IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 15, 2023 Session

KIMBERLY MILLER v. STATE OF TENNESSEE

Appeal from the Circuit Court for Maury County
No. 24831 Stella L. Hargrove, Judge

No. M2022-00901-CCA-R3-PC

Petitioner, Kimberly Miller, appeals as of right from the Maury County Circuit Court's denial of her petition for post-conviction relief, wherein she challenged her convictions for first degree premeditated murder and first degree felony murder, for which she received a life sentence. On appeal, Petitioner asserts that she was denied the effective assistance of counsel based upon trial counsel's failure to permit Petitioner "to make a knowing, intelligent, and voluntary decision on whether to assert—or not assert—the statute of limitations for all lesser[-]included offenses of first degree murder and first degree felony murder" and counsel's failure to file a motion to dismiss, "along with alternative requests for mandatory or permissive jury instructions, related to the violation of [Petitioner's] Due Process rights under the federal and state constitutions" based upon a lengthy, pre-indictment delay. Following a thorough review, we affirm.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J. ROSS DYER, JJ., joined.

Brandon E. White, Columbia, Tennessee, for the appellant, Kimberly Miller.

Jonathan Skrmetti, Attorney General and Reporter; Caroline Weldon, Assistant Attorney General; and Brent A. Cooper, District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

This appeal involves the 1994 murder of a twenty-one-year-old deliveryman for Papa John's Pizza, Christopher Heiss ("the victim"), who was shot and killed while delivering pizza to a residence in Columbia where Petitioner lived. *State v. Miller*, No. M2018-00869-CCA-R3-CD, 2020 WL 3120268, at *1 (Tenn. Crim. App. June 11, 2020), *perm. app. denied* (Tenn. Oct. 10, 2020). During the shooting, the victim's car was also stolen. *Id.* The case was considered a "cold case" until 2016, when two witnesses informed authorities about statements Petitioner had made regarding her involvement in the crime. *Id.* at *15. Thereafter, the Maury County Grand Jury indicted Petitioner, in connection with the victim's death, for first degree premeditated murder, first degree felony murder in perpetration of a robbery, and especially aggravated robbery. *Id.* at *1. Prior to trial, the third count of the indictment charging Petitioner with especially aggravated robbery was dismissed, and Petitioner proceeded to trial on the remaining charges. *Id.*

Trial[1]

During opening statements, Petitioner's trial counsel explained that Petitioner would be putting forth an alibi defense, which meant, from Petitioner's perspective, "I wasn't there, I didn't do it, I was somewhere else." Trial counsel asserted that the evidence would show that, at the time of the offense, Petitioner was in a car with three other people traveling to a mall to see a movie. He said:

> [They] got there, it was closed so they didn't go to the movie. They went to get something to eat at McDonald's. After that, they drove up the Nashville Highway, up to the Kwik Sak, and then they came back.
>
> . . . .
>
> So we are going to cover that time frame including the time the pizza delivery had to have been made. So we think you are going to hear testimony that supports that [Petitioner] is not the person that the [prosecutor] thinks his evidence will show . . . was actually there.

[1] To assist in the resolution of this proceeding, we take judicial notice of the record from Petitioner's direct appeal. *See* Tenn. R. App. P. 13(c); *State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009); *Delbridge v. State*, 742 S.W.2d 266, 267 (Tenn. 1987); *State ex rel. Wilkerson v. Bomar*, 376 S.W.2d 451, 453 (Tenn. 1964).

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

> At trial, Marie Heiss testified that she and her husband, Robert (Bob) Heiss, Sr., and their two sons, Robert, Jr., and Christopher, moved from Buffalo, New York, to Columbia, Tennessee, in 1988 because of her husband's job transfer with Saturn. At the time of the move, Robert was eighteen years old and had graduated from high school. The victim, who was fifteen or sixteen years old at the time of the move, attended Columbia High School but did not graduate. However, he obtained his general education development diploma (GED).
>
> Mrs. Heiss said that at the time of his death, the victim worked at Papa John's Pizza (hereinafter "Papa John's") and had been there for approximately two years. The victim delivered pizzas and occasionally managed the restaurant.
>
> Mrs. Heiss acknowledged that in the weeks leading up to his death, the victim had a problem with marijuana. Approximately two to four weeks prior to the victim's death, she found a package of marijuana the victim had hidden in their house. At her request, Mr. Heiss "disposed of" the package. Afterward, the victim asked if she had "any idea what [she had] done." Mrs. Heiss was not concerned because she thought he was upset that he had spent money for marijuana he did not get to smoke. Later, the victim began acting "jumpy" and "paranoid," and "he would look out the window at times." She was concerned but did not think he was in danger.
>
> Mrs. Heiss said that before the victim left for work at Papa John's on the day of the offense, he asked her to call a counselor at the hospital to see if he could get admitted into a rehabilitation program. Mrs. Heiss was "grateful" that he wanted treatment for his drug problem. She wanted to help him but was unable to reach anyone at the hospital because it was the Saturday before Easter. She told the victim that she would call him at work if anyone returned her call.
>
> Mrs. Heiss said that normally the victim was home from work by 11:30 p.m., but that night he had planned to meet his brother after work. Mr. and Mrs. Heiss were in bed when Robert ran into the house and said, "Somebody has killed my brother." Robert explained that someone had told him he needed to go to the hospital. When he arrived at the hospital, he learned that the victim was dead.

Mrs. Heiss said that prior to the victim's death, she had heard of Ricky Bell and Jason Bradburn but that she had never heard [Petitioner's] name mentioned and did not remember hearing of Bobby Bishop. After the victim's death, she learned that the victim's drug use was not limited to marijuana, and she acknowledged that he was probably associated with people she and her husband did not know.

Mr. Heiss testified that around the beginning of March 1994, Mrs. Heiss found a bag of marijuana hidden in the stereo speakers in the victim's room. Mr. Heiss said the bag was a "typical brown-bagger's [paper] lunch bag." Mr. Heiss did not look inside the bag, but he could tell that the marijuana was loosely packed and that the bag was not completely full. Mrs. Heiss wanted the bag out of the house, so Mr. Heiss took it to a vacant lot around the corner from their house and left it near some bushes or trees.

Mr. Heiss said that "[t]here was a period in there probably for a week or two weeks or so that [the victim] was looking over his shoulder everything he did." Mr. Heiss said that the victim seemed "very nervous," "paranoid," and "on edge." Mr. Heiss recalled one occasion when he and the victim were outside together and a car drove into the cul-de-sac where they lived. The victim said, "Here they come."

After Mr. and Mrs. Heiss discovered the bag of marijuana, they told the victim to leave the house. Approximately a week later, the victim "was desperate" and "begged" his father to tell him where he had put the marijuana, and Mr. Heiss told him. Mr. Heiss assumed the victim probably had retrieved the bag. They allowed the victim to return to the house, and he had been back for one or two weeks at the time of his death.

Mr. Heiss said that shortly before his death, the victim bought a red Nissan 200SX with a manual transmission, possibly a 1989 model, which Mr. Heiss described as a "schoolteacher's type car." The victim drove the Nissan to work on the day of the offense. Before the victim's death, Mr. Heiss was not aware of any problems with the clutch. After the victim's death, Mr. Heiss spoke with a mechanic where the car had been towed and learned that the clutch was "blown out" and "inoperable."

Dr. Feng Li testified that he was the chief medical examiner for Metropolitan Nashville and Davidson County. Without objection, Dr. Li testified as an expert in forensic pathology. Dr. Li said that he had reviewed the autopsy report on the victim's body, which was performed by Dr. Charles

Harlan on April 3, 1994. Dr. Li said the autopsy protocol would have been the same in 1994 as it was at the time of trial. As part of the autopsy, the victim's blood was tested, and it was positive for cocaine, cocaine metabolite, marijuana, and marijuana metabolite. Dr. Li could not determine when the victim took the drugs.

Dr. Li said that the autopsy report reflected that the victim was a white male, that he was sixty-five inches tall, that he weighed 147 pounds, and that he was twenty-one years old. The victim had a gunshot wound that entered his chest and one that entered the right side of his head. The bullet to the chest passed through the aorta, heart, and left lung and exited the left side of the victim's back. The bullet caused bleeding in the chest cavity and around the heart. The other bullet caused "a near contact wound to the head" and exited behind the victim's left ear. From stippling, Dr. Li determined the gunshot to the head was fired from an intermediate range, which was approximately two to three feet. Dr. Li did not see any stippling around the gunshot wound to the chest and surmised that it was likely fired from a distant range.

Dr. Li said that the report reflected the victim's body had multiple skin abrasions and rib fractures. Two of the victim's right posterior ribs and five of his left ribs were "cracked, broken." Dr. Li surmised that the victim's rib injuries were consistent with someone of his size being run over by an automobile. He clarified, "[I]f [the body] is completely run over, usually you will see more damage. May be hit. May be dragged. These are more consistent [with being hit and dragged]." Specifically, Dr. Li said that the abrasions were more consistent with a body being dragged over a roadway and that "probably the rib fractures can be caused by [a] strike."

On cross-examination, Dr. Li explained that the victim's blood and urine were drawn as part of the autopsy and submitted to the Tennessee Bureau of Investigation's (TBI) laboratory for testing. Dr. Li explained that the marijuana and cocaine found in the victim's bodily fluids were in small amounts.

Dr. Li acknowledged that he could not determine from the autopsy findings whether the victim's body had been lying face up or face down at the time of the abrasions and fractures to the ribs. Dr. Li indicated that usually a body would have had more internal damage than the victim's if it had been run over by an automobile. He noted that different injuries could occur depending on the size of the vehicle inflicting the injuries.

Dr. Li said that Dr. Harlan died in 2013 and that he lost his medical license in 2005. Dr. Li said that the autopsy report appeared to be "adequate."

Michelle Jones, the Assistant Chief of Police with the Columbia Police Department, testified that she started working with the police department in 1989 as a dispatcher and became a patrolman approximately four years later. She graduated from the police academy in 1993, and in April 1994, she was working as a patrol officer. She acknowledged that at the time of the victim's death, she had not received any specialized training in crime scene investigation.

Assistant Chief Jones said that around 11:20 p.m. on April 2, 1994, she received a call from the police dispatcher reporting a shooting that had occurred around 1825 Paul Drive and that a man lying in the street was not moving. She was only a minute or a minute and a half away from Paul Drive. On her way to the scene, she passed through a red light at the intersection of Highland Avenue and 17th Street/Hatcher Lane and saw a small red car stopped on the side of Highland Avenue near the intersection. She thought the vehicle was yielding to her blue lights and siren. Next to the car, she noticed a white male with an average build and "longer hair," who was wearing a dark shirt with several buttons on the front. The man was "standing there putting a sign inside the car on the passenger side." She thought that was odd, but she had no reason to stop.

Assistant Chief Jones was one of the first officers on the scene of the shooting. Several people were rendering aid to the victim, who was lying in the middle of the street in front of a residence where [Petitioner] resided with her mother. Other people were coming out of their homes. Assistant Chief Jones tried to get the names of everyone present and attempted to keep people from coming too close to the "main area." She checked the victim and could not find a pulse. Officer Johnny Luttrell, who was deceased at the time of trial, approached her with an insulated red pizza cover from Papa John's. Assistant Chief Jones identified the bag in court and stated that the notation on the bag indicated that the dark stains appeared to be body fluid, "possibly blood."

Assistant Chief Jones said that she and Officer Luttrell, who were both patrol officers, were in charge of the scene until a detective arrived. When Assistant Chief Jones learned that the victim's car had been taken, she advised her supervisor of the vehicle she had seen on her way to the crime

scene. The officers designated the location of the car as a second crime scene. Assistant Chief Jones was dispatched to the second crime scene to investigate the vehicle and traveled back and forth between the scenes.

Assistant Chief Jones said that neither she nor any other officer was asked to tape off either of the crime scenes. At that time, the officers did not carry yellow crime scene tape in their patrol cars, so that was not unusual. Assistant Chief Jones acknowledged that no one kept a log of who entered or exited the crime scene.

Assistant Chief Jones identified photographs of the scene where the victim was found. A "wet stain" that appeared to be blood was in the roadway near the body. She acknowledged that at that time she had not received any training in analyzing blood spatter. She also recalled seeing various items for medical treatment, such as gauze and tubing. She identified from a photograph two pairs of shoes and a ball cap that were similar to ones she saw at the scene. Assistant Chief Jones also recalled seeing two shell casings and one bullet in the street. She did not know if anyone collected the shoes, cap, shell casings, or bullet. She identified two evidence envelopes which [each] contained a shell casing collected from the pavement in front of 1825 Paul Drive. Assistant Chief Jones surmised that the shell casings appeared to be .380 caliber. Assistant Chief Jones also identified an evidence envelope containing a bullet found on the pavement in front of 1825 Paul Drive. The bullet appeared consistent with the size of the shell casings.

Assistant Chief Jones said that one year after the shooting, she was asked to write a supplemental report on the victim's case. She acknowledged that writing a supplemental report one year after the incident was unusual. In her report, she accidentally omitted that she had seen a white male standing beside the red car near the intersection.

Assistant Chief Jones said that the police procedures for collecting evidence and handling crime scenes in 1994 and the procedures used at the time of trial were "totally different." Assistant Chief Jones noted that at the 1994 crime scene, none of the evidence was marked with a numbered evidence marker. She said that currently, every police officer and detective had numbered evidence markers in the back of their patrol cars. She agreed that in 1994, yellow crime scene tape was not used to secure the scene and that civilians were inside the crime scene, which would not happen under current protocols.

Assistant Chief Jones said that Detective Mark Stooksbury, who was assigned to the case before she was, had a warrant issued for the arrest of a man named Bishop in connection with the victim's case. However, the warrant was retracted before it was served. Assistant Chief Jones did not know why the warrant was retracted or why Bishop was never charged. After Assistant Chief Jones was assigned to the case, she did not seek a warrant or indictment against Bishop because she did not think there was enough information to establish probable cause.

Assistant Chief Jones said that after she was promoted to lieutenant, she assigned the case to other detectives. Assistant Chief Jones thought based upon the information she had that Bishop was involved in the victim's murder, that [Petitioner] did not act alone, and that other individuals were involved. Assistant Chief Jones acknowledged she had no solid evidence that [Petitioner] actually "pulled the trigger" of the gun that killed the victim.

On cross-examination, Assistant Chief Jones said that the victim's murder was the first homicide on which she worked. She said that when she saw the red car at the intersection of Highland Avenue and 17th Street, the doors were closed. The white male was standing outside on the passenger side of the car and was removing a lighted Papa John's sign from the car. He put the sign inside the car through the passenger window. She did not realize the car was related to the shooting until she arrived at the scene. Assistant Chief Jones said that she did not see the man's face, explaining that as she "went by, he kind of hid his face behind the sign." At some point, she conducted interviews related to the instant case. She did not recall telling interviewees that Ricky Bell was the person she saw by the red car but acknowledged that she may have.

On redirect examination, Assistant Chief Jones agreed that she was not required to tell suspects the truth during interviews and that it was common practice to "bluff" during an interview in order to elicit a response. If she had mentioned Ricky Bell to another suspect during an interview, she could have been doing so to get an admission or confession. She asserted that if she could have positively identified Ricky Bell as the person who removed the sign from the red car, she would have had him arrested.

Corporal Jason Sanders testified that in 2014, he was a detective and was assigned to work on the victim's case. During that time, Tommy Goetz, an investigator with the district attorney's office, contacted Corporal Sanders, and they worked together on the case.

Corporal Sanders said that in the back hatch compartment of a Firebird, which was later determined to belong to Thomas Arthur Davis, the police found a "Southern Cal" baseball cap and a white washcloth that were related to the case. The police submitted the cap and washcloth to the TBI for fingerprinting and DNA testing. Testing revealed DNA from multiple contributors on the ball cap and the washcloth, but the results were inconclusive as to the identities of the contributors.

Corporal Sanders said that three Lord Calvert whiskey bottles, a Hawaiian Punch can, and a Bud Light bottle found in the victim's Nissan were submitted to the TBI for fingerprinting and DNA testing. A fingerprint on one of the whiskey bottles was identified as the fingerprint of Thomas Gordon Davis, and Investigator Goetz spoke with him. The TBI report regarding the ball cap stated that "the major contributor profile was consistent with an unknown female source."

Corporal Sanders said that he had seen Shannon Arntz' name in the casefile. Investigator Goetz spoke with Arntz, and, thereafter, [Petitioner] was arrested. Corporal Sanders did not believe [Petitioner] was the only person involved in the victim's murder. He said that . . . Bishop was a suspect but that Bishop had died before Corporal Sanders could speak with him. Corporal Sanders also suspected that Kenneth Richard Bell, who was also known as Ricky or Rick Bell, was involved in the crime. Corporal Sanders said that Jason Bradburn and Kerry Brown were also suspects.

On cross-examination, Corporal Sanders noted that Thomas Gordon Davis' thumbprint was on the whiskey bottle. The Hawaiian Punch can had one hole punched in each side and was dented in the middle. He said that the can was used to smoke marijuana, "kind of like a homemade bong." Corporal Sanders acknowledged that a partial palm print was found on the exterior door but "nothing was identifiable." He stated "there were some [prints] that were inconclusive but no identifiable prints indicating [Petitioner]."

Thomas Gordon Davis testified that he did not know the victim personally but that they had a mutual friend, Jerry Johnson, who worked at Papa John's. Thomas Gordon denied having any involvement in the victim's death. He acknowledged that his thumbprint was on a whiskey bottle found in the victim's car. He said he and Johnson "drank together all the time," and they sometimes drank whiskey from the same bottle. He surmised that Johnson could have put the whiskey bottle in the victim's car. He recalled

that, "a lot of partying [was] going on" during that time, and he did not remember meeting the victim or drinking with him. He agreed that the shooting occurred on "Mule Day weekend of 1994" and that he could not remember where he was that weekend.

Lawrence Nelson testified that in 1994, he lived at 222 Pickens Lane in Columbia. Nelson lived in one half of a duplex, and Thomas Arthur Davis lived in the other half. Nelson and Thomas Arthur got along well. Nelson was married at the time, but Thomas Arthur was single. Nelson's former sister-in-law occasionally "hung out" with [Petitioner]. Nelson explained, "I knew of [Petitioner] more than I knew her." [Petitioner] lived behind Nelson, and "her backyard was to [his] backyard." Nelson said that in Spring 1994, Thomas Arthur bought a black Pontiac Firebird Trans Am with a hatchback. Nelson knew that [Petitioner] and Thomas Arthur "had interaction," and Nelson had seen [Petitioner] drive Thomas Arthur's Firebird "a handful of times."

Nelson recalled that on April 2, 1994, Thomas Arthur was in Michigan visiting his father, and Nelson saw [Petitioner] driving Thomas Arthur's Firebird. That night, a pizza deliveryman was shot on Paul Drive. Nelson said that he had been to Walmart, and when he got home, "it looked like Christmas morning with all of the lights going everywhere and a bunch of commotion going on." Nelson heard that the police were looking for either Thomas Arthur or his car. Nelson spoke with the officers and told them he knew where Thomas Arthur was. Nelson called Thomas Arthur's father in Michigan who said that Thomas Arthur was out getting something to eat. Thomas Arthur called Nelson when he returned to his father's house.

Nelson said that the Firebird passed by while he was talking with the police about the car. Nelson pointed out the car to the police. He could not see who was driving the car at that time, but he knew [Petitioner] had driven Thomas Arthur "to the airport, or wherever they went, or took him to Andy's and she was supposed to bring the car back and leave it over at his house. And I'm not sure if I was supposed to get the keys or what, but, you know, the car was supposed to come back over there."

Thomas Arthur Davis testified that in 1994, he lived in a two-story duplex on Pickens Lane. In early 1994, he bought a black 1993 Firebird. [Petitioner] lived with her mother on Paul Drive, which was behind his duplex. Thomas Arthur said that he met [Petitioner] through Nelson's sister-

in-law, Shannon. He did not know Shannon's last name. Thomas Arthur said that he "hung out" with [Petitioner] "[m]aybe every other weekend."

Thomas Arthur said that on April 2, 1994, he was in Michigan. He had ridden with a friend from Nashville and had planned to leave his Firebird at home in Columbia. When he was unable to find anyone else to help him, he asked [Petitioner] to drive him to Nashville. [Petitioner] agreed to return the Firebird to his driveway, give the keys to Nelson, and make sure the car remained parked in the driveway. Thomas Arthur did not give [Petitioner] permission to drive his Firebird while he was out of town, and he had never let her drive his car in the past.

Around 11:00 p.m. on April 2, 1994, Nelson called Thomas Arthur's father and said that the police were chasing the Firebird and that Thomas Arthur needed to return home. The next morning, Thomas Arthur and his friend drove home. The drive took approximately ten to eleven hours. When Thomas Arthur arrived on Sunday afternoon, his Firebird was not in his driveway. He eventually found his car parked on the side of the road between the duplex and [Petitioner's] house. The Firebird was locked. Thomas Arthur was angry and walked to [Petitioner's] house. [Petitioner's] mother came to the door, but when he asked for [Petitioner], [Petitioner's] mother responded that [Petitioner] "didn't have anything to say" to him. Thomas Arthur thought that was odd, and he told [Petitioner's] mother that he wanted the keys to his Firebird. [Petitioner's] mother shut the door, and about a minute later, she opened the door, tossed the keys at him, and shut the door.

Thomas Arthur said that after he got his keys, he drove the car to his house and parked it in his driveway. Within thirty minutes, detectives came to his house, asked him some questions, and took the Firebird. Thomas Arthur did not recognize the California ball cap or the washcloth the police found in his car. He did not know to whom the items belonged and had never seen them before that day.

Thomas Arthur said that a week after the shooting, he received a telephone call. The caller, who sounded male, said, "[Y]ou're next," and hung up. Two days later, he got another call from someone who sounded like the same person. The caller said, "[W]e're going to kill you." Thomas Arthur was frightened by the calls and informed the detectives the day after the first call. After the second call, the police suggested that he stay with friends for at least a week. He stayed away seven to ten days.

On cross-examination, Thomas Arthur agreed that he met [Petitioner] through neighbors, that they had a "very casual acquaintance," and that they did not have a "close, intimate relationship."

Christopher Westmoreland testified that in Spring 1994, he was nineteen years old and lived at 212 Mockingbird Drive, which was near the intersection of Highland Avenue and Hatcher Lane. He explained that his house had a carport with a "very flat roof." Westmoreland and some friends were sitting on the roof of the carport when they heard something that sounded like gunshots from the direction of Paul Drive.

Westmoreland said that Mockingbird Drive was "a very short street, and it's hard to drive fast down the street coming up the hill." Nevertheless, after he heard the shots, Westmoreland saw two cars drive "fast" past his house. The first was red and sounded as if it had engine problems, such as misfiring or trouble shifting gears. Following closely behind was a black Trans Am or Camaro, which was unusual for cars on his road. The cars stopped, and Westmoreland saw someone get out of the black car and approach the red car. Westmoreland thought the red car had "some type of Papa John's emblem on it." The person looked into the red car for less than a minute, returned to the black car, and the black car drove away. Westmoreland could not tell what the person looked like and could not discern whether the person was male or female. Sometime later, a large number of police officers arrived on the scene.

Westmoreland said that he had noticed a car that looked very similar to the black car prior to this incident. The car usually was parked at a house near the corner of Mockingbird Drive and Paul Drive.

Jason Kennedy testified that in April 1994, he was the assistant general manager at Papa John's and that he usually ran the store at night. He said that the victim was a good employee and that he made deliveries, answered telephones, and made pizzas.

Kennedy said that in April 1994, when someone called the store to place an order, the employee had to type a personal code into the computer to identify who took the order. The employee asked for the customer's telephone number and typed the number into the computer. If the customer had never placed an order, the employee asked for their telephone number and address before taking the order. Kennedy said that he had the master code and that he never shared his code with anyone.

After the order was placed in the computer, the computer "spit a ticket out on the oven side for whoever was running the oven," which usually was the delivery driver. The ticket was placed on the pizza box, the correct pizza was put in the box, and the pizza was taken from the store for delivery. Kennedy estimated that a pizza could be ready and out of the store in seven minutes.

Kennedy said that April 2, 1994, was part of "Mule Day weekend" and that the store was very busy. The store was open until approximately 11:00 p.m., and the victim and Steve Roth were the only drivers working that night. Kennedy remembered that the victim had done his usual duties, such as making pizzas, putting them in boxes, and making deliveries.

Kennedy was shown a tag that was attached to the pizza box found at the scene. He said the ticket was for a pizza that was to be delivered to 1825 Paul Drive. Kennedy could not read the telephone number associated with the order. The name given by the person who placed the order was Seth Long; however, Kennedy did not verify that Long was the person who placed the order. Kennedy looked at other records from Papa John's and said that the telephone number associated with the order was 380-1645. The records reflected that Kennedy took the order and that the victim was the delivery driver. The pizza was ordered at 10:50 p.m. and left the store at 11:02 p.m. Kennedy remembered taking the call and said the voice sounded like a female "white person." Kennedy recalled that the delivery drivers were given an incentive pay of one percent at the end of the night if they had a Papa John's sign on their cars, but he could not recall if the victim had a sign.

Kennedy said that after the shooting, the police were unable to find the victim's parents or brother. Kennedy went to the hospital and identified the driver as Chris Heiss. Kennedy was shown another record from Papa John's, and he confirmed that an order for cheese sticks was placed on March 30, 1994, for delivery to 1825 Paul Drive. The name on the order was Miller.

Andrea Williams testified that in 1994, she lived at 1909 Paul Drive, was fifteen or sixteen years old, and was in tenth grade. Williams knew [Petitioner], who was eighteen years old and was probably a senior at the time. They had been friends since elementary school. Williams said that [Petitioner] had a driver's license and that she occasionally rode around with [Petitioner].

Williams said that she "knew of" Thomas Arthur through Shannon Arntz, who was another girl she and [Petitioner] "hung out with." Williams said that Thomas Arthur and Arntz' brother-in-law were friends.

Williams recalled that Thomas Arthur had a new, black Firebird. Williams said that [Petitioner] drove the Firebird, "I guess whenever she wanted to drive it." She estimated that she was inside the vehicle with [Petitioner] more than five times. Williams could not recall whether Arntz was ever in the vehicle. Williams said she and [Petitioner] had "cruised" the neighborhood in the Firebird more than once prior to April 2, 1994. Williams did not recall any other black Firebirds in the neighborhood at that time.

Williams recalled that on April 2, 1994, [Petitioner] was supposed to come to Williams' house to get a compact disc (CD). [Petitioner] came by about 9:30 p.m. She was driving the Firebird and was supposed to return later to pick up Williams, but she never returned. Williams later saw "blue lights and police cars" in front of [Petitioner's] home. Williams saw [Petitioner] drive by in a black Firebird, but she did not stop.

On cross-examination, Williams said that when [Petitioner] came to her house around 9:30 p.m., "Troop" was in the Firebird with her. She did not know another name for Troop.

Bruce Dixon testified that in April 1994, he was living with his girlfriend, Janelle Irby, in a duplex at 1829 Dimple Court, a street which ran parallel to "short Paul Drive." Ronnie Gick lived on the other side of the duplex. Dixon, Irby, and Gick were all employed at Saturn. Dixon said that Gick died in 2018.

Dixon said that the duplex had a deck that was approximately six feet above the ground. From his deck, Dixon could see what was happening at the intersection of Paul Drive and Mockingbird Drive. Dixon said that he, Irby, and Gick were at home on the evening of April 2, 1994. Gick had a dog that was a black Labrador mix named Bear. Around 11:00 p.m., Bear and other dogs in the neighborhood started barking. Dixon heard two or three gunshots, and the dogs stopped barking. Dixon was afraid Bear had been shot, so he ran out onto the deck. Gick soon joined him on the deck.

Dixon said that while he was on the deck, he saw two vehicles in the area. He said, "One was the pizza delivery, I don't know if it was a small pick up [or] what. The other was a dark sports car, like a Camaro or a

Firebird." Dixon said the Firebird was either dark blue or black. He said the Firebird usually was parked on the corner of Pickens Lane and Paul Drive. Dixon did not know Thomas Arthur Davis. Dixon said that he did not know [Petitioner] or her mother, but he knew they lived at 1825 Paul Drive. Dixon had never seen [Petitioner] driving the Firebird.

Dixon said that when he saw the red pizza delivery vehicle, it was traveling north on Mockingbird Drive and was followed closely by the dark vehicle. When asked to describe their speed, Dixon said the vehicles "weren't creeping. They were – they were moving on." Dixon heard one of the vehicles "revving" its engine and did not believe it sounded like the dark sports car.

Dixon said that while they were standing on the deck, Gick noticed the victim lying in the street, which was Paul Drive. Dixon went inside his house, called 911, and then walked down the street to the victim. Gick and Irby were already there. Irby had brought a rug and placed it over the victim's body. Dixon checked the victim's neck for a pulse, but he did not find one. Additionally, he noticed that the victim was not moving and that the victim's body felt cold. Dixon, Irby, and Gick remained with the victim until the police arrived. Dixon said that he gave a statement to the police on May 6, 1994.

On cross-examination, Dixon said that it was too dark outside to discern whether the Firebird was black or blue. He did not know if it was the same car he had seen earlier in the neighborhood but knew it was similar. When he saw the cars, they were "in motion." Dixon did not see anyone else on the street.

John Mark Faught testified that in April 1994, he was twenty-four or twenty-five years old. He acknowledged that he was convicted of a couple of shoplifting offenses in 2008 and 2009. Faught said that he was friends with the victim and that they "hung around" with the same group of friends. Faught recalled that in 1994, he did not have a car but that his girlfriend, Terri Jett, had a 1991 Corsica.

Faught said that on April 2,[] 1994, he had been working as a painter. That night, Faught picked up his girlfriend's son, Jeremy, at Dairy Queen. Jeremy asked to go by a friend's house on School Street near Johnny's Market, and Faught agreed to take him. On the way, Faught saw the victim's car at the intersection of Highland Avenue and 17th Street. Faught was not

sure of the time, but he estimated he saw the victim's car around 9:00, 10:00, or 10:30 p.m. An early 1990's model black Firebird was "[d]ead behind" the victim's car. Faught wondered "what was going on" because the light at the intersection was green, but neither car was moving. However, when the black car went around the victim's car, Faught drove around the victim's car as well. The Firebird stopped, and Faught saw a man get out of the victim's car and into the Firebird. Faught noticed that the hazard lights on the victim's car were on. The man was approximately 5'10" or 6" tall, had dark brown or black hair, and was white. The windows on the Firebird were tinted, so Faught could not see whether the driver was a man or a woman. Faught said that he initially did not know the Nissan was the victim's car because the Papa John's sign was not on it. Faught did not see the Papa John's sign until he was beside the victim's car and saw the sign in the passenger seat.

Faught said that after he drove away, he realized something was wrong because the victim never let anyone else drive his car and always kept the Papa John's sign on top of the car. Faught "made the block" and returned to the victim's car. The man who had gotten out of the victim's car earlier was "behind the steering wheel trying to get the car to go. He opened the door, looked under the car, [kept] stripping the gears trying to get the car to go." The man made seven or eight attempts, but the car would not move. The black Firebird returned and pulled up behind Faught. The light turned green, and Faught drove through the intersection. He saw the Firebird stop beside the victim's car. The man got out of the victim's car and got into the passenger seat of the Firebird. The Firebird continued south on Highland. Faught backed up and tried to follow the Firebird but lost sight of it because the Firebird was driving "at a high rate of speed."

Faught said that he turned right onto Pickens Lane to look for the Firebird and saw the police lights and a lot of people standing on Pickens Lane and Paul Drive. Faught parked, and he and Jeremy walked over and saw the victim lying in the "middle of Paul Drive in a puddle of blood." Faught walked to a patrol car and asked if the person in the road was Chris Heiss. The officer responded that they had not established the victim's identity. Faught said that when he saw the victim's body, he "knew something was wrong." Faught told the officer that the victim's car was at the red light at the intersection. The officer asked how Faught knew the car belonged to the victim. Faught responded that he knew the victim and was familiar with the victim's car.

Faught said that he gave a statement to Ray Messick on June 3, 1994. At some point, the police asked Faught to help with a composite of the man he saw in the victim's car. About a month later, he looked at a photograph lineup and identified . . . Bishop as the man he saw in the victim's car. Faught agreed that he did not mention [Petitioner] in his statement because he could not see who was driving the Firebird.

Faught said he knew that the victim sold cocaine but did not know if he sold marijuana. The day before the victim was killed, Faught was at Tina Blalock's house with the victim. The victim asked Blalock "to go talk to some people for him." Faught said that the victim "was stressing out about talking to these people and getting her to talk to them for him." Faught thought that the conversation was about the victim's "sales of cocaine." The victim was "stressed out, in a panic mode. Steadily begging her, asking her over and over and over." Blalock repeatedly refused. Faught said that the next time he saw the victim, he was lying "dead in the street."

Kerry Brown testified that one night in April 1994, Dewayne Bowe called and asked if Brown and Tiffany Crawford wanted to go to the movies. Brown said yes, and Mr. Bowe and [Petitioner] came by and picked them up, but the mall and the theater were closed. Mr. Bowe and [Petitioner] took Brown and Crawford home. Brown said that he knew Mr. Bowe better than he knew [Petitioner]. Brown could not remember who was driving that night, but he recalled that they were in a black car.

Brown did not know about the shooting until he was questioned by the police a year or two later. Brown thought that [Petitioner] and Mr. Bowe may have been dating. Brown said that he knew Bishop and that Bishop was a white man.

On cross-examination, Brown acknowledged that he had difficulty remembering what happened in April 1994, but he remembered that the mall closed at 9:00 p.m. Brown said that Crawford was his girlfriend at the time. He did not recall stopping at 1825 Paul Drive that evening.

Tiffany Crawford testified that in April 1994, she was in a relationship with Kerry Brown. She recalled that the police came to her mother's house sometime after the shooting. The police asked about a night when she and Brown went to the movies with [Petitioner] and Mr. Bowe, who was also known as "Troop." [Petitioner] and Mr. Bowe picked up Crawford and Brown at Brown's mother's house. They were in a small, dark car that

possibly had only two doors. The theater was in the mall, and both were closed, so [Petitioner] and Mr. Bowe drove Crawford and Brown home. They arrived home shortly before 11:00 p.m. Crawford said that she and Brown were not with [Petitioner] and Mr. Bowe very long. Crawford said that on the drive home, [Petitioner] "said that [if] the police get behind her, she was going to – she wasn't going to stop, I remember that. And I never asked her why." Crawford said that [Petitioner] had not done anything to make the police want to stop her that night.

Patricia Bowe testified that Dewayne Bowe was her son and that she had heard Brown call him "Troop." Ms. Bowe recalled a night in April 1994 when Mr. Bowe and [Petitioner] went out, and Ms. Bowe kept [Petitioner's] baby. Mr. Bowe and [Petitioner] left around 8:00 or 8:30 p.m. They told Ms. Bowe they were going to a movie and to get something to eat. Ms. Bowe told [Petitioner] to bring Mr. Bowe "right back." [Petitioner] and Mr. Bowe were not gone long. When they returned, [Petitioner] asked Ms. Bowe to keep the baby for a short while longer because [Petitioner] did not have a car seat. [Petitioner] left and then returned, but Ms. Bowe did not recall the exact time she returned. [Petitioner] asked Ms. Bowe to ride with her to her mother's house and hold the baby, and Ms. Bowe agreed. When they arrived, Ms. Bowe saw a lot of people, cars, and the police in front of the house. Ms. Bowe spoke with [Petitioner's] mother. A "heavy-set" man told Ms. Bowe and [Petitioner's] mother that he wanted to take a statement from them. Ms. Bowe drove them to the jail, and she gave a statement to the police at approximately 4:00 a.m.

Ms. Bowe said that she did not see Crawford or Brown that night. She said the only other person she saw was her boyfriend, whom she asked to take her to the store to get diapers and milk for the baby.

Dewayne Bowe testified that in 1994 his nickname was "Troop." He said that [Petitioner] was an "acquaintance" but that they were not in a romantic relationship. Mr. Bowe recalled a night in April 1994 when he, [Petitioner], Brown, and Crawford went out to go to a movie. [Petitioner] was driving a "relatively new" black car that "looked to be a Firebird." [Petitioner] picked up Mr. Bowe first and then picked up Brown and Crawford. Ms. Bowe kept [Petitioner's] baby while they were gone. They went to Shady Brook Mall, and Brown bought a shirt. Mr. Bowe said that they left the mall when it closed, which Mr. Bowe thought was at 11:00 p.m. [Petitioner] took Brown and Crawford home then took Mr. Bowe home. Mr.

Bowe thought that "whatever time the mall closed" was about the time they left.

Mr. Bowe said that [Petitioner] "was acting really moody and nervous that night." When [Petitioner] left Mr. Bowe, she said, "I've got to go, I've got to go. I'll be back for the baby." [Petitioner] returned thirty or forty minutes later, picked up the baby, and Ms. Bowe went with [Petitioner] to [Petitioner's] mother's house. Mr. Bowe did not recall why his mother went with [Petitioner], but he acknowledged that he gave a statement to the police reflecting that [Petitioner] "asked [his] mother to go with her so [his] mother could tell [Petitioner's] mother where [Petitioner] had been."

Mr. Bowe acknowledged that he was incarcerated due to a probation violation for a felony conviction for the sale of cocaine. He further acknowledged that in 1994, he was using and selling drugs. He did not know whether [Petitioner] was involved with drugs at that time. Mr. Bowe said that he did not know Bobby Bishop, Jason Bradburn, or Ricky Bell.

On cross-examination, Mr. Bowe said that he gave two statements to the police, one in 1994 and one in 1997. In one of the statements, Mr. Bowe said that after they left the mall, they went to McDonald's and got something to eat. Afterward, they went to a liquor store, and Brown bought something. Mr. Bowe thought they returned home around 11:00 p.m.

Mr. Bowe said that when he walked in the house, his mother said, "[T]here was an incident that occurred on Ms. Mary's street." His mother also said that detectives had asked where he and [Petitioner] were and that she had told them where they had gone. After reviewing the statements he gave the police in 1994 and 1997, Mr. Bowe agreed that his statements and his testimony had some inconsistencies regarding whether [Petitioner] came into his house after they returned from the mall.

On redirect examination, Mr. Bowe agreed that he may have gotten confused and that he may have learned about the incident down the street when [Petitioner] returned to get her baby.

Robin Osbourne testified that she was incarcerated for a violation of probation. Osborne said that she wrote a letter to the district attorney's office to inform them that she had information regarding the case. Osbourne said that she had not been contacted by anyone when she wrote the letter and that she had not been promised favorable treatment on her pending probation

violation in exchange for her testimony. She said that she was not angry at [Petitioner] and was not testifying against her due to any "bad blood." Osbourne said, "Just on the grounds of what I knew, I felt like it should be told."

Osbourne said that she met [Petitioner] while they were both incarcerated in the Maury County Jail. Osbourne said they may have met briefly when [Petitioner] "lived up the road from" her, but they did not know each other well and were not friends.

Osbourne said that she knew Bobby Bishop and that Bishop had been deceased for several years. Osbourne said that she and Bishop "were on and off a time or two" but that they were not engaged or married. When she was younger, they were friends, but her mother did not approve of Bishop because he had been investigated for his involvement in the victim's death. Osborne recalled that one night while they were drinking, Osbourne asked Bishop if he had anything to do with the murder. Osbourne said, "[H]e just kind of done a blank face, you know, like – like he didn't answer. He didn't say yes and he didn't say no."

Osbourne said that she had spoken with defense counsel once and with his investigator twice. She spoke with the investigator in 2016, before she wrote the letter to the district attorney's office. Osbourne conceded that the letter did not "contain exactly what [she] told the investigator" in 2016. Osbourne agreed that when she wrote the letter, she had a "different mindset about [Petitioner] and her possible involvement than [she] did when [she] met with the investigators before." Osbourne said that she spoke with defense counsel two or three weeks prior to trial and told him a version of events that was similar to what she had written in her letter.

Osbourne said that when she was incarcerated in 2016, she was in a cell with four people, including herself and [Petitioner]. Osbourne said that after [Petitioner] met with her lawyer, [Petitioner] would come back to the cell and "start saying things" about her case. They learned that they knew a lot of the same people, including Bishop. Osbourne said that she did not know much about the victim's murder before her discussions with [Petitioner].

Osbourne said that [Petitioner] never told her everything that happened at one time; instead "[i]t was parts at a time." Regardless,

Osbourne said that over the course of one month, she got the following story from [Petitioner]:

> [Petitioner] said that her and a guy named Troop and a gentleman named Kerry Brown was out riding around, just hanging out. It was throughout the whole evening. She said later in that evening, her and Troop dropped Kerry Brown off. He was no longer with them. They were going to her house to get a diaper bag for her little boy that was over at her sister's house. And when they got to her mother's house, she had went in to get the diaper bag and she had left Troop outside. And while she was in the house getting the diaper bag ready, when she come back out, there were two guys outside with Troop – a guy she called Troop.
>
> . . . .
>
> Then – but when she come back outside, the car had been moved. He had, I guess, parked it and met up with the two guys somewhere outside of her mother's house. And she got in the car with Troop and these two guys and Troop and a guy had left and she's sitting in the car with the gentleman and they're sitting there doing drugs, cocaine, whatever they were doing. And they were waiting on Troop and the other guy to come back. Well, she didn't know these two guys. And she's with a guy in the car. And as they're sitting there hanging out, she figures out – or she asks the guy his name, and it was Rick Bell. And the longer they sat there and talked, or whatever, she had asked who had Troop left with. And she had mentioned a Jason Bradburn.
>
> Well, they sat there and waited for Troop and Jason to come back. And as they were waiting, they were sitting there and a pizza delivery guy pulls up at her mother's house. And they're still sitting in the car. And they're watching this guy, this pizza guy, go up to her mother's door. And he knocks on the door. And her mother comes to the door. And she turns the pizza guy away. And the pizza guy goes back to get in his car. And he's in the car and he's looking around like – he's got his light on and he's, you know figuring out, I guess, you know, why she didn't accept the pizza.

> And she said at this time there was a guy that come from each side of the house. And at this point, it was a black male and a white male. And she had – when they approached the car, the pizza guy had gotten out and there was, like, some, like, arguing or loud verbal stuff going on. And Rick was getting out of the car and I guess she was fumbling around. I mean, she didn't – she don't – didn't go into detail on who shot, or whatever, but by the time Rick had gotten out of the car, she had – she heard two gunshots.
>
> Well, there was a lot of commotion going and Troop had come to her and asked her to drive the pizza guy's car and she gets in it and she can't drive a five speed so she runs back to the car and asked him if he would drive it and so she got in the car that she was in and she followed him to a church.
>
> Now whether – where the other two guys, or whatever, the pizza guy, you know, they wasn't around. And she followed them to a nearby church. And he dropped them off and she picked them up.

Osbourne said that [Petitioner] eventually said that a black man named Troop came from the side of her mother's house and approached the victim's car window. [Petitioner] identified the other person as a man named Jason. [Petitioner] never said who fired the shots. [Petitioner] said she tried to drive the victim's car but could not because it was a stick shift. Troop got into the victim's car and drove it, and [Petitioner] drove the other car and met him at a church. Osbourne said that prior to speaking with [Petitioner], she did not know that the victim had been shot.

Osbourne said that she did not know Jason Bradburn, . . . Ricky Bell, or Troop. [Petitioner] told Osborne that after she picked up Troop at the church, they went to [Petitioner's] sister's house. [Petitioner] never mentioned Troop's mother, and she never mentioned Bishop except to say "that he had drove the same kind of car that was involved in the murder." Initially, [Petitioner] tried to make Osbourne believe Bishop was driving his black car that night, but later [Petitioner] revealed that she was driving a black car and that she was at the scene of the shooting.

On cross-examination, Osbourne acknowledged that she first spoke with the defense's investigator, Jennifer Greer, on December 13, 2016;

Osbourne was out of jail at that time. Osbourne said that she did not recall telling Greer that she and Bishop were best friends, asserting that she and Bishop were acquaintances. Osbourne acknowledged that Bishop "[m]ay be" the father of her daughter, but she said that did "[n]ot necessarily" make them friends.

Osbourne acknowledged she told the defense that Bishop drank "[e]very time [she] was around him, which wasn't a lot." She did not recall telling the defense that Bishop said "he had something to do with the Papa John's murder and that he always made himself the trigger man."

Osbourne thought she wrote the letter to the district attorney's office in October 2017. She acknowledged speaking to defense counsel and Greer at the beginning of February 2018 while she was in jail. She remembered them asking why she had told them something different in December 2016, and that she responded she "didn't know how much different it was." Osbourne said that in February 2018, she gave the defense the same details she gave during her direct testimony. She thought her stories were "[p]retty close." She acknowledged leaving out some details, explaining, "I didn't speak with you about it because I was already going to speak with the State about it . . . . So I didn't tell everything to y'all."

Osbourne said that when she knew Bishop, he had a 1996 red Grand Prix. Osbourne acknowledged that a "broke down" Firebird was parked in Bishop's mother's yard.

Osbourne said that she was in jail for a probation violation on a conviction for sale of methamphetamine. The violation was based on a new drug charge incurred four months after she spoke with the investigator.

On redirect, Osbourne said that she did not think what she told Greer in December 2016 was "any different" from what she later told the State but that she "just didn't tell [the defense investigator] everything." Osbourne said that the information came from [Petitioner] and denied that she had made up some of the details to get [Petitioner] in trouble.

Osbourne said [Petitioner] never explained why she drove away without checking on the victim, and [Petitioner] never said what she did after she arrived at her sister's house. Osbourne asked [Petitioner] how Bradburn and Bell got to the scene, and [Petitioner] said that she did not know. [Petitioner] never told Osbourne that Bell participated in the murder;

however, she said that "[Bell] was getting out of the car, like in the midst of getting out." [Petitioner] said that either Bradburn or Troop shot the victim.

Shannon Arntz testified that in 1994, she and [Petitioner] were best friends and that they had been friends since eighth or ninth grade. Arntz said that she quit high school before the eleventh grade and that [Petitioner] was out of school but had not graduated. They lived near each other. Arntz said that she lived next door to Thomas Arthur's house and that her house was "diagonal" from [Petitioner's] house. At the time, Arntz' sister was married to Lawrence Nelson.

Arntz said that [Petitioner] got a driver's license before Arntz. [Petitioner] sometimes drove a black 1994 Firebird that Thomas Arthur had recently bought. [Petitioner] and Arntz thought "[i]t was a hot car." Arntz said that both she and [Petitioner] occasionally drove the Firebird. Arntz recalled that when the victim was shot, she and [Petitioner] were watching Thomas Arthur's house, dog, and car for two weeks while he was in Michigan.

Arntz said that the weekend of the murder, she was in Florida for spring break, and [Petitioner] had the Firebird. Early Sunday morning, her sister called and told her what had happened. Her sister told her that she needed to come back to Columbia, find the Firebird, and return the car and the keys to Thomas Arthur's house. Arntz returned immediately. Upon her return, she noticed that the Firebird was not parked at Thomas Arthur's house. Arntz went into her house, and when she came outside later, the Firebird was parked at Thomas Arthur's house. Arntz said that Thomas Arthur was not there and could not have driven the car home.

Arntz said that she and [Petitioner] did not discuss what happened that night until they went on a trip to Michigan. During the drive, they saw a sign they thought was for a rest area, but it was for a weigh station. Arntz was driving, and when they went through the weigh station, [Petitioner] was upset and said, "[W]e're going to jail." Arntz did not have a driver's license and explained that at most, she would get a ticket for driving without a license. [Petitioner] responded, "No, we're going to go to jail because I killed [Chris Heiss]." [Petitioner] told Arntz, "I called Papa John's and had the pizza delivered to my house." [Petitioner] said that the victim "owed $7,000 in cocaine money" to Judge Matthews, a general sessions judge in Maury County who was deceased at the time of trial. [Petitioner] also mentioned Jason Bradburn, Rick Bell, and "Bobby." [Petitioner] said that the judge had

ordered Bradburn "to do the hit," meaning to kill the victim. [Petitioner] said that "[s]he ran [the victim] over . . . . [S]he just said I ran him over six times." [Petitioner] said that she ran over the victim that many times because she "was scared" that he was not dead.

Arntz said [Petitioner] did not mention having trouble driving the victim's car and did not say anything about the Firebird. [Petitioner] did not say who shot the victim, but Arntz knew from [Petitioner] that the victim had been shot twice.

Arntz said that she gave a statement to the police in May 1994. In the statement, she did not mention that [Petitioner] ran over the victim. Arntz explained, "I was scared of her. You know, what did you want me to do."

Arntz acknowledged that she was providing more details at trial than she had in her 1994 statement. She explained, "In 1994, I had my life threatened, not only by them, but I also had a threat with 25 years of my life being sentenced to prison for something I didn't even do." Arntz did not feel safe telling the story in 1994, because some of "the cops" were involved. She felt safer by the time of trial because the general sessions judge was dead and could no longer do anything to her. Arntz said that she had no reason to lie about what [Petitioner] told her. She said that in 1994, she tried to help by giving detectives names of people who may have been involved, but they did not "listen."

On cross-examination, Arntz acknowledged that she had been convicted of aggravated assault. She explained that she and [Petitioner] went to Michigan because Arntz was from Michigan. Arntz said that when Thomas Arthur left, he gave the women the keys to his car. Arntz maintained that when she was not present that [Petitioner] was in charge of the car.

Investigator Tommy Goetz testified that he had worked in law enforcement since 1981. During that time he had worked for the Columbia Police Department, the Mount Pleasant Police Department, and also with the drug task force. On September 2, 2014, after he retired as Mount Pleasant Chief of Police, he began working as a criminal investigator for the district attorney's office, spending "most of [his] time on cold case homicides." The victim's case was designated as a cold case.

Investigator Goetz said that when he started his investigation into the victim's case, he spoke with Detective Sanders, who was investigating the

case for the Columbia Police Department. They began working on the case together. Investigator Goetz looked at the casefile on the victim's homicide. He said that the file "was enormous."

Investigator Goetz said that during his investigation, he interviewed approximately thirty-four witnesses who had been interviewed previously by the Columbia Police Department. One of those witnesses was Shannon Arntz, whom he interviewed in late November or early December 2014. When he told Arntz he wanted to interview her about the victim's murder, she "was welcoming and invited [him] into her home." She told him what she knew about the night of the shooting. Afterward, Investigator Goetz told Detective Sanders about Arntz' statement. Investigator Goetz said that he had heard Arntz' trial testimony and that it was consistent with what she had told him in her interview.

Investigator Goetz said that he knew Jason Bradburn and Ricky Bell from previous investigations with the drug task force. Investigator Goetz knew that Bradburn was "associated" with Bell in narcotics. Investigator Goetz knew Dewayne Bowe's nickname was Troop and "knew of" Bobby Bishop and [Petitioner]. Investigator Goetz knew the name Kerry Brown and also "knew of" [Petitioner] but never had any interactions with her before this case. Investigator Goetz was part of an undercover operation in which the drug task force had purchased a large amount of marijuana from Jason Bradburn.

Investigator Goetz acknowledged that Arntz "may have caught everyone off guard" when she mentioned Judge Matthews. Investigator Goetz said that while was working as a patrol officer and with the drug task force, he heard "rumors about Judge Matthews being involved with drugs" but he had never seen any credible evidence that confirmed the rumor. Investigator Goetz said, "That's almost like an urban myth. You have always heard that, but, you know." Investigator Goetz agreed that the judge "was a respected member of this community and [that he served] Maury County for a long time." The judge was deceased at the time of trial.

Investigator Goetz said that all the telephone calls of inmates in the Maury County jail were monitored except the calls to their attorneys. Investigator Goetz stated that [Petitioner] went to jail at the end of March or the first of April 2016 and that he had listened to her calls from the jail. He said that "[s]he was pretty careful" during her conversations. She never "[d]irectly" confessed her involvement in the victim's death, but a call she

made on April 22, 2016, led Investigator Goetz to believe she "was involved or at least had intimate knowledge" of the victim's death.

The State played the recording of the April 22, 2016 telephone call. Investigator Goetz explained that [Petitioner] had called Cameron Pillow. From other telephone calls, Investigator Goetz surmised that [Petitioner] and Pillow were in a romantic relationship. Eventually, Pillow asked [Petitioner] about the case, and "they start talking about [it] using initials." They referred to someone with the initials J.B., who Investigator Goetz thought was Jason Bradburn. They said that they thought R.B. was in "lockup." Investigator Goetz stated that at the time, Ricky Bell was in prison in Hardin County. [Petitioner] said, "K.B. that's exactly who set me up." Investigator Goetz thought they were referring to Kerry Brown, but he had not seen any indication that Brown "set up" [Petitioner].

On cross-examination, Investigator Goetz acknowledged that the discovery provided to the defense included the names of Bradburn, Bell, Dewayne Bowe, Brown, and Bishop. He further acknowledged that it would not have been unusual for defense counsel to discuss the information in the discovery with [Petitioner] prior to trial. However, Investigator Goetz had heard [Petitioner] complaining during several telephone calls that defense counsel was not providing her with discovery.

On redirect examination, Investigator Goetz reviewed defense counsel's request for discovery. The request was filed on May 9, 2016, after [Petitioner] made the April 22 telephone call mentioning the initials of various individuals involved in the victim's murder.

Julio Cabral testified as the first defense witness. Cabral said that he had worked "off and on" for Papa John's, Domino's Pizza, and Pizza Hut for several years. He said that on the night of April 2, 1994, he was working as a delivery driver at Papa John's with Kennedy and the victim. Cabral did not remember having to enter a code on the computer when taking a telephone order. He agreed that after the order was entered, the computer printed a ticket to reflect the order.

Cabral remembered that the order in question came in near the end of the evening. All of the drivers except the victim and Cabral had gone home, and Kennedy was still in the store. Cabral thought he took the order for the delivery the victim was on at the time of his death. Cabral recalled that he had just returned from a delivery and that he was the only one in the front of

the store when the telephone rang. Cabral said that he spoke with detectives at the time and told them that he answered the telephone, took the order, entered the order into the computer, and made the pizza. While waiting for the pizza to finish baking, he made a pizza for himself. His pizza was ready right after the pizza for delivery was ready. By that time, the victim had returned to the store. Cabral wanted to eat, so he asked the victim to make the delivery, and the victim agreed to go.

Cabral thought the person placing the order was male. The person had no accent, and the voice did not "bear any significant markings of any sort of ethnicity." Cabral did not think the person had ordered a pizza before because he had to enter a telephone number and address into the computer.

Cabral said that after the victim left with the pizza, another order came in, and Cabral had to make the delivery. When Cabral returned to the store, he noticed a "commotion" and learned that something had happened to the victim.

On cross-examination, Cabral said that his first job at a pizza restaurant was at Papa John's. Afterward, he worked at Pizza Hut and Domino's. He estimated that he worked in pizza restaurants for seven to ten years. He could not estimate how many thousands of pizza orders he had taken over the years. Cabral said that he was "pretty sure" he was the one who took the pizza order the victim attempted to deliver. He explained, "I mean, at the time that this happened, when I went to speak with detectives, I was I would say a hundred percent positive that I took the order." Initially, Cabral said, "From what I remember of the procedures in the store, we did not have to enter any code into the machine." He acknowledged that Kennedy was in the store and that Kennedy was answering the telephone and taking more orders than he was. Cabral examined the order for the pizza and acknowledged that it included an operator number that identified Kennedy as the person taking the order. Cabral said that the operator was "[n]ot necessarily" the person who took the order. He explained, "From what I remember of working in the store is that the managers would log into the machines and have them logged and ready for you to just take an order." Nevertheless, Cabral conceded that Kennedy, as a manager, probably had more knowledge about Papa John's computer system than he had.

Jennifer Greer, the defense's investigator, testified that in December 2016, she interviewed Robin Osbourne inside Osbourne's parents' house where Osbourne was living. At the beginning of the interview, Greer

identified herself and explained that she worked for the defense. During the interview, Osbourne said that

> Robert Bishop was a friend of [hers]. And when he would get tipsy, he would tell her that he had something to do with the pizza boy's murder. And each time I asked her how many times he had told this stor[y] and she said multiple times and every time he put himself as the shooter.

Greer said that the interview lasted approximately thirty minutes.

On cross-examination, Greer said that Osbourne did not seem impaired or intoxicated at the time of the interview. Greer acknowledged that she interviewed Osbourne again a few months later while Osbourne was in the Lewis County Jail. During the second interview, Osbourne's story was "quite a bit different," and she maintained that part of her earlier statement was not true. [Petitioner] told Osbourne that she went to her mother's house to get a diaper bag, that Bradburn and Bell arrived at the scene, and that after the shooting, Mr. Bowe told [Petitioner] to drive the victim's car away from the scene.

Id. at *1-17 (footnotes omitted).

During closing argument, trial counsel argued repeatedly that Petitioner "wasn't there" and explained how the testimony from Brown, Crawford, Mr. Bowe, and Ms. Bowe supported Petitioner's alibi. Following deliberations, the jury found Petitioner guilty of first degree premeditated murder and first degree felony murder in the perpetration of a robbery. *Id.* at *17. The trial court merged the convictions and sentenced Petitioner to life. *Id.* This court affirmed Petitioner's judgments of conviction on direct appeal, and the Tennessee Supreme Court denied further review. *Id.* at *20.

Post-Conviction Proceedings

Petitioner subsequently filed a timely *pro se* petition for post-conviction relief. Following the appointment of counsel, Petitioner filed a supplemental petition. As relevant to this appeal, Petitioner averred in the supplemental petition that trial counsel provided ineffective assistance "by agreeing for the trial court to only charge the jury with the charged offenses of first degree murder and first degree felony murder." Petitioner asserted that the lesser-included offenses should have been presented to the jury for consideration and that, had the jury convicted Petitioner of one or more of the lesser-included offenses, Petitioner could have "either waived the affirmative defense of the statute of limitations or

argued that the convicting lesser-included offense be dismissed pursuant to the statute of limitations." Additionally, Petitioner alleged in the supplemental petition that trial counsel provided ineffective assistance by "failing to prepare and prosecute a motion to dismiss related to the violation of Petitioner's right to a speedy trial and/or Petitioner's due process rights under the federal and state constitutions" based upon the approximately twenty-one-year delay in indicting Petitioner and the State's failure to timely submit evidence for DNA testing.

At an evidentiary hearing, trial counsel testified that he was appointed to represent Petitioner in April 2016, after her indictment. Trial counsel acknowledged that there had been over a twenty-year delay between the time of the offense and Petitioner's indictment. He filed a motion for discovery, and he received a "voluminous" set of materials in response. He reviewed and analyzed the discovery materials and talked with Petitioner about "everything that was in there that we were going to use at trial, the different witnesses we were screening through." Trial counsel explained that he investigated the facts of the offense following his discussions with Petitioner about the evidence. He said that he met with Petitioner at the jail many times. He explained that Petitioner was incarcerated in the Maury County Jail from the time of her arrest until trial.

Trial counsel recalled that the State made a plea offer for Petitioner to plead guilty to second degree murder in exchange for a sentence of twenty-five years' incarceration but that Petitioner rejected the offer. Trial counsel testified that he researched the issue of the statute of limitations and had numerous discussions with the prosecutor concerning the subject. He said that he asserted, as an affirmative defense, the statute of limitations as to the charge of especially aggravated robbery, resulting in the dismissal of the charge. Counsel noted that, by the time of Petitioner's indictment, the statute of limitations had run on all of the lesser-included offenses of first degree murder. Regarding his research on the issue, counsel stated:

> My research tells me that once, you know, that once that expired, it couldn't be charged to the jury. There was some case law on that issue. It was not to be charged to the jury because it can't -- they can't find them guilty of a crime that the statute has already run on.

Trial counsel agreed that a knowing, intelligent, and voluntary waiver cannot be presumed from a silent record. When asked if Petitioner made a knowing, intelligent, and voluntary waiver of the statute of limitations affirmative defense, trial counsel responded, "[T]here was never anything for her to waive. You can't waive something that's not there." Counsel stated, "[T]here wasn't an affirmative defense. The statute had run and [Petitioner] wasn't charged with those things."

Trial counsel acknowledged that he did not file a motion to dismiss the indictment based upon a violation of Petitioner's right to a speedy trial and/or her due process rights due to the pre-indictment delay. When asked about the pre-indictment delay in Petitioner's case, trial counsel responded, "I mean, I don't know – it's delay if they know something and don't do anything, which I'm not privy to." Counsel noted that Ms. Arntz's statement to police inculpating Petitioner was made only a year or two before Petitioner's arrest "because . . . [Ms. Arntz] was afraid of the police." Counsel agreed that there was also a delay between the time Detective Sanders obtained the police file in 2014 and when he sent samples off for DNA testing in 2017. The following exchange then occurred:

> Q. And do you recall . . . Detective Sanders' testimony during the trial about degrading of the samples?
>
> A. Yes. There is, usually when we have DNA or blood or any kind of evidence, we talk about . . . how those things degrade over time.
>
> . . . .
>
> Q. In your professional experience and in looking into this case, the sample is degraded –
>
> A. Correct.
>
> Q. -- do you agree with that?
>
> A. I would agree with that sure. I have done a lot of DNA stuff and that's what happens to them.
>
> Q. Whether it be a thumbprint or saliva or some other substance . . .
>
> A. That's correct.
>
> Q. -- turns back into dust, I suppose.
>
> A. That is right.
>
> Q. Okay.
>
> A. All of which was working in our favor.

Trial counsel continued:

> But when you're talking about this DNA stuff and the delays, we were somewhere in agreement with that. I talked to [Petitioner] that she adamantly maintained a position of innocence and not being involved in this. She made it clear that her DNA was not going to be found on any of these items. And it was further enhanced that the degraded samples were probably not going to show hers or anybody's. It wouldn't be able to determine any of it. So it was to our favor that this delay took place and that the samples were really wouldn't -- were inconclusive. I think all of the DNA said they couldn't determine whose it was.
>
> . . .
>
> We didn't like the fact that it was delaying things, but we knew if it came back without her DNA, or the next best thing, degraded to the point where it's without her -- that they -- the State can prove it[']s her DNA. That all works to our favor.

He said that, although the jury heard testimony that a female was a major contributor to the DNA sample found at the scene, he "felt satisfied that a female contributor was far enough away . . . that [it] wasn't anything we had to worry about."

Trial counsel testified that several potential witnesses died prior to Petitioner's trial, including Bobby Bishop and Detective Ray Messick. Counsel recalled that Bishop died three or four years prior to Petitioner's trial; he agreed that, had Bishop been alive at the time of trial, he would have investigated Bishop and cross-examined him "about whether he did or didn't have a role in the murder of [the victim]."

Trial counsel testified that he was awarded funds for investigators, which he hired to assist in Petitioner's case. He agreed that, in December 2016, one of the investigators obtained a recorded statement from Robin Osbourne "inculpating . . . Bishop as the trigger man of this." Counsel stated:

> And [Osbourne] had told us something the first time we met and then when we went to see her again after she made a statement that was provided to me from the State, it was inconsistent.
>
> We went to see her again and she told us something different. Then at trial, she even admitted that she didn't tell myself or my investigator the whole story or she told us something a little bit different than what actually she had said to the State.

So, I mean, she was . . . impeached.

Trial counsel stated that he put forth an alibi defense at Petitioner's trial. He explained that Petitioner "and three other people, Dwayne Bowe, Kerry Brown, and Tiffany Crawford, went to . . . the mall and then to the movie theater. And when it was closed, they went to McDonald's to grab something to eat . . . after the victim would have been murdered." Counsel said that all three witnesses testified consistently at trial and that he thought Petitioner had a "pretty strong" alibi defense. Counsel testified that, in his discussions with Petitioner, she was "adamant [that] there was another black Firebird" involved in the victim's murder. Counsel stated, however, that "the proof just never developed enough to pursue that." He explained:

> There was one witness that commented that there was a broke-down other black car, could have been a Firebird, parked somewhere. All testimony to a black Firebird was the one [Petitioner] was either seen driving or it was Mr. Davis'. And it just never developed into something we could pursue.

On cross-examination, trial counsel stated that he began practicing law in 2003 and that, prior to representing Petitioner, he had tried nine to ten homicide cases. When asked if he saw any indication that "the State had held back or had intentionally delayed indicting [Petitioner] for one reason or another[,]" counsel said:

> I mean, there was lack of proof, there was lack of testimony, there was . . . it seemed like there was lack of evidence for the State to proceed. If I had seen anything that looked like it was an intentional delay, I think I would have explored that.

Trial counsel acknowledged that, in some instances, it could benefit a defendant to not have the jury consider lesser-included offenses. Counsel testified, however, that he did not consider this "all-or-nothing kind of defense" because "in this case . . . it would have been, you know, illegal to charge a jury with something that they cannot consider." He agreed that, to his understanding, a lesser-included offense "had to be a crime for which the person could be convicted[.]" Trial counsel stated that it was his decision not to request that lesser-included offenses be charged. He averred that it would have been legally "inappropriate to charge a jury with those lesser[-]included [offenses,]" and he said that he did not think the trial court would have allowed such a charge "because of the [il]legality of it."

Petitioner testified that she had never seen any of the discovery materials related to her case. She stated:

> All I know is . . . some of the things that [trial counsel] told me was in there and some of the things that my daughter has went through and told me that was in there, because he turned everything over to my daughter when he was no longer my attorney.

Petitioner testified that trial counsel never discussed the issue of whether to request that the jury be charged with lesser-included offenses. Petitioner said that counsel only discussed with her "something about . . . 20 years, if I would give them a name of -- just a name" of the shooter. Petitioner said that she told counsel, "I can't give them a name that I don't know." She said that she was not involved in the offense.

Petitioner testified that she was unaware if counsel filed a motion for a speedy trial or a motion relating to a violation of her right to a speedy trial. She said that, during the twenty-one-year delay between the offense and her indictment, several individuals affiliated with the case had passed away. She stated that a detective involved in the case had died, as well as the alleged gunman, Bishop.

Petitioner explained that she met Robin Osbourne when they were both incarcerated in the Maury County Jail and that Osbourne told her that Bishop, the father of Osbourne's child, shot the victim. Petitioner stated that at least one of the defense investigators hired in her case later interviewed Osbourne. Petitioner averred that counsel did not adequately cross-examine Osbourne at trial about inconsistencies between her trial testimony and her interview with the defense investigator. Petitioner also testified that counsel should have questioned Osbourne more extensively about Osbourne's potentially having a deal with the State in exchange for her testimony, noting that Osbourne was released from jail twenty days after testifying at Petitioner's trial.

Additionally, Petitioner alleged that trial counsel did not thoroughly cross-examine Shannon Arntz about the statements Arntz provided to investigators. Petitioner said that Arntz provided investigators with an initial statement in 1994 or 1995 and a second statement in 2015, after the case was reopened. Petitioner testified that because trial counsel never provided her with discovery, she did not know whether Arntz's second statement to police was consistent with the first statement.

Petitioner testified that investigators took DNA samples from the black Firebird she had been driving the night of the offense. She stated, however, that the samples were not tested until 2017.

On cross-examination, Petitioner acknowledged that trial counsel met with her numerous times to discuss her case. Petitioner agreed that she had known the proof was going to show that the victim was run over by his own car and that his car was then seen

broken down or stopped at a traffic light at an intersection. Petitioner also acknowledged that she had known that the State had two witnesses, Arntz and Osbourne, who were going to testify that Petitioner confessed to them her role in the crime. Petitioner agreed that the two witnesses testified that Petitioner told them that the victim was shot twice, that Petitioner ran the victim over, and that everything they knew about the case came from her.

When asked whether Bishop's death prior to trial prejudiced her, Petitioner responded, "Well, not really. I mean . . . it just, you know, goes to say that, you know, that's -- I mean, that just bears more weight down on me because . . . I'm carrying a charge that I did not have anything to do with."

Following the hearing, the post-conviction court entered a written order denying relief. In addressing Petitioner's claim that counsel was ineffective for failing to ensure that she made a knowing, intelligent, and voluntary decision to assert or waive the statute of limitations for all lesser-included offenses, the post-conviction court noted that trial counsel agreed he did not file a request to charge the lesser-included offenses, which counsel believed were "no longer available to [Petitioner] due to [the] delay in prosecution." The court found that, although the hearing was "replete with 'what ifs' . . . there [was] nothing in the record to show how the trial would have turned out differently if [counsel] had accomplished the 'what ifs' suggested by [Petitioner]."

The post-conviction court also denied relief on Petitioner's claim that trial counsel rendered ineffective assistance based upon counsel's failure to file a motion to dismiss based upon the lengthy pre-indictment delay and the degradation of DNA evidence. The court noted trial counsel's testimony that he did not file a motion to dismiss because "he was not privy to the reason for the delay of prosecution; however, he never had a feeling that delay was intentional on the part of the State." The court further noted that trial counsel testified that the delay in an indictment could "actually benefit a defendant," explaining that, by the time of trial, the DNA evidence had degraded such that the State had no DNA evidence tying Petitioner to the crime. The post-conviction court found that, although Bishop passed away before Petitioner's indictment, Petitioner "was unable to testify how the trial would have turned out differently if she had been indicted sooner, or how it would turn out differently with a new trial with missing witnesses."

This timely appeal follows.

Analysis

On appeal, Petitioner asserts that she was denied the effective assistance of counsel based upon trial counsel's failure to permit Petitioner "to make a knowing, intelligent, and voluntary decision on whether to assert—or not assert—the statute of limitations for all

lesser[-]included offenses of first degree murder and first degree felony murder." Petitioner further asserts that counsel rendered ineffective assistance based upon counsel's failure to file a motion to dismiss, "along with alternative requests for mandatory or permissive jury instructions, related to [a] violation of [Petitioner's] Due Process rights under the federal and state constitutions" based upon the lengthy, pre-indictment delay. The State responds that the post-conviction court properly denied Petitioner relief on her claims of ineffective assistance of counsel.

Standard of Review

In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Post-conviction relief cases often present mixed questions of law and fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Appellate courts are bound by the post-conviction court's factual findings unless the evidence preponderates against such findings. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). When reviewing the post-conviction court's factual findings, this court does not reweigh the evidence or substitute its own inferences for those drawn by the post-conviction court. *Id.*; *Fields*, 40 S.W.3d at 456 (citing *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997)). Additionally, "questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the [post-conviction court]." *Fields*, 40 S.W.3d at 456 (citing *Henley*, 960 S.W.2d at 579); *see 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.

Ineffective Assistance of Counsel

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (stating that the same standard for ineffective assistance of counsel applies in both federal and Tennessee cases). Both factors must be proven for the court to grant post-conviction relief. *Strickland*, 466 U.S. at 687; *Henley*, 960 S.W.2d at 580; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Accordingly, if we determine that either factor is not satisfied, there is no need to consider the other factor. *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007) (citing *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004)). Additionally, review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to

reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see 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 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. Strategic decisions of counsel are given deference but only when such choices are informed ones based upon adequate preparation. *Id.* (citing *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982); *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992)).

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).

Claim 1

Petitioner asserts that trial counsel rendered ineffective assistance by failing to explain to her that she could waive the statute of limitations for the lesser-included offenses of first degree premeditated murder and first degree felony murder and request jury instructions on those lesser-included offenses. The first question we address is whether trial counsel's failure in this regard constitutes deficient performance.

A defendant has a constitutional right to instructions on lesser-included offenses if warranted by the proof. *Moore v. State*, 485 S.W.3d 411, 419 (Tenn. 2016). Tennessee Code Annotated section 40-18-110(a) provides that "[w]hen requested by a party in writing prior to the trial judge's instructions to the jury in a criminal case, the trial judge shall instruct the jury as to the law of each offense specifically identified in the request that is a lesser[-]included offense of the offense charged in the indictment or presentment." In the context of an ineffective assistance of counsel claim, failure to request a lesser-included offense instruction will not constitute deficient performance on the part of trial counsel if

the decision was a matter of strategy. *Moore*, 485 S.W.3d at 419; *Goad*, 938 S.W.2d at 369; *Hellard*, 629 S.W.2d at 9; *Cooper*, 847 S.W.2d at 528.

Generally, the statute of limitations for a criminal prosecution is "waivable, rather than jurisdictional," but such a "waiver [must] be knowingly and voluntarily entered." *State v. Pearson*, 858 S.W.2d 879, 887 (Tenn. 1993). Because the "protection of the defendant is a primary purpose of the statute of limitations," a "defendant who believes that a criminal statute of limitations no longer works to his advantage should be allowed to enter a knowing, voluntary, and intelligent waiver" thereof. *Id.* at 886-87. If there is no evidence in the record to indicate that the defendant was made aware of the issue, waiver of the statute of limitations will not be presumed. *Id.*

At the post-conviction hearing, trial counsel testified that the statute of limitations had run on all of the lesser-included offenses of first degree murder by the time of Petitioner's indictment. Counsel stated that it was his decision not to request that lesser-included offenses be charged, explaining that he believed it would have been legally "inappropriate to charge a jury with those lesser[-]included [offenses]" and that he did not think the trial court would have allowed such a charge "because of the [il]legality of it." Counsel said that he did not consider a "all-or-nothing kind of defense" in Petitioner's case because "it would have been . . . illegal to charge a jury with something that they cannot consider." He agreed that, to his understanding, a lesser-included offense "had to be a crime for which the person could be convicted[.]"

Here, trial counsel's decision to forego requesting instructions on any lesser-included offenses was not an informed choice based upon adequate preparation. *See Goad*, 938 S.W.2d at 369 (stating that "deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation"). Trial counsel never afforded Petitioner the opportunity to make a knowing, intelligent, and voluntary decision on whether to assert—or not assert—the statute of limitations for all lesser-included offenses of first degree premeditated murder and first degree felony murder. Counsel erroneously believed that it would be legally "inappropriate to charge a jury with those lesser[-]included [offenses,]" and he was unaware that the statute of limitations for a criminal charge is not a jurisdictional bar to prosecution. *See Pearson*, 858 S.W.2d at 887. We, therefore, conclude that trial counsel performed deficiently by failing to allow Petitioner to make an informed decision on whether to assert the statute of limitations as a defense or to waive the statute of limitations and request jury instructions on the lesser-included offenses.

Turning to the prejudice prong of *Strickland*, for ineffective assistance of counsel claims arising from the failure to properly request lesser-included offense instructions, the prejudice inquiry assesses whether a reasonable probability exists that a properly instructed

jury would have convicted the petitioner of the lesser-included offense instead of the charged offense. *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008). In *Moore*, our supreme court explained:

> In assessing whether the jury would have convicted a petitioner of a lesser-included offense instead of the charged offense, the analytical framework for the prejudice inquiry at post-conviction mirrors the harmless error inquiry on direct appeal. *See State v. Richmond*, 90 S.W.3d 648, 662 (Tenn. 2002) ("[I]n deciding whether it was harmless beyond a reasonable doubt not to charge a lesser-included offense, the reviewing court must determine whether a reasonable jury would have convicted the defendant of the lesser-included offense instead of the charged offense."). In determining whether a reasonable jury would have convicted the defendant of the lesser-included offense instead of the charged offense, courts should apply either the analysis set forth in *State v. Williams*, 977 S.W.2d 101 (Tenn. 1998), or that adopted in [*State v.*] *Allen*, 69 S.W.3d [181,] 191 [(Tenn. 2002)]. *See State v. Locke*, 90 S.W.3d 663, 675 (Tenn. 2002) (noting that harmless error is not limited to *Williams*-type cases and citing *Allen* as the alternative analysis).
>
> . . .
>
> We clarify that the purpose of the harmless error inquiry is to assess whether the jury would have convicted the defendant of the lesser-included offense instead of the charged offense. This assessment of prejudice is not a separate approach. Rather, the assessment is made by applying either the *Williams* analysis or the *Allen* analysis, depending on the circumstances.

Moore, 485 S.W.3d at 421.

The *Allen* analysis applies in this case because the jury was not given any option to convict Petitioner of a lesser-included offense. *See id.* at 422. Under the *Allen* analysis, in determining whether a reasonable probability exists that a properly instructed jury would have convicted Petitioner of any of her asserted lesser-included offenses instead of the charged offenses, we conduct a thorough examination of the record, including the evidence presented at trial and the theory of defense. *See Allen*, 69 S.W.3d at 191. When examining the evidence presented at trial, the prejudice analysis focuses on: (1) the distinguishing element between the greater and lesser offenses, (2) the strength of the evidence of the distinguishing element, and (3) the existence of contradicting evidence of the distinguishing element. *Moore*, 485 S.W.3d at 422 (citing *Allen*, 69 S.W.3d at 191).

Because the jury was given no option to convict Petitioner on any lesser-included offense, the verdict returned by the jury does not factor into the analysis. *Id.* at 423.

Petitioner asserts that the jury should have been instructed on the following as lesser-included offenses for both first degree premeditated murder and first degree felony murder: second degree murder, voluntary manslaughter, reckless homicide, and criminally negligent homicide. Petitioner also asserts that the jury should have been instructed on facilitation of a felony and conspiracy to commit first degree premeditated murder and first degree felony murder.

At the time the victim was killed, first degree premeditated murder was defined as an "intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202(a)(1) (1993). "Intentional" was defined as the "conscious objective or desire to engage in the conduct or cause the result." Tenn. Code Ann. § 39-11-106(a)(18) (1993). Premeditation, on the other hand, required "the exercise of reflection and judgment." Tenn. Code Ann. § 39-13-201(b)(2) (1993). Finally, deliberation required proof of a "cool purpose" that includes some period of reflection during which the mind is free from passion and excitement. *See* Tenn. Code Ann. § 39-13-201(b)(1) (1993).

As relevant here, first degree felony murder was defined at the time of the offense as the unlawful, "reckless killing of another committed in the perpetration of, or attempt to perpetrate any . . . robbery[.]" Tenn. Code Ann. §§ 39-13-201(a) and -202(a)(2) (1993).[2] A person "acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." Tenn. Code Ann. § 39-11-302(c). "Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401 (1993).

The jury in this case was instructed on criminal responsibility. "A person is criminally responsible as a party to an offense, if the offense is committed by the person's own conduct, by the conduct of another for which the person is criminally responsible, or by both." Tenn. Code Ann. § 39-11-401(a) (1993). As pertinent here, a person is criminally responsible for the conduct of another when, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]" Tenn. Code Ann. § 39-11-402(2) (1993). In order to be convicted of the crime, the

[2] We note that the provision defining felony murder was amended in 1995 to delete the reckless mens rea element. *See* Tenn. Code Ann. § 39-13-202. "No culpable mental state is required for conviction under [the felony murder] subdivision . . . except the intent to commit the enumerated offenses or acts . . . ." Tenn. Code Ann. § 39-13-202.

evidence must establish that the defendant in some way knowingly and voluntarily shared in the criminal intent of the crime and promoted its commission. *See State v. Maxey*, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994); *see also State v. Foster*, 755 S.W.2d 846, 848 (Tenn. Crim. App. 1988).

In order to sustain a conviction for second degree murder in this case, the evidence would have to show that Petitioner knowingly killed the victim. *See* Tenn. Code Ann. § 39-13-210(a)(1) (1993). Tennessee Code Annotated section 39-11-302(b) provides the following with respect to the knowing requirement:

> "Knowing" refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct of that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

"Voluntary manslaughter is the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Tenn. Code Ann. § 39-13-211(a) (1993). "Reckless homicide is a reckless killing of another." Tenn. Code Ann. § 39-13-215(a) (1993). Criminally negligent conduct that results in death constitutes criminally negligent homicide. Tenn. Code Ann. § 39-13-212 (1993). Criminal negligence requires "a substantial and unjustified risk . . . of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint." Tenn. Code Ann. § 39-11-302(d) (1993).

The distinguishing element between first degree premeditated murder and the lesser-included offenses of second degree murder, voluntary manslaughter, reckless homicide, and criminally negligent homicide is that, for first degree premeditated murder, the State had to prove that the killing was "intentional, premeditated and deliberate," and an examination of the record, including the evidence presented at trial, shows that there was overwhelming evidence that the killing of the victim was intentional, premeditated, and deliberate. The evidence established that, at 10:50 p.m. on April 2, 1994, someone placed a phone call to Papa John's and ordered a pizza to be delivered to Petitioner's residence. This call was made to lure the victim to the specific location. Once the victim arrived, he was approached by someone who shot him in the chest and in the right side of the head. The victim was then run over by a car to ensure his death.

At trial, Petitioner did not challenge that the victim's killing was intentional, premeditated, and deliberate but, instead, presented an alibi theory of defense, asserting

that she was not there and had no role in the offense. However, the State presented testimony from several witnesses to establish Petitioner's role in the offense, specifically that she placed the phone call ordering the pizza to be delivered to her residence; that Petitioner was outside her residence in a black Firebird when the victim arrived; that Petitioner ran over the victim with a car after he was shot; that Petitioner attempted to drive the victim's car away from the scene but was unable to operate it; that she then followed the victim's car in the black Firebird as an accomplice drove the victim's car; and that she picked up the accomplice at a church after the victim's car broke down. Thus, there was overwhelming evidence from which a jury could reasonably conclude that, "[a]cting with intent to promote or assist the commission of the offense," Petitioner aided or attempted to aid another person in committing the offense. Tenn. Code Ann. § 39-11-402(2) (1993).

Regarding Petitioner's conviction for first degree felony murder, the distinguishing element between that offense and the asserted lesser-included offenses of second degree murder, voluntary manslaughter, reckless homicide, and criminally negligent homicide is that the State was required to prove the victim's killing was committed "in the perpetration of, or attempt to perpetrate, a robbery." Our examination of the evidence presented at trial shows that there was overwhelming evidence from which the jury could find that the killing of the victim occurred "in the perpetration of, or attempt to perpetrate, a robbery." The evidence established that, at the time of the shooting, the victim "owed $7,000 in cocaine money." The night of the offense, the victim was lured to Petitioner's residence. Once there, two men approached the victim's car, which the victim had recently purchased, and began arguing loudly with the victim. The victim was shot twice and run over by a car. The assailants then took the victim's car, driving it away from the scene and removing the sign that identified it as a Papa John's delivery vehicle. Again, Petitioner presented an alibi theory of defense at trial, asserting that she was not there when the offense occurred and had no role in it; she did not challenge whether the killing was committed "in the perpetration of, or attempt to perpetrate, a robbery" as this element was not relevant to her assertion of her alibi defense.

Petitioner contends that the jury should have been instructed on facilitation of a felony and conspiracy as a lesser-included offenses of first degree premeditated murder and first degree felony murder. We note, however, conspiracy is not a lesser-included offense of first degree premeditated murder or first degree felony murder. *See generally State v. Burns*, 6 S.W.3d 453, 466 (Tenn. 1999); Tenn. Code Ann. §§ 39-12-103, 39-13-202(a)(1)-(2), 40-18-110(f) (2022).

Regarding facilitation of a felony, our criminal statutes state that "a person is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission

of a felony." Tenn. Code Ann. § 39-11-403(a) (1993). In this case, however, the record fully supports Petitioner's principal role in this crime. At trial, the State presented evidence from which the jury could conclude that Petitioner placed the order for a pizza to be delivered to her residence to lure the victim to the location; that Petitioner was at the scene in the black Firebird when the victim arrived; that Petitioner ran over the victim after he was shot; that she attempted to drive the victim's car away from the scene but was unable to because it was a stick shift; and that Petitioner picked up an accomplice at a nearby church after the victim's car broke down. Petitioner presented an alibi defense at trial, arguing that she had no role in the crime, that the State offered no physical evidence to establish her presence in the victim's car, and that the State's key witnesses were not credible.

After a thorough examination of the record, including the evidence presented at trial and Petitioner's theory of defense, we conclude that omitting the lesser-included offense instructions is harmless beyond a reasonable doubt because no reasonable probability exists that a properly instructed jury would have convicted Petitioner of any of her asserted lesser-included offenses, instead of the charged offenses. *See Allen*, 69 S.W.3d at 191. Thus, any deficiency by trial counsel resulting in the absence of these jury instructions cannot be prejudicial. Because Petitioner has not established prejudice under *Strickland*, she is not entitled to relief on her claim of ineffective assistance of counsel.

Claim 2

Petitioner also contends that she was denied the effective assistance of counsel due to trial counsel's failure to file a motion to dismiss, "along with alternative requests for mandatory or permissive jury instructions, related to the violation of [Petitioner's] Due Process rights under the federal and state constitutions" based upon a lengthy, pre-indictment delay. The State responds that Petitioner waived her claim regarding requests for "mandatory or permissive jury instructions" by failing to raise the issue in her petition for post-conviction relief. Regarding Petitioner's claim that trial counsel rendered ineffective assistance based upon his failure to file a motion to dismiss due to pre-indictment delay, the State responds that Petitioner has not shown deficient performance and is, therefore, not entitled to relief.

The State correctly asserts that Petitioner failed to include her claim regarding trial counsel's failure to request "mandatory or permissive jury instructions, related to the violation of [Petitioner's] Due Process rights under the federal and state constitutions" in either her pro se or supplemental petition for post-conviction relief. Generally, issues not raised in the post-conviction petition are subject to waiver. *See, e.g., Foley v. State*, No. M2018-01963-CCA-R3-CD, 2020 WL 957660, at *7 (Tenn. Crim. App. Feb. 27, 2020) (citing *Angel v. State*, No. E2018-01551-CCA-R3-PC, 2019 WL 6954186, at *7 (Tenn.

Crim. App. Dec. 18, 2019)). However, this court may extend appellate review to issues presented for the first time at the post-conviction hearing "if the issue was argued at the post-conviction hearing and decided by the post-conviction court without objection." *Holland v. State*, 610 S.W.3d 450, 458 (Tenn. 2020) (citations omitted). At the evidentiary hearing, no testimony was elicited about counsel's failure to request "mandatory or permissive jury instructions" relating to a violation of Petitioner's due process rights, and the post-conviction court's written order did not address this issue. Accordingly, we conclude that this issue is beyond the permissible scope of our review and that it is waived. *See id.*

We now turn to Petitioner's claim that trial counsel should have filed a motion to dismiss the indictment due to the pre-indictment delay. In *United States v. Marion*, 404 U.S. 307, 324-25 (1971), the United States Supreme Court explained that "[t]he Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay . . . caused substantial prejudice to the [defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." In *State v. Dykes*, 803 S.W.2d 250, 256 (Tenn. Crim. App. 1990), our supreme court adopted the approach in *Marion* and held that, before an accused is entitled to relief based upon the delay between the offense and the initiation of adversarial proceedings, the accused must prove that (a) there was a delay, (b) the accused sustained actual prejudice as a direct and proximate result of the delay, and (c) the State caused the delay in order to gain tactical advantage over or to harass the accused.

Rather than apply the *Marion-Dykes* test, Petitioner suggests that this court apply the analysis conducted by our supreme court in *State v. Gray*, 917 S.W.2d 668 (Tenn. 1996). In *Gray*, the supreme court held that, "[i]n determining whether pre-accusatorial delay violates due process, the trial court must consider the length of the delay, the reason for the delay, and the degree of prejudice, if any, to the accused." *Id.* at 673 (citing *United States v. Lovasco*, 431 U.S. 783, 790 (1977)). Following *Gray*, however, the supreme court reaffirmed the applicability of the *Marion-Dykes* rule and limited the test adopted in *Gray* to cases in which the State had no knowledge that a criminal offense had been committed. *State v. Utley*, 956 S.W.2d 489 (Tenn. 1997). In *Utley*, the court noted that, in "cases involving a pre-arrest delay, the due process inquiry continues to be guided by *Marion*." *Id.* at 495. The *Utley* court held that prejudice "cannot be presumed and instead must be substantiated by the defendant with evidence in the record" and that "the due process inquiry under *Marion* also requires proof regarding the State's use of the delay to gain tactical advantage." *Id.*

In denying relief on this claim, the post-conviction court noted trial counsel's testimony that he did not file a motion to dismiss because there was no indication that the delay was intentional on the part of the State. The court further noted trial counsel's

testimony that the delay in an indictment could "actually benefit a defendant," explaining that, by the time of trial, the DNA evidence had degraded such that the State had no DNA evidence tying Petitioner to the crime. The post-conviction court found that, although Bishop passed away before Petitioner's indictment, Petitioner "was unable to testify how the trial would have turned out differently if she had been indicted sooner, or how it would turn out differently with a new trial with missing witnesses." The record supports the post-conviction court's conclusion that trial counsel's performance was not deficient and that Petitioner was not prejudiced based on counsel's failure to file a motion to dismiss.

Applying the *Marion-Dykes* test to the facts of this case, Petitioner has established that there was a delay of almost twenty-two years between the date of the offense and Petitioner's indictment; however, she has failed to show that the State caused the delay to gain a tactical advantage and that she sustained actual prejudice as a result of the delay. *See Dykes*, 803 S.W.2d at 256.

In her brief, Petitioner asserts that "evidence exists in the record to substantiate that the State waited to indict [her] in order to gain a tactical advantage." Rather than identifying any specific benefit afforded the State, Petitioner observes that Arntz gave an inculpatory statement to the police in 1994 and implies that the State could have charged her at that time. However, as Arntz explained at trial, she omitted critical details from her 1994 statement for fear of retribution. Arntz testified, however, that by the time that she spoke to Investigator Goetz in 2014, more than twenty years had passed, and she no longer feared retribution from those involved in the offense. We reiterate that the due process inquiry under *Marion* "requires proof regarding the State's use of the delay to gain tactical advantage." *Utley*, 956 S.W.2d at 495. Such proof does not exist in this case.

With respect to actual prejudice, Petitioner offers that witnesses' memories faded due to the delay, suggesting that evidence was "lost" as a result. However, Petitioner provides no examples of witnesses testifying to that effect at trial or what evidence may not have been introduced as a result. Petitioner notes that a potential defense witness, Bishop, died before he could testify at trial. Petitioner points to a statement made by Osbourne to the defense investigator incriminating Bishop in the crime. The State's theory of the case, however, was that two men confronted and shot the victim, not Petitioner. Therefore, we agree with the State that "Bishop's hypothetical testimony may have actually strengthened the State's case against [Petitioner], assuming he decided to testify at all." Prejudice "cannot be presumed and instead must be substantiated by [Petitioner] with evidence in the record[.]" *Id.*

Petitioner also cites, as prejudice due to the delay, that analysts were unable to determine the source of the DNA found on a baseball cap in the victim's car and were only able to conclude that a female had been a "major contributor" to the recovered sample.

Petitioner asserts that timely testing of the baseball cap "might have revealed a female 'major contributor' other than [herself]." Of course, as recognized by trial counsel in his testimony, earlier testing may also have shown that the sample belonged to Petitioner, and conclusively established that she was a part of the crime. Trial counsel testified that it worked in Petitioner's "favor that this delay took place and that the [DNA] samples . . . were inconclusive[,]" and at trial, counsel highlighted the State's lack of physical evidence connecting Petitioner to the crime.

Although almost twenty-two years elapsed between the occurrence of the crime and Petitioner's indictment, Petitioner cannot show that the State intentionally delayed in charging her to gain a tactical advantage at trial or that she sustained any actual prejudice because of this delay. Petitioner has failed to establish she was denied the effective assistance of counsel based upon counsel's failure to file a motion to dismiss the indictment due to pre-indictment delay, and she is not entitled to relief on this claim.

Conclusion

Based on the foregoing, we affirm the judgment of the post-conviction court.

ROBERT L. HOLLOWAY, JR., JUDGE