IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 29, 2023

MICAH JOSHUA FORD, ALIAS JOSEPH TOLBERT III v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 114111 Kyle A. Hixson, Judge

No. E2022-01240-CCA-R3-PC

Petitioner, Micah Joshua Ford, alias Joseph Tolbert, III, appeals the denial of his post-conviction petition, arguing that the post-conviction court erred in finding that he received the effective assistance of counsel at trial and on direct appeal. He also argues that he is entitled to a new trial under the doctrine of cumulative error. Following our review of the entire record and the briefs of the parties, we affirm the judgment of the post-conviction court.

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

JILL BARTEE AYERS, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., AND JAMES CURWOOD WITT, JR., J., joined.

Gerald L. Gulley, Jr, Knoxville, Tennessee, for the appellant, Micah Joshua Ford, alias Joseph Tolbert, III.

Jonathan Skrmetti, Attorney General and Reporter; Mary Elizabeth King, Assistant Attorney General; Charme P. Allen, District Attorney General; and Rachel Lambert, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

On December 28, 2009, Petitioner broke into the home of Michael Cowan and Brittany Davis. Petitioner shot and stabbed Mr. Cowan and stabbed Ms. Davis and stole a considerable amount of cash. Ms. Davis survived but Mr. Cowan died of his wounds. An

autopsy revealed that Mr. Cowan suffered gunshot wounds to the head, face, chest, and left arm, and a stab wound to the neck. The gunshot wounds were inflicted by the same caliber bullet and fired from an undetermined distance. The stab wound punctured the jugular vein. Mr. Cowan's death was ruled a homicide. *State v. Tolbert*, 507 S.W.3d 197, 210 (Tenn. Crim. App. 2016).

At trial, the audio recording of the 9-1-1 call made by Ms. Davis was played for the jury. During the call, Ms. Davis told the operator that she and Mr. Cowan had been robbed, that she had been stabbed "everywhere," and that her boyfriend had been shot. *Id.* at 202. She could not identify the person or persons who attacked her and Mr. Cowan. *Id.*

Ms. Davis testified that on December 27, she arrived home from work at 10:00 p.m., left to go purchase a pack of cigarettes, returned home around 11:00 p.m., and fell asleep on the couch next to Mr. Cowan, who was playing a video game. *Id.* Ms. Davis awoke to a "loud bang" and saw "[l]arge grades of light, just sparks, like fireworks but no sound" coming from the path to her front door. *Id.* Mr. Cowan was in front of her and was shot. He fell and did not move after he fell. *Id.*

Ms. Davis attempted to hide under a table but was pulled up by her hair with a pistol in her mouth. *Id.* She said a man wearing a mask was holding the pistol and that he pulled the trigger but it did not fire. *Id.* The man held her hair and dragged her around the apartment and into the kitchen where he stabbed her with a kitchen knife. *Id.* At one point, Ms. Davis grabbed the man's face mask and pulled it away from his face. *Id.* at 203. The closet light was on and she recognized Petitioner. *Id.* She knew Petitioner as "Keith." *Id.* Ms. Davis found two "bricks" of money in her nightstand and threw them on the bed. Petitioner took the money, threw her across the bed and into the bathroom, and ran away. Ms. Davis then called 9-1-1 and locked the front door. *Id.*

Ms. Davis was placed in a medically induced coma for three days, and after coming out of the coma, she gave a statement to Knoxville Police Department ("KPD") Officer Nevin Long on December 31. *Id.* She gave Officer Long Petitioner's brother's name as the perpetrator because she could not remember Petitioner's name. *Id.* She identified Petitioner in a photograph lineup. Ms. Davis knew Petitioner because he frequently ate at the restaurant where she worked. *Id.* She also knew he drove a 2005 black Dodge Durango because he came through the drive-through window. *Id.* at 203. Ms. Davis said that she did not tell the 9-1-1 operator that Petitioner committed the crime because she was holding her fiancé and watching him die. *Id.* at 204. She also testified that when she spoke to Officer Long, she was "[v]ery disoriented, giving facts and . . . rambling at the same time." *Id.* She had been on a ventilator and in a coma for three days, was taking pain medication, and was connected to a morphine drip. *Id.* at 205. She stated that when she awoke, she had no recollection of speaking with Officer Long but that family members told her she

had spoken with him. *Id.* She said that when she first spoke to Officer Long, she provided information to her best recollection at the time. *Id.*

Ms. Davis testified that Petitioner had visited her apartment on December 24, and she believed that during the visit, he took a set of keys from the bar separating the kitchen and living room. *Id.* A set of keys went missing in the days preceding the incident, and after the incident, the keys were found on the bar in plain sight. *Id.* She stated that after her release from the hospital a week after the incident, her mother gave her purse, which contained the keys. *Id.* She told Officer Long the keys had been missing after she found them but did not remember when she told him. *Id.*

KPD Officer Eddie Johnson arrived at the victims' apartment at 4:23 a.m., and processed the crime scene once the apartment was secured. *Id.* at 206. He testified about all the evidence that was photographed and collected at the scene before and after a warrant was obtained. *Id.* He collected fingerprints and DNA swabs from the kitchen cabinets, the living room wall, and a light switch inside the master bedroom closet. *Id.* Among the many items collected at the scene was a roll of Christmas wrapping paper with a bullet hole. *Id.* at 207. Officer Johnson identified a photograph showing a bullet fragment, which had traveled through a roll of Christmas wrapping paper on the living room floor, and more bullet fragments underneath the corresponding section of carpet. *Id.* Officer Johnson stated that he could not determine the location of a shooter based on the location of the bullet fragments. *Id.* He said that the couch was not damaged and that it appeared the bullet, the fragment of which went through the wrapping paper, was fired straight down. *Id.* at 207.

Tennessee Bureau of Investigation Special Agent Jennifer Millsaps, an expert in serology and DNA science, analyzed the DNA and blood evidence in the case and testified that much of the blood samples taken from around the apartment matched Ms. Davis's DNA and that the DNA sample taken from the bloody knife matched Mr. Cowan's DNA. *Id.* at 207. However, she testified that blood sample from below the kitchen drawer matched Petitioner's DNA. *Id.*

Robert Hankins worked at a muffler and brake shop where Petitioner had previously brought in a 2005 Dodge Durango which was not "roadworthy." *Id.* at 208. On December 28, 2009, Petitioner paid cash for repairs totaling $475.24. *Id.*

Brady Newsome worked for a car repossession company, and on December 28, 2009, he repossessed Petitioner's 2005 Dodge Durango. *Id.* Three or four hours after he repossessed the vehicle, the finance company called and told Mr. Newsome to return the Durango to its owner because the loan had been repaid. *Id.* He identified an invoice for $675 addressed to the finance company for the repossession. *Id.*

Barry Smith worked at a finance company and Petitioner was one of his customers. *Id.* at 209. Mr. Smith identified a receipt from December 28, 2009, where Petitioner paid $1420 cash to redeem his Durango. *Id.* Mr. Smith said Petitioner was always past due in his payments and that the last payment had been made in August or September 2009. *Id.*

KPD Officer Nevin Long testified that he visited the hospital multiple times to speak with Ms. Davis but she was in a medically induced coma until December 31. *Id.* When he spoke with her, she was in a critical care unit, had been awake a short while, and was "hooked up to several medical devices." *Id.* Ms. Davis described the attacker and identified him "Keith," who she knew as the brother of Juan, a person she knew from the apartment complex where she previously lived. *Id.* She also told Officer Long that Juan had been arrested recently on drug-related charges. *Id.* Based on the information he received from Ms. Davis, Officer Long tracked down Petitioner's true identity and his whereabouts. *Id.* Petitioner was arrested in Georgia where he was interviewed by Officer Long. *Id.* During the interview, Petitioner said he was acquainted with Mr. Cowan because he had tried to sell Mr. Cowan an item, and that Petitioner was "very desperate for money" to repair his Durango. *Id.* According to Petitioner, he and Mr. Cowan never met in person in connection with the sale. *Id.* Petitioner denied involvement in Mr. Cowan's death. *Id.*

Petitioner testified in his own defense and admitted that he used several alias names, including "Keith." *Id.* at 210. He also acknowledged that he knew the victims, having met Mr. Cowan when Petitioner moved to Knoxville in 2005. *Id.* He and Mr. Cowan were friendly acquaintances but not friends and had never had a conflict. *Id.* Petitioner had been to Mr. Cowan's apartment a few times, including one visit around Christmas 2009. *Id.* at 211. He said that visit lasted for five or ten minutes. *Id.* He did not know if he had a cut on his hand when he visited and said he may have cut his hand with a razor blade when slicing a brick of marijuana. *Id.* Petitioner stated that he injured his hand on a skateboard but could not say whether that injury was the source of the DNA found in the victims' apartment. *Id.* Petitioner denied being at the victims' apartment and denied killing Mr. Cowan and stabbing Ms. Davis. *Id.* at 212.

Petitioner acknowledged telling Officer Long that he was broke, that he needed to sell a television, and that he was "blowing up Mr. Cowan's phone" in an attempt to arrange the sale. *Id.* at 212. He needed money for his vehicle repairs and he knew Mr. Cowan had cash. *Id.* He also acknowledged paying in cash for the vehicle repairs and redemption of the vehicle after it was repossessed. *Id.* Petitioner testified that he could only speculate how his blood came to be in the victims' kitchen and that he and Mr. Cowan never fought. *Id.* Petitioner stated that on one occasion, Mr. Cowan shook his hand so hard that Petitioner's hand bled. *Id.* Petitioner said that "purp" was marijuana with "purple haze in it," that it was expensive, and that it was known on December 28 that Mr. Cowan had

obtained a quantity of it. *Id.* Petitioner denied knowing that Mr. Cowan had $25,000 cash in his apartment, but he noted that he knew Mr. Cowan had an unspecified large amount of cash. *Id.* Petitioner denied knowing Mr. Cowan had an AR-15 rifle in his apartment, killing Mr. Cowan, stabbing Ms. Davis, and taking money and marijuana from the apartment. *Id.* at 212.

Based on this evidence, a jury convicted Petitioner of first degree felony murder, first degree premeditated murder, attempt to commit first degree murder, two counts of especially aggravated robbery, and two counts of especially aggravated burglary. The trial court merged the convictions for felony murder and premeditated murder and sentenced Petitioner to an effective sentence of life imprisonment plus twenty-two years.

On direct appeal, this court affirmed the judgments for first degree felony murder, attempted first degree murder, and one of the especially aggravated robbery convictions. *Id.* at 201. This court modified the two convictions for especially aggravated burglary to aggravated burglary and merged them to reflect one conviction for aggravated burglary. *Id.* at 213-16. This court also modified the second conviction for the especially aggravated robbery of Ms. Davis to aggravated assault and remanded the case for resentencing relative to the modified counts. *Id.* at 216-18. This court's opinion was issued on May 27, 2016. Petitioner filed an application for permission to the Supreme Court which was denied on August 18, 2016. Petitioner filed a post-conviction petition within one-year of the denial of his application to the Supreme Court. He filed a second post-conviction petition while the case was on remand and before he was re-sentenced. The first post-conviction petition was dismissed on the same day he was re-sentenced and Petitioner proceeded on the second petition. We will discuss the procedural history of the petitions in greater detail later in this opinion.

Post-Conviction Hearing – July 22, 2022

Petitioner had not verified under oath that all of his claims were included in the petition, *see* T.C.A. § 40-30-104(d), but the parties agreed that he would be permitted to cure this technical deficiency. Accordingly, the hearing began with Petitioner verifying his petition under oath after he had consulted with post-conviction counsel.[1] The post-conviction court then took judicial notice of the trial records and noted for the record that

[1] *See* Tenn. R. Sup. Ct. 28, § 6 (b) ("No pro se petition shall be dismissed for failure to follow the prescribed form until the court has given petitioner a reasonable opportunity to amend the petition with the assistance of counsel.").

Petitioner's trial counsel had passed away on March 20, 2022, prior to the post-conviction hearing.[2]

As relevant to the issues on appeal, Petitioner testified that trial counsel was the third attorney appointed to represent him on the case and that trial counsel was appointed "a couple of months" before the trial. Petitioner's first trial attorney was relieved because he had disagreements with Petitioner that could not be resolved. Petitioner's second trial attorney withdrew when he accepted employment as a prosecutor.

Petitioner testified that like his former attorneys, trial counsel had an investigator working on the case. Petitioner met trial counsel four to five times to discuss the case. Petitioner agreed that the two biggest pieces of evidence against him were Ms. Davis's identification of him as the attacker and his DNA matching blood found at the crime scene.

Petitioner stated that he had talked to all of his attorneys about suppressing his DNA buccal swab because the officers failed to follow the terms of the warrant. Petitioner explained that under the warrant, he was to be transported to KPD where a trained technician would obtain his DNA buccal swab which would then be turned over to another technician for analysis so the chain of custody would not be broken. Instead, Officer Long obtained the buccal swab while Petitioner was housed in the Roger D. Wilson Detention Facility. On the day the search warrant was executed, Petitioner entered the recreation area expecting to receive a visit from his then attorney ("first counsel"). Petitioner instead saw Officer Long, whom he recognized from his interview after his arrest in DeKalb county, and another officer, a sergeant. Petitioner stood in the doorway of a room known as the attorney-client visitation room with his hands handcuffed behind him because he was "out for rec" and on medication. After Officer Long's third question, Petitioner reminded Officer Long that he was represented by counsel and demanded that counsel be present should Officer Long continue to question him. Petitioner testified that Officer Long did not advise him of his *Miranda* rights before questioning him. Officer Long insisted that counsel did not need to be present to obtain Petitioner's DNA buccal swab because he was in the jail. Petitioner asked to see the warrant but was told he could see it after a sample was obtained.

After arguing for a few seconds, Officer Long instructed Petitioner to return to his cell. At that moment, the detention facility went into emergency lockdown and everyone was ordered back to their cells. Petitioner returned to his cell but stood in front of the door which remained open because he "wanted everybody to see" what was going on. Petitioner

[2] We likewise take judicial notice of the records in Petitioner's prior appeal to this court. *See Harris v. State*, 301 S.W.3d 141, 147 n.4 (Tenn. 2010) (noting that an appellate court may take judicial notice of its own records).

testified that Officer Long entered the cell with five to six officers of the institutional security team with tasers drawn. The officers ordered Petitioner to return to his cell and to get on the floor. Petitioner refused to do either. Petitioner backed up into his cell as the officers rushed him and pinned him to the floor. Petitioner testified that Officer Long "squeez[ed]" Petitioner's mouth open and instructed Petitioner to open his mouth. Petitioner complied and Officer Long swabbed the inside of his cheeks. Officer Long put the warrant on a table and left.

About an hour later, Petitioner made efforts to call his first counsel and see a medical professional, but he was refused. He relayed what had happened to first counsel via telephone a couple of hours later. Petitioner stated that first counsel visited him in the detention facility that evening or the following day and received a copy of the warrant. First counsel addressed the incident in court at the next hearing by stating on the record that he was to be consulted the next time someone wanted to talk to Petitioner. Petitioner was unaware if first counsel filed a motion to suppress the DNA buccal swab.

Trial counsel brought the issue of the chain of custody to Petitioner's attention the morning of the first day of trial. Petitioner learned that the warrant contained the incorrect year for when the DNA sample was obtained and that the DNA swab had not been entered into the evidence log. Petitioner testified that trial counsel filed a motion to suppress the DNA buccal swab and the hearing was held right before the trial began. The hearing lasted no more than five or six minutes, and no witnesses were called. Petitioner complained that at trial, trial counsel questioned Ms. Davis longer and more vigorously than he questioned Officer Long. Petitioner further complained that when trial counsel cross-examined Officer Long, trial counsel did not ask the officer about how Petitioner's DNA buccal swab had been obtained. Petitioner acknowledged that the execution of the warrant to obtain his DNA sample was not an issue at trial.

Petitioner testified that a piece of bullet-riddled wrapping paper found at the scene behind a couch was the "only proof" that someone else committed the crimes. He explained that a few days before the incident, officers canvassed the area of the victims' apartment and spoke to two of their neighbors, Adam Freeman and Vicki Price. Mr. Freeman purportedly saw a person standing outside the victims' building, dressed all in black and holding something in his pants to suggest a weapon. Mr. Freeman stated that he could have identified this person if he saw this person again. Ms. Price purportedly heard "a lot of fighting" at the victims' apartment around Christmas time and even heard a gunshot. Based on their purported statements, Petitioner surmised:

> So[,] if [Ms. Price] had heard a gunshot inside of that apartment and the only evidence of a gun being fired inside that apartment was the, was the gun that Mr. Cowan was shot with, that would lead, I believe, a reasonable person to

> believe that that murder weapon had been fired inside of that apartment prior to [the day of the murder].

Petitioner learned about the wrapping paper when trial counsel cross-examined Officer Johnson about it at trial:

> [A]s [trial counsel] [cross-examined] Officer Johnson – and I'm quite sure that's who it was. He was asking him about the furniture, "Was the furniture like this? Let you look at that picture." He said, "Was the furniture like this when you came in?" He's like "Yes." "Did y'all, did you all bother the furniture any?"
>
> He said, "No." He explained how they take pictures first before they disturb anything, and the apartment was exactly how it was when they came in, and that the couch was pushed up against the wall. And they discussed the gift wrapping paper and how the trajectory of the gift wrapping paper.
>
> The only way for a bullet to strike that gift wrapping paper, somebody would have had to move that couch out of the way and fire straight down. They'd had to fire straight. They said the trajectory was straight down, and as I said, that gift wrapping paper was never in any evidence at all, it's never logged into evidence.

Trial counsel told Petitioner that he saw the wrapping paper at the police station approximately a week before the trial. The wrapping paper grabbed his attention because trial counsel knew the crimes occurred around Christmas.

Petitioner took issue with the trial court's decision not to introduce the statement Ms. Davis gave after she had come out of a three-day induced coma. Ms. Davis was interviewed on December 31, 2009, while she was still hospitalized. Petitioner testified that trial counsel wanted to read her statement into the record or permit the jury to have the statement during deliberation for impeachment, but the State objected because Ms. Davis's condition did not make the statement entirely credible. Petitioner insisted that the statement should have been admitted to determine whether Ms. Davis was "lucid" when she made the statement.

According to Petitioner, Ms. Davis was unable to speak, but was able to write a physical description of her attacker and she never identified Petitioner. Petitioner acknowledged that at the time, everyone knew him as "Keith." Petitioner stated that the police were looking for a "Keith" several days before Ms. Davis was interviewed at the

hospital, and he told all of his attorneys he believed that the police suggested "Keith" as a suspect to Ms. Davis.

Petitioner maintained that Ms. Davis lied at trial. Petitioner stated that Ms. Davis came onto him but he turned her down because she was in a three-year relationship with Mr. Cowan, and Petitioner did not wish to reveal this at trial. Petitioner denied that he dined where Ms. Davis worked often enough for her to take down his license plate number. Petitioner testified that he informed trial counsel that there were other people who had motive to go after Mr. Cowan, and he identified Ron C. Nelson as a person who had motive to harm Mr. Cowan. Trial counsel knew Mr. Nelson because he had represented him. According to Petitioner, trial counsel was afraid of Mr. Nelson and advised Petitioner that Mr. Nelson had an alibi for the night of the crimes in that he was on house arrest. Petitioner explained to trial counsel that Mr. Nelson was the "OG" of his criminal gang and could order others to commit crimes on his behalf without leaving his home. Trial counsel did ask Officer Long whether Mr. Nelson was considered a suspect but did not pursue it further. Petitioner recalled that Officer Long did consider Mr. Nelson as a suspect but did not explain why Mr. Nelson was not charged.

Trial counsel's last action on the case was filing the motion for new trial. Petitioner was represented by appellate counsel at the hearing on the motion for new trial, the direct appeal, and at re-sentencing on remand. Petitioner testified that he met appellate counsel "a couple of times" including one time where appellate counsel visited Petitioner in the "bullpen" or the area reserved for attorney-client meetings in the courthouse.

Petitioner had prepared a document of the issues he wanted to raise in the motion for new trial. He had already cut some of the issues because the document was "long." Petitioner asked appellate counsel to read his list of issues but appellate counsel declined and told Petitioner that he had already decided to raise only two issues that had merit. Petitioner wanted to raise as an issue the execution of the search warrant to obtain Petitioner's DNA buccal swab and Ms. Davis's statement. When Petitioner continued to push back and insist on raising the issues he wanted to raise, appellate counsel replied that he would consider raising other issues if Petitioner could convince him of the merits. Ultimately, at the motion for new trial hearing, appellate counsel orally amended the motion by raising two additional issues: the search warrant and the State's questioning of Petitioner about prior convictions for assaultive offenses. Petitioner testified that he was permitted to speak about the execution of the search warrant. He did not, however, address Ms. Davis's statement.

On cross-examination, Petitioner stated he was aware that trial counsel had been practicing law since 1988 and agreed that trial counsel was a "very experienced" attorney who had tried cases and defended clients on murder charges before he represented

Petitioner. Petitioner maintained that he and trial counsel never discussed a defense strategy. He testified that trial counsel's strategy consisted only of "lambasting" Ms. Davis. Petitioner noted that trial counsel devoted "a long time" in closing argument to attacking Ms. Davis's credibility, citing inconsistencies between her statement and her testimony, and pointing out Ms. Davis's motivation to lie about the case. Trial counsel also argued that there was a reasonable explanation for Petitioner's blood in the victims' apartment: Petitioner had cut his finger while in the victims' apartment a few days before the crimes had occurred.

Petitioner stated that appellate counsel did not immediately respond to his letters until Petitioner filed a complaint with the Board of Professional Responsibility because it had taken six months for the trial transcripts to be prepared.

Petitioner understood that had he prevailed on the motion to suppress the DNA buccal swab, the State had the option of executing a new search warrant and obtain another DNA sample.

Appellate counsel testified that he is a criminal defense attorney whose practice is primarily devoted to appeals. He began practicing law in November 1996 after he passed the bar examination and has remained an attorney in good standing.

Appellate counsel became involved in Petitioner's case when trial counsel reached out to him about representing Petitioner. Petitioner's motion for new trial was delayed because trial counsel was having difficulty getting the trial transcripts, and the delay was causing "friction" between trial counsel and Petitioner. Appellate counsel was well-acquainted with trial counsel because they practiced in the same community for many years. Appellate counsel stated that trial counsel had tried many criminal cases, and he described trial counsel as a "very active trial attorney" who "didn't particularly enjoy appellate work."

Appellate counsel testified that he had a good relationship with trial counsel and the two met "multiple times" to talk about the case once appellate counsel was appointed. Trial counsel had already filed a motion for new trial to preserve jurisdiction. Appellate counsel confirmed that there was a delay in getting the trial transcripts which in turn delayed a hearing on the motion for new trial. This delay frustrated Petitioner. Appellate counsel did not know the cause of the transcript delay, but once the transcripts were completed, he took on the task of reading the twelve to fifteen volumes to prepare for the hearing. It was among some of the "longer trials" he had handled on appeal.

Petitioner did not understand why they were not proceeding to a hearing on the motion once the transcripts were available. Appellate counsel explained to Petitioner that

it was important for him to read the transcripts since he had not been at trial. Appellate counsel testified that he read the transcripts to prepare for the motion for new trial and read them again to prepare the appellate brief on direct appeal. Appellate counsel moved to expedite the hearing once he finished reviewing the transcripts.

Appellate counsel communicated with Petitioner by letter before the hearing on the motion for new trial. He and Petitioner "went back and forth" about what issues to raise in the motion for new trial. Appellate counsel agreed with Petitioner that they met in person for the first time after Petitioner was transported for the hearing on the motion for new trial. At that meeting, the two discussed the issues in the motion for new trial. Appellate counsel did not have an independent memory of Petitioner's argument at the hearing on the motion for new trial until Petitioner mentioned it during his post-conviction testimony. Appellate counsel recalled that Petitioner was "frustrated" with him because of the delay in getting the trial transcripts and the corresponding delay in the motion for new trial hearing. As such, Petitioner "wanted to do some of the talking on his own" at the hearing on the motion for new trial. The State did not object to the "last minute" addition of the two issues.

After re-reading the transcripts and the pertinent legal authority, appellate counsel decided not to challenge the DNA buccal swab as an issue on direct appeal. Appellate counsel explained his method for determining which issues to raise on appeal in general and in Petitioner's case:

> By reviewing the record, considering the Court's – you know, [trial counsel] who had had the case at trial, considering, you know, his viewpoint on as many of the issues that I could, reviewing the record for myself, to look, see what issues came up at trial, what were the contested legal issues at trial, what were the contested factual issues at trial, and then make a determination as to what issues that were, that I could argue based on both the fact – the evidence and the facts that we had from the trial record, and the, the existing law to the best that I understood it.

Appellate counsel raised three issues on direct appeal: the evidence was insufficient to support the convictions; dual convictions for especially aggravated burglary were barred by statute; and dual convictions for especially aggravated burglary violated double jeopardy principals. *Tolbert,* 507 S.W.3d at 201. Appellate counsel explained that the defense theory at trial was that Ms. Davis either lied or was mistaken about who broke into her apartment. Trial counsel had conveyed to appellate counsel his misgivings about Ms. Davis's account of the crimes and her lack of credibility. Although credibility is a jury determination, appellate counsel raised sufficiency of the evidence as an issue due to the problems with Ms. Davis's credibility.

Appellate counsel was more concerned with the dual convictions for especially aggravated burglary. On direct appeal, this court agreed that the especially aggravated burglary convictions should be reduced to aggravated burglary and that two aggravated burglary convictions violated double jeopardy principals. *Tolbert,* 507 S.W.3d at 216-17. Appellate counsel recognized that the reduction and dismissal of the aggravated burglary conviction did not affect the length of Petitioner's sentence, but he believed it was helpful "to get rid of . . . some of those felony judgments." Petitioner also obtained relief on the especially aggravated robbery convictions. This court concluded that only one robbery occurred against Mr. Cowan. *Id.* at 217. Accordingly, the conviction for the aggravated robbery of Ms. Davis was reduced to aggravated assault. *Id.* at 217-18.

Appellate counsel acknowledged that "the damaging part[]" of the statement was that Ms. Davis brought up the idea of a man named "Keith" as being involved in the crimes. She did not however, identify "Keith" as the perpetrator when she dialed 9-1-1. Appellate counsel did not raise the trial court's exclusion of Ms. Davis's statement at the hospital as an issue because he believed the court's ruling was correct. Appellate counsel explained:

> Yeah, the trial court made the correct ruling on that. What defense counsel wanted to do at trial was to say, well, she's already said that there's some things that are inconsistent between that statement and her trial testimony. And so certainly, what you do under those circumstances is you use the prior statement that you have, the prior recorded statement, and you question her about inconsistencies between that statement and the trial testimony, and you point those inconsistencies out to the jury using that statement.

Here, appellate counsel disagreed with trial counsel on the admissibility of the victim's statement:

> However, that statement itself is not evidence. That statement is just something that you can use to develop that evidence. The evidence is her testimony at trial. She's there as a testifying witness, so you ask her questions and then you ask her, you're asking her to testify to things at trial. You're not – you don't just put in whatever recorded statement that you have as, as evidence.

It was appellate counsel's opinion that because Ms. Davis never denied making the statement at the hospital, the statement was not admissible. Appellate counsel instead credited trial counsel's strategy for cross-examining Ms. Davis where her direct testimony was inconsistent with the statement she gave to Officer Long at the hospital.

After the hearing on the motion for new trial, appellate counsel and Petitioner continued to exchange letters. Petitioner wrote appellate counsel "fairly often to get updates on the case." In appellate counsel's letters to Petitioner, he explained to Petitioner why certain issues were argued the way they were or why certain issues were not raised. Petitioner did not insist on adding any new issues for the direct appeal. Appellate counsel's last letter to Petitioner was written after this court reduced the especially aggravated assault conviction against Ms. Davis to aggravated assault, merged the aggravated burglary convictions, and remanded for re-sentencing. Appellate counsel stated that Petitioner may have waived his appearance for re-sentencing.

The post-conviction court, in a detailed and comprehensive order, found that Petitioner failed to establish deficiency or prejudice by trial counsel or appellate counsel and denied Petitioner relief. It is from this judgment Petitioner seeks relief in this appeal.

Analysis

As a preliminary matter, we address whether Petitioner filed a timely post-conviction petition. Although it is not in the record, there is no dispute that on or about August 17, 2017, prior to the completion of the proceedings on remand and within one-year of the denial of his application to the Supreme Court, Petitioner filed a post-conviction petition, docketed as case number 111241. *See* T.C.A. § 40-30-102(a) (post-conviction petition must be filed "within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of the petition shall be barred"). The record contains a post-conviction petition, filed on October 24, 2018, and docketed as case number 93616.

In its order denying relief, the post-conviction court chronicled the procedural history of the case on remand and addressed whether the second petition was barred by the application of the one-petition rule. *Id*. The post-conviction court noted that the trial court re-sentenced Petitioner and entered judgments in accordance with the direction from this court on November 14, 2018. On the same day, the post-conviction court dismissed the initial post-conviction petition, case number 111241, with the understanding that the petition had not been resolved on the merits, and the instant post-conviction petition, case number 93616 remained pending. For these reasons, the post-conviction court held that post-conviction petition 93616 did not constitute a second post-conviction in violation of

the one-petition rule.[3] However, the post-conviction court did not address the timeliness of the petitions.

Upon review of the record and the applicable legal authority, we conclude that this court has jurisdiction to consider either post-conviction petition under the statute. The original petition 111241 was filed within one-year of the action of the highest appellate court. *Id.* § 40-30-102(a). In this case, the Supreme Court denied Petitioner's application for permission to appeal on August 18, 2016. Petitioner filed the petition 111241 on August 17, 2017, within one-year of the denial of his application to the Supreme Court. Alternatively, Petitioner was re-sentenced on November 14, 2018. While the judgments are not in the record, no appeal was taken on the re-sentencing. Thus, the judgments became final thirty days after they were entered, or on December 14, 2018. *State v. Pendergrass,* 937 S.W.2d 834, 837 (Tenn. 1996). Thus, petition number 93616, filed on October 24, 2018, albeit premature, was timely filed. *See* T.C.A. § 40-30-102(a) ("if no appeal is taken, [post-conviction petition must be filed] within one (1) year of the date on which the judgment became final").

In his petition and at the post-conviction hearing, Petitioner challenged the performance of trial counsel and appellate counsel on a multitude of grounds. He has winnowed his focus on appeal to two claims against trial counsel and two claims against appellate counsel. Petitioner claims trial counsel was ineffective in failing to file, long before trial, a motion to suppress the buccal swab of his DNA. Petitioner also claims trial counsel was ineffective in failing to use the bullet-riddled wrapping paper found at the crime scene as proof that someone else shot Mr. Cowan and stabbed Ms. Davis. In terms of his claim against appellate counsel, Petitioner argues that appellate counsel's performance was ineffective because he failed to raise two issues on direct appeal. The State contends the post-conviction court properly denied Petitioner relief because neither trial counsel nor appellate counsel's performance was ineffective. We agree with the State.

Under the Post-Conviction Procedure Act, a criminal defendant may seek relief from a conviction or sentence that is "void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. Because the right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee, the denial of effective assistance of counsel is a constitutional claim cognizable under the Post-Conviction Procedure Act. *See* U.S. Const. amend. VI; Tenn. Const. art. I, § 9; *Howard v. State*, 604 S.W.3d 53, 57 (Tenn. 2020).

[3] This case has been renumbered to 114111.

"Appellate review of an ineffective assistance of counsel claim is a mixed question of law and fact that this Court reviews de novo." *Phillips v. State*, 647 S.W.3d 389, 400 (Tenn. 2022) (citing *Dellinger v. State*, 279 S.W.3d 282, 294 (Tenn. 2009)). As an appellate court, we are bound by the factual findings of the post-conviction court unless the evidence in the record preponderates against those findings. *Howard,* 604 S.W.3d at 57 (citing Tenn. R. App. P. 13(d)); *see also Arroyo v. State*, 434 S.W.3d 555, 559 (Tenn. 2014); *Fields v. State,* 40 S.W.3d 450, 456 n.4 (Tenn. 2001). The same does not hold true for the post-conviction court's conclusions of law which are reviewed de novo with no presumption of correctness. *Howard,* 604 S.W.3d at 57; *Holland v. State,* 610 S.W.3d 450, 455 (Tenn. 2020).

When a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993); *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). Deficient performance is representation that falls below "an objective standard of reasonableness" as measured by prevailing professional norms. *Kendrick,* 454 S.W.3d at 457 (quoting *Strickland,* 466 U.S. at 688); *see also Baxter v. Rose,* 523 S.W.2d 930, 932-33 (Tenn. 1975). To show prejudice, a petitioner must demonstrate a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland,* 466 U.S. at 694; *Kendrick,* 454 S.W.3d at 458. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Reasonable probability is a lesser burden of proof than preponderance of the evidence. *Kendrick,* 454 S.W.3d at 458 (citing *Williams v. Taylor,* 529 U.S. 405-06 (2000)).

Failure to satisfy either prong results in the denial of relief. *Strickland*, 466 U.S. at 697; *Nesbit v. State,* 452 S.W.3d 779, 786-87 (Tenn. 2014). Accordingly, if we determine that either factor is not satisfied, there is no need to consider the other factor. *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007) (citing *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004)). "[T]he petitioner is required to prove the fact of counsel's alleged error by clear and convincing evidence." *Phillips,* 647 S.W.3d at 401 (quoting *Dellinger*, 279 S.W.3d at 294 (emphasis in original)); *see also* T.C.A. § 40-30-110(f); Tenn. Sup. Ct. 28, § 8(D)(1).

I. Trial Counsel's Representation

A. Timing of the filing of the motion to suppress DNA buccal swab

Petitioner argues that waiting to file the motion to suppress the buccal swab until the morning of the first day of trial constituted deficient performance because the issue was

litigated in a "circumscribed" hearing. He also argues that trial counsel's performance was prejudicial because it was DNA evidence that connected him to the crimes.

We begin our analysis with Petitioner's admission that this claim lacks prejudice. We refer to the following findings by the post-conviction court:

> As conceded by the [P]etitioner at hearing, any successful challenge to the admissibility of the buccal swab would have simply resulted in the State obtaining another search warrant for this evidence. For this reason, the [P]etitioner cannot demonstrate that he was prejudiced by any deficiency on the part of [trial counsel] in litigating the issue of the warrant's execution. The [P]etitioner makes no showing of how he was prejudiced by the absence of his attorney at the warrant's execution.
>
> Finally, although [trial counsel] challenged the chain of custody of the buccal swab, the [P]etitioner has failed to present proof by clear and convincing evidence that a more strident challenge to the chain of custody would have resulted in exclusion of the evidence.

The evidence does not preponderate against the post-conviction court's findings. When asked at the post-conviction hearing whether he understood that the State could obtain another search warrant for his DNA buccal swab even if he had prevailed on a suppression motion, Petitioner testified that he did. Accordingly, Petitioner cannot show prejudice. As the post-conviction court noted, because the motion to suppress was heard before the jury was selected and sworn, the State had the ability to seek another search warrant by asking to continue the trial. The post-conviction court also found no deficiency in trial counsel's performance in filing and litigating the suppression motion on the morning of the first day of trial:

> [Trial counsel] filed a motion to suppress the [P]etitioner's buccal swab due to the officer's noncompliance with the terms of execution and due to the incorrect date on the property report and a resulting chain of custody issue. Despite waiting until the morning of trial to file the motion, the trial court nevertheless fully heard the motion on its merits and denied relief. The [P]etitioner has not demonstrated by clear and convincing evidence that [trial counsel] performed deficiently in regard to this issue.

The post-conviction court also rejected Petitioner's argument that trial counsel performed deficiently by failing to argue that Petitioner was deprived of counsel at a critical stage of the prosecution during the execution of the search warrant:

> [Trial counsel] did not challenge the fruits of the search warrant on the basis that the [P]etitioner's attorney was not present for its execution, nor should he have been reasonably expected to do so. A post-presentment, ex parte search warrant proceeding to obtain a DNA sample from a defendant is not a critical stage of the proceeding that would require his attorney to be present. In light of controlling precedent, [trial counsel] was not deficient for failing to raise this issue.

(internal citation omitted); *see State v. Blye,* 130 S.W.3d 776, 782 (Tenn. 2004).

The evidence does not preponderate against the post-conviction court's findings. The record shows that on the morning of the first day of trial, trial counsel filed a motion to suppress the DNA buccal swab on the grounds that the search warrant for the buccal swab specifically authorized "a criminalistics technician" to obtain the evidence at the KPD, but the buccal swab was actually obtained by officers of the KPD by force while Petitioner was in his cell in the Knox County Penal Farm despite Petitioner's request for a technician and his attorney.

Although no witnesses testified at the suppression hearing, trial counsel explained to the trial court that no testimony was needed because the facts were "uncontroverted." There was no dispute that the State obtained Petitioner's DNA pursuant to a valid search warrant and that buccal swabs of Petitioner's DNA were taken at the Knox County Penal Farm by a KPD Officer instead of at the KPD by a "criminalistic technician." Trial counsel advanced Petitioner's argument that the buccal swabs should be suppressed because the State failed to comply with the strict dictates of the warrant. In denying the suppression motion, the trial court found that the officers substantially complied with the warrant and that Petitioner's rights were not violated "in any way by having a less intrusive procedure than that indicated by the warrant." Having reviewed the affidavit and the transcript of the hearing on the suppression motion, we conclude that trial counsel's performance was objectively reasonable and because the record shows that the motion to suppress on these grounds was unsuccessful, Petitioner has again failed to demonstrate prejudice.

Moreover, Petitioner cannot demonstrate prejudice given the strength of the State's evidence. *See Proctor v. State*, 868 S.W.2d 669, 673 (Tenn. Crim. App. 1992) (when proof of guilt is overwhelming, proving prejudice is exceedingly difficult); *Bray v. State*, No. M2011-00665-CCA-R3-PC, 2012 WL 1895948, at *6 (Tenn. Crim. App. May 23, 2012) (in light of overwhelming evidence, petitioner could not demonstrate prejudice). In this case, DNA evidence was not the only proof connecting Petitioner to the crimes. Ms. Davis identified Petitioner as the attacker. Additionally, there was proof that Petitioner was motivated to rob Mr. Cowan. Immediately after the crimes, Petitioner paid his car repairs and the outstanding balance of his car note. Petitioner is not entitled to relief.

B. Failure to use wrapping paper from crime scene as proof of alternative suspect

Petitioner argues that the State withheld the wrapping paper found in the victims' apartment and that trial counsel was ineffective in failing to use the wrapping paper to argue that someone else shot and killed Mr. Cowan and stabbed Ms. Davis. In making this claim, Petitioner alleges that Mr. Cowan's history of violence against Ms. Davis ultimately caused her to murder Mr. Cowan and self-inflict multiple stab wounds to deflect blame for Mr. Cowan's murder. Petitioner asserts that this allegation along with the bullet-riddled wrapping paper and the testimony of neighbor, Vicki Price, and passerby, Adam Freeman, would have advanced the theory that someone other than Petitioner committed the instant crimes. Relative to this issue, the post-conviction court found no demonstration of deficiency or prejudice in trial counsel's performance:

> [T]he [P]etitioner has failed to show by clear and convincing evidence that the State actually withheld the wrapping paper evidence until the morning of trial. His claim fails.
>
> Even if the State failed to produce the wrapping paper evidence until the morning of trial, and even if the court found that [trial counsel] was ineffective for failing to object to this failure, the [P]etitioner cannot prove prejudice because [trial counsel] was nevertheless able to make effective use of this evidence during his cross-examination of Off[icer] Johnson. Additionally, the only way that the bullet trajectory in the wrapping paper could help the [P]etitioner's case would be if he provided the testimony of Adam Freeman, who [Petitioner] claims saw a mysterious person outside the building days before, and Vicki Price, who [Petitioner] claims would say she heard gunshots coming from the victim[s'] apartment around that same time. Because the [P]etitioner failed to connect these dots by calling Mr. Freeman and Ms. Price as witnesses at the post-conviction hearing, he has further failed to demonstrate prejudice.

(footnote omitted). The evidence does not preponderate against the post-conviction court's findings. Without the testimony of Mr. Freeman and Ms. Davis, Petitioner cannot prove that he suffered prejudice. *See, e.g., Black v. State*, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990) (a post-conviction petitioner generally fails to establish his claim that counsel did not call a witness in support of his defense, if the petitioner did not present the witness to the post-conviction court because "neither a trial judge nor an appellate court can speculate or guess [about] what a witness's testimony might have been if introduced").

Thus, we decline to rely solely on Petitioner's post-conviction testimony regarding the purported materiality and favorability of any testimony by Mr. Freeman or Ms. Price.

Furthermore, Petitioner has failed to demonstrate by clear and convincing evidence that the wrapping paper would have established an alternative suspect. Officer Johnson testified at trial that some bullet fragments were found near some wrapping paper after all the evidence had been initially collected at the victims' apartment. The wrapping paper was found at the end of the couch and against the wall. A closer examination revealed that a bullet had "traveled through" the wrapping paper and into the floor underneath the carpet, but did not hit the couch, the wall, or a nearby table. Officer Johnson removed the carpet where the wrapping paper was found and uncovered a bullet fragment. Officer Johnson's testimony suggested that whoever fired the gun probably pointed the gun "almost straight down."

Trial counsel:	There would be – if – if a shooter was in the center of the room and fired that gun, the bullet that hit that wrapping paper would have to strike the table or the couch, wouldn't you agree?
Officer Johnson:	Depending on – yeah, on that angle, and depending on where the shooter was standing exactly which I can't – you know, I'm not a shooting reconstructionist, so I can't place that shooter based on the location of that bullet, where it was recovered. I don't have that training or expertise.

Based on the evidence, trial counsel's questioning of Officer Johnson was reasonable. The strategy in this case was straightforward: attack the credibility of the surviving victim's account of the crimes. Accordingly, we reject the notion that trial counsel should have accused Ms. Davis of shooting Mr. Cowan and stabbing herself repeatedly where the proof shows that Ms. Davis nearly died from the stabbings. *See Mays v. Hines,* 141 S.Ct. 1145, 1149-50 (2021) (United States Supreme Court held that this court "reasonably looked to the substantial evidence" of the defendant's guilt and reasonably rejected "fanciful (alternative) theory" that someone other than the defendant "committed and self-reported a gruesome murder" in post-conviction case alleging ineffective assistance of trial counsel). Indeed, at the post-conviction hearing, Petitioner acknowledged that Ms. Davis suffered "trauma" from the crimes and acknowledged further that he did not actually believe she committed the crimes but maintained that trial counsel should have advanced it as a potential theory to create reasonable doubt. Petitioner has failed to "connect the dots" to establish Ms. Davis or someone other than Petitioner, as the perpetrator. Petitioner is not entitled to relief.

II. Appellate Counsel's Representation

Petitioner complains that appellate counsel's representation was ineffective because he omitted two issues on direct appeal: one, the trial court's denial of his motion to suppress the DNA buccal swab; and two, the trial court's denial of his request to admit the statement Ms. Davis gave at the hospital after she had come out of an induced coma. The State contends appellate counsel's strategy to omit both issues was an informed one entitled to deference. We agree with the State.

The test for ineffective assistance of counsel is the same for both trial and appellate counsel. *Strickland*, 466 U.S. at 687; *Campbell v. State*, 904 S.W.2d 594, 596-97 (Tenn. 1995). Namely, a petitioner alleging ineffective assistance of appellate counsel must prove both that appellate counsel was deficient in failing to adequately pursue or preserve a particular issue on appeal and that, absent counsel's deficient performance, there was a reasonable probability that the issue "would have affected the result of the appeal." *Campbell,* 904 S.W.2d at 597; *see also Carpenter*, 126 S.W.3d at 886-88.

When a petitioner alleges ineffective assistance of appellate counsel, factors for consideration include (1) whether appellate counsel testified at the post-conviction hearing "as to his appeal strategy and, if so, were the justifications reasonable?"; (2) whether the petitioner and appellate counsel met and discussed possible issues; (3) whether the record establishes that appellate counsel reviewed all of the relevant facts; and (4) whether appellate counsel's decision to omit an issue was "an unreasonable one which only an incompetent attorney would adopt." *Carpenter*, 126 S.W.3d at 888.

"Appellate counsel is not required to raise all issues that a defendant desires to raise on appeal." *Howard v. State*, 604 S.W.3d 53, 62 (Tenn. 2020) (citing *Carpenter*, 126 S.W.3d at 887). The failure to preserve or assert all arguable issues is not per se ineffective assistance of appellate counsel because the failure to do so may be a part of counsel's appellate strategy. *State v. Matson*, 729 S.W.2d 281, 282 (Tenn. Crim. App. 1986). The decision to raise an issue on appeal is a matter of attorney discretion. *Id.* Indeed, it is up to appellate counsel to winnow out weaker arguments, even if they may have merit, and select the most promising issues for review. *Jones v. Barne*s, 463 U.S. 745, 751-52 (1983).

Because appellate counsel's alleged deficiency is comparable to an issue being omitted from review, we consider whether the issue, as raised by appellate counsel, possessed merit. *See, e.g., Carpenter*, 126 S.W.3d at 887. To do so, the following non-exhaustive list of questions should be considered:

1) Were the omitted issues "significant and obvious"?
2) Was there arguably contrary authority on the omitted issues?

3) Were the omitted issues clearly stronger than those presented?
4) Were the omitted issues objected to at trial?
5) Were the trial court's rulings subject to deference on appeal?
6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
7) What was appellate counsel's level of experience and expertise?
8) Did the petitioner and appellate counsel meet and go over possible issues?
9) Is there evidence that counsel reviewed all the facts?
10) Were the omitted issues dealt with in other assignments of error?
11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Id. at 888 (citing *Mapes v. Coyle*, 171 F.3d 408, 427-28 (6th Cir. 1999)). A petitioner cannot prevail on an ineffective assistance of counsel claim if the omitted issue lacked merit. *Id.* at 887-88. If an issue lacks merit, counsel's performance cannot be deficient for not raising it. *Id.* at 887. Similarly, a petitioner experiences no prejudice from failing to raise a meritless issue. *Id.* We have held that, "[a] petitioner who argues that issues presented in the trial court should have been preserved for appellate review must at the very least convince the appellate court and the post-conviction court the omitted issues had merit. Obviously, the best way to show that is to present a legal argument for each issue." *McNutt v. State*, No. W2016-01086-CCA-R3-PC, 2017 WL 4004172, at *7 (Tenn. Crim. App. Sept. 8, 2017).

A post-conviction court's application of law to its factual findings are reviewed de novo with no presumption of correctness. *Howard,* 604 S.W.3d at 57; *Holland,* 610 S.W.3d at 455; *Whitehead v. State*, 402 S.W.3d 615, 621 (Tenn. 2013). However, the post-conviction court's factual findings are conclusive on appeal unless evidence preponderates against them. *Howard*, 604 S.W.3d at 57 (citing Tenn. R. App. P. 13(d)); *see also Arroyo v. State*, 434 S.W.3d 555, 559 (Tenn. 2014).

A. Failure to raise denial of motion to suppress DNA buccal swab

Petitioner argues that the suppression issues were "significant and obvious" because DNA was "illegally collected from [him]." Concerning appellate counsel's performance, the post-conviction court found the issue of the DNA buccal swab was not "significant and obvious" compared to the ones appellate counsel chose to raise on direct appeal to justify post-conviction relief:

> [T]he buccal swab issues presented by the [P]etitioner had no real chance of success. They are not "significant and obvious" issues that should have been raised by appellate counsel. [Appellate counsel] decided not to raise the issue

> following sufficient research, preparation, and discussion. His reasoned judgment should not be second-guessed on post-conviction review.
>
> For the reasons stated, the [P]etitioner has also failed to show that a different course by [appellate counsel] would have probably changed the outcome of these proceedings. He has failed to show prejudice.

Application of the *Carpenter* factors indicates that appellate counsel's decision to omit this issue was not deficient; therefore the issue lacked merit, and Petitioner suffered no prejudice. At the post-conviction hearing, appellate counsel testified that he made the decision not to raise the suppression issue after reviewing the trial transcripts, researching the applicable authority, and consulting with trial counsel and Petitioner. Petitioner does not challenge the validity of the warrant, nor does he contest the fact that the State had the right to obtain his DNA by means of a buccal swab. Petitioner has presented no arguable contrary authority to the trial court's decision to deny a motion to suppress DNA evidence obtained pursuant to a valid search warrant. The trial court in this case concluded that the officers substantially complied with the terms of the warrant. *See Dahlia v. United States,* 441 U.S. 238, 257 (1979) ("[I]t is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant."); *Stinson v. State,* 835 S.E.2d 342, 355-56 (Ga. App. 2019) (ineffective assistance claim denied for failing to move to suppress DNA evidence where search warrant authorized officer to obtain buccal swab at the "Gwinnett County Jail at 2900 University Parkway, Lawrenceville, GA, 30043," but the swab was obtained while defendant was in a courtroom holding cell at "75 Langley Drive"). Appellate counsel's justification for not raising the suppression issue was reasonable.

Appellate counsel raised three issues on direct appeal: 1) the evidence was insufficient to support Petitioner's convictions; 2) Petitioner's convictions for especially aggravated burglary were statutorily barred; and 3) the same two convictions violated double jeopardy principals. *Tolbert*, 507 S.W.3d at 201. Although the second issue was raised for the first time on appeal, this court concluded that consideration of the issue was necessary to do substantial justice and agreed with appellate counsel that the especially aggravated burglary convictions were prohibited under Tennessee Code Annotated section 39-14-404(d) because the statute prohibits convictions for both especially aggravated burglary and another offense involving serious bodily injury when the injury (or killing) in both convictions is based on the same conduct. *Id.* at 213-14. For these reasons, this court reduced the two especially aggravated burglary convictions to aggravated burglary. *Id.*

Upon reducing the two aggravated burglary convictions, this court next considered appellate counsel's third issue that the dual convictions violated Double Jeopardy. *Id*. Because the proof at trial established that Petitioner entered a habitation and committed a

single theft, this court once again agreed with appellate counsel and merged the two aggravated burglary convictions into a single aggravated burglary conviction. *Id.* at 215-16.

Because the suppression issue was not "significant and obvious" compared to the issues appellate counsel chose to raise on appeal, Petitioner cannot prevail on this claim and he was properly denied relief.

B. Failure to raise trial court's denial of the introduction of Ms. Davis's out-of-court statement

Petitioner argues that appellate counsel's failure to challenge the trial court's decision to exclude Ms. Davis's statement on direct appeal was ineffective because her statement was admissible under Rule 613(b) of the Tennessee Rules of Evidence. "The purpose of Rule 613(b) is to allow the introduction of otherwise inadmissible extrinsic evidence for impeachment." *State v. Martin,* 934 S.W.2d 546, 567 (Tenn. 1998). Extrinsic evidence of a prior inconsistent statement remains inadmissible when a witness unequivocally admits to having made the prior statement. *State v. Davis,* 466 S.W.3d 49, 64 (Tenn. 2015).

In denying Petitioner relief, the post-conviction court held that appellate counsel was not ineffective because the statement was not admissible:

> During the bench conference on this issue, the trial court noted, "I don't want [the jury] to consider [the prior statement] disproportionately to other evidence because there is a lot of evidence that she was in and out of it at the time she gave the statement and [it] shouldn't be given inordinate weight." The trial [court] stated that when Ms. Davis gave the statement, there was "varying degrees of lucidity apparently." Based upon Ms. Davis'[s] severe medical condition at the time she spoke to [Officer] Long and the treatment that was required for her condition, it is clear that there was no showing that her statement was made under circumstances indicating trustworthiness. The trial court appropriately allowed [trial counsel] to cross-examine Ms. Davis with this statement, but it correctly prohibited [him] from introducing this unsworn, out-of-court statement into evidence. [Appellate counsel] was not ineffective for failing to raise this issue on appeal but was instead appropriately operating within the discretionary bounds afforded to appellate counsel. The [P]etitioner is not entitled to relief.

Because appellate counsel's strategy was an informed decision based on preparation, research, and consultation with Petitioner and trial counsel, this court affords it great deference.

The evidence shows that Ms. Davis never denied having made a statement to Officer Long after she had come out of the induced coma. Trial counsel was allowed to question Ms. Davis about the prior statement and cross-examined her specifically about where her testimony differed from her statement. For instance, she told Officer Long that the attacker wore dreadlocks or braids which "had a swing to them" but testified at trial that the attacker's hair was bunched up inside the mask. *Tolbert,* 507 S.W.3d at 204. She also told Officer Long that she retrieved her cell phone from the bathroom; at trial, she testified that she retrieved it from the living room couch. *Id.* Ms. Davis explained repeatedly that she was "disoriented" during the interview. *Id.* Based on the evidence, appellate counsel's strategy on appeal was reasonable.

Ultimately, neither the suppression issue nor the evidentiary issue was stronger than the issues appellate counsel chose to pursue on appeal. Although both omitted issues were raised at trial, appellate counsel's strategy to focus on the issues he raised was justified. *Matson*, 729 S.W.2d at 282. Appellate counsel was very experienced in defending clients in criminal appeals. Appellate counsel communicated with Petitioner before the motion for new trial was heard and continued to do so through the appeal and remand for re-sentencing. He was acutely aware of the issues Petitioner wanted to raise on appeal and was extremely familiar with the case having reviewed the voluminous trial transcripts twice. Application of the *Carpenter* factors demonstrates that appellate counsel's performance was not deficient. Furthermore, no prejudice resulted. *See Carpenter,* 126 S.W.3d at 887. Petitioner is not entitled to relief.

III. Cumulative Error

Petitioner contends multiple errors by trial and appellate counsel warranted relief under the cumulative error doctrine. The cumulative error doctrine recognizes that there may be many errors, each of which constitutes mere harmless error in isolation, but "have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). To warrant relief under the cumulative error doctrine, there must have been more than one actual error committed during the trial proceedings. *State v. Herron*, 461 S.W.3d 890, 910 (Tenn. 2015) (citing *Hester,* 324 S.W.3d at 77). Because we have concluded that neither trial counsel nor appellate counsel's representation was ineffective, there is no aggregate effect of multiple errors. Petitioner was therefore not deprived of a fair trial. He is entitled to no relief.

Conclusion

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

_____
JILL BARTEE AYERS, JUDGE