APPENDICES

APPENDIX A

No. 99-5279

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY BRADFORD CONE,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
RICKY BELL, WARDEN, RIVERBEND MAXIMUM SECURITY INSTITUTION,	)	
	)	
Respondent-Appellee.	)	

Filed: Sept. 26, 2007.

Before: MERRITT, RYAN, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active[*] judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

[*] Judge Gibbons recused herself from participation in this ruling.

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

MERRITT, Circuit Judge, with whom MARTIN, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges, join, dissenting from the failure to grant an *en banc* rehearing. As my opinion dissenting from the panel's majority opinion points out, the State has successfully relied on procedural default on Cone's *Brady* claim throughout the state and federal judicial proceedings. It successfully claimed in the Tennessee courts that the *Brady* claim was "previously determined," not that it was "never raised." Then in federal court, the State made inconsistent claims that the *Brady* claim was both "previously determined" and "never raised." The majority of our panel has now held in two separate opinions that the claim is procedurally defaulted because "previously determined."

Now for the first time in its response to Cone's *en banc* petition, the State no longer asserts that the *Brady* claim was "previously determined" in state court. It recognizes now that the state courts have never considered the *Brady* claim on the merits. The State's response relies only on the argument that the claim is defaulted because it was "never raised" in state court.

This "never raised" argument is blatantly false. As outlined in my dissenting opinion, the record clearly demonstrates that on October 5, 1993, Cone's counsel filed an amendment to his second petition for post-conviction relief in the Criminal Court in Memphis stating in some detail that a constitutional violation occurred in Cone's trial "because the State

withheld exculpatory evidence which demonstrated that petitioner did in fact suffer drug problems and/or drug withdrawal or psychosis both at the time of the offense and in the past, such evidence including . . . statements contained in official police reports . . . . Such evidence was highly exculpatory . . . . There is a reasonable probability that, had the evidence not been withheld, the jurors would not have convicted petitioner and would not have sentenced him to death."

The State now argues that the issue was "never raised" because Cone did not recite and describe in detail each of the fourteen police documents and witness statements containing the exculpatory evidence of drug addiction withheld by the prosecution. It seeks to avoid a decision on the merits by insisting that Cone improperly pled his separate pieces of evidence as one claim instead of separate claims. The State reverses its previous position on procedural default and now attempts to slice up Cone's whole claim into little pieces. The State knows that it cannot defeat Cone's fundamental claim that the prosecution withheld exculpatory evidence of Cone's drug addiction and that Cone "did in fact suffer drug problems and/or drug withdrawal or psychosis" and that his evidence is "contained in official police reports."

By failing to reject the State's artificial effort to divide up the claim into fourteen little pieces and then conquer it through a phony procedural default defense, the *en banc* court is closing its eyes and allowing Cone to be executed without any effort to get to the merits or have the district court or a state court investigate the prosecution's concealment of strong exculpatory

evidence of drug addiction.

The State's divide-and-conquer tactic is inconsistent with pleading rules in habeas cases under both Tennessee and federal law. The Tennessee Supreme Court requires simply that the habeas petition state "a colorable claim . . . for post-conviction relief, that, if taken as true, in the light most favorable to petitioner would entitle petitioner to relief." *Arnold v. State of Tennessee,* 143 S.W.3d 784 (Tenn. 2004). The United States Supreme Court requires simply that "the substance of the federal habeas corpus claim must first be presented to the state courts." *Picard v. Connor,* 404 U.S. 270, 278, (1971); *Gray v. Netherland,* 518 U.S. 152, 163 (1996). Cone's lawyers have tried diligently to comply only to be confronted by a prosecutorial smoke screen designed to obscure, confuse and mislead the court.

Assuming arguendo that the State were right that the *Brady* claim was never raised in state court, the solution to the problem is not to dismiss the claim on grounds of procedural default. Procedural default is improper in this situation. Rather the federal courts should stay the proceedings on the *Brady* claim until the claim can be exhausted in state court. *Rhines v. Weber,* 544 U.S. 269, 278 (2005). As pointed out in my dissenting opinion, the state court ruled that the *Brady* claim was "previously determined" and refused to adjudicate it—a mistaken ruling directly inconsistent with the State's defense that the claim was never presented to the state courts. Our court's refusal to look at the case means that no court, state or federal, will ever have considered the claim on the merits seriously. The State's concealment of exculpatory evidence from the jury will result in

Cone's execution without proper review.

The long delay in considering and correcting this fatal error is due in part to the fact that the case in federal court has gone to the Supreme Court twice on other issues. This court twice issued the writ of habeas corpus, first on grounds of ineffective assistance of counsel, and then on grounds that the "heinous, atrocious and cruel" aggravator found by the jury was unconstitutionally vague. The Supreme Court reversed the panel decision twice leaving the *Brady* issue in limbo for many years. *See Cone v. Bell,* 243 F.3d 961 (6th Cir. 2001), *rev'd,* 535 U.S. 685 (2002) (ineffectiveassistance of counsel); *Cone v. Bell,* 359 F.3d 785 (6th Cir. 2004), *rev'd,* 543 U.S. 447 (2005) ("heinous, atrocious and cruel" aggravator).

Now, fourteen years after the *Brady* claim was initially raised in state court, we learn from the State Attorney General that the claim was never really raised. Having been twice reversed in the Supreme Court, we should not err again by failing to insure that the State's prosecutorial misconduct in concealing exculpatory evidence is considered on the merits. After fourteen years and two trips to the Supreme Court, surely the time has come to fully consider the *Brady* claim on the merits. There is no constitutional basis for disposing of this claim under the doctrine of procedural default.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0227p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY BRADFORD CONE,
Petitioner-Appellant,

v.

No. 99-5279

RICKY BELL, Warden, Riverbend Maximum Security Institution,
Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 97-02312—Jon Phipps McCalla, District Judge.

Argued: November 2, 2006

Decided and Filed: June 19, 2007

Before: MERRITT, RYAN, and NORRIS, Circuit Judges.

COUNSEL

ARGUED: Paul R. Bottei, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Paul R. Bottei, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Jennifer L. Smith, Michael E. Moore, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

RYAN, J., delivered the opinion of the court, in which NORRIS, J., joined. MERRITT, J. (pp. 11-17), delivered a separate dissenting opinion.

OPINION

RYAN, Circuit Judge. In 1982, a Tennessee state court sentenced Gary Bradford Cone to death after convicting him of two counts of first degree murder, two counts of murder in the perpetration of a burglary, three counts of assault with intent to commit murder, and one count of robbery by use of deadly force. The jury found Cone had bludgeoned two elderly persons to death while hiding out after a robbery. The Tennessee courts upheld Cone's conviction and sentence on direct appeal and denied his petitions for post-conviction relief. Then, in 2000, Cone filed a petition for a writ of *habeas corpus* in federal district court, which, in due course, was denied. He appealed.

We have now heard Cone's appeal three times because the United States Supreme Court has twice reversed our decisions granting relief. This third time around, Cone raises a number of claims, none of which, in our judgment, has merit. Therefore, we will affirm the district court's original judgment denying Cone's petition.

I.

A.

The details of Cone's brutal crimes are not material to the issues we address in this appeal, but they are fully set forth in *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001), *rev'd*, 535 U.S. 685 (2002) (*Cone I*). However, the details of this case's *procedural* history are material to the issues before us on this appeal and we recount them now.

At the time of Cone's conviction, under Tennessee law a jury could impose the death penalty only if it found that the government had proved, beyond a reasonable doubt, the existence of at least one of twelve statutory aggravating factors. Tenn. Code Ann. § 39-2404(i) (1981) (current version at Tenn. Code Ann. § 39-13-204(i) (2006)). In sentencing Cone to death, the jury found four aggravating factors: "[1] The defendant was previously convicted of one or more felonies, other than the present charge, which involve[d] the use or threat of violence to the person[; 2] The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder [('great risk of death' factor);] . . . [3] The murder was especially heinous, atrocious, or cruel [(HAC)] in that it involved

torture or depravity of mind [(HAC factor); and] [4] The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another." *Id.*; *State v. Cone*, 665 S.W.2d 87, 94-95 (Tenn. 1984).

On direct appeal, the Tennessee Supreme Court found that the evidence did not support the jury's finding of the "great risk of death" factor. *Cone*, 665 S.W.2d at 95. However, the court found this error was "harmless beyond a reasonable doubt" because Cone's death sentence was supported by the other three aggravating factors found by the jury and by still another aggravating factor the jury did not find, but which the evidence supported; *viz.* that the murders were committed in perpetration of a burglary. *Id.* The court held that the death sentence was "not in any way disproportionate under all of the circumstances," and affirmed. *Id.* at 95-96. After Tennessee courts denied two post-conviction petitions, *Cone v. State*, 927 S.W.2d 579, 580 (Tenn. Crim. App. 1995), Cone filed a *habeas corpus* petition in federal district court under 28 U.S.C. § 2254, alleging numerous federal constitutional violations. As we have said, the federal district court denied Cone's petition on all claims and Cone appealed.

In 2001, after hearing Cone's first *habeas* appeal, we directed the district court to vacate the death sentence because Cone had been denied constitutionally guaranteed effective assistance of counsel at his sentencing hearing. *Cone*, 243 F.3d at 975-76. We also held that: (1) Cone's allegations that the prosecution had withheld evidence from him in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), had been procedurally defaulted and that Cone had

not shown cause and prejudice to overcome this default; (2) even if these *Brady* claims were not procedurally defaulted, the allegedly withheld documents were not *Brady* material; and (3) statements made by the prosecutor during closing argument did not rise to the level of prosecutorial misconduct. *Cone*, 243 F.3d at 968-73. We specifically declined to address Cone's arguments that death by electrocution violates the Eight Amendment's prohibition on cruel and unusual punishment and that the Tennessee jury improperly considered the "great risk of death" and HAC aggravating factors in sentencing him to death. *Id.* at 975. The United States Supreme Court reversed our decision that the assistance provided by Cone's attorney did not meet constitutional minimums and remanded the case back to this court. *Cone I*, 535 U.S. at 702.

We heard Cone's second appeal, on remand, in 2004. We held that the statutorily defined HAC aggravating factor found by the sentencing jury was unconstitutionally vague. *Cone v. Bell*, 359 F.3d 785, 797-99 (6th Cir. 2004), *rev'd*, 543 U.S. 447 (2005) (*Cone II*). Since this error was not harmless, particularly in light of the jurors' erroneous reliance on the "great risk of death" aggravating factor, we granted Cone's petition for *habeas* relief, without addressing any of Cone's other claims. *Id.* at 799. The United States Supreme Court again reversed, holding that even if Tennessee's HAC aggravating factor was facially vague, the Tennessee Supreme Court is presumed to have "cure[d] this vagueness by applying a narrowing construction on direct appeal." *Cone II*, 543 U.S. at 459. The Supreme Court did not address any other issues and remanded, once again. *Id.* at 460.

B.

In this, his third appearance before us, Cone argues that several of his claims for relief remain unresolved. Without conceding any other claims, Cone's brief focuses on two main claims: (1) that the jury's improper consideration of the HAC and "great risk of death" aggravating factors at sentencing has not been cured and so he deserves a new sentencing hearing; and (2) that we should revisit our first decision's holding that Cone's *Brady* claims are procedurally defaulted, because the Supreme Court has since decided *Banks v. Dretke*, 540 U.S. 668 (2004). Cone also makes six additional claims: (3) death by electrocution violates the Eighth Amendment; (4) the prosecutor made false arguments to the jury; (5) Cone received ineffective assistance of counsel; (6) the judge gave misleading jury instructions; (7) women were systematically underrepresented as grand jury forepersons when Cone was indicted; and (8) he was denied the right to counsel during trial. We address each claim below.

II.

We review the district court's disposition of a petition for *habeas* relief *de novo*, but review the court's factual findings for clear error only. *Carter v. Bell*, 218 F.3d 581, 590 (6th Cir. 2000).

Our scope of review is also subject to the law of the case doctrine. Under that doctrine, when a court explicitly decides an issue of law, that decision should govern the same issue raised in subsequent stages of the same litigation. *Arizona v. California*, 460 U.S. 605, 618 (1983); *Westside Mothers v. Olszewski*, 454

F.3d 532, 538 (6th Cir. 2006). In other words, when a court resolves an issue by a final decision, that decision binds future court decisions in the same litigation, even those by that same court. *Bowles v. Russell*, 432 F.3d 668, 676-77 (6th Cir. 2005), *cert. granted*, 127 S. Ct. 763 (2006). However, the doctrine does not preclude reconsideration of decided issues if the court finds "exceptional circumstances." *Westside Mothers*, 454 F.3d at 538 (citing *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997)). "Exceptional circumstances" include: "(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *Id.*

We also note that when the Supreme Court remands to our court, "'whatever was before [the Supreme Court], and disposed of by its decree, is considered as finally settled'" and not in our power to rehear. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978) (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)).

III.

As a general proposition, we have authority to grant *habeas* relief on a claim adjudicated by a state court if the state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The "contrary to" clause means a federal court "may grant the writ if the state court arrives at a conclusion opposite to that

reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). The "unreasonable application" clause means a federal court "may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. We make this determination by looking at whether the state court was objectively unreasonable in applying the federal law, not just whether the court was incorrect. *Id.* at 409.

Cone first claims that he is entitled to relief because the jury weighed two invalid aggravating factors—the HAC factor and the "great risk of death" factor—without any court performing a harmless error analysis or conducting a new sentencing hearing to consider Cone's mitigating evidence and valid aggravating factors.

In a so-called "weighing state" like Tennessee, in which the sentencer balances the aggravating and mitigating factors in making a death sentence determination, a sentence is arbitrary, and in violation of the Eighth Amendment, if the sentencer gives weight to an invalid aggravating factor, even if other valid factors have been found. *Richmond v. Lewis*, 506 U.S. 40, 46 (1992); *Stringer v. Black*, 503 U.S. 222, 230 (1992). However, the Supreme Court has held that a death sentence may still be upheld despite a court's consideration of an invalid aggravating factor if a state appellate court either: (1) reweighed the aggravating factors and mitigating evidence and found that the

death sentence is still supported by the evidence; or (2) determined that the jury's consideration of the invalid factor was harmless error beyond a reasonable doubt. *Stringer*, 503 U.S. at 230 (citing *Clemons v. Mississippi*, 494 U.S. 738 (1990)); *Chapman v. California*, 386 U.S. 18, 24 (1967).

In conducting a harmless error analysis, "[a] [state] appellate court may choose to consider whether absent an invalid factor, the jury would have reached the same verdict or it may choose instead to consider whether the result would have been the same had the invalid aggravating factor been precisely defined." *Jones v. United States*, 527 U.S. 373, 402 (1999) (citing *Clemons*, 494 U.S. at 753-54). Either way, the defendant must have received an "individualized sentenc[e]" from the jury, *Stringer*, 503 U.S. at 230, which means that the jury selected the sentence based on "the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983). This determination requires the state appellate court not simply to assume that absent the invalid factor, the jury still would have given a death sentence, *Stringer*, 503 U.S. at 231, but instead, to review the evidence before it, including the mitigating evidence. *See Parker v. Dugger*, 498 U.S. 308, 321-22 (1991).

There is another analytical route by which a court may decide the validity of a death sentence based in part, on an invalid factor. It is the route taken by the United States Supreme Court in rejecting Cone's vagueness challenge to the HAC factor. *Cone II*, 543 U.S. at 459. If a court finds that a factor is invalid because the factor is unconstitutionally vague, a jury's improper reliance on that factor may be "cured" by a

state appellate court sufficiently limiting the vague language of the factor by applying a narrowing construction. *See Lambrix v. Singletary*, 520 U.S. 518, 531, 537 n.6 (1997); *Stringer*, 503 U.S. at 230. In other words, "[there are] two distinct and permissible routes to satisfy the Eighth Amendment [prohibition against cruel and unusual punishment] where the sentencer considered a vague aggravator: a court's finding of the aggravator under a proper [narrowing] construction, *or* independent reweighing of the circumstances." *Lambrix*, 520 U.S. at 537 n.6. Therefore, when a state appellate court undertakes to "cure" the sentencer's consideration of an unconstitutionally vague aggravating factor by giving the flawed factor a narrowing construction, that is the end of it, and no further harmless error analysis is necessary. *Lambrix*, 520 U.S. at 537 n.6; *Richmond*, 506 U.S. at 47.

In its last decision in this case, the United States Supreme Court held that even assuming that the HAC factor relied on by the sentencing jury in Cone's case was facially vague, the Tennessee Supreme Court should be *presumed* to have applied a narrowing construction. *Cone II*, 543 U.S. at 456-58. Therefore, the Court reasoned, the presumed narrowing of the presumptively unconstitutional HAC factor rendered the factor's vague language constitutionally sufficient. *Id.* at 459-60. The Court concluded that the Tennessee court's affirmance of Cone's death sentence on this issue was "not contrary to . . . clearly established Federal law" and *habeas* relief should not be granted. *Id.* at 460.

These findings by the Supreme Court close the HAC aggravating factor issue and we find that the jury's reliance on the HAC factor in sentencing Cone

does not constitute a constitutional infirmity. Cone's argument to the contrary—that he should get relief because the jury considered the vague HAC factor and no court found this error harmless or conducted a new sentencing calculus—misreads Supreme Court precedent. As we have said, because the Supreme Court presumed that the Tennessee Supreme Court applied a narrowing construction, *Cone II*, 543 U.S. at 456-58, any error by the jury in relying on this factor was "cured." *See Richmond*, 506 U.S. at 47.

We also reject Cone's claim that he deserves a new sentencing hearing because the jury erroneously relied on the "great risk of death" factor. It is true that the Tennessee Supreme Court acknowledged that the jury finding on this factor was not supported by the evidence, but Cone is not entitled to a new sentence unless the Tennessee Supreme Court did not (1) conduct a proper harmless error analysis; *or* (2) reweigh the mitigating and aggravating factors in examining his sentence. *Stringer*, 503 U.S. at 230. Tennessee appellate courts generally do not reweigh, but instead conduct a harmless error analysis when faced with jury reliance on an invalid sentencing factor. *State v. Howell*, 868 S.W.2d 238, 259-61 (Tenn. 1993). As the *Howell* court recognized, the Tennessee Supreme Court did just such an analysis in this case. *See id.* at 260 (citing *Cone*, 665 S.W.2d 87). The Tennessee Supreme Court explicitly decided that the jury's consideration of the "great risk of death" factor "was harmless beyond a reasonable doubt and does not warrant the granting of a new sentencing hearing." *Cone*, 665 S.W.2d at 95.

While the Tennessee Supreme Court's statement that it found harmless error is significant in our

upholding that decision, *see Sochor v. Florida*, 504 U.S. 527, 540-41 (1992), the opinion further demonstrates that the court performed a proper harmless error analysis. Although the Court's opinion does not spell out its harmless error analysis in explicit terms, in discussing the jury's erroneous consideration of the "great risk of death" factor, the opinion examines the evidence supporting each aggravating circumstance found by the jury and finds that the other aggravating circumstances "were clearly shown by the evidence." *Cone*, 665 S.W.2d at 94. Earlier in the opinion, in a section immediately preceding a discussion of the claims Cone raised on appeal, the court explicitly discussed the mitigating evidence presented by Cone at trial and the contrary evidence presented by the government on that issue. *Id.* at 92. The court concluded: "[W]e have reviewed the sentence of death in this case and are of the opinion that it is not in any way disproportionate under all of the circumstances." *Id.* at 95. The court's analysis shows that it looked at "whether absent [the] invalid ["great risk of death"] factor, the jury would have reached the same verdict," *see Jones*, 527 U.S. at 402, and found that the sentence was appropriate. Contrary to Cone's claims, the court did not just "assume it would have made no difference if the thumb had been removed from death's side of the scale." *Stringer*, 503 U.S. at 232. Therefore, Cone has failed to establish that the Tennessee Supreme Court's affirmance of his death sentence was contrary to clearly established law and, therefore, we may not grant relief on this claim.

IV.

Cone's second claim raises an issue previously

decided by this court: whether the state prosecutors withheld evidence from Cone in violation of *Brady*, 373 U.S. 83. The *Brady* rule requires the government "to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). A government violation of this rule is grounds for setting aside a conviction or sentence only if the failure to disclose the relevant evidence "undermines confidence in the verdict, because there is a reasonable probability that there would have been a different result had the evidence been disclosed." *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998).

Cone's claim is actually better described as four separate *Brady* claims because Cone asserts that four groups of documents were withheld from him in violation of *Brady*. They are: (1) evidence regarding his drug use; (2) evidence that might have been useful to impeach the testimony and credibility of prosecution witness Sergeant Ralph Roby; (3) FBI reports; and (4) evidence showing that prosecution witness Ilene Blankman was untruthful and biased. We examined these four claims in our first opinion and found that each one had been procedurally defaulted. *Cone*, 243 F.3d at 968-70. Three of the claims had been procedurally defaulted because the Tennessee state court held the claims were previously determined or waived and that holding amounted to an independent and adequate state law ground barring our considering the claims. *Id.* The remaining claim, the FBI reports, had been procedurally defaulted because Cone failed to argue it in state court. *Id.* at 970. Cone also did not overcome this procedural default by showing both (a) reasonable cause for his failure to timely raise these

claims, and (b) unfair prejudice from the withholding of the documents. *Id.* at 971. We held that Cone had not shown cause *or* prejudice for his first, second, and fourth *Brady* claims, and while he had shown cause for his third claim, the FBI reports, he had not shown any prejudice. *Id.* Therefore, we held that Cone's *Brady* claims were not properly before us. In the alternative, we held that even if Cone could establish cause and prejudice to overcome his procedural default, "we are satisfied that the documents Cone complains were withheld are not *Brady* material." *Id.* at 968.

Given these prior rulings, we may not, because of the law of the case doctrine, reconsider Cone's *Brady* claims unless "'exceptional circumstances'" exist. *Westside Mothers*, 454 F.3d at 538 (citation omitted). Cone argues that the Supreme Court's decision in *Banks v. Dretke*, 540 U.S. 668, provides the necessary "exceptional circumstance[]" because it decided a "subsequent contrary view of the law" after our first decision in Cone's case. *See Westside Mothers*, 454 F.3d at 538. According to Cone, *Banks* "held that when the state withholds evidence which is material to a jury's death-sentencing determination, a petitioner has 'cause and prejudice' for any failure to timely present such claims in state court." Since the prosecution withheld mitigating evidence, Cone argues he had "cause and prejudice" under *Banks*. We disagree.

Contrary to Cone's arguments, *Banks* does not require us to review our prior findings. In *Banks*, the Supreme Court, citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999), stated the familiar rule for overcoming procedural default: that the petitioner must show cause and prejudice. *Banks*, 540 U.S. at 691. The Court recounted that a petitioner shows

"cause" when he demonstrates that his failure to develop facts in the state court proceedings was due to the prosecution's suppression of the relevant evidence and "prejudice" "when the suppressed evidence is 'material' for *Brady* purposes." *Id.* (quoting *Strickler*, 527 U.S. at 282). The *Banks* Court then analyzed each of these factors separately to find cause and prejudice. *Id.* at 692-703. The Court did not find cause and prejudice *solely* because the prosecution withheld evidence. Therefore, the Supreme Court did not decide a "subsequent contrary view of the law" that would lead us to disregard the law of the case here.

Furthermore, any attempt by Cone to analogize *Banks* to his case is misplaced because the Court's finding of cause and prejudice in *Banks* is distinguishable from Cone's case. The Supreme Court found that Banks showed "cause" by proving three factors: (a) the prosecution withheld exculpatory evidence; (b) Banks reasonably relied on the prosecution's open file policy to fulfill its *Brady* responsibilities; and (c) the State confirmed Banks's reliance on the prosecution's representation that it had disclosed all *Brady* material. *Banks*, 540 U.S. at 692-93. The Court concluded: "In short, because the State persisted in hiding [the witness's] informant status and misleadingly represented that it had complied in full with its *Brady* disclosure obligations, Banks had cause for failing to investigate, in state postconviction proceedings, [the witness's] connections to [the police]." *Id.* at 693. This circuit has held that "prosecutorial concealment and misrepresentation" was key to the *Banks* holding and rejected a petitioner's argument that the prosecution's withholding of documents alone, *i.e.*, without

prosecutorial misconduct, demonstrates cause. *Harbison v. Bell*, 408 F.3d 823, 833 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 1888 (2006).

This distinction is applicable here. Cone has not presented any evidence of prosecutorial concealment or shown his reliance on false prosecutor statements. Instead, he summarily concludes that *Banks* supplies the necessary cause without explaining how the facts of his case match Banks' case. *Banks* thereby does not give us reason to revisit our prior decision that three of Cone's *Brady* claims lack cause for his procedural default.

In *Banks*, the Court found "prejudice" because the government witness, whose testimony may have been impeached with the withheld *Brady* material, presented evidence on a key element of the case and was not corroborated by another witness. *Banks*, 540 U.S. at 700. The Court found this uncorroborated testimony on a key issue combined with the prosecutor's misrepresentations and concealment of the issue showed a reasonable probability that the outcome of the case would have been different if Banks had received the withheld evidence. *Id.* at 699-701.

But Cone has not made a similar showing. In his most recent brief, claiming that his receiving the withheld evidence would have resulted in a different sentence, Cone has made only conclusory arguments. Cone introduced considerable evidence that he had a drug habit, *Cone*, 665 S.W.2d at 92, and so we have no basis to conclude that the result of his trial would have come out differently had the *Brady* evidence been given to him. *See Coe*, 161 F.3d at 344. *Banks* thereby does not give us reason to revisit our prior decision

that Cone has not shown prejudice. We therefore will not disturb our decision that Cone's *Brady* claims are procedurally defaulted and not before this court.

Cone argues in the alternative that even without a showing of "cause and prejudice" this court can review three of his *Brady* claims—the mitigating drug evidence, the Roby impeachment testimony, and the Blankman testimony—because those claims were not procedurally defaulted under state law.

It is well settled that a *habeas* petitioner must exhaust his available remedies in state court before a federal court may grant *habeas* relief. 28 U.S.C. § 2254(b)(1)(A). If the state court decides the petitioner's claims on an adequate and independent state ground, such as a state procedural rule, the petitioner's claims are considered procedurally defaulted and he is barred from seeking federal *habeas* relief. *Wainright v. Sykes*, 433 U.S. 72, 86-87 (1977). Under Tennessee law, grounds for relief which have been "waived or previously determined" are not cognizable in a state post-conviction action. Tenn. Code Ann. § 40-30-112 (1990) (since repealed). The Tennessee courts held that Cone's *Brady* claims were previously determined under this rule, *State v. Cone*, No. P-06874 (Tenn. Crim. Ct. filed December 16, 1993) *aff'd* 927 S.W.2d 579 (Tenn. Crim. App.1995), and we found that Cone's claims were therefore procedurally defaulted. *Cone*, 243 F.3d at 969-70.

Cone looks to *Hathorn v. Lovorn*, 457 U.S. 255 (1982), to challenge our finding of procedural default. While the general rule is that a petitioner's failure to comply with a state procedural rule may constitute an independent and adequate state ground of decision

and bar a federal court's review of a federal question raised in state court, *Hathorn* held that a federal court will not be prevented from hearing a federal question raised in state court if the state court did not follow established state procedural rules. *Id.* at 262-63. Therefore, Cone argues, if the Tennessee court rested its finding that Cone's three *Brady* claims were previously determined upon a Tennessee procedural rule that was not "'firmly established and regularly followed,'" *Hutchison v. Bell*, 303 F.3d 720, 737 (6th Cir. 2002) (quoting *Ford v. Georgia*, 498 U.S. 411, 424 (1991)), then no independent and adequate state ground precludes this court from reviewing Cone's three *Brady* claims.

While we do not take issue with Cone's statement of the general rule, we find it is inapplicable to his case. We have already decided that Cone's claims are procedurally defaulted and so we would need to find an "exceptional circumstance[]" to revisit that decision. *Westside Mothers*, 454 F.3d at 538. We do not find any such circumstance. Even if we were disposed to ignore our prior decision on this issue, we find that Cone's argument has no merit. To determine whether a state procedural rule is firmly established, a court looks at "whether, at the time of the petitioner's actions giving rise to the default, the petitioner 'could not be deemed to have been apprised of [the rule's] existence.'" *Hutchison*, 303 F.3d at 737 (quoting *Ford*, 498 U.S. at 423). The petitioner must demonstrate more than "'[a]n occasional act of grace by a state court in excusing or disregarding a state procedural rule' in order for a federal court to conclude that the state procedural rule is inadequate because inconsistently applied." *Id.* (quoting *Coleman v. Mitchell*, 268 F.3d

417, 429 (6th Cir. 2001)).

Cone has not shown that Tennessee did not consistently follow its procedural rules such that we should have disregarded Tennessee's finding that his *Brady* claims were previously determined. While Cone cites a few cases in an attempt to show inconsistent application of Tennessee's procedural rules, they do not support the claim that Tennessee's waiver rule was not "'firmly established and regularly followed.'" *Hutchison*, 303 F.3d at 737 (citation omitted). Rather, the rules were firmly established and the Tennessee courts applied them here. We again find that Cone's claims are procedurally defaulted and we reject Cone's request to reconsider his *Brady* claims.

The dissent challenges our reliance on the law of the case doctrine, arguing that, on this third appeal, we should find our prior holding of procedural default no longer valid because Cone's *Brady* claims have never been decided by a court. The Tennessee courts found that Cone's *Brady* claims were "previously determined" and, therefore, not cognizable in Cone's state post-conviction action, *Cone v. State*, No. P-06874 (Tenn. Crim. Ct. filed Dec. 16, 1993), *aff'd*, 927 S.W.2d 579 (Tenn. Crim. App. 1995). However, after an impressively close scrutiny of the enormous state court record, our brother finds as a matter of fact that the Tennessee trial and appellate courts have repeatedly misstated the record. Our brother's fact-finding raises interesting questions as to a federal appellate court's authority on review of the denial of a *habeas* petition to make its own findings of fact contradicting a state court's findings on the contents of the state court record.

We need not be delayed by these interesting questions of federalism, however, because, in all events, the documents discussed in the dissenting opinion that were allegedly withheld are not *Brady* material. We said this before in *Cone*, 243 F.3d at 968-70, and we now say it again. A review of the allegedly withheld documents shows that this evidence would not have overcome the overwhelming evidence of Cone's guilt in committing a brutal double murder and the persuasive testimony that Cone was not under the influence of drugs. The dissent narrowly focuses on Sergeant Roby's testimony that "he knew of no evidence of drug addiction or abuse," dissent p. 13, and FBI Agent Eugene Flynn's testimony that he had "found no evidence of drug addiction," dissent p. 13. The dissent's argument, apparently, is that some of the undisclosed documents were prior inconsistent statements by Roby and Flynn that could have been used to impeach their credibility. While it is far from clear that these documents were indeed prior inconsistencies by Roby and Flynn, even if they were, they would have been admissible under Tennessee law, only to impeach veracity and not for their truth. *See Dailey v. Baseman*, 937 S.W.2d 927, 930 (Tenn. Ct. App. 1996). The third category of undisclosed documents are said to be (1) hearsay statements by Chief Daniels to Memphis police investigators that Cone "was a heavy drug user," and (2) statements by "[t]here other witnesses" that the day before the murder, Cone looked "weird" and on drugs, or "wild-eyed." Dissent, p. 13.

It would not have been news to the jurors, that Cone was a "drug user." They had already heard substantial direct evidence that he was a drug user,

including the opinion of two expert witnesses, the testimony of Cone's mother, drugs found in Cone's car, and photographic evidence. Despite this evidence, the jurors concluded that Cone's prior drug use did not vitiate his specific intent to murder his victims and did not mitigate his culpability sufficient to avoid the death sentence. In short, the allegedly withheld evidence catalogued by the dissent does not "undermine confidence in the verdict because there is [not] a reasonable probability that there would have been a different result had the evidence been disclosed," *see Coe*, 161 F.3d at 344, and so we reject Cone's *Brady* claims.

V.

Cone's third claim is that death by electrocution violates the Eighth Amendment. We explicitly did not address this claim in our first decision, *Cone*, 243 F.3d at 975, and so we address it now for the first time. The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. In Tennessee, electrocution was the only method of execution until 1999 when the legislature made lethal injection the default method, but gave inmates a choice of electrocution if they had committed their crime before January 1, 1999. Tenn. Code Ann. § 40-23-114. The Supreme Court has declared that in a state where the default method of execution is lethal injection and a person chooses to be executed by lethal gas that person has waived any objection he may have to the method of lethal gas. *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999).

Cone, who committed his crimes in 1980, has chosen electrocution over lethal injection and now

argues that electrocution violates the Eighth Amendment's prohibition on cruel and unusual punishment. Since Cone selected a method of execution different from the state's default method, his objections to his chosen method of execution are waived and we do not reach the merits of his claim. *See id.* We note that even if Cone's claim could move forward, neither the Supreme Court nor this circuit has concluded that electrocution offends "'the evolving standards of decency that mark the progress of a maturing society,'" *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (citation omitted), and constitutes cruel and unusual punishment. *Williams v. Bagley*, 380 F.3d 932, 965 (6th Cir. 2004), *cert. denied*, 544 U.S. 1003 (2005); *In re Sapp*, 118 F.3d 460, 464 (6th Cir. 1997); *see also In re Kemmler*, 136 U.S. 436, 443 (1890).

We decline to grant relief on Cone's Eighth Amendment claim.

VI.

Cone has a number of remaining claims: (1) the prosecutor made false arguments to the jury; (2) Cone received ineffective assistance of counsel; (3) the judge gave misleading jury instructions; (4) women were systematically underrepresented as grand jury forepersons when Cone was indicted; and (5) Cone was denied the right to counsel during trial.

We have previously decided the first of Cone's remaining claims and there are no "'exceptional circumstances,'" *Westside Mothers*, 454 F.3d at 538 (citation omitted), that would warrant our not following the law of the case. In our first decision we held:

> We find that the statements made by the prosecutor referring to Cone as a drug seller are not material, and we agree with the district court that the statement was too remote from the real issues in this case to have affected the jury's deliberations. Cone's drug psychosis defense was not substantially undercut by the prosecutor's remarks; rather, Cone simply did not present credible evidence that he was using drugs at the time he committed the murders. Under 28 U.S.C. § 2254(d), this decision does not appear to be contrary to, or involve an unreasonable application of, clearly established Federal law as determined by the Supreme Court.

Cone, 243 F.3d at 973. As we have already decided this issue, we reject Cone's request to reconsider this claim.

We are also precluded under the law of the case doctrine from considering Cone's claim that he received ineffective assistance of counsel. Cone raised only two ineffective assistance of counsel claims in his first post-conviction relief petition: (a) the failure of counsel to object during the State's argument at sentencing; and (b) the failure of counsel to present evidence in mitigation at the sentencing phase of the trial. We may not consider either of these claims because the United States Supreme Court has held that the Tennessee courts did not err in rejecting Cone's Sixth Amendment arguments on these issues. *Cone I*, 535 U.S. at 697, 700-02.

Any other ineffective assistance of counsel claims by Cone are procedurally barred because they were not raised until Cone's second petition for post-conviction

review. A petitioner must exhaust his available remedies in state court before a federal court may grant post-conviction relief. 28 U.S.C. § 2254(b)(1)(A). As previously discussed, if the state court decides the petitioner's claims on an adequate and independent state ground, such as a procedural rule, the petitioner's claims are considered procedurally defaulted and he is barred from seeking federal *habeas* review. *Wainwright*, 433 U.S. at 86-87. Under Tennessee law at the time, a claim not brought in a prior proceeding is presumed to be waived. Tenn. Code Ann. § 40-30-112(b)(2) (1990) (since repealed). Cone has not shown "cause and prejudice" to excuse the default. Therefore, his ineffective assistance claims raised in later petitions are procedurally barred.

Cone's claim of denial of counsel at trial suffers a similar fate. Cone specifically claims that he was denied his Sixth Amendment right to counsel by not being allowed to sit at counsel table during trial. This claim was not raised until an amendment to his second state post-conviction petition, rather than his first petition, and so it is procedurally defaulted. Cone has not made any attempt to show "cause and prejudice" for this claim and so we may not reach it.

Cone admits that his remaining two claims—misleading jury instructions and grand jury sex discrimination—fail under a prior decision of this court. *See Salmi v. Sec'y of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). In *Coe v. Bell*, we approved a jury instruction regarding unanimity identical to the one used in Cone's case and we also held that it was not error for a district court to hold that a male defendant lacked standing to raise a claim of discrimination against females in jury selection.

Coe, 161 F.3d at 337-39, 352-53. Since Cone admits that *Coe* controls his claims, that is the end of the matter.

VII.

Cone's petition for federal *habeas* relief has come before this court for a third time. We find that the law of the case directs us to **AFFIRM** once again the denial of those claims we have previously addressed and decided.

We **AFFIRM** the district court's rejection of Cone's remaining claims for the reasons we have given, and deny the petition for *habeas* relief.

DISSENT

MERRITT, Circuit Judge, dissenting. At least three serious problems exist in this case. First, the State deliberately concealed mitigating evidence of Cone's drug addiction and mental illness in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). As will be demonstrated below, the bulletins and teletypes sent out by the police at the time of the murders clearly show that the police believed Cone to be a drug addict.

Second, embedded within the *Brady* problem is the majority's failure to acknowledge and follow the long-established, bedrock principle of mitigation under the Eighth Amendment that forbids a state sentencing process that limits or proscribes the full consideration of addiction or other mitigating evidence by the jury. That principle was reiterated and explained once again by the Supreme Court as recently as April 25, 2007, in *Abdul-Kabir v.* Quarterman, 550 U.S. ____, 127 S. Ct. 1654 (2007). In that case, the Court stated in the text and accompanying footnote its holding that applies equally to Cone's claim:

> the basic legal principle that continues to govern such [mitigation] cases: The jury must have a 'meaningful basis to consider the relevant mitigating qualities' of the defendant's proffered evidence[21]
>
> 21. A jury may be precluded from doing so not only as a result of the instructions it is given, *but*

> *also as a result of prosecutorial argument . . . .*"

127 S. Ct. at 1671 n.21 (emphasis added, citations omitted). In the present case the trial prosecutor's argument, outlined below, combined with his concealment of mitigating evidence, prevented the jury from giving effect to Cone's evidence of drug addiction which arose from a post-traumatic stress disorder from the Vietnam War.

Third, the majority fails to acknowledge that we were wrong in our earlier reliance on procedural default on Cone's claim that the State concealed mitigating evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). I — and I believe my colleagues, as well — originally failed to understand the record correctly. The basic problem, as will be explained below, is that Cone presented a colorable *Brady* claim in the 1993 state habeas proceedings within a few months of discovering the documents wrongfully withheld by the State prosecutors. Cone presented this *Brady* claim as an amendment to his second post-conviction petition along with the 51 other pending claims. The claim was overlooked in the press of other claims, and the State trial court and Court of Appeals mistakenly asserted that the claims had been "previously determined" at earlier stages of the review process. In fact, Cone's lawyer had discovered the present *Brady* claim just before he filed it; it had not been previously presented or adjudicated. And to make matters worse, no court, state or federal, has as yet reviewed the claim on the merits. Four courts — two state courts and two federal courts — have now misconstrued the record and declined to hear the merits after invoking the doctrine of "procedural

default." These kinds of errors are risks that we all run — lawyers and judges alike — when presented with a large mass of claims and arguments, especially in death penalty litigation, a dense and difficult field.

The failures of the state and federal judiciaries to consider the claim properly were caused by the misrepresentations of the record in the case by the Tennessee Attorney General and his appellate staff. The majority does not acknowledge, analyze or seek to provide a remedy for the complete falsification of the procedural record in this case by the Tennessee Attorney General's appellate counsel concerning the State's procedural default defense to the *Brady* claim. I will outline below the unacceptable conduct engaged in by the State's appellate prosecutors in this litigation.

We should reverse our previous erroneous decision invoking procedural default and remand the case to the District Court for a full review of the merits of Cone's claim that combines a *Brady* violation together with an Eighth Amendment mitigation violation. I will briefly explain the claim and then how the mistake was made in each of the four courts that led them erroneously to invoke procedural default rather than reach the merits. Cone deserves a full hearing on the merits of his claim in the District Court. I would not resolve the other complex claims in the case until the *Brady*-mitigation claim is fully litigated in the District Court on the merits.

I. Cone's *Brady* Claim

In 1980, Gary Cone, who has a high IQ and a college education, committed an unprovoked brutal

murder in Memphis. Before that, he fought in the Viet Nam conflict, received a bronze star for bravery in combat, and came home with a mental illness. He returned addicted to drugs and suffering from a serious post-traumatic, wartime stress disorder. The State prosecutor decided to seek the death penalty despite the mitigating evidence and needed to undermine any possible feelings of sympathy that a juror might have for such a mentally ill man guilty of a brutal murder. The prosecutor wanted the jury to feel a strong sense that it should seek retribution for the murder by imposing a sentence of death. In final argument at the guilt phase of the trial, the prosecutor falsely dismissed Cone's mental illness and argued that Cone "says he's a drug addict," but "I say baloney." During the final argument, the prosecutor flatly told the jury that there was no evidence of drug addiction and, therefore, no mitigating evidence. He reminded them that the State's medical experts "saw no evidence of any kind, any extent of mental disease or defect" from drug use or any other form of post-traumatic stress syndrome. (App. 150.) The prosecutor repeated the testimony of a witness, Ilene Blankman, that there was no such evidence of drug abuse. (App. 158.)

The prosecutor did not want evidence inconsistent with this theory of the case to come before the jury. So far as the prosecutor was concerned, Cone was a perfectly intelligent and normal but evil man who should be executed for the good of society. The prosecutor did not answer Cone's motion for exculpatory evidence of drug addiction or mental illness by turning over the substantial mitigating evidence that the State had in its files. The prosecutor

was successful in undermining any feelings that Cone's mental illness and drug addiction were mitigating reasons for sparing his life. In rejecting what it called Cone's "tenuous defense, at best," and affirming the death sentence in 1984, the Tennessee Supreme Court explained that the only evidence of drug addiction and mental illness that the jury heard was "based purely on his [Cone's] personal recitation," and that his "known pattern of conduct" and "the testimony of several witnesses" "raised serious doubts" that he "was under the influence of or experiencing withdrawal from drugs" about his mental illness and drug addiction, the Tennessee Supreme Court said:

> The only defense interposed on his behalf was that of insanity, or lack of mental capacity, due to drug abuse and to stress arising out of his previous service in the Vietnamese war, some eleven years prior to the events involved in this case. This proved to be a tenuous defense, at best, since neither of the expert witnesses who testified on his behalf had ever seen or heard of him until a few weeks prior to the trial. Neither was a medical doctor or psychiatrist, and neither had purported to treat him as a patient. *Their testimony that he lacked mental capacity was based purely upon his personal recitation to them of his history of military service and drug abuse*.

Cone v. Bell, 665 S.W.2d 87, 90 (Tenn. 1984) (emphasis added). The prosecutors, trial and appellate, convinced both the jury and the Supreme Court that there was no mitigating evidence. (In Tennessee, the trial prosecutor comes from the local district attorney's

office, and appellate and habeas counsel come from the Tennessee Attorney General's staff.)

The exculpatory evidence of drug addiction and mental illness lay in the files of the State police and prosecutor's offices undiscovered by Cone's lawyers. Then, eight years after the opinion of the Tennessee Supreme Court, over the strong, persistent objection of State prosecutors in the State Attorney General's Office, these files became available for the first time as a result of a decision by Judge Cantrell in the Tennessee Court of Appeals, *Capital Case Resource Center of Tennessee, Inc. v. Woodall*, No. 01-A-019104CH00150, 1992 WL 12217 (Jan. 29, 1992), holding that such police records must be made available under the Tennessee Public Records Act. Based on this decision, Cone's lawyers searched through these records and found for the first time mitigating evidence that the State prosecutor had refused to disclose in response to the motion for exculpatory evidence.

When Sergeant Roby of the Memphis Police Department testified at the trial that he knew of no evidence of drug addiction or abuse, he also knew that he had sent out on August 10 and 11, 1980, detailed teletype all-points-bulletins to police departments around the country saying that Cone was armed, extremely dangerous and a drug user whose car contained "a large quantity of drugs." (App. 513, 515.) On August 12, he sent out a more detailed bulletin to selected police departments saying that Cone was "believed [to be a] heavy drug user." (App. 517-26.) These three police bulletins could have been used by defense counsel during trial to undermine Sergeant Roby's credibility, as well as to establish that it was

not "baloney" that Cone had the reputation for "heavy drug use." The undisclosed evidence supported the testimony of Cone's two experts concerning his heavy drug use and his mental illness. The documents tended to undermine the State's two expert witnesses who denied extensive drug use and mental illness. I do not agree with the majority that these documents containing mitigating evidence of drug addiction are not *Brady* material.

Police records also reflect that on August 11, 1980, the police chief of the town where Cone previously lived, Chief Daniels of the Lake Village, Arkansas, police department, advised the Memphis police investigators that Cone "was a heavy drug user." (App. 450.) Three other witnesses to events advised the police investigators that Cone appeared "weird" and on drugs or "looked wild-eyed" the day before the murders. (App. 449.)

The same problem exists with FBI Agent Flynn's testimony. He also testified that he found no evidence of drug addiction. Later-disclosed FBI documents contained teletypes sent around the country prior to Cone's arrest that refer to him as an "armed and dangerous drug user" and "subject believed heavy drug user." Cone has now produced ten such teletypes or letters. (App. 450-52.) I do not agree with the majority that these documents are not *Brady* material. Flynn, as the agent investigating the case, had to know that Cone had a reputation as a heavy drug user and that FBI documents so described him. Cone believes that this long string of FBI documents would have undermined Flynn's trial testimony, as well as the testimony of the State's two medical experts, and would have supported the testimony of Cone's medical

experts. If one or more jurors had believed that Cone was suffering from a post-traumatic combat stress mental illness and drug addiction — instead of believing it was just "baloney," as the trial prosecutor and the Attorney General's office insist — it is unlikely that the jury would have reached a verdict of death.

II. Eighth Amendment Mitigation Requirement

In this death penalty case, the constitutional right to show drug addiction in mitigation is particularly important because this was Cone's only way to prove a sufficient lack of mental capacity to avoid the jury's imposition of death in retribution for a brutal murder. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Supreme Court stated "the Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments." *Lockett*, therefore, absolutely forbids a state sentencing process that limits or proscribes the full consideration of addiction and other mitigators by the sentencer. By ruling immaterial the documented proof of addiction contradicting the prosecution's "baloney" argument, the State and our court are permitting the execution of Cone in violation not only of *Brady* but also the Eighth Amendment's mitigation line of death penalty cases, ending with *Abdul-Kabir*, quoted above. In its companion mitigation case, *Brewer v. Quarterman*, 505 U.S. ____, 127 S. Ct. 1706 (2007), the Court stated that "there is surely a reasonable likelihood that the jurors accepted the prosecutor's argument at the close of the sentencing hearing" that Brewer's mitigating evidence of drug abuse and mental illness was irrelevant to the issues. The Court went on to say that the prosecutor told the jury that

"all they needed to decide was whether Brewer had acted deliberately and would likely be dangerous in the future, necessarily disregarding any independent concern that, given Brewer's troubled background, he may not be deserving of a death sentence." 127 S. Ct. at 1712. Cone's claim in this case is much stronger than *Brewer's* because the prosecution here not only misinterpreted the law, as in *Brewer*, but falsified the factual record. Cone should be allowed to advance his argument in mitigation that he does not deserve the death penalty. He should be allowed to go forward on the merits with his argument that the State has concealed mitigating evidence in violation of *Brady*.

III. The Procedural Default Mistake

There is no question in this case that counsel for Cone filed before trial an extensive three-page "Motion for Production of Exculpatory Evidence" that covered the waterfront of exculpatory material, as well as a "Motion for Disclosure of Impeaching Information." (App., Add. 1, doc. 1, pp. 54-56, 98-99.) The State does not claim that Cone did not request before trial the type of exculpatory evidence withheld from Cone.

Our Court's earlier mistaken ruling that the doctrine of procedural default barred the *Brady* claim was based on false statements of the record by the Tennessee Attorney General's office in its brief in this Court and by incorrect statements from the record by two Tennessee courts. In its brief before this Court, the State argues that the *Brady* claim "is clearly procedurally defaulted" because "Cone's *Brady* claims were simply never raised in the state court." (Final brief, pp. 12-13.) This "simply never raised" statement can itself only be characterized as a deliberate

falsehood. On October 5, 1993, soon after counsel for Cone learned of the existence of the exculpatory statements, counsel filed an amendment to his second petition for post-conviction relief in the criminal court of Tennessee at Memphis in which Cone was originally sentenced to death. The amendment's paragraph 41 stated the *Brady* claim as follows:

Additional Claims for Review

> 41. Petitioner was denied his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 6, 7, 8, 9, 10, 11, 14, 16 and 17 of the Tennessee Constitution, *because the State withheld exculpatory evidence which demonstrated that petitioner that petitioner* [sic] *did in fact suffer drug problems and/or drug withdrawal or psychosis both at the time of the offense and in the past*, such evidence including, but not limited to, statements of Charles and Debbie Slaughter, statements of Sue Cone, statements of Lucille Tuech, statements of Herschel Dalton, and patrolman Collins, and other persons unknown at this time, such statements contained in official police reports, and/or contained in other documents unknown and/or through personal recollections of officers or others. Such evidence was highly exculpatory and exculpatory to both the jury's determination of petitioner's guilt and its consideration of the proper sentence. There is a reasonable probability that, had the evidence not been withheld, the jurors

> would not have convicted petitioner and would not have sentenced him to death.

(App. 2006) (emphasis added).

Two months later on December 16, 1993, the Criminal Court in Memphis, "William H. Williams, Senior Judge," dismissed this paragraph 41 *Brady* claim stating only:

> The petitioner, by way of his Third Amendment [to the second post-conviction petition] , continues with grounds *41*, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 52, all of which grounds are clearly re-statements of previous grounds *heretofore determined* and denied by the Tennessee Supreme court and upon Direct Appeal or the Court of Criminal Appeals upon the First Petitioner.

(App. Add. 4, p. 233) (emphasis added). Judge Williams did not cite or attempt to point out when or how or what court had "previously determined" the claim. In fact, the *Brady* claim is never mentioned by the Tennessee courts in any previous opinion or order, including the Tennessee Supreme Court opinion on direct appeal quoted above, the trial court order on the first post-conviction petition, *Cone v. State*, No. P-3653 (Tenn. Crim. Ct. at Memphis, Sept. 19, 1986) (App. 1954) (mentioning only claims of prosecutorial misconduct and ineffective assistance of counsel), or the Tennessee Court of Appeals opinion affirming the denial of the first post-conviction petition on the same grounds, *Cone v. State*, 747 S.W.2d 353 (Tenn. Ct. Crim. App. 1987). Had Judge Williams read paragraph 41 closely, or made inquiry, or conducted a hearing, or

asked for briefs, it would have been obvious that the material had only recently been discovered and the new claim could not possibly have been "previously determined." The State prosecutors at the trial and appellate levels had been concealing the mitigating evidence for 10 years since the trial.

If the inattentive and unfocused treatment of a capital defendant's *Brady*-mitigation claim in the Memphis trial court shows a broken judicial system unable to cope with its responsibilities in capital litigation, the treatment of the claim on review in the Tennessee Court of Criminal Appeals was worse. At least Judge Williams did not excoriate *pro bono* defense lawyers for diligently pursuing their duty to represent Cone. In Cone's appellate brief in the Tennessee Court of Criminal Appeals, filed August 22, 1994, counsel pointed out that the trial court was clearly in error. Counsel pointed out that the trial court did not address or examine "each individual issue" and that a reading of the decisions "clearly shows that the issues were neither presented on direct appeal nor addressed in the initial post-conviction petition." (App. Add. 4, p. 16.) But, in a brief opinion, the Tennessee Court of Criminal Appeals, like the trial court, did not specifically address the *Brady*-mitigation issues. The opinion begins:

> Appellant contends that the trial court's dismissal of his second petition was premature, because . . . the trial court declined to hold an evidentiary hearing . . . . Our conclusion as to the timeliness of the trial court's dismissal is therefore dependent on our resolution of the substantive issues of waiver and previous determination.

> . . . .
>
> Had Judge Williams not provided this court with such an exemplary and meticulous treatment of the appellant's petition, our task in reviewing the relevant issues would have been difficult if not insurmountable.
>
> . . . .
>
> The trial court found that most of the appellant's stated grounds for relief, in addition to being repetitious and cumulative, were previously determined either on direct appeal or in the appellant's first petition.

Cone v. State, 927 S.W.2d 579, 580-81 (1995). After denying all of the claims without specifically addressing them, the Tennessee Court of Criminal Appeals then criticized Cone's lawyers:

> [T]he appellant should not be able to extend the post-conviction process and delay the administration of justice *ad infinitum* by filing subsequent petitions which disingenuously claim that the grounds asserted were unknown to the appellant when his previous petition was filed.

Id. at 582. The Court then says that counsel's "perpetual disrespect for the finality of convictions disparages the entire criminal justice system" and further complains about counsel's conduct: "The courts, the executive branch of the government, the legal profession, and the public have been seriously inconvenienced by the prosecutions of baseless habeas corpus and post-conviction proceedings." *Id.* Counsel

for Cone filed a petition for review in the Tennessee Supreme Court of this decision setting out the *Brady* claim in detail. The Tennessee Supreme Court denied review. This treatment of Cone's claim illustrates a completely broken system of review in capital cases in Tennessee.

The judge of the Court of Criminal Appeals who wrote the opinion stating that the *Brady* issue was "previously determined," then became the Attorney General of the State by the time the issue came to federal court. When the issue was later presented to the federal courts, including this Court, the Attorney General maintained his previous judicial position that the *Brady* claim was "previously determined" but shifted the main focus to: "Cone's *Brady* claims were simply never raised in the state court." (Final Brief, p. 12.) In the federal court, the Attorney General attempts to conceal the very fact that the claim of *Brady* concealment was even presented in the Memphis trial court by stating that the "claims were simply never raised in the state court." Of course, the two procedural default defenses to the *Brady* claim — "never raised" and "previously determined" — cannot both be true. The fact is that neither is true. They were clearly raised but never decided. The Attorney General is deliberately falsifying the procedural record in the case.

It is difficult to tell exactly what the District Court below held with respect to the *Brady* claims. The District Court mixes the *Brady*-mitigation claims up in a discursive discussion of ineffective assistance of counsel claims, moving from a discussion of these *Brady* claims on page 17 of the opinion below (App. p. 1549) to a discussion of ineffective assistance of

counsel and then back to the claims at page 27. (App. 1559.) All we can really tell about the District Court's disposition of the *Brady*-mitigation claims is that the court said they are procedurally defaulted. It is unclear why they are procedurally defaulted. The District Court seems to agree at page 1559 with the Attorney General's false argument that the claims have "never been presented to the state courts" and "are now barred by the state post-conviction statute of limitations." In a footnote at this point, the District Court relies upon Tennessee's three-year statute of limitations for filing post-conviction petitions. T.C.A. § 40-30-102. The Court begins the limitation period on July 1, 1986, long before Cone discovered the mitigation evidence that the prosecutor at the trial and appellate levels had concealed. Despite the inconsistency between the State's witnesses (Roby, Flynn and the two experts) and the newly-discovered documents, the District Court wound up its discussion by saying:

> The evidence of Cone's guilt was overwhelming, and the material evidence that he was acting under the influence of amphetamine psychosis was, and continues to be, virtually nonexistent.

(App. 1563-64.) In our Court's earlier opinion invoking procedural default, we accepted the mistake of Judge Williams in the Memphis trial court and the Tennessee Court of Criminal Appeals by repeating three times that the "independent and adequate state ground in this instance is the State court's finding that Cone's claims were previously determined." 243 F.3d 969. We accepted the Attorney General's alternative argument and based our holding of procedural default

on the Tennessee courts' mistaken position that the claims were "previously determined." This is simply false.

The law of the case doctrine relied on by the majority does not wed us forever to a clear misreading of the record, especially a misreading brought about by the State's falsification of the record in the case. Courts should correct their mistakes where important matters are concerned, and a man's life is an important matter. The previous decisions of the Supreme Court and this Court tell us what is obviously true: "Death is different." Mistakes cannot be corrected after a man is executed. They must be corrected now. I would set aside the previous "procedural default" ruling on Cone's claim and remand the case to the District Court for a full hearing on the merits regarding his mitigating evidence that the State has now attempted to conceal for 25 years.

After relying on procedural default throughout its first opinion in this case, and now relying on procedural default again in its present opinion, the majority throws up its hands and says, "Well, anyway, all the withheld documents are not really *Brady* material." It does so without any analysis of the record, or the *Brady* and mitigation lines of cases, and states no basis for its conclusory statement. The majority's conclusory "well anyway" attitude is just as conclusory and misleading as the prosecutor's false, death knell statement to the jury that the defense statement was "baloney" that Cone was not a heavy drug user as a result of his wartime experience. The undisclosed, withheld documents directly contradict both the prosecutor's "baloney" statement and the majority's "not *Brady* material" conclusion. And

beyond these errors, the majority seems totally unconcerned that the Tennessee Attorney General's office has completely falsified the procedural record in the case by asserting that the *Brady*-mitigation claims were both "never raised" and "previously determined."

APPENDIX C

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2001 FED App. 0077P (6th Cir.)
File Name: 01a0077p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY BRADFORD CONE,
Petitioner-Appellant,

v.

No. 99-5279

RICKY BELL, Warden, Riverbend
Maximum Security Institution,
Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 97-02312—Jon Phipps McCalla, District Judge.

Argued: September 12, 2000

Decided and Filed: March 22, 2001

Before: MERRITT, RYAN, and NORRIS, Circuit Judges.

COUNSEL

ARGUED: Paul R. Bottei, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee. **ON BRIEF:** Robert L. Hutton, GLANKLER & BROWN, Nashville, Tennessee, for Appellant. Tonya G. Miner, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellee.

OPINION

RYAN, Circuit Judge. Gary Bradford Cone was convicted in a Tennessee state court on two counts of first degree murder, two counts of murder in the perpetration of a burglary, three counts of assault with intent to commit murder, and one count of robbery by use of deadly force. He was sentenced to death. His appeal to the Tennessee Supreme Court and two post-conviction petitions for relief were unsuccessful. He then filed a petition for a writ of *habeas corpus* in the federal district court, and it was denied. This court issued a certificate of appealability.

We now affirm the denial of Cone's petition with regard to the offenses of conviction but grant his petition with respect to the death sentence because, in the sentencing phase of his trial, Cone was denied the

effective assistance of counsel guaranteed him by the Sixth Amendment to the United States Constitution.

I.

Facts

The crime spree that culminated in Cone's conviction and sentence to death began on August 9, 1980, when he robbed a jewelry store in Memphis, Tennessee, of approximately $112,000 worth of goods. The police were alerted and they promptly spotted Cone driving a car. A high speed chase ensued, following which Cone abandoned the car in a residential neighborhood, shot pursuing police officer B.C. Allen and citizen John Douglas Clark, and unsuccessfully tried to shoot a third citizen, Herschel Dalton when Dalton refused to surrender his car to Cone. Cone temporarily eluded the police, but they seized his car and in it found a large amount of cash, drugs, and the stolen jewelry.

The next day, Cone appeared in the same residential neighborhood at the home of Lucille Tuech. He drew a gun on Tuech when she refused to let him in to make a phone call. Later the same day, Cone broke into the home of an elderly couple, Shipley and Cleopatra Todd, who were 93 and 79 years old, respectively. Cone tried to convince the couple to help him, but when they refused to cooperate, he brutally killed them. Three days later, the Todds' severely beaten and mutilated bodies were found in their home. Cone's fingerprints and hair samples were also found in the home. In due course, Cone was arrested in Florida and returned to Tennessee.

II.

State Court Trial Proceedings

Cone's jury trial was held in Shelby County Criminal Court beginning on April 14, 1982. It concluded with a jury verdict that found him guilty of: (1) two counts each of first degree murder and murder in the perpetration of a burglary involving the Todds; (2) assault with intent to commit murder in the first degree against Officer Allen, Clark, and Dalton; and (3) robbery with a deadly weapon, of the jewelry store clerk. Cone was sentenced to 10 to 25 years in prison on the assaults, life imprisonment on the robbery, and death on the two murder charges. He appealed as of right to the Tennessee Supreme Court, which affirmed the conviction and sentence.

A.

State Court Collateral Proceedings—First Petition

On June 22, 1984, Cone filed his first state post-conviction petition, attacking his conviction and death sentence. He alleged that his rights had been violated under the First, Fourth, Fifth, Sixth, Eight, Ninth, and Fourteenth Amendments to the United States Constitution, and particularly, that he had been denied the effective assistance of counsel at trial. On November 21, 1984, Cone filed an amended post-conviction petition, claiming that his prosecutors had engaged in misconduct and alleging additional instances of ineffective assistance of counsel. The state trial court held a hearing and denied Cone's petition.

Cone appealed that denial to the Tennessee Court of Criminal Appeals, and on November 4, 1987, that court affirmed.

On December 21, 1987, Cone sought permission to appeal to the Tennessee Supreme Court, raising only claims of prosecutorial misconduct and ineffective assistance of counsel, but his petition was denied.

B.

State Court Collateral Proceedings—Second Petition

On June 15, 1989, Cone, acting *pro se,* filed a second state post-conviction petition, and on June 22, 1989, an amended petition. The trial court dismissed the amended petition as barred by the successive petition restrictions of Tennessee's post-conviction statute. Tenn. Code Ann. § 40-30-112 (1990) (since repealed). Cone appealed, and on May 15, 1991, the Court of Criminal Appeals reversed and remanded the amended petition to the trial court to allow Cone to "rebut the presumption of waiver." A presumption of waiver arises under Tennessee law if a claim for relief is not asserted before a court of competent jurisdiction in which the claim could have been presented. Tenn. Code Ann. § 40-30-112 (1990) (since repealed). On August 13, 1993 and October 5, 1993, Cone's postconviction counsel filed second and third amended petitions, alleging more ineffective assistance of counsel claims. Finally, on November 12, 1993, counsel filed a fourth amended petition.

The trial court, on remand, dismissed the amended petitions under Tenn. Code Ann. § 40-30-112(b), holding that all the grounds raised were barred because they had previously been determined or were waived. This judgment was affirmed by the Tennessee Court of Criminal Appeals, and the Tennessee

Supreme Court denied an application for permission to appeal.

Cone filed a motion for a rehearing, but it too was denied by the Tennessee Supreme Court. The United States Supreme Court denied Cone's petition for a writ of *certiorari.*

III.

Federal Court *Habeas* Petition

Cone then filed a motion in federal district court to stay his execution; the court granted the stay and permitted the filing of a *habeas* petition under 28 U.S.C. § 2254. On July 1, 1997, Cone filed a petition for a writ of *habeas corpus* in federal district court. On October 14, 1997, Cone filed motions for an evidentiary hearing and for discovery, but they were denied. The district court also denied the section 2254 petition, and further, denied a certificate of appealability, finding that an appeal would not be taken in good faith. The court also lifted the stay of execution, however, a new execution date was not set. This court then granted Cone's motion for a certificate of appealability.

We review *de novo* the district court's disposition of a petition for *habeas corpus,* but we review the district court's factual findings for clear error. *Carter v. Bell,* 218 F.3d 581, 590 (6th Cir.2000).

IV.

Federal *Habeas* and Tennessee Waiver

Before addressing the substance of Cone's several constitutional claims, it might be useful to review the

basis for this federal court's authority to examine the validity of a state court conviction.

A federal court may grant relief on a petition for a writ of *habeas corpus* only if the applicant has exhausted the remedies available in the state court. 28 U.S.C. § 2254(b)(1)(A) (West Supp. 2000). If the state court adjudicates and rejects a claim on adequate and independent state grounds, such as a state procedural rule that precludes adjudicating the claim on the merits, the petitioner is barred by this procedural default from seeking federal *habeas* review of such claim, unless the petitioner can show "cause and prejudice" for the default. *Coleman v. Thompson,* 501 U.S. 722, 750-51 (1991); *Wainwright v. Sykes,* 433 U.S. 72, 87-88 (1977).

However, there are several prerequisites before the cause and prejudice test is applied in a federal court to any kind of state procedural default. "First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Maupin v. Smith,* 785 F.2d 135, 138 (6th Cir.1986). "Second, the court must decide whether the state courts actually enforced the state procedural sanction." *Id.* Third, the procedural default must be an "independent and adequate" state ground on which the state can rely to foreclose review of a federal constitutional claim. *County Court of Ulster County, New York v. Allen,* 442 U.S. 140, 148 (1979). If these three prerequisites are met, a federal court must determine whether the petitioner is able to meet the cause and prejudice test to excuse the state procedural default.

The cause and prejudice standard is a two-part test in which the petitioner must: (1) present a substantial reason to excuse the default, *Coleman,* 501 U.S. at 754; and (2) show that he was actually prejudiced as a result of the claimed constitutional error, *United States v. Frady,* 456 U.S. 152, 167-69 (1982).

If the claims presented in the federal court were never actually presented in the state courts, but a state procedural rule now prohibits the state court from considering them, the claims are considered exhausted, but are procedurally barred. *Coleman,* 501 U.S. at 752-53.

Under Tennessee law at the time of Cone's conviction, grounds for relief that had been previously determined or waived were not cognizable in a state post-conviction action. Tenn. Code Ann. § 40-30-111 (1990) (since repealed). Moreover:

> (a) A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.
>
> (b)(1) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.
>
> (2) There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

Tenn. Code Ann. § 40-30-112 (1990) (since repealed).

A federal court will not grant *habeas corpus* relief unless the state adjudication of the federal claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (West Supp. 2000).

V.

The *Brady* Claim

The first of Cone's claims before us is his assertion that the state prosecutors withheld exculpatory documentary evidence from him in violation of the rule announced in *Brady v. Maryland,* 373 U.S. 83 (1963). The *Brady* rule requires the government "to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Pennsylvania v. Ritchie,* 480 U.S. 39, 57 (1987). A *Brady* violation is grounds for setting aside a conviction or sentence only if the failure to declare the relevant material "undermines confidence in the verdict, because there is a reasonable probability that there would have been a different result had the evidence been disclosed." *Coe v. Bell,* 161 F.3d 320, 344 (6th Cir.1998), *cert. denied,* 528 U.S. 842 (1999).

The respondent argues that this claim has been procedurally defaulted under Tennessee law and therefore may not be entertained here. Cone argues that he has not procedurally defaulted his *Brady* claims because he was unable to raise the claims in his first and second petitions for post-conviction relief

because he did not then know the alleged *Brady* material existed. He also argues he has "cause" for any procedural default because some of the allegedly withheld documents were only recently available to him through discovery in 1997. He then proceeds to argue the merits of his *Brady* claim. Although it is a difficult question, we believe that Cone's claims are procedurally defaulted and that he cannot show cause and prejudice to overcome the default. And even if that were not so, we are satisfied that the documents Cone complains were withheld are not *Brady* material.

A.

Cone claims the documents that were withheld by the state prosecutors fall into four groups: (1) evidence regarding his drug use; (2) evidence that might have been useful to impeach the testimony and credibility of Officer Ralph Roby; (3) FBI reports; and (4) evidence showing that the prosecution's witness, Ilene Blankman, was untruthful and biased. We will take up each category of documents separately and then discuss whether they are *Brady* material at all.

1.

First, Cone claims that the prosecution withheld several witnesses' statements which indicate that the prosecution knew about Cone's drug use. These include: a statement by Robert McKinney, who stated he was present at the time of the robbery, and that Cone "acted real weird" and appeared to be on drugs; statements from Charles and Debbie Slaughter that Cone "looked wild eyed" the day before the killings; a statement by Sergeant Grieco of the Pompano Beach, Florida, Police Department who described Cone as

looking "frenzied" and "agitated" a few days after the killings; and a statement from Chief Daniels of the Lake Village, Arkansas, Police Department who informed authorities that Cone "was a heavy drug user."

Cone claims that his "amphetamine psychosis" defense—essentially an insanity defense—was undercut because the prosecution withheld these documents from his examination. Each of the statements was part of the state District Attorney's files, except for Chief Daniels's statement. It is difficult to discern from the record whether Chief Daniels's statement was for certain in the DA's files, nevertheless, it appears to be part of it. However, in his petition for a writ of *habeas corpus,* Cone admits Chief Daniels's statement was indeed part of the DA's files and that he had access to the files in 1992. Cone claims to have been unaware of their existence until 1992. Whatever the date of his discovery of the existence of these documents, it is clear that Cone learned of these materials well before his second and third amended petitions were filed on August 13 and October 5, 1993, respectively.

A careful examination of the state court proceedings reveals that before filing his petition for a writ of *habeas corpus* in the federal court on July 1,1997, Cone three times raised a generalized claim in the state courts that the prosecution had withheld evidence. He raised the issue for the first time in his *pro se* amended petition for post-conviction review, dated June 1989, wherein he claimed that the prosecution had been withholding evidence. The Tennessee criminal court determined that the claim had been waived by failing to raise it in his direct

appeal. This determination was affirmed on appeal. Cone raised the issue again in his second amended petition for post-conviction relief in August 1993, and this time claimed somewhat more specifically, that the prosecution had withheld evidence regarding Ilene Blankman. Finally, Cone raised the issue in his third amended petition for post-conviction relief in October 1993; this time his claim was that the state withheld exculpatory evidence that it knew of Cone's drug problem. This evidence, he claimed, included the statements by Charles and Debbie Slaughter, among others. The August 13, 1993 and October 5, 1993, amended petitions were dismissed by the trial court, which found that the claims had been previously determined or waived. This was affirmed on appeal. *Cone v. State,* 927 S.W.2d 579 (Tenn.Crim.App.1995).

Although Cone is correct in his argument that he in fact raised in the state court this first of his four *Brady* claims—that the prosecution withheld evidence that the state knew of his drug use—and therefore, that this claim was exhausted, we may not review a claim that has been decided in the state court on an "independent and adequate" state ground, as was the case here. The independent and adequate state ground in this instance is the state court's finding that Cone's claims were previously determined or waived under Tenn. Code Ann. § 40-30-112 (1990) (since repealed). Thus, this first of Cone's four-part *Brady* claim is procedurally defaulted.

In addition, even if Chief Daniels's statement were not part of the DA's files, and Cone did not have access to it, it is not *Brady* material. The statement that Cone "was a heavy drug user" does not undermine our confidence in the verdict such that a reasonable

probability exists that the verdict would have been different, because of the overwhelming evidence of Cone's guilt.

2.

The second of Cone's *Brady* claims is that the prosecution withheld evidence that Cone might have used to impeach the credibility of Officer Roby. According to Cone's interpretation of Officer Roby's testimony, the officer testified that there was no evidence that Cone had used drugs. According to Cone, the documents withheld from him included an All Points Bulletin sent out by Officer Roby, in which Roby warns the nation that Cone is not only a "drug user," but a "heavy drug user," and evidence that Cone's sister told Officer Roby that Cone had a "severe psychological problem" and "needed to work on his drug problem." Cone claims these two pieces of evidence show the falsity of Officer Roby's testimony that Cone was not a drug user. These two items of evidence were indeed part of the state DA's files and arguably fall within Cone's claim that the state withheld exculpatory evidence regarding his drug use, a claim he raised in his third amended petition for post-conviction relief.

The state court ruled that the claim had been previously determined or waived by Cone's failure to raise it earlier. This determination was affirmed on appeal. *Cone,* 927 S.W.2d 579. Again, we will not review a claim that has been determined under an independent and adequate state ground, and therefore this claim, likewise, is procedurally defaulted.

3.

Cone's third *Brady* claim is that certain FBI reports were withheld from him. He argues that several documents demonstrate that the FBI knew he had a severe drug problem, and that had Cone known of these documents at trial, he might have used them to impeach FBI Agent Eugene Flynn's testimony that Cone was not insane. The evidence included a nationwide FBI alert indicating Cone was a heavy drug user and an FBI document showing Cone was in possession of amphetamines in the late 1970s. In addition, Cone complains that Agent Flynn had access to a report prepared by a witness, Dr. Jonathan Lipman, who testified against Cone. Cone claims that the presence of Dr. Lipman's report in the FBI files demonstrates that Dr. Lipman was not a disinterested witness.

It appears that Cone did not make a request for the FBI documents until after he filed his second petition for post-conviction review and then he requested only FBI reports regarding himself and Ilene Blankman. His request did not refer to Dr. Lipman's report. It further appears that all of this evidence was in the DA's files and could have been discovered by Cone in 1992. He could have raised this claim in the state court in 1993, however, he did not do so. Because this claim regarding the FBI materials and Dr. Lipman's report was not raised in the state court when Cone had the opportunity to do so, it is procedurally defaulted.

4.

Cone's fourth *Brady* claim is that the prosecutors withheld evidence that Cone might have used to impeach the testimony of prosecution witness Ilene

Blankman. This witness testified at trial that Cone had never used drugs in her presence. The withheld evidence, according to Cone, is that the prosecution's file showed that the prosecutors had ongoing contact with Blankman, took her to dinner, and sent her a thank you letter after the trial was concluded and Cone was sentenced. This "withheld" evidence, Cone argues, might have been useful to impeach Blankman's credibility by showing her bias. As to whether Cone has exhausted this claim, it is true that he alleged in his second amended petition that the prosecution had withheld exculpatory evidence regarding Ilene Blankman. But the state court found that claim waived for not being raised earlier. Again, we do not review a claim that has been determined under an "independent and adequate" state ground, and thus it is procedurally defaulted. We conclude that Cone has procedurally defaulted all four of his *Brady* claims.

B.

We must now inquire whether Cone has made a sufficient showing under the familiar "cause and prejudice" standard to excuse his procedural default. We first determine whether the three prerequisites to application of the cause and prejudice test have been established. We think they have. To repeat, they are: (1) that there is a state procedural rule applicable to Cone's claim and that he failed to comply with it; (2) that the state actually enforced the state rule; and (3) that Cone's noncompliance with the rule is an independent and adequate state ground for denying state review of a constitutional claim. *Maupin,* 785 F.2d at 138. As to the first requirement, the Tennessee waiver rule is plainly applicable to Cone's *Brady*

claims; second, the Tennessee courts explicitly relied upon the waiver rule when deciding whether to consider Cone's post-conviction *Brady* claims; and third, the state's legitimate interest in requiring a defendant to raise all the claims he has at one time, thus avoiding multiple bites at the apple, is an independent and adequate state ground.

We are satisfied that Cone's *Brady* claims have been procedurally defaulted in the Tennessee courts, and so the next question is whether Cone has established cause and prejudice sufficient to excuse his procedural default. Cone must show that there is a reasonable cause for his failing to raise these claims timely, and if he makes that showing, that withholding the documents unfairly prejudiced him.

It is remarkable and significant that Cone does not argue in his brief before this court that there is a justifiable *cause* for his failure to raise his first, second, and fourth *Brady* claims in a timely manner in the state courts. Instead, he argues the merits of the claims. Cone's only mention in this court of his procedural default with respect to these three *Brady* claims appears in his reply brief, wherein he simply asserts that he raised the claims in state court and thus they are *not* procedurally defaulted, a position contradicted by the findings of the Tennessee courts and by the record.

Moreover, but not surprisingly, Cone does not argue the prejudice prong of the cause and prejudice test. According to *Frady,* 456 U.S. 152, "a convicted defendant must show *both* (1) 'cause' excusing his TTT procedural default, *and* (2) 'actual prejudice' resulting from the errors of which he complains." *Id.* at 168

(emphasis added). Therefore, we have no occasion to consider whether Cone's procedural default with respect to the first, second, and fourth of his *Brady* claims is excused under the cause and prejudice standard and thus no authority to consider the claims on the merits.

Cone's third *Brady* claim, that FBI documents were allegedly withheld, was indeed raised, but only in Cone's petition for a writ of *habeas corpus* in the federal court; it was never raised in the state court. Cone argues that there is no state court procedural default with respect to this claim because the FBI records are privileged and were made available to him only through discovery granted by the federal district court in 1997, and thus he could not have successfully requested them in a timely fashion. Assuming without deciding that Cone has reasonable cause for not raising this issue timely in his state post-conviction proceedings (because he did not learn of the FBI records until 1997), the fact remains that he makes no argument that he was *prejudiced* as a result of the government's failure to disclose to him the existence of the FBI documents, and thus he completely ignores the prejudice prong of the cause and prejudice standard. We are satisfied that because he did not raise this claim in the state court and has not made a showing under the prejudice prong of the cause and prejudice standard that would excuse his default, we may not now review this claim.

In conclusion, Cone's default in failing to raise these claims in the state court and further default in failing in the federal court to justify that failure forecloses us from reaching the merits of those claims.

VI.

Jury Instructions

Cone claims he was denied a fair trial because the trial court's jury instructions unconstitutionally equated "reasonable doubt" with "moral certainty." The challenged instruction was as follows:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible, or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense.

Although Cone admits that the reasonable doubt instruction in his case was "similar" to the instruction given and approved in *Austin v. Bell,* 126 F.3d 843 (6th Cir. 1997), he alleges that he received an additional instruction that made the instructions, when taken as a whole, unconstitutional. The additional instruction stated:

> It is not necessary that each particular fact should be proved beyond a reasonable doubt if enough facts are proved to satisfy the jury beyond a reasonable doubt of all the facts necessary to constitute the crime charged. Before a verdict of guilty is justified, the circumstances, taken together, must be of a

> conclusive nature and tendency, leading on the whole to a satisfactory conclusion and producing in effect a moral certainty that the defendant, and no one else, committed the offense.

The Tennessee Court of Criminal Appeals determined that since Cone did not raise the reasonable doubt argument until his second post-conviction petition, he had defaulted this claim. The court determined that Cone should not be able to "delay the administration of justice *ad infinitum* by filing subsequent petitions which disingenuously claim that the grounds asserted were unknown to the appellant when his previous petition was filed." *Cone,* 927 S.W.2d at 582. This is an independent and adequate ground that bars the consideration of these claims in this court. *Wainwright,* 433 U.S. at 87-88.

Cone argues that his jury instruction claim is not procedurally defaulted for three reasons. First, he violated no "clearly established" rule when he presented his claim in his second post-conviction petition, where he did not "knowingly and understandingly" fail to present the claim earlier, as required by Tenn.Code Ann. § 40-30-112(b). Second, he could not have defaulted his claim because there is no valid procedural default unless all similarly situated petitioners have been found defaulted by the state courts. Third, he has "cause" for failing to raise the claim earlier because he did not have effective trial or appellate counsel.

Assuming without deciding that Cone has not procedurally defaulted his claim, or, if he has, he can show cause and prejudice, his claim is meritless. A

nearly identical instruction has been approved by this court in *Austin,* 126 F.3d at 846. The instructions, taken together and in the context in which they were given, did not allow the jury to convict in order to reach a mere "satisfactory conclusion," as Cone suggests. *See Victor v. Nebraska,* 511 U.S. 1, 16 (1994).

VII.

Other Claims

We find no fault with the district court's dismissal of the claim of prosecutorial misconduct. Cone claims that the prosecution's closing argument in the guilt phase of the trial was improper and that it undercut Cone's amphetamine psychosis defense. The prosecution's argument was that the money found in Cone's car suggested that Cone was a drug seller, not a drug user. This, despite the fact that the prosecution knew that most of the money was stolen from a supermarket during Cone's crime spree.

Cone first raised this prosecutorial claim in the context of an ineffective assistance of counsel claim. The Tennessee Court of Criminal Appeals rejected the claim that the prosecution's argument affected the outcome of the trial when it rejected his first petition for post-conviction relief. *Cone v. State,* 747 S.W.2d 353, 355 (Tenn. Crim. App. 1987).

Cone next raised the claim in his second petition for post-conviction relief. The Tennessee Court of Criminal Appeals determined that Cone's claims had been either previously determined or waived. *Cone,* 927 S.W.2d 579.

In Cone's *habeas* petition, the federal district

court determined that this claim was without merit. The court found that this argument exaggerated the importance of the prosecutor's statement and ignored the fact that there was other evidence that Cone was indeed using drugs. Cone did not convince the district court that the state court's rejection of this claim "involved an unreasonable application of[ ] clearly established Federal law, as determined by the Supreme Court of the United States" under section 2254(d)(1). Rather, the district court determined that Cone's "out-of-his-mind-on-amphetamines" defense was not rejected by the jury because the prosecutor accused him of being a drug seller, but because Cone failed to present credible evidence that he had actually abused amphetamines at any time close to the murders.

In order to make a claim for prosecutorial misconduct, a defendant must demonstrate that: "(1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." *Coe,* 161 F.3d at 343.

We find that the statements made by the prosecutor referring to Cone as a drug seller are not material, and we agree with the district court that the statement was too remote from the real issues in this case to have affected the jury's deliberations. Cone's drug psychosis defense was not substantially undercut by the prosecutor's remarks; rather, Cone simply did not present credible evidence that he was using drugs at the time he committed the murders. Under 28 U.S.C. § 2254(d), this decision does not appear to be contrary to, or involve an unreasonable application of, clearly established Federal law as determined by the Supreme Court.

VIII.

Malice Instruction

Cone also claims that he was denied due process in that the state trial judge's instruction on malice was erroneous and unconstitutionally shifted the burden of proving this element to Cone.

Cone first raised a challenge to these instructions in his second petition for postconviction relief. The Tennessee Court of Criminal Appeals determined that the claim had been previously determined or waived by failure to raise it earlier.

In Cone's petition for a writ of *habeas corpus,* Cone raised this issue again. However, the district court determined that this claim was procedurally defaulted. It based its decision on a procedurally similar case, *Coe,* 161 F.3d 320. In that case, the Sixth Circuit determined that the state rule was an independent and adequate ground that barred relief in this court, where the petitioner raised his claim in his second petition for post-conviction relief only, and the state court determined that his claim was previously determined or waived. In this case, the district court relied on the finding of the Tennessee Court of Criminal Appeals that Cone raised this claim in his second petition for post-conviction relief only and thus his claim was previously determined or waived. According to *Coe,* the Court of Criminal Appeals' decision constitutes an independent and adequate ground that bars the consideration of these claims in the district court.

We agree with the district court and find that this claim is procedurally defaulted on an independent and

adequate state ground. However, if Cone is able to demonstrate cause and prejudice, his default would be excused.

Cone argues that even if he did fail to raise timely his claim of an erroneous jury instruction on malice, he has not defaulted the claim for several reasons. First, he did not give a personal "knowing[ ] and understanding[ ]" waiver, as required by the Tennessee statute, since he is not chargeable for any waiver made by his attorney. Tenn. Code Ann. § 40-30-112 (1990) (since repealed). Second, he argues that his claim cannot be defaulted because there can be no procedural default unless all similarly situated petitioners have been found defaulted by the state courts. Third, Cone claims that during the time of his state petitions for post-conviction relief, Tennessee law was in a state of confusion as to whether an "objective" or "subjective" standard was to be used in determining whether a claim was waived. Cone does not clearly explain his understanding of the difference between the "objective" and "subjective" standards to which he refers, and we do not find these terms helpful.

First, we are aware of two cases in which courts have considered whether a petitioner is bound by his attorney's waiver of a constitutional claim, *Coe,* 161 F.3d 320, and *House v. State,* 911 S.W.2d 705 (Tenn. 1995). The *House* court stated that "[w]aiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney." *House,* 911 S.W.2d at 714. *House* does not appear to announce a new standard, as Cone suggests. Rather, it seems merely to affirm Tennessee's standard of waiver.

In *Coe,* as we explained earlier, this court held that the petitioner had procedurally defaulted his state claim that the trial court failed to give a correct malice instruction. He presented the claim for the first time in his second petition for post-conviction relief rather than his first petition, as a consequence of which the Tennessee Court of Criminal Appeals found it had been procedurally waived.

Coe, 161 F.3d at 329-31. This court cited *House* when determining that Coe had defaulted his claim under an "objective" standard of waiver. However, the petition upon which the court relied in finding the default was filed before *House* was decided. Thus, concerning defaults that occurred before *House* was decided, the Tennessee courts have strictly and regularly applied the traditional standard of waiver, whether the waiver is made by counsel or the petitioner personally.

The cases that Cone cites to support his position that a petitioner must "knowingly and understandingly" waive a constitutional right are not helpful because they are distinguishable from his case. Those cases are either: (1) unpublished (*Richardson v. Dutton,* No. 86-5437, 1987 WL 38229 (6th Cir. Nov. 18, 1987)); (2) determined after Cone filed his petition and thus he could not have relied on them (*Wooden v. State*, 898 S.W.2d 752 (Tenn. Crim. App. 1994), *Johnson v. State,* No. 02C01-9111-CR- 00237, 1994 WL 90483 (Tenn. Crim. App. Mar. 23, 1994)); or (3) hold that a petitioner did not personally waive claims by not raising them earlier on the ground that the petitioner did not have counsel at the time (*Swanson v. State,* 749 S.W.2d 731 (Tenn. 1988), *Freeman v. State,* No. 70, 1988 WL 94769 (Tenn. Crim. App. Sept.

14, 1988)).

Cone's second reason why his claim cannot be defaulted also fails. He claims that there can be no valid procedural default unless all similarly situated petitioners have been found defaulted by the state courts. *Hathorn v. Lovorn,* 457 U.S. 255, 263 (1982).

This is, essentially, an argument that the state ground is not considered adequate unless the procedural rule is strictly and regularly followed. *Id.* However, as explained in *Coe,* the Tennessee courts have strictly, regularly, and consistently followed the waiver rule in similar cases. *Coe,* 161 F.3d at 331.

Last, we are not persuaded that Cone is correct in his claim that Tennessee law was in a state of confusion on whether an "objective" or "subjective" standard of waiver is appropriate. It is not clear from the Tennessee cases that procedural default may not be charged to a petitioner who has not himself "knowingly and understandingly" waived timely assertion of a federal constitutional claim when his attorney has done so. We are satisfied that Tennessee follows the traditional rule that a petitioner is chargeable with his attorney's failure to timely assert a claim and with the consequences of failing to do so.

In one sentence, Cone claims that an additional cause for his failure to raise the malice instruction issue in the state court is the ineffectiveness of his state counsel. Cone makes no argument, factual or legal, in support of his assertion, but newly instructs the reader to "*See* pp. 56-58, supra." Reference to those pages indicates that Cone appears to be incorporating by reference his earlier argument with respect to the

defaulted reasonable doubt/moral certainty instructional issue, that "trial and appellate counsel TTT may have been ineffective" because in the state court appeal, weaker legal issues were raised and "this was counsel['s] first capital trial and appeal."

Although it is well settled that the ineffective assistance of trial or appellate counsel may be cause sufficient to excuse a procedural default in raising a federal constitutional issue in state court, it is also settled that the petitioner must show both cause and prejudice to excuse the default. *See Coleman,* 501 U.S. at 750-51; *Frady,* 456 U.S. at 168-69. In this instance, while Cone claims ineffectiveness of counsel as the cause for his default, he does not claim any prejudice; he makes no mention of the prejudice prong of the cause and prejudice test at all.

For that reason alone, we would be justified in rejecting his ineffectiveness-of-counsel-as-cause argument. *See Frady,* 456 U.S. at 170. But Cone's argument fails for the more fundamental reason that he has not shown that his state counsel was ineffective under *Strickland v. Washington,* 466 U.S. 668 (1984). Under *Strickland,* Cone must show that in failing to raise the malice instruction issue in the state court, his "counsel's performance was deficient," which requires a "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

Cone has utterly failed to meet the requirements of *Strickland* with respect to this issue. In the first place, he makes no independent argument, factual or legal, relating to his failure to raise the malice

instruction issue in the state court of his attorney's performance. He merely invites us to "see" his argument that his counsel was constitutionally ineffective for failing to raise an altogether different instructional issue because "weaker" issues were raised and it was counsel's first capital case. Succinctly put, this sort of parenthetical instruction to this court to piece together a constitutional claim of ineffectiveness of counsel from the language Cone used in presenting the claim with a different instructional issue early in his brief does not meet his obligation under *Strickland*. Even if we were to heed Cone's instruction to us to assemble his ineffective assistance of counsel argument for him, the argument would fail because (1) counsel's failure to raise every conceivable issue on appeal that might have been raised, even issues arguably stronger than those that were raised, and (2) handling one's first capital case, are not, *per se*, "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*

In addition, as we have said, Cone makes no claim whatever that he was prejudiced as a result of the trial court's malice instruction.

For these reasons, Cone has not satisfied his burden under the cause and prejudice test, and we may not therefore reach the procedurally defaulted malice instruction issue.

IX.

Cruel and Unusual Punishment

We decline to address Cone's Eighth Amendment cruel and unusual punishment argument and his

argument concerning the application of aggravating circumstances because we have vacated the death sentence for the reasons set forth below.

X.

The Death Sentence

Cone argues that his death sentence must be vacated because he was denied the effective assistance of counsel at his sentencing as guaranteed by the Sixth Amendment. He claims that at sentencing his counsel offered no evidence whatever in mitigation and made no argument of any sort prior to sentencing. We agree that Cone was denied the effective assistance of counsel, and accordingly, we must vacate his death sentence.

Before going to the merits of this issue, it is appropriate to describe its procedural route to this court. Cone raised the issue of the ineffectiveness of his counsel at sentencing in his first petition for post-conviction relief, arguing that his trial counsel was ineffective for failing to present mitigating evidence at the sentencing phase of the trial and for waiving final argument. The Tennessee court determined that the attorney's silence at Cone's sentencing was not ineffective assistance because it was part of the attorney's "strategy" to prevent the prosecutor from making a "devastating" closing argument, for which he was apparently well-known. The trial court stated, in its September 19, 1986, opinion on Cone's first petition for post-conviction relief:

> This Court finds from the facts and circumstances that [defense counsel] put a great deal of thought and preparation in this

> case; further, he pointed out he interviewed numerous family members and relatives whose testimony was contradictory and generally not helpful. He said his strategy was to get as much mitigation in during the guilt/innocence phase as he could. It is the opinion of this Court that the defense attorney's performance, including his decision not to introduce any evidence in mitigation, did not fall below the objective standard of reasonableness set by the Sixth Amendment's guarantee of the effective assistance of counsel . . . .
>
> In reference to the waiver of final argument in the penalty phase it was clear [from] testimony from the record that this was strategy on the part of defense counsel, in view of the prosecutor's . . . . reputation for devastating closing arguments.

This decision was affirmed on appeal to the Tennessee Court of Criminal Appeals, which stated in part:

> One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastating closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffective

assistance.

Cone, 747 S.W.2d at 357.

Cone raised this issue again in his second petition for post-conviction relief. At that time, the Tennessee court determined that the claim was either previously determined or waived and the court dismissed it. On appeal, the Tennessee Court of Criminal Appeals reversed. The court cited *Swanson,* 749 S.W.2d 731, for the proposition that a petition for post-conviction relief, which stated a colorable claim for relief, should not be dismissed as having been waived without an opportunity to show the lack of waiver, unless waiver is clear. The court remanded the case to allow Cone to "rebut the presumption of waiver." However, on remand, the trial court determined that all of Cone's ineffective assistance of counsel claims—those relating to the guilt phase and those relating to the sentencing phase—should be considered as one claim.

Cone raised the issue for the third time in his petition for a writ of *habeas corpus* in the federal district court. The respondent does not argue that Cone's ineffective assistance of counsel claim based on the lack of mitigating evidence at sentencing and the failure to make a final argument is procedurally defaulted. Therefore, the claim is properly before us.

A claim of ineffective assistance of counsel presents mixed questions of law and fact which this court reviews *de novo. United States v. Jackson,* 181 F.3d 740, 744 (6th Cir. 1999). To repeat, in order to succeed on an ineffective assistance of counsel claim, a petitioner must show:

First, . . . that counsel's performance was

> deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

Under the first prong of *Strickland,* we must determine whether Cone's counsel, in remaining completely silent during the sentencing phase of the trial, except to declare that he "rested"—offering no evidence in mitigation and declining to address the court and jury—acted within an objective standard of reasonableness. *Olden v. United States,* 224 F.3d 561, 565 (6th Cir. 2000). If he did not, we must then turn to the second prong of *Strickland* and determine whether the petitioner has demonstrated a reasonable probability that he would not have been sentenced to death but for his counsel's failure. *Strickland,* 466 U.S. at 693-94.

In an appropriate case, *Strickland*'s prejudice prong may be presumed. *United States v. Cronic,* 466 U.S. 648 (1984).

The right to the effective assistance of

> counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing . . . . But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Id. at 656-57.

For example: "[I]f the accused is denied counsel at a critical stage of his trial [or] . . . if counsel *entirely fails* to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659, (emphasis added) (footnote omitted). In such a case, it is not necessary to demonstrate actual prejudice. *Rickman v. Bell,* 131 F.3d 1150, 1155 (6th Cir. 1997). Moreover, a defendant may demonstrate the "constructive" denial of counsel when, although counsel is present, "'the performance of counsel [is] so inadequate that, in effect, no assistance of counsel is provided.'" *Cronic,* 466 U.S. at 654 n. 11 (quoting *United States v. Decoster,* 624 F.2d 196, 219 (D.C. Cir. 1976) (MacKinnon, J., concurring)).

Whether the failure to introduce any mitigating evidence and the waiver of final argument in the sentencing phase of a death penalty case constitute ineffective assistance of counsel must be determined on a case-by-case basis. The failure to present mitigating evidence in a death penalty case does not necessarily constitute ineffective assistance of counsel, *see Darden v. Wainwright,* 477 U.S. 168, 184-87 (1986); *see also Moore v. Reynolds,* 153 F.3d 1086, 1105 (10th Cir. 1998), *cert. denied,* 526 U.S. 1025 (1999), although

given the uniqueness of the death sentence, the absence of any mitigating evidence, combined with a waiver of oral argument, plainly raises a "red flag." When the waiver of final argument is part of a legitimate trial strategy, great latitude is given to the decision of the attorney. *Moore,* 153 F.3d at 1104.

However, where the waiver is not based on a sentencing strategy, or is based upon a decision called "strategy" which no reasonable observer could credit as involving any logically defendable analysis, the attorney may have performed in a deficient manner. *Smith v. Stewart,* 140 F.3d 1263, 1269 (9th Cir. 1998). An attorney's decision to present no evidence whatever in mitigation and, *in addition,* to offer no argument when his client faces the prospect of being sentenced to death may amount to a virtual abandonment of the adversarial process that results in injustice, thus demonstrating both deficient performance and prejudice. *Kubat v. Thieret,* 867 F.2d 351, 368-70 (7th Cir. 1989).

This court has found that counsel's failure "to investigate and present any mitigating evidence during the sentencing phase so undermined the adversarial process that [defendant's] death sentence was not reliable." *Austin,* 126 F.3d at 848. Where mitigating evidence was available, but not adequately investigated and not presented at sentencing, this "does not reflect a strategic decision, but rather an abdication of advocacy." *Id.* at 849.

It is indisputable that Cone's trial attorney presented no mitigating evidence at all and made no final argument; he did not even ask the jury to spare his client's life. However, Cone's attorney testified at

the post-conviction hearing that he had several strategic reasons why he decided to waive final argument, admittedly a "radical tactic" at the penalty phase of a capital case. First, he thought that he had presented to the jury during the guilt phase almost every mitigating circumstance available. He claimed that since the jury is charged to consider those factors in its penalty phase deliberations, he did not have to put the evidence on a second time. Second, he claims that he "sucker[ed]" the prosecution into putting on mitigating evidence of Cone's Bronze Star decoration from Vietnam without having Cone testify. Third, he claims he thought the trial judge had "lost control" of the case. Fourth, he claims that Cone told him he would "explode" if he got on the stand. Fifth, he explained that he made his penalty phase "closing argument" in his opening statement during the guilt phase, and therefore, did not need to make a closing argument. Sixth, he explained his use of a rather confusing and convoluted theory on how he planned to get the jury to find an illegal aggravating circumstance, which would be the basis for later having the whole penalty phase thrown out. Last, he claimed that he wanted to prevent the prosecutor from making one of his notorious "devastating" closing arguments.

While these post hoc justifications, given in testimony at Cone's post-conviction hearing, surely amount to *explanations* for counsel's silence at sentencing and may have been "tactical" decisions, they do not necessarily defeat Cone's claim that his attorney's refusal to plead for Cone's life amounted to constitutional ineffectiveness.

A trial lawyer accused of constitutional

ineffectiveness for failing to act where action is ordinarily indicated will almost always have a reason for declining to act. The reason will usually be called the lawyer's "strategy." But the noun "strategy" is not an accused lawyer's talisman that necessarily defeats a charge of constitutional ineffectiveness. The strategy, which means "a plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result," Random House Dictionary 1298 (Rev.ed.1975), must be reasonable. It need not be particularly intelligent or even one most lawyers would adopt, but it must be within the range of logical choices an ordinarily competent attorney handling a death penalty case would assess as reasonable to achieve a "specific goal."

Here, the goal, the only conceivable goal, was to persuade the jurors not to sentence Cone to death. How counsel's refusal even to ask the jurors to do that could be called a reasonable strategy to achieve the goal, eludes us.

Even if we add up all of counsel's claimed strategic tactics, only one of which was apparently credited by the Tennessee appellate courts and the district court below—avoiding a "devastating" argument by the prosecutor—we think a reasonable attorney would have realized the absolute necessity of arguing for his client's life by making a closing argument. In addition, counsel had plenty of mitigating evidence at his fingertips; yet he failed to present it at the sentencing phase.

We reject out of hand, the argument that a competent attorney would determine that not presenting mitigating evidence of any kind and not

making a final argument in a death penalty case is a justifiable "strategy" because doing so might trigger a "devastating" response by the prosecutor—the sole reason assigned by the Tennessee courts for excusing counsel's silence. How much worse off could Cone have been if he were sentenced to death after a "devastating" argument by the prosecutor than if he were sentenced to death after the prosecutor's "mild" request that he be sentenced to death, which was followed by his own attorney's silence? Or, asked differently: How much more devastating for the petitioner could the prosecutor's "devastating" argument have been than the death sentence the petitioner got without such argument?

We can only imagine the effect on the jurors when Cone's defense counsel refused even to ask them to spare his client's life. They could only have inferred that Cone's counsel was, by his silence, acquiescing to the prosecutor's plea that Cone be sentenced to death. *See Stewart,* 140 F.3d at 1270. Cone may well have fared better if his counsel had left the courtroom entirely for the sentencing phase of the trial. If that had occurred, the jurors could not have inferred, as indeed they must have, that counsel's knowing and purposeful silence was an implicit agreement that justice required that Cone be put to death. When a man faces the gallows and his attorney sitting next to him declines even to ask the jurors to spare his life in the name of simple mercy, the attorney ought to have a most compelling reason for failing to speak-one that would incline a reasonable observer to credit as a sentencing strategy that is legally and factually justified. The reasons Cone's counsel has given are totally unreasonable, given the stakes. This was not

"strategic" representation; it was nonrepresentation of the most deadly sort.

Under *Cronic,* a presumption of prejudice is raised by counsel's behavior; thus, Cone need not show actual prejudice. Essentially, Cone did not have counsel during the sentencing phase of his trial and thus the prosecutor's insistence that justice required that Cone be put to death was not subjected to "meaningful adversarial testing." *Cronic,* 466 U.S. at 656. We find that counsel's abandonment of Cone at possibly the most "critical stage of his trial" fell below an objective standard of reasonableness and prejudiced him, which resulted in the ineffective assistance of counsel under the Sixth Amendment. *Id.* at 659.

But the state of Tennessee has held that Cone's lawyer's behavior was not ineffective under *Strickland* and we may not disturb that ruling unless we are convinced that it constitutes a "decision that is contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). We conclude that Cone's counsel's refusal to offer any evidence in mitigation and refusal even to address the jurors to ask them to spare Cone's life because counsel feared the prosecutor might make a "devastating" argument denied Cone his Sixth Amendment right to counsel at sentencing and that the Tennessee court's conclusion to the contrary is an unreasonable application of the clearly established law announced by the Supreme Court in *Strickland.*

XI.

Conclusion

We **AFFIRM** the district court's refusal to issue a writ of *habeas corpus* with respect to the petitioner's conviction, but we **REVERSE** the district court's judgment as to the petitioner's sentence. We **REMAND** to the district court with instructions to issue a writ of *habeas corpus* vacating the petitioner's death sentence due to the ineffective assistance of counsel at sentencing, unless the state conducts a new penalty phase proceeding within 180 days after remand.

APPENDIX D

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

GARY BRADFORD CONE,	x	
	x	
Petitioner,	x	
vs.	x	No. 97-2312-M1/A
	x	
RICKY BELL,	x	
Respondent.	x	

ORDER DENYING MOTION FOR
EVIDENTIARY HEARING
AND
ORDER OF PARTIAL DISMISSAL

(Filed May 15, 1998)

I. INTRODUCTION

This matter is before the Court on petitioner's Motion for Evidentiary Hearing, filed October 14, 1997. Petitioner, Gary Bradford Cone, an inmate at Riverbend Maximum Security Facility in Nashville, Tennessee, filed a habeas petition pursuant to 28 U.S.C. § 2254, attacking his state conviction of two counts of first degree murder, and the death penalty imposed for those crimes. The respondent warden has filed an answer raising various grounds for dismissing the petition, and the petitioner has filed a motion for an evidentiary hearing as to certain claims. For the reasons set forth below, petitioner's motion is DENIED and the claims addressed in his motion are

DISMISSED.

This document entered on docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 5/18/98.

II. STATE COURT PROCEDURAL HISTORY

A. *Facts of the Crime*

Examination of the record reveals the following undisputed facts. On Saturday, August 9, 1980, Cone robbed a jewelry store in Memphis, Tennessee of about $112,000 worth of expensive watches, rings and other jewelry. Shortly after the robbery, police received a description of the robber from. the store manager, spotted petitioner driving his 1972 gray Oldsmobile; and followed him at a normal speed. The suspect became alarmed and led police on a high-speed chase through mid-town Memphis and into a residential neighborhood. There he abandoned his automobile, shot pursuing police officer B. C. Allen, and a citizen, John Douglas Clark, who challenged him, and tried to shoot a third citizen, Herschel Dalton, when Dalton refused to give Cone his cat During the afternoon of August 9, 1980, police seized Cone's car, but he eluded them only to resurface early the next morning in the same neighborhood at the door of Lucille Tuech's apartment. She refused him admittance to make a telephone call and he drew a pistol on her. In the meantime the police had inventoried the car's contents and discovered a large amount of cash, some of which was later attributed to an earlier robbery of a grocery store, an enormous quantity of drugs, and the jewelry store's stolen property.

On the afternoon of Sunday, August 10, 1980, Cone broke through the rear door of the nearby home of an elderly couple, Shipley O. Todd and his wife, Cleopatra Todd. Mr. Todd was 93 years old and his wife was 79. Cone attempted to coerce them into helping him, and then killed them when they stopped cooperating with him. After the murders, relatives of the Todds became concerned because they were unable to contact the Todds at their home. Three days after the murders, the bodies of Mr. and Mrs. Todd were found in their home, horribly mutilated and cruelly beaten. The police found Cone's fingerprints and hair samples in the ransacked home. Cone then went to the airport and flew from Memphis to Florida, where he appeared at the home of an acquaintance on August 12, 1980. Cone was thereafter arrested on charges in Florida, and the Memphis police investigation led to his arrest and return to Tennessee on charges arising out of the August 9-10, 1980 crimes.

B. *Petitioner's State Court Trial Proceedings*

On August 19, 1980, a Shelby County Grand Jury indicted Cone for first degree murder in the perpetration of a burglary and first degree murder in the death of Shipley Todd, (case number B-74703), and first degree murder in the perpetration of a burglary and first degree murder in the death of Cleopatra Todd, (case number B-74702). See Addendum 1, Document 1, (State Court Record), at 2-8. On September 5, 1980, the grand jury indicted Cone for assault with intent to commit murder in the first degree against Dalton, (case number B-74898), assault with intent to commit murder in the first degree against Officer Allen, (case number B-74898), assault with intent to commit murder in the first degree

against Clark (case number B-74899), and robbery with a deadly weapon of the jewelry store, (case number B-74902). *Id.* at 11-19.

From April 14 to 23, 1982, Criminal Court Judge James C. Beasley, Sr., presided at a jury trial, which concluded with the jury finding Cone guilty on all charges and sentencing him to 10 to 25 years on the assaults, life imprisonment on the robbery, and death on the two murder indictments. *Id.* at 165-68. Cone appealed as of right to the Tennessee Supreme Court, which affirmed the conviction and sentence. *State v. Cone*, 665 S.W.2d 87 (Tenn. 1984), *cert. denied*, *Cone v. Tennessee*, 467 U.S. 1210 (1984). Addendum 1, Docs. 4, 7.

C. *State Court Collateral Proceedings — First Petition*

On June 22, 1984, Cone filed, through counsel, his first post-conviction petition attacking the conviction and death sentence. In that petition, he contended his rights had been violated under the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, and under various state laws, rules of court, and constitutional provisions. In particular, he claimed that his attorney had provided ineffective assistance of counsel by failing to: 1) advise him properly; 2) make timely objections; 3) conduct adequate voir dire of the jury; or 4) discuss penalty stage strategy. Addendum 2, Doc. 1 at 27-29.

On November 21, 1984, Cone's post-conviction counsel filed an amended petition claiming that the prosecutors engaged in misconduct during the closing

arguments of the guilt phase of Cone's trial by arguing that the jurors should reject Cone's drug-user defense[1] because the amount of money in the car tended to show that he was a drug seller, not a drug user, even though the prosecutors knew the money came from an earlier grocery store robbery. The amended petition further claimed that petitioner's trial counsel provided ineffective assistance by:

1) failing to offer proof of mitigating circumstances during the penalty phase of the murder trial; First Post-Conviction Petition, ¶ 11(a), Adden. 2, Doc. 1 at 51;

2) failing to make a closing argument during the penalty phase of the murder trial; First Post-Conviction Petition, ¶ 11(a), Adden. 2, Doc. 1 at 51;

3) failing to advise Cone regarding whether any privilege protected statements he made during examinations by Dr. Bursten, a state psychiatrist; First Post-Conviction Petition, ¶ 11(e), Adden. 2, Doc. 1 at 52;

4) failing to adequately investigate Cone's background and personal and medical history for mitigating evidence; First Post-Conviction Petition, ¶ 11(d), Adden. 2, Doc. 1 at 52;

5) failing to adequately advise Cone regarding his decision not to testify at either the guilt or penalty phase of the trial; First Post-Conviction Petition, ¶ 11(c), Adden. 2, Doc. 1 at 51.

---

[1] Cone's defense was "amphetamine psychosis."

The state court held a hearing, and on September 19, 1986, denied Cone's petition. *See* Adden. 2, Doc. 1 at 105. Cone then appealed to the Tennessee Court of Criminal Appeals, claiming, *inter alia*, that counsel provided ineffective assistance:

1) by failing to offer proof of mitigating circumstances during the penalty phase of the murder trial; First Post-Conviction Petition Appellate Brief, ¶ II(c)4, Adden. 2, Doc. 2 at 26;

2) by failing to make a closing argument during the penalty phase of the murder trial; First Post-Conviction Petition Appellate Brief, ¶ II(c)5, Adden. 2, Doc. 2 at 28; and

3) by failing to conduct adequate cross-examination of the State's expert witnesses during the guilt phase of the murder trial; First Post-Conviction Petition Appellate Brief, ¶ II(c)3, Adden. 2, Doc. 2 at 25.

He also raised the claim that the prosecutors engaged in misconduct during the closing arguments of the guilt phase by arguing that jurors should reject Cone's drug-user defense because the amount of money in the car tended to show that he was a drug seller, not a drug user. First Post-Conviction Petition Appellate Brief, ¶ I, Adden. 2, Doc. 2 at 12.

On November 4, 1987, the Court of Criminal Appeals rejected these claims and affirmed. Adden. 2, Doc. 4. On December 21, 1987, Petitioner, through counsel, sought permission to appeal to the Tennessee Supreme Court, raising only the claims of prosecutorial misconduct, and if ineffective assistance

based on counsel's failure to present proof of mitigation and failure to make a closing argument during the penalty phase of the murder trial. Adden. 2, Doc. 5. On March 14, 1988, the Tennessee Supreme Court denied permission to appeal. Adden. 2, Doc. 7.

D. *State Collateral Proceedings — Second Petition*

On June 15, 1989, Cone filed, *pro se*, a second state post-conviction petition. On June 22, 1989, Cone filed a *pro se* amended petition. The trial court dismissed the petition as barred by the successive petition restrictions of Tennessee's post-conviction statute. On May 15, 1991, the Court of Criminal Appeals reversed, however, and remanded to permit Cone an opportunity to rebut the presumption of waiver. Adden. 3, Doc. 4.

On August 13, 1993, Cone's post-conviction counsel filed a second amended petition raising 35 claims of ineffective assistance of counsel.[2] On October 5, 1993, counsel filed a third amended petition, raising claims which were numbered 41 through 52. Claim 41 contended that the State had withheld exculpatory evidence tending to prove that Cone did suffer from drug-induced psychosis. Claim 44 contended that Cone's trial counsel provided ineffective assistance by failing to offer any proof of mitigating circumstances during the sentencing hearing. Claim 47 contended that the trial court violated Cone's Sixth Amendment rights by refusing to permit him to sit at counsel table

[2] A table comparing the ineffective assistance claims raised in Cone's post-conviction petition and this federal petition is attached as an Exhibit to this order.

with his attorney during trial. Claim 48 contended that counsel provided ineffective assistance by improperly cross-examining the state's medical expert witnesses, and that Cone had been denied exculpatory evidence that would have enabled counsel to impeach their testimony. Claim 51 contended that death by electrocution amounts to cruel and unusual punishment in violation of the Eighth Amendment. On November 12, 1993, counsel filed a fourth amended petition raising no new actual claims, but arguing that the claims already presented in that proceeding were not barred by the waiver provisions of Tenn. Code Ann. § 40-30-112(b).

On April 24, 1994, the state trial court dismissed the petition under Tenn. Code Ann. § 40-30-112(b), holding that all grounds raised in the amended petition were barred as either previously determined or waived. Adden. 4, Doc. 1 at 230. On March 22, 1995, the Tennessee Court of Criminal Appeals affirmed. *Id.*, Doc. 5. On March 4, 1996, the Tennessee Supreme Court denied Cone's application for permission to appeal. *Id.*, Doc. 11.

Cone then filed a motion for rehearing, contending that the 1992 decision of Capital Case *Resource Center v. Woodall*, No. 01A01-9104-CH-00150, 1992 WL 12217, (Tenn. App. Jan. 29, 1992), had opened access to previously unavailable records from the prosecutor's file. *Id.*, Doc. 12. Cone argued under *Caldwell v. State*, 1996 WL 74160 (Tenn. Feb. 20, 1996), that claims only ascertainable after the *Capital Case Resource Center* holding constituted "late-arising" claims under state law. Cone argued that he should be permitted to have these claims considered on the merits. In his motion for rehearing,

Cone also argued that his claims that depended on the hiring of expert witnesses and investigative services should also not be deemed waived, because the Tennessee Supreme Court decision enunciating a procedure for obtaining such services during a post-conviction proceeding was not decided until 1995. *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995). On May 6, 1996, the Tennessee Supreme Court denied the motion for rehearing. Adden. 4, Doc. 13. On October 15, 1996, the United States Supreme Court denied Cone's petition for certiorari.

E. *Federal Court Habeas Petition*

Petitioner then filed a motion in the United States District Court for the Middle District of Tennessee to stay his execution pending appointment of counsel and the filing of this federal habeas petition. The Middle District Court transferred the case to this court, which granted the stay, appointed counsel, and permitted the filing of this petition.

III. CLAIMS FILED IN THIS PETITION

This petition asserts numerous grounds for relief. This order is concerned only with the claims on which Cone seeks an evidentiary hearing. Cone's motion seeks an evidentiary hearing on claims numbered 39, 40, 41, 61, and 65 in his habeas petition. The state has opposed this motion contending both that the claims do not merit a hearing under § 2254, and that the claims are mostly barred by Cone's procedural default. Cone contends that the claims are not procedurally defaulted.

A. *Law Governing Procedural Default*

Twenty-eight U.S.C. § 2254(b) states, in pertinent part:

> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) an application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.[3]

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[3] The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) (codified, *inter alia*, at 28 U.S.C. § 2244 et seq.) ("AEDPA"), substantially revised the procedural and substantive standards

Thus, a habeas petitioner must first exhaust available state remedies before requesting relief under § 2254. *See, e.g.*, *Granberry v. Greer*, 481 U.S. 129 (1987); *Rose v. Lundy*, 455 U.S. 509 (1982). *See also* Rule 4, Rules Governing Section 2254 Cases in the United States District Courts. A petitioner has failed to exhaust his available state remedies if he has the opportunity to raise his claim by any available state procedure. *Preiser v. Rodriguez*, 411 U.S. 475, 477, 489-90 (1973).

To exhaust these state remedies, the applicant must have presented the very issue on which he seeks relief from the federal courts to the courts of the state that he claims is wrongfully confining him. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). "[A] claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts which entitle the petitioner to relief." *Gray v. Netherland*, 116 S. Ct. 2074, 2081 (1996) (citing *Picard*, 404 U.S. at 271). " '[T]he substance of a federal habeas corpus claim must first be presented to the state courts.' " *Gray*, 116 S. Ct. at 2081 (quoting *Picard*, 404 U.S. at 278). A habeas petitioner does not satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) "by presenting the state courts only with the facts necessary to state a claim for relief." *Gray*, 116 S. Ct. at 2081.

Conversely, "[i]t is not enough to make a general appeal to a constitutional guarantee as broad as due

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by which state prisoners can seek habeas relief from the federal courts. The quotation of 28 U.S.C. § 2254(b) is from the revised, post-AEDPA version of the subsection. For purposes of procedural default analysis, the changes to § 2254(b) are not significant.

process to present the 'substance' of such a claim to a state court." *Id.* When a petitioner raises different factual issues under the same legal theory, he is required to present each factual claim to the highest state court in order to exhaust his state remedies. *See Pillette v. Foltz*, 824 F.2d 494, 497-98 (6th Cir. 1987). He has not exhausted his state remedies if he has merely presented a particular legal theory to the courts, without presenting each factual claim. *Id.* The claims must be presented to the state courts as a matter of federal law. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982). *Cf. Duncan v. Henry*, 115 S. Ct. 887, 888 (1995) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court."). *Cf. Gray*, 116 S. Ct. at 2081.

Moreover, the state court must address the merits of those claims. *Coleman v. Thompson*, 501 U.S. 722, 734-35 (1991). If the state court decides those claims on an adequate and independent state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, the petitioner is barred by this procedural default from seeking federal habeas review, unless he can show cause and prejudice for the default. *See Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

When a petitioner's claims have never been actually presented to the state courts, but a state procedural rule prohibits the state court from extending further consideration to them, the claims

are deemed exhausted, but procedurally barred. *Coleman*, 501 U.S. at 752-53; *Teague v. Lane*, 489 U.S. 288, 297-99 (1989); *Wainwright*, 433 U.S. at 87-88; *Rust*, 17 F.3d at 160.

A petitioner confronted with either variety of procedural default must show cause and prejudice for the default in order to obtain federal court review of his claim. *Teague*, 489 U.S. at 297-99; *Wainwright*, 433 U.S. at 87-88. Cause for a procedural default depends on some "objective factor external to the defense" that interfered with the petitioner's efforts to comply with the procedural rule. *Coleman*, 501 U.S. at 752-53; *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

A petitioner may avoid the procedural bar, and the necessity of showing cause and prejudice, by demonstrating "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. The petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime." *Schlup v. Delo*, 115 S. Ct. 851, 865-66 (1995) (quoting *Murray*, 477 U.S. at 496). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 115 S. Ct. at 867.

B. *Analysis of Petitioner's Claims*

In this case, analyzing procedural default has been made more difficult by the petitioner's confusing presentation of his claims, and the respondent's failure to articulate which specific claims are subject to which specific procedural default. Paragraphs 39, 40, 41, 61,

and 65 of Cone's petition contain a total of fifty-one claims in subparagraphs, (39(a-k) and 40(a-rr)), upon each of which petitioner claims entitlement to an evidentiary hearing.[4] Of these fifty-one claims, however, only four are both properly exhausted and not the subject of some procedural default during the state court proceedings. Cone's contention in claim 40(h), repeated at 40(qq), that his attorney provided

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[4] Cone's counsel divided the petition into paragraphs and subparagraphs, not all of which actually contain different claims. Subparagraph 39(b) and (c) simply consist of argument regarding the exculpatory effect of the eight allegedly exculpatory documents listed in subparagraph 39(a). Subparagraph 39(d) is an introduction to a *Brady v. Maryland*, 373 U.S. 83 (1963), claim based on the ten documents listed in subparagraph 39(e). Subparagraphs 39(f)-(h) actually enunciate the *Brady* claim based on those documents. Subparagraph 39(i) recites six documents which Cone's counsel assert reflect on the veracity of prosecution rebuttal-witness Ilene Blankman. Subparagraph 39(j) asserts a *Brady* claim based on evidence that money recovered from Cone's car was returned to the grocery store. Subparagraph 39(k) generally reasserts all of the previously asserted *Brady* claims. The Court construes these as four different claims:

1) a *Brady* claim that the prosecutor failed to reveal documents in the prosecutor's filed related to Cone's drug use;

2) a *Brady* claim based on the prosecution's failure to reveal documents in the FBI's possession related to Cone's drug use;

3) a *Brady* claim based on the prosecution's failure to reveal documents related to Blankman's testimony; and

4) a *Brady* claim based on the prosecution's failure to reveal that money seized from Cone's car was returned to the grocery store.

ineffective assistance when he failed to present any proof in mitigation of the death penalty was decided adversely to Cone during the first state post-conviction proceeding. Claim 40(i), that his attorney provided ineffective assistance by not making any closing argument at the penalty phase of the trial, was likewise decided against Cone on the merits during that same proceeding. Claim 39(j) duplicates claim 41. Cone contends that he was deprived of due process by the prosecutor's guilt-phase closing argument that jurors should reject Cone's drug-user defense because the amount of money found in Cone's car tended to show that he was a drug seller, not a drug user, even though the prosecutors knew the money came from an earlier grocery store robbery. This claim was decided on the merits adversely to petitioner during the first post-conviction proceeding, and was included in Cone's application of permission to appeal to the Supreme Court. Finally, claim 61, that electrocution is cruel and unusual, was decided adversely to Cone on his direct appeal from his conviction and sentence.

The remaining claims have never been presented on the merits to the Tennessee Supreme Court. Particular mention should be made of several claims. Cone's ineffective assistance claims 40(h), 40(j) through 40(gg), and 40(qq) are simply verbatim repetitions of claims he originally stated in the *pro se* state petition he filed on June 15, 1989, amended on June 22, 1989, and amended again on August 13, 1993. *See* Adden. 3, Doc. 1, at 28-31, 38-40; Adden. 4, Doc. 1, at 67-71.

Claim 40(g), that counsel provided ineffective assistance by failing to introduce evidence that Cone had won a Bronze Star in Vietnam, is frivolous in light

of Cone's submission, during the trial phase of the first post-conviction proceeding, of proposed findings of fact asserting that counsel did in fact obtain admission of this evidence. Adden. 2, Doc. 1 at 97. This evidence was admitted during the penalty phase of Cone's trial. Trial Trans. At 2123. Accordingly, this claim is DISMISSED.

Claim 40(r), that Cone's trial counsel had inadequate experience and expertise to handle a death penalty case is not an assertion of a Sixth Amendment violation. A Sixth Amendment claim requires a showing of deficient performance by counsel, and prejudice to the defendant from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). While counsel's experience is evidence on which a court might rely in evaluating counsel's performance, it is not in itself a basis for relief. Accordingly, this claim is DISMISSED.

Claim 40(x), that Cone's trial counsel provided inadequate advice regarding whether Cone should testify during the guilt and penalty phases of the trial, was decided adversely to Cone on the merits by the Tennessee Court of Criminal Appeals during the first post-conviction proceeding. Adden. 2, Doc. 4 at 8. Cone did not, however, present this claim to the Tennessee Supreme Court in his application for permission to appeal. Adden. 2, Doc. 5 at 2. He did later raise it as claim 15(n) in the August 1993 petition that was dismissed as procedurally barred. Adden. 3, Doc. 1 at 39.

Claims 40(a), (b), (c), (d), (e), and (f), all relating to trial counsel's alleged ineffectiveness in developing and presenting evidence regarding Cone's mental

health and drug use, have never been presented to the state courts. Claim 40(mm), that counsel failed to conduct adequate cross-examination of prosecution witnesses has never been presented to the state courts. Likewise, claim 40(oo), that counsel inadequately investigated and presented evidence regarding Cone's potential for living a worthwhile life in prison as a means of persuading the jury of the existence of a mitigating circumstances, [sic] has never been presented to the state courts.[5]

Claim 40(pp), that counsel inadequately cross-examined the state's medical experts, and that the State withheld exculpatory evidence with which to impeach them, was held waived on direct appeal of the first post-conviction petition. Adden. 2, Doc. 4 at 6. Petitioner did not include this claim in his application for permission to appeal from that ruling. He did later raise it as claim 15(af) in the August 1993 petition that was dismissed as procedurally barred. Adden. 4, Doc. 1 at 70.

Of the eleven *Brady* claims, only two, claims 39(a) and (i), were even arguably presented to the state post-conviction trial court. Claim 39(a) was raised as claim 20(d) in the June 22, 1989 *pro se* petition. Claim 39(i) was raised in claim 35 in the August 1993 petition. The state court held both claims waived and that decision was affirmed on appeal.

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[5] Cone has presented the state courts with similar claim 40(ff), that his counsel provided ineffective assistance by failing to request an instruction on this issue. *See* Adden. 4, Doc. 1 at 70. This claim was held procedurally barred under Tenn. Code Ann. § 40-30-112.

Cone now argues that his procedural defaults should be excused. This argument essentially reduces to two parts: 1) that the 1994 holding by the state post-conviction court that the ineffective assistance grounds were "previously determined" constitutes a ruling on the merits of all of his ineffective assistance claims; and 2) that the inadequacy of the state post-conviction procedures precluded him from raising the claims, especially the *Brady* claims. Neither argument has merit.

Cone argues that since he presented these ineffective assistance claims to the state court, but through no fault of his own did not receive a full and fair hearing, he is not barred from presenting them in this petition and is entitled to an evidentiary hearing. This argument misconstrues both the applicable Tennessee law and the standard governing federal habeas review of procedurally defaulted claims.

The State post-conviction trial court set forth the following analysis in its 1994 ruling:

> The Court finds, after a careful and thorough review based upon the entire record including the direct appeal and the first Petition for Post Conviction Relief and the pleadings, affidavits, and briefs of respective counsel[,] that the Second Petition for Post Conviction Relief as amended must be dismissed because the grounds stated in the Petition as amended have been either previously determined or presumptively waived as a matter of law.
>
> The petition fails to state any new

grounds that have not already been decided on direct appeal or the First Petition for Post-Conviction Relief. A distinction should be noted between a "ground" and a "factual claim" to support the ground. T.C.A. 40-30-105 states, to wit:

> "Grounds for Relief — Relief under this chapter shall be granted when the conviction is void or voidable because of the abridgement in any way of any right guaranteed by the constitution of this state or the constitution of the United States, including a right that was not recognized as existing at the time of the trial if either constitution requires retrospective application of that right."
>
> T.C.A. 40-30-111 states, to wit: "Scope of hearings" — the scope of the hearing *shall extend to all grounds* the petitioner may have, *except those grounds which the court finds shall be excluded because they have been waived or previously determined*, as herein defined." (Emphasis added).

It is, then, clear that a "ground" is a constitutional right. "Facts" are alleged by the petitioner to support the "grounds". Facts that are merely cumulative or conclusory in nature are non-supportive and will be disregarded.

In the Second Petition sub judice the petitioner employs the word "claim" to

> describe either a ground or a fact in support of the ground. This is somewhat confusing[,] but obviously an alleged fact is not a constitutional right, and there should be a distinction made in the manner in which the petition is drawn.

Adden. 4, Doc. 1, at 232.

The order then refers to former Tenn. Code Ann. § 40-30-112, which stated:

> When ground for relief is "previously determined" or "waived."
>
> (a) A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.
>
> (b)(1) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.
>
> (b)(2) There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

Tenn. Code Ann. § 40-30-112 (1990). The court then held:

> Ineffective assistance of counsel. This ground was previously denied on direct appeal and the First Petition for Post Conviction Relief.

> The claimed factual allegations herein are merely cumulative or have been presumptively waived for failure to present upon direct appeal or the First Petition For Post Conviction Relief.

Adden. 4, Doc. 11 at 233. This determination was explicitly affirmed by the Court of Criminal Appeals.

> In his first post-conviction petition, the appellant presented five factual allegations to support his constitutional claim of ineffective assistance of counsel. His second petition, on the other hand, listed thirty-five separate deficiencies in his trial counsel's performance. The trial court found that ineffective assistance of counsel is a single "ground for relief" as contemplated by the statute, *see* T.C.A. § 40-30-111, and that the issue of ineffective assistance of counsel was therefore previously determined. We agree with the trial court. A petitioner may not relitigate a previously determined issue by presenting additional factual allegations. We should not encourage post-conviction petitioners to invent new facts to revive an old issue which was unfavorably decided, nor should we allow petitioners to "sandbag" by reserving factual claims until their second or third petition.

Cone v. State, 927 S.W.2d 579, Adden. 4, Doc. 5, at 5.

Cone argues that this determination that the ineffective assistance ground was previously determined is not a finding of procedural default. This

argument is mistaken. From the above decisions, it is clear that when a ground for relief, such a ineffective assistance of counsel, is raised in a Tennessee post-conviction petition, subsequent consideration of factual allegations supporting that ground are barred by the prior presentation of that ground. Cone's argument to the contrary is based on his mistakenly equating the federal habeas term of art "claim" with the Tennessee phrase "ground for relief."

Under § 2254(b), exhaustion is required of every single factual aspect of a claim, not merely of generalized assertions of constitutional error. *Piflette*, 824 F.2d at 497-98. The state court refused to consider the merits of the factual allegations supporting any further Sixth Amendment ineffective assistance ground in the 1993 petition because petitioner had already had an opportunity to present his contention, (whether described as a "claim" or as a "ground for relief"), that his attorney provided ineffective assistance.

By refusing to consider the later factual allegations on the merits, the state courts erected a procedural bar in this federal habeas proceeding, not to every possible claim of ineffective assistance under the Sixth Amendment, but to the specific claims based on those particular factual allegations. That the state court does not use terms that parallel federal habeas analysis in describing the "claims" asserted in state post-conviction proceedings is irrelevant.[6]

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[6] In an analogous context, the Supreme Court, discussing the state court's obligation to state clearly when it is denying a claim on procedural grounds, noted that:

Petitioner argues that by declaring the ground of ineffective assistance "previously determined" the state courts have admitted that his Sixth Amendment claims have been decided on the merits. Petitioner reasons that since he cannot be procedurally barred from raising claims decided on the merits, the state court has decided all of his ineffective assistance *claims* on the merits for purposes of federal habeas review.

> [w]e encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim — every state appeal, every denial of state collateral review — in order that federal courts might not be bothered with reviewing state law and the record in the case.

Coleman, 501 U.S. at 739. Similarly, the Fifth Circuit has opined in upholding a procedural default defense:

> [w]e decline today to impose on the [Texas Court of Criminal Appeals] the need to pronounce some shibboleth or incant some magic words guaranteeing safe passage from a holding based on a state procedural bar to an alternative holding on the merits without infecting the opinion with "excuse" and thus dooming it to inadequacy. We likewise decline Amos' invitation to hold that a court's particular choice of words or phrases to reflect the shifting of its focus from a holding grounded on independent state law to an alternative holding based on federal law is dispositive when determining whether that state-law ground is adequate.

Amos v. Scott, 61 F.3d 333, 341 (5th Cir.), *cert. denied*, 116 S. Ct. 557 (1995).

The difficulty with petitioner's argument is that it is clear that almost all of the specific Sixth Amendment claims asserted in this petition were not addressed on the merits by the state courts. It is clear that the state courts interpreted the "previously determined" language as a type of procedural bar — a legal determination that certain claims resting on specific factual support should have been presented at the time the petitioner raised similar claims within a broad ground implicating the same constitutional right. Accordingly, for federal habeas purposes, the "previously determined" category is a type of procedural default as to those claims.

Cone may contend that the state courts should describe all such procedural defaults as a type of waiver. This argument, however, merely amounts to an assertion that the state courts have misapplied state law in creating a procedural barrier to considering the merits of those claims. A federal court cannot refuse to honor an adequate and independent state ruling because it disagrees with the state court's interpretation of state law. Moreover, this argument merely amounts to a disagreement over the terminology used by the state court. Petitioner's attempt to recast state court terminology to make his claims reviewable misconstrues both state and federal law.

Cone argues also that the Tennessee Supreme Court decision in *House v. State*, 911 S.W.2d 705, 713-14 (Tenn. 1995), issued after Judge Williams denied Cone's second amended state petition, changed the standard for waiver in Tennessee. According to Cone, prior to *House*, Tennessee courts applied a subjective standard for waiver that required a personally

knowing and voluntary decision by the prisoner to waive the claim.[7] According to Cone, *House* changed this to find waiver based merely on non-presentation of a claim. This contention misconstrues both prior Tennessee caselaw and *House*.

House simply definitively resolved the issue of whether the phrase "knowingly and understandingly" enunciated a subjective test based only on the petitioner's personal awareness, or an objective test based on what his attorney reasonably should have known. 705 S.W.2d at 713-14. According to the Tennesse [sic] Supreme Court, "[w]aiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney." 705 S.W.2d at 714. Moreover, it is clear from *House* that the Supreme Court's decision was shaped by the existing Tennessee caselaw, and merely clarified that body of law. Indeed, the *House* decision parallels the result in Cone's state court cases.

Furthermore, petitioner's argument that prior caselaw enunciated a subjective standard both conflicts with House's analysis of that body of law and is not supported by the single case on which he relies. *See Wooden v. State*, 898 S.W.2d 752, 754 (Tenn. Crim. App. 1994)). In 1992, Wooden, a Tennessee prisoner, filed a third post-conviction petition seeking to invalidate his 1982 rape conviction based on allegedly exculpatory evidence in police files that were unavailable to him until after the decision in *Freeman*

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[7] Memorandum in Support of Petitioner's Motion for an Evidentiary Hearing, at 9 (citing *Wooden v. State*, 898 S.W.2d 752, 754 (Tenn. Crim. App. 1994)).

v. Jeffcoat, No. 01A01-9103-CV-00086, 1991 WL 165802 (Tenn. App. Aug. 30, 1991), *perm. app. denied*, (Tenn. 1992), made the Tennessee Public Records Law applicable to certain police records. The trial court dismissed Wooden's petition as barred by the former three year statute of limitations on Tennessee post-conviction petitions. *See* Tenn. Code Ann. § 40-30-102 (1990). The appellate court, in *dicta*, observed that "it is doubtful that the defense of waiver would apply" and then remanded the case because the state conceded that the prisoner was entitled to a hearing on whether the statute of limitations would bar claims based on allegedly exculpatory evidence released under the public records law. This case, therefore, does not stand for the proposition that Tennessee courts had adopted and uniformly applied a subjective test for waiver prior to *House*.

Moreover, *Wooden* was not even decided until after Cone filed his various state court petitions. Accordingly, his argument that his reliance on an existing body of state law in filing his petitions should excuse his waiver of his various claims is without merit. His argument that *House* is a retroactive change in Tennessee law is likewise unavailing. In essence, petitioner merely disagrees with the way in which the Tennessee courts have applied Tennessee's post-conviction procedures to bar review of the merits of the most of his claims. This does not establish that the procedural bar does not exist.

Petitioner's arguments in support of overcoming this procedural bar closely resemble his arguments against its existence. With regard to his ineffective assistance claims, petitioner had the opportunity to raise each of the claims at issue when he first filed a

post-conviction petition. Each of the asserted factual claims related to trial counsel's performance were ascertainable from the record when Cone's attorney filed his first post-conviction petition. Cone offers no real excuse for failing to raise those claims in his first post-conviction petition, apart from a rather conclusory argument that his post-conviction counsel was ineffective. It is clear that there is not right to effective assistance of counsel in a state collateral proceeding. *Coleman*, 501 U.S. at 752. Accordingly, an error committed by petitioner's post-conviction counsel is not attributable to the state so as to constitute cause for a default. Rather, according to *Coleman*, the petitioner in a state collateral proceeding "must bear the risk of attorney error that results in procedural default." 501 U.S. at 752-53. Thus, Cone's ineffective assistance claims, except for the [sic] those presented to the Tennessee Supreme Court in the application for permission to appeal the denial of his first post-conviction petition, are barred here.

As to the *Brady* claims, Cone also attempts to argue that those claims were improperly held waived by the state courts. The only claims that were presented to the state courts, however, were conclusory assertions that the state had generally withheld exculpatory documents, and had withheld documents that might have been useful to impeach prosecution rebuttal witness Ilene Blankman. *See* June 22, 1989 Petition at ¶ 20(d), Adden. 3, Doc. 1 at 43; Aug. 13, 1993 Petition at ¶ 35, Adden. 4, Doc. 1 at 81. Of the eleven instant Brady claims on which Cone asserts entitlement to an evidentiary hearing, only claim 39(i) was specifically within the scope of the post-conviction proceeding claims. The other claims,

having never been presented to the state courts, are now barred by the state post-conviction statute of limitations.[8] *See Hannah v. Conley*, 49 F.3d 1193, 1194-95 (6th Cir. 1995).

It appears that petitioner contends that he can demonstrate cause for this procedural default because he did not have access to the documents supporting the defaulted claims until he utilized federal discovery procedures in this habeas case. This contention is without merit. The petition admits that the documents

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[8] Tennessee law previously set a three-year statute of limitations for filing post-conviction petitions. *See* Tenn. Code Ann. § 40-30-102 (1990). The period of limitations for Cone's conviction began on the statute of limitations' effective date of July 1, 1986, and expired on July 1, 1989. *State v. Masucci*, 754 S.W.2d 668 (Tenn. Crim. App. 1988) (original statute of limitations began running on effective date of act for all convictions that were final before that date).

In 1995, Tennessee repealed the previous post-conviction statute and replaced it with a completely new statute containing a one-year limitations period. Tenn. Code Ann. § 40-30-202(a) (Supp. 1995). The new statute was effective May 10, 1995. *See* 1995 Tenn. Pub. Acts Ch. 207 § 3, as amended by 1996 Tenn. Pub. Acts ch. 995 § 10 (May 13, 1996). The Tennessee Supreme Court has recently held that the amended statute does not provide a new "one-year window" from the effective date of the act in which every defendant could file a petition. Rather, if the petition would have been barred by the three-year statute provided under the previous act, it is still barred by the 1995 amendments. *See Carter v. State*, 952 S.W.2d 417, 420 (Tenn. 1997). Cone filed his second state post-conviction petition on June 16, 1989, fourteen days before the post-conviction statute of limitations expired. The statute was tolled during the time the second petition was pending, and expired, at the latest, fourteen days after the March 4, 1996 denial of Cone's petition for rehearing in the Tennessee Supreme Court.

from claims 39(a), 39(i), and 39(j) were all made available to Cone during the second post-conviction proceeding. *See* Adden. 4, Doc. 1 at 104 (State's response to request for discovery during post-conviction proceedings, stating "The •original file has already been made available to counsel for petitioner."). Moreover, the petitioner admits that these documents were available during the second proceeding. *See* Petition at 13, n.7 (noting 1992 change to Tennessee public records law making records available).

The argument that the state's post-conviction procedures were inadequate to provide Cone with the opportunity to present those claims also ignores Cone's own admission in his motion for rehearing before the Tennessee Supreme Court in his second post-conviction proceeding that the *Brady* evidence has been available to him since 1992. *See* Adden. 4, Doc. 12 at 1-2. His amended post-conviction petitions were not filed until August of 1993. Adden 4, Doc. 1 at 64. Yet, of the specific *Brady* claims raised in this case, only one was ever even arguably raised before the state courts. Cone's state post-conviction counsel apparently never utilized the Tennessee Public Records Act procedures to obtain the information, or did not consider the evidence to be of value if they did, in fact, obtain it. As discussed above, my mistakes made by Cone's state post-conviction counsel in handling that state petition cannot constitute cause under Coleman. By failing to present claims 39(a) and 39(j) to the state court, Cone procedurally defaulted those claims. He cannot demonstrate cause for this default.

Claim 35 in Cone's amended second post-conviction petition was held waived by the state court.

This claim arguably parallels claim 39(i) in this petition. Cone asks this court to declare that the claim was not actually waived because he had no opportunity to uncover the facts supporting the claim during the first post-conviction petition. This contention is without merit, however, because of the conclusory manner in which Cone asserted the claim during the second post-conviction petition. Despite the admitted availability of the materials from the prosecutor's file, Cone never relied on any specific document, and never made any specific *Brady* claim before the state court. He therefore failed to establish any basis for rebutting the statutory presumption of waiver of this claim. Accordingly, this claim is also procedurally defaulted, and Cone has failed to establish cause for this default.

Moreover, even if Cone's argument amounted to cause for this default, he cannot establish any prejudice based on the withholding of the information related to Blankman's testimony. These six items of information were:

1) A letter from the prosecutor to Blankman confirming their earlier conversation and providing her statement;

2) A letter from the prosecutor to Blankman confirming her court appearance and again providing the statement;

3) An F.B.I. report describing an event *after* the trial in which Blankman, while eating at a public restaurant, did not respond when someone accused her of lying;

4) The presence in the F.B.I. file of a copy of

a report by Dr. Jonathan Lipman;

5) The prosecutor's notes of a pre-trial interview with Blankman. These notes allegedly do not contain any reference to the statements Blankman afterwards made during her rebuttal testimony about her observations of Cone;

6) A letter from the prosecutors thanking Blankman for her testimony.

Petition at 16-17. None of these items fall within *Brady*, which requires the government to disclose to a criminal defendant evidence that is both favorable and material to guilt or punishment. *See United States v. Presser*, 844 F.2d 1275, 1281 (6th Cir. 1988) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987)). *See also United States v. Bagley*, 473 U.S. 667, 682 (1985); *United States v. Agurs*, 427 U.S. 97, (1976).

Items 3 and 6 concern post-trial events, and do not tend to prove any fact that would establish Cone's innocence. Items 1 and 2 also do not tend to prove any fact that is both favorable to Cone and material to his guilt or punishment. Item 5 consists not of information, but an absence of information. Cone attempts to turn this void into positive exculpatory evidence. This contention is frivolous. Information is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. The question is not whether the defendant would more likely than not have received a different

verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial." *Id.* at 678. That Blankman's in-court testimony is absent from the prosecutor's pre-trial notes does not undermine confidence in the outcome of petitioner's trial, thus those notes are not material.

Moreover, to the extent that this document would have been useful to establish that Blankman had not previously told anyone the facts to which she testified at trial, this evidence was admitted at trial through the cross-examination of Blankman and through the cross-examination of officer Roby. *See* Trial Transcript at 1896-1905, 1943-45. This document would not have resulted in any appreciable further impeachment of Blankman's testimony and was, therefore, not material to Cone's guilt or punishment under *Bagley* and *Brady*. As this document was not material, Cone cannot demonstrate the prejudice necessary to overcome a procedural default of this claim. Alternatively, under § 2254(b)(2), this claim is completely devoid of merit, regardless of issues of exhaustion or procedural default.

As to the fourth item, the presence in the F.B.I. file of Dr. Lipman's report is not only not exculpatory, but is not even probative of anything. Cone argues that the presence of Lipman's report:

> demonstrat[es] that both Ilene Blankman as well as F.B.I. agent Flynn, both of whom testified against Mr. Cone, had been

> informed about the evidence presented by the defense at trial and what they were specifically being called to rebut, thus demonstrating that such witnesses were not disinterested, truthful. witnesses, but specifically collaborating with the prosecution to present facts against Mr. Cone.

Petition, ¶ 39(I)(iv) at 17. This claim is entirely speculative and does not establish that the prosecutors withheld exculpatory information from the defense. Dr. Lipman was one of the experts who testified for the defense. His report on Cone's condition would naturally appear in the F.B.I.'s file. Its presence does not tend to make it more likely that the prosecution engaged in misconduct with regard to Blankman's testimony. As noted, Cone's trial counsel subjected Blankman to searching cross-examination in an attempt to demonstrate that her rebuttal testimony was a last-minute fabrication. This claim is simply an attempt to create a claim where none exists.

The evidence of Cone's guilt was overwhelming, and the material evidence that he was acting under the influence of amphetamine psychosis was, and continues to be, virtually nonexistent.[9] The allegedly

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[9] In this regard, the court should mention briefly that the eight items of supposed *Brady* material on which Cone relies in ¶ 39(a) are not exculpatory either. These items consist primarily of copies of fugitive alerts provided to various law enforcement agencies throughout the country during the hunt for Cone. They mention that Cone was a "hearvy drug user". Cone argues that this contradicted prosecution witnesses who testified that they did not observe Cone use drugs, did not observe any needle tracks on his body, and observed that his behavior was inconsistent with

exculpatory information on which he relies would not have cast any doubt on the testimony of Blankman. As to this claim also, Cone cannot establish cause for his procedural default and cannot establish a constitutional violation, even apart from that default.

Claim 65 in Cone's habeas petition, regarding his presence at counsel table, is also defaulted. Cone does not offer a reason for his failure to raise this claim in his first *post-conviction* petition, nor any basis for avoiding a procedural default. Finally, with regard to all of the procedurally defaulted claims, Cone has not demonstrated that he is actually innocent, either of the original crimes of murder, or of the death penalty.

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a person under the influence of any drugs. Agent Flynn testified that Cone admitted to using cocaine, Dilaudid, and Demerol. Flynn did not testify that Cone said anything about amphetamine abuse. Given that the issue at trial was not whether Cone had ever abused any drugs (he clearly had), but whether he was out of his mind on amphetamines at the time of the murders, this evidence does not devastate the state's case or even credibly impeach the state's witnesses. Cone's claims in this regard are exaggerated and devoid of merit. To the extent that the alerts were remotely relevant, they might have tended to prove that the police were initially cautious regarding the characteristics of a person who had committed several heinous crimes. Apparently, Cone's father made mention to a police officer during the initial investigation of Cone's *prior* drug use. Seemingly out of an abundance of caution, the police included this possible characteristic in their alert. Clearly, the evidence as subsequently developed during the investigation established that Cone's drug use was irrelevant to his commission of these offenses. Furthermore, Cone's reliance on the number of such alerts is misplaced. The probative value of each of these irrelevant items is not increased by their accumulation. Finally, Cone cannot establish that these items are actually not provided to him during the original criminal proceedings because his trial counsel is deceased and his file is not available.

He thus cannot obtain review of those defaulted claims.

The remaining claims are not procedurally defaulted, and were decided on the merits by the state courts. These claims bear repetition here:

1) 40(h) (also (qq))1 — Cone's trial counsel provided ineffective assistance when he failed to present any proof in mitigation of the death penalty.

2) Claim 40(i) — Cone's trial counsel provided ineffective assistance by not making any closing argument at the penalty phase of the trial.

3) Claim 39(j) (also 41) — Cone was deprived of due process by the prosecutor's guilt-phase closing argument that jurors should reject his drug-user defense because the amount of money in the car tended to show that he was a drug seller, not a drug user, even though the prosecutors knew the money came from an earlier grocery store robbery.

4) Claim 61 — electrocution is cruel and unusual punishment.

Dealing with the last claim first, this claim is without merit and does not require an evidentiary hearing.

> Electrocution has never been found to be cruel and unusual punishment by any American court. *See, e.g.*, *In re Kemmler*, 136 U.S. [436,] 443-44 [1890]; *Ingram v. Ault*, 50

> F.3d 898 (11th Cir. 1995); *Felker v. Turpin*, 101 F.3d [95,] 97 [(11th Cir.), *cert. denied* 117 S. Ct. 450 (1996)]; *Porter [v. Wainwright]*, 805 F.2d [930,] 943 n. 15 [(11th Cir. 1986), cert. denied, 482 U.S. 918, 107 S. Ct. 3195, 96 L.Ed.2d 682 (1987)]; *Glass v. Louisiana*, 471 U.S. 1080, 105 S. Ct. 2159, 85 L.Ed.2d 514 (1985) (Brennan, J., dissenting from denial of certiorari) ("such claims have uniformly and summarily been rejected"). No legislatively authorized method of execution in the United States is outlawed in any jurisdiction by any currently-effective court decision. *[Gomez v.] Fierro*, 117 S. Ct. [285,] 285 [(1986)]; *Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994), *vacated as moot*, 93 F.3d 1434 (9th Cir. 1996).
>
> The very practice of electrocution has been upheld by other courts within the past year, and there is no argument even plausible that there are differences in the level of "evolving decency" among the different circuits or states of the union, or over the last very few years.

In re Sapp, 118 F.3d 460, 464 (6th Cir.), *cert. denied* 117 S.Ct. 2536 (1997). *Accord*, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (holding that subjecting a convict to electrocution a second time after a first attempt at execution failed was not cruel and unusual punishment), *Williams v. Hopkins*, 130 F.3d 333, 337 (8th Cir. 1997) (following *Sapp* and rejecting § 1983 claim that electrocution is cruel and unusual punishment); *Ingram v. Ault*, 50 F.3d 898, 900 (11th Cir. 1995); *Johnson v. Kemp*, 759 F.2d 1503,

1510 (11th Cir. 1985) ("The contention that death by electrocution violates the Eighth Amendment is frivolous."); *Sullivan v. Dugger*, 721 F.2d 719, 720 (11th Cir. 1983) (denying motion for a TRO alleging that "the carrying out of appellant's death sentence by means of electrocution is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments"); *Spinkellink v. Wainwright*, 578 F.2d 582, 616 (5th Cir. 1978) (following *Klemmer* and finding cruel and unusual punishment argument without merit).

In deciding whether a particular form of capital punishment is unconstitutionally cruel and unusual, the federal courts "look to objective factors to the maximum extent possible. Among these factors are statutes passed by society's elected representatives. We presume that a punishment selected by a democratically elected legislature is constitutionally valid." *Campbell v. Todd*, 18 F.3d 662, 682 (9th Cir.) (holding hanging not cruel and unusual), *rehearing en banc denied*, 20 F.3d 1050 (9th Cir.), *cert. denied*, 511 U.S. 1119 (1994). Given that the Tennessee legislature has declared electrocution to be the form of capital punishment in this state, that capital punishment is not, in and of itself, cruel and unusual, *Gregg v. Georgia*, 428 U.S. 153 (1976), that many other states also impose death by electrocution, and that no court has ever held electrocution inherently cruel and unusual, this claim is legally without merit.

Furthermore, the court has reviewed the scientific paper on which Cone relies, Exh. C to Memorandum in support of Petitioner's Motion for Evidentiary Hearing. This paper establishes that electrocution is painful. What the paper fails to

mention, however, is any estimate of how long a person remains conscious and could actually experience pain while being executed in an electric chair. The paper disputes, *Id.* at 30, the contention by the chair's manufacturer that unconsciousness generally occurs in 1/240th of a second, but does not attempt to provide a correct figure. Regardless of the intensity of the pain inflicted by electrocution, a duration of 1/240th of a second cannot be said to be cruel and unusual, and petitioner has not carried his burden to demonstrate that he will survive for any longer period of time.

Most importantly, § 2254(d) provides:

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

Given the state of the law as discussed above, it cannot

be said that the Tennessee Supreme Court's rejection of this claim on direct appellate review "involved an unreasonable application of clearly established Federal law." Accordingly, this claim is without merit. Petitioner's third claim is also without merit. Cone contends that he was deprived of due process at the guilt phase by the prosecutor's argument that the jury should conclude that Cone was a drug seller instead of a user based on the money found in his vehicle, even though the prosecutor knew the money originated from Cone's robbery of a grocery store. This claim exaggerates the importance of the prosecutor's statement and ignores the other evidence that Cone was indeed involved in selling drugs. This claim was raised and fully addressed during Cone's first post-conviction proceeding. At trial, the prosecution established that Cone's car was found to contain thee hundred thirty-nine dollars in cash in his wallet, Tr. at 1500, a huge quantity of drugs, so far beyond what could arguably be for one person's use that it required four pages of the trial transcript to list, Tr. at 1506-10, one thousand nine hundred thirty-two dollars in cash removed from the same suit bag containing the drugs, Tr. at 1512, a list of drugs, Tr. at 1513, and additional loose change, Tr. at 1513. The prosecutor argued at the closing of the guilt phase that the nineteen hundred dollars was evidence that Cone had been selling drugs rather than using them. The state court on post-conviction review held this remark to be improper but harmless. In particular, the state court noted that the primary evidence that Cone was engaged in selling drugs was the large quantity of drugs in the vehicle. Adden. 2, Doc. 4 at 4.

Under § 2254(d), Cone cannot establish that this

decision involved an "unreasonable application of clearly established Federal law as determined, by the Supreme Court of the United States." A review of the evidence in the record supports that Cone's out-of-his-mind-on-amphetamines defense was not rejected by the jury because the prosecutor accused him of being a drug seller, but because he lacked credible evidence that he had in fact abused amphetamines during any period close to the murders. The prosecution's arguments regarding these funds were simply too remote from the real issues in this case to have affected the jury's deliberations. As this claim is without merit, there is no need for an evidentiary hearing to consider additional evidence. Accordingly, this claim is DISMISSED.

Cone's Sixth Amendment argument based on his attorney's failure to offer proof of mitigation also does not require a hearing. As Cone has procedurally defaulted his claims based on counsel's alleged failure to investigate and develop proof of mitigation, this claim must be evaluated based on the mitigating evidence available to counsel at the time he made the decision. The Court of Criminal Appeals, on review of the first post-conviction petition, explained that counsel made a series of reasoned tactical and strategic decisions regarding the proof of mitigation available to him. Of that proof, the two expert witnesses had already testified, and counsel determined there was no point to presenting cumulative testimony.

Counsel determined that Cone's mother was an ineffective witness whose exposure to further cross-examination would harm her son's case more than it would help. Counsel further determined that

testimony by other potential witnesses about Cone's past would merely have revealed further criminal activity of which the jury was unaware. As the state court found, "[t]here is nothing in the record to show that the testimony of these witnesses would have benefited the defense." Adden. 1, Doc. 4 at 8. Cone does not present any facts in this petition to refute this conclusion. Moreover, it is clear that all of the legitimate mitigating proof available to Cone was introduced during the actual trial. Cone's attack on this proposition is again based on procedurally defaulted claims and allegations.

Strickland v. Washington, 466 U.S. at 687, establishes the standard for an ineffective assistance claim. A petitioner must show:

1. deficient performance by counsel; and

2. prejudice to the defendant from the deficient performance.

See id. at 687.

A prisoner attacking his conviction bears the burden of establishing that he suffered some prejudice from his attorney's ineffectiveness. *Lewis v. Alexander*, 11 F.3d 1349, 1352 (6th Cir. 1993); *Isabel v. United States*, 980 F.2d 60, 64 (1st Cir. 1992). "[Al court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant." *Strickland*, 466 U.S. at 697. If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. *Id.* at 697.

To demonstrate prejudice, a movant under § 2255

must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Additionally, however, in analyzing prejudice,:

> the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair. trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

Lockhart v. Fretwell, 506 U.S. 364, 368 (1993) (citing *United States v. Cronic*, 466 U.S. 648, 658 (1984)). "Thus an analysis focusing solely on mere outcome. determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Fretwell*, 506 U.S. at 369.

In this case, Cone has failed to demonstrate any prejudice from the failure of his trial counsel to introduce any then-available evidence at his sentencing hearing. Cone's argument that counsel's decision harmed him is based largely on speculative assertions about the effect of further evidence on the jury's deliberations, and on even more speculative assertions about what might have happened if counsel had investigated other evidence of mitigation. The latter category of claims is procedurally barred, however, and Cone's belated attempts in this court to produce mitigating evidence is of no avail.

The state appellate court, in ruling on the merits of this claim, found that the supposed mitigating evidence counsel did not introduce would have had no affect on the jury's verdict. Cone has failed to allege any facts or arguments that would undermine confidence in the reliability of the jury's verdict, and has thus failed to demonstrate a reasonable probability that the proffer of the withheld testimony would actually have affected the jury's decision. Moreover, he has failed to carry his burden to demonstrate that the verdict was fundamentally unfair or unreliable. Nor has he demonstrated that the state court's decision did not comply with the requirements of § 2254(d)(1).

This case does not involve the type of total abdication of representation condemned in *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997). Here, unlike *Austin*, counsel had already introduced some mitigating evidence, and his rejection of other evidence was based on specific analysis of the tactical effect of that evidence. This is unlike the situation in *Austin*, in which counsel simply decided that any efforts would be useless. That counsel miscalculated the jury's ultimate verdict does not turn otherwise unreviewable strategic decision-making into deficient performance. In evaluating an ineffective assistance claim, the court should not second-guess counsel's tactical decisions. *Adams v. Jago*, 703 F.2d 978, 981 (6th Cir. 1983).

Accordingly, Cone has failed to demonstrate that the state court's rejection of this Sixth Amendment claim "involved any unreasonable application of clearly established Federal law." This claim is, therefore, without merit. As Cone cannot surpass the threshold requirement of § 2254(d), he is not entitled to an

evidentiary hearing under § 2254(e). This claim as to counsel's failure to introduce mitigating evidence is DISMISSED.

Similarly, Cone has failed to demonstrate any Sixth Amendment claim based on his counsel's decision to forego a closing statement during the sentencing phase. The state court found that counsel considered that the closing argument made by one of the state court prosecutors was not so damaging as to require a response. Defense counsel considered the risk of a persuasive final response from the other more experienced state prosecutor to be so great that the defense would be better off relying on the opening statement counsel gave at the beginning of the sentencing phase. Cone fails to offer any basis for disputing the state court's determination that this decision was a tactical choice to foreclose rebuttal argument by the prosecution.

A review of the closing remarks by the first prosecutor confirm that they were relatively straightforward — simply a recitation of the existence of four aggravating circumstances. Trial Trans. at 2144-47. There was no dispute that three of these circumstances definitely existed,[10] and Cone presents no argument that any statement counsel might have made would have persuaded the jury to give greater consideration to the evidence of mitigation introduced

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[10] On direct review the Supreme Court held the fourth factor, knowingly creating a great risk of death to two or more people other than the murder victims, was not supported by the evidence because the robbery and assaults with intent to murder were not committed during the murders of the Todds. The court nevertheless held this error to be harmless beyond a reasonable doubt.

during the guilt phase. The state court's decision was a reasonable application of Sixth Amendment standards to the facts presented in the state court post-conviction proceeding.

Cone now contends that he should be given a hearing on the ineffective assistance claims because, after the first post-conviction proceeding, his original trial counsel suffered from a mental disorder that apparently culminated in his committing suicide. He offers no evidence beyond speculation, however, that this condition affected either counsel's original trial performance or the testimony he offered during the post-conviction proceeding. He has not. offered any actual evidence of either deficient performance or prejudice affecting the fairness and reliability of Cone's trial or death sentence. Cone has not offered any evidence to support the conclusory allegation that counsel was incapable, during the first state court post-conviction proceeding, of remembering the basis for his trial decisions. Cone fails to point to any part of the trial record that contradicts counsel's post-conviction hearing testimony or any part of the record that is inconsistent with that testimony. Cone does not point to any portion of the post-conviction hearing transcript that shows that counsel acted or spoke as if he was incompetent, or to any references that would support an argument that counsel was simply fabricating his testimony.

Finally, these contentions are, an attempt to resurrect the procedurally defaulted claims of inadequate investigation and preparation. The argument that counsel's tactical decisions regarding the penalty phase of the trial were deficient and prejudicial to Cone are based on retrospective research

and speculation about the effect further evidence might have had on the jury. Additionally, most of these contentions are rooted in claims that were not presented during the first post-conviction proceeding. In effect, Cone is complaining, again, about the quality of his representation during that proceeding. As discussed above, Coleman forecloses such claims, however disguised. The claims are without merit, and are dismissed.

Accordingly, as the above claims are all either procedurally barred or correct under § 2254(d)(1), disposition of those claims without an evidentiary hearing is proper. Rule 8(a), Rules Governing Section 2254 Cases in the United States District Courts. Petitioner's motion is, therefore, DENIED, and those claims are hereby DISMISSED.

Cone devoted considerable argument to his contention that he is entitled to an evidentiary hearing under *Townsend v. Sain*, 372 U.S. 293 (1963), and *Keeney v. Tamyo-Reyes*, 504 U.S. 1 (1992). As the Court has determined that the claims are without merit, and as Cone has not established that any decisions involved an unreasonable application of clearly established federal law, he is not entitled to an evidentiary hearing in any event. The Court, therefore, need not address the issue of whether or how the standards enunciated in *Townsend* and *Keeney* apply after the enactment of new 28 U.S.C. § 2254(e).

IV. CONCLUSION

For the reasons set forth above, petitioner's motion for an evidentiary hearing is DENIED, and the claims addressed in his motion are hereby

DISMISSED.

IT IS SO ORDERED this 15 day of May, 1998.

/s/ Jon Phipps McCalla
JON PHIPPS McCALLA
UNITED STATES DISTRICT JUDGE

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