IN THE CRIMINAL COURT OF DAVIDSON COUNTY
AT NASHVILLE TENNESSEE

Christopher Ferrell	)
Petitioner	)
	)
Vs.	)
	)
State of TN	)
Respondant	)

PETITION FOR POST CONVICTION RELIEF

Comes the petitioner, Christopher M. Ferrell, and petitions this honorable Court to grant Post Conviction Relief, to wit: the reversal of his conviction and the striking of the sentence and judgment against him. In support, petitioner submits the following:

History

Petitioner was charged with Second Degree Murder in the death of Jerald Wayne Mills on 23 November 2013. Petitioner was represented at trial by David Raybin 02 March 2015. He was convicted of Second Degree Murder after a jury trial, and was sentenced to twenty (20) years.

Petitioner immediately filed for a direct appeal. His Rule 11 Application for Permission to Appeal was denied April, 2017.

Jurisdiction

This petition is timely filed, and this Court is the appropriate venue. This Court has jurisdiction, per T.C.A. 40-30-101.

Petitioner is currently incarcerated at Northeast Correctional Complex. His custodian of record is warden Randy Lee. His address is P.O. Box 5000, Mountain City, TN 37683.

Issues Presented for Review:

I. Trial Counsel Was Ineffective
II. Petitioner's Defense Was Affected By Storm
III. Improper Argument

Ineffective Assistance of Counsel

Legendary attorney David Raybin, despite his reputation, failed completely in his representation of petitioner. His representation fell well below any professional standard expected of counsel, and was so deficient that but for counsel's errors and deficiencies, there is a reasonable probability that petitioner would have enjoyed a different outcome.

Counsel's performance, while normally governed by Strickland and Baxter, was so deficient as to be nonexistent, falling under Cronic.

Of the seven things one would expect counsel to do in defense of his client, counsel erred grievously in all seven areas. He failed to call crucial witnesses; he failed to obtain experts, where they were necessary; he failed to obtain physical evidence, where he knew it existed and was readily available; he failed to file motions that would have affected the trial in its entirety; he failed to cross-examine effectively; he failed to raise objections; he failed to subject the State's case to the adversarial process.

The failures listed below are not listed chronologically, but by severity.

1.) Failure to Suppress Interrogation Video

At trial, the State played, in its entirety, the video of Detective Leonard Peck's interrogation of petitioner. In this video, filmed at the Davidson County Metro Police Station, petitioner is questioned without the benefit of counsel, and ultimately confesses that he shot the decedent because he thought Mills had a gun; and that, on finding the deceased was unarmed, he altered the crime scene. He also confessed that he had not been truthful in his initial statements about the decedent being armed.

Upon the arrival of police at the scene of the shooting, petitioner was placed in custody. He was not free to leave, he was placed in cuffs in the back of a squad car, and was held for hours before being ultimately driven to the police station to be interviewed. The police were aware, or reasonably should have been aware that petitioner had an attorney of record, Jay Norman, but Mr. Norman was not notified and petitioner was given no chance to call Norman himself.

Petitioner's parents and girlfriend asked police to release him into their care, promising to bring petitioner back for questioning after rest and a meal. Those requests were denied.

Detective Peck asked a number of questions regarding the events of the evening, and took petitioner through the whole story repeatedly. Ultimately, when satisfied with a final version of the events, Peck informed petitioner of his rights and requested petitioner recite his story one more time.

This behavior is identical to the behavior barred in Mo. v. Seibert, 542 U.S. 600 (2004). The police are not allowed to purposely do a custodial interrogation, then do a second round when they have achieved, through the interview process, a theory of events they find acceptable. Even post-warning statements are not admissible after "such a deliberate end-run around Miranda." (ibid) (referring to Miranda v. AZ, 86 S.Ct. 1602.

Certainly anyone arguing to suppress this kind of interrogation would be well-armed with precedent; only a year before, Dailey v. State, 273 S.W.3d 94, was issued by the TN Criminal Court of Appeals, expressly forbidding the dual interrogation used in this case in Seibert—in fact, Dailey was a Davidson County case argued in the very same courtroom in which petitioner found himself.

Dailey v. State, is very specific. "… the extraction of an illegal, unwarned confession from a defendant raises a rebuttable presumption that a subsequent confession, even if preceded by proper Miranda warnings is tainted by the initial illegality."

The Court listed nine factors that courts should consider when examining the totality of the circumstances, all of which apply to petitioner:

1.) The use of coercive tactics to obtain the initial, illegal confession; By the time of the interview, again, petitioner had been up over 30 hours; he had been drinking; he hadn't eaten; he had been held in 36 degree temperatures for about 5 hours. By no means could anyone mistake this detention for a free and voluntary statement.

Throughout his statement, Det. Peck interrupted, often forcefully, saying he believed petitioner was lying or wasn't forthcoming.

2.) Temporal proximity of prior and subsequent confessions: In almost the same breath, as soon as petitioner has finished his initial statement, Det. Peck thanks petitioner and begins to Mirandize him, preparing for an admissible statement.
3.) The reading and explanation of Miranda rights before a subsequent confession: Det. Peck, who had been talking to petitioner, goading and questioning him for over 40 minutes, did not Mirandize petitioner until he made a statement Peck found acceptable.
4.) The circumstances occurring after arrest, including length of detention and deprivation of food, etc. This Opinion could have in fact been written about petitioner. At one point, he was held outside in freezing temperatures for four hours, wearing only jeans and a T-shirt.
5.) The coerciveness of the atmosphere, form of questions and repeated or prolonged nature of the questioning: it became apparent through Peck's badgering that the questioning would continue until petitioner confessed to some form of culpability. Petitioner repeatedly answered the same questions, and Peck rejected each answer in turn.
6.) The presence of intervening factors, including consultations with family members: Since police at the scene refused to release petitioner to his family, and since they kept petitioner handcuffed in the back of a police car, it can be said the State minimized any intervening factors from influencing petitioner at all.
7.) The psychological effect of having already confessed; and whether petitioner was advised his prior statements were not admissible. On the one hand, petitioner was not so informed; on the other hand, the original statements were admitted without a peep from defense counsel, and without a word of concern from the State or the trial court.
8.) Whether the defendant initiated the conversation: Det. Peck, without irony, thanked petitioner for coming to the station to give a statement. It was the equivalent of thanking the turkey for coming to Thanksgiving dinner. Counsel had access to half a dozen witnesses to testify that this was a custodial interrogation, and would much rather be home with his family, where he would be able to obtain counsel before giving an interview.
9.) The petitioner's sobriety, intelligence and education.

The bulk of these determinations presume that the secondary statements are the statements in question, and that the initial pre-Miranda statements are inadmissible. This case is more egregious than Dailey for two reasons: first, the State used the entire statement, including the pre-Miranda interview that should have been automatically suppressed; second, Dailey was decided January, 2009. The State was warned about this type of behavior. The fact that the same police department acted in such a way such a short time after being warned establishes a pattern and creates a presumption of intent: an intent to make an end-run around Miranda and deliberately subvert petitioner's rights. The failure of counsel to suppress this interrogation is far below the expected performance level of a professional attorney.

Counsel, who had been informed of the State's intent to use the video, did not request its suppression; he did not object to its being played for the jury, in part or as a whole.

The video, which showed petitioner confessing to being deceitful, was obviously harmful to his case. Further, at the time of the interview, petitioner had been awake over 30 hours, had been drinking, and had endured traumatic events; he did not present an image that was compelling or endearing.

Counsel's failure here was a failure to file timely motions, a failure to object and a failure to subject the State's case to the adversarial process.

Failure to Present Witnesses/Incoherent Strategy

The only genuine strategy counsel asserted was that the defense would not malign the decedent, Wayne Mills. Although several people reported Mills' outrageous and belligerent behavior that evening, although Mills was so menacing three people fled just before his death, counsel did not ask any of them to testify to that.

However, as soon as petitioner took the stand, counsel asked him to narrate the events of the evening, specifically including the outrageous and belligerent behavior counsel had avoided talking about previously.

The crux of this trial was petitioner's credibility. In fact, the State had made a number of statements disparaging petitioner's honesty, telling the jury he was a liar who would say anything to save his own skin. Tr. P. 126.

Counsel's incoherent strategy decision was at odds with itself and at odds with petitioner's express will. Its end result was that petitioner told a tale that seemed self-serving, was unverified, and at odds with the testimony of every previous witness.

Petitioner requested a different strategy, involving the following witnesses:

1. Susan Branham, who would have been able to testify that: she heard decedent Wayne Mills shouting about "cocaine and whores" immediately prior to his conflict with petitioner; that she feared for petitioner; that she left the Pit and Barrel in haste because she was in fear for her safety and the safety of the people with her because of Mills.

Ms. Branham was also prepared to testify about a discussion she had with Eric Beddingfield, in which Mr. Beddingfield stated that he regretted not taking Mills with him when he left the Pit and Barrel; that "when Wayne gets like that I'm the only one that could talk him down"; and that it was his personal belief that petitioner did not kill Mr. Mills intentionally.

This last testimony regarding Mr. Beddingfield directly contradicts virtually every bit of his testimony at trial, that Mills was a friendly teddy bear who never got belligerent.

Nadia Markem was also present during Ms. Branham's conversation with Beddingfield and would have confirmed the same.

2. Ken Ryan, who would have been able to testify that: he had seen Mills on the evening of his death; that Mills was intoxicated and combative; that he started an altercation at Full Moon Saloon that evening.

Mills had been confrontational before entering Full Moon Saloon, and was allowed in only after Shooter Jennings asked Ryan to let him in as a favor.

3. Jared Ashley, who would have been able to testify that: that he saw Mills in an altercation with a customer at Full Moon Saloon the evening of his death; that Mills was intoxicated; that he (Ashley) put Mills on the phone with his wife Taylor Ashley to try to defuse the situation.

Mr. Ashley would also have been able to testify that he had gone partying in Alabama with Mr. Mills, and that they were unable to gain entry into any of several clubs or bars because Mills had caused trouble everywhere he had been.

4. Bartender Missy, John ____, Shooter Jennings' tour manager, Full Throttle Moonshine Promotions Girl, all of whom would have been able to testify that: Mills was combative and ready for a fight on the night of 23 November, 2013.
5. Ferrel's Next Door Neighbor, who would have been able to testify that he was up late on 23 November, 2013; he heard the alarm on his Mercedes going off; that he went to investigate; that he found Mills leaning against his (the neighbor's) car smoking a cigarette; that when he told Mills to get off his car, Mills flipped his cigarette at him and said, "You can die."
6. Stacey McCoy, who would have testified that she had witnessed illegal drug use by Mills and Beddingfield on previous occasions; that he had been aggressive and even combative with bar staff on multiple occasions.

   She also would have been able to refute intimations by the State that petitioner used to beat her; her skin was often red because she suffers a skin condition.

   Also, possibly most importantly, she would have testified about petitioner's custody that evening. She was not allowed to talk to petitioner; Det. Peck told petitioner he "had to go." Neither she nor petitioner's parents were allowed to accompany petitioner to the police station. And on being released, petitioner was in a terrible condition.

With such a wide plethora of witnesses available to speak for petitioner, either to corroborate petitioner's testimony or to refute the State's claims, it is incomprehensible why none of them were called, with the exception of Ms. Branham, who was unavailable because of weather (see issue III. below).

Petitioner requested specifically that these witnesses be called to testify; unfortunately, counsel and investigators did not speak to most of them, much less subpoena any of them.

Counsel's failure to investigate or call witnesses falls below the professional standards expected of an attorney. In this case, petitioner was prejudiced by counsel's complete failure that fell into Cronic levels: the complete absence of advocacy or representation. But for this failure, there is a strong likelihood petitioner would have enjoyed a different outcome.

Petitioner raises the issue of counsel's incoherent "strategy" because counsel's own actions were not in keeping with his own strategy. If it was indeed counsel's plan to not malign the victim in any way, it is incomprehensible why counsel would ask petitioner to malign the deceased immediately upon his being sworn in.

Further, it was not a strategy petitioner consented to, and it was in direct contravention of petitioner's wishes. And ultimately, strategy decisions are to be left to clients, not attorneys.

Ultimately, petitioner is not attempting to Monday Morning Quarterback. Strategy choices are not normally reviewed on appeal. Rather, petitioner asserts that counsel's ill-conceived poorly-thought-out plans did not represent either petitioner's wishes or his best interests, but counsel proceeded full-steam anyway. For this reason, this issue must be reviewed and is not waived.

Failure to Obtain Experts

A. On cross-examination, medical examiner Erin Michelle Carney admitted that, given the amount of alcohol and Adderall in his system, Mills was likely intoxicated. Given that she normally doesn't deal with the living, she was unable to state firmly the degree of impairment, or the behavioral effects of mixing alcohol and Adderall.

Nashville was rocked on 20 September 2014, when Titans kicker Rob Baronis, on a mix of the same drugs, went on a rampage, which ended with his death. He had less alcohol and Adderall in his system than Mills. His BAC was only .218.

An expert in drugs, alcohol or toxicology would have been able to testify unequivocally that the mix of chemicals in Mills' system would have made him into a manic rage-machine with an inclination for violence.

B. An independent maxi facial surge stated that during a review of autopsy results and x-rays it was noted that the decedent, Mills, had suffered many fractures and micro fractures to his skull. Because they had healed over time and were not directly related to the events of 23 November, 2013, they were not mentioned at trial.

Apart from being obvious proof of Mills' violent history, the many micro fractures indicate a condition called "CT". This results in a severe anger-management problem, to say the least. CT causes its sufferers to enter a blinding rage, often with little or no provocation.

Any medical expert who specializes in brain injury or trauma would have been able to testify that this condition would be disastrous mixed with drugs and alcohol and would have been able to assert that Mills could indeed suffer from this condition.

It is worth noting that Mills was 6'5" and weighed 265. The petitioner is 5'10" and weighs about 200, and is not athletic.

This is more than relevant. It is crucial to petitioner's affirmative defense that he was forced to shoot Mills in defense.

The argument focused on whether Mills was armed when petitioner shot him. He was, in fact, unarmed.

However, the legal standard is whether a reasonable person would believe his life was in danger. Allsup, 73 Tenn. 362. Mills was a giant, intimidating, imposing

individual. Add to that the insane, animal rage caused by an unfortunate chemical mix and a medical condition, and the jury would have seen another side of Mr. Mills.

Since the ultimate goal of the affirmative defense was to convince the jury that petitioner feared for his well-being, pistol or not, even just one of the two experts would have been a powerful tool in petitioner's argument. It would also have countered the State's claim that Mills was a harmless little lamb.

The failure of counsel to obtain experts where needed was another example of deficient performance to the detriment of petitioner's case, and merits reversal. State v. Edwards, 868 S.W.2d 682; West v. State, 1995 WL 241548.

Failure to Cross Examine

Counsel stated, prior to trial, that he did not intend to raise Mills' prior conduct, either charged or uncharged, unless the State opened the door (TR. p. 27).

The State almost immediately opened the door (TR p. 119). The State's witness testified that Mills had never had a firearm, which was already inappropriate. See Copenny v. State, 888 S.W.2d 450. The witness continued to testify under the State's questioning that Mills was "a big ol' teddy bear" who never hurt anyone in his life.

Apart from being prejudicial to petitioner's case, it was also patently untrue.

Apart from the many witnesses listed above, who had seen abusive, violent behavior from Mills that very evening, counsel was given a list of witnesses by petitioner, witnesses who would have testified to prior violent acts by the decedent Wayne Mills:

Officer Michael Passaro, a Nashville Metro PD patrol officer, who was nearly killed by Mills July 2010;

Ericka Sanders, a bar manager in mid-town Nashville, who often saw Mills hopped up on drugs and alcohol, who often saw Mills asked to leave by staff because of his bullying, aggressive actions;

Kory Ardicino, a bartender who often saw Mills acting aggressively;

Peyton Turner, a bartender at Loser's Bar and Grill, who had to cut Mills off because of his behavior; who asked Mills to leave; who saw him become belligerent with security staff, and who banned Mills from Loser's for bad behavior and not paying his tabs;

Nate Bigby, bar manager, Rebar, who had asked Mills to leave because of belligerent behavior.

In essence, without the need to investigate in the least, counsel had so many witnesses at his fingertips he could easily have forced the State to stipulate A) that Wayne Mills was a violent aggressive drunk, and B) that Eric Beddingfield was completely untruthful.

As listed above, it was also hinted at by officers that petitioner beat his former girlfriend, Stacy McCoy. While none of that should have been allowed in at all, counsel failed to object in the least. The moment passed unchallenged and counsel failed to inquire, even though he had readily available proof that the officer was either mistaken or untruthful.

Finally, perhaps most bizarre, counsel failed to mention during his cross-examination of police, a previous encounter petitioner had with the police department. In the summer of 2013, a short time before these events, police

investigated an incident at petitioner's home. An extremely expensive firearm, a $4,500 Sig Sauer pistol was missing immediately after police went through the place, and petitioner filed a formal complaint with the department.

Officer Michael Kent was one of the officers accused of theft by petitioner, and yet, even as he testified against petitioner, counsel didn't question him about it; counsel didn't question whether that past experience may have tainted his perspective toward petitioner; whether that may have resulted in some bias.

But more telling, the officer who investigated the alleged theft was Det. Peck, the lead investigator in the case against petitioner. Given the minimal time elapsed between petitioner's claim against the police department and that same department's decision to charge him with murder, counsel's failure to cross examine any of the officers about it is incomprehensible and unjustifiable.

But that failure continued, and produced even worse results.

The State attributed the statement, "He tried to rob me," to petitioner (TR. p. 123). The State had free rein to decide what petitioner meant by the statement, ultimately implying that petitioner was trying to say Mills had tried to rob him (TR p. 126).

Even when petitioner himself took the stand, counsel failed to ask about the statement, what petitioner meant, or who it referred to. Given every opportunity to perform his duty, counsel failed continuously. Petitioner never intended to say Wayne Mills tried to rob him. At no point did he intimate, in initial statements to police or to Det. Peck or to his friends and family, that Wayne Mills tried to rob him.

Rather, petitioner was worried about the bar's daily receipts, totaling about $4,000 in cash, left unattended in the bar while police were alone in the building. Petitioner had also bought a 2002 Cadillac Escalade earlier that day, and petitioner believed the title sat near the bar, in a bank bag with the money.

Petitioner was worried he was about to be robbed by the police a second time.

Certainly petitioner's statement, introduced without context, should have been clarified. But the statement also reflects a degree of animosity between petitioner and the police that would have painted a dramatically different picture of events for the jury.

This complete lack of meaningful cross-examination unduly prejudiced petitioner. As in Higgins v. Renico, 470 F.3d 624, this repeated failure to cross examine requires the reversal of petitioner's conviction and a remand for retrial.

Jury Instructions

For the most part, counsel was very particular about jury instructions, especially as they relate to self-defense. It is worth noting that counsel wrote a book with a very detailed section about jury instructions in 1986.

However, jury instructions regarding self-defense have changed significantly in a few regards since 1986.

Counsel failed to request an instruction that petitioner had no duty to retreat. See, e.g., State v. Renner, 912 S.W.2d 701. Counsel also failed to include this doctrine in his argument to the jury.

Petitioner was literally minding his own business, a bar he owned, while Mills' loud and intimidating behavior caused other customers to leave. Mills smoked in the bar, despite petitioner asking, then telling him not to.

Mills threatened petitioner, then smashed a glass on the ground.

After Trayvon Martin and a number of other very famous self-defense cases in recent news, the jury could not be expected to know the TN rules regarding the duty, if any, to retreat.

Petitioner had no obligation to retreat. See State v. Kennamore, 604 S.W.2d 856; State v. Bottenfield, 692 S.W.2d 447. Jury instructions regarding that doctrine, petitioner's rights and obligations, were warranted.

However, by failing to make a special request for a jury charge, counsel waived petitioner's plenary review. TCA 40-18-110(c); State v. Page, 184 S.W.3d 223. "The issue is subject to waiver for purposes of plenary appellate review when the issue is not timely raised and properly preserved."

In other words, petitioner had a right to a specific jury charge; his right to that charge and his right to review the failure of the Court to read that charge, both rights were forfeited by the failure of counsel.

Failure to Object

Failure to preserve petitioner's rights and issues for appeal was not limited to jury instructions. On three separate occasions, three expert witnesses were not allowed to testify as to issues directly in their purview, and counsel said nothing.

Most notably, investigator Larry Flair, a 41-year veteran of the police force and former head of the Murder Squad, was not allowed to testify as to his opinion about petitioner's intent during the shooting. The State's reasoning was that the opinion required speculation, and was outside Flair's training and area of expertise.

On the contrary, Flair was, again, a 41 year veteran of the police, homicide detective who was head of a squad of homicide detectives. He holds degrees in criminal justice, which includes courses in psychology. His police training included psychology. His training in interrogation techniques included intense training in behavioral analysis. He encountered literally thousands of homicides, from accidental killings to murder sprees, and had to analyze the motives, motivations, mind sets and behaviors of each killer. He had to psychoanalyze killers, given only the details of a crime scene, in order to hunt those killers.

There is no one on Earth more qualified to judge the intent of someone who has committed a homicide.

Also, it must be noted the State relies heavily on the opinion of detectives when determining whether to charge a potential defendant, and what to charge him with.

The State also prevented Blood Spatter Expert Artur Hipp from answering a question about blood spatter (TR p. 366) and TBI weapons expert Teri Arney from testifying about the comparative efficacy and lethality of two firearms (TR. p. 600).

Since petitioner killed the decedent with a small-caliber pistol with literally no ability to aim, when there was an accurate pistol with highly lethal large caliber shotgun rounds right next to it, Arney's answer would have been highly probative.

The value of experts as witnesses is they are able to testify to their broad training and experience, which go beyond our own. While questions of blood spatter might require speculation on a layman's part, Officer Hipp might be able to speak with clarity and certainty.

Certainly it was error to not allow the experts to answer any questions that might benefit petitioner. But it is baffling that counsel would have no objections, even when such testimony was both clearly admissible and clearly beneficial to his client.

See, e.g., Rules of Evidence 702; Tucker v. AT&T, 794 F.Supp. 240; Otis v. Cambridge Mutual Fire Ins. Co., 850 S.W.2d 439; State v. Brooks, 909 S.W.2d 854.

Counsel's failure to present any challenge whatsoever generally constitutes waiver of direct review, so again counsel's failure affected both petitioner's rights at trial and on appeal. State v. Estes, 2005 Cr. App. LEXIS 674. This waiver accomplished no good purpose, and certainly prejudiced petitioner's case.

This failure requires reversal. Dean v. State, 59 S.W.3d 663.

Lackadaisical Representation

Throughout trial, counsel did not appear zealous or even capable. Prior to trial, at a hearing regarding investigator Flair's qualifications, counsel did not have Flair's credentials, and the pre-trial hearing had to be put off (TR. p. 77).

Twice during opening statements, he was unable to remember key parts of the case (TR. p. 163); he forgot what questions he intended to ask (TR. p. 78, 374) and even forgot the exhibit number of a piece of evidence he needed for petitioner's defense and was thus unable to present it (TR. p. 580).

This Court is intimately familiar with the standard set forth in Baxter v. Rose, 523 S.W.2d 930; Strickland v. Washington, 104 S.Ct. 2052, and is no doubt aware of the standard outlined in Cronic v. U.S., 104 S.Ct. 2039.

First, a la Baxter, petitioner must establish error. Petitioner has done so, listing several pages of errors, from pre-trial hearings to jury instructions. Each is a violation of clearly-established rules or precedents.

Next, petitioner must establish prejudice. That, also, has been done. Of the harm done to petitioner's case at each stage of trial, there can be no doubt.

Finally, petitioner must establish that, but for counsel's errors, there is a reasonable probability that he would have enjoyed a different outcome. He need not establish that he would have won; only that a reasonable probability exists for a different outcome.

Petitioner has presented at least one precedent for each individual error, establishing that he is entitled to relief for any one of the individual failures of counsel. In other words, the Court of Appeals has already decided that each error, taken individually, constitutes an error so great that it merits the reversal of petitioner's judgment and sentence.

Taken cumulatively, a fortiori, the errors constitute such a grievous chain of events that a neutral observer can have no confidence in the outcome of petitioner's trial; that injustice has been done.

The Cronic standard, however, is also applicable here. Per Cronic, where counsel does literally nothing, petitioner's case is not subject to harmless error analysis, but is automatically entitled to relief.

Counsel failed at each stage of trial, from pre-trial hearing to final sentencing. He erred at every conceivable point, and an outside party would be hard-pressed to state exactly what counsel did.

Given the scope and breadth of law and evidence that was favorable to petitioner that remained unused, from witnesses ready to testify on his behalf to experts, both experts at trial and experts not obtained, to motions not filed, objections not raised—there can be no doubt that petitioner did not have the benefit of counsel in any way but name. Petitioner has the right to more than a warm body for representation.

These errors are a violation of petitioner's Sixth Amendment right to adequate counsel.

Witness Kept Out By Storm

Counsel did actually subpoena one witness, Susan Branham. She would have testified, among other things, that Wayne Mills was belligerent and threatening just before his death; that she left because she feared for her safety; and that she feared for petitioner's safety because of Mills.

The storm that hit Nashville during trial closed the city down. The jurors in this case were actually brought to Court by police officers driving 4 X 4's.

The police made no provision to bring Ms. Branham.

Ms. Branham did attempt to drive to the trial, but wrecked her vehicle in her own driveway.

Petitioner has an absolute right to present witnesses in his defense. See, e.g., <u>Holmes v. SC</u>, 547 U.S. 319, 126 S.Ct. 1727. Petitioner had only two witnesses to call for his own defense, investigator Flair and Ms. Branham. Where unavoidable circumstances intervened, counsel should have either requested that the same vehicles used to drive jurors be used to drive Ms. Branham (since, without witnesses there could be no fair trial, and thus no reason to deliver jurors to the court house) or ask for a continuance. To all appearances, counsel did neither.

This issue is thus raised in two aspects: it is clear that petitioner was unable to call a witness that would have aided his defense, and indeed was a vital part of his case. It is also clear that this inability was through no fault of his own.

This violation must be taken as what it is, a violation of his Sixth Amendment rights, or it must be taken in its aspect as a failure of counsel. In either form, it is clear it is an error that can only be resolved by a new trial, at which Ms. Branham's testimony can be heard.

Again, Ms. Branham's testimony refutes the testimony of the State's lead witness, Eric Beddingfield, and calls his credibility into question. Her testimony corroborates petitioner's claims that Mills was erratic, belligerent and menacing. It establishes that a reasonable person would be afraid of Mills and believe his life or health was in danger.

There can be no doubt her testimony was crucial to petitioner's case, and the loss of her testimony calls into question the reliability of the outcome.

Improper Argument

The prosecutor objected strongly to Investigator Flair giving an expert opinion about petitioner's intent and mindset because, to paraphrase, "Flair isn't a psychologist; it calls for speculation." (TR. p. 86).

Almost immediately (TR p. 123) the prosecutor made sweeping derogatory statements about petitioner's intent and mindset. The ADA stated, "He (petitioner) didn't like that!" and "The defendant says whatever he needs to!"

The State, at many points of argument, called the petitioner a liar, spoke about his credibility and what petitioner was thinking.

The State is barred from improper argument that speaks directly on the credibility of witnesses or defendants.

Relief

For the foregoing reasons, petitioner requests this Court grant the following relief:

* Appoint counsel for the perfection of this brief;
* Hold an evidentiary hearing for the presentation of proof, the testimony of witnesses listed herein and the opportunity to argue on his behalf;
* The reversal of his conviction and the judgment against him;
* And such other relief as this Court deem fit.

Respectfully submitted,

____
Chris Ferrell