IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE

UNJOLEE MOORE,	:	
	:	
Petitioner,	:	
	:	
v.	:	No. 301490
	:	Division III
STATE OF TENNESSEE,	:	
	:	
Respondent.	:	

MEMORANDUM

Before the Court are the amended petition of Unjolee Moore ("the petitioner"), by and through counsel and with an accompanying memorandum, for relief from the convictions or sentences in case 280014 and the answer of the state, by and through the district attorney general, thereto. The matter was heard on 13 August 2018. For the reasons that follow, the Court decides that the petition should be dismissed.

I. Procedural history

The record in case 280014 reflects that the petitioner and three co-defendants were indicted for first-degree, premeditated murder, first-degree, felony murder, attempted especially aggravated robbery, attempted first-degree murder, and employment of a firearm during a dangerous felony. After a jury trial, before which the charge of first-degree, premeditated murder was dismissed, the petitioner was convicted of first-degree, felony murder, attempted especially aggravated robbery, attempted second-degree murder, and employment of a firearm during a dangerous felony and was sentenced to the department of correction for life, two concurrent terms of fifteen years, and one consecutive term of six years, respectively.

At issue on direct appeal were the non-dismissal of the indictment for failure of police to collect a co-defendant's telephone, the admission of his statement to police, and the sufficiency of the evidence of the offenses other than first-degree, felony murder. On 20 September 2016, the Court of Criminal Appeals affirmed the judgments. On 18 January 2017, the Supreme Court denied permission to appeal.

On 28 March 2017, the petitioner, *pro se* and with verification, filed the original petition for post-conviction relief, alleging that his trial counsel, R. Garth Best, Esq., and Kelli L. Black, Esq., and his appellate counsel, Brandon Raulston, Esq., were ineffective in the following particulars:

(1) not challenging the indictment on the ground that it charges more than one defendant and therefore allows the conviction of more than one person for any one offense;
(2) not challenging the indictment on the ground that it charges more than one offense and therefore did not provide sufficient notice of the charge;
(3) not moving for a bill of particulars;
(4) not challenging the dismissal of count 1 of the indictment on the ground that only the grand jury can amend an indictment;
(5) allowing the jury to see the indictment, including the dismissed count; and
(6) not challenging the sufficiency of the evidence of first-degree, felony murder.

On 4 April 2017, the Court issued a preliminary order finding that three of the six allegations in the petition regarding acts or omissions of trial and appellate counsel state colourable claims of ineffective assistance of trial and appellate counsel and giving the petitioner thirty days in which to file an affidavit of indigence. Eventually, on 2 April 2018, after appointment of counsel and the petitioner's retention of new counsel, the petitioner, by and through counsel, filed the subject amended petition, alleging in addition as follows:

(1) trial counsel was ineffective in not filing a motion *in limine* or objecting to evidence of the firearms, ammunition, and bulletproof vest found in his girlfriend's house, not moving for a continuance when the state did not

provide a copy of the recording of his allegedly complete confession until one week before trial, not calling witnesses to establish his alibi or confirm that he regularly wore the black facial wrap, the sole item with his DNA found in his girlfriend's car, when he cut grass for a local church;

(2) appellate counsel was ineffective in waiving the issues of the prosecutor's disqualification for a conflict of interest as a result of his prior counsel's joinder of the office of the district attorney general and a mistrial on the ground of a juror's discussion of the case "'outside the jury"' with other jurors and in not including the transcript of the suppression hearing in the record on appeal; and

(3) a handwritten letter from co-defendant John Simpson constitutes new evidence and confirms his innocence.

On 1 June 2018, the state, by and through the district attorney general, filed an answer, denying any ground for relief.

On 13 August 2018, the petition was heard. At the hearing, five witnesses, the petitioner, his brother, Mr. John Hudson, his mother, Mrs. Annette Lynn Packer, his trial counsel, R. Garth Best, Esq., and Kenneth Burnette, Jr., of the Chattanooga Police Department, testified and twenty-four exhibits were introduced.

II. Summary of post-conviction evidence

A. Petitioner's testimony

The petitioner testified that he was born on 22 February 1986. He has been convicted of felony murder as well as carjacking not involving firearms and having a cell phone in a state penitentiary. He pled guilty in federal court to carjacking because he was guilty and was sentenced to five years, ten months, but was released early, after three years.

The day of the murder, 28 June 2010, was normal. He worked, stopping at 4:30 p.m. He spent time with a brother, from after 6:00 p.m. until 8:00 p.m. He returned home before taking a girl, Octavia, to visit his "little brother", John Hudson, which is where he was about 11:30 p.m., the time of the murder. He and the girl went to eat on

Brainerd Road, about 11:50 p.m., before going to a house. The next morning, he had another landscaping job at the church. He uses a facial wrap to protect his face while weeding.

At 1:30 p.m. on 9 July 2010, the petitioner was arrested while waiting with a lady in a purple Nissan Maxima, like the suspect vehicle, in front of his mother's house for his federal parole officer. Officers jumped from a van with guns drawn, surrounded the car, placed him in handcuffs, asking if his name was Francis and telling him that he was under arrest for kidnapping and armed robbery. They requested consent to search, which he denied and his mother, to whom he told that he was a suspect in a murder case, gave. They placed him in the back of a police car, where he stayed for an hour.

About 2:30 p.m., the petitioner arrived at the police center, where he was handcuffed to a bench in a narrow hall near the major-crimes office. A patrolman sat with him. He variously testified that they waited three-and-one-half to four hours for Det. Wenger to arrive, after which the interrogation lasted from 6:00 p.m. to 3:00 a.m., and he was beaten off and on for three hours, from 2:30 p.m. to 6:00 p.m. Most of the blows were body blows, but Det. Wenger caught him in the face. His left eye was swollen, as was his wrist from the handcuffs. The officers, whom he did not know, were big guys. After the first round, the handcuffs were placed behind his back. The beating stopped when other people passed. Exhibits 7-15 were taken before he was beaten. Offs. Narramore and Smith arrived later.

The petitioner was at the police center until 3:00 a.m., after which he was taken to jail. He was given water and allowed to use the restroom.

At jail, photographs and fingerprints were taken. In addition, the intake officer(s) called medical staff to examine him. Later, a buccal swab was obtained. Whenever he leaves and returns to the department of correction, too, he is booked and photographed.

Counsel was aware of but did not receive the medical records, Exhibit 6. According to the records, the petitioner, who was wearing a white shirt, had a rash, perhaps poison ivy, on his side. Bruises do not appear clearly on black skin and take time to develop.

Although the petitioner did not mention the beating when he testified at the suppression hearing, the claim is not new. Counsel was aware of but did not mention it.

Det. Wenger never advised the petitioner of his rights, and no one mentioned that they were being recorded. The petitioner did not realize that he was being interrogated and denies that the initials and signature on the waiver-of-rights form, Exhibit 4, are his. They had several conversations, but he does not remember Det. Wenger instructing him, "Sign right here." He did not see the form until two years later.

The petitioner is not very familiar with constitutional rights and has never read the waiver form. He can, however, read and write. He completed eleventh grade, has a G.E.D., and had two jobs. The biographical information on the waiver form, which Det. Wenger had and he confirmed at the police center, is correct.

The petitioner told counsel that he did not sign the waiver form. There was a hearing on the motion to suppress his statement, at which he and Det. Wenger testified.

Det. Wenger call the petitioner a murderer, questioned him about the murder, told him to tell the truth, and stated his, the detective's theory of the murder, telling the petitioner that police had the murder weapon and shoes, knew there had been a struggle,

could put him in the area and at the scene, a lie, and expected analysis to inculpate him. The petitioner provided his phone number and believes that cell-phone records would have shown where he was at the time.

The petitioner told police what they wanted to hear, believing that they would let him go. He knows that robbery may be the underlying felony for felony murder but was forced and rehearsed to tell police what he did. He wished to go home, he was tired of being beaten, his back was hurting, and they had made him look guilty. When he did so, however, they tried to act like he was the shooter. He denied having had anything to do with "it", by which time the patrolman had gone. He told them about the apartments and other murders so that he could leave. He read over the so-called confession and noticed irregularities. Much of the conversation is missing from the recording.

The petitioner met with Det. Wenger on at least one other occasion. He denies, however, that, on 13 July 2010, Det. Wenger showed him a photo lineup and, on 16 July 2010 or any other time, he was transported to Hickory Valley Road to identify a shoe. He also denies saying that co-defendant Butler had thrown a shoe out.

The petitioner has lived in Chattanooga his whole life and knows McCallie Avenue. It is ten-and-one-half miles and takes about twenty-five minutes from McCallie Avenue to Oakwood Drive. It takes about thirty minutes to Riverside Drive. The murder was on Westfield [*sic*] Drive at 11:30 p.m.

The lady who was with him at the time of his arrest gave a statement implicating him to some extent, but she was lying about his use of the car and the time of his return. He used her car two or three times. Police searched her house in Ft. Oglethorpe and found guns, but the guns were not his. He did not have a .45-caliber pistol with laser

sight, though, before he met her, he had a police scanner. He saw a lot of women but did not have a relationship with any of them. He was young. Before he met her, he had a police scanner.

At the preliminary hearing, the petitioner was represented by Matthew Rogers, Esq., who thereafter returned to the office of the district attorney general. Trial counsel was appointed one year, four months, later. Counsel came to interview him and he told his side of the story, counsel taking notes. Counsel obtained a private investigator, to whom the petitioner spoke one time for about ten minutes about basic details, his brother's name, where he was, what he did that day. Counsel filed numerous motions. Counsel and he reviewed discovery, including interviews of all witnesses, and his own statement that he was on one side of the building and the crime was on the other side of the building, which information he had heard "on the streets".

Counsel had trouble obtaining the petitioner's statement. The Court said to make sure that counsel received it. The petitioner does not know when counsel received the transcript and the audio recording of the statement. It was close to the trial date, and they did not review the recording before trial, though he did see the transcript when counsel came to visit him.

The petitioner met Kelli Black, Esq., the Friday before trial and talked to her for about fifteen or twenty minutes about a plea offer of twenty-five years at thirty percent (30%) in exchange for testimony. There was no preparation for trial.

Counsel mentioned a mental evaluation. He said that the judge would not let him off the case. No motion was filed.

At trial, the petitioner had concerns about counsel's opening statement. In addition, there was discussion about removing or splicing parts of the recording. The recording, which is a recording of him, has two parts, one brief, one lengthy.

Guns and bulletproof vest were mentioned and shown, though they had never been in his possession. No motion *in limine* had been filed to exclude them.

Ms. Black started questioning the detective. Counsel said that she was taking over, though the Court said that she was there to assist.

A juror had talked about knowing the victim's family. The Court brought her out and, after questioning her, dismissed her.

The Court gave the defense time to call a witness that day or the next day. After speaking to Ms. Octavia Rucker as well as the petitioner's mother and pastor, counsel said that he did not need to call them. He also advised the petitioner not to testify because of his record of carjacking and theft. The petitioner did not agree and told counsel so. They went back and forth. Counsel said that the state had the burden and he was concerned about the petitioner's record. The Court questioned the petitioner about testifying and told him that it was his decision. The petitioner told the Court that he would not testify. Counsel announced that the defense would not put on proof and argued that the state had not proven its case.

Two months after trial, counsel admitted to the petitioner that he had "messed up." Counsel did not mention the availability of post-conviction relief. When they returned to court, the petitioner wanted counsel off the case.

Appellate counsel represented him on the motion for a new trial and on appeal. They talked one time about twenty-five minutes. The petitioner told appellate counsel of

his concerns, including concerns about the recording. When he was sent to the department of correction, however, communication stopped. Appellate counsel did not respond to correspondence and emails from the petitioner, though, in November, he sent the petitioner a package.

In the motion for a new trial, appellate counsel did not present every issue. After the decision of the Court of Criminal Appeals, appellate counsel told the petitioner that he no longer represented him. The petitioner himself filed an application for permission to appeal to the Supreme Court.

The petitioner had nothing to do with robbery or murder. He did not really know co-defendant Simpson, who went through numerous lawyers. He may have seen him on the street. He did know the other two co-defendants. He did not know that co-defendant Ballou, with whom, he later learned, he had supposedly been, pled guilty.

B. Petitioner's brother's testimony

Mr. John Hudson testified that he is twenty-seven and the petitioner is his oldest brother. They lived together until the petitioner's incarceration.

On 28 June 2010, the petitioner visited Mr. Hudson and his girlfriend in a rented house off 12th Avenue where Mr. Hudson lived for only about two weeks. He does not remember the time but knows that it was late, after dark. Before arriving, the petitioner called twice, about 10:00 p.m. and then again about 11:00 p.m. After the second call, the petitioner arrived in ten minutes with a dark-skinned girl. The petitioner was in a truck that Mr. Hudson had never seen before. Mr. Hudson introduced the petitioner to his girlfriend Amanda Trowel, who has a record, and her step-daughter Hayley. He estimates that they were together for about two hours.

Mr. Hudson is familiar with the distance between McCallie Avenue and the apartment, meaning, presumably, the scene, and estimates that, at the speed limit, it would take twenty or twenty-five minutes to travel between the two. The time between 12th Avenue and McCallie Avenue is five minutes.

Mr. Hudson saw on the news and in the paper that his brother had been arrested but did not know the time of the homicide and never spoke to trial counsel. He now realizes that the petitioner was with him at the time of the homicide.

C. Petitioner's mother's testimony

Mrs. Annette Lynn Packer testified that she is the petitioner's mother and has lived here all her life. The petitioner, who has some learning disabilities, was employed as a landscaper. He was born with asthma and, while working, wore a black mask.

On 28 June 2010, the petitioner came in, took a shower, and spent time with a lady. He left after dark but before midnight. She saw him the next morning and again, later in the day, when he came in and took a shower.

Mrs. Packer spoke to a private investigator for about eight minutes before trial. She spoke to trial counsel one time, at trial. She and the pastor waited outside for about three hours.

D. Mr. Burnette's testimony

Off. Burnette testified that, now, his duties involve professional standards but, in July 2010, he was a crime-scene investigator, collecting and processing evidence at scenes of violent crime. He testified in co-defendant Butler's trial.

Off. Burnette does not recall searching the petitioner's mother's house. At about 4:40 a.m. on 10 July 2010, Sgt. Wenger called him to the police center to photograph the

petitioner, Exhibits 7-15, and collect the petitioner's fingerprints and DNA. He does not know whether the petitioner had been interviewed yet.

Off. Burnette has seen people with bruises. Bruises look different on different people.

E. Counsel's testimony

Counsel testified that he has been practicing law since November 2008, when he was licensed. His primary area of practice is criminal defense.

On 3 December 2010, counsel was appointed to represent the petitioner. Counsel reviewed the preliminary hearing, talked to the petitioner at jail, filed several motions, including a motion for a bill of particulars, discovery, disclosure of exculpatory evidence, dismissal for failure to preserve evidence, and suppression of the petitioner's statement and the bandana that was found in the car he was driving, filed lists of defense and alibi witnesses, prepared an outline of questions for witnesses, and requested jury instructions. The initial theory of the defense was that the state could not place the petitioner at the scene.

Counsel did not disclose that it was his first murder case; the issue did not arise. As he always does, however, he did request help at trial from another lawyer, in this case, Kelli Black, Esq. She reviewed discovery and, a couple of months before trial, they reviewed discovery together. At one point during trial, he was unable to read her suggested questions and asked her to take over an examination.

Before the motion to suppress the petitioner's statement was filed, the circumstances of the statement were discussed. Counsel was aware of the circumstances of the interview. The petitioner had been arrested, kept for an extended period on a

bench, and interviewed for several hours and the petitioner denied having signed the waiver form.

Neither during preparation for the suppression hearing nor during his testimony at the suppression hearing did the petitioner tell counsel that police beat him. Although counsel did not ask the petitioner about such police misconduct, counsel did make the petitioner aware that the admissibility of the statement was dependent on its voluntary nature and the petitioner did not give any indication that the statement was involuntary.

Counsel did not receive a complete transcript or any recording of the petitioner's statement until one week or so, perhaps a few weeks, before trial. He probably should have moved for a continuance in April, immediately upon receiving the recording of the statement, though he did file a late motion to continue. When counsel tried to play the recording for the petitioner, the petitioner did not wish to hear it, telling counsel that he was aware of the contents of the statement.

On 17 June 2013,[1] counsel filed a motion to reopen the suppression hearing. The motion was denied. Not until playback of the recording of the petitioner's statement during trial did counsel become aware that the petitioner attributed the gaps in the recording to times when police beat him.

Counsel did not move to redact the petitioner's statement before objecting to something in the statement at trial. He probably should have done before then to prevent the jury from hearing anything objectionable.

Counsel memorialized a plea offer from the state in writing and had the investigator deliver the document to the petitioner. He may have mentioned a plea one or two times to the petitioner but probably relied on the investigator to convey the offer.

[1] Jury selection in case 280014 began on 18 June 2013.

Counsel did not seek independent DNA analysis; the DNA evidence was inconclusive.

After the prosecution rested, counsel met with co-defendant Simpson. A note believed to have been written by Simpson had been intercepted in jail. Simpson, however, wished to speak to his lawyer, who was upset. Counsel conferred with the petitioner and Ms. Black about calling Simpson, and they decided not to call him. No one, including the petitioner, trusted Simpson. Furthermore, that Simpson, who had told police that the petitioner was present and a participant, had changed his story multiple times would not have been helpful.

The witness list for the defense included a handwriting expert and a local pastor. Counsel believes that there was not enough handwriting on the waiver form for the handwriting expert to form an opinion. At least two times, counsel talked to the petitioner about testifying. The petitioner decided not to testify. It was tough to explain the audio recording.

Counsel did review cell-phone records, which were part of discovery. He does not, however, remember Exhibits 1-3, which include post-conviction counsel's handwritten notes, and does not recall receiving them in discovery, though they include his handwritten notes.

Cell-phone transmissions go through the nearest cell-phone tower. The numbers in the cell-phone records represent cell-phone towers that were very close to the scene.

Although an eyewitness is better than cell-phone records, Exhibits 1-3 would have been very helpful to the defense. The surviving victim heard a knock on the door at 10:45 or 11:00 p.m.; it might even have been 11:30 p.m. At 11:40 p.m., however, cell-

phone records place the petitioner at Riverside Drive and 2340 McCallie Avenue. It would have been very difficult to get from the scene to those locations in that time. As for the distance between 12th Avenue and McCallie Avenue, it is about five miles.

On the alibi list were two names: the petitioner's pastor and friend. His brother Mr. Hudson was not on the list.

Counsel met with the pastor, who confirmed that the petitioner mowed grass at the church. The pastor was not comfortable saying the time or even the week when the petitioner was at the church. In fact, the pastor was very uncomfortable. After conferring with Ms. Black about it, they decided not to call the pastor. He concedes that the pastor may also have been able to testify about the black facial wrap.

Counsel believes that he said something to the petitioner's mother in passing. He acknowledges that she may have had helpful testimony about the facial wrap, too.

For the first time a few months before trial, the petitioner told counsel that he had been at the house of Ms. Octavia Rucker on the evening of the murder. Counsel talked to Ms. Rucker and she said that she worked during the day and went to night school and the petitioner would borrow her car,, though it may be another woman, Michelle Angel whose car he borrowed and whom he took to night school. She had a criminal record, perhaps two or three local thefts, and her story was not the same as the petitioner's story. They decided not to call her.

He probably should have moved to continue when he received the recording in April. He did file a late motion to continue.

The petitioner hugged counsel after trial. Both of them were unhappy. Counsel does not remember saying that the result might have been different had he had more experience.

III. Law and analysis

To obtain post-conviction relief, a petitioner must allege and, by clear and convincing evidence, prove that his conviction or sentence is void or voidable because of the abridgement of a constitutional right. T.C.A. §§ 40 30 103, 110(f).

A. Ineffective assistance of counsel

The petitioner claims that he did not receive effective assistance of counsel.

> Article I, Section 9 of the Constitution of Tennessee establishes that every criminal defendant has "the right to be heard by himself and his counsel." Likewise, the Sixth Amendment to the United States Constitution guarantees that all criminal defendants "shall enjoy the right ... to have the [a]ssistance of [c]ounsel." These constitutional provisions have been interpreted to guarantee a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Baxter v. Rose,* 523 S.W.2d 930, 936 (Tenn.1975).
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> To prevail on a claim of ineffective assistance of counsel, a petitioner must prove both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. at 687, 104 S.Ct. 2052; *Felts v. State,* 354 S.W.3d 266, 276 (Tenn.2011). A court need not address both elements if the petitioner fails to demonstrate either one of them. *Strickland v. Washington,* 466 U.S. at 697, 104 S.Ct. 2052; *Garcia v. State,* 425 S.W.3d 248, 257 (Tenn.2013). Each element of the *Strickland* analysis involves a mixed question of law and fact—a question this Court will review de novo without a presumption that the courts below were correct. *Williams v. Taylor,* 529 U.S. 362, 419, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Strickland v. Washington,* 466 U.S. at 698, 104 S.Ct. 2052; *Davidson v. State,* 453 S.W.3d 386, 392(Tenn.2014); *Calvert v. State,* 342 S.W.3d 477, 485 (Tenn.2011).
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> Deficient performance means that "counsel's representation fell below an objective standard of reasonableness." To determine whether counsel performed reasonably, a reviewing court must measure counsel's performance under "all the circumstances" against the professional norms prevailing at the time of the representation. *Strickland v. Washington,* 466 U.S. at 688, 104 S.Ct. 2052; *see also Baxter v. Rose,* 523 S.W.2d at 932–33. Counsel's performance is not

deficient if the advice given or the services rendered "are within the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose,* 523 S.W.2d at 936; *see also Harrington v. Richter,* 562 U.S. 86, 88, 131 S.Ct. 770, 778, 178 L.Ed.2d 624 (2011) ("The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." (quoting *Strickland v. Washington,* 466 U.S. at 690, 104 S.Ct. 2052)); *Padilla v. Kentucky,* 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) ("[Deficient performance] is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms' [considering all the circumstances]." (internal citations omitted)).

In *Strickland v. Washington,* the United States Supreme Court discussed the interaction between counsel's duty to investigate and counsel's freedom to make reasonable strategic choices:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland v. Washington, 466 U.S. at 690–91, 104 S.Ct. 2052.

A *Strickland* analysis, therefore, begins with the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all significant decisions. *Strickland v. Washington,* 466 U.S. at 689, 104 S.Ct. 2052. The petitioner bears the burden of overcoming this presumption. *Strickland v. Washington,* 466 U.S. at 687, 104 S.Ct. 2052; *see also Burt v. Titlow,* 571 U.S. ——, ——, 134 S.Ct. 10, 17, 187 L.Ed.2d 348 (2013); *Nesbit v. State,* 452 S.W.3d at 788; *State v. Burns,* 6 S.W.3d 453, 461–62 (Tenn.1999). Reviewing courts should resist the urge to judge counsel's performance using "20–20 hindsight." *Mobley v. State,* 397 S.W.3d 70, 80 (Tenn.2013) (quoting *Hellard v. State,* 629 S.W.2d 4, 9 (Tenn.1982)); *see also Strickland v. Washington,* 466 U.S. at 689, 104 S.Ct. 2052 (instructing reviewing courts to try "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time").

> The second element of the *Strickland* analysis focuses on whether counsel's deficient performance "prejudiced" the defendant. *Strickland v. Washington,* 466 U.S. at 687, 104 S.Ct. 2052. The question at this juncture is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) (citing *Strickland v. Washington,* 466 U.S. at 687, 104 S.Ct. 2052). To prove prejudice, the petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. at 694, 104 S.Ct. 2052. A "reasonable probability" is a lesser burden of proof than "a preponderance of the evidence." *Williams v. Taylor,* 529 U.S. at 405–06, 120 S.Ct. 1495; *Pylant v. State,* 263 S.W.3d 854, 875 (Tenn.2008). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington,* 466 U.S. at 694, 104 S.Ct. 2052; *see also Vaughn v. State,* 202 S.W.3d 106, 116 (Tenn.2006); *Goad v. State,* 938 S.W.2d 363, 370 (Tenn.1996).

Kendrick v. State, 454 S.W.3d 450, 457-8 (Tenn. 2015).

i. Trial counsel

The Court understands the petitioner to allege that counsel was ineffective in not challenging the indictment on the ground that it charges more than one defendant and therefore allows the conviction of more than one person for any one offense and charges more than one offense and therefore did not provide sufficient notice of the charge. Neither allegation states a claim for relief. Subsection (a) of Tenn. R. Crim. P. 8 explicitly requires joinder in a single indictment of offenses, like those in case 280014, that arise from the same criminal episode, are within the jurisdiction of a single court, and are known at the time of the return of the indictment. Subsection (c)(1) of Rule 8 explicitly allows joinder in a single indictment of defendants, like those in case 280014, each of whom is charged with accountability for each offense included. The Court therefore finds no deficiency in counsel's performance in this respect.

The Court notes that the law of criminal responsibility contemplates that more than one person may be criminally liable for an offense. *See* T.C.A. § 39 11 401 (defining a party to an offense as one who commits the offense, is criminally responsible for another's commission of the offense, or both and allowing each party to an offense to be charged with the offense).

The Court also notes that the indictment in case 280014 meets the standards of *State v. Hill*, 954 S.W.2d 725, 728 (Tenn. 1997).

> [T]he Court in *Hill* held that an indictment will be deemed valid if it provides sufficient information "(1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy." *Id.* (citing *State v. Byrd*, 820 S.W.2d 739, 741 (Tenn. 1991); *VanArsdall v. State*, 919 S.W.2d 626, 630 (Tenn. Crim. App. 1995); *State v. Smith*, 612 S.W.2d 493, 497 (Tenn. Crim. App. 1980)). It described adequate notice to the accused as the "touchstone for constitutionality." *Id.* at 729.

See State v. Duncan, 505 S.W.3d 480, 484-5 (Tenn. 2016). The indictment in case 280014 charges the offenses in the language of the applicable statutes and references the applicable statutes. Each count specifies the date of the offense and names any victim. The two counts that require a predicate felony, felony murder and employment of a firearm during the commission of a dangerous felony, specify the predicate felony.

The Court understands the petitioner to allege that counsel was ineffective in not moving for a bill of particulars. The record in case 280014 reflects that counsel did file a motion for a bill of particulars but, apparently, did not pursue the motion or obtain a bill of particulars. Nevertheless, the defense was aware of the statements of all witnesses and the lack of a bill of particulars did not prevent the defense from filing a notice of alibi or, apparently, result in any surprise at trial. *See State v. Moore*, No. E2015-00942-CCA-R3-CD, 2016 WL 5210866, *3 (Tenn. Crim. App. 20 Sep.), *perm. app. denied* (Tenn. 18

Jan. 2017) (summarizing the surviving victim's trial testimony that he arrived at the other victim's house between 10:30 and 11:00 p.m. and had been there at least twenty minutes when there was a knock on the door). The Court therefore finds no prejudice in counsel's performance in this respect.

The Court understands the petitioner to allege that counsel was ineffective in not challenging the dismissal of count 1 of the indictment, the charge of first-degree, premeditated murder, on the ground that only the grand jury can amend an indictment. Presumably, the dismissal of count 1 was a pre-trial, *i.e.*, pre-selection-of-jury, dismissal.

Arguably, for purposes of amendment and dismissal of indictments pursuant to Tenn. R. Crim. P. 7 and 48, respectively, each count of an indictment constitutes a separate indictment. *Cf. State v. L.W.*, 350 S.W.3d 911, 917-8 (Tenn. 2011) (agreeing with the Court of Criminal Appeals in *State v. Liddle*, 929 S.W.2d 415, 415 (Tenn. Crim. App.1996), that, for purposes of expungement, each count of an indictment constitutes a "case" within the meaning of T.C.A. § 40 32 101(a)(1)(E)). If so, pursuant to subsection (a) of Rule 48, the state, with the Court's permission, could dismiss count 1 of the indictment before trial, as it did, though it could not do so during trial without the petitioner's consent. Even if each count of an indictment does not constitute a separate indictment and dismissal of one count of an indictment constitutes an amendment of the indictment, contrary to the petitioner's apparent belief, subsection (b) of Rule 7 authorizes amendment of an indictment with the defendant's consent at any time or, if the amendment does not charge an additional or different offense and does not prejudice a substantial right of the defendant, without the defendant's consent before jeopardy

attaches. The Court therefore finds neither deficiency nor prejudice in counsel's performance in this respect.

The Court understands the petitioner to allege that counsel was ineffective in allowing the jury to see the indictment, including the dismissed count. There is no evidence on this issue. It not being the practice of the Court to send the jury into deliberations with a copy of the indictment, the jury was not aware of the dismissed count. The Court therefore finds no deficiency in counsel's performance in this respect.

The Court understands the petitioner to allege that counsel was ineffective in not filing a motion *in limine* or objecting to evidence of the firearms, ammunition, and bulletproof vest found in his girlfriend's house. At trial, Inv. Burnette testified that he "recovered guns from the home of the defendant's mother and girlfriend." *Moore*, 2016 WL 5210866 at *5. At trial, however, Agt. Scott testified that "none of the firearms sent to him in the investigation had fired the bullets." *Moore*, 2016 WL 5210866 at *6. Thus, even if there was evidence connecting the petitioner and the items in issue, that they were at his girlfriend's house, there was no evidence connecting the items in issue to the offenses. To any extent that evidence of the items in issue was not favorable to the petitioner, however, the petitioner's admissions and knowledge of the offenses at the time of his statement to police were so much more unfavorable as to render the evidence of the items in issue inconsequential. The Court therefore finds no prejudice in counsel's performance in this respect.

The Court understands the petitioner to allege that counsel was ineffective in not moving for a continuance when the state did not provide a copy of the recording of his allegedly complete confession until one week before trial. From counsel's post-

conviction testimony, the Court gathers that the state was late in providing a copy of the recording but did so in April 2013, several weeks before jury selection began on 18 June 2013. In any event, apparently, counsel did have a transcript of the recording before then. According to the petitioner's post-conviction testimony, he and counsel reviewed discovery, including interviews of all witnesses, and his own statement that he was on one side of the building and the crime was on the other side of the building, which information he claims to have heard "on the streets". As for the break in the recording, counsel was able to challenge the state's failure to record the entire interview before trial. The Court therefore finds no prejudice in counsel's performance in this respect.

The Court understands the petitioner to allege that counsel was ineffective in not calling witnesses to establish his alibi. The petitioner's present alibi is inconsistent in part with his original alibi. According to the petitioner's 10 May 2013 notice of alibi, a little before 7:00 p.m. on 28 June 2010, he collected his girlfriend Octavia Rucker from school in her vehicle, which he had borrowed to drive while she was in class, they spent the evening at and did not leave her residence, the following morning, she left him at church to mow grass starting at 7:00 a.m., and he planned to call Ms. Rucker and a pastor as alibi witnesses. According to the petitioner's brother's post-conviction testimony, the petitioner and a girlfriend arrived to visit him and his girlfriend about 11:10 p.m. and remained for about two hours. According to the petitioner's own post-conviction testimony, sometime after 8:00 p.m., he took Ms. Rucker to visit his little brother, which is where he was about 11:30 p.m., the time of the murder, went to eat on Brainerd Road about 11:50 p.m., and then went to a house.

The petitioner now seems to recognize that the original alibi is inconsistent with phone records placing his phone in different places during the relevant time. His present alibi seems to be an attempt to be consistent with the phone records. The Court accredits counsel's post-conviction testimony that the petitioner, despite his awareness of the value of an alibi witness, did not identify his brother as an alibi witness.

To the extent that the petitioner faults counsel for not calling a witness to reconstruct his apparent movements from the phone records, Exhibit 3, the Court notes that, at the post-conviction hearing, the petitioner did not call such a witness. On their face, the phone records do seem to show that the petitioner's phone was not stationary for much of the relevant time. In addition, at trial, the prosecution did not use the phone records against the defense, though it is possible that the plan was to use them to impeach Ms. Rucker, who did not provide an alibi at trial after all. Without a complete reconstruction from the records for the relevant time and immediately before and after the relevant time by a knowledgeable witness, however, the records by themselves do not establish that the petitioner was not at the scene. The Court therefore finds no prejudice in counsel's performance in this respect.

The Court understands the petitioner to allege that counsel was ineffective in not calling witnesses to confirm that he regularly wore the black facial wrap found in his girlfriend's car, the sole item with his DNA, when he cut grass for a local church. Even if the petitioner did wear the wrap to minimize his exposure to allergens while working, it was possible that a co-defendant was wearing it with a blue bandana during the offenses. *See Moore*, 2016 WL 5210866 at *3 (summarizing surviving's victim's description of the two men at the door, including the black and teal "do-rag" or half-mask over the face of

the shorter man). In any event, the petitioner's statement to police was so much more unfavorable as to render the omission of the evidence in issue inconsequential. The Court therefore finds no prejudice in counsel's performance in this respect.

ii. Appellate counsel

The Court understands the petitioner to allege that appellate counsel was ineffective in not challenging the sufficiency of the evidence of first-degree, felony murder. Even if there was no evidence that the petitioner robbed or shot the victim, he himself admitted that he planned the robbery and drove his co-defendants to and from the scene. In addition, the surviving victim testified that two of the co-defendants attempted robbery and one of them had a gun and shot both victims and the medical examiner testified that the deceased victim died of two gunshot wounds, both of which were fatal. *Moore*, 2016 WL 5210866 at *3, 6. Thus, assuming *arguendo* that the petitioner's statement was admissible, the Court finds that there was sufficient evidence to find the petitioner criminally responsible for the conduct of his co-defendants in killing one of the victims while attempting to rob him. The Court therefore finds no prejudice in appellate counsel's performance in this respect.

The Court understands the petitioner to allege that appellate counsel was ineffective in waiving the issue of the prosecutor's disqualification for a conflict of interest as a result of his prior counsel's joinder of the office of the district attorney general. The record in case 280014 reflects the entry, on 13 January 2012, of an order in co-defendant Butler's and the petitioner's cases, 280013 and 280014, respectively, granting their motions to disqualify the office of the district attorney general with respect

to prior counsel but denying their motions in all other respects. The order provides in part:

> To the extent that the defendants contend that the result would be different under the current version of the Rules of Professional Conduct, Tenn. Sup. Ct. R. 8, the Court respectfully disagrees.
>
> . . . .
>
> Rule 1.11(c), on the other hand, specifically governs situations arising when a lawyer leaves private practice to represent the government. Tenn. Sup. Ct. R. 8, RPC 1.11(c), Cmt. (10) (2003). Rule 1.11(c) states that a government lawyer shall not "participate in a matter in which the lawyer participated personally and substantially while in private practice." Id. at 1.11(c)(1). The disqualification in this situation is personal, and "paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated." Id. at 1.11, Cmt. (8). Neither Rule 1.10 or 1.11 adopts an appearance of impropriety standard. Id. RPC 1.10 and 1.11; see also Tenn. Bd. Prof. Resp., Formal Op. No. 03-F-147, 2003 WL 21540653, at *2 (June 13, 2003). Thus, assuming that Mr. Poole would still be employed by the district attorney's office at the time of a theoretical third trial of Defendant, and assuming that no further or new screening procedures would be implemented by the office, it appears that Mr. Poole's lack of any contact with or participation in Defendant's trial would be sufficient to insulate the district attorney general's office from imputed disqualification under Rule of Professional Conduct 1.11(c). Accordingly, assuming arguendo that it was error on the part of the trial court not to disqualify the Hamilton County district attorney's office from prosecuting Defendant's second trial, such error would be harmless in light of the new Rules of Professional Conduct. A new trial would not give Defendant any benefit of being prosecuted by a prosecutor in place of the Hamilton County District Attorney.

State v. Casteel, 2004 Tenn. Crim. App. LEXIS 814, * 42-44.

The Court therefore finds no prejudice in counsel's performance in this respect.

The Court understands the petitioner to allege that appellate counsel was ineffective in waiving the issues of a mistrial on the ground of a juror's discussion of the case '"outside the jury"' with other jurors. The transcript of the trial is not in evidence. The only evidence at the post-conviction hearing about this issue was the petitioner's

testimony that, in response to a juror's talking about knowing the victim's family, the Court questioned and dismissed the juror. Thus, there is no proof that the juror was talking with other jurors or did anything more than alert the appropriate officer with her concern. The Court therefore finds no prejudice in appellate counsel's performance in this respect.

The Court understands the petitioner to allege that appellate counsel was ineffective in not including the transcript of the suppression hearing in the record on appeal. Appellate counsel did not challenge the denial of the motion to suppress the petitioner's statement. He did challenge the state's failure to record the petitioner's entire statement. Because the record on appeal did not include a transcript of the suppression hearing, the Court of Criminal Appeals presumed that this Court's findings based on evidence at the suppression hearing were correct. The only findings from the suppression hearing relevant to the *Ferguson* issue on appeal, however, were the findings that the state did not record the entire interview and did not do so because there was first a battery failure and then a memory failure. Resolution of the *Ferguson* issue did not depend on the correctness of the decision to admit the petitioner's statement.

To the extent that the petitioner faults appellate counsel for not challenging the admission of his statement, the Court respectfully notes that, at the suppression hearing, the Court did not accredit the petitioner's testimony that he did not receive a *Miranda* warning or initial and sign the acknowledgement-of-rights-and-waiver-of-rights form, accrediting Det. Wenger's testimony that the petitioner did so. Now, after the post-conviction hearing, the Court respectfully finds the petitioner even less credible than before. His present alibi is not entirely consistent with his original alibi. His post-

conviction testimony regarding counsel's awareness of police brutality is inconsistent with counsel's post-conviction testimony and his own medical records. The Court therefore finds no prejudice in counsel's performance in this respect.

B. Newly discovered evidence

The Court understands the petitioner to allege that newly discovered evidence, a handwritten letter from co-defendant John Simpson, confirms his innocence. By itself, this allegation does not state a claim for post-conviction relief. *See* T.C.A. § 40 30 103 (conditioning post-conviction relief on the existence of a conviction or sentence that is void or voidable for violation of a constitutional right). An allegation of newly discovered evidence may state a claim for the writ of error *coram nobis*. *See* T.C.A. § 40 26 106(b) (authorizing the writ of error *coram nobis* in criminal cases in which there is newly discovered evidence that might have affected the judgment).

The petitioner, however, did not introduce the letter. The Court therefore finds no ground for post-conviction relief or the writ of error *coram nobis*.

IV. Conclusion

Finding no ground for post-conviction relief, the Court concludes that the subject petition should be dismissed. An order will enter accordingly.

Don W. Poole, Judge