

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

FILED

09/08/2023

Clerk of the
Appellate Courts

RODNEY EARL JONES v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Davidson County
No. 2012-C-2035 Angelita Blackshear Dalton, Judge**

No. M2022-01315-CCA-R3-PC

The petitioner, Rodney Earl Jones, appeals the denial of his petition for post-conviction relief, arguing the post-conviction court erred in finding he received the effective assistance of counsel at trial. Following our review, we affirm the denial of the petition.

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

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

Patrick T. McNally, Nashville, Tennessee (on appeal); Jim Todd, Nashville, Tennessee (at evidentiary hearing), for the appellant, Rodney Earl Jones.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; Glenn Funk, District Attorney General; and Brian Ewald, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

The petitioner was convicted of murder during the perpetration of robbery and especially aggravated robbery, and the trial court imposed consecutive sentences of life imprisonment and twenty years. *State v. Jones*, No. M2015-01373-CCA-R3-CD, 2016 WL 7103967, at *1 (Tenn. Crim. App. Dec. 6, 2016), *perm. app. denied, not for citation* (Tenn. Apr. 12, 2017). This Court affirmed the judgments of the trial court on direct appeal, and the Tennessee Supreme Court denied the petitioner's application for permission to appeal. *Id.* The facts giving rise to the petitioner's convictions were summarized by this Court on direct appeal as follows:

This case arises from the murder of the victim, Victor M. Parham, which occurred on or about March 14, 2012. For this murder, a Davidson County grand jury indicted the [petitioner] and two co-defendants, Alberto Conde-Valentino and Xavier Tull-Morales, for the first degree felony murder and especially aggravated robbery of Victor M. Parham. The [petitioner] filed a motion to sever, which the trial court denied. At the [petitioner]’s trial on these charges, the parties presented the following evidence: Carlos Burroughs testified through an interpreter that he was incarcerated serving a sentence for DUI at the time of the trial. Mr. Burroughs said that he and the victim had been friends since the third grade and that they were like brothers. The two, who had been roommates for several years, spoke by telephone every day and saw each other frequently. Mr. Burroughs stated that he and the victim lived together at a residence on Allen Road (“Allen Road Residence”) in Donelson, Tennessee. Mr. Burroughs eventually moved out, and the victim remained living at the Allen Road Residence.

Mr. Burroughs described the victim, saying that he was good with his family and never had a problem with anyone. Mr. Burroughs knew the victim’s girlfriend, Starnesha Grant, and his brother, Darius Parham. Mr. Burroughs said the victim owned a lawn care service. Mr. Burroughs said that the victim never discussed selling drugs, and Mr. Burroughs was not aware that the victim engaged in this activity.

Mr. Burroughs testified that he called the victim around 12:00 p.m. on his last day of DUI class. The two spoke on the telephone, laughing, and the victim said that he had to go to his house. When Mr. Burroughs got out of his class late that evening, he again tried to call the victim. When the victim did not answer either of his phones, which was unusual, Mr. Burroughs began calling other people to determine the victim’s whereabouts. Mr. Burroughs said that he called the victim’s girlfriend, Ms. Grant, who at first seemed unconcerned. She called him back and inexplicably said that she did not want to go to the Allen Road Residence alone. She came and picked up Mr. Burroughs, and the two of them went to the Allen Road Residence together at around 8:00 or 9:00 p.m. Mr. Burroughs recalled that, when Ms. Grant picked him up, she was driving the victim’s car, which was not unusual.

Mr. Burroughs said that he looked around the victim’s home, finding all the doors locked and the lights off. Ms. Grant’s car, which the victim often drove, was parked in the driveway. Mr. Burroughs said that Ms. Grant seemed “nervous” and repeatedly asked him to break into the home. Mr. Burroughs declined and suggested they contact the victim’s brother, Mr.

Parham, who lived with the victim at the time. Mr. Burroughs said that he assumed that the victim was with a friend, and the idea that he was dead never occurred to him.

Mr. Burroughs said that he returned home, wanting to contact Mr. Parham before entering the residence. He asked Ms. Grant to keep him apprised of any developments. Ms. Grant and Mr. Parham contacted him the next morning, and he went back to the Allen Road Residence, where police were investigating a crime scene. Mr. Burroughs said that he stayed at the residence until police removed the victim's body from the scene.

Mr. Burroughs said that, a few weeks later, he and several of the victim's friends and family were back at the Allen Road Residence cleaning. The victim's cousin found a bullet on the floor, and they called the police. The police asked several questions with regard to the bullet.

During cross-examination, Mr. Burroughs testified that when the bullet was found the group left it on the floor untouched. During further cross-examination, Mr. Burroughs agreed the victim had two phones, explaining that one was a work phone and the other a personal phone.

During redirect examination, Mr. Burroughs testified that, after Ms. Grant dropped him off that evening before [the] victim's body was found, she called him later to ask him whether he thought the victim would mind if Ms. Grant allowed Mr. Parham to sleep at her residence that evening. She wanted to know whether Mr. Burroughs thought that this would make the victim angry. Mr. Burroughs told her that he thought it was fine.

Starnesha Grant testified that she was a twenty-eight[-]year[-]old grievance analyst for CVS pharmacy. At the time of these events, Ms. Grant attended Cumberland University as a nursing student and also cared for her daughter, who was seven at the time. Ms. Grant recalled that she and the victim had dated for three years at the time of his death. Ms. Grant said that the victim owned several vehicles, one was a work truck and the others were personal cars. She said that she often drove the victim's two-door car, and he drove her four-door car because they liked each other's cars better.

Ms. Grant acknowledged that the victim sold drugs. She said that he sold marijuana, prescription pills, and ecstasy. Ms. Grant said that the victim had cash on-hand at all times, sometimes in large amounts. Ms. Grant said that, if the victim carried this money with him, he would place it in different

locations on his person. For example, he would store some of the cash in his shoes and some in his pockets. In this way, the victim attempted to avoid detection as a drug dealer if stopped by police. Ms. Grant said that when the police first questioned her about the victim's drug dealing she did not answer honestly and denied that the victim sold drugs.

Ms. Grant confirmed that Mr. Burroughs and the victim were as close as brothers. She said that the two contacted each other daily. She also recalled meeting the victim's brother, Mr. Parham, after Mr. Parham was released from jail a few months before the victim's murder. Ms. Grant said that Mr. Parham was living in the victim's Allen Road Residence, which was the reason that the victim still rented the residence. The victim had obtained an apartment nearby but kept the Allen Road Residence for Mr. Parham.

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Ms. Grant said that she knew the [petitioner] because the [petitioner] had previously lived with the victim. Ms. Grant recounted that the [petitioner] and the victim lived together before she and the victim began dating, but the victim had introduced her to the [petitioner] on several occasions. Ms. Grant said the victim could not drive because of his multiple DUI convictions, so she sometimes drove the victim places. She said she drove him to the [petitioner]'s house "a couple of times."

Ms. Grant recalled the events surrounding her finding the victim dead. She said that the victim had spent the night with her, and the two awoke together on March 14, 2012. Ms. Grant awoke at 8:00 a.m. because she had to go to work, and the victim returned to sleep in her bed. When she arrived at work, her outfit did not meet the dress code, so she returned home to change. When she arrived home briefly to change, she found the victim still asleep in bed. Ms. Grant said that she went to work and did not speak with the victim all day. After work, but before her night class, she went to the Allen Road Residence. Ms. Grant, who was driving the victim's black car, saw her white car, which he sometimes drove, parked and unlocked at the residence. She found this unusual. She assumed this meant that the victim had just run into his house for a minute and intended to return quickly. Ms. Grant smoked some marijuana and texted the victim to tell him that she was in the driveway. She then placed the remainder of her marijuana in the trunk of the white car.

Ms. Grant said that, when the victim did not text her back, she became concerned. She knocked on the door and looked around the house. After seeing nothing, she decided to leave and go to her class. As she was leaving, she thought she saw something in the window and went again and knocked on the door. Getting no response, Ms. Grant left and went to her class. Ms. Grant said that she and the victim's brother Mr. Parham texted each other during her class, and he asked her whereabouts. She left her class at 8:30 p.m., retrieved her daughter, and then went back to the Allen Road Residence. There, she retrieved the marijuana from the trunk of the white car, finding it strange that there were no lights on in the house and that the white car was still unlocked. Ms. Grant said that, because she had her daughter with her, she did not knock on the doors of the residence because she needed to get her daughter home and in bed.

Ms. Grant recalled that, when she arrived home, she started repeatedly calling the victim. When she did not get an answer, she started calling the local jails, the hospitals, and the victim's friends. Ms. Grant said she asked her neighbors to watch her sleeping daughter, and she asked Mr. Burroughs to go with her to the victim's house. She said that the two checked the house, again finding no answer, and she asked Mr. Burroughs to break a window. He declined, saying that the victim would be upset about the broken window. The two then left the residence.

Ms. Grant testified that she drove Mr. Burroughs back to his residence while continuing to attempt to contact the victim's brother and friends. She spoke with Mr. Parham, who also seemed concerned about the victim's welfare. He informed her that, because the Allen Road Residence was locked, he did not have anywhere to stay the night. He asked to stay at her apartment. Ms. Grant called Mr. Burroughs because the victim had previously expressed concern about Mr. Parham staying at her apartment. Mr. Burroughs agreed that the victim would approve, so she allowed Mr. Parham to stay with her.

The following morning, March 15, 2012, the victim's mother contacted her and asked if she had spoken with the victim, and she informed the victim's mother that she had not. Ms. Grant and Mr. Parham dropped off her daughter at daycare at 6:00 a.m. and went to the victim's house. Mr. Parham "popped a lock" on the door, and the two entered the house. They immediately saw the victim lying on his stomach on the floor. They also saw a knife on the floor, so she thought someone had stabbed the victim. Ms. Grant said that she turned the victim over and attempted to resuscitate him,

believing that she could save him. Mr. Parham called 911. She at some point spoke with the operator and expressed that she was a nursing student and attempting to save the victim.

Ms. Grant recalled that both she and Mr. Parham felt devastated by finding the victim dead. At one point, Mr. Parham, who was crying, punched a hole in one of the walls. When the emergency responders arrived, they asked Ms. Grant and Mr. Parham to wait outside. Ms. Grant recalled crying and being upset. The victim's mother arrived. The police also arrived, and a police officer transported Ms. Grant to the police station where she provided a statement. Ms. Grant said that she consented to the police searching her home and car and to swabbing her hands for gunshot residue. The police took the phones that she had in the black car. On the day of the victim's funeral, Ms. Grant deleted text messages from her personal cell phone that related to drug dealing activities. She said that she did this because she did not want to lose custody of her daughter.

During cross-examination, Ms. Grant testified that she knew that there was a surveillance system at the Allen Road Residence, and she knew how to turn it on and off. She believed that it recorded to a VHS tape. She denied taking the tape out of the surveillance system, saying that she did not go upstairs in the residence that day. Ms. Grant agreed that she knew that drug deals occurred at the Allen Road Residence, but she denied participating in any of those. She said she participated in other drug deals. She said that she "exchanged money for drugs" but denied that she was a "drug dealer." During further cross-examination, Ms. Grant testified that she had no explanation for why her phone and the victim's phone were "pinging from the same address" after she found his body. She agreed that she initially declined to give the police her phone because it was her only method of communication. She said that a police officer saw her delete a text message about selling five Lortabs. The officer then took the phone from her.

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Darius Parham testified that the victim was his older brother. Mr. Parham said that he moved into the Allen Road Residence almost two weeks before the victim died. The two planned to move, so the victim never made Mr. Parham a key for the residence. Mr. Parham recalled that the victim had a surveillance camera, explaining that the victim's room was far from the front door, and the camera enabled him to see who had arrived at the

residence. Mr. Parham recalled that the victim was very close with Mr. Burroughs, saying that the two spoke regularly.

Mr. Parham said that, the day before the victim died, Mr. Parham was away from the residence and, when he returned, he called the victim to let him into the Allen Road Residence. The victim did not answer his phone and did not call him back, which was unusual. Eventually Mr. Parham contacted Ms. Grant, and he spoke with Mr. Burroughs, both of whom had not heard from the victim.

Mr. Parham testified that he did not have anywhere to stay the night before he found the victim's body, so he asked Ms. Grant if he could stay at her residence for the night. She agreed, and he went to her home late that evening. Mr. Parham recalled that Ms. Grant told him that she had called the local jails and the hospital looking for the victim. Mr. Parham slept in the living room.

Mr. Parham said that, when he awoke the next morning, he and Ms. Grant took her daughter to daycare, and then she went to the Allen Road Residence. He said that he used his identification card to open the lock of the door, and he immediately saw a knife on the floor. Thinking the victim had been stabbed, Mr. Parham flipped the victim over. Mr. Parham said that he knew that the victim was dead because he was "too hard" to be alive. Mr. Parham said Ms. Grant tried to resuscitate the victim, but he knew that it was too late. He called 911, and he said he had listened to the 911 recording, upon which he and Ms. Grant sounded upset. Mr. Parham said that because he was so upset over his brother's death, he punched a hole in one of the walls. Mr. Parham said that police officers questioned him, took his fingerprints, and tested his hands for gunshot residue.

Mr. Parham recalled that, a couple of weeks later when he and some other relatives and friends were cleaning the victim's house, he found a bullet on the floor where the victim's body had been lying. He said that they called the police, who responded and took pictures.

During cross-examination, Mr. Parham testified that he was not aware that the victim sold drugs from the residence, believing that this activity was in his past. He said that several people had access to the residence during the time between the victim's death and the time they found the bullet. This included the property owner, his mother, his uncle, and himself. On redirect, Mr. Parham agreed that he "maybe" stated, "some bitch must have done

this.” He explained that he believed that the victim suffered a stab wound and that only a woman would stab someone.

Iris Pinson testified that she did not want and was scared to testify. Ms. Pinson recalled that, at the time of the victim’s death, she lived in a housing project in Davidson County. A man named Xavier Tull-Morales, a co-defendant in this case, resided in a home behind Ms. Pinson’s home in a housing project. She recalled that the two became acquainted and eventually became friends, seeing each other daily. Their relationship was not a romantic one, but she got the impression that he was romantically interested in her. Through co-defendant Tull-Morales, Ms. Pinson met the [petitioner] and co-defendant Conde-Valentino.

Ms. Pinson testified that co-defendants Tull-Morales and Conde-Valentino were frequently together. Co-defendant Conde-Valentino came to co-defendant Tull-Morales’s home every day and sometimes stayed there for days at a time. Co-defendant Conde-Valentino’s residence was in Dodge City, where he lived with his mother. Ms. Pinson said, however, that co-defendant Conde-Valentino came to the neighborhood frequently because his girlfriend also lived in their development.

Ms. Pinson said that the two co-defendants would sometimes come to her home, which she shared with her two children and her fifteen-year-old sister, of whom she had custody. They also engaged in social activities together, but Ms. Pinson never went to co-defendant Tull-Morales’s home because his older sister, Kathy, who lived with him did not like Ms. Pinson. Co-defendants Tull-Morales and Conde-Valentino told her that they were cousins.

Ms. Pinson said that she also met the [petitioner] through co-defendant Tull-Morales because the [petitioner] and co-defendant Tull[-]Morales were friends. Ms. Pinson’s friend, Patri, who was also related to co-defendants Tull-Morales and Conde-Valentino, dated the [petitioner]. When Patri visited Ms. Pinson, the [petitioner] came to see her there on several occasions. Ms. Pinson knew the [petitioner], who spoke fluent Spanish and drove a black SUV.

Ms. Pinson recalled a day in March 2012 when the three men came to her home. The [petitioner] drove there and approached her back porch on foot. The other two co-defendants walked toward her back porch also. At the time, co-defendant Tull-Morales began bragging that he was going to

“rob somebody.” Ms. Pinson did not take this statement seriously because co-defendant Tull-Morales had made similar statements in the past, as had the other men, but never carried through with them. Ms. Pinson said she had seen co-defendant Tull-Morales rob someone in the past, but he used a water gun and did not hurt the victim.

Ms. Pinson said that both co-defendant Conde-Valentino and the [petitioner] were present when co-defendant Tull-Morales made his statement. She also said that co[-]defendant Conde-Valentino made similar statements at the time about robbing someone. The [petitioner] stated that they could get drugs and money from the robbery. Ms. Pinson said that none of the men discussed the intended victim or location of the crime. She did not see a weapon in their possession until the men got into the [petitioner]’s car, at which time she saw the [petitioner] and co-defendant Conde-Valentino each with a weapon. Ms. Pinson said that, while co-defendant Tull-Morales said that he had a weapon, he was unarmed.

Ms. Pinson said that she did not see the three men again until dark that night. The three men came to her home, and she noted that co-defendant Tull-Morales had a lot of blood on his hands and shirt. He changed his shirt at her home. Ms. Pinson also saw that co-defendant Tull-Morales was carrying two baggies that she thought contained drugs; one baggie appeared to contain cocaine and the other appeared to contain pills. He also had “a lot of money” with him. Co-defendant Conde-Valentino also had a similar amount of blood on his shirt and hands as co-defendant Tull-Morales, and he also changed his shirt. Ms. Pinson said that, when the two men were upstairs changing, she saw them use the drugs that they had in their possession. Ms. Pinson said that the [petitioner] did not use the drugs. She also recalled that he only had a small smear of blood on his hand and none on his shirt.

Ms. Pinson testified that, when both co-defendants removed their shirts, they placed them in a grocery plastic bag, which they gave to the [petitioner]. The [petitioner] left her home with the bag.

Ms. Pinson testified that co-defendant Tull-Morales told her what had happened. He said that he had waited in the car for a long time and then went up to the residence, knocked on the door, and said he had to go to the bathroom. The occupant of the home let him enter, he walked past the man, and then he shot him. Ms. Pinson said co[-]defendant Tull-Morales said that “he blew his face off.” He made these statements, she said, in the presence of the other two defendants. Ms. Pinson noted that co-defendant Tull-

Morales seemed “very messed up off drugs” at the time he made these statements. His words were slurred but he did not seem tired.

Ms. Pinson said that co-defendant Conde-Valentino said that he stabbed the robbery victim and had “unloaded” on him. He made this statement in the presence of both co-defendants. Ms. Pinson confirmed that co-defendant Conde-Valentino was “shaky,” “nervous,” and that he kept saying that he was going to go to jail. Co-defendant Conde-Valentino then threw up multiple times. Ms. Pinson said that the two co-defendants began arguing, and the [petitioner] seemed like he did not know what either of them was talking about. Ms. Pinson took from their conversation that the men had already divided up the proceeds of the robbery but that co-defendants Conde-Valentino and Tull-Morales were both upset because they felt their portion was unfair.

Ms. Pinson said that the [petitioner] told her to keep her “mouth shut” about what she had heard in her apartment. Other than that, he “pretended like nothing had happened.”

Ms. Pinson said she asked the men to leave, saying that her kids were asleep. She said she “got them out as fast as [she] could.” She said she did not receive any drugs or money from them. The men also were no longer in possession of the weapons she had seen them with earlier. Ms. Pinson testified that she did not call the police because she was scared that she or her children would be hurt.

Ms. Pinson recalled that, a couple of weeks later, she, her sister, and co-defendant Tull-Morales were watching the news on television. A photograph of the Allen Road Residence surrounded by police tape appeared on the screen during the news story, and Ms. Pinson realized that she recognized the residence and had been there before. The report then showed a photograph of the victim, and Ms. Pinson realized that she knew the victim of the robbery. Ms. Pinson told co-defendant Tull-Morales that she knew the victim, and he apologized to her. Ms. Pinson said that before the news story she did not know where their robbery had occurred or whom they had killed.

Ms. Pinson said that she knew the victim as “Vic” and that she had met him almost two years before because he was friends with her sister’s boyfriend. She had not seen him in the seven months before his death. She said that they had “hung out a couple of times” with her sister and her boyfriend. She said she knew the victim sold drugs, and she had purchased

marijuana from him in the past. Ms. Pinson also had heard that the victim sold “pills,” but the victim did not discuss his business around her.

Ms. Pinson recalled that, after the robbery, co-defendant Tull-Morales repeatedly told her how he had killed the victim. He told her that there were “pieces of his hair and stuff all over the place.” She said that, after the initial night that the men came to her home, co-defendant Conde-Valentino did not speak about the robbery with her. He told her he was scared that he would go to jail, but he did not mention the substance of the crime. After the night of the robbery, she did not interact at all with the [petitioner] as the [petitioner] “disappeared from the projects after it happened.”

Ms. Pinson said that, a couple of weeks after the murder, a number of police officers “raided” her home. She said that she lied to police, telling them that co[-]defendant Tull-Morales was in California even though he was still living behind her. She told them that she did not know anything about the crimes. They left a telephone number for her to contact if she remembered anything relevant.

Ms. Pinson testified that co-defendant Tull-Morales told her that he was going to leave town. He explained that he did not want to go back to prison. He told her that “Patri” and “Louie” were going to drive him to Florida. When she saw co-defendant Tull-Morales leave, it appeared as if the [petitioner] was driving him and that Patri and Louie were in the car. Ms. Pinson said that she was upset to see co-defendant Tull-Morales leave. After he left, she still saw co-defendant Conde-Valentino around the housing project, but she did not see the [petitioner] again. Ms. Pinson said that she later learned that co-defendant Tull-Morales was in Zephyrhills, Florida, when he contacted her via Facebook. The two also spoke by telephone.

Ms. Pinson said that, after co-defendant Tull-Morales left town, she contacted the police. She explained that she had known the victim and felt “horrible” and as if she could not “live with [herself]” if she did not tell the truth. She gave the police the entire story and told them that co-defendant Tull-Morales still contacted her via phone. She attempted to do a “controlled call” in their presence but was unable to reach co-defendant Tull-Morales. The police gave her recording equipment, and she recorded one of their later conversations, during which she was able to elicit statements from co-defendant Tull-Morales about this incident.

Ms. Pinson agreed that it was difficult to understand[] the recording. She said, however, that in response to her question about whether co-defendant Tull-Morales shot the victim, he said that he knocked on the door, said he had to go to the bathroom, walked inside the home, and shot the victim. He also said that he shot the “mother f**ker in the face.” Ms. Pinson agreed that she led co-defendant Tull-Morales on during the conversation, telling him that she loved him and that she wanted him to come back and be with her. She referenced prior conversations about a daughter that the two wished to have in order to induce him to meet her in Knoxville, Tennessee, where the police apprehended him.

During cross-examination by the [petitioner]’s attorney, Ms. Pinson testified that she never sold marijuana or prescription pills to the victim but that she had sold prescription pills in the past. She said, however, that she had a “pill problem” at the time of the robbery, so she was purchasing pills and not selling them. She maintained that she never used any of the pills that the defendants brought to her home after the robbery. She said that she purchased her pills from the victim instead. She said that, from the amount of blood on the defendants, she assumed there would have been blood in the [petitioner]’s car. Ms. Pinson said that she had heard that the victim made a lot of money from selling drugs.

During cross-examination by co-defendant Tull-Morales’s attorney, Ms. Pinson testified that co-defendant Tull-Morales did not have much money at the time of the robbery or after. She said in her phone call to him that she offered to send him money to purchase a phone. Ms. Pinson said that many men in the “projects” brag about doing criminal activity that they do not actually commit. She said “[e]verybody thinks they are a thug or a gangster.” She said the only way she knew whether co-defendant Tull-Morales committed this crime was through his own statements. She agreed that the victim’s face was not “blown off,” so co-defendant Tull-Morales at least lied about that fact. Ms. Pinson said that the defendants bragged about what they had done to multiple people in the projects.

During cross-examination by co-defendant Conde-Valentino’s attorney, Ms. Pinson said that if she omitted telling police about seeing some of the defendants with weapons it was because she was “scared to death” at the time of her interview. She said she told police that the defendants returned with \$10,000. She said that they had “a lot” of money and that they told her it was \$10,000.

The State then presented the testimony of several law enforcement officers from the Metropolitan Nashville Police Department who described the crime and investigation identifying the suspects. Police officers responded to a call about a stabbing at the Allen Road Residence on March 15, 2012, at around 8:00 a.m. When Officer Larry Benz and Officer Daniel Crockett arrived, Mr. Parham waved them toward the residence. Officer Crockett stayed outside with Mr. Parham while Officer Benz went inside where he observed Ms. Grant performing CPR upon the victim's body. Officers described both Ms. Grant and Mr. Parham as "hysterical." Officer Benz asked Ms. Grant to cease CPR, reassuring her that paramedics were on their way. Officer Benz called for assistance and secured the crime scene. Mr. Parham and Ms. Grant provided statements to Officer Crockett at the scene about how they were related to and knew the victim and the story of how they found the victim.

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Officer Lawrence performed Gunshot Residue Tests on both Ms. Grant and Mr. Parham. Officers sent these tests to the TBI for testing, and Special Agent Robert Miles testified that neither revealed the presence of any gunshot residue. Special Agent Robert Miles testified that these results could be because Ms. Grant and Mr. Parham had not fired a weapon or because they washed their hands after firing a weapon.

Officer Lynette Mace photographed the crime scene, and she identified those photographs for the jury. Officer Mace photographed the exterior and interior of the Allen Road Residence, Mr. Parham and Ms. Grant, and the victim's body. Officers agreed that the scene around the victim's body was not a large, bloody crime scene. While photographing Mr. Parham, Officer Lawrence discovered that Mr. Parham had both of the victim's cell phones in his possession. She also photographed a cooler located upstairs in which there was a shoebox containing \$251 and a baggie of an unknown substance she believed to be drugs. Detective Injaychock determined the substance was crushed Ecstasy pills. Officer Lawrence photographed the knife block from which it appeared that a knife was missing. Officers were able to recover some fingerprints from the crime scene. Detective Injaychock said, however, all of the usable fingerprints recovered belonged either to the victim or to Mr. Parham, who was living in the home at the time.

Among other things, from the crime scene, officers collected two firearm magazines, several rounds of ammunition, spent cartridge casings, Hydrocodone, a white shirt, a Samsung cell phone, glass from the table, a mug, some candy wrappers, business cards, keys with a remote, a thumb drive, cigarette butts, and a baggie with the substance.

Officer Tommy Simpkins processed the two vehicles in front of the Allen Road Residence. Officer Simpkins gathered evidence from the black Toyota, which included one pill bottle containing forty blue pills and another bottle containing twenty-four blue speckled pills. From the white Pontiac, Officer Simpkins collected thirty-seven whole pills and thirteen half pills. Officer John Nicholson supervised the other officers gathering evidence, and he assisted in gathering evidence. He looked in trash cans located outside the residence. He found a \$100 American Express gift card and a shell casing on the ground along the grassy part of the driveway. The shell casing was from a 9mm gun and appeared similar but different from the five shell casings found inside the Allen Road Residence.

On March 29, 2012, Officer Charles Linville went to the Allen Road Residence and used a metal detector to search the backyard. He did not find anything of investigative value. On March 31, 2012, Mr. Parham informed police that, when the family moved items out of the home, they saw a projectile. Detective Injaychock went and gathered the projectile, noting that it was located down in some kind of a hard surface close to the front door where they found the victim's body.

Detective Injaychock executed a search warrant at Ms. Grant's home, looking for the victim's phone, a weapon, and to obtain Ms. Grant's DNA. To execute the warrant, he followed Ms. Grant from the victim's funeral to her apartment, where Ms. Grant also provided consent to search the residence. The detective said that he did not find the victim's phone or a weapon but that he did find some live unspent .380 ammunition in the residence. During the search, Detective Injaychock informed Ms. Grant that he suspected her of committing this crime and that he intended to confiscate her phone. She became upset and started manipulating data on her phone, deleting items. The detective said that he forcibly took Ms. Grant's phone. When officers analyzed the phone, nothing on it indicated that she participated in the victim's murder. He, however, did not know what she had deleted from the phone.

Detective Injaychock said that he received a tip about some “male Hispanics” who could have committed these crimes. Based upon this tip, he and other officers went to a local housing project and interviewed Ms. Pinson. The detective found Ms. Pinson uncooperative, and she did not give officers very much information.

Detective Injaychock examined the victim’s phone records and found that the phone that placed a call to the victim’s phone shortly before his death was registered to a woman who lived on Lake Drive. While the detective was following this lead, Ms. Pinson contacted police and gave her version of the events. Armed with this information, Detective Injaychock determined that the woman who lived on Lake Drive and to whom the phone was registered was the [petitioner]’s mother-in-law. Analyzing the phone records, it appeared that this phone contacted the victim’s phone several times a day leading up to his death and then never again after the phone call placed shortly before his death. Detective Injaychock determined that, at the time of the last phone call, the [petitioner]’s phone was “pinging off” a tower that was almost in front of the Allen Road Residence.

Under the direction of Detective Injaychock, Detective Jason Moyer gathered several days of surveillance video from a barbecue restaurant and a denture business both of which were located near the Allen Road Residence. He found nothing of value from the denture business video but, in the video footage from the restaurant, he saw a black SUV, with a stripe similar to the stripe on the [petitioner]’s vehicle, passing the restaurant at 11:56 a.m. and again at 1:39 p.m. Detective Moyer said that the video did not show the license plate of the vehicle or who was operating the vehicle.

Detective Injaychock said that, based upon Ms. Pinson’s statement, the surveillance video, and the [petitioner]’s Facebook posts, he went to the [petitioner]’s address on Winwood Place looking for a black GMC Yukon. Detective Injaychock noted that time data showed that, at the same time that the barbecue restaurant surveillance video showed the black SUV driving past the restaurant, the phone associated with the [petitioner] was using cell towers located near the Allen Road Residence.

On May 20, 2012, Detective Injaychock went to the address associated with the [petitioner]’s wife, Ms. Meklit Melke, on Windwood Place, where he believed that the [petitioner] also resided. He saw an SUV that appeared to match the one in the surveillance video, noting that both vehicles had trim across the door panel. The tires of the vehicle were flat.

Officers towed the [petitioner]'s GMC Yukon, which was registered to Ms. Melke, into custody. They contacted Ms. Melke, who gave consent for the officers to search the vehicle. Officer Linville assisted in processing the vehicle, and he said officers gathered fingerprints from the vehicle and photographed it. They conducted a presumptive blood test, looking for the presence of blood. All the spots tested negative. Officer Linville conducted a presumptive blood test on the knife found at the Allen Road Residence, which tested negative for the presence of blood. Detective Injaychock testified that all of the usable fingerprints found in the Yukon belonged to Ms. Melke, the [petitioner], or their son. He further testified that none of the DNA swabbings taken from the GMC Yukon showed anything of investigative value.

The medical examiner provided the police with the victim's clothing, fingernail clippings, projectiles the medical examiner recovered from the victim's body, and a DNA swab of blood from the victim's wrist. Detective Injaychock sent much of this evidence to the Tennessee Bureau of Investigations ("TBI") for testing. Special Agent Alex Brodhag testified that testing showed that all five of the .380 recovered cartridge cases matched. He noted that the cases found at the scene were of a different brand than those found in Ms. Grant's home. Special Agent Brodhag determined that the five bullets police recovered, four from the victim's body and the one found at his home, had all been fired by the same weapon.

Detective Injaychock testified that, following up on the initial tip that led them to Ms. Pinson, he attempted to contact co-defendant Conde-Valentino at his house in North Nashville. Co-defendant Conde-Valentino spoke to the officers in Spanish. The detective determined that, because of the language barrier, he needed to return later with another officer who could interpret. When he returned, upon questioning, co-defendant Conde-Valentino said that he knew both the [petitioner] and co-defendant Tull-Morale as "acquaintances" but that he did not "hang out" with them frequently. He told officers that he did not know the victim and had never been to the victim's home. At first, co[-]defendant Conde-Valentino denied ever being in the [petitioner]'s vehicle but, upon further questioning, he said he might have been in the SUV.

Detective Injaychock spoke with the [petitioner] about this murder in June 2012. The [petitioner] told him that he and the victim were friends but that they did not "hang out" a lot. The [petitioner] said that the last time that he saw the victim was a few days before his death when they met at a Wal-

Mart. The [petitioner] never definitively said whether he saw the victim on March 14, 2012. The [petitioner] denied any involvement in the victim's murder. The [petitioner] agreed that he knew both the co-defendants from the housing project and said he was "kind of watching out for them." The [petitioner] denied ever taking co-defendant Tull-Morales to Florida.

All three attorneys for the defendants cross-examined Detective Injaychock. As relevant to this appeal, the detective testified that Ms. Grant was at the crime scene when he arrived. He further agreed that the victim was killed with .380 ammunition and that he found that size of ammunition in Ms. Grant's home. Police never recovered the victim's cell phone. This was true despite the fact that the victim's cell phone was still active and pinging off cell phone towers after the police were called to the crime scene. He further noted that Ms. Grant's cell phone and the victim's cell phone appeared to be traveling in tandem after the murder occurred. Detective Injaychock opined that this was perhaps because Ms. Grant had attempted to "clone" their phones through an app.

Detective Injaychock agreed that he had interviewed a witness who said that the victim told her that Ms. Grant was jealous of another woman. According to the witness, the victim recounted that Ms. Grant stabbed him but that he did not call the police.

The detective testified that the Winwood address was located less than a mile from the Allen Road Residence. He agreed that, therefore, the [petitioner]'s cell phone would access similar cell towers when he was going to his own home. Detective Injaychock agreed that co-defendant Tull-Morales surrendered himself. He said that there was no fingerprint, DNA, or blood evidence that connected co-defendant Tull-Morales to the crime.

The detective agreed that Ms. Pinson's account of how much blood there was on the co-defendants after the murder did not comport with what he knew about the crime scene. Additionally, Ms. Pinson's statement that co-defendant Tull-Morales shot the victim in the face did not match the victim's actual injuries.

During the redirect examination of Detective Injaychock, he agreed that a conversation that he listened to between co-defendant Tull-Morales and Ms. Pinson also placed co-defendant Tull-Morales at the crime scene. He further agreed that Ms. Pinson relayed to him only information that she

had received from the defendants and never claimed to have seen the crime occur, which accounted for some of the discrepancies in her story.

Dejyitnu Gabru testified that her daughter, Meklit Melke, dated the [petitioner], and they had two children together. Ms. Gabru signed up for a Sprint family phone plan, and she identified the number associated with the [petitioner]. She said that she purchased this phone for one of her grandsons, the [petitioner]'s son, and that she later learned that the [petitioner] used this phone. Ms. Gabru confirmed that the [petitioner] drove Ms. Melke's GMC Yukon vehicle and that he lived in a house that Ms. Gabru owned on Winwood Place with Ms. Melke and their two sons. During cross-examination, Ms. Gabru testified that she learned from the police that the [petitioner] used the cell phone number she purchased for her grandson. She never saw the [petitioner] use this number.

Antwonie Jobe testified that he was facing federal drug charges at the time of this trial and that he had other prior felony drug-related convictions. Mr. Jobe testified that he hoped to receive a lesser sentence in exchange for his helpful, truthful testimony. The prosecutor of his case, however, had not made him any promises. Mr. Jobe said he did not want to testify against the [petitioner] and that he only decided to do so after he himself faced federal drug-related charges. Mr. Jobe said he had known the [petitioner] for about twenty years. The two grew up in the same neighborhood and were friends. They lost contact while Mr. Jobe was incarcerated but resumed their friendship in 2007 when he was released.

Mr. Jobe testified that the [petitioner] came to his home occasionally and that the two spoke by telephone frequently. Mr. Jobe identified the [petitioner]'s phone number as being the same number Ms. Gabru had purchased for her grandson. Mr. Jobe, whose primary source of income was the distribution of marijuana and cocaine, also knew the victim. He had grown up with the victim, they were acquaintances, and Mr. Jobe knew that the victim sold marijuana and pills. He did not know the victim to sell cocaine. Mr. Jobe said that while he and the victim both sold drugs they were geographically located in different parts of Nashville and their businesses did not overlap.

Mr. Jobe said that, the day before the victim's murder, some time in the morning, the [petitioner] came to his home in a black GMC Yukon that the [petitioner] drove. The [petitioner] came to his home to retrieve some "gas money." Mr. Jobe said that this was not unusual and that there were a

few people, whom he considered friends, that he would occasionally give \$20 for gas. The [petitioner] had with him two men who the [petitioner] referred to as his "Little Gs." Mr. Jobe said that, because he was a drug dealer who had both money and drugs with him, he was concerned about the identity of these men. He was concerned both for his safety and because the [petitioner] had never brought anyone to his home before.

Mr. Jobe said that he walked up toward the SUV to see who was with the [petitioner]. When he looked inside the SUV, he saw co-defendant Tull-Morales and co-defendant Conde-Valentino. Mr. Jobe said, at the time, he realized he had previously seen the [petitioner] with these two men in a housing project in South Nashville on multiple occasions. Mr. Jobe said the two men stayed in the SUV while Mr. Jobe and the [petitioner] went inside the home. Mr. Jobe gave the [petitioner] a marijuana cigarette and \$20, and the [petitioner] told him that he and the two co-defendants were planning to "rob" the victim. This did not surprise Mr. Jobe because the [petitioner] had twice previously mentioned robbing the victim. He asked Mr. Jobe to participate, and Mr. Jobe declined.

Mr. Jobe said that the [petitioner] stated that he had sold pills to the victim in the past, acting as a middleman. The victim then sold the pills to the victim's customers. The [petitioner] told Mr. Jobe that he intended to set up a false deal and get \$2,000 from the victim. Mr. Jobe said that he tried to talk the [petitioner] out of robbing the victim during their twenty to thirty minute conversation. Mr. Jobe said that he gave the [petitioner] extra marijuana and cocaine and told him to go home and "chill." The [petitioner] said that he was going to go home. Mr. Jobe believed that he had diffused the situation.

Mr. Jobe said that the [petitioner] called him later that evening at around 5:00 or 6:00 p.m. The [petitioner], who seemed nervous and scared, told Mr. Jobe that the [petitioner] should have listened to Mr. Jobe because the victim might be dead. Mr. Jobe said that he watched the news and learned that the victim was dead. He drove and picked up the [petitioner], who told him that the robbery had gone all wrong. The [petitioner] produced a small handgun and said he had to get rid of it. Mr. Jobe said the [petitioner] attempted to place the gun in Mr. Jobe's glove box, but Mr. Jobe told him that he could not. Mr. Jobe said that, at the time, they were driving on a bridge over a lake, and the [petitioner] then threw the gun into the lake. During their conversation, the [petitioner] told him that he had been to the victim's house the day before. The [petitioner] asked Mr. Jobe to be his alibi.

He asked Mr. Jobe to say that the [petitioner] was working for Mr. Jobe's lawn care service on the day that the murder occurred. Mr. Jobe declined.

Mr. Jobe testified that, in subsequent conversations in the weeks that followed, the [petitioner] told Mr. Jobe that he was going to kill himself. He said that he was going to meet with two detectives, shoot one of them, forcing the other to shoot the [petitioner]. The [petitioner] said that he believed that co-defendant Tull-Morales had told his girlfriend about the crime, and Mr. Jobe understood the [petitioner] to be saying that he was going to attempt to kill co-defendant Tull-Morales. Mr. Jobe said that he told the [petitioner] not to kill co-defendant Tull-Morales and suggested that he instead take him out of town. A few days later, the [petitioner] called Mr. Jobe and informed him that he had done as Mr. Jobe suggested and taken co-defendant Tull-Morales to Florida.

...

Mr. Jobe testified that when the [petitioner] said he was planning to rob the victim the two co-defendants were not within earshot. He agreed that, the day before this murder, the [petitioner] called him a number of times. On the day of the murder, he and the [petitioner] spoke for the first time at 7:33 a.m. They then spoke again at 7:58 a.m., 8:19 a.m., 8:22 a.m., 8:31 a.m., 8:37 a.m., 8:40 a.m. There was a pause in their phone calls, and they spoke again at 11:08 a.m., and 11:46 a.m., 11:58 a.m., and 12:04 p.m., and 12:59 p.m. on the day of the murder. Mr. Jobe maintained that he did not know the dates of the murder but that he knew that he had seen on the news that the victim was dead before he drove the [petitioner] around and the [petitioner] threw out his weapon.

Andrew Vallee, a detective with the Metropolitan Nashville Police Department, testified that he participated in this investigation. He obtained the cell phone records for the victim, the [petitioner], and Ms. Grant. He also ordered swabs for DNA be taken from the three defendants. The detective testified as an expert in cell phone analysis about the operation of cell phones in general.

Detective Vallee testified that the phone records for the phone belonging to the victim showed Ms. Grant listed in the subscriber information. Further, it showed that the victim called the [petitioner] at 10:04 a.m. and 10:15 a.m. on the day of his murder. The victim's last outgoing call

on the day of his death occurred at 11:42 a.m. The phone records showed that the victim's phone was "no longer responding to the network" after 12:16 p.m. on the day of his death. He explained that this could mean any number of things, including that his cell phone was turned off, destroyed, or in a tunnel.

The detective said that the [petitioner]'s phone listed the subscriber as Ms. Gabru. He noted that the antenna connections on the phone showed that it was located near I-40 and I-24 from 9:35 a.m. to 10:59 a.m. on the day of the murder. At 11:07 a.m., the phone was located next to the airport. The phone records then indicated the phone was in the Hermitage area at 11:44 a.m., and the Donelson area from 11:46 a.m. to 11:50 a.m. From 11:52 a.m. until almost 12:30 p.m. the cell phone used two towers, one 0.71 miles south of the crime scene and one 0.553 miles from the residence. At 12:16 p.m., the time of the final communication with the victim's phone, the [petitioner]'s phone and the victim's phone were pinging off the same tower.

Detective Vallee testified that he analyzed the victim's and Ms. Grant's cell phone records to determine whether they were located in the same area at the time of this crime. The records were consistent with Ms. Grant's testimony that she went to the victim's house looking for him on multiple occasions.

During cross-examination, Detective Vallee testified that while the phone records indicated where the cell phones were at specific times, he had no idea who possessed the cell phones at that same time. The detective agreed that he did not analyze data from the phones of Ms. Pinson or Mr. Jobe. He also could not analyze data from the victim's phone because police officers never found that phone. Detective Vallee agreed that neither co-defendant Tull-Morales nor co-defendant Conde-Valentino owned a cell phone.

Johnny Ray Crumby, Jr., a detective with the Metropolitan Nashville Police Department, testified that he interviewed both the [petitioner] and co-defendant Conde-Valentino. Recordings of these interviews were introduced but were not played for the jury. During the interview, the [petitioner] said that he was using his son's phone at the time of the murder. Detective Crumby also identified a map of the area near the Allen Road Residence. During cross-examination, Detective Crumby agreed that he misled the defendants during his interview with them in an attempt to get them to tell him what had happened.

Thomas Deering, MD, testified as an expert in forensic pathology that he responded to the scene of this murder on March 15, 2012 with a group of investigators. He observed the victim's body, which personnel then brought to the Medical Examiner's Office for examination. Dr. Deering testified that the victim was twenty-eight years old at the time of his death. The doctor performed an autopsy on the victim's body and opined from the state of the victim's body that the victim had been killed the previous day. Dr. Deering testified that he found multiple injuries to the victim's body, including six different gunshot wounds. Four of the bullets that created those wounds were still in the victim's body. The most significant wound was one that entered the victim's left shoulder, traveled through his chest, and hit his right lung. That bullet hit a portion of the victim's aorta causing significant internal bleeding and remained there until removed by the doctor. This wound alone was fatal.

Dr. Deering explained that the amount of blood in the chest cavity explained the lack of blood at the crime scene. He said the blood flows to the area of least resistance and, therefore, after the perforation of the victim's aorta, the blood flowed into his chest cavity rather than outside of his body. He further opined that the wounds occurred in close temporal proximity and from a distance of greater than two feet. The doctor testified that multiple gunshot wounds caused the victim's death and that the manner of death was homicide.

During cross-examination, Dr. Deering agreed he did not find any stab wounds. The doctor agreed that there were six bullet wound tracks but that he only found four bullets. He said that the other two bullets must have been at the scene.

Id. at *1-*15.

The petitioner filed a timely *pro se* petition for post-conviction relief, as well as a *pro se* amended petition and three amended petitions through counsel(s). Relevant to this appeal, the petitioner raised numerous allegations of ineffective assistance of counsel, including claims that trial counsel was ineffective for failing to: (1) make a contemporaneous objection or request a curative instruction to disregard testimony related to the petitioner that violated *Bruton v. United States*, 391 U.S. 123 (1968), or request a mistrial due to the offending testimony; (2) impeach the State's "star" witness, Iris Pinson, with her prior inconsistent statements; (3) investigate the petitioner's alibi; (4) challenge Ms. Pinson's identification of him from a single photograph; and (5) move for a mistrial

following the State's withholding of exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In the lower court, as on appeal, the petitioner also asserted that the cumulative effect of the errors resulted in the violation of his right to effective assistance of counsel.

The post-conviction court conducted an evidentiary hearing at which the petitioner was the first to testify. The petitioner stated that he and trial counsel never discussed filing motions to suppress any of the evidence against him. However, the petitioner recalled that he and counsel had discussions about a *Bruton* issue. According to the petitioner, he asked counsel to file a motion to sever his case from his co-defendants based on *Bruton*. However, counsel did not file a severance motion because counsel was more concerned about getting the petitioner's vehicle back from the police. The petitioner filed a *pro se* motion to sever, and counsel joined in a co-defendant's severance motion and represented the petitioner at a hearing on the motion. The trial court incorporated the petitioner into its decision on the co-defendant's severance motion.

The petitioner complained that counsel did not object or request a curative instruction when Ms. Pinson testified that she could not recall whether it was the petitioner or one of the co-defendants who said they had stabbed the victim, which violated *Bruton*. The petitioner averred that the issue was waived on appeal because of the failure to object but agreed that this Court nevertheless considered the issue. The petitioner conceded that of the three statements by Ms. Pinson that he claimed violated *Bruton*, this Court held that two of the statements did not violate *Bruton* and the third statement was harmless error and of insignificant importance to the petitioner's guilt.

The petitioner stated that he became aware that Ms. Pinson gave a statement to police, but he did not have an opportunity to read a summary of her statement or listen to her statement prior to trial. The petitioner claimed that he and counsel also did not discuss Ms. Pinson's testimony. The petitioner said that counsel attempted to play a recording of Ms. Pinson's statement for him, but counsel's computer malfunctioned. The petitioner acknowledged that all of the attorneys had access to Ms. Pinson's statement and cross-examined and impeached her at trial, and the petitioner was unable to explain how he was prejudiced by his not reading or listening to Ms. Pinson's statement prior to trial.

The petitioner agreed that counsel had a copy of Ms. Pinson's interview with Patrick Wells, the investigator for one of his co-defendants, prior to trial, and counsel provided him with a copy of the interview. The petitioner insisted that Ms. Pinson's statement to Investigator Wells was materially different than her testimony at trial and should have been used to impeach her. However, while he disputed the accuracy of what Ms. Pinson said, the petitioner agreed there were portions of the statement that were not inconsistent with her trial testimony.

The petitioner recalled that Ms. Pinson testified at trial that the police “raided her house” and that she had initially lied to the police. The petitioner claimed that counsel did not make any efforts to obtain potentially exculpatory information regarding Ms. Pinson’s lies to the police.

The petitioner stated that Ms. Pinson referred to him as “Ro,” but he had never gone by that name. The petitioner conceded that he drove a black Yukon XL at the time of the murder, but he asserted the vehicle captured on surveillance footage near the scene was not his because the chrome on the side of his vehicle was missing. He asked counsel to take a photograph of his vehicle, but counsel failed to admit any photographs at trial or have the petitioner’s wife testify about the accident that damaged his vehicle. The petitioner admitted that the timeline of the surveillance video presented by the State coincided with his cell phone communicating with cell towers in the area.

The petitioner recalled that Ms. Pinson testified at trial that the petitioner and two co-defendants were at her apartment before and after the robbery, and they had proceeds from the robbery afterwards, all had blood on them and discussed what had happened. The petitioner disputed that he was present at Ms. Pinson’s apartment and gave a proffer statement to the district attorney explaining where he was on the day of the victim’s murder. The petitioner agreed that counsel was present during the proffer.

The petitioner provided his version of events for the day of the victim’s murder. The petitioner said he got his children ready for school and dropped Meklit Melke, the mother of his children, off at work. He then went to a motel on Murfreesboro Road, where he smoked marijuana with “Patri” and the two co-defendants. The group discussed getting some Xanax, so the petitioner called the victim to see if he had any but they played “phone tag.” When they finally got in touch, the victim said he was at an address near the petitioner’s residence. The petitioner and the co-defendants went to the victim’s location, and the petitioner went inside and smoked marijuana with the victim. The petitioner heard a car door close, and the victim looked outside and instructed someone not to urinate outdoors. Co-defendant Conde-Valentino then came inside to use the bathroom.

While co-defendant Conde-Valentino was in the bathroom, the petitioner answered a phone call from Ms. Melke. Ms. Melke was upset that the petitioner had forgotten to bring lunch to her and accused the petitioner of being with another woman. The petitioner told Ms. Melke that he was at the victim’s house and that co-defendant Conde-Valentino and the victim had begun to fight. Before the petitioner could get involved, he heard gunshots and co-defendant Conde-Valentino said they needed to leave. The victim was laying on the floor and had been shot. The petitioner left with co-defendant Conde-Valentino, and they met co-defendant Tull-Morales in the car. The petitioner drove the

men to a residence within walking distance of Ms. Pinson's residence and left them there. Afterwards, the petitioner visited two cell phone stores and a pawn shop. He then went to the home of Pamela Jones, to whom he is now married, and "broke down crying" telling her what had happened. After talking to Ms. Jones, the petitioner picked up his children from the school bus, picked up Ms. Melke from work, and went to a car dealership to pick up his vehicle. The petitioner admitted that he did not report the incident to law enforcement, explaining he was scared because co-defendant Conde-Valentino had pointed a gun at him.

The petitioner provided all the information concerning his whereabouts to counsel, and he believed he disclosed all of the information in his proffer to the district attorney but could not remember everything he disclosed in his proffer. The petitioner said that counsel did not attempt to substantiate his story and kept saying he was going to file a motion for funds to hire a private investigator but nothing ever came of that. The petitioner stated that he did not testify at trial based on the advice of counsel and his concern with the petitioner's criminal history.

The petitioner agreed that Ms. Pinson testified at trial that the petitioner had driven someone to Florida, but he disputed that had occurred because he did not have a driver's license and would not have left the county. The petitioner said he also gave this information to counsel. The petitioner acknowledged that Antwonie Jobe testified at trial that the petitioner had tried to recruit him to participate in the robbery, called him afterwards in a "panic" saying it had "went bad," and asked him to dispose of the weapon. The petitioner said that Mr. Jobe was not telling the truth in his testimony.

Rebekah Kalchuk, a private investigator hired by the petitioner on post-conviction, testified that she tried multiple times over the course of a year and a half to locate Ms. Pinson but was unsuccessful in her endeavors. Ms. Kalchuk also tried to locate "Patri," the woman the petitioner smoked marijuana with at the motel, but she had passed away. Ms. Kalchuk interviewed Pamela Jones, who the petitioner claimed to have visited after the murder, and Ms. Jones remembered talking to the petitioner but could not verify the specific time of their visit due to the passage of time.

As part of her investigation, Ms. Kalchuk visited all of the locations where the petitioner claimed to have gone on the day of the victim's murder. Each of the businesses no longer had surveillance footage or any records available due to the passage of time. The proprietor of the pawn shop the petitioner claimed to have visited "sort of remembered" the petitioner coming in but could not specifically remember which day that had occurred. Ms. Kalchuk was able to recover records from the car dealership to support the petitioner's claim of picking up his vehicle from the Nissan dealership. Ms. Kalchuk reviewed the cell phone location records and confirmed that the petitioner's rendition of where he was

on the day of the murder coincided with the cell tower locations. However, Ms. Kalchuk acknowledged the cell towers were also close to Ms. Pinson's residence.

The petitioner's trial counsel testified that he was retained to represent the petitioner. He had previously represented the petitioner "several times" and had a good relationship with the petitioner's family. Counsel said his normal practice when taking on a case was to first obtain "skeletal information" from his client and then compare that to what the State provided in discovery. Counsel recalled the petitioner's version of events was essentially "that he helped arrange a purchase of some drugs and things kind of spun out of control." Counsel discussed with the petitioner the evidence the State planned to use at trial, noting "[i]t was a daunting case and I advised him of what I thought . . . we were facing."

Counsel first became aware of Ms. Pinson during the discovery process and agreed that her testimony concerning the petitioner's presence before and after the robbery was "critical" for the State to prove felony murder. Counsel did not have a specific recollection of discussing Ms. Pinson's claims with the petitioner but said they discussed many aspects of the case and "it would be bizarre to think we never brought up that topic." Counsel denied that the petitioner only received a summary of Ms. Pinson's statement to police, elaborating the petitioner "would have been provided with whatever I had." Counsel agreed there was a technical malfunction that prevented the petitioner from listening to the audio recording of Ms. Pinson's statement, but counsel was personally able to listen to it.

Counsel did not recall filing a motion for exculpatory evidence based on Ms. Pinson's testimony that the police had "raided" her house and she lied to them. Counsel said that he had made a standard discovery request, which included a provision for exculpatory evidence, and the request was on-going. Counsel did not recall receiving anything from the State to support the idea that police "raided" Ms. Pinson's home. Instead, counsel remembered that the "detectives questioned [Ms. Pinson] one time[,] she said whatever she said and she referred back later about it, she felt terrible about the situation and produced herself to the police."

Counsel agreed he could have impeached Ms. Pinson with any lies she may have told the police. Counsel said his defense strategy was a "three-legged stool" approach and attacking Ms. Pinson's credibility was an important part of his strategy. Counsel stated his strategy also included attacking Mr. Jobe's credibility and pointing out holes in the State's case. Counsel recalled that Ms. Pinson referred to someone named "Ro" in her statement to police, but counsel did not investigate whether anyone referred to the petitioner as "Ro."

Counsel acknowledged that Ms. Pinson's trial testimony contradicted her statement to police on several points. When asked why he did not impeach Ms. Pinson's trial testimony with various aspects of her statement, counsel said he "remember[ed] cross-

examining her on a variety of issues in trying to point out inconsistencies with her story.” Counsel could not recall all of the specific areas of Ms. Pinson’s testimony that he impeached, but he knew he “impeach[ed] her on a variety of things.” Some of the inconsistencies counsel tried to point out included Ms. Pinson saying the men were covered in blood but no blood was found in the petitioner’s car, Ms. Pinson saying one of the men reported they had stabbed the victim but the victim sustained no stab wounds, and Ms. Pinson saying the men were covered in blood but the medical examiner said the victim’s bleeding was primarily internal. Counsel also cross-examined Ms. Pinson about her purchasing marijuana and prescription pills to impugn her credibility. Counsel recalled that he reiterated inconsistencies in Ms. Pinson’s testimony in his closing argument and pointed out that Ms. Pinson admitted to lying to police.

Counsel testified that he was familiar with the statement Ms. Pinson gave to Investigator Wells, the investigator for one of the co-defendants. Counsel acknowledged that one could draw the conclusion from Ms. Pinson’s statement that the petitioner was not present for the initial meeting and he did not return to her home later the evening of the shooting. However, counsel clarified that he did not read Ms. Pinson’s statement to necessarily deny that all three of the men came to her house afterwards.

Counsel could not specifically recall a detective presenting Ms. Pinson with a single photograph of the petitioner during her interview, but counsel agreed the recording of the interview reflected she was shown a single photograph. Counsel acknowledged that a single photo lineup “would be problematic,” but counsel did not believe that he filed a motion to challenge the identification under *Neil v. Biggers*, 409 U.S. 188 (1972). Counsel agreed that the *Biggers* analysis was two-fold and consisted of the suggestibility and reliability of the identification. In addition, counsel agreed it was not “out of the ordinary” for a witness to be shown a single photo for identification when the witness knew the individual he or she was identifying, and Ms. Pinson knew the petitioner. Counsel did not recall his “thinking about suppression or not suppression,” but he acknowledged that “reliability would have been the next issue and they had prior history with one another[.]”

Counsel stated that the petitioner’s testimony at the evidentiary hearing that his vehicle had sustained damage, and therefore, the vehicle in the surveillance video could not be his came as a surprise to counsel. Counsel also did not recall the petitioner providing locations of where he claimed to be instead of at Ms. Pinson’s house, and the petitioner’s testimony as to those locations at the evidentiary hearing “comes as a surprise . . . today.” However, counsel agreed that he was present when the petitioner gave a proffer to the district attorney, and if the petitioner mentioned potential alibis during the proffer, counsel would have been aware of it. Counsel did not agree with post-conviction counsel’s assessment that proving the petitioner’s alibi would have “severely” damaged Ms. Pinson’s credibility, commenting that instead “it would have been another issue in her credibility.”

Counsel said there was another witness, Mr. Jobe, whose testimony connected the petitioner to the robbery and murder. Mr. Jobe testified that the petitioner asked him to participate in the robbery beforehand and afterwards in the disposal of the murder weapon. Counsel noted that Mr. Jobe's testimony was "problematic" and that it "was a problem for the defense" that Ms. Pinson and Mr. Jobe did not know each other yet provided consistent testimony.

Counsel agreed this Court found that Ms. Pinson's testimony that one of the parties said the victim had been stabbed violated *Bruton* but was harmless error. Counsel did not specifically recall recognizing the statement as a *Bruton* violation during the trial. However, counsel elaborated that one of his tactics was to note inconsistencies with which to discredit Ms. Pinson and that Ms. Pinson's testimony that the victim was stabbed was such an inconsistency. Counsel was able to use the fact that there was no stabbing as impeachment against Ms. Pinson. Counsel recalled that another aspect on which he impeached Ms. Pinson was that she testified the petitioner and two co-defendants showed up at her house covered in blood, but the petitioner's vehicle only had one spot of blood in the back seat and it was not even determined to be human blood.

Following the conclusion of the hearing, the post-conviction court entered a detailed written order denying the petition. The petitioner filed this timely appeal.

Analysis

On appeal, the petitioner argues trial counsel was ineffective for failing to: (1) make a contemporaneous *Bruton* objection, request a curative instruction to disregard offending testimony related to the petitioner, or request a mistrial due to the *Bruton* violation; (2) impeach Ms. Pinson with prior inconsistent statements; (3) investigate the petitioner's alibi; (4) challenge Ms. Pinson's identification of him from a single photograph; and (5) move for a mistrial following the State's *Brady* violation. The petitioner additionally alleges that the above errors cumulatively resulted in the violation of his right to effective assistance of counsel. The State contends the post-conviction court properly denied the petition.

The petitioner bears the burden of proving his post-conviction factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). The findings of fact established at a post-conviction evidentiary hearing are conclusive on appeal unless the evidence preponderates against them. *Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996). This Court will not reweigh or reevaluate evidence of purely factual issues. *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997). However, appellate review of a trial court's application of the law to the facts is *de novo*, with no presumption of correctness. *See Ruff v. State*, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel

presents mixed questions of fact and law. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Thus, this Court reviews the petitioner's post-conviction allegations *de novo*, affording a presumption of correctness only to the post-conviction court's findings of fact. *Id.*; *Burns v. State*, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceedings. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the standard for determining ineffective assistance of counsel applied in federal cases is also applied in Tennessee). The *Strickland* standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687. In order for a post-conviction petitioner to succeed, both prongs of the *Strickland* test must be satisfied. *Id.* Thus, courts are not required to even "address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.*; see also *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (stating that "a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

A petitioner proves a deficiency by showing "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; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the *Strickland* test is satisfied when the petitioner shows there is a reasonable probability, or "a probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. However, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

I. *Bruton* Issue

The petitioner asserts that counsel provided ineffective assistance in failing to object to Ms. Pinson's testimony that violated *Bruton*, request a jury instruction to disregard the problematic testimony, or request a mistrial due to the *Bruton* violation. Initially, the petitioner claims that this Court on direct appeal only reviewed the issue for plain error due to counsel's failure to object. However, we note as a matter of clarity and as pointed out by the State, this Court specifically "decline[d] to treat the . . . issue as waived." *Jones*, 2016 WL 7103967, at *16.

The petitioner and co-defendants Conde-Valentino and Tull-Morales were tried jointly. The petitioner filed a *pro se* motion for severance and also joined in the severance motion of one of his co-defendants. In denying severance, the trial court instructed the State to limit Ms. Pinson's testimony so as not to introduce any out-of-court statements of a co-defendant that implicated another co-defendant. In his petition, as on direct appeal, the petitioner cited to three instances in Ms. Pinson's testimony that he claimed violated *Bruton*. In *Bruton*, the Supreme Court of the United States held that introduction of a statement of a non-testifying co-defendant which expressly incriminates the complaining defendant violates the complaining defendant's constitutional right of confrontation. 391 U.S. at 126; *see* U.S. Const. amend. VI; Tenn. Const. art. 1, § 9.

On appeal, the petitioner confines his argument to the one statement this Court on direct appeal found to violate *Bruton*: Ms. Pinson stated that she could not remember whether co-defendant Conde-Valentino said that he stabbed the victim or if he said the petitioner stabbed the victim. When questioned about this issue at the evidentiary hearing, counsel did not specifically recall recognizing the statement as a *Bruton* violation during the trial. However, counsel elaborated that one of his tactics was to note inconsistencies with which to discredit Ms. Pinson, and Ms. Pinson's testimony that the victim was stabbed was such an inconsistency because the victim was not stabbed.

In ruling on this issue, the post-conviction court accredited counsel's testimony that he intended to impugn Ms. Pinson's testimony by pointing out the victim did not sustain stab wounds. The post-conviction court determined the petitioner failed to show by clear and convincing evidence that counsel performed deficiently in this regard because counsel made a tactical decision not to object to Ms. Pinson's testimony. The petitioner disagrees, asserting counsel's testimony shows that he "missed the issue," not that it was "an informed, strategic decision not to object." The assessment of witness credibility was for the post-conviction court, not this Court, and counsel's testimony is arguably subject to different interpretations.

Regardless, the petitioner has failed to show that he was prejudiced by counsel's failure to object, request a curative instruction, or request a mistrial. As noted by this Court

on direct appeal, the statement at issue “constituted an insignificant portion of the evidence of the [petitioner]’s guilt.” *Jones*, 2016 WL 7103967, at *20. In fact, the statement at issue completely contradicted the medical proof, which showed the victim was not stabbed. Ms. Pinson’s remaining testimony, as well as other evidence, provided proof of the petitioner’s guilt. As summarized by this Court:

[The evidence] showed that the [petitioner] told Mr. Jobe that he intended to rob the victim and that Mr. Jobe attempted to stop him. The [petitioner] then went to Ms. Pinson’s apartment and met his two co-defendants. The three decided to rob the victim, and the [petitioner] and two co-defendants left Ms. Pinson’s home in the [petitioner’s] vehicle with the [petitioner] driving and the [petitioner] and co-defendant Conde-Valentino were armed with guns. The [petitioner]’s phone placed him in the location of the murder at the time of the murder, and the surveillance video of a nearby restaurant showed that a car matching the description of the car driven by the [petitioner] . . . was near the victim’s home at the time of the murder. After the murder, the [petitioner], who had blood smeared on his hands, went to Ms. Pinson’s house where he washed up and told her to “keep [her] mouth shut about what had happened.” The following day, the [petitioner] contacted Mr. Jobe, told him the victim “might be dead” because the robbery “went wrong,” and Mr. Jobe saw the [petitioner] dispose of his weapon. The [petitioner] asked Mr. Jobe to say that the [petitioner] was working for Mr. Jobe at the time of the murder, and Mr. Jobe declined. A few days later, the [petitioner] contacted Mr. Jobe and told him that he might have to kill co-defendant Tull-Morales because he believed that he had said something about the crime. Mr. Jobe encouraged him not to and suggested that he send co-defendant Tull-Morales to another location. Thereafter, Ms. Pinson saw co-defendant Tull-Morales get in to the SUV to leave his home and travel to Florida.

Id.

The petitioner suggests that he was prejudiced by counsel’s failure to request a mistrial because of the State’s comment at the severance motion hearing that the defendants would have a right to mistrial if the State did not properly limit Ms. Pinson’s testimony. However, the State’s comment was not binding on the trial court. The decision of whether to grant a mistrial is within the sound discretion of the trial court. *State v. McKinney*, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). Normally, a mistrial should be declared only in the event that a manifest necessity requires such action. *State v. Millbrooks*, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). “In other words, a mistrial is an appropriate remedy when a trial cannot continue, or a miscarriage of justice would result if it did.” *State v. Land*, 34 S.W.3d 516, 527 (Tenn. Crim. App. 2000). There was no manifest necessity for

a mistrial because, as this Court determined, the *Bruton* error was harmless. *See Jones*, 2016 WL 7103967, at *19-*20.

The petitioner also suggests that he was prejudiced by counsel's failure to request a curative instruction because the jury being instructed to disregard the challenged portion of Ms. Pinson's statement would have caused the jury to discredit Ms. Pinson's testimony establishing the petitioner as an active participant in the crimes. Interestingly, the petitioner did not question counsel about his decision not to request a jury instruction, but we can surmise from the rest of counsel's testimony that such an instruction would have been inconsistent with counsel's strategy to impeach Ms. Pinson's credibility with inconsistencies in her testimony. However, regardless of whether counsel's failure to request a curative instruction was a strategy or not, the petitioner cannot show a reasonable probability that the result of the proceeding would have been different in light of the strength of the proof as discussed *supra*.

II. Impeach Witness

The petitioner asserts that counsel provided ineffective assistance in failing to impeach Iris Pinson with "the numerous inconsistencies between her trial testimony and statements she had previously made to the police and a private investigator." The petitioner submits that Ms. Pinson's testimony "provided linchpin evidence" that the petitioner "actively planned and participated in the robbery and murder, as opposed to simply being present during the commission of the crimes," and counsel's deficient performance "deprived [the jury] of the opportunity to examine Ms. Pinson's lack of credibility."

In support of this allegation, the petitioner points to numerous inconsistencies of which counsel failed to impeach Ms. Pinson, including: (1) Ms. Pinson testified at trial that she could not remember whether co-defendant Conde-Valentino told her that he or the petitioner had stabbed the victim, but in her prior statement to police she stated that co-defendant Conde-Valentino told her that the petitioner committed the stabbing; (2) Ms. Pinson testified at trial that the petitioner discussed the robbery before and after the fact in her presence, but in her statement to police said that she never spoke with the petitioner about it; (3) Ms. Pinson testified at trial that she saw the petitioner and co-defendant Conde-Valentino with firearms, but she did not mention seeing the petitioner with a weapon in her statement; (4) Ms. Pinson testified at trial that the petitioner and the co-defendants were at her apartment beforehand discussing plans to rob the victim and returned afterwards to dispose of evidence, but she told the investigator that co-defendant Tull-Morales was at her apartment on the day in question telling her about the plan and that the petitioner picked up the co-defendants with no mention of the petitioner being part of the robbery planning discussion; (5) Ms. Pinson testified that the petitioner was at her apartment after the crime, but she told the investigator that the co-defendants visited her apartment after the crime

and she did not speak to the petitioner until a couple days later; (6) Ms. Pinson testified at trial that she personally knew the victim, but she told the investigator that she had never met him; and (7) Ms. Pinson testified that the petitioner drove co-defendant Tull-Morales to Florida, but she told the investigator that “Patri” and “Louie” drove co-defendant Tull-Morales to Florida.

At the evidentiary hearing, counsel testified that attacking Ms. Pinson’s credibility was an important part of his trial strategy. Although counsel could not recall every aspect of Ms. Pinson’s testimony that he impeached, he related many of the inconsistencies he tried to point out. In addition, counsel stated that he reiterated inconsistencies in Ms. Pinson’s testimony in his closing argument and pointed out that Ms. Pinson admitted to lying to police.

We have thoroughly reviewed Ms. Pinson’s trial testimony, her statement to police, and her statement to the investigator, and we note that many things said by Ms. Pinson are subject to interpretation and might not actually be as “inconsistent” as alleged by the petitioner. In any event, we need not belabor whether counsel’s failure to impeach on each and every potential inconsistency amounted to deficient performance because the record supports the post-conviction court’s determination that the petitioner was not prejudiced. Counsel’s cross-examination of Ms. Pinson was certainly not as robust as it could have been, but counsel still brought Ms. Pinson’s credibility into question through his questioning. In addition, we are mindful that this was a three-defendant case and Ms. Pinson was subjected to cross-examination by two other attorneys who also took part in impeaching her credibility. Further, in his closing argument, counsel brought out that Ms. Pinson admitted to lying to the police as well as a number of other things to paint her as a liar. And, again, the jury heard two other closing arguments in which Ms. Pinson’s credibility was called into question. In fact, counsel for co-defendant Tull-Morales began his closing argument relative to Ms. Pinson by calling her “a living, breathing, walking, talking contradiction.” Moreover, as we have already addressed, there was other evidence of the petitioner’s guilt aside from Ms. Pinson’s testimony. Namely, the testimony of Mr. Jobe, who was entirely unconnected to Ms. Pinson, and the petitioner’s cell phone records and surveillance footage from businesses close to the victim’s residence connecting the petitioner to pertinent locales. Therefore, even if we presume counsel rendered deficient performance, we conclude the petitioner was not prejudiced by such deficiency.

III. Alibi

The petitioner asserts that counsel provided ineffective assistance in failing to investigate his alibi. Although the petitioner admits that he was present in the victim’s home at the time of the murder, he avers he did not participate in the planning or execution of the robbery turned murder. The petitioner claims he did not visit Ms. Pinson’s home

before or after the incident despite Ms. Pinson's claims and the proof supporting his involvement. The petitioner maintains that he provided "a detailed account of his whereabouts" to counsel that would have disproved Ms. Pinson's claims and contradicted her timeline of events.

Counsel testified at the evidentiary hearing that he did not recall the petitioner providing locations of where he claimed to be instead of at Ms. Pinson's house, and that the petitioner's testimony as to those locations at the evidentiary hearing "comes as a surprise . . . today." Counsel agreed that he was present when the petitioner gave a proffer to the district attorney and if the petitioner mentioned potential alibis during the proffer, counsel would have been aware of it.

The petitioner testified that he provided all the information concerning his whereabouts to counsel, and he believed he disclosed all of the information in his proffer to the district attorney but could not remember everything he disclosed in his proffer. The petitioner presented the testimony of Investigator Rebekah Kalcuk who visited the locations provided by the petitioner and essentially learned that no surveillance footage or records, aside from some documentation from the Nissan dealership, was available due to the passage of time.

In ruling on this issue, the post-conviction court accredited counsel's testimony that the petitioner did not provide him with any alibi evidence and specifically discredited the petitioner's testimony that he had provided details of his locations after the murder to counsel. The post-conviction court specifically stated that it considered the petitioner's:

two-hour long proffered statement to the [d]istrict [a]ttorney where he gave details about the events of the day of the murder, but fails to mention his locations after the murder that would have provided an alibi in order to contradict Ms. Pinson's testimony that he returned to her house after the murder. Having not been told of details of [the petitioner]'s locations after the murder, [counsel] could not have been expected to investigate alleged alibi evidence.

The record supports the post-conviction court's determination. The accredited testimony of counsel shows the petitioner did not give counsel an alibi to investigate and, therefore, counsel cannot be deficient for failing to investigate an alibi of which he was not apprised. *Ward v. State*, No. W2021-01224-CCA-R3-PC, 2022 WL 2721343, at *4 (Tenn. Crim. App. July 14, 2022) (stating that "the post-conviction court explicitly accredited trial counsel's testimony over that of the petitioner, and we are bound by the post-conviction court's weighing of credibility"). We have likewise listened to the petitioner's two-hour proffer statement to the district attorney and agree with the post-conviction court that the

petitioner did not mention the cell phone stores, pawn shop, or Nissan dealership that he supposedly visited after the murder instead of going to Ms. Pinson's residence. Because the petitioner has failed to show counsel rendered deficient performance, we conclude the petitioner did not receive ineffective assistance of counsel as to this claim.

Moreover, although we need not address prejudice because the petitioner has failed to prove deficiency, we briefly note that Ms. Pinson testified that the men did not return to her apartment until dark, which on March 14, 2012, would have been close to 7:00 p.m. Therefore, the petitioner's presence at any of the locations he provided at the evidentiary hearing did not necessarily prevent him from being back at Ms. Pinson's apartment at dark.

IV. Photographic Identification

The petitioner asserts that counsel provided ineffective assistance in failing to seek suppression of Ms. Pinson's identification of him from a single photograph. He asserts that counsel's decision to not challenge Ms. Pinson's identification was not a strategic decision, and the inherently suggestive nature of the identification caused him prejudice.

In order to establish a successful claim of ineffective assistance of counsel based on counsel's failure to file a motion to suppress evidence, a petitioner "must prove: (1) a suppression motion would have been meritorious; (2) counsel's failure to file such motion was objectively unreasonable; and (3) but for counsel's objectively unreasonable omission, there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Phillips v. State*, 647 S.W.3d 389, 404 (Tenn. 2022). The petitioner continues to bear the burden of proving the factual allegations supporting his or her claims by clear and convincing evidence. *Id.* (citing Tenn. Code Ann. § 40-30-110(f)). In order to prevail, the petitioner should "[i]n essence . . . incorporate a motion to suppress within the proof presented at the post-conviction hearing." *Cecil v. State*, No. M2009-00671-CCA-R3-PC, 2011 WL 4012436, at *8 (Tenn. Crim. App. Sept. 12, 2011).

In *Neil v. Biggers*, 409 U.S. 188 (1972), the United States Supreme Court set forth the test for determining whether the pretrial identification of a defendant is admissible as evidence at trial. First, this two-part analysis requires the trial court to determine whether the identification procedure was unduly suggestive. *Biggers*, 409 U.S. at 198. The identification cannot be "conducted in such an impermissibly suggestive manner to create a substantial likelihood of irreparable misidentification." *State v. Cribbs*, 967 S.W.2d 773, 794 (Tenn. 1998). This Court has stated that a single photograph lineup is inherently suggestive. *See State v. Hill*, No. E2020-00721-CCA-R3-CD, 2021 WL 1742291, at *7 (Tenn. Crim. App. May 3, 2021); *State v. Tate*, No. E2012-02576-CCA-R3-CD, 2013 WL 5436533, at *5 (Tenn. Crim. App. Sept. 27, 2013).

If the court finds the identification procedure was unduly suggestive, then the second question is whether the identification was reliable despite this undue suggestion. *Biggers*, 409 U.S. at 198-99. The factors to be considered in evaluating the reliability of an identification include: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Id.* at 199-200.

At the evidentiary hearing, counsel acknowledged that a single photo lineup "would be problematic," and counsel did not recall filing a motion to challenge the identification under *Biggers*. However, counsel agreed that the *Biggers* analysis was two-fold, consisting of the suggestibility and reliability of the identification, and that it was not "out of the ordinary" for a witness to be shown a single photo when the witness knew the individual he or she was identifying. Counsel was aware that Ms. Pinson and the petitioner knew each other, and Ms. Pinson did not misidentify the petitioner. When asked if he thought there was any merit to filing a motion to suppress given the reliability prong, counsel said that he could not recall his "thinking about suppression or not suppression" but "reliability would have been the next issue and they had prior history with one another[.]"

We initially observe that the petitioner did not incorporate a motion to suppress within the proof at the post-conviction hearing. The petitioner did introduce a recording of Ms. Pinson's statement to the police during which she identified a photograph of the petitioner. However, the petitioner did not present the testimony of the officer who administered the lineup or any evidence concerning the totality of the circumstances of Ms. Pinson's identification. In addition, the petitioner only asked counsel a handful of questions regarding the suppression issue at the evidentiary hearing. *Hall v. State*, No. W2022-00642-CCA-R3-PC, 2023 WL 3815065, at *3 (Tenn. Crim. App. June 5, 2023) (noting the petitioner failed to incorporate a motion to suppress within the proof at the post-conviction hearing, which prevents him from showing that a suppression motion would have been meritorious); *Gutierrez v. State*, No. M2021-00298-CCA-R3-PC, 2022 WL 2294897, at *8 (Tenn. Crim. App. June 27, 2022) (noting the petitioner failed to show by clear and convincing evidence that a suppression motion would have been meritorious where the petitioner failed to incorporate a hearing on the motion to suppress into the post-conviction evidentiary hearing).

In ruling on this issue, the post-conviction court accredited counsel's testimony and determined counsel made a strategic decision to not challenge the identification based on counsel's belief that he did not have a legal basis to challenge it due to the parties' familiarity with one another. The petitioner contends that counsel's testimony actually

shows counsel just never considered the issue and not that there was a strategic determination not to challenge the identification.

Regardless of the conflicting interpretations of counsel's testimony, the petitioner has failed to show that a motion to suppress Ms. Pinson's identification of him would have been meritorious. Again, an identification can still be reliable based on the totality of the circumstances even if the identification procedure was suggestive. Ms. Pinson testified that she met the petitioner through co-defendant Tull-Morales, and her friend, Patri, dated the petitioner. Ms. Pinson said that on several occasions the petitioner was with Patri when Patri visited Ms. Pinson. Ms. Pinson's previous interactions and familiarity with the petitioner weigh in favor of the reliability of her identification. *See State v. Clark*, No. E2021-00558-CCA-R3-CD, Slip Op. at *8 (Tenn. Crim. App. Sept. 28, 2022) (noting substantial likelihood of misidentification did not exist where witness knew the defendant);¹ *State v. Bobo*, No. W2021-00650-CCA-R3-CD, 2022 WL 808040, at *17 (Tenn. Crim. App. Mar. 17, 2022) (noting as factors in favor of reliability of identification that the witnesses were familiar with the defendant and interacted with him just prior to the incident); *State v. Terry*, 2001 WL 204185, at *4 (Tenn. Crim. App. Feb. 23, 2001) (determining identification of defendant reliable where, among other things, the victims knew the defendant prior to the incident), *perm. app. denied* (Tenn. July 16, 2001). In addition, the evidence before us indicates that Ms. Pinson had a good opportunity to view the petitioner and high degree of attention. When shown a photograph of the petitioner, Ms. Pinson was certain of her identification. Because Ms. Pinson's identification of the petitioner was reliable, the petitioner has failed to show that a motion to suppress would have been meritorious had one been filed. Therefore, the petitioner is not entitled to relief on this claim.

V. *Brady* Violation

The petitioner asserts that counsel provided ineffective assistance in failing to move for a mistrial following the State's *Brady* violation. The petitioner points to Ms. Pinson's testimony at trial that the police had "raided" her home two weeks after the murder and that she had lied to the police about her knowledge of the crimes. He complains that counsel "did not move to compel the State to provide Ms. Pinson's statement from the raid, nor did he request a mistrial due to the State's withholding of exculpatory impeachment evidence."

¹ A portion of this opinion was published and can be found at 667 S.W.3d 273 (Tenn. Crim. App. 2022). However, we are citing to a portion of the opinion that was not published and are therefore utilizing the slip opinion citation format.

In order to establish a violation based on the withholding of favorable evidence, the defendant must demonstrate that: (1) the defendant requested the information or that it was obviously exculpatory; (2) the State suppressed evidence in its possession; (3) the information was favorable to the accused; and (4) the information was material. *State v. Jackson*, 444 S.W.3d 554, 594 (Tenn. 2014). Evidence is material if there is a reasonable probability the result of the proceeding would have been different had the evidence been disclosed. *State v. Cureton*, 38 S.W.3d 64, 77 (Tenn. Crim. App. 2000).

At the evidentiary hearing, counsel testified the he made a standard discovery request, which included a provision for exculpatory evidence, and the request was on-going. Counsel did not recall filing a motion for exculpatory evidence based on Ms. Pinson's testimony that the police had "raided" her house and that she had lied to the police. However, counsel did not recall receiving anything from the State to support the idea that police "raided" Ms. Pinson's home. Instead, counsel remembered that the "detectives questioned [Ms. Pinson] one time[,] she said whatever she said and she referred back later about it, she felt terrible about the situation and produced herself to the police."

In our opinion on direct appeal, this Court summarized Ms. Pinson's testimony at issue as follows:

Ms. Pinson said that, a couple of weeks after the murder, a number of police officers "raided" her home. She said that she lied to police, telling them that co[-]defendant Tull-Morales was in California even though he was still living behind her. She told them that she did not know anything about the crimes. They left a telephone number for her to contact if she remembered anything relevant.

Jones, 2016 WL 7103967, at *7.

Later, this Court summarized that:

Detective Injaychock said that he received a tip about some "male Hispanicis" who could have committed these crimes. Based upon this tip, he and other officers went to a local housing project and interviewed Ms. Pinson. The detective found Ms. Pinson uncooperative, and she did not give officers very much information.

Id. at *10.

The police supplement report, submitted as an exhibit on post-conviction, reflects that officers spoke to Ms. Pinson on May 17, 2012, and Ms. Pinson gave a statement

regarding the events of March 14, 2012. The last sentences of the investigative notes relative to Ms. Pinson state, “She acted afraid and skirted around the questions and gave little information about the case and about the suspects. We left the residence and proceeded to follow up on the information.” Also, from our review of Ms. Pinson’s testimony, we observe that Ms. Pinson testified that the police only came to her apartment one time, specifically the time they “raided” it. Her other interactions with the police occurred at the police station.

In ruling on this issue, the post-conviction court found that there was no evidence presented that “Detective Injaychock’s recollection of police interaction with Ms. Pinson on this issue was called into question or that the reports from this interaction were not provided in discovery.” The court noted that although Detective Injaychock did not use the word “raid” or specifically say that Ms. Pinson lied, “it is evident from his trial testimony and the police supplement report that police went to her home in response to a tip and that Detective Injaychock concluded that she was uncooperative.” The court determined that the petitioner “failed to present evidence that distinguishes a separate occasion, aside from the occasion described by Detective Injaychock, in which Ms. Pinson’s apartment was in fact raided and that the police concluded that she lied.”

Because there is no actual proof of a separate occasion in which Ms. Pinson’s home was “raided” and she “lied” to the police, the petitioner has failed to prove that the State suppressed exculpatory evidence. Therefore, the petitioner has also failed to prove that counsel rendered deficient performance in failing to move for a mistrial based on an alleged *Brady* violation.

VI. Cumulative Error

Finally, the petitioner contends the cumulative effect of the errors alleged above entitle him to a new trial. The cumulative error doctrine applies when multiple errors were committed during trial, each of which alone would have constituted harmless error, but in the aggregate have a cumulative effect on the proceedings so great the defendant’s right to a fair trial can only be preserved through reversal. *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). Circumstances warranting reversal of a conviction under the cumulative error doctrine “remain rare.” *Id.* From our review, we observe a couple of areas where counsel arguably could have provided more robust representation, but the petitioner has not shown that counsel’s performance was deficient in multiple aspects. After consideration of the entire record, we conclude the petitioner was not denied of a meaningful defense or that the reliability of the verdict is in question. *See State v. Zimmerman*, 823 S.W.2d 220, 228 (Tenn. Crim. App. 1991). The petitioner is not entitled to relief under the cumulative error doctrine.

Conclusion

Based upon the foregoing authorities and reasoning, the judgment of the post-conviction court is affirmed.

J. ROSS DYER, JUDGE