IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 13, 2022

JEROME BARRETT v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2007-D-3201 Steve R. Dozier, Judge

No. M2021-01149-CCA-R3-PC

Petitioner, Jerome Barrett, appeals from the denial of his petition for post-conviction relief, seeking relief from his first degree murder conviction. On appeal, Petitioner contends that the post-conviction court erred by not recusing itself and that he received the ineffective assistance of counsel. Having reviewed 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 Trial Court Affirmed

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and JILL BARTEE AYERS, JJ., joined.

Jerome Sidney Barrett, Wartburg, Tennessee, Pro Se (on appeal); Manuel Russ, Nashville, Tennessee (post-conviction hearing).

Herbert H. Slatery III, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; Glenn Funk, District Attorney General; and J. Wesley King, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

On January 30, 2009, Petitioner was convicted of the 1975 murder of the victim, a Vanderbilt University student, and Petitioner was sentenced to life in prison. Petitioner's conviction was affirmed on direct appeal. *State v. Jerome Sidney Barrett*, No. M2010-00444-CCA-R3-CD, 2012 WL 2914119 (Tenn. Crim. App. July 18, 2012), *perm. app. denied* (Tenn. Dec. 12, 2012).

On February 1, 1975, George Trammel "Tram" Hudson, a student at Vanderbilt University, took the victim on a date. *Id*. at *2. They consumed alcohol, and the victim vomited twice. Mr. Hudson took the victim home around 1:30 a.m. *Id*. The following day, the victim's father and brother discovered her body inside her apartment. She was nude except for a blouse, and her face was "a little discolored." *Id*. at *1. They called police, and officers from the Metro Nashville Police Department ("MNPD") arrived and collected various items of evidence from the scene. Officer Thales Finchum said that neither he nor his partner wore gloves at the scene and that it was not a common practice at the time to wear gloves when collecting evidence. *Id*.

James Sledge, a former MNPD officer who was an assistant district attorney general at the time of Petitioner's trial, and Officer Tommy Burke also responded to the scene. General Sledge testified that police did not use gloves to collect evidence in 1975. *Id*. at *5. General Sledge and Officer Burke removed the bedding covering the victim's body and the victim's clothing and placed the items in evidence bags. *Id*. at *6.

A latent fingerprint expert analyzed prints recovered from the scene. She found usable prints but was unable to make an identification. *Id*. at *7. She said the prints were never compared to elimination prints from officers on the scene, the victim, the victim's family, neighbors, or friends. She compared the prints to those of Petitioner, and the prints were not Petitioner's. *Id*.

Edward Berwitz testified as an expert in hair and fiber analysis. In 1975, while employed by the Federal Bureau of Investigation ("FBI"), he analyzed hairs collected from the crime scene. *Id*. He found forcibly removed head hairs on a blanket, a sheet, and blue jeans. He found pubic hairs on a blanket, a sheet, blue jeans, a bedspread, and the victim's pubic hair combings. *Id*.

Retired MNPD Detective Bill Pridemore was assigned to the Cold Case Unit, which later reopened the case. *Id*. at *9. He sent several items to the Tennessee Bureau of Investigation ("TBI") for DNA testing. Detective Pridemore submitted a blouse, a white comforter, a pillow and pillow case, a quilt, a yellow striped blanket, a striped bed sheet, another sheet, panties, hairs and pubic hair combings, and fingernail clippings and scrapings. *Id*. He acknowledged that he did not send the blue jeans to the TBI. He said he attempted to locate the slides containing hairs and fibers that had been recovered by the FBI in 1975 but was unable to do so. *Id*.

Detective Pridemore testified that Petitioner was developed as a person of interest, and police obtained a search warrant for Petitioner's DNA sample. *Id*. TBI Special Agent Chad Johnson tested the items that Detective Pridemore submitted. Most of the evidence

was not ideal for testing due to its age, but Special Agent Johnson found a sufficient amount to test. *Id*. at *13. He received Petitioner's DNA swabs on October 29, 2007, and he had already examined the other evidence. *Id*. at *14. Special Agent Johnson said that a total of six items contained DNA with a profile consistent with Petitioner's DNA profile. *Id*. at *14.

Petitioner's DNA profile matched DNA found on the quilt and DNA from semen on the striped blanket. Special Agent Johnson said the probability of another person having the same DNA profile exceeded the world population. *Id*. at *14. The striped sheet contained semen that was a partial DNA match to Petitioner. Special Agent Johnson was able to match three of the 13 loci, and the probability of another person having the same profile that matched the same three loci was one in 6,600 in the African-American population, one in 5,500 in the Caucasian population, one in 16,000 in the Southeastern Hispanic population, and one in 19,000 in the Southwestern Hispanic population. *Id*. Special Agent Johnson found semen and human blood on the white sheet. *Id*. He obtained a partial profile from the semen, which was consistent with five of 13 loci from Petitioner's DNA sample. *Id*. The probability of another person having the same DNA profile was one in 560,000 in the African-American population, one in 490,000 in the Caucasian population, one in 2.6 million in the Southeastern Hispanic population, and one in 4.5 million in the Southwestern Hispanic population. *Id*.

Special Agent Johnson identified semen with Petitioner's complete DNA profile on the victim's blouse. *Id*. He said the possibility of another person having the same DNA profile exceeded the world population. *Id*. He also found Petitioner's DNA profile in the victim's fingernail clippings, and the probability of someone other than Petitioner having the same DNA profile was one in more than the world's population. *Id*.

Sheldon Anter, an inmate, was housed with Petitioner in jail. *Id*. at *15. He testified that Petitioner said he "killed that [ ] Vanderbilt girl and that he didn't know why he killed her and that he needed some help." *Id*. Mr. Anter said that another inmate, Frank White, was present during the conversation. One week later, Petitioner told Mr. Anter that if he mentioned anything about the previous conversation, Petitioner would kill him. *Id*. Mr. Anter testified that he saw an argument between Petitioner and Andrew Napper, during which Petitioner told Mr. Napper that he had no problem killing because he had killed before. *Id*. Mr. Anter said he also saw an argument between Petitioner and Mr. White, during which Petitioner said that he had murdered before and had no problem murdering Mr. White. *Id*.

Dr. Bruce Levy, the former Tennessee Chief Medical Examiner and Davidson County Medical Examiner, testified as an expert witness in forensic pathology. *Id*. at *10. He said that in 1975, forensic pathology was relatively new and that Dr. John Petrone, the

medical examiner who performed the victim's autopsy, was deceased at the time of trial. Dr. Levy testified that Dr. Petrone was a physician but not a forensic pathologist. *Id*. Dr. Levy was unable to locate the 1975 autopsy report, but he reviewed the victim's death certificate and medical examiner's report, photographs taken at the scene, police reports, laboratory reports, and newspaper clippings. *Id*. at *10-11. Dr. Petrone determined that the victim's cause of death was asphyxiation, either by strangulation or from choking on vomit. *Id*. Dr. Levy testified that in 1975, it was commonly believed that a person could choke to death on vomit but that this had since been proven untrue and that a person could only choke to death if a solid object was lodged in the airway. *Id*. at *10. Dr. Levy noted injuries to the victim's face and neck and agreed with Dr. Petrone's conclusion that the victim died from asphyxiation. *Id*.

A Davidson County Criminal Court jury convicted Petitioner of first degree murder, for which he received a sentence of life imprisonment. *Id*. at *16. A panel of this Court affirmed Petitioner's conviction, and the Tennessee Supreme Court denied Petitioner's application for permission to appeal. Petitioner filed a pro se petition for writ of error coram nobis, which the coram nobis court summarily dismissed as untimely. *Jerome S. Barrett v. State*, No. M2012-01778-CCA-R3-CO, 2013 WL 3378318, at *1 (Tenn. Crim. App. July 1, 2013) (affirming the dismissal), *perm. app. denied* (Tenn. Nov. 13, 2013). Petitioner filed a pro se petition for post-conviction relief and an amended pro se petition, alleging numerous claims of ineffective assistance of counsel and requesting that the post-conviction court recuse itself. *Jerome Sidney Barrett v. State*, No. M2015-01143-CCA-R3-PC, 2016 WL 4768698, *3 (Tenn. Crim. App. Sept. 12, 2016), *no perm. app. filed*. Petitioner subsequently filed an amended petition through post-conviction counsel. *Id*. At the post-conviction hearing, Petitioner attempted to fire his post-conviction counsel. *Id*. at *4. Petitioner requested the court either continue the case or allow him to proceed pro se. *Id*. The post-conviction court denied Petitioner's requests and proceeded with the hearing with appointed post-conviction counsel. *Id*. After the hearing, the post-conviction court denied relief. *Id*.

On appeal, a panel of this Court concluded that the post-conviction court erred by denying the motion for a continuance and the motion to proceed pro se. *Id*. at *5. The panel remanded the case for a hearing to determine whether Petitioner was competent to proceed pro se and ordered that Petitioner be appointed new counsel if the post-conviction court determined he was not competent. *Id*. Prior to the hearing on remand, the post-conviction court granted Petitioner's request for appointment of new counsel. After new counsel requested to withdraw, the post-conviction court appointed another attorney to represent Petitioner at the post-conviction hearing. The post-conviction court conducted three hearings on the post-conviction petition and ultimately denied the petition. Petitioner filed a timely notice of appeal.

Post-Conviction Hearing

At the outset of the hearing on remand, post-conviction counsel informed the court that Petitioner again wished to proceed pro se. When questioned by the post-conviction court, Petitioner stated that it was a "misunderstanding" and that he wanted post-conviction counsel to represent him.

Petitioner testified that his family hired trial counsel to represent him after his arrest. Petitioner admitted that trial counsel gave him "some discovery," but he claimed that trial counsel never reviewed discovery with him. Petitioner said he wrote to trial counsel expressing his concern about "four unidentified male DNA profiles," and Petitioner discussed his concerns with trial counsel, but "it never went any further than that." Petitioner testified that trial counsel was "nonresponsive" to his concerns. He stated that trial counsel visited him in jail "about five or six times."

Petitioner testified, "[n]obody talked about a plea bargain or anything, and I wouldn't entertain it anyway." He testified that he and trial counsel "had a disagreement about the defense" and that Petitioner felt "the cause of death was the main defense." He could not remember trial counsel's theory of defense. He testified that trial counsel "broke off" communication with him during trial and "moved all of the way to the other end of the table[,]" and Petitioner was not able to discuss trial strategy or witness testimony with trial counsel. Petitioner testified that trial counsel advised him not to testify at trial. Petitioner understood that he had the right to testify, but he "felt like [he] was kind of like on [his] own." Petitioner did not feel like he "had any defense counsel assistance."

Petitioner testified that trial counsel had "no response at all" to his questions about DNA evidence. Petitioner asked trial counsel why he was the only person being prosecuted when there were "like five or six unidentified male donors." Petitioner said trial counsel asked him how his DNA was at the scene, and Petitioner answered that the presence of DNA did not mean that he killed anybody. Petitioner was "very unsatisfied" with trial counsel's "response and attention to the DNA" evidence. Petitioner agreed that an expert would have had to testify at trial to challenge the State's DNA expert, but Petitioner stated he did not understand the importance of having an independent DNA analysis at the time of his trial. Petitioner believed it was "a serious mistake" not to analyze George Hudson's DNA. Petitioner testified that an independent DNA analyst could have determined whether a DNA test produced a false positive.

Petitioner testified that Dr. James Lauridson prepared a report on the victim's cause of death but that trial counsel did not call Dr. Lauridson to testify at trial. Petitioner said trial counsel told him he was not going to call Dr. Lauridson to testify, "because the Judge said if you are successful in attacking the DNA, . . . I'm going to allow the State to renew

their motion to present prior bad acts." Petitioner did not realize at the time the importance of Dr. Lauridson's testimony "as a rebuttal to Dr. Levy's testimony." Petitioner testified that Dr. Lauridson concluded there was insufficient evidence from the 1975 investigation for Dr. Levy to later determine a cause of death.

Petitioner believed trial counsel should have cross-examined James Sledge more thoroughly about inconsistencies between his trial testimony and reports on the incident. Petitioner believed that Sheldon Anter should not have been permitted to testify because, according to Mr. Anter's sister, Mr. Anter had an agreement with the State that he would not be deported if he testified against Petitioner. Petitioner believed that trial counsel should have called Frank White and Marcus Bradford[1], who would have testified that Mr. Anter's testimony was untruthful. Petitioner testified that everyone in the jail pod knew Mr. Anter was "a snitch."

In 2010, Petitioner became aware of criminal charges against Dr. Levy. Petitioner agreed that Dr. Levy's arrest happened after Petitioner was convicted, but Petitioner contended trial counsel should have discovered information about the investigation of Dr. Levy during Petitioner's trial and used the information to impeach Dr. Levy. Petitioner testified that trial counsel "had about ten different reasons why he could have shown that Dr. Levy's testimony was not reliable."

Petitioner claimed that trial counsel should have challenged the admissibility of items taken from the victim's apartment and tested for DNA on the basis that a proper chain of custody was not maintained because Detective Pridemore checked out exhibits several times and for an extended period of time without documenting where the evidence was stored. Petitioner said trial counsel sought to suppress the exhibits after the trial court had already allowed them to be admitted and shown to the jury.

Petitioner testified that the victim's death certificate indicated that an autopsy had been performed but that Dr. Levy testified at a pretrial hearing that no autopsy was performed. Petitioner said that Dr. Levy testified at trial that an autopsy had been performed, but the State failed to preserve the evidence. Petitioner believed that trial counsel should have pointed out the inconsistency to the court when requesting a jury instruction on missing evidence.

Petitioner testified that "the FBI used a fingertip touch to determine whether or not semen was on clothing" and that the TBI had performed microscopic and chemical analysis

[1] Petitioner refers to the witness interchangeably as "Marcus Bradford" and "Marcus Burford." For consistency, we will refer to the witness as "Marcus Bradford."

on those items. Petitioner said that the prosecution minimized the reliability of the FBI tests at trial as "old" and "antiquated" and that an independent DNA expert could have pointed out the variances between the tests to the jury. Petitioner said that trial counsel should have requested testing of George Hudson's DNA. Petitioner also said that the prosecutor's use of the term DNA "match" was prejudicial and that trial counsel should have objected and argued for the use of the terms "partial match" or "inconclusive" instead.

On cross-examination, Petitioner testified that he did not agree with trial counsel's defense theory but acknowledged that they had discussions about it. Petitioner said he trusted that trial counsel was "handling it." Petitioner was dissatisfied with trial counsel's cross-examination of Dr. Levy and felt that trial counsel gave Dr. Levy a "blank check" in terms of his trial testimony. Petitioner did not know how his DNA was at the crime scene. He testified there was "a reasonable doubt that it wasn't [his] DNA." He claimed that there could have been "cross-contamination or inadvertent substitution" from the evidence storage room.

Trial counsel testified that he had been a criminal defense attorney since 1997. In preparation for Petitioner's trial, trial counsel reviewed discovery, hired an investigator, interviewed witnesses, and consulted Dr. Lauridson, an expert in forensic pathology. Trial counsel also consulted with a DNA expert, Dr. William Watson. Trial counsel testified that he met with Petitioner "fairly frequently" and estimated that he visited him in jail on at least ten occasions. He testified that he and Petitioner did not always agree but that trial counsel "settled on what the theory of our case should be." Trial counsel sent the DNA reports to the DNA expert and consulted with him by phone. Trial counsel asked the expert to give an opinion as to the quality of the DNA testing done by the State. Trial counsel ultimately decided against calling the DNA expert as a witness at trial because trial counsel "wanted to make the case about something other than DNA." Trial counsel explained, "if this case boiled down to DNA and that's what the case was about, [Petitioner] had virtually no chance of winning the case." Trial counsel did not believe that attacking the DNA evidence was the best defense because he felt that "it would be very hard to challenge the conclusions of the State's experts."

Trial counsel felt that "the strongest theory" of the case was to challenge the victim's cause and manner of death. Trial counsel interviewed Dr. Levy before trial, and Dr. Levy conceded that his opinion on the victim's cause of death should not carry the same weight as it would in a case where he performed the autopsy. Trial counsel recalled that Dr. Levy stated that his conclusion about the cause and manner of death was a "gray area." Trial counsel felt that he did as well as he could in cross-examining Dr. Levy and that he "got him to admit" that his opinion was "a gray area." Trial counsel recalled that the prosecutors "were not happy with [Dr. Levy's] testimony at all." Trial counsel decided not to call Dr. Lauridson as a witness because he did not want the State to recall Dr. Levy, giving

prosecutors an opportunity to "clean up the mess that [Dr. Levy] left on the stand in [trial counsel's] opinion." In making that decision, trial counsel consulted with his law partner and another attorney who represented Petitioner in another case.

Trial counsel did not "specifically recall" physically distancing himself from Petitioner at the defense table during trial, but he explained, he "might have switched seating" with his law partner so that his law partner could listen to any concerns Petitioner might have had and trial counsel could listen to the witnesses testifying. Trial counsel recalled discussing Frank White as a potential witness, but trial counsel was unsure whether his investigator attempted to interview Mr. White. Trial counsel did not recall discussing George Hudson's DNA with Petitioner, but he "suspect[ed they] did."

On cross-examination, trial counsel testified that he "brought to the jury's attention that there were multiple DNA profiles found." Although he did not directly point it out to the jury, trial counsel "wanted the jury to get the idea" that the victim might have had multiple partners. Trial counsel testified that he was not aware of any efforts by the State to identify the unknown DNA profiles. Trial counsel chose not to question the State's DNA expert because he wanted to divert the jury's attention to the victim's cause of death. Trial counsel felt "sure" that he discussed with Petitioner his consultation with the DNA expert and explained the reason behind his decision not to call the expert. Trial counsel agreed that Dr. Lauridson prepared a report concluding that there was insufficient evidence to determine the victim's cause of death. Trial counsel was not aware of a criminal investigation involving Dr. Levy at the time of Petitioner's trial.

Trial counsel could not recall the trial court's reasoning for denying his *Ferguson* motion. Trial counsel testified it would have been appropriate to renew the motion based on Dr. Levy's testimony that an autopsy report existed, but trial counsel did not recall that being Dr. Levy's testimony. Trial counsel recalled arguing "very strenuously" that the box on the death certificate would not have been checked that an autopsy was performed if there was no autopsy report.

Dr. William Watson, an expert in DNA analysis, testified that he reviewed all of the documentation regarding the DNA evidence and serological testing in Petitioner's case. Dr. Watson agreed that the 1975 report did not identify any items containing semen and that the testing done in 2007 revealed the presence of semen on the victim's bed sheet. He further agreed that cross-examination on the issue of inconsistent results would have been a useful line of questioning.

Dr. Watson testified that there were two unidentified DNA profiles following the 2007-2008 testing. He testified, "certainly the presence of unknown individuals at the crime scene is something that needs to be explored[.]"

At the time of the DNA testing in Petitioner's case, the number of loci used to confirm a DNA match was 13, as compared to 24 loci tested at the time of the post-conviction hearing. Dr. Watson said the language used in the TBI report regarding a DNA match of fewer than 13 loci "was and generally is common usage even today."

Dr. Watson explained that procedures in storing and transporting DNA samples has changed since 1975. In 1975, before DNA testing existed, preservation of evidence was focused on serology testing. He explained that some methods used to store blood and semen samples might not be appropriate for preservation of DNA. Dr. Watson agreed that it would be a useful area of cross-examination if an item was unaccounted for in the evidence locker or property room.

On cross-examination, Dr. Watson testified that he had no reason to believe that there was an issue with the chain of custody in Petitioner's case. Dr. Watson acknowledged that he had not been provided a transcript of TBI Special Agent Chad Johnson's trial testimony and therefore could not comment on trial counsel's cross-examination of the witness. Dr. Watson conceded that additional testing could have resulted in evidence that was consistent with Petitioner's DNA.

Dr. Watson did not find anything in Special Agent Johnson's report that was inconsistent with the documentation underlying his report. Dr. Watson did not "have any issues" with the DNA testing or how it was reported.

On September 17, 2021, the post-conviction court entered an order denying the petition for post-conviction relief, finding that Petitioner had not established a basis for recusal and that Petitioner had not established that he received ineffective assistance of counsel at trial.

Analysis

In this appeal, Petitioner asserts that the trial court erred by not recusing itself and that he was denied the effective assistance of counsel at trial. Specifically, Petitioner argues that trial counsel was ineffective for: 1) failing to hire a DNA expert and seek independent DNA analysis; 2) failing to object to the admissibility of DNA evidence offered by the State based on an improper chain of custody; 3) failing to object to improper comments by the prosecutor; 4) failing to object to Sheldon Anter's testimony as hearsay; 5) failing to call as witnesses at trial Dr. James Lauridson, Ann Graves, and Marcus Bradford; 6) failing to effectively cross-examine State's witnesses General James Sledge and Dr. Bruce Levy; 7) failing to request a "missing witness" jury instruction; 8) failing to request a *Ferguson* jury instruction; 9) failing to request a jury instruction regarding the theory of defense; 10)

failing to discover the investigation of Dr. Bruce Levy; and 11) failing to request that the State make an election of offenses.[2] The State responds that the post-conviction court did not err by denying Petitioner's request for recusal and that Petitioner was not denied the effective assistance of counsel.

Recusal

Petitioner argues that the post-conviction judge erred by not recusing himself. He contends that the post-conviction court erred by denying his requests to have witnesses testify via video technology, by denying his requests for various subpoenas, and by failing to comply with this Court's direction on remand.

A trial judge should recuse himself or herself whenever the judge has any doubt as to his or her ability to preside impartially or whenever his or her impartiality can reasonably be questioned. *Pannell v. State*, 71 S.W.3d 720, 725 (Tenn. Crim. App. 2001). This is an objective standard. *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). "Thus, while a trial judge should grant a recusal whenever the judge has any doubts about his or her ability to preside impartially, recusal is also warranted when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Id*. A trial judge's adverse rulings are not usually sufficient to establish bias. *Id*. at 821. The trial judge retains discretion over his or her recusal. *State v. Smith*, 906 S.W.2d 6, 11 (Tenn. Crim. App.1995). Unless the evidence in the record indicates that the failure to recuse was an abuse of discretion, this Court will not interfere with that decision. *State v. Hines*, 919 S.W.2d 573, 578 (Tenn. 1995).

The post-conviction court observed that Petitioner filed a pro se motion for the post-conviction court to recuse itself on March 24, 2014, and that Petitioner's appointed counsel read a letter from Petitioner stating reasons for recusal at the April 28, 2021 post-conviction hearing. The court noted that the letter Petitioner's counsel read did not qualify as a written motion and it could therefore deem Petitioner's "litany of complaints regarding the Court's partiality" waived. Among the complaints were the post-conviction court's refusal to issue subpoenas for various witnesses to testify at the post-conviction hearing; denying his request to allow Dr. Lauridson testify remotely via video; and refusing to order independent DNA testing following this Court's remand. Petitioner's letter stated that the post-conviction court had made "bias[ed] decisions against [him]" and that the court "could no longer fairly and impartially adjudicate this matter."

[2] Petitioner's appellate brief is not a model of clarity. We have done our best to decipher the claims raised by Petitioner in his pro se brief, and we have reorganized the issues for clarity.

In its order denying post-conviction relief, the post-conviction court found that Petitioner's letter read in court by post-conviction counsel did not qualify as a written motion and deemed it waived. The court observed that it had approved some of the subpoenas requested by Petitioner.[3] The court noted that the purpose of this Court's remand was to determine whether Petitioner could proceed pro se and that Petitioner "mischaracterized the remand for pro se determination as a continued mechanism for the Court to refuse additional DNA testing." The post-conviction court declined to recuse itself, finding that Petitioner had failed to establish a basis for recusal.

Defendant's written motion, included in his pro se amended petition for post-conviction relief filed on March 24, 2014,[4] sought recusal of the post-conviction court based on a delay in his receiving file-stamped copies of his original post-conviction petition and the court's order appointing post-conviction counsel. Petitioner claimed that the post-conviction court and his then-appointed counsel failed to contact him in a timely manner to inform him of the status of his case. The petition was filed on November 12, 2013, and Petitioner alleged that he did not receive a copy of the court's order appointing counsel until January 1, 2014, which is more than 30 days after he filed his petition "and beyond the statutory limit afforded him in § 40-30-107." It appears that Petitioner misinterpreted Tennessee Code Annotated section 40-30-106, which provides that the court has 30 days to enter an order either dismissing the post-conviction petition or appointing counsel. This is not a proper basis for recusal.

Petitioner's complaints after remand are waived. As the post-conviction court observed, the letter read into the record at the hearing after remand does not comply with the requirements of Tennessee Supreme Court Rule 10B, section 1.01. It was not a written motion, it was not supported by an affidavit, and it was not promptly filed. Furthermore, it is well-settled that a petitioner cannot file pleadings pro se when represented by counsel. *State v. Muse*, 637 S.W.2d 468, 470 (Tenn. Crim. App. 1982).

Petitioner asserts that the post-conviction court "misconstrued the appellate court instructions[,]" which he argues directed the post-conviction court to order independent DNA testing. Rather, it is Petitioner who has misconstrued the opinion of this Court, in which the panel specifically declined to make any determinations on the grounds presented in the original post-conviction petition. *Jerome Sidney Barrett v. State*, 2016 WL 4768698, at *1. The sole reason for reversing the post-conviction court's denial of post-conviction

[3] The record contains orders by the post-conviction court dated August 22, 2017, and October 8, 2018, addressing each of Petitioner's requests to have numerous subpoenas issued and to allow video testimony. The court granted some of Petitioner's requests and denied others, finding that Petitioner had not shown that several out-of-state witnesses were material to the post-conviction petition.

[4] The petition is not part of the record in the present appeal. *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).

relief was to determine whether Petitioner should have been allowed to proceed pro se. *Id*. at *5. As the post-conviction court noted, "[a]fter the issuance of the opinion, but prior to the mandate and [the post-conviction court]'s ability to enact further proceedings, the Petitioner filed a pro se motion for appointment of new counsel . . . 'to accomplish the purposes of the remand.'"

Petitioner's claims, even if not waived, were based solely on adverse rulings by the post-conviction court. The post-conviction court did not abuse its discretion in denying Petitioner's request for recusal.

DNA Evidence

Petitioner makes several claims with regard to the DNA evidence, which are all framed in terms of whether he received the effective assistance of trial counsel. Nowhere in Petitioner's brief or reply brief does he cite the statute or contend that he is entitled to additional DNA testing under the Post-Conviction DNA Analysis Act. As discussed above, the State addresses the issue in the context of the scope of remand and whether this Court concluded Petitioner was entitled to independent DNA testing. Because Petitioner's several post-conviction petitions can be interpreted to request relief under the statute, and for the sake of preventing further needless litigation, we will address the issue.

The Post-Conviction DNA Analysis Act allows for defendants convicted of certain homicide and sexual offenses to request post-conviction DNA testing. T.C.A. § 40-30-303. The post-conviction court, after affording the prosecution the opportunity to respond, must order a DNA analysis if it finds the following:

> (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
> (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
> (3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
> (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

T.C.A. § 40-30-304.

In addition, the court may order DNA analysis if it finds "[a] reasonable probability exists that analysis of the evidence will produce DNA results that would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction," and the petitioner has satisfied the other three requirements. Under both the mandatory and discretionary provisions, the petitioner must satisfy all four requirements before DNA analysis will be ordered by the court. *See Powers v. State*, 343 S.W.3d 36, 48 (Tenn. 2011).

Here, the evidence collected was subject to DNA analysis by both the TBI and the FBI. Petitioner's trial counsel obtained a DNA expert who reviewed the TBI's DNA analysis and did not "have any issues with the testing that was done or how it was reported." Petitioner's DNA profile matched DNA found on a quilt and a blanket, and the probability of another person having the same DNA profile exceeded the world population. *State v. Sidney Jerome Barrett*, 2012 WL 2914119, at *14. Petitioner's DNA profile was also consistent with semen found on a striped sheet and the victim's blouse. *Id*. The probability of another person having the same DNA profile as the profile on the victim's blouse exceeded the world population. *Id*.

Petitioner has failed to show that additional DNA testing would have produced a more favorable result, that the evidence was not subjected to analysis that could resolve an issue not resolved by the previous analysis, or that the request for additional analysis was made for the purpose of demonstrating innocence and not to unreasonably delay the administration of justice. Petitioner is not entitled to relief.

Ineffective Assistance of Counsel

Petitioner makes numerous claims of ineffective assistance of counsel. The State responds that the post-conviction court properly denied post-conviction relief.

Post-conviction relief is available when a "conviction or sentence 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. Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI; Tenn. Const. art. I, § 9; *see Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980); *Dellinger v. State*, 279 S.W.3d 282, 293 (Tenn. 2009). When a claim of ineffective assistance of counsel is made under the Sixth Amendment to the United States Constitution, 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). "Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." *Goad v. State*, 938 S.W.2d 363,

370 (Tenn. 1996). The *Strickland* standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

Deficient performance requires a showing that "counsel's representation fell below an objective standard of reasonableness," despite the fact that reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 688-89. When a court reviews a lawyer's performance, it "must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from the perspective of counsel at that time." *Howell v. State*, 185 S.W.3d 319, 326 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 689). We will not deem counsel to have been ineffective merely because a different strategy or procedure might have produced a more favorable result. *Rhoden v. State*, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991). We recognize, however, that "deference to tactical choices only applies if the choices are informed ones based upon adequate preparation." *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992) (citing *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)).

As to the prejudice prong, the petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "That is, the petitioner must establish that his counsel's deficient performance was of such a degree that it deprived him of a fair trial and called into question the reliability of the outcome." *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008) (citing *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999)).

The burden in a post-conviction proceeding is on the petitioner to prove allegations of fact by clear and convincing evidence. T.C.A. § 40-30-110(1); *see Dellinger*, 279 S.W.3d at 293-94. "Questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved" by the post-conviction court. *Fields v. State*, 40 S.W.3d 450, 456 (Tenn. 2001). On appeal, we are bound by the post-conviction court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Id*. Because they relate to mixed questions of law and fact, we review the post-conviction court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. *Id*. at 457.

DNA Expert and Independent Analysis

Petitioner contends that trial counsel was ineffective for failing to hire a DNA expert to challenge the State's DNA expert and failing to request testing of George Hudson's DNA.

Trial counsel testified at the post-conviction hearing that he consulted with a DNA expert, which did not yield any concerns about the integrity of the State's DNA testing. Trial counsel explained that he made a strategic decision not to attack the DNA evidence because he wanted to give the jury the implication that the victim had multiple partners. Trial counsel also testified that he made the strategic decision to focus on the victim's cause of death rather than the DNA evidence because the DNA evidence against Petitioner was overwhelming. Counsel believed that diverting the jury's attention away from the DNA evidence and onto the cause of death was the better defense strategy.

Dr. William Watson, Petitioner's DNA expert who testified at the post-conviction hearing, ultimately provided further support for trial counsel's strategic decision. Dr. Watson reviewed Special Agent Johnson's report and did not have "any issues with the testing that was done or how it was reported." He found no "indication of an error or an incident of contamination in [Special Agent Johnson's] notes." Petitioner has not shown that trial counsel's performance was deficient in this regard.

Regarding Mr. Hudson, Petitioner asserts that trial counsel should have had his DNA tested because he was the last person to see the victim alive. The post-conviction court found that trial counsel was not deficient for failing to obtain a sample of Mr. Hudson's DNA. Mr. Hudson testified at trial, and trial counsel "extensively" cross-examined him. The post-conviction court noted that Petitioner was unable to explain "what authority or mechanism" would have allowed trial counsel to test Mr. Hudson's DNA. The court further found that "obtaining a sample of Mr. Hudson's DNA has no bearing on the presence of the Petitioner's DNA at the scene of the murder." Petitioner has not established that trial counsel was deficient in this regard.

Failure to Object Based on Chain of Custody

Petitioner argues that trial counsel was ineffective for failing to object to the admission of the "State's exhibits" on the basis that the State failed to maintain a proper chain of custody.

Petitioner argued on direct appeal that the trial court erroneously admitted evidence collected at the victim's apartment because a proper chain of custody was not established. *Jerome Sidney Barrett v. State*, 2012 WL 2914119, at *23. A panel of this Court noted that trial counsel objected to the chain of custody of the items during Special Agent Johnson's testimony, but trial counsel did not object earlier in the trial when the items were

introduced as exhibits to General Sledge's testimony. *Id*. The panel also noted that during oral argument, appellate counsel asserted that the chain of custody was challenged in a pretrial hearing but that the record did not contain a transcript of a hearing on the issue. *Id*. The panel, therefore, concluded that Petitioner had "waived any complaint about the chain of custody regarding the items themselves" by failing to make a contemporaneous objection at trial but that he had properly preserved his argument regarding the TBI's DNA analysis of the items. *Id*.

Regarding the chain of custody of the DNA analysis of the items of evidence, the panel noted that trial counsel objected to the introduction of this evidence and concluded that the trial court properly admitted the evidence. *Id*. at *23-25. The panel held that Petitioner had not presented any "proof to suggest that tampering or incorrect handling occurred." *Id*. at *25. At the post-conviction hearing, Petitioner failed to present any proof that the State tampered with the DNA evidence or that it was cross-contaminated with Petitioner's DNA from an unrelated case.

Regarding the chain of custody of the items collected as evidence from the victim's apartment, Petitioner has failed to show that trial counsel was deficient or that he was prejudiced by any alleged deficiency. Petitioner has not demonstrated that trial counsel did not challenge the chain of custody in the pretrial hearing, as appellate counsel suggested, or that a timely objection would have been sustained.

General Sledge testified at trial that he and Officer Tommy Burke collected evidence from the victim's apartment and explained the procedures for collecting and storing evidence. *Id*. at *5-6. Edward Berwitz, who examined the hairs collected for the FBI, testified that he did not remember whether he opened the package or if a lab technician opened it. Mr. Berwitz testified that when he completed his testing, the evidence was packaged and returned to Nashville. *Id*. at *8. Sergeant Pridemore testified that when he reopened the case, he submitted several items collected from the victim's apartment to the TBI for DNA testing. *Id*. at *9.

Petitioner alleges that Sergeant Pridemore kept the items in his "personal possession without accountability for 21 days[,]" but Petitioner has failed to present any proof to support the allegation. Petitioner has not demonstrated that a proper chain of custody was not established, and therefore, Petitioner has not shown that trial counsel was deficient or that he was prejudiced.

Failure to Object to Prosecutor Comments

Petitioner asserts that the State committed prosecutorial misconduct and misstated the evidence by stating that the victim's body had knife wounds; that Petitioner "told j.h.l.s.

that he raped" the victim, and that the prosecutor denied saying "he raped her." Petitioner argues that the prosecutor did not make the statements in good faith, that they were made without foundation, and that no corrective statement or retraction was ever made.

To the extent that Petitioner's claim is a stand-alone assertion of prosecutorial misconduct, Petitioner has waived this claim. A ground for post-conviction relief is waived "if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." T.C.A. § 40-30-106(g). Petitioner did not raise this claim on direct appeal. *See William Earl McCarver v. State*, No. M2009-00753-CCA-R3-PC, 2010 WL 596344, at *4 (Tenn. Crim. App. Feb. 19, 2010) (concluding that the petitioner waived claim of prosecutorial misconduct by failing to raise the issue on direct appeal), *perm. app. denied* (Tenn. Aug. 25, 2010). Accordingly, he has waived the issue.

To the extent Petitioner's claim is one of ineffective assistance of counsel, Petitioner failed to question trial counsel at the post-conviction hearing about the prosecutor's comments or trial counsel's reasoning for not objecting to the comments. The post-conviction court noted, "[t]here are often several 'valid tactical reasons' why trial counsel might refrain from objecting to testimony or arguments of attorneys, including 'not wanting to emphasize unfavorable evidence.'" (quoting *Gregory Robinson v. State*, No. W2011-00967-CCA-R3-PD, 2013 WL 1149761, at *79 (Tenn. Crim. App. Mar. 20, 2013), *perm. app. denied* (Tenn. Aug. 14, 2013).

"Without testimony from trial counsel or some evidence indicating that [the] decision was not a tactical one, we cannot determine that trial counsel provided anything other than effective assistance of counsel." *State v. Leroy Sexton*, No. M2004-03076-CCA-R3-CD, 2007 WL 92352, at *5 (Tenn. Crim. App. Jan. 12, 2007), *perm. app. denied* (Tenn. May 14, 2007). Petitioner is not entitled to relief on this issue.

Failure to Object to Sheldon Anter's Testimony

Petitioner complains that trial counsel failed to object to hearsay testimony by Sheldon Anter "about absentee witness Frank White" regarding an argument between Petitioner and Mr. White and threats by Petitioner to kill other inmates. Mr. Anter did not testify, however, about any statements of Mr. White. Rather, Mr. Anter testified about statements made by Petitioner. *See State v. Jerome Sidney Barrett*, 2012 WL 2914119, at *15. Tennessee Rule of Evidence 803 provides a hearsay exception for a statement offered against a party that is "the party's own statement." Tenn. R. Evid. 803(1.2)(A). Trial counsel had no basis to object to Mr. Anter's testimony. Petitioner has not established any deficiency.

Failure to Call Witnesses

Petitioner contends that trial counsel was ineffective for failing to call Dr. James Lauridson to testify at trial. The post-conviction court found that trial counsel made a strategic decision not to call Dr. Lauridson. Trial counsel testified that he consulted with Dr. Lauridson, and trial counsel agreed that Dr. Lauridson prepared a report concluding that there was insufficient evidence to determine the victim's cause of death. After having consulted with two other attorneys who were familiar with the case, trial counsel made the decision not to call Dr. Lauridson as a witness because he did not want to allow the State to recall Dr. Levy, whose testimony trial counsel believed favored the defense. Trial counsel explained that he had elicited testimony on cross-examination of Dr. Levy that his determination of the cause and manner of the victim's death was "a gray area."

Petitioner contends that trial counsel's reasoning was "incredulous," but Petitioner cannot attack "a sound, but unsuccessful, tactical decision made during the course of the proceedings." *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). The evidence does not preponderate against the post-conviction court's finding that trial counsel made a tactical decision after a thorough investigation.

Petitioner also contends that trial counsel should have subpoenaed Ann Graves, the sister of Sheldon Anter, and Marcus Bradford, a fellow inmate who knew Mr. Anter to be a "snitch." In its order addressing Petitioner's "Request for Subpoenas for Evidentiary Hearing," the post-conviction court determined that Petitioner had not shown how Ms. Graves's testimony "would affect the outcome of the original trial or the granting of post-conviction relief" and denied his request to subpoena Ms. Graves. The court concluded that Ms. Graves's testimony was not necessary to the post-conviction hearing. Regarding Mr. Bradford's testimony, the court determined that Petitioner could issue a subpoena for him to testify at the post-conviction hearing.

A post-conviction petitioner is entitled to subpoena witnesses to testify in support of his or her claims. Tenn. Sup. Ct. R. 28, § 8(C)(3) ("Each party [in a post-conviction action] shall have the right to subpoena witnesses for appearance at the evidentiary hearing."). However, a court has the authority "to prevent abuse of its process by abating subpoenas for witnesses whose testimony would be immaterial." *State v. Womack*, 591 S.W.2d 437, 443 (Tenn. Ct. App. 1979); *see also State v. Ostein*, 293 S.W.3d 519, 536 (Tenn. 2009) (holding that a defendant's right to subpoena witnesses "applies only when the proposed witness is material").

Petitioner asserts that Ms. Graves told reporters that prosecutors had promised not to have Mr. Anter deported in exchange for his testimony against Petitioner. In its order denying post-conviction relief, the court noted that Petitioner failed to provide "adequate

citation to the interview with Mr. Anter's sister[.]" Petitioner did not introduce copies of the alleged interview at the post-conviction hearing. Moreover, trial counsel cross-examined Mr. Anter at trial about his motives for testifying. He testified that he had a trial scheduled in a workers' compensation case and the State did not "help" him or promise him anything in that case. *Barrett*, 2012 WL 2914119, at *15. Notably, trial counsel was not questioned about Ms. Graves at the post-conviction hearing. Neither this Court, nor the post-conviction court may speculate about trial counsel's decision not to subpoena or call a witness to testify. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990).

Turning to the post-conviction court's denial of Petitioner's right to subpoena witnesses for the evidentiary hearing, we reiterate, a petitioner's right to compulsory process for obtaining witnesses in his or her favor is not absolute. *State v. Smith*, 639 S.W.2d 677, 680 (Tenn. Crim. App. 1982). Grounds for post-conviction relief are limited to constitutional abridgments that result in a void or voidable conviction or sentence. T.C.A. § 40-30-103. Petitioner failed to establish that Ms. Graves's testimony was material to the post-conviction hearing or that trial counsel was ineffective for failing to call her as a witness at trial.

This Court has observed that, "[a]s a general rule, . . . the only way [a] petitioner can establish" that trial counsel improperly failed to interview a witness is by calling the witness to testify at the post-conviction hearing. *Black*, 794 S.W.2d at 757. However, as the post-conviction court noted Petitioner failed even to introduce the news articles reflecting Ms. Graves's statement.

As to the issue of whether trial counsel was ineffective for failing to call Mr. Bradford as a witness at trial, the post-conviction court granted Petitioner's request to subpoena him to testify at the post-conviction hearing, and Petitioner failed to present his testimony. *See id*. Accordingly, Petitioner has not established that trial counsel was ineffective.

Cross-Examination

Petitioner contends that trial counsel's cross-examination of Dr. Levy and General Sledge was ineffective. The State responds that the post-conviction court properly denied relief on this basis.

Petitioner argues that General Sledge gave testimony at trial that was inconsistent with his 1975 police report. General Sledge testified at trial that lividity was an indicator of a body's position at the time of death and that this was significant because it indicated whether the body was moved after death. *State v. Jerome Sidney Barrett*, 2012 WL

2914119, at *6. The victim was on top of a quilt and covered by a comforter, and General Sledge noted the settling of blood on the back of her shoulders. *Id*.

Petitioner claims that General Sledge's trial testimony was not consistent with his report, but Petitioner gives no specific examples to support his assertions. The post-conviction court found that Petitioner did not "adequately cite[] examples of inconsistent statements or how he was prejudiced by trial counsel['s] failing to ask every question the Petitioner may have conceived." Moreover, Petitioner did not question trial counsel at the post-conviction hearing about his cross-examination of General Sledge at trial. Given the strength of the State's case against Petitioner, Petitioner has not established that he was prejudiced by trial counsel's failure to point out whatever inconsistencies Petitioner alleges there to have been between General Sledge's report and his trial testimony.

Petitioner also asserts that trial counsel should have questioned Dr. Levy's testimony that the victim fought Petitioner and that Petitioner's DNA was found under her fingernails. Petitioner argues that the source of the DNA was never determined and that it was never determined that the fingernails belonged to the victim. He also takes issue with the use of the term "fingernail scrapings" rather than "fingernail clippings" in the 1975 FBI report.

Special Agent Johnson testified that the victim's fingernail clippings revealed two DNA profiles. The larger profile was consistent with Petitioner's DNA, and the probability of another person having the same DNA profile was one in over six billion. *State v. Jerome Sidney Barrett*, 2012 WL 2914119, at *14. The smaller profile was consistent with the DNA profile from a pillow that was presumed to be the victim's. *Id*. Special Agent Johnson explained that the victim would typically be the larger contributor of DNA to fingernail clippings evidence. *Id*.

It is clear from the record that the State provided evidence that the fingernail clippings belonged to the victim and that Petitioner's DNA was found on them. Furthermore, trial counsel's defense strategy was to focus on the victim's cause of death rather than the DNA evidence, and trial counsel's cross-examination of Dr. Levy included his acknowledging that the cause and manner of the victim's death was a "gray area." Petitioner has not shown that trial counsel's cross-examination of Dr. Levy was deficient or that the outcome of his trial would have been any different had trial counsel chosen a different strategy.

Missing Witness Jury Instruction

Petitioner argues that trial counsel's failure to request a jury instruction regarding "absentee witness" Frank White denied him the effective assistance of counsel, due process, and the right to confront hostile witnesses.

> The "missing witness rule" as recognized in Tennessee provides that a party may comment about an absent witness when the evidence shows "that the witness had knowledge of material facts, that a relationship exists between the witness and the party that would naturally incline the witness to favor the party and that the missing witness was available to the process of the Court for trial."

State v. Bough, 152 S.W.3d 453, 463 (Tenn. 2004) (quoting *Delk v. State*, 590 S.W.2d 435, 440 (Tenn. 1979)). "The missing witness rule is premised on the idea that the absent witness, 'if produced, would have made an intelligent statement about what was observed.'" *Dickey v. McCord*, 63 S.W.3d 714, 722 (Tenn. Ct. App. 2001) (quoting *State v. Francis*, 669 S.W.2d 85, 89 (Tenn. 1984)).

To support a missing witness instruction, the party requesting it must establish "that 'the witness had knowledge of material facts, that a relationship exists between the witness and the party that would naturally incline the witness to favor the party and that the missing witness was available to the process of the Court for trial.'" *State v. Bigbee*, 885 S.W.2d 797, 804 (Tenn. 1994) (quoting *State v. Middlebrooks*, 840 S.W.2d 317, 334-35 (Tenn. 1992)) (internal citation and quotation marks omitted).

Petitioner has not offered any evidence that Mr. White would have been favorable to his defense. Although the post-conviction court determined that Petitioner could subpoena Mr. White to testify at the evidentiary hearing, Petitioner did not call Mr. White as a witness. *See Black*, 794 S.W.2d at 757.

Petitioner has not established that he was entitled to the missing witness jury instruction or that trial counsel was deficient. Petitioner is not entitled to relief on this basis.

Ferguson Instruction

Petitioner also contends that trial counsel was ineffective for failing to renew his request for a jury instruction pursuant to *State v. Ferguson* regarding the alleged missing autopsy report. Petitioner argues that Dr. Levy "changed his testimony" and testified "that he was certain an autopsy had been performed[,]" but the State failed to preserve the evidence.

The post-conviction court found that trial counsel requested a *Ferguson* jury instruction and the trial court denied the request. On direct appeal, a panel of this Court observed that Petitioner had failed to show the exculpatory value of the autopsy report and concluded that the trial court correctly declined to issue the instruction. *State v. Jerome Sidney Barrett*, 2012 WL 2914119, at *22-23.

Petitioner has not established that trial counsel was deficient or that he was prejudiced.

Defense Theory Jury Instruction

Petitioner appears to assert that trial counsel was ineffective for failing to request a special jury instruction on his theory of defense. Petitioner argues that trial counsel should have "requested that the jury be informed" of what Petitioner characterizes as trial counsel's "convoluted and illogical tactics regarding Dr. Lauridson and Dr. Levy[.]"

Trial counsel testified that his defense strategy was to focus on the victim's cause of death. Petitioner did not question trial counsel about his decision not to request a special jury instruction. Therefore, Petitioner cannot show that trial counsel's decision was not a tactical one. Consequently, Petitioner has not established that counsel was deficient.

Investigation of Dr. Levy

Petitioner argues that trial counsel was ineffective for failing to discover the criminal investigation of Dr. Levy and use it to impeach his credibility. Trial counsel testified that he did not know about the TBI's investigation of Dr. Levy at the time of Petitioner's trial. The post-conviction court accredited trial counsel's testimony and noted that Petitioner offered no proof that Dr. Levy was under investigation when he testified at Petitioner's trial. Petitioner has not established that counsel was deficient or that he was prejudiced.

Election of Offenses

Petitioner contends that trial counsel was ineffective for failing to request that the State make an election of offenses. Petitioner argues that the "prosecutor argued rape, burglary and murder and felony murder, betting the Jury to be disposed to find Petitioner guilty of something" and that it is unclear whether the jury convicted him of felony murder with rape or burglary as the underlying felony or first degree premeditated murder.

The post-conviction court found that only one offense was presented to the jury and, therefore, no election was required. The record shows that Petitioner was indicted for one

count of first degree premeditated murder and one count of felony murder during the perpetration of rape. The jury found Petitioner guilty of both counts, and the trial court properly merged his convictions before imposing a life sentence. Moreover, "our supreme court has held that the State is not required to elect between first degree premeditated murder and felony murder charged in separate counts of the indictment for a single offense, and both theories of first degree murder may be submitted to the jury." *State v. See State v. Joel Richard Schmeiderer*, No. M1999-02546-CCA-R3-CD, 2000 WL 1681030, at *9 (Tenn. Crim. App. Nov. 9, 2000), *perm. app. denied* (Tenn. Mar. 4, 2002) (citations omitted). Accordingly, the State was not required to make an election of offenses, and trial counsel was not ineffective for not objecting to the lack of an election. Petitioner is not entitled to relief on this basis.

CONCLUSION

Upon review, we affirm the judgment of the post-conviction court.

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TIMOTHY L. EASTER, JUDGE