IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE	:	
	:	
v.	:	No. 296296
	:	Division III
WILLIAM FRANK HAWK	:	

MEMORANDUM

Before the Court are the second amended motion for judgment of acquittal or new trial and pre-hearing memorandum of the defendant, by and through counsel, and the answer and post-hearing brief of the state, by and through the district attorney general. On 31 May 2016, almost thirty-five years from the date of the alleged offense on 3 June 1981, the trial of the defendant commenced and, on 6 June 2016, it concluded with a conviction for first-degree murder and a sentence of life imprisonment. After trial, the defendant's trial lawyers were replaced by his current lawyers, who have alleged fourteen grounds for relief, including multiple instances of ineffective assistance of counsel. The motion has been pending for a very long time, but, before it was heard, the parties agreed that the continuances were all necessary and consensual. The following circumstances, acts, and omissions individually and cumulatively are alleged by current counsel to have deprived the defendant of a fair trial:

(1) a pre-indictment delay of thirty-four years;
(2) the discovery violations of the state in:
    a. not disclosing four recorded jail calls and attempting to cross-examine Witness Sosebee with one such call, and
    b. not disclosing the post-conviction dismissal of an unrelated case by the office of a former district attorney general, Mr. Gary Gerbitz, on the ground that Witness Slaughter had committed perjury in the unrelated case;
(3) the errors of the Court in:
    a. denying his motion to dismiss for failure to preserve large, metal barrel and radiographs and his request for an instruction regarding the presumptive favorability of the missing evidence;
    b. allowing Witnesses Salyer and Slaughter to testify about matters inadmissible under Tenn. R. Evid. 404(b);
    c. infringing his rights to impeach Witness Slaughter and present a defense by

limiting cross-examination of Witness Slaughter;

d. allowing the medical examiner, Dr. Metcalfe, to testify about the cause of death;
e. allowing evidence that Witness Slaughter had passed "a lie detector test" and not giving a curative instruction;
f. allowing rebuttal testimony from a witness who was in violation of the rule of sequestration and not allowing him to recall Witness Sosebee; and
g. instructing the jury that it could infer where the murder occurred from where the body was found;

(4) the misconduct of the prosecutor in:

a. introducing evidence that Witness Slaughter took and passed polygraphs and
b. vouching for Witness Slaughter;

(5) the ineffectiveness of counsel in:

a. not requesting the judge's recusal;
b. not disclosing a conflict of interest as a result of a law partner's representation of the district attorney general in the matter of a subpoena from a governmental authority in the months before the trial;
c. not alerting him to increasing publicity of lead counsel's arrest for a misdemeanor, its effect on the jury venire, and the desirability of a continuance;
d. not challenging the pre-indictment delay or preserving evidence regarding the prejudicial effects of the delay with respect to the loss of evidence, the unavailability of witnesses, and his ability to develop defenses or use evidence that there were ten other possible perpetrators;
e. not raising venue and territorial-jurisdiction issues;
f. not tendering a special instruction or at least the pattern instruction on failure to preserve evidence or objecting to a limitation on arguing failure to preserve evidence and reasonable inferences therefrom;
g. not reviewing his recorded jail calls, requesting or clarifying exclusion of the calls for any purpose, including for the state's violation of Tenn. R. Crim. P. 16(a)(B), or advising him regarding the effect of the exclusion of the calls during cross-examination of Witness Sosebee;
h. not preparing him to testify in his own defense, which was a factor in his decision not to testify, agreeing among themselves about whether he should testify, considering or advising him of the potential use of an FBI recording of a 1986 conversation between him and Witness Slaughter in which he denies involvement in or responsibility for the victim's death as a prior, consistent statement, or advancing all grounds for admission of the recording, including subsections (5) and (26) of Tenn. R. Evid. 803;
i. with respect to Witness Slaughter, not requesting additional discovery, arguing all available grounds for admission of the 1986 FBI recording for which there was no transcript, objecting to refreshment of the witness's recollection with the 1986 FBI recording outside the jury's presence, or cross-examining the witness about his lies under oath in the *Toney* case;
j. with respect to Witnesses Bales, Bobby Hawk, Saylor, and Williams, not effectively cross-examining the witnesses with prior, inconsistent statements

or evidence of bias;

k. not objecting to prosecutorial misconduct in referring to polygraph evidence and vouching for Witness Slaughter, discussing mistrial options with him, requesting a mistrial, requesting curative instructions regarding both the inadmissible evidence and the prosecutorial misconduct, despite the Court's agreement regarding the propriety of curative instructions, ensuring the jury's receipt of curative instructions, or objecting to final instructions that did not include curative instructions; and

l. not arguing the state's failure to prove commission of the offense before return of the indictment; and

(6) the insufficiency of the evidence of first-degree murder, including the lack of evidence on the face of the indictment regarding the date of its return.

At a hearing on 26 and 27 March 2019, four witnesses, Gerald Webb, Esq., Bill Speek, Esq., James F. Logan, Jr., Esq., and David Raybin, Esq., testified and forty-one exhibits were introduced. On 8 April, 2019, the state filed a post-hearing brief, denying the existence of any ground for relief. For the following reasons, the Court decides that the motion should be granted.

I. Summary of testimony

Gerald Webb, Esq.

Mr. Webb testified that he represented the defendant in *State v. Reed*, whose conviction was reversed because of the introduction of polygraph evidence. On 29 December 2016, he and Mr. Speek visited the defendant, who was already represented by Mr. Logan. The defendant retained their firm to represent him, too, and signed a contract. It was understood, though not explicitly stated in the contract, that the defendant would be represented by Mr. Logan and Mr. Speek. Later, it was understood that the defendant would also be represented by Mr. Turner. Initially, Mr. Logan was lead counsel. Later, Mr. Speek was lead counsel.

Mr. Webb did assist in strategizing and selecting a jury. Considering four lawyers at the defense table to be inappropriate, however, he did not remain at the defense table for the trial. He was unaware of the defendant's waiver of a continuance on the ground of Mr. Speek's arrest.

Mr. Webb is knowledgeable about gang data, which was the subject of a subpoena from the city council to the district attorney general, General Pinkston. As a result of the withdrawal of the subpoena, he did not represent General Pinkston before the city council.

Bill Speek, Esq.

Mr. Speek testified that he has tried many murder cases and has known Mr. Logan by reputation for years. He has two partners and two associates.

Mr. Speek thinks that the defendant's then-wife contacted him and his office contacted Mr. Logan, who initially represented the defendant. He met with the defendant in jail. The defendant wanted Mr. Speek to represent him. The case was too big for one lawyer. Although the defendant had three lawyers and the responsibilities for examination and cross-examination of witnesses were divided among them, Mr. Speek thinks that final decisions were his.

Mr. Speek is doubtful that Mr. Webb agreed to participate in the representation. Mr. Webb did participate some, including in selecting the jury, but not throughout the entire trial.

On 19 March 2016, Mr. Speek was cited for a misdemeanor based on an event occurring a month before. He told the defendant about it when it happened and thinks there was also a newspaper report. On 28 May 2016, there was another newspaper report. At the time of the defendant's trial, he was being prosecuted by the state. The matter was never an issue for the defendant, but, from an abundance of caution, he had the defendant formally waive the issue on the day of trial. If the matter had been an issue for the defendant, he would not have continued to represent the defendant. A continuance to allow another lawyer to prepare for trial would have been necessary.

Delay was a major factor in the case. The barrel and a radiograph were not preserved.

The statements of witnesses, including Witnesses Bales, Slaughter, and Williams, changed over time. Memories faded. Witness Slaughter had had two strokes.

Mr. Speek does not recall discussion of dismissal issues; Mr. Logan was responsible for them. Had Mr. Speek known that Mr. Logan had prepared a motion to dismiss for pre-indictment delay, he would have filed it. Such a motion would have required the state to introduce proof and given the defense an opportunity to question witnesses.

The defense filed a *Ferguson* motion and Mr. Logan argued for the civil, not criminal, pattern instruction on missing evidence. The Court did not grant the motion, give the instruction, or allow argument about exculpatory inferences from the missing evidence, though the state did argue from the missing evidence without objection. Sometimes, counsel chooses not to emphasize bad facts by objecting.

There was discussion of recusal. The defendant would have deferred to counsel. Although the judge's son had prosecuted a federal case against the defendant, there was no real reason to seek the judge's recusal. Division III is very balanced.

The lawyers reviewed everything with the defendant. Mr. Speek identified witnesses, with the help of two investigators, found the witnesses, and met with the witnesses before trial. Every witness was assigned a lawyer. Although it is not unusual for there to be discrepancies between what witnesses say before and at trial, Mr. Speek consulted a psychology expert about witness preparation and recollection. Dr. Ross reviewed the defendant's and other witnesses' prior statements and evaluated potential testimony and, without meeting the defendant, opined that the defendant should not testify because he could not add value to the case.

The defense filed motions to suppress evidence. It also filed a motion for additional time for discovery but did not obtain a transcript of the 1986 recorded conversation. Although Mr.

Speek cross-examined Witness Slaughter extensively about the conversation, with a transcript, he could have done more. Whether the defendant knew that he was being recorded was crucial.

That Witness Slaughter was called as a witness was not a surprise. Although much of his testimony was in violation of a ruling, there were no objections. Mr. Speek was aware of Witness Slaughter's "issues with truthfulness" and, for this reason, called a former district attorney general, Mr. Gerbitz. Mr. Speek was not aware of the case of *Toney v. Davis*, 23 F.3d 408 (Table) (6th Cir. 1994), which states in part that "[o]n July 16, 1990, the District Attorney General for Hamilton County Tennessee moved for an order of dismissal based in part on Terry Slaughter's statement that he lied in his testimony during the original trial." Had he been aware of it, he would have used it, considering Witness Slaughter's testimony that he has lied but not under oath, Mr. Gerbitz's testimony that Witness Slaughter's lies had never affected the outcome of a trial, and the state's reference to both in closing argument.

Mr. Speek admits that he should have asked for a curative instruction or a mistrial on the ground that the prosecutor introduced inadmissible polygraph evidence. He does not remember why he did not do so after the Court's change of mind about a curative instruction, though, because a curative instruction could emphasize the inadmissible polygraph evidence, a mistrial would have been preferable.

The trial lasted six or seven days. About the defendant's decision to testify, Mr. Logan remarked, "We have not yet evaluated that." Mr. Speek admits that the decision was a last-minute one, during an evening break, though it had been discussed before then and Mr. Speek had anticipated that the defendant would testify. They talked about the defendant's background. They also practiced direct and cross examination, which they had not done before then. The defendant was not given questions and answers. Too much preparation of a witness can backfire

and make the witness's testimony seem rehearsed. The defendant's prior statements were also important.

After the prosecution rested, there was no real discussion about the defendant's testifying because the defendant did not believe that he could be convicted. Mr. Logan reviewed the waiver with the defendant, and the defendant made the decision.

Had the defendant wished to testify, Mr. Speek would have requested a continuance to allow for more preparation. Counsel needs to watch a trial unfold to complete such preparation.

The most important witnesses against the defendant were his ex-wife and an ex-girlfriend. Mr. Speek cross-examined them about their prior, inconsistent statements, as he would do again. They attributed their prior statements to having been frightened.

The defense moved for a judgment of acquittal, challenging the sufficiency of the evidence of venue but not the lack of evidence of pre-indictment commission of the offense.

James Logan, Esq.

Mr. Logan testified that he has practiced law and tried cases, including more than one hundred seventy homicide cases, since 1971. He practices in state and federal courts and, recently, has been doing less and less criminal work.

Mr. Logan began to represent the defendant in this case in September 2015 and remained lead counsel until January 2016. He still represents the defendant in a civil case.

Mr. Logan spent a lot of time, not all of which jail records reflect, with the defendant, who had a criminal history and was subject to a federal detainer. He reviewed discovery with the defendant, filed some motions, and, to avoid undesirable emphasis, decided not to file other motions.

Unlike Mr. Logan, the defendant did not believe that there was sufficient evidence for

conviction and, from the beginning, planned to go to trial. Even before the other lawyers were engaged, Mr. Logan had discussed the defendant's right to testify with him and told him that he should probably testify. The defendant knew that he had both a right to testify and a right not to testify. In Mr. Logan's view, there was no question that the defendant should testify.

Mr. Logan was the first lawyer to represent the defendant in this case. They discussed involving another lawyer, Mr. Webb, to assist with jury selection. Although Mr. Webb did go to jail with Mr. Logan and Mr. Speek, was in the conference room several times, and was in court on occasion, Mr. Logan does not think that he participated in jury selection or trial, despite his retention to assist with jury selection at least.

Mr. Logan did not file a motion to dismiss for pre-trial delay, though he did prepare a memorandum. He has no qualms about admitting his own mistakes.

The defense filed discovery motions, including a *Brady* motion. It did not receive the *Toney* case in discovery and he does not recall researching Witness Slaughter on Westlaw, though he did have pre-trial discussions with former DA Gerbitz and called him to testify. He was not aware of the case, which, he acknowledges, could have been used to impeach Witness Slaughter and refresh former Mr. Gerbitz's recollection, before trial.

Mr. Logan thinks that he suggested a memory expert and Mr. Speek and Mr. Turner suggested Dr. Ross, whose ability to convey the necessary expertise concerned Mr. Logan, though he was not his witness. Dr. Ross was not called. It would have taken time to prepare him.

Mr. Logan knew nothing about Mr. Speek's difficulties until he saw a report in the newspaper or on television. The judge inquired whether the matter would become an issue at trial. Before trial, Mr. Logan discussed the matter with the defendant, who wished to proceed.

The trial commenced on 31 May 2016.

Mr. Logan watched the jury's reactions to witnesses. Witness Bales' testimony was compelling. Witness Williams' testimony was less compelling or impactful. There was no preparation for the defendant's brother's testimony. He thinks that Mr. Speek should have cross-examined certain witnesses.

Mr. Logan was astonished by the General Pinkston's question to Mr. Gerbitz about whether he knew that Witness Slaughter had passed a polygraph. He objected and was again surprised by the Court's ruling allowing the question. Later, the Court raised the issue again and offered to give a curative instruction. Although such an error may not be curable, there was no discussion among the lawyers or with the defendant of a mistrial, which, he acknowledges, was an error on his part.

It is essential to evaluate a client's ability to testify and prepare for testimony. Failure to do so may constitute ineffectiveness. This involves reviewing discovery, reviewing testimony and recitation of facts, having someone cross-examine the client, and making notes but not writing questions. Preparation becomes a factor in the lawyer's recommendation to the client.

Mr. Logan did not prepare the defendant to testify. A final decision about whether the defendant would testify had not been made. Before April, he discussed the issue with Mr. Speek and there were discussions in Mr. Speek's conference room about the defendant's testimony. The defendant, though in custody, was available and had sufficient time to prepare.

Mr. Logan normally covers the defendant's decision whether to testify in *voir dire*, but that was not done in this case. He was no longer "the captain of the ship."

On the last day of trial, there was a conversation at jail about the defendant's decision to testify. All three lawyers, Mr. Logan, Mr. Speek, and Mr. Turner, were in the jail cell with the

defendant. The defendant evaluated the case, thought he could not be convicted, and decided not to testify. Mr. Logan does not remember any reservations about lack of preparation to testify on the defendant's part and does not mean to suggest that preparation would have made a difference to the defendant's decision.

David L. Raybin, Esq.

Mr. Raybin testified that he has been licensed to practice law since 1974. His resume was introduced as Exhibit 27. He has testified as an expert at least a dozen times, not always for the defense, though never for the state on the issue of the effectiveness of counsel. He charges a flat fee of thirty to thirty-five thousand dollars.

Mr. Logan approached Mr. Raybin about representing the defendant on the motion for new trial, possibly including a claim of ineffective assistance, and appeal. The defendant's wife also called and sent some things. Mr. Raybin declined to take the case. Current counsel was then hired and hired Mr. Raybin as an expert.

Mr. Raybin is familiar with the standards of effective assistance of counsel set forth in *Baxter v. Rose* and *Strickland v. Washington*. Sometimes, errors that individually do not amount to reversible error cumulatively do so, as in *State v. Watkins*, No. M2017-01600-CCA-R3-CD, 2019 WL 1370970 (Tenn. Crim. App. 26 Mar. 2017) (reversing convictions for cumulative error and remanding for a new trial).

In this case, Mr. Raybin reviewed seven thousand pages: the trial transcript, the technical record, the court's file, and the lawyers' files. He prepared a 19 March 2019 report, Exhibit 28. About issues other than counsel's effectiveness, including the prosecutor's conduct, he does not render an opinion. About some issues of counsel's effectiveness, Mr. Webb's representation of the defendant and Mr. Speek's arrest, he cannot render an opinion, in the latter instance, because

the defendant's knowledge of Mr. Speek's arrest is in dispute.

Mr. Raybin does not regard some of the acts or omissions of counsel of which the defendant complains objectively unreasonable, *i.e.*, below the standard of care. First, counsel made what was clearly a tactical decision not to seek the judge's recusal. It was within counsel's discretion to make such a decision.

Second, counsel, who had spent hours and hours reviewing audio recordings with the defendant in jail, correctly moved to exclude and the Court correctly excluded undisclosed jail calls. Whether counsel should have also requested a mistrial is arguable. It was not below the standard of care not to do so.

Third, counsel did not challenge territorial jurisdiction or object to the instruction from *State v. Trusty* that the discovery of a body in a county is sufficient to establish venue, despite some evidence of the commission of the offense in Georgia. Counsel's omissions in these respects not preventing the defendant from pursuing those issues in the motion for a new trial, they were not prejudicial.

Fourth, Mr. Raybin recognizes that, with respect to counsel's effectiveness in cross-examination, courts are conservative. To amount to a fundamental failure to cross-examine a witness, there must be a glaring omission on an important issue like an inconsistent statement or perhaps cumulative error. In Mr. Raybin's opinion, cross-examination of Witness Bales and Witness Williams did not fall below the standard of care.

Mr. Raybin does, however, regard some acts or omissions on counsel's part as objectively unreasonable. First, because this was a cold case with a pre-indictment delay of thirty-four years and a dozen other suspects, it was objectively unreasonable for counsel not to file a motion to dismiss, even though not to do so may sometimes be a tactical decision. Mr.

Logan's memorandum on the issue accurately stated the law and should have been used. The state would have had to prove the reason(s) for the delay at what would have been the functional equivalent of a preliminary hearing, giving the defense an opportunity to cross-examine witnesses and establish prejudice involving other leads.

Second, although it was clear that Witness Slaughter would be a witness, counsel did not investigate Witness Slaughter's background and find the *Toney* case, a profound piece of evidence that is devastating to Witness Slaughter's credibility and is easy to find through Westlaw. The importance of Witness Slaughter's testimony to the prosecution is apparent from closing argument.

Third, counsel tried to cross-examine Witness Slaughter about the 1986 recorded conversation without a transcript of the recording. Three times, the judge asked whether there was a transcript before doing the only thing he could do, which was to let the witness listen to the recording during a break. The importance of Witness Slaughter's testimony to the prosecution is apparent from closing argument.

Fourth, counsel did not discuss General Pinkston's response to Mr. Gerbitz's description of Witness Slaughter as a perpetual liar by asking Mr. Gerbitz whether he knew that Witness Slaughter had passed a polygraph with the defendant and request a mistrial or a curative instruction. The polygraph evidence did not concern a collateral witness but a highly influential one, and, according to Mr. Logan, it was not a tactical issue.

Fifth, counsel did not move for a judgment of acquittal on the ground that the state did not prove that the offense was committed before the return of the indictment, as T.C.A. § 39 11 201 requires. The indictment in this case, Exhibit 12, was sealed and does not reflect the date of its return, though the minutes do so. While the instructions, reflecting the Court's judicial notice

of the date, cure the defect, until then, the defendant was entitled to an acquittal under *State v. Brown*, 53 S.W.3d 264 (Tenn. Crim. App. 2000).

Sixth, in the seven thousand pages of records that he reviewed, Mr. Raybin did not find a memorandum or note regarding the defendant's possible testimony. Without preparation, the defendant's decision whether to testify could not be voluntary and intelligent, as *Momon* requires. Had the defendant testified, it might have been possible to introduce his 1982 statement on redirect examination.

Seventh, although counsel did argue for the civil pattern instruction on missing evidence, counsel did not file a request for a special instruction, thereby waiving objection to the omission of such an instruction. This was objectively unreasonable. There were references to key pieces of evidence in *voir dire* and the defendant's opening statement before the state obtained a ruling that the defendant could not argue anything about the missing barrel. Counsel did not preserve the issue for the record by objecting. Considering that the proof in this case was not overwhelming, Mr. Raybin opines that counsel's ineffectiveness in these respects probably prejudiced the defendant and affected the reliability of the verdict.

II. Law and analysis

Sufficiency of evidence, including evidence of commission of offense before return of indictment

The defendant claims that the evidence of his guilt, including evidence of the commission of the offense before the return of the indictment, is insufficient. He cites T.C.A. § 39 11 201(a)(4), as interpreted in *State v. Brown*, 53 S.W.3d 264 (Tenn. Crim. App. 2000), as authority that the state must prove commission of the offense before return of the indictment.

Viewing the evidence in the light most favorable to the prosecution, the Court finds that the evidence of the defendant's guilt is sufficient. In addition, acting in its role as thirteenth juror

and considering the evidence at trial and assessing the credibility of the witnesses from the evidence at trial, the Court approves the jury's verdict.

With respect to the commission of the offense before the return of the indictment in particular, the Court notes that, even if there was no evidence at trial of the precise date of the return of the indictment, there was evidence at trial that the victim's body was discovered on 3 June 1981 and the case was investigated for many years and remained unsolved until new evidence was discovered. From this evidence, it is reasonable to infer that the offense was committed before the case was solved and the indictment was returned, which is all that § 204(a)(4) requires the state to prove.

Furthermore, unlike the indictment in *Brown*, the indictment in this case, which describes the offense as having occurred "heretofore", *i.e.*, before the return of the indictment, was read to the jury. Even the *Brown* court allows that the reading of the indictment cures any lack of evidence in this respect. 53 S.W.3d at 279-80. The Court also notes that the *Brown* court does not regard an insufficiency of evidence with respect to the commission of the offense before the return of the indictment as preventing a retrial. 53 S.W.3d at 280.

The Court therefore finds no ground for a post-verdict judgment of acquittal pursuant to Tenn. R. Crim. P. 29. Nor, in its role as thirteenth juror, does the Court find ground for a new trial in this respect pursuant to Tenn. R. Crim. P. 33(d).

Discovery violation

The defendant contends that the state failed to disclose four recorded jail calls, despite trying to use one of the calls to impeach Witness Sosebee. Subsection (a)(1)(B) of Tenn. R. Crim. P. 16 requires in part that the state, on request, disclose to the defendant all of his "relevant written or recorded statements," on condition that "the statement is within the state's possession,

custody, or control[] and the district attorney general knows—or through due diligence could know—that the statement exists . . . ."

Apart from the state's attempt to use one of the recorded jail calls to impeach Witness Sosebee and Mr. Raybin's description of the recorded jail calls as not damaging, there is no evidence regarding the content of the calls. Despite the defendant's request, the state's possession and knowledge of the existence of the recorded statements, and the relevance of at least one of the recorded statements, the state did not disclose the recorded jail calls to the defendant. Because the state was not allowed to use the undisclosed, recorded jail call against the defendant and there is no evidence that the defense could have used it or any other undisclosed, recorded jail call, the defendant was not prejudiced. The Court therefore finds no ground for a new trial in this respect.

Errors, not including errors relating to polygraph evidence

First, the defendant contends that the Court should not have denied his motion to dismiss the indictment for failure to preserve evidence and his request for an instruction on the failure to preserve evidence. The Court only briefly addresses this issue, as neither the evidence at trial nor the defendant's post-trial argument changes its pre-trial analysis of this issue in a prior written order.

With respect to the barrel, the defendant argues that, had it been preserved, it could have been reexamined for physical evidence exculpating him and inculpating another suspect. This is like suggesting that the scene of a crime be indefinitely preserved because there is always a possibility that physical evidence was overlooked and could be found on reexamination. The possibility is simply not great enough to warrant indefinite preservation or even to warrant an inference in the defendant's favor.

The defendant also argues that, had the barrel been preserved, Witnesses Bales and Bobby Hawk could have excluded it as the barrel with which they saw him. The witnesses having agreed on the general description of the barrel, its size, large enough to contain an adult body, material, metal, color, and lid, and having disagreed only about the presence of a stripe, the presence or absence of which is clear from the photographs, it does not appear that the photographs were an inadequate substitute for the barrel.

With respect to the post-*mortem* radiographs of the victim's chest taken by Mr. Teddy Ladd for Dr. Adams, the defendant argues that the disappearance of only the radiographs important to the defense suggests that the state's failure to preserve the missing radiographs did not have an innocent purpose. From Dr. Adams' incomplete autopsy report, however, it appears that, in Dr. Adams's view, the missing radiographs were indicative of homicide, though Dr. Adams's could not confirm the homicide theory. Thus, it appears that the missing radiographs were more important to the prosecution than the defense.

To the extent that the missing radiographs were indicative of homicide, as Dr. Adams's inconclusive autopsy report suggests, they were not exculpatory. To the extent that the missing radiographs were inconclusive or not indicative of homicide, Mr. Ladd's recollection that they did not reveal a bullet in the victim's chest and Dr. Adams's inconclusive report as to cause of death were adequate substitutes. The Court finds no ground for a new trial in this respect.

Second, the defendant contends that the Court should not have allowed Witnesses Saylor and Slaughter to testify about Rule-404(b) matters. The Court does not further address this issue, as neither the evidence at trial nor the defendant's post-trial argument changes its pre-trial analysis of the issue in a prior written order. The Court finds no ground for a new trial in this respect.

Third, the defendant contends that the Court should not have limited cross-examination of Witness Slaughter with impeachment evidence. The only limitation on cross-examination of Witness Slaughter was a limitation that even Mr. Raybin describes as necessary, being attributable to the lack of a transcript of a 1986 recording in which Witness Slaughter, who had been "wired" by the FBI, tried and failed to elicit a confession from the defendant. The Court did allow counsel to use the recording to refresh Witness Slaughter's recollection during a break and did allow counsel to play a brief part of the recording in the jury's presence during the cross-examination, though it did not allow counsel to play the entire recording in the jury's presence. The Court finds no ground for a new trial in this respect.

Fourth, the defendant contends that the Court should not have allowed the current medical examiner, Dr. Metcalfe, to testify about cause of death, describing Dr. Metcalfe's observations and opinion as to cause of death as a matter of common sense, not requiring expertise.

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Tenn. R. Evid. 702.

Because of the decomposition of the victim's body at the time of its discovery, Dr. Adams did not perform an autopsy, though he did issue an inconclusive autopsy report. Dr. Metcalfe examined the victim's body after exhumation and a forensic-anthropology examination and issued a revised autopsy report, finding "a gunshot hole in the front of the chest and . . . a bullet" and concluding that this was the cause of the victim's death.

Contrary to the defendant's contention, Dr. Metcalfe's revised autopsy report with his opinion as to cause of death did require expertise, including expertise in recognizing gunshot

wounds and identifying a bullet in a radiograph, as much or more expertise than did Dr. Adams's original autopsy report with no opinion as to cause of death. The Court therefore finds no ground for a new trial in this respect.

Fifth, the defendant contends that the Court should not have allowed rebuttal testimony from a witness in violation of the rule of sequestration and should have allowed the defense to recall Witness Sosebee.

> In short, the underlying purpose of sequestering witnesses is to preserve the credibility of their testimony in its pre-trial condition. Thus, a potential witness's violation of the rule should generally be considered in terms of the witness's credibility rather than in terms of his or her competency. *See Williams v. State,* 258 Ark. 207, 523 S.W.2d 377, 380 (1975) ("[A] violation by a witness of the rule of sequestration of witnesses, through no fault of, or complicity with, the party calling him, should go to the credibility, rather than the competency of the witness."); *Navarrete v. State,* 283 Ga. 156, 656 S.E.2d 814, 820 (2008) ("A violation of the rule of sequestration generally does not affect the admissibility of the testimony, but may impact on the credibility of the offending witness.").
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> Tennessee Rule of Evidence 615 does not set forth any particular sanctions that should be imposed for its violation. Accordingly, trial courts have significant discretion when deciding how best to deal with its violation. *See, e.g., State v. Upchurch,* 620 S.W.2d 540, 543 (Tenn.Crim.App.1981) ("[W]hether to allow or not allow the testimony of a witness who has violated the rule is within the discretion of the trial court."); *Jones v. State,* 548 S.W.2d 329, 332 (Tenn.Crim.App.1976) (recognizing that "it remains a matter of the Trial Judge's discretion as to whether the witness who violated the rule will be permitted to testify"). This discretion should be exercised in light of both the policies at issue as well as the particular facts and circumstances of the case.

State v. Jordan, 325 S.W.3d 1, 39-40, 41 (Tenn. 2010).

The record reflects that Witness Sosebee testified that an officer had promised him "immunity" to betray the defendant. The Court allowed the prosecution to call the officer, despite the officer's presence in the courtroom during Witness Sosebee's testimony, as a rebuttal witness to clarify that, contrary to Witness Sosebee's testimony, he did not have authority to offer and did not offer Witness Sosebee "immunity", only "help". Contrary to the defendant's

allegation, the Court did also allow the defense to recall Witness Sosebee but the defense did not do so.

Because it is true that, without authorization from the district attorney general, officers do not have authority to enter immunity or non-prosecution agreements with witnesses, *State v. Spradlin*, 12 S.W.3d 432, 437 (Tenn. 2000), the officer was unlikely to admit to making an unauthorized offer of immunity whether or not he was present in the courtroom during Witness Sosebee's testimony. The Court therefore finds no ground for a new trial in this respect.

Sixth, the defendant contends that the Court should not have instructed the jury that it could infer where the murder occurred from where the body was found. In this case, the instruction on venue includes the following sentence: "You may infer that, if a murder was committed, it was committed in the county where the body was found." In addition, the instruction on inferences makes clear that inferences are permissive, not mandatory.

Mr. Raybin acknowledges that such instructions correctly state Tennessee law, as one of his cases, *State v. Trusty*, 326 S.W.3d 582 (Tenn. Crim. App. 2010), reflects, but suggests that they are inappropriate in a case like this one in which there is evidence of the commission of the offense elsewhere.

> Relying on that language, the defendant in *Cagle v. State,* 507 S.W.2d 121, 131 (Tenn.Crim.App.1973), argued "that the court erred in failing to instruct the jury that there is a presumption the deceased was killed in the county where her body was found." The *Cagle* court, however, explained why such an instruction was not required in that case:
>
> > In this case, as noted, there is evidence from which the jury could justifiably find that the crime was committed partially in both Hamblen and Jefferson Counties. Consequently, the defendant was not prejudiced by the court's failure to charge the jury this homicide victim was presumed to have been killed where her body was found.
>
> *Id.*

Thus, by implication, the *Cagle* court held that such an instruction would be

appropriate in certain cases.

Trusty, 326 S.W.3d at 599-600.

The only evidence at trial that even remotely suggests that the victim was not in this county or state at the time of his death was Witness Bales's testimony about a log cabin in Georgia, where the victim "would be staying", a girl named Janice "stayed", and Mr. Sosebee "occasionally spent the night". The phrase "would be staying", however, does not mean that the victim must have been killed in Georgia. It does not mean that the victim reached the log cabin in Georgia or, having reached it, did not come and go from it, including continuing to frequent this county and state where he had been charged with conspiracy to commit drug offenses and where his body was found. This not being a case in which there was evidence of the commission of the offense or part of the offense elsewhere, the instruction on the permissive inference regarding venue was appropriate. The Court therefore finds no ground for a new trial in this respect.

Pre-indictment delay

The defendant contends for the first time that the pre-indictment delay of thirty-four years deprives him of due process and entitles him to dismissal of the indictment. The Court notes that his failure to present this issue before trial does not waive the issue. *See State v. Utley*, 956 S.W.2d 489, 492, 495 (Tenn. 1997) (stating, "[a]s the United States Supreme Court said in *Marion,* "[t]he Due Process Clause of the Fifth Amendment would require dismissal ... if it were shown at trial that the pre-indictment delay ... caused substantial prejudice to the [defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused") (quoting *United States v. Marion*, 404 U.S. 307, 324-5, 92 S. Ct. 455, 465, 30 L.Ed.2d 468 (1971)).

The record reflects that the victim disappeared in late May 1981 and his "badly decomposed" body was found in a barrel on the river in early June 1981. The death was investigated and the defendant was apparently one of several suspects but, for lack of evidence, was not charged at the time. Because of the body's condition and an inability to confirm radiographs indicating a gunshot wound in the victim's chest, former medical examiner Dr. Adams, who is now deceased, did not perform a complete autopsy or identify a cause of death.

The defendant was not indicted until September 2015, after, apparently, a motive for the defendant to kill the victim was recognized and the investigation was reopened. The victim's body was exhumed and examined by a forensic anthropologist from University of Tennessee at Knoxville, who discovered and conveyed to the current medical examiner, Dr. Metcalfe, ballistic evidence that the victim had been shot. Dr. Metcalfe issued a revised autopsy report ruling the victim's death a homicide and opining that the cause of death was a gunshot wound in the victim's chest. In addition, new statements were obtained from the defendant's ex-wife, Witness Bales, his ex-girlfriend, Witness Williams, his brother, Witness Bobby Hawk, and his ex-associate and an ex-law-enforcement officer, Witness Slaughter.

While the Court agrees that the pre-indictment delay of thirty-four years implicates the due-process right to a fair trial, *see State v. Berry*, 141 S.W.3d 549, 568 (Tenn. 2004); *Utley*, 956 S.W.2d at 492, 495 (recognizing the existence of such a right under the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 9 of the Tennessee Constitution and distinguishing it from the similar speedy-trial right), it does not necessarily violate the due-process right to a fair trial. *See State v. Hill*, No. E2015–00811–CCA–R3–CD, 2017 WL 532481, *13 (Tenn. Crim. App. 9 Feb. 2017), *perm. app. denied* (Tenn. 7 Jun. 2017) (finding no due-process violation, despite a delay of twenty-six years between the offense in

September 1986 and the indictment in April 2012, where the delay was attributable to an initial lack of sufficient evidence to charge the defendant, the sole suspect).

The standard for determining the existence of a due-process violation involving pre-indictment delay in cases in which the state is aware of the commission of an offense remains the standard set in *Marion*, which requires (1) that there was a delay, (2) that, as a direct and proximate result of the delay, there was actual prejudice to the defendant, and (3) that the delay was attributable to the state's desire to gain a tactical advantage or harass the defendant. *Utley*, 956 S.W.2d at 495 (citing *State v. Gray*, 917 S.W.2d 668, 671 (Tenn. 1996)).

In this case, beyond the pre-indictment delay of thirty-four years, nothing entitles the defendant to dismissal. There is no evidence of an improper purpose on the part of the prosecution. As in *Hill*, 2017 WL 532481 at *13, the state did not have sufficient evidence to charge the defendant.

Furthermore, despite the initial existence of multiple suspects and some missing evidence, there is no evidence of actual prejudice. That the precise time of the victim's death was never determined, only the time of his last known contact, a telephone call to his ex-wife in Indiana, and the time of the discovery of his body, is attributable not to pre-indictment delay but to the decomposition of the victim's body at the time of its discovery. That the scene of the victim's death was never located is attributable not to pre-indictment delay but to the disposal of the victim's body in the lake. That physical evidence connecting a suspect to the offense was never recovered from the barrel containing the victim's body or the victim's body is attributable not to pre-indictment delay or failure to notice or preserve such evidence but to the submersion of the barrel and perhaps the decomposition of the victim's body and the consequent omission of

a contemporaneous autopsy, too.[1] The Court therefore finds no ground for dismissal in this respect.

Ineffectiveness of counsel

The petitioner claims that he did not receive effective assistance of trial counsel. The same standards that apply to claims of ineffective assistance of counsel in the context of a post-conviction petition apply to such claims in the context of a motion for a new trial. *See State v. Fisher*, No. M2017-00975- CCA-R3-CD, 2019 WL 103885, *5 (Tenn. Crim. App. 4 Jan. 2019) (citing *Burns v. State*, 6 S.W.3d 453, 461 n.5 (Tenn. 1999)).

> 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).
>
> 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).
>
> 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

[1] At a pre-trial hearing on the defendant's *Ferguson* motion, a TBI agent testified that one would not expect to find fingerprints or DNA on the barrel after its submersion in the lake. Although the state did not preserve the barrel, it did preserve photographs of the barrel, an adequate substitute for a relatively nondescript item, as the inconsistency in the testimony of Witnesses Bales and Bobby Hawk reflects. In addition, although the state did not preserve radiographs of the victim's chest and Dr. Adams has since died, it did preserve the inconclusive autopsy report, an adequate substitute that reflects that Dr. Adams did not perform an autopsy, was not able to confirm radiographs indicating that the victim had been shot, and did not determine a cause of death.

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).

The Court need address or further address only a few of the defendant's allegations of ineffective assistance of counsel. That some allegations (failure to challenge sufficiency of evidence of commission of offense before return of indictment, failure to review or request or clarify exclusion of undisclosed recorded jail calls, failure to request instruction regarding duty to preserve evidence, failure to challenge pre-indictment delay) lack merit is apparent from preceding analyses. That other allegations lack merit, either because there is insufficient evidence regarding counsel's acts or omissions (the source of any misapprehension regarding Mr. Webb's role in the defense, the defendant's advance knowledge of Mr. Speek's arrest and its implications for the defense), the deficiency of counsel's acts or omissions (failure to request the judge's recusal, cross-examination of witnesses other than Witness Slaughter), or the prejudicial nature of counsel's acts or omissions (failure to challenge or argue venue and territorial jurisdiction), the defendant's own expert concedes.

First, the defendant alleges that, with respect to Witness Slaughter, counsel was ineffective in several particulars, specifically, in not requesting additional discovery, arguing all available grounds for admission of the 1986 FBI recording for which there was no transcript, objecting to refreshment of the witness's recollection with the 1986 FBI recording outside the

jury's presence, or cross-examining the witness about his lies under oath in the *Toney* case. With respect to additional discovery, there is no evidence regarding the contents of such discovery and therefore no evidence that any deficiency was prejudicial. With respect to the 1986 FBI recording, even if the failure to have a transcript with which to cross-examine and refresh the recollection of Witness Slaughter about his unsuccessful attempt to eliciting a confession from the defendant was deficient, *see* Tenn. R. Evid. 612 (contemplating that a witness's recollection will be refreshed, if necessary, with "a writing", not a recording), it was not prejudicial, Witness Slaughter's recollection having been refreshed by the recording during a break, the jury having been made aware that Witness Slaughter's recollection had been so refreshed and even having heard a brief excerpt from the recording, and it having been apparent to the jury from the pre-indictment delay that the defendant never confessed to a law-enforcement officer or Witness Slaughter.

With respect to the *Toney* case, however, there is expert evidence that the failure to discover it and use it to impeach Witness Slaughter's testimony that he lies but not under oath and refresh Mr. Gerbitz's recollection that Witness Slaughter had lied under oath was deficient. Arguably, too, despite Mr. Gerbitz's insistence that he would not regard Witness Slaughter as a reliable witness, the failure, with the prosecutor's argument that Witness Slaughter's historical reliability was an assurance of his present reliability, was prejudicial. Further analysis of this issue, however, the Court leaves to analysis of the issues involving the polygraph evidence, which follows.

Second, the defendant alleges that counsel was ineffective in not preparing him to testify in his own defense, which was a factor in his decision not to testify, disagreeing among themselves about whether he should testify, and, in this context, not considering or advising him

on the potential use of the 1986 FBI recording of a conversation between him and Slaughter in which he denies involvement in or responsibility for the victim's death as a prior, consistent statement. There is no evidence that lack of preparation was a factor in the defendant's decision not to testify. Apparently, there was a consensus among counsel that the defendant should testify but, before trial, no one undertook to prepare the defendant to testify. During trial, when there was still time to prepare the defendant to testify or to request a continuance to prepare him to testify, the defendant did not wait to be prepared to make his decision not to testify, which he did during an evening break. There is no evidence that any deficiency in this respect was prejudicial.

Third, the defendant alleges that counsel was ineffective in responding to the polygraph evidence. Analysis of this issue the Court leaves to analysis of the issues involving the polygraph evidence, which follows.

Polygraph evidence

The defendant faults the prosecutor for introducing inadmissible polygraph evidence, the Court for allowing the evidence and not giving a curative instruction, and counsel for not objecting to the evidence or the prosecutor's misconduct in introducing it, discussing with him or requesting a mistrial, requesting curative instructions regarding both the evidence and the prosecutor's misconduct, ensuring the jury's receipt of curative instructions upon the Court's change of mind, and objecting to instructions that did not include curative instructions. The state both denies fault, arguing that the polygraph evidence was "available for impeachment purposes" because Mr. Gerbitz inconsistently described Witness Slaughter as a perpetual liar but admitted that Witness Slaughter had been used as a witness by Mr. Gerbitz's office and Witness Slaughter's lies had never affected a prosecution, and tries to shift fault to counsel for never objecting or requesting a curative instruction. It argues that the defendant should not benefit

from the "harmful testimony of his own witness."

The state in its post-hearing brief cites *State v. Klein*, No. M2017 00061 CCA R3 CD, 2017 WL 3895158 (Tenn. Crim. App. 6 Sep. 2017), as authority that polygraph evidence may be admissible. *Klein*, however, is unhelpful to the prosecution in this case not only because, in that case, it was the defense, not the prosecution, that was seeking to introduce polygraph evidence and arguing a constitutional right to cross-examine and confront witnesses but because, even if it holds that any error in the exclusion of the polygraph evidence was harmless, it also holds that "[i]t is settled law that polygraph evidence is inadmissible." 2017 WL 3895158 at *7-8 (citing *State v. Damron*, 151 S.W.3d 510, 515-6 (Tenn. 2004)).

The record reflects that Mr. Gerbitz was called to testify by the defense. During direct examination, he testified that Witness Slaughter had been revealed to be "a crooked cop" and is a perpetual liar, even misrepresenting to the FBI that he had "paid off" Mr. Gerbitz. In a heated exchange during cross-examination by the current district attorney general Neal Pinkston, Mr. Gerbitz conceded that his office had used Witness Slaughter as a witness and, to his knowledge, Witness Slaughter's dishonesty had not affected any prosecution but insisted that he would not now regard Witness Slaughter as a reliable witness.

At this, General Pinkston, seeming not to wish to cause a mistrial but to wish to defend his own judgment in using Witness Slaughter as a witness, asked, "Do you realize that FBI also administered several polygraphs to Mr. Slaughter?" Mr. Gerbitz replied, "I don't know that at all." General Pinkston then asked, "And he passed them?" At this point, the defense objected not to the inappropriate question but as follows: "I'm objecting, Your Honor, he says he doesn't know anything at all, and this representation that he passed them is . . . ." The Court, misapprehending the issue as one about the witness's knowledge of an FBI investigation,

overruled the objection. Eventually, however, after realizing the impropriety of General Pinkston's questions, the Court did offer to give a curative instruction but ultimately did not give one in deference to what it remembers as counsel's reluctance to remind the jury of the matter.

In *State v. Sexton*, 368 S.W.3d 371 (Tenn. 2012), the Tennessee Supreme Court reiterates the rule that polygraph evidence is inadmissible in Tennessee courts.

> Simply stated, polygraph evidence is inadmissible. *State v. Damron*, 151 S.W.3d 510, 515–16 (Tenn. 2004). This Court has repeatedly held that the results of a polygraph examination are inherently unreliable. *State v. Torres*, 82 S.W.3d 236, 252 n. 20 (Tenn. 2002); *State v. Hartman*, 42 S.W.3d 44, 61–62 (Tenn. 2001). The "lack of any indicia of reliability means it is not probative." *Hartman*, 42 S.W.3d at 60. Furthermore, "testimony regarding a [d]efendant's willingness or refusal to submit to a polygraph examination is not admissible." *State v. Stephenson*, 195 S.W.3d 574, 599 (Tenn. 2006) (appendix) (quoting *State v. Pierce*, 138 S.W.3d 820, 826 (Tenn. 2004)). One rationale for excluding the evidence is that it lacks relevance. *See* Tenn. R. Evid. 402; *United States v. Scheffer*, 523 U.S. 303, 309 n. 5, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (holding that polygraph evidence is unreliable).

Sexton, 368 S.W.3d at 409. As a consequence, the *Sexton* court finds as follows:

> In our view, any reference to a possible polygraph examination or the refusal to submit to such an examination had no place in this trial. The State should not have asked the question. The defense should have lodged a more timely objection. Curative instructions should have been provided. *See Stephenson,* 195 S.W.3d at 598–99 (appendix); *State v. Atkins,* 681 S.W.2d 571, 578 (Tenn.Crim.App.1984). Moreover, the Defendant did not "open the door." That principle applies only when the complaining party elicits "testimony he [later] assigns as error." *State v. Robinson,* 146 S.W.3d 469, 493 (Tenn.2004). While a litigant is not "permitted to take advantage of errors which he himself committed, or invited, or induced the trial [c]ourt to commit," *Norris v. Richards,* 193 Tenn. 450, 246 S.W.2d 81, 85 (1952) (quoting *Gentry v. Betty Lou Bakeries,* 171 Tenn. 20, 100 S.W.2d 230, 231 (1937)), that is not the case here. Allowing the references to the polygraph test was error. To its credit, the trial court acknowledged the error during the hearing on the motion for new trial, but ruled that the admission of the evidence did not affect the results of the trial.

Sexton, 368 S.W.3d at 409-10 (footnote omitted).

Whether a prosecutor's introduction of clearly inadmissible evidence entitles a defendant to a new trial depends on several factors.

> Factors to be considered in the event of instances of prosecutorial misconduct are

as follows:

> (1) The conduct complained of viewed in context and in light of the facts and circumstances of the case. (2) The curative measures undertaken by the court and the prosecution. (3) The intent of the prosecutor in making the improper statement. (4) The cumulative effect of the improper conduct and any other errors in the record. (5) The relative strength or weakness of the case.
>
> *Judge v. State,* 539 S.W.2d 340, 344 (Tenn.Crim.App.1976); *see also State v. Buck,* 670 S.W.2d 600, 609 (Tenn.1984). The ultimate test for evaluating prosecutorial misconduct is "whether the improper conduct could have affected the verdict to the prejudice of the defendant." *Judge,* 539 S.W.2d at 344.

Sexton, 368 S.W.3d at 426 (footnote omitted).

The prosecutorial misconduct involving introduction of inadmissible polygraph evidence in *Sexton* did not warrant a new trial because of overwhelming evidence of the defendant's guilt and erroneous rulings that "largely mitigated any improper intent on the part of the prosecution, an important factor to be considered." 368 S.W.3d at 409-10, 426, 431. In contrast, prosecutorial misconduct involving introduction of inadmissible Rule-404(b) evidence in *State v. Sutton*, No. M2011-01575-CCA-R3-CD, 2013 WL 430559, *7 (Tenn. Crim. App. 4 Feb. 2013), did warrant a new trial, despite strong evidence of the defendant's guilt, because of "the highly prejudicial nature of the [improper] evidence and the prosecutor's intent in presenting [it] . . . ." So, too, did prosecutorial misconduct involving introduction of inadmissible polygraph evidence in *State v. Reed*, No. E2015–01638–CCA–R3–CD, 2017 WL 1959497, *8 (Tenn. Crim. App. 11 May 2017), because, "[a]fter *Sexton*, no reasonable legal argument can be made that testimony about a polygraph exam is admissible *for any purpose*[,]" "[d]efendant was entitled to have the jury determine his credibility and the credibility of the State's witnesses . . . without the jury being exposed to the polygraph testimony[,]" and Tennessee Rule of Appellate Procedure 36(b) authorizes the setting aside of judgments when error results 'in prejudice to the judicial process' in addition to when a substantial right of the defendant is involved."

Even without physical evidence connecting the defendant to the offense, there was substantial proof of guilt. Nevertheless, Witness Slaughter was an important witness for the prosecution and his credibility, like that of other witnesses for the prosecution, many of whom had been slow to implicate the defendant, was an important issue.

One of the effects of the inadmissible polygraph evidence was to enhance Witness Slaughter's credibility. Another of the effects of the polygraph evidence, arguably as important as the direct effect on Witness Slaughter's credibility, was to undermine Mr. Gerbitz's low opinion of Witness Slaughter's credibility by suggesting that Mr. Gerbitz was ill-informed and his opinion was based on less than all available data. This is important because Mr. Gerbitz would otherwise be a witness whose credibility is unquestionable and whose opinion as a former district attorney general that Witness Slaughter is not a reliable witness deserves weight.

Compounding these effects were the following circumstances:

(1) the failure of Mr. Gerbitz to remember and of counsel to uncover the *Toney* dismissal based in part on Mr. Gerbitz's affidavit that Witness Slaughter had admitted to having lied under oath;
(2) the failure of counsel to object clearly to the inappropriateness of the prosecutor's questions about polygraph evidence and, after the Court's change of mind, discuss with the defendant his options, including a mistrial, and assent at the least to the Court's offer of a curative instruction;
(3) as in *Reed*, the lack of curative measures; and
(4) the closing argument of the prosecutor that Witness Slaughter's historical reliability under oath was an assurance of his present reliability under oath.

The unavoidable conclusion to which the coincidence of all these circumstances leads the Court is that, although, between the prosecutor and counsel, the prosecutor was more at fault, counsel bears some fault, too, for some omissions that were both deficient and prejudicial.

The Court of Criminal Appeals having found plain, reversible error in the introduction of polygraph evidence in *Reed*, it would find reversible error in the introduction of polygraph evidence in this case, too.

> Based upon the clear language in *Sexton* we conclude that all five criteria to grant plain error review exist as to the erroneous admission of testimony concerning Mr. Geiger's agreement to take a polygraph test and the "other guy" (obviously Defendant) refusing to do so. Defendant testified that he did not murder the victim and only used the victim's debit card because Mr. Greiger [*sic*] supplied it to him. Mr. Geiger testified and denied Defendant's allegations. After *Sexton*, no reasonable legal argument can be made that testimony about a polygraph exam is admissible *for any purpose*. While reasonable minds could argue the admissibility of the detective's statements and Mr. Geiger's responses thereto under the *hearsay rule,* there is no such ground at the present time as to the critical part of the out-of-court statements regarding polygraph testing. It was not admissible. Further, the State submitted and argued for, and the trial court admitted, evidence that was so obviously inadmissible that it is beyond comprehension.
>
> Defendant was entitled to have the jury determine his credibility and the credibility of the State's witnesses, and most importantly Mr. Geiger, without the jury being exposed to the polygraph testimony. Tennessee Rule of Appellate Procedure 36(b) authorizes the setting aside of judgments when error results "in prejudice to the judicial process" in addition to when a substantial right of the defendant is involved. It is hornbook law that a defendant anywhere in the United States is entitled to the due process of law under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. It is also hornbook law at the present time that "polygraph" evidence is never admissible in Tennessee. *State v. Sexton*, 368 S.W.3d 371, 409 (Tenn. 2012).

Reed, 2017 WL 1959497 at * 8. The Court concludes that there is ground for a new trial in this respect.

III. Conclusion

This case, commencing some thirty-four years after the event, was a difficult one to prosecute and to defend, requiring extra effort and expense. For the most part, the lawyers on both sides did very well, Mr. Raybin describing Mr. Speek's description of the effect of the delay in opening statement as poetic or almost poetic and the defense identifying and calling a former district attorney general as a witness to the unreliability of Witness Slaughter.

Mr. Logan's testimony that he made mistakes but the other defense lawyers made non-tactical mistakes amounting to ineffective assistance of counsel is troubling. He was the defendant's first lawyer and was clearly upset when the defendant chose Mr. Speek to represent him. After the trial, he tried to hire Mr. Raybin to handle the motion for new trial and appeal.

When Mr. Raybin refused, other counsel was hired and hired Mr. Raybin as an expert.

Of course, any trial lawyer would have to acknowledge mistakes. A perfect trial is unknown. As long as a lawyer continues to represent a client, however, he should participate fully in decision making and, if certain things are not done or should be done, he should take an active role in making sure those things are done. If he cannot do this, the appropriate course would seem to be to withdraw from the case. It is sincerely hoped that any lawyer who goes to trial does his best to ensure that his client receives a fair trial.

That the Court ultimately finds that the defendant did not receive a fair trial is basically attributable to acts or omissions relating to Witness Slaughter. Clearly, the questions about his polygraphs, which precipitated a series of events down to and including inappropriate vouching for the credibility of his testimony in the prosecution's closing argument, should not have been asked, as the decision in *Reed* about a year after the trial in this case involving the same prosecutor makes clear.

The Court concludes that the motion for judgment of acquittal should be denied and the alternative motion for new trial should be granted. An order will enter accordingly.

Don W. Poole

Don W. Poole, Judge