

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs May 21, 2024

<b>FILED</b> 10/08/2024 Clerk of the Appellate Courts
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**QUINCY D. SCOTT v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for McMinn County**  
**No. 2019-CR-291 Sandra Donaghy, Judge**

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**No. E2023-00339-CCA-R3-PC**

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In 2016, Petitioner, Quincy D. Scott, was convicted by a McMinn County jury of aggravated robbery, for which he received a sentence of seventeen years' incarceration as a Range II, multiple offender at eighty-five percent to be served consecutively to sentences for convictions in other counties. His conviction was affirmed on direct appeal, and the Tennessee Supreme Court denied review. Petitioner then sought post-conviction relief, alleging the ineffective assistance of trial and appellate counsel. Following a bifurcated hearing only on Petitioner's appellate counsel claim, the post-conviction court granted a delayed appeal, finding that Petitioner had received the ineffective assistance of appellate counsel. A panel of this Court reversed and remanded, concluding that the post-conviction court had failed to make sufficient findings of fact and conclusions of law. On remand, the post-conviction court again heard Petitioner's claims of ineffective assistance of appellate counsel as well as his trial counsel claims. The post-conviction court denied relief, and this appeal followed. On appeal, Petitioner asserts that trial counsel ineffectively cross-examined the State's witnesses, that trial counsel failed to file motions to suppress several pieces of evidence, that trial counsel failed to appeal the general sessions court's bind over of his charges to the grand jury, that the evidence was insufficient to support his conviction, that newly discovered evidence proves his actual innocence, and that appellate counsel failed to file a reply brief on appeal.<sup>1</sup> After a thorough review, we affirm the judgment of the post-conviction court.

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

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<sup>1</sup> We have reordered Petitioner's issues for clarity.

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., J., joined. JAMES CURWOOD WITT, JR., J., not participating.<sup>2</sup>

Quincy D. Scott, Henning, Tennessee, Pro Se.

Jonathan Skrmetti, Attorney General and Reporter; Abigail H. Rinard, Assistant Attorney General; Stephen Hatchett, District Attorney General; Shari Tayloe and Dorothy Cherry, Assistant District Attorney Generals, for the appellee, the State of Tennessee.

## OPINION

### *Trial and Direct Appeal*

Petitioner was indicted for the aggravated robberies of two “Check Into Cash” stores, one in Athens, Tennessee, and the other in Etowah, Tennessee. The State requested the consolidation of the two cases in July 2015, which the trial court denied. The July 2015 trial on the Athens charge (“Athens trial”) resulted in a hung jury and was dismissed by the State in November 2015. The Etowah charge was tried on January 7, 2016 (“Etowah trial”). This Court summarized the proof at Petitioner’s trial as follows:

On June 28, 2014, [Petitioner] entered a Check Into Cash and informed Felicia Bra[n]am,<sup>3</sup> the assistant manager, that he needed a loan. As Ms. Bra[n]am was questioning [Petitioner] about the loan, he pulled a piece of a black stretchy material over his face, brandished a gun, and demanded money. [Petitioner] took more than \$3,300 in cash and fled.

Lisa Raby, the manager, was in the parking lot and saw a man leave the store and place a gun in the back of his pants. A black truck drove into the parking lot, and the man entered on the passenger side. Ms. Raby attempted to follow the truck but lost sight of it in traffic. She was not able to identify the individual with the gun in a photographic line-up.

Initially, Ms. Bra[n]am was unable to identify the perpetrator in a photographic line-up that did not include [Petitioner]. On July 10, 2014, while investigating an accident during which the driver fled the scene, Detective Josh Rhodes initiated a traffic stop of a truck that he described as

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<sup>2</sup> Judge James Curwood Witt, Jr., a former presiding judge who served on this Court for twenty-seven years, passed away during the pendency of this appeal. We thank Judge Witt for his enduring commitment to this Court and the rule of law.

<sup>3</sup> This Court has alternatively spelled this witness’s surname as “Braham” and “Branam.” We adopt the spelling used by the witness during her trial testimony, “Branam.” We intend no disrespect.

so dark blue that it appeared to be black. Larry Moore, who was the focus of an ongoing bank robbery investigation, was the driver, and [Petitioner] was a passenger. Detective Rhodes allowed [Petitioner] and Mr. Moore to leave once the detective received information that they were not involved in the accident. While speaking to [Petitioner], Detective Rhodes realized that [Petitioner] matched the description of a suspect that the detective received in a be-on-the-lookout alert. Detective Rhodes provided [Petitioner]’s information to Detective Jim Shaw, who prepared a photographic line-up that included [Petitioner]’s photograph. Ms. Bra[n]am identified [Petitioner] as the perpetrator in the photographic line-up and at trial.

After a warrant was issued for [Petitioner]’s arrest, Detective Rhodes initiated a traffic stop of the same truck and spoke to Mr. Moore about [Petitioner]’s location. Detective Rhodes arrested [Petitioner] later that same day. Detective Rhodes also searched the truck and seized an “air soft type pistol” and magazine, a set of Walkie-Talkies, a black “cinch sack” with rainbow colors on the reverse side, a Joker’s mask, and a black nylon “do-rag.” The “do-rag” included a DNA mixture of three individuals, and [Petitioner] could not be excluded as a contributor.

[Petitioner] presented the testimony of Dr. Jeffrey Neuschatz, an expert in cognitive psychology and eyewitness identification, regarding the factors that could have affected a witness’s identification of a perpetrator and regarding problems with the photographic line-ups. [Petitioner] also presented the testimony of Officer Michael Richmond, who responded to the scene and followed a black Chevrolet truck that he believed matched the description of the truck involved in the robbery. Officer Richmond’s description of the truck differed from the description offered by Ms. Raby at trial. Officer Richmond, however, lost contact with the truck.

*State v. Scott*, No. E2017-01416-CCA-R3-CD, 2018 WL 3156979, at \*1 (Tenn. Crim. App. June 27, 2018), *perm. app. denied* (Tenn. Oct. 11, 2018). Upon this evidence, the jury convicted Petitioner as charged. After a sentencing hearing, the trial court sentenced Petitioner to seventeen years’ incarceration as a Range II, multiple offender at eighty-five percent to be served consecutively to sentences in Hamilton and Bradley Counties. New counsel was appointed to represent Petitioner on his posttrial motions and on appeal.

On direct appeal, Petitioner argued cumulative error, identifying numerous evidentiary errors relating to the State’s seizure of evidence from Mr. Moore’s truck, as well as the admission of certain items seized therefrom, “the admission of testimony that Mr. Moore was a suspect in another robbery, and the trial court’s denial of a new trial based on Detective Rhodes’s dismissal from his law enforcement position due to claims of misconduct.” *Id.* at \*2. A panel of this Court affirmed, holding that Petitioner had failed

“to set forth any basis or substantive contentions to support his claims of error, fail[ed] to cite to any authority relevant to establishing an individual error, and fail[ed] to provide any reasoning as to why his claims require[d] relief.” *Id.* Further, though appellate counsel acknowledged that he had reviewed the State’s brief asserting that Petitioner’s claims were waived due to inadequate briefing, appellate counsel failed to correct these deficiencies by filing a reply brief. *Id.*

Afterward, Petitioner sought post-conviction relief. A variety of petitions for post-conviction relief and motions ensued, including a petition for post-conviction relief, an amendment thereto, and three separate notices of appeal: two to this Court under Tennessee Rules of Appellate Procedure 3 and 10 and one to the supreme court under Tennessee Supreme Court Rule 10B, section 2.0. “Ultimately, this [C]ourt granted Petitioner’s motion to dismiss the Rule 3 appeal, No. E2019-01114-CCA-R3-PC, and dismissed the Rule 10 extraordinary appeal, No. E2019-01323-CCA-R10-PC. The supreme court denied the Rule 10B application, No. E2019-01110-CCA-T10B-CO.” *State v. Scott*, No. E2020-01186-CCA-R3-CD, 2022 WL 414354, at \*3 (Tenn. Crim. App. Feb. 11, 2022), *no perm. app. filed*.

In the midst of these appeals, the post-conviction court found that Petitioner’s amended petition for post-conviction relief raised a “partial colorable claim” and appointed post-conviction counsel to assist Petitioner in filing an amendment. However, Petitioner challenged the appointment of counsel, preferring to proceed pro se, and counsel was permitted to withdraw. On December 9, 2019, Petitioner filed another petition for post-conviction relief, which the post-conviction court treated as a timely amendment to his post-conviction petition. Petitioner was permitted to proceed pro se “in light of the court’s previous dealings with Petitioner,” and the post-conviction court heard his claims for post-conviction relief on August 13, 2020. *Id.*

#### *August 13, 2020 Post-Conviction Hearing*

At Petitioner’s post-conviction hearing, he again sought to amend his post-conviction petition, which the post-conviction court allowed over the State’s objection, noting that though Petitioner had already amended his petition “three or four times,” it would nevertheless “‘receive’ the amended petitions because Petitioner was pro se, was entitled to only one post-conviction petition per judgment, and the claims he was raising in the amended petitions had been raised in previous filings.” *Id.* at \*4. Upon the State’s request, the post-conviction court bifurcated the proceedings to first hear Petitioner’s claim against appellate counsel. This Court summarized the proof from the August 13, 2020 hearing as follows:

Petitioner’s first witness was appellate counsel who testified that he received “a lot of transcripts” from Petitioner’s trial counsel to prepare the motion for new trial and the direct appeal. Appellate counsel recalled

Petitioner advising him to obtain a transcript of the preliminary hearing because Petitioner insisted that “Josh Rhodes was lying on [Petitioner] the whole time,” and the preliminary hearing transcript would show that Petitioner “was being defrauded out of a fair trial.” What Petitioner characterized as “fraud,” appellate counsel characterized as issues of witness credibility and the nature of the State’s evidence against Petitioner:

The fraud I was thinking [Petitioner was] referring to was the issue with the police, issues, they had. I think it was Josh Rhodes that was stealing credit cards and things of that nature. And the things that they did to – the evidence they produced or got together to convict you. I wouldn’t necessarily characterize that as fraud per se. But now – but just the evidence they had against you.

Appellate counsel recalled that information about Detective Rhodes’s misdeeds became available “every month or month and a half” after appellate counsel was appointed. Eventually, the District Attorney made a statement about Detective Rhodes and his termination from the Sheriff’s Department. That statement was the basis for a newly discovered evidence claim in the motion for new trial.

When asked whether he recalled Petitioner pointing out that Ms. Branam had testified “false[ly]” when describing the robber’s pants, appellate counsel noted that “there were two ladies that identified [Petitioner]. There was one in the store and there was another lady” who saw Petitioner flee the scene. Despite two people identifying Petitioner as the robber, appellate counsel found the photographic lineups to be “sketchy” because of Detective Rhodes’s involvement in the case. And because he found “a lot of things that were sketchy” about Petitioner’s case, appellate counsel pursued the strategy of arguing cumulative error on direct appeal. Appellate counsel believed that cumulative error would be the “best shot” to obtain relief on Petitioner’s multiple issues because no one issue stood out as a winning issue:

[I]n looking at what you had with all the issues there, I didn’t see one that was a drop-dead – and this is from my experience – that would give you relief. All of them together maybe. I thought this might be the one. I’d seen some cases in doing some research. This seemed to be the best shot for me for you to try to put it in that form . . . I thought that was the best thing you had.

Appellate counsel understood that any issues not raised at trial could be reviewed for plain error on direct appeal. He went on to explain that any appellate issues were limited to the trial and could not be used to challenge alleged errors at the preliminary hearing. For instance, when Petitioner asked appellate counsel why he failed to “investigate [Petitioner’s] preliminary hearing claims that Josh Rhodes and Jim Shaw . . . had the wrong guy . . . [and] introducing fake evidence against [Petitioner],” appellate counsel explained that the trial record was “pretty extensive” and showed that the trial court fully addressed any issues regarding the admissibility of all the evidence which would include purportedly “fake” evidence. Petitioner asked appellate counsel why he did not investigate the preliminary hearing despite Petitioner’s repeated insistence to do so. Appellate counsel explained that he was appointed to “get you through sentencing” and not to conduct a full-scale investigation of Petitioner’s case. According to appellate counsel, the duty of investigating the case rested with trial counsel. Appellate counsel recalled that “it took about all I could do to get through the sentencing” due to the extensive records.

Appellate counsel testified that he and Petitioner discussed the possible issues for the motion for new trial. Based on their discussions, appellate counsel filed three amendments to the motion for new trial in order to raise “everything we needed to . . . bring before the court.” By filing three additional amendments to the motion, appellate counsel believed that “they took care of everything” Petitioner wanted addressed. Petitioner acknowledged that appellate counsel “basically raised the issues” he wanted to be raised on direct appeal but “wasn’t specific[.]” Appellate counsel testified that based on his experience, he did not think he needed to file a reply brief. He admitted however, that he “was wrong about that.”

Petitioner took issue with the State presenting photographs of certain pieces of evidence instead of the actual evidence and accused the State of committing a *Brady* violation. Appellate counsel explained that Petitioner’s case did not involve a *Brady* violation because the State did not withhold any evidence from Petitioner. Appellate counsel recalled that the State provided the evidence to Petitioner during the discovery but had lost it prior to trial and used photographs in lieu of the lost evidence at trial.

Petitioner asked appellate counsel why he did not challenge the admission of the Joker’s mask as “fabricated evidence and aggravated perjury because that’s what it was and I was asking you to do it that way[.]” Appellate counsel explained that “the more practical term” would be that the Joker’s mask should not have been introduced because it was irrelevant. Accordingly, appellate counsel argued that the Joker’s mask was irrelevant

because it was seized from Mr. Moore's truck two weeks after Mr. Moore had been pulled over while Petitioner was a passenger. Appellate counsel also argued that the admission of the mask was prejudicial. Appellate counsel recalled that the trial court addressed the relevancy of the Joker's mask at the trial and found the mask to have been properly admitted.

Petitioner accused Ms. Branam of "fabricat[ing] modus operandi evidence in an attempt to overwhelm [him] with two (robbery) cases[.]" According to Petitioner, Ms. Branam testified that the man who robbed her wore black pants "the same as the robber" in the Athens robbery trial. Petitioner averred that her testimony established "modus operandi" to consolidate the two robbery cases. When questioned why he did not challenge Ms. Branam's inconsistent description of Petitioner's pants in the motion for new trial and on direct appeal, [a]ppellate counsel noted that the robbery charge in the Athens robbery was later dismissed by the State. Appellate counsel further explained that any issues regarding the falsity and relevancy of Ms. Branam's proposed testimony was addressed before trial. Appellate counsel testified that Petitioner had "a lot of issues" he wanted to be raised and the issue regarding Ms. Branam's testimony about the robber wearing black pants had no "real bearing or real weight." Appellate counsel maintained that he investigated and researched "whatever was in the motion for new trial[.]"

Petitioner also asked appellate counsel whether evidence of a "prior hearing" is relevant to a motion for new trial without identifying the "prior hearing" or whether it was a prior hearing in this case or the Athens robbery case. Appellate counsel explained that reviewing the preliminary hearing transcript might be helpful for trial, but it was not relevant or helpful in preparing for the motion for new trial especially because Petitioner was referring to the preliminary hearing of the Athens robbery. Appellate counsel testified that he examined the trial records in this case to prepare for the appeal.

On cross-examination, appellate counsel testified that he has been practicing law thirty-four years and although he presently has a "small criminal practice," he has been "actively" handling criminal cases for twenty-five to twenty-seven years. Appellate counsel testified that he has handled criminal appeals in both state and federal court and has represented over 500 clients in criminal cases. Appellate counsel also testified that he was successful in overturning a conviction on appeal one time in federal court and two or three times in state court.

Appellate counsel testified that upon his appointment as counsel, he spoke with Petitioner to prepare for sentencing and the motion for new trial. Appellate counsel testified that he “tried to raise” the issues Petitioner wanted raised in the motion for new trial. He also met with Petitioner’s trial counsel to discuss which issues to raise in the motion for a new trial. Appellate counsel specifically recalled asking trial counsel about the preliminary hearing pursuant to Petitioner’s request. Trial counsel turned over “a box with a lot of [Petitioner]’s stuff.” Appellate counsel recalled that the hearing on the motion for new trial was “put off several times” which gave him time to amend the motion and to raise the issues Petitioner wanted to raise. Appellate counsel did not recall “anything lacking at the last hearing [Petitioner] wanted added.” Appellate counsel maintained that the motion for new trial also covered everything he and trial counsel had discussed about the case and believed should be raised.

Appellate counsel testified that while there was evidence to believe that Detective Rhodes had engaged in misconduct, no criminal charges had been filed against Detective Rhodes when appellate counsel was preparing for the direct appeal. Appellate counsel tried to contact Detective Rhodes via telephone but Detective Rhodes had already left the Sheriff’s Department. Appellate counsel received a copy of a letter from the District Attorney’s office accusing Detective Rhodes of violating the department policy on ethics, storage, issued equipment, and lack of truthfulness. Detective Rhodes was fired as a result of the violations. Appellate counsel testified that he later learned that Detective Rhodes was indicted on federal charges of credit card misuse two years before the post-conviction hearing. He assumed that the charges arose in connection with Detective Rhodes’s employment in the McMinn County Sheriff’s Department as opposed to when he was in the Athens Police Department.

While there were some things that “didn't make a lot of sense” about the case, appellate counsel denied that there was any evidence of Detective Rhodes fabricating evidence:

Well, I’m not exactly sure, . . . what you mean by fabrication. As – they’re saying that this was relevant to the trial. Okay? I felt it wasn’t really relevant to the trial. I don't think that’s fraud.

Appellate counsel insisted that had the State fabricated evidence, he would have raised it as an issue in the motion for new trial.

In terms of the issues he did raise in the motion for new trial, appellate counsel confirmed that he challenged the evidence taken from Mr. Moore's truck, inconsistency in Ms. Branam's description of the color of the bag used to collect the proceeds of the robbery, the lack of Petitioner's DNA on any of the evidence, the use of photographs to depict evidence that was lost before trial, and the inconsistency of the robber's head garb by the victims to name but a few of the issues. In terms of the evidence collected from Mr. Moore's truck, appellate counsel did not understand why the truck was searched two weeks after Mr. Moore and Petitioner were pulled over in a traffic stop and why law enforcement retrieved items from Mr. Moore's vehicle that were irrelevant to the case such as a gun and "a [Joker's] mask." Upon clarification of the record, appellate counsel agreed that the two traffic stops occurred only a day apart but that the search warrant was executed "a week or two" after the last traffic stop. While appellate counsel thought that the timing and substance of the search did not appear to make sense, he reiterated that such facts did not constitute "fraud" or "fabrication of evidence" as alleged by Petitioner.

At Petitioner's insistence, appellate counsel presented Petitioner's childhood foot disability as newly discovered evidence in the motion for new trial. Ms. Raby testified that she saw the robber run to the getaway vehicle. The issue of whether Petitioner could run was not explored at trial or at sentencing. Appellate counsel conceded that the disability was not newly discovered in that it was one Petitioner had since childhood.

Appellate counsel testified that he tried to "pare down" Petitioner's "very long list of issues" for appeal. Appellate counsel testified that most of Petitioner's issues were evidentiary challenges which are reviewed for abuse of discretion on appeal. Appellate counsel testified that he chose which issues to appeal based on his discussions with Petitioner and the issues that were preserved in the motion for new trial. Appellate counsel agreed that the issues raised in the motion for new trial "opened the door" for what issues could be asserted on direct appeal. In preparing for the appeal, appellate counsel examined the records and researched the issues. Appellate counsel explained that he found no cases on point supporting the position that the trial court committed obvious error.

Based on his legal research, appellate counsel pursued the strategy of "lump[ing]" all the issues for relief for cumulative error because none of the issues standing alone would have led to a successful appeal. He explained, "I thought the other areas would not be sufficient to give [Petitioner] relief. I thought all together they would."

Regarding Detective Rhodes's misconduct as impeachment evidence at trial, appellate counsel declined to say that it would have changed the outcome of the trial. However, appellate counsel could not believe that such evidence would not have some bearing on Detective Rhodes's credibility. Appellate counsel recalled that although Detective Rhodes may not have been the lead investigator, he had an active role in the case. He agreed that Detective Shaw put together the photographic lineup, not Detective Rhodes. Appellate counsel thought Detective Rhodes was present for one of the photographic lineups but he could not be certain. Appellate counsel was aware that there were two aggravated robbery cases. He recalled that Detective Shaw and Detective Rhodes shared information on what leads they had developed in their respective cases.

On redirect examination, appellate counsel maintained that he "brought everything before the Court. And I don't remember there was anything else [Petitioner] said needed to be brought" in the motion for new trial. Petitioner stated that Ms. Lisa Raby, the woman who saw the robber flee the scene, had, like Ms. Branam, "fabricated evidence" and committed "aggravated perjury." Petitioner then asked why appellate counsel did not challenge Ms. Raby's description of the getaway vehicle on direct appeal although appellate counsel raised the issue in the motion for new trial. Appellate counsel responded: "If she had committed fraud and all that, I'm assuming the [trial] court would have not allowed her to testify."

Ms. Raby's cross-examination by trial counsel was admitted as an exhibit and revealed that she had given a statement to the police right after the robbery had occurred. The statement had been video-taped and was played at trial to refresh Ms. Raby's recollection, although the record does not indicate what portion of her statement was played. Ms. Raby testified that the getaway truck had silver wheels. The photograph of the truck presented by the State had black wheels. Ms. Raby testified that other than the color of the wheels, the truck in the photograph matched the vehicle she saw fleeing the scene of the robbery.

At the post-conviction hearing, the State objected when Petitioner asked appellate counsel whether he agreed or disagreed that Ms. Raby had been impeached by her video statement regarding the getaway vehicle. The post-conviction court allowed the question but ruled for the record that inconsistency in Ms. Raby's description of the getaway vehicle did not constitute fabricated evidence. In response to Petitioner's question, appellate counsel testified that it was "possible" that "an impeached State witness can be grounds for a new trial."

Appellate counsel clarified that no evidence was seized when Mr. Moore and Petitioner were pulled over for an unrelated hit-and-run incident. He added that if any evidence had been collected during the stop, the State did not use it against Petitioner at trial. Appellate counsel recalled that Detective Rhodes was investigating an unrelated robbery where Mr. Moore was a suspect and agreed with Petitioner that Mr. Moore was not involved in the robbery in this case. When further questioned about the search of Mr. Moore's truck, appellate counsel explained that the search of Mr. Moore's truck did not constitute the fabrication of evidence but raised a concern as to relevance. Appellate counsel maintained that there was "no evidence it was fabricated." Accordingly, he could not argue to the trial judge in support of the motion for new trial that Detective Rhodes had planted evidence in Petitioner's case. He argued instead that evidence found in Mr. Moore's vehicle was irrelevant to Petitioner and the robbery. Appellate counsel also argued that there was no DNA evidence connecting Petitioner to the crime.

Petitioner took the stand and testified that appellate counsel was ineffective on direct appeal for failing to file a reply brief and for failing to raise a number of issues:

[F]abricated evidence, lost evidence, evidence not presented, *Brady* issues, witness being impeached with key evidence that Larry Moore's truck was used in the case as the robbery truck, but it was – through perjured testimony it was used, and I believe if [appellate counsel] . . . would have raised it the way I asked him as perjured testimony and fabricated evidence, I believe the result would have been different on appeal. And I believe that the (post-conviction) Court will agree with me and just as the Court of Criminal Appeals said their self (sic) that [appellate counsel] was inadequate, I believe they said, on page three of their opinion – [appellate counsel] was inadequate as counsel on appeal. So I believe that the facts establish that he's ineffective on appeal and was a denial since he didn't complete a reply brief that actually denied me an appeal. That's about it.

Petitioner also testified that appellate counsel was ineffective in failing to challenge Ms. Raby's inconsistent description of Mr. Moore's truck.

On cross-examination, Petitioner conceded that he did not witness Detective Rhodes search Mr. Moore's truck or talk to anyone who had witnessed Detective Rhodes fabricate evidence. Likewise, he had no witness who was prepared to testify that Detective Rhodes fabricated or planted

evidence against him. He based his conclusion that Detective Rhodes fabricated evidence on his examination of the testimonies at trial.

Petitioner testified that he met appellate counsel once or twice and that most of their communication was through letters. Petitioner wrote appellate counsel ten to twelve letters detailing the issues he wanted to be raised on direct appeal. According to Petitioner, appellate counsel raised the issues in the brief but failed to “crystallize” them for this court. Additionally, appellate counsel failed to cite to the record.

Petitioner acknowledged that he has no formal legal training and that his legal experience is limited to performing legal research in his own case while incarcerated. He testified that he drafted and filed the pleadings in this case without assistance from anyone in prison.

When queried by the post-conviction court, Petitioner testified that he first learned that the brief appellate counsel filed was inadequate when he received this court’s decision denying his appeal. However, he insisted that he gave appellate counsel specific citations to the record to be used in the brief before this court’s decision was released.

On re-cross examination, Petitioner reiterated that the evidence found in Mr. Moore’s truck was “fabricated” and “fraudulent.” On re-direct examination, Petitioner further explained how Detective Rhodes “fabricated evidence”:

And so where I understand law, you can’t present someone else’s possession as my possessions because that’s – that’s obviously fraud and fabricating evidence, if you take Larry Moore’s possession and present them in trial against me as my possessions. That’s what I meant by not – not did he actually get it from Larry Moore, because I don’t know, . . . So once he took them from Larry Moore, it was never fabricated till he put them in trial because as I said, those items were used to show the jury intent to commit robbery. That’s – that’s what I meant by – the taking of the evidence fabricating.

The post-conviction court permitted Petitioner to reopen the proof and call Athens Police Officer Harold Thompson. Officer Thompson testified that he “vaguely” remembered Petitioner. An affidavit dated May 10, 2017, and signed by Officer Thompson was introduced as an exhibit without objection. Although he did not recall the details of the traffic stop memorialized in the affidavit, Officer Thompson recognized his signature

stating that on July 10, 2014, he assisted Detective Rhodes in initiating a traffic stop involving Mr. Moore and Petitioner. Mr. Moore was the driver and Petitioner was a passenger. Officer Thompson likewise did not recall the details of a second traffic stop of Mr. Moore and Petitioner three years later on May 10, 2017. He explained that he has searched “hundreds of cars” and no one search “sticks out.” Officer Thompson acknowledged that he remembers “absolutely nothing” about the traffic stop conducted on July 10, 2014, and would need to read the report to refresh his recollection.

*Id.* at \*5-10 (footnote omitted).

The post-conviction court accredited appellate counsel’s testimony but nevertheless found that appellate counsel performed deficiently by failing to file a reply brief, finding that Petitioner “really never got his issues raised because the brief itself was insufficient.” Though appellate counsel raised some of the claims Petitioner identified, the post-conviction court held that appellate counsel “should have amended his brief to cite to the record those issues that [Petitioner] wanted raised and to present case law in support of those claims so that the Court would not just dismiss it on an ineffective brief, but actually look and review the issues presented.” The post-conviction court accordingly granted a delayed appeal.

In his delayed appeal, Petitioner argued that

1) Ms. Branam’s identification of him in a photographic lineup should have been suppressed because it was the fruit of an illegal stop and search of Petitioner while he was a passenger in Mr. Moore’s truck; 2) the general sessions court erred in determining probable cause to bind over this case to the grand jury because the determination was based on inadmissible hearsay by Detective Shaw that Ms. Branam identified Petitioner as the robber in a photographic lineup; 3) the trial court erred in allowing Detective Josh Rhodes to testify that Mr. Moore was a suspect in another robbery, and by allowing the State to introduce evidence recovered from the search of Mr. Moore’s truck; 4) transcripts of the preliminary hearing of this case and the Athens robbery constitute newly discovered evidence of impeachment against Ms. Branam, Detective Shaw, and Detective Rhodes; 5) Detective Rhodes’s termination from the sheriff’s department and the subsequent criminal investigation into his misdeeds constitute newly discovered evidence which should have resulted in a new trial; and 6) the evidence is insufficient to support his aggravated robbery conviction.

*Id.* at \*14. A panel of this Court reversed the post-conviction court’s grant of a delayed appeal, holding that the post-conviction court had failed to “articulate a finding that

appellate counsel's performance was prejudicial." *Id.* at \*16. The case was remanded with instructions to the post-conviction court to enter written findings of fact and conclusions of law on Petitioner's claims of ineffective assistance of appellate counsel as required by Tennessee Code Annotated section 40-30-111(b) and Tennessee Supreme Court Rule 28, section 9(A). *Id.*

### *October 17, 2022 Post-Conviction Hearing*

Following this Court's decision, Petitioner filed a "Motion for New Trial/Judgment of Acquittal," in which he reiterated his delayed appeal arguments. The State responded with a motion to dismiss, arguing that Petitioner's arguments were res judicata if construed as a motion for new trial and meritless if construed as an amendment to his post-conviction petition, as he had failed to establish prejudice on appellate counsel's behalf. The post-conviction court construed the filing as an amendment to Petitioner's post-conviction petition and held a hearing thereupon on October 17, 2022.

### *Ineffective Assistance of Appellate Counsel*

The post-conviction court first heard Petitioner's arguments for the ineffective assistance of appellate counsel. Petitioner introduced forty-five exhibits, the majority of which were portions of transcripts from his pretrial proceedings and his Athens and Etowah trials, through which he presented the claims he asserted appellate counsel should have raised.

Petitioner first argued that Ms. Branam's identifications of him as the robber were inconsistent and unreliable and, accordingly, should have been "discredited." At the hearing on the State's motion to consolidate the Athens and Etowah charges, Ms. Branam testified that she was unable to identify anyone in the first photographic lineup she was presented, but when presented with a second lineup several weeks later, she identified Petitioner. At Petitioner's preliminary hearing, Ms. Branam testified that she was presented with a photographic lineup and that she was able to "pick out the person in the lineup," but her response as to whom she identified was inaudible. Petitioner characterized this inaudible reply as a refusal to make an in-court identification. At Petitioner's trial, Ms. Branam testified that she was unable to identify anyone in the first photographic lineup, which was presented to her "a week or two after the robbery." She further testified that she viewed the second photographic lineup "approximately two months" after the robbery and that she identified Petitioner. Ms. Branam then identified Petitioner in court, though she noted that he looked subtly different at trial than during the robbery. Petitioner argued that Ms. Branam's testimony was also unreliable because of inconsistencies in her descriptions of the robber's clothing. At the preliminary hearing, Ms. Branam testified that the robber's pants were "dark in color" but noted that she "didn't really look at [the robber's] pants," while at trial she recalled that the robber had been wearing "light khaki pants."

Petitioner argued further that appellate counsel should have presented Petitioner's theory that Detective Rhodes had committed "aggravated perjury" in his inconsistent descriptions of the search of Mr. Moore's truck and the items recovered therefrom. At the preliminary hearing, Detective Rhodes testified that he performed a traffic stop and search of Mr. Moore's truck on the suspicion that Mr. Moore and Petitioner had been involved in a nearby hit-and-run incident. At the Athens trial, Detective Rhodes testified that he did not search Mr. Moore's truck and did not see another officer search it during the traffic stop. At the Etowah trial, Detective Rhodes testified that he searched Mr. Moore's truck the day after Petitioner and Mr. Moore were stopped. Petitioner also identified inconsistencies in Detective Rhodes's description of the items seized from Mr. Moore's truck. Detective Rhodes testified at the preliminary hearing that he recovered, among other things, a small black head covering that matched the description provided by witnesses to the Athens robbery. At the Etowah trial, Detective Rhodes testified that he recovered a "black head cap" and a "Joker's mask" from the truck, the latter of which he excluded from his preliminary hearing testimony. At the Athens trial, witnesses described the robber alternatively as wearing a "baseball cap" or a hat. Though Petitioner conceded that the State did not introduce the "Joker's mask" at trial, he maintained that Detective Rhodes must have "fabricated" it due to the inconsistencies in his testimony. He also presented "newly discovered evidence" of Detective Rhodes's termination and investigation for misconduct, which occurred months after Petitioner's trial concluded.

Petitioner argued that Detective Shaw also testified inconsistently at the consolidation hearing, in which he testified that the witnesses to the Athens robbery were unable to identify Petitioner in the first photographic lineup but did so in the second. At the preliminary hearing, Detective Shaw testified that there was an additional, unidentified witness that the State wished to call during the trial but did not, and Petitioner argued that this was evidence of Detective Shaw's "making up witnesses" to testify against him. Petitioner also introduced a transcript of trial counsel's Athens trial cross-examination of a State's witness in which the witness conceded that she was only ninety percent certain in her identification of Petitioner.

Appellate counsel testified regarding a letter he wrote to Petitioner dated December 22, 2016, in which he informed Petitioner that he would not file a motion to recuse the trial judge from further proceedings. Appellate counsel explained that he saw no basis for such a motion. He also wrote that Petitioner had threatened to file a complaint against him for not sending "pages from a transcript" and not filing motions that Petitioner had prepared requesting the trial judge's recusal. Appellate counsel requested that Petitioner refrain from filing further such complaints and attached the pages Petitioner had requested. Trial counsel was also called to "authenticate" several pieces of evidence.

At the conclusion of Petitioner's presentation of evidence, he summarized that appellate counsel should have filed a reply brief in which he presented his claims that the

State's witnesses had perjured themselves throughout their pretrial and trial testimonies and his "newly discovered evidence" arguments regarding Detective Rhodes. He also insisted that appellate counsel should have argued that Detective Rhodes's testimony regarding the "Joker's mask" was "fabricated" "via aggravated perjury" instead of arguing that the evidence was irrelevant and unduly prejudicial. Petitioner identified this, as well as appellate counsel's statement during the August 13, 2020 post-conviction hearing that he was retained to get Petitioner "through sentencing" and not to "investigate [Petitioner's] case" as proof that appellate counsel's performance was deficient. He argued that had appellate counsel presented the issues as Petitioner wished, he would have prevailed on his motion for new trial and on direct appeal. He also argued that the transcripts from his pretrial proceedings were newly discovered evidence of his innocence.

The State responded that appellate counsel provided effective assistance. The State argued that the inconsistencies Petitioner identified throughout his proceedings and trials were so minor that they would not have warranted either a new trial or direct appeal. The State cited appellate counsel's August 13, 2020 post-conviction hearing testimony that he had reviewed the record from Petitioner's trial and concluded, after researching, that the only argument likely to succeed on direct appeal was cumulative error. The State also noted that the "Joker's mask" was not introduced at trial and was not mentioned by any of the witnesses to the robbery, and that its impact on the jury's decision was likely minimal. The State asserted that the "newly discovered evidence" of Detective Rhodes's termination for misconduct was irrelevant because it occurred months after Petitioner's trial had concluded, and that though it was evidence with which he could have been impeached at trial, it was not evidence which would have necessarily led to a different result. Further, the State noted that the transcripts from Petitioner's pretrial proceedings were not newly discovered evidence. In summation, the State argued that Petitioner had not presented any proof to support his fabrication of evidence claims and had failed to establish prejudice on any of his claims.

#### *Ineffective Assistance of Trial Counsel*

The post-conviction court then heard Petitioner's arguments regarding the ineffective assistance of trial counsel. Trial counsel testified that he represented Petitioner throughout his pretrial proceedings and at both the Athens and Etowah trials. Trial counsel noted that the transcripts of Petitioner's pretrial proceedings would have been available to Petitioner at any time after their conclusion.

Trial counsel recalled the inconsistencies in Ms. Branam's descriptions and identifications of Petitioner as the robber throughout Petitioner's pretrial proceedings and at his trials. He agreed that her testimony was crucial to the State's proof at the Etowah trial and that he could have cross-examined her with her prior testimony from Petitioner's pretrial proceedings. However, trial counsel elected not to introduce Petitioner's pretrial transcripts to impeach Ms. Branam, Detective Shaw, or Detective Rhodes after considering

the potential costs and benefits of allowing the jury to hear proof that Petitioner had been charged in a similar robbery in Athens. He also did not believe that the transcripts would have been helpful in a motion to dismiss because “[e]ven if I were to show that [the] witness completely fabricated the case, I would have to show at that point there was nothing else for the State to rely on at trial . . . I did not feel that I had that.” Trial counsel testified that he instead “thoroughly impeached” Ms. Branam’s testimony, questioning her ability to recall a very brief interaction with the robber. He also noted that the State relied upon evidence of a “skullcap” but that Ms. Branam testified that the robber wore a bandanna, and he questioned her on this inconsistency to attack her credibility. He agreed that Ms. Branam testified inconsistently regarding the robber’s facial hair at trial and that he “probably should have” raised this inconsistency during cross-examination.

Trial counsel testified that during Petitioner’s preliminary hearing, Detective Shaw left the second photographic lineup in his vehicle, and the State did not introduce it. He recalled that Ms. Branam was presented with a photographic lineup in court and that she testified that she identified Petitioner from a different lineup. The State did not question Ms. Branam further regarding her identification and trial counsel argued in his motion to dismiss that she had insufficiently identified Petitioner as the robber. Trial counsel testified that he did not believe that Detective Shaw had fabricated any evidence against Petitioner or had intentionally concealed the second photographic lineup, characterizing his actions as simply being “unprepared.” Trial counsel believed that Detective Shaw added little to the State’s proof beyond his testimony regarding the photographic lineups and Ms. Branam’s identification, which he stated he “attacked” on its merits at trial. He recalled that the addition of Petitioner’s photograph to the second photographic lineup was a result of Detective Rhodes’s stop of Mr. Moore’s truck and subsequent conversation with Petitioner.

Trial counsel recalled that he cross-examined Detective Rhodes and challenged his testimony regarding the seizure of the “Joker’s mask” from Mr. Moore’s truck. He attempted to discredit Detective Rhodes’s testimony with a theory that Detective Rhodes was “grabbing at straws trying to come up with evidence.”

Trial counsel stated that he did not file a motion to suppress the stop and search of Mr. Moore’s truck, nor the evidence recovered therefrom because he did not believe that Petitioner had a right to privacy in the truck or its contents. Trial counsel was unsure whether Detective Rhodes had reasonable suspicion to stop Petitioner or Mr. Moore based upon the description of the suspects involved in the nearby hit-and-run incident, and he testified that he cross-examined Detective Rhodes on this issue, questioning whether Detective Rhodes had stopped Petitioner simply because he was a “big black guy.” Trial counsel averred that he would have filed a motion to suppress any evidence from a search that yielded evidence that Petitioner may have committed a crime, but no such evidence was recovered from Petitioner.

Trial counsel testified that he unsuccessfully argued for dismissal of the charges against Petitioner at the conclusion of his preliminary hearing. He stated that he could not appeal the general sessions court's finding of probable cause and bind over of the charge to the grand jury, testifying that he was without other remedies to challenge the State's prosecution until trial.

On cross-examination, trial counsel testified that he had worked as an assistant public defender for four years prior to representing Petitioner, estimating that he had tried between twenty and twenty-five cases. He recalled that after reviewing the evidence, he believed that the State's case largely hinged upon Ms. Branam's identification of Petitioner as the robber. He testified that he met with Petitioner at least ten times to prepare for his trials, with meetings lasting between ten minutes and several hours. During these meetings, he discussed trial strategy and the potential testimonies of the State's witnesses based on their pretrial testimonies. Trial counsel stated that he believed that Petitioner agreed with his trial strategy following these meetings and did not recall Petitioner's raising any issue regarding inconsistent statements from his pretrial proceedings. Trial counsel testified that he researched issues including pretrial identifications, expert witness testimony, witness reliability, and the advantages and disadvantages of introducing the photographic lineup.

Trial counsel stated that he presented the testimony of Dr. Jeffrey Neuschatz, an expert in the field of witness identification and memory, to attempt to impeach the State's identification witnesses at the Athens trial. After the Athens trial resulted in a hung jury, he decided to adopt a similar strategy at the Etowah trial and again used Dr. Neuschatz's testimony to attack Ms. Branam's credibility. Trial counsel testified he tried to impeach Ms. Branam by inquiring into her eyesight and need to wear glasses, whether she was focused on the robber or his firearm, the brief period of time in which the robbery occurred, and her ability to see the robber's face. Though he conceded that he could have cross-examined the State's witnesses more effectively at the preliminary hearing, trial counsel recalled presenting similar questions to Ms. Branam then.

Trial counsel recalled arguing that the contents of Mr. Moore's vehicle were irrelevant and unduly prejudicial in a Rule 404(b) hearing. He did not recall filing a motion to suppress any of Petitioner's statements during the traffic stop. Though he did not recall whether he attempted to suppress the video of the Etowah robbery, he noted that he found the video helpful to his cross-examination of Ms. Branam because the video depicted an individual who he believed did not resemble Petitioner.

In his closing argument, Petitioner reiterated his belief that trial counsel performed deficiently by failing to cross-examine the State's witnesses with their inconsistent pretrial testimonies, failing to effectively seek the suppression of Detective Rhodes's traffic stop and search of Mr. Moore's vehicle, as well as the evidence recovered therefrom, failing to effectively challenge the State's identification procedures, failing to seek the suppression

of rumors that Mr. Moore was a bank robber, and failing to seek the suppression of the video of the Etowah robbery, among other issues which he has abandoned on appeal.

The State responded that trial counsel provided effective assistance by researching the relevant legal issues, meeting with Petitioner multiple times to prepare for trial, hiring an expert witness, cross-examining the State's witnesses, and filing meritorious but unsuccessful motions for suppression. The State also argued that trial counsel's actions or inactions reflected reasonable, strategic trial decisions and that Petitioner had generally failed to prove prejudice on any of his claims.

### *Order Denying Post-Conviction Relief*

In its order denying Petitioner's claims for relief, the post-conviction court credited the testimonies of both appellate and trial counsel. The post-conviction court found that after appellate counsel met Petitioner, he researched the issues Petitioner wished to be raised and decided to raise only a single issue of cumulative error, as "he did not think any one of [P]etitioner's claims had merit on its own." Though it had previously granted a delayed appeal for appellate counsel's failure to file a reply brief adequately citing the relevant authorities and the record, on remand the post-conviction court concluded that Petitioner suffered no prejudice because the issues Petitioner wished to be raised on appeal were meritless or weak.

The post-conviction court also found that Petitioner received the effective assistance of trial counsel. The post-conviction court found that trial counsel effectively cross-examined Ms. Branam, Detective Shaw, and Detective Rhodes at trial based on their trial testimonies and that trial counsel's decision not to use the transcripts of their pretrial testimonies was strategically made after proper consideration of the costs and benefits to Petitioner's case.

The post-conviction court concluded that Petitioner's claims regarding trial counsel's failure to object to the State's identification procedures were unfounded, finding no undue suggestiveness and noting that trial counsel raised Ms. Branam's failure to make an in-court identification of Petitioner as an issue in his motion to dismiss. The post-conviction court found meritless Petitioner's claims that Ms. Branam "fabricated" evidence through her inconsistent descriptions of the robber and further noted that trial counsel thoroughly cross-examined Ms. Branam on these inconsistencies.

The post-conviction court also found that trial counsel did not perform deficiently by declining to file motions to suppress the "illegal traffic stop" of Mr. Moore's vehicle and the evidence seized therefrom. It further found that trial counsel effectively, though unsuccessfully, challenged Detective Rhodes's testimony regarding the "Joker's mask" as irrelevant. The post-conviction court denied Petitioner's claim that trial counsel performed deficiently by failing to object to the State's presentation of rumors that Mr. Moore was a

bank robber, noting that “[n]o evidence was presented at this hearing about the 404(b) motion other than trial counsel[’s] mention[ing] that it was filed, heard, and evidence admitted over objection.” The post-conviction court also found that trial counsel strategically elected to use the video of the Etowah robbery for its potential to impeach Ms. Branam’s testimony and found no evidence to support Petitioner’s claim that the video had been insidiously “altered.”

The post-conviction court held that Petitioner’s arguments regarding trial counsel’s failure to challenge the general sessions court’s finding of probable cause and binding over of the charge to the grand jury and the sufficiency of the convicting evidence were inappropriate grounds for post-conviction relief. As relevant to this appeal, it further determined that Petitioner’s preliminary hearing transcripts were not newly discovered evidence of his actual innocence.

Following the entry of the post-conviction court’s order denying relief, Petitioner filed a timely notice of appeal. On appeal, Petitioner challenges the post-conviction court’s denial of his contentions that he received the ineffective assistance of trial counsel by trial counsel’s failure to cross-examine the State’s witnesses with their pretrial testimonies, to effectively seek the suppression of several pieces of evidence, and to appeal the general sessions court’s finding of probable cause. He claims that the evidence was insufficient to support his conviction and that newly discovered evidence proves his actual innocence. He also argues that he received the ineffective assistance of appellate counsel by appellate counsel’s failure to file a reply brief on direct appeal adequately raising Petitioner’s claims.

### *Analysis*

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.

#### *I. Ineffective Assistance of Trial Counsel*

On appeal, Petitioner contends that he received the ineffective assistance of trial counsel based upon trial counsel's failure to cross-examine the State's witnesses with their pretrial testimonies, to effectively seek the suppression of several pieces of evidence, and to appeal the general sessions court's finding of probable cause. We will address these issues in turn.

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, this Court "need not address both elements if the petitioner fails to demonstrate either one of them." *Kendrick*, 454 S.W.3d at 457. 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).

#### A. Cross-Examination of the State's Witnesses

Petitioner argues throughout his brief that trial counsel ineffectively cross-examined several of the State's witnesses. He argues that ample evidence of perjury through inconsistent statements may be found in the transcripts of his pretrial proceedings. Accordingly, he posits that trial counsel should have introduced these transcripts during cross-examination and that his failure to do so resulted in prejudice by the jury's hearing "unimpeached and unreliable testimony." Specifically, he argues that trial counsel should have confronted Ms. Branam with her previous descriptions of the robber from her pretrial testimony and recorded statement and with her "refusal" to identify him in the photographic lineup at his preliminary hearing. Petitioner argues that trial counsel should have impeached Detective Shaw using the transcript of his Athens trial to show the jury that he had "coached" other witnesses into testifying against Petitioner and with his inconsistent and "unreliable" pretrial testimony regarding the identification procedures. Petitioner also claims that trial counsel should have impeached Detective Rhodes with his inconsistent preliminary hearing testimony regarding when he searched Mr. Moore's truck and his descriptions of the evidence taken therefrom.

The decision of whether to cross-examine a witness, as well as what matters to inquire into on cross-examination, is a "strategic[] or tactical choice, if informed and based upon adequate preparation." *Pierce v. State*, No. M2005-02565-CCA-R3-PC, 2007 WL 189392, at \*7 (Tenn. Crim. App. Jan. 23, 2007) (citations omitted), *no perm. app. filed*. These strategic decisions "are judged from counsel's perspective at the point of time they were made in light of all the facts and circumstances at that time." *Reeves v. State*, No. M2004-02642-CCA-R3-PC, 2006 WL 360380, at \*10 (Tenn. Crim. App. Feb. 16, 2006), *perm. app. denied* (Tenn. May 30, 2006). A petitioner alleging the ineffective assistance of counsel based on cross-examination decisions must show "what additional beneficial evidence could have been elicited" through his preferred method of cross-examination and must present that witness at the post-conviction evidentiary hearing to demonstrate how that witness would have responded. *See Ortiz v. State*, No. M2020-01642-CCA-R3-PC, 2021 WL 5080514, at \*4 (Tenn. Crim. App. Nov. 2, 2021), *perm. app. denied* (Tenn. Jan. 14, 2022); *see also Britt v. State*, No. W2016-00928-CCA-R3-PC, 2017 WL 1508186, \*4, \*7 (Tenn. Crim. App. Apr. 25, 2017) (finding that absent testimony showing how a witness would have responded to a petitioner's preferred method of cross-examination, "any assumption about what she would have said at trial is speculative at best.") (citing *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990), *no perm. app. filed*).

The post-conviction court denied relief on Petitioner's claims of ineffective assistance based on trial counsel's decision not to use his pretrial transcripts as impeachment evidence against the State's witnesses, finding it to be a strategic decision made after weighing the costs and benefits of introducing potentially harmful evidence. The record does not preponderate against this finding. First, Petitioner called none of the State's witnesses to testify during either of his post-conviction evidentiary hearings, so he has not demonstrated what more beneficial evidence would have been introduced had trial counsel adopted Petitioner's preferred strategy. Further, our review of the record indicates

that though trial counsel refrained from introducing the pretrial transcripts after concluding that they would likely harm Petitioner's case, he nevertheless thoroughly cross-examined each of the State's witnesses. After the Athens trial resulted in a hung jury, trial counsel, believing the result to be due in part to Dr. Neuschatz's testimony regarding witness recollection, again called him as an expert witness to testify calling into question Ms. Branam's ability to remember the robbery. Trial counsel also attempted to "attack[] on the merits" Detective Shaw's identification testimony and presented a theory that Detective Rhodes was "grabbing at straws" to find incriminatory evidence to use against Petitioner. Accordingly, we conclude that trial counsel was not deficient in this regard.

### *B. Motion to Suppress*

Petitioner also argues that trial counsel was ineffective for failing to seek the suppression of Ms. Branam's identification of him as a robber as "fruit" of an illegal traffic stop, Detective Shaw's testimony regarding witness identification, the video recording of the robbery, all evidence recovered from Mr. Moore's truck, and rumors that Mr. Moore was a bank robber.

Petitioner's argument regarding the suppression of Ms. Branam's identification of him as the robber appears to be that Detective Rhodes's traffic stop of Mr. Moore's vehicle was illegal and that as an illegal stop, and any information or evidence gleaned therefrom constitutes "fruit of the poisonous tree." Petitioner therefore argues that Detective Rhodes's recommendation to Detective Shaw that Petitioner's photograph be included in a photographic lineup to be presented to witnesses of the robbery was unlawful. He asserts that trial counsel should have filed a motion to suppress Ms. Branam's identification testimony raising this theory.

Recently, our supreme court explained that establishing a claim for ineffective assistance of counsel based on counsel's failure in a motion to suppress "creates an additional step" in the traditional *Strickland* analysis. *Phillips v. State*, 647 S.W.3d 389, 404 (Tenn. 2022). Such claims require proof that "(1) a suppression motion would have been meritorious; (2) counsel's failure to file such motion was objectively unreasonable; and (3) but for counsel's objectively unreasonable omission, there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Id.* (citations omitted). Accordingly, "[i]t is a petitioner's burden to submit evidence (and not just his testimony surmising on the merits of a pre-trial suppression motion) that the suppression motion would have been granted and that there is a reasonable probability that the trial proceedings would have concluded differently if trial counsel had pursued a motion to suppress evidence." *Stewart v. State*, No. M2015-02449-CCA-R3-PC, 2017 WL 2645651, at \*14 (Tenn. Crim. App. June 20, 2017), *perm. app. denied* (Tenn. Oct. 4, 2017). "In essence, the petitioner should incorporate a motion to suppress within the proof presented at the post-conviction hearing." *Cecil v. State*, No. M2009-00671-CCA-R3-PC, 2011 WL 4012436, at \*8 (Tenn. Crim. App. Sept. 12, 2011), *no perm. app. filed*.

Both the federal and state constitutions contain provisions protecting individuals from unreasonable searches and seizures. *See* U.S. Const. Amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”); Tenn. const. art. I, § 7 (“[T]he people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures.”). Not all contacts between police and citizens are prohibited, and our courts have recognized three distinct types of police-citizen interactions: (1) a full-scale arrest which must be supported by probable cause, (2) a brief investigatory detention which must be supported by reasonable suspicion, and (3) brief police-citizen encounters which require no objective justification. *State v. Daniel*, 12 S.W.3d 420 (Tenn. 2000) (internal citations omitted).

“One exception to the warrant requirement exists when a police officer makes an investigatory stop based upon reasonable suspicion, supported by specific and articulable facts, that a criminal offense has been or is about to be committed.” *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968); *State v. Bridges*, 963 S.W.2d 487, 492 (Tenn. 1997)). In cases involving a seizure when a police officer pulls over a vehicle, the police officer must have reasonable suspicion of criminal activity, supported by specific and articulable facts, at the time that the police officer turns on the blue lights. *State v. Binette*, 33 S.W.3d 215, 218 (Tenn. 2000). The moment that a police officer turns on the blue lights, the “police officer has clearly initiated a stop and has seized the subject of the stop.” *Id.* “Reasonable suspicion is a particularized and objective basis for suspecting the subject of a stop of criminal activity . . . , and it is determined by considering the totality of the circumstances surrounding the stop. . . .” *Id.* (internal citations omitted). We review the validity of a stop from a “purely objective perspective,” and this Court may consider “relevant circumstances demonstrated by the proof even if not articulated by the testifying officer as the reasons for the stop.” *State v. Smith*, 484 S.W.3d 393, 402 (Tenn. 2016).

While riding as a passenger in Mr. Moore’s truck, Petitioner was stopped by Detective Rhodes and another officer who were investigating a nearby hit-and-run in which the driver had abandoned his vehicle in a ditch. Detective Rhodes testified that he was looking for a “black male [wearing a] t-shirt” who fled the scene of the accident “going up Woodward Avenue” on foot. Detective Rhodes later saw a dark blue truck in the “800 block of Woodward Avenue” occupied by a male driver and “a black male passenger that matched the description” of the suspect from the hit-and-run. Believing that the passenger could have been the driver of the abandoned vehicle, Detective Rhodes decided to perform a traffic stop. Because his vehicle had no blue lights, he called for an additional officer to assist him in performing the stop. After stopping Mr. Moore’s vehicle, Detective Rhodes asked Petitioner if he would exit the vehicle to speak with him, and Petitioner agreed to do so. During their conversation, Detective Rhodes concluded that Petitioner was not the suspect he had been looking for, so he let him and Mr. Moore go. Realizing later that Petitioner matched the description of a suspect he had received in a be-on-the-lookout alert,

Detective Rhodes advised Detective Shaw to place Petitioner's photograph in future photographic lineups to be presented to witnesses to the "Check Into Cash" robberies.

Our review of the record shows that Detective Rhodes had reasonable suspicion to execute the stop of Mr. Moore's vehicle based upon his belief that Petitioner matched the description of the suspect involved in the nearby hit-and-run. The stop was brief and concluded upon Detective Rhodes's determination that Petitioner was not the suspect he sought. Therefore, a motion to suppress advancing Petitioner's "fruit of the poisonous tree" arguments regarding Ms. Branam's subsequent identification after Detective Rhodes passed his name along to Detective Shaw would have been meritless. Petitioner has not met his burden of submitting evidence to indicate that a suppression motion raising this ground would have been granted or that the proceedings would have concluded differently if trial counsel had pursued such a motion.

Petitioner also asserts that trial counsel should have objected to Detective Shaw's nondisclosure of the photographic lineup at the preliminary hearing, characterizing the State's identification procedures as impermissibly suggestive. Though he concedes that Detective Shaw was not charged with concealing evidence, Petitioner nevertheless maintains that Detective Shaw intentionally concealed the photographic lineup at the preliminary hearing. Relatedly, he asserts that because Ms. Branam "refused" to make an in-court identification, the photographic lineup should have been introduced to prove that she identified someone other than Petitioner. He contends that Detective Shaw's nondisclosure of the photographic lineup proves that he attempted to conceal exculpatory evidence. Finally, he argues that Ms. Branam first identified him at his trial after having seen him at his preliminary hearing, that such an identification was impermissibly suggestive, and that trial counsel should have filed a motion to suppress to this effect.

"To be admissible as evidence, an identification must not have been conducted in such an impermissibly suggestive manner as to create a substantial likelihood of irreparable misidentification." *State v. Cribbs*, 967 S.W.2d 773, 794 (Tenn. 1998). A two-part test is used to determine the validity of a pretrial identification. *See Neil v. Biggers*, 409 U.S. 188, 198-99 (1972). First, the trial court must determine whether the identification procedure was unduly suggestive. *Id.* at 198. If the trial court determines that the identification procedure was unduly suggestive, the second step is to determine whether, under the totality of the circumstances, the identification was nonetheless reliable. *Id.* at 199. Suppression is required only when the totality of the circumstances show that the identification was unreliable. *State v. Scarborough*, 300 S.W.3d 717, 729 (Tenn. Crim. App. 2000). The following factors must be considered in determining the reliability of an identification:

1. the opportunity of the witness to view the criminal at the time of the crime.
2. the witness's prior description of the criminal.
3. the accuracy of the witness's prior description of the criminal.

4. the level of certainty demonstrated by the witness at the confrontation.
5. the length of time between the crime and the confrontation.

*State v. Hall*, 976 S.W.2d 121, 153 (Tenn. 1998) (quoting *Biggers*, 409 U.S. at 199). It is unnecessary to apply the totality of the circumstances test if the trial court determines that the identification procedure was not unduly suggestive. See *State v. Butler*, 795 S.W.2d 680, 686 (Tenn. Crim. App. 1990).

The post-conviction court found that there “was some confusion” about Ms. Branam’s “lack of an identification at the preliminary hearing” because her answer was inaudible when asked whether she recognized “an unspecified exhibit believed to be [a photographic lineup]” and she did not identify the initials ascribed to the lineup. Though Petitioner characterized this lack of an identification as a refusal to make an identification, the post-conviction court found that Ms. Branam’s answer was simply inaudible. The post-conviction court also found from its review of the record that Ms. Branam had been presented with three photographic lineups: the first “did not include [P]etitioner and she made no identification,” the second “included [P]etitioner and she made an immediate identification with absolute certainty,” and the third “was erroneously displayed to the witness at the preliminary hearing.” Petitioner argues that a motion to suppress “all identification evidence” would have been successful and that trial counsel ineffectively challenged it, but this argument is not supported by the record. Trial counsel testified that he moved to dismiss the charges against Petitioner, arguing that the State had failed to sufficiently identify him as the robber and that Ms. Branam had not made an in-court identification. Though the motion was denied, trial counsel later cross-examined Ms. Branam at trial regarding her identification of Petitioner and the differences in her description of him in comparison with the robber depicted in the video recording and utilized Dr. Neuschatz as an expert to impeach her recollection.

Beyond Petitioner’s arguments that the lineup that Detective Shaw forgot in his vehicle showed that Ms. Branam identified someone other than Petitioner, little evidence was introduced to support Petitioner’s argument that the State’s identification was unduly suggestive. Neither Ms. Branam nor Detective Shaw were called during the post-conviction hearing to testify regarding the identification, and the allegedly exculpatory photographic lineup was not introduced. Trial counsel testified that he did not read any nefarious intent in Detective Shaw’s failure to bring the photographic lineup to court but instead viewed it as simply being unprepared, and the post-conviction court credited this testimony. In sum, Petitioner failed to introduce evidence sufficient to indicate that a motion to suppress Ms. Branam’s identification on the basis that the State’s identification procedures were unduly suggestive would have been granted or that a different outcome would have resulted from such a motion. *Stewart*, 2017 WL 2645651, at \*14. The post-conviction court appropriately denied relief.

Petitioner also argues that he received the ineffective assistance of trial counsel by trial counsel's failure to object to the State's use of an "altered" video recording of the Etowah robbery, which he argues could not be properly authenticated since the original VHS tape was "destroyed." He also notes that the video is distorted at times because it was fast-forwarded and maintains that he does not resemble the robber depicted in the video. He argues that he was prejudiced by trial counsel's failure to seek the video's suppression because the video tended to corroborate Ms. Branam's account of the robbery.

During the post-conviction hearing, trial counsel testified that though he did not recall whether he filed a motion to suppress the video, he was unsure why he would have wanted to do so because he believed the video lent much to his impeachment of Ms. Branam's testimony. In trial counsel's opinion, the video depicted a robber who did not resemble Petitioner, and he recalled using this inconsistency during his impeachment of Ms. Branam's testimony. In its order denying relief, the post-conviction court found no proof that the video had been altered beyond trial counsel's testimony that he took the recording to the Bradley County Sheriff's Office to attempt to slow it down.

After he reviewed the video, trial counsel considered its potential to harm or benefit Petitioner's case, concluding that its potential to provide impeachment material against the State's key witness outweighed any potential harm. Ms. Branam was thoroughly cross-examined, and this cross-examination included reference to the video recording of the robbery to illustrate to the jury the inconsistencies in her account of the robbery. This represents a strategic decision regarding a reasonable trial strategy adopted by trial counsel which we will not second guess. *Granderson*, 197 S.W.3d at 790. The post-conviction court properly denied relief.

Petitioner further contends that trial counsel was ineffective for failing to move for the suppression of all evidence seized from Mr. Moore's truck and for failing to argue that the truck, its search, and all items recovered therefrom were irrelevant to his case. Though Petitioner appears to concede that he had no Fourth Amendment right to privacy in Mr. Moore's vehicle or the items recovered therefrom, he nevertheless asserts that trial counsel should have argued that the "Joker's mask," a toy airsoft gun, a "rainbow and black colored" backpack, a black skull cap, and a set of walkie-talkies recovered from Mr. Moore's truck, as well as the truck itself, were "irrelevant" to his case and that their introduction was a "violation of due process of law."

In its order denying relief, the post-conviction court concluded that Petitioner had abandoned his arguments regarding the suppression of specific items recovered from Mr. Moore's truck, finding that he had introduced insufficient proof to support these claims. The record does not preponderate against this finding. At the October 17, 2022 post-conviction hearing, Petitioner questioned trial counsel regarding his failure to file a motion to suppress the stop, but he did not question trial counsel regarding specific items recovered from the truck. Trial counsel testified that he would have filed a motion to suppress any

evidence from a search that yielded evidence that Petitioner may have committed a crime, but no such evidence was recovered. Petitioner did elicit testimony from trial counsel regarding the State's reliance upon certain pieces of evidence recovered from the truck, including the black skull cap, but Petitioner did not question trial counsel on his failure to argue for their suppression. Petitioner introduced no evidence to suggest that a motion to suppress Mr. Moore's truck or the items recovered therefrom would have been granted and that such relief would have changed the outcome of his trial and, accordingly, failed to meet his burden of proof. *Stewart*, 2017 WL 2645651, at \*14. The post-conviction court appropriately denied relief.

Similarly, Petitioner claims that trial counsel was ineffective for failing to effectively argue against the introduction of testimony regarding rumors that Mr. Moore was a bank robber. At the post-conviction hearing, trial counsel testified that a Rule 404(b) hearing was held on this issue, that he argued against it, and that the evidence was ultimately admitted over his objection. However, Petitioner again did not introduce any evidence demonstrating trial counsel's deficiency or prejudice and, therefore, is not entitled to relief. *Id.*

### *C. Preliminary Hearing*

Petitioner argues that trial counsel rendered ineffective assistance by failing to object to the general sessions court's finding of probable cause and binding of the case over to the grand jury. Petitioner cites two cases in support of his argument that trial counsel should have appealed the general sessions court's binding over of his charges to the grand jury. *See Waugh v. State*, 564 S.W.2d 654, 660 (Tenn. 1978) (holding that the trial courts have jurisdiction to review motions to dismiss a bind over order); *see also Miller v. State*, 621 S.W.2d 156, 157 (Tenn. Crim. App. 1981) (holding that "a motion to dismiss a bind over order must allege the absence of competent evidence at the bind over hearing to entitle an accused to a hearing on such a motion."). With these principles in mind, Petitioner argues that trial counsel should have objected to Detective Shaw's "intentionally conceal[ing]" the photographic lineup from which Ms. Branam testified that she identified Petitioner. Petitioner contends that the general sessions court's "only reason" for finding probable cause was because Detective Shaw testified that he had the photographic lineup but had neglected to bring it into court with him and because Ms. Branam testified that she identified Petitioner.

We need not determine whether the cases cited by Petitioner continue to apply because we conclude that, regardless, Petitioner has failed to show prejudice. Throughout his brief, Petitioner argues that Detective Shaw intentionally concealed the photographic lineup from which Ms. Branam testified she identified Petitioner and that his statement that he had the lineup in his vehicle was "inadmissible hearsay." Trial counsel testified that he believed Detective Shaw had simply been unprepared and did not discern any malice in his neglecting to bring the photographic lineup into court with him for Petitioner's preliminary

hearing, and the post-conviction court credited this testimony. Petitioner maintains that Detective Shaw should not have been permitted to testify regarding the photographic lineup, and that had such testimony been excluded, the general sessions court would have had no basis for finding probable cause as Ms. Branam “failed to make an in-court identification” of Petitioner. Ms. Branam’s failure to make an in-court identification was precisely the basis upon which trial counsel argued for dismissal during Petitioner’s preliminary hearing. Because we ascribe no error to trial counsel’s performance regarding the State’s identification procedures, we conclude that Petitioner has failed to demonstrate prejudice.

## ***II. Sufficiency of the Evidence***

Petitioner also argues that the evidence adduced at trial was insufficient to sustain his conviction. Petitioner did not raise this issue on direct appeal but argued it at his October 17, 2022 post-conviction hearing. In its order denying relief, the post-conviction court held that such an argument was an inappropriate basis for post-conviction relief. We agree. An evidentiary error is not a cognizable claim for post-conviction relief. *See* T.C.A. § 40-30-103 (“Relief under this part shall be granted when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.”); *see also Workman v. State*, 868 S.W.2d 705, 711 (Tenn. Crim. App. 1993) (“It has long been established in this jurisdiction that a petitioner may not litigate the sufficiency of the evidence in a post-conviction suit.”) (citations omitted). Even if we were able to consider this claim in the context of a post-conviction petition, Petitioner’s claim is waived due to his failure to raise it on direct appeal. *See* T.C.A. § 40-30-106(g) (“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.”).

## ***III. Newly Discovered Evidence***

Petitioner claims that newly discovered evidence proves his actual innocence, reiterating his previous claims that the State’s witnesses committed perjury, that Detective Shaw’s testimony regarding Ms. Branam’s identification was inadmissible, that the State’s identification procedures were unduly suggestive, that Detective Shaw coached witnesses to testify against him, that Detective Shaw used a false affidavit to arrest him, and that Detective Shaw intentionally concealed the photographic lineup. These claims appear to be based upon the “newly discovered evidence” of the transcripts of Petitioner’s pretrial proceedings. At the October 17, 2022 post-conviction hearing, Petitioner also presented Detective Rhodes’s misconduct and termination as newly discovered evidence of his actual innocence, but he does not argue this claim on appeal.

A free-standing claim of actual innocence may be brought under the Tennessee Post-Conviction Procedure Act. *Dellinger v. State*, 279 S.W.3d 282, 291 (Tenn. 2009)

(citing T.C.A. §§ 40-30-102(b)(2) and -117(a)(2)). However, those claims are limited to claims based on newly discovered scientific evidence. *Id.* Petitioner must prove his claim by clear and convincing evidence. *Id.*

First, we note that Petitioner cites to no authority regarding the claims of actual innocence in the context of a post-conviction petition in his brief, instead relying upon the holdings of *Schlup v. Delo*, 513 U.S. 298 (1995), a federal habeas corpus case in which the Supreme Court adopted a “miscarriage of justice” exception to the exhaustion requirement and to the federal habeas corpus statute of limitations. Accordingly, Petitioner’s claim of actual innocence in the context of his post-conviction petition is waived. Waiver notwithstanding, we conclude that Petitioner’s claims of newly discovered evidence are based upon newly acquired transcripts of prior proceedings, which do not qualify as newly discovered scientific evidence such that would give rise to a cognizable claim of actual innocence under the Tennessee Post-Conviction Procedure Act. They are not scientific evidence and do not qualify as newly discovered evidence. The post-conviction court properly denied relief.

#### *IV. Ineffective Assistance of Appellate Counsel*

Finally, Petitioner argues that he received the ineffective assistance of appellate counsel by appellate counsel’s failure to file a reply brief on direct appeal. Petitioner notes that on direct appeal, the State responded to Petitioner’s single argument of cumulative error by asserting that such a claim had been waived due to inadequate briefing. Petitioner maintains that appellate counsel’s failure to file a reply brief curing the deficiencies in his brief led to this court’s dismissal of his single claim of error on direct appeal and, accordingly, precluded this Court from conducting meaningful review of his case on direct appeal, resulting in presumptive prejudice. Petitioner also presents a number of grounds for relief that he maintains appellate counsel should have raised in his reply brief, which mirror his arguments regarding the ineffective assistance of trial counsel and include a challenge to the sufficiency of the convicting evidence and a presentation of “newly discovered evidence.” The State responds that the post-conviction court appropriately denied relief.

The test used to determine whether appellate counsel was constitutionally effective is the same test applied to claims of ineffective assistance of counsel at the trial level. *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004). “Appellate counsel [is] not constitutionally required to raise every conceivable issue on appeal.” *Carpenter*, 126 S.W.3d at 887 (citing *King v. State*, 989 S.W.2d 319, 334 (Tenn. 1999)). Generally, appellate counsel has the discretion to determine which issues to raise on appeal and which issues to leave out. *Id.* Thus, courts should give considerable deference to appellate counsel’s professional judgment with regard to which issues will best serve the petitioner on appeal. *Id.* Appellate counsel is only afforded this deference, however, “if such choices are within the range of competence required of attorneys in criminal cases.” *Id.*

When a claim of ineffective assistance of counsel is based on the failure of appellate counsel to raise a specific issue on appeal, the reviewing court must determine the merits of the issue. *Id.* “If an issue has no merit or is weak, then appellate counsel’s performance will not be deficient if counsel fails to raise it.” *Id.* Similarly, if the omitted issue has no merit, then the petitioner suffers no prejudice from counsel’s decision not to raise it. *Id.* If the issue omitted is without merit, the petitioner cannot succeed in his ineffective assistance claim. *Id.* The petitioner bears the burden of establishing that the omitted issue had merit. *Id.* at 888.

On direct appeal, appellate counsel argued that “there were numerous errors in the admission of evidence, all of which were related to the State’s seizures of items from the truck belonging to [Mr.] Moore in which [Petitioner] had been a passenger weeks after the robbery.” *Scott*, 2018 WL 3156979, at \*2. He further challenged “numerous” evidentiary discrepancies, “the admission of photographs and other evidence of items seized from the truck, the admission of testimony that Mr. Moore was a suspect in another robbery, and the trial court’s denial of a new trial based on Detective Rhodes’s dismissal” and claims of misconduct. *Id.* At oral argument, appellate counsel stated that he had reviewed the State’s argument that he had waived his claims due to inadequate briefing but nevertheless elected not to file a reply brief addressing this argument. *Id.* Accordingly, this Court held that Petitioner had waived his claim of cumulative error due to inadequate briefing. *Id.* At Petitioner’s August 13, 2020 post-conviction hearing, appellate counsel testified that Petitioner had presented a “very long list of issues” which he wished to be raised upon appeal but that after researching them and discussing their merits with Petitioner, he elected to raise only those issues which had been preserved in his motion for new trial and those which he believed could be “lump[ed]” together to support a claim of cumulative error. *Scott*, 2022 WL 414354, at \*8. Following this hearing, the post-conviction court granted a delayed appeal, concluding that appellate counsel had performed deficiently by failing to more adequately cite to the record and appropriate authorities. *Id.* at \*10. This Court reversed, finding that the post-conviction court had failed to find prejudice. *Id.* at \*16.

At Petitioner’s October 17, 2022 post-conviction hearing, appellate counsel briefly testified that he wrote a letter to Petitioner responding to Petitioner’s requests to file a motion to recuse the trial judge prior to Petitioner’s motion for new trial hearing. Appellate counsel appended pages of a transcript that Petitioner had requested to this letter and requested that Petitioner refrain from further threatening to file complaints against him with the Board of Professional Responsibility. Petitioner then introduced a plethora of exhibits, largely portions of transcripts of prior hearings, upon which he based his claims that appellate counsel should have more thoroughly cited to the record to support his claims of cumulative error. He further argued that appellate counsel knew of his desire to raise certain claims and refused to do so because those issues had either been determined previously or were not preserved for appeal. Petitioner identified as prejudice appellate

counsel's refusal to pursue these claims, as well as his claims that the State's witnesses had perjured themselves and had fabricated evidence against him.

In its order denying relief, the post-conviction court held that Petitioner had failed to establish prejudice by appellate counsel's failure to advance the issues as he wished them to be raised on appeal and to cite to the record. It found that appellate counsel met with Petitioner, amended his motion for new trial several times to more thoroughly preserve Petitioner's issues for appellate review, but ultimately elected to file an appeal alleging cumulative error because he did not think that any of Petitioner's claims had merit alone. It concluded that the issues Petitioner advocated should have been included were meritless or were weak.

First, we address Petitioner's arguments regarding appellate counsel's failure to file a reply brief. Petitioner first points to the Supreme Court's acknowledgement in *Evitts v. Lucey*, 469 U.S. 387 (1985), that criminal defendants are entitled to the effective assistance of appellate counsel. *Id.* at 394. He also cites *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), in support of his argument that he is not required to prove prejudice resulting from appellate counsel's deficiency in failing to file a reply brief. *Id.* at 483-84. The State responds that Petitioner failed to demonstrate prejudice.

We agree with the State. Petitioner did not incorporate an argument for presumptive prejudice into his initial petitions for post-conviction relief, though he raised it in his reply brief on delayed appeal. On remand, Petitioner did not amend his petition for post-conviction relief to raise this argument and did not present proof at his post-conviction hearing regarding presumptive prejudice, though he now raises it again on appeal. The issue has been waived, and we therefore affirm the judgment of the post-conviction court. *See* T.C.A. § 40-30-106(g); *see also Woods v. State*, No. 2012-00563-CCA-R3-PC, 2013 WL 427902, at \*8 (Tenn. Crim. App. Feb. 1, 2013) (finding a petitioner "is limited to the issues as he presented them in his post-conviction petition and addressed them at the post-conviction hearing"), *no perm. app. filed*.

Next, Petitioner argues that appellate counsel should have argued for the suppression of Ms. Branam's identification of him as the robber because it was the "fruit" of an illegal traffic stop, as well as the result of the State's unduly suggestive identification procedures; for the suppression of the video of the Etowah robbery, Mr. Moore's truck and items seized therefrom, and rumors that Mr. Moore was a bank robber; that the evidence was insufficient to sustain his conviction; and that newly discovered evidence proved his actual innocence. After reviewing the record, appellate counsel concluded that, based on his research and professional opinion, no single issue Petitioner identified he wished to be raised or which was preserved for appeal merited relief alone, so he elected to challenge cumulative error. The issues Petitioner claims should have been raised mirror Petitioner's arguments for the ineffective assistance of trial counsel. Having already concluded that

these issues were meritless, we find no ineffective assistance of appellate counsel in appellate counsel's strategic decision to decline to raise them.

Petitioner also contends that appellate counsel should have challenged the sufficiency of the convicting evidence. When a defendant challenges the sufficiency of the evidence, the standard of review applied by this Court is "whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Parker*, 350 S.W.3d 883, 903 (Tenn. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)); see Tenn. R. App. P. 13(e). When this Court evaluates the sufficiency of the evidence on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. *State v. Davis*, 354 S.W.3d 718, 729 (Tenn. 2011) (citing *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010)). The jury as the trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses' testimony, and reconcile all conflicts in the evidence. *State v. Campbell*, 245 S.W.3d 331, 335 (Tenn. 2008) (citing *Byrge v. State*, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978)). When considering the sufficiency of the evidence, this Court shall not substitute its inferences for those drawn by the trier of fact. *Id.*

Petitioner's arguments for the insufficiency of the evidence center around his previous arguments that he was the victim of an illegal traffic stop, that the State's evidence was inadmissible, and that the State's identification procedures were unduly suggestive. We have already considered these issues and found them without merit. Petitioner also presents credibility arguments against the testimony provided by the State's witnesses, arguing that they were unreliable and false. However, trial counsel thoroughly cross-examined these witnesses and highlighted the inconsistencies in their trial testimony for the jury. The jury bears the prerogative of determining whether the evidence adduced at trial is credible. *Campbell*, 245 S.W.3d at 335. To be sure, there were inconsistencies at trial, but the jury resolved any issues of credibility with its decision to convict Petitioner. Accordingly, a sufficiency challenge raising Petitioner's credibility arguments would have similarly been meritless, and appellate counsel was not ineffective for declining to raise such a challenge on direct appeal.

### ***Conclusion***

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

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TIMOTHY L. EASTER, JUDGE