IN THE CRIMINAL COURT FOR CAMPBELL COUNTY, TENNESSEE

KENNETH BARTLEY,	)	
	)	
Petitioner,	)	
	)	**CASE NO: _____**
v.	)	**(POST-CONVICTION)**
	)	
STATE OF TENNESSEE,	)	
	)	
Respondent.	)	

PETITION FOR POST-CONVICTION RELIEF

Comes the Petitioner, Kenneth Bartley, by and through counsel, pursuant to Tenn. Code Ann. § 40-30-101, *et seq*., and petitions this Honorable Court for Post-Conviction Relief from a conviction upon a plea of guilty to one count of second degree murder and two counts of attempted second degree murder, resulting in an effective sentence of forty-five (45) years imposed upon him when he was merely fifteen (15) years of age, in abridgment of the rights guaranteed him by the Constitution of Tennessee and the Constitution of the United States. In support of this Petition, Petitioner would show as follows:

JURISDICTIONAL STATEMENTS

1. Petitioner Kenneth (Kenneth) Bartley is presently incarcerated at the Northwest Correctional Complex, 960 State Route 212, Tiptonville, Tennessee, 38079 and is serving consecutive sentences of twenty-five (25) years for one count of second degree murder, and ten (10) years each for two counts of attempted second degree murder for a total effective sentence of forty-five (45) years.

2. Kenneth Bartley was only fourteen (14) years old when he was charged with murder, attempted murder, and felony gun and drug charges in the Campbell County Juvenile Court. Following a February 2, 2007 transfer hearing before the Honorable Michael Davis, Mr. Bartley was transferred to the Campbell County Criminal Court to be tried as an adult. (*See* Order of Transfer to Criminal Court, attached hereto as Exhibit T).
3. On February 5, 2007, a seven count Indictment was issued by the Campbell County Grand Jury charging the young Mr. Bartley with first degree premeditated murder, first degree felony murder, two counts of attempted first degree murder, carrying a firearm on public school property, possession of a schedule IV drug with intent to sell, and possession of a schedule IV drug with intent to deliver.
4. Petitioner Bartley's jury trial commenced on April 10, 2007, barely two months after the indictment was issued. During a lunch break on the first day of trial, a plea agreement was negotiated by the attorneys. Without having a meaningful opportunity to discuss the plea agreement with his parents, and without having the plea agreement read to him in full, immediately following the lunch recess, Kenneth Bartley pled guilty to:
    a. Second degree murder with a twenty-five year sentence to be served at 100%;
    b. Attempted second degree murder with a ten year sentence to be served at 20%; and
    c. A second count of attempted second degree murder with a ten year sentence to be served at 20%.

The above sentences were to be served consecutively for an effective sentence of forty-five (45) years.

5. The plea was entered and accepted by the Court that same afternoon, as soon as Court resumed following the lunch break. *See* Exhibit E.
6. The judgments in accordance with the plea were entered on April 23, 2007.
7. On May 8, 2007, less than a month after the plea was entered, Kenneth Bartley, acting through his trial counsel, filed a motion to withdraw his guilty plea. *See* Exhibit F. An amended motion to withdraw the guilty plea was filed on June 26, 2007, following a change of counsel. *See* Exhibit G.
8. An evidentiary hearing on Petitioner Bartley's motion to withdraw his plea was held on July 2, 2007.
9. At the conclusion of the evidentiary hearing, the trial court denied the Petitioner's Motion.
10. Petitioner, through counsel, filed a timely notice of appeal, wherein he alerted the Court of Criminal Appeals to the legal and constitutional errors which occurred during the plea process. The following issues were presented to the Court of Criminal Appeals:

    a. Was Kenneth Bartley's plea of guilty defective and thus should be set aside because there were no facts presented to the Court to support the guilty plea?

    b. Did Kenneth Bartley's plea of guilty meet constitutionally required standards since it was not knowing and voluntary?

    c. Does prevention of a manifest injustice dictate Kenneth Bartley be allowed to withdraw his plea of guilty?

11. On May 1, 2009, the Court of Criminal Appeals rendered a judgment denying Mr. Bartley's appeal.
12. Mr. Bartley timely filed an Application for Permission to Appeal in the Supreme Court for the State of Tennessee. The same three issues raised in Mr. Bartley's appeal to the Court of Criminal Appeals were again raised in this Application.
13. The Petitioner's Application for Permission to Appeal was denied on October 19, 2009.
14. This Petition for Post-Conviction Relief is timely filed within one (1) year of the date of the final action of the highest state appellate court to which an appeal was taken, pursuant to Tenn. Code Ann. § 40-30-102.
15. The issues raised herein were not raised on direct appeal because Kenneth Bartley's trial counsel, who filed the original motion to withdraw Kenneth's guilty plea, was terminated and replaced with successor counsel. Successor counsel, Bruce Poston, chose to file an amended motion to withdraw Kenneth Bartley's plea and litigate that issue on appeal as opposed to the record as a whole. Mr. Poston's post-trial focus was narrow as it related to the issue of the motion to withdraw the plea and the scope of the appeal. Accordingly, the issues raised herein have not been waived or previously determined.

FACTUAL BACKGROUND[1]

Petitioner Kenneth Bartley is currently serving a forty-five (45) year sentence of imprisonment based on an agreement to plea guilty to one count of second degree murder and two counts of attempted second degree murder arising from an incident involving a shooting at Campbell County High School on November 8, 2005. As a result of the shooting, Campbell County High School Principal Gary Seale and Assistant Principal Jim Pierce were wounded, and Assistant Principal Ken Bruce died. TT at 83:21-84:5.

On the date of the incident, Kenneth Bartley brought a gun to school with the intention of trading the gun for Oxycontin after school hours with an individual who was not a student at Campbell County High School. *See* THT at 23:2-5; Exhibits H and O, attached. A number of Kenney's friends had knowledge that Kenneth Bartley brought the gun to school to trade it for drugs. *See* Statements of Daniel Hamblin, Trent Shane McCullah, and Preston Young, attached hereto as Collective Exhibit H. The gun belonged to Kenneth Bartley's father. *See* THT at 23:2-5; Exhibits H and O. Kenneth found the gun in the drawer of his father's nightstand, along with some Xanax pills that belonged to his father's girlfriend. *See* Exhibit O. Kenneth Bartley swallowed two 10 milligram pills of Valium, a

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[1] In support of the facts set forth herein, the transcripts of the following proceedings are attached hereto as exhibits, and referenced throughout this Petition using the following abbreviations:

THT: February 2, 2007 Transfer Hearing Transcript, Vol. I-III

TT: April 10, 2007 Trial Transcript containing voir dire, in-chambers conferences, and the entry of the plea.

PTT: Partial Trial Transcript containing only those portions of the April 10, 2007 transcript relating to the plea.

MHT: July 2, 2007 Motion Hearing Transcript re: Motion to Withdraw Guilty Plea

prescription drug commonly used for treating anxiety, insomnia, and seizures. He then put the gun and the Xanax pills in his pocket and left for school. *See Exhibit O*. He arrived at school late, after second period had ended. THT 27:8-14.

At some point during the day, Assistant Principal Jim Pierce received information that Kenneth Bartley was suspected of having a gun in his pocket. (January 29 – February 2, 2007 Transfer Hearing Transcript (THT) at 26:22 – 27:7; Statement of SRO Susan Phillips, attached hereto as Exhibit I). Subsequently, Mr. Pierce sent the School Resource Officer (SRO), Susan Phillips, to get Kenneth Bartley out of class. (*Id.* at 27:8-14). Mr. Pierce instructed the SRO to tell Kenneth Bartley that Mr. Peirce wanted to ask him why he was absent for his first and second period classes. *Id.* Significantly, SRO Phillips was unarmed and did not conduct a search of Kenneth Bartley's person immediately upon calling him out of the classroom. *See* Exhibit I. In her statement to investigators, SRO Phillips indicated that school policy prohibits her from carrying a firearm and from searching male students. *Id.* Immediately prior to SRO Phillips calling him to the principal's office, Kenneth Bartley snorted another crushed Valium pill. *See* Statement of Kenneth Bartley, attached hereto as Exhibit O.

While the SRO was retrieving Petitioner Bartley, Mr. Pierce contacted Principal Seale and requested his presence during the meeting with Kenneth Bartley. THT at 27:17-23. Ultimately, Assistant Principal Ken Bruce also came to Mr. Pierce's office for the meeting. THT at 28:2-7. With Kenneth Bartley sitting across the desk from him, Mr. Pierce asked Kenneth to give him "what you have in your pocket." THT at 28:12-16. At this point, Kenneth Bartley, who was under the influence of a significant quantity of a mood altering prescription drug, pulled the gun out of his pocket. See Exhibit O, THT at 29:3-10. Principal

Gary Seale, who was seated next to Kenneth Bartley, immediately reached for the gun. THT at 28:12-29:10. Kenneth Bartley swatted Mr. Seale's hand away and began waiving the gun in the air. *Id.* Despite the fact that three adult men were in the room with this 14 year-old boy of small stature, Kenneth Bartley had time to reach into his other pocket for the clip, load the weapon, aim and open fire. THT 30:18-31:3. Kenneth Bartley emptied the clip. *See* Exhibit O at 4. He believes there were five bullets in the gun. *Id.*

After the shooting, Kenneth Bartley immediately expressed regret for what had transpired. Various witnesses heard the young and intoxicated Kenneth Bartley make the following statements:

"I'm sorry Mr. Pierce. I'm sorry."

"What have I done? What have I done?"

"I am sorry Mr. Seale."

See statements of Josh Cochran, Susan Phillips, Knud Howard Salveson, and Johnny Thompson, attached hereto as Collective Exhibit J.

When questioned by law enforcement, Kenneth Bartley indicated that the shooting never would have happened if he were not under the influence of prescription medication. Bent over crying, Kenneth Bartley told Campbell County Deputy Sheriff Darrell Mongar, "If I hadn't of took the Xanaxes, none of this would have happened." THT at 23:13-24:14. Kenneth Bartley also told Jason Heatherly of the Jacksboro Police Department that "It was over Xanax." *See* Exhibit L, Statement of Jason Heatherly; and Exhibit K, April 9, 2007 Report of Diana McCoy, Ph.D., ABAP.

Following his arrest, Kenneth Bartley was held at Mountain View Youth Development Center (Mountain View) in Dandridge, Tennessee. His parents, Rita Vannoy

and Kenneth Bartley, Sr., divorced, retained Jacksboro, Tennessee attorney Michael G. Hatmaker to represent their son. At some point while the matter was still pending before the Campbell County Juvenile Court, Mr. Hatmaker conveyed a plea offer in which Kenneth Bartley would waive his right to a transfer hearing in Juvenile Court in exchange for the opportunity to plead guilty to one count of voluntary manslaughter and two counts of aggravated assault. MHT at 13:6-22. Pursuant to this initial plea offer, Kenneth Bartley would have received a total sentence of fifteen (15) years and would have been eligible for parole after only eight (8) years. MHT at 111:1-113:11. This offer was first conveyed to Kenneth Bartley's parents outside of Kenneth's presence. MHT at 13:6-14:18. After considering the plea offer over night, Ms. Vannoy, with permission from Kenneth Bartley's father, contacted Mr. Hatmaker and informed him that they would approve this offer because they believed it to be in Kenneth's best interest. At that point, Ms. Vannoy told Mr. Hatmaker that he could communicate the offer to Kenneth. *Id.*

Ultimately, this initial plea offer was withdrawn. The record is unclear as to why the offer was withdrawn, but it appears that either Jo Bruce, wife of the deceased Assistant Principal Ken Bruce, declined to approve the deal, or that based upon the recommendation of the State's expert psychologist, Dr. Vance Sherwood, the district attorney was of the opinion that a fifteen year sentence was not sufficient in this case. MHT 12:25-15:5; 111:1-113:7.

In any event, the matter proceeded and a transfer hearing was held before the Honorable Michael Davis, Special Judge sitting in the Campbell County Juvenile Court. The transfer hearing was extensive, lasting from January 29 through February 2, 2007. Investigators with the Tennessee Bureau of Investigation and the Campbell County Sheriff's Department testified, as did the surviving victims, and a significant number of mental health

professionals who had evaluated and/or treated the young Kenneth Bartley both before and after the shooting, including Kris Houser, M.D., Kevin Blanton, M.D., and Vance Sherwood, Ph.D.

On February 2, 2007, Judge Davis entered an Order finding that reasonable grounds existed to transfer Kenneth Bartley to the Criminal Court of Campbell County to be tried as an adult. Three days later, on February 5, 2007, the seven count Indictment was issued by the Campbell County Grand Jury charging Kenneth Bartley with first degree premeditated murder, first degree felony murder, two counts of attempted first degree murder, carrying a firearm on public school property, possession of a schedule IV drug with intent to sell, and possession of a schedule IV drug with intent to deliver.

On March 25, trial counsel for Kenneth Bartley came to visit him at Mountain View. The purpose of this visit was to convey a new plea offer. MHT at 16:7-19:6. By chance, both of Kenneth's parents happened to be at Mountain View on that same date and time to visit their son. *Id.* Mr. Hatmaker met with the three of them – Kenneth Bartley, Jr., Rita Vannoy, and Kenneth Bartley, Sr. – and told them that the state had offered a total of forty-five (45) years: twenty-five years on one count of second degree murder, and ten years each on two counts of aggravated assault. The twenty-five year sentence was to be served at 100% and the ten year sentences would each be served at 30%. All sentences were to run consecutively. *Id.*; MHT at 117:25-118:5. Kenneth Bartley, his father, and his mother all agreed that this offer was not acceptable and that Kenneth should proceed to trial. *Id.*; MHT at 50:1-51:14. In fact, Mr. Hatmaker was also "not pleased" with the offer and advised his client to reject it. Accordingly, Kenneth Bartley rejected the offer. *Id.*; MHT at 114:10-116:5. Significantly, this rejected offer was nearly identical to the plea deal that was

ultimately entered into on the first day of trial. The only difference was that in the final deal, the two ten-year sentences would be served at 20% rather that 30%, making Kenneth Bartley eligible for parole 2 years sooner; a negligible difference at best when facing a 45-year jail sentence.

Trial began on April 10, 2007. Plea negotiations continued that morning despite the Honorable Judge Blackwood's assertion that the Court was unlikely to approve any guilty plea at this late point in the proceedings. TT 150:7-12; 153:6-9. *Voir dire* began that morning. Not surprisingly, a significant number of the potential jurors from sparsely populated Campbell County indicated that they either (1) knew Kenneth Bartley or one of his parents personally, (2) knew one of the victims or their family members personally, (3) had ties to Campbell County High School and/or knew a student or faculty member who was present on the date of shooting, or (4) had been exposed to the extensive media coverage of this case. *See* TT at 13:6-146:25. One potential juror even indicated that she was part of the emergency response team that was called to the scene on that tragic November day. TT at 15:10-16:7. One potential juror after another indicated that for one or more of the above reasons they had preconceived notions regarding the case and Kenneth Bartley's guilt. *See* TT at 13:6-146:25.

The Court recessed for lunch prior to completing the jury selection process. When the parties returned from the lunch break, Kenneth Bartley took his seat next to his attorney at the defense table. At this time, counsel informed him that the State had made another offer. MHT at 55:12-58:15. The offer was still for twenty-five, ten and ten, however this time the ten year sentences would be served at 20% instead of 30% before Kenneth Bartley would be eligible for parole. *Id.*; MHT at 38:4-19. Kenneth Bartley – a "nervous and scared"

fifteen year-old boy on the first day of his murder trial – decided to accept the deal. MHT at 54:1-58:15; 126:3-12. Kenneth Bartley's attorney informed his mother of her son's decision to take the plea. MHT at 21:19-23:8. At this point, Kenneth Bartley's mother requested to see her son and she was permitted to meet with Kenneth and his counsel in a conference room adjacent to the courtroom. MHT at 31:15-41:5. Although they had rejected an almost identical plea offer two weeks prior, Rita Vannoy did not discuss the pros and cons of this plea offer with her young son because at this point, Rita Vannoy was under the impression that this was a done deal. *Id*. She had been told by Kenneth's counsel that "Kenneth took a deal." *Id*. She was not aware that there was still time to reject the offer and proceed with trial. *Id*. She held her little boy and cried. *Id*.

STATEMENT OF THE ISSUES

I. WHETHER PETITIONER BARTLEY'S PLEA WAS NOT VOLUNTARY, KNOWING AND INTELLINGENT AND WAS THEREFORE ENTERED IN VIOLATION OF HIS RIGHT TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS AS AFFORDED BY THE TENNESSEE CONSTITUTION AND THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

For a guilty plea in a criminal proceeding to be valid, the Fourteenth Amendment's due process clause requires the court to determine whether a defendant knowingly, intelligently, and voluntarily entered the plea. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274, 279 (1969). If a guilty plea is not so entered, the defendant has been denied due process and the guilty plea is void. Lane v. State, 316 S.W.3d 555, 562 (Tenn. 2010)(citing *Boykin*, 395 U.S. at 243 (quoting *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969))); *State v. Mellon*, 118 S.W.3d 340, 345 (Tenn. 2003). A guilty plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may

be entered without a trial; a waiver of his right to trial before a jury or a judge. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469 (1970). Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. *Id*. The Court has authority to set aside a guilty plea after the judgment is final, upon a finding that the plea was not entered voluntarily, intelligently, and knowingly or was obtained through the abridgment of any right guaranteed by the United States or Tennessee Constitutions. *State v. Mackey*, 553 S.W.2d 337, 340-341 (Tenn.1977); Tenn. Code Ann. § 40-30-203.

In determining whether a guilty plea was knowingly, voluntarily, and intelligently entered, the court must look to "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Lane*, 316 S.W.3d at 562 (Tenn. 2010), citing *Grindstaff*, 297 S.W.3d at 218. Some factors to consider in making this determination include:

> (1) the defendant's relative intelligence; (2) the defendant's familiarity with criminal proceedings; (3) the competency of counsel and the defendant's opportunity to confer with counsel about alternatives; (4) the advice of counsel and the court about the charges and the penalty to be imposed; and (5) the defendant's reasons for pleading guilty, including the desire to avoid a greater penalty in a jury trial.

Id., citing *Howell v. State*, 185 S.W.3d 319, 330-31 (Tenn.2006); *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn.1993)). A voluntary plea is one in which the defendant understands the consequences of his or her plea and the law in relation to the facts. *Id*. at 562-63.

A. <u>Whether a heightened standard applies when evaluating whether a juvenile's guilty plea was made knowingly, intelligently and voluntarily.</u>

Kenneth Bartley, a fifteen year-old adolescent, during his first degree murder trial, in an electrically charged courtroom environment, was suddenly presented with a plea offer after lunch recess as a jury was being selected. Remarkably, the plea offer was conveyed to 15 year old Kenneth Bartley and accepted within a time frame of a couple hours without any meaningful parental input. The method and timing in which the plea offer was conveyed in a high-profile first degree murder case to a juvenile with a significant history of psychological problems raises a material issue of first impression under Tennessee law as to whether the plea was knowingly, intelligently, and voluntarily given.

It is well-established that juvenile defendants are "less mature and responsible than adults," *Thompson v. Oklahoma,* 487 U.S. 815, 834, 108 S.Ct. 2687, 2698, 101 L.Ed.2d 702, 717 (1988), and "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird,* 443 U.S. 622, 635, 99 S.Ct. 3035, 3044, 61 L.Ed.2d 797, 808 (1979). The United States Supreme Court has on numerous occasions expressed special concern for protecting the constitutional rights of juveniles in criminal proceedings due to their immaturity and limited mental capacity to understand their legal rights. *See In re Gault,* 387 U.S. 1, 30, 55, 87 S.Ct. 1428, 1445, 1458(1967); *Gallegos v. Colorado,* 370 U.S. 49, 54, 82 S.Ct. 1209, 1212-13, 8 L.Ed.2d 325, 329 (1962); and *Haley v. Ohio,* 332 U.S. 596, 599-600, 68 S.Ct. 302, 303-04, 92 L.Ed. 224, 228 (1948).

When a juvenile defendant raises a claim that his plea was not knowing and voluntary, the Court must evaluate the "totality of circumstances" to determine whether

the claim has merit. *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 2572 (1979). The Supreme Court has opined that when evaluating whether a juvenile's waiver of his constitutional rights was knowing and voluntary, and applying a totality of circumstances test, the trial court must consider such factors as the juvenile's age, previous court experience, education, background, intelligence, and capacity to understand the nature of his or her rights and the consequences of waiving those rights. *Id.*

In addition, several state courts have recognized that a significant factor the court must consider is whether the juvenile had the opportunity to consult with a parent, guardian, or counsel before entering a plea or whether such person accompanied the juvenile to the plea hearing. *See People v. Thorpe*, 641 P.2d 935, 941 (Colo.1982); *S.A.R.*, 860 P.2d at 574; *see also State v. Farrell*, 145 N.H. 733, 766 A.2d 1057, 1062 (2001) (when parent not notified of custodial interrogation, lack of parental presence becomes "significant factor"); *State v. Presha*, 163 N.J. 304, 748 A.2d 1108, 1114 (2000) (in custodial interrogation, absence of parent considered "highly significant factor"); *State ex rel. J.M. v. Taylor*, 166 W.Va. 511, 276 S.E.2d 199, 202 (1981) (citing several cases that use advice of parent or counsel as totality factor in determining waiver). *See-also Juvenile Justice Standards Annotated, supra*, §§ 6.1, 6.2. The trial court should also consider whether a juvenile defendant has meritorious defenses to the charges against him or her. *People v. Simpson*, 51 P.3d 1022, 1027 (Colo. Ct. App. 2001) (reversed by 69 P.3d 79 (Colo. 2003) on grounds that district court failed to hold an evidentiary hearing to determine whether the allegations contained in the juvenile's petition for postconviction relief were true), citing *People v. Cunningham*, 678 P.2d 1058, 1061

(Colo.App.1983) (where juvenile represented by counsel, failure to assert meritorious defense should be considered).

As previously stated, the Tennessee Supreme Court has never directly addressed the issue of a heightened standard in determining whether a plea was knowing and voluntary in a case involving a juvenile defendant, however the Colorado Court of Appeals has held that a seventeen year-old juvenile's plea was not knowing and voluntary in circumstances very similar to those in the instant case. *Simpson*, 51 P.3d 1022 (Colo. Ct. App. 2001). Although *People v. Simpson* is not binding on this court, the rationale employed by the Colorado Court of Appeals in that case is illuminating regarding the facts and circumstances of Kenneth Bartley's case. The *Simpson* Court wisely observed that "even if a juvenile is charged in adult court, it does not follow that he or she must be treated as an adult in all respects." *Id.* at 1027-28 (citing Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, Utah L.Rev. 709, 722 (1997) ("Children's immaturity is ignored when the law holds them to adult standards of conduct by transferring them for trial in adult court."); Malcolm C. Young, U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Providing Effective Representation for Youth Prosecuted as Adults* 1, 4 (2000) (Model Program Advisory Team emphasized that representation of a child in adult court "is qualitatively different from representing an adult"); Malcolm C. Young, *Representing a Child in Adult Criminal Court*, Crim. Just. 15-20 (Spring 2000) (describing how at every critical point of adult criminal process, children are ill-equipped to defend themselves or be defended even by competent counsel).

In *Simpson*, the defendant argued that there were three reasons why his guilty plea was not knowing and voluntary: (1) he did not have an adult, guardian, or guardian ad litem present to assist him; (2) he only possessed a sixth grade education; and (3) he was suffering from a bipolar personality disorder. People v. Simpson, 69 P.3d 79, 80-81 (Colo. 2003). Although the Colorado Supreme Court reversed on other grounds, the Court recognized that any one of these reasons, if proven, could constitute a sufficient basis to set aside the plea on the grounds that it was not knowing and voluntary. *Id*.

In the instant case, Kenneth Bartley was merely a fourteen year-old freshman in high school at the time the shooting occurred. Accordingly, similar to the defendant in *Simpson*, he had obtained little more than an eighth-grade education. He received little to no significant additional education following the shooting and his incarceration at Mountain View, where the focus was on psychological counseling and treatment rather than education.

Also like the situation in *Simpson*, Kenneth Bartley's parents did not have an opportunity to participate meaningfully in Kenneth's deliberation as to whether to take the plea. The plea offer was conveyed suddenly to the young Kenneth Bartley in the midst of the first day of his emotionally charged murder trial. The requirement that a plea be knowingly, voluntarily and intelligently given would obviously mandate careful consideration, deliberation, and informed choice with an ability to meaningfully consult with counsel, parents and in this instance a psychologist, in the context of a juvenile. In the instant case, Kenneth Bartley was afforded no meaningful opportunity to consult with his parents regarding the reasonableness of

the plea and was afforded no significant amount of time to deliberate regarding the plea, either on his own or with his parents. Significantly, a minor cannot be held to a contract to purchase an automobile or any other item of substantial value, yet in this case, Kenneth Bartley, acting alone, at fifteen years of age, was permitted to make a decision that would significantly impact the rest of his life. *See* Tenn. Code. Ann. § 47-3-305(a)(1).

Suddenly and without any advance knowledge on the part of either Kenneth Bartley or his parents, Kenneth's attorney informed him that a plea offer had been extended by the State and he was taken to a room adjacent to the courtroom. The fifteen year-old Kenneth Bartley was nervous and scared as he learned of this new development. MHT at 53:23-54:11. Although Kenneth Bartley's parents were present in the courtroom, they were not included in the decision-making process as it related to whether Kenneth would accept the plea offer. MHT at 55:9-57:25; 21:19-23:8; 31:15-41:5. Kenneth Bartley's mother testified that she was only informed that Kenneth "had accepted a plea offer" when court resumed following a lunch break. MHT at 21:19-23:8. She further testified that Kenneth Bartley's trial counsel whispered this information to her from across the bar once Court was back in session, and led her to believe that Kenneth's acceptance of the plea offer was a done deal and that there was nothing for her to discuss with her son regarding this very important issue. MHT at 21:19-23:8; 31:15-41:5. Significantly, when a plea offer that was substantially similar was conveyed to Kenneth Bartley, shortly before trial, he rejected the offer after much consideration including the input and counsel of his parents. MHT at 50:1-51:14; 117:25-118:5.

Additionally, like the Petitioner in *Simpson*, Kenneth Bartley, due to his age and history of psychological problems, lacked the capacity to sufficiently understand the proceedings and the full consequences of accepting the State's plea offer. *See* Affidavit of Dr. James F. Murray, attached hereto as Exhibit M. At the very least, the fact that this fifteen year-old boy was afforded only approximately a half-hour within which to make this life-changing decision while under the extreme pressure of a first degree murder trial raises serious issues as to whether the plea was knowingly, voluntarily and intelligently given. *Id*.

At his transfer hearing in Juvenile Court, Dr. Diana McCoy testified that based upon a review of his psychiatric records, at various times during his youth, Kenneth Bartley has been diagnosed with numerous psychological and behavioral disorders, including but not limited to, Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder, Disruptive Behavior Disorder, Major Depression, Oppressive Disorder, and Conduct Disorder. *See* THT at 172:19-20; 353:13-16; 354:13-355:4;359:18-360:3; 362:5-363:10; 413:16-25. Additionally, Dr. McCoy testified that Kenneth Bartley had reported to various psychologists that he was "anxious and irritable," and had "problems concentrating." THT at 353:24-354:3. Psychologists at Ridgeview described Kenneth as having poor judgment and concentration, being impulsive and irritable, and as having poor insight. 359:18-360:3.

All of these characteristics support a finding that under the totality of the circumstances, in the emotionally charged and tense environment of the first day of his murder trial, Kenneth Bartley was not capable of entering into a plea that was knowingly, voluntarily, and intelligently given and supported by the facts of his case. Significantly,

the affidavit of Dr. James F. Murray, addresses the issue of whether a plea given by a juvenile under these specific circumstances can be knowingly, intelligently, and voluntarily given and whether in this specific instance there should be a heightened standard in evaluating the voluntariness of the plea. (*See* Exhibit M). In the instant case, Kenneth Bartley's immaturity and inability to accurately assess and weigh consequences involving substantial periods of time is underscored by his psychological history of ADHD, impulsivity and emotional instability.

B. <u>Whether Kenneth Bartley Had a Meritorious Defense to the First Degree Murder Charges</u>.

Another factor to consider is whether a juvenile defendant has meritorious defenses to the charges against him. *Simpson*, 51 P.3d at 1027, citing *Cunningham*, 678 P.2d at 1061 (where juvenile represented by counsel, failure to assert meritorious defense should be considered in determining whether plea was knowingly, voluntarily, and intelligently given). In the instant case, Kenneth Bartley had a meritorious defense to the first degree murder charges against him in that he did not act with the requisite premeditation and intent to kill Assistant Principal Ken Bruce.

A substantial amount of evidence existed to negate the mens rea required for first or second degree murder, a necessary element of the offense. First degree murder requires that the defendant act with "premeditation and intent" and second degree murder requires that the killing being a "knowing" killing. Tenn. Code Ann. §§ 39-13-201 and 39-13-210. "Premeditation" is defined as follows:

> [A]n act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any

> definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.
>
> Tenn. Code Ann. § 39-13-202(a)(1) (emphasis added).

First, the absence of premeditation could have been proven through testimony of numerous fact witnesses who gave written statements to law enforcement indicating that Kenneth Bartley told them that he brought the gun to school for the specific purpose of trading the gun for drugs or selling it in order to use the proceeds to purchase drugs. *See* Collective Exhibit H. Kenneth Bartley did not leave class, walk into the principal's office and open fire of his own volition, rather the incident occurred only after he was called into the principal's office for questioning. *See* Exhibit I, Statement of SRO Susan Phillips.

When interviewed by law enforcement after the incident, Kenneth Bartley indicated that he had taken two ten-milligram Valium pills before going to school at approximately 12:00 p.m. and that he snorted an additional valium just moments before SRO Phillips retrieved him from the classroom and the shooting occurred at approximately 1:45 p.m. *See* Exhibit O; THT 396:14-18. Kenneth Bartley's psychological history, significant history of drug use at this tender age, and the fact that he was under the influence of drugs at the time of the incident, at a minimum could have been used to establish diminished capacity such as would negate an essential element of the offense of first and second degree murder.

Significantly, if Kenneth Bartley's trial counsel had any intent of raising these defenses at trial, this intent was not communicated to Kenneth Bartley or his

parents at any time during the course of the representation. MHT at 57:17-25. This conclusion is further corroborated by the fact that Kenneth Bartley's trial counsel never filed a Tenn. R. Crim. B. 12.2(b) notice of intent to introduce expert testimony regarding the defendant's mental state at the time of the offense. Accordingly, had Kenneth Bartley's attorney intended to introduce expert testimony regarding the effects of drugs on Kenneth's mental state at the time of the shooting, such testimony could have been excluded pursuant to Tenn. R. Crim. P 12.2(d).

The State's theory of the case for the felony murder charge was that Kenneth Bartley killed Ken Bruce in the course of the attempted first degree murder of Gary Seale. MHT at 96:18-97:6, TT at 84:13-23, 89:9-15. In order to prove the attempted first degree murder of Gary Seale, the State would have to establish beyond a reasonable doubt that Kenneth Bartley possessed the requisite premeditated and intentional mens rea for the first degree murder of Gary Seale when he instead shot and killed Ken Bruce. Based upon the foregoing, and the record as set forth in the juvenile transfer hearing, the State could not have met their burden of proof beyond a reasonable doubt regarding the essential elements for the allegations as set forth in the indictment.

C. Whether Kenneth Bartley's guilty plea was not knowing and voluntary because the Trial Judge Failed to Confirm on the Record whether the plea was voluntary and not the result of force, threats, or promises as required by constitutional due process guarantees.

Rule 11 of the Tennessee Rule of Criminal Procedure governs the court's consideration and acceptance of a guilty plea by a criminal defendant. Rule 11 sets forth a number of requirements intended to safeguard a defendant's constitutional rights, ensure that the plea is voluntary, knowing, and intelligently entered, and further intended

to safeguard the plea process from postconviction attack regarding the constitutionality of the plea. *See State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977); *McCarthy v. U.S.*, 394 U.S. 459, 89 S.Ct. 1166 (1969). Tennessee's Rule 11 is essentially a codification of the 1977 Tennessee Supreme Court decision in *State v. Mackey*. The *Mackey* Court set forth the proper procedure for acceptance of a guilty plea by the court and held that the court must "substantially adhere" to that procedure. *Mackey* and Rule 11(b)(2) require that:

> The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty results from prior discussions between the District Attorney General and the defendant or his attorney.
>
> Notwithstanding the acceptance of a plea of guilty, the court shall not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.
>
> *Mackey*, 553 S.W.2d at 341, Tenn. R. Crim. P. 11(b)(2)&(3).

Mackey and Tenn. R. Crim. P. 11(e) further require that:

> A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty, the record shall include, without limitation, (a) the court's advice to the defendant, (b) the inquiry into the voluntariness of the plea including any plea agreement and into the defendant's understanding of the consequences of his entering a plea of guilty, and (c) the inquiry into the accuracy of a guilty plea.
>
> *Id.*, Tenn. Rule Crim. P. 11(e).

Although literal compliance with the Rule 11/*Mackey* advice to be given a defendant by a trial judge during a guilty plea hearing is not required, a trial court must substantially comply with the required advice. *Lane v. State*, 316 S.W.3d 555, 564-65 (Tenn. 2010), citing *State v. Neal*, 810 S.W.2d 131, 137 (Tenn. 1991), and *State v.*

Newsome, 778 S.W.2d 34, 38 (Tenn.1989) ("The rule in *Mackey* requires trial judges in accepting pleas of guilty in criminal cases to adhere *substantially* to the procedure prescribed. We consider that requirement to relate to Criminal Procedure Rule 11 as well."). In *Lane v. State*, a recent case decided in July 2010, the Tennessee Supreme Court gave a great deal of guidance as to what constitutes "substantial compliance" so as to render a plea valid, and contrarily, what constitutes error:

> Substantial compliance is not less than full compliance with the federal and Tennessee requirements. Further, substantial compliance is not error. Where there is substantial compliance the root purpose of the prescribed litany has been served and the guilty plea passes due process scrutiny because it was made voluntarily and understandingly.
>
> Where there has been substantial compliance, there is not an omission. Where there is a "patent omission" from the advice litany, it is error. The court then reviews the plea for harmless error. The level of harmless error review depends upon whether the omission constitutes a constitutional error or whether the required advice derives from a rule or pronouncement based on the supervisory authority of this Court. <u>If the former, the judgment is void unless the error is harmless beyond a reasonable doubt</u>. If the latter, the judgment will be void only if the defendant can show prejudice from the omission.
>
> *Id.* (citations omitted) emphasis added).

In the instant case, the Petitioner was never queried on the record as to whether his plea was "voluntary and not the result of force or threats or of promises apart from a plea agreement." *See* Partial Trial Transcript, April 10, 2007 (PTT)[2] attached hereto as Exhibit C). The only mention of "voluntariness" was where the Judge asked, "Having explained all those rights to you, do you now hereby voluntarily waive or give up your right to a jury trial." PTT at 36:14-16. Significantly, this question in no manner

[2] This transcript sets forth the entire record as it relates to Kenneth Bartley's plea, omitting the jury voir dire.

addressed the matter of whether the plea was "not the result of force or threats or of promises apart from the plea agreement." Rule 11(b). This omission constitutes a constitutional error as the 14th Amendment Due Process clause requires that a plea be voluntary. *Boykin v. Alabama,* 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274, 279 (1969). Accordingly, omission of this question on the record voids the judgment unless the Court determines that the error meets the highest level of harmless error review, harmless beyond a reasonable doubt.

Significantly, there is substantial evidence in the record to suggest that the plea was not voluntary and was potentially the result of "force or threats" by the Petitioner's own trial counsel. At the evidentiary hearing on the motion to withdraw Kenneth Bartley's guilty plea, Kenneth testified that after Mr. Hatmaker informed him that a new plea offer was on the table, he and Mr. Hatmaker, without Kenneth's parents, went into a conference room adjacent to the court and briefly discussed the plea offer. MHT at 55:12-57:25. He further testified that his only recollection of his discussion with Mr. Hatmaker was that, "Mr. Hatmaker just kept talking about the felony murder, how I'd probably get that no matter what, and he said that Ms. Bruce was really pushing for first degree." *Id*. According to Kenneth Bartley, the only other thing that was said about the deal was that he "would be lucky to get it." *Id*. Kenneth Bartley testified that he felt he was "being sold that deal" and that at no time during this crucial decision-making period were his parents brought in to discuss this with him. *Id*.

Again, this was a situation wherein a fifteen year-old with a documented history of anxiety, inability to concentrate, and "get[ting] so overwhelmed by emotion that he just loses it" was required to make a decision affecting the rest of his life in the midst of a

first degree murder trial, in a small, southern courtroom packed full of local citizens with hostile feelings towards him. Kenneth Bartley testified that he had spent only approximately thirty (30) minutes meeting with his attorney in preparation for trial, had no knowledge as to whether any defense witnesses would be called, and when asked what he believed the defense theory to be, Kenneth testified, "I didn't know that we had one." MHT at 57:17-57:25.

Remarkably, the plea was presented and entered on the record within a period of two hours without any meaningful parental input. MHT at 127:8-128:10. It is also significant to note that a substantial percentage of those hours were occupied by an in-chambers meeting between the judge, defense counsel and the district attorney, for which Kenneth Bartley was not present. MHT at 130:3-24. An additional percentage was occupied by an in-chambers meeting between the judge and the victims' families, at which time Kenneth Bartley was brought in to apologize to the families, but his parents remained in the courtroom. *Id*.; and *see* generally PTT.

At this point, the plea bargain had already been informally approved by the Judge and Kenneth Bartley, with good reason, believed that it was a done deal. By the time his mother was permitted to see him, at her own request, neither one of them were aware that the plea was not final and that Kenneth still had the choice of proceeding with trial. MHT at 39:12-41:5. Specifically, Kenneth Bartley's mother, Rita Vannoy testified as follows:

> Q. [Bruce Poston]: Okay. Now, so that we have the timing right, I think you testified on direct everybody was in the Courtroom, break for lunch, and then you came back. Correct me if I'm wrong. You then said that you believe Mr. Hatmaker and your son went into a room and talked.

A. [Rita Vannoy] Yes, sir.
Q. They came out, your son went to the defense table and at some point, the lawyers and the judge went into a room.
A. Yes, sir.
Q. Okay. And at some point after that, the victims and their families and your son went into a room.
A. Yes.
Q. And after that, everybody came out.
A. Correct.
Q. And that's when you were told that, quote, "Kenneth took a deal"?
A. He took a plea.
Q. Took a plea. And is that when you went in – were allowed to go and see your son in the room?
A. Yes. I said, "Could I please just see my son."
Q. Okay. Now, were you present when he actually signed anything?
A. No, sir.
Q. How long were you in that room?
A. Two or three minutes, maybe. Just a few minutes.
Q. Did you see his lawyer go over any of the documents at all?
A. No. We were all standing. No one sat down.
Q. You thought it was all over?
A. Yes.

MHT at 39:12-40:21.

The foregoing facts raise significant questions as the voluntariness of Kenneth Bartley's plea. This adolescent, with a history of psychological and emotional issues was suddenly presented with a plea offer that was a life-altering decision. The decision to accept this offer, which was nearly identical to the offer he had rejected just two weeks earlier when given an opportunity to discuss the decision with his parents, was made within a timeframe of less than half an hour.

The trial judge's failure to inquire as to the voluntariness of the plea on the record constitutes a "patent omission" from the advice litany. Simply put, it is constitutional

error. Considered in light of the above facts, it cannot be said that this error was harmless beyond a reasonable doubt and accordingly the judgment should be void.

II. WHETHER THE PERFORMANCE OF TRIAL COUNSEL WAS SO DEFICIENT AS TO DEPRIVE PETITIONER OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

When ineffective assistance of counsel is alleged, a convicted defendant must show two things before a reversal of his conviction is required: (1) that the services rendered by trial counsel were deficient; and (2) that such deficient performance prejudiced the defendant. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). To prove deficient performance of counsel, the defendant must show that counsel made such serious errors that he or she was not functioning as counsel envisioned by the Sixth Amendment. Id. In other words, the court must decide whether or not counsel's performance was within the range of competence demanded of attorneys in criminal cases. *Powers v. State,* 942 S.W.2d 551, 557-58 (Tenn. Crim. App. 1996), citing *Baxter v. Rose,* 523 S.W.2d 930, 936 (Tenn.1975). This inquiry focuses on whether counsel's assistance was reasonable under the circumstances. *Id.*, *Strickland,* 466 U.S. at 688-89, 104 S.Ct. at 2065.

In evaluating counsel's performance, the court should examine the context of the case as a whole. *State v. Mitchell,* 753 S.W.2d 148, 149 (Tenn. Crim. App.1988). The primary concern should be the fundamental fairness of the proceeding whose result is being challenged. *Id.* The court should not second-guess tactical and strategic decisions by defense counsel, but instead, should reconstruct the circumstances of counsel's challenged conduct and evaluate the conduct from counsel's perspective at the time.

Henley, 960 S.W.2d at 579. *Id.; see also Irick v. State*, 973 S.W.2d 643, 652 (Tenn.Crim.App.1998). However, the court's deference to counsel's tactical decisions must depend upon counsel's adequate investigation of defense options. *Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987). Deference to strategy and tactical choices applies only if the choices are informed and based upon adequate preparation. *Howell v. State*, 185 S.W.3d 319, 327 (Tenn. 2006), citing *House v. State*, 44 S.W.3d 508, 515 (Tenn.2001).

To satisfy the prejudice prong of the *Strickland* test, the petitioner must show a reasonable probability that, but for counsel's ineffective performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Accordingly, when the petitioner seeks to set aside a guilty plea on the ground of ineffective assistance of counsel, he must demonstrate a reasonable probability that, but for counsel's deficiency, he would have insisted upon proceeding to trial. *Powers*, 942 S.W.2d at 558, citing *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Bankston v. State*, 815 S.W.2d 213, 215 (Tenn. Crim. App.), *perm. to appeal denied*, (Tenn.1991); *Manning v. State*, 883 S.W.2d 635, 637 (Tenn.Crim.App.1994).

Under Tennessee law, the evidence showing that an attorney failed to prepare a sound defense or to present witnesses must be substantial before ineffective assistance of counsel will be found. Id. The failure of Kenneth Bartley's counsel to investigate and prepare a defense meets that burden. Specifically, Mr. Bartley's trial counsel committed the following errors which cumulatively resulted in assistance of counsel that was not "reasonable under the circumstances," or alternatively, in counsel that was not functioning as "counsel envisioned by the Sixth Amendment":

1. Counsel failed to timely communicate the State's initial plea offer and his client's response, and when informed by the State that the offer was being withdrawn, counsel failed to petition the court for enforcement of the agreement.

2. Counsel failed to conduct a reasonable investigation into the facts and circumstances surrounding the case prior to taking the case to trial and failed to interview, prepare, and subpoena important fact and expert witnesses.

3. Counsel failed to file any pretrial motions, despite significant and obvious issues that had a substantial probability of affecting the outcome of the case.

4. Counsel failed to communicate the plea offer to Petitioner Bartley's parents on the day of trial and failed to include the Petitioner's parents in the decision whether to accept the plea offer, contrary to past practice during course of representation.

5. Counsel failed to move for continuance to consider the plea agreement or otherwise put the plea agreement on the record

6. Counsel failed raise the issue of diminished capacity at the time of the offense based on his drug use and psychological history should have been used at a minimum to establish diminished capacity to negate an element of the offense of first and second degree competency at the time of the offense, or otherwise retain an expert to testify regarding the effect of prescription narcotics on the petitioner's mental state.

Each of the above issues is discussed more fully below:

A. <u>Counsel failed to timely communicate the State's initial plea offer and his client's response, and when informed by the State that the offer was being withdrawn, counsel failed to petition the court for enforcement of the agreement.</u>

The record is unclear as to the timing of the state initial plea offer in this matter, however, the record reflects that at some point near the beginning of the case, an offer was made which would have allowed Kenneth Bartley to plead guilty to one count of voluntary manslaughter and two counts of aggravated assault. MHT 12:25-15:8; 43:24-46:5; 111:1-113:7. In exchange for Kenneth's agreement to waive his right to a transfer hearing, he would have received a fifteen years sentence and would have been eligible for parole after eight (8) years. *Id.* Mr. Hatmaker first communicated this offer to Kenneth

Bartley's parents, and after they both agreed that it was in Kenneth's best interest to accept the deal, the offer was communicated to Kenneth. *Id*. Kenneth Bartley also accepted the offer and felt good about it. *Id*. Kenneth Bartley's willingness to enter into the plea agreement was communicated to the District Attorney by Mr. Hatmaker.

At this point, an offer has been made and accepted and the Petitioner's acceptance had been communicated to the District Attorney. A reasonable criminal defense attorney adhering to the applicable standard of care in this case should have known that a binding contract had been formed. However, this plea agreement was never finalized. The circumstances surrounding the offer and the revocation of this offer in the record are hazy at best. The offer was never reduced to writing by either Mr. Hatmaker or the District Attorney. Regarding revocation of this offer, Kenneth Bartley and his mother testified that the reason the deal was taken off of the table was because Mrs. Bruce, wife of the deceased Ken Bruce, would not approve it. *Id*. Mr. Hatmaker testified as follows:

> The deal was fifteen (15) years if he would waive the transfer hearing, if the District attorney could get the families to agree to it. The District attorney – I don't know if he ever brought it up with the families or what occurred. I think that he had Dr. Sherwood examine Kenneth before taking it to the families. I don't know that, I suspect that's the case. Dr. Sherwood met with Kenneth in May or June. After that, the District Attorney was of the opinion that fifteen (15) years was not enough.

A glaring issue in this case is that there was no effort to enforce this offer; an offer which would have given Kenneth Bartley a chance of being released from prison at an age where he would have a possibility of establishing a career, starting a family, and leading a meaningful life. As an advocate for this young man facing first degree murder charges, Mr. Hatmaker should have fought to have this plea entered on the record. Even if the offer were conditioned on approval by the families, based on Mr. Hatmaker's own

testimony at the motion hearing, he was never informed whether the families failed to approve the deal, or whether the deal was taken off the table for some other reason. He did not know whether the event upon which the offer may have been conditioned was ever fulfilled or not.

Mr. Hatmaker's representation of Kenneth Bartley deviated from the standard of care in that he failed to compel or litigate the issue of the agreement and its ambiguous revocation. This failure was not reasonable under the circumstances of this case. Kenneth Bartley was clearly prejudiced by this deficiency as envisioned by *Strickland*. There can be no question that the outcome of this case would have been different had this agreement -- this contract -- wherein there was an offer and acceptance, been enforced. Kenneth Bartley would be serving a fifteen (15) year sentence with a chance of parole by the age of twenty-three (23). Instead, he is serving a forty-five (45) year sentence with no chance of parole until he is at least forty-four (44) years old.

B. Counsel failed to conduct a reasonable investigation into the facts and circumstances surrounding the case prior to taking the case to trial and failed to interview, prepare, and subpoena important fact and expert witnesses.

The trial of this cause commenced merely two months after Kenneth Bartley was transferred to the Campbell County Criminal Court to be tried as an adult. Trial began on April 10, 2007. On February 5, 2007, the Campbell County Grand Jury issued an indictment charging Kenneth Bartley with first degree premeditated murder, first degree felony murder, two counts of attempted first degree murder, and a three gun and drug-related felonies. These were serious charges, which if proven, would have subjected the Petitioner to life in prison. Moreover, the Petitioner was a young child who was being

tried as an adult. This case deserved a significant amount of investigation and preparation. The fact that the case was tried merely two months after Kenneth Bartley was transferred and indicted alone evinces a substantial lack of preparation for trial.

When Kenneth Bartley testified regarding his motion to withdraw his plea, he was questioned regarding his role in preparing for trial. Kenneth Bartley testified that he spent only approximately thirty (30) minutes meeting with his attorney in preparation for trial. MHT at 57:17-25.

This criminal episode occurred at a large high school while school was in session. Twenty-seven (27) statements from fact witnesses were provided to Kenneth Bartley's attorney during the course of discovery. Neither the record nor Mr. Hatmaker's file reflect that any of these fact witnesses were ever interviewed by Kenneth Bartley's attorney or his staff, nor were they subpoenaed for trial by the defense. A number of these statements were exculpatory and the individuals who provided the statements would have been capable of presenting testimony at trial that would have negated an essential element of first or second degree murder. For example, a number of students had personal knowledge of Kenneth Bartley's reason for bringing the gun to school. These individuals knew that Kenneth Bartley had taken the gun from his dad's nightstand and brought it to school with the intent to trade it for drugs. *See* Statements of Daniel Hamblin, Trent Shane McCullah, and Preston Young, attached hereto as Collective Exhibit H.

Additional witness statements indicated that after the shooting, Kenneth Bartley immediately expressed regret for what had transpired. Various witnesses heard the young and intoxicated Kenneth Bartley make the following statements:

"I'm sorry Mr. Pierce. I'm sorry."

"What have I done? What have I done?"

"I am sorry Mr. Seale."

See statements of Josh Cochran, Susan Phillips, Knud Howard Salveson, and Johnny Thompson, attached hereto as Collective Exhibit J.

Anna Burden (now Anna Castleberry), Kenneth Bartley's teacher at the time he was pulled from the classroom and escorted to the principal's office by SRO Phillips, provided a statement to law enforcement. In her statement, she indicated that Kenneth Bartley had approached her in hall between third and fourth periods and engaged in a normal, polite, and happy conversation with her. Ms Burden had been absent from class the previous day, and Kenneth told her that he had missed her and was glad she was back. Ms. Burden stated that Kenneth was acting completely normal and as if nothing were out of the ordinary in her class, prior to the shooting. This is significantly in sharp contrast to the statements of Kenneth Bartley regarding the influence that prescription medication had on him at the time of the shooting. Ms. Burden was never interviewed or otherwise contacted by Kenneth Bartley's trial attorney. She was never subpoenaed for trial. *See* Affidavit of Anna Burden Castleberry, attached hereto as Exhibit N.

Additionally, during the course of the proceedings, Kenneth Bartley was evaluated and/or treated by a significant number of mental health experts, including but not limited to, Dr. Diana McCoy, Dr. Jeff Erickson, Camille Heathery, LCSW, Erin TePaske, various staff at Ridgeview (a non-profit Campbell County counseling center), a physician at Grainger Family Care who prescribed Paxil, an anti-depressant, to Kenneth Bartley, and Deniz Ekel, M.D. of Cherokee Health Systems. Dr. Diana McCoy and Erin

TePaske testified at Kenneth Bartley's transfer hearing. There is no evidence in the record that Mr. Hatmaker intended to call of any of these individuals to testify as expert witnesses at trial. Had Mr. Hatmaker intended to offer the testimony of Dr. McCoy at trial to establish diminished capacity at the time of the offense, a notice of intent to present this testimony should have been filed pursuant to Tenn. R. Crim. P. 12.2(b). No such notice was ever filed.

Further, as discussed in greater detail in Section C, below, counsel failed to investigate obvious grounds for a number of pretrial motions which could have had a significant impact out the outcome of this case.

Kenneth Bartley's attorney's failure to contact, interview, and subpoena these potentially important fact and expert witnesses, particularly in a first-degree murder case involving a juvenile defendant being tried as an adult, falls below the range of competence demanded of attorneys in criminal cases and was not reasonable under the facts and circumstances of this case. *Powers*, 942 S.W.2d at 557-58, citing *Baxter*, 523 S.W.2d 930, 936; *Strickland*, 466 U.S. at 688-89, 104 S.Ct. at 2065. No deference should be afforded on the grounds that Mr. Hatmaker's failure to interview or subpoena these witnesses was a tactical or strategic decision. In light of the facts and circumstances of this case when viewed as a whole, the failure to interview and subpoena these numerous witnesses demonstrates failure to adequately investigate defense options and a failure to adequately prepare for trial. *See Burger*, 483 U.S. at 794, 107 S.Ct. 3114 at 3126; *Howell*, 185 S.W.3d at 327, citing *House*, 44 S.W.3d at 515. Accordingly, no deference is warranted. *Id*.

C. Counsel failed to file any pretrial motions, despite significant and obvious issues that had a substantial probability of affecting the outcome of the case.

Motion practice plays an important role in the vast majority of criminal cases involving felony charges. Kenneth Bartley, a fourteen year old boy with a significant history of mental health problems, was charged with first degree murder. No significant pretrial motions were filed in his case. This facts and circumstances of this case presents numerous, obvious issues which should have been the subject of pretrial motions.

Mr. Hatmaker's failure to file (1) a motion to suppress Kenneth Bartley's statement to law enforcement, and (2) a motion for change of venue, was not reasonable under the circumstances of this case. The failure to file these motions was not a tactical or strategic decision, but rather evidences a lack of adequate preparation and a lack of adequate investigation of defense options.

1. Counsel failed to file a motion to suppress Kenneth Bartley's recorded statement.

Kenneth Bartley, at fourteen years of age, gave a recorded statement to Don Farmer and Deputy Don Anderson of the Campbell County Sheriff's department regarding the November 8, 2005 incident. *See* Exhibit O, attached. His statement was given at 3:01 p.m. in the wake of the shooting that occurred less an hour prior. Kenneth Bartley was at St. Mary's Hospital being treating for a self-inflicted gunshot wound to his left hand. *Id.* By his own admission, he had crushed and snorted a Valium pill at approximately 1:45 p.m. He did not have an attorney. His parents were not present. Kenneth Bartley signed an Admonition and Waiver of Rights. *See* Exhibit P, attached. Interestingly, the Waiver is dated November 7, 2005 although the shooting did not occur until November 8th. In this statement, Kenneth Bartley confessed to the shooting and

gave a number of details surrounding the incident. No motion to suppress this statement was ever filed.

2. Counsel failed to file a motion for change of venue.

The November 8, 2005 shooting was the subject of extensive print and television media coverage. *See* Collective Exhibit Q, various news articles, attached hereto. The incident and resulting court proceedings received in-depth coverage by the LaFollette Press, Campbell County's primary new source, and several Knox County media outlets, including but not limited to, the Knoxville News Sentinel, WATE, WBIR, and WVLT. Additionally, the incident was the subject of at least two Associated Press articles which were circulated nationally.

Campbell County is home to a handful of small towns. The 2005 Census Estimate placed the population of Campbell County at 40,686. Campbell County has one high school: Campbell County High School. It was here that the November 8, 2005 shooting took place. It is safe to assume that the vast majority of the 40,686 residents of the county, at least those of sufficient age, attended Campbell County High School at some point in their lives. Statistically, it is highly probable that every resident of Campbell County knew at least one student or staff member who was present at the high school when the shooting occurred.

Despite the above facts, no motion for change of venue was ever filed in this case. Neither did Kenneth Bartley's trial attorney ever request an out-of-county jury pool.

In *Arnold v. State*, 143 S.W.3d 784 (Tenn. 2004), the Tennessee Supreme Court held that there was a colorable postconviction claim for ineffective assistance of counsel where trial counsel failed to file a motion for change of venue based on the news media's

"constant exploitation" of the defendant's child rape charges. The *Arnold* Court found the lower court trial court erred in dismissing the defendant's petition, observing as follows:

> Arnold's petition alleges that the media coverage involving his child rape charges was both constant and exploitative. Despite this adverse publicity, Arnold's trial attorney failed to request a change of venue and failed to adequately question potential jurors to determine the extent to which they were subjected and influenced by this constant and exploitative media coverage. Arnold links his convictions and his consecutive sentences to his attorney's deficient performance and suggests that a fair trial was impossible under the circumstances. Specifically, he alleges that the jury selection process and the length of the trial demonstrate a "mockery of Justice itself." Under these circumstances, we hold that the petition states a colorable claim and that the post-conviction court erred in dismissing the petition.
>
> *Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004)

In the instant case, although Kenneth Bartley's plea was entered prior to the completion of the jury selection process, the transcript of the voir dire proceedings is replete with examples of potential jurors who indicated that they either (1) knew Kenneth Bartley or one of parents personally, (2) knew one of the victims or their family members personally, (3) had ties to Campbell County High School and/or knew a student or faculty member who was present on the date of shooting, or (4) had been exposed to the extensive media coverage of this case. *See* TT at 14-148. One potential juror even indicated that she was part of the emergency response team that was called to the scene on that tragic November day. TT at 15:10-16:7. Throughout the morning of April 10, 2007, one potential juror after another indicated that for one or more of the above reasons they had preconceived notions regarding the case and Kenneth Bartley's guilt. TT at 14-148. By the time the Court recessed for lunch, 51 potential jurors of the 60-person panel indicated significant exposure to media

coverage of this case. Approximately 28 of those potential jurors knew a victim or witness, or knew Kenneth Bartley or one of his parents personally. Had the trial of this case gone forward, Kenneth Bartley would have been deprived of his Sixth Amendment right to an impartial jury.

Mr. Hatmaker's failure to file these motions falls below the range of competence demanded of attorneys in criminal cases and was not reasonable under the facts and circumstances of this case. *Powers*, 942 S.W.2d at 557-58, citing *Baxter*, 523 S.W.2d 930, 936; *Strickland*, 466 U.S. at 688-89, 104 S.Ct. at 2065. No deference should be afforded on the grounds that Mr. Hatmaker's failure to file these motions was a tactical or strategic decision. It was not. In light of the facts and circumstances of this case when viewed as a whole, the failure to file these motions demonstrates failure to adequately investigate defense options and a failure to adequately prepare for trial. *See Burger*, 483 U.S. at 794, 107 S.Ct. 3114 at 3126; *Howell*, 185 S.W.3d at 327, citing *House*, 44 S.W.3d at 515.

D. Counsel failed to communicate the plea offer to Petitioner Bartley's parents on the day of trial and failed to include the Petitioner's parents in the decision whether to accept the plea offer.

Throughout the course of Mr. Hatmaker's representation of Kenneth Bartley, Mr. Hatmaker exhibited a pattern and practice of communicating plea offers made by the State to Kenneth Bartley and his parents. Each time, the offers were considered by Kenneth Bartley and his parents and a decision regarding the offer was reached only after deliberation by all three family members. Despite this pattern and practice, which was the manner in which one would expect plea negotiations to be handled in a case involving a fourteen/fifteen year-old juvenile defendant, the final plea offer was not handled this way.

On the date of trial, a plea offer was made and communicated to the young, nervous, and frightened Kenneth Bartley in a dramatic manner in a packed courtroom. Kenneth Bartley, acting alone, communicated his willingness to accept the offer to his attorney within a matter of minutes and only after the judge had approved the offer and spoken with the victims' families was the plea communicated to Kenneth Bartley's parents. MHT at 39:12-41:12; 126:3-12. Rita Vannoy was told that her son had "taken a plea" and was permitted to see him for only a few minutes. *Id*. At this point she was of the impression that this was a done deal. Her son had been out of her sight for nearly an hour and a half and her son's attorney, the District Attorney, and the Judge, and later the victims' families as well, had met in a private room for a lengthy period of time. *Id.*; 130:3-24. Rita Vannoy had no idea that the plea had not been formally entered on the record. Neither she nor her fifteen year-old son had any idea that not entering the plea and proceeding to trial was still an option. *Id*. Significantly, Kenneth Bartley's attorney knew that Kenneth Bartley placed great importance on his parents' advice regarding previous plea offers and further, that Petitioner Bartley and his parents had rejected an almost identical plea offer shortly before trial.

Between November 8, 2005 and the start of trial on April 10, 2007, two plea offers had been made and were ultimately rejected by either Kenneth Bartley or the State. The initial plea offer of voluntary manslaughter and two counts of aggravated assault, discussed at length in Section II(A), *supra*, was first presented to and approved by Kenneth Bartley's mother and father, and was subsequently presented to Kenneth for his approval. MHT at 13:3-14:25 Although Kenneth Bartley and his parents were in agreement that Kenneth should accept this offer, and communicated that acceptance to

Kenneth's attorney, the plea offer was somehow withdrawn by the state and never entered on the record. *Id*.; MHT at 111:2-113:11.

A second plea offer was communicated to Kenneth Bartley and his parents on March 25, 2007, after the transfer hearing, but prior to trial. MHT at 114:10-116:5. The terms of this offer were that Kenneth Bartley would serve twenty-five (25) years at 100% on a plea of guilty to second degree murder, and two ten (10) year sentences at 30% on a plea of guilty to two counts of attempted second degree murder. *Id*. These sentences would run consecutively for a total effective sentence of forty-five (45) years. Kenneth Bartley's attorney, Michael Hatmaker did not recommend that Kenneth take this deal as he was not pleased with the offer. *Id*. After discussing this offer with his parents, Kenneth rejected the offer and opted to proceed to trial. *Id.*

The plea agreement entered into on April 10, 2007, the first day of trial, was essentially the same offer that Kenneth had previously rejected when afforded an opportunity to deliberate and discuss the offer with his parents. The only difference was the final plea agreement required that the two ten (10) year sentences on the attempted second degree murder convictions be served at 20% prior to Kenneth becoming eligible for parole instead of 30%. *Id.*; MHT at 105:23-106:20; 117:25-118:13. In application, this meant that Kenneth would be eligible for parole two (2) years earlier than he would have been under the previous offer; his first parole hearing would occur when he was forty-four years-old instead of when he was forty-six. It is unfathomable that this minor discrepancy made the new offer more appealing to Kenneth Bartley than the previously rejected offer. Had Kenneth Bartley been granted a meaningful opportunity to discuss this offer with his parents, there is a substantial likelihood that he would have rejected the

offer. At the evidentiary hearing on Kenneth Bartley's motion to withdraw his guilty plea, Michaal Hatmaker testified that he "had some question about whether or not [Kenneth's] mother really wanted him to plead . . . She had misgivings about it . . ." MHT at 102:3-6.

This fact is corroborated by the fact that Kenneth Bartley told his parents that he was not happy with the plea and wished to withdraw it a few days after the plea was entered on the record. Kenneth's mother contacted Mr. Hatmaker with this information at the start of business the following week, and a motion to withdraw the plea was filed within a month of its entry on the record. Mr. Hatmaker drafted, signed and filed the motion to withdraw Kenneth plea in it alleging that the "plea was entered without the consent of defendant's parents. Defendant is 15 years old. Defendant's mother was consulted, and does not agree with the plea." *See* Exhibit F. However, based primarily on Mr. Hatmaker's testimony at the July 2, 2007 evidentiary hearing, the trial court denied the motion to withdraw the plea finding that "the defendant and his family and Mr. Hatmaker met and agreed to accept that settlement." MHT at 118:14-12:5; 167:18-20. Had Kenneth fully understood the impact of the plea and the included sentence, the motion to withdraw the plea never would have been filed. Further, although it is well-established that there is strong need for finality of proceedings and that a defendant cannot withdraw his plea based solely upon a "change of heart," this a not a situation where the defendant entered into a plea agreement and tried to get out of it after his sentencing hearing did not produce the results he was hoping for.

In the instant case, the sentence was a negotiated part of the agreement and was approved by the Judge on the date that plea was entered. Accordingly, Kenneth Bartley

had no opportunity after the fact to consider his guilty plea and withdraw that plea "for any fair and just reason" before sentencing as permitted by Tenn. R. Crim. P. 32(f)(1). Rather, in order to withdraw his guilty plea, Kenneth Bartley had the higher burden of proving that the withdrawal was necessary to correct "manifest injustice" as required by Rule 32(f)(2). As criminal defense counsel with thirty (30) years experience, Kenneth Bartley's attorney should have been aware of this fact, and should have taken this into consideration in deciding how handle the eleventh-hour plea offer. His client should have been afforded more than a half-hour to deliberate regarding this life-altering decision and should have been afforded a meaningful opportunity to discuss the matter with his parents prior to making his final decision.

But for Mr. Hatmaker's failure to communicate the eleventh hour plea offer to Kenneth Bartley's parents at a time when they could have meaningfully participated in the decision whether to accept the deal, there is a substantial probability that Kenneth would have insisted upon proceeding to trial. *Powers*, 942 S.W.2d at 558, citing *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Bankston v. State*, 815 S.W.2d 213, 215 (Tenn. Crim. App.), *perm. to appeal denied,* (Tenn.1991); *Manning v. State,* 883 S.W.2d 635, 637 (Tenn.Crim.App.1994).

E. Counsel failed to move for continuance to consider the plea agreement or otherwise put the plea agreement on the record.

When Mr. Hatmaker was presented with a final plea offer over the lunch recess on the first day of trial, beyond the eleventh hour, he presented the offer to his client. Mr. Hatmaker and Kenneth Bartley then went into a room adjacent to the courtroom to discuss whether Kenneth should take the plea. Following a brief "conversation"

consisting primarily of Mr. Hatmaker's admonitions that Kenneth would probably be convicted of felony murder "no matter what" and that Kenneth "would be lucky to get" this deal, the terrified fifteen year-old told his attorney he would accept the State's offer and plead guilty. MHT at 55:12-57:25.

Without notifying Kenneth's parents that Kenneth had agreed to take a plea, Kenneth's acceptance of the offer was then communicated to the District Attorney. MHT at 39:12-41:12; 118:7-13. The two attorneys then notified the judge that an agreement had been reached, and outside of Kenneth's presence, the judge and the two attorneys engaged in a lengthy discussion regarding whether the judge would accept a plea after trial had begun. PTT at 6:17-22:9; MHT at 130:3-24. Following the judge's hesitant decision to accept the agreement, the victims' families were called into the judge's chambers to communicate their approval of the deal on the record. PTT at 22:10-28:25. Kenneth parents were then notified that a plea had been reached and his mother was permitted to see her son briefly. MHT at 39:12-41:12. The plea was then entered on the record. PTT at 29:18-40:10.

At no point in this process did Mr. Hatmaker request additional time for his client to consult with his parents or otherwise deliberate regarding the plea offer. Mr. Hatmaker did not move for a continuance, or even request that the court stand in recess until the following morning in light of this significant new development.

The fact that this failure to move for a continuance prejudiced Kenneth Bartley is evidenced by two undisputed facts: (1) that Kenneth, when given time to discuss the matter with his parents, had rejected a substantially identical plea offer just two weeks before, and there had been no significant developments in the case which would have

caused him to accept an offer he had previously rejected, and (2) that Kenneth regretted his decision to enter into this plea agreement and filed a motion to withdraw the plea less than a month after the plea was entered on the record.

Again, experienced defense counsel should have been aware that in the event is young and emotionally unstable client should desire to withdraw his plea after additional consideration, because there would be no sentencing hearing, Kenneth Bartley would have no opportunity to withdraw his plea upon a showing of "any fair and just reason" and would instead be required to meet the high burden of demonstrating "manifest injustice" in order to withdraw his plea. Tenn. R. Crim. P. 32(f). Again, Kenneth Bartley, a frightened and vulnerable fifteen year old, should have been afforded more than a half-hour to deliberate regarding this life-altering decision, and should have been afforded a meaningful opportunity to discuss the matter with his parents prior to making his final decision.

But for Mr. Hatmaker's failure to move for additional time for his young, "nervous and scared" client to consider the reasonableness and life-changing impact of this eleventh hour plea offer, there is a substantial probability that Kenneth would have insisted upon proceeding to trial. *Powers*, 942 S.W.2d at 558, citing *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985); *Bankston v. State*, 815 S.W.2d 213, 215 (Tenn. Crim. App.), *perm. to appeal denied*, (Tenn.1991); *Manning v. State*, 883 S.W.2d 635, 637 (Tenn.Crim.App.1994).

F. Counsel failed to raise the issue of diminished capacity at the time of the commission of the offense.

Kenneth Bartley's actions were clearly not within the realm of reasonable actions expected of a fourteen year-old high school student. There was a glaring issue as to Kenneth's mental state at the time of the commission of the offense, however, this issue was not raised by Kenneth's attorney in criminal court.

At the transfer hearing in Juvenile Court, Dr. Diana McCoy testified that based upon a review of his psychiatric records, at various times during his youth, Kenneth Bartley has been diagnosed with numerous psychological and behavioral disorders, including but not limited to, Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder, Disruptive Behavior Disorder, Major Depression, Opressive Disorder, and Conduct Disorder. *See* THT at 172:19-20; 353:13-16; 354:13-355:4;359:18-360:3; 362:5-363:10; 413:16-25. Additionally, Dr. McCoy testified that Kenneth Bartley had reported to various psychologists that he was "anxious and irritable," and had "problems concentrating." THT at 353:24-354:3. Psychologists at Ridgeview described Kenneth as having poor judgment and concentration, being impulsive and irritable, and as having poor insight. 359:18-360:3.

Dr. Diana McCoy met with Kenneth Bartley on numerous occasions for extended periods of time and consulted regularly with Erin TePaske, Kenneth's therapist at Mountain View, who had previously worked with Kenneth when he briefly received counseling at Ms. TePaske's previous place of employment, Peninsula Hospital. THT at 268:4-271:14; 270:12-20. Dr. McCoy was of the opinion that Kenneth Bartley did not fit within the DSM IV criteria for a psychopathic diagnosis and was amenable to treatment and rehabilitation. *See* THT at 419:12-14; March 27, 2006 Report of Psychological Evaluation by Dr. Diana McCoy, attached hereto as Exhibit R. This prognosis, that

Kenneth's behavioral problems could likely be remedied over time through counseling and treatment, was also supported by the testimony of Doctors Kris Houser and Kevin Blanton, who conducted a court-ordered evaluation of Kenneth at Peninsula Hospital. THT at 161:15-163:23; 182:1-184:5.

Dr. Vance Sherwood, the State's expert psychologist testified that he had diagnosed Kenneth Bartley as a psychopath who would likely never change and was not amenable to treatment. THT at 200:6-12; July 1, 2006 Report of Psychological Evaluation by Dr. Vance Sherwood, attached hereto as Exhibit S. This diagnosis was based on a review of Kenneth's mental health records and a single, somewhat vague interview with the Petitioner that last only an hour and ten minutes. *Id.*; THT at 392:15-419:11. Significantly, Dr. Diana McCoy was present throughout Dr. Sherwood's single interview of Kenneth and described the interview as "bizarre." THT 392:22-393:12. Additionally, Dr. McCoy testified that Dr. Sherwood's forensic Psychological report was atypical for an expert report of that nature. For example, Dr. Sherwood did not cite any provisions of the DSM IV in support of his diagnoses, nor did administer any psychological tests to Kenneth Bartley to confirm his diagnoses that Kenneth was a psychopath although such tests do exist. THT at 410:20: 413:24; Exhibit S. Both Dr.McCoy and Dr.Blanton diagnosed Kenneth Bartley as fitting the DSM IV criteria for Conduct Disorder. THT at 182:1-184:5; 413:16-25, and Exhibit R.

Significantly, following the shooting, Kenneth provided a statement to law enforcement indicating that he took two ten milligram Valium pills the morning of the shooting, and crushed and snorted another pill "right as the lady walked in there…to come get me," referring to SRO Phillips coming to the classroom to escort him to the

principal's office. *See* Exhibit O, at p. 2. The fact that Kenneth Bartley was under the influence of drugs at the time of the offense raises a significant question as to his capacity to form the necessary means rea to sustain a conviction of first or second degree murder. There is no evidence in the record that Kenneth's trial attorney ever sought an expert opinion on the issue of whether the effects of Valium and/or Xanax on the brain could have impacted Kenneth's capacity to commit a homicide that was either "premeditated and intentional" or "knowing, " particularly in light of his extensive psychological history. *See* T.C.A. §§ 39-13-202 and 39-13-210. The issues of Kenneth's drug use and psychological history should have been used, at a minimum, to establish diminished capacity to negate an element of the offense of first and second degree murder at the time of the offense.

Mr. Hatmaker never filed a notice of intent to introduce expert testimony regarding the mental condition of the defendant bearing on the issue of his guilt as required by Tenn. R. Crim. P. 12.2(b). Accordingly, even if Mr. Hatmaker intended to introduce Dr. McCoy's testimony regarding this issue, the testimony was subject to exclusion pursuant to Tenn. R. Crim. P. 12.2(d) which provides that "if a defendant fails to give notice under Rule 12.2(b) . . . the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's mental condition." Tenn. R. Crim. P. 12(d).

In the instant case, the errors made by Kenneth Bartley's trial attorney were so serious that Kenneth Bartley was deprived of effective assistance of counsel as envisioned by the Sixth Amendment. The multitude and range of errors committed by Kenneth Bartley's trial attorney demonstrate that they were not part of any reasonably based trial strategy. The court's deference to counsel's tactical decisions must depend upon counsel's adequate investigation of defense

options, and as illustrated extensively above, there is no evidence in the record to indicate that Mr. Hatmaker adequately investigated a number of highly probative and glaringly obvious defense options. *Burger v. Kemp,* 483 U.S. 776, 794, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987). The Courts of this State have repeatedly indicated that deference to strategy and tactical choices applies only if the choices are informed and based upon adequate preparation. *Howell v. State*, 185 S.W.3d 319, 327 (Tenn. 2006), citing *House v. State*, 44 S.W.3d 508, 515 (Tenn.2001); *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn.Crim.App.1992); *See also Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App.1994)

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must first establish that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn.1975). The errors committed by Kenneth Bartley's trial attorney clearly fall below that standard. Secondly, the Petitioner must show that the deficiencies "actually had an adverse effect on the defense." Strickland v. Washington, 466 U.S. 668, 693 (1984). Again, Petitioner has met his burden in proving that counsel's constitutionally deficient performance severely prejudiced his defense and in fact, deprived him of any defense at all. As required by Strickland, the Petitioner has demonstrated a reasonable probability that, but for Mr. Hatmaker's errors, the outcome of this case would have been different. Specifically, but for Mr. Hatmaker's errors, Kenneth Bartley would either be serving a mere fifteen (15) years sentence instead of a forty-five (45) year sentence, or Kenneth would have proceeded to trial and had his fate determined by a jury of his peers in accordance with his Sixth Amendment rights. Consequently, Petitioner is entitled to post-conviction relief from the guilty plea and resulting sentence which occurred without the effective assistance of counsel.

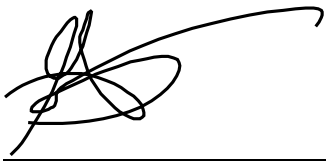
CONCLUSION

The issues raised herein as grounds for collateral relief are all of constitutional dimensions and would justify relief under Tenn. Code Ann. § 40-30-101, et seq. the applicable federal habeas corpus statutes. The errors in Petitioner's trial and sentencing raised as grounds for collateral relief in this Petition so undermine the fundamental integrity of the trial, that no constitutional conviction or sentence could have resulted.

WHEREFORE, Petitioner requests this Honorable Court to:

1. Grant an evidentiary hearing to resolve any and all issues raised in this Petition for Post Conviction Relief;
2. Vacate the sentence and judgment previously entered in that such judgment and conviction is void or voidable;
3. Return Petitioner to pre-trial status;
4. Grant any and all such relief as shall be warranted by the facts and/or by law.

RESPECTFULLY SUBMITTED this 18th day of October 2010.



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PETITIONER'S VERIFICATION

I hereby verify under oath, subject to penalty of perjury, that the contents of the foregoing *Petition for Postconviction Relief* are true and correct to the best of my knowledge and belief. I further verify that all claims known to me in support of granting postconviction relief are included in this Petition.

_____
KENNETH BARTLEY

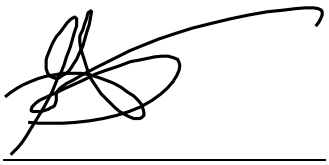
STATE OF TENNESSEE)
) ss.
COUNTY OF _____)

SUBSCRIBED AND SWORN to before me this ____ day of October, 2010.

_____
NOTARY PUBLIC
Commission Expires: _____

CERTIFICATION OF COUNSEL

I, Gregory P. Isaacs, certify that I have thoroughly investigated the alleged constitutional violations contained herein, and any other grounds that Mr. Bartley may have for relief. I have discussed other possible grounds with Mr. Bartley. I have raised all non-frivolous constitutional grounds warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law which Mr. Bartley has. I am aware that any ground not raised shall forever be barred by application of Tenn. Code Ann. § 40-30-206(g), and have explained this to Mr. Bartley.



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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing pleading has been served by placing a true and correct copy of same in the United States Mail with sufficient postage to carry the same to its destination, and addressed as follows:

Tennessee Attorney General and Reporter
Assistant Attorney General
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Michael G. Hatmaker
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THIS the 18th day of October 2010.

By: