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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs April 4, 2023

TEVIN DOMINIQUE LUMPKIN v. STATE OF TENNESSEE

Appeal from the Circuit Court for Henry County
No. 15115-PC Donald E. Parish, Judge

No. W2022-00747-CCA-R3-PC

Petitioner, Tevin Dominique Lumpkin, appeals as of right from the Henry County Circuit Court's denial of his petition for post-conviction relief, wherein he challenged his conviction for first degree premeditated murder. On appeal, Petitioner asserts that he received ineffective assistance of trial counsel because counsel failed to file a motion to dismiss related to the State's failure to collect, test, or maintain blood droplets from the crime scene. He also argues that his due process rights were violated by the lost evidence and because the post-conviction court did not force a witness to testify or, alternatively, speak to post-conviction counsel. Lastly, he argues that the cumulative effect of these errors requires relief. Following our review, we affirm the denial of post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which J. ROSS DYER and JILL BARTEE AYERS, JJ., joined.

Marcus D. Noles, Camden, Tennessee, for the appellant, Tevin Dominique Lumpkin.

Jonathan Skrmetti, Attorney General and Reporter; Caroline Weldon, Assistant Attorney General; Matthew F. Stowe, District Attorney General; and James B. Webb, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual and Procedural Background

Petitioner was convicted by a Henry County jury of first degree premeditated murder related to the August 25, 2012 shooting death of Eric Kinley in a nightclub and sentenced to life imprisonment. *See State v. Tevin Dominique Lumpkin*, No. W2014-01064-CCA-R3-CD, 2016 WL 520535, at *1 (Tenn. Crim. App. Feb. 9, 2016), *perm. app. denied* (Tenn. Apr. 17, 2020).

On direct appeal, this court summarized the evidence presented at trial as follows:

State's Proof

On August 25, 2012, at approximately 2:41 a.m., Sergeant Bryan Hall of the Henry County Sheriff's Department responded to a shooting at a nightclub called Fahrenheit 101. Deputy Blake Jenkins also responded to the call along with several Paris "city units." [Sergeant] Hall testified that when he arrived at the club there were "several hundred people running around." He said there were also people screaming and some people were in cars trying to leave the area. He described the scene as "pretty chaotic." [Sergeant] Hall and other officers blocked the remainder of the vehicles from leaving the area.

Sergeant Hall first spoke with one of the security guards at the nightclub who indicated that the shooter had left the building. Sergeant Hall then walked inside and saw the victim, Eric Kinley, lying on the floor with several individuals performing CPR on him. Other officers on the scene began interviewing witnesses and gathering the names and information from those individuals still there. After EMS personnel arrived, Sergeant Hall began securing any evidence inside the club. He covered several shell casings and "bullet heads" with cups and showed the evidence to investigators when they arrived. Sergeant Hall testified that he later made phone calls to the Madison County and Gibson County Sheriff's Departments and the Milan and Humboldt Police Departments "trying to get some general information on two suspects, [Petitioner] and Charles Liphford."

Special Agent Joe Walker, Sr., a criminal investigator with the Tennessee Bureau of Investigation (TBI), arrived on the scene at approximately 4:05 a.m. on August 25, 2012. He learned that there had been a special performance at the nightclub that night and "a lot of people came from out of town to perform there." There were many people still "milling around" the parking lot when he arrived. The victim had already been pronounced dead, and Special Agent Walker spoke with Sergeant Hall. Special Agent Walker also testified: "I met with Investigator Jenkins, Sheriff Belew, Captain Lowe, and talked with them about what they had learned up to that point. Then they explained what they had discovered so far and they were looking at the video at that point." Special Agent Walker collected evidence and drew a diagram of the scene. He noted that the shooting

occurred near the bar area, and the victim's body was lying in the middle of the floor. Special Agent Walker testified that four shell casings and three bullets were found on the scene. A fourth bullet was taken from the jukebox two days later. The bullets were all of the same caliber but were two different brands. Special Agent Walker noted that the victim's cell phone was in victim's left front pants pocket. He testified that the phone was damaged and that there were holes in the pocket.

Special Agent Walker testified that the nightclub had four video cameras, two inside and two outside. He and other officers watched the videos which showed where the shooting occurred. While still on the scene, Special Agent Walker identified [Petitioner] and Charles Liphford as being involved in the shooting. He then obtained [Petitioner]'s and Mr. Liphford's driver's license photos as part of his investigation. Special Agent Walker also began looking for Jiles Yarbrough and Cody Harmon. A search warrant was executed at [Petitioner]'s and his girlfriend's apartment but nothing related to the shooting was found. At that point, [Petitioner] had not been located. Special Agent Walker testified that two photographic lineups were prepared containing [Petitioner]'s picture. In one of the lineups [Petitioner] was wearing glasses, and he was not wearing them in the other photograph. The lineups were shown to individuals who were present at the time of the shooting.

At some point, Special Agent Walker began searching for [Petitioner] outside of the State of Tennessee. The United States Marshal's Service eventually located [Petitioner] and Mr. Liphford in Norfolk, Virginia, and they were taken into custody. [Petitioner] was taken into custody pursuant to a warrant for first degree murder, and Mr. Liphford for a weapons violation. He said that Mr. Liphford was not charged with first degree murder because the video from the nightclub showed that Mr. Liphford was on the dance floor with his back to the shooting. [Petitioner] was wearing glasses at the time he was taken into custody. He was also shown on video wearing the same glasses at the time of the shooting. Special Agent Walker and Investigator Jenkins transported [Petitioner] and Mr. Liphford back to Tennessee.

Special Agent Walker testified that Jiles Yarbrough and Cody Harmon were later charged with first degree murder. He and Investigator Jenkins attempted to speak with Mr. Harmon, who was represented by counsel, but Mr. Harmon refused to cooperate. Mr. Yarbrough gave a sworn statement and agreed to testify. On cross-examination, Special Agent

Walker testified that Mr. Liphford re-entered the club at some point on the night of the homicide with a gun and walked over and looked at the victim's body. He also testified that he never saw [Petitioner] on the video without his glasses.

On cross-examination, Special Agent Walker agreed that it could be assumed that a bullet caused the damage to the victim's cell phone. He also agreed that it would be common sense for that gunshot to have caused the victim's body to "twirl around." Special Agent Walker also agreed that the victim was shot twice in the back and that both of the shots were fired "up to down."

Tomika Ray testified that she was at Fahrenheit 101 on the night of August 24, 2012, into the morning of August 25, 2012, with Keenan Kendall and someone named "Mitch." Ms. Ray testified that she also knew Jiles Yarbrough who went by the nickname "Black Bennie." She did not know the victim, [Petitioner], Cody Harmon, or Charles Liphford. Ms. Ray testified that she was in the club by the bar area when the victim pulled her hair. When she turned around the victim said, "I was trying to see if this was your real hair." Ms. Ray answered, "Yeah." She did not have any further conversation with the victim. She later walked down the steps and spoke to Jiles Yarbrough and told him that the victim pulled her hair and that she would indicate who the victim was by looking "up at him." Mr. Yarbrough then stated that he was going to "[w]hoop" the victim. Ms. Ray testified that she walked off and sat down. At some point, Ms. Ray heard gunshots, and she saw the victim lying on the floor. She then went outside and eventually left the club before talking to police. She was later interviewed and gave a handwritten statement to police.

Tommy Taylor was working as a bouncer at Fahrenheit 101 on August 24-25, 2012. Mr. Taylor is six feet tall, and he weighed two-hundred and sixty pounds at the time. He did not know the victim, and he had seen Mr. Yarbrough at the club but did not know his name. Mr. Taylor did not know any of the other defendants. Prior to the shooting, Mr. Taylor was standing "in front of the bar, at the top of the stairs, nearest the bathroom." Mr. Taylor was watching the dance floor when he heard a loud argument. He saw the victim with three other men standing in front of him at the top of the stairs. Mr. Taylor approached the men and asked what was going on. They indicated that they were just talking, and Mr. Taylor told them to either stop arguing or leave the club. He then walked back over and resumed watching the dance floor. Mr. Taylor testified that the argument escalated again, and

he "re-approached the crowd." He said that the men were "arguing, getting closer to each other, in each other[']s faces." Mr. Taylor testified that a fight began, and he "broke through the middle of them and tried to separate them." He did not know who hit whom. Mr. Taylor heard one shot followed by a slight pause and then "[a]round four" consecutive shots. He thought that the shots came from behind him, and he turned around and "caught a flash of [the shooter] with the weapon in his hand firing at [the victim] all the way down the stairs." He later described the shooter to police as a "young, black gentleman with dreadlocks and a dark t-shirt." Mr. Taylor testified that when the shooting began the victim went down the stairs, down the side of the bar, and onto the dance floor. Mr. Taylor then ran down the stairs to assist the victim. The shooter ran towards the other set of stairs and out the door.

Mr. Taylor remained at the club and spoke with police. He viewed a photographic lineup and identified [Petitioner] as the shooter. He also identified three people from the video at the nightclub as being involved in the fight prior to the shooting.

Cody Harmon testified that he has a prior felony conviction for robbery and a misdemeanor theft conviction. He acknowledged that pursuant to an agreement with the State in exchange for his testimony, he would be allowed to plead guilty to aggravated assault for the incident at Fahrenheit 101 with an agreed sentence of three years, "split to time served as to [his] plea date." Mr. Harmon testified that he had previously refused to give a statement as to the events that occurred on August 25, 2012; however, he waived his rights and gave a statement to police on January 22, 2013. He was represented by counsel at the time.

Mr. Harmon testified that he knew [Petitioner], Jiles Yarbrough, and Charles Liphford prior to August 25, 2012. He went with Laura Scott and Atoya Raspberry to Fahrenheit 101 on August 25, 2012, to watch Mr. Yarbrough perform at the club. Mr. Harmon testified that while at the club, he drank gin, vodka, and beer. He said that Tomika Ray, Mr. Yarbrough's girlfriend at the time, was also at the club. At some point, Ms. Ray spoke to Mr. Yarbrough who then gathered Mr. Harmon and [Petitioner] to him, and he said that he was going to "whoop somebody." Mr. Harmon did not know who Mr. Yarbrough was referring to at the time because Mr. Yarbrough just pointed. However, the victim was the only person standing in the direction that Mr. Yarbrough pointed. Mr. Harmon testified that he joined Mr. Yarbrough because Mr. Harmon was drunk and "ready to fight."

Mr. Harmon testified that he walked up the stairs, stood in front of the victim, and blocked him from walking down the stairs. [Petitioner] and Mr. Yarbrough followed Mr. Harmon up the stairs. At some point, Mr. Harmon and the victim had words because Mr. Harmon was blocking the victim. Mr. Harmon testified that a "security guard come up and was like, 'what's going on.' [The victim] told him everything was alright, so as soon as he walked off, [the victim] hit [Mr. Harmon] and [he] fell to the ground." Mr. Harmon heard gunshots when he got up. He said that he saw [Petitioner] "reach back his hand" but he did not actually see a gun. He also saw flashes near [Petitioner]. Mr. Harmon testified that he never saw the victim strike [Petitioner] or Mr. Yarbrough, and he did not see more than one gun at the club that night. Mr. Harmon testified that he did not see [Petitioner]'s glasses get knocked off, and he never saw [Petitioner] without his glasses while at the club. Mr. Harmon testified that [Petitioner] and Mr. Yarbrough ran out of the club after the shooting. Mr. Harmon found Ms. Scott and Ms. Raspberry, and they left.

Nakenda Diggs testified that she was at Fahrenheit 101 on August 25, 2012, with Keenan Kendall and someone named "Mitch." She was there to watch her friend, Zack Teague perform. Ms. Diggs testified that Mr. Kendall and "Mitch" had also given Ms. Ray a ride to the club. Ms. Diggs did not know the victim or anyone else involved in the altercation and shooting. However, she had known Tomika Ray for more than ten years. She said that Ms. Ray spoke to her before the shooting, and Ms. Diggs noticed that a man in a yellow shirt, whom she identified as "Bennie" or Jiles Yarbrough, had been paying a lot of attention to Ms. Ray. Ms. Ray told Ms. Diggs that the victim had pulled her hair. At some point before the shooting, Ms. Diggs saw three people approach the victim upstairs, and they "surrounded him like a crescent moon." Ms. Diggs testified that the men began to argue, and the victim appeared to lean in to listen to what the men were saying to him. She said that Mr. Yarbrough was arguing more with the victim than the others. At some point, Ms. Diggs saw the victim strike Mr. Yarbrough and she thought that he hit another person but she did not know the person's name. After the fighting began, Ms. Diggs heard "a big, loud pop noise, and [she] thought it was a beer bottle being hit across somebody's head[.]" She then saw the victim "holding himself going down towards the steps, and then next more shots, and by this time [Ms. Diggs] got knocked down." Ms. Diggs testified that she heard one shot, a pause, and then three additional shots. She said that after the victim headed down the stairs, the shooter, whom she identified as [Petitioner], leaned over to fire more shots. She also said that

[Petitioner] moved toward the stairs. Ms. Diggs testified that two of the men ran out of the club after the shooting.

On cross-examination, Ms. Diggs testified that the victim knocked Mr. Yarbrough to the ground first, followed by Mr. Harmon. She also agreed that [Petitioner] got "busted in the face." Ms. Diggs testified that Mr. Taylor, the bouncer, came over, and [Petitioner] reached over Mr. Taylor and was shooting toward the victim.

Crystal Tessier testified that she went to Fahrenheit 101 on August 24-25, 2012, with Brittany Murray and Zack Teague to see Mr. Teague's concert. She knew the victim but not anyone else involved in the altercation or shooting. M[s]. Tessier testified that before the shooting, she was near the bar taking a picture with Mr. Teague and "Kenny" when someone yelled "[t]here's a fight." She looked over and saw the victim surrounded by three men. She then saw "the short one with the striped shirt fall." Ms. Tessier did not see anyone else fall to the floor, and she did not see anyone else get hit or shoved. After the man fell to the floor, Ms. Tessier saw [Petitioner] fire the first shot. There was a pause, and she heard three additional gunshots. She saw the victim "duck down, and he was down the steps." Ms. Tessier later identified [Petitioner] from a photographic lineup.

Brittany Murray testified that Zack Teague is her fiancé and the victim's cousin. Although the victim lived in Nashville, he was at Fahrenheit 101 on August 24-25, 2012, to watch Mr. Teague perform a concert. Ms. Murray testified that she and Ms. Tessier were also at the club at that time to watch the concert. Prior to the fight and shooting, Ms. Murray was behind the bar area taking a picture of Mr. Teague, Ms. Tessier, and another cousin named "Kenny." Ms. Murray noticed a "group of guys" surround the victim, and a fight broke out. She testified:

> I seen the fight. I seen [the victim]. A guy fell down the stairs that was in the front, and they all just started fighting, and then all of a sudden a shot rang out, and then not too much longer after that, a split second, it was three, three shots.

She did not see anyone else fall to the floor. Ms. [Murray] testified that after the first shot, the victim went down the stairs to get away from the men. [Petitioner] then "raised up over the people that were in front of him and popped it three times." The victim "landed in the middle of the dance floor." After the shooting, [Petitioner] ran down the steps and out the door. Ms.

Murray later identified [Petitioner] as the shooter from a photographic lineup and the video from the nightclub.

Keenen Kendall testified that he has had three prior felony drug convictions within the past ten years, and he was on parole at the time of trial. Mr. Kendall testified that he immediately left the club after the shooting because he was on parole and was not supposed to be there. He acknowledged that he did not appear in any of the videos from the club from August 24-25, 2012, and he later went to police of his own accord to give a statement. Mr. Kendall testified that he went to Fahrenheit 101 on August 24-25, 2012, with Tomika Ray and Mitch Boutwell. He left the club at some point to pick up Nakenda Diggs and drive her back to the club. Mr. Kendall testified that the victim and Zack Teague are his cousins, and Mr. Kendall was at the club to see Mr. Teague perform. Mr. Kendall testified that while at the club, Ms. Ray asked him for a cigarette, and then she walked downstairs and spoke to Jiles Yarbrough, who was wearing a yellow shirt. After Ms. Ray spoke to Mr. Yarbrough, he walked up the steps with two or three other men and approached the victim. Mr. Kendall testified that they formed a half circle around the victim. He said that the victim and Yarbrough had words, and the victim had his hands out and appeared confused. At some point, the bouncer walked over and then walked away. Mr. Kendall noticed that the group of men got closer to the victim, and the victim hit Mr. Yarbrough and Mr. Harmon. Mr. Harmon fell to the floor and then got back up. Mr. Kendall did not notice any injuries to Mr. Yarbrough. Mr. Kendall thought that the victim took three swings at the men as they got closer to him. He also thought that the third swing was at [Petitioner] but he did not know if the victim actually hit [Petitioner]. He did not see any injuries to [Petitioner]. By that time, the bouncer was in the middle of the altercation.

Mr. Kendall testified that he saw [Petitioner] "step back, raise his shirt, and pull the pistol out, and fire." He said, "I seen him shoot once. It got quiet and then I heard three more shots." After the first shot, the victim went down the steps. Mr. Kendall testified that [Petitioner] ran to the edge of the bar, leaned over the rail and fired the three additional shots down at the victim. Mr. Kendall later identified [Petitioner] on the video from the night club. On cross-examination, Mr. Kendall testified that he saw the victim touch Ms. Ray's hair. He also testified that the victim pushed Mr. Yarbrough when the argument first began, and he hit Mr. Harmon, knocking him down. Mr. Kendall testified that the victim swung at [Petitioner] over the bouncer who came over but Mr. Kendall did not know if the victim struck [Petitioner]. It was at that point that [Petitioner] pulled out the pistol.

Dr. David Zimmerman, an assistant medical examiner, performed an autopsy on the victim. He determined that the cause of the victim's death was multiple gunshot wounds, and the manner of death was homicide. The victim had a gunshot wound to his left shoulder that penetrated his left lung, heart, diaphragm, liver, and skeletal muscle. There was a second gunshot wound to the victim's back which penetrated his skeletal muscle, right lung, and fractured one of his right ribs. A third bullet tore through the victim's pant leg and struck his cell phone. Dr. Zimmerman testified that the victim also had alcohol and THC, the main chemical in marijuana, in his system at the time of death.

Steve Scott, a Special Agent Forensic Scientist for the TBI Crime Lab, testified that he received four fired bullets from the scene of the shooting, four fired cartridge cases from the scene, and the victim's pants, t-shirt, and button-down shirt. Special Agent Scott determined that all four of the cartridge cases were nine millimeter cases, and they had all been "fired in one firearm and one fire-arm [sic] only." Concerning the bullets, Special Agent Scott testified that all four of the bullets were nine millimeter, and three of the bullets were Federal brand, and one of them was Winchester brand. He further testified:

> Because of how that really thin copper jacket peels away on those three Federal bullets, I was not able to match those three bullets to the Winchester bullets or any of those three bullets together.
>
> I can explain that this way. When that bullet goes down the inside of the barrel of the firearm, there is only a certain part of the bullet that comes in contact with the firearm, and that part of the bullet bares the signature, or the mechanical fingerprint of that particular firearm. That's the part that I would look for, to be able to match.
>
> But if -- if this curved part of my hand is that bullet traveling down the barrel and that outer copper coating peels away, that coating has the marks from the firearm on it, rather than the lead that underlines it.
>
> So, with those markings absent or the copper rolled up on itself, in such a fashion, then it's very difficult, and often impossible,

> to match those particular kinds of bullets to one another, or to somebody, or to a firearm.

Special Agent Scott testified that he also tested the victim's clothing. Based on gun powder and lead residue on the button-down shirt, it was his opinion that the gunshots were fired from forty-eight to sixty inches.

Defense Proof

Jiles Yarbrough testified that he is presently incarcerated on a previous conviction for reckless endangerment, and he is charged with first degree murder in the present case. Mr. Yarbrough testified that he did not know [Petitioner] and that he had only met [Petitioner] at Fahrenheit 101 through Mr. Yarbrough's participation "in the group entertainments." Mr. Yarbrough testified that he performed rap music, and he and [Petitioner] performed on stage together on August 24-25, 2012. While at the club, he and [Petitioner] visited, laughed, and danced throughout the course of the night. He never knew that [Petitioner] had a gun. Mr. Yarbrough testified that they "chipped in" and bought buckets of beer. Mr. Yarbrough identified the victim on the video from the club, and he also identified Ms. Ray. At one point on the video, the victim walked up to Ms. Ray, put his hands around her waist, and whispered something into her hair. "[S]he turned around, and he walked back off." Mr. Yarbrough testified that there was no altercation between the victim and Ms. Ray, and she remained in close proximity to the victim after he touched her. Mr. Yarbrough also identified himself and [Petitioner] on the video talking about music, [Petitioner]'s age, and where he was from. Mr. Yarbrough testified that he and Ms. Ray were friends, and he identified her on the video walk down the steps over to him and talk into his ear because the music was loud. [Petitioner] was also there at the time. Mr. Yarbrough testified that Ms. Ray did not speak to [Petitioner], and he did not tell [Petitioner] what Ms. Ray told him.

Mr. Yarbrough testified that on the video, he reached back and touched [Petitioner]'s arm to let [Petitioner] know that he was going upstairs to get a drink. Mr. Yarbrough testified that when he got to the top of the steps, Mr. Harmon and [Petitioner] were already in an altercation. Mr. Yarbrough testified that prior to the altercation he had told Mr. Harmon that Ms. Ray said the victim had pulled her hair. He then pointed the victim out to Mr. Harmon. Mr. Yarbrough claimed that Mr. Harmon indicated that he was "going to the bar anyway," and that Mr. Harmon went upstairs and was dancing at the top of the stairs near the victim. He also claimed that the

victim bumped into Mr. Harmon. Mr. Yarbrough testified that during the altercation between the victim and Mr. Harmon, the bouncer walked up to see what was going on. Mr. Yarbrough told him that they were talking, and the bouncer walked away. Mr. Yarbrough testified that the victim and Mr. Harmon had words again, and the victim punched Mr. Harmon knocking him down, and he also punched Mr. Yarbrough and [Petitioner]. Concerning the fight, Mr. Yarbrough testified:

> When he hit me it shocked me, cause I didn't know where the punch was coming from, cause I wasn't expecting to be punched, and as you can see on the video, I got - - -
>
> I'm like this. I've got my hands up, like this, and that time I see him striking [Petitioner], and when he hit [Petitioner], [Petitioner] was holding a nose bleed, and pushing his glasses up at the same time.
>
> And then when I had started back up the security guard was in the middle, so I was started back up to get in the fight, cause at a point I knew that [the victim] had hit me.
>
> And when I had stood back up, [the victim] was coming toward me, and then that's when he broke out. I heard the shots fired. He broke out, pushing me out of the way and came down the steps.

Mr. Yarbrough testified that [Petitioner] produced the gun after the victim hit [Petitioner]. Mr. Yarbrough testified that as he ran out of the club, he saw [Petitioner] holding his head down. He said that he pushed [Petitioner] toward the door because he thought that [Petitioner] could not see. Mr. Yarbrough testified that he left the club in a car with his two best friends, Tyler Burns and Kyah Odom. Mr. Yarbrough testified that he had never seen [Petitioner] before or after the night of the shooting.

On cross-examination, Mr. Yarbrough agreed that he had two convictions for felony reckless endangerment and a conviction for possession of more than .5 grams of cocaine. He was on probation at the time of the offenses in this case. Mr. Yarbrough testified that he did not actually see [Petitioner] shoot the victim although it was reflected on the video. He said that he heard four shots at the time of the shooting and that they all occurred together. He did not hear a pause after the first shot. Mr. Yarbrough clarified

that he did not know [Petitioner] before August 24-25, 2012, but he had spoken with [Petitioner] after the shooting because they were in "lock down" together in the Henry County Jail. Mr. Yarbrough testified that he had not spoken to [Petitioner] since that time although [Petitioner] had written him three or four times since Mr. Yarbrough was moved to the Whiteville Correctional Facility. Mr. Yarbrough then was shown, and he identified, fourteen letters that [Petitioner] had written to him while Mr. Yarbrough was housed in the West Tennessee State Prison and the Whiteville Correctional Facility. The letters were written between June of 2013 and November 6, 2013, and Mr. Yarbrough admitted that he had read all of them. However, he denied that any of the letters indicated that he knew [Petitioner] prior to August 24-25, 2012.

Mr. Yarbrough testified that he and Ms. Ray were friends but they were not dating at the time of the shooting. He did not see the victim touch Ms. Ray's hair at the club but she told him about it. Mr. Yarbrough admitted that he said something about "whooping" the victim; however, he claimed that he laughed after making the statement. He also admitted that he pointed out the victim to Mr. Harmon and told Mr. Harmon what Mr. Ray told him. [Petitioner] was standing behind him at the time. After Mr. Yarbrough told Mr. Harmon what happened to Ms. Ray, he turned around and said something to [Petitioner]. Mr. Yarbrough claimed that he told [Petitioner], "Let's go get a drink." After that, [Petitioner], Mr. Yarbrough and Mr. Harmon walked up the stairs. Mr. Yarbrough denied that the video showed that Mr. Harmon was trying to block the victim at the top of the stairs. He said that Mr. Harmon was merely dancing, and the victim bumped into him and the two men began arguing. Mr. Yarbrough claimed that he, [Petitioner], and Mr. Harmon were on their way to the bar to get a drink. He testified that he was afraid after the victim punched him but he was ready to fight. Mr. Yarbrough admitted that he ran out of the club behind [Petitioner] after the shooting occurred. He said that [Petitioner] was holding his nose, and it appeared that he could not see.

State's Rebuttal

Agent Joe Walker was recalled as a witness and testified that when he and Investigator Jenkins travelled to Norfolk, Virginia to pick up [Petitioner], [Petitioner] agreed to waive his rights and give them a statement. [Petitioner] told Agent Walker and Investigator Jenkins that he did not kill the victim or have a gun at the club. [Petitioner] also stated that he knew Mr. Harmon prior to his time spent in jail for previous convictions, and he met Mr.

> Yarbrough "after he got out of jail the last time" which would have been prior to August 24-25, 2012. [Petitioner] never mentioned that the victim struck him or that he acted in self-defense.
>
> [Petitioner] was interviewed again after he arrived in Henry County. He was advised of his rights a second time. During the second interview, [Petitioner] did not deny shooting the victim. He also did not mention anything about self-defense or any injuries that he sustained.
>
> On cross-examination, Agent Walker testified that [Petitioner] indicated that he was at the wrong place at the wrong time and that he was ashamed of the situation he had gotten himself into. [Petitioner] said that he did not have anything to say and that he was going to talk to God.

Id. at *1-7. On direct appeal, Petitioner challenged the sufficiency of the evidence related to premeditation; this court concluded that the evidence was sufficient and affirmed the conviction. *Id.* at *8-9.

Petitioner subsequently filed a pro se post-conviction petition, alleging that trial counsel provided ineffective assistance. The post-conviction court appointed counsel, and Petitioner filed an amended post-conviction petition. Relevant to this appeal, Petitioner argued that trial counsel was ineffective because he failed to have drops of blood in the bar DNA tested. Petitioner averred that, if the blood had been tested, "it would have been confirmed to be Petitioner's and materially supported his defense. This would have allowed the jury to see this matter was not premeditated and was at most an escalation of self-defense." Petitioner next argued that counsel failed to communicate with Petitioner during the direct appeal and that counsel's "failure to accept Petitioner's phone call negatively impacted his appeal in that one of the co-defendant's [sic], Cody Harmon, had instructed [P]etitioner he wanted to change his testimony that he was sorry he lied and wanted to make it right."[1]

At the post-conviction hearing, the court noted that post-conviction counsel had advised the court in chambers that Petitioner intended to call Mr. Harmon, who was serving

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[1] After Petitioner filed his amended post-conviction petition, the post-conviction court entered an order granting Petitioner an opportunity to file a delayed Rule 11 application for permission to appeal to our supreme court. The post-conviction court noted that trial counsel did not file a Rule 11 application or request permission to withdraw after this court issued its opinion in the direct appeal. The post-conviction court appointed separate appellate counsel and stayed the post-conviction proceedings pending disposition of the Rule 11 application. Separate appellate counsel filed a Rule 11 application, which our supreme court subsequently denied. *See State v. Tevin Dominique Lumpkin*, No. W2014-01064-SC-R11-CD (Tenn. Apr. 17, 2020).

an unrelated sentence in prison, as a witness. The court noted that Mr. Harmon "was transported here today by a Court Order of Transport previously signed, and . . . has been served with a subpoena for his presence today once he actually arrived today." Post-conviction counsel had also advised the court that "Mr. Harmon has indicated to him that he may rely on his Fifth Amendment [p]rivileges not to give any evidence until he's had an opportunity to speak with counsel[.]"

Post-conviction counsel stated that one of Petitioner's main post-conviction issues was that trial counsel provided ineffective assistance by failing to accept Petitioner's telephone call, in which Petitioner would have advised trial counsel that Mr. Harmon wanted to change his testimony. Post-conviction counsel stated, however, that Mr. Harmon testified under oath at trial and was at risk to be prosecuted for perjury if he testified differently at the post-conviction hearing. Post-conviction counsel also stated, "But the other side of that is [Petitioner] has a right to call witnesses, and he should have a fair shot at this [p]ost-[c]onviction [h]earing, and if the testimony that can be elicited from Mr. Harmon indicates his [c]onstitutional [r]ights were violated, then that should be before the [c]ourt." The State responded that Mr. Harmon was no more exposed to prosecution for perjury than any other witness and that the prosecutor had not been in contact with Mr. Harmon or threatened to prosecute him for perjury.

The post-conviction court had Mr. Harmon brought into the courtroom, where Mr. Harmon indicated that he had reservations about testifying at the hearing. Mr. Harmon affirmed his understanding that he could be prosecuted for perjury if he testified falsely and that he had an "absolute right" to claim a Fifth Amendment privilege. The post-conviction court explained that it could not appoint Mr. Harmon an attorney because he had not been charged with a crime. Mr. Harmon stated that he had only been told that he was being transported to court for a hearing the previous day and that he "put two and two together when they told [him] Henry County." The court stated that, if Petitioner called Mr. Harmon as a witness, the court would repeat Mr. Harmon's rights to him, that post-conviction counsel could ask Mr. Harmon questions, and that Mr. Harmon could "take them on a case by case basis."

Petitioner then called Mr. Harmon to testify. Mr. Harmon stated that he was in prison related to a Henderson County drug charge. He agreed that he told post-conviction counsel in a previous conversation that he wanted, and was able to hire, an attorney. Mr. Harmon asserted that he would not testify to any facts related to the Fahrenheit 101 shooting without counsel. He agreed that he was invoking his Fifth Amendment right and would do the same for all of post-conviction counsel's questions. Post-conviction counsel made an oral motion "to allow Mr. Harmon to hire counsel."

Upon questioning by the State, Mr. Harmon agreed that he was a witness at Petitioner's trial. When asked whether his testimony at the post-conviction hearing would differ from his trial testimony, Mr. Harmon declined to answer.

The post-conviction court told Mr. Harmon to step down and return to custody, and the court noted that it did not anticipate his coming back to testify. The court stated the following:

> Okay. Alright, then, [post-conviction counsel], it appears that Mr. Harmon is going to rely on his Fifth Amendment [p]rivileges here today. What I propose to do is to hear the balance of the testimony then today, and at that point, make a decision about whether Mr. Harmon, the position he's taken this morning necessitates a bifurcation of a hearing. I want time to think about that and I'll think about it while you're putting on other proof.

Trial counsel testified that he had been practicing law for thirty-five years and had conducted hundreds of jury trials, including murder cases. He stated that he represented Petitioner beginning in June 2013 and that he met with Petitioner between ten and twenty times before the November 2013 trial.

Trial counsel testified that the defense strategy was to obtain a conviction for a less-included offense. He stated that blood droplets found "by the bar at the top of the steps" in the club had not been analyzed and that they "were very much concerned" that if the TBI tested them, it "would exclude [Petitioner] as being the owner of that blood." Trial counsel said his trial strategy relative to the blood was to create an inference that the blood was Petitioner's and that "basically, this was a self-defense, heat of the moment situation, due to [Petitioner's] being struck in the face by . . . the victim."

When asked if a *Ferguson* motion would have been appropriate in light of the State's failure to collect and test the blood, trial counsel disagreed, stating, "[Q]uite simply, our strategy . . . was such that . . . apparently the blood hadn't been collected, hadn't been tested, that weighed in our favor[,]" explaining that, without the blood's having been tested, there was no way to prove that the blood did not belong to Petitioner.

Trial counsel acknowledged that, in hindsight, there would have been no downside to lodging a *Ferguson* motion. He reiterated, though, that the trial strategy "was the fact that there was blood up there and [Petitioner] was not going to testify, then we had to get the assault or the striking in through . . . [Mr. Yarbrough] to . . . testify as to what [Petitioner] would testify to."

Trial counsel testified that, although he had not filed many *Ferguson* motions, he was familiar with them and knew that they could result in dismissal. He acknowledged that the jury would not hear the motion and that it would not "hinder the jury's view of the case." Counsel stated that Petitioner's case was the first time he tried a murder that was recorded on video and that "the overwhelming amount of evidence" against Petitioner was such that a *Ferguson* motion "would have been an effort in futility" and a waste of time. Counsel said that he "needed to concentrate [his] efforts on many, many things: the size of the bouncer and other witness statements." Trial counsel testified that the bouncer, Mr. Taylor, was six feet tall and weighed 260 pounds. Counsel argued at trial that Petitioner was "shooting wildly" over Mr. Taylor's shoulder without being able to see the victim such that he "wouldn't have been, necessarily, aiming at the victim" and was only guilty of criminally negligent homicide. Counsel recalled asking Agent Walker if being punched in the nose could affect a person's vision and if blood was an eye irritant.

Trial counsel testified that, after the trial, he communicated with Petitioner and Petitioner's mother. He agreed that he spoke to Petitioner on the telephone and met with him about the appeal. Trial counsel did not recall ever rejecting Petitioner's telephone calls. He denied that Petitioner ever told him that Mr. Harmon was going to change his testimony. He noted that, from his impression of the law at the time, even if Mr. Harmon changed his testimony after trial, an appeal on this issue would not have been successful. Counsel denied that Mr. Harmon's changed testimony as a co-defendant constituted new evidence. Counsel did not know whether it mattered why Mr. Harmon testified as he did. When asked whether it mattered if Mr. Harmon's testimony was a result of threats or intimidation, counsel stated that Mr. Harmon "got a sweetheart deal if he's the one that got the three . . . years, time served as [of] the day of trial on [a]ggravated [a]ssault. So I don't – The government, the State, obviously, wasn't threatening him with such a deal, you know."

When asked if the outcome of the trial would have changed if Mr. Harmon had testified that Petitioner was struck in the face and had his glasses knocked off, trial counsel responded that "anything's possible." He stated that the trial lasted four days, "early to late," that he spent three hours preparing for every hour of trial, and that he "put the time in" and "basically, destroyed [his] law office for a month on [Petitioner's] behalf getting prepared for the trial[.]" Counsel said that he provided competent representation and "did the best [he] could."

Trial counsel testified that Petitioner was "very much influenced by Jiles [Y]arbrough" and that Petitioner told trial counsel that "the best evidence is the video." Counsel stated that he never convinced Petitioner that the best evidence was not the video. He noted that he was surprised that the jury convicted Petitioner of first degree murder. Counsel stated that he expected a conviction for second degree murder or criminally

negligent homicide based upon Mr. Taylor's size, Petitioner's shooting over Mr. Taylor's shoulder, and the victim's going down stairs at the time he was shot. Counsel added that he was concerned about the angle of the victim's wounds and that he "could have taken a ruler, and put it at the angle of those steps, and it would have coincided with the shooting."

Trial counsel testified that Petitioner never suggested additional witnesses for counsel to interview "over and above what had been collected by the State." He said that he would have investigated any such witnesses if Petitioner had named them. Counsel said that he discussed all the witness statements with Petitioner during their visits and that counsel read the statements aloud or had Petitioner read them himself. He noted that the jail administrator gave them a room with a table every time he visited and that they "could spend as much time as [they] needed or wanted." Counsel stated that the statements and evidence filled two banker boxes.

On cross-examination, trial counsel testified that Petitioner's case was "tough" to defend and that it was hard to argue with a video. Counsel agreed that no question existed of Petitioner's competency and that an alibi defense was impossible. He further agreed that he requested that the jury be instructed on self-defense and defense of a third party and that the trial court charged lesser-included offenses of first degree murder. Counsel affirmed that the jury disagreed with the defense theory.

Trial counsel reiterated that, if the blood droplets had been tested and did not match Petitioner's blood, the self-defense theory would have been defeated. Counsel agreed that many of the witnesses who testified did not see the victim hit Petitioner; he did not recall what Mr. Harmon testified to in this regard. Counsel stated that he cross-examined the State's witnesses and called Mr. Yarbrough to testify on Petitioner's behalf. Counsel noted that Mr. Yarbrough introduced Petitioner's version of events without subjecting Petitioner to cross-examination.

Trial counsel testified that, between the State's proof and Petitioner's proof, every witness counsel wanted to testify did so. He agreed that he raised the sufficiency of the evidence on direct appeal and that he did not believe any of the trial court's other rulings during trial constituted reversible error. Counsel denied that Petitioner ever told him that he did not shoot the victim. Counsel stated that it was "never a good set of facts when you have a defendant that flees the scene. One can only surmise that the jury's opinion is not going to be favorable." Counsel agreed that Petitioner denied involvement in the shooting when he was interviewed in Virginia and in Henry County. Counsel agreed that, after seeing the video and hearing the witness testimony, the jury would think that Petitioner lied to the police.

On redirect examination, trial counsel stated that Mr. Yarbrough produced the testimony counsel expected. Counsel did not recall the trial court's instructing the prosecutor and Mr. Yarbrough to stop arguing; he noted, though, that Mr. Yarbrough "was battling for us."

Adam Jenkins testified that he was an investigator with the Henry County Sheriff's Office in 2012 and that he responded to the crime scene. Investigator Jenkins stated that the scene was "chaotic" and that he called in Agent Walker and assisted him to collect evidence. Investigator Jenkins recalled seeing blood droplets inside the club. Investigator Jenkins believed that, after shooting the victim, Petitioner "went down the bar area to the other set of steps . . . and out through the front door, and fled." Investigator Jenkins identified a crime scene photograph, which was taken inside the bar area and reflected one blood droplet. When asked whether the droplet was in the path Investigator Jenkins believed Petitioner took to the exit, he responded,

> It would have been in the general area, but where the bar area is, the checkered floor that you're talking about[,] that there where the seats are, there were people in all of those seats. There was a lot of people in the bar. He would have exited through the carpet that's just behind it and went through that way, the . . . walkway.

Investigator Jenkins noted that Petitioner was one of the first bar patrons to exit the building.

Investigator Jenkins testified that the blood droplet was not collected or tested. He noted that he did not think that the droplet had "any kind of bearing on this case." He stated,

> There was never any reason to believe on the video that [Petitioner] had been struck, or that might be his blood, and it was far enough away from the scene where the victim sustained his injury, we didn't think it was the victim's blood, and it just got lost in translation, and never got collected.

Investigator Jenkins agreed that blood droplets at a crime scene were important "[i]f they're pertinent to the crime[.]" He did not know what Petitioner's defense theory was. Investigator Jenkins recalled that one of Petitioner's group alleged that he had been struck, but he did not remember if it was Petitioner. Investigator Jenkins agreed that blood could "contribute to" proof that someone was struck as part of a self-defense claim; he disagreed, though, that the blood alone would prove it. Investigator Jenkins stated that, in hindsight, he wished that they would have collected and tested the blood because "that's why we're here now." He agreed that it would have clarified whether the blood was beneficial to the

State or Petitioner. Investigator Jenkins noted that several officers were collecting evidence at the scene and that they later realized the blood had not been collected. He stated that the scene had been cleaned and that no way existed to recreate the droplet. Investigator Jenkins agreed that, when the photograph of the blood droplet was taken, law enforcement controlled the building and that Petitioner would not have been allowed to come inside. He further agreed that Petitioner had no way to collect evidence. Investigator Jenkins stated that the police collected the surveillance recording and spoke to Mr. Taylor during the initial investigation at the crime scene. Investigator Jenkins agreed that Mr. Taylor reported having walked into the middle of a fight.

Investigator Jenkins did not know of any policy or procedure at the Sheriff's Office related to collecting evidence. Investigator Jenkins stated that, generally, he had a duty to collect "[a]ny and all [evidence] that is pertinent to the case." Investigator Jenkins stated that the investigation reflected that a woman had informed one of the co-defendants that the victim had touched her hair; three of the co-defendants "kind of corner[ed]" the victim and confronted him, then "a little scuffle" broke out and Petitioner shot the victim. Investigator Jenkins described the scuffle as "the little three (3) second, or so scrum[.]" Investigator Jenkins thought that Mr. Harmon was the only one who was hit. He did not know of anyone else who alleged that they were bleeding at the scene. Investigator Jenkins agreed that Mr. Harmon might have exited the building by walking down the steps toward the victim. He did not recall whether the surveillance video showed Petitioner and Mr. Yarbrough exiting while one of them had his arm around the other.

Investigator Jenkins traveled with Agent Walker to Virginia to pick up Petitioner. He stated that they spoke "quite a bit" on the drive back to Henry County but that Petitioner made no statements related to the case and, specifically, none about "the fight."

On cross-examination, Investigator Jenkins testified that Petitioner and Mr. Harmon were not present when the police were processing the crime scene. He denied that they had "any idea that anybody had been busted in the mouth" at that point. Investigator Jenkins agreed that they had no reason to collect the blood droplet and that the droplet was not in a location he would have expected to find it if anyone had been hit in the face. He stated that, when they picked Petitioner up in Virginia, he denied all involvement in the shooting.

On redirect examination, Investigator Jenkins estimated that the walkway in the bar area at the top of the stairs was between two and three feet wide and that, accounting for the space taken up by bar stools and tables and chairs against the wall, the entire area was about eight feet wide. He agreed that the blood droplet was within the eight-foot area and that a fight and a shooting had taken place. Investigator Jenkins stated that it was "somewhat correct" to state that the droplet was in the path that the shooter took. He agreed

that, if he were investigating the case today, he would like to test the droplet. Investigator Jenkins opined, though, that the droplet did not hold "any evidentiary value whatsoever" and that "it was not needed." He disagreed that, if the blood had matched Petitioner, it would have proven he was in the fight. Investigator Jenkins noted that guns sometimes "pinched" a person's hand and drew blood and that the blood could have been there for many reasons. Investigator Jenkins only recalled seeing injuries around Petitioner's eye when he picked Petitioner up in Virginia one week after the shooting.

Petitioner testified that he was at Fahrenheit 101 the night of the shooting because he dreamed of being a rapper; he said that a local rapper was opening for the main act, and that was how he met Mr. Harmon and Mr. Yarbrough. Petitioner stated that Mr. Liphford was his friend. Petitioner testified that, at one point that night, Mr. Yarbrough touched his arm and stated that he and Mr. Harmon were going to get a drink. Petitioner stated that Mr. Harmon was arguing with the victim when he and Mr. Yarbrough walked up to them. Petitioner stated that the victim was in the middle of the four of them, that the victim was "tall and bigger than . . . us," and that Petitioner could not hear what was said over the music other than that they were "yelling and screaming."

Petitioner testified that Mr. Taylor came over and asked if there was a problem and that the men agreed that "everything [was] good." Petitioner noted that the victim had the opportunity to leave at that point and that the victim chose "to stay there and argue." Petitioner said that, after Mr. Taylor left, he stopped paying attention until the victim hit him in the nose. Petitioner stated that the victim hit Mr. Harmon, "bounced right back up" and hit Petitioner, and began fighting with Mr. Yarbrough. Petitioner opined that the victim "threatened all of us at one time." He continued,

> [B]ut then when he did that, my nose busted, and now I'm bleary. Like, if I take my glasses off, I can't--- I can see a[n] image of you, but I can't see the detail of you. So once he did that, I fired the shot. You know what I'm saying? I fired the shot and I fired two more.
>
> I've got nine (9) shots. If I want to kill him intentionally, I would have fired the whole thing, but I wanted to just get him away from us. And you know, once I fired them shots, I figured, okay, now I go. I can get up out of this club, now. I'm in a club. I'm in a place where I . . . don't know my surroundings w[h]ere I'm at. I didn't know 'em at the time. I didn't know that this guy behind me. I just kn[ew] that, you know what I'm saying?
>
> I'm scared, I done got hit. I don[e] got into it. I've been firing off shots. That's why I'm running. I didn't run because of the simple fact that I

> was running cause what I done done. I was running, cause I didn't want to get jumped.

Petitioner testified that he later found out that the victim had died. He denied wanting to kill the victim and stated that he did not know him. Petitioner said that, if Mr. Yarbrough had told him that they were going to fight the victim, he would not have participated in it. He claimed that "[i]t's just in the heat of the situation, that's what happened. And I hate for the dude it went that way[.]"

Petitioner testified that Mr. Yarbrough grabbed him after Petitioner fired the shots and held him as they left the club. Petitioner stated that he could not see where he was going and that the video showed Mr. Yarbrough "toting [Petitioner] out." Petitioner stated that he had blood "all the way down, dripping" down his stomach and that the blood "blew" into his eyes. He noted that the blood was not visible on the video because he was wearing a black t-shirt.

Petitioner testified that trial counsel met with him at the jail four or five times before trial. Petitioner stated that he would call counsel's office and that counsel's assistant would tell him that counsel was not there. Petitioner stated that each meeting at the jail was no longer than forty-five minutes and that counsel "briefly" went over the discovery materials; Petitioner stated that counsel never "s[at] down and [went] through everything[.]" Petitioner said that he tried to tell counsel about witnesses he would like to testify and that counsel responded that "[i]t was coming out of his pocket, and [counsel] was going to have to pay . . . a private investigator[.]" He noted that he asked counsel to speak to Ms. Diggs because she saw the victim hit all three of them. Petitioner stated that counsel "didn't call her [as a witness]. The State called her."

Petitioner testified that he spoke to counsel in the holding area after the jury issued its verdict and that counsel said Petitioner "got f---ed over." Petitioner said that counsel conveyed that the appeal process would take time and that counsel would be in touch. Petitioner stated that he never spoke with counsel again and that he called his mother and "kept begging her to get in touch with him[.]" Petitioner said that, after the direct appeal opinion was issued, he called counsel's office and was told by the assistant that counsel no longer represented him. Petitioner averred that he was unaware that the appeal had been filed.

Petitioner testified that, when he called counsel's office, he wanted to tell counsel information about "certain witnesses . . . at that club [who were] coming forward to my family member[.]" He stated that the witnesses informed the family member that a fight broke out and that Petitioner had been assaulted. Petitioner specified that Mr. Harmon reached out to Petitioner's sister and told her that he had "messed up" and had lied,

although he did not say anything further. Petitioner denied having any more communications from Mr. Harmon, directly or through family.

Relative to the blood droplet, Petitioner opined that it would have matched his blood and that it would have shown that he was assaulted and defended himself without meaning to kill the victim. Petitioner stated that the victim knocked his glasses off of his face and that he was not wearing them when he fired the shots. When asked whether he could see that the victim was facing away from him, Petitioner stated that he was trying to get the victim away from him, that he "wasn't seeing who [he] was shooting at," and that he knew once he began shooting that people would run away. Petitioner stated that he "tried to recover [him]self as far as [his] nose being busted and things like that." Petitioner said that he asked trial counsel to have the blood droplet tested or raise it as an issue. He denied ever agreeing for it not to be addressed. Petitioner acknowledged that he fled after the shooting, and he explained that he did not live where Fahrenheit 101 was located, that he did not know what was happening, that he was afraid in a new environment, and that he was "trying to get away."

On cross-examination, Petitioner testified that he intentionally fired the three shots. When asked whether he understood that firing a gun at close range was likely to kill a person, Petitioner stated, "Yes, sir. I was honest. I was on the record, I hit him." Petitioner admitted that he fired at the victim the first time but disagreed that he fired at the victim with the second and third shots; he maintained that he could not see the victim. When asked whether he understood that a person could not use deadly force to defend himself against a second person's hitting him in the mouth, Petitioner responded that, in prison, an inmate had recently been killed in a fist fight.

Petitioner denied that Mr. Yarbrough presented his side of the story, stating that he only "spoke on what he . . . saw, and what happened." Relative to Ms. Diggs' testimony, Petitioner agreed that trial counsel cross-examined her.

Upon questioning by the prosecutor, Petitioner asserted that he did not come into the club armed, that an unnamed man Petitioner had just met asked him to hold the gun while he used the restroom, and that "it turned out [Petitioner] kept it[.]"

Petitioner acknowledged that he did not stay at the scene to tell law enforcement that the victim struck him or that the blood droplet was his. When asked whether he could have contacted his local authorities, Petitioner said, "Ah, yeah. I couldn't do that. I'm in with this girl."

Petitioner testified that, after he fired at the victim the first time, the victim ran toward him to go down the steps. Petitioner stated that his back was facing the steps at the

time. Petitioner said that he fired the last two shots because it was "still chaotic" and that people were coming toward him.

When asked what Mr. Harmon's testimony would have been had he not claimed his Fifth Amendment privilege, Petitioner responded, "The truth." The following exchange occurred:

> [The State:] Okay, but what I need to know is what do you know, yourself, personally, today, what do you know about what Cody Harmon is going to testify to?
>
> [Petitioner:] That's what I'm saying. The truth as far as me being--- About us going up there. Planning to whip him. About me knowing that . . . they was going up there and put their hands on him. That's a lie. About me being a gang member. All of that's a lie. Like that's a lot of lies.

When the prosecutor noted that no testimony was presented at trial to indicate that Petitioner was a gang member, Petitioner stated that he referred to Mr. Harmon's "first two statements that he wrote[.]"

Petitioner acknowledged that he denied having shot the victim in his statement given in Virginia. He said, though, that once he was in Henry County, he "told them [he] was at the wrong place at the wrong time, and . . . [he] was beaten up."

On redirect examination, Petitioner testified that Mr. Harmon lied during the trial because "[t]hey offered him three (3) years . . . and time served, and he walk[ed] away." Petitioner did not know if anyone told Mr. Harmon what to say. Petitioner agreed that Mr. Harmon testified that he did not see the victim hit Petitioner, which Petitioner asserted was untrue.

After Petitioner's testimony, the prosecutor stated the following:

> [The State]: Your Honor, about Mr. Harmon[]. If either [post-conviction counsel] or [Petitioner] can give us an idea of what his proposed testimony is, then maybe we should go through all of this process of giving him time to hire a lawyer and reconvening this.
>
> But if neither one of them know what he's going to testify to, I submit that we just move on and complete the hearing. Your Honor, second hand, somebody, some kin folk of Mr. Harmon has communicated with [Defendant] that he said he lied. Your Honor, that's not enough.

> I think they just subpoenaed him and ordered him transported just hoping he might say something helpful and I don't think that grounds to require the [c]ourt to go through all of those gyrations about him pleading the Fifth Amendment. He may testify of something that would be favorable.

Post-conviction counsel responded that Mr. Harmon was "part of" the post-conviction petition, that he "ha[d] been involved in this from the very beginning," and that Petitioner and counsel could not tell the post-conviction court what Mr. Harmon might testify. Counsel stated, "I would submit to the [c]ourt that [Petitioner] has a right to a full hearing on this [p]ost-[c]onviction issue, and if Mr. . . . Harmon has facts that he can give, they should come before the [c]ourt. Whether they're beneficial to the State or us, I don't know, but those facts should be given." Counsel noted Mr. Harmon's request for an attorney and added that he "ha[d] a risk of prosecution," and that "the interest of justice at least should allow him to have the opportunity to speak to his lawyer."

The post-conviction court found that Mr. Harmon's proposed testimony "just doesn't rise to the level . . . to continue this hearing, bifurcate this hearing, and give Mr. Harmon an opportunity to hire counsel[.]" The court noted that the post-conviction hearing had been reset repeatedly over a period of years, in part due to the COVID-19 pandemic. The court stated that it did not know what Mr. Harmon might say but that, if Mr. Harmon changed his testimony, he would be subject to prosecution for perjury. The court said that an attorney would advise Mr. Harmon of this fact and that the "most logical . . . decision that he would make . . . would be . . . not to testify and put himself at risk." The court determined that the interest of justice was best served by "proceeding on the timetable that we have, having conducted the hearing today[.]" The court stated that it would take the matter under advisement and issue a written decision.

In the post-conviction court's written order, it credited trial counsel's testimony and found Petitioner's credibility to be "poor." The court found that counsel was "very experienced" in criminal defense work at the time of Petitioner's representation; that counsel "adequately" discussed with Petitioner defense theories and the anticipated witness testimony before trial; that counsel adequately investigated the facts and prepared for trial; that counsel "made the reasonable tactical decision to defend the case of a theory of self-defense or the defense of a third person"; and that counsel "presented reasonable and appropriate argument to the jury" based upon the evidence. The court noted that the jury rejected the opportunity to find Petitioner guilty of a lesser-included offense or to find that Petitioner acted in self-defense or defense of another. The court stated that the evidence of Petitioner's guilt was "overwhelming."

Relative to the blood droplet, the post-conviction court found as follows:

> The law enforcement officers did not take a sample from what may have been a drop of blood found on the floor near to the area where the trouble between [Petitioner] and the victim began. That apparent blood drop may or may not have actually been blood and, if so, the identity of the person it came from is unknown. [Investigator] Jenkins . . . testified at the post-conviction hearing that, in hindsight, . . . the supposed drop of blood should have been collected and tested in order to determine the identity [of] the person from whom it came. [Investigator] Jenkins did not testify at trial. In this circumstance, the tactical decision by trial counsel to suggest to the jury that the drop could be the blood of [] Petitioner, which was spilled when he was first struck by the victim, thus supporting a self-defense or defense of a third party, was reasonable. The law enforcement officers on the scene photographed the supposed blood drop but did not collect a sample. The law enforcement officers did not hide or lo[se] this evidence.

In the context of the ineffective assistance claim, the post-conviction court also considered "whether the absence of this evidence has violated the right of [] Petitioner to a fair trial" pursuant to *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). The court found that the investigating officers acted in good faith; that they did not have a duty to preserve the droplet because "it was one apparent drop of blood among many at the scene and the officers could not have reasonably anticipated that the evidence might play a significant part in the later defense of a suspect"; that Petitioner fled the scene instead of staying and identifying himself to law enforcement as the source of the blood; and that "the evidence regarding the identification of the blood drop might have been significant but its absence does not render the remaining evidence insufficient to support the conviction."

Analysis

On appeal, Petitioner asserts that he received ineffective assistance of counsel because counsel failed to file a motion to dismiss under *Ferguson* based upon the State's failure to collect and preserve the blood droplet found at the crime scene, arguing that the "sufficiency of the other evidence at trial to support the conviction was weak" and that, if the blood had matched Petitioner, it would have been exculpatory and resulted in a conviction on a lesser-included offense. The State responds that counsel was not deficient and that Petitioner was not prejudiced.

Petitioner also raises two freestanding due process claims. The first is based upon the State's failure to collect and preserve the blood droplet. In the second, he alleges that the post-conviction court violated his due process rights by declining to force Mr. Harmon to testify at the post-conviction hearing. Petitioner argues that his "right to a full and fair post-conviction hearing outweighed Mr. Harmon's right against self-incrimination when it

is unclear if he could have even been charged for his testimony." The State argues that Petitioner has waived consideration of both issues for failure to raise them on direct appeal and failure to contemporaneously object, respectively.

Lastly, Petitioner argues that the cumulative effects of the errors in his trial and at the post-conviction hearing deprived him of due process. The State responds that no error occurred.

I.

Waiver

First, the State correctly notes that Petitioner could have raised the *Ferguson* issue as a free-standing claim on direct appeal and failed to do so. Tennessee Code Annotated section 40-30-106(g) states that "[a] ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented," unless certain conditions exist that are not applicable here. Accordingly, we conclude that the claim is waived. *See id*.

Moreover, we note that Petitioner did not argue the *Ferguson* issue outside the context of ineffective assistance of counsel at the post-conviction hearing, and the post-conviction court did not address it as a due process claim in its written or oral rulings. Accordingly, this court is without discretion to consider it. *Holland v. State*, 610 S.W.3d 450, 458 (Tenn. 2020) (citations omitted).

Regarding Petitioner's claim that the post-conviction court should have compelled Mr. Harmon to testify or speak to post-conviction counsel, our examination of the record indicates that Petitioner never requested that Mr. Harmon be required to speak to post-conviction counsel or be forced to testify. At the hearing, post-conviction counsel referenced already having had a conversation with Mr. Harmon, in which Mr. Harmon stated his intent to assert his Fifth Amendment privilege if called as a witness, and only requested that Mr. Harmon be appointed counsel. This issue has been waived for failure to raise a contemporaneous objection requesting the relief Petitioner asserts should have been granted at the hearing. Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error"). We briefly note that Petitioner had a full post-conviction hearing, to which Mr. Harmon was transported; Mr. Harmon was sworn and placed on the witness stand, and he asserted under oath that he would claim his Fifth Amendment privilege for any question related to the shooting, as was his right. *See State v. Dooley*, 29 S.W.3d 542, 551 (Tenn.

Crim. App. 2000) (stating that although a witness who is not the accused in a criminal prosecution "may not claim a blanket Fifth Amendment immunity from giving relevant testimony simply because" certain questions may elicit incriminating answers, the proper procedure is for the witness to take the stand and claim a Fifth Amendment privilege "on a question by question basis"); *see also State v. Dicks*, 615 S.W.2d 126, 129 (Tenn. 1981) (stating that "where there is a conflict between the basic right of a defendant to compulsory process and the witness's right against self-incrimination . . . the right against self-incrimination is the stronger and paramount right"). We will consider Petitioner's remaining issues below.

II.

Ineffective assistance of counsel

In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Post-conviction relief cases often present mixed questions of law and fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Appellate courts are bound by the post-conviction court's factual findings unless the evidence preponderates against such findings. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). When reviewing the post-conviction court's factual findings, this court does not reweigh the evidence or substitute its own inferences for those drawn by the post-conviction court. *Id.*; *Fields*, 40 S.W.3d at 456 (citing *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997)). Additionally, "questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the [post-conviction court]." *Fields*, 40 S.W.3d at 456 (citing *Henley*, 960 S.W.2d at 579); *see also Kendrick*, 454 S.W.3d at 457. The post-conviction court's conclusions of law and application of the law to factual findings are reviewed de novo with no presumption of correctness. *Kendrick*, 454 S.W.3d at 457.

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (stating that the same standard for ineffective assistance of counsel applies in both federal and Tennessee cases). Both factors must be proven for the court to grant post-conviction relief. *Strickland*, 466 U.S. at 687; *Henley*, 960 S.W.2d at 580; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Accordingly, if we determine that either factor is not satisfied, there is no need to consider the other factor. *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007) (citing *Carpenter v.*

State, 126 S.W.3d 879, 886 (Tenn. 2004)). Additionally, review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Henley*, 960 S.W.2d at 579. We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Granderson v. State*, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006).

As to the first prong of the *Strickland* analysis, "counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases." *Henley*, 960 S.W.2d at 579 (citing *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)); *see also Goad*, 938 S.W.2d at 369. In order to prove that counsel was deficient, the petitioner must demonstrate "that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688); *see also Baxter*, 523 S.W.2d at 936.

Even if counsel's performance is deficient, the deficiency must have resulted in prejudice to the defense. *Goad*, 938 S.W.2d at 370. Therefore, under the second prong of the *Strickland* analysis, 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*. (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

In *Ferguson*, our supreme court "explained that the loss or destruction of potentially exculpatory evidence may violate a defendant's right to a fair trial." *State v. Merriman*, 410 S.W.3d 779, 784 (Tenn. 2013) (citing *Ferguson*, 2 S.W.3d at 915-16). The court determined that the due process required under the Tennessee Constitution was broader than that required under the United States Constitution and rejected the "bad faith" analysis adopted by the United States Supreme Court. *Id.* at 784-85 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)). Instead, the court in *Ferguson* adopted a balancing approach in which a trial court must determine "[w]hether a trial, conducted without the [lost or] destroyed evidence, would be fundamentally fair." *Id.* at 785 (quoting *Ferguson*, 2 S.W.3d at 914).

When a defendant raises a *Ferguson* claim, a trial court must first "determine whether the State had a duty to preserve the evidence." *Merriman*, 410 S.W.3d at 785. "[T]he State's duty to preserve evidence is limited to constitutionally material evidence described as 'evidence that might be expected to play a significant role in the suspect's defense.'" *Id.* (quoting *Ferguson*, 2 S.W.3d at 917). To meet this constitutional materiality standard, "the evidence must potentially possess exculpatory value and be of such a nature

that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* (footnote omitted).

If the proof demonstrates the existence of a duty to preserve evidence and further shows that the State has failed in that duty, a court must proceed with a balancing analysis involving consideration of the following factors:

> 1. The degree of negligence involved;
>
> 2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
>
> 3. The sufficiency of the other evidence used at trial to support the conviction.

Ferguson, 2 S.W.3d at 917 (footnote omitted). The trial court is required to balance these factors to determine whether conducting a trial without the missing evidence would be fundamentally fair. *Merriman*, 410 S.W.3d at 785. "If the trial court concludes that a trial would be fundamentally unfair without the missing evidence, the trial court may then impose an appropriate remedy to protect the defendant's right to a fair trial, including, but not limited to, dismissing the charges or providing a jury instruction." *Id.*

This court has repeatedly stated that "failure to collect evidence from a crime scene does not rise to the level of a *Ferguson* violation." *State v. Franklin*, 585 S.W.3d 431, 461 (Tenn. Crim. App. 2019). In *Franklin*, we discussed that

> the State is not required to investigate cases in any particular way: Due process does not require the police to conduct a particular type of investigation. Rather, the reliability of the evidence gathered by the police is tested in the crucible of a trial at which the defendant receives due process. Moreover, [i]t is not the duty of this Court to pass judgment regarding the investigative techniques used by law enforcement unless they violate specific statutory or constitutional mandates.

Id. (quoting *State v. Brock*, 327 S.W.3d at 645, 698-99 (Tenn. Crim. App. 2009)).

The record supports the post-conviction court's conclusion that trial counsel's performance was not deficient and that Petitioner was not prejudiced based on counsel's failure to file a motion under *Ferguson*. Trial counsel testified that he was certain the droplet would not match Petitioner if tested, which would have harmed the self-defense

strategy. Counsel further discussed that, in the absence of DNA testing, he created an inference that it might have been Petitioner's blood, supporting the defense's trial strategy. The post-conviction court found that counsel, a "very experienced" criminal defense attorney, made a reasonable strategic decision to utilize the lack of testing to Petitioner's benefit at trial. We agree that counsel was not deficient in this regard.

Relative to prejudice, the post-conviction court correctly concluded that the police had no duty to collect the blood droplet. Moreover, as the post-conviction court observed, the other proof of Petitioner's guilt was overwhelming—the murder was captured on video, and multiple witnesses testified to seeing Petitioner shoot the victim. We note that Petitioner's version of events was presented through Mr. Yarbrough's testimony, including Petitioner's being hit by the victim, and that the jury had ample opportunity to assess trial counsel's argument that Petitioner could not see the victim as he reached over Mr. Taylor's shoulder to shoot at him. As we concluded in Petitioner's direct appeal, the evidence was more than sufficient to support his guilt, and the blood droplet would not have changed the verdict. Petitioner is not entitled to relief.

III.

Cumulative error

The cumulative error doctrine recognizes that there may be many errors committed in trial proceedings, each of which constitutes mere harmless error in isolation, but "have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). To warrant review under the cumulative error doctrine, there must have been more than one actual error during the trial proceedings. *Id.* at 77. Here, we have found no error occurred, and cumulative error review is unnecessary.

Conclusion

Based on the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

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ROBERT L. HOLLOWAY, JR., JUDGE