CAPITAL CASE
No. 15-_____

IN THE

Supreme Court of the United States

DONNIE JOHNSON,

Petitioner,

v.

WAYNE CARPENTER, WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court held that a federal habeas petitioner who has procedurally defaulted a claim by failing to raise it in state court may not excuse that default by pointing to negligence of postconviction counsel. But *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), carved out an important exception to that rule, allowing petitioners to raise an ineffective-assistance-of-trial-counsel (IATC) claim for the first time in federal court if that claim was defaulted through ineffective assistance of postconviction counsel in state court.

In the aftermath of those decisions, many petitioners—including many capital petitioners—filed motions under Federal Rule of Civil Procedure 60(b)(6), asking the courts to reopen judgments premised on *Coleman*'s now-rejected rule. There is an acknowledged disagreement in the circuits regarding the rule for deciding those motions. Three circuits have held that every such motion must be rejected, adopting a *per se* rule against granting Rule 60(b)(6) motions premised on *Martinez*. By contrast, three circuits hold that Rule 60(b)(6) motions premised on *Martinez* may be granted in appropriate circumstances.

The questions presented are:

1. Must a court categorically deny a Rule 60(b)(6) motion premised on the change in decisional law produced by *Martinez v. Ryan*?

2. Should the Sixth Circuit's decision to deny even a Certificate of Appealability in this case be summarily reversed?

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INTRODUCTION

Under *Coleman v. Thompson*, 501 U.S. 722 (1991), ineffective assistance on the part of a prisoner's postconviction attorney could never qualify as cause to excuse a procedural default. For example, if a capital petitioner's counsel performed no investigation whatsoever at the sentencing stage, and his state habeas counsel failed to raise an ineffective assistance of trial counsel (IATC) claim in state court, that claim could never be raised in federal court, no matter how meritorious.

That is precisely what happened to petitioner Donnie Johnson. Johnson's trial counsel learned the state's capital sentencing criteria when he read them in court. And he failed to even investigate—let alone present to the jury—a childhood full of shocking physical and sexual abuse. After a jury, ignorant of these facts, sentenced Johnson to death, Johnson's postconviction counsel then failed to develop and preserve this error in state habeas review. When this issue was finally developed in Johnson's federal habeas petition, the district court acknowledged his "potentially meritorious" claims of ineffective assistance at sentencing. Pet. App. 93a n.142. But despite being "deeply troubled" by its inability to consider these claims, the court held that *Coleman* closed the door on Johnson's first chance to present them for review through competent counsel. *Id.*

Recognizing the unfairness of such situations, this Court carved out an exception to *Coleman*'s rule in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). *Martinez* held that having no counsel or ineffective counsel at the initial postconviction proceeding could excuse procedural default of substantial IATC claims.

Otherwise, petitioners would never receive the opportunity to have their IATC claims decided on the merits—a "particular concern because the right to effective trial counsel is a bedrock principle in this Nation's justice system." *Martinez*, 132 S. Ct. at 1312. Although this rule initially covered only those states that require IATC claims to be raised in initial collateral review proceedings, *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), made clear that it also applies in states that make it "virtually impossible" for IATC claims to be presented on direct review.

By the time *Martinez* and *Trevino* were decided, many capital petitioners found themselves in Johnson's position—with serious IATC claims that had never been heard because they were defaulted by absent or ineffective state habeas counsel and foreclosed by *Coleman*. Like Johnson, these petitioners filed motions under Federal Rule of Civil Procedure Rule 60(b)(6) seeking to reopen their habeas judgments in light of *Martinez* and other equitable considerations.

This development has led to an acknowledged conflict among the circuits about whether petitioners can ever win a Rule 60(b)(6) motion premised on *Martinez*'s change in law, or whether every such petition must necessarily be denied. Four circuits (the Fourth, Fifth, Sixth, and Eleventh) have held that no petitioner like Johnson can ever prevail; three circuits (the Third, Seventh, and Ninth) have correctly held that Rule 60(b)(6) motions premised on *Martinez*—like every other Rule 60(b)(6) motion—may *sometimes* be granted, when the equities of extraordinary cases so require.

The question presented is as recurring as it is important: the Court has received four petitions raising the circuit conflict in the last three months.[1] And Johnson's case aptly illustrates what is at stake: his district court acknowledged the strength of Johnson's IATC claim regarding the lack of investigation at sentencing—a claim that has since been validated unanimously by this Court, and would prevail, if it could only be considered. *See Porter v. McCollum*, 558 U.S. 30 (2009). Indeed, the district court expressly said that it was "deeply troubled" by applying the result that *Coleman* once required, but *Martinez* and *Trevino* now reject.

This Court should take this opportunity to clarify that Rule 60(b)(6) empowers courts to "vacate judgments *whenever* such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615 (1949) (emphasis added). Because *Martinez*'s holding was grounded in "bedrock principle[s]" of justice, 132 S. Ct. at 1317, the change in law it produced should unquestionably be an avenue for petitioners to at least seek Rule 60(b)(6) relief—and for courts to grant it if (and only if) the case-specific equities counsel in favor of that result. Indeed, *Martinez* held that someone twice denied effective assistance of counsel must be able to excuse a procedural default "to ensure that proper consideration was given to a substantial claim." *Id.* at 1318. Categorically denying Rule 60(b)(6)

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[1] In addition to this petition, see also No. 15-7988, *Hamilton v. Jones*; No. 15- 8049, *Buck v. Stephens*; No. 15-7828, *Wright v. Westbrooks*.

petitioners this basic opportunity would essentially take away with one hand what *Martinez* gave with the other, especially in the capital cases where it should matter most.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Donnie Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit is reproduced in Appendix A (Pet. App. 1a).

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2015. Pet. App. 1a. The court of appeals denied a timely petition for rehearing on October 28, 2015. Pet. App. 13a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents a recurring question upon which the courts of appeals are in open conflict: whether a Rule 60(b)(6) motion premised on *Martinez v. Ryan* as an intervening decision of law must be categorically denied, or may sometimes be granted in light of the equities presented.

1. Johnson's wife, Connie, was murdered in 1984. *State v. Johnson*, 743 S.W.2d 154, 155 (Tenn. 1987). As the Tennessee Supreme Court would later note, "from [the] record, there is no question but that [either Johnson] or one Ronnie McCoy murdered her." *Id.* at 155. McCoy, the other suspect in the

case, was the State's star witness, and testified that Johnson had killed her. Pet. App. 17a-19a. Johnson was ultimately convicted of capital murder. Pet. App. 16a.

Johnson's representation was questionable from the start. His attorneys had *represented McCoy* in plea negotiations on unrelated state charges only a month earlier, but never told Johnson or the court. Pet. App. 49a-50a. And while the State's case turned on McCoy's testimony, Johnson's lawyers never asked him about any deal he struck with the government, or how he somehow avoided even being charged for his admitted participation in Connie's murder. Pet. App. 69a.

Johnson's representation at sentencing was even worse. Tennessee law permitted the death penalty for first-degree murder if certain aggravating factors outweighed any mitigating factors. *See* Tenn. Code Ann. § 39-13-204 (formerly § 39-2-203). But Johnson's lead attorney was ignorant of the particulars of this scheme: he reviewed Tennessee's capital sentencing procedures for the first time while *sitting in the courtroom*. Pet. App. 85a. As this Court has since unanimously clarified, Johnson's attorney was duty bound to perform a meaningful investigation of Johnson's background to present a mitigation case. *See Porter,* 558 U.S. at 39; *see also Rompilla v. Beard*, 545 U.S. 374, 383-84 (2005). But he made no investigation into Johnson's history of abuse as a child. Pet. App. 97a-98a. Such an investigation would have uncovered that Johnson had suffered numerous head injuries, had been regularly beaten by his parents, had been repeatedly sexually assaulted by his uncle from ages six to eight,

and had been sexually assaulted by inmates and beaten by guards at reform school. Pet. App. 90a-91a; *see also* Pet. App. 102a-109a (affidavits of Johnson and two relatives).

Having failed to investigate Johnson's devastating childhood, Johnson's counsel put on essentially no mitigation case. Pet. App. 80a-81a. He called only two witnesses: a priest to testify to Johnson's religiosity, and Johnson himself, who simply denied—to the jury that had just convicted him—that he was guilty. *Id.* With such scant mitigating evidence before it, the jury recommended the death penalty. *See* Pet. App. 1a.

Johnson's luck with lawyers didn't improve in state habeas. A frequently shifting cast of appointed attorneys raised a number of claims, Pet. App. 24a-29a & nn. 7, 9-11, and while they commissioned an investigation of his background, they never even called the investigator to testify about her findings, nor presented any evidence of Johnson's brutal upbringing. Pet. App. 90a-91a, 93a n.142. In fact, they never questioned Johnson's trial counsel about the odd strategic decision to have Johnson testify at sentencing only by denying his guilt. Pet. App. 98a n.145.

Deprived of this evidence, the state habeas court found Johnson's trial attorneys had provided adequate counsel, and denied relief. Pet. App. 93a. The Tennessee Court of Criminal Appeals affirmed, Pet. App. 27a, and the Tennessee Supreme Court, after admonishing Johnson's counsel for apparently abandoning him, assigned new counsel and then denied permission to appeal. Pet. App. 28a, 29a.

2. In federal habeas, Johnson's new attorneys presented—for the first time—the critical evidence of Johnson's abusive upbringing that Johnson's jury had never heard. They argued that Johnson's trial attorneys were ineffective for failing to uncover and present this mitigation case. Pet. App. 90a-91a. The State argued that these claims were procedurally defaulted, and that the federal habeas court could not address them because Johnson's postconviction counsel had not raised them in state habeas. Pet. App. 91a-92a.

As explained above, *supra* p.1, the State was right: At the time, *Coleman* prevented Johnson from raising IATC for the first time in federal court, even if that claim had only been defaulted through ineffective assistance of state postconviction counsel. So recognizing, the district court enforced *Coleman* and held that it could not reach Johnson's IATC arguments. Pet. App. 91a-92a.

In so doing, however, the district court went out of its way to flag the serious inadequacy of Johnson's representation in the state courts, and the plausibility of his underlying IAC claims. It noted that Johnson presented "what appears to be valid mitigating evidence" that his lawyer never even investigated—let alone showed to the jury. Pet. App. 93a n.142. And the court was "dismay[ed] at the scant attention" paid by postconviction counsel to this "potentially meritorious issue[]." *Id.* But, although it "admit[ted] to being deeply troubled by its inability to consider" the evidence, the district court held that a claim based on this evidence was procedurally defaulted, and further concluded that there would be "no useful purpose" to inquiring into the performance

of postconviction counsel because, under *Coleman*, "negligence of postconviction counsel would not excuse a procedural default."[2] *Id.* The district court thus denied the petition, Pet. App. 101a, and the Sixth Circuit affirmed, *see* Pet. App. 2a.

3. After *Martinez* excepted certain IATC claims from *Coleman*'s bar, Johnson sought to reopen his federal habeas judgment under Rule 60(b)(6). To be clear, *Martinez* removed the very procedural barrier that so "deeply troubled" Johnson's district court. But Johnson's motion was assigned to a different judge, who rejected it. The court first wrongly concluded that (because *Trevino* had not yet been decided) *Martinez* likely did not apply in Tennessee at all. Pet. App. 8a-9a. It then held that, in any event, *Martinez* "does not embody the type of extraordinary or special circumstance that warrants relief under Rule 60(b)(6)." Pet. App. 10a. The district court also denied a Certificate of Appealability (COA), because "jurists of reason would not disagree that [Johnson] is not entitled to relief from judgment." Pet. App. 11a.

Shortly thereafter, this Court issued its opinion in *Trevino*, making clear that *Martinez* did apply to states (like Tennessee[3]) where the procedural

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[2] The district court likewise noted the relative strength of—and inattention paid to—a claim of IATC respecting the conflict of interest in Johnson's lawyers having recently represented the only other suspect in the case. Pet. App. 46a, 52a.

[3] *See Sutton v. Carpenter*, 745 F.3d 787, 795-96 (6th Cir. 2014) (holding that *Trevino* extends *Martinez* to Tennessee).

framework "makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity" to raise an IATC claim before state habeas. 133 S. Ct. at 1921. At the time of that decision, this Court granted, vacated, and remanded two cases in which the petitioner, like Johnson, had raised a *Martinez* claim in a Rule 60(b)(6) motion.[4] *Haynes v. Thaler*, 133 S.Ct. 2764 (2013) (mem.); *Balentine v. Thaler*, 133 S.Ct. 2763 (2013) (mem.). In one, Texas had expressly argued that *Martinez* could never form the basis for 60(b)(6) relief, and so the Court should affirm (or deny certiorari) whether *Martinez* applied in Texas or not. Brief In Opposition, *Haynes v. Thaler*, 133 S. Ct. 2764, 2012 WL 5083409 at *19-20. But this Court apparently rejected this argument and vacated Haynes's adverse judgment nonetheless.

On the same day this Court recognized that *Martinez* and *Trevino* could affect these cases in a Rule 60(b)(6) posture, Johnson sought a COA from the Sixth Circuit to make that very argument. Johnson of course argued that the district court had erred in failing to apply *Martinez* to Tennessee (as *Trevino* had held). But he also emphasized that, as the Ninth Circuit had recently held, his Rule 60(b)(6) motion premised on *Martinez* had to be evaluated on its overall equities; that the district court had thus

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[4] In one of these cases, *Haynes*, this Court had also granted a stay of execution pending *Trevino*. Two Justices wrote opinions regarding the grant of stay; neither suggested that Rule 60(b)(6) relief was categorically unavailable, and the Court's decision to grant a stay (and then, later, to vacate the decision below) demonstrates the exact opposite. *See* 133 S. Ct. 639, 639 (2012) (Sotomayor, J.); *id.* (Scalia, J., dissenting).

erred in categorically denying it; and that Johnson was entitled to full briefing on how his case-specific factors should be weighed in assessing his plea for Rule 60(b) relief. *See Lopez v. Ryan*, 678 F.3d 1131, 1135-37 (9th Cir. 2012) (so holding).

The Sixth Circuit denied a COA, concluding that "reasonable jurists could [not] debate whether … the petition should have been resolved in a different manner," *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), because *Martinez* and *Trevino* did not constitute extraordinary circumstances warranting 60(b)(6) relief. Pet. App. 3a (citing circuit precedent). In so doing, the court refused to consider any of the equities offered by Johnson, or how Johnson's case might differ from other Rule 60(b)(6) petitioners'. *Id*. Indeed, in denying even a COA, the court necessarily held that jurists cannot reasonably debate the equities of such a Rule 60(b)(6) petition, and that there was accordingly no need to provide a capital petitioner like Johnson with a chance to brief the matter.

Johnson petitioned for rehearing en banc, arguing that the panel's decision conflicted with decisions in other circuits regarding whether Rule 60(b)(6) motions premised on *Martinez* can ever be granted. *See* Pet. App. 13a. He explained that while the Sixth Circuit categorically denies such motions—as evidenced by its refusal even to grant a COA in this case—other circuits recognize that such a motion requires a balancing of case-specific equities, including a case's capital nature, the substantiality of the underlying IATC claim, and the importance of *Martinez*'s change in law. Although at least one judge called for a vote on rehearing, "less than a

majority" of the judges voted in favor, and rehearing was denied. Pet. App. 13a.[5]

[5] The Sixth Circuit also granted a stay of the mandate pending Johnson's petition for certiorari, thus at least recognizing that Johnson's case presented a "substantial question," *see* Fed. R. App. P. 41(d)(2)(A).

REASONS FOR GRANTING THE WRIT

As evidenced by its COA denial below, the Sixth Circuit stands with the Fourth, Fifth, and Eleventh Circuits in holding that Rule 60(b)(6) motions premised on *Martinez*'s intervening change in law must be categorically denied. This categorical rule is incorrect and runs counter to the approach adopted by the Third, Seventh, and Ninth Circuits, which hold that Rule 60(b)(6) petitioners relying on *Martinez* must at least be afforded the *possibility* of relief. Parties on both sides of this manifest split are aggrieved, including states that face the more defendant-favoring rule in their home circuits. *See* Petition at 9, *Wetzel v. Cox*, 2014 WL 5841701, No. 14-531 (Nov. 5, 2014) (arguing that this Court should grant certiorari and impose the Sixth Circuit's rule rather than the Third Circuit's). Given the importance of this issue both to capital habeas petitioners and the states, this division should not endure, and this case presents an ideal vehicle for the Court to resolve it.

I. There Is An Acknowledged, Entrenched, And Untenable Circuit Split On The Precise Question Presented.

Rule 60(b) allows courts to grant relief from a final judgment for five enumerated reasons, *see* Fed. R. Civ. P. 60(b)(1)-(5), as well as for "any other reason that justifies relief," *id.* 60(b)(6). The latter form of relief, as this Court clarified in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), is reserved for "extraordinary circumstances." *Id.* at 536. At the same time, this Court has also made clear that Rule 60(b)(6) must be at least *available* in every case to "accomplish justice" where such extraordinary case-specific circumstances

are present. *Klapprott*, 335 U.S. at 615. Accordingly, important, intervening changes in decisional law (like *Martinez*) may form a basis for Rule 60(b)(6) relief in conjunction with critical, case-specific equities. The circuit conflict here results from the fact that three circuits have recognized this fundamental tenet of Rule 60 jurisprudence, and four have rejected it—holding, incorrectly, that no Rule 60(b)(6) motion premised on *Martinez* can ever be granted.

This conflict is widely acknowledged. The Seventh Circuit, for example, has stated that it "agree[s] with the Third Circuit's approach in *Cox*, in which it rejected the absolute position that the Fifth Circuit's *Adams* decision may have reflected, to the effect that intervening changes in the law *never* can support relief under rule 60(b)(6)." *Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015) (emphasis in original). The Eleventh Circuit has likewise recognized that "[t]he Third Circuit has disagreed" with its rule in these cases, while the Third Circuit has expressly said that the Fifth Circuit's rule "does not square with [its] approach." *Hamilton v. Sec'y*, 793 F.3d 1261, 1266 (11th Cir. 2015); *Cox v. Horn*, 757 F.3d 113, 121-22 (3d Cir. 2014). This is, in short, an obvious and well-recognized split that the circuits have precisely framed. It is ready for—and requires—this Court's immediate resolution.

A. The Circuits Are Divided Four-to-Three.

1. Four circuits have incorrectly held that a 60(b)(6) motion premised on *Martinez* as an intervening decision of law must be automatically denied. These courts hold that, under *Gonzalez*, *Martinez*'s change in decisional law is insufficient to

reopen a judgment even if other equitable considerations relevant to particular cases strongly recommend relief. Thus, in these circuits, 60(b)(6) petitioners relying on *Martinez* can simply never prevail.

The Fifth Circuit was the first to adopt this mistaken categorical approach. In *Adams v. Thaler*, 679 F.3d 312 (5th Cir. 2012), a death-row petitioner filed a 60(b)(6) motion, arguing that *Martinez*'s change, combined with the capital nature of his case and the merits of his underlying IATC claims, constituted "extraordinary circumstances" justifying reopening of judgment. *Id.* at 319. The Fifth Circuit held that the district court abused its discretion in granting even a stay of execution pending the resolution of the motion, stating that "[a] change in decisional law after entry of judgment does not constitute exceptional circumstances." *Id.*

Relying on *Gonzalez*, the Fifth Circuit explained that this *per se* rule applies with full force in the habeas context and therefore to *Martinez*'s jurisprudential shift: "*Martinez*, which creates a narrow exception to *Coleman*'s holding regarding cause to excuse procedural default, does not constitute an 'extraordinary circumstance' under Supreme Court and our precedent to warrant Rule 60(b)(6) relief." *Id.* at 320 (citing *Gonzalez*, 545 U.S. at 536). The Fifth Circuit thus refused to balance the equities, reasoning that because petitioner premised his motion on *Martinez*'s change in law, it was "without merit" regardless of any other equitable considerations. *Id.*

Since *Adams*, the Fifth Circuit has repeatedly reaffirmed its categorical approach to 60(b)(6)

motions premised on *Martinez*. For example, in *In re Paredes*, 587 Fed. Appx. 805 (5th Cir. 2014), it denied a COA and stay of execution to a death-row petitioner who filed a 60(b)(6) motion premised on *Martinez*, reasoning that "[u]nder our precedents, changes in decisional law … do not constitute the 'extraordinary circumstances' required for granting Rule 60(b)(6) relief." *Id.* at 825. And in *Hall v. Stephens*, 579 Fed. Appx. 282 (5th Cir. 2014), it again denied a COA in identical circumstances, stating that "[w]e have already rejected the theory that [*Martinez* and *Trevino*] constituted a kind of 'extraordinary circumstance' that warrants relief under Rule 60(b)(6)." *Id.* at 283. As in *Adams*, the Fifth Circuit refused in each of these cases to consider any individual equities presented by the petitioners—and it is, of course, only this kind of categorical bar that permits it to deny a COA in these cases and deprive petitioners of even the right to brief these questions.

The Eleventh Circuit has also adopted this erroneous categorical approach. In *Arthur v. Thomas*, 739 F.3d 611 (11th Cir. 2014), it interpreted *Gonzalez* to hold that "a change in decisional law is insufficient to create the 'extraordinary circumstance' necessary to invoke Rule 60(b)(6)." *Id.* at 631 (citing *Gonzalez*, 545 U.S. at 535-38). As a result, it found that *Martinez* categorically could not form the basis for 60(b)(6) relief. *Id.* It thus refused to account for "other factors beyond [the] change in decisional law," such as the petitioner's death sentence and the fact that no court had considered his IATC claims on the merits. *Id.* at 633.

The Eleventh Circuit has followed *Arthur* since, and—like the Fifth Circuit—now denies a COA to

any petitioner whose Rule 60(b)(6) motion is in any way rooted in *Martinez*. For example, in *Hamilton v. Sec'y*, 793 F.3d 1261 (11th Cir. 2015), it denied a COA to a death-row petitioner who filed a 60(b)(6) motion premised on *Martinez*, explaining that "*Arthur* is controlling on us and ends any debate among reasonable jurists about the correctness of the district court's decision" that the petitioner's motion must be categorically denied. *Id.* at 1266. So too in *Griffin v. Sec'y*, 787 F.3d 1086 (11th Cir. 2015), where the court made clear that the possibility of granting petitioner's 60(b)(6) motion premised on *Martinez* was "squarely foreclosed by our decision in *Arthur*." *Id.* at 1087.

The Sixth Circuit has recently joined these other wayward circuits in both its published precedent and procedural practice. In *Abdur-Rahman v. Carpenter*, 805 F.3d 710 (6th Cir. 2015), the court denied a 60(b)(6) motion premised on *Martinez* without considering any equities, holding that *Martinez* "was a change in decisional law and does not constitute an extraordinary circumstance meriting Rule 60(b)(6) relief." *Id.* at 714. In dissent, Chief Judge Cole criticized the majority's categorical approach, explaining that "[t]he decision to grant Rule 60(b)(6) relief" should remain "a *case-by-case* inquiry that requires the *trial court* to intensively balance *numerous factors*, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Id.* at 718 (Cole, C.J., dissenting) (quoting *McGuire v. Warden*, 738 F.3d 741, 750 (6th Cir. 2013)); *see also Mooreland v. Robinson*, 813 F.3d 315, __ n.4 (6th Cir. Feb. 11, 2016) (to the extent defendant was contending that *Martinez* "constitutes

an extraordinary circumstance requiring Rule 60(b) relief," that "contention would fail").

Indeed, as petitioner's own case shows, the Sixth Circuit has also joined with the Fifth and Eleventh Circuits in denying COAs in every *Martinez*-based Rule 60(b)(6) case—recognizing that there is no longer any need to detain itself with consideration of the facts and equities of particular cases. The court's *holding* below is that "reasonable jurists" cannot even "debate" whether Johnson's Rule 60(b)(6) petition might succeed. Pet. App. 2a-3a (denying COA); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). And, accordingly, the court dispensed with all of Johnson's plea in just one sentence rejecting the view that *Martinez* should affect his result. Pet. App. 3a. As in the other circuits, this practice makes clear that the Sixth Circuit no longer thinks that any *Martinez*-based Rule 60(b)(6) motion could ever prevail or is even worth an opportunity to appeal.

Finally, the Fourth Circuit recently joined the *per se* camp, rejecting a *Martinez*-based Rule 60(b) motion on the ground that "a change in decisional law subsequent to a final judgment provides no basis for relief under Rule 60(b)(6)." *Moses v. Joyner*, __ F.3d __, No. 15-2, 2016 WL 878086, at *5 (4th Cir. March 8, 2016). In so doing, the court acknowledged the Circuit split, including the Sixth Circuit's position in the camp applying a categorical bar. *See id*.

2. In stark contrast, the Third, Seventh, and Ninth Circuits correctly recognize that *Martinez*'s change weighs in favor of Rule 60(b)(6) relief, and that some such motions might prevail. These courts have all held that a court reviewing a Rule 60(b)(6)

motion premised on *Martinez* must conduct holistic review of the equities, including the significance of *Martinez*'s change in law. Under this approach—and unlike in the other three circuits—Rule 60(b)(6) petitioners at least have a *chance* of getting *Martinez* relief.

The Third Circuit's decision in *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014), embodies this correct view. There, the district court had adopted the Fifth Circuit's reasoning in *Adams*, holding that a Rule 60(b)(6) motion premised on *Martinez* categorically fails. *Id.* at 120. The Third Circuit, however, vacated the district court's decision, making clear that the Fifth Circuit's ruling in *Adams* "does not square with our approach to Rule 60(b)(6)." *Id.* at 121. As it explained: "[W]e have not embraced any categorical rule that a change in decisional law is never an adequate basis for Rule 60(b)(6) relief. Rather, we have consistently articulated a more qualified position: that intervening changes in the law *rarely* justify relief from final judgments under 60(b)(6)." *Id.*

The Third Circuit, moreover, explicitly parted ways with the Fifth Circuit's refusal "to consider the full set of facts and circumstances attendant to the Rule 60(b)(6) motion under review." *Id.* at 122. It emphasized the need for "a flexible, multifactor approach to Rule 60(b)(6) motions, including those built upon a post-judgment change in the law," and thus took issue with the Fifth Circuit's choice to "end[] its analysis after determining that *Martinez*'s change in the law was an insufficient basis for 60(b)(6) relief" without considering "whether the capital nature of the petitioner's case or any other

factor might … provide a reason … for granting 60(b)(6) relief." *Id.*

The Third Circuit also distanced itself from the Eleventh. It explained that, "[r]elying on *Gonzalez*, the Eleventh Circuit in *Arthur*, just as the Fifth Circuit in *Adams*, … [held] that 'the change in the decisional law affected by the *Martinez* rule is not an "extraordinary circumstance" sufficient to invoke Rule 60(b)(6).'" *Id.* at 123. But, according to the court, "the Eleventh Circuit extracts too broad a principle from *Gonzalez*" because "*Gonzalez* did not say that a new interpretation of the federal habeas statutes—much less, the equitable principles invoked to aid their enforcement—is *always* insufficient to sustain a Rule 60(b)(6) motion." *Id* (emphasis in original).

After noting its disagreement with these other circuits, the Third Circuit set forth its view that a "case-dependent analysis, fully in line with Rule 60(b)(6)'s equitable moorings, retains vitality post-*Gonzalez*" and that it would be improper to "adopt a *per se* rule that a change in decisional law, even in the habeas context, is inadequate, either standing alone or in tandem with other factors, to invoke relief from a final judgment under 60(b)(6)." *Id.* at 124. Accordingly, the Third Circuit remanded for a holistic analysis balancing the "jurisprudential change rendered by *Martinez*" (which it described as "remarkable" and "important"), "the merits of [the] petitioner's underlying ineffective assistance of counsel claim," the "movant's diligence in pursuing review of his ineffective assistance claims," and the "special consideration" of a capital sentence. *Id.* at 124-26.

The Seventh Circuit has since followed the Third Circuit's approach. In *Ramirez v. United States*, 799 F.3d 845 (7th Cir. 2015), that court noted that it "agree[d] with the Third Circuit's approach in *Cox*, in which it rejected the absolute position that the Fifth Circuit's *Adams* decision may have reflected, to the effect that intervening changes in the law *never* can support relief under Rule 60(b)(6)." *Id.* at 850. And it stressed that "Rule 60(b)(6) is fundamentally equitable in nature" and therefore "requires the court to examine all of the circumstances." *Id.* at 851. Thus, like the Third Circuit in *Cox*, the court held that a Rule 60(b)(6) motion premised on *Martinez* must be considered in light of the overall equities, including the significance of *Martinez*, "the diligence of the petitioner," "whether alternative remedies were available but bypassed," and "whether the underlying claim is one on which relief could be granted," *Id*. Considering those factors in the case before it, the Seventh Circuit ordered the district court to grant Rule 60(b)(6) relief. *Id*. at 856. The district court subsequently granted habeas relief. *See Ramirez v. United States*, No. 11-CV-719-JPG, 2016 WL 1058965 (S.D. Ill. Mar. 17, 2016).

The Ninth Circuit also conducts holistic equitable review of Rule 60(b)(6) motions premised on *Martinez*. For example, in *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2012), that court evaluated such a motion by balancing "the nature of the intervening change in the law," "the petitioner's exercise of diligence in pursuing the issue during the federal habeas proceedings," "delay between the finality of the judgment and the motion for Rule 60(b)(6) relief," the "degree of connection" between the petitioner's claim and the intervening change in law, and

concerns about comity and finality. *Id.* at 1135-37. In considering the "nature" of *Martinez*'s intervening change of law, the court posited that *Martinez* "constitutes a remarkable—if 'limited'—development in the Court's equitable jurisprudence." *Id.* at 1136 (quoting *Martinez*, 132 S. Ct. at 1319). The Ninth Circuit has continued to conduct the required equitable balancing in each such case to come before it since. *See, e.g.*, *Jones v. Ryan*, 733 F.3d 825, 839 (9th Cir. 2013); *Styers v. Ryan*, 2015 WL 9461543, at *1, (9th Cir. Dec. 24, 2015).

B. This Circuit Split Is Entrenched, Persistent, And Unlikely To Benefit From Further Percolation.

The circuit conflict will not be resolved without this Court's intervention, and further delay will serve no purpose.

1. Even though they are aware of other circuits' contrary decisions, the courts of appeals have persisted in their conflicting interpretations. For example, in *Hamilton*, the Eleventh Circuit observed that "[t]he Third Circuit has disagreed with [our] *Arthur*[] holding" but expressly held itself "bound by our Circuit precedent, not by Third Circuit precedent." 793 F.3d at 1266. And in *Cox*, the Third Circuit recognized that the Fifth Circuit's decision in *Adams* "does not square with our approach to Rule 60(b)(6)" but nonetheless stayed true to its broader rule. 757 F.3d at 121.

There is no chance that this split will resolve itself. Not only have the courts acknowledged and rejected the contrary holdings of their sister circuits, but the Fifth, Sixth, and Eleventh Circuits have begun denying COAs—holding that their precedents

on this point are not even subject to reasonable debate. No consensus on this issue will emerge going forward. *See In re Paredes*, 587 Fed. Appx. at 825; *Johnson v. Carpenter*, Pet. App. 3a; *Hamilton*, 793 F.3d at 1266. These denials evince an entrenched and binding *per se* rule against granting Rule 60(b)(6) motions premised on *Martinez*. Moreover, courts on both sides of the circuit split have denied petitions for rehearing en banc on this issue, confirming that no rapprochement will occur. Pet. App. 13a; Order Denying Rehearing En Banc, *Lopez v. Ryan*, 98-cv-00072-SMM (9th Cir. May 15, 2012).

Furthermore, these courts will not clarify their own positions any further through application to particular cases or fact-patterns. That Sixth Circuit panels—and other circuits—are denying even COAs (and any opportunity for briefing) in even capital cases demonstrates that their view against Rule 60(b)(6) motions rooted in *Martinez* is firm and unwavering. It also demonstrates that no further information regarding their position or its merits can possibly emerge with further percolation.

2. Only this Court can resolve this stalemate, as it is grounded in a broader disagreement about the meaning of *Gonzalez*. On the one hand, the Fifth, Sixth, and Eleventh Circuits incorrectly read *Gonzalez* to establish the principle that changes in decisional law are irrelevant to Rule 60(b)(6)'s inquiry into whether "extraordinary circumstances" justify relief. *See*, *e.g.*, *Arthur*, 739 F.3d at 631 (citing *Gonzalez*, 545 U.S. at 535-38)); *Adams*, 679 F.3d at 319 (similar).

On the other hand, the Third, Seventh, and Ninth Circuits correctly read *Gonzalez* as reaching a

very different conclusion—namely, that a change in decisional law is an important factor in Rule 60(b)(6) analysis, and one that can call for relief in the presence of other equitable considerations. *See, e.g.*, *Cox*, 757 F.3d at 123; *Ramirez*, 799 F.3d at 850.

C. The Conflict Between The Circuits Is Untenable

This circuit divide is untenable because it implicates issues of vital importance to both capital habeas petitioners and the states, and makes clear that the fate of a particular inmate's death sentence may depend only on the happenstance of their jurisdiction.

The question presented by this petition is of recurring importance to capital habeas petitioners. A huge proportion of the capital habeas petitioners who have invoked *Martinez* must do so in a Rule 60(b)(6) posture because their initial habeas petitions were already denied. Indeed, at least thirty-six capital petitioners have filed Rule 60(b)(6) motions premised on *Martinez*'s intervening change of law. *See Pruett v. Stephens*, 608 Fed. Appx. 182, 185 (5th Cir.); *Buck v. Stephens*, No. 14-70030, 2015 WL 4940823, at *4 (5th Cir. Aug. 20, 2015); *In re Paredes*, 587 Fed. Appx. 805, 826 (5th Cir. 2014); *Diaz v. Stephens*, 731 F.3d 370, 372 (5th Cir. 2013); *Williams v. Thaler*, 524 Fed. Appx. 960, 963 (5th Cir. 2013); *Jones v. Ryan*, 733 F.3d 825, 830 (9th Cir. 2013); *Cook v. Ryan*, 688 F.3d 598, 601 (9th Cir. 2012); *Haynes v. Stephens*, No. CIV.A. H-05-3424, 2015 WL 6016831, at *4 (S.D. Tex. Oct. 14, 2015); *Henderson v. Collins*, No. 1:94-CV-106, 2015 WL 519247, at *3 (S.D. Ohio Feb. 9, 2015); *Taylor v. Wetzel*, No. 4:CV-04-553, 2014 WL 5242076, at *1 (M.D. Pa. Oct. 15, 2014); *Ringo v. Roper*, No.

4:03-CV-08002-BCW, 2014 WL 4377962, at *4 (W.D. Mo. Sept. 3, 2014); *Moreland v. Robinson*, No. 3:05-CV-334, 2014 WL 4351522, at *10 (S.D. Ohio Sept. 2, 2014); *Moore v. Mitchell*, No. 1:00-CV-023, 2014 WL 4273334, at *1 (S.D. Ohio Aug. 29, 2014); *Franklin v. Robinson*, No. 3:04-CV-187, 2014 WL 4211022, at *3 (S.D. Ohio Aug. 26, 2014); *Wood v. Ryan*, No. CV-98-0053-TUC-JGZ, 2014 WL 3573622, at *3 (D. Ariz. July 20, 2014); *Strouth v. Carpenter*, No. 3:00-CV-00836, 2014 WL 1394458, at *1 (M.D. Tenn. Apr. 9, 2014); *Barnett v. Roper*, 941 F. Supp. 2d 1099, 1102 (E.D. Mo. 2013); *Landrum v. Anderson*, No. 1:96-CV-641, 2013 WL 5423815, at *1 (S.D. Ohio Sept. 26, 2013); *West v. Carpenter*, No. 3:01-CV-91, 2013 WL 5350627, at *1 (E.D. Tenn. Sept. 23, 2013) *aff'd*, 790 F.3d 693 (6th Cir. 2015); *Schad v. Ryan*, No. CV-97-02577-PHX-ROS, 2013 WL 5276407, at *1 (D. Ariz. Sept. 19, 2013); *Dubose v. Hetzel*, No. 2:09-CV-1392-KOB-JEO, 2013 WL 4482413, at *4 (N.D. Ala. Aug. 20, 2013); *Henness v. Bagley*, No. 2:01-CV-043, 2013 WL 4017643, at *1 (S.D. Ohio Aug. 6, 2013); *Styers v. Ryan*, No. CV-98-2244-PHX-JAT, 2013 WL 1149919, at *11 (D. Ariz. Mar. 20, 2013) ; *McGuire v. Warden, Mansfield Corr. Inst.*, No. 3:99-CV-140, 2013 WL 1131423, at *3 (S.D. Ohio Mar. 18, 2013); *Howell v. Crews*, No. 4:04-CV-299/MCR, 2013 WL 672583, at *1 (N.D. Fla. Feb. 23, 2013); *Foley v. White*, No. CIV.A. 6:00-552-DCR, 2013 WL 375185, at *3 (E.D. Ky. Jan. 30, 2013); *Post v. Bradshaw*, No. 1:97 CV 1640, 2012 WL 5830468, at *12 (N.D. Ohio Nov. 15, 2012); *Hines v. Hobbs*, No. 5:12CV00321 JLH/HDY, 2012 WL 5416920, at *1 (E.D. Ark. Oct. 24, 2012); *Sheppard v. Robinson*, No. 1:00-CV-493, 2012 WL 3583128, at *1 (S.D. Ohio Aug. 20, 2012); *Leavitt v. Arave*, No. 1:93-CV-0024-BLW, 2012 WL 1995091, at *5 (D. Idaho

June 1, 2012); *Lopez v. Ryan*, No. CV-98-72-PHX-SMM, 2012 WL 1520172, at *3 (D. Ariz. Apr. 30, 2012).

Because first federal habeas has already expired for so many individuals on death row, *Martinez* and *Trevino* would be largely nullified in the capital context if they could not be invoked in Rule 60(b)(6) motions. For example, every substantial claim of capital-sentencing-phase IATC deemed defaulted under *Coleman* is categorically excluded from *Martinez* relief unless it is at least *possible* through Rule 60(b)(6). Consequently, *Martinez*'s truth that a prisoner deserves one opportunity to present an IATC claim because "the right to counsel is the foundation for our adversary system," 132 S. Ct. at 1317, will be ignored in those cases in which it should apply most forcefully: those in which an individual's life is at stake.

Capital petitioners, moreover, should have the best chance to actually obtain Rule 60(b)(6) relief premised on *Martinez*. That is because a capital sentence represents a critical equitable factor that militates in favor of reopening a judgment. As this Court has explained, the "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987). Accordingly, those circuits that (correctly) recognize the need to conduct holistic equitable review of Rule 60(b)(6) motions deem a capital sentence a "special" equitable consideration. *See Cox*, 757 F.3d at 126. To be sure, even these courts recognize that Rule 60(b)(6) motions—even in capital cases—will "*rarely*" be granted. *Id.* at 121. But *Martinez* stands for the

principle that individuals with substantial IATC claims should at least be afforded the *opportunity* to have these claims heard—an opportunity the Fifth, Sixth, and Eleventh Circuits currently deny.

This opportunity matters. At least one district court applying the correct approach has granted a Rule 60(b)(6) motion in a case similar to this one. That court relied upon the capital nature of the petitioner's case, the fact that he had "diligently pursued the underlying substantive claim of [IATC]," and the "underlying strength" of that claim, which (like petitioner Johnson's) featured "powerful testimony that was never presented." *Barnett v. Roper*, 941 F. Supp. 2d 1099, 1116-21 (E.D. Mo. 2013). Notably, that IATC claim—just like petitioner's here—involved a *Porter* claim for failure to investigate and present mitigating evidence at sentencing. *Id.* at 1113. After this Rule 60(b)(6) motion was granted, Barnett received an evidentiary hearing and was ultimately granted habeas relief—vacating his death sentence. Order Granting Habeas Relief, *Barnett*, 4:03-cv-00614-ERW (E.D. MO. Aug. 15, 2015). Had Barnett's case arisen in the Fifth, Sixth, or Eleventh Circuits, his death sentence would remain. Thus, while such grants will be rare given *Gonzalez*'s "extraordinary circumstances" standard, it is vital that petitioners have the *chance* to reopen their habeas petitions where such circumstances exist.

Of course, this issue matters vitally to the states as well. After the Third Circuit in *Cox* remanded to the district court for holistic equitable review, Pennsylvania urged this Court to grant certiorari and adopt the contrary view of the Sixth Circuit on this

question. Petition, *Wetzel v. Cox*, 2014 WL 5841701, No. 14-531 (Nov. 5, 2014). The interlocutory nature of that case made it a poor vehicle for review on certiorari, but no similar issues present themselves here, and subsequent percolation has demonstrated that this split is stable, deepening, and aggrieving parties on both sides. *See Ramirez*, 799 F.3d at 850-51 (Wood, C.J.) (aligning Seventh Circuit with Third Circuit after *Cox*).

Given the life-or-death importance of this issue to capital petitioners and the states, this circuit split calls for immediate review.

II. This Case Is An Ideal Vehicle.

This case presents a discrete question of law on which the Sixth Circuit's holding squarely conflicts with the holdings of other circuits. And this case also presents the rare circumstance of a district court lamenting its inability to consider a petitioner's IATC claim because of *Coleman*'s then-controlling rule. It accordingly provides an ideal vehicle to address the question of whether a Rule 60(b)(6) motion premised on *Martinez* may ever be granted.

The only obstacle preventing Johnson's IATC claims from being reopened, so that they can be decided on the merits for the first time, is the Sixth Circuit's position that a Rule 60(b)(6) motion premised on *Martinez* must be categorically denied. The Sixth Circuit's order denying Johnson a COA did not dispute that *Martinez* applies to Johnson's case. Pet. App. 1a-3a. Indeed, the Sixth Circuit has already determined that *Martinez* applies in Tennessee after *Trevino*. *Sutton*, 745 F.3d at 790. Nor did the Sixth Circuit dispute that Johnson has

strong IAC claims regarding both trial and state postconviction review. Pet. App. 1a-3a.

Had his case arisen in either the Third, Seventh, or Ninth Circuits, Johnson's Rule 60(b)(6) motion would have received an individualized inquiry to determine if extraordinary circumstances warranted reopening his habeas petition—rather than a rote, one-sentence COA denial. This case isolates the importance of that disagreement, because of the number of equitable considerations that would have weighed in favor of Johnson's motion.

First, *Martinez* wrought a "remarkable" change in the law. *Lopez*, 678 F.3d at 1136. Johnson's case illustrates as much. Even though the federal district court expressed "dismay at the scant attention that has been devoted to what appears to be one of the few potentially meritorious issues" in his habeas petition, it could not, pre-*Martinez*, address those claims. Pet. App. 93a n.142. Instead, "because the negligence of post-conviction counsel would not excuse a default" under *Coleman*, the court's hands were tied. *Id.*

Martinez then "modif[ied] th[is] unqualified statement in *Coleman*," by establishing that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default" of an IATC claim. *Martinez*, 132 S. Ct. at 1315. In dissent, Justice Scalia recognized *Martinez*'s importance, proclaiming that the holding represented "a repudiation of the longstanding principle governing procedural default, which *Coleman* and other cases consistently applied." *Id*. at 1324 (Scalia, J., dissenting). And the courts of appeals that apply a broad equitable approach under Rule 60(b)(6) have made similar acknowledgments,

characterizing *Martinez* as a "remarkable" change, *Lopez*, 678 F.3d at 1136, as an "important" change that "altered *Coleman*'s well-settled application," *Cox*, 757 F.3d at 124, and as a "significant[] change[] [in the Court's] approach to claims of ineffective assistance of counsel at initial-review collateral proceedings," *Ramirez*, 799 F.3d at 848. After *Martinez*, this Court's precedent clearly would have allowed Johnson to at least attempt to establish cause for the procedural default by showing that postconviction counsel was ineffective.

Second, Johnson's IATC claims have obvious merit. This Court has unanimously clarified that sentencing counsel has an "obligation to conduct a thorough investigation of the defendant's background." *Porter*, 558 U.S. at 39. In *Porter*, this Court found counsel deficient for "fail[ing] to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service." *Id.* at 40. That deficiency prejudiced Porter, since the sentencing judge and jury "heard almost nothing that would humanize [him] or allow them to accurately gauge his moral culpability." *Id*. at 41. So too here: Johnson's counsel was similarly deficient for failing to uncover and present any evidence of Johnson's head injuries, family background, or childhood physical and sexual abuse. And Johnson was likewise prejudiced by the sentencing jury hearing none of these facts. Indeed, this is the rare case where, invoking *Coleman*, the district court has *already* flagged the merit of such claims—if only *Martinez* had then allowed the first federal habeas court to consider them.

Third, Johnson has diligently pursued his claim. He first raised concerns about the ineffectiveness of his state habeas counsel in his second state habeas petition, Pet. App. 30a, though *Coleman* rendered that argument futile, *see, e.g.*, Pet. App. 54a-55a. And, post-*Martinez*, Johnson has diligently pursued his efforts to reopen his petition. As in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009), where the Ninth Circuit granted a Rule 60(b)(6) motion premised on an intervening decision of law, here, Johnson has "pressed all possible avenues of relief" at "every stage of this case." *Id.* at 1137.

Fourth, the capital nature of Johnson's case is a compelling equitable factor that weighs in favor of reopening his petition. Especially so, since his principal claim is ineffectiveness of counsel at capital sentencing.

III. The Circuits Adopting A Categorical Rule Are Wrong.

Given the plain circuit split on the question presented—and the importance of that split to the disposition of numerous capital cases—the merits are not particularly relevant to the decision whether to grant certiorari. But to the extent the merits are relevant, the categorical position of the Fifth, Sixth, and Eleventh Circuits against Rule 60(b)(6) motions premised on *Martinez* are irreconcilable with the purposes of Rule 60(b)(6) and this Court's binding precedents.

Rule 60(b)(6) "permits reopening [a final judgment] when the movant shows 'any … reason justifying relief from the operation of the judgment' other than the more specific circumstances set out in Rules 60(b)(1)-(5)." *Gonzalez*, 545 U.S. at 529. This

rule was intended to be a broad, catchall provision for achieving justice in extraordinary cases, and a holistic equitable inquiry is essential to accomplishing that objective. *See* Wright and Miller, Other Reasons Justifying Relief, 11 *Fed. Prac. & Proc. Civ*. §2864 (3d ed.) (Rule 60(b)(6) "gives the courts ample power to vacate judgments whenever that action is appropriate to accomplish justice"); 7 J. Lucas & J. Moore, *Moore's Federal Practice* ¶60.27[2] at 375 (2d ed. 1982) (Rule 60(b)(6) is a "grand reservoir of equitable power to do justice in a particular case"). This Court has explained that the language of subsection 60(b)(6), "[i]n simple English … vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott*, 335 U.S. at 615. A categorical rule foreclosing certain petitioners from Rule 60(b)(6) relief, even in extraordinary equitable circumstances, is inconsistent with these established principles.

This Court's own opinion in *Gonzalez* confirms the point. Correctly read, *Gonzalez* shows that equitable considerations are always relevant—and while *some* changes in decisional law may be insufficient on their own to *require* Rule 60(b)(6) relief, it remains necessary for the court to evaluate the equities in particular cases to determine whether relief is appropriate. *See Gonzalez*, 545 U.S. at 536-38. Thus, while this Court determined in *Gonzalez* that its new interpretation of AEDPA's statute of limitations in *Artuz v. Bennett*, 531 U.S. 4 (2000), was not itself an "extraordinary circumstance," it nonetheless went on to examine other equitable considerations, such as the petitioner's diligence, to determine whether reopening the case was

warranted. *Id.* at 537. *Gonzalez* therefore did not create a *per se* rule that a change in decisional law is *never* an extraordinary circumstance warranting 60(b)(6) relief for habeas petitioners. If anything, it *rejects* precisely the *per se* approach that the Fourth, Fifth, Sixth, and Eleventh Circuits have read into it. *See, e.g.*, *id.* at 534 ("Rule 60(b) has an unquestionably valid role to play in habeas cases.").

Moreover, *Martinez* and *Trevino* themselves suggest that they are an appropriate basis for the courts to at least consider granting Rule 60(b)(6) relief. As explained above, *Martinez* and *Trevino* (and even their dissents) expressly recognize the critical importance of their change in *Coleman*'s rule. *See supra* pp.28-29. Indeed, the whole point of that change was to prevent meritorious IATC claims from being defaulted simply because there was never an adequate attorney to develop them. As this case shows, cutting off all Rule 60(b)(6) claims rooted in *Martinez* and *Trevino* brings about essentially the result that those cases sought to avoid.

This is confirmed by this Court's own actions in the wake of *Martinez*. Taking *Martinez*'s invitation at its word, two Texas petitioners sought Rule 60(b)(6) relief, which the Fifth Circuit denied. After *Trevino* clarified that *Martinez* applied in Texas, this Court apparently rejected Texas's argument that Rule 60(b)(6) relief is categorically unavailable when premised on *Martinez*—granting certiorari, vacating, and remanding those cases for further consideration. *Haynes v. Thaler*, 133 S.Ct. 2764 (2013) (mem.); *Balentine v. Thaler*, 133 S.Ct. 2763 (2013) (mem.). Indeed, it even stayed one of these petitioner's executions to allow him to raise a *Martinez* claim on

remand. *Haynes v. Thaler*, 133 S. Ct. 639 (2012); *see supra* p.9 n.4.

A proper application of Rule 60(b)(6) in motions premised on *Martinez* would not be overly burdensome or broad: This Court need recognize only that an exception to finality for extraordinary cases remain available for extraordinary cases—and only those. Courts can readily determine when such extraordinary circumstances are absent (for example, where the underlying claims are weak, the sentence is less severe, or the petitioner failed timely to invoke *Martinez* after it became available). Moreover, many habeas petitioners cannot invoke *Martinez* at all: their IATC claim may not have been defaulted in state habeas; they may lack a "substantial" IATC claim; they may be unable to show IAC in state collateral review; or there may be an alternative merits disposition in their first federal habeas petition. *Trevino*, 133 S. Ct. at 1918; *Martinez*, 132 S. Ct. at 1318-1319, 1320-1321. But where the equities weigh strongly in petitioner's favor, it flies in the face of Rule 60(b)(6) to cut off the equitable inquiry before it has even begun.

IV. The Court Should At Least Summarily Reverse the Denial of Johnson's COA.

Given the clear split among the courts of appeals on the question presented, this Court should grant plenary review. But to the extent that it thinks *anything* is lacking in the development of case for review, the fault lies entirely with the Sixth Circuit, which deemed this case so far beyond debate that it denied petitioner even a chance to brief it. To be clear, there are *nine* "reasonable jurists" on three *unanimous* panels that have determined that a

holistic, equitable inquiry is necessary in Rule 60(b)(6) motions premised on *Martinez*, and yet the Sixth Circuit denied a COA—foreclosing any case-specific inquiry into the equities of Johnson's case. If this Court declines to grant plenary review, it should summarily reverse the Sixth Circuit to allow for full briefing and argument on the proper treatment of Johnson's *Martinez*-based Rule 60(b)(6) motion.

Recall that Johnson's underlying IATC claim is so strong that the district court reviewing his habeas petition expressed serious alarm about its inability to address it. *See* Pet. App. 93a n.142. Indeed, without even considering the defaulted claims, the district court went out of its way to flag that "petitioner's trial counsel were ineffective for failing to investigate mitigating evidence." Pet. App. 98a. This Court recently (and unanimously) reaffirmed that the failure to "conduct a thorough investigation of the defendant's background" constitutes ineffective assistance of counsel in violation of the Sixth Amendment. *See Porter*, 558 U.S. at 39. If the case for Rule 60(b)(6) relief rooted in *Martinez* is not even *debatable* in that factual context, it never will be.

Moreover, this Court has held that a court should permit briefing and conduct plenary review when a circuit split exists. *See Lozada v. Deeds*, 498 U.S. 430 (1991) (per curiam) (regarding certificates of probable cause). Several circuits have similarly concluded that, in the presence of a circuit split, a COA must be granted. *See, e.g.*, *United States v. Doe*, No. 13-4274, 2015 WL 8287858, at *9 (3d Cir. Dec. 9, 2015); *Kramer v. United States*, 797 F.3d 493, 502 (7th Cir. 2015); *United States v. Gomez-Sotelo*, 18 F. Appx. 690, 692 (10th Cir. 2001); *Lambright v. Stewart*, 220

F.3d 1022, 1027-28 (9th Cir. 2000); *Franklin v. Hightower*, 215 F.3d 1196, 1200 (11th Cir. 2000). There is thus no question that the district court and Sixth Circuit both erred in finding that reasonable jurists could not debate whether "the petition should have been resolved in a different manner," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), and whether the district court and Sixth Circuit were correct to deny the 60(b)(6) motion without conducting an individualized balancing of the equities.

Indeed, at least one judge of the Sixth Circuit thought the issue sufficiently debatable to request a vote on rehearing en banc. *Cf. Jordan v. Fisher*, 135 S. Ct. 2647, 2651 (2015) (Sotomayor, J., dissenting from denial of certiorari) ("Those facts alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution of Jordan's claim."). Because reasonable jurists could debate—and are debating—the very procedural ruling that the district court made, the Sixth Circuit could not have denied a COA on those grounds.

* * * * *

In short, Johnson certainly has as "debatable" a claim for Rule 60(b)(6) relief as one might imagine—the impartial discussion from his district court in applying *Coleman* frames that fact in a way few vehicles will. That makes this an ideal case for resolving the question presented, on which there is an unmistakable and fully acknowledged circuit split. In fact, the Sixth Circuit's denial of Johnson's COA in this case is the best possible proof that its categorical rule rejecting Rule 60(b)(6) motions rooted in *Martinez* goes far beyond what the rule's equitable foundations could possibly allow. This Court should

grant plenary review, or at a minimum grant Johnson the full briefing in the Sixth Circuit his case so manifestly requires.

CONCLUSION

This Court should grant certiorari or summarily reverse the denial of Johnson's COA.

Respectfully submitted,

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APPENDIX

APPENDIX A

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONNIE E. JOHNSON, Petitioner-Appellant, v. WAYNE CARPENTER, Warden Respondent-Appellee.	No. 13-5537 ORDER

Before **BOGGS, NORRIS**, and **CLAY**, Circuit Judges.

Donnie E. Johnson, a Tennessee prisoner under a death sentence, appeals from a district court order denying his Fed. R. Civ. P. 60(b)(6) motion for relief from the court judgment's dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The case is now pending before this court for review of Johnson's application for a certificate of appealability (COA).

In 1985, a Tennessee jury convicted Johnson of first-degree murder, and the jury recommended that Johnson be sentenced to death. The trial court accepted this recommendation and imposed the death penalty on Johnson. The Tennessee Supreme Court affirmed Johnson's conviction and sentence on direct appeal. *State v. Johnson*, 743 S.W.2d 154, 160 (Tenn. 1987).

In 1997, Johnson filed his § 2254 habeas petition. The district court determined that Johnson's claims were without merit and dismissed the petition. On appeal, this court affirmed the district court's judgment. *Johnson v. Bell*, 344 F.3d 567, 575 (6th Cir. 2003).

In March 2013, Johnson filed his current Rule 60(b)(6) motion, asking the district court to reconsider its previous dismissal, on the basis of procedural default, of two claims because of a change in the law. The district court denied Johnson's motion as meritless, and Johnson has timely appealed that decision. Johnson requests that this court issue him a COA for the following issue: whether the recent Supreme Court decisions in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), are extraordinary circumstances warranting relief under Rule 60(b)(6). Johnson also moves this court to grant him in forma pauperis (IFP) status.

Under 28 U.S.C. § 2253(c)(2), the court may grant a COA for an issue raised in a § 2254 petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. A petitioner satisfies this standard by demonstrating that reasonable jurists could disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues raised are adequate to deserve further review. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The petitioner is not required to show that the appeal will succeed to be granted a COA, and the court should not deny a COA merely because it believes that the petitioner fails to

demonstrate an entitlement to relief. *Miller-El*, 537 U.S. at 337.

Upon review, we conclude that Johnson has not made a substantial showing of the denial of a federal constitutional right. It "is well established that a change in decisional law is usually not, by itself, an 'extraordinary circumstance' meriting Rule 60(b)(6) relief." *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750 (6th Cir. 2013)(quoting *Stokes v. Williams*, 475 F.3d 732, 735 (6th Cir. 2007)). This court has concluded that *Martinez* and *Trevino* do not sufficiently change the balance of the factors for consideration under Rule 60(b)(6) to warrant relief. *Id.* at 750-51.

Accordingly, we deny Johnson's application for a COA. We also deny his motion for IFP status as moot.

ENTERED BY ORDER OF THE COURT

APPENDIX B

FILED
Apr 17, 2013

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

WESTERN DIVISION

DONNIE E. JOHNSON, Petitioner, v. RICKY BELL, WARDEN, Respondent.	No. 2:97-cv-03052-JTF

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

On March 8, 2013, Petitioner Donnie E. Johnson, through counsel, filed a motion styled "Motion for Relief from Judgment" pursuant to Fed. R. Civ. P. 60(b)(6). (Electronic Case Filing ("ECF") No. 160.) On March 25, 2013, Respondent Ricky Bell filed a response to Petitioner's motion. (ECF No. 163.) On March 27, 2013, Respondent filed a notice of supplemental authority in support of his response to Petitioner's Rule 60(b) motion. (ECF No. 164.)

A. PROCEDURAL HISTORY

In October 1985, Petitioner was convicted for the first-degree murder of his wife Connie Johnson and sentenced to death by electrocution. Johnson v. State,

1993 WL 61728, at *1 (Tenn. Mar. 8, 1993). On November 14, 1997, Petitioner filed his petition pursuant to 28 U.S.C. § 2254, in this Court. (ECF No. 1.) On February 28, 2001, the Court granted Respondent's motion for summary judgment and dismissed the petition. See Johnson v. Bell, No. 97-3052-DO, 2001 U.S. Dist. LEXIS 25420 (W.D. Tenn. Feb. 28, 2001). On September 10, 2003, the United States Court of Appeals for the Sixth Circuit affirmed the dismissal. Johnson v. Bell, 344 F.3d 567 (6th Cir. 2003), reh'g and reh'g en banc denied, (6th Cir. Nov. 25, 2003). In 2004, the United States Supreme Court denied the petition for writ of certiorari and the petition for rehearing. Johnson v. Bell, 541 U.S. 1010, 124 S. Ct. 2074, 158 L. Ed. 2d 621 (2004), reh'g denied, 542 U.S. 946, 124 S. Ct. 2930, 159 L. Ed. 829 (2004).

Petitioner filed two motions for equitable relief related to his federal habeas case in 2004, which were both denied. Johnson v. Bell, 605 F.3d 333, 335 (6th Cir. May 17, 2010), reh'g and reh'g en banc denied, (6th Cir. Sept. 10, 2010). On May 17, 2010, the Sixth Circuit dismissed the appeal of one motion for failure to first obtain leave to file a successive petition, and the district court's decision was affirmed with regard to the other motion. *See* id. at 339, 341. The Supreme Court denied the petition for writ of certiorari on May 23, 2011. Johnson v. Bell, 131 S. Ct. 2902, 179 L. Ed. 2d 1246 (2011).

B. ANALYSIS

Petitioner seeks to reopen the habeas proceeding to consider the merits of his claims that trial counsel had a conflict of interest and rendered ineffective assistance of counsel at sentencing. (ECF No. 160 at 1.) He argues that he is entitled to relief because the

Court denied habeas relief for a procedural reason and subsequent events establish that the court's procedural ruling was erroneous. (Id. at 1-2.) He relies on Gonzalez v. Crosby, 545 U.S. 524 (2005), for the proposition that a habeas petitioner can seek relief from judgment under Fed. R. Civ. P. 60(b) if he challenges a "defect in the integrity of the federal habeas proceedings" and does not seek to relitigate the merits of the claims. (Id. at 2.)

Petitioner seeks relief under Fed. R. Civ. P. 60(b), which provides as follows:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or other misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Id.

Petitioner has not specified under which subparagraph of Rule 60(b) he seeks relief, and no subparagraph other than Rule 60(b)(6) appears applicable. A movant seeking relief under Rule 60(b)(6) is required "to show 'extraordinary circumstances' justifying the reopening of a final judgment. Such circumstances will rarely occur in the habeas context." Gonzalez, 545 U.S. at 535 (internal citations omitted).

Petitioner argues that he is entitled to Rule 60(b) relief based on the recent Supreme Court decision in Martinez v. Ryan, 132 S. Ct. 1309 (2012). (ECF No. 160 at 1.) He contends that Martinez reveals defects in the integrity of the Court's prior rulings and that procedural default precluded the Court from considering the merits of his claims of conflict of interest and ineffective assistance of counsel ("IAC") at sentencing. (Id. at 1-2.) He asserts that Martinez is applicable to his case because Martinez applies where the initial review collateral proceedings is the first designated proceeding for a prisoner to raise an IAC claim. (Id. at 3.) Petitioner contends that Martinez is applicable because Tennessee courts have routinely prohibited consideration of IAC at trial claims on direct appeal and ordered the claims to be raised for the first time in postconviction proceedings. (Id. at 3-5.) Petitioner asserts that he can establish cause for

the procedural default of his conflict of interest[1] and IAC at sentencing[2] claims. (Id. at 5.)

In Martinez, the Supreme Court recognized a narrow exception to the rule stated in Coleman v. Thompson, 501 U.S. 722, 729-30 (1991), "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding . . . ." Martinez, 132 S. Ct. at 1320. In such cases, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Id., 132 S. Ct. at 1320. The Supreme Court also emphasized that "[t]he rule of Coleman governs in all but the limited circumstances recognized here. . . . It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial. . . ." Id., 132 S. Ct. at 1320.

Martinez arose under an Arizona law that does not permit IAC claims to be raised on direct appeal. 132 S. Ct. at 1313. However, "Tennessee does not require prisoners to bring ineffective assistance of trial counsel claims on collateral attack - prisoners may bring them

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[1] The Court made an alternative merits determination on Petitioner's conflict of interest claim. *See* Johnson, 2001 U.S. Dist. LEXIS 25420, at **61-76, **97-106. The Court found that the evidence did not support a conclusion that trial counsel was actively representing competing interests. See id. at *102.

[2] The Court made a merits determination on Petitioner=s IAC sentencing claim. *See* Johnson, 2001 U.S. Dist. LEXIS 25420, at **247-281. However, certain factual allegations were considered procedurally barred because they were not presented in the state court. See id. at **266-29.

on direct appeal." Hodges v. Colson, No. 09-5021, 2013 WL 1196660, at *19 (6th Cir. Mar. 26, 2013). *See* Leberry v. Howerton, No. 3:10-00624, 2012 WL 2999775, at *1 (M.D. Tenn. July 23, 2012) ("[I]n Tennessee, 'there is no prohibition against litigation of ineffective counsel claims on direct appeal, as opposed to collateral proceedings.'") (internal quotation marks omitted). Although IAC claims are usually raised in post-conviction proceedings in Tennessee, the Sixth Circuit in Hodges determined that Tennessee's system does not implicate the same concerns that triggered the rule in Martinez.[3] Hodges, 2103 WL 1196660, at *19; *see* Leberry, 2012 Wl 2999775, at *2 (declining to extend the reasoning of Martinez).

"Virtually every court to have examined the import of *Martinez* in the context of a request for Rule 60(b)(6) relief has rejected the notion that *Martinez* constitutes the 'sea change in law' maintained by Petitioner or satisfies Rule 60(b)(6)'s 'extraordinary circumstances' requirement." Sheppard v. Robinson, No. 1:00-CV-493, 2013 WL 146342, at *11 (S.D. Ohio Jan. 14, 2013) (internal citations omitted) (agreeing that Martinez amounts to a limited change in decisional law and citing Adams v. Thaler, 679 F.3d 312, 320 (5th Cir. 2012) (concluding that Martinez's crafting of a narrow, equitable exception to Coleman is hardly

[3] The United States Supreme Court granted certiorari to address the question of whether Martinez applies where either the courts discourage and/or make it practically impossible to effectively bring an IAC at trial claim on direct appeal. *See* Trevino v. Thaler, 499 F. App'x 415 (5th Cir. 2011), cert. granted, 133 S. Ct. 524 (U.S. Oct. 29, 2012) (No. 11-10189). Oral argument was heard on February 25, 2013. *See* http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalFeb2013.pdf (last accessed Apr. 15, 2013).

extraordinary)); Jackson v. Ercole, No. 09BCVB1054, 2012 WL 5949359, at *4 (W.D. N.Y. Nov. 28, 2012); Fitzgerald v. Klopotoski, No. 09B1379, 2012 WL 5463677, at *3 (W.D. Pa. Nov. 8, 2012); Haynes v. Thaler, No. HB05B3424, 2012 WL 4739541, at *4 (S.D. Tex. Oct.3, 2012); Gale v. Wetzel, No. 1:12BCVB1315, 2012 WL 5467540, at *9 (M.D. Pa. Sept. 27, 2012); Vogt v. Coleman, No. 08B530, 2012 WL 2930871, at *3B4 (W.D. Pa. July 18, 2012) (characterizing Martinez as simply a change in decisional law). *But see* Lopez v. Ryan, 678 F.3d 1131, 1136 (9th Cir. 2012); and Cook v. Ryan, No. CVB97B00146BPHXBRCB, 2012 WL 2798789, at *6 (D. Ariz. July 9, 2012) (concluding that the nature of the change in law heralded by Martinez was a remarkable, albeit limited, development weighing slightly in favor of 60(b)(6) relief).

The Supreme Court announced that its ruling in Martinez was an equitable ruling, which does not rise to the level of a constitutional ruling. Martinez, 132 S. Ct. at 1319B20. The Martinez Court explicitly declined to confront the constitutional question left open in Coleman of whether a prisoner has a right to effective counsel in collateral proceedings, which provide the first occasion to raise a claim of ineffective assistance at trial. *See* id., 132 S. Ct. at 1315 (noting that given the facts presented, "this is not the case ... to resolve whether that exception exists as a constitutional matter"). Therefore, this change in decisional law does not embody the type of extraordinary or special circumstance that warrants relief under Rule 60(b)(6).

Petitioner's motion for relief from judgment (ECF No. 160) is DENIED

C. APPEAL RIGHTS

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. Miller-El v. Cockrell, 537 U.S. 322, 335 (2003); Bradley v. Birkett, 156 F. App'x 771, 772 (6th Cir. 2005). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11, Section 2254 Rules. The petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & (3). A "substantial showing" is made when the petitioner demonstrates that "'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Miller-El, 537 U.S. at 336 (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)); Henley v. Bell, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (same), cert. denied, ___ U.S. ___, 129 S. Ct. 1057 (2009). A COA does not require a showing that the appeal will succeed. Miller, 537 U.S. at 337, 123 S. Ct. at 1039; Caldwell v. Lewis, 414 F. App'x 809, 814-15 (6th Cir. 2011) (same). Courts should not issue a COA as a matter of course. Bradley, 156 F. App'x at 773 (quoting Slack, 537 U.S. at 337, 123 S. Ct. at 1039).

In this case, jurists of reason would not disagree that Petitioner is not entitled to relief from judgment.

Because any appeal by Petitioner does not deserve attention, the Court DENIES a certificate of appealability.

Rule 24(a)(1) of the Federal Rules of Appellate Procedure provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. However, if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the prisoner must file his motion to proceed *in forma pauperis* in the appellate court. *See* Fed. R. App. P. 24(a) (4)-(5). In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter would not be taken in good faith, and leave to appeal *in forma pauperis* is DENIED.[4]

IT IS SO ORDERED this 17th of April, 2013.

BY THE COURT:

/s/John T. Fowlkes, Jr.

JOHN T. FOWLKES, JR.

United States District Judge

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[4] If Petitioner files a notice of appeal, he must pay the full $455 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty (30) days of the date of entry of this order. *See* Fed. R. App. P. 24(a)(5)

APPENDIX C

FILED
[STAMP]
Oct 28, 2015
[REDACTED]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONNIE E. JOHNSON, Petitioner-Appellant, v. WAYNE CARPENTER, WARDEN, Respondent-Appellee.	No. 13-5537 ORDER

Before **BOGGS, NORRIS**, and **CLAY**, Circuit Judges.

Donnie E. Johnson petitions for rehearing en banc of this court's order entered on August 10, 2015, denying his application for a certificate of appealability. The petition was initially referred to this panel. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition then was circulated to all active members of the court. Less than a majority of the judges voted in favor of rehearing en banc. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

FILED
Mar 1, 2001

APPENDIX D

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

WESTERN DIVISION

DONNIE E. JOHNSON, Petitioner, v. RICKY BELL, WARDEN, Respondent.	No. 97-3052-DO

MEMORANDUM AND ORDER ON RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

* * * * *

[*5]

A. INTRODUCTION

Petitioner, Donnie E. Johnson, is confined as an inmate on death row at the Riverbend Maximum Security Facility in Nashville, Tennessee. In preparation for filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, Johnson filed a number of motions related to his capital murder conviction and death sentence, including a motion for stay of execution pursuant to 28 U.S.C. § 2251, a motion pursuant to 28 U.S.C. § 1915 to proceed *in forma pauperis* in filing the habeas petition, an affidavit in support of the section 1915 motion, and an

application pursuant to 21 U.S.C. § 848(q) for appointment of counsel to prepare and file a section 2254 habeas petition.

This case was originally assigned to the Honorable Jerome E. Turner, who granted a stay of execution, granted leave to proceed *in forma pauperis*, and appointed counsel for Johnson. Counsel filed a habeas petition, which respondent has answered. Respondent has also filed the complete state court record with the Court. On January 26, 1999, Judge Turner entered an order holding inapplicable **[*6]** to this petition Chapter 154 of Title 28 of the United States Code, enacted by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, Title I, § 102, 110 Stat. 1220 (Apr. 24, 1996), and holding applicable to this petition Chapter 153 of Title 28, as amended by the AEDPA. (Docket Entry 46.) Respondent then moved for partial summary judgment. In response, petitioner filed a motion seeking leave to conduct discovery. Respondent opposed that motion and submitted several factual affidavits. On June 4, 1999, Judge Turner issued an order denying petitioner leave to conduct discovery and ordering him to respond to the motion for partial summary judgment. (Docket Entry 72.)

The partial summary judgment motion was fully briefed and submitted to Judge Turner. [1] **[*7]** Following the death of Judge Turner, the action was

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[1] Because respondent has moved for summary judgment on each claim in the Petition, it is not entirely clear why this motion is termed one for "partial" summary judgment. The Court assumes that respondent intended to reserve the right to make a later motion in the event the Petition is not dismissed.

reassigned to this Court. For the reasons that follow, the Court now grants summary judgment for respondent. [2]

[*8] B. STATE COURT PROCEDURAL HISTORY

In October, 1985, a Shelby County, Tennessee, Criminal Court jury convicted petitioner of first degree murder in the death of his wife, Connie Johnson, and sentenced him to death by electrocution. The Tennessee Supreme Court affirmed the conviction and sentence. State v. Johnson, 743 S.W.2d 154 (Tenn. 1987), cert. denied, 485 U.S. 994, 99 L. Ed. 2d 513, 108 S. Ct. 1303 (1988). A proper consideration of this federal habeas petition requires a detailed recitation of the procedural history in state court, beginning with the facts of the murder itself. The following is taken from the Tennessee Supreme Court's opinion:

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[2] In their briefs, the parties devote much effort to skirmishing about whose burden it is to come forward with factual and legal authority on this motion. This argument reflects a misunderstanding of the fundamental difference between a habeas proceeding and an ordinary civil action. In most civil actions, the effect of denying a motion for summary judgment is that the case proceeds to trial or, at least, additional discovery. In a habeas proceeding, by contrast, as discussed in more detail in later sections, the ability to conduct an evidentiary hearing, or even to use the fruits of any discovery, is severely constrained. Accordingly, it is in the interest of both parties to provide this Court with any factual or legal support of which they are aware. Even where the parties have not done so, the Court has nonetheless attempted to resolve each of the issues presented by the Petition. Cf. O'Neal v. McAninch, 513 U.S. 432, 437, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995) ("'Whether or not counsel are helpful, it is still the responsibility of the . . . court, once it concludes there was error, to determine whether the error affected the judgment.'") (ellipses in original; citation omitted).

At the time of the trial, appellant was thirty-four years of age. The homicide occurred on December 8, 1984. For three or four years prior to that time, appellant had been the manager and a salesman for a camping equipment center in Memphis. His wife had also worked at the center for a period of twelve to eighteen months, but she was not so employed at the time of her death. Appellant had adopted a daughter of his wife by a former marriage, and the couple had a son who was about four years old at the time of the trial.

There **[*9]** had been some difficulties in the marriage, and appellant's wife had from time to time threatened to separate from him. There is no evidence that appellant had ever seriously injured his wife prior to December 1984. He had admittedly been unfaithful to her although he denied involvement with any other woman at the time of his wife's death. More than a year and a half prior to her death, Mrs. Johnson had purchased a policy of life insurance in which appellant was named as primary beneficiary and her sister as contingent beneficiary. Following the death of Mrs. Johnson, both her sister and appellant made claims for the policy proceeds of fifty thousand dollars.

Mrs. Johnson suffered a most terrible death by suffocation. From this record there is no question but that appellant or one Ronnie McCoy murdered her. Appellant did not testify until the sentencing hearing. At the guilt hearing McCoy testified that appellant killed Mrs. Johnson at appellant's place of employment in the early evening of Saturday,

December 8, 1984, the time of death being estimated at between 6:30 and 7 p.m.

McCoy was a prisoner on work release at the place where appellant was employed. Appellant transported McCoy **[*10]** to and from work each day, checking him in and out at the Shelby County Penal Farm near Memphis. Appellant did so on the date of the homicide. McCoy and two employees of the penal farm testified that appellant transported McCoy to the penal farm after work on that date and checked him in at about 7:17 p.m.

McCoy testified that he left appellant and Mrs. Johnson alone in the office of the camping center while McCoy attended to some chores preparatory to leaving the place of business for the day. He was gone for some ten to fifteen minutes, and when he returned to the office, he testified that he found Mrs. Johnson strangled or suffocated to death.

It is not necessary here to give the horrible details of the manner of her death. It is sufficient to state that a large plastic garbage bag had been forced into her mouth, resulting in her strangulation and asphyxiation. She bled from the nose and ears, and traces of blood were found on a couch in the office where her death occurred. There was testimony that she would have been conscious during the terrifying ordeal and that from one to four minutes would have elapsed before she expired.

Appellant did not testify until the sentencing hearing **[*11]** after he had already been found guilty of murder in the first degree. At that time he denied killing his wife and attempted to place

responsibility upon McCoy. He testified that he left McCoy and Mrs. Johnson alone in the sales office for a few minutes. He had given Mrs. Johnson about $ 250 earlier that morning and about $ 200 again that afternoon for purposes of Christmas shopping. It was his contention that McCoy tried to rob Mrs. Johnson and killed her in the process.

Appellant and McCoy each testified to being afraid of the other. In all events, however, they collaborated, willingly or otherwise, in transporting the body of Mrs. Johnson in her 1981 Ford van from the sales office to a shopping center a few miles away. They also placed inside the van her broken spectacles, her shoes, her coat and some earrings which had become dislodged in her struggle for breath. They parked the van on the edge of a large shopping center and left it there. Each testified that the other drove the van from the office to the shopping center. Both agreed that appellant then transported McCoy to the penal farm in appellant's pick-up truck. McCoy testified that he had driven the truck to the shopping **[*12]** center following appellant who was driving the van.

In all events the van was left on the parking lot overnight. A security officer at one of the retail stores noted its presence, and in the early morning hours of December 9 he placed a ticket on the vehicle but did not open it.

Appellant called his employer near 11 a.m. on the morning of Sunday, December 9, pretending to make inquiry about his wife. He said that she had not come home on the previous evening and had

not picked up their children from the home of appellant's brother. Appellant had spent the night at the sales office and early on the morning of December 9 had delivered a trailer to a customer at a camp site. Upon returning from that trip, he placed the call to his employer.

The employer, Mr. James Force, and his wife were advised by appellant that Mrs. Johnson was supposed to have gone Christmas shopping on the previous evening. Mr. and Mrs. Force agreed to assist in finding her. In the course of doing so they found her van, which was well known to them, at the shopping center. Upon opening the van, they found the lifeless body of Mrs. Johnson. They immediately reported to security personnel at the mall. Investigating **[*13]** police officers arrived in a short time.

Both Mr. and Mrs. Force and appellant gave statements to the police. Appellant denied any involvement in the death of his wife. He made no mention of having known that McCoy killed her and denied that he had any knowledge of when or how her van had reached the premises of the shopping mall.

In addition to the direct testimony of McCoy, there was other strong evidence implicating appellant in the homicide. Appellant had called one Barry Pfister at about 9 p.m. on Saturday evening to inquire about his wife. He told Pfister that he and his wife were coming to the sales office to try to work out their differences. He asked Pfister to observe if and when Mrs. Johnson arrived and to advise her that appellant was on his way.

> At some time during the evening, appellant called on a former girl friend, Debbie McKee, who was working at a local motel. She had called him earlier in the evening, and he drove to her place of employment at some time between 7:30 and 8 p.m. Appellant admitted to the police that he had previously had an affair with Ms. McKee but denied that there was any sexual relationship between them at the time of the homicide.
>
> When Mrs. **[*14]** Johnson's van was opened by police at the shopping mall, it did not contain ignition keys. Mrs. Johnson's set of ignition keys, together with her hairbrush and some other personal items, were found behind the seat of appellant's truck when it was seized following the discovery of Mrs. Johnson's body. Sisters of Mrs. Johnson testified that they could identify the keys which were the only set of keys to the van which Mrs. Johnson had.
>
> The only witnesses called by appellant at the guilt phase were an insurance agent who testified about the life insurance claims made under Mrs. Johnson's policy and one Paul Adams, manager of a tent shop at the camping center. He testified that appellant had come to the door of his shop at about 7 p.m. on Saturday, December 8.

Id. at 155-57.

Petitioner's trial commenced on September 30, 1985 [3] and the case was presented to the jury on October 3, 1985, when the jury returned its verdict finding the petitioner guilty of first degree murder. The sentencing phase of the trial took place on October 3 and 4, 1985. At the conclusion of jury deliberations on October 4, 1985, the petitioner was sentenced to death. The jury found both **[*15]** the aggravating circumstances presented to them: that the defendant was previously convicted of one or more felonies other than the present charge which involved the use of threat or violence to the person, and that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind. [4]

On October 31, 1985, trial counsel filed a motion seeking a judgment of acquittal or, alternatively, a new trial. See Addendum 1, Vol. 1, at 27-28. The trial court judge denied that motion on November 21, 1985. **[*16]** See id. at 30.

A notice of appeal to the Tennessee Supreme Court was filed on December 17, 1985. See id. at 40. Thereafter, on July 14, 1986, trial counsel filed a brief in the Tennessee Supreme Court that raised the four issues that were presented in the motion for a new

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[3] Petitioner was represented at trial by Jeff Crow and Clark Washington.

[4] At the close of testimony in the sentencing phase, the trial judge ruled there was insufficient evidence in the record to charge the jury with respect to an additional aggravating circumstance sought by the State, that the murder was committed for remuneration. See Addendum 1, Vol. 5, at 526-28 (discussing the proposed charge); id., Vol. 1, at 15 (Notice as to the Death Penalty and Aggravating Circumstances).

trial. See Addendum 4. At some time after the direct appeal was fully briefed, petitioner apparently filed charges of attorney misconduct against trial counsel, see Addendum 13, Vol. 2, at 149-50, who were permitted to withdraw, see id., Vol. 1, at 20. Thereafter, new counsel were appointed to represent petitioner before the Tennessee Supreme Court and to file a supplemental brief. See id. at 22. [5] That brief, which was filed on April 28, 1987, raised eleven additional issues. See Addendum 7.

The decision of the Tennessee Supreme Court affirming petitioner's conviction and sentence was issued December 21, 1987. **[*17]** State v. Johnson, 743 S.W.2d 154 (Tenn. 1987). With respect to the issues raised by substitute counsel, the Court stated that "most of them involve matters as to which no objection was made at the trial and no assignment of error contained in the motion for a new trial." Id. at 158. Nonetheless, the Court proceeded to address the merits of a number of those issues. See id. at 158-60.

Substitute counsel filed a petition for a writ of certiorari with the United States Supreme Court on or about February 18, 1998. See Addendum 10. The Supreme Court denied the petition on April 4, 1988. See Addendum 12. On April 18, 1988, the Tennessee Supreme Court scheduled petitioner's execution for June 7, 1988. See Addendum 13, Vol. 1, at 29. Thereafter, on May 12, 1988, the Tennessee Supreme Court issued an order postponing petitioner's

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[5] J. Russell Heldman and James L. Weatherly, Jr. were appointed substitute counsel for petitioner on direct appeal.

execution date until September 8, 1988 on the grounds that

> counsel representing [petitioner] in his direct appeal to this Court have advised that they wish to be relieved and that [petitioner] desires to file a post-conviction relief petition in the Criminal Court of Shelby County and to have **[*18]** new counsel appointed for that purpose.

Id. at 31. The Court further ordered that, in the event of a timely filing of a petition for post-conviction relief, petitioner's execution would be stayed until a final disposition in that proceeding. See id. at 31-32.

Petitioner filed a pro se petition pursuant to the then-current version of the Tennessee Post-Conviction Procedure Act, Tenn. Code Ann. §§ 40-30-101 to -124, in the Shelby County Criminal Court on or about May 8, 1988. See id. at 34. That petition raised a number of claims, the most significant of which was a claim of ineffective assistance of counsel at trial and on direct appeal. See id. at 34-37. [6] The state court petition was assigned to the judge who had conducted petitioner's original trial, who appointed the public defender to represent petitioner. See id. at 52. [7]

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[6] At that time, petitioner apparently did not complain about the performance of substitute counsel on direct appeal. See id. at 35.

[7] Petitioner was represented during the post-conviction proceeding by Gwendolyn Rooks and Robert Jones of the Shelby County Public Defender's Office.

Petitioner had very definite ideas about the issues he wanted raised in the state post-conviction proceeding. From this point

[*19] Thereafter, on March 29, 1988, post-conviction counsel filed an amended petition incorporating all the material contained in the original petition and raising additional contentions that trial counsel's performance during the sentencing phase of the trial was deficient. The amended petition alleged, *inter alia*, that trial counsel failed to present sufficient mitigating evidence. [8]

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forward, the state-court record reveals continuous conflicts between petitioner and the numerous attorneys appointed to represent him. Thus, post-conviction counsel filed a motion on September 21, 1988 seeking an order allowing petitioner to act as co-counsel and participate in his own defense. See id. at 66. Several months later, petitioner became dissatisfied with the performance of his court-appointed counsel and advised her that he was "firing" her. Accordingly, on November 29, 1988, post-conviction counsel filed a motion seeking to withdraw. See id. at 65. Petitioner simultaneously filed a motion seeking appointment of new counsel or, in the alternative, leave to proceed pro se. See id. at 69. (Various letters from petitioner to his post-conviction counsel are attached as Exhibits 7-13 and 15-17 to Petitioner's Response to Respondent's First Motion for Partial Summary Judgment ("P. Br.").) On December 15, 1988, the court issued an order denying the various motions. See id. at 74. That order stated:

> The Petitioner has no standing to "fire" his attorney appointed by this Court to represent the Petitioner. The Court will not release the Public Defender's office without good cause. Good cause has not been shown by the Petitioner. From past experience this Court has the utmost faith in the ability of Ms. Rooks and Mr. Jones to adequately represent the Petitioner's allegations.

Id.

[8] A copy of the Amended Petition and a *nunc pro tunc* order of the Court, dated January 14, 1991, are contained at the end of Addendum 13, Vol. 1, following page 119. These additional pages are not numbered.

The evidentiary hearing on the petition for post-conviction relief commenced on March 31, 1989 and continued on April 3, 1989. See id. at 89. During that hearing, the court heard the testimony of twenty-seven (27) witnesses called by petitioner and three witnesses called by the State. These witnesses included the petitioner, each of the attorneys who had represented him at and prior to trial, various witnesses who **[*20]** previously testified at trial, numerous relatives and one friend, and several experts on the proper investigation and conduct of the sentencing phase of a capital case. Thereafter, on August 2, 1989, the court issued an order denying the petition for post-conviction relief. See id. at 96-104.

A notice of appeal was filed with the Tennessee Court of Criminal Appeals on May 25, 1990. See id. at 108. [9] **[*21]** Petitioner's brief was filed January 22, 1991.

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[9] On or about May 24, 1990, a judge of the Tennessee Court of Criminal Appeals issued an order waiving the 30-day notice of appeal requirement pursuant to Rule 4(a), Tennessee Rules of Criminal Procedure. See Addendum 16. The State filed a petition to rehear, see Addendum 17; see also Addendum 15 (State's Response to Appellant's Motion to Waive Deadline for Filing Notice of Appeal), which was denied on June 8, 1990. See Addendum 18. Post-conviction counsel attributed petitioner's failure to file a timely notice of appeal to the fact that, after the trial judge denied the petition, petitioner informed his attorneys that he no longer wanted them to represent him and would instead hire private counsel. See Addendum 14. This fact was not brought to the attention of the trial court judge, and no order was entered relieving counsel from further representation. See Addendum 16 at 1-2. Accordingly, the Court stated that it "is not going to permit the appellant to be executed because of a procedural default which occurred when counsel abandoned him without authorization. . . . Consequently, it is in the interest of justice to waive the notice of appeal requirement." Id. at 3.

See Addendum 19. [10] On March 20, 1991, the Court of Criminal Appeals issued an order transferring to the Tennessee Supreme Court petitioner's claim that he was denied effective assistance of counsel on his direct appeal to that court. The Tennessee Court of Criminal Appeals retained jurisdiction over the remaining issues raised on appeal. See Addendum 21. Thereafter, on June 26, 1991, the Tennessee Court of Criminal Appeals issued an opinion affirming the trial court judgment. See Addendum 22.

On June 27, 1991, the Shelby County Public Defender's Office moved for permission to withdraw as counsel on the ground that that office did not see a basis for an Application for Permission to Appeal to the Tennessee Supreme Court. See Addendum **[*22]** 23, at 1. That motion was granted on July 3, 1991. See Addendum 24.

At the time of this order, that portion of petitioner's appeal that was before the Tennessee Supreme Court was still pending and, on October 29, 1991, in response

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[10] Petitioner's brief on appeal was filed by James H. Bostick, an assistant public defender. A.C. Wharton, Jr., Shelby County Public Defender, was of counsel.

Previously, on or about December 13, 1990, Mr. Bostick had filed a motion seeking to relieve the Shelby County Public Defender's Office from further representation of petitioner on the grounds that petitioner had filed a second post-conviction petition alleging ineffective assistance by Ms. Rooks and Mr. Jones. Petitioner apparently filed a pro se motion to the same effect. These motions were apparently denied by the Tennessee Court of Criminal Appeals on December 20, 1990. (Copies of the motion papers filed by the Shelby County Public Defender's Office and the first page of the court's order are contained at the end of Addendum 19. The remainder of the court's order does not appear in the record.

to a letter received from petitioner, see P. Br., Exhibit 26, the Tennessee Supreme Court issued an order making clear that "the Court of Criminal Appeals has not relieved counsel in the appeal still pending before this Court," see Addendum 26, at 1. The Tennessee Supreme Court elected to treat petitioner's letter as a Rule 11 application for permission to appeal, and it appointed counsel to represent petitioner in that application. See id. at 2-3. [11]

[*23] Petitioner's brief on the ineffective assistance of appellate counsel issue was filed on or about March 5, 1992. See Addendum 30. Likewise, petitioner's counsel filed an Amended Rule 11 Application for Permission to Appeal and Supporting Brief of Appellant on or about March 18, 1992. See Addendum 31. On or about March 19, 1992, the State filed a motion seeking an order holding the ineffective assistance of appellate counsel issue in abeyance pending resolution of petitioner's motion for permission to appeal. See Addendum 32. The Tennessee Supreme Court denied that motion on April 7, 1992, and, instead, ordered that, "in the interests of judicial efficiency, . . . the appellant's issue regarding the effectiveness of his counsel will be considered along with his application for permission to appeal." Addendum 34. After the State responded to the Amended Rule 11 Application,

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[11] The order of the Tennessee Supreme Court appointed Mr. Bostick of the Shelby County Public Defender's Office to represent petitioner. See id. On November 7, 1991, Mr. Bostick filed a motion to be relieved on the ground that he had retired from the Public Defender's Office. See Addendum 27. That motion was granted on December 5, 1991, and Walker Gwinn was appointed to represent petitioner as substitute counsel. See Addendum 28.

see Addendum 35, petitioner filed a supplemental pro se brief on or about April 23, 1992. See Addendum 36. Shortly thereafter, the State submitted its brief on the ineffective assistance of appellate counsel issue. See Addendum 37.

In response to what it characterized as "[a] plethora of **[*24]** petitions, motions and various pleadings [that] have been filed in this proceeding by petitioner pro-se and by appointed counsel," Addendum 38, at 1, the Tennessee Supreme Court issued an order, dated July 2, 1992, that summarized the procedural posture and ordered as follows:

> 1. The clerk of this Court is directed to consolidate all issues raised in this case and to docket the same for consideration at the November, 1992 term of Court at Jackson.
>
> 2. Counsel for petitioner and for the State are directed to file all required briefs and pleadings, etc. necessary to the disposition of the proceedings at the November term.
>
> 3. No further pro-se pleadings will be filed except by express permission of the Court.
>
> 4. All motions[,] pleadings, etc. not heretofore ruled upon are herewith denied, subject to re-submission by counsel.

Id. at 3-4.

On March 8, 1993, the Tennessee Supreme Court issued an order denying permission to appeal. See Addendum 40. That day the Tennessee Supreme Court

also issued an opinion rejecting petitioner's claim that he was denied effective assistance of counsel on direct appeal. See Addendum 39. The Tennessee Supreme Court **[*25]** based its decision on the fact that it had fully reviewed on the merits each of the issues raised in petitioner's various briefs on direct appeal:

> Substitute counsel filed a supplemental brief raising eleven additional issues, and those issues were fully reviewed, on the merits, by this Court. Here, the defendant fails to recognize that we considered the issues raised by substitute counsel and found that each one was either without merit, or if error occurred, it was harmless beyond a reasonable doubt. Therefore, even assuming for the purpose of argument that the initial appellate counsel's performance was deficient, the defendant has not demonstrated that the deficient performance prejudiced his appeal. . . .

Id. at 5.

In the meantime, because of his dissatisfaction with the performance of post-conviction counsel, petitioner filed a successive pro se petition in the Shelby County Criminal Court pursuant to the Tennessee Post-Conviction Procedure Act on or about June 5, 1989. This new petition alleged that petitioner had received inadequate assistance of post-conviction counsel and also reiterated many of the same claims that were alleged in the first post-conviction **[*26]** proceeding. See P. Br., Exhibit 14. [12] The successive Petition was

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[12] The various Addenda submitted to this Court do not include a copy of this second petition.

accompanied by a lengthy affidavit of petitioner, which contains numerous additional allegations not incorporated into the Petition, see Addendum 41, Vol. 1, at 37-51, as well as by factual affidavits submitted by family members and a friend who testified at the first post-conviction hearing [13] and an additional friend and a correction officer who submit that they were not called to testify notwithstanding their availability and willingness to offer evidence. [14]

The State moved to dismiss the successive petition on or about December 5, 1989 on the grounds that certain claims had been previously determined in the first post-conviction petition and the others were waived. **[*27]** See id. at 73-75. [15] **[*28]** Thereafter, on or about December 12, 1990, petitioner filed a motion seeking a continuance until resolution of his appeal of the decision in his first Petition for Post-Conviction

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[13] See id. at 32-34 (affidavits of Barry Gray); 52 (Mary Ward); 53 (Shirley Ward).

[14] See id. at 35-36 (affidavit of William Wicks); 54 (Denise Johnson).

[15] On July 12, 1989, the trial court judge appointed Thomas Veteto to represent petitioner in the successive post-conviction proceeding. See Addendum 41, at 56. Petitioner filed a motion on or about September 11, 1989 seeking appointment of new counsel or, in the alternative, leave to proceed pro se. See id. at 58-60. That motion was denied by order dated April 6, 1990. See id. at 89, 91. On or about April 10, 1990, petitioner filed a motion seeking to be allowed to proceed pro se. See id. at 92-97. Mr. Veteto also filed a motion on April 27, 1990 seeking permission to withdraw. See id. at 100. Mr. Veteto's motion was granted on April 27, 1990, see id. at 102, and, by order dated June 18, 1990, the court appointed Jim Ball to represent petitioner, see id. at 108. On June 22, 1990, the court also appointed Dwight E. Duncan as counsel for petitioner. See id. at 110.

Relief. See id. at 119-20. [16] Although the trial court judge apparently did not rule on this motion, the hearing on the State's motion to dismiss the successive petition occurred on August 22, 1991, shortly after the Tennessee Court of Criminal Appeals rendered its decision resolving most of the issues raised on appeal. See id. at 126.

At the hearing, the trial court judge heard arguments by counsel but refused to permit petitioner to present evidence in support of this petition. See id., Vol. 2. Petitioner's counsel argued that there was no waiver because appointed counsel refused to present valid issues identified by petitioner. See id. at 9-16. On October 3, 1991, the trial court issued an order granting the State's motion to dismiss. See id., Vol. 1, at 129. With respect to petitioner's waiver claim, the trial court wrote as follows:

> The petitioner contends that he is entitled to a second evidentiary hearing on the basis that the issues A-Q have not been intelligently and knowingly waived. Swanson v. State, 749 S.W.2d 731. Swanson is not of assistance to the petitioner in that the allegation in this second petition was recognizable and available for a presentation **[*29]** to a competent court of jurisdiction for a determination. These are not new grounds that were not recognized at the time of conviction and have been applied retroactively. The petitioner, in

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[16] Petitioner's counsel in the successive post-conviction proceeding also sought, apparently unsuccessfully, to replace the Shelby County Public Defender's Office as counsel for petitioner in the then-pending appeals. See id.

> a previous hearing, had every opportunity to litigate these allegations through competent counsel. This is not a situation of a technical dismissal of a pro-se petition without benefit of counsel.

Id. at 131.

Petitioner filed a notice of appeal to the Tennessee Court of Criminal Appeals on October 31, 1991. See id. at 142. Petitioner's brief in support of his appeal was filed on or about August 4, 1992, see Addendum 42, [17] and the State filed its brief on or about September 17, 1992, see Addendum 43.

[*30] On March 23, 1994 the Tennessee Court of Criminal Appeals issued a lengthy opinion reversing the dismissal of petitioner's second post-conviction petition. See Addendum 44. The Court of Criminal Appeals assumed that post-conviction counsel had failed or refused to raise issues that petitioner had brought to their attention. See id. at 2; see also id. at 3-9. The Court held:

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[17] Previously, on or about January 27, 1992, petitioner filed a pro se motion for appointment of counsel and for an extension of time to file his brief. See Addendum 29. Petitioner alleged in support of his motion that one of the attorneys formerly assigned to represent him, Dwight Duncan, had moved out of state and that the other, James Ball, had advised him of his intention to seek to withdraw. The record does not indicate the disposition of petitioner's motion. In any event, petitioner's brief was signed by both Messrs. Duncan and Ball and the cover page indicates that both attorneys had Memphis addresses more than 7 months after petitioner's pro se motion.

> In consideration of our Act limiting relief to constitutional violations which render a conviction or sentence void or voidable, we conclude that waiver of such a ground for relief in a post-conviction proceeding is personal to the petitioner. In this respect, post-conviction counsel's role is only relevant in terms of how it bears upon the petitioner knowingly and understandingly waiving a ground for relief. . . .

Id. at 33. Thus, the Court concluded:

> As a matter of fact, if the issues relating to constitutional rights were not raised in the criminal prosecution because of the ineffective assistance of counsel and were not raised in the first post-conviction case because counsel refused the petitioner's request to raise them, we would conclude that the petitioner has rebutted **[*31]** the presumption of waiver. However, such determinations of fact must follow an evidentiary hearing.

Id. at 36-37. The Court of Criminal Appeals directed the trial court to conduct an evidentiary hearing in which "the petitioner has the burden of proving by a preponderance of the evidence that each ground for relief he now raises has not been waived." Id. at 37.

The record suggests that the State sought leave to appeal to the Tennessee Supreme Court on or about

May, 1994, see Addendum 45, [18] **[*32]** and petitioner responded on or about July 1, 1994, see Addendum 46. [19] On or about October 9, 1995, the Tennessee Supreme Court issued a per curiam order granting the State's application for the purpose of remanding the case to the Court of Criminal Appeals for reconsideration in light of House v. State, 911 S.W.2d 705 (Tenn. 1995), cert. denied, 517 U.S. 1193, 134 L. Ed. 2d 787, 116 S. Ct. 1685 (1996). See Addendum 47.

On remand, the Tennessee Court of Criminal Appeals issued an order on or about December 15, 1995 directing the parties to file briefs directed to three specified issues. See Addendum 48. [20] Petitioner's supplemental brief was filed March 4, 1996, see Addendum 50, and the State filed its brief on April 9, 1996, see Addendum 51. Thereafter, on March 27, 1997, the Tennessee Court of Criminal Appeals issued its opinion holding that the trial court's dismissal of the second petition was proper. See Addendum 52, at 2. The court explained:

> Given House's conclusions, the petitioner's claims about the ineffectiveness, failures and refusals of

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[18] The copy of this brief appearing in the record is neither signed nor dated. In the absence of any objection by petitioner, the Court assumes it to be genuine.

[19] Petitioner's brief was submitted only by James V. Ball, and the certificate of service indicates that a copy was mailed to Dwight Duncan in Las Vegas, Nevada. See id. at 12.

[20] The Court of Criminal Appeals issued an order on January 23, 1996 substituting Paul Johnson Morrow for Messrs. Ball and Duncan as counsel for petitioner. See Addendum 49. Although the order refers to a motion by petitioner, a copy of that motion does not appear in the record.

> counsel in his first post-conviction case neither refute previous determinations of some grounds nor rebut the presumption of waiver as to other grounds. Further, he does not now specify the violation of any particular fundamental trial right that would require his **[*33]** personal waiver in a knowing and understood fashion.

Id. at 4-5 (footnote omitted).

Petitioner, through counsel, filed an application for permission to appeal on or about May 30, 1997. See Addendum 53, [21] and the State responded on June 6, 1997, see Addendum 54. The Tennessee Supreme Court issued a per curiam order on September 8, 1997 denying permission to appeal. See Addendum 55. Shortly thereafter, petitioner commenced this action.

* * * * *

[*62]

II. Analysis of Petitioner's Claims

A. Ineffective assistance of counsel at the guilt stage of trial (Claim 1)

Count 1 of the Petition raises the issue of ineffective assistance of counsel at the guilt stage of petitioner's trial. Although petitioner first raised the issue of ineffective assistance of trial counsel in his first post-conviction proceeding, it is given a substantially

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[21] The version of the document that appears in the record is not signed by petitioner's counsel, although the first page is stamped as received by the office of the Tennessee Attorney General.

different cast in this habeas Petition. The Petition alleges that trial counsel had several actual conflicts of interest that precluded them from pursuing various viable defense strategies. In his brief in opposition to respondent's summary judgment motion, petitioner also urges that, in the event the conflict theory is rejected, his Petition should be read as encompassing a standard claim of ineffective assistance of trial counsel. The Court addresses each theory separately.

1. The actual conflict of interest claim

During pretrial proceedings **[*63]** and at trial, petitioner was represented by Jeff Crow and Clark Washington of the firm of Schledwitz, Crow, Beliles, Bearman, Butler & Washington (the "Firm"). See Petition at 12. Leslie Fatowe, an associate at the Firm, was also involved in the representation of petitioner for some time prior to trial. See id. at 11-12. The Petition alleges that Ronnie McCoy, a key prosecution witness, was indicted for burglary and false reporting on August 14, 1984 and, on November 11, 1984, he pleaded guilty and was placed on work release. Ms. Fatowe represented Mr. McCoy in connection with these charges. See id. at 11, 13. Petitioner contends that Mr. McCoy's admitted participation-at least after the fact-in Mrs. Johnson's murder could have jeopardized his work release status and resulted in criminal charges. See id. at 12, 14. The Firm also represented Mr. McCoy in an unrelated civil matter. See id. at 13. Finally, the Firm represented Debbie McKee, a trial witness called by the State, in a divorce. See id.

Petitioner argues that this dual representation created inherent conflicts of interest. As a result of this

conflict, petitioner contends that the Firm could not pursue **[*64]** the defense that Mr. McCoy killed Mrs. Johnson. It also could not impugn the credibility of its clients. See id. at 14. Petitioner contends that his trial was, therefore, unreliable.

Before evaluating the substance of this claim, including respondent's contention that much of the claim has been procedurally defaulted, the Court first addresses the legal standards for evaluating claims that a petitioner's trial counsel had a conflict of interest. The Court must then set forth the factual record, including the development of this issue in state court. The legal analysis follows.

a. The legal standards for evaluating attorney conflict of interest claims

In Cuyler v. Sullivan, 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980), the Supreme Court established the standard for evaluating claims by habeas petitioners that defense counsel represented conflicting interests. Although the Supreme Court recognized that "a possible conflict inheres in almost every instance of multiple representation," it nonetheless refused to "presume that the possibility for conflict has resulted in ineffective assistance of counsel." Id. at 348. Instead, the Supreme Court held that, "in order **[*65]** to establish a violation of the Sixth Amendment, a defendant who has raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Id. (footnote omitted).

> [A] defendant who shows that a conflict of interest actually affected the adequacy of his

> representation need not demonstrate prejudice in order to obtain relief. . . . But until a defendant shows that his counsel actively represented competing interests, he has not established the constitutional predicate for his claim of ineffective assistance. . . .

Id. at 349-50 (citations omitted).

Thereafter, in Burger v. Kemp, 483 U.S. 776, 97 L. Ed. 2d 638, 107 S. Ct. 3114 (1987), the Supreme Court revisited the issue of attorney conflicts of interest in criminal representations. In that case, two law partners represented co-indictees, who were tried separately, and worked together in preparing their defense. The district court, after conducting a full evidentiary hearing, determined that the petitioner was not entitled to relief. Once again, the Supreme Court emphasized that joint representation is not a per se violation of the Sixth Amendment. See **[*66]** id. at 783. The Supreme Court also did not articulate any general standards for determining whether the two requisites set forth in Cuyler-(i) that counsel actively represented competing interests and (ii) that the conflict of interest adversely affected the lawyer's performance-has been satisfied. Instead, in holding that neither requisite had been established, the Supreme Court conducted a detailed examination of the factual record, deferring to the credibility determinations of the district court and refusing to speculate that decisions taken by trial counsel were

motivated by the conflict, rather than by legitimate tactical considerations. See id. at 783-90. [24]

The various Courts of Appeals have also had occasion to consider the standards to be applied in evaluating claims that **[*67]** a criminal defendant's trial counsel represented conflicting interests. These decisions are not completely in accord with respect to the standards to be applied to such claims. [25] Keeping in mind the statutory command in section 2254(d)(1) that the district courts apply "clearly established Federal law, as determined by the Supreme Court of the United States," the Court does not attempt to reconcile these various approaches or to suggest the appropriate standard to be applied in this case. Instead, the Court discusses these legal standards at length to make the point that petitioner's allegation that trial counsel labored under an actual conflict of interest is a potentially serious claim that would appear to be worthy of investigation.

The Eleventh Circuit has developed the most detailed standards for evaluating attorney conflict claims. The test applied by that Court for determining **[*68]** whether a lawyer labored under an actual conflict of interest is as follows:

> An "actual conflict" of interest occurs when a lawyer has "inconsistent interests." . . . In order to

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[24] Indeed, the Supreme Court stated that "we generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client." Id. at 784.

[25] Moreover, many opinions applied pre-AEDPA standards concerning the ability of a district court to conduct an evidentiary hearing.

> prove that an "actual conflict" hindered petitioner's lawyer's performance, petitioner "must make a factual showing of inconsistent interests" or point to "specific instances in the record" to suggest an actual impairment of his or her interests. . . . "Generally, it is more difficult to prove that successive representation caused an actual conflict of interest than that simultaneous representation did so." . . . At a minimum, petitioner must "show that either (1) counsel's earlier representation of the witness was substantially and particularly related to counsel's later representation of [petitioner], or (2) counsel actually learned particular confidential information during the prior representation of the witness that was relevant to [petitioner's] later case." . . . . Even proof of both substantial relatedness and confidential information, however, may not necessarily be enough to demonstrate "inconsistent interests" in a successive representation case. . . . The situation may call for "other **[*69]** proof of inconsistent interests." . . . Overall, the "actual conflict" inquiry is fact-specific, consistent with the petitioner's ultimate burden "to prove that his conviction was unconstitutional."

Freund v. Butterworth, 165 F.3d 839, 859 (11th Cir.) (en banc), cert. denied, 528 U.S. 817, 145 L. Ed. 2d 50, 120 S. Ct. 57 (1999) (citations and footnote omitted; bracket in original); see also Mills v. Singletary, 161 F.3d 1273, 1287 (11th Cir. 1998), cert. denied, 528 U.S. 1082, 145 L. Ed. 2d 677, 120 S. Ct. 804 (2000); Porter v. Singletary, 14 F.3d 554, 560-61 (11th Cir.), cert. denied, 513 U.S. 1009, 130 L. Ed. 2d 435, 115 S. Ct.

532 (1994); Smith v. White, 815 F.2d 1401, 1404-06 (11th Cir.), cert. denied, 484 U.S. 863, 98 L. Ed. 2d 133, 108 S. Ct. 181 (1987).

Likewise, in order to show that a conflict has adversely affected a lawyer's performance, the Eleventh Circuit requires proof of the following:

> "To prove adverse effect, a habeas petitioner must satisfy three elements. First, he must point to 'some plausible alternative defense strategy or tactic [that] might have been pursued.' . . . Second, he must demonstrate that the alternative strategy or tactic was reasonable **[*70]** under the facts. Because prejudice is presumed . . . , the petitioner 'need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used,' rather he only need prove that the alternative 'possessed sufficient substance to be a viable alternative.' . . . Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, 'he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.' . . ."

Freund, 165 F.3d at 860 (quoting Freund v. Butterworth, 117 F.3d 1543, 1579-80 (11th Cir. 1997), vacated, 135 F.3d 1419 (11th Cir. 1998)) (brackets in original). [26]

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[26] The Eleventh Circuit's standard has also been adopted by the Seventh Circuit. See Enoch v. Gramley, 70 F.3d 1490, 1496 (7th

[*71] A number of other Circuits have adopted somewhat similar tests. For example, the Fifth Circuit examines the following factors:

> We have in each case focused upon the "guiding principle in this important area of Sixth Amendment jurisprudence," which is whether counsel's allegiance to the accused was compromised by competing obligations owed to other clients. . . . This is not to say that those factors employed in the threshold tests employed by our sister circuits are without import in our own precedent. A conflict of interest may exist by virtue of the fact that an attorney has confidential information that is helpful to one client but harmful to another. . . . Likewise, we have relied upon the relationship between the subject matter of the multiple representations when determining whether counsel was burdened by an actual conflict. . . . This Court has also relied upon the temporal relationship between the prior and subsequent representations. Where the prior representation has not unambiguously been terminated, or is followed closely by the subsequent representation, there is more likely to be a conflict arising from defense counsel's representation of the first client. . **[*72]** . . Where, on the other hand, defense counsel's prior representation unambiguously terminated before the second representation began, the possibility that defense counsel's continuing obligation to his former client will impede his representation of his

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Cir.), cert. denied, 519 U.S. 829, 136 L. Ed. 2d 50, 117 S. Ct. 95 (1996).

> current client is generally much lower. . . . This Court has also relied upon the character and extent of the prior representation. Where the prior representation involved a formal and substantial attorney-client relationship, a finding of actual conflict is more likely. . . . Where, however, defense counsel's involvement in the prior representation was either transient or insubstantial, we have been less inclined to find an actual conflict. . . . Thus, whether the facts of a particular case give rise to an actual conflict depends . . . upon these and any other factors that illuminate whether the character and extensiveness of the prior representation were such that counsel is prevented "by his interest in another's welfare from vigorously promoting the welfare of his [current] client." . . .

Perillo v. Johnson, 205 F.3d 775, 799-800 (5th Cir. 2000) (citations omitted; brackets in original); see also Simmons v. Lockhart, 915 F.2d 372, 378 (8th Cir. 1990) **[*73]** ("The conflict of interest, however, must be actual, not merely theoretical. Under the cases, this appears to mean that there must have been some actual adverse effect on the defendant's case. The mere fact, for example, that one of Simmons's lawyers in the state trial court had previously represented a person later called as a prosecution witness against Simmons, does not suffice to entitle Simmons to relief. Simmons must show, in addition, that this dual representation made some difference, and that this difference was adverse to his defense."); Burket v. Angelone, 208 F.3d 172, 184-88 (4th Cir.), cert. denied, 530 U.S. 1283, 147 L. Ed. 2d 1022, 120 S. Ct. 2761 (2000); Hess v. Mazurkiewicz, 135 F.3d 905, 910-11 (3d Cir. 1998);

Sanders v. Ratelle, 21 F.3d 1446, 1452-53 (9th Cir. 1994). [27]

[*74] A number of Courts of Appeals have considered the precise factual situation alleged by petitioner here-defense counsel's prior representation of a significant witness for the State who is also an alternative suspect in connection with the pending charges. The different resolutions of these cases turn, in large part, on differences in the factual situations presented. See Enoch v. Gramley, 70 F.3d at 1496-97 (holding petitioner not entitled to evidentiary hearing; defense counsel had represented the State's witness on a totally unrelated charge 4 years ago; no showing of an actual conflict of interest); Church v. Sullivan, 942 F.2d 1501 (10th Cir. 1991) (holding petitioner entitled to an evidentiary hearing; the charge on which defense counsel represented the State's witness was factually intertwined with the criminal charges pending against the defendant; an effective cross-examination of the State's witness required defense counsel to probe the circumstances of, and motivations for, the crime on which he represented the witness, information clearly subject to the attorney-client privilege); Smith v. White, 815 F.2d at 1404-06 (upholding **[*75]** dismissal of the petition after an evidentiary hearing; prior representation was near in time but there was no showing it was substantially related or that defense counsel possessed confidential information learned

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[27] By contrast, the Tenth Circuit, in a pre-AEDPA decision, held that, once a petitioner establishes an actual conflict of interest, he is entitled to an evidentiary hearing "in which he might develop facts sufficient to prove that the conflict adversely affected his representation." Church v. Sullivan, 942 F.2d 1501, 1510 (10th Cir. 1991).

during the prior representation; noting that the evidence "raised, at very most, a speculative possibility of conflict"); see also Sanders v. Ratelle, 21 F.3d at 1446 (ordering that petition be granted; defense attorney in murder case had briefly represented defendant's brother and knew he was almost certainly the real murderer; there was substantial evidence that defense attorney failed to take steps that would implicate brother although that was his client's strongest defense). [28]

[*76] At a minimum, then, these cases indicate that the actual conflict of interest claim is a potentially serious issue that should have been fully developed in state court. As the next sections demonstrate, this did not happen.

b. The factual record

The record before this Court concerning the alleged conflicts of interest is skeletal. There was virtually no

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[28] By contrast, for obvious reasons, courts have found actual conflicts of interest where an attorney representing the petitioner negotiates an immunity agreement for a witness. See, e.g., Dawan v. Lockhart, 31 F.3d 718 (8th Cir. 1994); Burden v. Zant, 24 F.3d 1298, 1305 (11th Cir. 1994). However, a court is not required to find an actual conflict where trial counsel was not involved in the procurement of any deal. See Porter v. Singletary, 14 F.3d at 561 ("Porter failed to adduce evidence to prove an actual conflict of interest. The evidence credited by the district court establishes that Widmeyer did not refrain from asking Thomas any questions because of his prior representation of Thomas, and that Thomas was not in fact promised anything for testifying against Porter. Moreover, in light of Thomas' explicit testimony [at trial] that he was promised nothing, Widmeyer apparently decided for strategic reasons not to cross-examine Thomas about a deal, but rather to argue the inference of a deal in closing to the jury.").

factual development of the issue in state court. The issue was first raised at the very close of petitioner's testimony at the post-conviction hearing in 1989. The entirety of petitioner's testimony on this subject was as follows:

> Q: Also, Mr. Johnson, is it not true that-or do you have information that that firm of Mr. Crow's and Mr. Washington's also represented Mr. McCoy who was a state's witness on this case?
>
> A: Yes. It's my understanding that their office represented Mr. McCoy on the charge that he was incarcerated on at the time. As to exactly which one did, I don't know.

Addendum 13, Vol. 2, at 176.

Each of the three Firm lawyers who participated in petitioner's defense testified at the post-conviction proceeding. Post-conviction counsel did ask Mr. Crow about the Firm's prior representation **[*77]** of Mr. McCoy, and he testified as follows:

> Q: Now, Mr. Johnson has alleged that someone in your office represented Mr. McCoy, who was the state's witness in this case, right before Mr. Johnson's case or in the case that Mr. McCoy was serving time?
>
> A: The only thing I can testify to is my own knowledge, and Ron McCoy was involved in an automobile accident at or about the time of Connie Johnson's murder. He retained me to represent him. I withdrew as soon as I learned that he was going to be a witness against Johnson.

Id., Vol. 3, at 216. [29] Mr. Washington and Ms. Fatowe were not asked about any criminal representation of Mr. McCoy.

[*78] The factual record regarding the representation of Debbie McKee also is not well developed. Mr. Crow testified as follows:

> Q: What about Ms. McKee, you also were representing her during that time for her divorce?
>
> A: I think Mr. Washington was.

Id. at 221. Mr. Washington was not asked any questions concerning his representation of Ms. McKee. Debbie McKee, who testified as well, confirmed only that Mr. Washington represented her in a divorce. See id., Vol. 4, at 303. [30]

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[29] Mr. Crow was not asked any additional questions concerning his representation of Mr. McCoy in the automobile accident case. Accordingly, the state-court record does not reveal (a) the dates on which Mr. Crow commenced and terminated his representation of Mr. McCoy; (b) whether Mr. McCoy was plaintiff or defendant in that case; (c) the extent of work done by Mr. Crow on Mr. McCoy's behalf; and (d) whether Mr. Crow was in possession of client confidences related by Mr. McCoy. Mr. Crow does amplify on these matters in an affidavit submitted to this Court. See infra page 55.

[30] Accordingly, the record does not disclose (a) the time period during which Mr. Washington represented Ms. McKee; (b) whether the divorce was contested and, if so, whether Ms. McKee was the plaintiff or the defendant; (c) the particular legal services Mr. Washington performed for Ms. McKee; or (d) the extent to

No further information was developed concerning these alleged conflicts until this action was commenced and petitioner sought **[*79]** leave of the Court to take discovery on this issue in order to respond to the partial summary judgment motion. Petitioner submitted a declaration of Ms. Fatowe in support of his motion. That declaration stated in relevant part as follows:

> 2. During the period August 1984 to October 1985 I worked as an Associate with the firm SCHLEDWITZ, CROW, BELILES, BEARMAN, BUTLER & WASHINGTON ("Firm").
>
> 3. Ron McCoy was a Firm client. Prior to the Firm's representation of Donnie E. Johnson, either Jeff Crow or Clark Washington referred to me Mr. McCoy and requested that I represent him on charges that he had falsely reported times he was out of the Shelby County Penal Farm.
>
> 4. I represented Mr. McCoy as requested. The attached Exhibit 1 indicates that on November 13, 1984, the final disposition of Mr. McCoy's case was a four month sentence based on a guilty plea Mr. McCoy entered.
>
> 5. Any documents that I created or reviewed during my representation of Mr. McCoy were maintained in a central file at the Firm. When I left the Firm, I did not take any of those documents with me.

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which Mr. Washington was in possession of client confidences related by Ms. McKee.

Declaration of Leslie Fatowe, Esq., dated Apr. 7, 1999. The exhibit to Ms. Fatowe's declaration consists of **[*80]** the "jacket" for the state court proceeding against Mr. McCoy, which lists Ms. Fatowe as the defense attorney. [31]

Respondent submitted the affidavits of Messrs. Crow and Washington in opposition to petitioner's discovery motion. Although both attorneys apparently conceded that Ms. Fatowe must have represented Mr. McCoy in the criminal proceeding, both denied any current knowledge of that representation and stated that any written records no longer exist. Mr. Crow stated as follows:

> At the time our firm was retained by Donnie Johnson, I was working on a case involving a car accident on behalf of Mr. McCoy. As soon as I became aware of McCoy's involvement in the murder trial, he was sent a letter discontinuing my representation of him. At this time, I cannot recall if I had even met with Mr. McCoy. It was **[*81]** our custom in the firm that car wreck cases were brought in by the original attorney and passed to me to negotiate with the insurance companies.
>
> Mr. McCoy was referred to our firm for representation by Donnie Johnson. Mr. Johnson referred a number of people to our firm following our handling of a bankruptcy case for himself and his wife.

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[31] This declaration and the accompanying exhibit are annexed as Exhibit 4 to Petitioner's Memorandum in Support of Motion for Leave to Conduct Discovery, which was filed April 12, 1999 (Docket Entry 53).

> I have reviewed the declaration of Leslie Fatowe who was an associate of the law firm. While it appears from her statement that our firm handled a criminal matter on behalf of Ronnie McCoy, I have no personal recollection of such representation or any details surrounding it. The subject of his representation by our firm was not discussed with or brought up by Mr. Johnson.
>
> The firm was dissolved about 1988. All records, other than those retained by individual firm members, were shredded. I have no records pertaining to any representation by any firm members of Ronnie McCoy.

Affidavit of Jeff A. Crow, Jr., Esq., sworn to on Apr. 27, 1999. [32]

[*82] Likewise, Mr. Washington stated as follows:

> Mr. McCoy was referred to the law firm for representation by Donnie Johnson prior to the case involving Donnie Johnson, and Mr. Johnson referred people other than Mr. McCoy to the law firm.
>
> I have reviewed the declaration of Leslie Fatowe, who was an associate of the law firm. While it appears from her statement that the law firm handled a criminal matter on behalf of Ronnie

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[32] A copy of this affidavit is annexed to Respondent's Response in Opposition to Motion for Discovery, filed April 27, 1999 (Docket Entry 57).

> McCoy, I do not have any personal recollection of such representation, or any details surrounding it.
>
> The law firm was dissolved in 1989-1990. I retained only the files of client's [sic] whom I was representing. I do not have any records pertaining to any representation of Ronnie McCoy by the law firm or any of its members.

Affidavit of W. Clark Washington, Esq., sworn to on Apr. 27, 1999. [33]

[*83] Although an evidentiary hearing might well be useful to clarify the record concerning the various alleged conflicts, petitioner's entitlement to such a hearing must first be addressed.

c. Procedural default

Respondent contends that this claim is procedurally defaulted to the extent it rests on trial counsel's representation of Mr. McCoy on the criminal charges for which he was assigned to work release at the Penal Farm. See Answer at 17-18. The conflict of interest claim was not raised in the post-conviction petition, and the issue was not explicitly addressed in the trial court's decision denying relief on the petition. This failure to address the issue is not surprising in light of the minimal attention it received during the hearing. See supra pages 51-53.

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[33] A copy of this affidavit was filed on April 27, 1999 (Docket Entry 57). Thereafter, on May 4, 1999, respondent apparently filed a photocopy of Mr. Washington's affidavit (Docket Entry 58).

The issue of a conflict of interest was raised on appeal to the Tennessee Court of Criminal Appeals, see Addendum 19, at 41-42, but the criminal representation of Mr. McCoy was not discussed in that brief. The conflict issue-again without any mention of the criminal representation of McCoy-was also raised in petitioner's brief in support of his application for permission to appeal to the Tennessee Supreme **[*84]** Court. See Addendum 31, at 42-43. It would appear, therefore, that petitioner's claim that his trial counsel had a conflict of interest due to their representation of Mr. McCoy on criminal charges is procedurally defaulted. [34] Petitioner has, however, exhausted his claims based on the prior civil representation of Mr. McCoy and the representation of Ms. McKee in her divorce action.

Petitioner attempts to show "cause" for his default of the claim that the criminal representation of Mr. McCoy constituted **[*85]** an actual conflict of interest by suggesting that there is a factual issue whether Mr. Crow lied in his testimony at the post-conviction proceeding. See P. Br. at 56-58. As evidence for this position, petitioner points to the Firm's time records concerning the representation of petitioner, which show several conversations with Mr. McCoy as well as two conferences between Firm attorneys concerning

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[34] A number of courts have held similar claims to be procedurally defaulted. See, e.g., Whitmore v. Avery, 63 F.3d 688 (8th Cir. 1995), cert. denied, 516 U.S. 1181, 134 L. Ed. 2d 227, 116 S. Ct. 1282 (1996); Weeks v. Jones, 26 F.3d 1030, 1046 n.14 (11th Cir. 1994), cert. denied, 513 U.S. 1193, 131 L. Ed. 2d 137, 115 S. Ct. 1258 (1995); see also Hess v. Mazurkiewicz, 135 F.3d at 909 (remanding to the district court to consider whether petitioner's claim was fairly presented to the state courts).

Mr. McCoy. See id. at 57-58; see also Addendum 13, Vol. 6, Exhibit 2.

The Court is are not required to resolve this issue concerning the veracity of Mr. Crow's testimony [35] because of the failure of post-conviction counsel to question Mr. Washington and Ms. Fatowe concerning the criminal representation of Mr. McCoy. [36] Moreover,

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[35] The Court feels compelled to state, however, that there is no convincing evidence that Mr. Crow testified falsely on this issue. Given Mr. McCoy's central role in the events at issue, the Court is not surprised by the number of times Firm lawyers contacted Mr. McCoy or had meetings to discuss him. Moreover, even if it is assumed that Firm attorneys had conferences concerning Mr. McCoy in 1984 at which the criminal representation may have been raised, it does not follow that Mr. McCoy's failure to recall that representation in testimony given in 1989 was disingenuous.

[36] Indeed, Judge Turner had previously denied petitioner's motion to take discovery concerning this alleged conflict on the ground that petitioner could not establish cause for his failure to pursue the issue in state court. Judge Turner explained:

> Petitioner has not provided a sufficient reason for his failure to develop the record during the state proceedings. Crow, Washington and Fatowe were all witnesses during petitioner's state post-conviction proceedings. Petitioner's counsel asked Crow whether the firm had represented McCoy on a criminal charge and Crow answered that he was unaware of any such representation. Similar questions were not addressed to Washington or Fatowe. Thus, while the opportunity existed, petitioner simply failed to develop the record on this issue during the state court proceedings.

Order on Petitioner's Motion for Leave to Conduct Discovery at 3-4 (June 4, 1999) (footnote omitted) (Docket Entry 72). Despite this ruling by Judge Turner, petitioner's response to the partial summary judgment motion does not address the failure to

the law is clear that the conduct of post-conviction counsel, however negligent, cannot constitute cause to excuse any procedural default. See Coleman v. Thompson, 501 U.S. at 752-57; 28 U.S.C. § 2254(i); see also Edwards v. Carpenter, 529 U.S. 446, 146 L. Ed. 2d 518, 120 S. Ct. 1587 (2000). Accordingly, the Court holds that petitioner has failed to show cause for the procedural default of his claim that trial counsel's criminal **[*86]** representation of Mr. McCoy constituted an actual conflict of interest.

[*87] Petitioner also argues that this Court may reach the merits of his conflict of interest claim, notwithstanding any procedural default, because he has raised a plausible claim of actual innocence. See P. Br. at 68-69. [37]

[*88] As previously noted, see supra page 34, a petitioner who has been sentenced to death may avoid a procedural bar to the consideration of the merits of

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question Mr. Washington and Ms. Fatowe in state court about the criminal representation of Mr. McCoy.

[37] To the extent that Judge Turner's decision on petitioner's motion for leave to conduct discovery may be read to suggest that the "actual innocence" exception to the doctrine of procedural default does not survive the AEDPA, see Docket Entry 72 at 6, we respectfully disagree. Although the question may not have been resolved at the time of Judge Turner's death, the Supreme Court has recognized the actual innocence exception-although it has not been required to apply that rule-in at least one post-AEDPA decision. See Edwards v. Carpenter, 529 U.S. at 451 ("The one exception to that rule [that a prisoner demonstrate cause and prejudice for a procedural default], not at issue here, is the circumstance in which the habeas petitioner can demonstrate a sufficient probability that our failure to review his federal claim will result in a fundamental miscarriage of justice.") (citation omitted).

his constitutional claim if he is able to show that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Schlup v. Delo, 513 U.S. at 327. [38]

[*89] In support of his claim of actual innocence, petitioner notes that the only two people who could have committed the murder are himself and Mr. McCoy. See P. Br. at 68. Petitioner then states as follows:

> Mr. Johnson makes a preliminary showing that (1) a conflict of interest impaired his attorneys' ability to investigate whether Mr. McCoy committed the Connie Johnson homicide and to present evidence that he was the perpetrator of that crime; and (2) because Mr. McCoy and the State had a deal, his testimony that Mr. Johnson killed the victim is not trustworthy.

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[38] Petitioner cites Kuhlmann v. Wilson, 477 U.S. 436, 454, 91 L. Ed. 2d 364, 106 S. Ct. 2616 (1986), for the proposition that he need make only a colorable showing of factual innocence. See P. Br. at 68. Petitioner's brief appears to understate the burden on a petitioner. See Schlup, 513 U.S. at 322 ("The Kuhlmann plurality, though using the term 'colorable claim of factual innocence,' elaborated that the petitioner would be required to establish, by a "'fair probability,"' that "'the trier of the facts would have entertained a reasonable doubt of his guilt."'") (quoting Kuhlmann, 477 U.S. at 455 n.17). In any event, the opinion in Schlup, which petitioner does not cite, laid to rest any doubt about the proper standard.

Id. [39] This does not even begin to satisfy the showing of actual innocence required by Schlup.

The evidence presented at trial of petitioner's guilt was strong. The Tennessee Supreme Court has stated that "the evidence to support the conviction **[*90]** of [Mr. Johnson] of murder in the first degree was legally sufficient beyond question." State v. Johnson, 743 S.W.2d at 157. Mr. McCoy testified that petitioner killed the victim outside his presence and that he and petitioner brought her body to the Mall of Memphis. Apart from that testimony, the State had other very significant evidence pointing to the petitioner's guilt. The defense did not challenge the evidence that the victim was killed at Force Camping Center. Petitioner was one of the few people at Force Camping at the time of the murder. Petitioner also admitted to the police that he was at the Mall of Memphis at about the same time that Mr. McCoy testified that the victim's body was transported to that location. No keys were found in the victim's van, and her only set of keys was later found in petitioner's truck. Petitioner gave two statements to the police accounting for his whereabouts the night of the murder. Virtually everything petitioner said in both statements was later revealed to be false. Notably, petitioner did not mention the fact that he drove Mr. McCoy back to the Penal Farm the night of the murder, a fact he cannot seriously dispute since **[*91]** the State introduced the log maintained by the Penal Farm, which indicates that petitioner signed Mr. McCoy in at 7:17 p.m. that

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[39] The first part of petitioner's "preliminary showing" duplicates Claims 1(B)(1), (3), and (4). The substance of petitioner's claims is discussed at pages 96-99, 102-06, infra.

night. That omission strongly suggests that petitioner did not want to lead the police to Mr. McCoy for fear of what he might tell them.

Petitioner has presented no new evidence of actual innocence, in the traditional sense. [40] **[*92]** Instead, he asserts that his testimony, which was offered only during the sentencing phase at trial, should have been presented during the guilt phase. Petitioner's

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[40] The Supreme Court explained:

> To be credible, such a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial.

Schlup, 513 U.S. at 324. It matters whether the evidence of innocence is "new", since the function of a habeas court is not to retry factual disputes that the jury apparently resolved against the petitioner. As the Supreme Court explained:

> Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim. However, if a petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

Id. at 316.

testimony is, of course, not "new", since the jury heard it at the sentencing phase of the trial. [41]

The remainder of petitioner's "new evidence" consists of questions trial counsel did not ask and evidence-most of which was available at petitioner's trial-that trial counsel did not use. None of this additional evidence tends to establish that Mr. McCoy committed the murder. [42] At best, the evidence would have permitted defense counsel to demonstrate on cross-examination of Mr. McCoy that he was mistaken about certain details related in his direct testimony (e.g., the time sequence the night of the murder, the location of the victim's van at Force Camping) and that his factual descriptions were sometimes not complete (e.g., whether the victim was dragged at least briefly, whether the trash bag was in the victim's mouth, the amount of blood on the sofa). Although this evidence may tend to undermine Mr. McCoy's powers of observation or description, it does not tend to demonstrate that Mr. McCoy was lying when **[*93]** he testified that petitioner murdered the victim.

Whether petitioner's evidence is considered separately or together, then, petitioner has not met his burden of showing that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. Accordingly, the Court holds that

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[41] As is discussed at page 106, infra, the Court also finds that the admission of petitioner's testimony during the guilt stage of the trial would not have been helpful to him.

[42] Moreover, as is set forth in detail in connection with Claim 2, see infra pages 112-17, the Court holds that petitioner has presented no credible evidence that the State entered into a "deal" with Mr. McCoy in exchange for his testimony.

petitioner has not made a sufficient showing of actual innocence to permit a decision on the merits of those claims that are subject to a procedural bar.

For similar reasons, petitioner cannot concede that his claim concerning the criminal representation of Mr. McCoy is new and seek an evidentiary hearing to develop the facts of that claim. Under the AEDPA, the discretion of a habeas court to hold an evidentiary hearing is limited:

> If the applicant has **[*94]** 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 factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

The Supreme Court recently held that, "under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams v. Taylor, 529 U.S. 420, 432, 146 L. Ed. 2d 435, 120 S. Ct. 1479 (2000). Here, petitioner's post-conviction counsel failed to ask each of the attorneys who represented him at or prior **[*95]** to trial whether they also represented Ronnie McCoy. The Court finds that this failure constitutes a lack of diligence bringing petitioner's request for an evidentiary hearing within section 2254(e)(2). See id. at 437-40 (holding that petitioner's state habeas counsel was not diligent in developing his claim that a psychiatric report was withheld where references to such a report in the state-court record should have alerted counsel to the issue). Petitioner is therefore entitled to an evidentiary hearing on his conflict of interest claim only if he shows that the facts could not have been developed through due diligence and if petitioner has a convincing claim of innocence. [43]

Petitioner has not demonstrated that the facts underlying his **[*96]** claim concerning the criminal representation of Ronnie McCoy could not have been developed in state court. Although the Court assumes without deciding that Mr. Crow's testimony disclosing only the civil representation of Mr. McCoy would meet the statutory standard, petitioner does not attempt to

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[43] By contrast, a petitioner who has been diligent in attempting to develop the facts of his claim in state court but who was frustrated in his efforts to do so is not required to satisfy the requirements of § 2254(e)(2). See id. at 437.

suggest that questions addressed to Mr. Washington and Ms. Fatowe would not have proven fruitful. Indeed, the fact that Ms. Fatowe has provided an affidavit to petitioner's counsel strongly suggests that, if asked the question in state court, she would have testified about her prior representation of Mr. McCoy.

Moreover, for the reasons previously stated in connection with petitioner's claim of "actual innocence", the new evidence proffered by petitioner is insufficient to demonstrate by clear and convincing evidence that no reasonable factfinder would have convicted petitioner.

Accordingly, the Court holds that petitioner has not met the requirements of section 2254(e)(2) and is not entitled to an evidentiary hearing to develop his conflict of interest claim. [44]

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[44] Although the Court recognizes that two of the three members of the panel in Abdur' Rahman v. Bell, 226 F.3d 696 (6th Cir. 2000), believed that a district court has inherent discretion to hold an evidentiary hearing on a habeas petition, see id. at 704-06 (opinion of Siler, J.) (holding that pre-AEDPA court has inherent discretion; "While there may not be any inherent discretion to order an evidentiary hearing following the enactment of AEDPA, we decline to specifically determine whether AEDPA has so altered the law."); id. at 719 (Cole, J., concurring in part and dissenting in part), the Court agrees with Judge Batchelder that the applicable Supreme Court precedent does not appear to give habeas courts any such discretion, see id. at 715-18 (Batchelder, J., concurring).

[*97] d. Petitioner's showing that his defense was adversely affected by an actual conflict of interest

As previously noted, see supra pages 51-56, the factual record with respect to the three alleged conflicts of interest is far from fully developed. This failure to develop the record is significant because petitioner has, at most, alleged potential conflicts without providing the evidence necessary to show either that trial counsel actively represented competing interests or that such representation adversely affected their performance at trial.

With respect to Mr. Washington's representation of Ms. McKee in connection with her divorce, petitioner has failed to show any actual conflict of interest or that trial counsel failed to pursue a viable defense strategy because of any alleged conflict. Petitioner apparently contends that an actual conflict of interest occurs whenever an attorney is required to cross-examine a client, because "an attorney who cross-examines a former client inherently encounters divided loyalties." Lightbourne v. Dugger, 829 F.2d 1012, 1023 (11th Cir. 1987) (citations omitted), cert. denied, 494 U.S. 1039, 108 L. Ed. 2d 640, 110 S. Ct. 1505 (1988); **[*98]** see P. Br. at 37. [45] As previously

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[45] Lightbourne's holding is not of assistance to petitioner. Although the Eleventh Circuit recognized that "whether or not an actual conflict arose [due to the cross-examination] presents a substantial question," 829 F.2d at 1023 (citation and footnote omitted), it found the factual record on that issue to be inconclusive, see id. at 1024. Moreover, the Court held that, "even if an actual conflict existed, petitioner has failed to allege such

noted, see supra pages 44-45, the Supreme Court has refused to impose a per se rule. In the absence of any evidence in the record concerning that representation, the Court is unable to conclude that trial counsel actively represented competing interests. [46]

[*99] Petitioner also alleges that trial counsel failed to cross-examine Ms. McKee concerning her interest in obtaining a monetary reward from Crime Stoppers. See Petition at 23-24. There is no evidence in the record that Ms. McKee had any such interest and, even if there were, petitioner does not demonstrate that trial counsel possessed that information. [47] Moreover, even if Ms. McKee was motivated in whole or in part by the hope of a reward when she contacted the police with her information, that fact does not appear to be sufficiently impeaching of Ms. McKee's credibility so as to make the omission of that line of inquiry from the cross-examination rise to the level of an adverse effect on petitioner's representation. Petitioner also does not explain how Ms. McKee's hope of obtaining a monetary award from Crime Stoppers

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facts which, if proven, would demonstrate that the alleged conflict adversely affected petitioner's representation." Id.

[46] The Court does note that trial counsel expended considerable effort to exclude all testimony regarding petitioner's alleged extramarital sexual relationships, including a brief affair with Ms. McKee. See Addendum 1, Vol. 3, at 197-99. Such evidence may also have been potentially prejudicial to Ms. McKee in her divorce action, although the factual record does not permit any conclusions to be drawn in that regard. In any event, the interests of petitioner and Ms. McKee in this respect were consistent, not conflicting.

[47] Indeed, the Petition also alleges that prosecutors withheld the identical information from the defense. See Petition at 29.

would prejudice her in her divorce action. He must, of course, make this connection in order to demonstrate counsel's motivation for holding back during cross-examination.

[*100] Ms. McKee's testimony provided the State with two pieces of information: first, that petitioner visited her the evening of the murder and asked her out for drinks and, second, that petitioner was wearing a blue plaid shirt similar to the shirt seized by the police. In light of petitioner's admission to the police that he met with Ms. McKee, petitioner does not even attempt to argue that trial counsel could have done anything to undermine Ms. McKee's testimony concerning the incident. Moreover, contrary to petitioner's allegations, Mr. Crow did cross-examine Ms. McKee at length in an attempt to cast doubt on her testimony concerning the plaid shirt. See infra pages 107-08. [48] In short, petitioner has not even come close to establishing either of the Cuyler elements here. The Court therefore grants summary judgment to respondent on this claim.

[*101] With respect to Mr. Crow's brief representation of Mr. McCoy in connection with an automobile accident, petitioner has utterly failed to show any actual conflict of interest. Mr. Crow's testimony that he terminated his representation of Mr.

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[48] For this reason, this case is not similar to Rosenwald v. United States, 898 F.2d 585 (7th Cir. 1990), a pre-AEDPA decision in which the Seventh Circuit remanded for an evidentiary hearing concerning whether a defense attorney's simultaneous representation of a potential witness on an unrelated civil matter induced the attorney to persuade petitioner to plead guilty in order to avoid having to cross-examine his client.

McCoy after learning he would be a trial witness is uncontradicted. There is no evidence that Mr. Crow received any confidential information from Mr. McCoy during that brief representation. Petitioner does not attempt to prove that any of the alleged deficiencies in the cross-examination of Mr. McCoy were motivated, in whole or in part, by any sense of loyalty arising from this civil representation. There is, in short, absolutely no evidence establishing either element of the Cuyler standard. The Court therefore grants summary judgment to respondent on this claim. [49]

[*102] Petitioner's allegations with respect to Ms. Fatowe's criminal representation of Mr. McCoy are the most substantial, although, as previously noted, this claim is subject to a procedural default. Moreover, although the factual record is not sufficiently developed to permit definitive conclusions, the record before this Court does not support a conclusion that trial counsel actively representing competing interests. Although petitioner insists that Mr. McCoy made a "deal" with the State in exchange for his testimony, there is no allegation that trial counsel represented Mr. McCoy in connection with his role in Mrs. Johnson's death. In addition, although the Court recognizes that the apparent criminal representation of Mr. McCoy was very close in time to petitioner's arrest, it had apparently terminated at the time of the

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[49] Moreover, as respondent notes, see Answer at 23-24, petitioner did not raise this argument in state court, preferring to argue that the civil representations of Ms. McKee and Mr. McCoy constituted per se violations of the Sixth Amendment. Accordingly, the Court holds that petitioner has procedurally defaulted with respect to his claim that he was actually prejudiced by the alleged conflicts of interest.

murder. The fact that Ms. Fatowe had negotiated a plea agreement for Mr. McCoy that resulted in his assignment to a work release program does not mean that defense counsel had any obligation-ethical or otherwise-to protect Mr. McCoy's work release status in the event he committed subsequent criminal acts. See, e.g., Vega v. Johnson, 149 F.3d 354, 358 (5th Cir. 1998) **[*103]** (noting that, once a representation has terminated, the ethical duty of loyalty does not restrict the actions of an attorney toward a former client; "Once the matter ended, Kimbrough's only duty was to protect confidential information he received in his capacity as attorney."), cert. denied, 525 U.S. 1119, 142 L. Ed. 2d 899, 119 S. Ct. 899 (1999).

Moreover, the record suggests that Mr. McCoy was subjected to a vigorous cross-examination. Contrary to the allegations in the Petition, Mr. Crow devoted considerable effort to impeaching Mr. McCoy's testimony concerning the time sequence of events at the time of the murder. See Addendum 1, Vol. 4, at 374-75, 376-80. Mr. Crow also brought out the fact that, when he contacted Mr. McCoy on two occasions in December, 1984, Mr. McCoy falsely stated that he knew nothing about Mrs. Johnson's death. See id. at 383-84. Defense counsel established that Mr. McCoy was serving a sentence at the Shelby County Penal Farm for attempted burglary and false reporting, see id. at 384-86, and brought out the fact that the false reporting charge consisted of "having made a false statement to the police," id. at 386. Mr. McCoy **[*104]** was also questioned about his prior criminal record, which involved armed robbery and burglary. See id. at 386. With respect to the existence of a "deal", Mr. Crow established that Mr. McCoy was not charged with any

crime for his participation in the disposal of Mrs. Johnson's body, see id. at 387, and that Mr. McCoy was not taken off work release, see id. at 375. [50]

[*105] Likewise, Mr. Crow's description in summation of Mr. McCoy and his testimony was scathing. See Addendum 2, at 41-44. Although Mr. Crow did not take the position that Mr. McCoy was the *only* alternative suspect in the murder of Mrs. Johnson, see id. at 44, [51] he certainly argued that Mr. McCoy could have committed the murder, see id. at 43. He emphasized the facts that "Mrs. Johnson's

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[50] The various Courts of Appeals have assigned vastly different weights to the apparent vigor of a cross-examination. Compare, e.g., Simmons v. Lockhart, 915 F.2d at 379-80 (finding no adverse effect where the attorney "cross-examined Davis every bit as vigorously as a lawyer without an arguable conflict would have done") with Church v. Sullivan, 942 F.2d at 1512 ("The dangers inherent in successive and multiple representations do not become apparent merely by scrutinizing what the attorney did: 'representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.' . . . The apparent 'vigor' of cross-examination is but one factor to be considered in determining whether a conflict adversely affected counsel's performance.") (citation omitted). As previously noted, see supra pages 45-46, the Court is not required to take a position on this issue.

[51] Although it now is clear that the murder could only have been committed by petitioner or Mr. McCoy, the position taken by trial counsel is not unreasonable when viewed from the perspective of the close of the guilt phase of the trial. Petitioner did not testify until the sentencing phase and, therefore, the jury did not have petitioner's admission that he transported his wife's body to the Mall of Memphis. Moreover, there was evidence in the record-including the facts that the victim's top was pulled up above her breasts and her purse was not found-that could support an alternative theory.

checkbook, diamond rings, and money, was not found, nor were credit cards," id., and that Mr. McCoy was "[a] convicted robber" and "burglar" with a "long outstanding criminal record," id.

[*106] The Court recognizes that Mr. Crow did not argue in summation that Mr. McCoy had entered into a deal with the State, although there is very little evidence in the record from which such an argument could have been made. The Court also realizes it does not have the benefit of Mr. Crow's testimony concerning his strategic decisions on cross-examination and during closing argument. Nonetheless, from the evidence in the record, the Court is unable to speculate that Mr. Crow's strategic decisions were influenced in any way by Ms. Fatowe's alleged criminal representation of Mr. McCoy. In the absence of such evidence, petitioner cannot establish an adverse effect on his defense and would not be entitled to relief.

For all the foregoing reasons, the Court grants summary judgment to respondent on this claim.

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[*241]

L. Ineffective assistance of counsel during the sentencing phase of trial (Claim 12)

Claim 12 of the Petition alleges that petitioner received ineffective assistance of counsel during the sentencing phase of his trial. In particular, he complains that (i) trial counsel did not investigate mitigating circumstances; (ii) trial counsel failed to

prepare petitioner for his sentencing hearing testimony; (iii) trial counsel did not have a mental health expert review petitioner's background; (iv) trial counsel failed to investigate the propriety of, and object to, the jury instructions respecting the "heinous, atrocious, or cruel" aggravating circumstance; (v) trial counsel failed to investigate **[*242]** whether Mrs. Johnson was dead or unconscious at the time a trash bag was put into her mouth even though such evidence would have defeated application of the "heinous, atrocious, or cruel" aggravating circumstance; (vi) trial counsel failed to investigate and challenge the constitutional validity of the prior convictions on which the State based the "prior violent felonies" aggravating circumstance; (vii) trial counsel failed to object to introduction of petitioner's arrest record; and (viii) trial counsel failed to object to unconstitutional jury instructions. [132]

[*243] 1. <u>The legal standards</u>

The general legal standards for evaluating claims of ineffective assistance of counsel asserted by habeas petitioners are set forth in the discussion of Claim 1. <u>See supra</u> pages 74-77. Those standards are equally applicable to claims that trial counsel were ineffective at the sentencing stage of a capital trial.

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[132] A number of these allegations are repeated in subsequent claims and, therefore, for the sake of clarity, will be addressed in connection with those claims. Accordingly, the discussion of Claim 12 encompasses grounds (i), (ii), and (iii). Ground (iv) is addressed <u>infra</u> pages 229-32 (Claim 16(A)), ground (v) is addressed <u>infra</u> pages 232-34 (Claim 16(B)), ground (vi) is addressed <u>infra</u> pages 235-38 (Claim 16(C)), ground (vii) is addressed <u>infra</u> pages 211-13 (Claim 13(C)), and ground (viii) is addressed <u>infra</u> pages 220-28 (Claim 15).

The Supreme Court has recently had occasion to consider a claim that trial counsel was ineffective for failing to investigate and present mitigating evidence. In Williams v. Taylor, 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000), the petitioner alleged that trial counsel failed to investigate and present several significant pieces of mitigating evidence. [133] **[*245]** The Supreme Court explained:

> We are likewise persuaded that the Virginia trial judge correctly applied both components of that [Strickland] standard to Williams' ineffectiveness claim. Although he concluded that counsel competently handled the guilt phase of the trial, he found that their representation during the sentencing phase fell short of professional standards--a judgment barely disputed by the State in its brief to this Court. The record establishes that counsel did not begin **[*244]** to prepare for that phase of the proceedings until a week before the trial. . . . They failed to conduct an

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[133] In Williams, the petitioner had commenced a state habeas corpus proceeding. Based on the evidence adduced at a two-day hearing on petitioner's allegations, the trial court judge concluded that Williams' conviction was valid but his trial attorneys had been ineffective during sentencing. The trial court recommended that Williams be granted a new sentencing hearing. See id. at 370-71. The Virginia Supreme Court did not accept that recommendation. Although it assumed that trial counsel were ineffective, it held that Williams did not suffer sufficient prejudice to be entitled to relief. See id. at 371-72. Likewise, the federal district court analyzed the record in detail and held that trial counsel were ineffective. See id. at 372-73. It appears that the district court did not conduct its own evidentiary hearing but, instead, was able to rely on the record developed in the state-court proceedings.

> investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. . . .

Id. at 395 (citation omitted); see also id. at 396 ("Of course, not all of the additional evidence was favorable to Williams. . . . But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of the sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.") (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)). [134]

The Supreme Court also discussed the standards for assessing prejudice:

> We are also persuaded, unlike the Virginia Supreme Court, that counsel's unprofessional service prejudiced Williams within the meaning of Strickland. After hearing the additional evidence

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[134] Consistent with its observation that application of the Strickland standard "'of necessity requires a case-by-case examination of the evidence,'" id. at 391 (citation omitted), the Supreme Court did not attempt to articulate general standards for determining when counsel is ineffective.

> developed in the postconviction proceedings, the very judge who presided at Williams' trial and who once determined that the death penalty was "just" and "appropriate," concluded that there existed "a reasonable probability that the result of the sentencing phase would have been different" if the jury had heard that evidence. . . . We do not agree with the Virginia Supreme Court that Judge Ingram's conclusion should be discounted because he apparently adopted "a per se approach to the prejudice element" that placed undue **[*246]** "emphasis on mere outcome determination." . . . Judge Ingram did stress the importance of mitigation evidence in making his "outcome determination," but it is clear that his predictive judgement rested on his assessment of the totality of the omitted evidence rather than on the notion that a single item of omitted evidence, no matter how trivial, would require a new hearing.

Id. at 396-97 (citations omitted). Moreover, the Supreme Court stressed that, in evaluating the prejudice component of Strickland, it is necessary "to evaluate the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceeding--in reweighing it against the evidence in aggravation." Id. at 397-98 (citation omitted). Accordingly, the Supreme Court determined that Williams was entitled to relief. [135]

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[135] The Supreme Court also explained that its holding is not "new" but, rather, is based on law that was clearly established at the time of Williams' trial. See id. at 390 ("the merits of [Williams'] claim are squarely governed by our holding in Strickland v. Washington").

[*247] The Sixth Circuit has also recently considered several cases in which habeas petitioners have claimed ineffective assistance of counsel at the sentencing stage of their capital trials. In Carter v. Bell, 218 F.3d 581 (6th Cir. 2000), a pre-AEDPA decision, see id. at 591,

> the defense neither investigated nor introduced any evidence of mitigating factors, basing its argument on a theory of residual doubt by appealing to any lingering doubt the jury might have had regarding the conviction in an attempt to dissuade the jury from imposing the death penalty.

Id. at 587. [136] There had not been a state-court evidentiary hearing on trial counsel's performance during the sentencing phase of trial, see id. at 600, but the district court did conduct an evidentiary hearing at which extensive mitigating evidence was presented, see id. at 592-94.

[*248] The Sixth Circuit readily found the performance of counsel to be deficient. The Court explained:

> Trial counsel here did Carter a disservice by failing to investigate mitigating evidence. While counsel

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[136] See also id. at 596 ("Counsel's theory [during the sentencing phase] was that even though the jury had convicted Carter at least in part on the basis of Price's testimony, there remained sufficient doubt about Price's credibility to prevent imposition of the death penalty. . . . Despite this theme, counsel did not request jury instructions on residual doubt about the credibility of Price or inequity in the Price and Carter sentences as potential non-statutory mitigating factors.").

> advanced several reasons for adopting their strategy, their reasons do not excuse their deficiency. The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility. We find that reluctance on Carter's part to present a mental health defense or to testify should not preclude counsel's investigation of these potential factors. . . . We agree, therefore, with the district court's conclusions that defense counsel made no investigation into Carter's family, social or psychological background and that the failure to do so constituted representation at a level below an objective standard of reasonableness.

Id. at 596-97; see also id. at 596 (counsel's explanations for their failures to investigate and present mitigating evidence).

With respect to the prejudice inquiry, the Sixth **[*249]** Circuit stated:

> Carter has presented substantial evidence of a childhood in which abuse, neglect and hunger were normal. In light of the quantity of mitigation evidence available, and the limits discussed above on what the State could introduce in rebuttal, we find ourselves unpersuaded that there is a reasonable probability that a jury would have returned the same sentence had the evidence been introduced.

Id. at 600; see also id. (trial counsel "presented no meaningful evidence by way of mitigation as a result of their failure to investigate and prepare, not as a result of trial strategy after thorough research. It is not just that the defense presented on Carter's behalf was ineffective; rather, Carter's attorneys did not even attempt to present a defense at the sentencing phase."). As a result, "we do not need to determine whether trial counsel's failure to investigate mitigating circumstances constituted deficiencies so severe as to dispense with the need to establish prejudice." Id.

In Scott v. Mitchell, 209 F.3d 854 (6th Cir.), cert. denied, 531 U.S. 1021, 148 L. Ed. 2d 503, 121 S. Ct. 588 (2000), by contrast, the Sixth Circuit declined **[*250]** to grant relief on a claim that trial counsel failed to investigate and present mitigating evidence and to interview certain members of Scott's family. The only evidence presented by the defense during the sentencing phase of trial consisted of Scott's unsworn statement in which he denied his guilt and refused to ask for mercy. See 209 F.3d at 880 & n.8. The state trial court made factual findings in a post-conviction proceeding that the intransigence of Scott and his family members was to blame for the failure to present more extensive mitigating evidence and that, had Scott chosen to have a presentence report prepared or had family members testified, the jury would have learned of Scott's extensive criminal history. See id. at 880.

The Sixth Circuit held that Scott was not prejudiced by any deficiency on the part of counsel:

> The district court was correct to focus on the second Strickland prong. It is clear that, in its words, the "mitigating circumstances Scott wishes his counsel had presented . . . are largely, even overwhelmingly, negated by evidence that his background includes commission of robbery, assault, kidnaping, and other violent **[*251]** acts upon innocent citizens," and that prosecutors would have elicited such information from any family members who testified for Scott. The mitigating evidence would have revealed Scott's personal loyalty to his siblings, girlfriend, and children, and an exceedingly violent environment throughout his upbringing. As the district court said, it is impossible to say for certain that one juror would not have been swayed by this evidence, but certainty is not required here; we must ask only whether Scott has met his burden of demonstrating a reasonable probability that this would happen. None of the proffered mitigating evidence reduces Scott's culpability for the Prince murder or the string of violence that preceded it. Scott can only offer a hypothetical juror, not a reasonable probability, and hence cannot show prejudice.

Id. at 880-81.

Although the Sixth Circuit did not expressly reach the issue, it also stated that "it is not clear that the lawyers' performances fell below the objective standard" of the first Strickland prong. See id. at 881. The Sixth Circuit observed that it was bound by the

state court's factual finding that Scott **[*252]** and members of his family were not cooperative. See id. Moreover, although "Scott's penalty-phase attorneys would certainly have been well-advised to conduct more research into mitigating factors than they did . . . , these lawyers had a credible reason for not presenting testimony: a desire to keep Scott's extensive criminal record from the jury." Id. (citation omitted). [137]

[*253] Likewise, in Abdur'Rahman v. Bell, 226 F.3d 696 (6th Cir. 2000), the Sixth Circuit reversed a district court's finding that a petitioner was prejudiced by counsel's conduct at the sentencing phase. The state post-conviction trial court had concluded that Abdur'Rahman's trial counsel were ineffective but he was not prejudiced

> because the evidence that he would have offered to support a finding of mitigating circumstances was both helpful and harmful and . . . it would not have been a prudent strategy to present the evidence.

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[137] The Sixth Circuit in Carter noted that, under Tennessee law, the State is not entitled to introduce a defendant's prior criminal record to rebut mitigating evidence concerning his background. See 218 F.3d at 600. Instead, the State is limited to the introduction of evidence that would rebut the specific mitigating evidence presented. See id. Moreover, because Scott was decided prior to the Supreme Court's decision in Williams,

> we find that Williams may limit Scott to the narrow facts of a federal court contemplating a habeas petition after a state court has conducted an evidentiary hearing and made a finding of fact that had mitigating evidence been introduced, the defendant's recent criminal history would have been presented to the jury in rebuttal.

Id. at n.2.

Id. at 707. [138]

The Sixth Circuit explained:

> Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that **[*254]** the balance of aggravating and mitigating factors did not warrant death. We reach this conclusion even considering the evidence presented at the evidentiary hearing below. . . .
>
> Even considering the supplemental evidence heard by the district court and outlined in its opinion, Petitioner did not suffer prejudice at the sentencing phase due to his trial counsel's deficient performance. While it is true that much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling, the same evidence likewise has aspects that would be compelling evidence of aggravating circumstances. In particular, the supplemental evidence contained a description of Petitioner's motive for killing a fellow prison inmate and a history of violent character traits. . . .

Id. at 708-09; see also id. at 708 (quoting the conclusion of the Tennessee Court of Criminal Appeals that "'it probably would not have been the most

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[138] In Abdur'Rahman, the state post-conviction trial court had made extensive factual findings concerning the allegedly deficient performance of trial counsel. See id. at 701-02. The district court also ordered its own evidentiary hearing.

prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial'").

2. The [*255] factual record

The defense presented very little proof during the sentencing phase of petitioner's trial. Trial counsel's opening statement consisted in its entirety of the following:

> The Defense in this stage will allow you to see Donnie Johnson on the stand. He will tell you for the first time his version of the events of the evening of December 8th. You've been a most attentive jury throughout this trial and I want you to listen to what Mr. Johnson has to say about those events. Listen very carefully. Listening, observing, see whether or not you believe the version that he gives you, and I feel comfortable that if you do you'll consider this to be a mitigating factor wherein you can justify the life sentence rather than the death sentence.

Addendum 1, Vol. 5, at 487.

The defense called only two witnesses at the sentencing phase of the trial. As previously mentioned, petitioner testified that Mr. McCoy killed Mrs. Johnson and the two of them then transported her body to the Mall of Memphis. See id. at 506-13. Petitioner also testified that, although he sometimes tries to sound tough, he is not a violent person and could not have killed his wife. See id. **[*256]** at 514-

15. Trial counsel concluded petitioner's direct examination by eliciting the simple statement that petitioner wants to live. See id. at 516.

Trial counsel also presented the testimony of Robert G. Lee, a Southern Baptist minister, who stated that he had met with petitioner and his family regularly in the months following petitioner's arrest. With respect to the content of their discussions, Mr. Lee stated:

> Well, naturally, being-my being an ordained minister our discussions centered around the topic of religion. Donnie expressed to me on numerous occasions that his faith in God was what was sustaining him through this ordeal. He also expressed to me that he knew that ultimately one day he would have to give an accounting of his life to God.

Id. at 531. Mr. Lee's testimony in its entirety encompasses less than three pages of the trial transcript. [139]

[*257] In his summation, trial counsel emphasized the heavy responsibility on the jury, see Addendum 2, at 83, 86, and urged the jury to consider whether "justice [is] going to be served by taking another life,"

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[139] During the guilt phase of petitioner's trial, certain additional mitigating evidence was elicited. Thus, there was evidence in the record that petitioner held a responsible position at Force Camping, where he was a valued employee, see id., Vol. 2, at 51, 71-72, 75-76 (testimony of Jo Ann Miller Force); id. at 89, 106-07 (testimony of James T. Force). There was also evidence that petitioner adopted his wife's daughter by a previous marriage. See id., Vol. 4, at 321-22 (testimony of Mary Frances Dean).

id. at 84, 86. Trial counsel emphasized that, regardless of the decision of the jury, petitioner would have to live with what happened for the rest of his life, see id. at 86-87, and that petitioner would suffer if he received a sentence of life imprisonment, see id. at 87.

The factual record concerning trial counsel's alleged failure to investigate and present mitigating evidence is not well developed. At the hearing on the first post-conviction petition, petitioner testified that, prior to trial, he provided trial counsel with the names of a number of witnesses who could testify on his behalf, including family members, his friend Barry Gray, and others who could rebut evidence that petitioner's marriage was rocky. See Addendum 13, Vol. 2, at 106-08; see also id. at 108-09, 123. Petitioner also testified that trial counsel did not prepare him for his testimony at the sentencing phase and did not advise him that the jury could use his testimony against **[*258]** him. See id. at 141.

A number of petitioner's family members also testified at the post-conviction hearing. Ruby Johnson, petitioner's mother, testified that trial counsel did not ask her about petitioner's background. See Addendum 13, Vol. 4, at 367. She testified that petitioner "and his wife and family lived next door to me all these years, ever since [they have] been married," id., that she did not know of any problems in petitioner's marriage, and that he was a hard worker who cared for his family and raised well-mannered children, see id. at 367-68.

James Johnson, petitioner's father, testified that petitioner "was one of the most devoted person[s] to his family that I have ever seen," id. at 370, and that he was a good son, a hard worker, and a good family man,

see id. at 370-71. Mr. Johnson also testified that trial counsel asked him "very little" about petitioner's background and schooling. See id. at 370. Petitioner's father also testified that he offered to testify at trial but trial counsel stated it would be better not to offer any testimony by family members. See id. at 370, 372.

Petitioner's brother, James C. Johnson, Jr., testified **[*259]** that trial counsel did not ask about petitioner's background, "nothing other than his arrest in Ohio, things of that nature." Id. at 373. He testified that he spent a significant amount of time with petitioner and his family "and I never had any problems out of his or knew of anything." Id. at 374. With respect to petitioner's relationship with the victim, Mr. Johnson testified that "there was never an altercation of any kind that I remember other than fun and laughter." Id. Mr. Johnson also stated that he was available to testify on behalf of his brother, but trial counsel "said it would be advisable not to." Id.; see also id. at 375.

Petitioner's sister, Shirley Ward, testified that she was never contacted by trial counsel. See id. at 378. She stated that petitioner was a good family man who did not have any problems at home. See id. at 378-79. With respect to petitioner's relationship with his wife, Ms. Ward stated:

> The weekend before she [was] killed, we were up there on a Saturday afternoon visiting with them, and Connie said that she and Donnie were happier than they [had] ever been. He was building a new addition, a bedroom, on for them. **[*260]**

Id. at 379. On cross-examination, Ms. Ward admitted that she knew nothing about petitioner's alleged or admitted extramarital relationships. See id. at 379-80.

Mary Ward, petitioner's sister, testified that she told trial counsel she was available to testify at trial. See id. at 381-82. Post-conviction counsel did not ask Ms. Ward what she would have testified to. On cross-examination, she stated that "all I know is that Donnie loved Connie, and he would not have killed her. And they had a happy marriage." Id. at 384. She did not admit to knowing anything about the alleged problems in petitioner's marriage. See id. at 382-84.

Barry Gray, who had been a friend of petitioner since their childhoods, see id. at 384-85, testified that petitioner was a good friend and a hard worker who seemed to care for and provide for his family, see id. at 385; see also id. at 387 ("Donnie is a very loyal friend" and a good family man as far as he knew). He also stated that he could testify to "a long-time friendship and all the things that we shared and, you know, done for each other." Id. at 386. Mr. Gray stated that he would have been willing to testify **[*261]** at trial. See id.

Petitioner also presented the testimony of Officer James M. Ingram, a deputy jailer with the Shelby County Sheriff's Department, who testified that, when petitioner was incarcerated after his arrest for the murder of his wife, "he didn't cause any trouble. He never had a disciplinary write-up or anything to my knowledge." Id. at 334. Officer Ingram stated he would have been willing to testify at petitioner's trial but did not receive a subpoena. See id.

David Force, an owner of Force Camping, testified that petitioner was a good employee. See id. at 340.

Mr. Crow, petitioner's lead trial counsel, testified that he had been practicing law since 1974 and, at the time of petitioner's trial, about half his practice was criminal. See id., Vol. 3, at 178, 215. Prior to petitioner's trial, Mr. Crow had had five or six criminal trials and, at most, one capital trial. See id. at 214, 215, 250-51, 253. Mr. Crow had also conducted civil trials, and he testified that petitioner's trial was the only criminal trial he had ever lost. See id. at 254. He did not recall attending any seminars on the death penalty, see id. at 215-16, and he reviewed **[*262]** the statute enumerating mitigating factors in the courtroom, see id. at 230.

Mr. Crow said he did not have a mental evaluation of petitioner performed because petitioner seemed to be competent. See id. at 212. With respect to his handling of the mitigation issue, Mr. Crow testified:

> As I remember, we talked to the family. We talked to the minister. We talked to Johnson. And we decided after doing all that to handle the sentencing hearing in the manner in which it was done.

Id. He stated that he talked to petitioner concerning the evidence that would be presented at the sentencing hearing and that petitioner made the decision to testify. See id. Mr. Crow also testified that petitioner's family members did not want to testify. See id. at 205-06.

Mr. Washington, petitioner's co-counsel at trial, testified that his background was primarily in civil practice. See id., Vol. 5, at 431-32. Mr. Washington corroborated Mr. Crow's testimony that petitioner's family members were reluctant to testify at trial. See id. at 427-28.

Petitioner also presented expert testimony concerning the manner in which background investigation should be performed in capital **[*263]** cases in Tennessee. Jeff Blum, administrator of the Capital Case Resource Center, testified about the necessity for speaking extensively with the petitioner and members of his

> family, friends, employers, school teachers, medical personnel [who] may have had some contact with the individual, social workers [who] may have had some contact with the family through some way, church officials who may have dealt with the family, military background.
>
> We do a fairly extensive search of all the various points of contact an individual would have had sometime in their past life. And through that process, gathering as much written material, papers, files, records that we can in that process toward discovering information we feel may be helpful in mitigation, and at the same time, gathering names of other individuals who may be helpful in testifying on behalf of the defendant.

Id., Vol. 2, at 57-58; see also id. at 63, 65-67; see also id., Vol. 4, at 272-74, 276-77 (testimony of Edward Thompson, Esq.); id. at 286-88 (testimony of D'Armey

Bailey, Esq.); id. at 388-400 (testimony of Christine Glenn, a mitigation specialist with the Shelby County Public Defender's **[*264]** Office). [140]

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[140] As previously mentioned, see supra page 16, petitioner's successive post-conviction petition contained a number of factual affidavits. Mr. Gray stated:

> I was under subpoena to testify at Donnie's post-conviction hearing but, was never contacted by anyone as to what my testimony would be thus leaving me totally in the dark as to how far I could go with the few questions that was put to me while on the stand.
>
> I did have further testimony and had someone interviewed me before the hearing I would have made this known. I did the best I could but felt there was much that was left out and I was not questioned on all that I had knowledge of and wanted to testify to.

Affidavit of Barry Gray, sworn to May 19, 1989, in Addendum 41, at 34. Mr. Gray stated he had personal knowledge of petitioner's relationship with the victim. See id. Petitioner's sisters, Mary Ward and Shirley Ward, submitted similar affidavits. See id. at 52, 53.

In addition, Denise Johnson, a family friend, submitted an affidavit in which she stated that she was subpoenaed to testify at the post-conviction hearing but was not called by post-conviction counsel. See Affidavit of Denise Johnson, sworn to June 14, 1989, in Addendum 41, at 54. Ms. Johnson stated that "had I been allowed to testify I would have offered testimony that would have rebutted the states theory of a rocky marriage, as well as to my personal knowledge of the good father and husband Donnie was." Id.

Finally, William Wicks, a captain with the Shelby County Deputy Sheriffs Department, submitted an affidavit in which he stated that he knew petitioner while he was incarcerated in 1985 and that "in all the time I knew this inmate I never had any problems with him nor did he have any problems during his time in the county jail." Affidavit of William Wicks, sworn to May 30, 1989, in

[*265] 3. Procedural default

As respondent concedes, see Answer at 44-45, petitioner has exhausted a general allegation of ineffective assistance of counsel during the penalty phase of his trial. See Answer at 44-45. In the Amended Petition for Post-Conviction Relief, petitioner alleged that trial counsel were ineffective for the following reasons:

> B. Trial counsel failed to investigate and present any social or psychological evidence. That Trial Counsel never had a routine examination to determine the competency of the defendant. That the Petitioner's social background was not investigated or presented for purposes of mitigation at sentencing.
>
> C. That Counsel did not adequately investigate or present any character witnesses at the sentencing even though the Petitioner had available a variety of potentially helpful witnesses.
>
> D. That Counsel presented little evidence at sentencing that would be mitigating in the Petitioner's behalf.

Addendum 13, Vol. 1, following page 119 (PP4(c)-4(e)).

On appeal, petitioner argued that trial counsel were ineffective in that they failed to investigate and present evidence during the penalty phase of the trial.

Addendum 41, at 35. Captain Wicks stated that he was available to testify at the post-conviction hearing but was not subpoenaed and did not know about the hearing until it was over. See id.

[*266] See Addendum 19, at 47-51. The Tennessee Court of Criminal Appeals rejected that position. See Addendum 22, at 2-3. This issue was also raised in petitioner's application for permission to appeal to the Tennessee Supreme Court. See Addendum 31, at 48-52.

Petitioner's allegations of ineffective assistance of counsel at the penalty phase of his trial are far more developed than the claims that were presented to the state court. Petitioner's allegations of ineffective assistance of counsel at the penalty stage of his trial consist of a laundry list of allegations, spanning four pages of the Petition, that include a mixture of legal claims and factual allegations. Just as with petitioner's allegations of ineffective assistance of counsel at the guilt stage of trial, it is first necessary to determine which claims were exhausted in state court. The Court will then consider whether it is entitled to consider the merits of those claims that were not properly raised in any state-court proceeding.

Claims that were exhausted in state court. The following claims were exhausted in state court and are, therefore, properly before this Court:

(a) Trial counsel failed to investigate **[*267]** petitioner's background for mitigating circumstances. Trial counsel did not contact petitioner's family members or friends respecting potential mitigating circumstances, nor did they obtain records respecting petitioner's childhood. See Petition at 37.

(b) Petitioner maintained family and friends who cared for him and considered him a good man who worked hard and provided for his family. See Petition at 38.

(c) Trial counsel failed to prepare petitioner for his sentencing hearing testimony. As a result, Mr. Johnson's testimony at the sentencing hearing did not present mitigating circumstances. See Petition at 38-39.

(d) Trial counsel did not have a mental health expert review petitioner's background. See Petition at 39.

Claims that were not raised in state court. The Petition contains a large number of factual assertions that are not supported by any evidence in the record:

(a) Mr. Johnson was born with congenital myopia and, due to this condition, he was unable to see his surroundings until receiving glasses when he was two years old. See Petition at 37.

(b) Because he could not see his surroundings, as a child Mr. Johnson regularly fell down a **[*268]** flight of concrete stairs leading to his home's basement. See Petition at 37.

(c) Mr. Johnson's parents regularly beat him with their fists, their feet, belts, tree limbs, and other objects.

(d) When Mr. Johnson was in the second or third grade, he was hit in the forehead with a baseball bat. See Petition at 37.

(e) From the time he was six years old until he was eight, Mr. Johnson was sexually assaulted by an uncle, a truck driver, when he visited the Johnson family. See Petition at 38.

(f) To escape the misery of his home, Mr. Johnson ran away. After doing so a number of times, Mr. Johnson's

parents placed him in the Jordania Youth Center. See Petition at 38.

(g) At Jordania, Mr. Johnson was sexually assaulted by an inmate, beaten by inmates, and beaten by guards. See Petition at 38.

(h) After being released from Jordania, Mr. Johnson was sent to Pikeville Reform School. See Petition at 38.

(i) At Pikeville, Mr. Johnson was sexually assaulted by an inmate, beaten by inmates, and beaten by guards. See Petition at 38.

(j) After being released from Pikeville, Mr. Johnson was held in the Tipton County Jail for vandalism. Trustees stoned Mr. Johnson **[*269]** with glass bottles. See Petition at 38.

Petitioner also did not raise in state court his claim that, as a result of trial counsel's failure to prepare him for his testimony, petitioner's testimony at the sentencing hearing was limited to petitioner's denial that he killed Mrs. Johnson. Because the jury had just stated it believed he killed Mrs. Johnson, petitioner's sentencing hearing testimony was virtually worthless if not hurtful. See Petition at 38. [141]

Because petitioner did not raise any of these allegations in state court, these claims are procedurally barred. Petitioner has not even presented

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[141] Indeed, petitioner's testimony at the hearing on the post-conviction petition did not present evidence of mitigating circumstances but, instead, was limited to an explanation of the claims raised in his petition.

an argument that this Court should not reach this result, nor has he presented any evidence to this Court that would support these claims. Moreover, as previously noted, see supra pages **[*270]** 58-59, the law is clear that the ineffectiveness of post-conviction counsel would not be sufficient to excuse this default.

The Court also holds that, because petitioner has "failed" to develop this issue in state court, he has not satisfied the conditions that would permit this Court to hold an evidentiary hearing. See 28 U.S.C. § 2254(e)(2); see also supra pages 64-66. Petitioner cannot demonstrate that he could not have developed the facts in support of his claim in state court. Numerous family members testified at the post-conviction proceeding. If relevant information was not developed, it can only be because post-conviction counsel did not ask the appropriate questions. Because the AEDPA is applicable to petitioner's claims, the Court does not have inherent discretion to hold an evidentiary hearing. See supra page 66 n.44.

Although petitioner has not raised this issue, the Court also is unable to consider this evidence-assuming it even exists-on a theory that petitioner is legally innocent of the death penalty. As previously noted, see supra page 34, the discovery of new mitigating evidence does not constitute grounds for a claim that **[*271]** a petitioner is legally innocent of the death penalty. See Sawyer v. Whitley, 505 U.S. 333, 345, 120 L. Ed. 2d 269, 112 S. Ct. 2514. In any event, the factual information set forth in the Petition is not "new"; instead, it is nothing more than information that was readily available to post-

conviction counsel but which was not, for whatever reason, used. [142]

[*272] 4. The state-court decisions

The Tennessee state courts rejected petitioner's claim that he received ineffective assistance of counsel during the penalty phase of his trial. In his order

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[142] The Court admits to being deeply troubled by its inability to consider what appears to be valid mitigating evidence-assuming, of course, that such evidence exists. Christine Glenn, the mitigation specialist for the Shelby County Public Defender's Office, testified that she did a background investigation of petitioner in preparation for the hearing on the post-conviction petition. See Addendum 13, Vol. 4, at 393-95. Post-conviction counsel did not ask Ms. Glenn to testify to the information she developed as a result of that investigation. The record also does not reveal whether any lawyer representing petitioner subpoenaed any records concerning petitioner, including medical records, school records, military records, social service records, and records maintained by the various institutions in which petitioner has been confined.

Because of the complete absence of factual evidence, the Court declines to speculate on whether petitioner was sufficiently prejudiced by the failure to develop this evidence in state court as to undermine confidence in the outcome of the penalty phase.

The Court emphasizes that no conclusion has been reached with respect to whether post-conviction counsel was at fault for failing to present the factual evidence set forth in the Petition. Post-conviction counsel have not been asked to explain the choices made by them and, because the negligence of post-conviction counsel would not excuse a procedural default, no useful purpose would be served by such an inquiry. The Court's observations here are not intended as a reflection on the professional conduct of any attorney but, instead, reflect dismay at the scant attention that has been devoted to what appears to be one of the few potentially meritorious issues in this Petition.

denying relief on the petition, the trial court judge made the following factual findings:

> (1) As to ground (b) the petitioner alleges that trial counsel failed to investigate and present any social or psychological evidence and failed to inquire into his competency. As to this allegation the petitioner called two attorneys, six members of his family, Jeff Blum of the Capital Resources Center and one jailer. Mr. Crow testified as to his contact with members of the petitioner's family. This is supported by Ex. # 2. According to Mr. Crow his family could not or would not get involved in testifying. Mr. Crow did offer the petitioner during the penalty stage. At that time the jury heard the petitioner's version of the facts as to how and the manner of his wife's death occurred. The petitioner contended that McCoy killed his wife. The cross-examination in this stage, in the Court's opinion, was devastating. The Jury evidently rejected the petitioner's testimony. Members of his family would **[*273]** testify that he was a good worker and had a good marriage. During the guilt phase his employer testified as to his work habits and his concern for his wife missing. The State's evidence would show that their marital relationship was strained. The jury had these mitigating circumstances, if they are, for consideration. There is no merit to this allegation.
>
> (2) As to ground (c)-the trial counsel failed to produce character witnesses, the trial attorney did not call any character witnesses in mitigation. Mr. Bruce [sic] Gray would testify that the petitioner was a good family man. The Court finds that the

> failure to call this witness would not substantially alter the decision of the jury.
>
> (3) As to ground (d), both trial attorneys stated that family members were very supportive in wanting to help the petitioner. Especially in the investigative stage. However, they were reluctant to take the witness chair. Then trial counsel offered petitioner as to the best source for mitigation. As the Court previously noted the jury rejected the petitioner's testimony. This Court charged the jury all the relevant statutory mitigating circumstances as well as any relevant circumstances they could **[*274]** arrive at in all the testimony.

Addendum 13, Vol. 1, at 101.

The trial court also reached the following legal conclusions:

> As to the penalty stage, the decision to call witnesses rests with the trial attorneys. . . .
>
> The proof shows that Mr. Crow and Mr. Washington, after full consultation with the petitioner, made certain strategic and tactical decisions at the penalty stage in not calling family members as witnesses. The attorneys must do this after weighing all the factors favorable and unfavorable to their client. They are not to be second guessed as to their decision. . . .
>
> The Court is of the opinion that counsel are required to exert every reasonable effort on behalf of a client both in the investigation and in the trial

> of a case. The Court finds nothing in the evidentiary hearing to suggest that there was any failure of counsel to meet the standards of competence required in criminal cases or that any action or inaction on their part prejudiced the case of their client.
>
> There is no legal requirement and no established practice that the accused must offer evidence at a sentencing hearing. . . .
>
> Both attorneys fully complied with the mandates of . . . **[*275]** Strickland v. Washington . . . .

Id. at 103-04 (emphasis in original; citations omitted).

The Tennessee Court of Criminal Appeals affirmed. With respect to this issue, they stated as follows:

> We do feel compelled, however, to remark briefly upon . . . that portion of issue number three which asserts a failure of counsel to put on mitigating evidence at the penalty phase.
>
> The attorney testified members of [Mr. Johnson's] family would not testify at the sentencing phase of the trial. This, he says, left him without any witnesses to offer testimony in mitigation of the acts of [Mr. Johnson].
>
> At the post-conviction hearing, members of [Mr. Johnson's] family testified they wished to testify at the convicting trial but were not called to do so.
>
> These witnesses testified they would have told the jury [Mr. Johnson] was a hard worker who loved

> his family. The major flaw in this was the fact [Mr. Johnson] was convicted of murdering his wife.
>
> We conclude this evidence would not have benefitted [Mr. Johnson], and the failure of the trial lawyer to call these witnesses during the penalty phase of the trial gives no right to a new trial. . . .

Addendum **[*276]** 22, at 2-3 (citation omitted).

5. The merits of petitioner's claim

In evaluating the merits of petitioner's claim, the Court is required to accept the state courts' factual findings in the absence of clear and convincing evidence to the contrary. See 28 U.S.C. § 2254(e)(1); see also Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052; cf. Abdur'Rahman v. Bell, 226 F.3d at 702-04 (discussing the presumption of correctness under pre-AEDPA law).

To the extent that the state courts held that the performance of trial counsel was not deficient, [143] such a holding represents an unreasonable application of clearly established federal law. As previously noted, see supra page 180 n.135, the Supreme Court recently held in Williams v. Taylor, 529 U.S. at 390, that the law has been clear since the 1984 decision in Strickland that counsel has a duty to investigate and present mitigating evidence. The evidence suggests

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[143] Although the trial court clearly made such a determination, it is not clear whether the Tennessee Court of Criminal Appeals reached that issue or if it based its decision solely on a finding that petitioner was not prejudiced.

that petitioner's trial counsel were ineffective for failing to investigate mitigating evidence. See Carter v. Bell, 218 F.3d at 600. There is no evidence trial counsel sought **[*277]** to obtain any medical, school, or social service records concerning petitioner. Although trial counsel spoke to several members of petitioner's family, [144] the record suggests that trial counsel did not fully explore potential mitigating evidence. Trial counsel apparently did not speak to family friends or jailers. Trial counsel also did not order a psychological evaluation of petitioner.

[*278] Although the performance of trial counsel may well have been deficient in some respects, [145] petitioner

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[144] Post-conviction counsel attempted to establish that any contacts trial counsel had with members of petitioner's family were minimal or involved matters other than preparing for petitioner's defense at trial. Trial counsel denied that that was the case. The trial court judge accepted the testimony of trial counsel, which he found to be corroborated by the attorneys' time records. See supra page 199. The Court is required to accord special deference to the credibility determinations of the trial court judge.

[145] The Court does not reach the issue whether trial counsel were deficient for failing to present mitigating evidence. It cannot be concluded from the evidence in the record, however, that trial counsel made the conscious decision to pursue a residual guilt strategy. Trial counsel did not explicitly argue during the sentencing phase that Mr. McCoy committed the murder, and they did not suggest that it was in any way unjust for petitioner to face the death penalty while Mr. McCoy suffered no penalty for his participation in Mrs. Johnson's murder. Trial counsel also did not request a residual doubt instruction. Nonetheless, because post-conviction counsel failed to develop the factual record concerning trial counsel's strategic choices at the sentencing phase hearing, the Court is not in a position to reach a definitive conclusion with respect to this issue.

is entitled to relief on this claim only if he suffered sufficient prejudice to undermine confidence in the outcome of the sentencing phase of his trial. In that regard, the Court is bound by the trial court's finding that petitioner's family members were unwilling to testify on his behalf. See Scott v. Mitchell, 209 F.3d at 881. Instead, any testimony would have had to come from petitioner himself or from friends.

The evidence does suggest that trial counsel did not sufficiently prepare petitioner for his testimony during the sentencing hearing. The Court has previously rejected petitioner's argument that counsel were ineffective during the guilt stage of trial for failing to present at that time petitioner's testimony that he did not kill his wife. See supra page 106. Mr. Crow testified at the post-conviction hearing that he advised petitioner not to testify during the guilt phase because he found his testimony to be unbelievable and thought petitioner would not make a good witness. See Addendum 13, Vol. 3, at 210. Given this professional judgment, which, from the evidence in the record, appears to be eminently reasonable, the Court cannot understand why trial counsel did not strongly urge petitioner not to testify during the sentencing phase or, alternatively, to limit his testimony to matters that would tend to establish mitigating circumstances. The introduction of petitioner's testimony may well have hindered trial counsel's ability to use a residual doubt strategy. As a result of petitioner's testimony, the jury was essentially asked to decide whether they believed that petitioner, acting alone, killed his wife or whether Mr. McCoy, acting alone, killed Mrs. Johnson. The jury had no basis--other than speculation--to consider a third possibility: that petitioner and Mr. McCoy killed the victim together. Trial counsel was not asked to explain this decision during the post-conviction hearing. Moreover, as previously noted, see supra pages 196-97, petitioner did not exhaust in state court any claim that his testimony was affirmatively detrimental to him. Accordingly, in considering petitioner's claim of failure to prepare him for testifying, the Court is limited to consideration of the failure to elicit mitigating evidence from petitioner.

[*279] Moreover, because of previous rulings on the issue of procedural default, see supra pages 194-97, the Court is entitled to consider only evidence that petitioner maintained family and friends who cared for him and considered him a good man who worked hard and provided for his family. As previously noted, see supra page 186 n.139, there was some evidence in the trial-court record that would support these contentions. Moreover, both the trial court judge and the Tennessee Court of Criminal Appeals found that this testimony would not have been helpful to petitioner. See supra pages 199-201. This Court must accept that finding unless it is unreasonable. See 28 U.S.C. § 2254(d)(2). Given the extremely limited scope of the mitigating testimony that was offered during the post-conviction hearing, the Court is not in a position to reach such a conclusion. Finally, as was previously observed in connection with petitioner's claim of ineffective assistance of counsel during the guilt stage, see supra pages 103-04, introduction of testimony concerning the state of petitioner's marriage would open the door to rebuttal evidence that may well have been **[*280]** significantly prejudicial to petitioner. For these reasons, petitioner is not entitled to relief.

This leaves petitioner's claim that trial counsel should have ordered a psychological evaluation. The record does not reflect whether such an evaluation was performed, although Tennessee law at the time of the first post-conviction hearing apparently did not authorize post-conviction counsel to seek such an evaluation. See Owens v. State, 908 S.W.2d 923 (1995). Given the previous holdings on the issue of procedural default, see supra pages 195-96, however,

the Court cannot conclude that there is any reasonable likelihood that a psychological evaluation would benefit petitioner. There is no evidence in the record concerning the primary facts of petitioner's background, and petitioner has not exhausted in state court his claim that trial counsel should have discovered and presented any such information. Under those circumstances, there is very little admissible evidence that could be developed through a psychological evaluation. The Court cannot, of course, permit petitioner to substantiate through the back door of a psychologist's testimony claims that have plainly **[*281]** been procedurally defaulted. Accordingly, the Court declines to order a psychological evaluation of petitioner at this late date.

For all the foregoing reasons, the Court grants summary judgment to respondent on this claim.

* * * * *

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IT IS SO ORDERED this 28th day of February, 2001.

BERNICE B. DONALD

UNITED STATES DISTRICT JUDGE

APPENDIX E

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

WESTERN DIVISION

DONNIE E. JOHNSON, Petitioner, v. RICKY BELL, Warden, Riverbend Maximum Security Institution Respondent.	Case No. 97-3052-TU/A Judge Turner

DECLARATION OF DONNIE E. JOHNSON

Declarant Donnie E. Johnson states as follows:

1. I am an adult resident of Nashville, Davidson County, Tennessee. I am the petitioner in the above-styled proceeding.
2. I was born with congenital myopia.
3. As a child, I regularly fell down a flight of concrete stairs.
4. My parents beat me with their fists, their feet, belts, and tree limbs.
5. When I was in the second or third grade, I was hit in the forehead with a baseball bat .
6. During the ages six to eight, my uncle sexually assaulted me when he visited my family.
7. I ran away from home. After doing so a number of times, my parents placed me in the Jordania Youth Center (Jordania).

8. At Jordania, I was sexually assaulted by an inmate, beaten by inmates, and beaten by guards.
9. After being released from Jordania, I was sent to Pikeville Reform School (Pikeville) .
10. At Pikeville, I was sexually assaulted by an inmate, beaten by inmates, and beaten by guards.
11 . After being released from Pikeville, I was held in the Tipton County Jail for vandalism. Trustees stoned me with glass bottles.

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

Donnie E. Johnson

2/25/98

APPENDIX F

DECLARATION OF SHIRLEY JOHNSON WARD

My name is Shirley Johnson Ward. I am an adult resident of Tipton County, Tennessee. Donnie Edward Johnson is my youngest brother.

My father James Lee Johnson was very difficult to live with. He was cruel and violent with my mother, Ruby, and beat Donnie regularly when he was a boy. Everyone in the house walked on eggshells around my father, but he had a particularly short fuse with Donnie. He would beat Donnie for anything that he would say, and sometimes for no reason. The main thing I remember about Donnie as a little boy was that he was starved for attention and affection, and he was beaten constantly by my father.

My father was sexually inappropriate with me and my two sisters when we were growing up. It was so bad when I was growing up that we couldn't have girlfriends come over to the house because he would try to kiss them. I considered him a pervert. I also caught him doing the same thing to my daughter after I was grown. After my parents divorced, my father became romantically involved with his son's young mistress. He married her and they all lived together and slept together: my halfbrother, his wife, my father, and his young wife, my half-brother's girlfriend. My father was sexually inappropriate to the end, and I didn't shed a tear when he died.

My father was kinder to strangers than he was to his own wife. He had several affairs throughout their

marriage. He put up a front of respectability, but most men didn't respect him because he was a bully with women.

I attended most of Donnie's trial. I don't remember ever talking to Donnie's trial attorneys. I have worked with attorneys all of my adult life and I would have been willing and able to testify on Donnie's behalf.

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

Shirley J. Ward
2/28/2013

APPENDIX G

DECLARATION OF SARA CAGLE

My name is Sara Cagle. I am an adult resident of Tipton County, Tennessee. I am Donnie Edward Johnson's maternal Aunt. I am 75 years old.

My sister Ruby was Donnie Johnson' mother. She was approximately eight years older than me. She and I were very close until her death in 2009. Our father's name was Ira Edgar Ballard and our mother's name was Rosie May Beasley Ballard. My father was originally from Friendship, Tennessee, and my mother was from Hayti, Missouri, but moved to Covington, Tennessee to work and start a family. My parents had 7 children. Ruby and I were the only girls. Ruby was the third oldest child, born in 1930 and I was the third youngest, born in 1938.

When Ruby was fourteen years old, she met James Lee Johnson, who was a cab driver in Covington. James Lee was twenty four years old and separated from his wife Hattie, and their two sons, James and Clarence, who everybody called "Doodle." My father and mother were very angry about James Lee's interest in Ruby, and Ruby's interest in James Lee. Our older brother Melvin went to see James Lee to confront him about his relationship with Ruby. When Melvin arrived at the house, James Lee snuck up behind him and hit him on the head with a tire iron. James Lee was a violent man, but it was usually just towards women and children.

James Lee and Ruby stayed together in spite of our family's disapproval. Soon Ruby was pregnant with my niece Shirley, who was born in July 1946. James Lee didn't divorce his wife until 1948. He was married to Ruby in July of 1948.

James Lee treated Ruby horribly throughout their 46 year marriage. He beat her, choked her, and slapped her. In addition to the physical abuse, he talked down to her, always berating her and calling her stupid. In all their time together, he controlled all the financial aspects of the household and never allowed her to have a checkbook or handle money. When she needed something for the house or herself, she had to ask him and he would buy it if he saw fit. It wasn't as if James Lee had any talent at finances. In later years, after my sister had taken it upon herself to obtain her GED, go to cosmetology school, and eventually open her own beauty shop, James Lee mismanaged the bookkeeping and self-employment tax. As a result my sister was ineligible for Social Security after a lifetime of work and years of James Lee's non-payment. Ruby hated the way that James Lee treated her, but since he had a steady job at International Harvester, she considered her marriage to him as financial security. She did get fed up and leave him for a short period of time not long after they were married, and that was what led to Donnie's birth.

After our father died in 1950, my mother moved to St. Joseph, Michigan, where my older brothers Ray and Billy Jo lived and worked. My mother took my younger brothers Jaime and Harold with her to live there. I stayed behind in Covington and lived with Ruby and James Lee. I was 12 years old. At their house, they

had a bathtub in the basement, and when I bathed, James Lee would crawl into a laundry chute from the first floor and try to watch me bathe. I would hear him and call out to Ruby to make him stop. James Lee was always sexually inappropriate. We didn't find out how inappropriate until much later. Not long after my mother moved to Michigan, Ruby grew tired of James Lee's abuse, and left him. She took four year old Shirley and went to Michigan.

While Ruby was in Michigan, she met Elmer Young. Elmer was the brother of a friend of one of my older brothers. All of those young men were factory workers and drank in taverns during their time off. Ruby and Elmer had a short romantic relationship during which Donnie Johnson was conceived. James Lee eventually convinced Ruby to come back to him in Covington, and she returned to her marriage, pregnant with Donnie. Years later, when I made my home in Michigan, I would see Elmer Young around town. Donnie looked just like Elmer, and nothing like James Lee. Soon James Lee returned to his cruel treatment of Ruby, and Donnie became a target of his violence.

James Lee beat Donnie mercilessly from the time he was little. James Lee beat Donnie for anything he did and sometimes for no reason at all. He beat Donnie with a razor strop. I always felt sorry for Donnie, and tried to stand up to James Lee on his behalf, but there was only so much I could do.

I move to Michigan in 1955 and lived there until 1991. Although I was living there, I remained close to Ruby and Donnie through frequent visits, phone calls, and letters. I know that as Donnie got older, he rebelled

against James Lee's cruel treatment of him and his mother. After James Lee died, Ruby told me that she had discovered that James Lee had sexually molested all three of his daughters. Ruby told me later that James Lee was also in the habit of walking around the house naked in front of his daughters. I always hated the way James Lee treated my sister, and Donnie, and I was disgusted to find out that he had treated his daughters that way as well.

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

Sara Cagle 2-27-13