with reports of family members, Petitioner himself, and institutional documents showing that Harries: (1) had suffered a head injury when he fell from a moving car as a child; (2) had been choked to the point of having ocular hemorrhages at age eleven; (3) the juvenile records noted scars on his head from trauma; and (4) he had also tried to commit suicide by asphyxiation and was rendered unconscious from carbon monoxide poisoning. (FT at 375-78.) Dr. Lewis also reviewed tests and

reports going back to Harries' first detention which showed brain damage. For example, at eleven he was noted to have "[b]orderline deficiencies in analytic ability and social awareness. . . concrete-like approach to problem solving, and they noted perseveration," which is another sign of organic impairment. (Id. at 380.) Dr. Lewis explained that the 24-point discrepancy between his verbal and performance I.Q. is also typical of somebody with an organic impairment.

47. As it relates to the Bipolar Mood Disorder diagnosis, Dr. Lewis drew upon her experience at the Child's Study Center and accounts from relatives describing Mr. Harries' behavior as a child. She further considered the juvenile records describing Petitioner's "mood swings" and "as having fluctuating moods and being emotionally unstable" by the Ohio prison system between 1973-78. (Id. at 386-89.) She reviewed the Tennessee prison records from 1980's-90's, which indicate:

On 11-7-85, "I am wound up tight. I haven't slept in two nights. Call the doctor, get me something. . . he is yelling, he is shouting, he broke everything in his cell." (Id. at 390.) On 10-3-91, they note that he had severe insomnia, racing thoughts, nervous, an[x]ious. And then they say, "But stable now for one year post-suicide attempt." And they say, "Rule out Bipolar, rule out Adjustment Disorder." . . . They then in '92 treat with Trazodone. So they have thought about Bipolar. And they treat with Doxipin an antidepressant. . . . in '93, there is a diagnosis of Bipolar with depression and anxiety.

(Id. at 392.) Finally, Dr. Lewis also noted that Dr. Martell's videotaped interviews provided a coherent description of Harries' extreme mood swings. (Id. at 396.)

48. Dr. Woods likewise reviewed documents relating to Petitioner, which dated back to his childhood and included the trial file, tests, and reports from other experts including Respondent's experts. (Id. at 465-66.) Dr. Woods emphasized Harries family's predisposition to mental illness, and the environmental stressors that may have affected Petitioner and increased his vulnerability for such illnesses. (Id. at 477.) Dr. Woods also reviewed those diagnosis and tests reviewed by Dr. Lewis, reaching a similar conclusion. He focused on an examination conducted by psychologist

Raymond Clausman when Harries was fourteen, which the doctor opined was “very telling” because

within his findings you see signs and symptoms of the very psychiatric diagnoses and symptoms that are made of Mr. Harries through his entire life. When you look at this one evaluation you see symptoms of Anxiety Disorder Not Otherwise Specified, as the prison and Dr. Martell and Dr. Matthews have opined. You see symptoms of Bipolar Disorder and other mood disorders that the prison psychiatrists have both diagnosed and treated Mr. Harries for, as well as Dr. Lewis and myself have made these diagnoses. . . [Dr. Clausman] said that he appeared to be interested in the tests and responded appropriately. The real value about that is that even at the age of 14, we don’t see malingering. (Id. at 498-99). . . . What is powerful about that, of course, is that that is the same finding that Dr. Martell made in his testing, did in both 1995 and 1998. . . . From the type of quality of the test responses, it is estimated that Ronnie is of at least average intelligence. Once again, I can’t stress how important it is to separate someone’s I.Q. from the way their brain functions. (Id. at 499.)

. . . He is capable of perceiving his world much as others - - as they see it, but under mild, emotional stimulation, his thinking and perception become more autistic. . . it was clear to this particular psychologist, based on his testing, that under mild stimulation. . . Mr. Harries’ ability to think accurately and clearly becomes impaired. (Id. at 500.)

. . . “He fluctuates from a feeling of complete helplessness to a somewhat grandiose view of opposing everyone and taking what he wants from the world.” . . . There is an inference of the mood lability. I wouldn’t make that inference if Dr. Clausman hadn’t used the word “grandiose.” . . . he goes from complete helplessness to grandiosity. It’s the kind of mood disruption that you see in mood disorders. (Id. at 502.)

Finally, with regards to Respondent’s experts diagnosis, Dr. Woods concluded that:

. . . There is nothing in the psychological reports, the neuropsychological reports that I have seen that indicate a conduct disorder, which is what you- - the diagnosis that you would be making here for an Antisocial Personality Disorder. It’s interesting to note that with the multiple psychological evaluations that Mr. Harries has, in terms of testing, including this one, there is no mention of Antisocial Personality Disorder really until he is much farther along in his career. What you really see here is someone that is 14-years old and is described as still quite immature and self-centered. And in some ways you really see movements away from conduct disorder. . . he wants to avoid the rage stage and the possible retaliation for such behavior. What you see commonly in people that have conduct disorder, they may want to avoid the retaliation, but they have no problem with the rage stage. They just don’t want to be punished for it.

(Id. at 503-4.)

49. Dr. Matthews did diagnose Petitioner as suffering “Anxiety Disorder Not Otherwise Specified [ADNOS], Polysubstance Dependence in a controlled environment and Antisocial Personality Disorder [ASPD].” (FT at 709.) Dr. Matthews disagreed with the Bipolar diagnoses for the following reasons: (1) it requires “a pattern of symptoms that proceeds over a very, very long period of time,” which he believed Harries did not meet (id. at 711); (2) the Diagnostic Statistical Manual, Fourth Edition (“DSM-IV”) requires that the expert doing the diagnosis “excludes the effects of substance abuse” and malingering (id. at 713-14), which he asserted was not possible here; and (3) he noted that certain episodes relied upon by the other experts were “either normal behavior or criminality or intoxication,” rather than manic-depressive episodes (id. at 716). Further, Dr. Matthews could not agree with the Bipolar diagnosis because many of the factors associated with such disorder (i.e. genetic predisposition, substance abuse, criminal behavior, child abuse) are also common in individuals diagnosed as suffering ASPD. (Id. at 725-26.)¹⁶

50. Dr. Martell, who is an expert in the field of forensic neuropsychology, has been involved in this case since 1994, and has examined Petitioner on three occasions. At the federal hearing Dr. Martell presented Harries’ test scores in the form of a chart. While his verbal I.Q. scores were average and consistent over time, his performance I.Q. was within the range of a mild to moderate impairment. However, the expert explained this does not show that Harries’ ability to “think” is impaired. (Id. at 855-58.) Dr. Martell next presented the results of two “frontal lobe tests” which he acknowledged showed “clear evidence that Mr. Harries does have impairment in frontal lobe

¹⁶ Criteria used in diagnosing ASPD: pervasive pattern of disregard for and violation of the rights of others, deceitfulness, impulsivity, irritability or aggressiveness, reckless disregard for the safety of self or others., irresponsibility, lack of remorse, evidence of juvenile delinquency, and the occurrence of anti-social behavior other than during the course of schizophrenia or a manic episode. (Id. at 734-41.)

functioning” and stated that the difference with Petitioner’s experts “on this issue is one of degree.” (Id. at 861.) Dr. Martell also testified that he relied on “another measure of the overall degree of impairment that is called the Neuropsychological Deficits Scale.” (Id. at 862.) On a scale from normal to mild to moderate to severe, Mr. Harries was in the moderate range. He also expressed his belief that while Harries’ frontal lobe impairment is mild, his most pervasive impairment is in his visual spatial functioning. (Id. at 863.)

51. Finally, Dr. Martell’s diagnosis mirrored that of Dr. Matthews. (Id. at 866.) He similarly stated he could not support a Bipolar Disorder diagnosis because he didn’t find “the required evidence of it at any point in time, where he meets all of the requirements set out in the diagnosis, over the period of time that is required in the absence of substance abuse.” (Id.) He discussed the results of the Minnesota Multiphasic Personality Inventory administered both in 1995 and 1998, in support of his diagnosis. (Id. at 867.) Dr. Martell testified that Petitioner’s profile exhibited the highest elevation on the psychopathic scale and a small elevation on hypomania, which is generally seen in persons who are antisocial. (Id.) The doctor testified that he did not believe Harries had suffered from a major depressive disorder, but rather situational depression. (Id. at 868.)

52. In making their competency determination, the experts analyzed Petitioner’s behavior before and during his trial. Despite advice from counsel that the Kingsport community harbored animosity towards the accused, Petitioner refused to request a change of venue. (PCT at 241.) During his pretrial confinement Harries attempted to defraud the jailers and a woman he had met while incarcerated. (FP Ex. 28, 101, newspaper articles); (FP Ex. 39, Jail Log). The Sumner County Jail Log also shows that he went on a hunger strike that lasted a week and created many other disturbances such as flooding his cell, cursing and yelling at the jailers, and bringing knives, saw

blades and illicit drugs into his cell. (FP Ex. 39.) Petitioner concluded his testimony at the trial of co-defendant Stapleton by telling the prosecutor, Mr. Kirkpatrick: “You’re a lying bastard and I’m going to get you,” which was widely publicized by the local newspapers. (FP Ex. 29-33.)

53. Dr. Lewis noted that Harries staged hunger strikes, engaged in fighting, scamming and cursing, and identified this behavior as representing a manic phase. (FT at 406.) She interpreted his trial decisions, including his communication with the local news media as “irrational and grandiose decisions against his attorneys’ advice.” (*Id.*) In light of these actions, Harries’ history and prior diagnoses, Dr. Lewis concluded the following with respect to Petitioner’s competency:

there is no question in my mind that [he] was experiencing the manic phase of a bipolar mood disorder exacerbated [by] brain dysfunction, which impaired his executive or frontal lobe functions. Thus, it is clear that Mr. Harries was not competent to assist himself, much less his lawyers, at the time of trial and should not have been permitted to proceed.

(FP Ex. 86 at 14.) Similarly, Dr. Woods concluded “to a reasonable degree of medical certainty, that Mr. Ronald Harries was incompetent to stand trial.” (FP Ex. 88 at 3.)

54. Dr. Woods emphasized Petitioner’s decision to confess to killing Ms. Greene to the police and to talk to the local media; the waivers that his attorneys asked him to sign regarding the change in venue and calling Stapleton as a witness in his trial; and his refusal to waive extradition until he was assured that Tennessee would seek the death penalty. (FT at 521-23.) In determining that Harries had been incompetent to stand trial, Dr. Woods also relied on Petitioner’s testimony at the trial of his co-defendant Stapleton:

The newspaper reports the confrontation between Mr. Harries and the District Attorney. . . So the Jury pool is reading about his behavior in the courtroom. . . This is the same Jury pool that he has refused to leave, that is reading this information from day-to-day. Now, when you keep in mind that that is the context in which he chose to take the Fifth Amendment, you know, it’s - - it means little. . . He had already had an uncounseled confession [in Florida], he had already confessed to the newspapers, the media.

(Id. at 526.) Dr. Woods explained that his “irrational behavior” extended to other things, such as the disturbances created to bring attention to the conditions at the county jail which brought the guards into Harries’ cell where he was growing marijuana, and the money orders scam which defrauded the jailers who controlled him. (Id. at 527, 524.) He opined that these actions show a “superficial effectiveness that is followed by this obvious lack of planning and lack of thought, and really a lack of understanding of what the consequence of his behavior was going to be.” (Id. at 524-525.)

55. On the other hand, given the behavior described above and considering Petitioner’s justifications for such behavior, Respondent’s experts concluded that Mr. Harries was competent to stand trial. Dr. Martell testified that several of Harries’ actions at the time of trial indicated he was competent. He found “most compelling his testimony at Mr. Stapleton’s trial,” where Petitioner “invokes his Fifth Amendment rights repeatedly, and he invokes them at smart points in time. When he is asked if he killed Rhonda Greene, he invokes his Fifth Amendment rights.” (Id. at 875-76.) Dr. Martell opined that “the skills most necessary for things like competency to stand trial have to do with your verbal abilities: your ability to communicate with counsel, your ability to analyze your situation, and those abilities are largely unimpaired, for Mr. Harries.” (Id. at 864); see also Fact # 50.

56. Dr. Martell testified that most actions Dr. Lewis regarded as irrational, had “very rational and purposeful reasons” as described by Harries himself, such as talking to the press to

ensure his safety within the prison, because he was staging hunger strikes and trying to improve prison conditions, and this would ensure that the reporter would come and check on him. It also gave him an outlet to put “his spin” on the crime in the mind of the public, and therefore influence his jury pool.

(Id. at 877.) Dr. Matthews shared this opinion and stated the following about Harries’ trial behavior:

He was able to identify potential witnesses to his attorney, and he was able to discuss trial strategies with him. He was reflected - - in the Transcript of his testimony at his trial and

the Stapleton trial, he was able to speak fluently and productively and coherently. He was correctly oriented to the time and the place and the person and the situation. There was no evidence that the Court intervened to try to make his speech more comprehensible or tell him to slow down or get him to explain himself. His memory appeared intact.

(Id. at 753.) Regarding his jail behavior, Dr. Matthews similarly relied on Harries' own justification for his actions, in concluding that they were rational. (Id. at 756- 761.)

57. Despite any potentially "bizarre" actions, Petitioner consistently told his attorneys he was not mentally impaired and directed them not to present a mental state defense, a request they heeded. (PCT 264 and 444.) However, on the first day of trial counsel announced to the court their concern for the client's mental state and requested a mental evaluation. (Trial at 2.) Also on one occasion, Mr. Harries interrupted the trial proceedings in the following manner:

MR. HARRIES: They wouldn't even let me talk to my lawyers last night.

THE COURT: Let's plan on 1:00 o'clock.

MR. HARRIES: Damn.

THE COURT: Mr. Miller and Mr. Eilers, the State. [Bench conference as follows:]

THE COURT: I don't want to admonish your client here publicly, but you should remind him that the Court has an alternative as to outbursts. He can be bound and gagged.

(Id. at 860-61.) Harries had consented to having television cameras in the courtroom during his trial, and insisted on testifying as he was convinced he could persuade the jurors to view him more favorably. As stated above, the experts view the decisions differently. Thus, on the issue of competency, their disagreement extends both to their diagnoses and their interpretation of Petitioner's litigation-related actions, in light of such diagnoses.

(7) Harmless error analysis

58. Following the state-ordered mental evaluations, the trial ensued. Petitioner was found guilty of murder in the first degree. The jury that convicted Petitioner found two aggravating circumstances: the prior violent felony circumstance and the felony-murder circumstance. See T.C.A. § 39-2404(i) (2), (7) (Supp. 1981). The Tennessee Court of Criminal Appeals concluded that application of the felony-murder aggravating circumstance was unconstitutional. Harries, 958 S.W.2d 799. The Court of Criminal Appeals purported to apply the harmless error analysis, and after finding the error to be harmless, it affirmed the death sentence.

59. Petitioner claims that the error in his case was not harmless. First, he alleges the state courts performed an improper harmless error analysis. Second, the Court of Criminal Appeals improperly replaced the jury's process for weighing aggravating and mitigating factors for its own, in violation of Harries' Eight and Fourteenth Amendments rights, see T.C.A. §§ 39-2404 (a) ("the jury shall fix the punishment"), -2404 (f), (g) (it shall also weight the circumstances). (Doc. No. 802 at 110-11.) Petitioner relies on the Court of Criminal Appeals' assertion that it had to determine whether "the jury would have imposed the same sentence had it given no weight to the invalid aggravating circumstance." Harries, 958 S.W.2d at 804.

(8) Introduction of evidence related to two prior convictions

60. At the sentencing stage, the prosecution also submitted, and the trial court allowed into evidence proof of prior convictions for mail fraud and malicious entry, to prove the "prior violent conviction" aggravating circumstance. The Tennessee Supreme Court recognized that the admission of the mail fraud conviction was in error, but found the error to be harmless. Harries, 657 S.W. 2d at 421-22. The State Court did not address the admissibility of the malicious entry conviction,

apparently because appellate counsel did not raise it on appeal. The prosecution also introduced into evidence, and the trial court admitted, proof of facts underlying the convictions under the prior violent felony aggravating circumstance, which was introduced in the manner of witness testimony.

(9) Jury instructions: unanimity, mitigation and aggravation, and mental capacity

61. Section 39-2404 (h) as it was in effect at the time of Harries' trial provided that:

If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

62. At sentencing, the trial judge generally instructed the jury as follows:

You may, of course, consider facts or circumstances you have heard in the trial and the sentencing hearing of this case on the issues of aggravating and mitigating circumstances listed in this charge:

...

You shall consider the testimony of each and every witness in arriving at your verdict in this case, as well as all other exhibits and documentary evidence. In reaching your decision on the question of punishment, you are to weigh evidence in aggravation and mitigation, but you are cautioned, that in a case such as this, you are not to be influenced by any passion, prejudice or any other arbitrary factor.

(Trial at 1177.) The judge then proceeded to enumerate the eleven aggravating and eight mitigating circumstances listed under T.C.A. § 39-2404 (i) and (j), and read them verbatim. The statutory language under -2404 (j)(2) and (8), as recited by the trial judge, provides:

2. The murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

...

8. The capacity of the Defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment. (Id. at 1180.)

63. In regards to mitigation, the trial judge further instructed the jurors as follows:

mitigating circumstances surrounding a criminal offense are those circumstances which tend to ameliorate or lessen the apparent badness of the particular crime in question or the apparent badness of the particular Defendant. Because different people may have different views about what tends to ameliorate or mitigate any particular offense, the law provides that you may weigh and consider any and all circumstances which you feel tend to mitigate the offense in question. There are eight (8) statutory mitigating circumstances listed for your consideration, but you are in no way limited to these, and you are free to consider any other mitigating facts or circumstances.

(Id. at 1180 and 1182.)

C. Prosecutorial Misconduct

(11) Prosecutor's closing argument

64. During the prosecution's closing argument at the guilt stage of trial, Assistant Attorney General ("AAG") Kirkpatrick told the jury the following:

It is a case that involves the killing of a young eighteen (18) year old girl in cold blood, and that young girl, whose body lies in the grave today, has a right to be alive. . . . and it's a question of what are you going to do about it.
(Trial at 1060.)

. . . It's that what that young girl's life is going to end up meaning? A very quickly forgotten nothing. . . . And you've got the power to make it that way. You can say, oh, well, this really wasn't too serious a matter. Or you can say, no, this is murder in the first degree. (Id. at 1061.)

The prosecution also argued that Mr. Harries was guilty of felony murder since the shooting was:

a cold-blooded singular execution operation of killing a witness. This man had been caught twice before in robberies because he'd been identified by the victims. He finally figured out, hey, there's a better way to do this armed robbery stuff. Wipe out the victim.

(Id. at 1066.) The above statement was followed by the trial court's admonition to the jurors that, if from the proof presented by the parties, they found that Defendant had been convicted of other crimes, they could "consider such prior conviction only for purpose of its effect, if any, on his

credibility as a witness." (Id. at 1066-67.)

65. Petitioner has also identified as unfair and inflammatory portions of the prosecution's closing argument during the sentencing stage of trial, some of which encouraged the jurors to act:

... you've decided beyond a reasonable doubt that the defendant, Ronald Richard Harries, did kill and murder Rhonda Greene during the commission of the armed robbery. Now, what are you going to do about it, and that's really what it boils down to.

MR. EILERS: If your Honor please, I'm going to object to the district attorney saying, 'what are you going to do about it' . . .

THE COURT: Well, if its said in the context of challenging the jury, it is improper. I think the jury should consider such a statement only in light of the duty of deciding punishment. (Trial at 1143-44.)

...

If popping pills and drinking booze gives you immunity from the death penalty, then we might as well take the electric chair and turn it into firewood because it'll never be used again.

MR. EILERS: If your Honor please, I'm going to object to the inflammatory nature of those statements, about what 'we might as well do.' Is totally immaterial.

THE COURT: Proceed. The jury must decide the case solely and alone upon the law and the evidence and without any passion, prejudice, or emotion. Proceed. (Id. at 1154-1155.)

...

The question, ladies and gentleman, boils down to this, how far are we going to go before we let the criminal element. . .

MR. EILERS: If your Honor please, I'm going to object to that, about "the criminal element." It's immaterial, it has no place in this particular hearing.

THE COURT: Well, . . .

GA KIRKPATRICK: Let me withdraw that. (Id. at 1155.)

...

Ladies and gentlemen, without any qualification whatsoever, I'm asking that the verdict in this case be the death penalty. . . you have the evidence beyond any doubt as to the aggravated circumstances that exist in this case, and there are no substantial mitigating circumstances in this case. I can only beg for you and ask you to join with me in trying to see that justice is done in this case.

MR. EILERS: this . . .

THE COURT: Sustain that type of argument. I have sustained it on more than one occasion. You cannot challenge the jury, General Kirkpatrick. The jury must follow the law and the evidence and you cannot challenge the jury. Proceed.

(Id. at 1174.)

66. The closing argument also touched upon the jurors' role and duties:

Now, when you leave this courtroom tonight and go back into the community, you're going to see the people in the little Jiffy Markets and the gas stations that have to stay open at night. You're going to see those people. Maybe they're not rich, but they have to rely on the protection from armed robbers, they have to rely on the law, and the only protection they have, ladies and gentlemen, is the protection that you given them.

MR. EILERS: If your Honor please, I'm going to object. . .

THE COURT: Sustained as to the argument "the protection which the jury gives." You may argue protection of the law. Proceed.

(Id. at 1169.)

67. Other portions of the argument emphasized Harries' previous convictions as follows:

Laura Ann Padgett who was seventeen (17) years old testified that she was the victim of this man when he robbed her, armed robbery . . . And he took her hostage. And for a night of terror, she had to live in fear every moment of her life

MR. EILERS: If your Honor please, I would ask the court to instruct the jury to disregard that. That's totally inflammatory. She never testified about a "night of fear," she merely testified as to being held ten (10) hours. . . .

THE COURT: The jury heard all the testimony and, of course, the State may argue any inference from any testimony. As to the specific words, I sustain the objection as to that particular phrase, "night of fear." (Id. at 1145-46.)

the jury can also look and consider mitigating circumstances. And let's look at what the law says about those. The first, that the defendant has no significant history of prior criminal activity. Is that one applicable? Does he have no prior significant history of criminal activity? Well, he's got four felony convictions, two of them major. He's actually got five felony convictions. You saw four events, but five convictions.

(Id. at 1150.)

68. The prosecution's argument also discussed the evidence presented by Harries:

Then number eight [mitigating circumstance] comes up and this is the one they are going to try to crawl in under. The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law . . . Ladies and gentleman, if he was the drug addict they are claiming he was, if he was involved in methadone programs and all these other things he's come up with and told

you on the witness stand, they would have had all those records down here and they would have shown them to you like they've shown you these two pieces of paper, but this is the best they can produce.

...
And I submit to you there's nothing in this man's history, because it would be clearly documented in the prison records if he in fact was a drug addict and had all this problems and couldn't control himself. And they would have brought it here, and they would have brought it in paper form. . . . And I submit to you the reason is it doesn't exist. It doesn't exist.

(Id. at 1153-54.)

69. Some portions of the argument also emphasized the deterrence role of punishment:

The element as described by Mr. Miller, the type of individuals he described that drink early in the morning and pop pills and go out and carouse around. That kind of individual is the kind that I'm talking about, because he's defined his people, Bud Stapleton and Ron Harries to be the kind of individuals, and you know about their criminal records, too. . . . Well, ladies and gentleman, how far must we retreat from people of that type before a jury sometime, somewhere, finally says no. Enough of this killing is enough. We're not going to tolerate this sort of thing.

MR. EILERS: Your Honor please, I'm going to interpose an objection again. . . .

THE COURT: Sustained (Id. at 1155-56.)

...
The death penalty is no threat unless it is used. (Id. at 1156.)
... in a case like this if the death penalty is not used, we're teaching by our act. We're saying it[']s not so bad to walk into a market and kill a little eighteen (18) year old girl. We're saying it's not sufficiently bad that we in this country feel like its sufficient to give the maximum punishment in a case of that nature, that we really don't think that's too bad. And witnesses who are killed by people committing armed robberies, as this case really is, tell that person committing the robbery whether or not they made the right decision by killing their victim. . . .

MR. MILLER: If your Honor please, we object to that.

...
What you do is important because it will teach. . . . (Id. at 1156-57.)

70. Other relevant portions of the closing argument provided as follows:

Well, I submit to you that to give less than the death penalty in this case will be to cheapen the memory of Rhonda Greene. It's pathetic what happened. Here was a young girl in the ... just the blossoming beginning of her life, and it was snuffed out by this man, and we're going to say, oh, well, give him life. . . .

(Id. at 1170.) . . .

And my record shows that I don't ask for it [death penalty] very often. Seven times in fifteen years.

THE COURT: There's no ... gentlemen.

MR. MILLER: Objection, if your honor please

THE COURT: There is nothing wrong in the record of this case. That is completely outside. The jury will disregard that. Give it no weight whatsoever. Gentlemen, approach the bench.

(Whereupon a bench conference was held in the presence of the jury, but out of the hearing of the jury, and the following procedure had:)

THE COURT: Gentlemen, we invested too much time to have a mistrial at this stage.

(Id. at 1172-1173.)

71. At the end of the prosecution's closing arguments the parties approached the bench and the following colloquia took place beyond the hearing of the jury:

MR. MILLER: Based upon the attorney general's argument, comes the defendant, Ronald Harries, and moves the Court for a mistrial

...

Relative to certain statements which he made as to prior asking for death penalties in this state and other inflammatory remarks which he made throughout it, and we want that on the record, if your Honor please.

THE COURT: Well, I instructed the jury to disregard that. I'm sure they will. Juries hear a lot of matters during the course of a trial and they generally follow the law and the evidence and I think they will in this case. Overruled.

(Id. at 1174-76.)

CONCLUSIONS OF LAW

A. Ineffective Assistance Of Counsel

A criminal defendant has a Sixth Amendment right to receive effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86 (1984). The Strickland test has two prongs: the performance prong and the prejudice prong. Id. at 688. To meet the first prong, a petitioner must establish that his attorney's representation "fell below an objective standard of reasonableness." Id. The "prejudice" prong focuses on "whether counsel's deficient performance renders the result of the

trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. 364, 372 (1993). Petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694-95.

In assessing counsel's performance, a reviewing court must be highly deferential. Id. at 689. However, while strategic choices made after thorough investigation are generally considered within the range of competent assistance, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691; see also Martin v. Rose, 717 F.2d 295 (6th Cir. 1983) (counsel ineffective where she failed to interview alibi witnesses and was unaware of investigative file prepared by public defender).

The standard for measuring attorney performance is "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. Thus, Petitioner's trial counsel were bound by the standard of care applicable in Sullivan County, Tennessee, in 1981. The Tennessee Supreme Court had established that standard in Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), where it stated that competence would be measured under the "duties and criteria" set forth in: United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973); the Sixth Circuit standard under Beasley v. United States, 491 F.2d 687, 696 (1974), cert. denied, 489 U.S. 1970 (1991); and the American Bar Association ("ABA") Standards for the Administration of Criminal Justice, particularly portions relating to the "Defense Function." 523 S.W.2d at 936.

In order to prevail on his ineffectiveness claim, Mr. Harries must demonstrate that counsel's deficiencies prejudiced the defense so as to deprive the defendant of a fair trial. Strickland, 466 U.S. at 687. Harries argues the following instances of ineffectiveness:

(1) Trial preparation, family history, background, mental state investigation

In explaining counsel's duties to investigate, the Tennessee Supreme Court held that:

Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed [T]he adversary system requires that "all available defenses are raised" so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. . . . And, of course, the duty to investigate also requires adequate legal research.

Baxter, 523 S.W.2d at 933 (citing DeCoster, 487 F.2d at 1204 (citation omitted)). More specifically, the ABA Standards state that it "is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." ABA Standard 4-1.1. With respect to counsel's failure to investigate, the Supreme Court has explained that:

Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland, 466 U.S. at 690-91. This Court will evaluate the reasonableness of counsel's decision not to further investigate Harries' background, in light of what they knew or should have known.

In this case, the attorneys' investigation was limited to: sending written record requests to some of the institutions where Mr. Harries had been incarcerated with no follow up on their part, interviewing two of the State witnesses, and briefly talking to Petitioner's mother and brother Bill telephonically. Despite the fact that Harries spent almost all his life in Ohio prior to the January 1981 trip, the defense's investigation was limited to Kingsport, Tennessee, with the exception of telephoning two family members in Ohio. (PCT at 211, Eilers; and 411, 419-431, Miller.) As early

as February 1981, Petitioner's mother had advised counsel that her son had been diagnosed as suffering schizophrenia. (FP Ex. 4.) Following the April interview with their client, counsel knew or should have known about Harries' unstable family life and childhood, and his alcohol and drug abuse, which had started at an early age. (FP Ex. 1.) Petitioner also advised counsel that he had been sent to Starr Commonwealth for Boys at age nine, because of "incurability, running away from home, skipping school and stuff like that." (Id.)

Defense counsel decided to investigate *none* of these issues, and their testimony on post-conviction and Mr. Eilers' testimony before this Court revealed no strategy supporting the limited character of their investigation. Strickland, supra. This failure to explore most available avenues of information violated the lawyers' duty to investigate. See ABA Standard 4-1.1; Baxter, supra.

Even if the only two summaries that counsel did gather from the Ohio institutions and federal prisons did not reveal any mental impairment (FP Ex. 10 and 11), the attorneys had a duty to investigate, especially given the other available leads and their own concerns about the client's mental state. Wilcoxson v. State, 22 S.W.3d 289, 315 (Tenn.Crim. App.1999)("the fact that records of past psychological or psychiatric treatment are not uniformly helpful to a defendant does not necessarily rule out further investigation.")¹⁷ At the federal hearing, Mr. Burr testified that "the most important thing is the history of the client, the social psychiatric history. And they did nothing to develop that history." (FT at 632); see also Part A. 2, infra (competency).

Defense counsel did not investigate Petitioner's mental health history, despite the fact that his behavior was sufficiently erratic to prompt counsel to seek a court-ordered mental evaluation.

¹⁷ Counsel admitted they were on notice of their client's mental illness but did not follow up their documents requests. (FP Ex. 13, Letter from Eilers to Chillicothe Correctional Institute stating that counsel understood Harries "was diagnosed as a paranoid schizophreniac (sic)")

They failed to consult with the State mental experts, and they failed to provide them with any information relating to their client's history, which while unreasonable was understandable since counsel had little information to begin with. Following the evaluation counsel abdicated their responsibilities in this respect and justified their client's behavior as being the effect of drugs or his deceiving manners. In light of their client's rejection of the insanity defense, they also abandoned that possibility. But see Coleman v. Mitchell, 268 F.3d 417, 546 (6th Cir. 2001)(finding that it is not ineffectiveness to follow client's instructions).¹⁸

Thus, defense counsel's preparation and investigation prior to trial was ineffective within the meaning of Strickland's first prong. But the analysis does not end here, and the Court must determine whether, had counsel undertaken the necessary investigation, it is reasonably probable that the outcome of Mr. Harries' trial would have been different. See Strickland, 466 U.S. at 694.

"Judges wisely defer to true tactical choices - that is to say, to choices between alternatives that each have the potential for both benefit and loss." Proffitt v. Waldron, 831 F.2d 1245, 1249 (5th Cir. 1987). Defense counsel chose a diminished capacity defense and forewent an insanity defense. Although this was an extremely troubling, and perhaps unwise, tactical choice, the Court cannot conclude the choice rendered counsel's services to Mr. Harries ineffective in this regard. It is undisputed that there was an abundance of available information regarding Harries' background, which counsel's deficient assistance prevented them from uncovering. Nevertheless, Harries has not made a clear showing that this failure prejudiced him at the guilt stage of the trial court proceedings, as required by Strickland, 466 U.S. at 694.

¹⁸ Indeed, at the federal hearing, Dr. Woods explained that Bipolar Disorder "speak[s] to both denial and lack of insight" and "there certainly could be a relationship between his unwillingness to accept a mental health defense." (FT at 528.)

Similarly, Petitioner has not shown how the attorneys' failure to investigate his social history affected the jury's verdict on guilt. The prosecution presented a well-developed case, and there was no controversy as to Harries' identity as the robber of the store, or the fact that it was him who shot Ms. Greene. Other than the potential mental issues which are discussed below, see infra Parts A.2 and 3, Petitioner has failed to identify any other relevant, helpful information an effective counsel might have submitted in his defense. Therefore, the Court rejects Petitioner's writ of habeas corpus with regard to counsel's preparation at the guilt stage of the trial.¹⁹

(2) Adequacy of the mental evaluation and competency determination

The autonomy of an individual is one of the highest values in our society, and thus competency is critical, because an incompetent defendant cannot make informed decisions as to rights and the potential consequences of such decisions. Zagorski v. State, 983 S.W.2d 654, 658-61 (Tenn. 1998), cert. denied, 528 U.S. 829 (1999), (affirming *competent* defendant's right to decline to present evidence at sentencing in capital case). Defense counsel is the one with "the closest contact with the defendant," Drope v. Missouri, 420 U.S. 162, 177 (1975), from which derives his "special role in effectively ensuring that a client is competent to stand trial." Hull v. Kyler, 190 F.3d 88, 113 (3rd Cir. 1999) (interpreting Drope): see also Thompson v. Wainwright, 787 F.2d 1447, 1451-52 (11th Cir. 1986), cert denied, 481 U.S. 1042 (1987) (recognizing that an "attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment.")

The constitutional guarantee of fairness requires a defendant be given, at a minimum, "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation,

¹⁹ The Court notes that this issue is separate from any determination of prejudice at the sentencing stage of the trial, which may have arisen from the original failure to investigate and prepare for trial, see infra Part A.4

preparation, and presentation of the defense.” Ake v. Oklahoma, 470 U.S. 68, 83 (1985). In this case, counsel properly identified a potential problem and sought a competency evaluation of Harries prior to trial.²⁰ Defense counsel requested not one but two evaluations, and although the evaluations may have been less than perfect, they provided Petitioner with the minimum constitutional protections. As required in the trial court order and without any known objections by defense counsel, the State-examiners found that Mr. Harries “understood” the charges pending against him and the nature of the legal process. (FP Ex. 49-52.)

The 1981 standard actually required the defendant to be able to “consult with his lawyer with a reasonable degree of *rational* understanding” and have a “*rational as well as factual understanding* of the proceedings against him.” Dusky v. United States, 362 U.S. 402, 402 (1960)(emphasis added). Although the applicable competency standard demanded more than it was determined by the court-ordered evaluations, trial counsel took the evaluations at face value and failed to test their conclusions in the adversarial system. Hull, 190 F.3d at 111 (defendant “is entitled to adequate procedures, including the opportunity to present evidence and to cross-examine government witnesses, when his competency is at issue.”) In spite of this failure and given the proof in the case, the Court cannot find that counsel’s performance in this area was so deficient that Petitioner was deprived of “the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Skaggs v. Parker, 235 F.3d 261, 267 (6th Cir. 2000) (quoting Strickland at 687).

Additionally, even if counsel’s performance was deficient, under Strickland Petitioner must also show prejudice arising from such deficiency. That is, Mr. Harries “must show that there is a

²⁰ The Court notes that at the time of Petitioner’s trial, Tenn. Code Ann. § 33-708 (1977) provided that a court may order an evaluation of a defendant when competency is at issue.

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. As explained below, see infra Part B.6, even after considering the full record as it now stands, including the testimony of the mental health experts submitted by Petitioner at the federal hearing, the Court finds that Mr. Harries has failed to prove he was incompetent to stand trial. He has not met his burden of proving that but for counsel's allegedly deficient performance, the State examiners or the trial court would have found Mr. Harries was incompetent back in 1981. Therefore, this claim is rejected for failure to show prejudice.

(3) Guilt-Phase of Trial: insanity and diminished capacity defenses

In 1981, if a defendant was suffering from a mental disease or defect at the time of the offense which prevented him from appreciating the wrongfulness of his conduct or conforming his conduct to the requirements of the law, he had a viable affirmative defense. State v. Clayton, 656 S.W.2d 344, 346 (Tenn. 1983). Moreover, once the defendant had presented evidence tending to show insanity at the time of the crime, the burden shifted to the prosecution to prove his sanity beyond a reasonable doubt. State v. Estes, 655 S.W.2d 179, 184 (Tenn.Crim.App. 1983).

Also, while the state law was less clear with respect to the "diminished capacity" defense, there is "a line of cases in Tennessee extending back in time to 1930 which implicitly approved the use of evidence of a defendant's mental state to negate the requisite mens rea of an offense." Wilcoxson, 22 S.W.3d at 315 (citations omitted). "A defense of diminished capacity allows a defendant to introduce competent evidence, usually expert testimony, of his impaired mental condition to show that he was incapable of forming a criminal intent, even though he was not insane. See State v. Simmons, 309 S.E.2d 89, 98 (W. Va. 1983); 22 A.L.R.3d 1228 (1968)." State v. Shelton, 854 S.W.2d 116, 121 (Tenn.Crim.App. 1993).

Defense counsel was not aware of the full extent of Mr. Harries' mental health or lack thereof, a troubling fact in a capital case. However, at this point the Court is only concerned with the implications of this lack of knowledge for Mr. Harries' constitutional rights at the guilt phase of trial. Accordingly, the Court finds that given the result of the court-ordered evaluations, defense counsel's interactions with Mr. Harries, and their client's own negative reaction towards the possibility of raising such a defense, it cannot be said that their failure to further pursue a mental state defense amounted to ineffective assistance of counsel at the guilt stage of trial.

The Court concedes that it is possible that had the defense "investigated the case and obtained adequate forensic expert assistance, they would have had evidence to properly present a defense based on Petitioner's mental illness and brain damage, rather than voluntary intoxication evidence." (Doc. No. 802, at 81.) However, more than the existence of a better strategy is needed in order to find counsel's performance was ineffective, and courts should make "every effort [] to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Furthermore, even if counsel's performance was ineffective, this Court must still determine whether the performance was prejudicial to Mr. Harries. As discussed below, the Court concludes the ineffectiveness insanity-related claim must fail, because Petitioner cannot prove the prejudice prong of the Strickland test.

The first-degree murder statute applicable to Mr. Harries' conviction provides that

(a)(1) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, . . . is murder in the first degree.

(b) A person convicted of murder in the first degree shall be punished by death or by imprisonment for life.

T.C.A. § 39-2-202 (1982) (former § 39-2402 (4)). The Tennessee courts have held, however, that the felony-murder provision allows willfulness, deliberation, malice and premeditation to be supplied by the commission of the underlying felony. See e.g., Claiborne v. State, 555 S.W.2d 414, 419 n.1 (Tenn. Crim. App. 1977); Tosh v. State, 527 S.W.2d 146, 148 (Tenn. Crim. App. 1975).

In the instant case, the robbery of the Jiffy Market constituted the underlying felony, and based on the legal standard applicable at the relevant time, the trial judge charged the jury as follows:

Murder is the unlawful, willful, deliberate, and malicious killing of a reasonable creature or being. . . . A person commits murder in the first degree, as charged in this case, if he kills any person during the perpetration of, or attempt to perpetrate any robbery. For you to find the Defendant guilty of murder in the first degree, as charged, the State must have proven beyond reasonable doubt:

- (1) that the Defendant unlawfully killed the alleged victim;
- (2) that the killing was committed during the alleged perpetration or attempt to perpetrate the alleged robbery; and,
- (3) that the Defendant specifically intended to commit the alleged robbery.

(Trial at 1091.)²¹ The jury returned a verdict of guilty of murder in the first degree. (Id. at 1117.)

Thus, it follows from this that the jury found Defendant had the required *mens rea* as to the robbery.

In Graham v. State, 547 S.W.2d 531 (Tenn. 1977), the Tennessee Supreme Court had explicitly adopted a standard to determine sanity at the time of the offense which provides that a person "is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." Id. at 543 (adopting the American Law Institute Model Penal Code, Section 4.01 (1962).) A successful insanity defense would destroy the existence of *mens rea*, or in other words, it would negate the proof of criminal intent. State v. Stacy,

²¹ The trial court also instructed the jury as to the requirements of other lesser offenses included in the indictment. (Id. at 1090, 1094-1102.)

601 S.W.2d 696, 704-06 (Tenn. 1980). However, none of the experts who testified at the federal hearing concluded that Mr. Harries "lack[ed] substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct" as it relates to the robbery of the Jiffy Market. Graham, *supra*. The experts' opinion was limited to Mr. Harries' lack of capacity as it relates to the actual shooting, which is not enough to avoid conviction under the felony-murder statute in Tennessee. See Facts # 28-29.²²

Therefore, the Court concludes that the ineffectiveness subclaim arising from counsel's failure to properly present a diminished capacity defense and raise an insanity defense must fail, because Petitioner has not proven there is a "reasonable probability that, but for counsel's [failure as to a mental defense], the [verdict] would have been different." Strickland, 466 U.S. at 694.²³ However, there is no doubt that counsel's pre-trial investigative errors and their failure to prepare the jurors,

²² Since the killing was unquestionably committed during the perpetration of a robbery, it is not necessary to show the killing was deliberate. State v. Johnson, 661 S.W.2d 854 (Tenn. 1983). Even one who accidentally kills the victim during the commission of an enumerated felony is guilty of murder in the first degree. State v. Middlebrooks, 840 S.W.2d 317, 336 (Tenn. 1992).

The Tennessee Supreme Court has upheld the constitutionality of this provision when it denied appellant's claim that the felony-murder statute violated his due process rights because, "by not requiring a finding of premeditation, deliberation, and intent to kill for a conviction of felony murder, a defendant charged with such a crime cannot rely on defenses afforded a defendant charged with any other form of first degree murder, such as accident, diminished capacity, insanity or self-defense." State v. Walker, 893 S.W.2d 429, 430 (Tenn. 1995). The Court found the "jury [had] returned a constitutionally sound verdict of murder in the first degree as the result of a reckless killing in the perpetration of a robbery." Id. at 431.

²³ The Court will not consider the underlying issue of whether the imposition of the death penalty for a felony murder is per se unconstitutional, specifically where the defendant is found to be incompetent to commit a murder. The Supreme Court found in Enmund v. Florida, 458 U.S. 782 (1982), that the Eight Amendment prohibits the imposition of the death penalty in situations where a defendant does not himself kill, attempt to kill, or intend that a killing take place. Id. at 797 (stating that for the death penalty to be imposed, there still must be a showing, at some stage of the proceedings, that defendant had the necessary mens rea to commit the murder). This case has been limited, see Tison v. Arizona, 481 U.S. 137 (1987), but the notion that one that causes harm intentionally must be punished more severely than one who does so unintentionally remains on solid ground. See H. Hart, Punishment and Responsibility 162 (1968). It is anomalous that a person can at once be incompetent to commit a willful and pre-meditated homicide (murder), yet at the same time be competent enough to be found guilty of committing felony-murder. While this issue might implicate Eight Amendment concerns, the issue was not raised in this case, and thus this Court need not resolve this legal conundrum at this point.

beginning at the guilt stage, for a diminished capacity argument in mitigation, did have a direct effect on the outcome at the sentencing stage, as discussed in detail below.

(4) Sentencing-Phase: mitigation and preparation against aggravating factors

Whereas this Court found that counsel's performance was not prejudicial at the pre-trial and guilt stages of Mr. Harries' trial, the Court finds that defense counsel's performance was prejudicial at the sentencing stage. The investigatory failures at the pre-trial stage and defense counsel's deficiencies at the guilt stage of trial were magnified at the sentencing phase, and rendered defense counsel's performance ineffective. As the Sixth Circuit has recently recognized:

The direct relationship between the quality of background investigation and the quality of the mitigation strategy is well-settled. "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."

Coleman, 268 F.3d at 447, n.15 (quoting Strickland, *supra* at 690-91). Specifically applicable to this stage of the proceedings is the notion that counsel must investigate the scope of admissible proof that can be introduced to enhance a defendant's sentence. See Spriggs v. Collins, 993 F.2d 85, 90 (5th Cir. 1993); see also Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994)(citation omitted)("Failure to investigate the constitutionality of the aggravating circumstances under which one's client is to be put in jeopardy of the death penalty falls well below the standard of representation required for capital defendants.")²⁴

The Strickland standard "requires counsel to research relevant facts and law, or make an informed decision that certain avenues will not prove fruitful. Solid, meritorious arguments based

²⁴ The applicable statute in 1981 provided that "[a]ny such evidence which the Court deems to have probative value on the issue of punishment, may be received [at a capital sentencing], regardless of its admissibility under the rules of evidence." T.C.A. § 39-2-203(e). The law allowed introduction of evidence including but not limited to defendant's character, background history, and physical condition.

on directly controlling precedent should be discovered and brought to the court's attention.” United States v. Phillips, 210 F.3d 345, 348 (5th Cir. 2000) (quoting United States v. Williamson, 183 F.3d 458, 462-63 (5th Cir. 1999)). In this case, the prosecution provided trial counsel with notice that they intended to rely on the “prior violent conviction” statutory aggravating circumstance under T.C.A. § 39-2404 (i)(2), in support of a death sentence. Based on the “open file” policy, defense counsel was on notice of the offenses, dates of conviction, and witnesses the prosecution intended to call to support that aggravating factor. (FP Ex. 17, Miller’s trial notes.)

During the sentencing stage of trial, the prosecution did introduce certified copies of Harries’ five prior convictions (Trial at 1122-23, Ex. 30-33.) The State also introduced four witnesses who testified about the events giving rise to the convictions, two of which were the victims of the offenses. (Trial at 1123-34.) Two of these convictions, the mail fraud and malicious entry, were not admissible to prove the “prior violent conviction” aggravating factor, because they did not involve violence or the threat thereof. See infra, Part B.8, see also Harries, 657 S.W.2d at 421 (finding that the admission of the mail fraud conviction was an error).²⁵ Nevertheless, defense counsel did not object to their introduction. The testimonies of both Mr. Joecken and Mr. Chitwood relating to *facts underlying* those non-violent convictions were also inadmissible. Furthermore, the testimony of Ms. Padgett was also inadmissible, because the armed robbery conviction “on its face show[ed]” that violence was involved, and thus her testimony was superfluous. Cozzolino v. State, 584 S.W.2d 765, 768 (1979) and State v. Bigbee, 885 S.W.2d 797, 811 (Tenn. 1994), infra Part B.8.

²⁵ Although the Tennessee Supreme Court found that the admission of the mail fraud conviction was harmless error, that Court did not have the opportunity that this federal Court now has to evaluate the cumulative effect of the introduction of the mail fraud and malicious entry conviction, and the consideration of the unconstitutional “felony murder” aggravating circumstance.

Had defense counsel properly prepared for trial and researched these legal issues, they could have prevented the admission of these two prior non-violent convictions. Phillips, 210 F.3d at 348 and Strickland, *supra*.²⁶ Counsel would have also been able to prevent the admission of three of the four witnesses submitted by the prosecution, which constituted the sum total of the prosecution's proof at the punishment stage. (Trial at 1123-1138.) See also Cozzolino, 584 S.W.2d at 768 (stating that only that evidence sufficient to "establish" a statutory aggravating circumstance was admissible therefor). Given that the "prior violent" conviction was the only constitutional factor that the jury found against Mr. Harries, defense counsel's error in this regard was likely outcome-determinative. Counsel's performance at the sentencing stage of Petitioner's trial "fell below [the Strickland] standard of reasonableness." 466 U.S. at 688.²⁷

"The basic concerns of counsel during a capital sentencing proceeding are to neutralize the aggravating circumstances advanced by the state, and to present mitigating evidence." Starr, 23 F.3d at 1284. Therefore, failure to present mitigation evidence at sentencing also constitutes ineffective assistance of counsel. Austin v. Bell, 126 F.3d 843, 849 (6th Cir. 1997). Defense counsel's duty to investigate is even more stringent in capital cases, because in the absence of a pre-sentence

²⁶ The Court notes that this was clearly lack of legal research rather than mistake because during closing arguments Mr. Miller told the jury the following:

. . . Ronald Harries, has admitted, ladies and gentlemen, that two (2) aggravating circumstances have arisen in this case . . . The malicious breaking and entering into an empty school building, no violence. The armed robbery and kidnaping was the only violent act of this young man in all of the felonies which they have talked about this afternoon.
(Trial at 1159-60.)

²⁷ The other circumstance relied upon by the jury was the "felony murder" aggravating factor, which the Tennessee Supreme Court in Harries v. State, found to be unconstitutional pursuant to Middlebrooks, *supra*. See *infra*, Part B. 7.

At the federal hearing, Mr. Burr testified that counsel "has an obligation . . . to challenge in every way possible the State's case in aggravation, because the weighing of aggravation and mitigation is how the jury is going to decide a sentence." (FT at 642.)

investigation report the burden to investigate and present evidence in mitigation falls entirely on trial counsel. See ABA Standard 4-8.1(b) (“If there is no presentence report. . . the lawyer should submit to the [jury] all favorable information relevant to sentencing.”)

The Tennessee death penalty statute requires the jury to weigh and consider information regarding a defendant’s “character, background history, and physical condition.” T.C.A. § 39-2404(c). Both Petitioner’s mother and brother were able and would have been willing to testify at the trial (FP Ex. 47 and 48), and several of the experts and other witnesses at the federal hearing also testified as to their availability in 1981.²⁸ Defense counsel’s failure to present mitigation evidence based on their belief that it would be of no benefit constituted ineffective assistance of counsel, when several witnesses would have been available to testify on Harries’ behalf. See Skaggs, 235 F.3d at 261 (quoting Austin 129 F.3d at 849) (“the failure to present mitigating evidence when it was available could not be considered a strategic decision, but rather, an ‘abdication of advocacy’”); Glenn, 71 F.3d at 1206-08.

Through witnesses and the introduction of institutional, family and medical records, defense counsel could have painted the real picture of a mentally ill child, whose biological father spent most of his life in jail, and was later replaced by a violent, abusive stepfather, a child who was shuttled between his mother and grandmother, causing him to constantly change schools. (FP Ex. 100, 103.) This childhood combined with his mental illness and the related substance abuse would have helped explain a life of crime and “humanize” Petitioner. Instead, the defense called no witness at the

²⁸ The post-conviction state court addressed this issue without making a specific finding as to whether counsel had been incompetent for failing to introduce *any* witnesses at the punishment stage. It merely found that appellant had “not pointed out what *beneficial witnesses* could have been presented,” and stated that failure to introduce evidence which will be of no benefit does not show ineffectiveness. 1990 WL 125023, at * 4 (emphasis added). This is rather a mixed statement of law and fact, to which a presumption of correctness does not apply.

punishment stage, and merely read into evidence the inadequate one-page letter from BMHC advising the trial court it had found a trace of phenobarbital in defendant's blood, and an irrelevant 1977 one-page write-up against Harries for having a syringe and a pill in his cell. (Trial at 1140-41.)

Besides the importance of lay testimony, which was clearly lacking at Harries' sentencing, the Supreme Court has long-recognized the pivotal role that psychiatry has come to play in criminal proceedings, acknowledging the importance and power of expert testimony:

When the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, . . . Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the 'elusive and often deceptive' symptoms of insanity, and tell the jury why their observations are relevant.

. . .

By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them."

Skaggs, supra at 272 (quoting Ake, 470 U.S. at 80-81). However, trial counsel disregarded this need for expert testimony when mental issues are involved, by failing to even consult such expert.

In dealing with the lack of mitigation evidence in Glenn v. Tate, the Sixth Circuit explained

[t]he reason for the paucity of mitigation evidence, as we have said, was lack of preparation on the part of Glenn's lawyers. The lawyers made no systematic effort to acquaint themselves with their client's social history. They never spoke to any of his numerous brothers and sisters. They never examined his school records. . . They never talked to his probation officer or examined the probation officer's records.

71 F.3d at 1208. The situation was similar in the instant case, and in case the jurors were not already wondering whether the meager evidence presented was all that supported defendant's right to live,

the prosecution emphasized the lack of evidence during closing arguments, by telling the jury:

. . . I submit to you there's nothing in this man's history, because it would be clearly documented in prison records if he in fact was a drug addict and had all these problems and couldn't control himself. And they would have brought it here, and they would have brought it in paper form. . . they would have had the right to have brought the witnesses too if they had wanted.

(Trial at 1154.)

At the federal hearing, Respondent asked Mr. Eilers about the defense's mitigation rationale:

Q: . . . In terms of jurors in the Sullivan County area, based on your experience in the community, in knowing the people there in 1981, how well would defenses such as, "Drugs made me do it", "I had a bad childhood", "All my family were criminals"; how would that play as a mitigation factor?

A: . . . It was our opinion that those defenses, that the jurors in upper East Tennessee would have not given us one instant of consideration on that kind of a defense or that kind of position, as far as mitigating factors are concerned.

(FT at 680.) Despite Mr. Eilers' belief, Richard Burr, the legal expert introduced by Petitioner, opined otherwise. When Mr. Burr was asked about the effect that the available mitigating evidence as described at the federal hearing would have had on the jury's decision, he testified as follows:

Often when that evidence is presented with the richness that it could have been presented here, the Jury comes to understand the defendant in the complexity in which his life has been lived, develops some degree of compassion for that defendant, and does not impose the death sentence.

(FT at 652.) Then the undersigned asked the expert for clarification:

Q: You're not saying that occurs in every case, but you have seen that occur?

A: I have seen it occur, in my experience, probably more often than not. It is generally the exception when that kind of evidence is presented and someone gets sentenced to death. Occasionally it happens, but less likely. (*Id.*)

The Court finds that Petitioner has met his burden of showing that counsel's failure to prepare and present evidence in mitigation prejudiced him under *Strickland*. See e.g., *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (explaining that "defendants who commit criminal acts that are attributable to

a disadvantaged background, or to emotional and mental problems, may be less culpable”); Lambright v. Stewart, 241 F.3d 1201, 1208 (9th Cir. 2001) (stating that “evidence of mental disabilities or a tragic childhood can affect a sentencing determination even in the most savage cases.”)

Respondent contends that prejudice cannot be proven in this case because, had Petitioner introduced any of the aforementioned mitigating evidence, that would have opened the door for the prosecution to introduce Mr. Harries’ full criminal history. The prosecution also could have introduced evidence regarding an incident where Harries shot Wolfgang Kravec, though no charges were pressed, (FT at 245-47, Kravec.) While it is correct that the State could have introduced such evidence to show future dangerousness and deterrence, and to rebut the defense theory of lessened culpability due to diminished capacity, see State v. Bates, 804 S.W.2d 868, 881-82 (Tenn. 1991), the prejudice equation is not affected.

First, evidence regarding Harries’ life history and mental illness, specially if supported by credible expert testimony, could have explained the extensive criminal behavior. Second, his prior convictions were nevertheless presented to the jury and none of the offenses, at least up until the robbery of the Jiffy Market, had resulted in harm to others. See Carter v. Bell, 218 F.3d 581, 599 (6th Cir. 2000) (quoting Cozzolino, *supra* at 767-68) (similarly explaining that “[m]erely because [defendant] has a lengthy criminal record hardly serves to ‘explain or controvert’ these factors [such as child abuse or neglect]”). As it relates to the shooting of Mr. Kravec, it could have been explained as a passionate reaction, since Harries believed Kravec was having an affair with his wife.

Additionally, in assessing the prejudice prong under Strickland, the Court should also consider the characteristics of the capital sentencing scheme under which Petitioner Harries was sentenced to death. In 1981, T.C.A. § 39-2404 (g) (Supp. 1981) provided that:

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

Id. Subsection (h) proceeded to explain that “[i]f the jury cannot agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment.” Id. -2404(h).

Therefore, in a Tennessee capital sentencing, a defendant faced with even one statutory aggravating circumstance must present *some* mitigating evidence or face certain death. Id. -2404 (g); Mapes v. Coyle, 171 F.3d 408, 426 (6th Cir. 1999)(analyzing similar Ohio capital sentencing law and finding that “when a client faces the prospect of being put to death unless counsel obtains and presents *something* in mitigation, minimal standards require some investigation.”)(original emphasis). Accordingly, if there is a “reasonable probability” that, had defense counsel presented *any* mitigating evidence, a single juror may have decided that defendant’s mitigating circumstances outweighed the aggravating ones presented by the prosecution, then the Strickland prejudice prong has been satisfied. 466 U.S. at 695 (stating that a “reasonable probability is a probability sufficient to undermine confidence in the outcome”); see also Mak v. Blodgett, 970 F.2d 614, 621 (9th Cir. 1992) (“Strickland does not stand for the proposition that a court cannot consider the effect of counsel’s deficient performance on a single juror”).

The Court finds that given the wealth of available mitigating evidence which was never presented to the jury, “it is reasonably probable that the presentation of even a substantial subset of the mitigating evidence detailed above “would have humanized [Petitioner] before the jury such that at least one juror could have found he did not deserve the death penalty.” Coleman, 268 F.3d at 452 (quoting Carter, 218 F.3d at 592); see also Strickland, 466 U.S. at 694 (“The defendant must show

that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.") This is especially applicable here, because the prosecution was able to prove only one valid aggravating factor, see infra Parts B. 7 and 8 (invalidating the "felony murder" aggravating factor and partially invalidating evidence supporting the "prior conviction" factor), and because, as explained above, unanimity is needed to impose a sentence of death.²⁹

Despite an abundance of mitigation sources, despite Harries' mental impairments and brain damage which have been recognized by experts on both sides at the federal level, and partially due to the defense's fatuous attempt at proving diminished capacity through the introduction of two irrelevant pieces of paper, both the jury and the trial judge found that Petitioner had no "character or behavior disorder" or any other "significant mental or physical conditions." They concluded that no evidence of "extreme mental or emotional disturbance" or "diminished capacity" had been introduced at trial. (FP Ex. 41, Report of Trial Judge filed with appellate record in the case.) Thus, the prosecution was able to argue that if the defense had presented no evidence, it was probably because there was nothing favorable to be said about Harries. Under Tennessee law, if the prosecution presents sufficient evidence to prove at least one aggravating factor beyond a reasonable doubt, such as Mr. Harries' prior violent conviction(s) in this case, and "said circumstance or circumstances are not outweighed by *any mitigating* circumstance, the sentence *shall* be death." T.C.A. § 39-2404(g)(emphasis added).

²⁹ See also Glenn, 71 F.3d at 1206-08 (holding counsel had provided ineffective assistance when mitigating evidence was not presented to the jury and counsel made virtually no attempt to prepare for sentencing); Elledge v. Dugger, 823 F.2d 1439, 1446-47 (11th Cir. 1987) ("If a reasonable investigation would have revealed mitigating evidence and lay or expert witnesses that could have testified as to these mitigating factors, then prejudice exists if that evidence and testimony creates a reasonable probability the jury would have recommended life, rather than death.")

The Court finds that defense counsel's failure to investigate or present any mitigating evidence violated Harries' Sixth Amendment rights because it "undermined the adversarial process and rendered the death sentence unreliable." Austin, 126 F.3d at 849. Counsel's "abdication of advocacy" left the jury with no choice but to impose a sentence of death. Id. Furthermore, the combined effect of counsel's failure to research and object to the introduction of inadmissible evidence in support of the only valid aggravating factor, the fact that the felony murder circumstance was later found to be unconstitutional, and defense counsel's failure with regards to mitigation, wholly undermine this Court's confidence in "the just outcome of this proceeding." Skaggs, 235 F.3d at 269. Under these circumstances, a reversal of the sentence of death is proper.

(5) Failure at the appeals stage

Petitioner correctly asserts that defense counsel failed to present certain valid claims, such as the trial court's improper admission of evidence supporting the "prior conviction" aggravating circumstance, see supra, but there is no constitutional requirement that an attorney argue every issue on appeal. See Smith v. Murray, 477 U.S. 527 (1986). Also, the Court has already concluded that under T.C.A. § 39-2406 the Tennessee Supreme Court had a statutory obligation to automatically review the "entire record." (Doc. No. 674 at 18, et al.) Therefore, even if counsel's performance was deficient, prejudice under Strickland has not been established. This claim must fail.

B. Court Error

(6) Competency

A habeas petitioner may raise both procedural and substantive competency claims. A procedural claim, also known as a *Pate* claim, alleges that a trial court failed to hold a competency hearing after the defendant's mental state was put at issue; while a substantive claim alleges that defendant was, in fact, tried and convicted while mentally incompetent. In this case, Petitioner alleges he "was incompetent at the time of trial in violation of his due process rights," thus raising a substantive competency claim.³⁰ (Doc. No. 802 at 32.) See generally Medina v. Singletary, 59 F.3d 1095, 1106 (11th Cir. 1995), cert. denied, 517 U.S. 1247 (1996) (summarizing distinction between substantive and procedural competency standard); Pate v. Robinson, 383 U.S. 375 (1966).³¹

A defendant is mentally incompetent to stand trial if he lacks a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well

³⁰ Petitioner originally raised both a substantive and a procedural incompetency claim (Doc. No. 516 at 53, Amended Habeas Pet. at ¶¶ 78 and 79.) However, ¶ 79 addressing the procedural claim was dismissed at the summary judgment stage. See Facts # 8, 9.

Respondent's Post-Hearing Brief applies the factors listed in Drope, 420 U.S. at 180, which states that to evaluate competency courts should consider defendant's demeanor at trial, evidence of irrational behavior, and prior medical competency determinations. (Doc. No. 807 at 13-20.) Drope involved a procedural competency claim, where the issue is whether "objective facts known to the trial court were sufficient to raise a bona fide doubt," Reese v. Wainwright, 600 F.2d 1085, 1091 (5th Cir.), cert denied, 444 U.S. 983 (1979). Cf. Dusky, *infra*. Nevertheless, Petitioner here has the burden of proof, there was extensive evidence presented by both parties at the federal hearing, and the factors examined by Respondent are also relevant to a substantive competency claim.

³¹ The standards of proof are different. Pate established a rebuttable presumption of incompetency upon a showing of trial court error in failing to hold a competency hearing, see James v. Singletary, 957 F.2d at 1570. In contrast, "a petitioner raising a substantive claim of incompetency is entitled to no presumption" and the claim "does not require a showing of error on the part of the trial judge, or any other state actor." Id. at 1571, 73. The distinction in standards is important because this Court's finding that Harries was in fact incompetent when tried, would not contradict the State court's finding that "there was nothing in the record to indicate to anyone that the appellant had a mental disease or defect." 1990 WL 125023, at *5. See 28 U.S.C. § 2254(d), *supra* at 3. "[A] petitioner is entitled to an evidentiary hearing on a substantive competency claim if he or she 'presents clear and convincing evidence to create a real, substantial and legitimate doubt' as to his or her competency," James, *supra* at 1573 (quotation omitted), such as Harries did in this case, see (Doc. No. 715 at 4-5.)

as factual understanding of the proceedings against him.” Dusky, 362 U.S. 402 (1960); Williams v. Bordenkircher, 696 F.2d 464, 466 (6th Cir.), cert. denied, 461 U.S. 916 (1983) (quoting Dusky). Tennessee courts have adopted this standard. See e.g., State v. Black, 815 S.W.2d 166, 173-74 (Tenn. 1991); Mackey v. State, 537 S.W.2d 704, 707 (Tenn.Crim.App. 1975). The burden is placed on Petitioner to prove by the preponderance of the evidence that he was incompetent to stand trial. See Bouchillon, 907 F.2d at 592; Conner v. Wingo, 429 F.2d 630, 639 (6th Cir. 1970) (holding that in federal habeas attack on a state court competency decision the burden of proof is on petitioner).

“Not every manifestation of mental illness demonstrates incompetence to stand trial.” Card v. Singletary, 981 F.2d 481, 487 (11th Cir. 1992). Similarly, neither low intelligence, nor weird, volatile, or irrational behavior can be equated with mental incompetence, see McCune v. Estelle, 534 F.2d 611, 612 (5th Cir. 1976). However, in making this determination, it is “not enough for the [trial] judge to find that the defendant [is] oriented to time and place and [has] some recollection of events,” Dusky, 362 U.S. at 402. Rather, the issue is whether defendant was able “to assist counsel or understand the charges.” Card, supra. This determination will be divided in two parts for the purpose of clarity. First, based on expert testimony, the Court will determine whether Harries suffers from a “clinically recognized [mental] disorder.” If so, the second part of the analysis will examine whether the illness rendered this Defendant incompetent under the Dusky standard.³² Bruce v. Estelle, 536 F.2d 1051, 1059-60 (5th Cir. 1976)(using two-part analysis).

³² Under the second part, courts have considered a defendant’s appreciation of the charges, and the range and nature of possible penalties; his understanding of the adversary legal system; his ability to disclose to his attorney facts relevant to the alleged offense; defendant’s ability to relate to and assist counsel in planning a defense; his capacity to challenge prosecution witnesses; his ability to appropriately behave in the courtroom; defendant’s capacity to testify relevantly; and defendant’s capacity to cope with the stress of incarceration prior to trial. Bundy v. Dugger, 675 F. Supp. 622, 624 (M.D. Fla. 1987), aff’d by, 850 F.2d 1402 (11th Cir. 1988).

In denying Harries' petition for post-conviction relief, the Tennessee Court of Criminal Appeals evaluated the record available at the time. See Harries, 1990 WL 125023. The state court noted that "[e]ven prior to [Dr. Bockian's] evaluation the appellant had vetoed insanity as a possible defense." Id. at * 2. The attorneys representing Petitioner at trial also conceded that "[t]hey never received any information or became aware of anything that would suggest that the appellant was suffering from brain damage." Id. at * 3. The attorneys also failed to provide the trial court with the mental evaluations conducted while Mr. Harries was a child incarcerated at the Starr Commonwealth for Boys in Ohio. Id. at * 5. In light of this information and the fact that a full-blown hearing on Mr. Harries' competency was not held at the state trial level (Doc. No. 715 at 4), this Court need not defer to any prior determination of competency at the time of trial.³³

The first part of this Court's competency analysis addresses whether Petitioner suffers from a "clinically recognized" mental disorder. see Bruce, supra. It is undisputed that Petitioner suffers from anxiety disorder. However, Respondent's experts strongly dispute the diagnosis stating that Mr. Harries suffers from Bipolar Disorder. Drs. Martell and Matthews rather believe that Petitioner suffers from ASPD, which is in turn heavily disputed by Petitioner's experts. Therefore, this competency finding focuses on credibility.³⁴ Although all the experts were highly qualified, for the

³³ It is well-settled that, at a minimum, where a trial court is "on notice that the defendant's mental faculties may be impaired, the court has [an affirmative duty to] ... delve further to determine defendant's comprehension." Osborne v. Thompson, 481 F. Supp.162, 169 (M.D.Tenn. 1979) (Wiseman, J.), aff'd 610 F.2d 461 (6th Cir.1979). While not conducting a full-blown hearing, the trial court did order two evaluations of Mr. Harries, both finding that he was competent to stand trial.

³⁴ This determination is even more important here because the external manifestations of impairments identified by both Respondent's and Petitioner's experts are Harries' deviant behavior. However, while the criteria for the ASPD diagnosis under the DMS-IV is this deviant behavior, the diagnosis does not identify the cause of such conduct. See (Fact # 49.) On the other hand, pursuant to Drs. Lewis and Woods, the *cause* of Harries' behavior is found in the combined effects of his Bipolar Disorder, his organic brain damage, his genetic predisposition and the traumatic environment where he was raised.

reasons stated below and as it relates to the diagnosis of Harries' mental health, the Court gives more weight to the testimony of Petitioner's expert witnesses.

Dr. Matthews did very little personal investigation into Mr. Harries' background and only reviewed portions of the trial transcript. (FT at 784, et al.) His second-best source of information was Petitioner himself, who Dr. Matthews believes is an unreliable and deceitful person. (Id. at 735-36.) In contrast, Dr. Martell, who has examined Harries for competency on three occasions, testified that Harries always had a perfect performance in terms of malingering. In other words, he tried his hardest to show the expert that he was indeed competent rather than incompetent. (FT at 903-904.) Dr. Martell also heavily relied on information provided by Mr. Harries (FT at 890-91), and when he first wrote his report he had little or no pre-offense information about Petitioner's health and history, (FT at 897-901). Furthermore, the external manifestations of Bipolar Disorder are manic and depressive states, and Dr. Martell's report stated he had not seen signs of major depression. However, on cross-examination the Court learned that Petitioner had told Dr. Martell that sometimes "he is so depressed he can't get out of bed," that he had "trouble eating due to depression," and that "medications kept him from going over the deep end" and also from being "hyper." (FT at 905-908) None of this information had been noted in his report.

Also, in contrast with Dr. Lewis who has more than thirty years of experience, Dr. Martell testified he has had little to no clinical experience. Dr. Lewis has impressive credentials, including many years of experience in the study of the environmental variables that affect violent behavior (FT at 369-370.) While the Court finds that Dr. Lewis' interpretation of Mr. Harries' behavior was judgmental and overly dramatized, she did have the longest standing relationship with Petitioner, as she first examined him in 1984, just three years after his trial, and has examined him several times

since then. As to Dr. Woods, he testified thoroughly and knowledgeably, and the Court heavily credits his opinion. However, the Court does not question the results of the tests Dr. Martell conducted on Petitioner, which were praised and relied upon by all of the habeas experts, any disagreement in this area focuses on the interpretation derived from the results of the tests administered, rather than the testing itself.

Finally, another factor that prompts this Court to give more weight to Petitioner's experts relates to the manner in which the experts reached their diagnoses. Rather than per se rejecting the merits of a Bipolar Disorder diagnosis, the Respondent's experts seem to reject it on methodological grounds. Both experts adduce that the symptoms have not been identified for long enough periods where the effects of substance abuse could be ruled out. See Fact # 49, Dr. Matthews. More specifically, Dr. Martell testified that he "cannot support a diagnosis of Bipolar Disorder because [he didn't] see the required evidence of it at any point in time, where [Harries] meets all of the requirements set out in the diagnosis, over the period of time that is required in the absence of substance." (FT at 866.) The conclusions of the Respondent's expert witnesses disturb the Court in several respects.

First, their conclusions seem to ignore the diagnoses of Dr. Memeth in 1962 when Harries was eleven years old, and Dr. Clausman's diagnosis at age fourteen, both of which identified manic-depressive behavior. (FT at 500.) Substance abuse was not apparent in either of these diagnoses. Rather, these observations reflect a Bipolar Disorder diagnosis, which was confirmed over a long-period of time by the Ohio prison staff in the 1970's, by the Tennessee prison staff in the 80's and 90's, and presently by Petitioner's experts at the federal proceedings. Second, contrary to Drs. Martell and Matthews' rejection of the Bipolar diagnosis by elimination, Dr. Woods presented very credible

reasons for rejecting an ASPD diagnosis on its merits. (FT at 503-504.) Finally, the Court is also concerned with the fact that ASPD is largely defined by behavior and that "the only psychological variable is a lack of remorse." (FT at 884, Dr. Martell on cross-examination); see supra n. 16. This is even more troublesome because Petitioner has indeed expressed remorse for the shooting. (FT Ex. 86 at 11, Dr. Lewis); Harries, 958 S.W.2d at 807 (same proposition).

The Court accepts the testimony and opinions of Dr. Woods and Dr. Lewis and the factual contents of the tests and examinations conducted by Dr. Pincus and Dr. Martell, as being logical and consistent with testimony of other witnesses, as well as the record evidence. Therefore, the Court finds that at the time of the trial Petitioner was suffering from Bipolar Disorder and Anxiety Disorder, impairments which may have been exacerbated by a pre-existing organic brain damage, his drug use, his unstable childhood, and the pre-trial conditions of confinement³⁵ in Sullivan County. Once the "clinically recognized" mental disorders are identified, the next step is to evaluate whether these rendered the Defendant incompetent under the Dusky standard. Bruce, supra. As stated earlier, as it relates to this second step the Court finds Dr. Martell's and Dr. Matthews' analysis of Petitioner's litigation behavior to be logical, and more credible and objective than other expert opinions.

The Supreme Court has recognized the complexity of the "sum total of decisions that a defendant may be called upon to make during the course of trial" such as:

whether to waive his 'privilege against compulsory self-incrimination,' Boykin v. Alabama, 395 U.S. 238, 243 (1969), by taking the witness stand; [. . .] and, in consultation with counsel, he may have to decide whether to waive his 'right to confront

³⁵ At the hearing, Petitioner submitted the testimony of Gordon Kamka, an expert who inspected over six hundred prisons, and testified that the Sullivan County Jail was "one of the three worst facilities he had ever inspected," (FT at 572, 574.) He stated this would cause inmates to be "disoriented and confused" and "sometimes leads to violence." (FP Ex. 96 at 2.) Though Mr. Kamka did not inspect the jail until 1985-86 (FT at 570), he based his opinion on inspection reports, newspaper articles and materials from 1981, when Harries was confined there.

[his] accusers.’ *ibid.*, by declining to cross-examine witnesses for the prosecution.

Godinez v. Moran, 509 U.S. 389, 398 (1993). Therefore, the second part of the competency analysis will focus on this Defendant’s litigation-related behavior.

The earliest relevant decision that Mr. Harries had to make after he was apprehended in Florida, was whether to give a statement to the police. After being advised of his rights, Petitioner gave an uncounseled statement, and agreed to waive extradition to Tennessee only on condition that the prosecution would seek the death penalty. See Fact # 11. Dr. Lewis listed the “bizarre, self-destructive act” among the actions supporting her incompetency opinion. (FP Ex. 86 at 12.) Dr. Woods also testified that the “noteworthy” feature of the otherwise common, uncounseled confession was the fact that Harries refused to be extradited unless the death penalty was sought. (FT at 523.)

Even if a “bizarre” decision, the Court finds it to be minor in a determination of Mr. Harries’ competency at trial. First, Petitioner was apprehended after being on the run and just a couple of days after the events at the Jiffy Market, which the experts agreed were very stressful, particularly in light of Harries’ anxiety disorder. See Facts # 29 and 48 (early report already recognized that “under mild stimulation . . . Mr. Harries’ ability to think accurately and clearly becomes impaired.”) Additionally, Dr. Lewis herself stated that Petitioner is remorseful about the shooting (FT Ex. 86 at 11), thus his desire to waive extradition on this condition may have been a hotheaded reaction based on his remorse. Finally, mental capacity is a fluctuating state which should be evaluated as close as possible to the time of trial. See Card, 981 F.2d at 488 (“the evidence must indicate a *present* inability to assist counsel”) (emphasis added).

Prior to trial, Petitioner also had an opportunity to exercise his Fifth Amendment right against self-incrimination, when he testified at the trial of his co-defendant Stapleton. Respondent’s experts

heavily relied on Harries' decision to properly invoke the aforementioned right to support a competency opinion, see Fact # 55. On the other hand, Dr. Woods explained that since Harries had already confessed his crime to the police in Florida and the local media in Tennessee, and given that the community from which the jurors in his trial were to be chosen was reading daily about his aggressive court behavior,³⁶ his invocation of the Fifth Amendment was meaningless, see Fact # 54. The experts further disagree with regards to the "rationality" of Mr. Harries' decision to speak to the press against counsel's advice generally.

Again, the Court does not assign much weight to Harries' actions immediately following his arrest. As to his decision to talk to the press, Dr. Martell explained that Petitioner had justified it as a mean to ensure his safety while staging hunger strikes to improve prison conditions. He also viewed it as an opportunity to imprint "his spin on the crime on the minds" of the potential jurors. (FT at 877.) The Court finds that Harries' testimony at his co-defendant's trial, including his attempt to intimidate the prosecutor who would later try his case, tarnished rather than improved his reputation among the jury pool. However, Harries' unwise decision to testify can be explained as "convict loyalty." Undoubtedly, Harries had pulled the trigger and as he told the press, there was no reason for two people to die for the murder of Ms. Greene. (Trial at 1023.) The Court agrees with Dr. Martell's observation that even if Harries' actions "weren't the behaviors his attorneys would have selected for him. . . Mr. Harries at that time, was attempting to manipulate his situation . . . [and] the behaviors reflect rational, thought-out" decisions. (Id.) See also McCune, supra (volatile behavior

³⁶ The Kingston Times News reported that his questioning by Kirkpatrick, who would be the prosecutor in Harries trial, "turned into a shouting match between the pair" and that "Harries shouted as he pointed an accusatory finger at Kirkpatrick." (FP Ex. 29.) Similarly, the Johnson City Press bear the headline: "Murder trial turns into courtroom battle." (Id. Ex. 31.) Under the headline "Accused Slayer Testified" the Bristol Herald Courier also reported that "the man accused of the actual slaying testified that Stapleton was not involved." (Id. Ex. 30.)

does not equate incompetency).

Petitioner's experts also identified his refusal to follow counsel's advise to seek a change of venue among the actions showing Harries was not competent to stand trial. However, Harries has explained he refused to change venue because that would have entailed going to a smaller county, with more conservative views, where he would have no access to the media and thus, would have been unable to manipulate the public opinion in his favor. (FT at 932, FR Ex. 8C and 9B.) The Court agrees with Dr. Martel's remark that, even if Petitioner's conclusion was factually erroneous and counsel's advise was sound, his decision may have been "misinformed, misguided, but not necessarily irrational." (*Id.*) As Dr. Matthews noted at the hearing, Petitioner's experts (in particular Dr. Lewis) tend to look back at decisions that turned out badly for Harries and label them as irrational based on their ultimate outcome. (FT at 757.)

Dr. Lewis has stated that Petitioner's actions at the county jail, which included "hunger strikes, food throwing, fighting, alternately scamming and cursing guards," showed that he was incompetent prior to and during trial. (FP Ex. 86 at 12.)³⁷ On cross-examination, AAG Pruden asked Dr. Lewis whether she knew that Mr. Harries said that his erratic behavior at the jail had been purposely done to "manipulate the system." Dr. Lewis thereby explained:

Yes, I am aware that he said that many times. At other times he said he did this to manipulate that. And Mr. Harries reconstructs explanations for things afterwards, and he often - - he is also quite grandiose and he likes to look back and think I had control, I had

³⁷ For example, the Sullivan County Jail Log includes the following remarks:
3-15-81 became mad because he didn't get to see visitors, although no one came to see him; said he was going to flood cell and set it on fire;
3-15-81 he called officers Thacker and Hale "M.F.'s + S.O.B." and officer Hazard a "fat M.F."; his cell was flooded and the light busted out;
4-20-81 raising hell about shake-down;
(FP Ex. 39.) While the hunger strikes and other protests were taking place in February-March, 1981. (FP Ex. 22-27, newspaper articles about jail conditions.)

did (sic) that, I manipulated the system. However, he did not manipulate the system. He was out of control. . . but he has to look back on it and seem like a big shot.

(Id. at 426.)³⁸ Dr. Woods similarly concluded that Harries' actions showed a "lack of understanding of what the consequences of his behavior [would] be." (FT at 525.) Dr. Martell agreed with Dr. Lewis' characterization, but he stated the following: "My knowledge of Mr. Harries has come over a period of time where his competency has been at issue and he has been effectively infantilized by having his own self-determination taken away. So these issues [control] have been very important issues in the way I have come to understand him." (Id. at 877-78.)

While Harries' actions may show a lack of understanding of the extent of his own capacity to manipulate the system and those around him, that is entirely different from Petitioner's ability to rationally consult with his lawyers and fully understand the proceedings against him. First, the fact that the manipulations do not always pan out the way he plans, does not mean he is "out of control" at the time. Indeed, rather than a sign of incompetency "it is human nature to use poor judgment on occasion." Bundy, 675 F. Supp. at 627. Second, Harries' "poor" choices may have been rational for somebody in his situation. For example, while Drs. Woods and Lewis interpreted his decision to defraud the jailers who controlled him as a sign of incompetency, Harries stated he analyzed the pros and cons of passing forged money orders and decided the benefits, i.e. having money for gambling, his needs and acquiring influence in jail, outweighed the disadvantages. (FT at 427.)³⁹

³⁸ Indeed, "grandiosity" is one of the manifestations of the manic phase of Bipolar Disorder, see Bundy, 850 F.2d at 1409, n. 6, and this characteristic seems to have been first identified in Harries when he was only fourteen, (FT at 502, evaluation by Dr. Clausman)

³⁹ It is also unlikely that Petitioner's behavior at the county jail, the behavior that caused trial counsel to request a second evaluation, or the single outburst in the courtroom were caused by heavy drug usage for two reasons. First, despite Harries' allegations that "he did shoot up Talwin" in the jail, the blood screening done on the eve of trial found "7 micrograms per cc" of Phenorbital, while "[t]oxic levels are not reached with this drug until there are 50 micrograms per cc of blood or more present." (FP Ex. 52, Letter to trial court from BMHC.)

Finally, while collateral events are relevant to a competency determination, they may not be sufficient "to counter the best evidence of what his mental condition was at the only time that counts, which is the time of trial." Wright v. Sec'y for the Dep't of Corr., 278 F.3d 1245, 1259 (11th Cir. 2002). Besides being temporal, competency is also contextual, as "it looks to the capacity of a particular defendant to play a fact-specific role at trial. . . ." Watts v. Singletary, 87 F.3d 1282, 1289 (11th Cir. 1996) (citing Drope, 420 U.S. 162, 180). Petitioner here was actively involved in all stages of his trial, beginning with an interview by counsel back on April of 1981, where Harries provided the defense with extensive information about his family history and the circumstances surrounding the offense charged. See Fact # 13.

Moreover, the Court has thoroughly reviewed the trial transcript, including Petitioner's own testimony, and it finds that, except for a brief interruption outside the hearing of the jury where he merely uttered the word "damn", see Fact # 57. Petitioner's behavior during his trial was proper. His testimony at trial shows Petitioner was articulate and responsive to questioning. (Trial at 960, et al.) He coherently described the events prior to and following the robbery, his prior offenses, and he also described with particular detail his substance abuse problem, using both the medical and "street" names of the drugs he had consumed. (Id.) He took an active role in his defense, trying to convince the Sullivan County community via the media⁴⁰ and the jurors via his own trial testimony, that he

Second, Dr. Woods observed that

Mr. Harries was able to take a significant amount of drugs without presenting either symptom of intoxication or symptoms of withdrawal. . . . through his history there really [aren't] these excessive responses or even symptomatic responses to drug uses that you can imply with someone with a normal brain

(FT at 547.)

⁴⁰ Particularly telling was a well-crafted letter from Petitioner that was published in the Kingsport Times News on February 26, 1981, which told readers he had been a troubled youngster and that he felt sorry for the death of Rhonda. Trying to manipulate the jury venire he wrote: "I don't want to die. I may deserve to die. But a

did not intend to kill Rhonda Greene and that drugs had played a substantial role in the allegedly accidental shooting.

It is true that he repeatedly acted against counsel's advise, such as when he testified in both Charles Stapleton's and his own trial and the various times he granted interviews to the press. Nevertheless, mere disagreement on litigation-related issues does not amount to incompetency, especially in light of Mr. Harries' own rational explanations for his decisions. At the post-conviction hearing Mr. Eilers testified that Harries "had strong feelings" about how his case should be managed, but that during the representation he never felt his client was incapable of assisting counsel. (PCT at 466.) Even while seeking a drug screening, Mr. Eilers told the trial court that his client had "always been able to communicate" and counsel had "never found that [they] had a problem communicating with Mr. Harries." Fact # 40. On post-conviction, Mr. Miller further asserted that the second mental exam request had been a "trial tactic." (PCT at 434-35.) Petitioner's ability to rationally communicate with others at the time of trial was also shown during his mental evaluations by Drs. Farra and Bockian, and it was memorialized in the interviews he granted to local newspapers.

Therefore, the Court finds that Petitioner has failed to prove by a preponderance of the evidence, see Conner, 429 F.2d at 639, his lack of "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" under Dusky. Mr. Harries' mental illness did not render him incompetent to stand trial. See Bundy, 675 F.Supp. at 629 (courts must be "cautious not to confuse the issue of mental disease with the issue of competency.") At the time of his 1981 trial, Petitioner had a rational understanding of the proceedings against him, was able to relate well with his attorneys, and could rationally assist them in his own defense.

panel of 12 will decide that. Hopefully, they will temper their decision with a little mercy." (FT at 759.)

(7) Improper harmless error analysis as to one aggravating factor

In reviewing the remainder of the alleged errors, the Court will use the following standard:

The standard for showing harmless error on collateral review, like the standard for demonstrating that a trial error has occurred, is considerably less favorable to the petitioner than the standard applicable on direct review. . . . Relief may be granted on collateral review only if the trial error “had substantial and injurious effect or influence in determining the jury’s verdict. Under this standard, habeas petitioners . . . are not entitled to habeas relief based on trial error unless they can establish that it resulted in ‘actual prejudice.’” Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

McGhee v. Yukins, 229 F.3d 506, 513 (6th Cir. 2000). See also (Doc. No. 807 at 35).

The first alleged trial error is based on the felony-murder aggravating factor. In 1992, the Tennessee Supreme Court concluded that the application of the felony-murder aggravating circumstance was unconstitutional under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution, as it duplicates the elements of the first degree felony murder offense. State v. Middlebrooks, 840 S.W.2d 317, 346 (Tenn. 1992).⁴¹

In light of Middlebrooks, Harries filed a second post-conviction petition arguing that his sentence was infirm as a result of the jury’s application of the invalid felony-murder aggravating circumstance to his felony murder conviction. Harries, 958 S.W.2d at 803. After reviewing the record, the Court of Criminal Appeals deferred to the trial court’s findings, concluding that the error was harmless, because “the jury would have imposed the death penalty had it not considered the invalid felony-murder aggravating circumstance.” Id. at 809. Petitioner claims that the state courts did not apply the proper harmless-error analysis, thus failing to cure the sentencing error.

⁴¹ Middlebrooks dealt with T.C.A. §§ 39-2-203(i)(7) (1982) and 39-13-204(i)(7) (1991), while the statutory provision applicable at the time of Harries trial was former § 39-2404 (i)(7), however, the substance of the text is identical in all these instances. The Middlebrooks rule enhances the integrity and reliability of the sentencing process, and therefore, it has been applied retroactively. See e.g., State v. Boyd, 959 S.W.2d 557, 560 (Tenn. 1998)

In Chapman v. California, the United States Supreme Court held that to determine whether a constitutional error is harmless a court should ask whether it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” 386 U.S. 18, 24 (1967). The leading Tennessee case on this issue is State v. Howell, 868 S.W.2d 238 (Tenn. 1993), cert. denied 510 U.S. 1215 (1994), which adopted the Chapman test and enumerated certain nonexclusive factors to guide the harmless error analysis. Id. at 260-61. The jury in Howell had found both the prior violent conviction and the felony-murder aggravators pursuant to T.C.A. § 39-2-203 (i)(2) and (7) (1982). Id. at 244. Howell held that an individualized assessment of the sentencing error should consider “the number and strength of remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality and strength of mitigating evidence.” Id. at 261.

After noting “the evidence supporting the remaining aggravating factor of prior violent felony convictions [was] undisputed” and that there was “virtually no mitigating evidence,” the Howell Court concluded that consideration of the invalid felony-murder aggravator had been harmless beyond a reasonable doubt. Id. at 262. Similarly, the post-conviction court in Harries explained that Middlebrooks required it to “review the record of the evidence at trial and evaluate whether the error is harmless beyond reasonable doubt.” 958 S.W.2d at 803 (citing Howell). In denying relief, the court found that: (1) the evidence supporting the remaining aggravator, Harries’ three prior violent convictions, was strong; (2) the prosecutor had placed little emphasis on the invalid factor during closing arguments; (3) no other evidence supporting this factor was introduced at sentencing; and (4) that the evidence in mitigation was scarce and weak. Id. at 801 (applying the Howell factors).

The factual findings of the state courts in this area are entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254 (d). The Court finds that the Howell analysis as applied to this case was consistent with Chapman, albeit a modified formulation of the harmless analysis thereby set forth. The state appellate court complied with the “Eighth Amendment requirement of individualized sentencing determinations in death penalty cases,” which demands “close appellate scrutiny of the import and effect of invalid aggravating factors.” Stringer v. Black, 503 U.S. 222, 230 (1992).

Additionally, the Court does not agree with Petitioner that the state court improperly replaced the jury’s weighing process. (See Rickman v. Dutton, 854 F.Supp. 1305, 1311-12 (M.D.Tenn. 1994) (finding that reweighing by Tennessee courts is impermissible), aff’d sub nom by, Groseclose v. Bell, 130 F.3d 1161 (6th Cir. 1997). Rather than eliminating the invalid factor and just reweighing the remaining aggravating and mitigating factors, the Howell standard directs the courts to review the record, the strength and quality of the remainder factors, and determine whether “the jury would have imposed the same sentence had it given no weight to the invalid aggravating circumstance.” Id. at 804.⁴² In this instance, the Court agrees that these errors were harmless.

(8) Improper admission of non-violent prior convictions and related facts

This Court finds that, although it failed to explicitly do so, the Tennessee Supreme Court did conduct the proper harmless error analysis as it related to the mail fraud conviction, concluding that

⁴² In Clemons v. Mississippi, the Supreme Court held that both reweighing and harmless error are constitutionally permissible. Thus, since state law authorized its courts to affirm a sentence on grounds of harmless error, the Court had to reject Clemons’ claim of “an unqualified liberty interest under the Due Process Clause to have the jury assess the consequence of the invalidation of one of the aggravating circumstances on which it had been instructed.” 494 U.S. 738, 747 (1990). See also Stringer, supra; Coe v. Bell, 161 F.3d 320, 334 (6th Cir. 1998) (finding that while reweighing by appellate court is impermissible in Tennessee, performing “harmless-error analysis, by contrast, a court determines that the original sentence is not constitutionally infirm in the first place, a process that is quite appropriately performed on federal collateral review”), cert. denied, 528 U.S. 1039 (1999).

the introduction of the conviction “was not prejudicial to defendant in the circumstances here and harmless beyond a reasonable doubt.” Harries, 657 S.W.2d at 422. The Court also finds that, had the State Court conducted a harmless error analysis of the improper admission of the prior malicious entry conviction, it would also have concluded that the error was harmless. In light of the other convictions properly introduced in support of the “prior violent conviction” aggravating circumstance, i.e. two robberies and a kidnaping (Trial at 1126-32), the Court finds that Harries cannot establish that this error by the state courts “had substantial and injurious effect or influence in determining the jury's verdict.” Brecht, *supra*.⁴³

Citing Cozzolino v. State, 584 S.W.2d 765, Petitioner argues that the state courts erroneously admitted into evidence the facts underlying the prior convictions. Although the Tennessee Supreme Court in that case had excluded evidence of a subsequent (rather than prior) crime as inadmissible to establish an aggravating factor, this Court finds that the rationale behind that decision equally applies to prior non-violent crimes. Id. at 768. Indeed the Cozzolino Court held that under T.C.A. § 39-2404(c) evidence is relevant to sentencing, and thus admissible, “if it is relevant to an aggravating circumstance” under T.C.A. § 39-2404(i). Subsequently, the Tennessee Supreme Court further explained the rule as follows:

Evidence of facts regarding a previous conviction to show that it in fact involved violence or the threat of violence to the person is admissible at a sentencing hearing in order to establish the aggravating circumstance. State v. Bates, 804 S.W.2d 868 (Tenn. 1991); State v. Moore, 614 S.W.2d 348, 351 (Tenn. 1981). However, it is not appropriate to admit evidence regarding specific facts of the crime resulting in the previous conviction, when the conviction on its face shows that it involved violence or the threat of violence to the person. Id.

⁴³ At the sentencing hearing, the prosecution introduced copies of the four judgments for malicious entry, mail fraud, robbery and robbery/kidnaping. (Trial at 1119-22, State Ex. 29-33.)

State v. Bigbee, 885 S.W.2d 797, 811 (Tenn. 1994).

In this case, the malicious entry and mail fraud convictions did not involve the use or threat of violence. See supra. Hence, both the fact of the convictions and any facts related to them were inadmissible to prove the “prior violent conviction” aggravating factor. The State introduced the brief testimony of Edward Joecken regarding the malicious entry conviction, which although in error, did not have a “substantial and injurious effect” over the sentencing. Brecht, 507 U.S. at 637. Through cross-examination, the defense was able to establish that there was “nobody present” at the time of the entry, “nobody [was] harmed” and “[t]here was no violent act made against any person during the malicious breaking.” (Trial at 1125.) The same conclusion applies to the erroneously admitted testimony of Robert Chitwood regarding mail fraud (id. at 1132-34), and given his testimony on cross and other evidence properly admitted in support of this aggravating factor, it cannot be said that this error was harmful under Brecht, supra.

The prosecution further introduced into evidence two prior robberies and one kidnaping conviction, and the issue is whether each “conviction on its face shows that it involved violence or the threat of violence.” Bigbee, supra. The unarmed robbery conviction did not show on its face whether it involved violence, and the brief testimony of the victim Linda Phelps about the facts underlying the crime (Trial at 1126-28), was admissible to “show that it in fact involved violence or the threat of violence.” Bigbee, supra. As the Tennessee Supreme Court held on direct appeal, the robbery was a “prior violent conviction” under § 39-2404(i)(2), because the victim “was placed in fear because the defendant’s hand was in his pocket in a manner indicating that he had a weapon.”

Harries, 657 S.W.2d at 421.

On the other hand, the armed robbery conviction “on its face shows” that it involved violence or the threat thereof; thus making any evidence as to specific facts surrounding the crime, in this case consisting of a negligible part of Laura Ann Padgett’s testimony (Trial at 1130), inadmissible under Bigbee. The kidnaping conviction, which does not clearly involve violence, stemmed from the events surrounding this robbery. The statute in effect in 1973 when Harries was convicted for kidnaping, provided that “[n]o person shall kidnap, or forcibly or fraudulently carry off, detain, or decoy a person, or unlawfully arrest or imprison a person.” Ohio Code § 2901.26. Under this definition, it is impossible to conclude whether the offense was violent “on its face.”

Therefore, the testimony of the victim, Ms. Padgett, was admissible as it related to “facts regarding a previous [kidnaping] conviction to show that it in fact involved violence or the threat of violence,” Bigbee, supra. However, her testimony recounted details that were irrelevant to a determination of its violent character, thus going beyond the admissible scope.⁴⁴ To that extent, the trial court erroneously admitted that portion of the testimony. Nevertheless, while erroneously admitted in part, the succinct testimony of Ms. Padgett did not have a “substantial and injurious effect” in the sentencing. Brecht, supra.

(9) Improper jury instructions

First, Petitioner argues that the judge failed to instruct the jurors as to the effect of their inability to agree on a verdict. Second, he argues that the court’s instructions on mitigation under T.C.A. § 39-2404 (j) were erroneous. Petitioner also alleges that the court erroneously instructed the jury as to all statutory aggravating and mitigating circumstances, whether relevant to his case or

⁴⁴ She testified she was kidnaped for ten hours, she was driven to Cleveland, and it was Harries’ accomplice who “talked [Harries] into letting [Ms. Padgett] go.” (Trial at 1131.)

not. Finally, Mr. Harries argues that the instructions on impaired capacity at sentencing were incomplete, confusing and erroneous. (Doc. No. 516 at ¶¶ 94-97, 100.)

As it relates to the verdict instruction, the statutory language clearly precluded the trial judge from informing the jury that if it was not unanimous in its sentencing verdict, the sentence would automatically be life imprisonment. See T.C.A. § 39-2404 (h). Certainly the Eighth Amendment requires that a sentence of death not be imposed arbitrarily. See e.g., Buchanan v. Angelone, 522 U.S. 269, 275 (1998). However, this only requires the sentencing scheme to fulfill a narrowing function with regards to the “eligibility” and the “selection” phase, neither of which are jeopardized by the failure to instruct the jury on the effect of a non-unanimous verdict. Jones v. United States, 527 U.S. 373, 381 (1999) (holding that “the Eighth Amendment does not require that jury be instructed as to consequences of their failure to agree.”)

Similarly, the Court finds that the unanimous verdict charge did not improperly suggest to the jury that it had to unanimously find mitigating circumstances. The trial court instructed the jurors they were to unanimously decide defendant’s punishment. The judge instructed the jurors that “[n]o death penalty shall be imposed unless you *find unanimously* that one (1) or more of the following specified statutory aggravating circumstances has been proven,” but in contrast, it charged them that “[i]n arriving at the punishment *the jury shall consider* as heretofore indicated, *any mitigating* circumstances which shall include, but not limited to the following. . . .” (Trial at 1176-1180) (emphasis added).⁴⁵ The Court finds these instructions did not “created a substantial possibility that

⁴⁵ Addressing a similar claim in Kordenbrock v. Scroggy, the Sixth Circuit held that “[t]he instructions carefully stated that finding an aggravating factor required such [unanimous] agreement, but it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement.” 919 F.2d 1091, 1121 (1990). See also Williams v. Coyle, 260 F.3d 684 (6th Cir. 2001); Scott v. Mitchell, 209 F.3d 854 (6th Cir. 2000).

the jury interpreted the instruction to prevent them from individually considering a mitigating circumstance unless they unanimously agreed on that circumstance,” Austin, 126 F.3d at 849.

Petitioner also argues the trial court improperly charged the jurors that a mental impairment had to be “substantial” and a mental disturbance “extreme” before evidence supporting such condition may qualify as mitigating evidence. (Doc. No. 516 at ¶¶ 95-96.) However, the Tennessee Supreme Court rejected this same argument in State v. Smith, 857 S.W.2d 1, 16-17, cert. denied, 510 U.S. 996 (1993), where defendant had similarly argued that the instructions utilizing the modifiers “substantial” and “extreme” had impermissibly limited and misled the jury’s consideration of his evidence in mitigation. Id. at 16. After noting that “virtually all of the States with death penalty statutes . . . include as a mitigating circumstance evidence that ‘the capacity of the defendant. . . was substantially impaired.’” Id. at 17 (quoting Penry, 492 U.S. at 337), the State Court concluded that, in conjunction with the remaining instructions on mitigation, the instructions were correct.

In a challenge to a jury instruction in a habeas proceeding, the instruction must be considered as a whole to determine if it so infected the entire trial that the resulting verdict denied petitioner due process of law. See Engle v. Isaac, 456 U.S. 107, 121 (1982); Cupp v. Naughten, 414 U.S. 141 (1973). In the case at bar, the jury was clearly instructed that it could consider *any* mitigating factor raised by the evidence presented at trial. See Fact # 63. Thus, the jury instruction taken as a whole, adequately set forth the applicable law to be considered by the jury and did not deprive Petitioner of his due process right.

The Court does agree with Petitioner that only those circumstances relied upon by the parties should have been charged to the jury. (Doc. No. 506 at ¶ 97.) The purpose of a jury charge is to inform the jurors of the law to be applied to the facts of the case, and thus, to charge them on all

possible circumstances undermines this purpose and it may invite speculation. Nevertheless, the Court finds no prejudice in this case because the jury verdict identified the only two aggravating factors supported by the evidence presented at trial, while identifying no mitigating factors. (Trial at 1191); see also Victor v. Nebraska, 511 U.S. 1 (1994) (citation omitted) (emphasis in original) (explaining “the proper inquiry is not whether the instruction ‘could have’ been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it.”)

Finally, the Court disagrees that the diminished capacity circumstance was improperly charged to the jury. As Petitioner states, the trial court instructed the jury by reading the statute, which provides for consideration of whether

the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defects or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

T.C.A. § 39-2404 (j)(8). (Trial at 1180.) The instruction, albeit meager, did reflect the legal statutory requirement at the time of the trial. The trial judge had specifically charged the jury as to the voluntary intoxication defense at the guilt stage. (*Id.* at 1109.) The judge further charged the jury that “mitigating circumstances surrounding a criminal offense are those circumstances which tend to ameliorate or lessen the apparent badness of the particular crime in question or the apparent badness of the particular Defendant.” The judge also highlighted the subjective nature of mitigating factors, and advised the jurors that they were “in no way limited to [statutory mitigators], and [were] free to consider any other mitigating facts or circumstances.” (*Id.* at 1182.) After considering the charge as a whole, the Court finds no error as the charge properly instructed the jury on mitigation.

Petitioner further asserts he had a “liberty interest” in having the trial court define the terms used in the mitigation charge. He emphasizes that the State’s “argument was devoted to the negation of this defense,” which was the foundation of his “entire defense both at guilt stage and at sentencing.” (Doc. No. 516 at 61.) Though relevant to ineffectiveness, this is of no relevance here as defendant had no “liberty interest” in having the court make a case on his behalf.

(10) Execution by Electrocutation

This claim asserts the unconstitutionality of an execution by electrocution and it was raised in Petitioner’s Amended Petition (Doc. No. 516), but not in his Post-Hearing Brief (Doc. No. 802). The claim is summarily disposed as moot, as a result of the passage of T.C.A. § 40-23-114, which has made the lethal injection the default method of execution in Tennessee.

C. Prosecutorial misconduct

(11) Prosecution’s closing arguments during guilt and sentencing stages

The Court must next determine whether the prosecutor’s conduct infected Petitioner’s trial with such unfairness as to make the resulting conviction a denial of due process. Byrd v. Collins, 209 F.3d 486, 529 (6th Cir. 2000)(quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986) (other citations omitted)). When analyzing a claim of prosecutorial misconduct, a court must first decide whether the challenged statements were improper. Boyle v. Million, 201 F.3d 711, 717 (6th Cir. 2000). If the conduct was improper, the district court must then examine whether the statements are so egregious as to constitute a denial of due process and warrant granting a writ. Id. The Sixth Circuit has identified several factors that should guide this examination:

In every case, we consider 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.

Angel v. Overberg, 682 F.2d 605, 608 (6th Cir. 1982) (en banc). The prosecution did emphasize the age of the victim, probably in an attempt to gain the sympathy of the jurors, which was improper at the guilt stage of trial. See Facts # 64, 69. The prosecution's asking the jurors what they would do about the crime may be interpreted as an improper challenge of the jury. However, the remark may also be interpreted as merely inquiring what the jury would do as to conviction. Bute v. People of State of Ill., 333 U.S. 640, 653 (1947) (there is a presumption of regularity and doubts are to be resolved in favor of the proper performance by the court and state's attorney of their duties).

The prosecution also improperly mentioned facts underlying previous convictions and encouraged the jury to infer from them that Petitioner's motive for shooting Ms. Greene was the elimination of a witness. The allusion was improper because, at the guilt stage of a trial, facts underlying prior convictions are admissible in very limited circumstances not present here. Also, the inference drawn by the prosecutor was not reasonable given the physical evidence showing that Harries did not harm Ms. Lane, the other store clerk. Cf. United States ex. rel. Williams v. Washington, 913 F. Supp. 1156, 1163-1164 (N.D. Ill. 1995) (finding no due process violation when the argument is a reasonable inference from the evidence). However, following this remark, the trial judge promptly cautioned the jury that they could "consider such prior conviction only for purpose of its effect, if any, on his credibility as a witness." (Trial at 1066-67.)

Therefore, after examining the totality of the closing argument regarding guilt and the strength of the proof tending to establish such guilt. Angel supra, the Court finds that any misconduct by the prosecution was not so egregious as to render the trial fundamentally unfair. Byrd supra.

On the other hand, the Court finds that both the quality and quantity of the prosecutorial misconduct at the sentencing stage of trial was injurious. The prosecution's closing argument: (1) challenged the jury to impose the death penalty and implied it was the jurors' civic duty to do so, see Facts # 65-66; (2) emphasized the non-violent convictions, as well as facts underlying Harries' prior violent convictions, which were initially admitted in error, id. at # 67; (3) incorrectly stated the law asking the jury to draw improper inferences from the defense's failure to present evidence on certain issues, id. at # 68; and, among other things, (4) it submitted inflammatory comments encouraging the jury to impose the death penalty as a tool to deter future criminal action, id. at # 69.

The prosecution challenged the jury to impose the death penalty by asking the jurors what they would do about the shooting, stating that "the death penalty is no threat unless it is used," encouraging the jurors to view their role as "protect[ors] from armed robbers" beyond their proper role of fact-finders on this specific case. See Facts # 70, 66. The extensive, repetitive and deliberate character of the prosecution's challenge to the jury rose to the level of misconduct. Angel, 682 F.2d at 608. The challenge had the tendency to mislead the jury as to their role, and the trial judge's various warnings to AAG Kirkpatrick that he should not challenge the jury was not sufficient to remove the taint of unfairness at the sentencing stage of the trial.

The prosecution mentioned that Defendant had five prior felony convictions on his record. As already explained, two of these convictions (the mail fraud and malicious entry) were non-violent convictions initially admitted in error. See Cozzolino, 584 S.W.2d at 768 (holding that evidence of prior convictions admissible at sentencing only if it is relevant to an aggravating circumstance). The prosecution's argument also emphasized facts underlying the kidnaping conviction, which were not necessary to show the violent character of the crime and only tended to inflame the jury. AAG

Kirkpatrick inferred from Ms. Padget's testimony that she had spent "a night of terror" and as a consequence "had to live in fear every moment of her life." See Fact # 67. While a statement regarding the victim of the crime charged is not precluded by either state or federal law, see Payne v. Tennessee, 501 U.S. 808 (1991), a statement regarding the victim of a previous crime is improper, see Bigbee, 885 S.W.2d at 812.

The prosecution also misstated state law by prompting the jurors to infer from Defendant's failure to present further evidence in mitigation that such evidence was non-existent. Additionally, the prosecution improperly mentioned Harries' "criminal record" and stressed the need to impose the death penalty as a means of deterrence and for the good of society as a whole, Fact # 69. See e.g., Lesko v. Lehman, 925 F.2d 1527, 1545 (3rd Cir. 1991), cert. denied, 502 U.S. 898 (1991); Rogers v. Lynaugh, 848 F.2d 606, 611 (5th Cir. 1988) (prosecutor's argument that jury's sentence should include punishment for prior claims violates double jeopardy rule).

Finally, the prosecution generally engaged in a pattern of remarks appealing to the emotions, fears, and sympathies of the jurors. One example is the prosecution's statement about it being only the seventh time that the attorney general had requested the death penalty. The Tennessee Supreme Court found the statement to be "clearly improper," although it also found that "the prompt action by the trial judge prevented any prejudice." Harries, 657 S.W.2d at 421. Thus, without further analysis, the Tennessee Supreme Court concluded the error had been "harmless beyond a reasonable doubt." Id. However, given its failure to explain the harmless error analysis under Chapman, supra, this Court cannot conclude that the State Court's review cured the error. Even if that Court had conducted the proper analysis, its conclusion that this "error was of a minor nature" is rebutted by a review of the totality of the closing argument.

“It is beyond dispute that the State may risk reversal by engaging in argument which appeals to the emotions and sympathies of the jury, see e.g., Sparks v. State, 563 S.W.2d 564, 569 (Tenn. Crim.App. 1978); 23 C.J.S. Criminal Law § 1270(c)(1989).” Bigbee, 885 S.W.2d at 809. Here, the prosecution’s closing argument at sentencing, taken in context and read as a whole, and in spite of the languid attempts of the trial judge to instruct the jury to partially disregard them, was so misleading and inflammatory that it created a “substantial risk that the [death penalty] would be inflicted in an arbitrary and capricious manner,” in violation of the Eighth and Fourteenth Amendment of the U.S. Constitution. Gregg v. Georgia, 428 U.S. 153, 188 (1976). Even though prosecutorial misconduct falls in the category of mere trial errors, which the court should review for harmless error, see Pritchett v. Pitcher, 117 F.3d 959, 964 (6th Cir. 1997), the risk that the closing argument had a substantial and injurious effect on the jury’s imposition of punishment is so high, that reversal of the Petitioner’s sentence is warranted. Brecht, supra at 637; Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

D. Cumulative errors

(12) The Sixth Circuit has recognized that errors which individually might not rise to the level of a constitutional violation may, when considered cumulatively, render a trial fundamentally unfair. See Lundy v. Campbell, 888 F.2d 467, 472-73 (6th Cir. 1989), cert. denied, 495 U.S. 950 (1990); Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983), cert. denied, 464 U.S. 951 (1983). While the Court has found a number of errors that do not give rise to a constitutional violation of Mr. Harries’ rights, the Court does find that the combination of errors at the penalty stage of the trial did render the imposition of the death sentence fundamentally unfair as to this Petitioner.

Counsel's failure to prepare and present any evidence in mitigation rendered their assistance ineffective at the penalty phase of Petitioner's trial; the trial court erroneously allowed the jury to weigh the later-determined unconstitutional felony-murder aggravating circumstance, it erroneously permitted jurors to consider inadmissible evidence in support of the "prior violent conviction" aggravating circumstance; and this errors were also exacerbated by the prosecution's improper closing argument at this stage of the trial. Therefore, while some of these errors may not have harmful when individually considered, the combination of these sentencing errors did have a "substantial and injurious effect or influence in determining the jury's [sentence]." Brecht, 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).⁴⁶

CONCLUSION

For the above-stated reasons, the Court finds that Petitioner Harries was denied ineffective assistance of counsel at the penalty phase (Claim 4); was sentenced on the basis of an unconstitutional aggravating factor and improperly admitted aggravating evidence (Claim 8); the sentence was also affected by the prosecution's unconstitutional closing argument to the jury (Claim 11, partially); and the sentencing errors accumulated (Claim 12). The Court finds that these claims support the issuance of a writ of habeas corpus, and mandate that the trial court re-sentence Petitioner.

On the other hand, the Court finds that Petitioner was unable to prove prejudice based on defense counsel's performance at the guilt stage of trial, or their failures on appeal (Claims 1-3, 5);

⁴⁶ Clearly the State Court's harmlessness finding is not a factual finding of fact, to which the presumption of correctness applies. See e.g., Thompson v. Keohane, 516 U.S. 99, 110 (1995). Also, this Court's conclusion does not contradict the State's conclusion as this harmless analysis considers facts not previously available, such as the improper introduction of the entry conviction, as well as some of the testimony relating to the prior convictions.

he has failed to prove that he was incompetent to stand trial (Claim 6); he has not shown the Tennessee Supreme Court applied an improper harmless error analysis to the felony-murder aggravating circumstance (Claim 7); and has failed to prove his allegation that some of the trial court's jury instructions were unconstitutional (Claim 9). The Court also finds that Petitioner's claim that executions by electrocution are unconstitutional is moot (Claim 10).

Accordingly, the Court hereby vacates Petitioner's sentence of death, and remands this case to the State of Tennessee for further proceedings not inconsistent with this memorandum. An order consistent with the findings and conclusions herein is filed contemporaneously.

Entered this the 22nd day of August, 2002.


JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT