No. 09-790

In The
Supreme Court of the United States

EDMUND ZAGORSKI,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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March 8, 2010

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether a "security" justification for abusive pretrial confinement precludes, as a matter of law, a determination that the circumstances of confinement impermissibly coerced the making of custodial statements.

2. Whether a defendant's initiation of contact with police per se establishes admissibility of his statements, or whether the court must consider the totality of circumstances in determining whether inculpatory statements made by the defendant were voluntary.

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OPINION BELOW

The opinion of the court of appeals that is the subject of this petition was not selected for publication in the Federal Reporter. *Zagorski v. Bell*, 326 Fed. Appx. 336 (6th Cir. 2009). (Pet. App. 1a). The memorandum opinion of the district court relevant to the question presented is unreported. (Pet. App. 15a).

STATEMENT OF JURISDICTION

The judgment and opinion of the court of appeals were entered on April 15, 2009. (Pet. App. 1a). The court denied rehearing on August 7, 2009. (Pet. App. 224a). By order entered October 26, 2009, Justice Stevens extended the time for filing a petition for writ of certiorari from November 5, 2009, until January 4, 2010. (09A386). Petitioner filed a certiorari petition on January 4, 2010. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254, which governs the remedy of federal habeas corpus for applicants in state custody, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

* * *

(e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that–

(A) The claim relies on–

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

I. Procedural History

Petitioner, Edmund Zagorski, was convicted in 1984 by a Robertson County, Tennessee, jury of two counts of felony murder in the deaths of John Dotson and Jimmy Porter. He was sentenced to death for both murders. His convictions and sentence were affirmed on direct appeal by the Tennessee Supreme Court, and this Court denied a petition for writ of certiorari. *State v. Zagorski*, 701 S.W.2d 808 (Tenn. 1985), *cert. denied*, 106 S.Ct. 3309 (1986).

Petitioner filed a petition for post-conviction relief in the state trial court in 1987 and an amended petition in 1989. Following an evidentiary hearing, the state trial court denied relief. The Tennessee Court of Criminal Appeals affirmed the trial court's judgment. *Zagorski v. State*, No. 01C01-9609-CC-00397, 1997 WL 311926 (Tenn. Crim. App. 1997). Petitioner subsequently filed an application for permission to appeal to the Tennessee Supreme Court pursuant to Tenn. R. App. P. 11. On November 3, 1997, the Tennessee Supreme Court granted Petitioner's application on a single issue unrelated to

the issue before this Court and, on December 7, 1998, affirmed the judgment of the Court of Criminal Appeals. *Zagorski v. State*, 983 S.W.2d 654, 657-59 (Tenn. 1998).

Petitioner filed a *pro se* Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Tennessee on December 23, 1999, and an amended petition on August 4, 2000. *Zagorski v. Bell*, No. No. 3:99-cv-01193 (M.D. Tenn.) (Trauger, J.). Respondent filed a motion for summary judgment and supporting memorandum as to all of the claims in the Amended Petition. On April 28, 2003, the district court ruled that an evidentiary hearing was warranted on the single issue of whether the state suppressed material evidence regarding state's witness, Jimmy Blackwell. (Resp. App. 1b). The evidentiary hearing was conducted on July 23, 2003, and on March 31, 2006, the district court granted judgment in favor of the respondent as to all claims raised in his petition for writ of habeas corpus. (Pet. App. 15a). Petitioner appealed to the United States Court of Appeals for the Sixth Circuit.

On April 15, 2009, the court of appeals affirmed the district court's judgment. *Zagorski v. Bell*, 326 Fed. Appx. 336, 2009 WL 996307 (6th Cir. 2009) (reh. denied). (Pet. App. 1a). That decision is the subject of the instant petition.

II. Facts Relevant to the Petition

A summary of the evidence presented at petitioner's trial appears in the opinion of the Tennessee Supreme Court on direct appeal. *State v. Zagorski*, 701 S.W.2d 808 (Tenn. 1985). In addition,

the district court summarized the evidence at petitioner's trial and sentencing hearing in its memorandum opinion. (Pet. App. 15a-24a). The instant petition addresses the admissibility of certain custodial statements made to law enforcement officials in which petitioner inculpated himself in the murders. Petitioner filed a pretrial motion challenging the admissibility of the statements on grounds that he did not make a knowing, intelligence and voluntary waiver of his right to remain silent and to counsel. Following an evidentiary hearing, the trial court denied petitioner's motion to suppress.

On direct appeal, the Tennessee Supreme Court affirmed, concluding that the petitioner had initiated the interrogations in question, that his statements were not the result of any coercive action on the part of the State, and that he knowingly and intelligently waived his right to have counsel present. The court further found that, even if that were not the case, admitting the statements in question was harmless beyond a reasonable doubt in view of the overwhelming evidence of guilt.

> The statements of Zagorski in question were those of June 1, July 27, and August 1, 1983. Zagorski consistently denied that he had killed the victims, but in each of the statements, though differing in details, Zagorski implicated himself in the killings. For example, in the June 1 statement, Zagorski placed the killing site in Robertson County and himself at the Kentucky - Tennessee border keeping a lookout for police authorities. The later statements had the victims meeting their death in Hickman

County, with Zagorski present but not taking part in the killings.

Zagorski also talked with police officers on May 27, 1983. The statement was not used in the trial, but is important as Zagorski then stated he was not going "to make no statements or answer any question," and finally saying "[l]ike I said, I guess I really should talk to a lawyer."

Zagorski having asked for a lawyer, it becomes important to determine whether later statements were initiated by Zagorski and whether there was a knowing and intelligent waiver by him of his request for an attorney to be present at any interrogation. *See Smith v. Illinois*, 469 U.S. 91, 105 S.Ct. 490, 492-93, 83 L.Ed.2d 488 (1984); *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

With this in mind as we viewed the evidence, we concluded that the evidence supports the trial court's finding that the *defendant initiated the interrogations*, that he was *not subject to any coercive action on the part of the state*, and that *he knowingly and intelligently waived his right to have counsel present* during the interrogations. Further, we are of the opinion that even if there had been an *Edwards* violation, error in admitting the statements in evidence was harmless beyond a reasonable doubt in view of the overwhelming evidence of guilt in this case. *See United States v. Webb*, 755 F.2d 382, 392 (5th Cir.1985) (applying harmless error analysis to *Edwards* violation).

Zagorski, 701 S.W.2d at 812 (emphasis added).[1]

III. The Opinions Below

The district court denied Zagorski's petition for habeas corpus relief. Because the Tennessee courts had previously adjudicated petitioner's custodial-statement claim on the merits, the district court applied the review provisions of 28 U.S.C. § 2254(d) to petitioner's application for habeas relief on that ground. The district court first found that the Tennessee Supreme Court correctly identified this Court's opinions in *Smith v. Illinois*, 469 U.S. 91 (1984), and *Edwards v. Arizona*, 451 U.S. 477 (1981), as controlling authority in determining whether a criminal defendant has made a knowing and intelligent waiver of his right to remain silent and to have counsel present before answering questions posed

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[1] As discussed in more detail below, petitioner's factual contentions concerning the conditions of his confinement, set forth at length in his Statement, rely largely on material outside the record of his state trial proceedings and, thus, not before the state court when it adjudicated his pretrial suppression motion. However, both the district court and the court of appeals assessed the state court's adjudication under the provisions of 28 U.S.C. § 2254(d), concluding that the state court's merits disposition was reasonable in all respects. Consistent with AEDPA's jurisdictional limitations and this Court's own decisions, the lower federal courts correctly focused on the state court findings in light of the record before it. For ease of reference, the entirety of the proof before the state trial court relative to the conditions-of-confinement question is reproduced as an appendix to respondent's brief in opposition. (Resp. App. 4b – 37b). This Court should likewise decline petitioner's invitation to reject the state court's merits determination on the basis of facts never presented to it.

by law enforcement officials. (Pet. App. 31a). The district court further found that the state courts made factual determinations relevant to the statements in question based on evidence presented during a pretrial suppression hearing in February 1984. The district court specifically observed that the Tennessee Supreme Court "'viewed the evidence' [from that proceeding] and made a factual determination that Zagorski 'knowingly and intelligently waived his right to have counsel present' because he 'initiated the interrogations [and] that he was not subject to any coercive action on the part of the state.'" (Pet. App. 33a-34a). The district court concluded that the record of the state proceedings supports the state court's disposition of petitioner's claim and, thus, habeas relief was not warranted under 28 U.S.C. § 2254(d).

> Although Zagorski offers extensive argument on this issue in these [federal] proceedings, he has not rebutted the presumption of correctness [afforded factual determinations of a state court under 28 U.S.C. § 2254(e)(1)] by clear and convincing evidence. In addition, the record supports the conclusion that the Tennessee Supreme Court's determination was in accordance with *Smith* and *Edwards*. Therefore, the Tennessee Supreme Court's determination on this issue was neither contrary to nor an unreasonable application of clearly established federal law . . . [and] Zagorski is not entitled to federal habeas corpus relief on this issue.

(Pet. App. 34a).

The court of appeals affirmed, likewise concluding that "th[e] conclusion [of the Tennessee Supreme Court] was neither 'contrary to' federal law, nor an 'unreasonable application' of Supreme Court precedent." (Pet. App. 7a). The court further found that, even if suppression was warranted as to the first of petitioner's three statements (June 1), its admission had no "substantial or injurious effect in determining the jury's verdict" and, thus, did not warrant relief from the state court's judgment. (*Id.*).

> An accused, 'having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). But the accused's statement may be admitted nevertheless if an *Edwards* initiation occurs; that is, the statement is admissible "when, without influence by the authorities, the suspect shows a willingness and a desire to talk generally about his case." *United States v. Whaley*, 13 F.3d 963, 967 (6th Cir. 1994). Zagorski did not just express a voluntary willingness "to talk generally about his case" – he insisted on giving Detective Perry specific details. As a result, the state court decision is neither contrary to, nor involved an unreasonable application of clearly established Federal law. Moreover, Zagorski cannot demonstrate that the admission of his June 1 statement was not harmless error. *See Kyger v. Carlton*, 146 F.3d 374, 382-83 (6th Cir. 1998)

> (holding that the admission of a statement obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), resulted in harmless error because the defendant repeated the substance of the statement in a later admissible statement.).

(Pet. App. 9a-10a).

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE STATE COURT'S DECISION OVERRULING PETITIONER'S MOTION TO SUPPRESS HIS PRETRIAL STATEMENTS WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW.

Petitioner seeks review of his case by writ of certiorari, arguing that the court of appeals' decision regarding the admission of certain incriminating statements "was a manifest departure from clear and repeated holdings of this Court." He asserts that the statements in question were secured by law enforcement personnel through oppressive conditions of confinement and inhumane treatment, which overbore his will, and that the Sixth Circuit "improperly characterized" his statement as a voluntary initiation under *Edwards v. Arizona*, 451 U.S. 477 (1981). (Pet. 25). He further contends that the lower court's focus on security concerns related to petitioner's confinement impermissibly precluded consideration of his state of mind at the time he initiated discussions with law enforcement officials, and he seeks review by this Court on that precise question. (Pet. i, 23-25).

The petition should be denied, however, because the questions presented are not directly implicated by the decision below; rather, both the district court and the court of appeals correctly concluded that the evidence presented in state proceedings supported the state courts' determination that petitioner initiated the interrogations and was "not subject to any coercive action on the part of the state." (Pet. App. 7a; 33a-34a). The state courts did not reject petitioner's coercive-conditions argument based on "security" concerns, but because he failed to present competent evidence showing that his confinement conditions or any other state actions were, in fact, coercive. (Resp. App. 36b). Both the district court and the court of appeals agreed that the state-court record supported that determination. While it is true that the court of appeals included in its opinion a discussion of certain state-court testimony that security concerns had prompted the Sheriff's decision to confine petitioner in isolation from other prisoners, that discussion enunciates no rule of law essential to the determination of petitioner's appeal and should be viewed, at most, as obiter dicta.

Aside from the questionable relevance of the questions presented given the Sixth Circuit's narrow holding, petitioner constructs his coercive-conditions argument based largely on materials not before the state court at the time of its adjudication, nor the subject of any evidentiary proceeding before the federal habeas court, in contravention of the jurisdictional limitations imposed under 28 U.S.C. § 2254(d). In the district court, petitioner contended that the state trial court committed prejudicial error by admitting into evidence certain statements given by him to law enforcement officials on June 1, July 27,

and August 1, 1983, after he had been taken into custody. He argued that the June 1 statement violated *Edwards*, because officials improperly initiated the interrogation after he had previously invoked his right to counsel. He further argued that the July 27 and August 1 statements were "the result of a combination of coercive, oppressive, and unbearable conditions of incarceration; mental disturbance; and his being on mind-altering medication."[2] As to the June 1 statement, the court of appeals found that, even if *Edwards* error occurred, its admission had no "substantial or injurious effect in determining the jury's verdict" given the admissibility of the subsequent statements. *Zagorski v. Bell*, No. 06-5532, slip op. at 7 (6th Cir. Apr. 15, 2009) (Pet. App. 7a). *Brecht v. Abrahamson,* 507 U.S. 619, 637-38 (1993). The latter two statements, the court concluded, were the product of a valid *Edwards* initiation. (Pet. App. 9a-10a). Critically, the court of appeals made clear that petitioner's application for habeas relief was properly denied under the deference provisions of 28 U.S.C. § 2254(d), since the state court decision was neither contrary to, nor an unreasonable application of clearly established federal law.

> The Tennessee Supreme Court found that although Zagorski invoked his right to counsel, "the evidence supports the trial court's finding that the defendant initiated the interrogations, the he was not subject to any coercive action . . .

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[2] Because the latter two encounters took place as a result of a personal note from Zagorski to Detective Ronnie Perry, there has never been any serious dispute that Zagorski initiated the discussions leading to the July 27 and August 1 statements.

> and that he knowingly and intelligently waived his right . . . " *Zagorski*, 701 S.W.2d at 812. We deny relief because this conclusion was neither "contrary to" federal law, nor an "unreasonable application" of Supreme Court precedent.

(Pet. App. 7a).

All three statements were the subject of an evidentiary hearing in the state court in connection with a pre-trial motion to suppress evidence. The entirety of the testimony in support of Zagorski's motion regarding the July 27 and August 1 statements is attached as an appendix hereto. (Resp. App. 4b-37b). Even a cursory reading reveals that the state trial court had no competent proof before it of petitioner's medical or mental condition, and aside from the bare fact that petitioner was held in solitary confinement for security reasons, there was little, if any, proof suggesting that his confinement conditions were "torturous" or otherwise unduly oppressive. What is clear from the proof, however, was that petitioner himself initiated both meetings with Detective Ronnie Perry, a fact evidenced by petitioner's own notes, which were introduced into evidence at the hearing, and not in dispute here. At the conclusion of the hearing, the state court rejected petitioner's contention that the conditions of his confinement and the state of his health rendered his July 27 and August 1 statements involuntary, particularly in light of the absence of proof to support that contention — "[B]oth the defense attorneys are knowledgeable enough to know that my ruling would depend on the evidence presented . . . . [B]y the proof that has been presented to me, there is nothing to indicate that there was any force or coercion in making

the statements . . . ." (Resp. App. 36b). On direct appeal, the Tennessee Supreme Court determined, based on its review of the record, that "the evidence supports the trial court's finding that [petitioner] initiated the interrogations, that he was not subject to any coercive action . . . and that he knowingly and intelligently waived his right [to counsel]. . . ." *State v. Zagorski*, 701 S.W.2d 808, 812 (Tenn. 1985). The state supreme court further found that any "error in admitting the statements in evidence was harmless beyond a reasonable doubt in view of the overwhelming evidence of guilt in this case." *Zagorski*, 701 S.W.2d at 812.

A federal court may grant a writ of habeas corpus with respect to a claim that was adjudicated on the merits in State court proceedings only if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this] Court" or was "based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*." 28 U.S.C. § 2254(d)(1), (2) (emphasis added). Here, recognizing its limited authority to grant relief given the state court's merits determination, the district court correctly rejected petitioner's claim after finding that the Tennessee Supreme Court's determination of the issue was neither contrary to nor an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1), and that petitioner had failed to overcome the presumption of correctness accorded the state court's underlying factual findings as required by 28 U.S.C. § 2254(e)(1). The court of appeals likewise found that the state court's disposition of his claim was neither contrary to nor an unreasonable application of

Supreme Court precedent. *See* 28 U.S.C. § 2254(d). (Pet. App. 7a).

Petitioner argues, however, that the conditions of his confinement "produced physical and psychological distress so severe" that it caused him to summon a detective and offer to confess to the murders. (Pet. 13). He argues that petitioner's incarceration "had a pronounced effect on [his physical and mental condition," that he suffered from "acute anxiety attacks, rashes, insomnia, and uncontrollable rage, resulting in emergency room visits," that he was treated with "at least five different anti-psychotic and mood-altering medications," that he suffered from migraine, insomnia, and high blood pressure, and that he lost 30 pounds during the period in question. (Pet. 5-7). He further asserts that the jail's ventilation system had been "inoperative since the jail was built," and that the temperature in his jail cell was "in the hundred degree range." (Pet. 5). But petitioner's allegations concerning the conditions of confinement rely largely on material outside the state trial record filed nearly 20 years later in his federal habeas corpus proceeding as an attachment to a response in opposition to the Warden's motion for summary judgment (R. 104: Response, filed October 1, 2002), including materials generated in connection with an unrelated federal lawsuit[3] and newspaper accounts describing jail conditions at a time when petitioner was not occupying it. None of these materials was before the state trial court when it adjudicated

[3] Petitioner relies heavily on testimony and other materials generated in the case of *Douglas v. Emery*, No. 81-3826 (M.D. Tenn.).

petitioner's claim, and both the district court and the court of appeals properly declined to include any discussion of it in its decision. Petitioner refers to the administration of antipsychotic and other mood-altering medications, but presented no medical records or other competent medical testimony to the state trial court during the hearing on his motion to suppress evidence. He provides details of hospitalizations, but introduced no competent evidence of those details during his state court suppression hearing. He provides a description of weather conditions in Robertson County, Tennessee, in July 1983 and its effect on local crops. But none of this was before the state trial court. Petitioner presented no proof at his suppression hearing concerning air conditioning in the jail, the jail ventilation system, lighting conditions, or the psychiatric effects of his solitary confinement. There was no proof before the state trial court of physical complaints such as sleeplessness, numbness, headaches, weight loss, elevated blood pressure or any of the other maladies to which petitioner now points as evidence of the court of appeal's incomplete consideration of his claim. In short, virtually none of the evidence purportedly demonstrating alleged oppressive conditions of confinement was before the state court when it adjudicated his claim. Nor was any aspect of his claim the subject of an evidentiary hearing in the federal district court. (Resp. App. 1b).

And, while it is true that petitioner presented *some* of this information to the state court during *post-conviction* proceedings,[4] he did so in connection with a

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[4] Specifically, petitioner introduced into evidence during state post-conviction proceedings certain emergency room records from

separate claim challenging trial counsel's effectiveness in handling the suppression issue. First, because this evidence was not before the state court when it adjudicated petitioner's challenge to the admissibility of the statements, it has no bearing on the federal court's analysis of the reasonableness of the state court's adjudication under § 2254(d). *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (reasonableness of state court's decision "must be assessed in light of the record the court had before it"); *Miller-El v. Cockrill*, 537 U.S. 322, 348 (2003) (reasonableness of state court's factual finding assessed "in light of the record before the court"); *Bell v. Cone*, 535 U.S. 685, 697 n.4 (2002) (declining to consider evidence not presented to state court in determining whether its decision was contrary to federal law). But even if that were not the case, petitioner failed to show, even in state post-conviction proceedings, that he spoke to law enforcement involuntarily or that his will was otherwise overborne as a result of his confinement conditions, much less did that proof rise to the clear and convincing level required to overcome the presumption of correctness of the state court's earlier voluntariness determination under 28 U.S.C. § 2254(e)(1). Petitioner presented no evidence concerning his state of mind at the time of the statements or his ability to make a decision concerning the presence of counsel, and neither of his trial counsel

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Jesse Holman Jones Hospital for admissions in July and September 1983 and limited excerpts from *Douglas v. Emery*, No. 81-3826 (M.D. Tenn.), consisting of Defendants' First Set of Stipulations filed April 13, 1983, an Agreed Order entered April 15, 1983, an Agreed Partial Order entered September 16, 1991, and an Agreed Final Order entered August 26, 1993. (R. 9 (Notice of Filing), Addendum 3, Collective Exhs. 15 and 30).

could recall any specific statement from petitioner suggesting that his actions were the product of anything other than his own will.[5] (Resp. App. 43b, 47b-48b). More importantly, the state post-conviction court concluded that petitioner was not prejudiced by any alleged deficiencies in counsel's performance with respect to the suppression issue given the Tennessee Supreme Court's finding on direct appeal that "any error in admitting the statements was harmless error in view of the overwhelming evidence of guilt." *Zagorski v. State*, No. 01C01-9609-CC-00397, 1997 WL 311926, at 10 (citing *Zagorski*, 701 S.W.2d at 812). Indeed, the statements in question added little to the body of evidence arrayed against petitioner at trial. They provided few details and were inconsistent with each other and with the State's proof. Under these circumstances, petitioner would be unable to show that admission of the statements, even if arguably erroneous, had a substantial and injurious effect or influence in determining the jury's verdict in any event. *Brecht,* 507 U.S. at 638.

In rendering its decision in this case, the state court identified and applied the controlling precedent of this Court, *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), holding that an accused person in custody who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been

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[5] Petitioner's willfulness throughout his capital trial proceeding is most clearly evident in his persistence that counsel present no mitigating evidence at his capital sentencing proceeding, a decision described by the Tennessee Supreme Court on appeal from the denial of post-conviction relief as intelligent, voluntary, and informed. *Zagorski v. State*, 983 S.W.2d 654 (Tenn. 1998).

made available to him, unless the accused himself initiates further communication, exchanges, or conversations with police." The state court specifically found that the evidence presented in the trial court supported the determination that "the defendant initiated the [subsequent] interrogations, that he was not subject to any coercive action on the part of the state, and that he knowingly and intelligently waived his right to have counsel present during the interrogations." *Zagorski*, 701 S.W.2d at 812. The state court's decision was reasonable given the evidence before it, and the court of appeal's disposition of Zagorski's claim is consistent with AEDPA's limited authority to review a state court adjudication rendered after a full and fair hearing. Certiorari is not warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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

Civil No. 3:99-1193

Judge Trauger
Magistrate Judge Brown

[Filed April 28, 2003]

EDMUND ZAGORSKI,	)
	)
Petitioner,	)
	)
v.	)
	)
RICKY BELL, Warden,	)
	)
Respondent.	)
	)

MEMORANDUM and ORDER

By Order entered January 21, 2003 (Docket No. 116), the court ordered the parties to brief the issue whether the petitioner should be accorded an evidentiary hearing on any of the constitutional errors asserted in his Petition for Writ of Habeas Corpus. Presently pending before the court are petitioner's Memorandum in Support of Evidentiary Hearing (Docket No. 119), respondent's Brief in Opposition (Docket No. 121) and petitioner's Reply (Docket No. 123).

Petitioner asserts that he is entitled to an evidentiary hearing on the following issues:

1. Whether the trial court improperly admitted at trial statements by petitioner in violation of petitioner's Fifth and Sixth Amendment rights;
2. Whether trial counsel was ineffective in for failing to have petitioner's statements suppressed;
3. Whether trial counsel was ineffective for failing to investigate all possible mitigation;
4. Whether trial counsel was ineffective for failing to present available mitigation;
5. Whether trial counsel was ineffective for failing to investigate and present evidence regarding state's witness Jimmy Blackwell;
6. Whether the state withheld material evidence about Blackwell; and
7. Whether the death sentence imposed upon petitioner is arbitrary.

Respondent generally asserts that petitioner is not entitled to an evidentiary hearing on any of his claims because these claims either are procedurally defaulted, rely upon new evidence that petitioner should have presented to the state courts, or fail to establish a genuine issue of material fact.

Based upon its review of the parties' arguments, the pleadings, and the record, the court finds that an evidentiary hearing is warranted only on the issue of whether the state suppressed material evidence regarding state's witness Jimmy Blackwell. To the extent that respondent maintains that any of petitioner's evidence presented at the evidentiary hearing should have been discovered previously and

presented in state court proceedings, he may present his own evidence and argument on those issues at the hearing.

It is hereby ORDERED that the evidentiary hearing is set for July 24, 2003 at 9:00 a.m. The court will set aside one (1) day for the hearing.

It is so **ORDERED.**

ENTER this the 28th day of April, 2003.

/s/ Aleta A. Trauger
ALETA A. TRAUGER
United States District Judge

**IN THE CRIMINAL COURT OF
ROBERTSON COUNTY
AT SPRINGFIELD, TENNESSEE**

No. 6052

[Dated February 13, 1984]

STATE OF TENNESSEE,	)
	)
Appellee,	)
	)
vs.	)
	)
EDMUND GEORGE ZAGORSKI,	)
	)
Appellant.	)
	)

PRELIMINARY MOTIONS

February 13, 1984

THE HONORABLE FRED A. KELLY III,
PRESIDING JUDGE

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* * *

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THE COURT: Were there other statements?

MR. WILKS: Yes, sir, there were two other possible statements, Your Honor. Your Honor, would you prefer to rule on each statement as it comes up or wait until the end and make one ruling?

THE COURT: I believe I'd rather wait.

MR. WILKS: Yes, sir. Your Honor, the next area of inquiry in our motion to suppress statements concerns July the 27th, 1983, and August the 1st, 1983, and possibly on some other occasions, but we're not sure.

The defendant was interrogated by Detective Perry: Your Honor, these contacts occurred clearly after counsel had been appointed for the defendant. They took place without any notice being given to counsel for the defendant. They occurred at the jail. They occurred at a time the defendant was in solitary confinement in the jail in an eight by eight foot steel room. It occurred at a time when the heat in the jail, all over the jail, was almost unbearable, but it was particularly so where the defendant was kept because he was, in fact, segregated from the rest of the population, and had been for a significant period of time. There was little, if any, ventilation.

The Sheriff's Department had been kind enough to provide a small fan that blew through about an eight inch area where there were steel bars, and everywhere else surrounding the defendant was steel, solid steel. It was a time when the

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defendant was suffering severely from his incarceration; where his mental status was at an all time low; where he had, in fact, required the attention of a physician; where he had received medication. In fact, that medication was for his nerves.

During this period of time, Your Honor, there was at least one occasion where he attempted suicide through the use of medication, and a second occasion where he was shocked in his cell by stepping on an electric cord. The media has reported this as two suicide attempts. So those are indications of the defendant's state of mind at the time statements were

received from the defendant on July the 27th and August the 1st.

Your Honor, I don't know if the Court wishes us to put on Detective Perry. I believe the matters I have stated to this point in time can be validated either by Dr. Webster's records, Jesse Holman Jones Hospital's records, or the local paper, or the Tennessean. So I'm not necessarily providing anything that we cannot call and place into evidence, Your Honor. We might ask that the State respond, if they wish to, at this time to statements given to Detective Perry.

THE COURT: What were the general contents of the statements?

MR. WILKS: Primarily, Your Honor, an alleged version of the events that occurred on April the 23rd and

[p.66]

thereafter that involved, allegedly, the defendant.

THE COURT: As far as the State knows, you would probably use those statements?

MR. WHITLEY: Yes, sir, we intend to use those statements. I would like to state that most or much of what Mr. Wilks says is very much in contention, and I don't want Your Honor to take it all as gospel because Mr. Wilks said it. I know he's not misrepresenting anything, but the State --

THE COURT: States it as he believes it to be, but that his belief may be incorrect?

MR. WHITLEY: That's the point I'm trying to make.

THE COURT: I really need to know what was in the statements.

MR. WHITLEY: Yes, sir. I intend to call Detective Perry.

THE COURT: I didn't want to put the burden on you, but since we intend to proceed that way, it has been very satisfactory, so we'll do that.

MR. WHITLEY: We'll be glad to do that.

MR. WILKS: Thank you.

MR. WHITLEY: Come around, Detective Perry.

RONNIE PERRY was called and being duly sworn was examined and testified as follows:

DIRECT EXAMINATION

[p.67]

BY MR. WHITLEY:

Q. Would you state your full name for the record, please?

A. Ronnie Perry.

Q. What is your occupation?

A. I'm a detective with the Sheriff's Office here in Springfield.

Q. How long have you been with the Sheriff's Office, Detective Perry?

A. Approximately six years.

Q. How long have you been a law enforcement officer?

A. About the same, six years.

Q. The entire time?

A. Yes.

Q. You participated in the investigation concerning the deaths of Mr. Porter and Mr. Dotson, did you not?

A. Yes, sir, I did.

Q. And you went to Ohio and were present when Mr. Zagorski was questioned by yourself and Sheriff Emery and another detective?

A. Yes, sir, I was.

Q. And you were present when Mr. Zagorski was brought back from Tennessee to Ohio?

A. Yes, sir.

Q. You were present when Mr. Gay met with you and Mr.

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Zagorski and Sheriff Emery?

A. Yes, sir.

Q. Now, let's go to July the 27th of 1983. I would like to ask you if you had conversation with Mr. Zagorski on that date?

A. Yes, sir, I did.

Q. Where was Mr. Zagorski on that date?

A. He was incarcerated in our county jail.

Q. Where inside the confines of the county jail was Mr. Zagorski incarcerated?

A. He was in a single cell unit in the bottom cell block.

Q. Why was he in that single cell unit?

A. For security reasons.

Q. What was the need for security reasons?

A. He was a high escape risk.

Q. Why was he a high escape risk?

A. He has violated parole twice or something like that. I would have to look. He'a just a very dangerous person in my opinion.

MR. WHITLEY: Your Honor, could I see that rap sheet, Exhibit 2, please?

Q. This FBI rap sheet, of course, shows that he was arrested for bond jumping?

A. Uh-huh.

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Q. You were aware of the circumstances surrounding his arrest in Ohio, also, were you not?

A. Yes, sir, I was.

Q. Just briefly summarize those circumstances of the events that you were aware of concerning his arrest.

A. In Ohio?

Q. Right.

A. The police tried to apprehend Mr. Zagorski. They had a fairly lengthy chase, and Mr. Zagorski met a patrol car coming toward him. Instead of going around the patrol car, he rammed the patrol car in the front end, and they had a little shoot-out.

Q. What do you mean, a little shoot-out?

A. Well, Zagorski shot one of the officers in the back three times, and then one of -- the officer that he was with, shot Zagorski twice. He shot up the patrol car; put a bunch of bullet holes in the patrol car.

Q. How was Mr. Zagorski armed at the time of his arrest?

A. He was heavily armed. He had a .223 mini fourteen, a shotgun, two pistols. That's all I can remember.

Q. What is a .223 mini fourteen?

A. It's a light assault rifle.

Q. Was he wearing anything unusual on his torso at the time of his arrest?

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A. Yes, sir, he had a bullet-proof vest on.

Q. Were these the reasons he was placed in this isolation cell in Robertson County?

A. Part of them, yes, sir.

Q. Did Judge Pellegrin, the Criminal Court Judge at that time, know that he was placed in an isolation cell?

A. Yes, sir, I believe he did.

Q. What occasioned you to talk to Mr. Zagorski on July the 27th of 1983?

A. I previously received two notes from Mr. Zagorski saying that he wanted either to see myself or the Sheriff.

Q. From whom did you receive the notes?

A. They were put in our -- we've got a box downstairs that we get messages and notes, and they were put in that box.

Q. When did you receive the notes?

A. When did I receive them? I believe it was July 22nd.

Q. At the time you received the notes, had you initiated any contact with Mr. Zagorski?

A. At the time I received them?

Q. Right.

A. No, sir.

Q. Had the Sheriff, to your knowledge?

A. No, sir.

Q. Had any law enforcement officer sent word to Mr.

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Zagorski that you wanted to talk to him?

A. No, sir.

Q. I've got two scraps of paper here with some writing on it. See if you can identify those.

A. Those are the notes received from Mr. Zagorski.

Q. The first one says what?

A. (Reading) I need to see the Sheriff or Ron Perry, Ed Z or E.D.Z.

Q. What does the next one say?

A. (Reading) I need to talk with Ron Perry or the Sheriff. It's got, E.D.Z. on it.

Q. Did you receive both of these notes at the same time?

A. Yes, sir, I got them out of the box at the same time.

Q. Is that the first time you were aware of them?

A. Yes, sir.

MR. WHITLEY: I'd like to make these a collective exhibit and hand them to Your Honor.

THE COURT: All right.

(Whereupon, Exhibit No. 3, collective, was marked and filed.)

Q. When you received these notes on July the 22nd, Mr.

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Perry, did you go and see Mr. Zagorski that day?

A. No, sir, not on that day, I didn't.

Q. You went to see him on July the 27th?

A. Yes, sir.

Q. Why did you wait from the 22nd until the 27th to see him?

A. I really hadn't got no good reason for it; just being busy.

Q. No particular reason?

A. No particular reason.

Q. Did you have any idea what he wanted with you?

A. None whatsoever.

Q. What happened when you went to see him?

A. Well, I believe it was before the preliminary hearing in General Sessions Court. I was at the District Attorney's Office, and I got a phone call from the jailer saying that Ed wanted to talk to me before we went to court.

Q. Ed Zagorski did?

A. Yes, sir. He said it was real important. So I went back down to the jail and went in the lower cell block into Ed's cell and asked him what he needed. He asked me, said, what's going to happen today? I said, well, we've got to show proof, and then it will probably be bound over to the Grand Jury. He said, are my lawyers going to be there? I said, yes. He said, well, I'll tell you what I'll do -- if

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you'll let me pick the type execution and the day of execution, I'll confess to these murders. I told him, I said, look, man, you need to stop right here and go talk to your lawyers; don't be doing stuff like this right now. He said, well, he didn't need to talk to his lawyers; he knowed what he wanted to say. I said, well, I think you need to talk to them. He said, well, them men wasn't killed up here. I said, they wasn't?

Q. He said what?

A. He said, those two men weren't killed up here.

Q. Weren't killed up here?

A. I said, they wasn't? He said, no, they were killed down in Hickman County and Boiling Springs. That was about the extent of the conversation.

Q. Well, did you ask him any questions?

A. Not that I can remember.

Q. Did he provide any other information, other than the fact that the men weren't killed up here; they were killed in Boiling Springs?

A. Not that I can remember at that time.

Q. Did you have another occasion to talk to Mr. Zagorski?

A. Yes, sir, I did.

Q. When was that?

A. I believe it was on -- I forgot that date.

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Q. Mr. Wilks mentioned earlier the date of August the 1st. Does that help you?

A. Yeah, I believe that's correct, August the 1st.

Q. Tell the Judge how that came about?

A. Well, I was in the office and the jailer called me and told me that Ed was wanting to talk to me. He said it was pretty important again. I said, well, I'll be down in a few minutes. I went downstairs and they got him out. We went in the Lieutenant's office and sat down and started talking.

Q. What did he say?

A. He was wanting to talk about the murders again. He said that he wasn't the trigger man in the murders, but he did have something to do with them. He said that he just set them up; said he was hired by a man from -- no, it was a man from Florida that was the trigger man, and all he done was drove them to the spot in Boiling Springs. He got out of the car, Porter and Dotson got out of the car, and they were shot.

Q. Did he say how they were brought up here?

A. He said they were put in plastic bags and carried up here.

Q. Did he say what his job was with regard to the murders?

A. Just set the murders up. He said that Dale Dotson's killing was a mistake. He said the person he was hired to kill was Jimmy Porter.

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Q. Did he say why?

A. He said it was drug related. That was all he would say.

Q. Did he say how long it took for them to be killed?

A. About five seconds. That's what he said.

Q. Well, again, on this August 1st date, did you ask Mr. Zagorski any questions?

A. None that I can think of.

Q. The second time that you went down to see Mr. Zagorski, did he acknowledge that he had sent for you?

A. I did ask him a question. I said, was you wanting to see me? He said, yeah. He said, you're a hard man to get ahold of.

MR. WHITLEY: That's all I have on direct, Your Honor.

CROSS EXAMINATION

BY MR. WILKS:

Q. Detective Perry, you were present when the defendant, Ed Zagorski, executed a waiver in West Virginia?

A. Uh-huh.

Q. When Ed Zagorski got ahold of you - or whatever occurred on July the 27th and August the 1st - and left you those notes, when you went in the cell or the office to talk to Ed Zagorski, were you still relying on that waiver executed?

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A. Well, I wasn't really interrogating him or anything, but if I had been interrogating him, I would have relied on that waiver.

Q. After you asked Mr. Zagorski what can I do for you or whatever, did you ever at any time ask him any other question on July the 27th?

A. July the 27th?

Q. Yes, that's the first statement.

A. As far as asking him any questions, I can't recall that I did. The only thing I done on that day was told him that he really needed to talk to his lawyers before he made any kind of statements to me like that.

Q. It's my understanding -- and you correct me if I'm wrong -- isn't it true that he said that he wanted to be executed on Halloween night at midnight, and he would confess to these statements?

A. (Responded in the negative.)

Q. That's not correct?

A. I didn't hear it, if it is.

Q. Let me ask you again then: what were his exact words when he said something about if I could name my execution?

A. He told me, he said, you know, Ron, I'd confess to these murders if you all would do one thing for me; if you all would let me pick the type of execution and the date and time

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of execution. I told him, I said, you need to start talking to your lawyers, Ed; you don't need to be telling me stuff like that.

Q. He didn't say he wanted to be shot by firing squad at midnight on Halloween night?

A. No, not to me, he didn't.

Q. Now, let's go back in time for just a moment. You understand that Ed Zagorski had been incarcerated in the Robertson County jail since May the 31st?

A. Uh-huh.

Q. That he had been incarcerated in that eight by eight foot special cell since May the 31st or as soon thereafter as it was completed. Do you remember if it was completed when he first came there?

A. I don't think it was.

Q. Do you know how long it was before he would have been moved into that cell?

A. It wouldn't have been long.

Q. A day or two, at most?

A. I can't say for sure, but I don't think it was long.

Q. Give or take a day from June the 1st, Ed Zagorski had been segregated from the rest of the population in the jail. Is that right?

A. Yes, sir.

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Q. In effect, he was in solitary confinement?

A. He was by himself.

Q. And he never left that cell for any purpose unless he was talking to his attorneys or unless he was going to the emergency room. Is that correct?

A. Or when he talked to me the second time.

Q. Where was it that you talked with him the second time?

A. The Lieutenant's office.

Q. How long was this conversation?

A. Probably – it was a good hour.

Q. Was he shackled during that conversation?

A. No

Q. He was not shackled at all; had no handcuffs on, no leg irons or anything?

A. No, not during the conversation.

Q. Was there anyone else present during this conversation?

A. No.

Q. Now, you realize that it had been several weeks since Mr. Zagorski had executed any sort of waiver?

A. Uh-huh.

Q. Are other statements occasionally taken in Lieutenant Wilson's office?

A. Yeah.

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Q. Are execution and waiver forms handy?

A. I don't think so.

Q. Not any at all?

A. I usually don't take statements down there. If I'm going to take a statement off of somebody, I'll take them to the office and take it.

Q. But you do know statements have been taken there?

A. Yes.

Q. Well, the gist of my question is: did you have a blank execution and waiver form there handy?

A. Huh-uh.

Q. When you went -- let me ask you: on July the 27th, where did that conversation occur?

A. That's the first one -- in the cell block.

Q. Did it occur in Zagorski's cell?

A. Yes, sir.

Q. So he did not leave his cell for that statement?

A. No. He was getting ready to come to court.

Q. Detective Perry, on July the 27th when you had that conversation with the defendant and the defendant was getting ready to come to court, isn't it true that Zagorski was taking medication that had been prescribed to him by Dr. Webster?

A. I don't know.

Q. Did you ever inquire?

A. About medication?

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Q. Correct.

A. No.

Q. You never did?

A. No.

Q. Were you aware of the fact that the defendant's condition, physical condition, was deteriorating while he was segregated from the rest of the jail population?

A. Most anybody's physical condition will deteriorate some after you get put in jail.

Q. Isn't it true that one of the reasons, if not one of the main reasons, that he spoke with you was because he was lonely?

A. I don't know. It might have been. I can't sit here and say yeah or no. It might have been.

Q. Don't you suspect that he was lonely? He had been locked up in this eight by eight foot cell since may the 31st?

A. Uh-huh.

Q. That the only people that he had talked to -- he talked with Assistant District Attorney Dee Gay on June the 1st. Is that correct?

MR. WHITLEY: Your Honor, I don't think Mr. Perry is qualified to answer that, since it does call for speculation.

THE COURT: I'm taking it as speculation because I realize that you are asking questions that he's really not

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qualified to give a medical opinion on.

MR. WILKS: Your Honor, we understand that he is not in a position to give a medical opinion. What we're asking, Your Honor, is lay testimony concerning the physical and mental well-being of another.

THE COURT: I believe that I would have to limit your questions to just what he could observe, his appearance and mannerisms.

MR. WILKS: Thank you, Your Honor.

Q. Detective Perry, when you talked with Mr. Zagorski on July the 27th and on August the 1st, isn't it true that his physical condition, as you observed it, was deteriorating? Had he not lost weight?

A. The 27th, I don't believe he had.

Q. Now, there's a very short time between July 27th and August the 1st.

A. I can't remember him losing any weight.

Q. Isn't it true that he had not been on a regular diet for a period of time and that he was receiving soft foods?

A. I don't have any idea.

Q. Isn't it true that he required the attention of a doctor to give him medication for his nerves during this period of time?

A. I know he went to the doctor a lot. I don't know

[p.82]

what for.

Q. Isn't it true that on at least one occasion when he was carried to the doctor, he was carried on a stretcher; he couldn't walk?

A. Yeah.

MR. WILKS: Your Honor, that's all the questions that I have at this time.

REDIRECT EXAMINATION

BY MR. WHITLEY:

Q. Detective Perry, the first conversation that you testified to was the 27th of July. That was the day of the preliminary hearing. Is that correct?

A. That's correct.

Q. Did Mr. Zagorski attend his preliminary hearing?

A. Yes, air.

Q. Did he consult with his attorneys, as far as you could see, during the course of that –

A. As far as I know, he did.

Q. Judge Guthrie held the preliminary hearing here in this very Court?

A. Yes, sir.

MR. WHITLEY: That's all.

THE COURT: That's all, Mr. Perry.

*** (WITNESS EXCUSED) ***

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MR. WHITLEY: Your Honor, I would like to call Sheriff Emery. His testimony will be very short.

TED EMERY was recalled and previously having been sworn, was examined and testified as follows:

REDIRECT EXAMINATION

BY MR. WHITLEY:

Q. Sheriff Emery, Mr. Zagorski was kept in a single man cell, was he not?

A. Yes, sir.

Q. And the purpose of that, or as Detective Perry testified to, was for security reasons?

A. Yes, sir.

Q. Are you aware of the so-called suicide attempt that Mr. Wilks has mentioned involving his medication?

A. Yes, sir.

Q. Would you tell the Judge what you know about that?

A. Well, that he had got some medication from other prisoners. There's a small crack -- just about that much room -- between the steel plate, and he had saved some of that up and took it all at once. The doctor said he couldn't tell if it was that serious or not, but Mr. Zagorski acted like it was. The doctor, himself, couldn't say whether he was really in serious shape on it or not.

Q. Do you know whether this incident was before or

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after August 1st of 1983?

A. No, sir. I don't have the exact date that took place with me. I could get it from the jail records, but I don't have it with me.

Q. The second so-called suicide attempt involving the electrical shock, tell the Judge what you know about that.

A. Well, we found -- our first report from him was that he took a shower and got out and it shorted out and shocked him.

Q. What shorted out?

A. The fan that was in the cell area. It was an electrical appliance plug up. I believe it was a fan. After we made an investigation on it, we found that apparently he had got ahold of a coat hanger, and we found the rig that was made to where it could be -- burn the ends of the plug to make it appear -- the ends of the plug weren't burned, rather than a short in the wire anywhere, where he had shorted it out with a coat hanger and done the damage to the fan, and then he got in the shower, and then came out and fell down like he was shocked. It was obvious that it was an escape attempt.

MR. WHITLEY: That's all I have, Your Honor.

CROSS EXAMINATION

BY MR. WILKS:

Q. Sheriff Emery, I believe you described the

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defendant as a high security risk. Is that correct?

A. Yes, sir.

Q. Isn't it true that no one but Ed Zagorski has ever been in that eight by eight foot cell at the jail?

A. It was built --

Q. Just for him?

A. It was built so we would have a security cell. We're presently in a Federal suit, and we didn't have any isolation cell; therefore, we cannot have disciplinary hearings or anything on any prisoners. We had started on it. It was already a cell isolated by separate doors, so we decided we'd just put the steel around it and make one, and we did need it, in particular, at that time.

Q. So he's the only man that's ever stayed in that cell?

A. No, we've had others in there since he's been gone.

Q. Since he's left?

A. Yes, sir.

Q. And, basically, he was in solitary confinement, wasn't he?

A. Well, yes, he was the only one in there.

Q. He never received any sunshine, except the day that he came up here to the preliminary hearing while he was incarcerated?

A. Yes, sir.

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Q. Never got any exercise. Is that correct?

A. Correct.

Q. He did have to go to the doctor on some occasions?

A. Yes.

Q. And he did receive medication?

A. Yes, sir.

Q. And that medication was, in fact, either for his nerves or for headache?

A. I believe they said it was something for his nerves.

Q. On the occasion where he overdosed, isn't it true that the jailer came up and peeped through the little peep-hole on the steel door, looking into Ed Zagorski's cell, and punched him with a rod through that peep-hole and couldn't rouse him. Isn't that true?

A. I don't know exactly how he woke him up, but he become alarmed and got help to open the door and check on him. I don't know how it came about.

Q. Isn't it true that they had to take him to the emergency room and pump his stomach?

A. They did do that, as I recall.

Q. And another inmate there in the jail was hollering or urging the authorities there to get him up, that he had taken downers and that he would die?

A. Yeah, the one that gave him the stuff was the one

[p.87]

that was doing the hollering.

Q. And said he would die?

A. Yeah.

Q. That his respiratory system would stop?

A. Yes, sir. The pills were laying out right beside him on the bed, where it would be easy to identify them and see what he had taken.

Q. And Mr. Zagorski was also receiving medication from the county physician, though. Isn't that correct?

A. Yes, he has a prescription of his own.

Q. In fact, on August the 1st -- on the alleged suicide attempt involving the electrocution, isn't it a fact that Zagorski was shocked? The wires were shorted?

A. Yes, they were shorted.

Q. And he was shocked?

A. We don't know that.

Q. He was taken to the hospital?

A. No evidence of injury. The doctor said he could not testify that he was injured. If a man complains of his back hurting and no visible breaks or anything --

Q. Isn't it true he was carried from the jail on a --

A. He was carried from the jail --

Q. -- on a board?

A. -- on a board, all right.

Q. By a trained technician?

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A. Yes, sir.

MR. WILKS: No further questions.

MR. WHITLEY: No further questions.

*** (WITNESS EXCUSED) ***

MR. WHITLEY: With the Court's indulgence, I would like to ask Detective Perry one question that wasn't asked of him that I think might clear something up.

THE COURT: All right.

RONNIE PERRY was recalled and previously having been sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WHITLEY:

Q. Do you know for an absolute fact whether these two suicide attempts, in quotes, occurred before or after August the 1st, 1983?

A. They occurred after.

Q. You know that for sure?

A. Yes, sir.

MR. WHITLEY: That's all I have, Your Honor.

*** (WITNESS EXCUSED) ***

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THE COURT: We'll take a lunch break.

(Whereupon, lunch recess was taken and the following proceedings were had:)

THE COURT: Are we ready to proceed?

MR. WHITLEY: The State has no more witnesses on this one point that has been raised, Your Honor.

THE COURT: We'll go to the next one.

MR. WALTON: We have no further witnesses on that motion.

THE COURT: I mean the next statement. Do you have more statements?

MR. WILKS: No, sir. As far as we know, that covers them all.

THE COURT: What motions do we have left?

MR. WHITLEY: Motion to suppress evidence that was found in Ohio, and the photographs.

THE COURT: I'll rule on the statements, if you would like for me to. The first one was the May 27 statement, which I understand is not going to be used. The next one is the June the 1st statement, which was taken in jail. Am I on the track?

MR. WILKS: Yes, sir.

THE COURT: On that statement I overrule the

* * *

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MR. WILKS (cont.): Perry. Other than that, he had no contact with the outside world. No walks in the sunshine. No other individual to talk to. There was a steel wall that separated him from the rest of the prison population in the jail. There was a tiny hole, as I understand it, where there was some medication that was stuck through the wall. That was it.

As a result of his physical condition, Your Honor -- as a result of that condition and that mental condition, he was in no situation to make any sort of statement that was voluntary in the truest sense of the word. We believe, Your Honor, if these two statements are allowed to be introduced into evidence and to reach twelve on this jury, then he will not receive a fair trial, and that is ultimately what we're seeking, is a fair trial.

THE COURT: You are correct; that is what we ultimately want to reach, but both the defense attorneys are knowledgeable enough to know that my ruling would depend on the evidence presented, and the evidence presented hasn't been sufficient to show that the defendant was not aware at the time. He had enough time after making the request to change his mind. There were about five days elapsed there. Furthermore, for whatever it might be worth, he didn't make any request; say; I'll do so and so if you'll let me out of here. How much bearing that has on it, I'm not sure. But by the proof that I have presented to me, there is nothing to

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indicate that there was any force or coercion in making the statements, and since the appearance on his preliminary hearing occurred about the same time, I feel that there's no indication strong enough for the Court to do anything but overrule your motions.

I believe that does bring us to another statement? Do we have another statement later on in August?

MR. WHITLEY: No, Your Honor, that's all we have.

THE COURT: I will overrule your motions on that.

MR. WILKS: Your Honor, do you have any preference as to which motion we take up next?

THE COURT: No, sir, just whichever you'd rather.

MR. WILKS: Does the State have a preference?

MR. WHITLEY: Could we take up the motion to suppress since we have Mr. Diamond here? We kind of need to get him out of the way while he's here.

THE COURT: We'll take that up.

MR. WILKS: Your Honor, this is a motion considerably down our list. This is a motion, Your Honor, to suppress all items derived from either Steve Boggs or Phillip Boggs or reference thereto in the trial of this cause. The reasons for our requesting this of the Court is as follows: there were several items, Your Honor, that were seized or taken from the property of Steve or Phillip Boggs in Ohio. This is property, Your Honor, that belonged to the defendant,

* * *

IN THE CRIMINAL COURT OF ROBERTSON COUNTY, TENNESSEE

NO. 6052

[Dated August 1, 1996]

EDMUND GEORGE ZAGORSKI	)
	)
VS .	)
	)
STATE OF TENNESSEE	)
	)

TRANSCRIPT OF THE PROCEEDINGS

VOLUME I OF III VOLUMES

THE HONORABLE JANE W. WHEATCRAFT
PRESIDING

APPEARANCES:

FOR THE STATE:

MR. LAWRENCE RAY WHITLEY
DISTRICT ATTORNEY GENERAL
MR. DEE GAY
ASSISTANT DISTRICT ATTORNEY GENERAL
MR. GLENN PRUDEN
ASSISTANT STATE ATTORNEY GENERAL
FOR THE PETITIONER:

MR. SAMUEL L. FELKER
MR. JOSEPH F. WELBORN, III
BASS, BERRY & SIMS

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things to pin down what we're looking at, the trial record is so voluminous.

THE COURT: It is so long I don't think it is reasonable to believe they would read the whole thing. I think this is a good way to do it, but it will all go up.

MR. GAY: Judge, while we're talking about it, now I think it would be a good time to make the entire trial transcript--I don't know if you want to do it now or at the end of the hearing. We need to be sure that is made exhibit-- the trial transcript, all the motions and hearings. We need to make that exhibit.

THE COURT: Is that all right to do it at the end?

MR. FELKER: That is fine, Your Honor.

MR. GAY: I don't want to forget.

BY MR. GAY:

Q Now, getting back to the motion to suppress, you or Mr. Wilks had done a lot of research about the conditions of the jail and his medical condition already, and you were concerned about that, and brought that out at the motion to suppress. Do you recall that?

A General, I remember we had the hearing. It has been near 12 years ago. I don't recall what issues we addressed, really.

Q I believe Mr. Wilks brought out the jail conditions, his medical condition, and at least two suicide attempts by

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Mr. Zagorski, and questioned Sheriff Emery and questioned Detective Perry about that. Do you recall those questions or that line of questioning?

A I vaguely do, but not the specifics.

Q You were asked certain questions if you still have those records there, Judge, from the hospital up in Campbell County, if you'll turn to the date, and you were asked certain things from the records. The notes on the back on page--

A All I have are Jesse Holman Jones' records.

MR. GAY: Could we have Exhibit 14?

BY MR. GAY:

Q On page 6123, date of 5/28/83, the date after the first statement--

A Okay.

Q --there at 11:45, in the left-hand column, states, "The pain has decreased. 1 p.m., resting in bed and watching TV." Do you see that?

A I see it.

Q And then over on the next column, looks like at 7:30 p.m., about the second paragraph "Patient talkative and cooperative." Do you see that entry there?

A Uh-huh.

Q "Circulation appears adequate, "and then looks like, "11:00, patient slept very little, watching TV, and talking with guards"?

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A Okay.

Q And the entry on--doesn't have a page number--6187.

A Okay.

Q There, looks like 3-11, in the left-hand column, looks like it says he's alert, cheerful, watching TV. Down there about 3 dash 11?

A Okay.

Q Did you know, Judge Walton, the extent of the injuries he received in the shoot-out? Do you recall?

A He had an injury. He was shot in the shoulder, and he had a bullet which grazed his skull.

Q Was it his shoulder or arm, through here?

A Could have been the arm.

Q And there was no--was there any surgery to remove the bullet in his arm? Do you recall that?

A I really don't recall.

Q The head wound was a graze wound?

A Right.

Q The medical records of Jesse Holman Jones, if you would look at those.

A Okay.

Q On page 6002, the date there of 7/16/83, in the middle of the page, physical exam and treatment, do you see there in the middle of the page, "Awake. Oriented. Responds appropriately to questions. Memory intact"?

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A Yes

Q The diagnosis, "Valium excess"?

A Okay.

Q Then, Judge, on page 6004, date 7/24/83, there the first paragraph states, "Where, when, and how illness, describe. Talks about a migraine. He states that it is severe, but is able to converse easily, and light doesn't bother him"?

A Okay.

Q Judge, that is all I'm going to ask about the records. Were you aware of every time he was taken to Jesse Holman Jones Hospital?

A He was taken immediately back, and he did not require any time to stay down there. That is my recollection.

Q And when you talked with Mr. Zagorski in preparing for this particular motion, the motion to suppress, did he ever say to you or Mr. Wilks he was out of his head when he gave those statements?

A I don't recall any statement of that nature.

Q He didn't complain about that to you at all?

A Not that I remember.

Q And also, Judge, in this case you and Mr. Wilks filed some other motions, ex parte motions. What motions--ex parte motions were filed?

A I remember meeting with Judge Kelly in his office.

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case. You went to the trout farm, you went to Ohio, you learned about his background in New Orleans from the sheriff?

A I can't say today whether I remembered that or not, to be honest about it.

Q Then you called Michigan against the desire of Mr. Zagorski. You talked to the mother, and did she want to come down?

A I honestly do not remember for sure. The best recollection that I have, and I could be wrong, was that they were folks of modest means. I don't know what the situation was with regard to her ability to get here. That is the best I can remember.

Q And you talked to all the witnesses that was listed on the indictment. You knew who we were going to call?

A Yes, sir.

Q So you were very familiar with what happened in this case. On the motion to suppress, you handled that in court, did you not?

A I believe that's right. I probably would like to go back and look at that motion.

Q There were four statements, you recall, and we agreed we would introduce the first statement from

Campbell County, and you knew--let me ask again. Did you not have any records, medical records, or do you remember having them?

A As I sit here today, I'm not sure. I just can't

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remember with enough assurance to say.

Q Well, you had talked to him, and you knew about the conditions in the jail. You knew about the medications he was taking and reported suicide attempts. Do you remember bringing all that up during the cross-examination of Sheriff Emery and Mr. Perry?

A If I could review the transcript or the motion or something, I would be a lot--

Q Does that refresh your memory?

A Yes. I have hurriedly flipped through pages 27 through 88.

Q What did you do in preparation for this motion?

A I don't have a specific recollection as I sit here today. It was on the docket.

Q You did some investigation?

A I did some research.

Q So you spent some time looking in the background?

A Yes.

Q You mentioned the conditions of the jail, his medical condition, and two reported, quote, "suicide attempts," unquote. You brought all that out in cross-examination. Do you feel there is anything else you could have done in that area?

A Well, with the benefit of 20/20 hindsight, age, and experience, I might have been a more aggressive

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cross-examiner. I might have pushed the witnesses harder, elicited something new or different.

Q But you felt you had all the information you needed?

A I did the best I knew how at the time.

Q Now, did Mr. Zagorski ever tell you that he was out of his head when he gave these statements to the officers? Did he ever tell you he didn't know what he was doing?

A It has been so long I don't really recall. Most folks wouldn't have done it that way, anyway. I mean, this was a gentleman--the facts were that he had been involved in a matter where he got hurt, where he had been shot and taken to the hospital and given the medication. He was in solitary confinement in our jail, in a cell that was built for him.

Q My question was--we're aware of all that. You brought that out. Did he ever specifically tell you when

he gave each of these three statements that were introduced into evidence he was out of his head and didn't know what he was doing?

A I think he did not understand the ramifications of making statements. One of our concerns was one of the statements was elicited from him on the very day counsel was appointed, and he was questioned, if I recall correctly, at the jail, and I think you were present for that questioning. We were very concerned about the fact that whether it happened just after we were appointed or just before that we weren't

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present for that questioning, and we weren't able to advise him of his right to remain silent.

Q I understand all that, and it was all litigated and a valid issue. My question was: Did he ever tell you he was out of his head or didn't know what he was saying when he gave the statements? That is what I'm asking.

A I don't remember as I sit here today him telling me he was out of his head.

MR. FELKER: Could I ask the witness be allowed to finish?

THE COURT: Go ahead.

A I don't remember. To specifically answer your question, I don't remember him telling me was out of his head.

Q Or didn't understand what he was saying or didn't understand what he was asked. That is all I'm asking.

A I understand. My answer is that my recollection is he asked for counsel and didn't get it, and I don't remember any more after that.

Q You heard Judge Walton testify he doesn't recall Mr. Zagorski ever making any statement that he was out of his head when he gave these statements?

A No, sir. That is right.

Q Did you talk to Mr. Zagorski to see if he had any witnesses that he wanted to call?

A At?

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Q Trial.

A We had numerous conversations with Mr. Zagorski and communicated back and forth.

Q Did he want to call any witnesses?

A I don't recall him saying do this, do that, do this, do that.

Q Did he tell you any witnesses to call or tell you of anybody he thought might be good witnesses?

A Not that I can recall as I sit here today.

Q What version did he give you as to what happened?

MR. FELKER: Your Honor, I object to that. This is one area of attorney client privilege I don't see any relevance in terms of what we raised in the case. I object to his having to answer specifically what version of the event the defendant gave to him. The concern here is that in the event that the sentence is set aside and the conviction is set aside is that Mr. Zagorski will be retried and this will be used against him at a future trial. I don't see that it is necessary to directly rebut anything we offered.

MR. GAY: I would like to respond. It goes to the crux of the case. They alleged incompetent counsel at the trial level and sentence level. Also, they introduced evidence from letters about other people being involved or possibly leads, suspects, and I think it is very appropriate in light of all those things that have been brought up and

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