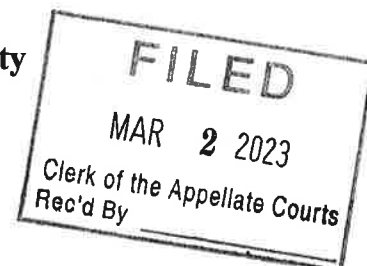


IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 24, 2023 Session

ADOLPHUS LEBRON HOLLINGSWORTH v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Hamilton County
No. 302466 Thomas C. Greenholtz, Judge**

No. E2021-01100-CCA-R3-PC



The petitioner, Adolphus Lebron Hollingsworth, appeals the denial of his petition for post-conviction relief, which petition challenged his conviction of second degree murder, alleging that he was deprived of effective assistance of counsel at trial and on appeal. Because the petitioner has failed to establish that he is entitled to post-conviction relief, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., P.J., delivered the opinion of the court, in which ROBERT H. MONTGOMERY, JR. and KYLE A. HIXSON, JJ., joined.

Brian Pearce, Ridgeland, Mississippi, for the appellant, Adolphus Lebron Hollingsworth.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Assistant Attorney General; Coty G. Wamp, District Attorney General; and Cameron Williams and Kevin Brown, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

On January 22, 2014, the petitioner was indicted on one count of first degree premeditated murder for the death of his wife, Victoria Witherspoon Carr Hollingsworth, which occurred on August 18, 1997. *State v. Adolphus L. Hollingsworth*, No. E2015-01463-CCA-R3-CD, slip op. at 2 (Tenn. Crim. App., Knoxville, Jan. 11, 2017). Although the victim disappeared on August 18, 1997, her body was not discovered until June 5, 1999. *Id.* In January 2014, the production company for the television show “Cold Justice” contracted with the City of Chattanooga to film an episode on the victim’s case, and the petitioner subsequently was indicted. *Id.* The original indictment included language

regarding the charge of first degree murder, as well as language relevant to the tolling of the fifteen-year statute of limitations for the lesser included offense of second degree murder. *Id.*, slip op. at 11, 13 (citing T.C.A. §§39-13-210(c), 40-2-101(b)(1)). The indictment stated that the petitioner ““was not usually and publically resident [sic] within the state but residing in Alabama from 2004 until 2010 and then in the State of Texas from 2010 to present.”” *Id.*, slip op. at 11. Prior to trial, the indictment was amended to replace the language regarding the petitioner’s place of residence with a provision alleging that the petitioner ““concealed the facts of the crime in that the body of [the victim] was not discovered until June 5, 1999.”” *Id.*, slip op. at 13.

The State presented evidence at trial regarding the volatile relationship between the petitioner and the victim prior to the victim’s disappearance. Wesley Carr, the victim’s son who was nine years old at the time of the victim’s disappearance, testified that while he, his sister, and the victim were living with the petitioner, Wesley¹ awoke one night to screaming and went into the bathroom where he saw the petitioner pouring gasoline on the victim’s face. *Id.*, slip op. at 2. The argument ““escalated,”” and the petitioner threw a set of keys in the victim’s face. *Id.* The victim and her children subsequently moved into the home of the victim’s parents on Duncan Avenue. *Id.*

Adolphus Mitchell, a long-time acquaintance of the victim and a former co-worker of the petitioner, saw the victim and the petitioner ““[a]ggressively”” arguing at a flea market approximately one week prior to the victim’s disappearance. *Id.*, slip op. at 4-5. Once the petitioner grabbed the victim’s arm, Mr. Mitchell intervened and kept them separated for a few minutes before Mr. Mitchell left. *Id.*, slip op. at 5.

Orville Hughes, a childhood friend of the victim, testified that approximately two weeks prior to the victim’s disappearance, he, the victim, her parents, and her brother were on the front porch of the home of the victim’s parents when the petitioner

drove up to the house at an ““excessive speed,”” screamed at the victim, and told her ““what he was going to do to her.”” The [petitioner], who was yelling and cursing, said he ““was going to kill [the victim], he was going to hurt her family.”” The [petitioner] then drove down Duncan Avenue, did a U-turn, and drove back up the street and began ““saying the same thing[, that] he’s going to kill her, he’s going to do this to her.”” The [petitioner] then informed the victim that she would not be ““coming back home.”” At the time, the [petitioner]’s ill mother,

¹ Because Wesley Carr and Jerome Carr, who testified at the post-conviction hearing, share a last name, we will refer to their first names for clarity. We intend no disrespect.

who was in the car with him, was trying to reason with him, but he would not listen. The [petitioner] drove up and down the street six or seven times and continued to scream at the victim.

Id., slip op. at 8.

The victim was employed with the Chattanooga Housing Authority at the time of her disappearance, and her supervisor, Janice Pruett, testified that the victim went to lunch with the petitioner on the Friday prior to her disappearance. *Id.*, slip op. at 5-6. The victim informed Ms. Pruett that she intended to stop seeing the petitioner, but the victim returned from lunch with roses and a note that stated, “I would like to make love to you all weekend long.” *Id.*, slip op. at 6. When the victim left work that afternoon, she took work orders with her to categorize for filing on Monday. *Id.* On the night prior to her disappearance, she asked Wesley to help her with some work for her job. *Id.*, slip op. at 2.

Wesley awoke at 8:00 a.m. the next morning to find the victim not at home even though she was supposed to take him and his sister to daycare. *Id.* He called the victim, but the call went to voicemail. *Id.* The victim’s Ford Mustang was parked in the driveway, and Wesley opened the car’s door and smelled a foul odor. *Id.* He called his grandparents, who were out of town. *Id.*

Kenneth Witherspoon testified that on the morning of August 18, 1997, he went to his parents’ home to check on the victim when she did not answer his call. *Id.* Although he saw the victim’s Mustang parked in the driveway, the victim did not answer his calls, and no one came to the door when he knocked. *Id.*, slip op. at 2-3. He noticed “a piece of brush” on the back of the Mustang and did not recognize the shrub as coming from his parents’ yard. *Id.*, slip op. at 3. He returned to his home to call his parents and saw the petitioner across the street at the home of Tommy Vaughn, who Mr. Witherspoon was aware often acted as a “gopher” for the petitioner. *Id.* When Mr. Witherspoon asked the petitioner about the victim, the petitioner “had a ‘little grin’ on his face that suggested that something had happened to her. At the same time, [Mr.] Vaughn refused to look at [Mr.] Witherspoon. The [petitioner] told [Mr.] Witherspoon that he did not know where the victim was and that he had ‘been looking for her’ himself.” *Id.*

Mr. Witherspoon was aware that the victim often drove the petitioner to work, and Mr. Witherspoon went to the petitioner’s home and walked around his yard. *Id.* He observed “skid marks” near a bush, which appeared to have been run over. *Id.* He returned to his home and saw the petitioner sitting inside an orange truck that the petitioner had purchased that morning. *Id.* Mr. Witherspoon called the police, returned to his parents’ home, opened the door to the victim’s Mustang, and smelled what he initially believed to

be kerosene but realized was instead a substance used to “clean your car...when you [are] trying to cover up something.” *Id.* He stated that the petitioner never contacted him or his parents about the victim. *Id.*

Ms. Pruett became worried when the victim did not come to work, and Ms. Pruett spoke to the victim’s son, mother, and brother, all of whom were looking for the victim. *Id.*, slip op. at 6. The petitioner called the victim’s work that morning and asked to speak to the victim, which Ms. Pruett thought to be unusual since the petitioner did not generally call the victim during that time of the morning. *Id.* She told the petitioner that the victim was not at work. *Id.* She went to the home of the victim’s parents in an effort to locate the victim, and she found the work orders that the victim had taken with her inside the victim’s car, which had been “doused with gasoline.” *Id.*

At approximately 6:00 a.m. on August 18, 1997, the petitioner called Erica Collins, a friend, and asked her to drive him to work because the victim had not arrived at his home. *Id.*, slip op. at 4. Ms. Collins told the petitioner that she would do so if she had time before she had to be at her place of employment, but she did not call him or drive him to work. *Id.* At approximately 9:00 a.m., the petitioner came to Ms. Collins’ work with Mr. Vaughn and asked to borrow her car in order to “take care of some business.” *Id.* She allowed the petitioner to borrow her car, and he returned it by 11:00 a.m. *Id.* She then drove the petitioner and Mr. Vaughn to a used car dealership in order for the petitioner to purchase a vehicle, but the dealership was closed. *Id.*

On August 18, 1997, Mr. Witherspoon and the victim’s mother both filed a missing person report regarding the victim with the Chattanooga Police Department (“CPD”). *Id.*, slip op. at 3. The victim’s mother referenced instances of domestic abuse by the petitioner against the victim and stated in the report that the petitioner denied seeing the victim on August 18th. *Id.*, slip op. at 4. On the same day, the petitioner was photographed and fingerprinted at the police department. *Id.*, slip op. at 5. The petitioner filed a missing person report on August 19th. *Id.*, slip op. at 3.

Officers with CPD’s missing persons unit went to the home of the victim’s parents and spoke to the victim’s mother and brother. *Id.*, slip op. at 3-4. The officers opened the door of the victim’s Mustang parked in the driveway and smelled gasoline, and they observed some “brush under the vehicle.” *Id.*, slip op. at 3. The CPD’s major crime division was contacted about the case, and forensic evidence was collected due to evidence indicating foul play. *Id.*, slip op. at 4, 8. Crime scene officers collected the brush that was wedged between the Mustang’s bumper and the tailpipe. *Id.*, slip op. at 5. The officers also collected samples of the carpet and seats from the Mustang, and testing of the sample by the Tennessee Bureau of Investigation (“TBI”) established that all of the samples contained gasoline and that some of the samples contained kerosene. *Id.*, slip op. at 5, 8.

Sergeant Brian Bergenback with the crime scene unit testified that he did not observe any substances that appeared to be blood inside the Mustang. *Id.*, slip op. at 5. In 1999, the samples from the Mustang were submitted to the TBI for DNA and serology testing. *Id.*, slip op. at 9. Testing revealed that a sample from the left front seat was positive for blood, that a sample from the right front floor was inconclusive for blood, and that no blood was on the other samples. *Id.*, slip op. at 9-10.

Officers executed a search warrant on the petitioner's home during the early morning hours of August 20, 1997. *Id.*, slip op. at 5, 8. Although no visible blood was found inside the petitioner's home, the police, at that time, did not have alternative light source technology capable of detecting bodily fluids that were not visible. *Id.*, slip op. at 5. Sergeant Bill Phillips testified that some crime scenes do not include much blood, explaining that "[t]he blood doesn't always come outside the body." *Id.*, slip op. at 9.

Sergeant Phillips observed tire tracks in the petitioner's back yard leading to a bush that appeared "damaged," and he testified that the car leaving the tracks "had traveled back through this yard and into the bush." *Id.* Officers measured the tire tracks, and Sergeant Phillips concluded that the tire tracks matched the wheelbase of the Mustang. *Id.*, slip op. at 5, 9. Gene Van Horn, a botanist, examined the bush from the petitioner's yard and the brush found attached to the victim's car and determined that they were from the same species of *Viburnum*, which was found in gardens and not found growing wild in Tennessee. *Id.*, slip op. at 6, 9. He determined that "[e]verything" on the plants were the "same," including the stem size and the "unusual gland on the leaf stock." *Id.*, slip op. at 6.

In May 1999, a cranium, which was later identified as belonging to the victim, was discovered in an area located approximately 200 feet below Billy Goat Hill, which Sergeant Phillips described as "almost a one lane very secluded travel type area." *Id.*, slip op. at 6-7, 9. On June 5, 1999, the remains of the victim's body were located on Billy Goat Hill approximately 900 feet from where the victim's cranium had been discovered. *Id.*, slip op. at 6-7. Her body was buried underneath four tires placed in a linear orientation. *Id.*, slip op. at 7. Sandra Sanchez, who had been in a relationship with the petitioner during a period of time prior to 1997, testified that the petitioner took her to Billy Goat Hill on one occasion. *Id.*

Thomas Boykin, who worked for the Medical Examiner's Office and was a member of the search team that located the victim's body, testified that the victim's cause of death was an incisional wound to her neck. *Id.*, slip op. at 6-7. Doctor James Metcalfe, the Hamilton County Chief Medical Examiner, reviewed the victim's autopsy report and determined that the cause of her death was an incisional wound to her neck and that her

manner of death was homicide. *Id.*, slip op. at 7. The stab wound went from the back of her neck to the front, cutting a major artery and causing the victim to bleed to death. *Id.*

In 2010, Sergeant Justin Kilgore reviewed the victim's murder as a cold case and interviewed additional witnesses. *Id.*, slip op. at 7-8. In the fall of 2013, officials with the television show "Cold Justice" contacted him about filming an episode on the victim's case, and Sergeant Kilgore interviewed additional witnesses in 2014. *Id.*, slip op. at 8. Officers did not have a sample of the victim's blood, so they obtained a buccal swab from the victim's daughter and sent it and the carpet samples from the victim's car to Sorenson Forensic, a private laboratory, for testing. *Id.* The television production company paid for the testing. *Id.* Results of the testing revealed that the blood on the sample from the right front floor of the victim's car belonged to the victim. *Id.*, slip op. at 10.

The jury convicted the petitioner of second degree murder as a lesser included offense of first degree premeditated murder. *Id.*, slip op. at 1. The trial court imposed a sentence of 22 years' incarceration. *Id.* This court affirmed the petitioner's conviction on direct appeal. *Id.*

The petitioner filed a timely pro se petition for post-conviction relief, alleging numerous issues including ineffective assistance of counsel. The petitioner retained counsel, who filed multiple amended petitions, incorporating all grounds alleged in the pro se petition and asserting numerous instances of deficient performance by trial counsel and appellate counsel. Evidentiary hearings were held on August 17 and December 10 of 2018 and June 28 and December 6 of 2019, and the transcripts from the petitioner's trial were entered as exhibits.

According to the proof presented during the evidentiary hearing, the public defender's office was appointed to represent the petitioner. Original counsel, with the assistance of trial counsel, represented the petitioner until original counsel left the public defender's office in August 2014. Trial counsel continued representing the petitioner through the trial in January 2015 and was assisted by co-counsel and an investigator. The petitioner then retained appellate counsel to represent him on direct appeal.

Original counsel, a retired attorney formerly with the public defender's office, testified that she primarily focused on criminal law during the last 25 years of her practice and that she had tried between 20 and 40 criminal trials, including three death penalty cases. She was appointed to represent the petitioner shortly after he was arrested in Texas in March or April of 2014, and she stated that, initially, she was the only attorney assigned to the petitioner's case. She stated that she met with the petitioner, attempted to establish telephone contact with the petitioner's wife in Texas, attempted to obtain discovery from the State, and filed motions. She and the investigator, Hugo Ruiz, visited

the crime scene at Billy Goat Hill where the victim's body was discovered. The statute of limitations was an issue that original counsel considered early in her representation of the petitioner.

Original counsel said that in April 2014, she filed a motion requesting that the State be required to present its representative as its first witness at trial. She stated that she regularly filed this motion in criminal cases in order to prevent the State's representative from listening to the testimony of other witnesses at trial and then conforming his or her testimony to be consistent with the testimony of those witnesses. Original counsel identified an agreed order entered in September 2014 after she left the public defender's office, which stated that the petitioner's motion was "sustained." Original counsel had no further involvement in the petitioner's case once she left the public defender's office.

At the time of the post-conviction hearing, trial counsel had been an attorney for 27 years, including 15 years with the public defender's office. He had conducted more than 50 trials, including three first degree murder trials, and the petitioner's case was trial counsel's second first degree murder trial. Trial counsel initially worked with original counsel on the petitioner's case and served as lead counsel once original counsel left the public defender's office. The defense investigation was likely halfway completed when trial counsel became lead counsel. Trial counsel recalled that the petitioner maintained that he did not kill the victim and that the defense strategy was that the petitioner was mistakenly charged with the offense and that the only reason that he was charged was to "give closure to the television show." Trial counsel agreed to the importance of showing the lack of evidence of a crime at the petitioner's home.

Trial counsel testified that Mr. Ruiz located a Mustang that was similar to the victim's 1988 Mustang at a shop. Trial counsel and Mr. Ruiz went to the shop where trial counsel spoke to the owner of the shop, who seemed to have particularized knowledge of Mustangs, but trial counsel did not contemplate issuing a subpoena for the owner to testify at trial. Trial counsel and Mr. Ruiz took photographs of the Mustang and measured the tire width, and trial counsel testified that there was about a two-inch variance between the measurements taken by trial counsel and Mr. Ruiz and the measurements of the tire tracks that were provided in discovery. Trial counsel did not receive any information in discovery indicating that the police officers had measured the victim's vehicle. Trial counsel stated that there were two models of Mustangs in 1988 and that he was unable to establish that the Mustang that he viewed, measured, and photographed at the shop was the same model as the victim's Mustang. He also stated that two different Mustangs were used to build the victim's Mustang and that, as a result, her Mustang had two different vehicle identification numbers. Trial counsel said that the defense team was unsure whether the victim's Mustang was considered a 5.0 or a GT and that the two models had different trim

levels and wheelbases. He explained that due to this “confusion,” he did not believe the two-inch discrepancy was “significant” in that “[i]t wasn’t a smoking gun. It wasn’t a got-you moment.”

Trial counsel testified that law enforcement officers interviewed the petitioner and questioned him about allegations of assaults against other women, his prior arrests, and his involvement in the drug trade. Trial counsel was successful in persuading the trial court to order that this information be redacted from the petitioner’s recorded statement. However, the petitioner’s statements that he believed the victim was cheating on him at the time of her disappearance, which was indicative of motive, and the petitioner’s lack of concern for the victim’s homicide and his failure to assist law enforcement in investigating her disappearance remained in the recorded statement. The State did not present the petitioner’s redacted recorded statement during its case-in-chief, which “quite surprised” trial counsel. As a result, trial counsel decided against presenting any defense proof at trial. He and co-counsel discussed this with the petitioner after the State rested its case, and trial counsel stated that although the petitioner was not “in total agreement,” trial counsel determined this was the best course to take. Trial counsel was prepared to present Mr. Ruiz as a witness at trial regarding the measurements of the Mustang, but trial counsel did not believe the two-inch variance in measurements was significant and could not establish that the Mustang that he and Mr. Ruiz measured was the same make and model as the victim’s Mustang. Once the State failed to present the petitioner’s statement in its case-in-chief, trial counsel feared that presenting defense evidence could open the door to allow the State a second opportunity to present the petitioner’s statement. The petitioner also wanted to present one of his friends as a witness, but trial counsel did not find the friend to be “favorable or credible.” The petitioner also provided the defense team with the manufacturer’s specifications for a 1988 Ford Mustang. Trial counsel testified that he did not present the written specifications at trial because he believed the document was hearsay and that he would have difficulty admitting it into evidence.

Trial counsel stated that contrary to an agreed order requiring that the State’s representative testify as the first witness in the State’s case-in-chief, Sergeant Phillips, who was designated as the State’s representative, did not testify until near the end of the State’s proof and had the opportunity to hear the testimony of the other State’s witnesses before he testified. Trial counsel did not object to Sergeant Phillips’ testifying as the seventeenth witness at trial, and trial counsel did not know why he failed to object.

Trial counsel filed a motion pursuant to *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999), due to the State’s failure to preserve the victim’s Mustang, and he argued that the defense was unable to conduct an independent examination of the car. Following a hearing, the trial court denied the motion. Trial counsel did not recall Sergeant Phillips’

testifying at the hearing that he would not have been the person who measured the victim's Mustang. Trial counsel recalled that the crime scene investigators who testified at trial stated that they did not measure the Mustang, and trial counsel did not believe he was provided any information in discovery showing that officers had measured the Mustang. Trial counsel stated that he did not recall whether Sergeant Phillips testified at trial that the Mustang had been measured, but trial counsel later acknowledged that he believed he and post-conviction counsel discussed Sergeant Phillips' testifying that he had measured the Mustang, which came as "somewhat of a surprise" to trial counsel. Trial counsel was certain that he questioned Sergeant Phillips regarding the measuring of the Mustang during cross-examination at trial, but trial counsel was unable to recall the questions asked. Trial counsel acknowledged that testimony establishing that the measurement of the tires on the Mustang corresponded to the measurement of the tire tracks would have been inculpatory.

Trial counsel testified that he questioned witnesses in an effort to show that a large amount of blood would have been present where the victim was killed, that only a small amount of blood was located inside the victim's Mustang, and that no blood was located inside the petitioner's home. Trial counsel believed the medical examiner testified that the victim's injury would have produced a large amount of blood. However, Sergeant Phillips testified at trial that a person could sustain a cut to the throat and not produce a large amount of blood. Trial counsel "[s]omewhat" believed Sergeant Phillips' testimony was not credible and stated that he questioned Sergeant Phillips about the testimony during cross-examination, but trial counsel did not know why he did not object to the testimony. Trial counsel did not believe Sergeant Phillips' testimony undermined the defense, explaining, "I would think that the jury would weigh the testimony of the medical examiner more heavily than that of a police officer when it came to a body producing blood in connection with a certain type of wound."

Trial counsel believed he obtained Sandra Sanchez's recorded statement to the police and listened to it prior to trial, but he did not recall whether anyone on the defense team interviewed her prior to trial. He stated that Ms. Sanchez had "some pretty damaging things to say" against the petitioner. Trial counsel said that he filed a motion seeking to limit Ms. Sanchez's testimony pursuant to Tennessee Rule of Evidence 404(b) and that the trial court granted the motion and allowed Ms. Sanchez only to testify that she had been to Billy Goat Hill with the petitioner in order to establish that the petitioner was familiar with the location where the victim's body was found. Trial counsel did not question Ms. Sanchez during cross-examination regarding her prior convictions, which included identity theft and other crimes of dishonesty. He explained that he did not find her testimony, which was limited to her claim that the petitioner was familiar with an area known as Billy Goat Hill, to be "particularly harmful." Trial counsel testified that he made a strategic decision to limit his questions to her during cross-examination to show that Billy Goat Hill was generally known to those who lived in the area. He explained that he limited his cross-

examination of Ms. Sanchez in order to avoid opening the door to testimony that the trial court previously had ruled to be inadmissible.

Trial counsel did not believe Wesley Carr's testimony that he witnessed the petitioner pour gasoline on the victim was credible, but trial counsel believed Wesley was the most damaging witness produced by the State at trial. Trial counsel did not know whether the defense team interviewed Jerome Carr, Wesley's father, prior to trial, but trial counsel reviewed Jerome's statement to the police. Jerome told the police that he learned from Wesley that the petitioner and the victim frequently argued and fought. Trial counsel stated that he subpoenaed Jerome to testify at trial likely at the petitioner's request, but trial counsel did not believe he would have presented Jerome as a witness to impeach Wesley's testimony regarding the gasoline incident due to fear that the State would attempt to utilize Jerome's statement regarding other incidents of abuse.

Trial counsel questioned Sergeant Phillips during cross-examination about his receiving the keys to the victim's Mustang from Mr. Witherspoon in an effort to suggest that Mr. Witherspoon was somehow involved in the victim's disappearance. Trial counsel recalled that Mr. Witherspoon was actively involved in the investigation and repeatedly accused the petitioner of being involved in the victim's disappearance. Mr. Witherspoon found the victim's Mustang, found the brush that was attached to the Mustang, and identified the petitioner's yard as the possible source of the brush. Mr. Witherspoon also told police officers that he had learned that the petitioner had confessed his involvement in the victim's murder to a drug dealer, but Mr. Witherspoon declined to reveal his source to the officers. Trial counsel stated that although he may have "alluded" that "a common thread or a common denominator was Mr. Witherspoon," trial counsel did not seek to impeach Mr. Witherspoon at trial regarding his repeated efforts to direct the officers to the petitioner as the perpetrator because trial counsel feared such efforts would open the door to allow Mr. Witherspoon to testify about otherwise inadmissible evidence.

During cross-examination at the post-conviction hearing, trial counsel testified that the petitioner was in the local jail during the pendency of the case and that the defense team visited the petitioner 25 times, which trial counsel verified through jail records. Trial counsel stated that he did a significant amount of work on the case even when original counsel was still involved. He reviewed discovery, interviewed witnesses, filed and litigated several motions, met with the State's expert witnesses, and conducted an investigation independent of the discovery provided by the State. He also utilized an investigator and had the assistance of co-counsel. Trial counsel testified that he examined the issue of the delay between the commission of the offense and the indictment and that he "knew it was within the statute of limitations."

Trial counsel testified cross-examination is a “very delicate art,” which requires “split second decisions.” He agreed that it is not necessarily beneficial to impeach a witness on all possible points because doing so may bring further attention to the witness’ testimony and lead the jury to believe that the testimony, which is being impeached, was harmful. He stated that Ms. Sanchez informed the police that the petitioner assaulted her in a vehicle and left her in the woods to die and that when Ms. Sanchez escaped from the woods the petitioner drove his vehicle in such a manner to lead Ms. Sanchez to believe he was attempting to run over her. Trial counsel recalled that the trial court only allowed Ms. Sanchez to testify that while in the petitioner’s vehicle on one occasion, she overheard him talking about Billy Goat Hill and that, as a result, Ms. Sanchez’s testimony was “very brief.” Trial counsel also recalled that Ms. Sanchez was “somewhat angry” when she testified, which made her an unpredictable witness. Trial counsel explained that he did not question her about her prior identity theft convictions due to fear that she could become angrier and make statements detrimental to the petitioner. Rather, trial counsel chose to question Ms. Sanchez on the fact that many who lived in the area were aware of Billy Goat Hill.

Trial counsel testified that the State, regularly, does not call its designated representative as its first witness at trial. He stated that although Sergeant Phillips was in the courtroom while other witnesses testified prior to him, trial counsel did not believe Sergeant Phillips lied during his testimony. Trial counsel agreed that Sergeant Phillips did not testify during a pretrial hearing that he measured the tire tracks or the Mustang himself. Sergeant Phillips also did not testify at trial that he measured the tire tracks and compared it to the victim’s Mustang himself but testified “we” did. Trial counsel understood “we” to mean Sergeant Phillips and the other investigators who were involved in the case.

Trial counsel agreed that he did not have “solid proof” to discredit the State’s evidence regarding the width of the tire tracks and the tires of the victim’s Mustang. He received a photograph in discovery showing that the width of the tire tracks was five feet, four inches, and trial counsel and Mr. Ruiz measured the wheelbase of a Mustang, which showed a two-inch variance. Trial counsel noted that tire width can vary, that he could not establish that the Mustang that he had measured was the same model of Mustang with the same type of tires as the victim’s Mustang, and that he did not believe the two-inch variance was significant. Once the State did not present the petitioner’s statement to the police in its case-in-chief, trial counsel decided against presenting proof of the two-inch variance, explaining, “If I’d had some bombshell witness that was going to get up and blow this case away, I would have put that witness on the stand regardless of whether the [S]tate played his statement. But I didn’t have that. I had a two-inch variance in measurements of a vehicle.” Trial counsel agreed that the State could have argued that the two-inch measurement was not significant. He believed the petitioner discussed the Mustang in his statement to the police and that, as a result, evidence about the measurements could have

opened the door to allow the State to play the petitioner's statement as impeachment evidence or in rebuttal.

During redirect examination, trial counsel acknowledged that Ms. Sanchez stated in her statement to the police that she had been arrested previously at the direction of the petitioner. Trial counsel acknowledged that he would have questioned Ms. Sanchez on cross-examination regarding her prior record had her testimony been damaging to the petitioner, but trial counsel did not believe her testimony was significant.

Appellate counsel testified that at the time of the post-conviction hearing, he had been practicing law for 13 years and had represented clients in 10 to 15 jury trials, numerous bench trials, and 10 to 15 appeals. Another attorney from appellate counsel's office prepared the motion for new trial and conducted the hearing on the motion, and appellate counsel took a "major part" in representing the petitioner on direct appeal. Appellate counsel sought to separate the issues that he believed were appropriate to raise on direct appeal from the issues that he believed were better suited for post-conviction proceedings, and he discussed this subject with the petitioner "quite often." Appellate counsel recalled a few issues were "a close call" as to whether the issues were more appropriately raised on direct appeal or during post-conviction proceedings and that as a result, he had to "make a strategic decision" regarding whether to raise the issues on direct appeal.

Appellate counsel acknowledged that he did not raise an issue on direct appeal regarding the failure to enforce the agreed order requiring that the State's representative testify as the first witness in the State's case-in-chief. He did not believe that the failure to enforce the order was an error committed by the trial court but was "something that the trial counsel...did not do." Appellate counsel stated that he believed trial counsel's failure to seek to enforce the order could have been a strategic decision, and appellate counsel noted he routinely filed a motion seeking to sequester witnesses in accordance with Tennessee Rule of Evidence 615 and then later changed his mind. Because appellate counsel believed any error was based upon trial counsel's inaction rather than any action by the trial court, he also believed the issue was more appropriate for post-conviction proceedings.

Appellate counsel testified that he was "not a fan" of the ability of the State's representative to testify after remaining in the courtroom throughout the trial and hearing all of the evidence presented. He stated that because remaining in the courtroom gives the witness the opportunity to "mold their answers to what they've heard," he believed "it is almost always a good strategy to keep that type of witness out of the courtroom if possible." Although appellate counsel believed the law changed following the petitioner's trial to grant a trial court discretion in determining whether a State's representative could remain

in the courtroom without testifying as the first witness, he also believed a trial court still had the authority to sequester the State's representative and that the appellate courts could determine that the failure to exclude the testimony of a witness who was not sequestered resulted in harm and could order a new trial.

During cross-examination, appellate counsel testified that he met with the petitioner several times, during which they discussed the issues to be raised on direct appeal. Appellate counsel stated that, at times, he and the petitioner had different opinions about what issues should be raised and that the petitioner saw some post-conviction issues as issues that should be raised on direct appeal. However, appellate counsel believed the petitioner trusted him to determine which issues were more appropriate to raise on direct appeal. Appellate counsel confirmed that he "consciously" omitted any issues related to the sequestration of the State's designated representative because he believed post-conviction proceedings were the more appropriate avenue by which to raise the issue. He was concerned that if he raised the issue on direct appeal, this court would address the issue in such a way as to preclude any relief in the later post-conviction proceedings.

Hugo Ruiz, a criminal investigator with the public defender's office, was assigned to work on the petitioner's case shortly after the public defender's office was appointed to represent him. He assisted in developing a timeline of the case and attempted to recreate the route that the State alleged the petitioner had taken to determine whether the State's theory of the case was possible. Mr. Ruiz stated that he generally performed a background check on anyone who was involved in a case and that he recalled performing a background check on Sandra Sanchez. He believed that he also received Ms. Sanchez's statement to the police and that he interviewed Jerome Carr, Wesley Carr's father, prior to trial.

Mr. Ruiz testified that prior to trial, he attempted to locate a vehicle that was the same year, make, and model of the victim's 1988 Mustang. He was unable to locate a 1988 Mustang, but he located a 1987 Mustang at a garage that restored vehicles, such as Mustangs. Based upon the information that he received from those at the garage, he believed the 1987 and 1988 Mustangs were the same size. He determined that the wheelbase of the Mustang at the garage was 66 inches long. He stated that the defense team attempted to compare the width of the wheelbase to the measurements of the tire tracks in the petitioner's yard that were taken by police officers. Although Mr. Ruiz did not recall the measurements for the tire tracks, he did not believe they were close to matching the measurements for the 1987 Mustang.

Sergeant Bill Phillips, who was retired from the CPD at the time of the post-conviction hearing, testified that when executing a search warrant on the petitioner's home, he located tire tracks in the dew in the backyard. He stated that the tire tracks led to the

general area of damaged bushes, but he could not recall whether the tracks led directly to the bushes. He said that he and "someone else" measured the tire tracks, but he could not recall who assisted him. He testified that "we measured the Mustang, the crime scene unit did. And it was the same measurement from outside to outside." Sergeant Phillips was unaware that no report was made of anyone's measuring the victim's Mustang, but he explained that occasionally, officers will not include information in a report due to the mistaken belief that another officer has already included the information in a separate report. Sergeant Phillips did not know whether this occurred in the petitioner's case. He did not recall that his testimony at the pretrial hearing regarding the measurement of the Mustang differed from his testimony at trial.

Sergeant Phillips testified that the victim's purse and pager were located inside her parents' home. Officers located a set of keys but were unable to locate her car keys. Officers obtained the victim's car keys from Mr. Witherspoon, but Sergeant Phillips did not recall whether Mr. Witherspoon had an extra set of keys or how he obtained the keys.

Sergeant Phillips stated that he worked on approximately 700 homicides in his career and that he recalled cases in which officers did not realize a victim had been stabbed or shot until the autopsy. He recalled cases where the victim received a stab wound and the wound closed due to the elasticity of the skin and the officers were unable to determine from the scene what had occurred due to the lack of blood.

During cross-examination, Sergeant Phillips denied ever lying when testifying in court, changing his testimony to coincide with the testimony of other witnesses, or intentionally omitting information that should have been disclosed. He stated that he sat with the prosecutors through the majority of the petitioner's trial and heard the testimony of other witnesses before he testified at trial. He denied changing his testimony at the petitioner's trial based on the testimony of other witnesses.

Sergeant Phillips was recalled at a subsequent hearing during which he testified that crime scene investigators measured the tire tracks at the petitioner's home. He stated that the crime scene investigators then went to the bay where the victim's Mustang was kept, measured the Mustang, and "reported to us their measurements on the car."

Investigator Craig Johnson, a retired CPD crime scene investigator, identified numerous reports issued in the investigation of the victim's death and testified that none of the reports provided that he measured the victim's Mustang but that one report stated that Sergeant Phillips measured the tire tracks in the petitioner's yard. Investigator Johnson stated that had he measured the width of the Mustang, he generally would have

included the information in his report. During cross-examination, Investigator Johnson agreed that he did not document every step that he took in investigating a case. During redirect examination, he testified that a subsequent surgery affected his memory and that he did not have any personal recollection of the petitioner's case.

Investigator Brian Richard Bergenback, a retired crime scene CPD investigator, testified that he "vaguely" recalled working on the victim's case. Upon reviewing his reports, he stated that he did not recall measuring the width of the victim's Mustang and that he was "fairly certain" that he did not do so. He said that no measurements of the Mustang were included in his report and that his report would have included such measurements had he taken them.

Edward Greene, Jr., the petitioner's cousin, testified that he and post-conviction counsel located a 1988 Ford Mustang at an automobile repair shop and agreed that they measured the width of the tires from the outside of the front right tire to the outside of the front left tire. Mr. Greene believed the width of the tires was 54 inches, but he acknowledged that he could not recall the specific length. Photographs of their measurements were entered as exhibits to the hearing, and the post-conviction court found that the photographs appeared to show a measurement of between 66 and 67 inches.

During cross-examination, Mr. Greene testified that the owner of the car informed him that it was a 1988 Mustang, but Mr. Greene did not inspect the vehicle identification number of the car. Mr. Greene stated that he was told to search for a 1988 Mustang 5.0 and that he had no prior experience with Mustangs. He did not see any indication that the car had been wrecked previously and stated that the car appeared to have its original tire base. He did not know whether wheel spacers were added to the car or whether the Mustang that he measured and the victim's Mustang had the same type of tires.

During redirect examination, Mr. Greene testified that he was able to locate the specifications for a 1988 Mustang 5.0 through research on the internet, and he determined that the specifications were consistent with the measurements that he and post-conviction counsel obtained. When asked whether he obtained any research indicating whether the wheelbases on a Mustang GT and a Mustang 5.0 would differ, he replied that "[i]f you would look at that particular model, there would be some discrepancies in regards to the width of that particular tire would be longer."

Mark Frazer, a private investigator, testified that post-conviction counsel retained him to locate a 1988 Ford Mustang GT with a 5.0 engine. Mr. Frazer located the Mustang, and the owner allowed him to measure it. He measured the width of the tires "from outside tire to outside tire" and determined that the tires were 66 and three-fourth inches wide. During cross-examination, Mr. Frazer testified that he did not recall the type

or size of the tires that were on the Mustang that he measured or whether the tires were available in 1997.

Tommy Lebron Johnson, a friend of the petitioner, testified that prior to trial, he went to a Ford dealership and requested specifications for a 1988 Mustang. He stated that the dealership did not have records for that time period and that personnel suggested that he visit a body shop or research the information over the internet, informing him that the information on the internet was "valid." Mr. Johnson conducted internet research and informed the petitioner that the specifications were not "adding up." He provided the results of his research to the petitioner, who then provided it to trial counsel. During cross-examination, Mr. Johnson testified that he spoke to trial counsel on three or four occasions prior to trial and that he also met with Mr. Ruiz.

Jerome Carr, Wesley Carr's father, testified that Wesley never told him about what occurred inside the home while the victim was still alive. After Wesley came to live with Jerome following the victim's disappearance, Wesley informed him of incidents that occurred inside the home, but Jerome testified that Wesley never told him that the petitioner poured gasoline on the victim's face.

Mr. Kenneth Witherspoon, the victim's brother, testified regarding his discovery of the victim's Mustang in the driveway and the "piece of hedge" that was on the bumper and his going to the petitioner's home where he saw the tracks where the Mustang had driven over the hedge. Mr. Witherspoon recalled making statements to the police implicating the petitioner in the victim's disappearance and death. He acknowledged that he likely informed the police that the victim was abducted from their parents' home in that she was "tricked out the door, snatched, and taken away." Mr. Witherspoon stated that a man named "Woody" told him that he knew the location of the man who killed the victim, and Mr. Witherspoon provided this information to the police.

The Petitioner testified that he was arrested in 2014 while living in Texas and was transported to Tennessee where he was appointed counsel. He stated that he met with trial counsel on only three or four occasions and that they never "really went over the complete discovery." He also stated that he never received a copy of his statement to the police to review prior to trial and that he requested the statement from trial counsel, who informed him that the State did not plan to use the redacted statement because there was "nothing left."

The Petitioner testified that although the Mustang was in the victim's name, he purchased the car and was the primary driver. He stated that the victim was driving it because her vehicle was not operational. When he purchased the Mustang, it had been damaged in an accident, so he installed the front and rear bumpers, the hood, the

windshield, the driver's side door, and the front dash. He said that the Mustang had a GT chassis and that he installed parts from a Mustang LX with a Fox body style, explaining that the "Fox body styles correspond with each other, no matter if it's a LX GT or just a genuine 5.0, or just a standard four cylinder, a Fox body style LX, everything's the same." He acknowledged that the victim's Mustang had two vehicle identification numbers, the original vehicle identification number and the LX vehicle identification number that was on the driver's side door that he installed. He stated that he received specifications prior to trial showing that the width of the wheelbase of the Fox body style was 69.1 inches when measured "outside of the tire to the outside of the tire," which was greater than the measurements provided by the State. The petitioner said that his 69.1-inch measurement applied regardless of whether the Mustang was a LX or a GT. He denied performing any maintenance on the Mustang that would have narrowed the wheelbase. He explained that the Mustang had Fox Pony tires, which were nine inches wide, and a 16 x 7-inch rim. He agreed that some of the measurements presented during the hearing were narrower than 69.1 inches. He explained that he understood that the tires were measured "where each outside tire touched the ground" and maintained that the proper way to measure the tires is from "outside wall to outside wall."

The petitioner testified that he did not learn that trial counsel would not present an expert in Mustangs at trial until trial counsel announced that the defense rested. The petitioner stated that after the trial court called a recess and he was placed in a holding cell, he saw trial counsel and asked him why he did not present any evidence in his defense. The petitioner said that while trial counsel was pacing with his head down, trial counsel "screamed" that the trial court would advise him of his right to testify and that "if I was you[,] I advise you not to testify." The petitioner again asked trial counsel about his defense proof, but trial counsel walked away. The petitioner maintained that trial counsel did not discuss his right to testify prior to this instance. The petitioner acknowledged that the trial court questioned him about his decision to not testify at trial but stated that he was merely following trial counsel's advice.

The petitioner testified that trial counsel should have called Jerome Carr to testify at trial to rebut Wesley Carr's testimony that the petitioner poured gasoline on the victim. The petitioner denied that trial counsel challenged the admissibility of Ms. Sanchez's testimony pursuant to Tennessee Rule of Evidence 404(b) prior to trial and asserted that trial counsel should have impeached Ms. Sanchez's testimony at trial with her multiple prior convictions. The petitioner denied that he and Ms. Sanchez were ever involved in a serious relationship and described their relationship as a "casual midnight type of relationship." He stated that prior to trial, he had not seen Ms. Sanchez since he had her arrested after she came to his home and exchanged "words" with his mother. The petitioner said that he expressed his concerns about Ms. Sanchez to trial counsel, who informed him that he was unable to locate her.

During cross-examination, the petitioner testified that he did not realize that he and the victim were married, explaining that although they had a wedding ceremony, he never completed the marriage certificate. He stated that at the time of the victim's disappearance, they were "technically not separated." He testified that he told the officers that he thought she might have been cheating on him but that he was unsure. He understood that trial counsel was able to have several unfavorable statements redacted from his statement to the police but maintained that he never had the opportunity to view his redacted statement. He acknowledged that he did not complain about the failure to present any evidence in his defense when he was questioned by the trial court outside the jury's presence at trial. He explained that he was "upset" and "startled" by trial counsel's actions and that because he was unfamiliar with the law and legal proceedings, he answered "yes" to the trial court's questions. He denied striking, kidnapping, and raping Ms. Sanchez.

Sandra Sanchez testified that she was in a relationship with the petitioner from 1989 to 1990 and that the incident with the petitioner on Billy Goat Hill occurred in 1989 or 1991 after the petitioner had been released from prison and was on parole. She initially testified that when she spoke to the police in 2014, she did not know many details about the victim's murder or that her body had been discovered at Billy Goat Hill. However, after post-conviction counsel played portions of her recorded statement, Ms. Sanchez acknowledged that prior to talking to the police, she had heard that the victim, who was the petitioner's wife, had been reported as missing and that her body had been discovered at Billy Goat Hill.

Ms. Sanchez did not recall her relationship with the petitioner having "a nice, decent ending." She stated that she was arrested due to an outstanding warrant and spent 75 days in jail and that during that time period, the police were investigating a murder and believed she was involved. Following her arrest, she learned that the petitioner had reported her to the police. She acknowledged that post-conviction counsel visited her in prison while she was serving a sentence for credit card fraud and that she had two prior convictions for credit card fraud.

During cross-examination, Ms. Sanchez testified that the petitioner raped and choked her at Billy Goat Hill. She denied fabricating a story because she was angry at the petitioner for having her arrested or she had heard that the victim's remains had been discovered at Billy Goat Hill.

During redirect examination, Ms. Sanchez testified that when post-conviction counsel visited her in prison, he chased after her and that when he tried to speak to her again, the warden intervened. She maintained that the incident was captured on a video camera. Following the hearing, post-conviction counsel subpoenaed any recordings

from the prison showing his pursuit of Ms. Sanchez, and the prison responded that no such recordings existed.

At the conclusion of the hearings, the post-conviction court took the matter under advisement. On August 23, 2021, the post-conviction court entered a 139-page order denying post-conviction relief. The post-conviction court determined that trial counsel was not ineffective in failing to assert a defense based upon the expiration of the statute of limitations for second degree murder. The post-conviction court stated that on direct appeal, this court considered and rejected the claim that the statute of limitations had expired or that a defense based upon the expiration of the statute of limitations “existed” and that, as a result, the petitioner could not establish prejudice.

The post-conviction court found that trial counsel met with the petitioner a sufficient number of times to discuss the developments of the case, including efforts to obtain measurements of the wheelbase of a similar Mustang and the development of a timeline. The post-conviction court noted that trial counsel was familiar with the proof and legal issues involved in the case and that trial counsel filed various pleadings seeking to exclude evidence, interviewed lay and expert witnesses, reviewed prior statements of witnesses, conducted independent research, performed background checks of witnesses, attempted to locate a Mustang similar to the victim’s Mustang and took measurements, visited the various locations relevant to the case, and attempted to create a timeline of the events. The post-conviction court concluded that “the defense team was well prepared and informed about the case.”

The post-conviction court rejected the petitioner’s claim that trial counsel was ineffective in failing to insist that Sergeant Phillips, the State’s designated representative at trial, testify as the State’s first witness. The post-conviction court noted the State’s argument that *Mothershed v. State*, 578 S.W.2d 96 (Tenn. Crim. App. 1978), the case upon which the petitioner relied, was no longer the law once Tennessee Rule of Evidence 615 went into effect and that, as a result, trial counsel could not be ineffective in failing to follow a rule that was no longer mandatory. The post-conviction court stated that regardless of the State’s contention, trial counsel was successful in obtaining an order requiring Sergeant Phillips to testify first and that trial counsel could not testify that he made a strategic decision against seeking to enforce the order. The post-conviction court found that, thus, “the focus on the inquiry may be more properly focused on the prejudice prong of *Strickland*.”

The post-conviction court found that no reasonable probability existed that the outcome of the trial would have been different had Sergeant Phillips testified as the State’s first witness at trial. The post-conviction court credited Sergeant Phillips’ testimony at the post-conviction hearing in which he denied altering his trial testimony to

conform to the testimony of other witnesses at trial, and the post-conviction court also credited trial counsel's testimony that he did not believe Sergeant Phillips perjured himself at trial.

In determining that trial counsel's failure to enforce the order did not result in prejudice, the post-conviction court rejected the petitioner's claim that by being allowed to remain in the courtroom while other witnesses testified, Sergeant Phillips was able to "clean up" the State's case by explaining why little blood was located despite the nature of the victim's wound. The post-conviction court found that there was "no hole" in the State's case which Sergeant Phillips' testimony resolved. The post-conviction court noted that although Mr. Bodkin and Doctor Metcalf testified at trial that they believed an incisional wound to the neck would produce a large amount of blood, they also testified that the amount of blood produced was dependent upon the location of the incised wound. The post-conviction court stated that the State did not use Sergeant Phillips' testimony in its closing argument to explain why little blood was found even after trial counsel argued that there should be a large amount of blood from the wound. The post-conviction court also stated the State's theory at trial was not that no blood existed but that the petitioner used gasoline and other agents to clean the blood. Finally, the post-conviction court noted that in response to questioning by trial counsel on cross-examination at trial, Sergeant Phillips conceded that a medical doctor would be more qualified to testify regarding the amount of blood that would have been produced. The post-conviction court determined that if Sergeant Phillips' testimony "was an attempt to 'clean up' a weakness of the State's case—and the Court does not so find—this evidence falls far short of clear and convincing evidence of the fact."

The post-conviction court also rejected the petitioner's claim that by remaining in the courtroom during the testimony of other witnesses, Sergeant Phillips was able to "clean up" the State's case by explaining how the victim's Mustang was measured and compared against the tire tracks in the petitioner's yard. The post-conviction court noted that although the two crime scene investigators testified at trial that they did not recall being asked to measure the width of the tire track of the victim's Mustang and that no such measurements were included in their reports, Sergeant Phillips' testimony at trial regarding the measurements of the Mustang was not "obviously" inconsistent with his testimony during a pretrial hearing. The post-conviction court noted that when asked during a pretrial hearing whether he personally measured the wheelbase of the Mustang, Sergeant Phillips replied, "I probably did not. That's been more than 17 years ago, I think. But I probably would not have been the one to do that. That most likely would have been someone from ID. I may have assisted." Sergeant Phillips also testified that he "[p]robably" requested that measurements of the Mustang be taken. The post-conviction court noted that when asked at trial whether he measured the tracks in the petitioner's back yard, Sergeant Phillips testified, "We did. Sergeant Johnson and I did." When asked at trial whether he compared

the measurements of the tire tracks to any automobiles, Sergeant Phillips testified, “Yes, we compared it against the Mustang of [the victim’s].” The post-conviction court found that Sergeant Phillips’ testimony at trial using “the first-person plural to describe his actions” was consistent with his testimony at the pretrial hearing “describing the actions of his team.” The post-conviction court noted that trial counsel testified at the post-conviction hearing that he understood Sergeant Phillips’ phrasing of “we” to mean the investigators working on the case and that Sergeant Phillips and other witnesses used this phrasing in response to other questions at trial. The post-conviction court did not view Sergeant Phillips’ phrasing at trial as indicating that Sergeant Phillips was personally involved in taking the measurements, and the post-conviction court stated that it had “serious doubts as to whether this phrasing was being used, purposefully or otherwise, to ‘clean up’ supposed holes in the State’s case.” Because the post-conviction court had “substantial doubt about the correctness of the conclusion drawn” by the petitioner, the court concluded that the petitioner failed to establish prejudice.

The post-conviction court also rejected the petitioner’s claim that appellate counsel was ineffective in declining to raise an issue on direct appeal regarding a violation of the rule of sequestration of witnesses by Sergeant Phillips. The post-conviction court found that because trial counsel did not object to the failure to enforce the order, the review on direct appeal would have been limited to plain error and that appellate counsel could not exclude the possibility that a strategic reason existed to waive the enforcement of the order. The post-conviction court determined that after appellate counsel discussed with the petitioner the prospect of raising the issue as part of a post-conviction claim, appellate counsel made a reasonable, strategic decision against raising the issue on direct appeal.

The post-conviction court found that trial counsel was not ineffective in declining to present evidence at trial to rebut the State’s proof, offered through Sergeant Phillips’ testimony, that the wheelbase of the Mustang from “outside tire to outside tire” was five feet, four inches or 64 inches, the same measurement of the tire tracks in the petitioner’s yard. The post-conviction court found that trial counsel made a strategic decision to not call a witness to testify about the measurements of the Mustang and that the decision was “was within a range of reasonableness based upon adequate investigation.” The post-conviction court noted that when trial counsel made the decision, he was aware that the measurements obtained by the defense team differed by only two inches from the measurements obtained by the State and could be used to support the State’s case; that the victim’s Mustang was an “amalgamation of various parts and had two VINs,” which would be “problematic” in attempting to offer the manufacturer’s specifications; and that the wheelbase measurements would differ depending upon the model of the Mustang. With respect to the petitioner’s attempts to challenge trial counsel’s testimony, the post-conviction court noted that testimony of various witnesses offered by the petitioner regarding the measurement of the wheelbase of a Mustang was inconsistent and that the

weight afforded the testimony of Mr. Greene and Mr. Frazer were “lessened” because neither witness could offer an “apples to apples” comparison between the victim’s Mustang and the Mustang measured. The post-conviction court found that Mr. Johnson did not take any measurements and that his testimony regarding the specifications that he located would have been hearsay. The post-conviction court concluded that the petitioner failed to establish facts regarding the measurement of the wheelbase by clear and convincing evidence, “as substantial doubt remains as to the correctness of his testimony in light of the other proof that he offered and in light of the other proof in the case.”

The post-conviction court found that trial counsel made a reasonable, strategic decision against offering evidence related to the Mustang measurement in order to prevent the State from having the opportunity to present the petitioner’s redacted statement during the cross-examination of a defense witness or in rebuttal. The post-conviction court found that the petitioner was often defensive and combative during the interview, that he acknowledged his lack of cooperation with the police in investigating the victim’s disappearance, that he admitted that he and the victim were separated at the time of her disappearance, and that he believed the victim was cheating on him, which the State could use to argue motive. The post-conviction court concluded that trial counsel was not deficient and that any deficiency did not result in prejudice.

The post-conviction court relied upon its findings related to the petitioner’s proof of the measurements of Mustangs and the alleged inconsistencies in Sergeant Phillips’ testimony in rejecting the petitioner’s claim that trial counsel was ineffective in failing to impeach Sergeant Phillips’ testimony about the measurements of the victim’s Mustang. The post-conviction court found that no reasonable probability exists that a different outcome would have been obtained had trial counsel “asked additional questions.”

The post-conviction court concluded that trial counsel was not deficient in declining to present Jerome Carr as a witness to testify that Wesley never told him that the petitioner poured gasoline on the victim. The post-conviction court found that trial counsel made a reasonable, strategic decision against presenting Jerome as a witness due to concern that he could bolster Wesley’s testimony if Jerome testified that Wesley informed him of various fights between the petitioner and the victim. The post-conviction court noted that through trial counsel’s cross-examination of Wesley at trial, trial counsel was able to establish that Wesley did not tell officers about the gasoline incident until 2010 and that trial counsel argued this point during closing arguments. The post-conviction court concluded that because trial counsel’s cross-examination of Wesley allowed the jury to infer that this testimony was the product of a more recent fabrication, no reasonable probability exists that the outcome of the trial would have been different had trial counsel called Jerome to testify at trial.

The post-conviction court found that trial counsel made a reasonable, strategic decision to limit his cross-examination of Sandra Sanchez. The post-conviction court credited trial counsel's testimony and stated that trial counsel weighed the limited nature of Ms. Sanchez's testimony on direct examination "against the risk that an angry witness could open the door to inadmissible evidence." The post-conviction court stated that trial counsel's fears were illustrated during Ms. Sanchez's testimony during the post-conviction hearing when she "had enough" of post-conviction counsel's questioning and "sought to end the questioning by injecting, rather gratuitously, an inflammatory and non-germane accusation directed personally to [p]ost-[c]onviction [c]ounsel himself." The post-conviction court found that due to post-conviction counsel's demonstration of "the dangers of continuing to question an angry Ms. Sanchez, [t]rial [c]ounsel's decision 'not to poke the sleeping bear' at trial certainly appears to be within a range of reasonableness, especially in light of Ms. Sanchez's limited trial testimony."

The post-conviction court found that although the petitioner asserts that trial counsel was ineffective in failing to question Kenneth Witherspoon on cross-examination about how he came to possess the keys to the victim's Mustang, the petitioner failed to question Mr. Witherspoon about the keys during the post-conviction hearing and, therefore, failed to establish prejudice. The post-conviction court also found that trial counsel was not deficient in failing to object to the State's use of a report of another officer to refresh Sergeant Phillips' recollection at trial that investigators never located the keys to the victim's Mustang and that Mr. Witherspoon had given them another set of keys to the Mustang. The post-conviction court determined that Tennessee Rule of Evidence 612 did not prohibit the use of a writing authored by a third person to refresh a witness's recollection. Finally, the post-conviction court rejected the petitioner's claim that he was entitled to relief due to cumulative error.

In this timely appeal, the petitioner reasserts that he was deprived of effective assistance of counsel at trial and on appeal.

We view the petitioner's claim with a few well-settled principles in mind. Post-conviction relief is available only "when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. A post-conviction petitioner bears the burden of proving his or her factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f). On appeal, the appellate court accords to the post-conviction court's findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). By contrast, the post-conviction court's conclusions of law receive no deference or presumption of correctness on appeal. *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001).

Before a petitioner will be granted post-conviction relief based upon a claim of ineffective assistance of counsel, the record must affirmatively establish, via facts clearly and convincingly established by the petitioner, that “the advice given, or the services rendered by the attorney, are [not] within the range of competence demanded of attorneys in criminal cases,” *see Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975), and that counsel’s deficient performance “actually had an adverse effect on the defense,” *Strickland v. Washington*, 466 U.S. 668, 693 (1984). In other words, the petitioner “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. Should the petitioner fail to establish either deficient performance or prejudice, he is not entitled to relief. *Id.* at 697; *Goard v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Indeed, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” *Strickland*, 466 U.S. at 697.

When considering a claim of ineffective assistance of counsel, a reviewing court “begins with the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all significant decisions,” *Kendrick v. State*, 454 S.W.3d 450, 458 (Tenn. 2015) (citation omitted), and “[t]he petitioner bears the burden of overcoming this presumption,” *id.* (citations omitted). We will not grant the petitioner the benefit of hindsight, second-guess a reasonably based trial strategy, or provide relief on the basis of a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

A. Failure to Object to Sergeant Phillips’ Testimony

The petitioner asserts that trial counsel was ineffective in declining to object to the State’s failure to call Sergeant Phillips, its designated representative, as its first witness at trial. Citing *Smartt v. State*, 80 S.W. 586 (Tenn. 1904), and *Mothershed v. State*, 578 S.W.2d 96 (Tenn. Crim. App. 1978), both of which predated the adoption of the Tennessee Rules of Evidence, the petitioner contends that the proper practice is for the State to call its designated representative as its first witness. The petitioner notes that an agreed order entered by the trial court prior to trial also required the State to call its designated representative as its first witness. The petitioner maintains that due to trial counsel’s failure to object, Sergeant Phillips listened to the testimony of numerous witnesses prior to his testifying at trial and then used his testimony to “patch holes” in the

State's case. The petitioner further maintains that appellate counsel was ineffective in failing to raise the issue on direct appeal.

The State responds that prior to the petitioner's trial, the Tennessee Supreme Court issued its opinion in *State v. Jordan*, 325 S.W.3d 1, 38-40 (Tenn. 2010), in which the court held that Tennessee Rule of Evidence 615 permitted the State to designate "an investigating officer as immune from sequestration" and, therefore, "supplanted" the rule developed in *Smart* and *Mothershed* that "the prosecutor should be required to testify first or be sequestered." *State v. Randall T. Beaty*, No. M2014-00130-CCA-R3-CD, 2016 WL 600148, at *19 (Tenn. Crim. App., Nashville, Nov. 8, 2016) (opinion on remand). The State maintains that the petitioner has not shown deficiency or prejudice for trial counsel's failure to object to Sergeant Phillips' testimony and that the petitioner has failed to establish that appellate counsel was ineffective in failing to raise the issue on direct appeal.

As noted by the post-conviction court, we need not determine the effect of the *Smart/Mothershed* rule at the time of the petitioner's trial because the trial court entered an agreed order prior to trial requiring the State to present its designated representative as its first witness at trial. The petitioner asserts that trial counsel was deficient in failing to seek to exclude Sergeant Phillips' testimony as violating the order. The State argues that based on trial counsel's testimony at the post-conviction hearing, the State commonly declined to call its designated representative to testify as its first witness at trial and that trial counsel's failure to object was reasonable because he did not believe Sergeant Phillips perjured himself or engaged in misconduct when he testified at trial. Despite the State's efforts on appeal to argue that trial counsel had a reasonable explanation for declining to object, the post-conviction court credited trial counsel's testimony at the post-conviction hearing that he did not have a strategic reason for failing to object to Sergeant Phillips' testifying as one of the State's last witnesses in its case-in-chief in violation of the trial court's order. Accordingly, we conclude that trial counsel was deficient in failing to object to Sergeant Phillips' testimony at trial.

In asserting that trial counsel's deficiency resulted in prejudice, the petitioner argues that Sergeant Phillips was able to "patch holes" in the State's case to explain the lack of blood evidence. The petitioner maintains that Sergeant Phillips offered "lay opinion testimony" in a "transparent attempt to mitigate the inconsistencies between the medical examiner's testimony and the State's theory of the case." At trial, Mr. Boykin, a forensic anthropologist, testified during cross-examination that he "would imagine" that an incisional wound to the neck "could" produce a large amount of blood. Doctor Metcalfe, the medical examiner, agreed during cross-examination that an incisional wound through one or more arteries would produce a large amount of blood, causing a person to "bleed out." Sergeant Phillips subsequently testified during direct examination that in his experience, blood is often present at a crime scene, that the presence of blood can vary

from scene to scene, that he had been involved in some homicide cases where he believed the victim died of natural causes due to the lack of blood at the scene only to later learn from the medical examiner that the victim sustained a stab wound, and that “the skin has a lot of elastic and especially on a small wound the skin has the ability to close back to a certain degree and the blood will fill inside the cavity. So blood is not on every scene, but it is on many scenes.” Although Sergeant Phillips acknowledged during cross-examination that he “would think” the medical examiner would be more qualified to testify regarding the amount of blood that the injury would have produced, Sergeant Phillips further testified that he did not believe that when the medical examiner used the term “bleed out,” he meant “bleed outside the body. He’s just meaning that you would die because you lost your blood. What happens many times is the cavity fills with blood and the torso will hold a large amount of blood.” Sergeant Phillips further testified that he did not know “exactly” what the medical examiner had stated and that “according to my experience with several hundred homicides,” “there are times when blood does not or not very much blood will exit the body” where the victim has sustained a gunshot or stab wound.

Regardless, as noted by the post-conviction court, the State’s theory at trial was not that the victim’s injury would not have produced a large quantity of blood. Rather, the State argued during closing arguments that the petitioner used gasoline and other agents to clean the blood that was produced, assuming that the victim’s body was ever inside the Mustang. The State did not reference Sergeant Phillips’ testimony even after trial counsel argued during closing arguments that the victim’s wound should have produced a large amount of blood based on the medical examiner’s testimony. Furthermore, the post-conviction court credited Sergeant Phillips’ testimony at the post-conviction hearing in which he denied altering his trial testimony based upon the testimony of other witnesses. We, therefore, conclude that no reasonable probability exists that the outcome of the trial would have been different had Sergeant Phillips testified as the first witness in the State’s case-in-chief at trial. *See Strickland*, 466 U.S. at 694.

The petitioner also asserts that Sergeant Phillips’ trial testimony regarding the measuring of the wheelbase of the victim’s Mustang was inconsistent with his testimony at a pretrial hearing. The petitioner maintains that after Sergeant Phillips heard the testimony of the State’s witnesses at trial that the wheelbase of the victim’s Mustang had not been measured, Sergeant Phillips altered his testimony in order to “patch holes” in the State’s case by explaining that the wheelbase of the victim’s Mustang was measured and that the measurements matched those of the tire tracks in the petitioner’s yard. The State responds that the post-conviction court properly determined that Sergeant Phillips’ testimony at trial was not inconsistent with his testimony at the pretrial hearing and that the petitioner, therefore, failed to establish that Sergeant Phillips altered his testimony at trial as the result of hearing the testimony of other witnesses.

At the beginning of the pretrial hearing, trial counsel informed the trial court that the measurements of tracks in the petitioner's back yard purportedly matched the measurements of the Mustang taken by the State. Sergeant Phillips testified at the pretrial hearing that measurements were taken of the tire tracks in the petitioner's back yard and of the Mustang's wheelbase for comparison. The following exchange occurred during questioning by trial counsel:

Q. Now, the tire tracks that were found in the location of the home where [the petitioner] lived, they were measured and you actually photographed yourself measuring those; is that right?

A. Our crime scene did that, yes.

Q. Did you personally measure the wheel base of the Mustang automobile?

A. I probably did not. That's been more than 17 years ago, I think. But I probably would not have been the one to do that. That most likely would have been someone from ID. I may have assisted.

Q. Would you have requested that that be done?

A. Probably so.

Sergeant Phillips also testified that he was unaware that there was no report of the measurements made of the Mustang and that, although unsure, he believed the information would have been included in a supplemental report. He also did not recall seeing any photographs of the officers' measuring the Mustang.

At trial, Investigators Brian Bergenback and Craig Johnson of the crime scene unit both testified on cross-examination that they did not recall being asked to measure the width of the Mustang's wheels. Investigator Bergenback stated that his report did not indicate that he was requested to take the measurements, and Investigator Johnson stated that had he been requested to document the measurements, he was sure that he would have included them in his report. Sergeant Phillips subsequently testified during direct examination at trial that "we" first compared the tire tracks from the petitioner's back yard, which measured five feet, four inches, to the wheelbase to the petitioner's truck, which measured six feet, two inches. When asked whether he compared the tire tracks against any other automobiles, he testified, "Yes, we compared it against the Mustang of [the victim's]." He stated that the Mustang's wheelbase "from the outside tire to outside tire was five foot four inches, which was the same as the tracks in the yard leading back into the bush." He explained that "it was only common sense that there's a bush here with tire tracks, there's a bush in her bumper. So that was just more that we did."

The post-conviction court found that Sergeant Phillips' trial testimony during which he used the term, "we," in discussing the investigative tasks performed in the case was consistent with his testimony during the pretrial hearing when describing the actions of the investigative team. As noted by the post-conviction court, Sergeant Phillips and other witnesses used this phrasing of "we" in testifying throughout the trial, and trial counsel testified during the post-conviction hearing that he understood the phrasing of "we" to mean the investigators working on the case. We, like the post-conviction court, do not view Sergeant Phillips' phrasing at trial as indicating that he was personally involved in taking the measurements. Furthermore, the post-conviction court credited Sergeant Phillips' testimony during the post-conviction hearing in which he denied that he altered his testimony at trial. The petitioner has failed to present clear and convincing evidence establishing that Sergeant Phillips' trial testimony was inconsistent with his testimony during the pretrial hearing. Because the petitioner has not established that Sergeant Phillips altered his trial testimony upon hearing the testimony of the two crime scene investigators, we conclude that trial counsel's failure to object to Sergeant Phillips' trial testimony did not result in prejudice. *See William Cole Nicholson v. State*, No. M2020-01128-CCA-R3-PC, 2022 WL 1194639, at *8 (Tenn. Crim. App., Nashville, Apr. 22, 2022), *no perm. app. filed* (concluding that the petitioner was not prejudiced by trial counsel's failure to request that the State's representative testify first when the petitioner failed to demonstrate that the testimony of the State's representative was tainted).

The petitioner asserts that appellate counsel was ineffective in declining to raise the State's failure to call Sergeant Phillips in accordance with the trial court's order as an issue on direct appeal. Our supreme court has held that "unless the omitted issue has some merit, the petitioner suffers no prejudice from appellate counsel's failure to raise the issue on appeal. When an omitted issue is without merit, the petitioner cannot prevail on an ineffective assistance of counsel claim." *Carpenter v. State*, 126 S.W.3d 879, 887-88 (Tenn. 2004) (citing *United States v. Dixon*, 1 F.3d 1080, 1083 (10th Cir. 1993)). Just as trial counsel's failure to object to Sergeant Phillips' testimony at trial did not result in prejudice, appellate counsel's decision to not raise the issue on direct appeal likewise did not result in prejudice.

B. Failure to Challenge the Expiration of the Statute of Limitations

The petitioner asserts that his conviction of second degree murder is barred due to the expiration of the fifteen-year statute of limitations. He maintains that Tennessee Code Annotated section 40-2-103, which tolls the statute of limitations during the period in which a defendant "conceals the fact of the crime," does not apply because the State failed to present sufficient evidence establishing that he concealed "the fact of the crime." The petitioner contends that counsel were ineffective in failing to raise the issue in a motion for judgment of acquittal, a motion for new trial, and on direct appeal. The State responds

that this court addressed the issue on direct appeal and determined that the statute of limitations had been tolled. The State further responds that the evidence established that the petitioner “conceal[ed] the fact of the crime” by hiding the victim’s body and that the petitioner otherwise failed to establish deficiency or prejudice.

On direct appeal, the petitioner challenged the trial court’s decision to amend the indictment to replace tolling language alleging the petitioner’s absence from the jurisdiction with tolling language alleging concealment. *Adolphus L. Hollingsworth*, slip op., at 10-11, 13. This court recognized that “where the indictment is brought after the period of limitations has expired, it must be pleaded and proved that *certain specific facts* toll the statute of limitations.” *Id.*, slip op., at 13 (quoting *State v. Davidson*, 816 S.W.2d 316, 318 (Tenn. 1991)). The court stated that the tolling language in the original indictment provided that the petitioner was not a resident of this state from 2004 to 2010 and from 2010 to 2014, “which effectively tolled the statute of limitations for approximately ten years. Consequently, the original indictment was timely.” *Id.*, slip op., at 14. The court also stated that the tolling language in the amended indictment provided that the petitioner concealed the crime from the date of the victim’s murder on August 18, 1997, until her body was discovered on June 5, 1999, “which effectively tolled the statute of limitations for a period of 1 year, 9 months, and 18 days.” *Id.* The court concluded that the amended indictment “also tolled the fifteen-year statute of limitations for second degree murder because the amendment related back to the time of filing the indictment.” *Id.* The court also concluded that the petitioner consented to the amendment pursuant to Tennessee Rule of Criminal Procedure 7(b)(1) or that, “at the very least,” the indictment was amended without the petitioner’s consent pursuant to Rule 7(b)(2). *Id.*

In rejecting the petitioner’s claim of ineffective assistance of counsel, the post-conviction court found that on direct appeal, this court addressed and rejected the claim that the statute of limitations had expired and that, as a result, the petitioner did not establish prejudice by trial counsel’s failure to raise the issue. In this appeal, the petitioner relies upon the Tennessee Supreme Court’s opinion in *State v. Davidson*, 816 S.W.2d 316, 319, 321 (Tenn. 1991), and argues that to successfully toll the statute of limitations, the State must (1) plead specific facts in the indictment demonstrating the tolling of the statute of limitations; and (2) prove the alleged facts either at trial or during a hearing. *See, e.g. State v. White*, 939 S.W.2d 113, 115 (Tenn. Crim. App. 1996) (holding that “when there is a prosecution after the expiration of the statute of limitation, the indictment or presentment must contain allegations that certain specific facts tolled the statutory period, and proof must support the allegations”); *State v. Tidwell*, 775 S.W.2d 379, 389 (Tenn. Crim. App. 1989) (providing that “when the charging instrument alleges sufficient facts to toll the statute of limitations, but the State fails to prove these facts during trial, the trial court must dismiss the prosecution with prejudice”). The petitioner maintains that on direct appeal, this court only addressed whether the State sufficiently pled specific facts in the indictment

demonstrating tolling and that this court did not address whether the State met its burden of proving those facts at trial or during a hearing. The petitioner asserts that evidence of concealment of the victim's body was insufficient to establish tolling of the statute of limitations pursuant to Tennessee Code Annotated section 40-2-103 as concealment of "the fact of the crime" and reasons that this provision permits tolling only when there is not "awareness of criminal activity." The petitioner further reasons that because the officers were investigating the victim's disappearance as a homicide prior to the discovery of the victim's body, there was "awareness of criminal activity," which prevented tolling of the statute of limitations.

The State responds that the "most natural reading" of this court's opinion on direct appeal is that we determined that "the statute of limitations defense is non-meritorious because the State effectively tolled the statute of limitations," which essentially forecloses an ineffective assistance of counsel claim. The State acknowledged that the petitioner's argument that this court did not address whether the State proved the facts supporting tolling is "debatable" in light of this court's acknowledgement that successful tolling required the State to prove the tolling facts. *See Adolphus L. Hollingsworth*, slip op., at 13. The State asserts that, regardless, the State presented facts at trial establishing that the petitioner "conceal[ed] the fact of a crime" by hiding the victim's body, thus tolling the statute of limitations. The State maintains that trial counsel, therefore, was not ineffective in failing to address the issue.

On direct appeal, this court specifically concluded that the fifteen-year statute of limitations had been tolled pursuant to Code Section 40-2-103 and that the indictment was timely. *See id.*, slip op., at 13-14. Therefore, the post-conviction court correctly found that the petitioner cannot establish prejudice resulting from his claims of deficiency. Even if we adopt the petitioner's interpretation of this court's opinion from the direct appeal, we conclude that the petitioner is not entitled to relief on his claim of ineffective assistance of counsel.

The petitioner asserts that trial counsel should have challenged the expiration of the statute of limitations in a motion for judgment of acquittal, in a motion for new trial, and on direct appeal. However, counsel who represented the petitioner in the post-trial proceedings did raise the expiration of the statute of limitations in the motion for new trial as a separate issue from the challenges to the amended indictment.² During the hearing on the motion for new trial, counsel argued that the statute of limitations had expired. The State responded that the tolling provision in Code Section 40-2-103 based on concealment

² Although the petitioner's motion for new trial and the transcript of the hearing on the motion were not entered as exhibits during the evidentiary hearing, the motion and transcript were included in the appellate record on direct appeal, and we take judicial notice of these records. *See State v. Lawson*, 291 S.W.3d 864, 867-70 (Tenn. 2009); *Delbridge v. State*, 742 S.W.2d 266, 267 (Tenn. 1987).

applied because the murder occurred in August 1997 and the victim's body was not located until June 1999. The trial court found that Code Section 40-2-103 applied to toll the statute of limitations. Because counsel raised the issue in the motion for new trial, the petitioner has failed to establish that counsel was deficient. Although the petitioner asserts that appellate counsel was ineffective in failing to raise the issue on direct appeal, the petitioner did not raise the issue in his pro se or amended petitions, and the post-conviction court did not address the issue in its order. Rather, the post-conviction court's order addressing the claim of ineffective assistance of appellate counsel was specifically limited to appellate counsel's failure to raise an issue on direct appeal related to the State's failure to abide by the order requiring Sergeant Phillips to testify first. Accordingly, this issue is waived. *See Holland v. State*, 610 S.W.3d 450, 458 (Tenn. 2020) ("Tennessee appellate courts may only consider issues that were not formally raised in the petition if the issue was argued at the post-conviction hearing and decided by the post-conviction court without objection.").

C. Failure to Impeach Witnesses

The petitioner asserts that trial counsel was ineffective in failing to impeach Sergeant Phillips' trial testimony regarding the measurement of the Mustang with his testimony from the pretrial hearing. However, as we have recognized, Sergeant Phillips' trial testimony was not inconsistent with his testimony at the pretrial hearing. The petitioner has established neither deficiency nor prejudice.

The petitioner also challenges trial counsel's decision to not call Mr. Ruiz as a witness at trial in order to rebut Sergeant Phillips' testimony that tire tracks in the petitioner's yard were the same size as the wheelbase to the victim's Mustang. The post-conviction court found that trial counsel identified multiple issues concerning the reliability of the measurements that he and Mr. Ruiz obtained from another Mustang. Trial counsel believed the admission of the manufacturer's specifications were hearsay and would otherwise be problematic because the victim's Mustang was a combination of two different models and had two vehicle identification numbers. Trial counsel believed the wheelbase measurements would differ based on the model, and one of the petitioner's witnesses, Mr. Greene, confirmed this belief during the evidentiary hearing. Trial counsel acknowledged that the State could argue that the two-inch difference between the measurements obtained by the defense and those obtained by the officers was insignificant and supported the State's case. Although the petitioner testified that the wheelbase for the victim's Mustang was 69 inches, four inches greater than the measurements obtained by the officers, the post-conviction court found that the evidence presented during the post-conviction hearing did not support the petitioner's claim. The State did not present the petitioner's redacted statement during its case-in-chief, and trial counsel believed the State intended to present the statement during the cross-examination of defense witnesses or as rebuttal proof. Trial counsel and the post-conviction court noted the damning nature of the petitioner's

statement during which he maintained that the victim was cheating on him at the time of her disappearance, thus, serving as evidence of motive. In light of the questionable nature of the evidence that would have been presented through Mr. Ruiz's testimony, the risk that the State could use the testimony to bolster its case, and the need to ensure that the State did not have another opportunity to present the petitioner's redacted statement, trial counsel made a reasonable, strategic decision to forgo calling Mr. Ruiz as a witness at trial. Trial counsel was not deficient in this regard.

The petitioner maintains that trial counsel was ineffective in failing to call Jerome Carr, Wesley Carr's father, to testify that Wesley never told him that the petitioner poured gasoline on the victim. The petitioner contends that Jerome's testimony would have impeached Wesley's testimony regarding the gasoline incident as a recent fabrication. Trial counsel reviewed Jerome's statement to the police in which he recalled Wesley's informing him of fights between the petitioner and the victim. In addition to trial counsel's concern that presenting defense proof would give the State the opportunity to present the petitioner's redacted statement as evidence at trial, the post-conviction court found that trial counsel was reasonably concerned that if he called Jerome as a witness, Jerome would corroborate Wesley's testimony about the fighting between the petitioner and the victim. Instead, trial counsel was able to establish through cross-examination of Wesley that Wesley did not inform officers of the gasoline incident following the victim's disappearance and first provided the information to officers in 2010. We agree with the post-conviction court that trial counsel's cross-examination of Wesley allowed the jury to infer that Wesley's testimony was the product of a more recent fabrication. We conclude that trial counsel made a reasonable, strategic decision to not call Jerome as a witness at trial and to suggest, through the cross-examination of Wesley, that the gasoline incident was a recent fabrication. Trial counsel was not deficient in this regard.

The petitioner next contends that trial counsel was ineffective in failing to question Ms. Sanchez on cross-examination to establish that she had been convicted twice of credit card fraud, that prior to giving her statement to police, she was aware that the victim's body had been recovered at Billy Goat Hill, and that she "displayed substantial animus" toward the petitioner because he previously had her arrested in an unrelated case. Although Ms. Sanchez told police officers that the petitioner assaulted and raped her at Billy Goat Hill, she only testified at trial that the petitioner drove her to Billy Goat Hill on one occasion. Due to the limited nature of Ms. Sanchez's testimony, her unpredictability, and trial counsel's concern that extensive cross-examination would lead to Ms. Sanchez's volunteering information about her accusations against the petitioner, trial counsel decided to limit his cross-examination of Ms. Sanchez to establish that Billy Goat Hill was a location generally known to those who lived in the area. The post-conviction court found that trial counsel's concerns about Ms. Sanchez were confirmed during the post-conviction hearing when she became angry and frustrated by post-conviction counsel's questioning

and falsely accused him of chasing and harassing her when he attempted to interview her at the prison where she was housed. We agree with the post-conviction court that trial counsel made a reasonable, strategic decision to avoid “pok[ing] the sleeping bear” and limit his cross-examination of Ms. Sanchez.

The petitioner maintains that after Sergeant Phillips testified during cross-examination at trial that Mr. Witherspoon provided him with the keys to the victim’s Mustang, trial counsel improperly failed to object to the State’s use of a supplemental report prepared by another officer to refresh Sergeant Phillips’ recollection that the keys to the victim’s Mustang were never found and that “[i]t was in another set of keys that they gave us.” The petitioner asserts that evidence that Mr. Witherspoon possessed the keys to the victim’s Mustang after the victim’s key ring, which was found near the Mustang, was missing the victim’s car keys, raised “the prospect of an ulterior motive” for Mr. Witherspoon’s efforts to cast suspicion on the petitioner for the victim’s disappearance. The petitioner has waived this issue on appeal by failing to cite to any legal authority in his brief to support his claim that the State’s use of a report authored by a third party to refresh a witness’s recollection was error. *See* Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. 10(b). Regardless, this court has recognized that Tennessee Rule of Evidence 612, which governs the use of writings to refresh a testifying witness’s memory, “*applies to any writing used to refresh a witness’s memory, irrespective of who prepared the writing.*” *State v. Price*, 46 S.W.3d 785, 813-14 (Tenn. Crim. App. 2000) (quoting Neil P. Cohen, et al., *Tennessee Law of Evidence* § 612.2, at 402 (3d. ed. 1995)). The petitioner has established neither deficiency nor prejudice.

D. Cumulative Error

Finally, the petitioner argues that he is entitled to post-conviction relief because of the cumulative effect of trial counsel’s errors. Because the petitioner has established only one instance of trial counsel’s deficient performance, we need not consider the aggregate prejudicial effect of trial counsel’s conduct.

Accordingly, the judgment of the post-conviction court is affirmed.

JAMES CURWOOD WITT, JR., PRESIDING JUDGE