IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 9, 2023 Session

**BILLY JOE NELSON v. STATE OF TENNESSEE**
**Appeal from the Circuit Court for Coffee County**
**No. 2019-CR-45733 Don R. Ash, Senior Judge**

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**No. M2022-00375-CCA-R3-PC**

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Petitioner, Billy Joe Nelson, appeals as of right from the Coffee County Circuit Court's denial of his petition for post-conviction relief, wherein he challenged his convictions for aggravated kidnapping, carjacking, robbery, and aggravated rape. On appeal, Petitioner asserts that he received ineffective assistance of trial counsel based upon counsel's failure to (1) move to suppress the evidence obtained by Petitioner's arrest, the search of his girlfriend's mother's home, and the search of a cell phone he shared with his girlfriend; (2) move to suppress the victim's identification of Petitioner on a surveillance recording as impermissibly suggestive; (3) investigate DNA evidence or contest the chain of custody of the victim's rape kit and the DNA standards for the victim and Petitioner; (4) introduce a voice exemplar of Petitioner to prove that the perpetrator's voice in the background of the victim's 911 call was not his; and (5) use telephone records to cast doubt on the State's timeline of events and establish that a witness had reason to lie about Petitioner's involvement in the offenses. Petitioner also alleges that the State withheld exculpatory evidence relative to the victim's rape kit and DNA standards for the victim and Petitioner. Following our review, we affirm.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which JILL BARTEE AYERS and MATTHEW J. WILSON, JJ., joined.

Drew Justice, Murfreesboro, Tennessee, for the appellant, Billy Joe Nelson.

Jonathan Skrmetti, Attorney General and Reporter; T. Austin Watkins, Associate Chief Deputy; Craig Northcott, District Attorney General; and Jason M. Ponder, Assistant District Attorney General, for the Appellee, State of Tennessee.

## OPINION

### Factual and Procedural Background

*a. Proof at Trial*

Petitioner was convicted after a jury trial of carjacking, two counts of aggravated kidnapping, robbery, and aggravated rape. *State v. Nelson*, No. M2016-00010-CCA-R3-CD, 2017 WL 4621168, at *1 (Tenn. Crim. App. Oct. 16, 2017), *perm. app. denied* (Tenn. Feb. 14, 2018). In Petitioner's direct appeal, this court summarized the proof adduced at trial as follows:

> On December 31, 2012, the victim celebrated New Year's Eve at the 41 South Sports Bar and Grill ("41 South") in Manchester where her husband and his band were performing for patrons of the bar. After their show ended, sometime between 12:30 a.m. and 1:00 a.m. on January 1, the victim's husband needed to help the band take down equipment and load it onto a trailer. The victim was tired and wanted to go to sleep, so her husband escorted her to their car, which was parked in a well-lit parking lot beside the bar, so that she could sleep in the car while he loaded the equipment. Because it was cold outside, the victim started the car and turned on the heat. She reclined in the passenger seat, pulled a coat up over her lap, and fell asleep. Sometime later, the victim awoke to find that the car was "in motion," and a man was talking. When she turned over, the victim discovered that [Petitioner] was driving her car down Highway 55 towards Tullahoma. The victim did not know [Petitioner] and had never seen him before. [Petitioner] asked her, "Where did you think you were going, b****, you've been flirting with me all night, did you think you would get away from me[?]" [Petitioner] then said, "[C]ome here, b****, and suck my d***[.]" [Petitioner], whose blue jeans were opened, grabbed the back of the victim's head and forced her mouth onto his penis. As he continued to drive, [Petitioner] forced the victim to perform oral sex.
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> [Petitioner] pulled into a dark parking lot near Manchester High School. When the car stopped, the victim opened her car door and attempted to get out, but [Petitioner] grabbed her by the hair and pulled her towards him, saying, "[W]here are you going, b****, I'm not through with you, you're a rich b****, I'm going to rape you up the a**, do you understand that[?]" He pulled out clumps of the victim's hair and bit her face under her left eye, causing her to let go of the car door. [Petitioner] also told the victim that he had a gun as he pulled her back into the car. He then made the victim

pull down her pants, and he penetrated her vagina with his finger as he drove back onto Highway 55.

The victim later explained that she had "never felt pain like that before" and that she eventually "just gave in." [Petitioner] told her to pull up her sweater, and she did. He then pulled up her bra and "pinched [her] nipple." [Petitioner] asked her several times if she wanted to see his gun, but she "kept saying no[.]" [Petitioner] referred to the victim several times as "rich b****," so the victim asked [Petitioner] if he wanted money. The victim grabbed her purse from the backseat and told [Petitioner] that she could give him money. She retrieved her wallet, took out credit cards and gift cards, and attempted to give them to [Petitioner]. At the same time, the victim realized that she had her cell phone in the purse, and she called 911. When the dispatcher answered the call, however, it could be heard over the car's speakers because the cell phone was connected to the car through Bluetooth technology. The call to 911 was disconnected, but moments later, the victim's husband called her cell phone. [Petitioner] was angry that the victim was using her cell phone, and the victim's husband heard the victim saying, "[P]lease, don't shoot me." The victim's husband then hung up and called 911.

The victim begged [Petitioner] to take her to her credit union, which was in a well-traveled part of town. Instead, [Petitioner] drove to the ATM at Citizens Tri-County Bank, where he demanded the victim's ATM card. When she could not find the card in her wallet, she again requested that they go to the credit union. [Petitioner] backed out of the parking lot and drove towards the credit union. However, [Petitioner] made a U-turn and "started flying" down the road. Eventually, [Petitioner] stopped the car and opened the driver's side door. The lights came on inside the car, and the victim saw that her credit cards and business cards were "everywhere" in the car. [Petitioner] leaned over and picked up cards off the floorboard. He then demanded the victim's jewelry, and she gave him her wedding ring and an heirloom diamond ring. [Petitioner] told her, "I know where you live, b****, . . . don't move your head for ten minutes[,] or I will f***ing blow it off."

When [Petitioner] got out of the car, the victim locked the doors and "just sat there." The victim's husband called again and asked the victim where she was, but she was "hysterical" and said she had "no idea[.]" Her husband convinced her to get in the driver's seat and leave the area. The victim noticed a dumpster in front of her car that said "Dossett use only." She then told her husband that she was at Dossett Apartments in Tullahoma.

The victim called 911 a second time as she was driving to the police station. She told the 911 dispatcher that she felt "out of control and shaky" and like she "should not be driving." Officers intercepted the victim's car, and she was taken by ambulance to Harton Regional Medical Center. The victim was "very upset . . . [and] terrified." At the hospital, the victim was treated for her injuries, including an abrasion on her scalp and the bite mark on her face. An emergency room physician also performed a rape kit, which was then turned over to investigators with the Manchester Police Department.

The victim provided the investigators a description of [Petitioner] and stated that he was wearing a black hoodie and blue jeans. She stated that the lights were on inside the car and that she saw [Petitioner]'s face when she handed him the rings and as he instructed her to not to move for ten minutes. In describing the sexual assault, the victim stated that, when she was forced to perform oral sex, [Petitioner]'s black hoodie rubbed against her cheek. She said that she was unsure if [Petitioner] ejaculated during the assault.

The victim's car was processed at the Manchester Police Department's impound lot. Investigators swabbed multiple surfaces in the car for "touch DNA" and dusted for latent fingerprints inside the car. Investigators also went to 41 South, where they reviewed video surveillance footage from the New Year's Eve party during the timeframe that the victim had been at the bar. On the video surveillance footage, investigators saw two men wearing black hoodies. Manchester Police Department Investigator Billy Butler recognized one of the men as someone he knew. Investigator Butler later spoke to Shirley Cooley, who had been at 41 South for the New Year's Eve party, and she was able to identify the second man in a black hoodie on the video surveillance footage. On the morning after the victim's kidnapping, Ms. Cooley learned about the crime when she received a phone call from a friend. During the conversation, Ms. Cooley learned that the assailant had worn "a black hoodie sweatshirt." Ms. Cooley recalled that, while at 41 South the night before, a man wearing a black hoodie "kept coming up to [her] table," saying that he wanted to go to Mickey's Bar and Grill. The man asked Ms. Cooley if she wanted to go with him, but she refused. He told Ms. Cooley that his name was Billy Nelson and that he was from Indiana. Ms. Cooley contacted investigators, and when shown the video surveillance footage from 41 South, she was able to identify [Petitioner] as the second man in the black hoodie. Investigators then showed the victim the video surveillance footage, and the victim immediately identified the second man in the black hoodie as the man that had assaulted her.

Later that day, [Petitioner] called Investigator Butler and asked if investigators were looking for him. [Petitioner] wanted to talk over the phone, but Investigator Butler insisted that [Petitioner] come to the police department. [Petitioner] claimed that he had been in Alabama since December 28, 2012, working at a construction job. Although [Petitioner] agreed to meet Investigator Butler at the police department the following day, [Petitioner] did not show up. Investigator Butler later located [Petitioner] at a residence in Cannon County. Investigator Butler transported [Petitioner] back to Manchester, where he interviewed [Petitioner] after [Petitioner] waived his *Miranda* rights. [Petitioner] told Investigator Butler:

> I was at a party . . . from 6:00 p.m. to 2:00 a.m. Jeremy and Adrian Robertson was [sic] having a party. I left at Jeremy's at about 2:00 a.m. I went to 41 then went to Mickey's. I was wearing a pair of blue jeans and a Carhartt jacket, light brown, black and gray Nikes.
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> We went in the front door at the 41 South Sports Bar. We then went straight to Mickey's, and I spoke to Mickey and talked about the DJ [sic] could I sing a karaoke song. . . . Mickey said shut it down. . . . I left here yesterday morning and went to Tuscaloosa, Alabama, turned around and came back at 4:00 a.m.

Investigators subsequently obtained a search warrant to search the Cannon County residence, where [Petitioner] lived with his girlfriend and her mother. During the execution of the search warrant, investigators found a black hoodie in the laundry room and collected it as evidence.

Investigators also visited [Petitioner]'s friend, Derek Carver, at his home on East Grundy Street in Tullahoma. Mr. Carver's home was within walking distance of Dossett Apartments. Mr. Carver told investigators that sometime in the early morning of January 1, 2013, [Petitioner] entered his residence carrying a car amplifier. Mr. Carver stated that it was unusual for [Petitioner] to show up unannounced that early in the morning. [Petitioner] told Mr. Carver that "he got robbed" and needed to use Mr. Carver's phone to call his girlfriend for a ride home. [Petitioner] left "a stack of cards" at Mr. Carver's residence, which Mr. Carver later threw into a trashcan. When Mr. Carter retrieved the cards for investigators, they found that the cards

belonged to the victim and included her driver's license, credit cards, and personalized business cards.

The Manchester Police Department submitted all items of evidence collected to the Tennessee Bureau of Investigation crime lab, including buccal swabs from [Petitioner] and the victim. Special Agent Chad Johnson, a forensic scientist with the crime lab, tested a stain on the front pocket near the waistline of [Petitioner]'s black hoodie. He swabbed the area of the stain, and subsequent testing revealed that there was a mixture on the hoodie of spermatozoa and alpha-amylase, which was indicative of saliva. DNA testing showed that there was a mixture of DNA on the hoodie; the "sperm component" matched [Petitioner]'s DNA profile, and the "non-sperm component" matched the victim's DNA profile.

Following the investigation, the Coffee County Grand Jury indicted [Petitioner] for aggravated rape, carjacking, robbery, and two counts of aggravated kidnapping. Following a trial, [Petitioner] was convicted as charged. The trial court merged the convictions for aggravated kidnapping into a single conviction and sentenced [Petitioner], as a Range I standard offender, to twenty years with a 100% release eligibility for aggravated rape; ten years with a thirty percent release eligibility for carjacking; six years with a thirty percent release eligibility for robbery; and ten years with a 100% release eligibility for aggravated kidnapping. The trial court ordered all sentences to run concurrently with each other, except for the twenty-year sentence for aggravated rape, which the trial court ordered to run consecutively to the sentence for aggravated kidnapping, for a total effective sentence of thirty years at 100% in the Department of Correction.

*Id.* at *1-3.

*b. Direct appeal*

On appeal, Petitioner raised only the sufficiency of the evidence relative to his identity. In concluding that the identity evidence was sufficient, this court discussed the following evidence:

In this case, the victim identified [Petitioner] at trial as the man who kidnapped, raped, and robbed her. She testified that she was in the car beside [Petitioner] for an extended period of time before he left her in her car at Dossett Apartments. She stated that she could see [Petitioner]'s face in profile as he drove and that, when [Petitioner] was getting out of the car, the

> interior lights of the car came on, and she could see his whole face as he stole her rings and ordered her not to move for ten minutes. The victim testified that she had "no doubt" about [Petitioner]'s identification. Following the attack, the victim provided investigators with a physical description of the assailant and recalled that [Petitioner] wore a black hoodie. When she watched the video surveillance footage from 41 South, the victim immediately recognized [Petitioner] and his black hooded sweatshirt on the video. Because the victim viewed [Petitioner] under such circumstances that would permit a positive identification to be made, her testimony alone would be sufficient, if credited by the jury, to support [Petitioner]'s convictions.
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> The State, however, presented additional evidence confirming the victim's identification. Ms. Cooley testified at trial that she met [Petitioner] at 41 South on the night of the attack. She recalled that [Petitioner] was wearing a black hoodie and that he wanted her to accompany him to another bar. [Petitioner] introduced himself by name to Ms. Cooley, as Billy Nelson, and she later recognized [Petitioner] as the second man in the black hoodie seen on the video surveillance footage. Additionally, Mr. Carver testified that, in the early morning of January 1, [Petitioner] unexpectedly entered his residence, which was within walking distance of Dossett Apartments. [Petitioner] left the victim's credit cards, driver's license, and business cards, which he had just stolen from the victim, at Mr. Carver's residence. Clearly, Ms. Cooley's and Mr. Carter's testimony provided further proof of the accuracy of the victim's identification of [Petitioner].
>
> Additionally, forensic evidence supports the victim's identification of [Petitioner]. Agent Johnson testified that he found a DNA mixture consisting of [Petitioner]'s sperm and alpha-amylase (indicative of saliva) belonging to the victim on the black hoodie found in the laundry room of [Petitioner]'s residence. Finding evidence of the victim's saliva on the front of the hoodie would be consistent with the victim's testimony that [Petitioner] forced her to perform oral sex while he drove her car. Based on this evidence, a rational juror could conclude that the State had proven [Petitioner]'s identity as the perpetrator beyond a reasonable doubt.

*Id.* at *5.

*c. Post-conviction proceedings*

Petitioner filed a timely post-conviction petition, which post-conviction counsel amended. Petitioner alleged, in relevant part, that trial counsel provided ineffective

assistance by failing to (1) move to suppress the evidence obtained by Petitioner's arrest, the search of his girlfriend's mother's home, and the search of a cell phone Petitioner shared with his girlfriend; (2) move to suppress the victim's "show up" identification of Petitioner on the surveillance recording as impermissibly suggestive; (3) investigate or contest the chain of custody of the victim's rape kit; (4) introduce an exemplar of Petitioner's voice to prove that the voice heard in the background of the victim's 911 call was not his; and (5) use Mr. Carver's telephone records to establish that the State's timeline of events was impossible and that Mr. Carver was predisposed to lie about Petitioner's involvement in the incident. Petitioner also alleged that the State withheld exculpatory evidence relative to the chain of custody of the victim's rape kit.

At the post-conviction hearing, trial counsel testified that he met with Petitioner in a private room for court appearances in April, June, and July 2013; that he met with Petitioner's family in July 2013; that he wrote letters to Petitioner in August and September 2013; and that he visited Petitioner in jail for the first time in June 2014. He noted that Petitioner was not housed in Coffee County for part of the pretrial period. Counsel's file notes, which were received as an exhibit, reflected that he also met with Petitioner in August, October, and November 2014, and March 2015. He said that he took notes about Petitioner's version of events and discussed with Petitioner whether he would testify. In addition, Petitioner sent him letters.

Trial counsel testified that he attempted unsuccessfully to withdraw from Petitioner's case after a breakdown in communication occurred. He noted that "there was always some disagreement as to whether the offer coming from the [S]tate was appropriate" and that Petitioner believed counsel was "working with [the State], not doing everything [he] could on his case." Counsel did not recall Petitioner's filing a motion to remove counsel. Counsel agreed that part of Petitioner's discontent arose because he advised Petitioner to plead guilty; counsel noted that he believed that Petitioner would be convicted at trial based upon the DNA evidence. Counsel stated that Petitioner denied having committed the offenses. Counsel added that Petitioner was upset that counsel had not interacted with him.

Trial counsel acknowledged a letter from Petitioner, in which Petitioner asked counsel to withdraw. The letter, which was received as an exhibit, reflected Petitioner's assertion that counsel had not communicated with him in several weeks and that, when they eventually met, they only had twenty minutes to speak because "they could not get" Petitioner to counsel. Counsel did not recall the specific situation leading to the letter.

Trial counsel testified that "primary points" of the defense theory were that the victim was misled and confused in making her identification; that the DNA on Petitioner's hoodie could have been "innocently" transferred; and that Mr. Carver was an unreliable

witness. Counsel agreed that he had read articles about problems with eyewitness identifications and that he argued at trial that the victim could not have gotten a good look at the perpetrator because it was dark outside, and the person wore a hood for part of the incident. Counsel did not consult or hire an expert in eyewitness identification, and he opined that one was not "necessary or appropriate" in light of the DNA evidence. Counsel stated that he did not feel the need to "go all out" in undermining the victim's identification because the victim had identified Petitioner several times when viewing the surveillance recording, at the preliminary hearing, and at trial.

Trial counsel testified that the case was very difficult to defend and that, in addition to the DNA evidence, witnesses placed Petitioner "at the scene from the car that was abandoned . . . outside Dossett Apartments that tied into [the victim's] . . . recollection that the individual had taken debit cards, credit cards, other things from her purse."

Trial counsel testified that he was familiar with the law about due process violations occurring with a biased lineup or "show up." Counsel stated that filing a motion to suppress the victim's identification would not have interfered with his trial strategy. He opined, though, that there was no good faith basis for filing such a motion. Counsel acknowledged that an unreliable one-person lineup could violate due process. Counsel disagreed, though, that the victim's identification occurred during a one-person lineup; he stated that she picked Petitioner out "and then there were other individuals who were shown." Counsel agreed that he argued to the jury that "this was kind of a one-man lineup," although he noted the "difference between an argument to a jury and . . . the standard to have evidence suppressed in a pretrial suppression motion hearing."

Trial counsel affirmed that he reviewed the preliminary hearing testimony prior to trial. When shown the preliminary hearing transcript,[1] counsel recited the following portion of the victim's testimony:

> Q. And what were you looking for in that video?
>
> A. A man in a black-hooded sweatshirt with a white T-shirt, or something, underneath it, and jeans.
>
> Q. Okay. Were you looking for any man in a white shirt, black hoodie, T-shirt and jeans?
>
> A. No.

[1] The trial record was exhibited to the post-conviction hearing.

Q. Who were you looking for?

A. The man that was in my car.

Q. Did you see the man in your car?

A. Yes.

Q. How quickly did you see the man that was in your car?

A. Right away, but I didn't want to say that is him without watching it for a minute, but I -- it took my breath the minute he came on the screen.

Q. And you were able to identify him to the police?

A. Yes.

When asked whether he argued at trial that only one man in a black hooded sweatshirt appeared in the surveillance recording, trial counsel did not recall but deferred to the trial transcript.

Several warrants were received as exhibits at the post-conviction hearing and reflected as follows:

1. Post-conviction Exhibit 3 – Search of Cindy[2] Betts' residence

The search warrant for Ms. Betts' residence on Hollow Springs Road was issued at 1:27 p.m. on January 3, 2013. The warrant consisted of an initial page, a two-page affidavit, and two pages containing instructions to the police officer executing the warrant. The first page of the warrant stated:

Personally appeared before me, Honorable Susan Melton, the General Sessions Judge, for said State of Tennessee[,]

Undersigned and made oath in due form of law that Jennifer Betts and Billy J. Nelson [are] in possession of certain evidence of crime, to wit:

. . . .

[2] Jennifer Betts was Petitioner's girlfriend; Cindy Betts is Jennifer Betts' mother. Because Jennifer and Cindy Betts share a surname, we will refer to Jennifer Betts as Petitioner's girlfriend and Cindy Betts as Ms. Betts for clarity. We intend no disrespect.

1. Wedding band
2. Credit Cards with victim's name []
3. Driver[']s License with victim's name []
4. Cell phone that has the number [ending in] -0329 as call number
5. Black hooded sweat shirt
6. Gift cards

The property to be searched was described as follows:

> The property to be searched will be located at [address]. This residence is a single wide mobile home that sits off Hollow Springs Road in Woodbury TN 37910. There is a black mail box in front of this mobile home with the numbers . . . . A photograph of this residence is embedded.

The first page was unsigned.

The search warrant affidavit stated that Investigator Anthony Young[3] had been in law enforcement for seven years, four years as a patrol deputy and three as an investigator. It included that Investigator Young had "received extensive training in all areas of criminal investigation, including the investigation of rape and robbery." Investigator Young also stated that he had investigated several rape and robbery cases resulting in arrests and convictions.

Investigator Young set out the victim's report of having been kidnapped, sexually assaulted, threatened with a gun, and robbed of "her jewelry, credit cards, gift cards and driver's license." Investigator Young stated that, on January 1, 2013, Petitioner was identified as a person of interest and that Investigator Butler went to Petitioner's last known address, which was his stepfather's home. Petitioner's stepfather gave Investigator Butler a cell phone number ending in -0329 and stated that it belonged to Petitioner. Subsequently, Petitioner called Investigator Butler and stated that he had not been in the county on the night of the incident. Investigator Butler knew the statement to be false because the surveillance recording showed Petitioner inside the bar. Investigator Young stated that the victim identified Petitioner as the perpetrator on January 2, 2013.

Investigator Young stated that Investigator Stuart Colwell executed a search warrant for the phone number ending in -0329 and that the GPS location reflected that Petitioner was at the Hollow Springs Road residence. Investigator Young wrote that Petitioner was arrested at the house on January 2, 2013, that Petitioner was brought to the police

[3] Investigator Young signed the affidavit, but it was not clearly legible. The last page of the warrant included Investigator Young's name.

department, and that Petitioner stated that he was at 41 South "during the times of the abduction" and that he "often frequent[ed] the residence o[n] . . . Hollow Springs Road . . . to see his pregnant girlfriend Jennifer Betts."

Investigator Young stated:

> Your affiant knows that persons who commit the crimes such as aggravated rape and aggravated robbery will often conceal evidence of the crime at their place of residence because they feel secure in their concealment. Your affiant knows that often times person[s] who commit the crimes of aggravated rape and aggravated robbery will often take items for souvenirs and mementos such as the driver's license of [the] victim . . . . Your affiant believes that in all probability that evidence of the crimes will be found at [the residence on] Hollow Springs Road[.]

The last page of the warrant was signed by Judge Melton with the date and time. The search warrant return included that a black hooded sweatshirt was among the items seized during the search.

2. Post-conviction Exhibit 4 – Petitioner's arrest warrant

The arrest warrant was dated January 2, 2013, and reflected that Petitioner was to be arrested for carjacking. Investigator Butler wrote in the affidavit of complaint:

> On Tuesday January 1, 2013, [Petitioner] forced his way into a vehicle of a female at an unopened gas station near the 41 Sports Bar in Manchester, Tennessee. [Petitioner] forced his way into the victim's car, and then took the victim and her vehicle to other areas in Coffee County, Tennessee, where he committed other crimes.

3. Post-conviction Exhibit 23 – Cell phone search warrant -0329

Investigator Colwell obtained the cell phone search warrant on January 2, 2013, at 4:43 p.m. and requested that Verizon Wireless provide text message, call, tower, and subscriber information for the phone number ending in -0329 between December 31, 2012, and January 2, 2013, to obtain evidence of aggravated rape, carjacking, aggravated robbery, and aggravated kidnapping. It also requested current "cell phone tower location information" to help locate the cell phone user due to exigent circumstances.

Investigator Cowell included in the affidavit that the victim had identified Petitioner as the perpetrator, that Investigator Cowell had been told that the -0329 number belonged

to Petitioner, that Petitioner had contacted Investigator Butler and claimed to be in Alabama, and that Investigator Cowell believed that Petitioner was attempting to evade law enforcement and posed a danger to the public.

Trial counsel identified the search warrant for Ms. Betts' house, and he stated that the hoodie containing Petitioner's and the victim's DNA was obtained during that search. Counsel agreed that warrant affidavits had to be sworn, and he stated his belief that Investigator Young was sworn based upon the language in the warrant. Counsel said that he habitually examined warrants to ensure that they met all legal requirements, that they were signed and described the appropriate and correct location, that the dates matched, and that the warrant was timely. Counsel read from the warrant that Petitioner frequented the residence at Hollow Springs Road to see his girlfriend, but he did not recall discussing with Petitioner whether he lived there. Counsel agreed that Petitioner was at least a social guest and was arrested there.

Trial counsel did not recall whether, during his preparation for Petitioner's case, he reviewed specific cases named by post-conviction counsel about the nexus requirement for search warrants. Counsel stated that he did not know if he was qualified to opine about the existence of a nexus between the offenses and Ms. Betts' house. He noted that Petitioner was "staying there based upon the officer's assert[ion] here[,] he signed off on the warrant." When asked whether the search warrant affidavit showed a nexus in light of case law holding that simply frequenting or living at a place was not sufficient to establish a nexus, counsel responded, "I do not agree that that's what this warrant says . . . . [I]t talks about the fact there was also a search warrant executed on Verizon Wireless which also ties that address in particular and why they think there may be proof of crimes located there."

Trial counsel testified that it was not necessarily harmless to file a motion to suppress even if it was denied, noting that filing baseless motions could influence offers from the State and "other decisions going forward." Counsel said that he discussed with Petitioner the benefits and drawbacks of filing a motion to suppress the search of Ms. Betts' home and of the victim's identification of Petitioner on the surveillance recording, although he did not recall the specific drawbacks he mentioned. He stated that Petitioner did not ask him not to file a motion to suppress.

Trial counsel testified that, prior to the execution of the search warrant for Ms. Betts' house, Petitioner's girlfriend claimed that she and Petitioner were together the entire night; however, the Verizon Wireless records the police obtained reflected that Petitioner and Petitioner's girlfriend called each other at various points in the evening. He stated that Petitioner's cell phone "pinged" near Dossett Apartments, where the victim was left in her car. Counsel stated that the phone records led police to question Petitioner's girlfriend's statement and believe that there might be other proof related to the incident at her home

because she was Petitioner's girlfriend and he was staying with her. Counsel opined that the search warrant had the proper nexus based upon this information, although he acknowledged that the information he recited went beyond the face of the warrant. He noted that the warrant referenced the phone records, stated that the telephone number belonged to Petitioner, and "tie[d], it looks like, back to the date of the crime." Counsel agreed that nothing in the search warrant affidavit stated that Petitioner went to Ms. Betts' house after the incident.

Trial counsel testified that he likely examined Petitioner's girlfriend's phone records. He stated that, after being presented proof that her first statement was false, Petitioner's girlfriend gave a second statement admitting to picking up Petitioner at Mr. Carver's house. Counsel spoke to Petitioner's girlfriend through her attorney and directly with her attorney's permission. Petitioner's girlfriend told counsel that she last saw Petitioner walking out of 41 South and that she received a call around 3:00 a.m. from Petitioner, who was using Mr. Carver's phone.

Trial counsel testified that the telephone number ending in -0329 belonged to either Petitioner or Petitioner's girlfriend. He had no reason to dispute Petitioner's assertion that he and Petitioner's girlfriend shared the phone. Counsel said that he did not believe a legal basis existed to file a motion to suppress the Verizon search warrant. Counsel stated that he would have told Petitioner why he declined to file a motion to suppress despite Petitioner's request to do so—namely, that it was not supported by relevant case law. Counsel noted that Petitioner requested a "multitude of motions" and asked if they could "get rid of" evidence and that he explained to Petitioner why the motions were inappropriate and would not be granted.

Trial counsel testified that he argued at trial that Mr. Carver was "fed" Petitioner's name by police, that more than one officer responded to Mr. Carver's house, and that the officers smelled marijuana when they came inside. Counsel recalled that the interview occurred some days after the incident. He agreed that Mr. Carver told police that multiple other people were at the house when Petitioner visited; he noted that the incident occurred on New Year's Eve.

Trial counsel testified that, in response to Mr. Carver's nervousness, a police officer told Mr. Carver not to worry because they were "not [t]here about the weed." Upon questioning by the post-conviction court, counsel said that he did not know if the officer's statement came up during trial.[4] Counsel did not know if marijuana was discussed more than once at the trial. Counsel agreed that he asked Mr. Carver on cross-examination

[4] The trial record reflects that trial counsel elicited this information from the officer on cross-examination.

whether he was anxious because he believed the officers were concerned about the marijuana and that Mr. Carver answered negatively.

When asked whether a strategic reason existed for not introducing extrinsic proof of the marijuana odor to show Mr. Carver's "bias in speaking to the police," trial counsel testified that he did not know how marijuana odor would show bias for or against Petitioner. Relative to his decision not to press Mr. Carver after he denied being anxious about the marijuana, counsel noted that he was concerned about how far to "push" the drug evidence because Petitioner and Mr. Carver knew one another from past drug transactions. Counsel noted that the jury was already inclined to dislike Petitioner. Counsel stated that he did not want to open the door to testimony about Petitioner's being involved in drug sales by asking why Petitioner knew the location of Mr. Carver's residence. Counsel noted that he had successfully excluded evidence of Petitioner's other prior convictions and bad acts. Counsel did not recall Petitioner's telling him that Mr. Carver was a drug dealer. He acknowledged that Mr. Carver's selling drugs might provide a reason that the victim's stolen goods were in his house but reiterated that such evidence could have tied Petitioner to drug sales in front of the jury. Counsel discussed with Petitioner not wanting to introduce proof of his "drug trafficking." Counsel noted that proof of a drug transaction "would not negate the fact that there were also phone calls placed to pick him up from that area. He was being identified. And there was going to be DNA evidence." Counsel stated that he did not believe the drug sale "was going to be sufficient explanation for the jury to provide a different . . . reason for him to be there. It was only going to give further reason for the jury to think he was involved in criminal activity."

Trial counsel testified that Petitioner claimed to have been with Jeremiah Meeks at the time of the incident and that Petitioner said that he went with Mr. Meeks to Mr. Carver's house to buy pills. According to a letter Petitioner sent counsel, which was received as an exhibit, Mr. Meeks tried to rob Petitioner after becoming upset with Petitioner because he could not get pills from Mr. Carver. Counsel identified a billing statement he submitted to the court system, which reflected that someone from his office interviewed Mr. Meeks. Counsel did not recall speaking to Mr. Meeks personally and only remembered that Mr. Meeks' statement was not helpful to Petitioner; as a result, counsel decided not to call him as a witness. In addition, counsel's notes from the June 2014 jail visit reflected that Petitioner took Mr. Meeks from 41 South to Mickey's bar and that Mr. Meeks was not with him after he left Mickey's, which contradicted Petitioner's earlier statement.

Trial counsel testified that, at one point, Petitioner asked him to argue that the victim voluntarily had oral sex with him. Counsel said that he questioned Petitioner about the assertion given his position that Mr. Meeks was with him the entire evening. Counsel's notes from that conversation reflected, "Meeks not around for oral sex." Counsel disagreed that his notes about sex could have referred to Petitioner's girlfriend instead of the victim;

he recalled a specific conversation in which Petitioner alleged that he and the victim had consensual oral sex behind 41 South behind a dumpster. Petitioner claimed that he entered 41 South as the victim was coming out, that they knew each other, that they talked for a few minutes, and that the victim said that she was going to talk to her husband, the bouncer, and the other band members. Petitioner stated that he went to Mickey's bar and obtained four "hydros," then gave them to the victim behind 41 South in exchange for oral sex. Petitioner stated that Mr. Meeks was not around, that Petitioner's girlfriend pulled up in the car, and that Petitioner walked to Mickey's. Petitioner reported dancing with a woman at Mickey's, leaving with her and walking to her car, and going to Mr. Carver's house. Counsel said that the story made no sense when compared with the other proof and that he "felt the jury would laugh us both out of the courtroom" if they had presented a consent defense. He noted that the victim was a realtor and former teacher who was very well-respected and that she and Petitioner came from "two very different circles of friends." Trial counsel acknowledged that post-conviction counsel had shown him records that "appeared to show [the victim's husband's] phone number," and he stated that, if the records documented a telephone call from the victim's husband to Petitioner's girlfriend, he was unaware of it and could not explain it. Trial counsel maintained that no proof existed to support Petitioner's drugs-for-sex story.

A telephone record for the -0329 number, which was received as an exhibit, reflected an outgoing call from the phone to the victim's husband's phone number at 2:36 a.m. on January 1, 2013, that lasted one minute.

Trial counsel testified that his practice was to keep notes from witness interviews in his case file; he stated that his file notated that he located Mr. Meeks and his telephone number. Counsel noted that he would not have "bothered" to get the phone number and not call Mr. Meeks, although no further notes were in the file about Mr. Meeks' interview. Counsel stated that pages sometimes got lost from paper files. Counsel did not remember Petitioner's asking him not to call Mr. Meeks as a witness.

Trial counsel agreed that Mr. Carver said that Petitioner came to his house carrying a car amplifier; counsel noted that he discussed this at trial as "one thing that made no sense." When asked whether Petitioner's having an amplifier would have made more sense if Petitioner was seeking drugs, counsel reiterated that he made a tactical decision not to introduce proof of drug transactions to avoid "turn[ing] the jury against" Petitioner. Counsel noted that it was undisputed that Petitioner went to Mr. Carver's house. He stated that he told Petitioner that, in light of the overwhelming proof of the kidnapping and rape, drug-related proof would be cumulative against Petitioner.

Trial counsel did not recall why he did not introduce extrinsic evidence of Mr. Carver's statement that a number of people, not only two others, were at the house when

Petitioner arrived. He acknowledged that a gathering at the house made Petitioner's presence there less suspicious. Counsel noted, though, that other peoples' presence in the house did not negate that Petitioner gave Mr. Carver the victim's belongings. Counsel said that Petitioner may have told him that many people were at Mr. Carver's house for a New Year's party, but he did not recall Petitioner's describing the house as a "drug house." Counsel acknowledged Mr. Carver's statement to police that Petitioner talked to "everyone." He said that Mr. Carver told the police and him that Petitioner came to the house in the early morning, that Petitioner gave him the victim's belongings, and that Mr. Carver threw them away until the police came. Counsel believed that, if pressed, Mr. Carver would have maintained that he got the victim's items from Petitioner. Counsel stated that, although it was possible Mr. Carver got the items from a third party who was buying or selling drugs, counsel never identified a motive for Mr. Carver to falsely accuse Petitioner.

When asked if Mr. Carver could have lied when the police "fed him" Petitioner's name, trial counsel testified that he and Petitioner repeatedly discussed that the jury had two options—that Petitioner was guilty or that a "grand conspiracy" existed in which the DNA evidence, Mr. Carver's testimony, and the telephone records "collided together to inexplicably frame him for this crime." Counsel never believed they could convince a jury of the latter, and Petitioner refused to accept a plea offer.

Trial counsel testified that he argued at trial that the victim's DNA could have been deposited on Petitioner's hoodie by incidental contact at 41 South. Counsel noted that he examined the surveillance recording in search of contact between the victim and Petitioner. He stated that the DNA evidence was inconclusive, although the mixture of semen and saliva on the hoodie complicated his argument.

Relative to the victim's identification of Petitioner, trial counsel testified that he was reluctant to "go[] after" the victim on cross-examination for fear of appearing to harass a rape and kidnapping victim in front of the jury. Counsel acknowledged that the DNA report did not include that the DNA profiles were extracted from a small sample. Counsel agreed that he elicited from Agent Johnson that he swabbed a "large" area on the hoodie and that he could not determine whether the two DNA profiles came from the same part of the hoodie. When asked whether Agent Johnson "specifically admitted that the saliva was about 1/200th of the strength of what he would normally expect for saliva," counsel responded, "I believe that sounds -- I guess." Counsel agreed that he further elicited that amylase also existed in urine and other bodily fluids. Counsel did not know if the vaginal swab could also have deposited a small amount of amylase. Counsel denied ever requesting "raw" data from the DNA analysis.

Trial counsel testified that the DNA evidence was a significant obstacle, and he noted that he never felt a good explanation existed for the victim's DNA being on Petitioner's hoodie. Counsel agreed that the DNA would have been suppressed if a motion to suppress regarding the arrest warrant or the search warrant for Ms. Betts' house had been granted, but he maintained that one would not have been granted because insufficient grounds existed. Counsel did not recall which charge supported Petitioner's arrest warrant; post-conviction counsel confirmed for the post-conviction court that Petitioner was arrested for carjacking. Counsel opined that the arrest warrant affidavit established probable cause in a nonconclusory manner. He stated that Ms. Betts' house was searched based upon the search warrant, not Petitioner's arrest. Post-conviction counsel noted for the post-conviction court that no evidence was collected during the execution of the arrest warrant, and he opined that the search warrant was the "fruit" of the arrest warrant.

Trial counsel testified that the police tried to interview Petitioner after arresting him, that Petitioner denied involvement, and that Petitioner tried to contact his then-attorney. Counsel did not recall if Petitioner claimed not to have been *Mirandized* after his arrest. Counsel agreed that Petitioner was not a lawyer, which was why counsel "didn't do everything he told [counsel] to do."

Trial counsel testified that the telephone records contained GPS tracking and detailed calls between Petitioner and Petitioner's girlfriend. Counsel disagreed that every piece of evidence aside from the victim's identification stemmed from the GPS tracking. He acknowledged, though, that the Verizon search warrant was part of the reason police went to Mr. Carver's home and why they disbelieved Petitioner's girlfriend and charged her for a time. Counsel stated that the police also had the victim's statement, the surveillance recording, the witnesses at the bar, and Mr. Carver's statement. Counsel did not recall how the police located Petitioner or when Petitioner's girlfriend was arrested. He did not know whether the police would have arrested Petitioner or Petitioner's girlfriend or executed the search warrant at the same time without the GPS tracking data. He did not know why he did not file a motion to suppress related to the Verizon search warrant.

Trial counsel testified that he went to the police evidence locker before trial to inventory the State's evidence and match it to the descriptions given, as well as verify "whether they appeared to be properly sealed and taped up at that point in time." He denied seeing anything leading him to believe that something was wrong with the chain of custody or how the evidence had been handled. Counsel did not recall if the State ever disclosed that no vaginal swab was present in the victim's rape kit before Agent Johnson testified that only a vaginal smear slide was present in the kit.[5] Counsel stated that, if he had been

[5] The trial and post-conviction record reflect that the DNA testing request form related to the rape kit, which Investigator Butler completed, included a vaginal swab. However, Agent Johnson testified at trial that, when he opened the rape kit to test its contents, no vaginal swab was present.

made aware the swab was missing, he would have used it during cross-examination to call into question the remaining items in the kit and the test results. Counsel stated that, although the missing swab was potentially exculpatory, the mere fact that it was missing was not exculpatory.

Post-conviction counsel asked trial counsel if he agreed that the DNA swab could have been the source of the victim's DNA on Petitioner's hoodie; the post-conviction court asked, "Are you arguing someone took the DNA swab and rubbed it on the hoodie?" Post-conviction counsel answered affirmatively. The court responded, "Got any proof of that?" Post-conviction counsel replied, "The fact that it's missing and was documented."

Trial counsel testified that the swab could have been the source of the hoodie DNA if the police department, county sheriff's office, and TBI were colluding to frame Petitioner. Counsel noted, though, that he "never had any reason to believe whatsoever in the over [a] year of handling this case that that was in any way what was going on." Counsel disagreed that a single person could steal and transfer the DNA because the person would have to document the vaginal swab, remove it from the rape kit, and access the hoodie without anyone else finding out.

Trial counsel testified that he never had reason to question the chain of custody of the physical evidence. He did not know whether a case number would have been generated at the time the rape kit was put inside its packaging at the hospital, and he could not testify to the police's policies and procedures on handling evidence. Counsel did not recall the proof at trial that items were unopened between the hospital and the TBI laboratory.

Trial counsel testified that he looked at all of the physical exhibits, although he could not recall specific items. He stated that he would potentially use a rape kit that was not sealed at the hospital for "exculpatory purposes." He did not recall the State's disclosing that the rape kit was not sealed[6] or that tape had to be added at the TBI laboratory. Counsel did not recall whether tape was added to the rape kit.

Trial counsel identified a timeline graphic he was provided and had in his trial file, which reflected that the victim's 911 call, in which she cried and pleaded with the perpetrator, was placed at 3:01 a.m. The timeline also reflected that, at 3:01 a.m., the victim called her husband from the parking lot at Dossett Apartments and that, at 3:09 a.m., the victim called 911 again. Counsel said that he compared the times on the timeline with the State's evidence.

[6] Post-conviction counsel's questioning presupposed that the rape kit was not sealed; it was the subject of some dispute at the post-conviction hearing whether and when the rape kit was sealed and opened.

Trial counsel testified that he examined the telephone records in this case at the District Attorney's Office. Counsel stated that, per the 911 dispatch report, the victim's husband used a telephone number ending in -6348. He acknowledged that the records for Petitioner's girlfriend's cell phone showed an incoming call from the -6348 number at 1:10 a.m.[7] Counsel noted that Petitioner said that he knew the victim's husband in some capacity, but he did not recall if Petitioner said that he and the victim's husband interacted that night.[8]

Trial counsel testified that he was told by the State that only the ten minutes of surveillance footage played at trial existed; however, during his trial testimony, Investigator Butler referred to more footage. After discussing the matter with Petitioner, they decided to proceed with cross-examination, obtain the remaining footage, review it that evening, and reserve the right to recall Investigator Butler the following day. Counsel told Petitioner that they could ask for a mistrial and have the trial reset, or if counsel did not see anything exculpatory in the footage, they could proceed. Petitioner opted to proceed. Counsel acknowledged that the longer recording, which was multiple hours in length, was not in his file. He stated that it was impossible to review the footage with Petitioner, although he had shown Petitioner the ten-minute recording.

Trial counsel disagreed that the surveillance footage the victim viewed was a lineup. He did not recall if Petitioner described bumping into the victim at the bar, although he remembered conversations in which Petitioner said he knew who the victim was and interacted with her. Counsel did not recall where in the bar Petitioner and the victim allegedly interacted; he did not think the surveillance footage showed the entire bar, and he was unable to determine that Petitioner lied about the contact. Trial counsel identified notes he took on the day before trial, which reflected that the victim was drinking that night, that she never saw a weapon and no weapon had been recovered, that no fingerprints were collected, that none of Petitioner's DNA was found on the victim, and that Petitioner's girlfriend reported having sex with Petitioner that night, which would explain why his semen was on the hoodie.

Trial counsel testified that he filed a motion to withdraw after the trial because Petitioner was going to hire private counsel; the trial court stated that it would allow substitute counsel once new counsel filed a notice of appearance, but none was ever filed. Trial counsel stated that his relationship with Petitioner had deteriorated at an unspecified point in the proceedings but that it did not affect his ability to represent Petitioner at trial. He said that, based upon communications from Petitioner, he believed it was appropriate to try to withdraw.

[7] We note that the telephone records introduced at the post-conviction hearing only reflected an outgoing call from the -0329 number to the victim's husband's telephone number at 2:36 a.m.

[8] Petitioner's letter to trial counsel indicated that he spoke to the victim's husband at the bar.

On cross-examination, trial counsel agreed that the State had "extraordinarily strong proof." He stated that the victim and her husband were well-known, educated, married in college, had two small children, and were active in the schools and the community. He noted that jury selection was a challenge because everyone knew them. He expected that the jury found the victim to be very credible, and he noted again that her account was consistent across the preliminary hearing and several statements.

Trial counsel testified that the surveillance recording showed more than twenty men in the crowded bar area. Counsel denied that the recording was inherently suggestive, and he noted that the recording was unedited. He recounted that the victim stated that she saw Petitioner's face when he turned toward her in the car, when the overhead light came on as she opened the door to escape, and when the overhead light came on as Petitioner left the car. The victim had reported that Petitioner retrieved her credit cards, her children's gift cards, and items from her purse before threatening her to wait quietly because he knew who she was and where she lived.

Trial counsel testified that the evidence did not support a consent defense because the victim was bitten and a clump of her hair was pulled out as Petitioner pulled her back into the car. The victim's hair was found inside the car, and the police took photographs of her injuries at the hospital.

Trial counsel testified that he explored Petitioner's alibi and that Petitioner's statements to counsel about the incident were inconsistent. He opined that Petitioner would have been "fairly easily impeached" on cross-examination and that Petitioner's version of events would not have made sense to the jury. He noted that Petitioner's girlfriend's revised statement was consistent with the victim's timeline because it demonstrated that Petitioner was not with his girlfriend at the time of the offenses. Counsel stated that, in addition to Mr. Carver's statement and his giving the victim's personal items to police, people at Mr. Carver's house told police that Petitioner showed up in the early morning hours carrying an amplifier, which was consistent with the time at which the victim was left in her car.

Trial counsel testified that he spoke to the owner of Mickey's bar, who reported that Petitioner was intoxicated on New Year's Eve and wanted to sing karaoke while they were trying to close. The owner told counsel that he had to "run him off" from two women because Petitioner was being pushy or aggressive and that his presence was unwanted. Counsel did not feel that testimony would have been productive at trial.

Trial counsel testified that the victim was at 41 South dancing and watching her husband perform; he noted that, although she had consumed alcohol during the evening, she was not intoxicated. Tina Wilds, girlfriend of the owner of 41 South, and her friend

Ms. Cooley recalled that Petitioner wanted them to go to Mickey's bar and was being overbearing. Ms. Wilds and Ms. Cooley provided the police with Petitioner's name.

Trial counsel testified that no evidence[9] from the rape kit was used at trial, which he anticipated based upon the type of sexual contact the victim described. Counsel stated that, if the police had set out to contaminate Petitioner's hoodie, he would not expect them to use a vaginal swab to show that saliva was on the garment.

Trial counsel testified that he had handled hundreds of criminal cases and that it was common to open and close physical evidence in the evidence custodian's presence. When counsel reviewed physical evidence, he opened packages so that he could see what was inside the paper bags. The evidence custodian remained present for the entire time, and counsel assumed the custodian resealed the packages after he left.

On redirect examination, trial counsel testified that he did not interview any of the other people who were at Mr. Carver's house. He agreed that, generally, if a victim was shown a suggestive or misleading lineup, she could honestly believe that an innocent person was the perpetrator. Counsel affirmed that the victim was only shown the shorter, ten-minute surveillance recording.

Trial counsel testified that the telephone number ending in -0329 was registered to Alan Betts. Post-conviction counsel noted that Mr. Betts was Petitioner's girlfriend's father. Trial counsel agreed that records for a phone number ending in -3808 was registered to Robert Carver. He agreed that the records showed "multiple attempts [at a call] between . . . [Petitioner's girlfriend] and Mr. Carver starting at 2:49 a.m. up to 3:22 that morning." Counsel stated that a question existed as to when the offenses ended because the victim sat and waited for a period of time before calling 911 shortly after 3:00 a.m.

Trial counsel testified that he had a copy of the 911 call that Petitioner alleged contained a recording of the perpetrator's voice. Counsel said that the voice was not loud enough for him to understand what was said or like whom the voice sounded. Counsel stated that he had no strategic reason not to introduce an exemplar of Petitioner's voice to the jury.

Trial counsel testified that he graduated from law school in 2002 and was in private practice between 2005 and 2016. At the time of Petitioner's trial, half of his caseload was criminal defense. He had tried thirty cases, including offenses like kidnapping and rape,

[9] The trial record reflects that DNA from the victim's fingernail swab and vaginal smear slide, both from the rape kit, were introduced at trial; both samples included a minor contributor with too limited a profile to be conclusive. However, the expert testified that he was unable to exclude Petitioner as the contributor.

the bulk of which occurred before Petitioner's trial. Counsel could not remember if he tried any other sexual assault cases.

Former TBI forensic technician Erica Miller testified that her job duties included receiving and accepting evidence at the TBI laboratory and entering it into the computer for chain of custody purposes. She said that she checked each piece of evidence for seals and, if the evidence was unsealed, asked the delivering officer to seal it. Per the submittal form in Petitioner's case, the delivering officer submitted a sealed sexual assault kit, two large sealed brown paper bags, three sealed brown paper bags, one medium sealed brown paper bag, and three sealed envelopes. She noted that she did not open any of the types of evidence present in this case. Ms. Miller said that she wrote "page 1 of 6" on the form because two officers submitted evidence on the same day, and they combined the pages from both submittal forms into one. Ms. Miller acknowledged a note that the "contents [were] not verified at time of receipt," which meant that the evidence technicians did not open the packages. Ms. Miller denied placing one of the submittal form pages inside the rape kit.

When asked why she noted "[a]dditional tape added to Exhibits 8-A and 10-A," corresponding to the victim's and Petitioner's DNA exemplars, respectively, Ms. Miller responded that the original seal "might not have covered the overlapping edge . . . [I]t was sealed but to ensure that it would stay sealed." Relative to Exhibit 8-A, Ms. Miller stated that she wrote "1 SE" to indicate a sealed envelope, and she acknowledged that she had crossed the notation out, wrote, "1 E," crossed that out, and wrote "1 SE" again. Ms. Miller said that she crossed out "1 SE" and wrote "1 E" because the tape "did not cover all the sides – all the opening. But the flap would not open. So it was actually sealed. It just could have been sealed better." Ms. Miller said that the envelope appeared to have a "small kit shipping seal from the agency on there, but it was small. So that is one of the times I did add the extra tape just to ensure that it was sealed." She clarified that the small seal appeared to be "stuck down securely." Ms. Miller noted that another technician, Lindsey Holland, had accepted some of the evidence, and that Ms. Miller preferred to have more tape. Ms. Miller maintained that "it wasn't a concern that it wasn't sealed. The evidence was sealed." She added that the envelope couldn't be opened without breaking the small seal.

Upon examining Exhibit 8-A, Ms. Miller acknowledged that the shipping seal was coming off of the paper; she noted that nine years had passed. Ms. Miller affirmed that the small seal was not loose when she received the envelope and that nothing indicated that the small seal had ever been broken.

Relative to the rape kit, Ms. Miller testified that it came to her sealed and that she added clear tape to the edges because no initials were present to document that it was sealed

prior to its arrival at the TBI laboratory. She stated that red tape on the kit contained the initial "A." Ms. Miller said that she added a sticker reading "initials" to verify that it was sealed. She did not know if a sticker reading, "Evidence, warning police seal do not remove," with initials written on it was present at the time she received the kit. She noted that the sticker might have been added by the police department after it was returned to them from the TBI laboratory.

Ms. Miller testified that the rape kit showed that it was opened three times by three people and that the kit had an original police seal, the TBI laboratory seal, and an additional police seal. She noted that the TBI seal read, "TBI crime lab evidence." She denied that the police seal and initials could have been present, broken, and resealed at the time she received it—her notes indicated that she received one sealed kit with no initials. She stated that it was a question for the police whether it was possible that the kit was sealed with white tape after a white seal was broken. She acknowledged that a seal with illegible initials next to it did not have a date, and she did not know why the initials were undated.

Ms. Miller testified that she had never opened the rape kit and had not seen a paper inside it. She stated that if, "[t]heoretically," a paper in the kit said "4 of 6" and had a crossed-out line reading "for laboratory use only," the line would have been crossed out after the two submittal forms were combined into one. Relative to the copy of the request form that was not inside the rape kit, Ms. Miller said that a written notation reading "sexual assault kit" would have been written by the police officer who originally filled out the form.

Ms. Betts testified that, at the time of the offenses in this case, Petitioner was living at her house on Hollow Springs Road. She said that the police knocked at the door and asked for Petitioner. Ms. Betts stated that she turned around to call Petitioner, and the police were suddenly "breathing down [her] neck" and inside the house. She said that she did not invite the police inside, but she did not tell them to stay outside. One or two days after Petitioner's arrest, the police executed a search warrant at the house.

Ms. Betts testified that Petitioner's girlfriend's phone number ended in -0329 and that she "guess[ed]" Petitioner's girlfriend shared the phone with Petitioner. She did not know of another phone number Petitioner used at that time. Ms. Betts and Petitioner's girlfriend did not know the victim or her husband.

Petitioner testified that he shared the telephone number ending in -0329 with his girlfriend, that he lived with his girlfriend, and that all his possessions were at Ms. Betts' house at the time of the incident in this case. On New Year's Eve 2012, Petitioner visited his parents at 5:00 p.m. and went to Mr. Carver's house at 5:30 p.m., where he stayed for fifteen minutes. Petitioner said that he argued with Mr. Carver because Petitioner did not have any hydrocodone or other pills to sell him. Petitioner stated that he and Mr. Carver

sold pills to one another, although he also described them as being friends. Petitioner said that, afterward, he and his girlfriend went to a party in Hillsboro, where he drank "a whole lot." They left the party at 12:40 a.m. and began to argue because his girlfriend did not like driving in the rain. Petitioner stated that he had his girlfriend pull over at a McDonald's in Manchester and that he walked to 41 South. Petitioner arrived at 41 South after 1:00 a.m. His girlfriend followed and remained in the car.

Petitioner testified that the victim and her husband were walking out of the bar as he entered and that his torso "smacked dead dab into" the victim's face. He averred that the victim threw up her hands and pushed him away and that he apologized. Petitioner said that, later, he talked to the victim's husband and thanked him for playing in a charity band in Tullahoma. Petitioner stated that he knew the victim's husband in passing because they worked on the "same line" at a car part manufacturer; he denied knowing that the victim was a realtor. Petitioner did not recall why the victim's husband called Petitioner's girlfriend's cell phone, although he acknowledged the possibility that he could have used the victim's husband's phone or asked him to call Petitioner's girlfriend. Petitioner affirmed that he told trial counsel that he knew the victim and her husband.

Petitioner testified that he talked to Ms. Cooley at 41 South and suggested going to Mickey's bar for karaoke because 41 South was closing for the night; she declined. Petitioner stated that he ran into Mr. Meeks, whom he called "J.R." or "Junior," at the bar and that Mr. Meeks was with him during the conversation with Ms. Cooley. After speaking to Ms. Cooley, Petitioner, Mr. Meeks, Mr. Meeks' wife, and "another guy" went to Mickey's.

Upon examination by the post-conviction court, Petitioner testified that he sent a written statement to trial counsel about one month after he arrived at Riverbend Maximum Security Institution in February 2013. He acknowledged that the statement contained no mention of his colliding with the victim at 41 South. Petitioner stated that he was "so confused" and did not include "a lot of things" in the letter. He noted that he could not get counsel to visit him at the prison or contact him. Petitioner agreed that the DNA evidence was tested in late spring 2013 and that, at the time he sent counsel his statement, he had no reason to explain how the victim's DNA came to be on his hoodie. He said that he told counsel about the collision after the DNA report was received. He agreed that counsel presented no evidence of the collision but argued the incidental contact theory at trial.

Petitioner denied that trial counsel ever asked him if he wanted to testify or prepared him to testify. He also denied ever telling counsel that he had consensual oral sex with the victim. He agreed that the victim never reported the perpetrator's having ejaculated during the incident. Petitioner stated that counsel told him that he "didn't know how to present a defense" and that counsel opined that they could not "accomplish anything" at the trial.

When played a recording of the victim's 911 call occurring during the incident, Petitioner testified that he could not hear the perpetrator's voice in the background. After hearing it a second time, he stated that the recording was not "the clearest" but that the voice had "a twang" he did not and that the voice was not his. An additional recording of Petitioner and post-conviction counsel speaking was received as an exhibit. This court's careful review of the 911 recording reflects that a male voice was barely audible in the background; the volume was too low to discern the words spoken or any characteristics of the voice.

Petitioner testified that he did not receive the 911 call recording in discovery, review it with trial counsel, or discuss it. He noted that no computers were at the prison to play audio or video recordings and that he was confined for the duration of the pretrial period. He stated that the discovery materials he received consisted of the DNA analysis report, the search warrants, police reports, the 911 dispatch report, and a photograph of the victim. Petitioner stated that trial counsel had "never done anything [Petitioner] asked him to do." He agreed that counsel did not get Petitioner's "permission not to file" a suppression motion.

Petitioner testified that, on the day he was arrested, he went to an obstetrician appointment with his girlfriend in Murfreesboro, returned home, and showered. He heard a knock while he was getting dressed and told his girlfriend that it was the police; he averred that he recognized the type of knock the police used. He said that his girlfriend opened the door and did not invite the officers in but that they entered and arrested him. Petitioner stated, though, that he asked if he was under arrest and was told, "Not at this time but you need to come with us." He said that the officers only gave him the option to leave with them. Petitioner agreed, though, that they "then . . . actually did arrest [him.]" He asserted that he was not *Mirandized* and that he told his then-attorney as much.

On cross-examination, Petitioner testified that he and his girlfriend began a romantic relationship in April 2012, moved in together that month, and lost their residence in June, at which time they moved in with Ms. Betts. Petitioner testified that he did not recall the January 2, 2013 statement he gave to police. He said, though, that he told them he was wearing a black hoodie, blue pants, and black and grey Nike shoes on New Year's Eve. He denied having a Carhartt jacket with him. The prosecutor read from Petitioner's typed police statement that he had reported wearing a brown Carhartt jacket and blue jeans. When asked why he omitted the hoodie from his police statement, Petitioner responded, "I did tell them. I told them exactly what I was wearing. A black hoodie and a blue pair of jeans." Petitioner stated that he "may have" told the police that he owned a Carhartt jacket but maintained that he did not wear it that night. Petitioner denied telling the police that he went to Alabama after waking up on January 1.

Petitioner testified that, after walking to 41 South, he got back into his girlfriend's car, smoked a cigarette, and told her that he was going to have one beer inside and that they would go home afterward. Petitioner stated that he knew of the victim because she usually accompanied her husband to his band performances. He denied that he frequented the victim's home or that he spent time with the victim or her husband other than seeing the victim's husband at work or when he played in his band.

On redirect examination, Petitioner testified that he and Mr. Meeks went to Mr. Carver's house because Mr. Meeks had an amplifier to sell and wanted to buy pills. Petitioner did not know if the amplifier was stolen. Petitioner said that Mr. Meeks' wife drove them to Mr. Carver's house. He acknowledged calling his girlfriend from Mr. Carver's cell phone at 3:10 a.m. to ask for a ride. He estimated that it took five minutes to walk from Dossett Apartments to Mr. Carver's house.

On recross-examination, when asked who tried to rob him, Petitioner testified, "Junior had—whoever the guy was in the back. We got in an argument. They didn't try to rob me. I robbed them of the amp because they left." When asked whether Mr. Carver's statement that Petitioner said two men tried to rob him was false, he said, "I may have left some stuff up out of that letter when it come to that, yeah."

On redirect examination, Petitioner testified relative to his letter to trial counsel, "I speak so freely, when I'm writing I do the same thing. I just think when I'm writing and I just write it down." Petitioner said that he was "highly intoxicated" on the night of the incident.

TBI DNA analyst Chad Johnson acknowledged that he testified at Petitioner's trial. Upon examining the rape kit, Agent Johnson stated that it contained an FDA insert and an additional "request form." Agent Johnson identified his handwritten laboratory notes, which were received as an exhibit; he stated that he only sent his notes and raw data to attorneys upon request and that he did not recall whether he sent them to trial counsel. Agent Johnson agreed that the request form contained a laboratory number and that the phrase "laboratory use only" had been crossed out. He further agreed that a notation reading "(sexual assault kit)" was not present on the request form, although the notation was present on a corresponding copy of the request form that was in evidence. Agent Johnson could not tell if the form inside the kit was the original, handwritten copy; he noted that the page was printed on both sides, like the copy he had in his notes. Agent Johnson said that the request form "was probably something that was in the kit" when the TBI received it. He stated that he would not have placed the page inside the rape kit himself and would instead have placed it in the case file.

Agent Johnson testified that the request form page inside the rape kit referenced an attached offense report and district attorney's "DNA letter"; he stated that his notes contained a copy of the DNA letter, which was dated January 2, 2013. When asked whether he agreed that the kit was unsealed before January 2, or had been sealed and was reopened, Agent Johnson said, "I can't tell what happened before it came to TBI. When it came to TBI, it was sealed." Agent Johnson had written in his notes that the package had red evidence tape on it, but he could not tell whether it had been opened before or after it arrived at the TBI laboratory. Relative to the sticker reading, "No Initials," he stated that it was evidence receiving's "common practice" to add that sticker, although he did not know to what it referred. Agent Johnson stated that the package had "definitely been initialed," although he the letters were illegible. Relative to the police seal, he said, "I know these labels are inside the kit. Sometimes they're used; sometimes they're not." He did not know if a hospital employee or investigator placed it on the package. He noted that no dates were listed near the seal.

Agent Johnson testified that the rape kit was supposed to contain a vaginal swab and a vaginal smear slide but that the vaginal swab was missing. Agent Johnson acknowledged the possibility that DNA could be transferred if a wet vaginal swab was touched to a suspect's clothing. He stated that envelopes inside the rape kit containing the smear slide and pubic hair combings were unsealed and did not appear to have been torn open. He noted that he preferred to make his own opening in an envelope rather than disturb existing tape and that he closed the opening with a single staple after he tested the contents. The smear slide, cheek swab, and fingernail swab envelopes had a single staple each. Agent Johnson said that the envelope with the cheek swab was sealed with reddish tape, which he assumed the investigator placed there.

Agent Johnson testified that the chain of custody paperwork on the rape kit reflected that it was taken by "Hickerson" to an evidence locker on January 1, 2013, and that Ray Stewart transported it to the TBI laboratory. Officer Stewart also delivered the victim's DNA standard.

Agent Johnson testified that he issued an initial report on May 9, 2013, and that on May 15, 2013, Officer Stewart sent him an email requesting that he test Petitioner's hoodie for DNA. The email asked him to "check the pullover of the subject item 007A for the DNA of the victim[.] There is a stain on the front lower part of the pullover that we think might have the DNA of the victim on it." Agent Johnson said that he had received the hoodie on January 7, 2013, with the rest of the evidence. Agent Johnson issued a second report in July 2013. Agent Johnson stated that he kept a communication log when he received telephone calls related to a case and that he had noted no such calls related to the May 15 email.

Upon examination by the post-conviction court, Agent Johnson testified that he originally received a general request to test the rape kit, which would have included the vaginal swab. Agent Johnson noted, "Typically, what happens is—and this happens more often than you think. They'll collect the swab from the victim, make the slide, and then dispose of the swabs sometimes." Agent Johnson stated that, in these circumstances, he wet a sterile swab and rubbed it on the slide to test it.

Agent Johnson acknowledged his trial testimony that it was rare not to receive a vaginal swab in a rape kit and that it was a "unique situation." Agent Johnson clarified that it happened "more often than you'd think a doctor would do that" but that the circumstance was still rare. When asked about Investigator Butler's January 2, 2013 note reflecting that the kit contained a vaginal swab, Agent Johnson said, "I doubt the investigator goes in and looks and sees what's in there. He's going by what's on the envelope, and the envelope is pre-marked" by the manufacturer. He acknowledged that it was easy to verify the kit's contents.

Agent Johnson had no recollection of notifying the State or trial counsel that the vaginal swab was missing, that the request form page was "placed or fiddled with" inside the kit the day after it was collected, that the kit contained no initials, or that the inner containers in the kit did not appear to have been sealed. Agent Johnson noted that he had no way to know when the request form page was placed in the kit and that it was not his practice to notify the parties of a lack of initials unless he was asked.

On cross-examination, Agent Johnson testified that he had worked as a forensic scientist for twenty-six years and that he had analyzed thousands of rape kits. He stated that rape kits were prepackaged and either kept at the hospital or handed to hospital staff by the police. He agreed that variances occurred in the rape kits he received and that he was "limited to the expertise of the staff at the ER."

Agent Johnson testified that, if he saw something that would jeopardize the integrity of the samples inside a rape kit, he would not process it and would contact the investigator. He stated that he would not typically worry if a container inside a sealed rape kit was unsealed. He agreed that officers sometimes showed up with unsealed boxes and that the evidence receiving technician required the officers to seal them before they were brought in. Agent Johnson noted that the TBI's chain of custody "starts whenever we get the sealed evidence" and that any abnormalities occurring before then would need to be addressed with the law enforcement agency.

Agent Johnson identified Petitioner's hoodie, which was sealed in a bag with Agent Johnson's initials and the date, and the stain he tested, which was "crusted over" in the middle front of the hoodie above the pocket. He stated that, given the allegations, he would

not have expected to find much evidence on the vaginal swab and smear slide. He stated that some DNA was recovered from the victim's cheek swab and fingernail swabs and that insufficient data existed to conclude that it belonged to Petitioner, although he was not excluded as the contributor. Agent Johnson agreed that he had "the stats of 1 out of 1,000 people in one of them and 1 out of 60 in the other" and that the evidence was not useful. Agent Johnson acknowledged the possibility that a person could "make a copy" of a DNA swab by wetting the swab and touching it to a different swab.

On redirect examination, Agent Johnson testified that amylase was found in different levels in different bodily fluids. He said that it would likely be present in digestive material and "very diluted" in urine. He noted that, although it was possible to find amylase in urine, it was not guaranteed. Agent Johnson agreed that he swabbed "several inches[']worth of the material" on the hoodie. Agent Johnson stated that the amount of amylase detected "fell between 1 in 100 and 1 in 1,000. Closer to the 1 in 100 range."

Relative to the additional clear tape, Agent Johnson testified that he could not say whether the item's original small seal did not stick properly or might have been opened at some point. He noted that it was typical in his laboratory to tape over stickers to keep them in place "because they do come off over time." He maintained that he did not know the condition of the seals when the clear tape was placed. He denied opening the small seal and repeated that he opened the parcel from the other end, after which he resealed it with orange tape and wrote his initials and the date. Agent Johnson acknowledged that the portion of the sticker not covered in clear tape was loose at the time of the post-conviction hearing.

*d. Post-conviction court's findings*

The post-conviction court issued a written order denying relief. Relative to the motions to suppress, the court found that Petitioner did not have standing to object to the search of Ms. Betts' house or the search of the cell phone registered to Mr. Betts. The court noted that Petitioner had no reasonable expectation of privacy in records maintained by the telephone company, a third party. The court also found "an adequate basis for the [cell phone] warrant." The court concluded that trial counsel's decision not to file a motion to suppress was reasonable because no basis existed to do so. Relative to the arrest warrant, the post-conviction court found that there was no basis to object to the arrest and that trial counsel was not obligated to bring "frivolous motions."

Relative to the telephone records showing that Petitioner and Mr. Carver arranged a drug deal earlier in the evening, which explained his presence at Mr. Carver's house later, the post-conviction court found that trial counsel was concerned about discussing Petitioner's drug transactions with Mr. Carver. The court noted that the trial transcript

reflected limited discussion of drug use and that the decision not to use the phone records was strategic.

Relative to the victim's identification of Petitioner on the surveillance recording, the post-conviction court found that trial counsel had raised the issue before the jury and that this court had found it to be without merit in the direct appeal. The court concluded that Petitioner had presented no evidence trial counsel was ineffective in his handling of the issue at trial or on appeal.

Relative to Petitioner's voice exemplar issue, the post-conviction court found that because Petitioner "did not bring in any expert analysis," Petitioner had not established that trial counsel was ineffective for failing to introduce a voice exemplar to contrast his voice with the one in the victim's 911 call.

Relative to the chain of custody of the victim's rape kit, the post-conviction court found that the proof showed that all of the evidence had been properly sealed and that no proof indicated that any evidence had been tampered with. The court concluded that no *Brady* violation had occurred. Petitioner timely appealed.

## Analysis

On appeal, Petitioner asserts that he received ineffective assistance of counsel because trial counsel failed to: (1) file a motion to suppress the evidence obtained by Petitioner's arrest, the search of Ms. Betts' home, and the search of his girlfriend's cell phone GPS information; (2) move to suppress the victim's identification of Petitioner on the surveillance recording as impermissibly suggestive; (3) investigate DNA evidence or contest the chain of custody of the victim's rape kit; (4) introduce a voice exemplar of Petitioner to prove that the voice heard in the background of the victim's 911 call was not his; and (5) use Mr. Carver's telephone records to establish that the State's timeline of events was impossible. Petitioner also alleges that the State withheld exculpatory evidence relative to the chain of custody of the victim's rape kit. The State responds that Petitioner has not proven that he was prejudiced by any of the alleged deficiencies and that it did not withhold evidence.

In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Post-conviction relief cases often present mixed questions of law and fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Appellate courts are bound by the post-conviction court's factual findings unless the evidence preponderates against such findings. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). When reviewing the post-conviction court's factual findings, this court does not reweigh the evidence or substitute

its own inferences for those drawn by the post-conviction court. *Id.*; *Fields*, 40 S.W.3d at 456 (citing *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997)). Additionally, "questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the [post-conviction court]." *Fields*, 40 S.W.3d at 456 (citing *Henley*, 960 S.W.2d at 579); *see Kendrick*, 454 S.W.3d at 457. The post-conviction court's conclusions of law and application of the law to factual findings are reviewed de novo with no presumption of correctness. *Kendrick*, 454 S.W.3d at 457.

*I. Ineffective Assistance of Counsel*

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (stating that the same standard for ineffective assistance of counsel applies in both federal and Tennessee cases). Both factors must be proven for the court to grant post-conviction relief. *Strickland*, 466 U.S. at 687; *Henley*, 960 S.W.2d at 580; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Accordingly, if we determine that either factor is not satisfied, there is no need to consider the other factor. *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007) (citing *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004)). Additionally, review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see Henley*, 960 S.W.2d at 579. We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Granderson v. State*, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006).

As to the first prong of the *Strickland* analysis, "counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases." *Henley*, 960 S.W.2d at 579 (citing *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)); *see Goad*, 938 S.W.2d at 369. In order to prove that counsel was deficient, the petitioner must demonstrate "that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688); *see also Baxter*, 523 S.W.2d at 936.

Even if counsel's performance is deficient, the deficiency must have resulted in prejudice to the defense. *Goad*, 938 S.W.2d at 370. Therefore, under the second prong of

the *Strickland* analysis, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

*a. Motion to Suppress*

Our supreme court has recently held that:

> [T]o establish a successful claim of ineffective assistance of counsel based on counsel's failure to file a motion to suppress evidence on Fourth Amendment grounds, the Petitioner must prove: "(1) a suppression motion would have been meritorious; (2) counsel's failure to file such motion was objectively unreasonable; and (3) but for counsel's objectively unreasonable omission, there is a reasonable probability that the verdict would have been different absent the excludable evidence."

*Phillips v. State*, 647 S.W.3d 389, 404 (Tenn. 2022) (citations omitted). The *Phillips* court cautioned that "[i]t remains the petitioner's burden to prove the factual allegations supporting all claims in the petition by clear and convincing evidence." *Id.* (citing Tenn. Code Ann. § 40-30-110(f)).

The United States and Tennessee[10] constitutions protect citizens from unreasonable searches and seizures. U.S. Const. amend. IV; Tenn. Const. art. I, § 7; *State v. Binette*, 33 S.W.3d 215, 218 (Tenn. 2000). In *State v. Tuttle*, our supreme court set out the requirements for probable cause in an affidavit for a search warrant, adopting a "totality of the circumstances" test. 515 S.W.3d 282, 307 (Tenn. 2017). Both the United States Constitution and the Tennessee Constitution instruct that a search warrant may not be issued "unless a neutral and detached magistrate determines that probable cause exists for [its] issuance." *Id.* at 299 (citing *Illinois v. Gates*, 462 U.S. 213, 240 (1983); *State v. Henning*, 975 S.W.2d 290, 294 (Tenn. 1998); and *State v. Jacumin*, 778 S.W.2d 430, 431 (Tenn. 1989), *overruled on other grounds*); U.S. Const. Amend. IV; Tenn. Const. Art. I, § 7. "Probable cause is more than a mere suspicion but less than absolute certainty." *Tuttle*, 515 S.W.3d at 299. "[T]he strength of the evidence necessary to establish probable cause . . . is significantly less than the strength of evidence necessary to find a defendant guilty beyond a reasonable doubt." *State v. Bishop*, 431 S.W.3d 22, 41 (Tenn. 2014). A determination of probable cause is "extremely fact-dependent." *Tuttle*, 515 S.W.3d at 300 (quoting *State v. Bell*, 429 S.W.3d at 524, 534 (Tenn. 2014)) (internal quotation marks

[10] We note that Petitioner has only raised his suppression issues under the federal Fourth Amendment, not the Tennessee constitution.

omitted). Upon review, this court gives "'great deference' to a magistrate's determination that probable cause exists." *Id.* (quoting *Jacumin*, 778 S.W.2d at 431-432, *overruled on other grounds*).

In determining probable cause for issuance of a search warrant, our supreme court explained that a magistrate must "exercise[] independent judgment," and the affidavit "must contain more than mere conclusory allegations by the affiant" but must have facts upon which the magistrate may make its commonsense probable cause determination. *Id.* (citing *Henning*, 975 S.W.2d at 294; *State v. Smotherman*, 201 S.W.3d, 657, 662 (Tenn. 2006)). The magistrate must be able to draw a "reasonable conclusion" from these facts "that the evidence is in the place to be searched." *Id.* (citing *State v. Smith*, 868 S.W.2d 561, 572 (Tenn. 1993)). "In other words, the affidavit must demonstrate a nexus between the criminal activity, the place to be searched, and the items to be seized." *Id.* (citing *State v. Saine*, 297 S.W. 3d 199, 206 (Tenn. 2009)). The facts in the affidavit which can establish this nexus include:

> [T]he type of crime, the nature of the items, . . . the normal inferences where a criminal would hide the evidence[,] . . . whether the criminal activity under investigation was an isolated incident or a protracted pattern of conduct[,] . . . and the perpetrator's opportunity to dispose of incriminating evidence.

*Id.* at 300-01 (internal citations omitted).

However, an issuing magistrate cannot base a determination of probable cause "on the bare conclusions of others." *Gates*, 462 U.S. at 239. For example, "[a] sworn statement of an affiant that 'he has cause to suspect and does believe that' liquor illegally brought into the United States is located on certain premises" is insufficient to support probable cause. *Id.* "An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause[.]" *Id.* "[O]nly the information contained within the four corners of the affidavit may be considered" in determining whether probable cause supported the issuance of the search warrant. *State v. Keith*, 978 S.W.2d 861, 870 (Tenn. 1998) (citations omitted).

A jurat is defined as "the written certificate of the issuing judge attesting that the affiant submitted the affidavit under oath." *Keith*, 978 S.W.2d at 868. Our supreme court has stated that, "although it is preferable that every affidavit [supporting a search warrant] contain a completed jurat, an incomplete or defective jurat does not invalidate a warrant issued upon probable cause if it is proven by extrinsic evidence that the supporting affidavit was properly sworn by the affiant." *Id.* at 870.

i. Search of Ms. Betts' house

Petitioner contends that trial counsel was ineffective for failing to challenge the search warrant for Ms. Betts' house, arguing that the affidavit was unsworn and "did not contain an oath of affirmation," that the affidavit was not signed by the judge, and that the warrant did not establish an adequate nexus between the offenses and the place to be searched. Petitioner adds that trial counsel inadequately researched suppression issues in his case because counsel did not recall reviewing specific cases and evinced a "misunderstanding of key law" because, at the post-conviction hearing, counsel discussed the contents of the police report instead of only the search warrant affidavit when answering questions about the potential success of a suppression motion.

The State responds that Petitioner has not proven that a suppression motion would have succeeded or that the result of his trial would have been different had the DNA evidence been excluded. The State admits that the search warrant application does not contain a jurat or the judge's signature but argues that Petitioner had the burden of establishing by clear and convincing evidence that the affidavit was unsworn and did not do so.

As a preliminary matter, the post-conviction court based its ruling on this issue on Petitioner's lack of standing to contest the warrant based upon his not owning the property. The parties agree that the post-conviction court erred in this regard. We briefly note that Petitioner and Ms. Betts testified at the post-conviction hearing that Petitioner was living there. Petitioner's status as an overnight guest gave him standing to object to the search. *See State v. Transou*, 928 S.W.2d 949, 958 (Tenn. Crim. App. 1996) (stating that, as opposed to a casual visitor, "[t]he fact that a person is an overnight guest in a residence or an apartment, standing alone, is sufficient to clothe the guest with a legitimate expectation of privacy in the premises sufficient to challenge the search and any resulting seizure") (citing *Minnesota v. Olson*, 495 U.S. 91 (1990)).

The State submits that the burden of proof related to proving the merits of a suppression motion in the post-conviction context is "murky." Petitioner contends in response that this court should apply the same burden of proof as a suppression hearing, *i.e.*, that once Petitioner raised the jurat issue, it was the State's burden to provide extrinsic evidence that the affidavit was sworn. *See Keith*, 978 S.W.2d at 870. Petitioner cites in support of his argument the United States Supreme Court's decision in *Kimmelman v. Morrison*, 477 U.S. 365 (1986), in which the Court remanded a federal habeas case for a hearing to determine prejudice related to an ineffective assistance of counsel claim based upon the failure to seek a motion to suppress.

However, we need not delve into the merits of the suppression motion because Petitioner has not established that he suffered prejudice as a result of trial counsel's failure to challenge the search of Ms. Betts' home. Trial counsel testified that, in addition to the DNA evidence, the State's proof consisted of the victim's identification of Petitioner, Ms. Cooley's testimony regarding Petitioner's presence and demeanor at 41 South, the surveillance recording, Petitioner's initial statement to the police that he was in Alabama on the night in question, and Mr. Carver's testimony that Petitioner was near Dossett Apartments and in possession of the victim's belongings at the time the victim was left in her car. The trial record also reflects testimony from the owner of Mickey's bar about Petitioner's bothering other women that evening and Ms. Betts' testimony that Petitioner and his girlfriend arrived home sometime between 3:00 and 4:15 a.m. We note that, in the direct appeal, this court discussed that the victim's identification alone would have been sufficient proof of Petitioner's identity as the perpetrator. *Nelson*, 2017 WL 4621168, at *5 ("Because the victim viewed [Petitioner]under such circumstances that would permit a positive identification to be made, her testimony alone would be sufficient, if credited by the jury, to support [Petitioner's] convictions."). Even if the DNA evidence had been excluded, the evidence of Petitioner's identity was sufficient; as a result, he was not prejudiced by counsel's failure to file a suppression motion, and he is not entitled to relief on this basis.

ii. Cell phone warrant

Petitioner contends that the cell phone warrant did not establish a nexus between the phone and the offenses because it did not claim that Petitioner had the phone with him during the incident. Petitioner argues that, as a result of obtaining the GPS data for the phone, police located Mr. Carver, questioned his girlfriend, and obtained the search warrant for Ms. Betts' house. The State responds that Petitioner did not have standing to challenge the warrant because, pursuant to the law at that time, he did not have a reasonable expectation of privacy in Verizon's location data. Alternatively, the State argues that Petitioner did not prove that the visit to Mr. Carver's house or the search warrant were based upon the GPS tracking data, noting that Petitioner's girlfriend told the police about telephone calls she made on the night in question and picking up Petitioner at his friend "Derek's" house. The State also submits that Petitioner would have been convicted even if the fruits of the Verizon warrant, *i.e.*, Mr. Carver's testimony and the DNA obtained from the hoodie, had been excluded.

As a preliminary matter, we again disagree with the post-conviction court's determination that Petitioner lacked standing to contest the search because his name was not registered to the cell phone—Petitioner testified that he and his girlfriend shared the phone and that he had no other telephone number, Ms. Betts agreed that Petitioner and his girlfriend shared the phone, and Petitioner's stepfather gave the police the -0329 number

to reach Petitioner. Petitioner had an interest in the cell phone sufficient to convey standing. *Cf. State v. Lockhart*, No. M2013-01275-CCA-R3-CD, 2015 WL 5244672, at *29 (Tenn. Crim. App. Sept. 8, 2015) (concluding that the appellant lacked standing to challenge the GPS tracking of another person's cell phone when "nothing indicate[d] that the appellant ever used the phone or that he had a possessory or privacy interest in it"), *perm. app. denied* (Tenn. Jan. 20, 2016); *see State v. Hawthorne*, No. E2015-01635-CCA-R3-CD, 2016 WL 4708410, at *26 (concluding that the defendant had no reasonable expectation of privacy in the cell phone data of another person when a witness testified that she and the defendant shared some of her cell phones but not the number at issue), *perm. app. denied* (Tenn. Feb. 23, 2017).

As stated above, this court concluded in the direct appeal that the victim's identification alone would have been sufficient proof of Petitioner's identity as the perpetrator because she viewed Petitioner under circumstances allowing her to make a reliable identification. *Nelson*, 2017 WL 4621168, at *5. As a result, even if the search warrant were invalidated by exclusion of the GPS data from the affidavit—a matter on which we express no opinion—Petitioner has failed to prove that he was prejudiced.

Moreover, Petitioner has failed to prove that a motion to suppress the fruits of the Verizon search warrant would have succeeded. First, Petitioner has not provided this court or the post-conviction court with the data in question, making it difficult to determine its precise nature. The Verizon search warrant contains a page requesting current and historical location and tower information, as well as the "current cell phone tower location information" to help locate the phone's user due to exigent circumstances. It is unclear if Verizon provided the police with GPS tracking or only cell site location information (CSLI), although we acknowledge that the search warrant for Ms. Betts' house states that "a GPS location was obtained" that led the police to the address.[11]

In 2018, the United States Supreme Court held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." *Carpenter v. United States*, 138 S.Ct. 2206, 2217-18 (2018). We note that the Court specifically chose not to "express a view on matters not before us," including "real-time CSLI." *Id.*

[11] In his dissenting opinion in *Carpenter v. United States*, 138 S.Ct. 2206, 2225 (2018), Justice Kennedy explained that CSLI is the record of the cell towers to which a cell phone had connected; in 2018, CSLI provided authorities with between a one-half-mile and two-mile radius in urban areas and was "up to 40 times more imprecise" in rural areas, whereas GPS tracking could "reveal an individual's location within around 15 feet."

However, as the post-conviction court noted in its order, at the time of the search in 2013 and the trial in 2015, the state of the law in Tennessee was such that Petitioner had no reasonable expectation of privacy in his location data. In *State v. Hodgkinson*, 778 S.W.2d 54, 62 (Tenn. Crim. App. 1989), this court concluded that the defendant had no reasonable expectation of privacy in a telephone company's records and, consequently, lacked standing to contest their use. *Id.* *Hodgkinson* was an accurate statement of the law[12] during the relevant time period as to an expectation of privacy in telephone records maintained by a third party. *See, e.g.*, *State v. McBride*, No. M2020-00765-CCA-R3-CD, 2021 WL 3871968, at *4 (Tenn. Crim. App. Aug. 31, 2021) (citing *Hodgkinson* when telephone company disclosed records pursuant to a subpoena in 2015), *no perm. app. filed*; *Howell v. State*, No. M2018-02050-CCA-R3-PC, 2019 WL 6954191, at *4 (Tenn. Crim. App. Dec. 19, 2019) (citing *Hodgkinson* when phone records were obtained and guilty plea proceedings occurred prior to *Carpenter*), *perm. app. denied* (Tenn. June 3, 2020); *Hawthorne*, 2016 WL 4708410, at *26 (citing *Hodgkinson* when phone records were obtained by subpoena related to an incident occurring in 2011).

Moreover, Petitioner's argument that trial counsel should have filed a suppression motion because case law existed that later supported *Carpenter's* prohibition on warrantless searches for CSLI is not well-received. This court previously concluded that an attorney did not provide ineffective assistance for failing to file a motion to suppress CSLI data that was obtained in 2008 by subpoena pursuant to then-effective federal law. *French v. State*, No. M2019-01766-CCA-R3-PC, 2021 WL 1100765, at *14 (Tenn. Crim. App. Mar. 23, 2021) (discussing that the federal Stored Communications Act, 18 U.S.C. § 2703, authorized disclosure of CSLI from cell phone providers pursuant to a court order instead of a search warrant). Importantly, this court noted that the state of Fourth Amendment jurisprudence relative to cell phone data "was not so clear that the failure to file a motion to suppress was deficient." *Id.* The same principles apply in this case. Because Petitioner lacked a reasonable expectation of privacy in the CSLI, trial counsel was not deficient for failing to file a motion to suppress. Petitioner is not entitled to relief on this basis.

iii. Arrest warrant

Petitioner contends that his arrest warrant was facially defective because it did not identify the basis of the officer's knowledge. He also argues that the warrant did not establish that he committed carjacking because it did not allege that he took the car from the victim, only that he drove away with her in the car. Petitioner states relative to prejudice that his arrest resulted in the "freezing" of evidence and the inability to move it from Ms.

[12] We note that, pursuant to statute effective July 1, 2014, a search warrant is required to obtain cell phone data. Tenn. Code Ann. § 40-6-110(b)(1).

Betts' home, which led to the seizure of the hoodie, as well as his statement to police that he frequented Ms. Betts' home. The State conceded at oral argument that the arrest warrant was defective but argued that no prejudice resulted from Petitioner's arrest because his statements to police were made after receiving *Miranda* warnings, and the search of Ms. Betts' home occurred after obtaining a warrant.

Relative to the "freezing" of the hoodie in place after his arrest, Petitioner has not provided any authority for the proposition that an inability to tamper with evidence as a result of an arrest is evidence subject to suppression. We note that Ms. Betts and Petitioner's girlfriend were not arrested on that day and presumably had access to the hoodie during the two days after Petitioner was arrested and before the search warrant was executed.

Relative to his statements to police and the hoodie, even without Petitioner's statement about frequenting Ms. Betts' home, Petitioner was arrested there within a relatively short period after the incident; we do not think that omitting that one statement would have invalidated the search warrant affidavit. However, as we discussed above, even in the event that the DNA evidence on the hoodie was excluded, the evidence of Petitioner's identity was sufficient, and he has failed to establish prejudice in that regard. Petitioner is not entitled to relief on this basis.

*b. Victim's Identification of Petitioner*

Petitioner contends that trial counsel was ineffective for failing to challenge the victim's identification of Petitioner when viewing the surveillance recording, arguing that it was impermissibly suggestive because only Petitioner fit the description the victim gave of her attacker. He also argues that the victim's description was inaccurate because it was not detailed enough and because she, at one point, thought the perpetrator's hoodie was dark blue; that she had an insufficient opportunity to view the perpetrator's face; that she was "in a fog" during the incident and had been drinking; and that she gave no indication as to her confidence in the identification.

"Under the Due Process Clause of the Fifth Amendment to the United States Constitution, a witness's pretrial identification of the defendant by photograph will be suppressed 'only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *State v. Martin*, 505 S.W.3d 492, 500 (Tenn. 2016) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

If the identification procedure was unduly suggestive, the next question is whether the identification was reliable despite the undue suggestion. *See Neil v. Biggers*, 409 U.S.

188, 198-99 (1972). The United States Supreme Court has identified five factors to be considered in making this determination:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

*Id.* at 199-200. If, using the standard in *Biggers*, a pretrial confrontation was so impermissibly suggestive that it violated an accused's right to due process, both the out-of-court and in-court identifications are excluded. *See State v. Shanklin*, 608 S.W.2d 596, 598 (Tenn. Crim. App. 1980).

We note that Petitioner's argument relative to the reliability or specificity of the victim's identification was raised, in part, on direct appeal; this court concluded that "[b]ased on the verdict, the jury accredited the testimony of the victim and the victim's husband" relative to her possible intoxication. *Nelson*, 2017 WL 4621168, at *5. Relative to the victim's opportunity to see Petitioner and her description of him to the police, this court summarized the evidence and concluded that "the victim viewed the [Petitioner] under such circumstances that would permit a positive identification to be made[.]" *Id.*

Even assuming for the sake of argument that the procedure was suggestive, the *Biggers* factors establish that the victim's identification was reliable. The victim was in the car with Petitioner for a significant amount of time, part of which was with the dome light in her car illuminated. She stated that he took his hood down for part of the incident. The circumstances were such that the victim would have paid close attention to Petitioner. She described Petitioner consistently and provided police with his approximate height, build, clothing, and "baby face." Investigator Butler showed the victim the surveillance recording the day after the incident. When Petitioner appeared in the recording, Investigator Butler noted that the victim began crying and had a visceral reaction. The victim waited until the recording was over and immediately identified Petitioner as her attacker. Trial counsel was not deficient for failing to challenge the identification, and Petitioner is not entitled to relief on this basis.

*c. Chain of Custody*

Petitioner contends that trial counsel provided ineffective assistance by failing to investigate and object to the chain of custody of the rape kit and DNA standards, arguing that the chain of custody was incomplete at trial because "no testimony ever showed the absence of tampering with the packages [containing the rape kit and DNA standards] in the

meantime." Petitioner avers that the rape kit and DNA standards "conclusively" show they were opened or that their having remained sealed could be "reasonably questioned." Petitioner notes that the rape kit, which the trial testimony established was sealed by a nurse at the hospital on January 1, contained a request form referencing a January 2 letter by the time it arrived at the TBI laboratory; that handwriting on a bag inside the rape kit indicated that Officer Hickerson placed the bag in an evidence locker on January 1, which Petitioner argues meant that it had been opened at the police station; that the DNA standards for the victim and Petitioner had loose seals; and that the vaginal swab was missing from the rape kit.

Tennessee Rule of Evidence 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." Tenn. R. Evid. 901(a). The Tennessee Supreme Court has previously recognized that it is "well-established that as a condition precedent to the introduction of tangible evidence, a witness must be able to identify the evidence or establish an unbroken chain of custody." *State v. Scott*, 33 S.W.3d 746, 760 (Tenn. 2000) (internal quotes omitted). "The purpose of the chain of custody requirement is 'to demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence.'" *Id.* (quoting *State v. Braden*, 867 S.W.2d 750, 759 (Tenn. Crim. App. 1993)). Even though each link in the chain of custody should be sufficiently established, Rule 901(a) does not require that the identity of tangible evidence be proven beyond all possibility of doubt; nor is the State required to establish facts which exclude every possibility of tampering. *State v. Cannon*, 254 S.W.3d 287, 296 (Tenn. 2008) (citing *Scott*, 33 S.W.3d at 760). "[W]hen the facts and circumstances that surround tangible evidence reasonably establish the identity and integrity of the evidence, the trial court should admit the item into evidence." *Id.* In addition, the State's failure to call as a witness each person who handled an item does not necessarily preclude the admission of the evidence. *Id.* "Absent sufficient proof of the chain of custody, however, the 'evidence should not be admitted . . . unless both identity and integrity can be demonstrated by other appropriate means.'" *Scott*, 33 S.W.3d at 760 (quoting COHEN ET AL., TENNESSEE LAW OF EVIDENCE § 901.12, at 624 (3d ed. 1995)).

At trial, Dr. Jeffrey Jobe testified that he performed the victim's examination at the hospital and collected samples for the rape kit on January 1. Registered Nurse Penny Thornhill testified that she sealed the kit on January 1 and gave it to the police investigator. Investigator Butler, however, testified that he sealed the kit on January 1 and checked it into police evidence. Relative to the DNA standards, Registered Nurse Valeria Uselton testified that she collected Petitioner's DNA swab at the jail and that Investigator Jackie Matheny sealed the envelope. Investigator Matheny testified that he witnessed Ms. Uselton collect the DNA sample, that he sealed the envelope, and that he checked the swab into

police evidence. Officer Butch Stewart testified that he collected DNA swabs from the victim and her husband; discussion between the prosecutor, Officer Stewart, and the trial court also reflected that the envelopes housing the swabs were sealed at the time of trial. Agent Johnson testified about his testing the rape kit and the DNA standards after they were at the TBI laboratory, including that the rape kit and DNA standards were sealed when they arrived. Agent Johnson indicated that a rape kit usually contained a vaginal swab, but that the doctor "just submitted the slide and not the swab." He explained that he took the slide, swabbed it, and tested that swab instead. On cross-examination, trial counsel questioned Agent Johnson about the lack of a vaginal swab and asked him, "What can a swab tell you that maybe a slide cannot?" Agent Johnson replied, "Mainly, it's for convenience sake for us. The fact that he made the slide from the swabs that he collected and then just submitted the slide means we had an extra step that we had to do."

Petitioner has not shown that suspicious circumstances indicative of tampering existed in the chain of custody or that trial counsel's investigation was deficient. At the post-conviction hearing, trial counsel testified that he examined the physical evidence at the police department. He stated that the condition of the items appeared to be proper, that the evidence custodian opened the parcels for him as requested, and that he had no reason to doubt the integrity of the chain of custody. Agent Johnson and Ms. Miller testified that the rape kit and DNA standards were sealed when they were received at the TBI laboratory. Ms. Miller explained some discrepancies in her notations about the rape kit as occurring because another evidence technician received some of the evidence in Petitioner's case, which was brought to the TBI laboratory in two deliveries. Ms. Miller testified that the envelopes containing the DNA standards for the victim and Petitioner were sealed when they came to her and explained at some length that it was her practice to add clear tape to envelopes in case a small sticker, like the ones present on the DNA standard envelopes, failed over time. Both Ms. Miller and Agent Johnson acknowledged that, at the time of the post-conviction hearing, the small stickers no longer adhered to the envelopes but maintained that the stickers sealed properly when the evidence was received at the TBI laboratory. Agent Johnson articulated his process for opening and resealing samples with a staple or tape after testing the contents.

Relative to the request form, both Ms. Miller and Agent Johnson testified that they did not place the form inside the rape kit and that they did not know what may have happened with the kit before it arrived at the TBI laboratory. Although the presence of the request form inside the rape kit suggests that it was placed there sometime after the kit was sealed at the hospital on January 1, 2013, Petitioner has not carried his burden of proving that the items inside the kit—which neither inculpated nor exculpated Petitioner—were altered or were not what they purported to be as a result of the alleged opening. We note briefly that post-conviction counsel's conspiracy theory regarding a "rogue officer" who stole the vaginal swab in order to frame Petitioner was not supported by any evidence.

Similarly, Petitioner has not alleged that the DNA standards were altered if they were opened. We reiterate that the State was not required to establish facts which excluded every possibility of tampering. *Cannon*, 254 S.W.3d at 296. Petitioner has not established that trial counsel was deficient for failing to challenge a sufficient chain of custody.

Petitioner has also not proven that he was prejudiced by any deficiency related to the chain of custody. As we have stated several times, even excluding all DNA evidence, the evidence of Petitioner's identity was sufficient, and there is not a reasonable probability that the outcome of his case would have been different. Petitioner is not entitled to relief on this basis.

*d. Voice Exemplar*

Petitioner contends that trial counsel provided ineffective assistance by failing to introduce an exemplar of his voice at trial to contrast with the voice heard in the background of the victim's 911 call during the incident. He asserts that the timbre and accent of the perpetrator's voice do not match his. Petitioner disputes the post-conviction court's conclusion that Petitioner needed to introduce expert testimony in order to demonstrate that he is entitled to relief, which Petitioner characterized in his brief as a "ridiculous punt on the issue." The State acknowledges that expert testimony was unnecessary but avers that trial counsel's performance was not deficient and that Petitioner was not prejudiced.

Tennessee Rule of Evidence 901(b)(5) regarding authentication states as an example that "[i]dentification of a voice, whether heard firsthand or through . . .[a] recording" may be authenticated "by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." The parties are correct that an expert witness would not have been required for a voice exemplar to have been admissible; however, a witness would have been required to identify Petitioner's voice on an exemplar. Likewise, the jury would have been capable of comparing an exemplar and the 911 call and drawing a conclusion on the similarity of the voices.

However, we conclude that Petitioner has not proven that trial counsel's performance was deficient or that Petitioner was prejudiced. Trial counsel testified that he could not hear the voice in the 911 call sufficiently to identify its characteristics. This court has reviewed the 911 recording carefully, and similarly, we found the voice not audible enough to compare it with the recording of Petitioner's voice. Trial counsel was not deficient for not pursuing an argument related to the voice. Moreover, in light of the other evidence of Petitioner's identity, including the victim's identification, the surveillance recording, Ms. Cooley's testimony, Mr. Carver's testimony, and the DNA evidence, Petitioner has failed to establish that he was prejudiced in this regard. He is not entitled to relief on this basis.

*e. Telephone Records*

Petitioner contends that trial counsel was ineffective for failing to utilize Mr. Carver's telephone records at trial, arguing that the records "create[] a virtual alibi" and undermine the State's timeline of events. Petitioner also argues that the call Ms. Betts made to the victim's husband[13] provided documentation that Petitioner knew the victim's husband; he submits that the victim's identification was "premised on identifying a stranger" and avers that the call provided evidence that an innocent transfer of DNA could have occurred at the bar.

Petitioner states that Ms. Betts began calling Mr. Carver at 2:49 a.m., "possibly showing that [Petitioner] had already arrived at Carver's." He submits that the short interval between the victim's call to her husband at 3:09 a.m., conveying that she had gotten away from the perpetrator, and Petitioner's call to Ms. Betts from Mr. Carver's cell phone at 3:10 a.m., makes it unfeasible that Petitioner committed the offenses. The State responds that the telephone records did not make it more or less likely that Petitioner committed the offenses.

Petitioner's argument regarding the call Ms. Betts made to the victim's husband's phone was not included in his amended post-conviction petition, and the post-conviction court did not consider it. Petitioner raises this argument for the first time on appeal, and we conclude that it has been waived. *See Holland v. State*, 610 S.W.3d 450, 458-59 (Tenn. 2020) (discussing that this court may extend appellate review to issues presented for the first time at the post-conviction hearing "if the issue was argued at the post-conviction hearing and decided by the post-conviction court without objection" but may not review a waived issue for the first time on appeal). Briefly, however, we disagree with Petitioner that the fact that the call occurred made it more likely that the victim's saliva was innocently deposited onto Petitioner's hoodie at the bar. We note that, even if Petitioner was acquainted with the victim's husband, it does not follow that the victim knew Petitioner or had physical contact with him at 41 South. The fact of the call would not have changed the outcome of Petitioner's trial in light of the other evidence, and trial counsel was not deficient for omitting it. Petitioner is not entitled to relief on this basis.

We agree with the State that the telephone records are not incompatible with the State's timeline of events. It is undisputed that Petitioner did not have the cell phone he and Ms. Betts shared during the timeframe in which the offenses occurred; as a result, Ms. Betts' calling Mr. Carver had no bearing on whether Petitioner was at Mr. Carver's home. Relative to the time it took to walk from Dossett Apartments to Mr. Carver's house, the

[13] At the post-conviction hearing and in their briefs, the parties characterized this call as coming from the victim's husband's phone; however, the telephone records reflect that the call was outgoing from Ms. Betts to the victim's husband's telephone number.

jury heard testimony about the distance and saw a map exhibit of the area. Trial counsel drew the jury's attention to the distance and short timeline in cross-examination, and the jury resolved any inconsistencies in favor of the State. Additional telephone records would not have strengthened counsel's argument to the degree that Petitioner was prejudiced by their absence. Moreover, we agree with the post-conviction court that omitting the telephone records fit into trial counsel's general strategy to avoid any mention of Mr. Carver and Petitioner's exchanging drugs. Petitioner is not entitled to relief on this basis.

*II. Brady Violation*

Petitioner contends that the State violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to provide him with information about the rape kit and other physical evidence until trial. Specifically, he argues that the State should have informed trial counsel that (1) the rape kit vaginal swab was missing; (2) the rape kit's seal was "breached multiple times" before reaching the TBI laboratory; (3) the seals on the DNA exemplars for the victim and Petitioner were "weak at best, suggestive of tampering"; and (4) Agent Johnson's bench notes indicated that the amount of amylase on the hoodie was between 1/100 and 1/1000 "as strong as one might expect to find in saliva." The State responds that it did not suppress any evidence and that trial counsel examined the physical evidence prior to trial.

As a preliminary matter, Petitioner did not raise in his post-conviction petition a *Brady* issue related to Agent Johnson's bench notes and the amount of amylase present during testing. He similarly did not raise the issue at the post-conviction hearing, and the post-conviction court did not address it in its order. As such, it has been waived. *See Holland*, 610 S.W.3d at 458-59.

Relative to the rape kit, Petitioner asserts that the nurse examiner testified at trial that she sealed the kit upon its collection at the hospital on January 1; that a bag inside the kit indicated that Officer Hickerson placed it inside an evidence locker on January 1; and that the request form present inside the kit when it was received by the TBI contained Petitioner's name as the suspect and referenced a letter composed by the District Attorney's Office on January 2. Petitioner argues that, "since the kit was opened at least twice without explanation, the theory of stealing a swab is plausible" and that "lab testing supports the theory" of a "rogue officer['s]" stealing the vaginal swab because it was possible to create new DNA swabs by wetting existing DNA swabs and transferring the liquid to a clean swab. Petitioner notes that a window of time existed between the rape kit's allegedly having been opened on January 2, the seizure of the hoodie on January 3, and the delivery of the physical evidence to the TBI laboratory on January 7.

The United States Supreme Court stated in *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The State is responsible to disclose "any favorable evidence known to the others acting on the government's behalf in the case, including police." *Strickler v. Greene*, 527 U.S. 263, 307 n.12 (1999). Four prerequisites must be satisfied to establish a *Brady* violation:

> 1. The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
>
> 2. The State must have suppressed the information;
>
> 3. The information must have been favorable to the accused; and
>
> 4. The information must have been material.

*State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995), *as amended on reh'g* (July 10, 1995). Even if the defendant does not specifically request evidence, favorable evidence is material, and its suppression is a constitutional violation, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "Reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

In this case, Petitioner has failed to prove that the State suppressed any information related to the physical evidence. Trial counsel testified that he examined the rape kit and other items of physical evidence at the police station in the presence of the evidence custodian, that the evidence custodian opened pieces of evidence as requested, and that he did not see anything concerning about how the items were sealed. Counsel's failure to notice the missing vaginal swab or attach significance to the request form inside the rape kit does not constitute suppression of the information by the State. As we noted above, Ms. Miller and Agent Johnson testified that the seals on the DNA exemplars were not loose at the time they were received at the TBI laboratory; Petitioner has not established that the seals were defective at the time trial counsel examined them.

Moreover, Petitioner has not shown that the rape kit or the missing vaginal swab contained favorable, let alone material, evidence. The vaginal smear slide, which Agent Johnson tested, was made from the missing vaginal swab and did not contain exculpatory evidence, and the victim did not allege vaginal penetration such that Agent Johnson would

have expected to find the perpetrator's DNA on the swab. We reiterate that no evidence was presented to support post-conviction counsel's theory that the swab was used as part of a police conspiracy to deposit the victim's DNA on the hoodie. We note that Agent Johnson testified that, in his experience, medical providers sometimes inadvertently discarded vaginal swabs after using them to make the smear slides. The record supports the post-conviction court's conclusion that Petitioner failed to prove that a *Brady* violation occurred, and he is not entitled to relief on this basis.

*III. Cumulative Error*

In Petitioner's appellate brief, he urges this court several times to consider the alleged errors in his case in light of their cumulative effect. However, the post-conviction court did not address cumulative error in its order, Petitioner has not briefed cumulative error as a freestanding issue, set out the applicable standard for cumulative error, or argued how cumulative error principles entitle him to relief. To the extent that he has attempted to raise cumulative error, it has been waived. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."); Tenn. R. App. P. 27(a)(7) (stating that an appellant's brief shall contain an argument "setting forth . . . the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record . . . relied on[.]").

## Conclusion

Based on the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

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ROBERT L. HOLLOWAY, JR., JUDGE