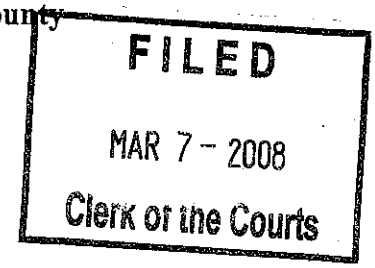
IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 2007 Session

STATE OF TENNESSEE v. RICHARD C. TAYLOR

Direct Appeal from the Circuit Court for Williamson County
No. S-83428 Russ Heldman, Judge



No. M2005-01941-CCA-R3-DD

The Defendant, Richard C. Taylor, was convicted by a Williamson County jury of one count of first degree murder, and he was sentenced to death. On appeal, he alleges twenty-three errors. Upon review, we conclude the trial court failed to consider the full panoply of evidence relevant to whether the Defendant knowingly and voluntarily waived his right to counsel. The Defendant is, thus, entitled to a new trial. Additional errors that also require reversal are as follows: the Defendant's constitutional right to counsel was denied at a competency hearing; the trial court erred when it failed to hold a competency hearing during trial; and the trial court erred in failing to appoint advisory counsel. We also conclude that the trial court erred when it instructed the jury at the sentencing phase, which requires that the Defendant be given a new sentencing hearing. As such, we reverse the conviction and the sentence, and we remand the case for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Case Remanded

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Cassandra Stubbs, Durham, North Carolina; Kelly A. Gleason, Nashville, Tennessee; and E. Covington Johnston, Jr., Franklin, Tennessee, for the appellant, Richard C. Taylor.

Robert E. Cooper, Attorney General and Reporter; Michael E. Moore, Solicitor General; Elizabeth Ryan and C. Daniel Lins, Assistant Attorneys General; Ronald L. Davis, District Attorney General; and Derek K. Smith, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

A. Procedural Background

In 1984, a jury convicted the Defendant of the first degree murder of a correctional officer, and, finding the existence of four aggravating circumstances, the jury sentenced the Defendant to death. The Tennessee Supreme Court affirmed the Defendant's conviction and sentence on direct appeal. *State v. Taylor*, 771 S.W.2d 387 (Tenn. 1989). The Defendant subsequently filed a petition for post-conviction relief. After conducting several evidentiary hearings in 1994 and 1995, the post-conviction court concluded that counsel was ineffective during both the guilt and penalty phases of the trial and granted post-conviction relief. Specifically, the post-conviction court found that counsel failed to adequately explore and assert the Defendant's competency and mental health condition at trial or as mitigation during sentencing. When the post-conviction court set aside both the conviction and sentence, it further concluded that the Defendant was not competent to stand trial; this occurred in 1997. The post-conviction court directed that the Defendant be evaluated for competency before the new trial began. The State appealed the trial court's decision, and this Court affirmed the lower court's judgment. *Richard C. Taylor v. State*, No. 01C01-9709-CC-00384, 1999 WL 512149 (Tenn. Crim. App., at Nashville, Jul. 21, 1999). The State did not seek an application for permission to appeal to the Tennessee Supreme Court.

After he received post-conviction relief, the Defendant filed several pro se motions in the trial court, including a motion to represent himself. The trial court determined it could not rule on the Defendant's pro se motions until after a competency hearing, and it appointed Attorneys Thomas Overton and John Appman to represent the Defendant. The parties agreed to select an independent psychiatrist to evaluate the Defendant. However, when they failed to do so, and when the trial court learned the Administrative Office of the Courts lacked funds available to pay a court witness, on May 10, 2000, the trial court directed the Forensic Services Division of the Middle Tennessee Mental Health Institute ("MTMHI") to evaluate the Defendant's competency to stand trial. The court's order provided that the Defendant could move the court within fifteen days for funding of an independent evaluation.

On August 21, 2000, MTMHI wrote a letter informing the trial court the Defendant was incompetent to stand trial, and they outlined a treatment and assessment plan. In response to this letter, the trial court scheduled a competency hearing. On November 1, 2000, MTMHI wrote a follow-up letter to the trial court stating that the Defendant met the standard for commitment as a result of a mental illness. On December 13, 2000, the trial court appointed Attorney Virginia Lee Story as guardian ad litem over the Defendant's affairs.

On January 26, 2001, the trial court held a competency hearing. After hearing testimony from employees of MTMHI, the trial court found the Defendant incompetent to stand trial because of a mental illness as outlined in Tennessee Code Annotated section 33-7-301(b)(1)(A). The court ordered the Defendant committed to the custody of MTMHI for treatment and directed a competency re-evaluation at least every six months. On August 7, 2001, Defendant's guardian ad litem filed a motion for judicial review on Defendant's behalf protesting the involuntary administration of medication. On September 18, 2001, following a hearing, the trial court ordered the continued administration of medicine to the Defendant.

On January 10, 2002, MTMHI informed the trial court that the Defendant remained incompetent to stand trial. On May 6, 2002, MTMHI wrote the court a letter stating that the Defendant's condition had improved sufficiently so that he was competent to stand trial and assist in his defense. MTMHI also informed the court that the Defendant no longer met the standard for commitment. On May 23, 2002, MTMHI informed the trial court that "[t]hings have changed rather suddenly over the past four days" and that it would be a mistake to transfer the Defendant to the custody of the TDOC because his "psychiatric condition had rapidly and significantly deteriorated." On July 1, 2002, MTMHI informed the court that the Defendant showed improvement since the events described in the May 23rd letter and stated that the Defendant was competent to stand trial and no longer met the standards for commitment at MTMHI. On July 3, 2002, the trial court granted Defendant's ex parte motion for funds for an independent psychiatric evaluation. On August 14, 2002, the trial court replaced Attorney Overton with Attorney Hershell Koger as lead counsel for the Defendant.

Dr. Keith A. Caruso, the expert retained by defense counsel, evaluated the Defendant and concluded that he remained incompetent to stand trial due to Continuous Undifferentiated Schizophrenia. In a letter to counsel dated August 16, 2002, Dr. Caruso stated that the Defendant intended to dismiss counsel and refuse taking any further medication. Dr. Caruso informed counsel that the Defendant was not only incompetent to stand trial but also incompetent to make his own treatment decisions. MTMHI reported to the trial court on August 29, 2002, that the Defendant remained competent to stand trial but stated that his competence was contingent upon continued treatment. MTMHI expressed concern about the Defendant's statements that he intended to refuse to take any more medication.

On September 9, 2002, the trial court continued the scheduled competency hearing until March 19, 2003. In the interim, Judge Donald P. Harris, who presided over the case after the granting of post-conviction relief, was replaced by Judge Russ Heldman. On December 30, 2002, the trial court set the competency hearing for April 1, 2003. On March 10, 2003, MTMHI updated the trial court that the Defendant was competent to stand trial and assist with his defense. MTMHI again reiterated that Defendant's continued competence relied upon treatment, and it believed that the Defendant could effectively be treated at the DeBerry Special Needs Facility.

On April 2 and 3, 2003, the trial court held a hearing to determine whether the Defendant was competent to stand trial. Following the testimony of the various witnesses, the trial court found the Defendant competent to stand trial under the standards set forth in *State v. Blackstock*, 19 S.W.3d 200 (Tenn. 2000), and the trial court set a trial date of October 15, 2003. On April 15, 2003, the trial court denied Defendant's motion for permission to seek an interlocutory appeal to this Court. Also on April 15, 2003, the trial court relieved Attorney Story as the Defendant's guardian ad litem.

On or about May 12, 2003, the Defendant filed a pro se motion requesting the termination of representation by counsel and the termination of his involuntary medication. After the Defendant filed his pro se motions, his counsel filed numerous pretrial motions on his behalf. Following a hearing on Defendant's pro se motions on June 10, 2003, the court granted

the Defendant permission to represent himself. Having found that the Defendant knowingly and voluntarily waived his right to counsel, on June 16, 2003, the trial court entered an order relieving counsel from further representation in this capital case. Furthermore, the court struck from the record the many pretrial motions filed by counsel after May 12, 2003. The court, however, denied Defendant's request to terminate his medications. On July 15, 2003, Attorneys Koger and Appman filed a motion for a rehearing on the trial court's decision to allow the Defendant to represent himself and to continue the Defendant's forced medication. On July 16, 2003, the trial court filed an order responding to counsel's motion. Initially, the court reiterated the fact that it had previously granted the Defendant's request to represent himself and stated that counsel no longer had standing to file the motions. The court then stated it would be unconstitutional for the court to force appointed counsel back on the case. The trial court also considered the issue of involuntary medication in light of the recent United States Supreme Court opinion in *Sell v. United States*, 539 U.S. 166 (2003), and thereafter concluded that the involuntary medication complied with constitutional standards. The court set the case for pretrial hearing on October 14, 2003, to address any remaining motions and to determine whether the Defendant was still competent to stand trial.

On August 25, 2003, MTMHI wrote the trial judge a letter stating it was still of the opinion that the Defendant remained competent to stand trial. MTMHI also informed the court of the Defendant's impending transfer to TDOC at the DeBerry Special Needs Correctional Facility on August 26, 2003. On September 12, 2003, the Defendant filed a pro se motion requesting, in addition to jury instructions on premeditation, that letters he wrote after the killing of the victim be deemed inadmissable because they were the product of torture and that a tape be barred from evidence because it was the product of Defendant's insanity. On October 14, 2003, the trial court entered an interim order directing TDOC to continue administering medications to the Defendant.

The probate court in Davidson County, having been informed that the Defendant was discharged by MTMHI and placed back in the custody of TDOC, appointed Attorney Edward S. Ryan as conservator for the Defendant on September 11, 2003. Apparently, sometime thereafter, Attorney Ryan directed TDOC to discontinue administering the Defendant's medication. On October 14, 2003, Attorney Story filed a notice of the medications the Defendant was receiving at the time. In response to this information, the trial court issued an order on October 16, 2003, stating that the "matter came before the Court via two unwarranted and inappropriate filings." The trial court commented that "it is regrettable but both Mr. Ryan and Ms. Story are interfering with the constitutional rights of Mr. Taylor . . . to represent himself." The court ordered the attorneys to stop interfering with the Defendant's rights:

> In light of these recent actions by Mr. Ryan and Ms. Story, said actions in disrespect and disregard of Defendant's election to represent himself, it is hereby ORDERED that Edward S. Ryan and Virginia Lee Story, be and hereby are, enjoined and restrained from further interference with the constitutional rights of the defendant, Richard C. Taylor, applicable to this case, that is, interfering with his state and federal constitutional right to represent himself in this case by filing

papers in this Court or taking action in this Court in this case, presumably in his behalf, absent prior permission to do so from this Court.

On October 14, 2003, the trial court conducted another hearing to ensure the Defendant's continued competency to stand trial and to determine whether the criteria for involuntary medication was still met. In a subsequently filed written order, the court concluded that the Defendant was still competent to stand trial and that the involuntary medication should continue. Prior to the start of trial, the Defendant, by and through Attorney Ryan, the conservator appointed by the probate court, filed applications for extraordinary appeals in this Court and the Court of Appeals. The Defendant sought review of the interim order filed by the trial court on October 14, 2003. The Court of Appeals denied the application stating that this Court had jurisdiction over the matter. This Court ultimately denied the application on October 22, 2003. The Court found the issue to be moot as the trial had already concluded, and this Court further concluded that it did not appear the trial court so far departed from the accepted and usual course of judicial proceedings that relief was warranted.

B. Trial

Jury selection and opening arguments occurred on October 14, 2003. The guilt and penalty phases of the trial were held over two days, October 15 and 16, 2003, where the following evidence was presented:[1]

Eureka Lenjoy Wilsdorf, an employee with the Mark Luttrell Correctional Center, testified that Ronald Moore, the victim, was her brother. Wilsdorf explained that she was sixteen years old at the time of the victim's death, and the victim was twenty. Wilsdorf then identified a photograph of the victim, taken after he had been stabbed at the Turney Center. On cross-examination, Wilsdorf stated that she did not believe her brother was a member of the Klu Klux Klan.

Warden Ricky Bell, the current warden of the River Bend Maximum Security Prison, testified that he held the position of Associate Warden of Security at the Turney Center at the time of the victim's death. Warden Bell testified that the Turney Center differed from other prisons: at the Turney Center, the inmates mingled within their housing units and performed their jobs. Warden Bell likened the Turney Center to a vocational training security center. The guards were stationed in the units, but they never went armed because it was too dangerous. He

[1]During trial, the Defendant wore sunglasses because, as the Defendant's doctor stated, this was a manifestation of a delusional belief that the police were attempting to bombard him with radio waves that would control him. The Defendant also declined to wear civilian clothes, instead choosing to wear prison garb. The Defendant made a limited opening statement, telling the jury that he would not ask very many questions of witnesses. The Defendant's statement held true, as he only cross-examined five of the State's eleven witnesses at the guilt phase. The Defendant presented no evidence during his case-in-chief and made no closing argument. At sentencing, the Defendant presented no opening, no evidence, and no closing. The Defendant also declined to cross-examine the State's three witnesses at the sentencing phase.

explained that the term "shank" describes a handmade weapon that might be used to stab someone.

Warden Bell further testified that, on August 29, 1981, a corrections officer was murdered at the Turney Center. After receiving a call concerning an incident at the center, Warden Bell left his house, and, as he entered the Turney Center, one of the supervisors advised him that Officer Ronald Moore, the victim, had been killed. Warden Bell viewed Officer Moore's body in the infirmary, and when he returned from the infirmary a guard told him that the Defendant killed the victim. The jury then watched a video showing the Turney Center. On cross-examination, Warden Bell stated that he did not know of any threats made by the Defendant against Officer Moore. Warden Bell also stated he did not receive a demotion as a result of this incident.

Jeff Garner testified that he was an inmate at the Turney Center in 1981. Garner stated that he and three other inmates were standing in the hallway of Unit 14, talking with Officer Moore about his personal history in the military. The Defendant approached the group and stood beside the victim for about ten minutes without saying anything. Garner then described watching the Defendant kill Officer Moore:

> [T]he next thing I know he's coming around with a shank stabbing Officer Moore . . . . He said, "What are you going to do now, S.O.B." You know, the guy hadn't said a word, but he has to call him a S.O.B.; . . . Officer Moore was up against the wall, so he jumped back like he's trying to back up the hallway and he said, "No, Taylor; no, Taylor." And Taylor just kept hanging on to him and stabbed him as he kept backing up down the hallway till he collapsed on the floor at the other end of the hall. He turned around and Taylor walked back up the hallway after he done that.

Garner said he did not attempt to restrain the Defendant because he did not want to get stabbed. On cross-examination, Garner testified that he did not recall a black inmate walking through the group as they stood there prior to the stabbing.

Michael Compton testified that he was an inmate at the Turney Center in 1981, serving a fifteen year sentence. Compton knew Officer Moore as a corrections officer who worked strictly "by the rules." Compton stated that he knew the Defendant, and he was standing with a group of individuals who were speaking with Officer Moore when the Defendant approached the group. The Defendant stood with the group for five minutes or more until, suddenly, he grabbed Officer Moore from behind and stabbed him. Compton guessed that the Defendant stabbed Officer Moore twenty to thirty times. Compton described the Defendant as having "wild eyes," and he identified the weapon used in the murder. On cross-examination, Compton stated he also did not recall a black inmate walking through their group immediately prior to the killing.

Howard Wayne Patterson testified that he was incarcerated at the Turney Center in 1981, and he remembered Officer Moore as one of his best friends. Patterson stated that another inmate wished to leave the Defendant a television and radio, but Officer Moore would not allow

it because the gift had not been processed through the proper channels. This upset the Defendant who stated, "I'm going to kill somebody." Patterson also testified that the Defendant cleaned one of the hallways as his job at the Turney Center. Patterson stated that on one occasion prior to the killing, the Defendant cleaned his hall and then laid down because he felt ill. Another man then went into a nearby bathroom and clipped his beard. Instead of picking up the clippings, that man swept the clippings out into the hallway. Officer Moore saw the clippings and surmised that the Defendant had not adequately cleaned his hallway. Officer Moore ordered the Defendant to clean it up again, which upset the Defendant.

Although Patterson did not see the stabbing, he saw the Defendant afterwards, and Patterson described him as "bouncing off the walls" with a "wild look on his face like he just spaced out . . . ." The Defendant held a shank in his hand at this time, and he wore bloody blue jeans and a tee-shirt. Patterson testified that the Defendant took off his clothes and placed them on the floor, and he put the shank in a closet. Patterson then identified the shank.

Dr. George Mayfield, the deputy medical examiner in 1981, testified that Officer Moore died as a result of a loss of blood due to hemorrhaging in the abdominal cavity. He observed seven stab wounds on the body, two of which were life-threatening. Dr. Mayfield examined the instrument purportedly used in the attack, and he stated that the shank was the type of weapon that would be used to inflict such damage. On cross-examination, Dr. Mayfield testified that all of the stab wounds appeared to be entry wounds.

Robert Hudson testified that he was incarcerated at the Turney Center in 1981 when he witnessed the Defendant's attack on Officer Moore. Hudson stated that he and Officer Moore were engaged in conversation when the Defendant approached and stabbed Officer Moore. The Defendant yelled, "I've got you now, you son-of-a-bitch." Hudson screamed in response, "Stop it, stop it; you're killing him, you're killing him." When the Defendant finally stopped stabbing Officer Moore, Hudson stated that "he looked up at me with the – you know, with the most emptiest eyes; you know, just like no one was home, and then turned around and walked down the hall . . . ."

Hudson further testified that, prior to the killing, the Defendant was involved in a dispute over a stereo. Apparently, an inmate left a stereo to the Defendant, which a guard took from him. The Defendant somehow reacquired the stereo, which was again taken from him. Hudson testified that he heard the Defendant state he was going to "get" a guard. Hudson also testified that, prior to the incident, Officer Moore walked by the Defendant's cell and took a towel off the door and threw it on the floor, as prison rules made it impermissible to have a towel hanging over the window in the door. Additionally, prior to the killing, an incident occurred where the Defendant cleaned the area for which he was responsible, which another inmate then dirtied. Officer Moore directed the Defendant to clean it again, and this irritated the Defendant. Hudson also identified the shank that the Defendant used.

Frank Atkinson, Hickman County Sheriff in 1981, testified that dispatch contacted him concerning the incident at the Turney Center. When he arrived at the Turney Center, he viewed the body of Officer Moore and the crime scene, and he spoke with witnesses and the Defendant.

Sheriff Atkinson also photographed the shank, and he removed it from the water closet where it was hidden. When Sheriff Atkinson first saw the Defendant, he wore only pajama bottoms and was shaking. After the Defendant calmed down, he was read his *Miranda* rights, he signed a waiver, and he made a statement.

When Sheriff Atkinson interviewed the Defendant, he first asked him about his dispute with Officer Moore. The Defendant responded that Officer Moore had taken his stereo on one occasion, and he "jerked" the Defendant's towel off of his door. The Defendant stated that this was "the straw that broke the camel's back," and Officer Moore was not going to "jerk" anymore towels. The Defendant expressed no remorse, and he stated that, after the towel incident, he retrieved the shank and stabbed Officer Moore.

Special Agent Jerry Tenry, with the Tennessee Bureau of Investigation, testified that he was called to the Turney Center in response to a guard being killed. When he arrived, he viewed Officer Moore's body, examined the crime scene, and interviewed inmate witnesses. Agent Tenry then located the shank in a pipe closet after an inmate directed him there. Agent Tenry interviewed the Defendant, who stated that he was agitated with Officer Moore over a stereo and a towel, and he went looking for Officer Moore in Unit 12. The Defendant eventually found him, and he stood with the shank in his pants until Officer Moore turned away. He stabbed Officer Moore, and when Officer Moore tried to escape the Defendant ran him down, grabbed his shirt, and continued stabbing Officer Moore.

In a jury-out hearing, the State called Jim Rose, the warden at the Tennessee State Prison in Nashville in 1981. Rose testified that, after the incident at The Turney Center, the Defendant was transferred to his prison for placement in maximum security. Rose ordered that the Defendant's mail be censored, an ordinary procedure in such a situation. The State then moved to admit a number of letters into evidence, after which the following exchange occurred:

Court: Mr. Taylor, this is a jury-out hearing; you objected to the letters based upon your filing. You can now question him anything about this issue; in support of your objection, you can question the witness at this time.

Defendant: What's my objection?

Court: Your objection? You made an objection –

Defendant: Are you telling me to object?

Court: No, I – you objected in writing to these letters originally; you sent an objection in. You recall that, don't you?

Defendant: Right.

Court: Okay. Now you can – I've noted your objection; the State wants this introduced. You have an opportunity now in the writing to cross-examine the witness about these.

Defendant: I have no questions.

The trial court directed the witness to read aloud the letters sought to be introduced. Following the reading of the letters, the trial judge asked the Defendant whether he wanted to question the witness. The Defendant responded, "No." Eventually, the Defendant stated, "Well, my proof of that will be the affidavit that Officer Dale Hunt gave my post-conviction attorney in 1996." The Defendant stated what the affidavit would show:

> He goes on and on about how they treated me when I was first brought there. What they did was poison my food with feces and urine until I gave them some statements against my interests; wanting me to make it sound real mean. And it does; it sounds pretty evil, pretty mean [the Defendant's comments in the letters]. He didn't talk about that in his affidavit; he talked about other things.

When questioned by the court about the affidavit, the State responded that the affidavit was hearsay and irrelevant.[2] The State also argued that the probative value of the letters outweighed any prejudicial effect. The Defendant chose not to respond to the State's argument. The Defendant informed the court he did not intend to call Officer Hunt to testify. Finding the letters relevant, the court allowed them into evidence. With respect to the torture claim, the court concluded it could not consider the allegations in the affidavit because the Defendant did not subpoena the affiant to testify.

In the presence of the jury, Jim Rose testified that the Defendant was transferred to his prison two days after Officer Moore was killed. Rose ordered that the Defendant's mail be censored for security purposes. Rose intercepted seven letters, the first of which was to Mike Malady, and it included the statement, "I know [I'm] damn sure [I] can't say I'm sorry though cause I ain't." The next letter, to Tommy Wiser, included the following:

> [M]y past mental record will put a lot of shit in this game . . . . I didn't really think anyone could have talked me out of doing that killing. . . . Hell, I must have stood there with that shank in my hand for five minutes before Moore looked away, and then I said wham; now, motherfucker, what are you going to do. . . . That Moore just looked at me and started running up the hall, and I was right behind him. Then [I] grabbed him by his collar and let out a roar like a lion and was shaking the hell out of him until you ran up and got me to stop.

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[2]The affidavit in question was obtained by the Defendant's post-conviction attorneys in 1996. Officer Dale Hunt was a TDOC officer who explained how he and other TDOC officers mistreated the Defendant during his stay at the Tennessee State Prison. This occurred after he was transferred from the Turney Center subsequent to the events that led to this trial.

In a letter to an inmate named Leo, the Defendant wrote, "Now there's a lot of things I couldn't do but I knew there was one thing I can do. I figured that I just killed me a punk motherfucker and maybe that would stop some of this bullshit that goes on around here." A second letter to Tommy Wiser indicated that the towel incident touched off the killing, and it gave a full account of the stabbing. Finally, in a letter to an inmate called Red, the Defendant stated, "I just got upset, couldn't control myself . . . ."

Charlotte Ware, of the United States Postal Inspection Service Forensic Lab, testified that the letters purportedly written by the Defendant were, in fact, written by the Defendant.

After the State rested its case, the Defendant stated he would not present any witnesses, and he would not testify on his behalf. The Defendant also declined to have advisory counsel.

In addressing the jury instructions, the State objected to the inclusion of the following statement: "In this case you've heard evidence the defendant might have suffered from a mental condition which could have affected his capacity to form the culpable mental state." The State argued there was no evidence presented concerning the Defendant's mental state. The Defendant responded that one witness stated he saw that the Defendant had "wild eyes." The trial court determined the jury instruction concerning the Defendant's mental state should remain in the instructions. Prior to closing arguments, the trial court again asked the Defendant if he wished to have advisory counsel; the Defendant again declined.

After the State presented its closing argument, the Defendant waived his right to present a closing argument. After the jury was instructed, they deliberated and found the Defendant guilty of first degree murder. Immediately after the verdict was returned, the trial court moved into the sentencing phase.

C. Sentencing

The State made an opening statement, after which the Defendant waived his opening statement. Following this, Melissa O'Guin, the Chief Deputy Clerk of Coffee County, testified that the Defendant was convicted of simple robbery and sentenced to ten years' incarceration. The judgment for this conviction and the accompanying indictment were entered into evidence.

Dr. John Filley, a psychiatrist with MTMHI in the early 1980s, testified that he interviewed the Defendant once in December, 1983, and once in January, 1984. Dr. Filley determined that there were no grounds to support an insanity defense.

Officer Jerry Simmons, previously with the Department of Correction in the Turney Center, testified that he was working the night Officer Moore was killed. Officer Simmons testified that he came upon Officer Moore not long after he was stabbed. When asked what happened, Officer Moore responded that he could not breathe. Officer Moore repeated that he could not breathe and that he felt as if his legs were on fire. Officer Moore told Officer Simmons that he was not going to survive. When asked who stabbed him, Officer Moore said

"Taylor in [Unit] 12." Officer Simmons said the last minute he was alive, Officer Moore was fighting for his breath, like someone was choking him.

After the State rested, the trial court questioned the Defendant about whether he wished to present witnesses, testify himself, or have advisory counsel. The Defendant declined all three. After the State presented its closing argument, the Defendant declined to present a closing argument. In instructing the jury at the sentencing phase, the trial court explained that, to sentence the Defendant to death, the jury must find the existence of at least one aggravating circumstance and must find that the aggravating circumstance or circumstances outweigh the mitigating circumstances. The trial court specified that those mitigating circumstances included, but were not limited, to the following: the Defendant did not have a significant history of criminal activity, the Defendant's age at the time of the killing, and "any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing." The jury returned a sentence of death after finding four aggravating circumstances: that Officer Moore was a corrections official engaged in the performance of his duties; the murder was especially heinous, atrocious and cruel in that it involved torture or depravity of mind; the murder was committed while the Defendant was in custody; and that the Defendant had been previously convicted of one or more felonies involving the use or threat of violence to the person. The sentencing phase was completed on October 16, 2003.

D. Motion For A New Trial

Following the jury's verdict, the trial court appointed Attorneys E. Covington Johnston and Kelly A. Gleason to represent the Defendant on the motion for new trial and appeal. The trial court granted counsel several extensions to file the motion for new trial, the motion eventually being filed on May 3, 2004. On August 3, 2004, the court set a hearing on the motion for new trial for August 24, 2004, and stated that the date would not be continued absent a showing of good cause and advanced permission by the court. On August 18, 2004, the Defendant filed a motion requesting a two-week continuance of the hearing date due to counsel having another murder trial set for August 30, 2004. On August 20, 2004, counsel filed another motion to continue, asserting that they were not consulted prior to the trial court setting the hearing date and that key witnesses would be unavailable to testify due to scheduled vacations. Counsel filed yet another motion to continue on the date of the hearing, August 24, 2004.

On August 24, 2004, the court held a hearing as scheduled, but the court did not permit counsel for the Defendant to call witnesses in support of the issues raised in the motion for new trial. Counsel intended to demonstrate that the Defendant was incompetent to proceed to trial on his own, and sought to introduce evidence in support of their claim, which developed after the Defendant was permitted to represent himself. Counsel sought to elicit testimony from individuals who had contact with the Defendant before, during, and after trial. The State argued the Defendant should not be permitted to re-litigate what already occurred during trial. Counsel for the Defendant argued they were merely introducing evidence of Defendant's alleged incompetence. According to counsel, the Defendant could not have been expected to introduce evidence during trial of his own incompetence.

Because the trial transcript had not yet been prepared, the court granted counsel additional time after receipt of the transcript to supplement the motion for new trial. The Defendant filed his supplemental motion on November 15, 2004. On March 7 and 8, 2005, the Defendant filed two pro se pleadings. In the first, he contended that the State did not prove premeditation and that the letters introduced at trial were obtained through "torture and torment." In the second pleading, the Defendant asserted that, due to his mental illness and his medications, he had no recollection of certain trial testimony. During a hearing on March 29, 2005, counsel stated that when she talked to the Defendant about the trial in preparation of the motion for new trial the Defendant did not remember the testimony of all the witnesses and did not remember making an opening statement.

After a hearing on the supplemental motions, the court filed an order denying the Defendant's motion for a new trial on July 19, 2005. The trial court set an execution date for September 19, 2005. On August 1, 2005, the trial court received a handwritten letter from the Defendant requesting that his execution be carried out "a.s.a.p., as soon as possible." Counsel filed notice of appeal on behalf of the Defendant on August 17, 2005.

II. Analysis

On appeal, the Defendant, by and through counsel, raises twenty-three issues; the State responds that many are waived due to the Defendant's failure to include them in his motion for a new trial. We note that the Defendant, in fact, failed to file his motion for a new trial within the prescribed thirty days. *See* Tenn. R. Crim. P. 33(b), 45(b)(3). While the untimely filing of a motion for a new trial would normally jurisdictionally bar this Court from reviewing most all of the Defendant's claims, the Tennessee Supreme Court has held that rule inapplicable to death penalty cases. *State v. Nesbit*, 978 S.W.2d 872, 880-81 (Tenn. 1998) ("We simply hold that in light of our statutory duty to review capital cases, this Court has jurisdiction to review the issues raised in this appeal despite the defendant's failure to timely file his motion for new trial."); *cf. State v. Dodson*, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989) (holding failure to timely file motion for a new trial jurisdictionally bars certain review); *State v. Davis*, 748 S.W.2d 206, 207 (Tenn. Crim. App. 1987) (same); *State v. Givhan*, 616 S.W.2d 612, 612-13 (Tenn. Crim. App. 1980) (same). Additionally, because the Defendant did not file a timely motion for a new trial, the requirements for a timely filing of a notice of appeal were also not met. *See* Tenn. R. App. P. 4(a), (c). However, because the notice of appeal is not jurisdictional, we may waive it, which we choose to do in the interest of justice. *Dodson*, 780 S.W.2d at 781-82; *see* T.C.A. § 27-1-123 (2006); *Davis*, 748 S.W.2d at 207.

Upon review, we conclude the trial court failed to consider the full panoply of evidence relevant to whether the Defendant knowingly and voluntarily waived his right to counsel. He is thus entitled to a new trial on this issue. Additionally, the Defendant's constitutional right to counsel was denied at a pretrial competency hearing, the trial court improperly failed to hold a subsequent competency hearing during trial, and the trial court erred in failing to appoint advisory counsel. These errors also require reversal. We also conclude that the trial court erred when it instructed the jury at the sentencing phase, which would entitle the Defendant to a new sentencing hearing.

A. April 2003 Competency Hearing

The trial court initially found the Defendant incompetent to stand trial in 1997. The trial court again found him incompetent to stand trial in 2001, but, in April 2003, a new trial judge heard the case and adjudged the Defendant competent to stand trial. MTMHI first treated the Defendant prior to his 2001 competency hearing, and, after they evaluated the Defendant, two MTHMI doctors, Drs. Craddock and Farooque, opined that the Defendant was incompetent to stand trial because he was psychotic. The opinion of the physicians at MTMHI changed by May 6, 2002, when they wrote to the trial court stating that the Defendant's condition had "improved sufficiently that he is currently competent to stand trial and to assist in his own defense." By May 23, 2002, however, MTMHI again changed its mind because an attending physician slightly adjusted the Defendant's medication causing a rapid and significant deterioration.

On July 1, 2002, MTMHI informed the court that it again determined the Defendant was competent to stand trial, and Dr. Larry D. Southard, Director of Forensic Services at MTMHI, stated that the Defendant "could be effectively treated while in the custody of the TDOC (Tennessee Department of Correction)." However, on August 29, 2002, MTMHI stated that they no longer believed the Defendant could be properly treated at the Department of Correction. This final opinion was based on the ongoing question of whether the Defendant would cooperate and take his prescribed medication while in TDOC custody.

Subsequent to this initial correspondence between MTMHI and the trial court concerning the Defendant's competency, the case was assigned to the judge who would ultimately preside over the trial. The trial court held a hearing on the Defendant's competency on April 2-3, 2003, where the State presented two witnesses, Drs. Ronnie G. Stout and Farooque, who testified that the Defendant was competent to stand trial. The Defendant countered with Dr. Keith Caruso and five of the Defendant's former attorneys, who all stated that, in their view, the Defendant was incompetent to stand trial.

Dr. Stout testified that, although the Defendant previously manifested a delusional belief that unseen forces guided his actions, he had relinquished that belief. According to Dr. Stout, the Defendant's schizophrenia, which produces delusional behavior, was under control. The doctor acknowledged that he did not question the Defendant about why he continuously wore sunglasses or many layers of clothing.

Dr. Caruso, the Defendant's expert, testified that, in his view, the Defendant's continued wearing of sunglasses was the manifestation of a delusional belief that the police were attempting to bombard him with radio waves that would control him. The multiple layers of clothing were also worn to protect him against radio waves.

Two of the Defendant's former attorneys, William Redick, Jr., and Henry Martin, testified that the Defendant told them he shot President Kennedy. Although the Defendant was actually three years old at the time President Kennedy was shot, the Defendant maintained he was thirteen at that time. In addressing this issue, all three doctors testified that the Defendant suffered from hallucinations, although the Defendant had attempted to minimize them.

Multiple witnesses also testified to the Defendant's belief that death was impermanent. The Defendant told one of his attorneys in 2002 that, if he were executed, he would quickly awaken. Dr. Caruso testified that the Defendant told him awakening would occur "within minutes" of death. Redick stated that the Defendant told him that he had previously died three, and, at a later time, four times. Once the Defendant was executed for this crime, he would wake up and be a free man. However, Dr. Stout stated that, when he questioned the Defendant, the Defendant denied believing he had previously died and come back to life.

The Defendant's previous attorneys also testified that the Defendant had a fundamental distrust of his attorneys. Dr. Caruso testified that the Defendant believed his attorney was actually working for the Attorney General. Brad MacLean, one of the Defendant's previous attorneys, testified that the Defendant would insist his lawyer pursue irrational positions on issues.

Dr. Stout further testified that the Defendant had a distorted view of the events surrounding Officer Moore's death. When asked if the Defendant had a clear understanding of the facts of the crime, Dr. Stout recommended that an attorney "check everything he said against collateral information." Drs. Stout and Farooque, however, believed the Defendant was competent because he could listen to and follow instructions while on his medication. Dr. Stout stated, though, "I do not think he's equipped to represent himself . . . because he's, he's not a lawyer . . . [a]nd you know, if he had to do it all by himself, if he had to do it all by himself from beginning to end, I don't know if he could hold up to the stress."

The trial court found Drs. Stout and Farooque more credible than the Defendant's witnesses due to the Defendant's witnesses' "result-oriented agenda" and "prior interests and agendas." The court determined the evidence preponderated in favor of competency.

1. Burden

The Defendant first argues the trial court improperly placed the burden of proof on the Defendant to prove his incompetency after he had previously been adjudged incompetent. Traditionally in Tennessee, a defendant bears the initial burden of proving incompetency by a preponderance of the evidence. *State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). That burden was satisfied in this case when the Defendant was first found incompetent in 1997. Thus, the questions before us are, who bears the burden of proof at a competency hearing held after the defendant has been adjudged incompetent, and what is that burden.

Although not specifically stated as such, Tennessee and Sixth Circuit case law logically imply that the State has the burden of proving competency by a preponderance of the evidence after an initial finding of incompetency. This Court, in *State v. Oody*, originally adopted the preponderance of the evidence standard from the Sixth Circuit case of *United States v. Shepard*, 538 F.2d 107 (6th Cir. 1976), when this Court determined that the defendant bore the burden in a competency hearing. *Oody*, 823 S.W.2d at 559. However, *Oody* did not address whether this burden applied to a defendant who had previously been found incompetent, or if the burden then shifted to the State. *Id.* However, in *Shepard*, after an initial finding of incompetency, a

defendant was further examined and, after another hearing, he was found competent. *Shepard*, 538 F.2d at 109. The *Shepard* court stated that, in such a situation as this, the State bore the burden of proof by a preponderance of the evidence. *Id.* at 109-10. The Tennessee Supreme Court, in *State v. Reid*, affirmed the holding in *Oody*. 164 S.W.3d 286, 307-08 (Tenn. 2005). It is somewhat unclear whether the supreme court intended to incorporate a "burden shifting" when a defendant is first found incompetent, but, in our view, that is the proper rule. *See State v. Paul Dennis Reid, Jr.*, No. M2001-02753-CCA-R3-DD, 2003 WL 23021393, at *42 (Tenn. Crim. App., at Nashville, Dec. 29, 2003) ("If the presumption of competency is sufficiently rebutted, then the burden shifts to the State.").

In this case, the trial court found that "the evidence preponderates in favor of finding that Mr. Taylor [is] competent to stand trial in this matter." In our view, this finding implied the burden of proof was on the State to prove competency, and that burden was met. Thus, we conclude the trial court did not err in this regard.

2. Competency Determination

Next, we address whether the trial court properly concluded the Defendant was competent at the April 2003 hearing. A trial court's finding of competency is conclusive on appeal unless the evidence preponderates against that decision. *Oody*, 823 S.W.2d at 559. The trial court heard two witnesses for the state, Drs. Stout and Farooque, who concluded that the Defendant was competent to stand trial. They testified that the Defendant had the capacity to understand the proceedings and the consequences that might follow. The trial court also heard one doctor and a number of former lawyers for the Defendant, who all testified that, in their view, the Defendant was not competent to stand trial.

The Fourteenth Amendment to the United States Constitution and article I, section 8 of the Tennessee Constitution prohibit the trial of a person who is mentally incompetent. *Pate v. Robinson*, 383 U.S. 375 (1966). In Tennessee, a defendant must "have the capacity to understand the nature and the object of the proceedings against him, to consult with counsel and to assist in preparing his defense." *Reid*, 164 S.W.3d at 306; *see State v. Blackstock*, 19 S.W.3d 200, 205 (Tenn. 2000). The United States Supreme Court has stated, "[T]he test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (*per curiam*).

The thrust of the Defendant's argument is that the trial court improperly credited the State's witnesses, while discrediting the Defendant's witnesses. The Defendant cites the United States Supreme Court case of *Medina v. California* for the proposition that "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." 505 U.S. 437, 450 (1992). However, Drs. Stout and Farooque had met with the Defendant over 100 times, and the trial court was not in error in crediting their testimony. We conclude that, given these credibility determinations, the Defendant has not proven that the evidence preponderates against the trial court's decision.

B. Counsel

The Defendant contends that the trial court erred when it allowed the Defendant to waive his right to counsel, held a competency hearing without affording the Defendant the benefit of counsel, and failed to appoint advisory counsel.

1. June 2003 Waiver of Counsel

After the trial court deemed the Defendant competent at the April 2003 competency hearing, the Defendant submitted a motion to proceed pro se. The Defendant filed his pro se motion to terminate counsel and medications on May 12, 2003. On June 10, 2003, the date of the hearing, counsel filed a motion to continue due to counsel's involvement in a separate unrelated capital murder case. The trial court, questioning whether counsel had a right to respond to the Defendant's pro se motion, denied the motion to continue.

The trial judge questioned the Defendant about his motion. The Defendant testified during the hearing that he learned from the "rule book" that he had to sign an open waiver of counsel in order to proceed on his own. He had his hand-written motion to terminate counsel notarized, and then he mailed it to the court along with a copy to the State. The Defendant said he did not mail a copy of the motion to his attorneys because he "didn't feel it interested" them.

The Defendant testified that no one assisted him in preparing the motion, and he stated that it was his own decision to request permission to proceed pro se. The Defendant informed the court he first decided to represent himself in 1986. The Defendant wanted to represent himself after this Court affirmed the granting of post-conviction relief, but the trial court determined the Defendant was incompetent to stand trial and, thus, denied his request to represent himself. The Defendant was adamant about wanting to represent himself and told the trial judge, "We could start the trial today, your Honor."

When asked by the trial judge when the Defendant believed he became competent to stand trial, the Defendant stated that he believed he became competent in September 2002. The Defendant relied upon discussions with the staff at MTMHI and a letter MTMHI wrote the court on July 1, 2002, stating that the Defendant was then competent to stand trial. Although the Defendant seemed confused by dates, after the trial court asked several more questions, the Defendant stated that he decided to represent himself the day after he determined for himself that he was competent. The trial court asked the Defendant why he waited from approximately September 2002 until May 2003 to file his motion for self-representation. The Defendant said he delayed filing the motion until the court declared him competent to stand trial because his previous request was denied when the former trial judge found him incompetent. The Defendant then told the judge he read *State v. Gillespie*, 898 S.W.2d 738 (Tenn. Crim. App. 1994), a case discussing the right of self-representation.

The Defendant testified that, although he had read reported case law, he had not read any treatises or other legal publications. Even though the Defendant had never represented himself

in any other legal proceeding, he understood he was charged with first degree murder, and he knew the sentence would be either life imprisonment or death. The Defendant said he understood that if the judge granted his motion he would be on his own during trial. The Defendant testified the reason he wanted to represent himself was because "nobody will get it correct, except me."

The trial judge then informed the Defendant that he would not be allowed to advise the Defendant on how to proceed during trial, and the Defendant acknowledged he understood. The Defendant stated he did not want his attorneys to assist him in any manner. The Defendant said he was a "little familiar" with the Rules of Evidence and knew he would have to abide by them during trial. He informed the court that he thought the prison library would have a copy of the current rules. When asked if he had read the current rules, the Defendant answered, "They're pretty boring to read," but that he read through them about two years prior. When asked if he was familiar with the hearsay rule, the Defendant answered, "Yeah, a little bit . . . Someone says something, says they saw something, because someone else said they saw it." The Defendant testified that he understood hearsay is generally inadmissible. The Defendant informed the court he was not familiar with the Rules of Criminal Procedure.

The following exchange between the judge and the Defendant occurred after the Defendant acknowledged he would have to abide by the applicable rules during the trial:

Judge: Do you realize that if you decide to take the witness stand in your case, you must present your testimony by asking questions of yourself?

Defendant: If I take the stand.

Judge: Yes, sir. If you decide to do that, you'd have to, you couldn't just start giving a narrative summary. You would say here's my question. You ask the question and then you would answer it.

Defendant: Seems a little preposterous.

Judge: Well –

Defendant: I cross examine myself.

Judge: Could you do that?

Defendant: If I had to, yes. I could do that.

Judge: And do you understand that you would also be given the right to cross-examine witnesses? You understand that, don't you? And you would be the one doing the examination and be standing at the podium. Do you understand that?

Defendant: Yeah.

Judge: Because –

Defendant: Is it nailed down now?

Judge: Is it nailed down now? I don't know the answer [to] that question. No, it's not. Not right now.

Defendant: Used to sit on it and rock it back and forth.

Judge: Okay. Well –

Defendant: About twenty years ago.

Judge: It's best not to rock back and forth. It conveys [a] sort of a slovenly appearance to the jury. But anyway, do you, do you realize that if you were trying, if you're representing yourself, at time you would be given the opportunity to address the jury an opening or closing statement. And you wouldn't have a lawyer doing that for you.

Defendant: Uh uh [affirmative].

Judge: And that's what you want?

Defendant: Yes, sir.

Judge: You don't want a lawyer doing all that for you?

Defendant: No. I don't want a lawyer. I don't want any lawyer in any way, form or fact. They want to be lawyers, my lawyers so bad they can wait till post conviction.

Judge: Now why do you say that? Why do you say that they, those guys can wait till post conviction? What do you mean by that? That's curious.

Defendant: After I'm found guilty.

Judge: Well, why do you say you're going to be found guilty?

Defendant: Well –

Judge: Is that what you're expecting?

Defendant: I'm, I'm hoping to be found guilty of second-degree murder. Not first-degree murder.

Judge: You don't want any lawyer helping you get there?

Defendant: No, no.

Judge: Now, can you explain a little bit more for me why you think that your lawyers don't get it right? I mean, is that what I'm supposed to conclude, that's the reason you're doing this?

Defendant: Well, the reason is is the, the Supreme Court says I can.

Judge: Okay.

Defendant: My past experiences say I better.

When the trial judge asked the Defendant why his motion to terminate counsel should be granted, the Defendant answered simply, "It's in the interest of justice. It ought to be granted."

Following the trial judge's questioning of the Defendant, the judge allowed the State to examine the Defendant regarding his request for self-representation. The Defendant testified he understood premeditation to mean "cool deliberation, calmly reflective." The Defendant stated the lesser included offenses of first degree murder include "second degree murder, voluntary manslaughter, involuntary manslaughter, assault and battery." The Defendant indicated he had some understanding of possible sentences for the lesser offenses. He also confirmed that he could be sentenced to death if the jury convicted him of first degree murder.

When questioned by the State about whether he understood the nature of various defenses that could be raised, such as insanity or diminished capacity, the Defendant testified that he was not going to present an insanity defense but that "there's a little bit of a question about diminished capacity." When the Defendant said he was not going to present an insanity defense, the State agreed with his position.

Whenever the State questioned the Defendant if he understood the roles his attorneys would play as his advocate, the Defendant tended to brush off the questions stating that he wanted nothing to do with his attorneys. The Defendant testified he was willing to give up his right to have his attorneys pursue defenses or suppression issues on his behalf. He acknowledged that he might not have as complete an understanding of the law as his attorneys, but he stated that he was willing "to take that risk." The Defendant said that he did not "stand on anything but the truth." The Defendant knew that he had the right to subpoena witnesses, but he did not plan to during trial.

The Defendant stated that he could not recite the aggravating circumstances that would be sought during sentencing but stated, "I'll allow them." After he was shown a copy of the statutory aggravating circumstances, he stated that his desire to represent himself remained. He testified that his understanding of mitigation could be "anything under the sun."

Following up on what the Defendant suggested earlier, that his attorneys could wait until the post-conviction process, the judge asked the Defendant if he was aware that he would waive any later claim of ineffective assistance of counsel by representing himself at trial. The Defendant indicated he was so aware. Responding to the judge's question whether the Defendant understood there are "clear pit falls" in self-representation in this capital case, the Defendant stated, "Maybe there is, maybe there isn't. I've been in a lot of pits."

The trial judge read through the standard list of rights each criminal defendant enjoys, including the right to counsel, right to trial by jury, right to be present, right to testify, right against self-incrimination, and right to cross-examine witnesses. The Defendant interrupted the judge and informed him "there won't be much to examine, there won't be, I won't be cross-examining." When the judge told the Defendant he had the right to waive a jury trial and have the judge try the case, the Defendant asked the judge, "That what you prefer?"

The Defendant read and signed a waiver of counsel form in open court. The trial judge then asked appointed counsel if they had any questions for the Defendant. However, prior to allowing counsel to examine the Defendant, the judge questioned whether counsel had any standing in the matter. The judge also asked counsel to argue why the court should deny the Defendant's motion. Counsel argued that he believed the Defendant did not have a true perception of death. Counsel also argued that the Defendant has a fundamental mistrust of attorneys, which clouds his decision. As counsel noted, the Defendant testified earlier during the hearing that his past experience says he should represent himself because he is the only person who could do it right. However, as counsel pointed out, the Defendant's court-appointed attorneys successfully pursued post-conviction relief on his behalf. Counsel argued to the court that the Defendant, therefore, operated under a misperception.

Though counsel recognized that the court had already determined the Defendant was competent to stand trial, counsel argued that the Defendant's own perception of his competence suggests that the Defendant could not "recognize his own deficiencies in any problems that arise." Counsel stated that the Defendant never believed he was incompetent, even when the experts found him to be so, and his statement to the court that he believed himself to be competent in September 2002 after reading the letter MTMHI sent to the court highlighted the Defendant's misperception of competency. Counsel also suggested that the Defendant's desire to cease taking medication reflects upon his inability to make important decisions regarding his representation.

After counsel argued his position, he requested permission to examine the Defendant about his decision. Counsel recited the questions he would ask the Defendant. The trial judge asked the Defendant if he wanted to answer any of counsel's questions, and the Defendant

responded in the negative. The following exchange occurred following counsel's recitation of one question:

Counsel: Yes, sir. My next question, Judge, would be what, Richard is your, my next question would be, Judge, Richard have you died in the past and come back to life?

Court: Alright. Mr. Taylor, did you hear that question?

Defendant: I think he's talking about when I was killed and came back to life. Is that –

Court: I'm just asking did you hear the question he wants to ask you?

Defendant: No.

Court: You didn't hear it? Alright. State it again.

Counsel: Let me restate –

Court: I just want to hear what the question is. I'm not going to make you answer them. We're going to get to that. I just want to make sure [you] heard it. State what question it is, Mr. Koger.

Counsel: The question would be whether Richard has died or been killed in the past?

Defendant: Yes.

Court: Well –

Counsel: Has he –

Court: Did you hear it, did you hear the question?

Defendant: Was I died [sic] or killed in the past?

Court: Yeah. Did you hear the question?

Defendant: Yeah.

Court: Alright. Now, do you want to answer that question?

Defendant: No.

The trial judge informed the Defendant that he believed the Defendant's decision to represent himself was "unwise" and that the Defendant would be better defended by counsel. The judge reiterated that the Defendant admitted his lack of any real familiarity with the rules of procedure and evidence. The judge stated that he "strongly urged" the Defendant not to represent himself. The judge then asked the Defendant a final time whether he still wanted to waive his right to counsel, and the Defendant testified that he did. The court concluded that the Defendant knowingly waived his right to counsel.

The Tennessee Supreme Court has recognized a right to self representation grounded in the Sixth Amendment to the United States Constitution. *State v. Northington*, 667 S.W.2d 57, 60 (Tenn. 1984) (citing *Faretta v. California*, 422 U.S. 806 (1975)). Further, "The constitutional right to represent oneself can be asserted, but only after a defendant both knowingly and intelligently waives the valuable right to assistance of counsel." *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *State v. Burkhart*, 541 S.W.2d 365 (Tenn. 1976)). Additionally, "In *Johnson v. Zerbst*, . . . it was held that the constitutional right of an accused to be represented by counsel 'imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.'" *Id.* (quoting *Johnson*, 304 U.S. at 465).

> A judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

Id. (quoting *Von Moltke v. Gillies*, 322 U.S. 708, 723-24 (1948)). Thus, as we stated in *State v. Herrod*, the right to self representation may be asserted based upon three conditions: (1) The defendant must timely assert his right to self-representation; (2) the exercise of the right must be clear and unequivocal; and (3) the defendant must knowingly and intelligently waive his right to assistance of counsel. 754 S.W.2d 627, 629-30 (Tenn. Crim. App. 1988). In the present case, the only issue before us is whether the waiver was made knowingly and intelligently.

The Defendant argues the colloquy between the trial court and the Defendant was insufficient to meet constitutional requirements. Specifically, he claims that, although the court asked the routine questions required, his responses should have prompted further examination by the court, which was not done. We agree. We base our decision on the fact that the trial court allowed the Defendant to refuse to answer questions from his own counsel who was attempting to present an argument for the Defendant. Notably, defense counsel had not yet been discharged when the trial court refused to allow counsel to question the Defendant. Because the Defendant

was still represented by counsel, counsel had a duty to zealously represent the Defendant. In the view of counsel, the Defendant would be better served if he were not allowed to represent himself. Counsel was free to make this choice because the presentation of evidence on this issue was a tactical decision concerning the means of the representation, not the objectives. *See* Tenn. Sup. Ct. R. 8, RPC 1.2, Cmts. ("A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint understanding."). We recognize that the Defendant has the right to determine whether he will testify, but in this case, the Defendant had already chosen to testify. *See* Tenn. Sup. Ct. R. 8, RPC 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive jury trial, and whether the client will testify.). Additionally, counsel was not permitted to call other witnesses or present evidence on behalf of the Defendant. Counsel's argument corresponded with his duties of competence and diligence. *See* Tenn. Sup. Ct. R. 8, RPC 1.1, 1.3.

The responses to counsel's questions were part of the inquiry that the situation demanded, and, in our view, the trial court did not "investigate as long and as thoroughly as the circumstances of the case before him demand[ed]." *Northington*, 667 S.W.2d at 60 (quoting *Von Moltke*, 322 U.S at 723-24). Thus, we are not convinced that the Defendant made a knowing and voluntary waiver, especially "in light of the strong presumption against waiver of the constitutional right to counsel." *Id.* Thus, we conclude the Defendant is entitled to a new trial based on the inadequacy of the counsel waiver colloquy. We are not convinced that "[t]he public conscience [is] satisfied that fairness dominate[ed] the administration of justice" in this case. *State v. Coleman*, 519 S.W.2d 581, 583 (Tenn. 1975) (quoting *Adams v. United States ex. rel McCann*, 317 U.S. 269, 279 (1942)). Accordingly, we reverse this case on this ground and remand it for a new trial. In the interests of justice, we review the remaining issues presented by the Defendant.

2. October 2003 Competency Hearing

The Defendant next argues that the trial court erred by holding a competency hearing on the eve of trial where the Defendant was not afforded the benefit of counsel. After finding the Defendant competent at the April 2003 hearing, the trial court entered an order on July 16, 2003 that set a hearing for October 14, 2003, to address, in part, "whether Defendant [was] still competent to stand trial." At the October hearing, the Defendant was not represented by counsel because he waived counsel in June 2003. The Defendant argues that, at this hearing, his competency was "sufficiently in doubt," and, thus, he should not have been allowed to represent himself. The State responds that this competency hearing was not "full-blown" but was instead a "precautionary" competency hearing; thus, the Defendant did not have a right to counsel.

When a "sufficient doubt" is raised to a defendant's competency, a hearing is required to prevent the prosecution of incompetent persons. *Drope v. Missouri*, 420 U.S. 162, 180 (1975). It follows that, at a competency hearing where the Defendant's competency is "sufficiently in doubt," the potentially incompetent person should not be permitted to represent himself. *See Appel v. Horn*, 250 F.3d 203, 215 (3d Cir. 2001); *United States v. Klat*, 156 F.3d 1258, 1262-63 (D.C. Cir. 1998). "Logically, the trial court cannot simultaneously question a defendant's

mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel." *United States v. Purnett*, 910 F.2d 51, 55 (2d Cir. 1990).

The District of Columbia Circuit Court of Appeals has stated, "[W]here a defendant's competence to stand trial is reasonably in question, a court may not allow that defendant to waive her right to counsel and proceed pro se until the issue of competency has been resolved." *Klat*, 156 F.3d at 1262-63. That Court went on to describe the law as follows:

> The Supreme Court has not explicitly considered this issue; however, we find support for our conclusion from the Court's decision in *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), where it found that a defendant could not waive his right to a competency hearing when there was a question as to his competency to stand trial: "[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.* at 384, 86 S.Ct. 836. Likewise, we find it contradictory to conclude that a defendant whose competency is reasonably in question could nevertheless knowingly and intelligently waive her Sixth Amendment right to counsel. Such a defendant may not proceed pro se until the question of her competency to stand trial has been resolved.

Id. at 1263 (footnotes omitted).

In the case at bar, the trial court was presented with a Defendant who was for years considered incompetent to stand trial. MTMHI began treating the Defendant in 2000, and, in the view of the doctors employed there, he went through periods of incompetency followed by competency. Dr. Ronnie G. Stout, one of the State's witnesses at the April 2003 competency hearing, testified that he was unsure whether the Defendant could retain his competency under the stress of trial. In our view, the trial court would not have scheduled this hearing if it did not have "sufficient doubt" about the Defendant's competency to stand trial. Because of this "sufficient doubt" about the Defendant's competency, counsel should have been appointed to vigorously cross-examine the State's witnesses and present witnesses on behalf of the Defendant. Depriving the Defendant of this right to counsel is reversible error. *See United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) ("[T]he Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceedings."); *Klat*, 156 F.3d at 1263 (The defendant "was erroneously denied [his] Sixth Amendment right to counsel because the court found reasonable cause to doubt [the defendant's] competency to stand trial and yet failed to appoint counsel to represent [him] through the resolution of the competency issue."). We also conclude this error requires reversal because we have no confidence that this "error did not pervade [the Defendant's] entire trial." *United States v. Collins II*, 430 F.3d 1260, 1268 (10th Cir. 2005).

3. Failure to Appoint Advisory Counsel

The Defendant next argues that the trial court erred in failing to appoint advisory counsel. Whether a defendant was entitled to advisory counsel is a question of law, which we review de novo. *State v. Small*, 988 S.W.2d 671, 673 (Tenn. 1999); *State v. Davis*, 940 S.W.2d 558, 561 (Tenn. 1997). The right to self-representation is found in the United States and Tennessee Constitutions. U.S. Const. amend. VI; Tenn. Const. art. I, § 9; *Faretta v. California*, 422 U.S. 806, 807 (1975); *State v. Northington*, 667 S.W.2d 57, 60 (Tenn. 1984). The benefit of advisory counsel is not a right, but a privilege "granted by the trial court only in exceptional circumstances." *Small*, 988 S.W.2d at 673 (quoting *State v. Melson*, 638 S.W.2d 342, 359 (Tenn. 1982)). Thus, the decision of whether to appoint advisory counsel is within the discretion of the trial court. *Id.* at 674. We recognize that the "trial court, whose responsibility it is to ensure the orderly and fair progression of the proceedings, is in an excellent position to determine the legal assistance necessary to ensure a defendant's right to a fair trial." *Id.* The determination should be based "in part, upon the nature and gravity of the charge, the factual and legal complexity of the proceedings, and the intelligence and legal acumen of the defendant." *Id.* The trial court's determination will not be overturned absent an abuse of discretion. *Id.*

In the case before us, the trial court stated that it could not appoint advisory counsel over the Defendant's objection without violating his Sixth Amendment rights. Although this is wholly incorrect, the application of an incorrect legal standard has not been found to be, in and of itself, an abuse of discretion. *Id.* at 674-75 (concluding no abuse of discretion despite the trial court's mistaken belief that it had no right to appoint advisory counsel). Thus, we review this issue based on the above mentioned factors.

The "nature and gravity of the charge" heavily weigh in favor of the appointment of advisory counsel. The Defendant was on trial for capital murder. As Justice Burton famously stated, "There is something pretty final about a death sentence." *Griffin v. Illinois*, 351 U.S. 12, 28 (1956) (Burton, J., dissenting).

Next, although the facts of the case were not particularly complex, the legal complexities included the Defendant's competency, a potential insanity defense, and the exclusion of incriminating letters, as discussed below. Advisory counsel could have additionally aided subsequently appointed counsel in the preparation of post-trial motions, which was apparently difficult considering the Defendant lacked recollection of portions of the trial.

Finally, although Dr. Stout testified at the April 2003 competency hearing that there was "certainly nothing wrong with [the Defendant's] intellect," Dr. Stout also expressed concern about the Defendant's ability to sustain the pressure of trial. The Defendant appeared to have some legal acumen, as shown by his filing of numerous motions, but he was also under some delusions as to his abilities: he believed *he* had successfully prosecuted his post-conviction proceeding without the assistance of counsel. The Defendant also testified that he was not familiar with the rules of evidence or criminal procedure.

While there are some limited factors that would weigh against providing the Defendant with advisory counsel, we conclude it was an abuse of discretion not to appoint advisory counsel. We base our decision on the fact that this was a legally complex capital murder case.

The State notes that the Defendant repeated on twelve occasions that he would not accept advisory counsel. It is not unconstitutional, though, to appoint advisory counsel even over the defendant's objection. *See McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984) ("[A] defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel – even over the defendant's objection."). We further conclude this was not harmless error. *See* Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b). Whether the Defendant would have taken advantage of advisory counsel during his trial is unclear. However, in our view, to allow this conviction to stand would "result in prejudice to the judicial process" because the nature and history of the Defendant's competency was such that advisory counsel would have been in the unique position to raise any competency issues arising during trial. Tenn. R. App. P. 36(b); *Faretta*, 422 U.S. at 834 n.46 ("[A] State may – even over the objection of the accused – appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to the accused in the event that termination of the defendant's self-representation is necessary."). Thus, the Defendant is entitled to a new trial based on this issue.

C. Subsequent Competency

The Defendant asserts two additional claims with regard to his lack of competency. First, the Defendant asserts that the trial court erred in failing to hold a competency hearing during trial. Second, the Defendant argues that the trial court erred in failing to determine if the Defendant was competent to proceed with post-trial motions.

1. *Sua Sponte* Competency Hearing

The Defendant next alleges the trial court erred in failing to conduct a *sua sponte* competency hearing during trial. Again, the cornerstone question in such a situation is whether a trial court observes conduct that would raise a sufficient doubt as to the Defendant's competency. *Drope v. Missouri*, 420 U.S. 162, 180 (1975); *Berndt v. State*, 733 S.W.2d 119, 122 (Tenn. Crim. App. 1987). This responsibility is on the trial court regardless of whether the defendant raises the issue. *Drope*, 420 U.S. at 181 ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."); *Cogburn v. State*, 281 S.W.2d 38, 39-40 (Tenn. 1955). Although the State urges this Court to only consider facts that were known to the trial court at the time the trial commenced, we conclude this rule only applies to a situation such as that in *Berndt* where a defendant is challenging his competency before trial or a guilty plea. *See Berndt*, 733 S.W.2d at 122 ("In determining whether a court should have conducted a hearing *sua sponte before permitting an accused to go to trial or enter a plea of guilty or nolo contendere*, an appellate court may only consider those facts which were before the court when the trial commenced or the pleas were entered.") (emphasis added).

In the previous section, we determined there was "sufficient doubt" about Defendant's competency so that the October 14, 2003, hearing was, in fact, a "full-blown" competency hearing. For similar reasons, we conclude the Defendant's competency was "sufficiently in doubt" when one considers the Defendant's history in addition to the circumstances at trial: Dr.

Stout testified that he did not think the Defendant was "equipped to represent himself" and was unsure if the Defendant would "hold up to the stress of trial;" the doctors, on the Defendant's conservator's orders, changed the Defendant's medication on the eve of trial; the Defendant wore sunglasses throughout trial; the Defendant had a history of mental illness; and the Defendant did not conduct any substantial questioning or give a closing statement. In our view, these facts raised a substantial doubt about the Defendant's competency at trial so that a hearing should have been conducted to inquire further.

It is somewhat unclear what remedy is appropriate in such a situation as this. One option is to remand for a hearing to determine if such a *sua sponte* competency hearing during trial would have resulted in a finding of competency, thus making the failure harmless. *See* Tenn. R. Crim. P. 56(a); Tenn. R. App. P. 36(b). Alternatively, outright reversal may be merited. In *Osborne v. Thompson*, the Sixth Circuit concluded that habeas corpus relief should be granted because the trial court failed to hold a *sua sponte* competency hearing prior to the Defendant's pleas of guilty. 610 F.2d 461, 461 (6th 1979). The court further concluded that it would be improper to remand the case to the trial court for a hearing to determine if the defendant was competent four years prior. *Id.*; *accord State v. Robert Bucky Baker*, No. 01-C-01-9219-CR-00307, 1993 WL 48861, at *3 (Tenn. Crim. App., at Nashville, Feb. 25, 1993) (holding outright reversal is proper in such a situation), *no Tenn. R. App. P. 11 application filed.* In *Pate v. Robinson*, the United States Supreme Court gave its view on the issue:

> It has been pressed upon us that it would be sufficient for the state court to hold a limited hearing as to Robinson's mental competence at the time he was tried in 1959. If he were found competent, the judgment against him would stand. But we have previously emphasized the difficulty of retrospectively determining an accused's competence to stand trial. *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). The jury would not be able to observe the subject of their inquiry, and expert witnesses would have to testify solely from information contained in the printed record. That Robinson's hearing would be held six years after the fact aggravates these difficulties.

383 U.S. 375, 387 (1966). This opinion is persuasive. Thus, because the trial court failed to hold a competency hearing when the Defendant's competency became "sufficiently in doubt," he is entitled to a new trial.

2. Post-Trial Competency

The Defendant next contends that the trial court erred when it failed to determine if the Defendant was competent to proceed with post-trial motions. The parties initially dispute whether the post-verdict proceedings require the Defendant's competence. The Defendant cites to Tennessee Code Annotated section 33-7-301(a)(4) and *Reid v. State*, 197 S.W.3d 694 (Tenn. 2006), for the proposition that the Defendant must be competent to proceed with post-trial motions.

We view the Defendant's reliance on this authority as misplaced. Section 33-7-301(a)(4) and *Reid* address the right to be competent to proceed on post-conviction, not at the motion-for-a-new-trial stage. *See Reid*, 197 S.W.3d at 699-700. We agree with the State that the Defendant does not have a right to be competent to proceed on post-trial motions. *See Godinez v. Moran*, 509 U.S. 389, 403 (1993) (The *Dusky* standard "is applicable from the time of arraignment to the return of the verdict.") (Kennedy, J., concurring); *see also Berndt v. State*, 733 S.W.2d 119, 121-22 (Tenn. Crim. App. 1987) ("It is a fundamental principle of our system of criminal justice that one who is charged with a crime cannot be required to plead to the offense, be put to trial, convicted, or sentenced while insane or otherwise mentally incompetent.") (citing *Pate v. Robinson*, 383 U.S. 375 (1966); *Drope v. Missouri*, 420 U.S. 162 (1975); *State v. Stacy*, 556 S.W.2d 552 (Tenn. Crim. App. 1977); *Mackey v. State*, 537 S.W.2d 704 (Tenn. Crim. App. 1975)). The Defendant is not entitled to relief on this issue.

D. Medication

The Defendant next argues that the trial court erred in forcing the Defendant to be medicated. The Defendant asserts that the Defendant's forced medication violated his due process rights, deprived him of a fair trial, and violated his constitutional right to fair sentencing. The parties initially disagree as to what standard the State's forcible medication must adhere. The Defendant argues that the requirements of *Sell v. United States*, 539 U.S. 166 (2003), must be satisfied, while the State asserts only the requirements of *Washington v. Harper*, 494 U.S. 210 (1990), and *Riggins v. Nevada*, 504 U.S. 127 (1992), need be satisfied. Initially, we recognize that the Defendant "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Harper*, 494 U.S. at 221-22 (citing *Vitek v. Jones*, 445 U.S. 480, 491-94 (1980); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982); *Parham v. J.R.*, 442 U.S. 584, 600-01 (1979)).

Harper addressed a situation where a prisoner challenged his forced medication for the purpose of decreasing his dangerousness. *Id.* at 214, 217. The Court concluded that "the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Harper*, 494 U.S. at 227.

Riggins followed *Harper*, where the Defendant challenged the forced administration of antipsychotic drugs during his trial in which he attempted to assert an insanity defense. 504 U.S. at 130. Riggins argued that he had a due process right to show jurors his true mental state, especially in light of his insanity defense. *Id.* The State responded that Nevada prevented the trying of incompetent persons, and thus the State could forcibly administer medication that would ensure competency. *Id.* The Court observed the holding in *Harper*, and stated, "The Fourteenth Amendment affords at least as much protection to persons the State detains for trial." *Id.* at 135 (citing *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987)). The Court ultimately held that Riggins' conviction should be overturned because the trial court failed to "acknowledge the defendant's liberty interest in freedom from unwanted antipsychotic drugs[,]" and there was a "possibility that the substance of his own testimony, his interaction with counsel, [and] his comprehension at trial were compromised by

forced administration . . . ." *Id.* at 137. These problems were not overcome by an "essential state policy." *Id.* at 138. However, the Court stated, "Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the District Court had found, that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others." *Id.* at 135.

In *Sell*, the Supreme Court addressed "whether the Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant in order to render that defendant competent to stand trial for serious, but nonviolent, crimes." 539 U.S. at 169. The *Sell* Court concluded that one could be forcibly administered antipsychotic drugs "solely for the purpose of trial competency" if the following requirements are met:

> *Harper* and *Riggins* [ ] indicate that the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental interests.

Id. at 179-80. The Court went on to say:

> We emphasize that the court applying these standards is seeking to determine whether involuntary administration of drugs is necessary significantly to further a particular governmental interest, namely, the interest in rendering the defendant *competent to stand trial.* A court need not consider whether to allow forced medication for that kind of purpose, if forced medication is warranted for a *different* purpose, such as the purposes set out in *Harper* related to the individual's dangerousness . . . .

Id. at 181 (emphasis in original). The Court's explicit limitation in *Sell* indicates that the *Harper/Riggins* test is more appropriate when a Defendant is medicated because he is dangerous and that medication continues through trial, even if the forced medication is for a dual purpose of lessening the defendant's dangerousness and establishing competency. *Id.* at 180 (establishing that the *Sell* test applies when competency is the "sole[ ]" purpose).

The first report, from August 21, 2000, concerning the Defendant's forced medication indicates that medication was initially contemplated to potentially restore his competency to stand trial and assist in his defense. However, by November 1, 2000, the doctors at MTMHI had concluded that the Defendant was "such a risk of harm to others that it would be highly unsafe for both the other patients and the staff for him to be placed . . ." at MTMHI. The trial court held a hearing on the issue on August 20, 2001. At that hearing, Dr. Farooque testified that the Defendant was "very dangerous," that he needed to be medicated for his safety and the safety of others, and that this was the least restrictive measure for the circumstances. The trial court concluded that involuntary medication was medically appropriate, necessary to enable the

Defendant to assist counsel at trial, and necessary to avoid danger to himself and others. The Defendant's own expert opined in 2002 as follows:

> Taylor should continue to be medicated involuntarily for clinical reasons even if he is declared permanently incompetent to stand trial, as cessation of medication will lead to him decompensating to a point . . . where he is dangerous to others. Taylor must be regarded as an extremely dangerous man, although he currently is in good control in his current highly structured environment on near maximal doses of atypical antipsychotic medication. Taylor cannot be trusted to take antipsychotic medication on his own accord. He will cease taking medication at the earliest opportunity. When he does so, he will decompensate to the same state in which he committed the alleged offense.

It is clear that the Defendant was not involuntarily medicated solely for the purpose of rendering him competent to stand trial; thus *Sell* is not implicated.[3] *Sell*, 539 U.S. at 180. Under *Harper/Riggins*, forcible medication is permitted under the Due Process Clause when "treatment with antipsychotic medication [is] medically appropriate and, considering less intrusive alternatives, essential for the sake of [the Defendant's] own safety or the safety of others." *Riggins*, 482 U.S. at 135. The record supports all of these requirements. Drs. Farooque, Stout, and Caruso all testified the Defendant was dangerous, and without this medication he would return to the psychotic state he was in at the time of the killing. The Defendant is not entitled to relief on this issue.

E. Motion to Subpoena

The Defendant argues the trial court erred when it failed to rule on the Defendant's motion to subpoena an expert psychiatric witness and Officer Dale Hunt. These motions were filed with the trial court on May 1, 2000, November 8, 2000, and December 28, 2000, when the Defendant was considered incompetent and represented by counsel. After the trial court determined the Defendant was competent and allowed the Defendant to waive counsel, he instructed the Defendant "to file his own motions at a later date." The Defendant did not re-file these motions.

"[I]t is well-established that defendants are generally restricted from representing themselves while simultaneously being represented by counsel." *Williams v. State*, 44 S.W.3d 464, 469 (Tenn. 2001) (citing *State v. Burkhart*, 541 S.W.2d 365, 371 (Tenn. 1976)). Because of this rule, defendants are not permitted to file pro se motions while being represented by counsel. *State v. Muse*, 637 S.W.2d 468, 470 (Tenn. Crim. App. 1982) (citing *Burkhart*, 541 S.W.2d at

[3]After initially denying the Defendant's motion to terminate forcible medication on June 16, 2003, the trial court reconsidered the issue in light of *Sell*. Without elaborating, the trial court found the requirements of *Sell* were met, and the Defendant would remain on medication.

371). The Defendant did not re-file his motions; thus, there was no request on file upon which the trial court could have ruled. The Defendant is not entitled to relief on this issue.

F. Motion to Suppress

The Defendant next alleges the trial court erred when it denied the Defendant's motion to suppress because letters from the Defendant to other inmates were a product of State torture of the Defendant. Although not specifically stated, it appears the Defendant argues the letters are inadmissible under Tennessee Rule of Evidence 403, which would allow exclusion if the "probative value is substantially outweighed by the danger of unfair prejudice . . . ." In making evidentiary rulings, "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . [and it is] not bound by the rules of evidence except those with respect to privilege." Tenn. R. Evid. 104. A court's finding with regard to a motion to suppress will be upheld unless the evidence preponderates against it. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996).

The motion to suppress covered letters written by the Defendant to other inmates addressing Officer Moore's murder. The Defendant claimed they were the product of torture, as substantiated by the affidavit of Officer Dale Hunt. Officer Hunt's affidavit was originally submitted to the court in 1996. In it, he explained the various ways he and other guards attempted to make the Defendant "crazier than he was" by beating him, starving him, and setting the Defendant's clothes on fire.

The Defendant argues that the trial court's failure to consider this affidavit is reversible error because Rule 104 allows the trial court to consider hearsay. *See generally* Tenn. R. Evid. 801-04. While it was error not to consider the affidavit, we conclude that the error was harmless. Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b). In our view, even when considering the affidavit, the probative value of the letters is not substantially outweighed by the danger of unfair prejudice. We base this view on the lack of a connection between the alleged "torture" and the letters: it is unclear what role, if any, the treatment by the guards had in procuring the letters. Officer Hunt does not mention that he or the other officers forced the Defendant to write the letters, and we find this telling considering the myriad hazards he admits they inflicted upon the Defendant. The Defendant is not entitled to relief on this issue.

G. Sentencing

The Defendant presents six arguments concerning the sentencing phase of his trial. First, he argues the trial court erred when it failed to engage in a *Zagorski* colloquy when the Defendant waived the presentation of mitigating evidence. Second, the Defendant argues the trial court erred when it failed to properly instruct the jury on relevant mitigating circumstances. Third, he alleges the trial court erred with respect to the use of the Defendant's previous conviction for robbery as an aggravating circumstance. Fourth, the Defendant argues the trial court erred when it allowed the State to present a witness who testified that the Defendant was sane at the time of the offense. Fifth, the Defendant argues the "Especially Heinous, Atrocious or Cruel" aggravating circumstance is unconstitutionally vague and overbroad. Sixth, the

Defendant argues his constitutional rights were violated when the jurors were told they were the judges of the law.

By statute, this Court is required to review a sentence of death to determine: (a) whether the sentence was imposed in an arbitrary fashion; (b) whether the evidence supports the jury's finding of statutory aggravating circumstances; (c) whether the evidence supports the jury's finding of the absence of any mitigating circumstance or circumstances sufficiently substantial to outweigh the aggravating circumstances so found; and (d) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. T.C.A. § 39-2-205(c) (1982). Because we conclude the Defendant's death penalty sentence was imposed in an arbitrary fashion due to the trial court's failure to properly instruct the jury on a relevant mitigating circumstance, we would vacate the sentence of death and remand for a new sentencing hearing.

1. *Zagorski* Colloquy

The Defendant first argues that the trial court failed to adequately question the Defendant about his waiver of mitigating evidence at sentencing. In *Zagorski v. State*, the Tennessee Supreme Court held that a specific colloquy should be performed between the trial court and the Defendant if the Defendant wishes to waive the presentation of mitigating evidence at sentencing. 983 S.W.3d 654, 660-61 (Tenn. 1999). This would prevent a defendant from later arguing that counsel was ineffective for failing to present mitigating evidence. The opinion was written entirely in the context of a defendant's relationship with counsel. *Id.* at 659-61.

The Defendant cites three cases that have "enforced" the *Zagorski* holding, but in all three cases the defendant was represented by counsel. *See State v. Holton*, 126 S.W.3d 845, 862 (Tenn. 2004); *State v. Smith*, 993 S.W.2d 6, 14-16 (Tenn. 1999); *State v. Michael D. Rimmer*, No. W1999-00637-CCA-R3-DD, 2001 WL 567960, at *7-8 (Tenn. Crim. App., at Jackson, May 25, 2001) *no Tenn. R. App. P. 11 application filed.* In our view, *Zagorski* was not intended to be used when a pro se defendant chooses to waive the presentation of mitigating evidence; instead it is a shield for counsel who advises a defendant against waiving mitigating evidence, but the defendant nevertheless persists in his ill-advised choice. The Tennessee Supreme Court has not applied the *Zagorski* rule to this type of situation, and we decline this opportunity to so do. The Defendant is not entitled to relief on this issue.

2. Instructions on Mitigating Circumstances

Under *State v. Hartman*, the trial court is required to instruct the jury on any mitigating circumstances raised by the evidence at either the guilt or sentencing phase. 703 S.W.2d 106, 118 (Tenn. 1985) (construing Tennessee Code Annotated section 39-2-203(j) (amended 1989)). The Defendant argues the evidence at trial raised two circumstances: (1) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance; and (2) the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of

mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment. T.C.A. § 39-13-204 (j)(2) & (8).

At trial, three witnesses testified to the Defendant's "wild eyes," his "spaced out" "wild look," and his "emptiest eyes . . . just like no one was home." The trial court, on its own initiative, determined that the following should be charged to the jury at the guilt phase of trial, over the State's objection: "In this case you have heard evidence that the defendant might have suffered from a mental condition which could have affected his capacity to form the culpable mental state to commit a particular offense." Because the trial court concluded the evidence at trial raised the issue for the purposes of the guilt phase, the issue was also raised for sentencing. *See* T.C.A. §§ 39-2-203(e), -204(e) (1982) (repealed). As such, the jury should have been instructed on this issue, and it was reversible error to fail to do so. *See Odom*, 928 S.W.2d at 31 ("Once the trial court decides that the proffered evidence is 'mitigating' in nature and that it has been 'raised by the evidence,' it becomes a 'mitigating circumstance' as a matter of law, and the trial court must include it in the instructions."). We thus conclude the Defendant's death sentence was imposed in an arbitrary manner, and he is entitled to a new sentencing hearing.

3. Use of a Previous Conviction as an Aggravating Circumstance

The Defendant raises the following issues with respect to the use of his previous conviction for robbery as an aggravating circumstance: (1) the State impermissibly used the indictment for armed robbery; (2) the trial court erred in using the pre-1989 law with respect to this aggravating circumstance; (3) the trial court erred in, essentially, ordering a directed verdict on whether the prior conviction "involved the use or threat of violence to the person;" (4) the trial court erred in defining "fear;" and (5) the State failed to prove the robbery conviction "involved the use or threat of violence to the person."

a. Use of an Indictment

The Defendant argues that the State improperly used the Defendant's indictment for aggravated robbery, when he was ultimately convicted of simple robbery, in proving a prior violent felony in accordance with Tennessee Code Annotated section 39-2404(i)(2) (1975 & Supp. 1980). Citing *Taylor v. Kentucky*, the Defendant notes that guilt is to be established by probative evidence "not on grounds of official suspicion, indictment, continued custody or other circumstances not adduced as proof at trial." 436 U.S. 478, 485 (1978) (citing *Estelle v. Williams*, 425 U.S. 501, 503 (1976)).

In *State v. Ivy*, the Tennessee Supreme Court addressed whether it was error to allow the State to prove an aggravating circumstance by the introduction of an indictment. 188 S.W.3d 132, 154 (Tenn. 2006). The Court held that the use of an indictment to prove an aggravating circumstance was improper, but ultimately harmless in that case. *Id.* at 154-55. The State attempts to restrict *Ivy* to the situation where only an indictment is used to support the circumstance, as opposed to this case, where the guilty plea and judgment of conviction were also submitted.

The State cites to *State v. Smith* as a case more specifically on point. 755 S.W.2d 757 (Tenn. 1988), *overruled on other grounds by State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992). In *Smith*, the Court determined that the use of indictment, not in lieu of but accompanied by the judgment of conviction, was not improper. *Id.* at 764. The *Smith* Court found, "In the instant case, the indictments, as well as the convictions, were relevant to show the underlying facts of the offenses in order to establish that each offense involved the use or threat of violence to the person." *Id.*

We agree with the State that *Ivy* did not overrule *Smith* in that *Ivy* addressed the use of an indictment by itself, while *Smith* addressed the use of an indictment in conjunction with other documents. Because additional documentation was introduced in this case, we view *Smith* as controlling. The indictment could then be used to explain the facts surrounding the conviction. The Defendant is not entitled to relief on this issue.

b. Use of Pre-1989 law

Next, the Defendant argues that the trial court erred in applying the pre-1989 aggravating circumstance law, when the post-1989 law should have been applied. The Defendant quotes a portion of Tennessee Code Annotated section 39-11-112 that states:

> Whenever any penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, any offense, as defined by the statue or act being repealed or amended, committed while such statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense. Except as provided under the provisions of § 40-35-117, *in the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act.*

(Emphasis added).

The Defendant notes that the evidence in this case showed the Defendant only used the threat of violence in his prior conviction, not the use of violence, and that discrepancy would preclude the use of this aggravating circumstance under the post-1989 law, which deleted "threat." *Compare* T.C.A. § 39-2-203(e)(2) (1982), *with* T.C.A. § 39-13-204(i)(2) (1989).

However, the State correctly argues that the limiting statement from section 112 mentioned above, "Except as provided under the provisions of § 40-35-117," is particularly applicable. Tennessee Code Annotated section 40-35-117(c) states, "For all persons who committed crimes prior to July 1, 1982, prior law shall apply and remain in full force and effect in every respect, including, but not limited to, sentencing, parole and probation." Because the killing occurred on August 29, 1981, the Defendant falls squarely into this exception. The Defendant is not entitled to relief on this issue.

c. Directed Verdict

Under *Ring v. Arizona* and the accompanying line of cases, a Defendant has the right to have a jury decide whether the aggravating circumstances have been proven beyond a reasonable doubt. 536 U.S. 584, 609 (2002); *see Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003). The Defendant argues that the trial court's instructions on this issue precluded the jury from making the determination, as the instructions were functionally a directed verdict. The trial court instructed, "Simple robbery is the felonious and forceful taking of goods or money from the person or presence of another by violence or putting the person in fear." The Defendant asserts this statement did not allow the jury to determine if the prior conviction "involved the use or threat of violence to the person." We note that the Tennessee Supreme Court addressed this issue in the Defendant's 1989 case, stating,

> No evidence of the circumstances of the offense was presented,[4] but it was not necessary since simple robbery, by definition, is the felonious and forcible taking from the person of another, goods or money of any value, by violence or by putting the person in fear. T.C.A. § 39-2-501. *See also State v. Moore*, 614 S.W.2d 348, 351 (Tenn.1981). The fear constituting an element of robbery is a fear of bodily injury and of present personal peril from violence offered or impending. *See Sloan v. State*, 491 S.W.2d 858 (Tenn. Crim. App. 1973).

State v. Taylor, 771 S.W.2d 387,398 (Tenn. 1989) (applying pre-*Ring* law) (footnote added). Essentially, the Defendant argues that, given this definition, the jury could have arrived at no other conclusion. We disagree. The Defendant was free to present evidence that would rebut the State's evidence and the definition of simple robbery; he declined to do so. The trial court's definition of simple robbery did not "direct a verdict." Instead, it simply explained what acts one convicted of simple robbery could be expected to have committed. Instructing the jury on the definition of simple robbery was not error. In our view, the jury was free to determine for itself from the evidence presented whether the robbery conviction satisfied the requirements of the aggravating circumstance.

d. Definition of "Fear"

The Defendant next argues that the trial court erred in failing to adequately define fear as it is used in the robbery statute. *See* T.C.A. § 39-2-501(a) (1982) (repealed). The Defendant notes that the Tennessee Supreme Court defined the "fear" at issue by stating, "The fear constituting an element of robbery is a fear of bodily injury and of present personal peril from violence offered or impending." *State v. Taylor*, 771 S.W.2d 387, 398 (Tenn. 1989) (citing *Sloan v. State*, 491 S.W.2d 858, 861 (Tenn. Crim. App. 1973)). The Defendant notes that the elements of the robbery statute and the requirements of the aggravating circumstance are not synonymous, and thus further instruction was required. We disagree; in our view, the Tennessee Supreme Court upheld such an instruction when this case was first before it. *See id.* The charge was sufficient in this respect.

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[4]The indictment used in the Defendant's second trial was not used in the first trial.

e. Failure to Prove "Use or Threat of Violence"

The Defendant finally argues that the State failed to prove the robbery conviction involved the "use or threat of violence," such that the crime could be used as an aggravating circumstance. Because we concluded above that the State could properly use the indictment, the allegations contained therein, combined with the guilty plea, are sufficient to prove beyond a reasonable doubt a "use or threat of violence." *See* T.C.A. § 39-2404 (1975 & Supp. 1980). The indictment stated that the robbery involved an "assault upon the body" of the victim, which "put the said victim in fear," after which the defendant "violently did steal" the victim's personal property. The Defendant is not entitled to relief on this issue.

4. Testimony Concerning the Defendant's "Sanity"

At the sentencing phase, the State called Dr. John Filley to testify that the Defendant was sane at the time of the offense. The Defendant argues that allowing Dr. Filley to testify to this issue was error. No contemporaneous objection was made concerning this testimony; thus, it is waived. *See* Tenn. R. App. P. 36(a); *State v. Alder*, 71 S.W.3d 299, 302 (Tenn. Crim. App. 2001).

5. Vague and Overbroad Aggravating Circumstance

The Defendant challenges the aggravating circumstance contained in Tennessee Code Annotated section 39-2404(i)(5) (1975 & Supp. 1980), "The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of the mind," as unconstitutionally overbroad and vague. In its jury instructions, the trial court stated the following:

> In determining whether or not the State has proven or has proved the aggravating circumstance that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, you are governed by the following definitions:
> Heinous: Heinous mean[s] grossly wicked or reprehensible, abominable, odious, vile, atrocious.
>
> Atrocious: Atrocious means extremely evil or curel, monstrous, exceptionally bad, abominable.
>
> Cruel: Cruel means disposed to inflict pain suffering, causing suffering, painful.
>
> Torture: Torture means the infliction of [ ] severe physical or mental pain upon the victim while he remains alive and conscious.
>
> Depravity: Depravity means moral corruption, wicked or perverse act.

As stated in *State v. Cazes*, the Tennessee Supreme Court has consistently upheld the language, accompanied by the definitions, as constitutional. 875 S.W.2d 253, 267 (Tenn. 1994) (citing

State v. Black, 815 S.W.2d 166, 181 (Tenn. 1991)); *see State v. Hines*, 919 S.W.2d 573, 587-88 (Tenn. 1995); *State v. Williams*, 690 S.W.2d 517, 526-30 (Tenn. 1985); *see also Bell v. Cone*, 543 U.S. 447, 447-460 (2005) (addressing constitutionality of circumstance in issue, specifically in context of narrowing construction of *State v. Dicks*, 615 S.W.2d 126 (Tenn. 1981)).

Addressing the merits of the aggravating circumstance, we conclude there is sufficient evidence to conclude this crime was "the conscienceless or pitiless crime which was unnecessarily torturous to the victim," such that the aggravating circumstance may be applied. *Dicks*, 615 S.W.2d at 132 (citing *Florida v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973)). The Defendant retrieved his "shank" and stood, waiting for an opportune time to ambush Officer Moore. After the Defendant stabbed Officer Moore, Officer Moore managed to escape the Defendant's clutches in a frantic run for his life, but the Defendant ran him down, continuing to stab him. After the Defendant stopped, Officer Moore remained alive for a short period of time, describing to his fellow officer a choking feeling, with death squarely facing him. These facts satisfy the requirements of the law. The Defendant is not entitled to relief on this issue.

6. "Judges of the Law"

The Defendant next argues that the trial court erred by instructing the jury that they were the "judges of the law." The Defendant claims the following instruction was in error:

> The jury is the sole judge of the facts and of the law as it applies to the facts in this case. In arriving at your verdict you are able to consider the law in connection with the facts. But the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the Court.

The Defendant asks this Court to find this instruction was error because it allowed the jury to disregard the mandates of the Eighth Amendment, article 1, section 16 of the Tennessee Constitution, and Tennessee Code Annotated section 39-2-203. The language cited is derived directly from article 1, section 19 of the Tennessee Constitution, and it has long been approved by the Tennessee Supreme Court. Tenn. Const. art. I, § 19 ("[T]he jury shall have the right to determine the law and the facts . . . ."); *Wright v. State*, 394 S.W.2d 883, 885 (Tenn. 1965) ("Many old cases are cited for this statement."). The Defendant is not entitled to relief on this issue.

7. Additional Aggravating Circumstances

Although not specifically alleged by the Defendant, we must also review whether there was sufficient evidence to support the application of the two additional aggravating circumstances beyond a reasonable doubt: the killing occurred in a lawful place of confinement and the victim was a corrections officer. *See* T.C.A. § 39-2404 (i)(8) & (9) (1975 & Supp. 1980). The State presented abundant and undisputed evidence that the victim, Officer Ronald Moore was a corrections officer at the Turney Center when he was killed, and the Defendant was housed at the Turney Center at the time of the killing.

8. Proportionality Review

We are required to review the sentence of death to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the Defendant. *See* Tenn. Code Ann. § 39-13-206(c)(1) (2003).

In our view, this task is made especially difficult because the Defendant was not afforded counsel, which we have concluded was error. To facilitate further review, however, we must address this issue as presented at this trial and as if no error was committed. With that in mind, we conclude that the death penalty in this case is proportional to similar cases where an inmate murdered someone while incarcerated and to cases where an inmate murdered a corrections employee. *See State v. Hugueley*, 185 S.W.3d 356, 384-85 (Tenn. 2006) (analysis under T.C.A. § 39-13-204(i)(2), (5), (8), (9)) (citing *State v. Taylor*, 771 S.W.2d 387, 401(Tenn. 1989)); *State v. Henderson*, 24 S.W.3d 307, 310 (Tenn. 2000) (analysis under T.C.A. § 39-13-204(i)(8), (9)); *State v. Sutton*, 761 S.W.2d 763, 764 (Tenn. 1988) (analysis under T.C.A. § 39-13-204(i)(8)). Therefore, the Defendant is not entitled to relief on this issue.

H. New Trial

The Defendant further asserts that the trial court erred when it denied the Defendant's motions to continue and reschedule the hearing on the motion for a new trial, and it erred when it refused to permit the Defendant to present evidence in support of his motion for a new trial. The Defendant also argues that the trial court erred when it denied the Defendant's motion for a new trial.

1. Continuance and Evidence in Support of Motion for New Trial

The Defendant argues that the trial court erred when it failed to grant a motion for a continuance and erred in not permitting the Defendant to present evidence in support of his motion for a new trial. We address these claims together because the request for a continuance was made to allow the Defendant to present live witnesses at the hearing.

After the Defendant was convicted on October 16, 2003, a number of extensions were granted to allow the Defendant to file his motion for a new trial and for the State to respond. The Defendant ultimately filed his motion on May 3, 2004. As stated in the Defendant's brief, defense counsel learned on August 10, 2004, that a hearing on the motion had been scheduled for August 24, 2004. The Defendant, wishing to call live witnesses, requested a continuance on August 18, 2004, on August 20, 2004, and again on August, 24, 2004. The particular reason given was that "counsel [was] unable to adequately prepare for the hearing due to the unavailability of key witnesses due to previously scheduled vacations." Attached to this last motion was an affidavit from the Defendant's attorney describing proposed testimony of Attorneys Brad MacLean and William Redick. These attorneys would address the Defendant's competency during trial. The Defendant claims he finally learned the trial court preferred the evidence be presented by affidavit on August 23, 3004.

The hearing began as scheduled on August 24, 2004, at which time the trial court addressed the requests for a continuance. The trial court took the matter under advisement and proceeded with the hearing. The Defendant then made an offer of proof where guardian ad litem Virginia Story testified about the Defendant's "highly medicated state" during trial. The Defendant also attempted to introduce an affidavit of a newspaper reporter who offered lay testimony concerning the Defendant's mental state — information gained from the witness's interviews of the Defendant before trial. The trial court ultimately declined to admit the affidavit into evidence because it was "irrelevant;" however, it was marked for identification purposes. The trial court denied the motion for a continuance in a subsequent written order, indicating that he preferred the evidence relating to the motion for a new trial be submitted by affidavit, rather than by live witness. The court also denied the Defendant's motion for a new trial.

In arguing against the Defendant's position, the State notes that Tennessee Rule of Criminal Procedure 33(c)(1) states, "The court *may* allow testimony in open court on issues raised in the motion for a new trial." (Emphasis added). Rule 33(c)(2)(A) goes on to state, "Affidavits in support of a motion for a new trial may be filed with the motion or an amended motion. The court shall consider any such affidavits as evidence." In our view, it is the Defendant's responsibility to attach affidavits in support of his motion for a new trial, as the court is not required to hear live witnesses; it is not the Defendant's choice. Thus, it was not error to preclude the Defendant's live witnesses from testifying or to reject a request for a continuance for the purpose of allowing the Defendant to prepare his live witnesses. *See State v. Russell*, 10 S.W.3d 270, 275 (Tenn. Crim. App. 1999) (abuse of discretion standard is applied to a refusal to grant a continuance). The Defendant is not entitled to relief on this issue.

2. Merits of the Motion for a New Trial

The Defendant asserts the trial court erred in the following eleven instances: (1) by allowing the jury to view the Defendant in his "prison garb;" (2) by permitting victim-impact evidence and other highly prejudicial evidence; (3) by allowing the prosecutor to engage in "repeated and pervasive misconduct;" (4) by applying the "corrections officer" and "lawful custody" aggravating circumstances; (5) by violating the Defendant's right to a speedy trial; (6); because the verdict was against the overwhelming weight of the evidence; (7) by failing to conduct constitutionally sufficient voir dire; (8) by failing to inform the jury of the Defendant's medicated state; (9) by admitting a video tape without a proper foundation; (10) by not commuting the sentence because of the State's "torture" of the Defendant; and (11) by allowing the Defendant to represent himself at a capital trial.

a. Prison Garb

The Defendant argues the trial court erred in failing to prevent the Defendant from appearing in front of the jury in his prison uniform. *Estelle v. Williams* stated that the government "cannot, consistently with the Fourteenth Amendment, compel an accused to stand before a jury while dressed in identifiable prison clothes." 425 U.S. 501, 512 (1976); *see State v. Zonge*, 973 S.W.2d 250, 256-57 (Tenn. Crim App. 1997). However, the crucial question is "whether the state compelled the defendant to wear prison garb." *Zonge*, 973 S.W.2d at 257. If

the Defendant fails to object to the prison uniform, the compulsion is negated. *Id.* In this case, the Defendant specifically declined the opportunity to wear civilian clothes, affirming three times that he was content to wear the prison uniform. Because the State did not compel the Defendant to wear prison garb, he is not entitled to relief on this issue.

b. Improper Testimony

The Defendant next argues that it was error to permit the State to introduce victim impact evidence at the guilt phase of trial. Four inmates testified to the good character of Officer Moore, and Officer Moore's sister testified to their relationship. Additionally, the Defendant complains that Warden Ricky Bell testified that Officer Moore was "murdered." Because no contemporaneous objection was made at trial, the Defendant has waived this issue. Tenn. R. App. P. 36(a); *State v. Alder*, 71 S.W.3d 299, 302 (Tenn. Crim. App. 2001).

c. Prosecutorial Misconduct

Two points are raised by the Defendant in his argument. First, the State presented false or misleading testimony, and, second, there was prosecutorial misconduct in the opening and closing statements of the State. Again, because the Defendant failed to lodge an objection, these issues are waived. *See* Tenn. R. App. P. 36(a); *State v. Alder*, 71 S.W.3d 299, 302 (Tenn. Crim. App. 2001).

d. Aggravating Circumstances

The Defendant next asserts that two aggravating circumstances, the killing occurred in a lawful place of confinement and the victim was a corrections officer, are unconstitutional. This argument has previously been rejected by the Tennessee Supreme Court. *State v. Taylor*, 771 S.W.2d 387, 399 (Tenn. 1989) ("The defendant . . . complains that the State's reliance on three aggravating circumstances, T.C.A. § 39-2-203(i)(2), (8), and (9), was unconstitutional, multiple charging of the same aggravating circumstance. There is no merit in this complaint."). The Defendant is not entitled to relief on this issue.

e. Speedy Trial

After the crime occurred in 1981, the Defendant waited three years to be tried, and then, after this Court granted post-conviction relief in 1999, the Defendant was not retried until 2003. The Defendant claims the sum of these delays are a violation of his right to a speedy trial. *See* U.S. Const. amend. VI; Tenn. Const. art. I, § 9; T.C.A. § 40-14-101; *State v. Berry*, 141 S.W.3d 549, 568-69 (Tenn. 2004). The Tennessee Supreme Court rejected the 1981-1984 claim, *Taylor*, 771 S.W.2d at 399, so we will address only the 1999-2003 claim.

A court found the Defendant to be incompetent in 1997, and he remained so until April 3, 2003. Subsequent to the trial court's determination of competency, the Defendant was tried on October 14, 2003. In addressing whether a Defendant's right to a speedy trial has been violated, we weigh four factors: (1) the length of the delay; (2) the reason for the delay; (3) the

defendant's assertion of his right to a speedy trial; and (4) any prejudice caused by the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *Berry*, 141 S.W.3d at 568.

The Defendant attempts to frame the delay as one of twenty-two years, from 1981 to 2003. However, we view the delay as one of just over six months. This is because the initial delay was ruled on by the Tennessee Supreme Court in 1989. Subsequent to that decision, the Defendant petitioned for post-conviction relief, which was ultimately granted and affirmed by this Court in 1999. The Defendant was incompetent until April 3, 2003, and he was finally re-tried in October, 2003. Thus, the only delay is the April to October delay, six months. The Defendant did not assert his right during this time as the only time this right was asserted was in 2002, while the Defendant was still incompetent. Additionally, the Defendant has not shown he was prejudiced by the delay. In our opinion, the factors weigh against the Defendant. Thus, the Defendant is not entitled to relief on this issue.

f. Sufficiency of the Evidence

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

The Defendant was convicted of first degree murder, in violation of Tennessee Code Annotated section 39-2402. That section requires a murder in the first degree to be a "willful, deliberate, malicious, and premeditated killing." T.C.A. § 39-2402 (1975 & Supp. 1980) (repealed 1989). Thus, for the Defendant to be convicted of first degree murder for this unlawful killing, the State was required to prove beyond a reasonable doubt that the Defendant did the following: (1) the Defendant killed Ronald Moore maliciously, (2) the killing was willful; (3) the killing was deliberate; and (4) the killing was premeditated. *See* T.C.A. §§ 39-2401, -2402 (1975 & Supp. 1980) (repealed 1989).

The evidence at trial showed the Defendant became irritated at Officer Moore's treatment of himself and other inmates. Three particular incidents inflamed the Defendant: Officer Moore took the Defendant's stereo; Officer Moore made the Defendant re-clean a portion of the prison he had recently cleaned; and Officer Moore took or "jerked" a towel off of a window. Letters from the Defendant to other prisoners indicated that the Defendant told other inmates that they would not have to worry about Officer Moore any longer, and, after he said this, he went in search of a shank. Upon finding his weapon, he went to look for Officer Moore, and he found Officer Moore talking to a small group of inmates. The Defendant stood for approximately five to ten minutes until Officer Moore turned his back on the Defendant. The Defendant then took out the shank from his pants and stabbed Officer Moore twice. When Officer Moore attempted to flee, the Defendant chased him down and continued to stab him. Officer Moore died a short time later from the wounds.

Tennessee law allows for the inference of malice when a deadly weapon is used to kill a victim. *Everett v. State*, 528 S.W.2d 25, 26 (Tenn. 1975); *Claiborne v. State*, 555 S.W.2d 414, 416 (Tenn. Crim. App. 1977); *see McDonald v. Tennessee*, 486 F.Supp. 550, 553 (M.D. Tenn. 1980). Because the Defendant used a shank to repeatedly stab Officer Moore, there is sufficient evidence for a reasonable jury to conclude the Defendant acted with malice when he killed Officer Moore.

Black's Law Dictionary defines "willful" as "voluntary and intentional, but not necessarily malicious." *Black's Law Dictionary* at 1630 (8th ed. 2004). Evidence introduced at trial indicated that the Defendant, as a result of being irritated at Officer Moore, retrieved the shank and walked around the prison attempting to find Officer Moore. Upon finding Officer Moore, the Defendant waited until Officer Moore turned away, at which time he began stabbing. This, coupled with the letters from the Defendant to inmate friends, provided sufficient evidence for a rational jury to conclude that the Defendant acted willfully when he killed Officer Moore.

With respect to premeditation and deliberation, the Tennessee Supreme Court has stated:

> [P]remeditation and deliberation are not synonymous terms. While the existence of both elements may be established by circumstantial evidence alone, premeditation requires proof of a previous intent to kill, while deliberation requires proof of a "cool purpose" that includes some period of reflection during which the mind is free from passion and excitement.

State v. Bush, 942 S.W.2d 489, 501 (Tenn. 1997) (citing *State v. Brown*, 836 S.W.2d 530, 539 (Tenn. 1992)). Our Supreme Court has reiterated that, despite the tendency to intermingle them, the elements are distinct and both must be proven in order to sustain a first-degree murder conviction. *Brown*, 836 S.W.2d at 539-41. In *Brown*, the Supreme Court stated:

> Perhaps the best that can be said of 'deliberation' is that it requires a cool mind that is capable of reflection, and of 'premeditation' that it requires that the one with the cool mind did in fact reflect, at least for a short period of time before his act of killing.

Id. at 541 (citing 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.7 (1986)). Stated differently, this Court has held that, "In order to convict a Defendant for premeditated murder, the jury must find that the Defendant formed the intent to kill prior to the killing, i.e., premeditation, and that the Defendant killed with coolness and reflection, i.e., deliberation." *State v. Brooks*, 880 S.W.2d 390, 392 (Tenn. Crim. App. 1993).

The existence of premeditation and deliberation are questions for the jury that may be inferred from the manner and circumstances of the killing. *See State v. Gentry*, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993). Circumstances tending to indicate premeditation and deliberation include the use of a deadly weapon on an unarmed victim, the fact that the killing was particularly cruel, declarations by the Defendant of his intent to kill, the making of preparations before the killing for the purpose of concealing the crime, and calmness immediately after the killing. *See Bland*, 958 S.W.2d at 660 (citing *Brown*, 836 S.W.2d at 541-42; *State v. West*, 844 S.W.2d 144, 148 (Tenn. 1992)). Premeditation and deliberation can also be shown by "proof of motive, evidence of a plan or design to kill, or the very nature of death." *State v. Bordis*, 905 S.W.2d 214, 225 (Tenn. Crim. App. 1995).

We conclude that the evidence presented at trial satisfies both of these requirements because, among other evidence admitted, a letter was read where the Defendant stated, "Now there's a lot of things I couldn't do but I knew there was one thing I can do. I figured that I just killed me a punk motherfucker and maybe that would stop some of this bullshit that goes on around here." This statement indicates that the Defendant had an intent to kill over the happenings at the prison. Additionally, because the Defendant stood by Officer Moore for at least five minutes, waiting until Officer Moore turned his back, the evidence is sufficient to support a finding of deliberation. The Defendant is not entitled to relief on this issue.

g. Voir Dire

The Defendant next challenges the voir dire, specifically alleging that the trial court failed to question potential jurors about their views on the death penalty. The Defendant notes that the vast majority of the voir dire questions were asked by the State, with very few by the trial court, and almost none by the Defendant. He cites to *Morgan v. Illinois* for the proposition that the trial court is required to inquire as to whether a juror would automatically impose the death penalty. *See* 504 U.S. 719, 721 (1992). However, in our view, *Morgan* only imposes this duty if requested by the Defendant. *Id.* at 735-36; *see Kevin B. Burns v. State*, No. W2004-00914-CCA-R3-PD, 2005 WL 3504990, at *59 (Tenn. Crim. App., at Jackson, Dec. 21, 2005) *perm. app. denied* (Tenn. Apr. 24, 2006). The Defendant never made any such request; thus, the Defendant is not entitled to relief on this issue.

h. Failure to Inform the Jury of the Defendant's Medicated State

The Defendant next argues that the jury should have been instructed that he was on medication prior to his opening statement, especially in light of a possible insanity defense. The Defendant cites *Riggins v. Nevada*, 504 U.S. 127 (1992), discussed in depth *supra* section II(C), in support of this proposition. However, in our view, Justice Kennedy's concurrence provides the most support for this proposition, as he expresses concern that an involuntarily medicated defendant's demeanor may change and that "will prejudice his reactions and presentation in the courtroom." *Id.* at 142. While we may generally agree with Justice Kennedy's above quoted concerns, we cannot conclude that the law requires a jury instruction concerning the medicated condition of the Defendant. The Defendant is not entitled to relief on this issue.

i. Video Tape

The Defendant argues that a video tape of the Turney Center was not a "true and accurate depiction of the subject matter" because the testimony identified the tape as "pretty close." *See* Tenn. R. Evid. 401, 901. However, because the Defendant failed to lodge an objection, this issue is waived. *See* Tenn. R. App. P. 36(a); *State v. Alder*, 71 S.W.3d 299, 302 (Tenn. Crim. App. 2001).

j. Torture

The Defendant next asserts that his death sentence should be commuted due to his torture at the hands of the State. The Defendant bases his argument on the affidavit of Officer Dale Hunt, and the Eighth Amendment to the United States Constitution. However, we agree with the State, that "[t]he courts have no authority or jurisdiction to terminate a valid sentence of confinement. The authority to grant pardons and commutations of sentences rests solely with the executive authority of this State." *Rucker v. State*, 556 S.W.2d 774, 776 (Tenn. Crim. App. 1977) (citing Tenn. Const. art. III, § 6).

k. Self-Representation at a Capital Trial

Because of the nature of a capital trial, the Defendant argues, individuals should never be allowed to represent themselves as the right to self-representation is outweighed by the constitutional rights to a fair trial and due process. We are not in a position to overrule *Faretta v. California*, the seminal case addressing the right of self-representation. *See* 422 U.S. 806 (1975). We decline to grant relief on this issue.

I. Constitutionality of the Death Penalty

The Defendant raises three issues with respect to the Constitutionality of his death sentence: (1) the United States Constitution prevents the execution of defendants who were severely mentally ill at the time of the commission of the offense; (2) Tennessee's death penalty procedures violate the United States Constitution because the prosecutors have unfettered discretion to seek the death penalty; and (3) the death penalty violates the United States and Tennessee Constitutions.

1. Execution of the Mentally Ill

The Defendant first argues that *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting execution of those mentally handicapped at the time of the crime), *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001) (prohibiting execution of mentally handicapped), and *Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting execution of minors), logically compel the conclusion that severely mentally ill patients, such as the Defendant, cannot be executed. We find no law that compels this Court to make such a conclusion, and we decline to so do.

2. Prosecutorial Discretion

The Defendant's claim, that Tennessee's death penalty scheme is unconstitutional because prosecutors have unfettered discretion to seek the death penalty, has been rejected by the Tennessee Supreme Court. *State v. Hines*, 919 S.W.2d 573, 582 (Tenn. 1995); *State v. Cazes*, 875 S.W.2d 253, 268 (Tenn. 1994); *State v. Thompson*, 768 S.W.2d 239, 250-52 (Tenn. 1989).

3. Death Penalty is a per se violation of the United States and Tennessee Constitutions

The Defendant finally contends that the death penalty is unconstitutional under both the United States and Tennessee Constitutions. *See* U.S. Const. amends. V, VIII, & XIV; Tenn. Const. Art. I, §§ 8, 9, 10, 13, 16, & 32; T.C.A. § 39-13-205. The Defendant bases his arguments primarily on those outlined by Justice Breyer in his concurrence in *Ring v. Arizona*, 536 U.S. 584, 613 (2002). *Ring* itself did not conclude the death penalty is unconstitutional, and we likewise decline to so do.[5] *Id.* at 584. *See generally Kansas v. Marsh*, 126 S.Ct. 2516 (2006); *State v. Copeland*, 226 S.W.3d 287, 307 (Tenn. 2007) (affirming use of death penalty).

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[5]The United States Supreme Court has recently granted a writ of certiori presumably to address whether the "three-drug cocktail" used by Kentucky violates the Eighth Amendment to the United States Constitution. *See Baze v. Rees*, — S. Ct. —, No. 07-5439, 2007 WL 2075334, at *1 (Sept. 25, 2007); *see also Harbison v. Little*, — F.3d —, 2007 WL 2821230 (M.D. Tenn. Sept. 19, 2007) (concluding Tennessee's three-drug death penalty protocol unconstitutional.).

J. Motion to Consider Post-Judgment Facts

On January 23, 2007, after the parties had already filed their briefs in this appeal, the Defendant filed a motion requesting this Court to consider post-judgment facts. In 1999, this Court stated the following with respect to the Defendant's "torture" claim:

> Relative to the claim that the petitioner's conviction and sentence must be set aside because the petitioner suffered torture and abuse inflicted by prison guards, we are unable to consider this ground on the record before us. The petitioner did not raise this claim until well after his petition was heard. Although he sought to reopen the proof, the trial court pretermitted the issue. Under these circumstances, we have nothing before us upon which we could base a decision on the merits. Although the trial court should have determined whether the petitioner's claim merited reopening the proof and, if so, then determined the merits of the issue, the present appeal presents nothing for our review.

Richard C. Taylor v. State, No. 01C01-9709-CC-00384, 1999 WL 512149, at *23 (Tenn. Crim. App., at Nashville, Jul. 21, 1999), *no Tenn. R. App. P. 11 application filed.*

Subsequent to that opinion, on June 26, 2006, the Defendant, by and through counsel, made a public records request that uncovered documents that explained how the Tennessee Department of Correction conducted an internal investigation that "sustained" allegations that the Defendant was intentionally mistreated by Officer Dale Hunt while at the Tennessee State Prison. In the Defendant's view, these documents support his argument that letters admitted at trial were the product of torture, and the information could have been used by the Defendant at the mitigation stage of his sentencing hearing. As such, the petition to consider post-judgment facts alleges violations of *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring the state to disclose exculpatory evidence), and *Napue v. Illinois*, 360 U.S. 265 (1970) (prohibiting convictions by use of false evidence).

The State responds that these are not "facts" at all, and they therefore do not fall under the scope of Tennessee Rule of Appellate Procedure 14(a). Tenn. R. App. P. 14(a) (The Court "may consider facts concerning the action that occurred after the judgment."). The Advisory Commission Comments provide additional guidance to the type of facts to be considered, stating, "These facts, unrelated to the merits and not genuinely disputed, are necessary to keep the record up to date." The Tennessee Supreme Court further directed that the Court may not consider facts that "would be mere cumulative evidence, nor evidence which it would be possible to controvert or dispute in the trial court, nor concerning the effect of which there might be differences of opinion, or from which different conclusions could possibly be drawn." *Duncan v. Duncan*, 672 S.W.2d 7656, 767 (Tenn. 1984). However, in *State v. Branam*, the Tennessee Supreme Court opined there may be an exception to the general rule if the record "suggests but does not clearly show" that exculpatory evidence was withheld from the defense. 855 S.W.2d 563, 564, 571-72.

In our view, the information was not "withheld" from the Defendant, as there is no indication that the Williamson County District Attorney's office knew of the Tennessee Department of Correction internal investigation. The Defendant admitted he had reviewed the State's file, and he found nothing to show the District Attorney's office was aware of the issue. An internal investigation is, by nature, internal. However, even if the knowledge was imputed to the Williamson County District Attorney, "[t]he prosecution is not required to disclose information that the accused already possesses or is able to obtain." *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001). Because a mere public records request is all that was required to obtain the information, we decline the opportunity to consider the post-judgment facts.

III. Conclusion

Upon review, we conclude the trial court failed to consider the full panoply of evidence relevant to whether the Defendant knowingly and voluntarily waived his right to counsel. He is thus entitled to a new trial. Additionally, the Defendant's constitutional right to counsel was denied at a competency hearing, the trial court erred in failing to hold a competency hearing during trial, and the trial court erred in failing to appoint advisory counsel. These errors also entitle the Defendant to a new trial. We also conclude that the trial court erred when it instructed the jury at the sentencing phase, and the Defendant is entitled to a new sentencing hearing. In accordance with the foregoing reasoning and authorities, we vacate the Defendant's conviction and sentence of death and remand for a new trial.

ROBERT W. WEDEMEYER, JUDGE