IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 19, 2018 Session

CHRISTOPHER LEE BLUNKALL v. STATE OF TENNESSEE

Appeal from the Circuit Court for Marshall County
No. 2016-CR-16 Franklin Lee Russell, Judge

No. M2017-01038-CCA-R3-PC

The Petitioner, Christopher Lee Blunkall, appeals from the denial of his petition for post-conviction relief, wherein he challenged his jury conviction for rape of a child. On appeal, the Petitioner alleges that he received ineffective assistance because trial counsel (1) failed to file suppression motions concerning multiple items of evidence, including the text message communications between the Petitioner and the victim, certain phone records, the Petitioner's banking records and the automated teller machine ("ATM") surveillance video showing the Petitioner's withdrawing money, the traffic stop, and the Petitioner's statement to the police; (2) failed to rebut the medical testimony from the State's expert; and (3) failed to pursue a preliminary hearing, adequately investigate the victim's background, or vigorously cross examine and impeach the victim. The Petitioner further contends that the State committed prosecutorial misconduct by failing to provide the defense with favorable evidence—the victim's juvenile record—and by certain statements made during closing arguments. After a thorough review of the record, we affirm the judgment of the post-conviction court.

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

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and TIMOTHY L. EASTER, JJ., joined.

Kevin R. McGee (at hearing and on appeal) and Richard McGee (at hearing), Nashville, Tennessee, for the appellant, Christopher Lee Blunkall.

Herbert H. Slatery III, Attorney General and Reporter; Leslie E. Price, Senior Counsel; Robert J. Carter, District Attorney General; and Weakley E. Barnard and William B. Bottoms, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

A Marshall County jury convicted the Petitioner of rape of a child, and the trial court sentenced him to thirty-two years in the Tennessee Department of Correction. See State v. Christopher Lee Blunkall, No. M2014-00084-CCA-R3-CD, 2015 WL 500751, at *1 (Tenn. Crim. App. Feb. 5, 2015), perm. app. denied (Tenn. May 15, 2015). Given the complexity of the Petitioner's post-conviction issues and the need to place them in their proper context, we set forth the factual background from the opinion on direct appeal in its entirety:

> At trial, P.R.[1] testified that she lived in Estill Springs with her four minor children: the victim, B.J., who was fourteen years old and was born on May 5, 1999; S.J., who was ten years old; E.J., who was four years old; and A.R., who was five months old.
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> P.R. said that on Monday, April 30, 2012, the victim was twelve years old, was in seventh grade, and was in special education classes. The victim could not tell time, do math, or understand anything but simple words. Additionally, the victim had difficulty understanding complex questions.
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> P.R. said that on April 30, she woke her children, got ready for work, and got the victim and S.J. ready for school. Around 6:30 a.m., she drove the victim to the house of her maternal grandmother, E.W., in Winchester so the victim could catch the bus for school. The victim was supposed to ride the bus back to E.W.'s house after school. That afternoon, P.R. received a call from E.W., who said that the victim had gotten into a car with someone E.W. did not recognize and was missing.
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> P.R. contacted the victim's father, who said that he had not seen the victim. P.R. went to E.W.'s house and called the police. The police came to E.W.'s house, spoke with the witnesses, then issued a missing child report.
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> P.R. said that the victim usually carried a deactivated cellular telephone. P.R. called Verizon and had the telephone activated in an attempt to locate the victim. Throughout the night, P.R. and other family

[1] It is the policy of this court to address the minor victims of sexual crimes and their immediate family members by their initials.

members repeatedly called the victim's telephone and sent text messages but to no avail.

P.R. said that the next morning, May 1, 2012, E.W. called and told her that the victim had been found on the side of the road by a neighbor and taken to Southern Tennessee Hospital. When P.R. arrived at the hospital, the victim had a scratch on one eye and a painful knot on top of her head. The victim said that she had been raped. She "told more than one story about how things happened . . . [, and] some of those stories weren't true." The victim told her mother that she was afraid to reveal the identity of the rapist; however, "[e]very story [the victim] said always came back to [the Petitioner]. It would give different ways of how she left and where she stayed, but everything came back to [the Petitioner]." The victim also said that she and the [Petitioner] went to the Walking Horse Motel. P.R. did not know the [Petitioner] prior to this incident.

P.R. said that the following day, she took the victim to the Children's Advocacy Center in Nashville for an examination. P.R. later learned that the victim and the [Petitioner] had talked on the telephone and sent each other text messages for approximately one year. The [Petitioner] was listed in the contact list on the victim's cellular telephone as "Baby Boy."

On cross-examination, P.R. said that the victim spent a lot of time with E.W. P.R. got the victim a prepaid cellular telephone for emergencies, believing the victim would be responsible with it. The victim did not use the telephone responsibly; therefore, about two months prior to April 30, P.R. had the telephone service changed so that the victim could not make or receive calls or send text messages. Nevertheless, the victim contacted the [Petitioner] by using other people's telephones without P.R.'s knowledge. When P.R. examined the contact list on the victim's telephone, she found the names of several boys and girls who the victim said were friends from school. P.R. denied that the victim was "boy crazy." P.R. did not know whether the victim sent text messages to boys.

E.W. testified that she lived in a small neighborhood on Cotton Street. A church, a graveyard, and a liquor store were all within walking distance of her house. On April 30, 2012, the victim rode the bus to E.W.'s house after school, arriving at approximately 4:10 p.m. Afterward, the victim used E.W.'s cellular telephone, purportedly to call her father.

After the call, the victim went outside with her cousin Austin to play. Around 5:00 p.m., Austin returned to E.W.'s house, but the victim did not. At that time, E.W.'s niece, Rosa Burks, called and said that the victim had been at the church nearby, that she had gotten into a green car, and that she had left. Burks asked if the victim had permission to leave, and E.W. replied that she did not. E.W. got into her van and tried to locate the green car, but she could not. E.W. then called P.R. to report that the victim was missing. Thereafter, they reported the victim's disappearance to the police. The victim's family drove around all night looking for her. When E.W. checked her cellular telephone, she learned that the text messages the victim had sent immediately prior to her disappearance had been deleted.

E.W. said that at approximately 8:00 a.m. on May 1, 2012, she was driving down Cotton Street and met her neighbor, Linda Joyce Johnson. Johnson stopped her vehicle, and E.W. saw that the victim was with Johnson. The victim told E.W. that she had been raped, and E.W. took her to the emergency room (ER) at Southern Medical Center. E.W. notified P.R. and the police that the victim had been found.

On cross-examination, E.W. said that the victim spent a lot of time with her. She did not know the victim was using her telephone to contact boys, but she later learned the victim had contacted the [Petitioner] with her telephone on the day of her disappearance.

The victim testified that her date of birth was May 5, 1999, and that she lived with her mother, stepfather, and siblings. On April 30, 2012, the victim was twelve years old and in the seventh grade. Approximately one year earlier, she got the [Petitioner's] telephone number from the contact list on her older cousin Misty's telephone. She began "sneaking" and exchanging text messages with the [Petitioner]. She told him her name, age, and the name of her school. The [Petitioner] said that his name was "Chris Moore," that he was in his 20s, and that he was employed. The [Petitioner] sent the victim photographs of his face and his penis. The victim sent the [Petitioner] photographs of her face. He asked her to send photographs of her vagina, but she refused.

The victim said that she and the [Petitioner] decided to meet each other. The victim told the [Petitioner] that she loved him, and he responded in kind. She said they referred to each other by the nickname "Baby." The [Petitioner] also offered to buy the victim a necklace. They first saw each

other at a movie theater in Winchester. They did not speak because Misty was there. Later, they made plans for the [Petitioner] to come to Winchester and "take [the victim] away from there." The victim thought that she and the [Petitioner] would "be together from that point on" and that they "would start a life together."

The victim said that on the morning of April 30, she went to E.W.'s house then rode the bus to school. While she was at school, she used a cellular telephone she had stolen from her cousin Austin to exchange text messages with the [Petitioner] about his coming to school to get her. However, when the [Petitioner] sent a message saying he was at the school, the victim could not leave because teachers were outside watching. At the end of the school day, the victim rode the bus to E.W.'s house. She used E.W.'s telephone to send text messages to the [Petitioner], and they ultimately arranged for him to meet her at the nearby church. The victim erased the text messages before returning the telephone to E.W. Afterward, the victim told E.W. that she was going for a walk. She took with her a bag containing some clothes and her deactivated cellular telephone.

The victim said that after she met the [Petitioner] at the church, he went to a "drive-thru" of a bank to obtain money. Later, they went to a Burger King restaurant before ending up at a motel, the "Horse Lodge," in Lewisburg. The [Petitioner] paid cash for the room, which was located upstairs. In the room, they sat on the couch, talked, and watched television. Afterward, the victim sat on the bed and removed her shirt and pants but kept on her bra and panties. The [Petitioner] completely undressed. The [Petitioner] did not put on a condom, but he put "some gooey stuff" from a bottle on his penis. The victim said that the [Petitioner] penetrated her vagina with his penis and that it "hurt." Afterward, they cleaned up and got dressed. The [Petitioner] sat on the couch most of the night, drinking and smoking. The victim slept in the bed.

The victim said that when she woke around 5:00 a.m., she looked at her cellular telephone and noticed she had received numerous text messages and had missed a lot of calls. One of the messages, which was from her mother, indicated that the police were looking for the victim. Soon thereafter, the victim and the [Petitioner] left the motel room. The [Petitioner] drove to a shed in "some woods" where the [Petitioner] said he lived. The victim pulled out her cellular telephone to send her mother a text message. The [Petitioner] got angry, took the telephone from her, and threw it out the car window. The [Petitioner] said he wanted her to walk

with him, and they got out of the car. The [Petitioner] pushed her and hit her on the head.

The victim said that following the altercation, they got back into the car. The victim went with him because he said that he was sorry and was going to take her home. The [Petitioner] left her at a church behind a Food Lion in Winchester and drove away. The victim started walking back to her house and was picked up by her neighbor, Johnson. The victim said that she got into the car, started "telling her . . . lies," and revealed that she had been raped. They met E.W., and the victim got into E.W.'s van. E.W. called P.R. and the police to inform them that the victim had been found, then she took the victim to the hospital.

The victim said that when she spoke with employees of the Department of Children's Services (DCS), police detectives, and her mother, she told them that she had been kidnapped by a group of men in a car, that they had taken her to the woods, and that they had raped her. She said that she lied because she was afraid she would get in trouble.

On cross-examination, the victim acknowledged that she had not only sent text messages to the [Petitioner] but also to other boys. The victim said that she deleted the [Petitioner's] photographs and text messages expressing his desire to have sex with her. She was "pretty sure" that she had deleted most of the text messages they sent each other.

The victim acknowledged that she had given eight conflicting stories about what happened following her disappearance. She first told a detective that several people took her to a wooded area and raped her. She then said that a man named Chris White was with her in a motel in Manchester. Next, she said that "White became angry, grabbed [her] phone, threw it across the yard and tied her up, hands and feet, with rope, placed tape over [her] mouth in the driveway of the house." She later said that White did not tie her with rope but that he did put tape over her mouth. Her fifth version was that White had tape and threatened to put it over her mouth but did not follow through. Other versions were that White did not rape her and that she and White "stayed on the top floor in room 316 at a motel in Manchester." She also told Johnson that she had been grabbed, taken to the woods, had her mouth taped, and was raped. The victim conceded that she had told lies in the past but asserted that she was telling the truth at trial.

Hemant Desai, the owner of the Walking Horse Hotel in Lewisburg, testified that a man filled out a registration card on April 30, 2012. The man identified himself as "Chris Blunkall" and gave his address as 177B Cedar Grove Road, Shelbyville. The [Petitioner] indicated on the card that only one guest would stay in the room. He paid cash for the room and was assigned a room on the second floor. The [Petitioner] checked out of the room the next day.

Linda Joyce Johnson testified that she and E.W. were neighbors. On April 30, 2012, Johnson learned that the victim was missing. Around 8:00 a.m. the next morning, Johnson was driving on 4th Avenue Southwest. She was approximately one-half a mile away from Food Lion when she noticed the victim walking ahead of her. Johnson stopped her car and asked the victim where she had been. The victim looked around and said, "I've been raped." The victim got into Johnson's car and began crying. Johnson asked the victim who raped her. The victim said that she did not know him but that he was a white man. She said that the man took her into the woods, took her cellular telephone, put tape over her mouth, and hit her on the head. Johnson noticed scratches on the victim's face. As Johnson and the victim drove away, E.W. drove around the corner. Johnson "flagged her down" and told her about the victim's claims.

Winchester Police Detective Kelly Gass testified that around 5:00 p.m. on April 30, 2012, the police department received a call reporting that the victim was seen leaving with someone in a green or blue vehicle. As a result of the call, Detective Gass went to 419 Cotton Street and also put out a be on the lookout (BOLO) for the vehicle and the victim.

Detective Gass said that around 9:00 a.m. the next morning, he was informed that Johnson had found the victim near the victim's home around 8:00 a.m. Detective Gass went to Southern Tennessee Medical Center to speak with the victim. Detective Gass learned that the victim was twelve years old and that "there had been sexual intercourse involved." The victim gave various stories about what had occurred while she was missing. The victim said that her assailant was "Chris White, Chris George, everything—Chris always stayed consistent. She couldn't remember his last name." Detective Gass knew the victim was not telling the complete truth, so he continued to interview her. He also collected the victim's clothing, which consisted of her pajama pants, t-shirt, panties, and bra. He later sent the clothing to the Tennessee Bureau of Investigation's (TBI) crime laboratory for testing.

Detective Gass said that on May 2, 2012, the victim was taken to the Our Kids Child Advocacy Center in Nashville for a forensic rape examination. Later that night, Detective Gass and Detective Ronnie Durham got into a car with the victim, and she showed them the route that she and the [Petitioner] had taken the night she left. She pointed out the Regions Bank [ATM] where the [Petitioner] had gotten money. Thereafter, Detective Gass obtained the security video from the ATM. After speaking with bank personnel and viewing the security video, Detective Gass learned that the man who used the ATM was the [Petitioner]. The video also revealed that the [Petitioner's] passenger was wearing blue jeans that were ripped at the knee; however, the passenger's face was not visible. Additionally, the [Petitioner's] bank statements revealed that he withdrew $140 from the ATM on April 30, 2012.

The victim told Detective Gass the telephone number of the man with whom she exchanged text messages. During the course of Detective Gass's investigation, he learned that the number corresponded to a TracFone the [Petitioner] was using to talk to girls or women. Detective Gass said that a TracFone was a "throwaway" prepaid telephone that could be purchased at any number of stores without disclosing any personal information. The [Petitioner] had another cellular telephone, which was associated with the [Petitioner's] Verizon Wireless account. Detective Gass researched the telephone records for the TracFone and found a woman who had met the person who owned the telephone; she said that his name was "Chris" but that she did not know his last name. The [Petitioner's] prepaid cellular telephone showed that a number of calls had been made to and from the telephones of the victim's grandmother and her cousin Austin.

Detective Gass said that on April 30, the [Petitioner] and the victim exchanged numerous text messages. In the messages, they called each other "Baby" and expressed their love for one another. The [Petitioner] said that he wanted the victim to be with him, and she encouraged him to come get her. Initially, the victim planned to sneak out of school. When that plan failed, they arranged for the [Petitioner] to go to the church near E.W.'s house. Each time that the victim appeared to want to abandon the plan to meet, the [Petitioner] cajoled or made her feel guilty until she capitulated.

Detective Gass said that he had P.R. show the victim a photograph of the [Petitioner], and the victim identified him as the perpetrator. During the investigation, the victim said that the [Petitioner's] car was green and

that on the inside it had camouflage seat covers, a global positioning system (GPS) mounted on the dash, and a manual gearshift in the floor. On May 24, 2012, Detective Gass and another detective stopped the [Petitioner's] car. He was driving a two-door Mitsubishi Eclipse, which matched the description given by the victim and the car shown on the ATM's security video. The police searched the car and examined the GPS, discovering that the travel history had been erased from the device. Detective Gass also discovered the [Petitioner's] two cellular telephones inside the car. Detective Gass learned that [the] telephone number listed on the receipt from the Walking Horse Hotel matched the [Petitioner's] telephone. In a pocket behind the passenger seat, Detective Gass discovered a bottle of KY Warming Liquid.

Detective Gass said that the [Petitioner] was taken into custody and transported to the Shelbyville Police Department. Detective Gass told the [Petitioner] that the police had read the text messages exchanged by the victim and the [Petitioner]. After being advised of his Miranda rights, the [Petitioner] was interviewed, and he gave the following written statement:

> [The victim] and I have been texting back and forth for about a year. She wanted to come stay with me, so I went to pick her up after school. I never thought it would happen, but this day, she got in my car and told me to drive. I said, where? And she said, away from here. I felt awkward sitting there, so I drove away. I didn't have anywhere to go, so instead of driving around, I drove to the bank and got money out and went to a motel. When we got to the motel it was a—a good place to sit back and think about what had just happened. I did something and didn't know what to do to undo it. She saw that I was just sitting there and so we started talking. I was talking to her when she said to shut up and kiss me, as she was crawling in my lap. So I did for about 15 minutes. I was starving, so I decided to go to Burger King and eat. I offered multiple times to get her something to eat and drink, but she said no. Got back to the motel and ate, then laid on the bed beside her and watched [television] until she woke me up. We laid there until we both fell asleep. And the next thing I know, it's early morning. I had to make a decision to just bite the bullet and take her back home. I went to get some more gas and took her back home and dropped her off

close to where I picked her up. She got out and I left to go home.

On cross-examination, Detective Gass acknowledged that the victim told "a whole bunch of stories." He said that P.R. provided him with a list of the names and telephone numbers of people the victim knew. Detective Gass contacted all of the individuals. He was also present while Ashley Sowder, a DCS employee, interviewed the victim. He stepped out of the room when the victim described "the sexual contact in the hotel room."

Detective Gass said that the [Petitioner] denied having any sexual activity with the victim. The [Petitioner] never recounted the night's events in a chronological order but instead relayed "bits and parts then he would jump over things." Detective Gass said that many of the details the [Petitioner] conveyed matched those given by the victim. The primary difference was whether they had intercourse.

On redirect examination, Detective Gass said that the [Petitioner] and the victim exchanged text messages for approximately one year. From the messages, Detective Gass deduced that the [Petitioner] was "grooming" the victim. He explained that "grooming" was "where a person—usually older person, . . . actually take[s] children and they talk to them over a period of time, they build their trust up." During the interview, the [Petitioner] admitted touching the victim's clothing over her buttocks and vaginal area. The [Petitioner] said that he believed the victim was fourteen years old.

Chad Johnson, a special agent forensic scientist with the serology/DNA unit of the TBI crime laboratory, testified that he conducted tests on the sexual assault kit that was performed on the victim and on the clothing the victim was wearing at the time of the incident. All of the items tested were negative for semen.

Lori Littrell testified that she was a certified registered nurse and physician's assistant with the Our Kids Center in Nashville. Littrell said that she performed a forensic sexual abuse examination on the victim at Nashville General Hospital on May 2, 2012, two days after the incident. When Littrell examined the right side of the victim's head, she found a raised area that was tender to the touch. The victim had bruises on the base of both thumbs and on her right forearm. She also had one scratch on her right cheek. When asked about the injuries, the victim stated that the [the Petitioner] hit her with a baseball bat to prevent her from using her cellular

telephone to call her mother. The victim told Littrell that "Chris" had placed his penis inside her vagina and that she had experienced bleeding and pain as a result of the penetration. Littrell described the victim's affect as "somewhat blunted" and said that she had difficulty "elicit[ing] emotion from [the victim] during the exam."

Littrell said that she found no injuries to the victim's external genitalia. During the internal genital examination, Littrell found discharge "in the hymen and in the vaginal vault." She also found an acute tear and redness on the hymen. She opined that the tear had occurred within three days of the examination. The injury was "consistent with blunt force penetrating trauma," which included "[t]he first time of sexual intercourse." Littrell performed a rape kit on the victim.

The thirty-three-year-old [Petitioner] testified that at the time of the incident, he had two prepaid cellular telephones. The victim initiated contact with him about one year prior to the incident. He surmised that the victim found his telephone number on someone else's telephone; however, he denied that he knew anyone named Misty. Although he did not know the victim, he began exchanging text messages with her "out of boredom." He also spoke with her a few times by telephone. He admitted sending the victim one photograph of his face but denied sending her a photograph of his genitals or requesting that she send a photograph of her genitals. The [Petitioner] told the victim his first name and may have mentioned his last name. He did not tell the victim that he was married.

The [Petitioner] said that he was not interested in having sex with the victim. He maintained contact with her because he pitied her. He explained that the victim told him stories about her troubled home life and difficult relationships with her parents and grandmother. He said that he wanted to help the victim. The [Petitioner] acknowledged that he and the victim referred to each other as "Baby" and that they expressed their love for one another. Nevertheless, he maintained that he did not intend to have "a relationship" with the victim "other than texting." He denied seeing the victim at a movie theater.

The [Petitioner] said that "it was obvious that [the victim] was having problems at home" and that she wanted to live with him. On April 30, 2012, he and the victim exchanged text messages. The [Petitioner] said that neither of them indicated that they wanted to meet. The [Petitioner]

stated that he "had no idea" what he was going to do after the victim got into his car. He asserted, "I didn't preplan it by no means, no."

The [Petitioner] said that he did not know what the victim looked like because she had sent photographs of several individuals. He denied being sexually attracted to the victim.

The [Petitioner] said that after the victim got into his car, he realized that he was in trouble. He drove to an ATM, withdrew money, then drove to the Walking Horse Hotel. He asserted that he could not go home or to a friend's house and that he "had nowhere else to go." He did not take the victim home immediately because he was afraid of getting in trouble with the police. He decided to take her home the next morning.

The [Petitioner] said that after they checked into the room, he kissed the victim twice. Thereafter, they went to Burger King and got food; however, the victim did not want anything to eat. They returned to the room, and the [Petitioner] ate his dinner. At some point, they turned on the television. They did not discuss having sex or engage in intercourse. The [Petitioner] said that he may have unintentionally touched the victim's "private parts" over her clothing. He stated that the victim never undressed. He removed his shirt and pants while the victim went to the bathroom. He left his underwear on and crawled under the covers of the bed to sleep. When he fell asleep, the victim was on the couch. When he woke the next morning, the victim was on the bed asleep, fully dressed. They were separated by a sheet or a blanket.

The [Petitioner] said that he told the victim he was going to take her home. She got mad and said that she could not return home. He denied stopping in the woods, hitting the victim, or throwing away her cellular telephone. The victim told him to leave her at a church close to her house, and he complied.

The [Petitioner] said that he had bought the KY lubricant in North Carolina for his personal use several months prior to the incident and that it had been in his car since that time. He denied using the lubricant with anyone else.

On cross-examination, the [Petitioner] acknowledged that he may not have told the victim his last name or that he may have given her a "phony" last name. He further acknowledged that he knew he was "dealing

with an underage girl." The [Petitioner] denied that he called the victim "Baby" or told her he loved her in order to pursue a romantic relationship.

The [Petitioner] said that he went to the victim's school solely to meet the victim. The State asked the [Petitioner] why he sent the text, "I want you to come with me, but if you're not ready, don't get my hopes up and tell me you are and you don't. Okay? That's all I ask. If you're for real, then I will call out." The [Petitioner] explained that he was supposed to call in to work at a certain time and "[t]hat's why I was trying to push the issue for her to—you know, all I wanted to do was actually meet this dadgum girl." He said that it was "just an expression" when he said "don't get my hopes up" and "[i]f you are for real."

The [Petitioner] said that he did not tell the victim he was married because he did not intend to meet her and did not believe it was "necessary" to reveal his marital status. He said that he "didn't actually want [the victim] to come out" of the school and get in his car but that "[i]f she did leave school, . . . I was going to be there for her." He acknowledged that they had previously discussed having him pretend to be her stepfather in order to check her out of school.

The [Petitioner] denied that he had been to Winchester prior to April 30, 2012. He said the victim had given him E.W.'s address. He explained that he knew there were graveyards and a liquor store near E.W.'s house because he programmed her address in his GPS. The [Petitioner] acknowledged that he erased the history from the GPS.

The [Petitioner] denied that he knew the victim intended to go home with him. He acknowledged, however, that several hours before he picked her up, the victim sent text messages saying that she intended to leave with him and that she was going to pack a bag to bring with her. He said that the victim had stated on several previous occasions that she wanted to move in with him; however, neither of them took it seriously. He stated that after he "dropped off" the victim, he stopped at a bridge to relieve himself. When he got out of the vehicle, he noticed the victim had left her bag in his car. He threw the bag into the river. He explained, "I just wanted to erase the night, you know, that happened and I really wanted to just move on and act like it just never even happened." He also explained that he did not want to be caught with the bag in his car.

> The [Petitioner] acknowledged that the victim told him that she had been raped and that she previously had intercourse with "a lot" of people. However, they never discussed the two of them having sex.
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> The [Petitioner] acknowledged that he left Winchester after the victim got into his car because he did not want to be seen by anyone who knew him. He then drove to Shelbyville[] because he was familiar with the area. He said that he withdrew money from an ATM but denied planning to check into a motel. He acknowledged that when he checked into the motel in Lewisburg, he marked on the registration form that only one person would be staying in the room. The [Petitioner] conceded that he had told the officers that the victim was wearing blue jeans with holes in the knees and that he might have put his hands in those holes while kissing her. He explained that the victim was wearing jeans when he picked her up and that she changed into pajama pants in the motel bathroom. He denied touching any of the victim's intimate parts over her clothes but said that if he did, the touching was unintentional.
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> In rebuttal, the State played a small portion of the [Petitioner's] videotaped interview, in which he acknowledged touching the victim's intimate parts over her clothing.

Blunkall, 2015 WL 500751, at *1-9 (footnote in original).

On February 2, 2016, the Petitioner filed a petition seeking post-conviction relief, which was later amended. An evidentiary hearing followed on August 12, 2016.

Detective Gass testified regarding his involvement in investigating the victim's allegations. Detective Gass confirmed that the Petitioner was first charged in Franklin County with a kidnapping offense, that the Petitioner was then indicted in Marshall County for the rape offense, and that the kidnapping was later dropped. The documents prepared by Detective Gass during his investigation—his complete eight-page investigative report, his two-page summary of evidence, and his six-page timeline of events—were admitted as exhibits. In addition, Detective Gass also testified that he received a copy of the victim's medical records from Southern Tennessee Medical Center. Detective Gass additionally identified the report prepared by registered nurse Lori Littrell at the Our Kids Center in Nashville following Ms. Littrell's forensic sexual abuse examination of the victim on May 2, 2012. The hospital records and Ms. Littrell's report were entered into evidence.

Detective Gass reported that the victim provided him with multiple different names for her assailant over the course of the investigation. The summary of evidence

reflected that the victim had identified multiple Caucasian men with the first name Chris, but they had different last names that included White, Wyatt, Moore, Stephens, and George. In addition, she had identified an African-American male with the last name Taylor, who had a cross tattoo on his arm, a Caucasian male named Shane Majors, and another individual possibly named Jordan Masengill. The summary also reflected that multiple phone numbers were involved in the investigation of the victim's allegations; showed various phone numbers as identified by the victim, including the Petitioner's phone number listed as "Baby Boy"; provided the victim's description of the hotel they stayed in; and relayed various descriptions of the Petitioner's vehicle.

Detective Gass reviewed the "different stories" that the victim had told him. According to Detective Gass, he first interviewed the victim at the Winchester Police Department on May 1, 2012. The victim's mother was present during that interview. Detective Gass agreed that the victim told him "several" lies during this interview, explaining as follows:

> So, when [the victim] started telling about the . . . abduction and taking her places and beating on her and stuff like that, . . . there was no real evidence to back that up. . . . [L]ike the bruising and stuff like that, the hospital said there was no bruising and stuff to her . . . face, where she said she'd been hit and stuff.

The victim told Detective Gass that she had been abducted, that someone got out of the vehicle and grabbed her, that the assailant's car was blue, that the assailant was accompanied in the car by an African-American male, that the assailant pushed her into the vehicle and "hit the child locks," that "she was fighting and screaming" against her assailant, that she had been given drugs to take, and that she was driven to Nashville and raped. However, according to Detective Gass, those details were not corroborated by the evidence. During this same interview, the victim recanted her story to Detective Gass and "offered to provide the truth."

The victim next told Detective Gass that her assailant's name was Chris White and that he was approximately twenty years old; however, the Petitioner's last name was Blunkall and "was in his 30's." The victim also said that she had been "taken to a motel in Manchester and there were various people that held her down and raped her in a wooded area." She immediately recanted that statement, saying, "I wasn't really raped by multiple people in the woods." The victim continued her narrative by relaying that, once they were at the Manchester motel, "Chris White wanted to have sex with her, but she didn't want to." She claimed that "Chris White put his hands down the front of her pants and she told him to stop and he didn't." However, the investigation did not lead to

a Chris White or to any Manchester motel. In addition, the victim said that they had to be out of the motel by midnight, but there was no evidence to substantiate that claim.

The victim claimed to Detective Gass that, after she and the Petitioner left the motel around midnight, "they went to Chris White's sister's residence on Duck River in Manchester." Later during the interview, the victim said that they stayed at the motel "'til morning and then went to his sister's residence." The victim claimed that she "didn't want to go inside" the sister's residence but that she "[w]anted to go home, [and] tried to call her mom." According to the victim, "Chris White tied her up, hands and feet with rope, [and] placed tape over her mouth in the driveway of the residence." The victim maintained that Chris "White then pulled her pants and panties off and raped her." Again, Detective Gass testified that there was no evidence to support the victim's story. When Detective Gass confronted the victim, she said that she was not tied up with rope but that there was tape placed over her mouth. When challenged again, the victim said that Chris "White had tape and threatened to use it, but did not." She changed her statement yet again, claiming that Chris "White threw her phone, she went to retrieve it[,] and he pulled his pants down and walked over to her, pushed her down, pulled her pants and panties down[,] and raped her in the driveway." The victim conveyed several other unfounded allegations: (1) telling Detective Gass that Chris "White drove her back to Winchester," and claiming that "she had feelings or she said that she had sex with White, but they had their clothes on;" (2) stating that "the scratch on her face was from a tree limb and one of the bruises on her arm was done by [Chris] White, but it was an accident"; (3) and asserting that "she stayed in a motel with Chris White around Wal-Mart in Manchester," that Chris White used a credit card to purchase a room, and that she was present with him when he paid.

Detective Gass testified that one of his detectives called several motels in the area trying to confirm the victim's claim, to no avail. They also spoke with several individuals named Chris White, but none were the victim's assailant. Detective Gass testified that he met with the victim later on May 1, 2012, around 8:00 p.m. This time the victim said that her assailant was named Chris George. Later, she again said it was Chris White and maintained that "she met Chris at her grandfather's funeral one year ago."

Eleven days later, on May 12, 2012, Detective Gass met with the victim again after the victim's mother phoned him stating that the victim "want[ed] to the tell truth." At this time, the victim stated that her assailant was a man named Chris Stephens. According to the victim, her neighbor, Cody Vaughn, "showed up and saw her wanting to meet with a boyfriend and asked the boyfriend to go buy liquor for him." However, Detective Gass had already spoken with Cody Vaughn, who had not provided similar details. The victim also told Detective Gass on this occasion that Chris Stephens "became angry at her, began punching her in the face and kicking her in the side"; that,

"at one point, Stephens retrieved a baseball bat from the car and struck her in the back of the head"; and "that Stephens . . . had black tape and he put it over her mouth." Again, nothing Detective Gass discovered during his investigation confirmed this version of the victim's story.

Detective Gass also testified about the subpoenas and warrants he secured to receive certain evidence and information during his investigation. Those warrants and subpoenas were admitted as exhibits.

On May 7, 2012, Detective Gass obtained a subpoena for the Regions Bank ATM security video footage from April 30, 2012, seeking the recording from the Shelbyville location where the victim said that she had stopped with the Petitioner. During his initial review of the recording, he was not successful in observing anything of value. However, on May 23, 2012, Detective Gass again reviewed the Regions Bank ATM security video footage after he had spoken with Patty Thomas.[2] This time he was "looking for a vehicle that matched" Ms. Thomas's description. Detective Gass stated in his investigative report that he "observed a two-door, (appeared to be) dark green sporty car, with a wing on the trunk lid pull up to the ATM" in Shelbyville at approximately 5:48 p.m. on April 30, 2012; that a white male was driving and the passenger "appeared to have jeans on with tears in the knees"; and that the victim "stated that she was wearing jeans that had tears all over them." After watching the ATM security video footage, Detective Gass asked Joseph Lee with Regions Bank security if the first name of the person using the ATM at 5:48 p.m. on April 30, 2102, was Chris. Mr. Lee confirmed that it was indeed someone with the first name of Chris. After receiving this information from Mr. Lee, Detective Gass secured a judicial subpoena for the "records of the person using the ATM at that time."

On May 24, 2012, Detective Gass received those bank records identifying the Petitioner as the man in the ATM surveillance video footage. That same day, Detective Gass sent a copy of the Petitioner's driver's license picture to Patty Thomas for identification. Ms. Thomas said that the person in the photograph appeared to be the individual she knew as "Chris" with the phone number 2389,[3] although, when Ms. Thomas observed the Petitioner, his hair was shorter and he did not have facial hair.

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[2] Patty Thomas is referred to in the direct appeal opinion as the woman who knew the individual using the number 2389 as "Chris," although she did not know the individual's last name. See Blunkall, 2015 WL 500751, at *5. According to the timeline of events, Ms. Thomas had met this individual at a local bar, and she had also encountered him at a Waffle House in Shelbyville. Detective Gass located Ms. Thomas through cell phone records for the phone number 2389, and he spoke with Ms. Thomas on May 22, 2012.

[3] For purposes of anonymity and clarity, we will refer to telephone numbers using the last four digits only.

Detective Gass also sent a picture to the victim's mother, and the victim identified the Petitioner as her assailant.

Thereafter, Detective Gass, accompanied by Detective Brian Crews with the Shelbyville Police Department, proceeded to the Petitioner's residence, but no one was home. According to Detective Gass, they were traveling towards the Petitioner's work when Detective Crews spotted the Petitioner driving. Detective Gass explained that he and Detective Crews were traveling in separate, unmarked police cars, that Detective Crews was leading, and that the traffic stop was initiated by the use of blue lights. Detective Gass confirmed that, at the time of the stop, there was no arrest warrant for the Petitioner and no search warrant for the Petitioner or his car. Detective Gass said that he did not observe the Petitioner commit any crimes and that the purpose of the traffic stop "[w]as to speak with [the Petitioner]." Detective Gass did not recall having any discussions with the Petitioner "about any traffic violations when he was pulled over" or the Petitioner's being cited with any traffic violations.

Once stopped on the side of the road, both officers made contact with the Petitioner. Upon approaching the vehicle, Detective Gass saw that "there were things in the car that actually matched . . . what [the victim] had said." Detective Gass described that the Petitioner's vehicle "appear[ed] to be dark green at one angle and light green at another," that the two front seats "had Mossy Oak seat covers," that there was a GPS device "that mount[ed] on the dash in the front passenger floorboard," and that the car was a "manual shift." Detective Gass confirmed that the Petitioner gave verbal consent to search his automobile, although Detective Gass could not remember how long they spoke to the Petitioner before he provided his consent. In addition, when asked the details surrounding the Petitioner's consent, Detective Gass testified that he did not know "the words that were asked" of the Petitioner in seeking his consent because Detective Crews "got the consent" and that the specifics of that consent "would be something" to ask Detective Crews about. Detective Gass explained that Detective Crews took charge of speaking with the Petitioner because they "were in his jurisdiction." According to Detective Gass, he "played a little bit more of a back-up role" on the side of the road because they were not "for sure if the actual sex part of the information happened in Shelbyville or somewhere[] else." A cell phone with the number 2389 was found "in the center console of the vehicle," and a second cell phone was also found inside the vehicle. In addition, a bottle of lubricant was discovered in the car. Detective Gass confirmed that they "looked through" the Petitioner's GPS device while on the side of the road and that they did not have a search warrant to do so at that time. Detective Gass could not remember whether they obtained any separate consent from the Petitioner to search his GPS device or the cell phones found inside the car.

Thereafter, the Petitioner was taken to the police station and questioned. Although Detective Gass could not recall if the Petitioner was given his Miranda rights when they were stopped on the side of the road, Detective Gass reported that the Petitioner was read his rights prior to the interview that followed at the police station. The video of the Petitioner's interview was admitted as an exhibit. The recording showed that the Petitioner was originally handcuffed when he was brought into the interview room, but he was uncuffed prior to questioning. In addition, a waiver of rights form signed by the Petitioner was entered into evidence. They reviewed the Petitioner's "background information" with him before Detective Crews "rather quickly" read the Petitioner his Miranda rights. Detective Gass confirmed that the Petitioner asked, "Do I need a lawyer here or [any]thing[?]" and that Detective Crews told the Petitioner that he could not "make that decision" for him. According to Detective Gass, the Petitioner indicated that he understood his Miranda rights. However, the Petitioner was never asked specifically if "he was willing to waive" those rights but was instead told to sign the waiver. Detective Gass stated that, after the interview was completed, the Petitioner was arrested, and he took the Petitioner back to Franklin County.

Detective Gass agreed with the calculation that there were "[thirty-five] separate statements in [his] supplemental report" where the victim "either recanted" or she made statements that he was "able to identify" as untrue by May 1, 2012. Regarding the search warrants that Detective Gass obtained on May 1, 2012, and May 2, 2012, for "text content records and cell site locations" of three different phones used by the victim to communicate with her assailant, Detective Gass acknowledged that he did not mention in those affidavits that the victim had told him "dozen[s] of lies." According to Detective Gass, although he did not state in the search warrant affidavits that the victim had lied to him, he claimed that he had "actually told the judge" of the victim's falsehoods. Detective Gass confirmed that he initiated a complaint against the victim in juvenile court on May 2, 2012, for filing a false police report. Detective Gass agreed that he also did not mention in the May 8, 2012 search warrant for certain cell phone records for 2389, the Petitioner's phone, that the victim had lied to him or that he had filed a complaint against her in juvenile court. At the time he sought the records for the number 2389, Detective Gass did not know the identity of the person using that cell phone. The records provided by Verizon Wireless still did not identify the owner because it was a prepaid phone. Finally, any information that the victim lied to Detective Gass was also not contained in either of the judicial subpoenas used to seek the Regions Bank ATM footage or the Petitioner's banking records.

On cross-examination, Detective Gass confirmed that, when his investigation started, he was pursuing a possible kidnapping in Franklin County. The Petitioner was charged with kidnapping the same day he was taken into custody, May 24, 2012, and later that charge was dropped due to the "misinformation" provided by the victim. At the

time the Petitioner was arrested, Detective Gass had "independent information" from other witnesses that was consistent with the victim's story "that someone had either tried to pick her up or had picked her up." Also, prior to the stop of the Petitioner's vehicle, it had been confirmed by Our Kids Center "that there had been penile/genital penetration." Detective Gass additionally had the text message communications between the victim and her assailant from "other persons' phones," and Detective Gass had spoken with Ms. Thomas, who identified the Petitioner in a photograph as the person using that phone number.

While watching the recording of the Petitioner's interview, Detective Gass heard Detective Crews state that he pulled the Petitioner over for speeding. Regarding preparation of the search warrants and judicial subpoenas, Detective Gass stated that he did not "give any of those judges false information" and that he believed everything in those documents was true.

Patricia M. Speck testified that she had a doctorate in Nursing Science and was a certified nurse practitioner. In addition, Ms. Speck stated that she was working as a professor at the University of Alabama in Birmingham where she "coordinate[d] the advanced forensic nursing practice, graduate and doctoral programs." Furthermore, Ms. Speck testified that she was "familiar" with the Our Kids Center in Nashville, and Ms. Speck asserted that she "trained the initial nurses that practiced in Our Kids and the physicians." According to Ms. Speck, Our Kids Center was "[q]uite a good program." Ms. Speck was then qualified as an expert "in the area of forensic nursing and specifically in the area of child sex abuse."

Ms. Speck testified that she had reviewed Lori Littrell's trial testimony, Ms. Littrell's report from Our Kids Center, the victim's hospital records, and the documents prepared by Detective Gass. Ms. Speck testified that she had "a problem with putting a timetable" on the victim's injuries and, therefore, she viewed Ms. Littrell's trial testimony that the victim's injuries were "acute" having occurred "within [seventy-two] hours of the examination" as questionable. Ms. Speck described Ms. Littrell as "an excellent provider" but said that Ms. Littrell "overstepped with the timing."

When asked to explain her opinion, Ms. Speck stated that "the variables that influence timing are patient centric, depend[] on age, depth of injury, [and] . . . whether or not . . . there [was] a provider injury." Ms. Speck continued that "there [are] certain expected cascading responses to occur, all dependent on a person's health." According to Ms. Speck, "the literature [was] clear" that a time cannot be placed on "injury and healing," that there was "no literature that support[ed] giving an hour at all," and that all one "can do [was] describe [an injury] in its phase of healing[,]" such as "acute," "sub-acute," and "chronic stages of healing." Ms. Speck stated that she would not "commit" to

any opinion regarding whether the victim's "injury occurred prior to the date in question or after the date in question[.]"

Ms. Speck maintained that Ms. Littrell should not have "put[] an hour" on the victim's injury because Ms. Littrell only observed bleeding and was unable to view the base of the victim's hymen. Therefore, according to Ms. Speck, Ms. Littrell would have been unable to state that the bleeding was not "menstrual blood" because, without viewing the base, Ms. Littrell could not have known for certain "where the blood [was] coming from." Ms. Speck described Ms. Littrell's examination as "incomplete." Ms. Speck further stated that victim's injury was noted as "acute" because it was "actively bleeding" but that there was no documentation on any inflammation, which is "the body's normal response . . . after that cascade to stop the bleeding." In addition, Ms. Speck remarked that Ms. Littrell said in her report "that she took the Q-Tip[,] and when she moved it, [the victim] started to bleed," which indicated to Ms. Speck "that it wasn't bleeding before [Ms. Littrell] touched it" and that it should have been considered as provider-caused until Ms. Littrell figured out the source of the bleeding.

Ms. Speck testified that a baseball bat blow to the head "would create tremendous injury, depending . . . on the force, the angle and those kinds of things." Ms. Speck noted that the hospital did not document a "soft tissue injury" or "hematoma-type injury" to the victim's head on May 1, 2012, and Ms. Speck would "have expected it to be on the medical record" from the hospital as well being observed by Ms. Littrell the following day at Our Kids Center if such an injury existed. Ms. Speck found it significant that "none of those injuries as [it] relate[d] to hematoma, physical knot on the head or any bruising like [the victim] described were mentioned in the hospital records[.]" According to Ms. Speck, the fact that the head injury was not noted by the hospital suggested to Ms. Speck that the "injury occurred between the time [the victim] left the hospital and when she was examined" at Our Kids Center the next day.

On cross-examination, Ms. Speck acknowledged that "plenty" of individuals in her field provided timeframes for injuries, even though she believed it was incorrect to do so. After an excerpt of Ms. Littrell's trial testimony was reviewed, Ms. Speck agreed that Ms. Littrell did not specifically say in that excerpt that the victim's injuries had occurred seventy-two hours ago but that Ms. Littrell said that the injuries occurred during the "last three days," although Ms. Littrell could not pinpoint "an exact hour." Moreover, Ms. Speck admitted that the victim had reported to Ms. Littrell that she had bleeding and pain associated with contact, which would have influenced the determination about when the trauma occurred. Finally, Ms. Speck could not affirmatively state that the victim's head injury was absent when the victim presented to the hospital in Winchester.

On redirect, Ms. Speck testified that she reviewed Ms. Littrell's entire trial testimony not just the excerpt that was read to her on cross-examination. Ms. Speck believed that somewhere else in Ms. Littrell's testimony "she was more convincing about [seventy-two] hours."

Next, Courtney Boatright, the Marshall County Circuit Court Clerk, testified. Although Ms. Boatright was not the clerk at the time of the Petitioner's trial, she was asked to review the Petitioner's case file. Upon her review, Ms. Boatright was unable to find any affidavit of authenticity in this case regarding cell phone records filed by the Keeper of Records for Verizon Wireless or CellCo, doing business as Verizon Wireless. She did not know if one was ever filed.

Trial counsel was next to testify. Trial counsel stated that he had been practicing law since 1970 and that one-third of his practice since that time had been in the area of criminal defense. He estimated that he had conducted approximately 600 criminal jury trials for offenses ranging from disorderly conduct to murder.

Trial counsel was asked about his investigation and "perspective" of the Petitioner's case prior to trial. Trial counsel agreed that the Petitioner was originally charged with a kidnapping offense in Franklin County and that "it was several months later" when he was charged in Marshall County with rape of a child. Furthermore, trial counsel acquiesced that he waived the preliminary hearings in both counties, opining that he "would obtain nothing at a preliminary hearing, other than what [he] already knew" from Detective Gass's investigative report. Trial counsel averred that he made a "tactical decision" not to seek such hearings, explaining that he knew Detective Gass, that Detective Gass offered trial counsel access to his "entire file" on the Petitioner's case, and that he had discussed "material" facts of this case with Detective Gass. According to trial counsel, he "knew everything about this case that would have been explored at a preliminary hearing, unless hypothetically, the State had chosen to put the girl on the stand[,] [b]ut that wouldn't have happened." Trial counsel also acknowledged that he did not hire an investigator in this case.

Trial counsel noted his familiarity with filing motions to suppress, having filed an abundance. He acquiesced that he did not file any motions to suppress the evidence in the Petitioner's case. Trial counsel said that, while the trial "would definitely have been different" if he could "have successfully suppressed the phone records, the bank records, the evidence found during the warrantless search of [the Petitioner's] car and [police] statement," he did not seek to suppress that evidence because the Petitioner had chosen to testify at trial and any motions to suppress would, therefore, have had "no practical effect." Trial counsel remarked that the decision for the Petitioner to testify at trial had been "made relatively early" in this case. Trial counsel stated that, prior to making this

decision, he had consulted with the Petitioner "on numerous occasions," who felt "resentment against [his] being charged with this crime," and the Petitioner decided that he wanted to testify because "he felt he was an innocent man that had been wronged by a girl that he tried to help." Trial counsel also believed that it was in the Petitioner's "best interest" to testify and "that the only chance that [the Petitioner] had to succeed in this case was to be able to convince the jury . . . that this feeling for this girl was not sexual, but rather derived from something entirely different." According to trial counsel, he "practice[d]" cross-examination with the Petitioner by reviewing what questions were likely to be asked by the prosecutor.

However, trial counsel acknowledged that he did not discuss any other "possible defense strategies" with the Petitioner and that it may be "useful" at times to file a motion to suppress "even in circumstances where . . . the trial court might not grant it," noting that such approach could be used to obtain discovery, obtain "leverage in a plea bargain situation," or "advance the law." Trial counsel further agreed that, if a pre-trial suppression issue was not raised, it was waived for appellate purposes.

Regarding impeachment of the victim, trial counsel acknowledged that the victim had given a "number of different statements" to Detective Gass, but trial counsel opined that "[i]t was difficult, when . . . involved in a case like this [one], to unnecessarily attack a [twelve]-year-old girl." Trial counsel explained that he "had to walk a tight rope" by "show[ing] [the victim] respect, yet at the same time, . . . put[ting] it before the jury that she had consistently not told the truth." According to trial counsel, he "had to be rather careful in the manner in which [he] approached [the victim], to avoid in any way creating in the mind of the jury, a sympathetic person." So, the manner in which he "cross-examined her was based on [his] appreciations of her age and . . . the circumstances of this case." Trial counsel pointed out that he "couldn't blindly accuse [the victim] of being a liar and prevaricator and castigate" the victim in the same way he "might do to an adult criminal." However, trial counsel assented that much of the State's evidence presented at trial bolstered the victim's credibility.

In addition, trial counsel also agreed that, on direct appeal, this court "found that [the victim] had made eight misstatements, but there were many more than just eight." Trial counsel remarked that "very damaging testimony" against the Petitioner was elicited at trial, including that the officers found "a receipt from the Walking Horse Motel" when they searched the Petitioner's vehicle. So, "it was pretty clear to [trial counsel] from the beginning that they were going to place [the Petitioner] in a particular room in the Walking Horse Motel" with the victim, and this information was "the weakest thing about the [Petitioner's] case from a defense standpoint," in trial counsel's opinion. Trial counsel opined that he did not "see any reasonable way to defend [the] case without [the Petitioner's] testifying" about how he ended up in a motel room with a

twelve-year-old girl. Trial counsel described the Petitioner as likeable and trustworthy, and trial counsel maintained that he found the Petitioner's story "convincing."

Trial counsel asserted that he recalled speaking with the Petitioner, Detective Gass, and the victim's neighbors and family prior to trial. Trial counsel further claimed that he "did an investigation into the background of the [victim]." When asked what his investigation revealed, trial counsel responded that it "was obvious from the[] text messages" that the victim had "a troubled background" and that she "kept company [with] people who were not very good influences." Trial counsel continued, "[The victim] was prone to misstatements and she had already, in [his] opinion, engaged in activities that weren't wholesome" for a girl her age.

Trial counsel was also asked about his strategy for the text messages between the Petitioner and the victim. Trial counsel stated that he did not view the text messages as "wholly inappropriate," explaining,

> The conversation in those text messages . . . were in many cases innocuous and involved matters dealing with [the victim's] personal life. There wasn't anything overtly sexual or that would indicate there was any sexuality, any intent to have improper sexual contact. And, in fact, if you look at it the way I tried to argue it, is they . . . tended to be more helpful to his defense than not. Particularly since [the Petitioner] was sincere in his desire to help this girl.

Trial counsel's opinion was that the communications were not "damaging" despite the fact that the Petitioner and the victim frequently referred to each other as "Baby" and said "I love you." Trial counsel maintained that "[the Petitioner's] position was that because of [the victim's] troubled background and the problems she was having at home, [the Petitioner] was . . . providing emotional . . . assistance to [the victim], and [the Petitioner] felt sorry for her."

Trial counsel claimed that he "was not aware" that the custodian of records from Verizon Wireless never filed an affidavit of authenticity in this case. Trial counsel stated that it was his trial strategy to use the communications as evidence instead of seeking suppression, believing that the communications "might ultimately help" the defense because the Petitioner was going to testify at trial. In addition, trial counsel noted that he "didn't think there was much doubt that [the communications] would come in during the course of the trial" because both the Petitioner and the victim were going to testify. Furthermore, trial counsel opined that the State did not do "an especially good job in showing that those text messages established what they want[ed] to establish," namely that the Petitioner was "grooming" the victim.

Trial counsel testified that he believed that the Petitioner would have been identified, even without the bank records, "based on [the victim's] statements that [she and the Petitioner] had been at the [Walking] Horse Motel, and [the police] would have ultimately. . . connected [the Petitioner] to the motel and her being with him." Trial counsel stated that he did not consider the bank records "as critical." Trial counsel also observed that the victim and the owner of the motel were going to identify the Petitioner at trial.

Regarding the Petitioner's statement to police, trial counsel said that he did "ascertain whether or not a motion to suppress his statement would have been successful" because the Petitioner was going to testify at trial. In addition to the chosen defense strategy rendering a motion to suppress the Petitioner's police statement unnecessary, trial counsel also believed that any such motion was without merit. Trial counsel maintained that the Petitioner testified at trial consistent with the details from his police statement. In addition, trial counsel observed that the Petitioner "had been given his Miranda warnings" and opined that the statement was therefore voluntarily made. According to trial counsel, the Petitioner never indicated to him in any way that he had "been coerced, intimidated, [or] forced." However, trial counsel admitted that he never specifically asked the Petitioner such.

While trial counsel agreed that if the Petitioner's "statement could have been successfully excised, it would have been helpful[,]" but trial counsel explained, "[O]nce you make the determination that [the Petitioner] was going to have to testify at trial, you can't suppress part of a statement and let the rest in." Trial counsel opined that admission of the fact that the Petitioner came to the victim's school to pick her up was not "dependent" on entry of the Petitioner's police statement into evidence because the text message communications and the victim's own testimony would have verified this fact. Trial counsel acknowledged that the Petitioner had no criminal record or experience with the criminal justice system at the time of his arrest. Finally, trial counsel observed that the Petitioner was not asked if he was willing to waive his constitutional rights in the video recording, and trial counsel assented that he was not familiar with the concept of "a silent waiver" explained in North Carolina v. Butler, 441 U.S. 369, 373 (1979).

Moreover, regarding the search of the Petitioner's car, trial counsel asserted that the Petitioner consented to the search and confirmed as much to trial counsel. Trial counsel also believed that the officers "had enough probable cause . . . to have made that stop" and to have ultimately arrested the Petitioner on the scene. Trial counsel opined that a motion to suppress the evidence found during the stop would not have been successful. Trial counsel continued that, even if a motion to suppress the search was successful making the motel receipt inadmissible at trial, the receipt could have still been

used by the officers as an "investigative tool." When asked about the "fruit of the poisonous tree" doctrine with respect to the receipt, trial counsel explained,

> Of course, we can say . . . that if had they not got that [receipt], they never would have found out about the Walking Horse Motel, even though evidence of that . . . would have ultimately been found by the testimony of the girl herself. They would have found out that motel and that signature on the [receipt], when [the Petitioner] signed it, and they would have [the motel owner] identify him.

Trial counsel also maintained that the GPS device found inside the Petitioner's vehicle "was of no significance[] because it had been erased."

Trial counsel believed that he had "examine[d] all of the search warrants and the search warrant affidavits and the applications for judicial subpoena and the actual judicial subpoenas" in the Petitioner's case. Trial counsel stated that he was aware of the requirements for search warrants imposed by Rule 41 of the Tennessee Rules of Criminal Procedure (that an authorized judge only had the authority to issue a warrant for property located in their county) and of the law governing judicial subpoenas found in Tennessee Code Annotated section 40-17-123 (that an authorized judge only had the authority to issue the production of documents and records located within the State of Tennessee). Trial counsel stated that he was not aware of the United States Sixth Circuit Court of Appeals' decision in United States v. Master, 614 F.3.d 236 (6th Cir. 2010), concerning the jurisdiction of the same General Sessions Court judge from Winchester involved in this case. Trial counsel also testified that he had no knowledge of the Tennessee Financial Records Privacy Act, Federal Right to Financial Privacy Act, or the Tennessee Attorney General's opinion dealing with the authority of general sessions and city court judges to issue subpoenas for telephone or other electronic communications in the possession of service providers pursuant to the Federal Stored Wired and Electronic Communications Act. Trial counsel acknowledged that he did not file any motions based upon these jurisdictional concerns, explaining that he made a "strategic decision" "[v]ery early in the case" not to do so "because of the manner in which [he was] going to try the case."

When asked about Lori Littrell, trial counsel maintained that he did not consider Ms. Littrell's testimony as "determinative" because the Petitioner "had to explain what happened in that motel room and he had an explanation." Trial counsel observed that Ms. Littrell did not say the injury to the victim's hymen took place "at the exact same time" as the excursion to the motel room with the Petitioner and maintained that the victim at trial "admitted to several [other] possibilities" for the source of the injury. Trial counsel also noted that "[t]he only thing that was devastating, was when the . . . [victim]

testified that it hurt." Trial counsel acknowledged that he did not consult with or hire another expert in the field of sexual assault examinations. However, trial counsel believed that "any examiner would have found" as Ms. Littrell did. When asked if he made a mistake by not calling an expert in the Petitioner's defense, trial counsel replied, "In my opinion, it would have had to have been a different expert [from Ms. Speck], that may have said something differently. . . . I don't think that expert that testified here today would have made much difference."

Regarding the victim's juvenile record, trial counsel said he "saw those records" prior to trial, although he could not recall specifics. Trial counsel testified that, prior to the Petitioner's trial, he had talked to "several juvenile officers" with juvenile court "about [the victim's] problems" she was having in that court. Trial counsel claimed that he did "know about [the victim's] involvement in juvenile court and what her problem was and what her background was." Trial counsel could not remember if he reviewed "any educational records." When asked why he did not attempt to get a copy of the victim's juvenile record, trial counsel replied, "I felt I knew enough about her background and her educational potential and her, that I didn't think the records would add anything." The victim's juvenile record was admitted as an exhibit to the hearing.

Next, John Gabriel Oliva recounted his distinguished legal career that began in 1982 and testified as an expert in criminal defense. Mr. Oliva stated that, when "developing a litigation strategy for a case," it, "first and foremost, has to be a dynamic consideration" because "[i]t is going to be, in essence, a road map for conducting not only the investigation, but also for determining what litigation is necessary and how it should proceed." According to Mr. Oliva, trial counsel, by not hiring an investigator and by "conducting the entire investigation and actually interviewing witnesses and potential witnesses" himself, "risk[ed] disqualifying himself" by becoming "a potential witnesses in the case." Mr. Oliva noted that, if a client does not have funds to hire an investigator, then a lawyer could ask the court to declare the client indigent for that purpose and request funding from the court. In addition, Mr. Oliva maintained that a lawyer should still file a motion to suppress in some cases even if that lawyer thinks that the motion "may not be successful" because doing so preserves the record and avoids waiver, possibly "develop[s] the law in areas where" a "change is appropriate," and may lead to suppression of the evidence despite the lawyer's disbelief. Mr. Oliva testified that it was a lawyer's duty "to look at the means by which the State obtained the evidence that it intends to use against the client."

Mr. Oliva classified the decision about whether a client should testify on his own behalf as an "extremely important" one. Mr. Oliva explained,

> It is not a decision that needs to be made before the attorney has an opportunity to understand what the legal issues are; to understand fully what the facts in the case are; and then to determine whether any of the critical information that the State tends to rely on, can be attacked, discredited or perhaps even excluded or suppressed.

According to Mr. Oliva, to decide on a defense strategy that includes the client's testifying at trial "before litigation any of the issues, before completing the investigation, before knowing all the issues that will be presented at trial . . . is often very dangerous and very disserving to the client."

Mr. Oliva stated that "an attorney handling a criminal case should know the jurisdictional limits on judges issuing judicial subpoenas[.]" He explained that, if an application for a subpoena cites a particular statute, then it is "incumbent upon the attorney to look at the statute, to verify that the statute that's listed on the application is, in fact, accurate and that any procedure that's required to obtain specific records is complied with." Mr. Oliva provided an example: "[I]f there are bank records, there needs to be a close scrutiny to determine whether the Federal and the [s]tate financial records confidentially has been honored . . . [o]r that the exceptions to that . . . have been rigorously honored." Mr. Oliva remarked that "[a] decision made without knowledge" to forego filing a motion to suppress "is risky at best." According to Mr. Oliva, trial counsel was deficient in this case for not having read Master, 614 F.3.d 236, and for not filing a suppression motion consistent with that holding.

Mr. Oliva was then asked about other suppression issues he believed that trial counsel should have explored. Mr. Oliva opined that challenging the phone records "would have been extremely significant." He also thought that trial counsel "failed to grasp the significance of using the bank records to identify the bank customer, even though the State never obtained the records through proper legal means" and "did not comply with either the Federal or [s]tate laws concerning the confidentiality of bank records." Regarding the Petitioner's police statement, Mr. Oliva said that trial counsel "failed to grasp the significance of the two-part process of a Miranda waiver, where the first part deals with the correct advisement of the 5th Amendment rights under Miranda, and the second part deals . . . with the voluntary waiver of those rights." Mr. Oliva believed that trial counsel also failed "to grasp the significance" of the warrantless stop of the Petitioner's car and "failed to appreciate the potential to challenge the search of the vehicle[.]" Mr. Oliva confirmed that, without an arrest warrant, the burden was on the State at any suppression hearing to justify the warrantless stop. Mr. Oliva also opined that the police search of the Petitioner's GPS device and other "items within the vehicle itself" was "a separate search without proper authority" in violation of Arizona v. Hicks, 480 U.S. 321 (1987). The issue of challenging the scope of the Petitioner's consent was

one more issue that trial counsel failed to grasp the significance of, according to Mr. Oliva. Mr. Oliva commented that trial counsel "did not explore or litigate [the Petitioner's] efforts to limit, restrict or in some [way] literally narrow the areas that could be searched or, in essence, the scope of the search." Finally, Mr. Oliva opined that trial counsel's failure to challenge any of the State's proof, combined with not hiring an investigator, fell below the level of competency expected of a lawyer involved in a case of this magnitude.

On cross-examination, Mr. Oliva acknowledged that he had not watched the video recording of the Petitioner's police statement. Therefore, Mr. Oliva had no knowledge of "exactly what the officer said to [the Petitioner] during his waiver of his rights[.]"

The Petitioner did not testify. The post-conviction court thereafter denied the Petitioner relief by written order filed on April 7, 2017, concluding that the Petitioner "was not denied the effective assistance of counsel at the pre-trial stage, at the trial, at sentencing, or on appeal." This timely appeal followed.

ANALYSIS

On appeal, the Petitioner alleges that he received ineffective assistance because trial counsel (1) failed to file suppression motions concerning multiple items of evidence, including the text message communications between the Petitioner and the victim, certain phone records, the Petitioner's banking records and the automated teller machine ("ATM") surveillance video showing the Petitioner's withdrawing money, the traffic stop, and the Petitioner's statement to the police; (2) failed to rebut the medical testimony from the State's expert; and (3) failed to pursue a preliminary hearing, adequately investigate the victim's background, or vigorously cross examine and impeach the victim. The Petitioner further contends that the State committed prosecutorial misconduct by failing to provide the defense with favorable evidence—the victim's juvenile record—and by certain statements made during closing arguments. We will address each in turn.

Post-conviction relief is available when a "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. The burden in a post-conviction proceeding is on the petitioner to prove his allegations of fact supporting his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); see Dellinger v. State, 279 S.W.3d 282, 293-94 (Tenn. 2009). On appeal, we are bound by the post-conviction court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Additionally, "questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved" by the post-conviction court. Id.

I. *Ineffective Assistance of Counsel*

Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. Dellinger, 279 S.W.3d at 293 (citing U.S. Const. amend. VI; Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)). When a claim of ineffective assistance of counsel is made under the Sixth Amendment to the United States Constitution, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72 (1993). The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). In addition, both prongs of the test must be established, and "a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996). Furthermore, because they relate to mixed questions of law and fact, we review the post-conviction court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Fields, 40 S.W.3d at 457.

Deficient performance requires a showing that "counsel's representation fell below an objective standard of reasonableness," despite the fact that reviewing courts "must be highly deferential and 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" State v. Honeycutt, 54 S.W.3d 762, 767 (Tenn. 2001) (quoting Strickland, 466 U.S. at 689). When a court reviews a lawyer's performance, it "must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from the perspective of counsel at that time." Howell v. State, 185 S.W.3d 319, 326 (Tenn. 2006) (citing Strickland, 466 U.S. at 689). Additionally, a reviewing court We will not deem counsel to have been ineffective merely because a different strategy or procedure might have produced a more favorable result. Rhoden v. State, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991). We recognize, however, that "deference to tactical choices only applies if the choices are informed ones based upon adequate preparation." Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992) (citing Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982)).

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

263 S.W.3d 854, 869 (Tenn. 2008) (citing State v. Burns, 6 S.W.3d 453, 463 (Tenn. 1999)). "A reasonable probability of being found guilty of a lesser charge . . . satisfies the second prong of Strickland." Id.

The Petitioner contends that trial counsel "provided ineffective assistance of counsel because he failed to engage in any litigation to suppress or exclude unlawfully obtained evidence that the State introduced during the trial[.]" Specifically, the Petitioner argues that "[t]here were several pieces of evidence that were introduced by the State that the jury should have never considered": (1) the Petitioner's phone records and text message communications with the victim; (2) the bank's ATM surveillance footage and the Petitioner's banking records identifying him as the individual at the ATM; (3) the evidence seized from the warrantless stop and search of the Petitioner's car, including his cell phones and GPS device; and (4) the Petitioner's police statement. In addition to his legal arguments concerning the admissibility of these pieces of evidence, the Petitioner submits that trial counsel was ineffective for failing to rebut the medical testimony from the State's expert and for failing to adequately investigate the case and impeach the victim. The State responds that "the [P]etitioner failed to prove by clear and convincing evidence that [trial] counsel was deficient, or that, as a result of any alleged deficiency, the outcome of the trial would have been different." We will address each of the Petitioner's ineffective assistance claims in turn.

A. Suppression Issues

At the outset, we observe that much of the Petitioner's brief takes issue with trial counsel's chosen trial strategy of calling the Petitioner to testify to dispute the victim's allegations and, thus, not seeking suppression of much of the State's evidence. The post-conviction court noted that much of the Petitioner's argument "seemed to be that a lot of small mistakes viewed in the aggregate amount[ed] to a failure to meet the applicable standard" and that post-conviction counsel "proposed as an alternative trial strategy[,] a rather academic approach to the defense." The post-conviction court remarked that Mr. Oliva's conclusion that the decision for a client to testify "should never be made early in trial preparation . . . ignore[d] the fact that the [Petitioner] and not counsel for [the Petitioner] ma[d]e the ultimate decision as to whether to testify" regardless of when that decision occurred.

Moreover, the post-conviction court found that

> [n]othing in Mr. Oliva's testimony changed the fact that it was a legitimate trial strategy, and very possibly the only strategy that had a chance to succeed, for the [Petitioner] to get on the stand and convince the jury that his peculiar actions towards a child with whom he had no legitimate connection were justified as a rescue operation from neglectful relatives.

In concluding that the Petitioner received effective assistance, the post-conviction court reasoned,

> The strategies adopted by [trial counsel] were reasonable and defensible and to a major degree were unavoidable and dictated by the facts in the case that simply could not be denied or disproved. The sole viable defense strategy was for the [Petitioner] to take the stand and to be more convincing about his motivations than the victim was persuasive in describing what was done to her by the [Petitioner].

We agree with the post-conviction court that trial counsel made a reasoned, tactical decision not to file any motions to suppress and, additionally, that any alleged error in failing to file any of the various suppression motions did not affect the outcome of the Petitioner's trial.

Trial counsel testified that he discussed with the Petitioner his testifying on numerous occasions and that they "practice[d]" cross-examination. After initial discussions with the Petitioner "relatively early" in the case, the Petitioner, who felt "resentment against [his] being charged with this crime," decided that he wanted to testify because "he felt he was an innocent man that had been wronged by a girl that he tried to help." The Petitioner did not testify at the post-conviction hearing or dispute trial counsel's testimony in any way. "[T]he Post-Conviction Procedure Act requires a petitioner to testify at the post-conviction hearing 'if the petition raises substantial questions of fact as to events in which the petitioner participated.'" Timothy Evans v. State, No. E2017-00400-CCA-R3-PC, 2018 WL 1433396, at *4 (Tenn. Crim. App. Mar. 22, 2018) (quoting Tenn. Code Ann. § 40-30-110(a) and citing Tenn. Sup. Ct. R. 28, § 8(C)(1)(b)), perm. app. denied (Tenn. July 19, 2018). Furthermore, trial counsel also believed that it was in the Petitioner's "best interest" to testify and "that the only chance that [the Petitioner] had to succeed in this case was to be able to convince the jury . . . that this feeling for this girl was not sexual, but rather derived from something entirely different." See, e.g., Maurice Johnson v. State, No. E2017-00037-CCA-R3-PC, 2018 WL 784761, at *21 (Tenn. Crim. App. Feb. 8, 2018) (concluding that trial counsel's advice that the petitioner testify was a matter of trial strategy in that case, reasoning "that trial counsel determined that it was a better strategy for the [p]etitioner to testify in an attempt to rebut the testimony of several witnesses who implicated the Petitioner rather than to remain silent[,]" and that this finding was supported by the record) (citation omitted), perm. app. denied (Tenn. June 6, 2018).

Moreover, we note that this is a request for post-conviction relief and not a direct appeal, and we review the Petitioner's suppression issues with these well-settled principles in mind. This court has previously addressed the evidence necessary at a post-

conviction hearing in order to demonstrate that counsel's failure to file a motion to suppress prejudiced the petitioner:

> It is well settled that when a [p]etitioner in post-conviction proceedings asserts that counsel rendered ineffective assistance of counsel by failing to call certain witnesses to testify, or by failing to interview certain witnesses, these witnesses should be called to testify at the post-conviction hearing; otherwise, [p]etitioner asks the [c]ourt to grant relief based upon mere speculation. Black v. State, 794 S.W.2d 752, 757 (Tenn. 1990). The same standard applies when a [p]etitioner argues that counsel was constitutionally ineffective by failing to file pre-trial motions to suppress evidence. In order to show prejudice, [a] [p]etitioner must show . . . that (1) a motion to suppress would have been granted and (2) there was a reasonable probability that the proceedings would have concluded differently if counsel had performed as suggested. Vaughn[], 202 S.W.3d [at] 120 [] (citing Strickland, 466 U.S. at 687). In essence, the petitioner should incorporate a motion to suppress within the proof presented at the post-conviction hearing.

Terrance Cecil v. State, No. M2009-00671-CCA-R3-PC, 2011 WL 4012436, at *8 (Tenn. Crim. App. Sept. 12, 2011). In addition, this court has stated that, if a petitioner alleges that trial counsel rendered ineffective assistance of counsel by failing to . . . file a motion to suppress, "the petitioner is generally obliged to present . . . the [evidence supporting his claim] at the post-conviction hearing in order to satisfy the Strickland prejudice prong." Demarcus Sanders v. State, No. W2012-01685-CCA-R3-PC, 2013 WL 6021415, at *4 (Tenn. Crim. App. Nov. 8, 2013); see also Craig Abston v. State, No. W2014-02513-CCA-R3-PC, 2016 WL 3007026, at *9 (Tenn. Crim. App. May 17, 2016). "Consequently, it was incumbent on [a p]etitioner to establish an adequate record at his post-conviction hearing upon which this court could determine the likelihood of success of a motion to suppress." Keven Scott v. State, No. W2010-02515-CCA-R3-PC, 2011 WL 5903933, at *10 (Tenn. Crim. App. Nov. 22, 2011).

1. Text Messages. The Petitioner submits that trial counsel was ineffective for failing to file a motion to suppress the text message communications between the Petitioner and the victim by challenging the search warrant used to obtain those communications. He contends that trial counsel "did not investigate the numerous legal challenges that exist to try to suppress or exclude these text messages." According to the Petitioner, the "text messages were one of the most significant parts of the State's case against" him because "[t]hey established an intimate dialogue and relationship" between himself and the victim, noting that they often referred to one another as "Baby" therein and reflected that they had devised a plan to meet and "run off" together. Moreover, the

Petitioner maintains that these communications were used to "vigorously impeach" him on cross-examination at trial, were used to provide support for the State's theory that he was "grooming" the victim, and were "a focal point" for the State during closing argument.

The Franklin County search warrant at issue sought collection of the "cell phone text content, cell site location, and call log records" for phone number 2389 from April 28, 2012, through May 4, 2012, and alleged that those records were in the custody and control of "CellCo Partnerships dba Verizon Wireless." Detective Gass swore the following in the search warrant affidavit as establishing "probable cause to believe th[at] the evidence" of rape of child would be found in the phone records:

> During an investigation of especially aggravated kidnapping that occurred in Winchester, TN on April 30th, 2012, I determined that the victim . . . used her grandmother's cell phone with the number []0091 sometime between the time she got home from school (3:00 p.m. CST April 30th, 2012) and the time she was noticed missing (6:00 p.m. April 30th, 2012). During this time frame, it was determined through my investigation that [the victim] used her grandmother's cell phone ([]0091) to call and text a meeting place with the person with the cell phone number []2389. The records requested for []2389 will assist me in locating the owner of the cell phone as all other means to locate this person of interest in the investigation have been exhausted. During the time the victim was missing, she states that she was raped by a [nineteen]-year-old male.

Circuit Court Judge Buddy D. Perry for the 12th Judicial District[4] signed the warrant on May 8, 2012, averring therein that Detective Gass had "made proof" by sworn affidavit that there was probable cause to believe that these records would provide evidence of the crime of rape of child. According to Detective Gass's notation, the warrant was executed on May 21, 2012. At the post-conviction hearing, Detective Gass could not confirm whether the Verizon office that responds to search warrants was geographically located inside the State of Tennessee or elsewhere. Moreover, Detective Gass stated that he faxed the search warrant to Verizon, but he did not recall the number or location of where he faxed it.

a. Jurisdiction. As his first assignment of ineffective assistance for trial counsel's failure to challenge the May 8, 2012 search warrant, the Petitioner submits that Judge

[4] The 12th Judicial District of Tennessee is comprised of Franklin County, Marion County, Grundy County, Bledsoe County, Rhea County, and Sequatchie County. Marshall County, where this case was ultimately tried because that was where the rape was alleged to have occurred, is located within the 17th Judicial District of Tennessee.

Perry "had no jurisdiction or authority to issue a search warrant for evidence located outside of Franklin County" and outside of the State of Tennessee, and thus, the collection of his text message communications violated his Fourth Amendment rights. The Petitioner maintains that "[b]oth Verizon Wireless and CellCo Partnerships are located in New Jersey" and then avers that, "[w]hile Detective Gass could not recall the specific state where the records in question were located, he knew that they were not in Franklin County and not in Tennessee."

The Petitioner cites to two cases in support of his assertion that the search warrant is void for jurisdictional reasons. Recently, in State v. Frazier, our supreme court affirmed the decision of this court, holding that a circuit court acting as a magistrate to issue a search warrant "lacks authority to issue search warrants for property located outside the judge's statutorily assigned judicial district." 558 S.W.3d 145, 154-55 (Tenn. 2018). This decision was in accord with the Sixth Circuit's decision in Master, 614 F.3.d 236, also cited by the Petitioner. In Master, the Sixth Circuit concluded that the Tennessee general sessions judge who signed the search warrant application but presided in a different county from the defendant's residence had no authority under Tennessee law to authorize the warrant. 614 F.3.d at 239-41. After citing to these two cases, the Petitioner argues that, "[b]ecause Judge Perry lacked jurisdiction to issue the search warrant . . . , the text content records of [the Petitioner]" were also obtained in violation of the Federal Stored Wired and Electronic Communications Act because the warrant was not issued by a federal or state "court of competent jurisdiction." See 18 U.S.C. § 2703.

b. Search warrant affidavit. Next, the Petitioner contends that "the search warrant affidavit used to obtain [the Petitioner's] text message communications contained numerous omissions of material facts." The Petitioner submits that the affidavit was materially misleading because Detective Gass did not include therein the multiple lies that the victim had told him or that he had charged the victim in juvenile court with filing a false report. The Petitioner then cites to the following legal principles. An affidavit that contains false or misleading information may invalidate a search warrant. State v. Little, 560 S.W.2d 403, 407 (Tenn. 1978); see also Franks v. Delaware, 438 U.S. 154, 172-73 (1978) (the United States Supreme Court holding that the fruits of a search should be excluded when the affidavit in support of the search warrant contains deliberately or recklessly false statements by the affiant, which are material to the establishment of probable cause). In Little, the Tennessee Supreme Court held that "there are two circumstances that authorize the impeachment of an affidavit sufficient on its face, (1) a false statement made with intent to deceive the [c]ourt, whether material or immaterial to the issue of probable cause, and (2) a false statement, essential to the establishment of probable cause, recklessly made." 560 S.W.2d at 407. This court has observed that the same rationale of Little and Franks extends to material omissions in an affidavit. See State v. Yeomans, 10 S.W.3d 293, 297 (Tenn. Crim. App. 1999) (citation omitted).

c. Execution timeliness. Third, the Petitioner argues that the search warrant is invalid because it was not executed within five days after its issuance as required by Rule 41(e)(3) of the Tennessee Rules of Criminal Procedure. Detective Gass states in the May 8, 2012 warrant that it "was executed" on May 21, 2012. In addition to Criminal Rule 41, Tennessee Code Annotated section 40-6-107(a) provides that a search warrant "shall be executed and returned to the magistrate by whom it was issued within five (5) days after its date, after which time, unless executed, it is void."

d. Affidavit of authenticity. The Petitioner submits that his phone records were admitted in violation of Tennessee Code Annotated section 24-7-116 because "[n]o custodian or authorized agent of Verizon Wireless or CellCo Partnerships filed with the court clerk a true and correct copy of the cell phone records introduced in this case along with an affidavit." He cites to Ms. Boatright's testimony "that she reviewed the original trial court file and the lists of exhibits introduced at trial," and she was unable to find an affidavit from the Keeper of Records for Verizon Wireless.

"Tennessee Code Annotated section 24-7-116 governs the admissibility of telephone records and the process by which they should be admitted into the record." State v. Shaun Royal Hill, No. W2015-00710-CCA-R3-CD, 2016 WL 3351817, at *7 (Tenn. Crim. App. June 9, 2016). The required procedure dictates that a "custodian or other authorized agent of the company shall . . . file with the court clerk a true and correct copy of all records . . . [and] be accompanied by an affidavit of the custodian stating in substance":

> (A) That the affiant is duly authorized custodian of the records and has authority to certify the records;
>
> (B) That the copy is a true copy of all the records described in the subpoena; and
>
> (C) That the records were prepared by the personnel of the company acting under the control of the company, in the ordinary course of business.

Tenn. Code Ann. § 24-7-116(a)(1). The Petitioner cites to Hill in support of his argument. In Hill, this court held that, while it was error for the trial court to introduce the defendant's phone records in that case because the procedure in Tennessee Code Annotated section 24-7-116(a)(1) was not complied with, the error was harmless. 2016 WL 3351817, at *7. The finding of harmless error in Hill rested on the conclusion that the "admitted phone records merely added credence to that which three witnesses testified to: that the victim did not and could not have called the [d]efendant and invited him over because she did not have a phone." Id. The Petitioner submits that the error in his case was not harmless.

e. Review. With regards to the Petitioner's cell phone records, the post-conviction court concluded, "It is fairly obvious that, if the initial efforts to obtain the records was not properly handled and the records were initially suppressed, the State could have obtained the records by other, proper means by the time the jury trial was conducted." We agree with the post-conviction court and determine that the Petitioner failed to provide the requisite proof of Strickland prejudice even assuming, arguendo, that trial counsel had been deficient by not filing any motion to suppress the text message communications based upon deficiencies in the warrant.

To meet his burden of showing prejudice, the Petitioner must establish that there is a reasonable probability that, had trial counsel filed a motion to suppress, the motion would have been granted. Samuel L. Giddens v. State, No M2006-01938-CCA-R3-PC, 2008 WL 271967, at *6 (Tenn. Crim. App. Jan. 29, 2008) (citing Strickland, 466 U.S. at 694). The victim used three separate phones to communicate with the Petitioner. The record reflects that the search warrant for records from two of the phones used by the victim to communicate with the Petitioner—numbers 1134 (the victim's cousin's phone) and 1590 (the victim's cell phone)—was "executed" on May 1, 2012, and that the search warrant for the victim's grandmother's cell phone was "executed" on May 8, 2012.

Detective Gass averred in the search warrant affidavit for the Petitioner's records, that, through his investigation, "it was determined . . . that [the victim] used her grandmother's cell phone ([]0091) to call and text a meeting place with the person with the cell phone number []2389." Detective Gass's stated purpose in the warrant for requesting the Petitioner's records was to "locat[e] the owner of the cell phone as all other means to locate this person of interest in the investigation ha[d] been exhausted." Because Detective Gass had in his possession the records from the three phone numbers used by the victim before he applied for the search warrant, it was very likely that Detective Gass already had much of the relevant information in his possession when filling out the challenged search warrant affidavit. We only have records for the Petitioner's phone and do not have records from any of these other three phone numbers. As noted above, in the post-conviction context, the Petitioner must establish his allegations of fact supporting his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); see Dellinger, 279 S.W.3d at 293-94. Therefore, "it was incumbent on the Petitioner to establish an adequate record at his post-conviction hearing upon which this [c]ourt could determine the likelihood of success of a motion to suppress." Jason Lee Fisher v. State, No. M2014-02327-CCA-R3-PC, 2015 WL 5766521, at *6 (Tenn. Crim. App. Oct. 2, 2015) (quotation omitted). We cannot grant relief based upon mere speculation that these other records did not provide the same information regarding the text message communications between the Petitioner and the victim.

Furthermore, we note that the Petitioner's phone with the number 2389 was found and seized incident to his arrest following the traffic stop. Detective Gass admitted that the phone was searched at that time. The law in effect at the time of Petitioner's trial did not preclude the State from obtaining information from the Petitioner's cell phone without a warrant when that phone was obtained incident to arrest. It was not until 2014 that the United States Supreme Court ruled that the government could not search the contents of a cell phone seized incident to an arrest without either obtaining a search warrant or proving that exigent circumstances required the warrantless search of the phone. Riley v. California, 134 S. Ct. 2473, 2493 (2014). "Similarly, Tennessee Code Annotated section 40-6-110, requiring a search warrant for law enforcement to examine data stored on a cell phone, such as text messages, became effective July 1, 2014." Jeffery L. Vaughn v. State, No. W2015-00921-CCA-R3-PC, 2016 WL 1446140, at *5 (Tenn. Crim. App. Apr. 12, 2016). The Petitioner's trial was held in 2013. Based upon precedent in place at the time of the Petitioner's trial, the text message communications could have been validly obtained once the police had the phone in their possession. This court has cautioned that "'[t]rial counsel cannot be held to a standard of being clairvoyant concerning a case not yet decided.'" Id. (quoting Darryl Lee Elkins and Rhonda Grills v. State, Nos. E2005-02153-CCA-R3-PC and E2005-02242-CCA-R3-PC, 2008 WL 65329, at *6 (Tenn. Crim. App. Jan. 7, 2008)). The Petitioner cannot show that his motion to suppress his text message communications records based upon issues with the search warrant would have been granted because the records were lawfully obtained through another method at that time.

2. Other phone records. Next, the Petitioner observes that the search warrants "used to obtain [the other phone] records in this investigation were also invalid," citing many of the same reasons as he cites above for his text message communication records. The Petitioner references the search warrant for the victim's grandmother's cell phone 0091, which was "executed" on May 8, 2012, and the search warrant for records from the two other phones used by the victim to communicate with the Petitioner, numbers 1134 (the victim's cousin's phone) and 1590 (the victim's cell phone), which was "executed" on May 1, 2012. The Petitioner notes that he may not have "standing to challenge the search warrants for someone else's phone records," but he submits that "the fact that there were numerous obvious legal issues with all of the search warrants utilized by Detective Gass during his investigation makes it clear that [trial counsel] did not carefully examine the search warrants used in this case or conduct any legal research into their validity."

Typically, "relative to the telephone records and data furnished by [a] cellular provider pursuant to subpoenas," a defendant has no reasonable expectation of privacy in another person's cell phone data and records maintained by a third party. State v. Jerrico Lamont Hawthorne, No. E2015-01635-CCA-R3-CD, 2016 WL 4708410, at *26 Tenn.

Crim. App. Sept. 7, 2016) (citing State v. Hodgkinson, 778 S.W.2d 54, 62 (Tenn. Crim. App. 1989)). Additionally, our court has held that "nothing indicate[d] that the [defendant] ever used the phone or that he had a possessory or privacy interest in it" and that, therefore, "the trial court properly determined that the [defendant] lacked standing to challenge the GPS tracking of [someone else's] phone." State v. Vernon Elliot Lockhart, No. M2013-01275-CCA-R3-CD, 2015 WL 5244672, at *29 (Tenn. Crim. App. Sept. 8, 2015) (footnote omitted). The Petitioner here does not argue that he had any possessory or privacy interest in the other three cell phones or their contents and, thus, cannot contest the use of these records. The Petitioner has not established that any motion to suppress would have been successful.

3. Judicial Subpoenas. The Petitioner challenges several of the judicial subpoenas issued in this case as well. He alleges ineffective assistance with regard to the subpoena issued to Verizon Wireless for the account information for the owner of phone number 2389 and to both of the subpoenas issued to Regions Bank for the ATM surveillance footage and his banking records.

a. Verizon subscriber information. The Petitioner challenges as invalid the Franklin County judicial subpoena issued by Judge Perry on May 2, 2012, for "[a]ny and all materials relating to phone number []2389," including "any name(s), addresses, contact information, and any other phone numbers related to the above account." The Petitioner acknowledges that Tennessee Code Annotated section 40-17-123 authorizes Judge Perry as a circuit court judge to issue a judicial subpoena anywhere in the State. However, the Petitioner again submits that Judge Perry did not have the authority to subpoena records located outside the State of Tennessee, citing an Attorney General's opinion dealing with the authority of general sessions and city court judges to issue subpoenas for telephone or other electronic communications in the possession of service providers pursuant to the Federal Stored Wired and Electronic Communications Act. See "Authority of General Sessions and City Courts to issue Subpoenas for Telephone and Other Electronic Records in the Possession of Service Providers," Tenn. Op. Att'y Gen. 08-136 (Aug. 15, 2008). The Petitioner extrapolates that, because Judge Perry lacked jurisdiction to issue the subpoena, the information was obtained in violation of the Federal Stored Wired and Electronic Communications Act. See 18 U.S.C. § 2703. While the Petitioner acknowledges that "Detective Gass received no identifying information for [the Petitioner]" through this subpoena because the phone was prepaid, he contends that the State used "the lack of identifying information" during trial "to establish that [the Petitioner] was trying to hide his identity." Finally, the Petitioner notes that trial counsel made no objection to the authenticity of the records pursuant to Tennessee Code Annotated section 24-17-116 or any "objections to relevance pursuant to Rule 401 or 403 of the Tennessee Rules of Evidence."

Once again, the Petitioner has not shown prejudice because he has not established that there was a reasonable probability that he would have been successful had trial counsel filed such a suppression motion. See Giddens, 2008 WL 271967, at *6 (citing Strickland, 466 U.S. at 694). Other than his bald assertions, the Petitioner did not provide any evidence at the post-conviction hearing that Detective Gass served the subpoena to a person located outside the State of Tennessee or that Verizon headquarters was located in New Jersey.

Furthermore, the phone in this case was a TracFone or a "throwaway" prepaid telephone that could be purchased at any number of stores without disclosing any personal information. Blunkall, 2015 WL 500751, at *5. Regardless of the type of phone, an expectation of privacy for Fourth Amendment purposes has generally not been found in identifying information "such as name, address, or telephone number that is used to facilitate the routing of communications by methods such as physical mail, e-mail, landline telephone, or cellular telephone." State v. Hill, 789 S.E.2d 317, 319 (Ga. Ct. App. 2016) (holding that a taxi cab passenger had no legitimate expectation of privacy in his cellular phone number, name, and birthdate). First, as to communications, there is a "core distinction: although the content of personal communications is private, the information necessary to get those communications from point A to point B is not." United States v. Carpenter, 819 F.3d 880, 886 (6th Cir. 2016). Second, "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Smith v. Maryland, 442 U.S. 442 U.S. 735, 743-744 (1979) (citations omitted). This rule applies even where the person revealing information intended its use by the third party to be limited. United States v. Graham, 824 F.3d 421, 425 (4th Cir. 2016) (en banc). By using a phone, a person exposes identifying information to third parties, such as telephone companies, and assumes the risk that the telephone company may reveal that information to the government. Smith, 442 U.S. at 744.

The majority of courts to consider the question have agreed that a person's name and address is not information about which a person can have a reasonable expectation of privacy under the Fourth Amendment. See, e.g., Smith, 442 U.S. at 743-747 (concluding no violation where the government used a "pen register" to record telephone numbers of calls made from the defendant's landline phone); United States v. Forrester, 512 F.3d 500, 509-511 (9th Cir. 2008) (holding no violation where the government used "mirror port" technology to learn, among other things, the "to/from" addresses of the defendant's e-mail messages); United States v. Choate, 576 F.2d 165, 174-177 (9th Cir. 1978) (determining no violation where the government arranged for "mail cover," under which the postal service provided the government agency with information appearing on the face of envelopes or packages addressed to the defendant); Commonwealth v. Duncan, 817 A.2d 455, 465-69 (Pa. 2003) (concluding no violation where the government first obtained from the shopkeeper the account number associated with the defendant's bank

card, and then obtained from the defendant's bank his name and address); People v. Elder, 63 Cal. App. 3d 731 (1976) (holding no violation where the government obtained name and address of the subscriber to particular telephone number); Ensley v. State, 765 S.E.2d 374 (Ga. Ct. App. 2014) (determining no violation where the government obtained subscriber information associated with the defendant's Internet service account); State v. Jonathan Neely, 2012 WL 175340, at *4 (Ohio Ct. App. Jan. 20, 2012) (concluding no violation where the cellular phone subscriber has no reasonable expectation of privacy in his own phone number and "the police can trace from a phone number dialed to the identity of the subscriber of the phone from which that number was dialed").

We note that, in 2008, our supreme court dispensed with "the long-standing rule that only one to whom a subpoena is directed has standing to challenge the subpoena" and adopted in its place the rule that "[a] person has standing to challenge a subpoena issued to a third party, as long as that person asserts a personal right, privilege, or proprietary interest in the materials being sought by the subpoena." State v. Harrison, 270 S.W.3d 21, 29 (Tenn. 2008) (citations omitted). The concept of standing involves whether a person has "a sufficiently personal stake in a matter at issue to warrant a judicial resolution of the dispute." Id. at 28 (citing SunTrust Bank, Nashville v. Johnson, 46 S.W.3d 216, 222 (Tenn. Ct. App. 2000)). However, permitting standing to challenge the subpoena does not create a constitutional violation for Fourth Amendment purposes were no reasonable expectation of privacy exists under constitutional jurisprudence. The Harrison court cautioned that "concluding that a person has standing to challenge a subpoena issued to a third party does not mean that the party's challenge will ultimately be successful. That decision will ultimately be made based on the substantive merits of the challenge to the subpoena." Id. at 29. In this case, the Petitioner's having standing would simply have allowed him to set forth his statutory arguments concerning the subpoena at a motion to suppress hearing.

Addressing the Petitioner's statutory argument, that Circuit Court Judge Perry did not have the authority to subpoena records located outside the State of Tennessee under Tennessee Code Annotated section 40-17-123, the Petitioner fails to recognize that any defect in this regard, if raised at the proper time, could have been cured by the State. The Petitioner makes no argument that the subpoena failed to establish a sufficient nexus between the documents requested and the criminal offense committed but only that the circuit judge exceeded his jurisdiction. See Tenn. Code Ann. § 40-17-123(c). Had the trial court at a motion to suppress hearing found the affidavit to be insufficiently particular on this ground, the State could have simply obtained a subsequent subpoena that complied with the statute or pursuant to a different statute. See Brian Dunkley v. State, No. M2016-00961-CCA-R3-PC, 2017 WL 2859008, at *10 (Tenn. Crim. App. July 5, 2017) (noting that the petitioner did not dispute that, had the trial court found the

affidavits to be insufficiently particular, the State could have simply obtained subsequent subpoenas that complied with the statute), perm. app. denied (Tenn. Nov. 16, 2017); see also State v. Scott McLain, No. E2012-01082-CCA-RM-CD, 2013 WL 709616, at *4-5 (Tenn. Crim. App. Feb. 26, 2013) (opinion on remand) (noting that the State was provided with "ample opportunity to cure the defect" of the subpoena that was signed by a court clerk rather than a judge as required by Tennessee Code Annotated section 40-17-123). Accordingly, the Petitioner cannot show prejudice.

Furthermore, regarding the Petitioner's argument that, because the court lacked jurisdiction to issue the subpoena, the information was obtained in violation of the Federal Stored Wired and Electronic Communications Act, we observe that suppression of evidence "is not a remedy for a violation" of the Federal Stored Wired and Electronic Communications Act." United States v. Guerrero, 768 F.3d 351, 358 (5th Cir. 2014). Finally, as noted above, the cell phone was seized incident to the Petitioner's arrest. The Petitioner makes no argument that the subscriber information could not have been gained through some other method once the police had the phone in their possession.

We also agree with the post-conviction court that the Petitioner made no showing that his phone records were in any way inauthentic. Ms. Boatright's testimony merely provided that an affidavit from the custodian of records was not found in the Petitioner's case file. This is not enough to establish in the post-conviction context that the records were not what they were purported to be or that the Petitioner was prejudiced due to the alleged inauthenticity of the records. In addition, the Petitioner has not made any legal argument as to why the information obtained pursuant to this subpoena was irrelevant, only noting that trial counsel "made no objections to relevance." See Tenn. R. App. P. 27(a)(7)(A); Tenn. Ct. Crim. App. R. 10(b). As such, he has failed to show ineffective assistance in this regard.

b. ATM surveillance video and banking records. The Petitioner argues that trial counsel "failed to investigate and challenge the dissemination and use of the [the Petitioner's] banking records." According to the Petitioner, "[t]hese records were incredibly significant" to the State's case because "[p]rior to receiving these records, [the Petitioner] had not been identified as a suspect." Moreover, the Petitioner notes that "these records were used to corroborate the [victim's] story."

The Petitioner alleges that the judicial subpoena used to secure the bank's ATM surveillance video footage was void. In the document at issue, the Franklin County application for judicial subpoena sought "video footage on [April 30, 2012,] from 5:00 p.m. to 10:00 p.m. from the drive-up ATM at Regions Bank on 101 Elm Street in Shelbyville, Tennessee." Detective Gass swore therein "that a specific criminal offense ha[d] been committed or [was] being committed," "that production of the requested

documents w[ould] materially assist in investigation of such offense," and "that a sufficient nexus exist[ed] between the documents requested and such offense." He described that nexus as follows:

> On [April 30, 2012,] at around 4:00 p.m., [the victim] left in a dark green, four door Honda with unknown person(s). On [May 2, 2012], Detective Ronnie Dunn and myself drove [the victim and her mother] the route [the victim] and the unknown person(s) took. The route took us into Shelbyville, Tennessee. Upon traveling to the intersection of Madison Street and Highway 231, [the victim] stated that they (her and unknown person(s)) stopped at the Regions Bank drive-up ATM at 101 Elm Street. [The victim] stated that she was one hundred percent sure it was that bank. The video footage requested should show [the victim] and the unidentified person(s) at the ATM. The ATM video footage should also show a picture of the unidentified person(s).

The subpoena application was signed on May 7, 2012, by Judge Thomas Faris, a general sessions judge in Franklin County. Detective Gass acknowledged that Shelbyville, where the ATM was located, was in Bedford County. Detective Gass relayed, however, that there was a branch of Regions Bank in Winchester, which is in Franklin County.

Detective Gass confirmed that he received the video footage and a Certificate of Origin and Authenticity concerning the ATM video, which was signed on May 9, 2012, by Jeannie M. Lacey with Regions Bank's Legal Processing Section located in Birmingham, Alabama. Ms. Lacey also sent Detective Gass a letter dated May 10, 2012, stating therein that Regions Bank had complied with the subpoena. Detective Gass averred that he "sen[t]" the subpoena to Nashville, which is in Davidson County, Tennessee, and not to Birmingham, Alabama. According to Detective Gass, he sent the bank subpoenas to Nashville because they "usually go to Nashville anyway[.]"

The Petitioner also challenges the judicial subpoena issued for his banking records as void. Regarding this document, Detective Gass confirmed that he sought and obtained a subpoena for "any and all information, including names of the account holder, addresses of account holders, and phone numbers of account holders relating to the ATM transaction on [April 30, 2012,] at 5:48 p.m. at Regions Bank ATM on 101 Elm Street in Shelbyville, T[ennessee]." This Franklin County subpoena was signed by Judge Faris on May 24, 2012. Again, Detective Gass swore therein "that a specific criminal offense ha[d] been committed or [was] being committed," "that production of the requested documents w[ould] materially assist in investigation of such offense," and "that a sufficient nexus exist[ed] between the documents requested and such offense." He described that nexus as follows:

> While investigating a rape of a child case, the victim stated that [she] and the suspect stopped at the Regions Bank ATM at 101 Elm Street in Shelbyville, T[ennessee]. After receiving the ATM video footage, I spoke to a witness that observed the type of vehicle the suspect drove. Upon looking at the ATM video, I observed a car that appeared to be the same style and description of the suspect[']s vehicle. I could observe that the person in the passenger seat had jeans on that were cut around the knees. The victim stated that she was wearing jeans that were cut. She also stated that the vehicle had a GPS unit in the middle of the dash. The vehicle in the video had the GPS in the middle of the dash. The victim and witness stated that the suspect[']s name was Chris. Upon speaking to Regions[,] they were able to tell me the person[']s in the video first name was Chris. The documents requested should show the full name and address of the suspect.

Regarding this subpoena, Detective Gass acknowledged that the suspect account was accessed through an ATM in Shelbyville and testified that he again sent the subpoena to Nashville. Moreover, he confirmed that, after obtaining the bank records, the Petitioner was arrested that same day, May 24, 2012.

Similar to his allegations above, the Petitioner is challenging the jurisdiction of Judge Faris, a general sessions judge, to issue these subpoenas for records located outside of Franklin County. Tennessee Code Annotated section § 40-17-123(f) authorizes the following: "A subpoena granted pursuant to this section by a judge of a court of general sessions shall in all respects be like a subpoena granted by the judge of a court of record but shall issue only within the county in which the sessions judge has jurisdiction." (Emphasis added). The Petitioner again cites to Master, 614 F.3d 236, in support of his argument that the subpoenas are invalid. In addition, the Petitioner submits that both subpoenas violated the Federal Right to Financial Privacy Act, see 12 United States Code Annotated sections 3401-3423, and the Tennessee Financial Records Privacy Act, see Tennessee Code Annotated section 45-10-101 to -119. According to the Petitioner, both acts require that the issuance of a subpoena be authorized by law and that the banking customer be notified of the law enforcement subpoena prior to it being served on the financial institution.

Regarding the ATM video surveillance footage, the Ninth Circuit has set forth the general rule that "[v]ideo surveillance does not in itself violate a reasonable expectation of privacy." United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991). The Ninth Circuit continued that, when such surveillance is conducted in a public place such as a bank, where no reasonable expectation of privacy exists pursuant to the Fourth Amendment, the surveillance is not subject to suppression. Id. No evidence was

presented in the post-conviction court in support of any privacy claim under the Fourth Amendment, and it does not appear that the video surveillance was conducted on behalf of any government entity but by the bank itself. Without any evidence that the Petitioner had a reasonable expectation of privacy in this situation, the Petitioner cannot establish a likelihood of success on the merits regarding suppression of the ATM video surveillance footage on constitutional grounds. See Giddens, 2008 WL 271967, at *6 (citing Strickland, 466 U.S. at 694).

Next, we will address the Petitioner's jurisdictional concerns with the subpoena for his banking records. The Petitioner argues that the invalid subpoena issued for his banking records pursuant to Tennessee Code Annotated section 40-17-123 violated the constitutional prohibition on unreasonable searches and seizures. Even if we assume that the judicial subpoena violated Tennessee Code Annotated section 40-17-123(f), the Petitioner has failed to establish that a motion to suppress in this regard had a reasonable probability of success. See Giddens, 2008 WL 271967, at *6 (citing Strickland, 466 U.S. at 694).

The United States Supreme Court has held in United States v. Miller, 425 U.S. 435, 43 (1976), that bank customers do not have a constitutionally protected privacy interest in banking records. In Miller, an internal revenue agent subpoenaed the defendant's financial records from the defendant's bank. An attack was made on the constitutionality of the subpoena on the ground that the depositor had a legitimate expectation of privacy in his banking records and that they were therefore protected by the Fourth Amendment. In holding that the banking records were not so protected, the Supreme Court said,

> The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

Miller, 425 U.S. at 443 (internal citations omitted.). The Miller court continued,

> Since no Fourth Amendment interests of the depositor are implicated here, this case is governed by the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant, even if a criminal prosecution is contemplated at the time of the subpoena is issued.

Id. at 444 (citations omitted). Our supreme court has held that Tennessee's constitutional protections regarding searches and seizures are identical in intent and purpose to those in the federal constitution. State v. Turner, 297 S.W.3d 155, 165 (Tenn. 2009).

Under Fourth Amendment jurisprudence, the same would be true for identifying information of a bank account as we discussed above for subscriber information on a cell phone account. A person's name and address is not information about which a person can have a reasonable expectation of privacy under the Fourth Amendment. See Smith, 442 U.S. at 743-47. By way of example, the Supreme Court of Pennsylvania has squarely addressed the scenario presented here and affirmed a trial court's decision to deny suppression of a subpoena to a bank requesting the defendant's name and address corresponding to an ATM card used near a crime scene. Duncan, 817 A.2d at 457. Because no constitutional implications are at play, the decisions of Master, 614 F.3d 236, and Frazier, 558 S.W.3d 145, addressing jurisdictional limits of judge's issuing a subpoena under the Fourth Amendment, are inapplicable. See Frazier, 558 S.W.3d at 155 ("The warrants are therefore invalid under the Fourth Amendment because . . . states are vested with authority to determine who may function as magistrates and to delineate the limits of a magistrate's authority.") (citing Master, 614 F.3d at 239-40)). Although it does appear from the record that additional banking records of the Petitioner were entered into evidence, he makes no specific argument that he was prejudiced by any of the additional information contained therein.

Turning to the Petitioner's statutory argument regarding the privacy acts, in response to the holding in Miller, Congress enacted the Federal Right to Financial Privacy Act and Tennessee later enacted its state version. The Petitioner concedes that neither the federal nor state privacy "acts mandate[] suppression of evidence as a remedy for violating their mandatory requirements." The federal courts consistently hold that, in the criminal context, the damage remedy specified in 12 United States Code Annotated section 3417(a) is the exclusive remedy against the government and that a violation does not authorize a court to suppress or exclude evidence. See United States v. Daccarette, 6 F.3d 37, 52 (2d Cir. 1993); United States v. Davis, 953 F.2d 1482, 1496 (10th Cir. 1992); United States v. Kington, 801 F.2d 733, 737 (5th Cir. 1986); United States v. Frazin, 780 F.2d 1461, 1466 (9th Cir. 1986). The same has been held in Tennessee, i.e., that our privacy act does not require evidence to be suppressed in the event of a violation. State v. Rickey Bradford, No. M2012-02616-CCA-R3-CD, 2014 WL 2494548, at *15 (Tenn. Crim. App. May 30, 2014); State v. James Michael Naive, No. M2012-00893-CCA-R3-CD, 2013 WL 4505395, at *14 (Tenn. Crim. App. Aug. 21, 2013); State v. M. Dale Lowe, No. 89-92-III, 1990 WL 176722, at *9 (Tenn. Crim. App. Nov. 15, 1990). Despite this acknowledgment, the Petitioner continues in his claim for relief by noting that trial counsel testified that he was not aware of either Act. However, this mere statement is

wholly inadequate to make the required showing that he was prejudiced by the violation of Tennessee Code Annotated section 40-7-123(f).

Moreover, as noted above, any jurisdictional defects in either subpoena pursuant to Tennessee Code Annotated section 40-17-123, if raised at the proper time, could have been cured by the State. Again, the Petitioner makes no argument that the subpoenas failed to establish a sufficient nexus between the documents requested and the criminal offense committed but only that Judge Faris exceeded his jurisdiction. See Tenn. Code Ann. § 40-17-123(c). Accordingly, the Petitioner cannot show prejudice. See Dunkley, 2017 WL 2859008, at *10; McLain, 2013 WL 709616, at *4-5. The Petitioner has failed to establish ineffective assistance in these regards.

4. Stop and search of car. The Petitioner maintains that trial counsel was ineffective for failing to file a motion to suppress the warrantless traffic stop of his vehicle and the evidence obtained during the subsequent search of his car. The Petitioner notes that the traffic stop and subsequent search "yielded very significant evidence": (1) the camouflage seat covers, which corroborated the victim's description of the car; (2) a bottle of KY lubricant, corroborating the victim's description that the Petitioner rubbed "some gooey stuff" from a bottle on his penis; (3) the search of the Petitioner's GPS device revealing that he had deleted its history; and (4) the search of the Petitioner's cell phones showing that he was in possession of the phone used to communicate with the victim.

a. Traffic stop. Regarding the warrantless stop, the Petitioner asserts "that the traffic stop in this case was premised on Detective Gass['s] desire to interrogate" the Petitioner and that "[t]here were no specific and articulable facts that would have justified a pretextual stop based upon speeding." He notes that, had a motion to suppress the traffic stop been filed, the State would have had the burden to justify the stop; a burden that the State could not meet, according to the Petitioner. He concludes that the traffic stop violated his constitutional rights because the officers did not have reasonable suspicion or probable cause to initiate the stop.

At the post-conviction hearing, Detective Gass testified that he heard Detective Crews state on the video recording that he pulled the Petitioner over for speeding. Our review of the recording confirmed Detective Crews said that the Petitioner was speeding, that the Petitioner admitted that he was speeding, and that Detective Crews admitted that the speeding was pretextual.

Trial counsel testified that he believed that the officers "had enough probable cause . . . to have made that stop" and to have ultimately arrested the Petitioner on the scene. Regardless of any pretext, the record supports trial counsel's conclusion that the stop was supported by probable cause. One of the exceptions to the warrantless arrest of

an individual is when an officer has probable cause for believing that the person has committed a felony. See Tenn. Code Ann. § 40-7-103(a)(3); State v. Echols, 382 S.W.3d 266, 277 (Tenn. 2012) (citing State v. Hanning, 296 S.W.3d 44, 48 (Tenn. 2009)). "Probable cause . . . exists if, at the time of the arrest, the facts and circumstances within the knowledge of the officers, and of which they had reasonably trustworthy information, are 'sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an offense.'" Echols, 382 S.W.3d at 277-78 (quoting State v. Bridges, 963 S.W.2d 487, 491 (Tenn. 1997)).

At the time of the traffic stop, the victim had consistently, although not exclusively, identified "Chris" as a person who raped her. Detective Gass had independent information that someone had picked the victim up and that she had gone missing. Detective Gass had the text message communications between the victim and the Petitioner. The victim was able to locate an ATM in Shelbyville where she stopped with the Petitioner on April 30, 2012, and he withdrew money. Detective Gass had watched the ATM's surveillance footage, which provided details consistent with the victim's account. He had also received the Petitioner's identifying information from Regions Bank. Furthermore, Detective Gass sent a copy of the Petitioner's driver's license picture to Patty Thomas, who said that the person in the photograph appeared to be the individual she knew as "Chris" with the phone number 2389. The victim also identified a photograph of the Petitioner. In addition, Detective Gass had the report from Our Kids Center, wherein Ms. Littrell had determined that the victim's injuries were consistent with penetration. The Petitioner has failed to establish that a motion to suppress in this regard had a reasonable probability of success. See Giddens, 2008 WL 271967, at *6 (citing Strickland, 466 U.S. at 694).

b. Search. The Petitioner also asserts that "the determination of whether [he] consented" to the search of his car that followed the stop "is far from clear." The Petitioner cites to the factors set forth in State v. Cox, 171 S.W.3d 174, 185 (Tenn. 2005), that a trial court must consider in its determination of whether consent was voluntary. The Petitioner avers that trial counsel "simply took the statement by Detective Gass that [the Petitioner] consented to the search of his car as legally binding" without further investigation into the facts or the law. Moreover, the Petitioner submits that the officers "went beyond a standard search" of the Petitioner's car because they conducted "more intensive searches" of his cell phones and GPS device; thus, "the scope of any alleged consent was a crucial issue." The Petitioner cites to Riley, 134 S.Ct. 2473, for the proposition that a warrant was required for the Petitioner's cell phone absent a valid exception. He also maintains that "[t]he same standard should apply to the search" of his GPS device.

The post-conviction found that "[t]he evidence establishe[d] that the search of the car was warrantless but was entirely consensual." The post-conviction court cites to trial counsel's "uncontroverted testimony at the evidentiary hearing . . . that the [Petitioner] never claimed to him . . . that the search was anything but consensual."

At the post-conviction hearing, Detective Gass confirmed that the Petitioner gave verbal consent to search his automobile. In addition, when asked the details surrounding the Petitioner's consent, Detective Gass testified that he did not know "the words that were asked" of the Petitioner in seeking his consent because Detective Crews "got the consent" and that the specifics of that consent "would be something" to ask Detective Crews about. Detective Gass could not remember whether they obtained any separate consent from the Petitioner to search his GPS device and cell phones found inside the car. In addition, trial counsel testified that the Petitioner consented to the search and that he confirmed as much to trial counsel. Again, Detective Crews was not called to testify, and the Petitioner did not testify to dispute the allegation that he gave consent to search or whether that consent was limited. We note once more that "t]he Post-Conviction Procedure Act requires a petitioner to testify at the post-conviction hearing 'if the petition raises substantial questions of fact as to events in which the petitioner participated.'" Evans, 2018 WL 1433396 (quoting Tenn. Code Ann. § 40-30-110(a) and citing Tenn. Sup. Ct. R. 28, § 8(C)(1)(b)). The Petitioner has once again failed to establish his allegations of fact supporting his grounds for relief by clear and convincing evidence and asks that we grant relief based upon mere speculation.

5. Police Statement. As his final suppression issue, the Petitioner argues that trial counsel should have filed a motion to suppress the Petitioner's police statement because the "statement was horrible for the [d]efense" by "corroborat[ing] nearly every detail" of the victim's story. Initially, the Petitioner argues that, because his detention was illegal, his subsequent police statement was fruit of the poisonous tree. However, as previously discussed, the traffic stop and the Petitioner's arrest were supported by probable cause.

The Petitioner additionally contends that there was no valid Miranda waiver. At the post-conviction hearing, trial counsel observed that the Petitioner "had been given his Miranda warnings" and opined that the statement was therefore voluntarily made. According to trial counsel, the Petitioner never indicated to him in any way that he had "been coerced, intimidated, [or] forced." The Petitioner did not testify to contradict trial counsel's testimony. Trial counsel acknowledged that the Petitioner had no criminal record or experience with the criminal justice system at the time of his arrest. Finally, trial counsel assented that he was not familiar with the concept of "a silent waiver" as explained in Butler, 441 U.S. at 373.

The video recording was admitted as an exhibit at the post-conviction hearing. At the outset of the interview, when Detective Crews told the Petitioner that they were there to discuss some "very serious allegations," the Petitioner replied, "Do I need a lawyer or anything?" Detective Crews told the Petitioner that he could not "make that decision for [him]," that he would read the Petitioner his rights and make sure he understood them, and that "it would be up to" him at that point to decide if he wanted to talk with the detectives. Detective Crews continued, "I've got to read this to you and make sure you understand it. And, then if you agree, we'll ask those questions, and hopefully you can answer them to the best of your ability at that time." After Detective Crews read the Petitioner his Miranda rights "rather quickly," the Petitioner gave an affirmative indication that he understood those rights and then signed the waiver form.

The Petitioner's Miranda argument centers on the fact that Detective Crews "completely omitted the portion of the waiver of rights that encompassed [the Petitioner's] understanding of his rights and his willingness to waive them." According to the Petitioner, "at no point was [he] asked if he was willing to waive the crucial constitutional rights he had just been advised of" by Detective Crews. The Petitioner cites to Butler in support of his argument. However, Butler pointed out that Miranda unequivocally said that mere silence is not enough to establish a waiver of rights, but then said "[t]hat does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights." Butler, 441 U.S. at 373.

The post-conviction court concluded that it would not have suppressed the statement in this case had it been asked to do so. The post-conviction court found, "Detective Crews . . . Mirandized the [Petitioner]. The [Petitioner] agreed to talk and did so. There is no evidence of any coercion." We agree. An explicit waiver may be written or oral. State v. Steven James McCain, No. M2000-02989-CCA-R3-CD, 2002 WL 1033249, at *6 (Tenn. Crim. App. May 22, 2002). A defendant's "express waiver after being informed of his Miranda rights is 'strong proof of the validity of the waiver.'" State v. Freeland, 451 S.W.3d 791, 814 (Tenn. 2014) (citing Butler, 441 U.S. at 373). In addition, "the State may establish an implicit waiver of Miranda rights by showing that the suspect received and understood Miranda warnings, did not invoke Miranda rights, and gave an uncoerced statement to the police." State v. Climer, 400 S.W.3d 537, 565 (Tenn. 2013).

Here, the Petitioner signed the waiver form, albeit somewhat quickly. But, prior to signing the waiver, Detective Crews told the Petitioner why he was reading the form to him. Moreover, that Detective Crews did not explicitly ask the Petitioner whether he would be willing to waive his rights and answer questions does not warrant suppression of the Petitioner's statement because the Petitioner clearly indicated that he understood

the rights of which he was advised—one of which was his right to remain silent—and chose to answer Detective Crews's questions. See Berghuis v. Thompkins, 560 U.S. 370, 385-87 (Tenn. 2010) (concluding that the defendant's waiver could be inferred where the evidence established he was provided a written copy of Miranda warnings, each warning was read aloud to the defendant, the defendant never indicated that he did not understand the rights, the defendant provided a statement after remaining silent for almost three hours, and where there was no evidence of coercion); see also Climer, 400 S.W.3d at 565 ("[T]the State may establish an implicit waiver of Miranda rights by showing that the suspect received and understood Miranda warnings, did not invoke Miranda rights, and gave an uncoerced statement to the police.").

The record is devoid of any evidence that the Petitioner was coerced, threatened, or tricked into signing the waiver and giving a statement. See Miranda, 384 U.S. at 476 (stating that evidence that the suspect was "threatened, tricked, or cajoled" into a waiver will show that the Fifth Amendment privilege was not voluntarily waived). Again, we note that the Petitioner did not testify at the post-conviction hearing, and "the Post-Conviction Procedure Act requires a petitioner to testify at the post-conviction hearing 'if the petition raises substantial questions of fact as to events in which the petitioner participated.'" Evans, 2018 WL 1433396, at *4 (quoting Tenn. Code Ann. § 40-30-110(a) and citing Tenn. Sup. Ct. R. 28, § 8(C)(1)(b)). Moreover, we conclude that the Petitioner's course of conduct sufficiently showed that he understood and knowingly waived his rights after being given an opportunity to exercise them. See United States v. Tutino, 883 F.2d 1125, 1138 (2d Cir. 1989) (internal quotations omitted) (finding that the defendant who nodded his head and answered "yes" when asked if he understood his rights prior to his confession had waived his Miranda rights); United States v. Taj Williams, No. 16-GR-6014W, 2016 WL 6311805, at *6 (W.D.N.Y. Oct. 26, 2016) (determining that the defendant's waiver was inferred where the defendant was advised of his Miranda rights, asked whether he understood them, responded "um-hum" and nodded his head, and answered the investigators' questions), report and recommendation adopted, No. 6:16-CR-06014 EAW, 2016 WL 6952307 (W.D.N.Y. Nov. 28, 2016); United States v. Ronald Cleveland, No. 12-CR-6109G, 2013 WL 4759081, at *9 (W.D.N.Y. Sept. 3, 2013) (holding that "[law enforcement's] failure to read the last question on the rights card in order to obtain an explicit answer from [the defendant] to the waiver question does not require suppression[;] . . . [the defendant] was advised of his rights, stated that he understood his rights and agreed to speak with [law enforcement][;] [s]uch facts establish that [the defendant] knowingly and voluntarily waived his rights—whether he did so explicitly or implicitly"), report and recommendation adopted, No. 12-CR-6109-FPG, 2013 WL 6440949 (W.D.N.Y. Dec. 9, 2013). Once again, the Petitioner cannot show that trial counsel's failure to file a motion to suppress his police statement amounted to ineffective assistance.

B. Medical Evidence

The Petitioner submits that his trial counsel "provided ineffective assistance of counsel because he failed to investigate the factual and legal issues concerning the expert medical testimony introduced by the State about the timing of [the victim's] injury[.]" According to the Petitioner, trial counsel "failed to challenge" Ms. Littrell's testimony and "failed to rebut it with expert proof[.]" The Petitioner asserts that Ms. Speck's testimony at the post-conviction hearing "clearly demonstrated the central issue with Ms. Littrell's testimony that should have been challenged and rebutted before the jury in this case: it was completely improper to testify that the injury to [the victim's] hymen would have been inflicted within three days."

Ms. Speck testified that it was impossible to place a timeframe on the victim's injury and that Ms. Littrell should have only described the phase of recovery but not the duration. Ms. Speck also opined that Ms. Littrell's examination was incomplete because she did not examine the base of the hymen and that, without viewing the base, Ms. Littrell could not have known for certain "where the blood [was] coming from." The post-conviction court found that "[t]he State's expert at trial was entirely credible, and the [Petitioner's] expert . . . was not credible." The post-conviction court reasoned that "[t]he State's expert had seen the child, and the [Petitioner's] expert had only seen the records." The post-conviction court also noted that Ms. Speck "did not support her position with any learned treatise" despite her testimony that the literature supported her conclusion and that she "conceded that experts frequently at trial testify about the time and dates of injuries in the vaginal area."

The post-conviction court further concluded that, "it cannot be found that, but for the failure to generate a medical expert at trial, the outcome of the case would have been any different." The post-conviction court reasoned that "[t]he two experts would have disagreed about the ability to determine the exact time of the injury to the vaginal area," but "[t]here was, undeniably, bleeding after the . . . rape." The post-conviction court continued, "The jury would have had to believed that the vaginal bleeding was coincidental and unrelated to the transporting of the [twelve-year-old victim] to a Lewisburg hotel."

The Petitioner argues that the post-conviction court's credibility ruling is unfounded because Ms. Speck "is significantly more experienced than Lori Littrell in the field of penetrating injuries to the hymen and forensic sexual assault examinations." According to the Petitioner, the record preponderates against the post-conviction court's finding because Ms. Speck "is one of the most experienced sexual assault nurses ever to testify in Tennessee." The Petitioner notes that Ms. Speck "rebutted" Ms. Littrell's trial testimony in several respects": (1) Ms. Littrell "did not determine whether the injury to

the hymen extended to the base"; (2) A medical expert should not "give an opinion as to the time that an injury occurred"; and (3) Ms. Littrell "may have caused the acute injury that she diagnosed." The Petitioner also discusses the injury to the victim's head and asserts that the proof supports the conclusion that the victim's head was injured after she left the hospital. According to the Petitioner, "[t]hat also calls into question the timing of the other injuries[.]"

Ms. Littrell testified at trial that there was a raised area on the right side of the victim's head that was tender to the touch, that the victim had bruises on the base of both thumbs and on her right forearm, and the she also had one scratch on her right cheek. Blunkall, 2015 WL 500751, at *7. When asked about the injuries, the victim stated that the Petitioner "hit her with a baseball bat to prevent her from using her cellular telephone to call her mother."

The victim told Ms. Littrell that "Chris" had placed his penis inside her vagina and that she had experienced bleeding and pain as a result of the penetration. Id. Ms. Littrell said that she found no injuries to the victim's external genitalia but, during the internal genital examination, found discharge "in the hymen and in the vaginal vault." Id. Ms. Littrell also found an acute tear and redness on the hymen, and she opined that the tear had occurred within three days of the examination. Id. Specifically, Ms. Littrell testified as follows:

> It is impossible to specifically date injury. What I can say, is just in my experience in our practice, the way that specific injury looked, typically, I would feel comfortable saying that that had occurred within the past three days. But, again, it's impossible to nail it down to an exact hour.

Ultimately, Ms. Littrell determined that the victim's "recent" injury was "consistent with blunt force penetrating trauma," which included the possibility of "[t]he first time of sexual intercourse."

In addition, the hospital records from Southern Tennessee Medical Center ("STMC") indicated that the victim reported head pain during triage assessment. At the hospital a CT scan of the victim's head was performed. The report of that scan reflected the following findings: "The ventricles are normal in size. Gray-white differentiation is maintained. There is no intracranial hemorrhage, midline shift, edema or mass-effect. The sinuses and mastoid are clear and the calvarium is in intact." The doctor concluded that there was "[n]o acute intracranial abnormality."

The post-conviction court did not find Ms. Speck credible because she did not examine the victim personally, because she did not support her opinion with literature, and because she acknowledged that "plenty" of individuals in her field provided

timeframes for injuries. We do not dispute that Ms. Speck is certainly a renowned practitioner. The Petitioner asserts that the record supports the conclusion that the victim's head was injured after she left the hospital, which "calls into question the timing of the other injuries," making Ms. Littrell's trial testimony not credible. This assertion mischaracterizes the record. The STMC records note that the victim reported head pain during triage assessment and that no internal head issues were found during the CT scan. Regardless, the post-conviction court resolves any questions concerning witness credibility, and we may not substitute our own inferences for those drawn by the post-conviction court. See Honeycutt, 54 S.W.3d at 766-67.

In addition, we agree with the post-conviction court that "it cannot be found that, but for the failure to generate a medical expert at trial, the outcome of the case would have been any different." Ms. Littrell stated at trial that she could not "specifically date injury[,]" but she did opine that the victim's "recent" injury "had occurred within the past three days." Ms. Speck and Ms. Littrell did not differ in all respects; having Ms. Speck testify would have presented disagreeing experts about the ability to determine the timing of an injury or the duration of recovery. It was undeniable that the victim was bleeding during the examination. Ms. Littrell testified that she observed an acute tear and redness on the victim's hymen and that the victim had discharge in the vaginal vault. The evidence, which included the ATM video recording, the hotel owner's testimony, the text message communications, and the Petitioner's own statement admitting to kissing the victim, overwhelmingly supported the Petitioner's guilt. As the post-conviction court accurately observed, "The jury would have had to believed that the vaginal bleeding was coincidental and unrelated to the transporting of the [twelve-year-old victim] to a Lewisburg hotel." We hold that the post-conviction court did not err in concluding that the Petitioner failed to show prejudice through proof of a reasonable probability of a different result at the trial. See, e.g., Curtis Cecil Wayne Bolton v. State, No. E2014-00559-CCA-R3-PC, 2015 WL 4557754, at *22 (Tenn. Crim. App. Jan. 22, 2015) (holding that, although a defense medical expert might have been able to testify about the timing of the victim's injury, the evidence nevertheless overwhelmingly pointed to the petitioner as the person who fatally injured the victim, and the petitioner had failed to establish prejudice).

Furthermore, the Petitioner also maintains that trial counsel was ineffective for failing to object to Ms. Littrell's hearsay testimony at trial when she testified by reading from her report. The Petitioner asserts that Ms. Littrell's testimony "should have been limited to describing her observations, including the presence of any injuries and factors that could explain their state of healing." According to the Petitioner, Ms. Littrell's act of reading to the jury the victim's story contained in the report vouched for the victim's credibility. The Petitioner fails to point to specific instances in the record where this occurred at trial. See Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b).

Regardless, we cannot conclude that admission of any hearsay statements in the forensic medical examination report to which Ms. Littrell testified about at trial resulted in prejudice to the Petitioner. Here, the victim testified at trial, and we have already noted the other substantial evidence in support of the Petitioner's guilt. See State v. Williams, 920 S.W.2d 247, 256-57 (Tenn. Crim. App. 1995) (concluding that the trial court erred in admitting the entire contents of the patient's medical history, but that, because the witness made a positive identification of the defendant at trial and in light of the other evidence in the record describing the events of the rape and identifying the defendant as the perpetrator, admission of those statements was harmless); see also State v. Spratt, 31 S.W.3d 587, 601 (Tenn. Crim. App. 2000) (holding that the admission of hearsay statements contained in a medical report "was clearly harmless error" when those statements "were merely cumulative of the victim's testimony at trial"). The Petitioner is not entitled to relief on this issue.

C. Investigation and Impeachment of the Victim

According to the Petitioner, trial counsel "provided ineffective assistance of counsel because he failed to investigate facts that should have been used to impeach the credibility" of the victim. The Petitioner further asserts that trial counsel "failed to request favorable evidence from the State that could have used to impeach" the victim and "failed to challenge the State's portrayal of the . . . victim as intellectually disabled[.]" In this regard, the Petitioner notes the following: (1) trial counsel did not hire an investigator; (2) it is "doubtful" that trial counsel conducted witness interviews; (3) trial counsel did not formally request discovery in this case or file any motions for Brady evidence; and (4) trial counsel waived both of the Petitioner's preliminary hearings in this case. The Petitioner submits that, because trial counsel failed to "adequately investigate the facts of this case or engage in any pretrial litigation that would preview the State's evidence at trial," trial counsel "was blind-sided in front of the jury" when the State "introduced evidence to portray [the victim] as an intellectually disabled child."

As noted in the direct appeal opinion, the victim's mother, in addition to saying that the victim "was in special education classes" and "had difficulty understanding complex questions," testified that the victim "could not tell time, do math, or understand anything but simple words." Blunkall, 2015 WL 500751, at *1. The Petitioner contends that, if adequate investigation had been conducted, trial counsel could have rebutted the victim's mother's testimony about the victim's intellectual disabilities and portraying the victim as a special education student. The Petitioner notes that Ms. Littrell, in her report, stated that the victim's mother described the victim as "an Honor Roll student at school." Moreover, the Petitioner submits that the victim's juvenile record also "completely contradicted the testimony elicited by the State that [the victim] was intellectually

disabled," noting that the victim's satisfactory grades were reflected in the juvenile record.

Furthermore, the Petitioner maintains that the victim's juvenile record reflected an adjudication for theft; "a documented act of dishonesty that could have been used to impeach [the victim]." The adjudication indicates that the victim sold another student's cell phone for $15.00, which, according to the Petitioner, also "indirectly undercuts" the victim's mother's testimony that the victim could not count money. Moreover, in addition to the theft adjudication, the Petitioner submits that the victim could have been impeached with the adjudication for filing a false police report.

The State responds that the Petitioner has failed to establish that trial counsel "failed to obtain any pertinent information about the case or that he was deficient in his cross-examination of the victim." The post-conviction court concluded that "it was obvious that [trial counsel] had unfettered access to all the information in the hands of Franklin County law enforcement, including access to the victim's juvenile records and to information about her family."

The post-conviction court observed that, while post-conviction counsel "went to great lengths at the evidentiary hearing to establish that the victim lied to law enforcement at the beginning of the investigation of her disappearance," the victim's lies "were established at trial[] by more than one witness." The post-conviction court further noted that, if trial counsel "had been more abrasive in his cross-examination of the child, he risked making the jury more angry with" the Petitioner. The post-conviction court found, "To have viciously cross-examined the child would have antagonized the jury without proving a single additional lie[.]" Trial counsel's "strategy to avoid the risk of inflaming the jury [was] entirely defensible," in the post-conviction court's opinion. In addition, the post-conviction court determined that the Petitioner had failed to establish prejudice in this regard: "It cannot be said that, but for the absence of a scolding examination of the victim, the outcome of the trial would have been different."

Moreover, the post-conviction court observed that "[i]t [was] typical to waive [preliminary hearings] in return for cooperation by the State in the discovery process" and that, in this case, "the State clearly could have established probable cause without calling the child" at any preliminary hearing. Finally, the post-conviction court determined that the Petitioner had not provided sufficient evidence "to support the proposition that the [Petitioner] would have obtained any benefit from a preliminary hearing" and that the Petitioner "certainly" had not shown "that, but for the waiving of a preliminary hearing, the outcome of his case would have been different." The post-conviction court determined that trial counsel was not deficient for waiving the preliminary hearings.

Detective Gass acknowledged that he had initiated a complaint against the victim on May 2, 2012, in juvenile court for filing a false police report. However, trial counsel testified that he saw the victim's juvenile record prior to trial. Trial counsel also averred that he had talked to "several juvenile officers" with juvenile court "about [the victim's] problems" she was having in that court. Trial counsel could not remember if he reviewed "any educational records." When asked why he did not attempt to get a copy of the victim's juvenile record, trial counsel replied, "I felt I knew enough about her background and her educational potential and her, that I didn't think the records would add anything."

Trial counsel also testified that he recalled speaking with the Petitioner, Detective Gass, and the victim's neighbors and family prior to trial. Trial counsel claimed that he also "did an investigation into the background of the [victim]" and that his investigation revealed that the victim had "a troubled background" and that she "kept company [with] people who were not very good influences." Trial counsel opined that the victim "was prone to misstatements" and had already "engaged in activities that weren't wholesome" for a girl her age.

Trial counsel agreed that, on direct appeal, this court "found that [the victim] had made eight misstatements, but there were many more than just eight." Although the victim had given a "number of different statements" to Detective Gass, trial counsel opined that "[i]t was difficult . . . to unnecessarily attack a [twelve]-year-old girl." Trial counsel explained that he "had to walk a tight rope" by "show[ing] [the victim] respect, yet at the same time, . . . put[ting] it before the jury that she had consistently not told the truth." According to trial counsel, he "had to be rather careful in the manner in which [he] approached [the victim], to avoid in any way creating in the mind of the jury, a sympathetic person." So, the manner in which he "cross-examined her was based on [his] appreciations of her age and . . . the circumstances of this case." Trial counsel illustrated, for example, that he "couldn't blindly accuse [the victim] of being a liar and prevaricator and castigate" the victim in the same way he "might do to an adult criminal."

Trial counsel maintained that he "would obtain nothing at a preliminary hearing, other than what [he] already knew" from Detective Gass's investigative report. Trial counsel averred that he made a "tactical decision" not to seek a preliminary hearing, explaining that he knew Detective Gass, that Detective Gass offered trial counsel access to his "entire file" on the Petitioner's case, and that he had discussed "material" facts of this case with Detective Gass. According to trial counsel, he "knew everything about this case that would have been explored at a preliminary hearing, unless hypothetically, the State had chosen to put the girl on the stand[,] [b]ut that wouldn't have happened."

A. Preliminary hearing. First, we agree with the post-conviction court that the State had sufficient evidence to establish probable cause at the preliminary hearing without calling the victim. Moreover, trial counsel stated that, based upon his relationship with Detective Gass, he had access to Detective Gass's "entire file" on the Petitioner's case, and that he had discussed "material" facts of this case with Detective Gass. According to trial counsel, he "knew everything about this case that would have been explored at a preliminary hearing[.]"

The evidence reflects that trial counsel made a reasonable strategic decision based on the information he had at the time to waive the preliminary hearings. The post-conviction court accredited trial counsel's testimony in this respect and found that the waiver of appearance was a reasonable strategic decision. Furthermore, this court has held that it was a reasonable strategic decision not to pursue a preliminary hearing in exchange for an open-file discovery policy. See, e.g., Edward Thomas Kendrick III v. State, No. E2011-02367-CCA-R3-PC, 2015 WL 6755004, at *27 (Tenn. Crim. App. Nov. 5, 2015); Robert Faulkner v. State, No. W2012-0612-CCA-R3-PD, 2014 WL 4267460, at *91 (Tenn. Crim. App. Aug. 29, 2014); Jamie Bailey v. State, No. W2008-00983-CCA-R3-PC, 2010 WL 1730011, at *6 (Tenn. Crim. App. Apr. 29, 2010). The Petitioner has not shown that counsel was deficient for failing to request preliminary hearings. Moreover, the Petitioner has not presented any evidence that waiver of the preliminary hearings affected the outcome of his trial in any way. See, e.g., Paul David Childs v. State, No. M2015-00994-CCA-R3-PC, 2016 WL 1745270, at *7 (Tenn. Crim. App. Apr. 28, 2016). Accordingly, we conclude that the Petitioner has failed to prove that trial counsel was ineffective in this regard.

B. Investigation. Trial counsel testified that he did an investigation into the victim's background, including conducting witness interviews, and that he was aware of the information contained in her juvenile file. Indeed, trial counsel testified that he saw the victim's juvenile record prior to trial. We agree with the post-conviction court based upon trial counsel's testimony at the post-conviction hearing that "it was obvious that [trial counsel] had unfettered access to all the information in the hands of Franklin County law enforcement, including access to the victim's juvenile records and to information about her family." The Petitioner has failed to present any proof substantiating his claim that counsel was ineffective for failing to hire an investigator. William T. Minton v. State, No. E2015-00986-CCA-R3-PC, 2016 WL 2605782, at *6 (Tenn. Crim. App. May 4, 2016) (finding that the petitioner had failed to show that trial counsel's investigation was deficient or that it caused the petitioner prejudice when trial counsel testified that he did not hire a private investigator because he conducted his own investigation and described the details of that investigation).

C. Cross-examination and impeachment. At trial, "[t]he victim acknowledged that she had given eight conflicting stories about what happened following her disappearance." Blunkall, 2015 WL 500751, at *4. The Petitioner has mischaracterized what happened at trial: this was eight different stories, not merely eight "misstatements." Trial counsel inquired on cross-examination about many of the specific details in these various versions provided by the victim to Detective Gass. "The victim conceded that she had told lies in the past but asserted that she was telling the truth at trial." Id. In addition, on cross-examination, "the victim acknowledged that she had not only sent text messages to the [Petitioner] but also to other boys." Id.

In addition, trial counsel testified that he believed an overtly aggressive cross-examination of the victim would be ineffective and make her more sympathetic to the jury. The post-conviction court found that trial counsel's "strategy to avoid the risk of inflaming the jury" by more vigorously cross-examining the victim "[was] entirely defensible." We agree that trial counsel's approach was reasonable and based upon a sound trial strategy. See William James Watt v. State, No. M2015-02411-CCA-R3-PC, 2016 WL 6638856, at *6 (Tenn. Crim. App. Nov. 10, 2016) (concluding that trial counsel's decision not to attack the six-year-old victim was a reasonable trial strategy).

Furthermore, the post-conviction court determined that the Petitioner had failed to establish prejudice in this regard: "It cannot be said that, but for the absence of a scolding examination of the victim, the outcome of the trial would have been different." The jury was aware that the victim had told numerous lies, and this information came from several witnesses at trial. Moreover, the following colloquy between the victim and the prosecutor occurred during the Petitioner's trial:

> Q. . . . I mean, you told a bunch of lies, didn't you?
>
> A. Yes, sir.
>
> Q. Well, why didn't you just tell them the truth, that you ran off with an older man and spent the night in a motel room and he had sex with you?
>
> A. Because I knew I was going to get in trouble.
>
> Q. Okay. And it's fair to say, actually, you wound up getting in trouble, didn't you?
>
> A. Yes, sir.
>
> Q. Had to go to juvenile court?
>
> A. Yes, sir.
>
> Q. And they put you on probation for not telling the truth to them?
>
> A. Yes, sir.

Therefore, the fact that the victim had been subjected to punishment in juvenile court for telling Detective Gass multiple lies was information that was in fact placed before the jury.

In addition, even if the theft adjudication were admissible as impeachment evidence, see Tennessee Rules of Evidence 608 and 609, evidence of that adjudication would have "done little to further vitiate" her credibility. See Berry v. State, 366 S.W.3d 160, 80 (Tenn. Crim. App. 2011). The victim's trial testimony was corroborated by much of the State's evidence that was properly admitted into evidence as discussed above. Finally, the juvenile records only contained the victim's grades and did not speak to her mental capacity, and thus, the record does not support the Petitioner's assertion that those records "completely contradicted the testimony elicited by the State that [the victim] was intellectually disabled." And, as noted above, it was undeniable that the victim was bleeding during the examination. Ms. Littrell testified that she observed an acute tear and redness on the victim's hymen and that the victim had discharge in the vaginal vault. We agree with the post-conviction court that the Petitioner has failed to establish prejudice in this regard.

Regarding the information in Ms. Littrell's report that the victim was an honor roll student, that information would have been used to impeach the victim's mother and not necessarily the victim. Moreover, Ms. Littrell was asked at trial if she learned during the victim's examination that the victim was in "special ed. at school?" Ms. Littrell said that "was not something [she] believed [they] were told." Ms. Littrell's trial testimony disputed the victim's mother's testimony to some extent. While trial counsel failed to ask the victim about her educational abilities at trial, the victim's grades as shown in the juvenile record did not themselves establish that the victim's mother was lying that the victim was in special education classes. Moreover, the members of the jury also observed the victim during her testimony and could use those observations when assessing her intellectual capacity. We cannot say that trial counsel rendered ineffective assistance if he was aware of the impeaching evidence in Ms. Littrell's report or had seen the victim's grades and failed to use them.

II. *Prosecutorial Misconduct*

The Petitioner further contends that that the State committed prosecutorial misconduct by failing to provide the defense with favorable evidence, the victim's juvenile file, and by certain statements made during closing arguments. At the outset, the State asserts that the Petitioner has waived any issue of prosecutorial misconduct by failing to raise it on direct appeal.

It is well established that a party may not raise an issue in a post-conviction petition that could have been raised on direct appeal. State v. Townes, 56 S.W.3d 30, 35

(Tenn. Crim. App. 2000), overruled on other grounds by State v. Terry, 118 S.W.3d 355 (Tenn. 2003). Pursuant to the Post-Conviction Procedure Act, "[a] ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented[.]" Tenn. Code Ann. § 40-30-106(g). The presumption that a ground not raised has been waived is rebuttable. Tenn. Code Ann. § 40-30-110(f). In order to rebut the presumption, the petition must contain "allegations of fact supporting each claim for relief set forth in the petition and allegations of fact explaining why each ground for relief was not previously presented in any earlier proceeding." Tenn. Code Ann. § 40-30-104(e). Waiver notwithstanding, because the Petitioner insinuates that his attorney was ineffective for failing to raise these issues, we will review the merits of the issues.

A. Juvenile Record

"Separate and apart from [trial counsel's] ineffectiveness in failing to investigate [the victim's] background and obtain her juvenile court records," the Petitioner maintains that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by withholding the victim's juvenile record. Citing to Kyles v. Whitley, 514 U.S. 419, 437 (1995), the Petitioner contends that, "[e]ven if the prosecutors in [the Petitioner's] case were not personally in possession of [the victim's] juvenile file, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case.'" According to the Petitioner, "[w]hat makes the non-disclosure of [the victim's] juvenile file material in this case is the State's theory and story it told the jury[,]" which included portraying the victim "as intellectually disabled and therefore particularly vulnerable" to being groomed by the Petitioner. The Petitioner notes the educational background described in the file and that it was also noted therein that the victim had committed theft, an act of dishonesty.

Every criminal defendant is guaranteed the right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the "Law of the Land" Clause of article I, section 8 of the Tennessee Constitution. Johnson v. State, 38 S.W.3d 52, 55 (Tenn. 2001). In the landmark case of Brady v. Maryland, the United States Supreme Court held that "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." 373 U.S. at 87. The duty to disclose extends to all "favorable information" regardless of whether the evidence is admissible at trial. Johnson, 38 S.W.3d at 56. Additionally, "the prosecutor is responsible for 'any favorable evidence known to the others acting on the government's behalf in the case.'" Strickler v. Greene, 527 U.S. 263, 275 n.12 (1999) (citing Kyles, 514 U.S. at 437). However, the State is not required to

disclose evidence that the accused already possesses or is otherwise able to obtain. State v. Marshall, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992). In order to establish a due process violation under Brady and obtain post-conviction relief, the petitioner must show that he made a proper request for the evidence "unless the evidence, when viewed by the prosecution, is obviously exculpatory in nature and will be helpful to the accused"; that the State suppressed the evidence; and that the undisclosed evidence was both favorable and material. State v. Spurlock, 874 S.W.2d 602, 609 (Tenn. Crim. App. 1993); see also State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995).

First, the Petitioner has failed to establish that the State suppressed the evidence. The victim was asked at trial about her proceedings in juvenile court for giving a false report. Moreover, the State has no duty to disclose "information that the accused already possesses or is able to obtain, or information which is not possessed by or under the control of the prosecution[.]" State v. Colvett, 481 S.W.3d 172, 201 (Tenn. Crim. App. 2014) (citing State v. Marshall, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992)); Berry, 366 S.W.3d at 179-80 ("There is no Brady violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available . . . from another source, because in such cases there is really nothing for the government to disclose." (quoting Owens v. Guida, 549 F.3d 399, 415) (6th Cir. 2008)). "[W]hen exculpatory evidence is equally available to the prosecution and the accused, the accused 'must bear the responsibility of [his] failure to seek its discovery.'" Marshall, 845 S.W.2d at 233 (quoting United States v. McKenzie, 768 F.2d 602, 608 (5th Cir. 1985)).

The court in Berry observed that juvenile court files are "maintained" by the courts rather than parties to the litigation. 366 S.W.3d at 176. The court also noted that, pursuant to the unambiguous language of the statutes governing access to juvenile court records, they are to remain confidential except under certain limited circumstances. Id. at 177-78 (citing Tenn. Code Ann. §§ 37-1-153 and -154). The court concluded that none of the witness's juvenile court records would have been open to the general public. Id. at 179. The court observed, however, that both parties would arguably have had the right prior to petitioner's trial to inspect the "petitions and orders" contained in the witness's juvenile court file. Id. Any "medical report, psychological evaluation or any other document" contained in the file, though, would have remained confidential to either party. Id. at 180. Thus, the court concluded that the petitioner failed to establish that the State withheld information that was in its exclusive possession or control. Id. Because access to the victim's juvenile record was equally available to either party, the Petitioner has failed to establish that the State withheld information that was in its exclusive possession or control. Id. at 179 (citing Timothy Terell McKinney v. State, No. W2006-02132-CCA-R3-PD, 2010 WL 796939, at *48 (Tenn. Crim. App. Mar. 9, 2010); Coe v. Bell, 161 F.3d 320, 344 (6th Cir. 1998); Barnes v. Thompson, 58 F.3d 971, 975 (4th Cir.

1995); United States v. Wilson, 901 F.2d 378, 380 (4th Cir. 1990); United States v. Davis, 787 F.2d 1501, 1505 (11th Cir. 1986)).

As noted above, trial counsel testified that he saw the victim's juvenile records and that he had talked to "several juvenile officers" with juvenile court "about [the victim's] problems" she was having in that court. Trial counsel claimed that he did "know about [the victim's] involvement in juvenile court and what her problem was and what her background was." Trial counsel maintained that he did not attempt to get a copy of the victim's juvenile record because he "felt [he] knew enough about her background and her educational potential and her, that [he] didn't think the records would add anything." The post-conviction court found trial counsel credible. As trial counsel testified that he discovered this information through his investigation, and the victim was asked about her involvement in juvenile court at trial, there is no Brady violation.

In addition, the Petitioner's claim of Brady error must fail because he has failed to establish that the information contained in the victim's juvenile record was material. As noted above, the jury was aware the victim had told numerous lies and was charged in juvenile court. The fact that the victim had been adjudicated delinquent for theft would have "done little to further vitiate" her credibility. See Berry, 366 S.W.3d at 180. The juvenile records only contained the victim's grades and did not speak to her intellectual capacity. Even if the theft adjudication were admissible as impeachment evidence, the victim's trial testimony was corroborated by much of the State's evidence that was properly admitted into evidence as discussed above. Again, it was undeniable that the victim was bleeding during the examination, and Ms. Littrell testified that she observed an acute tear and redness on the victim's hymen and that the victim had discharge in the vaginal vault. The Petitioner has failed to make a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435.

B. Closing Arguments

The Petitioner submits that the State committed prosecutorial misconduct during closing arguments. He also notes that trial counsel "failed to object even one time during the State's initial closing argument or its rebuttal closing argument." According to the Petitioner, "[t]hese improper arguments provide great context to the prejudice that [the Petitioner] suffered due to the numerous deficiencies of [trial counsel] in this case." The Petitioner cites to instances where the prosecutor discussed the victim's virginity, where the prosecutor spoke about the victim's type of neighborhood, where the prosecutor accused the Petitioner of being an aggressive, predatory pedophile. The Petitioner concludes that, "[b]y failing to object, [trial counsel] not only allowed the State to

improperly interject fear and rage in the jury, but he also failed to preserve any appellate review of these issues on direct appeal."

In his post-conviction petition, the Petitioner argued that trial counsel was ineffective for failing to challenge the State's closing argument, but he did not raise any free-standing claim of prosecutorial misconduct in this regard. Therefore, the Petitioner has waived this issue by failing to raise it in his original or amended petitions. See Tenn. Code Ann. § 40-30-106.

The Petitioner also did not put forth any evidence at the post-conviction hearing of ineffective assistance of counsel pertaining to this issue. While the trial transcripts were admitted as exhibits, the Petitioner made no specific references at the post-conviction hearing to any comments made by the prosecutor during closing arguments. Moreover, the Petitioner did not question trial counsel about his decision not to object to the alleged improper comments. Absent trial counsel's testimony on this issue, we will not speculate about the reasons underlying his decision and whether any prejudice resulted from his actions. See State v. Charles Edward Wagner, No. E2012-01144-CCA-R3-CD, 2014 WL 60971, at *13 (Tenn. Crim. App. Jan. 8, 2014) (citation omitted) ("Without counsel's testimony on this issue, we would be forced to speculate about the reasoning behind his decision and whether any prejudice resulted from his actions."); see also Steven James McCain v. State, No. M2013-00992-CCA-R3-CD, 2014 WL 3659976, at *12 (Tenn. Crim. App. July 23, 2014) (citing Fredrick Tucker v. State, No. M2007-00681-CCA-R3-PC, 2008 WL 2743644, at *5 (Tenn. Crim. App. July 14, 2008)). The Petitioner is not entitled to relief.

CONCLUSION

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

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D. KELLY THOMAS, JR., JUDGE