

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
July 8, 2020 Session

FILED

01/27/2021

Clerk of the
Appellate Courts

TYRONE BOHANNA v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County

No. 10-01849

Lee V. Coffee, Judge

No. W2019-01200-CCA-R3-PC

Following a jury trial, the Petitioner, Tyrone Bohanna, was convicted of especially aggravated robbery, reckless endangerment, aggravated burglary, and three counts of aggravated assault. The trial court imposed an effective sentence of 120 years, eleven months, and twenty-nine days. This court affirmed the Petitioner's convictions and sentences on direct appeal. *See State v. Tyrone Bohanna*, No. W2011-01273-CCA-R3-CD, 2013 WL 2393050, at *1 (Tenn. Crim. App. May 29, 2013), *perm. app. denied* (Tenn. Nov. 14, 2013). The Petitioner filed a petition for post-conviction relief, which the post-conviction court denied following an evidentiary hearing. On appeal, the Petitioner contends that trial counsel was ineffective at trial and during proceedings on his motion for new trial, that the State failed to disclose evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and that the Petitioner did not receive a fair trial after his trial was severed from the trial of his co-defendant. Upon reviewing the record, the parties' briefs, and the applicable law, we affirm the judgment of the post-conviction court.

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

JOHN EVERETT WILLIAMS, P.J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and J. ROSS DYER, JJ., joined.

David Mays, Memphis, Tennessee, for the appellant, Tyrone Bohanna.

Herbert H. Slatery III, Attorney General and Reporter; Samantha L. Simpson, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

According to the evidence presented at trial, on November 21, 2008, the Petitioner, co-defendant Mr. Brandon Harris, and an unidentified third man entered a residence occupied by Mr. Michael Reynolds, Mr. Johnny Morgan, and twin brothers Mr. Antonio Hawkins and Mr. Antoine Hawkins in order to commit a robbery. *See Tyrone Bohanna*, 2013 WL 2393050, at *1. During the robbery, Mr. Harris shot Mr. Antoine Hawkins multiple times and took his cash and his watch. *Id.* at *3-4. The perpetrators fled in a late-model, white Dodge Charger. *Id.* Mr. Antonio Hawkins was the only occupant of the residence who identified the Petitioner as one of the perpetrators. *Id.* at *4. The Petitioner and Mr. Harris were indicted on especially aggravated robbery, attempted second degree murder, employing a firearm during the commission of a felony, aggravated burglary, and three counts of aggravated assault.

Pretrial Proceedings

On June 18, 2010, prior to the Petitioner's trial, Mr. Antonio Hawkins was shot and killed. The State sought to introduce various statements made by Mr. Antonio Hawkins, arguing that the Petitioner was involved in the death of Mr. Antonio Hawkins and that, as a result, the statements of Mr. Antonio Hawkins were admissible at trial based upon the hearsay exception of forfeiture by wrongdoing set forth in Tennessee Rule of Evidence 804(b)(6). The State also sought to introduce ten recordings of the Petitioner's jailhouse telephone calls as evidence of his attempts to influence the testimony of witnesses at trial. In response, Mr. Harris requested that his trial be severed from the Petitioner's trial based upon the Petitioner's statements during the calls.

On January 31, 2011, the day that the trial was set to begin, the trial court held a hearing on the admissibility of the recordings of the Petitioner's calls and Mr. Antonio Hawkins's statements. The State reviewed approximately 500 recordings of the Petitioner's calls made from the jail and narrowed the number of recorded calls that it sought to admit down to ten. The State played recordings of two calls that related to Mr. Harris's severance motion.

During the first call on March 18, 2009, the Petitioner had the following conversation:¹

[The Petitioner]: What's Brandon's momma number?

¹ Both the recordings and a transcript of the recordings were entered into evidence at trial.

[Other Party]: She won't even answer no more, she like she's gonna write me a letter. What she told me on the phone proving you were nowhere around.

[The Petitioner]: She gonna live to pay, she gonna live to regret it though, she's gonna live to regret it....

[Other Party]: Every time I call she play up like she ain't home.

[The Petitioner]: She gonna live to regret it. Leave a message let her know I will be testifying against her son, if they don't cut me loose, he won't never get out no more.

[Other Party]: All I'm trying to say is[,] [the Petitioner], if they just cooperate with me I could tell 'em what Brandon's momma told me.

[The Petitioner]: I'm just trying to get you all prepared for when they call for you all and talk to 'em, I'm trying to get up on 'em, I got some more folks what I saying I'm just trying to get you prepared make sure your stories are right when they call you all....

....

[The Petitioner]: I got some people there that fixin to that fixin to help me get out.

....

[The Petitioner]: I gonna get Kasey Katewood got a story to tell them people gonna get Katewood to tell them people, he's gonna be a witness for me too. Yeah, got people like Katewood, talk to Katewood, when I talk to these detectives. I'm just trying to ... when they call me up there ... I'm just trying to make sure everybody...all the ducks in a ro[w]. That's why I need to talk to Tony and Robin so they won't tell the detective something different and they think we're lying.

[The Petitioner]: Tony ... It's [the Petitioner] man ... you ain't never call that detective's number man.... I got these people that probably gonna call you all right. I told them that them young n***as they been threaten, I told you got into with them right I told them folks they threatening, they been

threatening my brother and my sister-in-law to keep them from coming forward with information on me right. I told Robin was the clean up lady for them and she overheard them talking all that. Ya hear me. And Dirty Kirk tell Dirty Kirk I'm gonna have them call him too. I need someone to bear witness that them dudes was in that White Charger too. Tell Robin I gonna need her man to have her story straight man. They call this number man because they probably they them detective come on and talk to me today they can get me out in two days, they come talk to me tomorrow they can get me out in two days.

*See Tyrone Bohanna, 2013 WL 2393050, at *7.*

On March 24, 2009, the Petitioner had the following conversation:

[The Petitioner]: Brandon signed the paper I had cutting me loose but because that lawyer didn't show up that's the reason I didn't come home today. You know what I'm saying? Brandon signed the paper to cut me loose today with his lawyer. Brandon's lawyer said he couldn't do it without my lawyer being present such and such. So is it because that lawyer didn't show up the reason why?

[Other Party]: Yeah, me and Kendra sit in there and sit in there but they had called ya....

[The Petitioner]: I'm gonna give you the number 5**.... No f*** that lawyer. 5**-5*** that the lawyer I got that's the public defender they gave me.... Brandon gonna call Kendra's number tonight. He's gonna tell y'all everything. You know what I'm saying. I told him we are gonna do whatever we can to help him on his case man so long as you know what I'm saying he do what he say he gonna do.... He gonna call you all says he said he gonna send all his messages through you all to Kendra to me to tell y'all what going on.

....

[The Petitioner]: Brandon ready to stand up and take responsibility for his actions. I told him me and my family do whatever we can to help him out. You know what I'm saying. I gave him Kendra's number. I gave him Tony's number and all that, yeah man. So I told him we do whatever to help out. But that trying that Jimmy wanting to give him money too, Jimmy tried. I told Brandon he didn't have to worry about paying his

lawyer, he do what he what he say he gonna do and cut me loose he don't have to worry about paying his lawyer, we help him pay his lawyer.

See id. at *8.

Based upon the Petitioner's statements during the telephone calls, the trial court granted Mr. Harris's motion to sever the trials. In addition to the recordings of the two calls made by the Petitioner in March of 2009, the State sought admission of the recordings of the Petitioner's following calls:

November 26, 2008

[The Petitioner]: Where Trell at, need Trell to put that pistol, tell Trell to put that pistol on that boy, f*** that, tell Trell to put the pistol on that boy.

....

[Other Party]: I ain't seen nothing of those twins, I've been looking for their a**.

[The Petitioner]: They don't live in the house where their mother use to live, I live in their grandma's house across the street from over there.

[Other Party]: I'm going to get on everything bro.

....

[The Petitioner]: Throw that pistol in every mf face.

December 25, 2008

[The Petitioner]: What happened to the whatacallit, the iron piece the thing we had before I left?

[Other Party]: What thing?

[The Appellant]: The hardware.

[Other Party]: Oh the hardware, I still got that, that ain't budging, that ain't budging, I promise ya that.

January 5, 2009, shortly prior to the preliminary hearing

[The Petitioner]: If dude don't point me out I'll come home Wednesday. Like I said, I got an afro now, ... another thing he's like [the Petitioner] I don't even know how you look, I just remember some of your facial features, so he don't know how I look or nothing so I'm gonna have some glasses on and I grew my hair out, I'm gonna have some glasses on so hopefully he won't know I cut all the hair off my face, so I don't really think he's gonna know you know.

January 10, 2009, a few days after the preliminary hearing

[The Petitioner]: Ain't no reason to be sweating on that ... it's done did on that deal right now I got a trick for them. I be out in 45, 30 days when I get through doing what I'm gonna do.

January 30, 2009

[The Petitioner]: This reminds me why I had to chill out from the get go. I chilled out the wrong way, I just stopped everything and haunted. Mother f****r haunted ... but I had a relapse that's what I did, I had a relapse with a pistol. I'm gonna sell the mf when I get out though.

January 31, 2009

[The Petitioner]: Call down to eleventh floor robbery squad, tell them you want to report a real crime, yeah a real crime that's all you got to do, don't tell you no kin to me.

February 5, 2009

[The Petitioner]: I just need someone like that BK or that B dude ...

[Other Party]: Wait a minute say it again now.

[The Petitioner]: Anyone who know how to get up on that John Morgan dude ...

[Other Party]: John Morgan, who's that?

[The Petitioner]: You know how they have smokers watching their door and s**t, that's what they have right, they got two of them n***as over there, they got two of those n***as over there that came to court with them they cut their hair and dressed them up, you know how mother f****rs do, and I just need ... or somebody to lure one of them mf like they want them to wash their car and drop them off at Mitchell Heights with you and lure their a** downtown offer them two or three hundred dollars or something, get them full up ... and two or three hundred dollars probably get them to change their mother f***ing story for that detective.

...

[The Petitioner]: John Morgan never identified me in court offer him about five or six drops.

See id. at *5-6.

The trial court and the parties addressed the admissibility of each call individually, and the trial court determined that the calls were admissible pursuant to Tennessee Rule of Evidence 404(b).

The parties also played a recording of a call made on January 5, 2009, during which the Petitioner appeared to have a fellow inmate, who knew the Hawkins brothers, try to convince them that the Petitioner was not involved in the offenses. During the conversation, Mr. Antonio Hawkins stated that he saw the Petitioner commit the offenses and refused to change his statements. The prosecutor announced that she did not intend to introduce Mr. Antonio Hawkins's statements during the call unless she could establish the forfeiture by wrongdoing hearsay exception.

The State then presented the testimony of Memphis Police Sergeant William Merritt, who was involved in the investigation of Mr. Antonio Hawkins's murder, in support of the State's claim that Mr. Antonio Hawkins's statements were admissible under the forfeiture by wrongdoing hearsay exception. Sergeant Merritt testified that he interviewed Ms. Tajuana Knight, who stated that she and Mr. Antonio Hawkins had been at a motel shortly before he was shot and killed at his home. Sergeant Merritt noted that there was a large amount of blood inside the kitchen of Mr. Antonio Hawkins's home, as well as a blood trail that led from the kitchen, through the garage, down the driveway, and into the street. Officers collected samples of the blood and submitted them for DNA testing, and the testing revealed that the DNA was that of Mr. Charles Townsend.

Trial counsel requested that the State provide him with information about the investigation into Mr. Antonio Hawkins's death pursuant to *Jencks v. United States*, 353 U.S. 657 (1957). Trial counsel argued in part that the material may rebut the allegation that the Petitioner was responsible for Mr. Antonio Hawkins's death as an element of the forfeiture by wrongdoing hearsay exception. The prosecutor responded that the murder investigation did not relate to the offenses for which the Petitioner was on trial and, therefore, was not subject to discovery. The trial court noted that it was unaware of whether the murder was an ongoing investigation, whether the case had been submitted to the grand jury, or whether the information in the murder investigation could compromise the safety and security of others. The trial court found that the information regarding the murder investigation was not relevant because the State had not yet developed any theory that Mr. Antonio Hawkins was unavailable due to the actions of the Petitioner.

On cross-examination, Sergeant Merritt testified that he believed Mr. Townsend had been arrested in connection with Mr. Antonio Hawkins's murder, but he did not know whether the Petitioner had been charged. Sergeant Merritt was not the case coordinator, and his only role in the investigation was to go to the scene and to interview Ms. Knight.

The State next called Mr. Adrian Wright, an inmate with pending charges, as a witness. Mr. Wright agreed that he contacted the prosecutor several months prior to the hearing regarding the Petitioner and that Mr. Wright and his attorney met with the prosecutor. Mr. Wright also agreed that he informed the prosecutor that he spoke to the Petitioner following a telephone call in June of 2010. Mr. Wright testified that after the Petitioner completed his call, the Petitioner was excited and happy and said, "I'm good." The Petitioner told Mr. Wright that Mr. Antonio Hawkins had been shot "the day before I went to—while I had to go to trial." When Mr. Wright asked how the shooting had happened, the Petitioner replied, "You know who I am. T.Y., Bohanna...." Mr. Wright testified that he understood the Petitioner to mean that he had Mr. Antonio Hawkins killed.

Mr. Wright stated that when he and the Petitioner later discussed the homicide, the Petitioner said, "I got it t[aken] care of." The Petitioner told Mr. Wright that "Vanhook," "Twan," and "Mule" arranged for Mr. Antonio Hawkins to be at a hotel so that they would know his location. The Petitioner identified the actual shooters as "Little Dee" and "Little Charles." Mr. Wright stated that at one point, the Petitioner said he had not been using his booking number to make calls from the jail, but Mr. Wright could not recall when the Petitioner made the statement in relation to the death of Mr. Antonio Hawkins. The State entered as an exhibit a compact disk demonstrating that no telephone calls associated with the Petitioner PIN number were made from the jail from June 14 to June 24, 2010.

On cross-examination, Mr. Wright testified that he believed he contacted the prosecutor in December of 2010. He agreed that he had the initial conversation with the Petitioner regarding Mr. Antonio Hawkins's death around June 10, 2010, while they were both housed in pod 4D. Although Mr. Antonio Hawkins was killed in June 2010, Mr. Wright also said the Petitioner told him that Mr. Antonio Hawkins died the day before the Petitioner's trial, which Mr. Wright believed was scheduled to occur in April. Mr. Wright believed the Petitioner's statement that he "got it [taken] care of" occurred later, around the first week of July. Mr. Wright said that he and the Petitioner previously were housed together in another pod prior to June 2010 and that they had known each other for about six or seven years. Mr. Wright testified that he was housed with the Petitioner from June 2010 until the instant pretrial hearing.

Mr. Wright testified that he had a pending aggravated burglary charge, that he was scheduled to go to trial during the same week as the hearing in which he was testifying, and that he first learned that his trial had been postponed "[y]esterday." When asked what he was received in exchange for his testimony, Mr. Wright replied, "Nothing. To get out of here. To get out of jail." On redirect examination, Mr. Wright testified that he initially wrote a letter to the prosecutor, whose name he had gotten through his conversations with the Petitioner. Mr. Wright stated that the prosecutor had not made any promises to him in exchange for his testimony but that he hoped to "get away from this jailhouse."

On re-cross examination, Mr. Wright testified that he had prior convictions for theft, felony drug offenses, theft of an automobile, and other offenses which he was unable to recall. Trial counsel noted that Mr. Wright was "sort of a surprise witness." Trial counsel requested that the State furnish him with a copy of Mr. Wright's criminal record. The trial court denied the request, stating that the court did not have the authority to require the State to provide the information and that the defense investigator could obtain the records, which were public. The trial court also denied trial counsel's request for a continuance to allow the investigator to obtain the records.

The Petitioner testified that although Mr. Wright stated that they had met six or seven years ago at someone's home, the Petitioner had been incarcerated for several years during that time period. He stated that he first met Mr. Wright at the jail.

The trial court noted that the Petitioner's trial was scheduled for June 28, 2010, and that on June 18th, the trial court granted the Petitioner's request for a continuance to allow him to retain an expert in eyewitness identification. The court also noted that Mr. Antonio Hawkins was killed less than twenty-four hours later. The court stated that the trial was reset for September 20th but was continued after the State informed the court

that the Petitioner was being investigated in connection with Mr. Antonio Hawkins's death. The trial court reviewed the testimony of the witnesses presented at the evidentiary hearing, as well as the Petitioner's statements during his jailhouse telephone calls. The trial court described Mr. Wright's testimony as "a little bit difficult to follow." The court found that the Petitioner made efforts to keep Mr. Antonio Hawkins from testifying and that during a telephone conversation, the Petitioner encouraged Mr. Antonio Hawkins to change his testimony. The trial court also found that for a number of years, the Petitioner "has consistently and has with unwavering commitment tried to prevent not only Mr. [Antonio] Hawkins but other witnesses from testifying." The trial court concluded that Mr. Antonio Hawkins was unavailable and that "part of the reason, part of what [the Petitioner] was doing was in part to prevent Mr. [Antonio] Hawkins from testifying in Court." The trial court found that the State had established by clear and convincing evidence that the conversations between the Petitioner and Mr. Wright occurred. The trial court concluded that Mr. Antonio Hawkins was unavailable due to the actions of the Petitioner and that those actions were designed in part to ensure that Mr. Antonio Hawkins would not appear in court. The trial court stated that the State would be allowed to admit Mr. Antonio Hawkins's statements at trial pursuant to the forfeiture by wrongdoing hearsay exception. The trial court also concluded that Mr. Antonio Hawkins's testimony during the preliminary hearing was admissible under the hearsay exception for former testimony of an unavailable witness pursuant to Tennessee Rule of Evidence 804(b)(1).

During a jury-out hearing at trial, trial counsel presented the testimony of Sergeant Michaele Byers, who was employed at the Shelby County Jail, regarding the housing records of the Petitioner and Mr. Wright in an effort to impeach Mr. Wright's testimony. Sergeant Byers acknowledged that the Petitioner and Mr. Wright were only housed in the same pod from July 7, 2010, until January 31, 2011. The trial court denied trial counsel's request for a mistrial, noting that Mr. Wright testified at the pretrial hearing that some of his conversations with the Petitioner occurred in July of 2010.

Trial

Mr. Michael Reynolds testified that on November 21, 2008, he was visiting the home of Mr. Antonio Hawkins and was in the front room, while Mr. Antonio Hawkins, Mr. Antoine Hawkins, and Mr. Johnny Morgan were in a room in the back of the house. Mr. Reynolds heard a knock at the front door and saw two men standing at the door. The men asked for Mr. Antonio Hawkins. Mr. Antonio Hawkins came to the door, recognized the two men, and allowed them inside the house. Mr. Reynolds identified the first man who walked into the home as Mr. Brandon Harris. Mr. Antonio Hawkins and Mr. Harris discussed going to a club and walked to the back of the house, while Mr. Reynolds and the second man remained in the front room.

Mr. Reynolds testified that the second man pointed a gun at his upper chest and instructed him to lie down on the ground. Mr. Reynolds complied, lying face down. He then heard three or four gunshots come from the back of the house, after which the second man allowed a third man inside the house. Mr. Reynolds did not look up and could only see the feet of the third man as he entered the house. One of the men grabbed Mr. Reynolds and dragged him away from the front door and into the den.

Mr. Reynolds stated that when the shooting began, Mr. Antonio Hawkins ran to another room. Once the shooting stopped, Mr. Reynolds heard Mr. Antonio Hawkins open a door that led into the room where Mr. Reynolds was lying down. The man who was standing next to Mr. Reynolds ordered Mr. Antonio Hawkins to get back inside the other room. Mr. Reynolds heard the men leave, and Mr. Antonio Hawkins reentered the room. Mr. Reynolds said the men fled in a newer-model, white Dodge Charger. Mr. Antonio Hawkins tried to follow them but was unable to do so. Mr. Reynolds went to the back of the house where he saw Mr. Antoine Hawkins, who had been shot, lying on the floor. On the following day, Mr. Reynolds identified Mr. Harris in a photographic lineup as the man who first entered the house and went to the back with Mr. Antonio Hawkins. Mr. Reynolds was unable to identify the second man because it was too dark in the front of the house and the events occurred so quickly. He never saw the third man's face.

On cross-examination, Mr. Reynolds testified that he described the second man to the police as an African-American male who was six feet and one inch tall, was between twenty-five and twenty-eight years old, and had a "low haircut." He first saw the Charger when he saw the men at the front door, and he stated that while he did not see the men drive away in the Charger, the car was gone after the men escaped. On redirect examination, Mr. Reynolds stated that he did not know whether the second man or the third man dragged him into the next room and that he assumed that the second man was the person who remained with him during the entire episode.

Mr. Johnny Morgan testified that on the night of the shooting, he heard a knock at the door and that Mr. Antonio Hawkins knew the men knocking, opened the door, and let the men inside. Mr. Antonio Hawkins and the men, one of whom Mr. Morgan identified as Mr. Harris, talked about going to a club. Mr. Antonio Hawkins told the men to wait at the front door while he retrieved his jacket and told his brother about his plans. He and Mr. Morgan walked to the den in the back of the house, and Mr. Reynolds remained in the front room. Mr. Harris followed Mr. Antonio Hawkins and Mr. Morgan to the den and stood somewhat behind Mr. Morgan, who was standing in the doorway. Mr. Antonio Hawkins sat on a couch, while Mr. Antoine Hawkins sat on the floor with his back against the couch while doing homework for school.

Mr. Morgan testified that a man, who appeared to be between nineteen and twenty-one years old, ran from the front of the house while waving a gun and said, "Get down, b****es. Y'all know what this is." Mr. Harris produced a gun and began shooting Mr. Antoine Hawkins, while Mr. Antonio Hawkins ran down another hallway and the second man ran back toward the front of the house. Mr. Morgan did not know whether the man who ran toward them while waving a gun was the same man who had entered the house with Mr. Harris. Mr. Morgan stated that Mr. Harris approached Mr. Antoine Hawkins, struck him in the head with the gun, and demanded money. Mr. Antoine Hawkins gave Mr. Harris cash, and Mr. Harris went through his pockets and took a necklace, a watch, and possibly a cellular phone. As Mr. Harris was leaving, he turned around and shot Mr. Antoine Hawkins again. After the men left, Mr. Antonio Hawkins came from the front of the house and stated that the men fled in a white Charger driven by Mr. Derek Dowdy. Mr. Antonio Hawkins wanted to search for the men, but Mr. Morgan said he wanted to stay with Mr. Antoine Hawkins who had blood coming from his stomach.

On the following day, Mr. Morgan identified Mr. Harris as the shooter in a photographic lineup. Mr. Morgan reviewed another photographic lineup but testified that he was "unable to 100% pick out [the Petitioner]." Mr. Morgan stated that Mr. Antonio Hawkins told him that during the shooting, he opened a door that led to an exit when he encountered the Petitioner, who pointed a gun at him and told him to "get his b***h a** back in the room."

On cross-examination, Mr. Morgan testified that following the shooting, the Petitioner called Mr. Antonio Hawkins several times from jail and maintained that he was not involved in the shooting. People also approached Mr. Antonio Hawkins and offered him money to drop the charges. Mr. Morgan described Mr. Harris as an African-American man who was about twenty-two years old, was approximately five feet, three inches tall, weighed about 115 pounds, had "V-cut hair," and was wearing a green jacket. Mr. Morgan described the second man to the police as an African-American man who was five feet, eight inches tall, had a medium build and a "low" haircut, was eighteen or nineteen years old, and was wearing a black jacket.

On redirect examination, Mr. Morgan testified that Mr. Antonio Hawkins told him that three people were involved in the shooting. Mr. Morgan agreed that he did not know whether the Petitioner was the second or third man who entered the house.

Mr. Antoine Hawkins testified that he went to the home of Mr. Reynolds, Mr. Morgan, and Mr. Antonio Hawkins after his night classes on the night of the shooting. He stated that while he was in the den in the back of the house completing his homework, Mr. Harris, whom Mr. Antoine Hawkins had met on two or three prior occasions and

whom he recognized as one of his brother's friends, walked into the room, looked around, and walked out of the room. Shortly thereafter, Mr. Antonio Hawkins ran past him. Mr. Antoine Hawkins asked what was occurring, but his brother did not answer, opened a door that led into a hallway, and ran inside. Mr. Harris then shot Mr. Antoine Hawkins multiple time on the side of his stomach, and he fell to the ground. Mr. Harris went though Mr. Antoine Hawkins's pockets and demanded money. Mr. Harris took cash out of Mr. Antoine Hawkins's pockets, struck him in the head twice with a gun, and asked him where "the rest" of the money was, and Mr. Antoine Hawkins told him that he did not have any more money. Mr. Harris took Mr. Antoine Hawkins's watch, valued at \$150.00, his cell phone, valued at about \$400.00, and \$550.00 in cash. As Mr. Harris was leaving and as Mr. Antoine Hawkins was lying on the floor, Mr. Harris stopped and aimed his gun at Mr. Antoine Hawkins's face. Mr. Antoine Hawkins stated that he believed Mr. Harris intended to kill him, and Mr. Antoine Hawkins threw his arms up to cover his face and head. Mr. Harris fired another shot and struck Mr. Antoine Hawkins in the arm, and Mr. Harris left. At that point, Mr. Morgan was in the room and was yelling, "Please stop shooting him. Don't kill him." Mr. Antoine Hawkins said that before he was shot, he did not hear anyone yell, "You know what this is. A robbery."

Mr. Antoine Hawkins testified that he was in extreme pain and that Mr. Morgan stayed with him and tried to keep him calm until emergency personnel arrived. Mr. Antoine Hawkins underwent surgery, during which a portion of his intestines was removed, and he remained hospitalized for one and one-half weeks. Police officers spoke to him at the hospital, and he identified Mr. Harris in a photographic lineup as the shooter.

Mr. Antoine Hawkins testified that Mr. Antonio Hawkins later told him that Mr. Harris was the first man who entered the house and that he did not know the second man. Mr. Antonio Hawkins described the second man as a tall, skinny, African-American man who was seventeen or eighteen years old. Mr. Antonio Hawkins told his brother that the second man let the Petitioner into the house. Mr. Antonio Hawkins also stated that he opened a door in an effort to escape and then saw the Petitioner, who pointed a gun at him and ordered him to get "his b***h a** back" into the room. Mr. Antonio Hawkins said that he looked the Petitioner "dead in the face" and that the men fled in a white Dodge Charger. He told Mr. Antoine Hawkins that two or three days prior to the shooting, Mr. Dowdy and the Petitioner came to his home in the same vehicle and tried to sell him something. At the time, Mr. Antonio Hawkins was selling crack cocaine out of the home. Mr. Antoine Hawkins knew Mr. Dowdy because they had grown up together and Mr. Dowdy had robbed Mr. Antonio Hawkins on a prior occasion and was incarcerated for six or seven years as a result.

Mr. Antoine Hawkins testified that Mr. Harris offered him money to not come to court to testify. Mr. Antoine Hawkins responded that he had \$70,000 to \$80,000 in medical bills and permanent scars and that the amount of money that Mr. Harris offered was “nothing.” The Petitioner’s brother contacted Mr. Antonio Hawkins because the Petitioner insisted that he was not involved, and Mr. Antonio Hawkins stated that he was certain that he correctly identified the Petitioner.

On cross-examination, Mr. Antoine Hawkins testified that he never saw the Petitioner on the night of the robbery. He said Mr. Antonio Hawkins never told him that anyone offered him money on the Petitioner’s behalf. On redirect examination, Mr. Antoine Hawkins testified that he was present when the Petitioner and the Petitioner’s brother contacted Mr. Antonio Hawkins through a three-way telephone call. During the call, the Petitioner maintained that he was not involved and that Mr. Antonio Hawkins had misidentified him. Mr. Antoine Hawkins testified that his brother told him on multiple occasions that he was sure that the Petitioner was involved, and Mr. Antoine Hawkins instructed him to stop answering calls from the Petitioner and his family.

Ms. Vita Zelikov, who was retained as a defense investigator for the Petitioner, was called by the State as a witness regarding her interview with Mr. Antonio Hawkins in August of 2009. She said he, initially, was hesitant to speak to her but then agreed to do so. Ms. Zelikov’s written summary of the interview was admitted as an exhibit at trial.

According to the summary, Mr. Antonio Hawkins told Ms. Zelikov that he first met the Petitioner three or four days prior to the shooting when the Petitioner and Mr. Dowdy came to Mr. Antonio Hawkins’s home in a white Dodge Charger, which Mr. Antonio Hawkins believed to be the same vehicle in which the perpetrators fled following the shooting. Mr. Antonio Hawkins stated that a few days later, at approximately 11:00 p.m., Mr. Harris and another man came to his home and asked if he wanted to go to a club. Mr. Antonio Hawkins had frequented clubs with Mr. Harris in the past and described Mr. Harris as wearing a white hoodie and blue jeans. Mr. Antonio Hawkins did not know the second man but had since heard in the neighborhood that the man’s name was “Jake.” Mr. Antonio Hawkins described the second man as a young, skinny, African-American man of medium height. Upon entering the house, Mr. Harris asked Mr. Antonio Hawkins for change for a fifty-dollar bill. Mr. Antonio Hawkins instructed Mr. Harris to wait in the front room while he went to the back den to get change. As Mr. Antonio Hawkins began walking toward the den where Mr. Morgan and Mr. Antoine Hawkins were, Mr. Harris walked up behind him. Once they reached the den, Mr. Harris produced a gun and began shooting, and the second man remained in the front room with a gun to Mr. Reynolds’s head. Once the shots were fired, Mr. Antonio Hawkins ran out of the room. Mr. Harris shot Mr. Antoine Hawkins multiple times and took a watch, a cellular phone, and \$400 in cash from him.

Mr. Antonio Hawkins told Ms. Zelikov that after three or four shots were fired, the Petitioner entered the house with a gun but never fired it. Approximately thirty seconds later, the three perpetrators fled the house and left in a white Dodge Charger. Mr. Antonio Hawkins stated that he was certain that the Petitioner was the third man who entered the house and described the third man as having a goatee, large eyes, and a “low, faded haircut” and wearing dark clothing. Mr. Antonio Hawkins also stated that since the shooting, he had spoken to the Petitioner and some of the Petitioner’s family members, all of whom were adamant that the Petitioner was not involved. Mr. Antonio Hawkins maintained that he was “90 percent sure” that the Petitioner was responsible. He stated that all three men had the same type of black .40 caliber or nine millimeter handgun.

Memphis Police Sergeant Robert Tutt of the Felony Response Unit responded to the scene of the shooting and interviewed Mr. Antonio Hawkins. According to Sergeant Tutt’s report, Mr. Antonio Hawkins stated that two men, whom he identified as Mr. Harris and the Petitioner, came to his home and asked him about going to a club. Mr. Antonio Hawkins stated that the men walked into the back room and that the shorter of the two men produced a gun and demanded money. At least two shots were fired, and Mr. Antonio Hawkins ran through the house in an attempt to escape. He stated that he encountered a third man, who he believed had waited outside the house until the other two men went to the back room. The man had a gun and ordered Mr. Antonio Hawkins to go back into the room. Mr. Antonio Hawkins reported that the men left in a newer-model, white Dodge Charger and stated that the men had been driving the car for about a week. He believed the car had been stolen and was being used as a “community car.”

On cross-examination, Sergeant Tutt described Mr. Antonio Hawkins as “excitable” during the interview and stated that his primary goal was to obtain the names of the suspects. He explained that the robbery detective would take a formal statement from Mr. Antonio Hawkins at a later time when he was calm.

Sergeant Christopher Kee testified that Mr. Reynolds, Mr. Morgan, Mr. Antonio Hawkins, and Mr. Antoine Hawkins each identified Mr. Harris in a photographic lineup. Mr. Antonio Hawkins also identified the Petitioner in a photographic lineup as the person who “[p]ulled the gun up and said, ‘Sit down.’” Sergeant Kee also interviewed Mr. Antonio Hawkins, who identified the first man who entered the house as Mr. Harris or “Rico,” the second man as “Jacob” or “Lil Jake,” and the third man as the Petitioner. Mr. Antonio Hawkins stated that Mr. Harris and “Lil Jake” knocked on the door to his home and that he allowed them inside. Mr. Harris talked to Mr. Antonio Hawkins about going to a club. Mr. Antonio Hawkins stated that as he was walking to the back of the house to retrieve his jacket, Mr. Harris followed him and “upped” his gun, and he heard “Lil Jake” say, “Lay down.” Mr. Antonio Hawkins stated that Mr. Harris shot his brother, and Mr.

Antonio Hawkins ran, trying to find a way out of the house. He said he heard four shots, Mr. Harris demanding money, and Mr. Antoine Hawkins stating he had given Mr. Harris all the money he had, followed by another gunshot. Mr. Antonio Hawkins stated that he opened the door to enter another room when he encountered the Petitioner, who pointed a gun at him and ordered him to “[g]et back in there.” When he heard Mr. Reynolds say that the men had left, Mr. Antonio Hawkins looked outside and saw the men driving away in a white Dodge Charger.

Ms. Susanna Shea, a prosecutor with the Shelby County District Attorney General’s Office, testified that she conducted the preliminary hearing in the case in the general sessions court. She stated that prior to the hearing, she spoke to Mr. Antonio Hawkins, who expressed concern about further retribution if he testified. General Shea said Mr. Antonio Hawkins was calm initially. However, following an incident during the hearing which required the general sessions judge to warn the Petitioner about his behavior, Mr. Antonio Hawkins became “more kind of irritated and more alert and somewhat more, I believe, aware of the possibility of something happening to him after the hearing.” He became “more reserved” and “less bold” during his testimony.

A recording and a transcript of Mr. Antonio Hawkins’s testimony during the preliminary hearing were entered as exhibits at trial. During the preliminary hearing, Mr. Antonio Hawkins testified that on Friday, November 21, 2008, at 10:00 or 10:30 p.m., Mr. Harris and another man knocked on his front door. Mr. Antonio Hawkins had met Mr. Harris at a club through a mutual friend. Mr. Antonio Hawkins was unable to get a good look at the second man’s face because the second man kept turning his back as if he was trying to hide his face. Mr. Antonio Hawkins testified that he and Mr. Harris discussed going to a club and that he instructed Mr. Harris to wait in the front room while he retrieved his jacket. As Mr. Antonio Hawkins was walking toward the back of the house, he turned around and saw Mr. Harris following him. Mr. Antonio Hawkins retrieved his jacket from the back room, turned around, and saw Mr. Harris with a gun.

Once Mr. Harris began shooting, Mr. Antonio Harris ran to the other side of the house in an effort to escape. He said that at the time, he was unaware that his brother was being shot. He heard screaming and someone yelling, “Don’t kill me.” He stated that when he opened a door that led into another room in the front of the house, he encountered the Petitioner, whom he identified at the preliminary hearing. The Petitioner had not entered the house with the other two men, and Mr. Antonio Hawkins stated that he had heard that the Petitioner had been hiding outside. Mr. Antonio Hawkins testified that the Petitioner ordered him to get back inside the room. At that point during the preliminary hearing, the Petitioner had an apparent outburst, and the general sessions judge warned him that he would be removed from the courtroom if his behavior continued.

Mr. Antonio Hawkins testified that he returned to the room as ordered by the Petitioner. After two or three minutes, he heard Mr. Reynolds say the men had left, so Mr. Antonio Hawkins ran out of the room and checked on his brother. Mr. Antonio Hawkins stated that his DVDs and his brother's cellular phone and cash were taken during the robbery. He also stated that Mr. Harris had either a .40 caliber or a nine millimeter gun and that the Petitioner had a black gun.

Upon further questioning, Mr. Antonio Hawkins testified that he saw the Petitioner three days prior to the robbery when the Petitioner and a man named "Derrick" came by Mr. Antonio Hawkins's home and tried to sell him items. Mr. Antonio Hawkins stated that during the robbery, he opened a door in order to escape when he saw "a guy resembling" the Petitioner, who pointed a gun at his face. Mr. Antonio Hawkins said the Petitioner had either a .40 caliber or a nine millimeter handgun and that the Petitioner pointed the gun at him and ordered him back into the room.

Mr. Donovan Hensley, an employee at Jiffy Lube, testified that in November of 2008, two men came to Jiffy Lube in a 2006 or 2007 model white Dodge Charger. Mr. Hensley later identified the Petitioner in a photographic lineup as the driver.

The State presented the recordings of the Petitioner's telephone calls from the jail that the trial court had concluded were admissible during the pretrial hearing. The State also played a recording of a telephone call made by the Petitioner on February 11, 2009, where the Petitioner had the following conversation:

[Other Party]: Man TY man I'm greasing them n***as man, you'll hear about it. But you ain't gonna hear it was me though. Ya hear me.

[The Petitioner]: But look I just know I need the mother f*****s greased. Greased to a ... ya hear me?

[Other Party]: Man look I got you on that big bra.

[The Petitioner]: It's a real game of chance baby that game[']s a real game of chance baby you hear me?

[Other Party]: Just like checkers man.

[The Petitioner]: I know it gonna take someone to break me, um break me out of here old school way man ya hear me. A real n***a don't never win the game no more ya hear me?

[Other Party]: I swear man.

[The Petitioner]: A real n***a, a real n***a is a dangerous species man you hear me?

[Other Party]: I swear to God man.

[The Petitioner]: Man like I said man, you know what I'm saying, we playing for a whole 100 years. Now man my back[']s against the wall ya hear me.

[Other Party]: Man I'm full in to cheating.

[The Petitioner]: Blood in blood out ya know what I mean.

The Petitioner testified at trial and attempted to explain the context of each telephone call. He stated that he was speaking to his brother on November 26, 2008, and that he wanted Trell to find out if Mr. Dowdy knew something about the offenses because Mr. Dowdy previously had been convicted of offenses against the Hawkins brothers. The Petitioner maintained that when referencing twins, he was not referring to the Hawkins brothers but was referring to another set of twins who lived in the neighborhood and may have had information about the offenses. He also maintained that his statements about a pistol referred to a pistol that he took from a man named "Black" during an altercation.

The Petitioner testified that his statement to his mother that "I got a trick for him I be out in 45, 30 days" was a reference to his plan to present evidence of his innocence to the police. He explained that his instruction to call the "robbery squad" was in reference to his family members reporting to the police the actual person who committed the offenses with Mr. Harris. The Petitioner said he thought if the officers knew his family members were calling, the officers would not believe them. He acknowledged that he changed his appearance for the preliminary hearing, but stated that the trial court made him remove his glasses before Mr. Antonio Hawkins identified him at the hearing.

The Petitioner acknowledged discussing a plan to offer Mr. Morgan money and explained that he believed that by doing so, Mr. Morgan would tell the truth about who actually committed the offenses. The Petitioner testified that his statement about having people "greased" referred to having the real perpetrators arrested in a "slick" way and denied that the term meant to kill someone. He claimed that "blood in blood out" did not mean to cause physical harm to someone but meant "through thick and thin."

The Petitioner testified that when he stated that Mr. Harris's mother would "live to regret it," he meant that she would regret it if she did not testify truthfully. He maintained he wanted Mr. Harris to admit that the Petitioner was not involved in the offenses. The Petitioner denied trying to influence witnesses when he talked about getting their stories "straight" and maintained that he wanted to ensure his alibi witnesses were telling the truth about when and where they saw him. He stated that none of the telephone calls could be interpreted as instructions to kill Mr. Antonio Hawkins or to influence the testimony of witnesses.

The Petitioner testified that on the night of the offenses, he was at a family gathering at his mother's home during which he ate fish and spaghetti. He stated that after arriving at around 6:45 p.m., he ate dinner and watched two basketball games while lying on the floor. He reported sleeping on the floor that night. The Petitioner's family members also testified to the Petitioner's presence at the family gathering.

The Petitioner acknowledged that he was in the white Dodge Charger at Jiffy Lube with Mr. Dowdy and that he drove the car on November 13 and 17, 2008. The Petitioner maintained that the car belonged to a drug addict who pawned it to someone who allowed Mr. Dowdy to use it for a period of time. The Petitioner also maintained that Mr. Dowdy was the perpetrator. The Petitioner admitted to committing a string of eleven armed robberies when he was eighteen years old.

Ms. Jurline Bohanna, the Petitioner's mother, admitted to speaking to the Petitioner while he was incarcerated but denied plotting to influence witnesses. Mr. Tony Bohanna, the Petitioner's brother, testified that he did not recall telling the Petitioner not to worry about the location of the pistol and maintained that the pistol referenced during the calls with the Petitioner belonged to Trell Wright. Mr. Tony Bohanna stated that he threw the pistol away. Although he admitted that the Petitioner told him to tell a family member to "have her story straight," Mr. Tony Bohanna explained that the Petitioner just wanted her to tell the truth at trial.

Mr. Courtney Lurry, Mr. Harris's brother, testified that on the night of the offenses, he saw Mr. Jacob Halliburton and Mr. Eric Walker at a basketball game, that they were in a white Dodge Charger, and that they had been driving the car during the entire month of November 2008. Mr. Tony Bohanna also testified to seeing Mr. Halliburton and Mr. Walker driving the white Dodge Charger. Ms. Marilyn Harris, Mr. Harris's mother, testified that she saw two of Mr. Harris's friends driving a white Dodge Charger but denied ever seeing her son driving the car. She acknowledged that the Petitioner and Mr. Harris were friends.

Mr. Myrico Carr testified that after the robbery, he saw either Mr. Halliburton or Mr. Walker wearing a watch that looked like the watch taken from Mr. Antoine Hawkins, and Mr. Carr told Mr. Antoine Hawkins about the watch. Mr. Carr also stated that another set of twins lived in the neighborhood.

The defense also presented the testimony of Dr. Jeffrey Neuschatz, an expert in the field of eyewitness identification, who testified regarding the reliability of eyewitness identification and the effect of various factors, including stress, on reliability.

At the conclusion of the trial, the jury convicted the Petitioner of especially aggravated robbery, reckless endangerment as a lesser-included offense of attempted second degree murder, aggravated burglary, and three counts of aggravated assault. The jury acquitted the Petitioner of the firearm charge. The trial court found that the Petitioner was a career offender and imposed consecutive sentences of sixty years for especially aggravated robbery, eleven months and twenty-nine days for reckless endangerment, fifteen years for aggravated burglary, and fifteen years for each of the aggravated assault convictions for an effective sentence of 120 years, eleven months, and twenty-nine days.

Trial counsel filed a motion for new trial on the Petitioner's behalf, raising numerous issues. Following a hearing, the trial court denied the motion, granted trial counsel's request to withdraw, and appointed appellate counsel to represent the Petitioner. On appeal, the Petitioner raised multiple issues, including challenges to the trial court's admission of Mr. Antonio Hawkins's statements pursuant to the hearsay exception for forfeiture by wrongdoing set forth in Tennessee Rule of Evidence 804(b) and the trial court's denial of the Petitioner's request for *Jencks* material from Sergeant Merritt and for discovery of police reports in the murder investigation of Mr. Antonio Hawkins. *See Tyrone Bohanna*, 2013 WL 2393050, at *10-12.

This court affirmed the Petitioner's convictions and sentences on direct appeal. *Id.* at *1. In upholding the trial court's admission of Mr. Antonio Hawkins's statements, this court concluded that the trial court properly conducted a hearing to determine the admissibility of the statements, and this court concluded that the evidence did not preponderate against the trial court's findings that the Petitioner was involved in or was responsible for procuring the unavailability of Mr. Antonio Hawkins and that the Petitioner's actions were intended, in part, to procure Mr. Antonio Hawkins's absence. *Id.* at *12. This court concluded that the Petitioner waived his challenge to the trial court's decision to deny his request for materials related to the investigation of Mr. Antonio Hawkins's murder by failing to raise the issue in the motion for new trial. *Id.*

Post-Conviction Proceedings

The Petitioner filed a pro se motion to reopen post-conviction proceedings, which the post-conviction court treated as an initial petition for post-conviction relief, and the court appointed counsel to represent the Petitioner. Post-conviction counsel filed multiple amended petitions, and an evidentiary hearing was held on multiple dates. Among other issues, the Petitioner raised stand-alone claims challenging the trial court's decision to sever the trials of the Petitioner and Mr. Harris and the State's failure to disclose evidence related to the investigation into Mr. Antonio Hawkins's death. The Petitioner also claimed that trial counsel was ineffective in failing to: (1) listen to all of the recordings of the Petitioner's telephone calls from the jail and to review those recordings with the Petitioner; (2) adequately investigate Mr. Wright; (3) adequately investigate and discover evidence related to the death of Mr. Antonio Hawkins; (4) challenge the State's nondisclosure of evidence at trial and in the motion for new trial; and (5) challenge the trial court's decision to sever the trials of the Petitioner and Mr. Harris in the motion for new trial. Trial counsel passed away prior to the evidentiary hearing.

During the evidentiary hearing, Ms. Marilyn Harris, Mr. Harris's mother, testified that her father paid the fees of Mr. Harris's trial counsel. The Petitioner also called Mr. Harris, who confirmed the testimony he gave at his own trial. The Petitioner entered the transcript of Mr. Harris's trial, which took place after the Petitioner's trial, as an exhibit. Mr. Harris testified at his trial that on the night of the robbery, he saw Mr. Halliburton and Mr. Walker in a white Dodge Charger and went with them to the home to purchase cocaine. Mr. Harris stated that he and Mr. Walker entered the house and that Mr. Walker shot Mr. Antoine Hawkins and took drugs that were in the home. Mr. Harris denied possessing a gun or intending to rob or shoot anyone. He was convicted of especially aggravated robbery, reckless endangerment, and three counts of assault and was sentenced to an effective term of twenty-eight years, eleven months, and twenty-five days. *See State v. Brandon Harris*, No. W2012-02574-CCA-R3-CD, 2014 WL 2809685, at *1 (Tenn. Crim. App. June 19, 2014). This court upheld his convictions and sentence on direct appeal. *Id.*

Assistant Attorney General Pamela Stark, the chief prosecutor assigned to the Petitioner's case, testified that Mr. Antonio Hawkins was shot and killed prior to trial, and General Stark argued during a pretrial hearing that his statements were admissible pursuant to the forfeiture by wrongdoing hearsay exception because the Petitioner was partially responsible for his death. General Stark acknowledged that the Petitioner was never charged in connection with Mr. Antonio Hawkins's death, but she maintained that she had substantial evidence that his death was, "in part, motivated by the behavior" of the Petitioner. General Stark noted that the Petitioner had made multiple calls from the

jail during which he was attempting to tamper with or do harm to Mr. Antonio Hawkins and other witnesses, that Mr. Antonio Hawkins was shot and killed less than twenty-four hours after trial counsel obtained a continuance of the trial, that the Petitioner stated during telephone calls following Mr. Antonio Hawkins's death that he no longer had to worry about the charges and that he would be released, and that an inmate had testified that the Petitioner admitted to arranging for someone to kill Mr. Antonio Hawkins.

General Stark testified that she first learned of Mr. Antonio Hawkins's death two or three days after trial counsel obtained a continuance when the homicide office of the Memphis Police Department contacted her because her cell phone number was stored in Mr. Antonio Hawkins's cell phone. General Stark also learned that Mr. Antoine Hawkins's son, who shared his name, was shot at a different location within the same twenty-four-hour period. On July 6, 2010, following Mr. Antonio Hawkins's death on June 18th, General Stark searched through the investigation file in the homicide office to determine whether there was any connection between the Petitioner and those who were being investigated in connection with the murder. While General Stark stated that she did not know how Mr. Charles Townsend and Mr. Demetrius Lay were involved in Mr. Antonio Hawkins's death, she also stated that around July 6th or shortly thereafter, she learned that Mr. Antonio Hawkins was "laid up" in a hotel room with the girlfriend of one of the men shortly before he was killed. General Stark did not review the file again after July 6th but stated that she spoke to Sergeant Kevin Lundy, who was involved in the murder investigation, about whether there was any exculpatory evidence related to the Petitioner.

General Stark believed she had a conflict of interest due to her preexisting relationship with Mr. Antonio Hawkins that prohibited her involvement in the investigation and prosecution of his homicide. She did not know whether anyone had been indicted in relation to Mr. Antonio Hawkins's death by the time of the forfeiture by wrongdoing hearing. She stated that those involved in the investigation and prosecution of Mr. Antonio Hawkins's murder knew that he was a witness in her case, and she was sure that they would have provided her with any information indicating that the Petitioner was not involved in the murder. She did not believe that the investigative file into Mr. Antonio Hawkins's death was relevant to the Petitioner's case. She stated that based upon the recordings of the Petitioner's telephone calls from jail, the timing of Mr. Antonio Hawkins's death, and the information obtained from the inmate, she believed she had sufficient evidence to establish forfeiture by wrongdoing.

General Stark did not recall whether she saw any connection with the Petitioner when she reviewed the file of the investigation of Mr. Antonio Hawkins's murder. She testified that "there would have been no way to ever look in the file and find out, unless one of these individuals just admitted, 'Yes, I killed him, and one of the reasons I killed

him is because [the Petitioner] told me,' to have ever known all the motivations behind why these individuals killed" Mr. Antonio Hawkins. General Stark maintained that the information in the investigation file related to Mr. Antonio Hawkins's death was not discoverable in the Petitioner's case because it was "not the case before this Court." General Stark said she was "morally convinced" that Mr. Wright was being truthful. She did not know of any connection between Mr. Wright and Mr. Charles Townsend, Mr. Demetrius Lay, and Ms. Tajuana Knight.

General Stark stated that Mr. Harris and his attorney made it clear that Mr. Harris would not testify on the Petitioner's behalf at trial. She recalled that the trial court granted a request made by Mr. Harris's counsel to sever Mr. Harris's trial from the Petitioner's trial due to a series of telephone calls that the Petitioner made from the jail during which he stated that he was paying the fees of Mr. Harris's counsel.

General Stark testified that while she was unsure whether trial counsel filed a formal discovery request, she provided trial counsel with discovery regardless. She stated that one day during the week of the trial, she and trial counsel stayed until 11:00 p.m. reviewing her file to ensure that trial counsel had seen everything. She believed she provided trial counsel with the recordings of the Petitioner's telephone calls from jail within days of receiving them. She stated that the Petitioner made around nine hundred calls and that trial counsel would not have had sufficient time to review each and every call. However, trial counsel reviewed a sufficient amount of calls to file a motion to exclude the recordings prior to trial.

On cross-examination, General Stark testified that prior to Mr. Antonio Hawkins's murder, the Petitioner contacted him from the jail and tried to convince him to not come to court. General Stark recalled that a suppression hearing on Mr. Antonio Hawkins's identification of the Petitioner was scheduled on numerous occasions and that Mr. Antonio Hawkins was contacted by someone associated with the Petitioner prior to each scheduled date. Mr. Antonio Hawkins also was threatened just prior to entering the courtroom for the suppression hearing. Because Mr. Antonio Hawkins continued to be harassed and threatened, General Stark gave her cell phone number to him. Homicide officers discovered General Stark's number in Mr. Antonio Hawkins's cell phone following his death. General Stark spoke to Sergeant Lundy about the shooting and performed a cursory review of the file to determine whether she could find any connection between the Petitioner and those suspects listed in the file, but she was unable to find any such connection. General Stark agreed that trial counsel was aware that she had reviewed the names listed in the file and found no connection with the Petitioner. General Stark did not know the timing of the arrest of those who murdered Mr. Antonio Hawkins in relation to the Petitioner's trial and believed trial counsel would have spoken to the arrestee's defense attorney about the case.

General Stark testified that she did not listen to the recordings of the Petitioner's calls from the jail until after she spoke to Mr. Wright. She did not recall Mr. Wright stating that the Petitioner named two people who were involved in Mr. Antonio Hawkins's murder. She believed Mr. Wright told her that the Petitioner had been using the PIN numbers of other inmates to make telephone calls from the jail. General Stark recalled that trial counsel presented a witness in an effort to establish that Mr. Wright and the Petitioner were never housed in the same location, but trial counsel was unable to establish this.

General Stark testified that she created a transcript of ten calls made by the Petitioner that she intended to introduce at trial and provided the transcript to trial counsel. She also provided any *Jencks* material on the first day of trial, and she believed trial counsel had his investigator interview several witnesses. She recalled that trial counsel presented several alibi witnesses at trial and that "[t]here was nothing in this case that wasn't zealously challenged" by trial counsel. Despite the fact that the State pursued the charge of attempted second degree murder on a theory of criminal responsibility, the jury acquitted the Petitioner of the charge and convicted him of a lesser-included offense.

On redirect examination, General Stark testified that she did not believe she heard the Petitioner refer to Mr. Townsend or Mr. Lay during the Petitioner's calls from the jail. The Petitioner only referred to people by nicknames. General Stark's theory upon which her claim of forfeiture by wrongdoing was based was that the Petitioner encouraged others to kill Mr. Antonio Hawkins and that those who killed Mr. Antonio Hawkins did so based in part upon the Petitioner's encouragement. General Stark stated that she believed trial counsel did not raise the issue of the failure to obtain discovery of the investigation of the murder of Mr. Antonio Hawkins in the Petitioner's motion for new trial because trial counsel "took the whole ethical thing of not putting forth frivolous motions pretty seriously, and the Court would have never granted his motion for new trial based on not getting discovery in a case that he wasn't on."

The Petitioner entered as exhibits various statements from witnesses, police reports, pleadings, and other documents related to the investigation into Mr. Antonio Hawkins's homicide and the prosecution of those who were charged in connection with his death. According to the exhibits, on June 18, 2010, at approximately 11:55 p.m., Mr. Antonio Hawkins was shot and killed at his residence. An officer interviewed Mr. Antoine Hawkins, who stated that Mr. Antonio Hawkins was scheduled to testify in an upcoming trial.

On June 19, 2010, officers interviewed Mr. Joseph Brazley and obtained a statement from him. He stated that on the night of the shooting, Ms. Tajuana Knight, a

relative of the mother of Mr. Antonio Hawkins's child, contacted Mr. Antonio Hawkins. After the conversation, Mr. Brazley drove Mr. Antonio Hawkins to a nearby hotel. After a period of time, Mr. Antonio Hawkins called Mr. Brazley, who picked him up at the hotel. They stopped at Exline's Pizza, ordered pizza, and then returned to Mr. Antonio Hawkins's house to wait until the pizza was ready. A short time later, Mr. Brazley returned to the pizza restaurant to get the pizza while Mr. Antonio Hawkins remained at his house. When Mr. Brazley returned to the house and pulled his car into the garage, a man entered the garage, stood on the passenger side of Mr. Brazley's car, and pointed a gun at Mr. Brazley. Mr. Brazley stated that a second man entered the house, that he heard two gunshots, and then the two men fled. Mr. Brazley said both men were wearing masks and black clothing. Mr. Brazley entered the house, saw Mr. Antonio Hawkins lying on the floor, and called 911.

On June 19, 2010, officers also interviewed Mr. Charles Townsend, who waived his rights and agreed to speak to the police. Mr. Townsend stated that in February and March of 2010, he burglarized the home of Mr. Antonio Hawkins, a drug dealer. Mr. Townsend admitted that he returned on the night of the homicide to commit another burglary, but Mr. Townsend denied any responsibility for Mr. Antonio Hawkins's death. Mr. Townsend stated that at around 11:30 p.m., he entered the home through a side door. While inside, he saw a car pull into the garage, and he hid in the laundry room. He saw someone exit the vehicle and heard a noise inside the house. A few minutes later, Mr. Townsend heard two men enter the house. He then heard a "commotion" and two gunshots, followed by eight to ten gunshots, and he said he was struck by a bullet. He saw a man fleeing the scene, and Mr. Townsend ran in the opposite direction.

Mr. Townsend stated that sometime prior to the shooting, "Nico" told him that Mr. Antonio Hawkins and "Meaty" were on bad terms because they were both dating the same woman. "Meaty" offered "Nico" drugs and money to kill Mr. Antonio Hawkins, but "Nico" declined. "Nico" told Mr. Townsend that Mr. Antonio Hawkins was a good friend from the neighborhood and that "Nico" could not see himself killing him. Mr. Townsend learned that "Nico" had been killed approximately one month later.

On June 20, 2010, Sergeant Merritt interviewed Ms. Tajuana Knight, who stated that she was in a hotel room with Mr. Antonio Hawkins approximately one to one and one-half hours before he was killed. Ms. Knight stated that Mr. Antonio Hawkins was friends with Mr. Demetrius Lay or "Meaty." She also stated that Mr. Lay was unaware of her relationship with Mr. Antonio Hawkins and asked that the officer to keep her relationship with Mr. Antonio Hawkins confidential. Ms. Knight denied seeing or having any contact with Mr. Lay on the day or evening of the shooting.

On November 9, 2010, officers interviewed Mr. Deangelo Howard, who stated that Mr. Lay or “Meaty” was responsible for Mr. Antonio Hawkins’s death. Mr. Howard stated that on the night of the shooting, he arranged to meet Mr. Antonio Hawkins at his home to purchase drugs. As Mr. Howard was walking down the street near the home, he heard two gunshots and saw two masked men run out of the garage and down the driveway to a gray Jaguar. Once the men entered the car, they removed their masks, and Mr. Howard recognized one of the men as Mr. Lay. A few days after the shooting, Mr. Howard saw Mr. Lay and “Dun’d” in the same car.

Mr. Howard stated that sometime prior to the shooting, Mr. Antonio Hawkins told him that Mr. Lay was angry because he had caught Mr. Antonio Hawkins and Ms. Knight together in a hotel room. Mr. Antonio Hawkins stated that a few days later, Mr. Lay drove by a house where Mr. Antonio Hawkins was and threw cash in the yard. Mr. Howard identified Mr. Lay in a photographic lineup.

On November 18, 2010, Mr. Lay was indicted for the first degree premeditated murder of Mr. Antonio Hawkins. A report dated December 17, 2010, stated that Mr. Townsend’s blood was found at the crime scene. On January 5, 2011, Mr. Lay’s counsel filed multiple pleadings, including a discovery request, and the prosecutor assigned to Mr. Lay’s case answered the discovery request in an email dated February 8, 2011, the day after the Petitioner’s trial ended. On July 28, 2011, Mr. Lay and Mr. Townsend were indicted for the first degree premeditated murder of Mr. Antonio Hawkins. On February 14, 2013, Mr. Townsend pleaded guilty to voluntary manslaughter.

Ms. Vita Zelikov, an investigator who was retained by the defense for trial, testified that trial counsel provided her with a copy of discovery and that she expended approximately 330 hours investigating the case. She stated that trial counsel never mentioned Mr. Townsend, Mr. Howard, or Mr. Lay to her, that their names were not listed in the discovery materials provided by the State, and that she did not conduct any investigation into the three men.

The Petitioner testified that he was unaware of Mr. Lay, Mr. Howard, and Mr. Townsend until Mr. Wright testified during the pretrial hearing. The Petitioner denied that Mr. Antonio Hawkins’s death was an ongoing investigation at the time of his trial. He stated that trial counsel failed to raise the request for information related to the murder investigation in the motion for new trial and that, as a result, trial counsel waived the issue on appeal. The Petitioner stated that Mr. Wright was the uncle of Mr. Antonio Hawkins’s children and that Mr. Wright had access to information about Mr. Antonio Hawkins’s murder through his family connection. The Petitioner also stated that Mr. Wright and Mr. Lay were in the same “holding tank” and were members of the same gang. The Petitioner said Mr. Courtney Harris, the deputy jailer, could have testified that

Mr. Wright was not housed in the same pod with the Petitioner when the Petitioner first learned of Mr. Antonio Hawkins's death and that the Petitioner and Mr. Wright were not housed together until three weeks later. The Petitioner maintained that while he provided this information to trial counsel, counsel failed to properly investigate Mr. Wright's connections.

The Petitioner testified that trial counsel did not review the recordings of the telephone calls from jail with him. He stated that while trial counsel and the investigator showed him the transcript of the recordings of the ten calls that the State intended to introduce at trial, he never heard the recordings. The Petitioner maintained that during one of the calls, he was discussing a crime that occurred months before the offenses for which he was charged. He asserted that trial counsel failed to interview his brother before calling him to testify and that as a result his brother's testimony about the gun discussed during the telephone calls was based upon assumptions and speculation about the origin of the gun. The Petitioner stated that trial counsel failed to call as witnesses the twins to whom the Petitioner was referring in a call from the jail and that trial counsel questioned witnesses at trial about the twins even though those witnesses did not know the twins.

The Petitioner maintained that trial counsel should have asked the trial court to hold Mr. Harris's trial first. The Petitioner denied stating that he was paying Mr. Harris's attorney and maintained he told Mr. Harris that he would do whatever he could to help Mr. Harris with his attorney's fees. The Petitioner maintained that he only asked Mr. Harris to be truthful.

On cross-examination, the Petitioner agreed that he testified at trial regarding his alibi and the meaning of the language that he used in the calls. He also agreed that alibi witnesses testified at trial. He stated that trial counsel should have called additional witnesses to support the Petitioner's credibility because his "credibility wasn't the best credibility in the world, having eleven prior robberies." The Petitioner testified that trial counsel never gave him the opportunity to listen to the recordings of the telephone calls in order to prepare a defense. The Petitioner recalled that one of the recordings was used to challenge his alibi as it indicated that he was at a different location. He acknowledged that he was able to explain the call to the jury.

At the conclusion of the evidentiary hearing, the post-conviction court made oral findings and later written findings denying the Petitioner relief. The post-conviction court found that the Petitioner did not meet his burden of presenting clear and convincing evidence that trial counsel was ineffective in failing to interview and present certain witnesses at trial because the Petitioner failed to present any such witnesses to testify at the evidentiary hearing. The post-conviction court found that trial counsel met with the

Petitioner on multiple occasions and discussed trial strategy with him. The court noted that trial counsel was provided with discovery and that he and General Stark reviewed the State's file one night around the time of trial to ensure that trial counsel had all discovery materials. The court stated that trial counsel retained an investigator, who accumulated more than 330 hours investigating the case, and that the defense team investigated the Petitioner's claims of an alibi and other individuals who the Petitioner maintained were responsible for the offenses. The court noted that trial counsel presented an alibi defense, challenged the testimony of the State's witnesses as inconsistent and not credible, and convinced the jury to acquit the Petitioner of some of the indicted charges. The court found that the Petitioner's testimony at the evidentiary hearing was not credible and that the Petitioner "said absolutely nothing that would have made a difference in his trial or sentencing."

The post-conviction court found that trial counsel adequately reviewed the recordings of the Petitioner's telephone calls that the State intended to use at trial and challenged the State's use of those recordings at trial. The court also found that the Petitioner failed to establish prejudice by trial counsel's failure to review the recordings of all 900 calls with him.

The post-conviction court determined that trial counsel was not deficient in investigating and challenging evidence presented during the forfeiture by wrongdoing hearing. The court stated that trial counsel "vigorously attacked" Mr. Wright's testimony during the forfeiture hearing and presented evidence in an effort to establish that Mr. Wright and the Petitioner were not housed in the same pod during the applicable time period. The post-conviction judge, who was also the trial judge, stated that he ruled during the forfeiture hearing that the Petitioner was responsible for procuring the unavailability of the declarant and that the Petitioner's actions were intended at least in part to ensure Mr. Antonio Hawkins's absence at trial. The post-conviction court found that the State was not required to prove that the Petitioner was responsible for killing anyone but that his actions were intended in part to ensure that witnesses did not appear in court.

The post-conviction court found that trial counsel requested that the State provide him with information regarding the investigation into Mr. Antonio Hawkins's death and that the trial court denied the request. The post-conviction court stated that the trial court found that information regarding the investigation into Mr. Antonio Hawkins's death was not relevant to the issue of whether the Petitioner tried to ensure that Mr. Antonio Hawkins did not appear in court as a witness and that the disclosure of the information involved an issue of public safety because the investigation was ongoing and no one had been charged. The post-conviction court also stated that trial counsel challenged the trial court's findings but was unsuccessful at the trial level and on appeal. The post-

conviction court found that although the Petitioner presented, during the evidentiary hearing, documentation regarding the State's investigation into the death of Mr. Antonio Hawkins, the information "would not have made a difference in the outcome of the case." The post-conviction court determined that trial counsel raised all viable arguments in the motion for new trial and that all other issues were "essentially 'slam dunk losers.'"

The post-conviction court found that trial counsel was not ineffective in failing to call Mr. Harris as a witness at trial. The court stated that there was no legal basis to argue that trial counsel should have called Mr. Harris as a witness and forced him to testify at trial when Mr. Harris and his counsel informed the trial court that Mr. Harris would not testify.

The Petitioner appeals the post-conviction court's order, asserting that trial counsel was ineffective in failing to adequately investigate Mr. Wright, as well as evidence linking Mr. Lay and Mr. Townsend to the death of Mr. Antonio Hawkins, in order to challenge the evidence presented by the State at the forfeiture hearing; in failing to adequately investigate and review all of the recordings of the Petitioner's telephone calls from the jail; and in failing to raise as issues in the motion for new trial challenges to the trial court's severing of the trials of the Petitioner and Mr. Harris and the State's nondisclosure of materials related to the investigation into the death of Mr. Antonio Hawkins. The Petitioner also maintains that the State failed to disclose evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and that he did not receive a fair trial after his trial was severed from the trial of his co-defendant.

ANALYSIS

The Post-Conviction Procedure Act provides for relief when a petitioner's conviction or sentence is void or voidable due to the abridgment of a right guaranteed by the United States Constitution or by the Tennessee Constitution. T.C.A. § 40-30-103. A claim that the petitioner was denied effective assistance of counsel constitutes a mixed question of law and fact. *Moore v. State*, 485 S.W.3d 411, 419 (Tenn. 2016). An appellate court reviews de novo with no presumption of correctness the post-conviction court's conclusions of law, its determinations of mixed questions of law and fact, and its application of law to factual findings. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). The post-conviction court's factual findings are conclusive on appeal unless the record preponderates otherwise. *Nesbit v. State*, 452 S.W.3d 779, 786 (Tenn. 2014). An appellate court does not reweigh or reevaluate the evidence or substitute its own inferences for those of the fact-finder. *Kendrick*, 454 S.W.3d at 457. On appeal, we defer to the post-conviction court's findings regarding witness credibility, the weight and value of witness testimony, and the resolution of factual issues presented by the evidence.

Id. The petitioner bears the burden of demonstrating the allegations of fact entitling him to relief by clear and convincing evidence. T.C.A. § 40-30-110(f).

A person accused of a crime is entitled to the assistance of counsel in criminal proceedings under the Sixth Amendment to the United States Constitution and under article I, section 9 of the Tennessee Constitution. These provisions guarantee the reasonably effective assistance of counsel. *Nesbit*, 452 S.W.3d at 786. The deprivation of this right is a cognizable claim under the Post-Conviction Procedure Act. *Moore*, 485 S.W.3d at 418. To prevail on a claim, the petitioner must show that trial counsel's representation "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Felts v. State*, 354 S.W.3d 266, 276 (Tenn. 2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)).

In order to demonstrate that he received ineffective assistance of counsel, a petitioner must show both that trial counsel performed deficiently and that the deficient performance prejudiced the defense. *Nesbit*, 452 S.W.3d at 786 (citing *Strickland*, 466 U.S. at 687). Failure to prove either deficiency or prejudice precludes relief, and the court need not address both components if the petitioner has failed to make a showing on one. *Calvert v. State*, 342 S.W.3d 477, 486 (Tenn. 2011).

To show deficient performance, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness' guided by 'professional norms' prevailing at the time of trial." *Felts*, 354 S.W.3d at 276 (quoting *Strickland*, 466 U.S. at 688). In other words, the petitioner must demonstrate that counsel's errors were "so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment." *Id.* (quoting *Strickland*, 466 U.S. at 687). Counsel's performance is not measured by "20-20 hindsight." *Id.* at 277 (quoting *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)). Instead, the court applies a strong presumption that counsel's performance was within the bounds of reasonable professional assistance. *Dellinger v. State*, 279 S.W.3d 282, 293 (Tenn. 2009). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Kendrick*, 454 S.W.3d at 458 (quoting *Strickland*, 466 U.S. at 690-91).

To show prejudice, a petitioner must establish that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Felts*, 354 S.W.3d at 277 (quoting *Strickland*, 466 U.S. at 694). The question at its core is "whether counsel's deficient performance

renders the result of the trial unreliable or the proceeding fundamentally unfair.” *Kendrick*, 454 S.W.3d at 458 (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)).

A. Failure to Investigate

The Petitioner asserts that trial counsel failed to adequately investigate Mr. Wright, the connection of Mr. Lay and Mr. Townsend to Mr. Antonio Hawkins’s murder, and all of the recordings of the Petitioner’s telephone calls from the jail. The State responds that the post-conviction court properly determined that the Petitioner failed to present clear and convincing evidence that trial counsel was deficient or that any deficiency resulted in prejudice.

Although trial counsel does not have an absolute duty to investigate particular facts or a certain line of defense, counsel has a duty to conduct a reasonable investigation or make a reasonable decision rendering a particular investigation unnecessary. *Strickland*, 466 U.S. at 691. Furthermore,

[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel. Rather, courts must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct, and judicial scrutiny of counsel’s performance must be highly deferential.

Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (internal citations and quotations omitted). There are “countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Harrington v. Richter*, 562 U.S. 86, 106 (2011) (quoting *Strickland*, 466 U.S. at 689). Cases rarely exist in which the “wide latitude counsel must have in making tactical decisions’ will be limited to any one technique or approach.” *Id.* (quoting *Strickland*, 466 U.S. at 689). “A reasonable investigation does not require counsel to ‘leave no stone unturned.’” *Robert Faulkner v. State*, No. W2012-00612-CCA-R3-PD, 2014 WL 4267460, at *87 (Tenn. Crim. App. Aug. 29, 2014) (quoting *Perry Anthony Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454, at *48 (Tenn. Crim. App. July 1, 2009)). “Reasonableness should be guided by the circumstances of the case, including information provided by the defendant, conversations with the defendant, and consideration of readily available resources.” *Perry Anthony Cribbs*, 2009 WL 1905454, at *48.

The only evidence that the Petitioner presented in the post-conviction hearing regarding the connection of Mr. Lay and Mr. Townsend to the homicide were statements

of various witnesses to law enforcement and reports prepared by or provided to law enforcement during its investigation. However, these materials were in the possession of the State; trial counsel requested that he be provided with the materials; and the trial court denied the request. Thus, trial counsel had no access to the materials and was not privy to the information in the State's investigation file prior to trial. The Petitioner presented no evidence during the post-conviction hearing establishing what an investigation by trial counsel would have revealed independent of the State's investigation file. There is nothing indicating that trial counsel would have been able to discover witnesses relevant to Mr. Antonio Hawkins's homicide without access to the State's file or that those witnesses would have agreed to be interviewed by trial counsel or the defense investigator. "When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990); *see also Scott v. State*, 936 S.W.2d 271, 273 (Tenn. Crim. App. 1996). As a general rule, this is the only way the petitioner can establish that: (1) a material witness existed who could have been discovered but for counsel's negligent investigation of the case; (2) a known witness was not interviewed; (3) the failure to discover or interview the witness caused him prejudice; or (4) the failure to present a known witness resulted in the denial of critical evidence which caused the petitioner prejudice. *Black*, 794 S.W.2d at 757.

Instead, the record reflects that trial counsel continued to investigate Mr. Wright, the jailhouse informant, following the forfeiture hearing. During a jury-out hearing at trial, trial counsel presented the testimony of an officer from the jail in an effort to discredit Mr. Wright's testimony about being housed with the Petitioner when the Petitioner learned of Mr. Antonio Hawkins's death. Following the officer's testimony, the trial court confirmed the court's earlier ruling that the State had sufficiently established the forfeiture by wrongdoing hearsay exception. The Petitioner testified at the evidentiary hearing that Mr. Wright knew of the details of Mr. Antonio Hawkins's death as a result of Mr. Wright's connection to Mr. Antonio Hawkins's family, and the Petitioner maintained that trial counsel was ineffective in failing to investigate this connection. However, the post-conviction court found that the Petitioner's testimony was not credible, and the Petitioner failed to present any other evidence establishing such a connection. Accordingly, we conclude that the Petitioner failed to present clear and convincing evidence that trial counsel was deficient in his investigation of Mr. Wright and the circumstances surrounding Mr. Antonio Hawkins's death.

The Petitioner also maintains that trial counsel was ineffective in failing to investigate and review with him all of the recordings of the hundreds of telephone calls that the Petitioner made from jail. The record reflects that the prosecutor informed trial counsel of what recordings that she intended to introduce at trial and provided trial

counsel with a transcript of those calls. The Petitioner acknowledged that trial counsel reviewed the transcript with him prior to trial. During a pre-trial hearing, trial counsel challenged the admission of the recorded calls; the trial court held that the recordings were admissible; and this court affirmed the trial court's decision on direct appeal. *See Tyrone Bohanna*, 2013 WL 2393050, at *12-13. Trial counsel attempted to establish at trial that the Petitioner's statements during the calls relied upon by the State were taken out of context and did not pertain to the robbery. The Petitioner presented no evidence during the post-conviction hearing as to what an additional review or investigation into all of the Petitioner's calls would have revealed. Therefore, trial counsel was not deficient, and any deficiency did not result in prejudice.

B. Severance

The Petitioner asserts that the trial court erred in severing his trial and Mr. Harris's trial. However, the Petitioner waived this issue because he could have raised it on direct appeal but failed to do so. *See* T.C.A. § 40-30-106(g) ("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..."). However, the Petitioner also asserts that trial counsel was ineffective in failing to challenge the severance in a motion for new trial, which prevented the Petitioner from raising the issue on direct appeal.

The trial court granted Mr. Harris's request for a severance based upon the Petitioner's statements during his telephone calls from jail suggesting that he planned to contact Mr. Harris in order to persuade him to testify favorably for the Petitioner. During the calls, the Petitioner made statements that the State submitted constituted threats toward Mr. Harris's mother, and the Petitioner stated his intentions to pay a portion of Mr. Harris's legal fees in exchange for Mr. Harris's favorable testimony.

Tennessee Rule of Criminal Procedure Rule 14(c)(1) provides that a defendant may "move for a severance because of an out-of-court statement of a codefendant makes reference to the defendant but is not admissible against the defendant." If the State intends to present the statement into evidence at trial, the trial court "shall require the prosecuting attorney to elect" either a joint trial without the statement or at which the statement would be admissible, a joint trial at which the statement is admitted "only after all references to the moving defendant have been deleted and if the redacted confession will not prejudice the moving defendant," or a severance of the moving defendant. Tenn. R. Crim. P. 14(c)(1)(A)-(C). A trial court's decision regarding a severance motion is reviewed for an abuse of discretion. *State v. Maddox*, 957 S.W.2d 547, 556 (Tenn. Crim. App. 1997).

On direct appeal, this court upheld the admission of the recordings of the Petitioner's calls at his trial. *See Tyrone Bohanna*, 2013 WL 2393050, at *12-13. The Petitioner does not contest that his statements would have been inadmissible against Mr. Harris. Although the Petitioner asserts the severance was prejudicial because Mr. Harris would have testified in a joint trial, he has not shown that Mr. Harris was not entitled to severance when the State intended to introduce the prejudicial statements made by the Petitioner. The trial court acted well within its discretion in severing the trials based upon the Petitioner's misconduct, which would have affected the credibility of Mr. Harris's testimony in a joint trial but would have been inadmissible against Mr. Harris in a separate trial. Accordingly, the Petitioner failed to establish that he was prejudiced by trial counsel's failure to raise the issue in a motion for new trial. *See State v. Eric Bernard Chism*, No. W2001-01287-CCA-R3-CD, 2002 WL 31624946, at *8-9 (Tenn. Crim. App. Nov. 8, 2002) (holding that the trial court did not abuse its discretion in severing the trials of the defendant and the co-defendant on the day of trial even through the defendant's counsel and the co-defendant's counsel had prepared to proceed on a joint defense).

The Petitioner maintains that trial counsel was ineffective in failing to call Mr. Harris to testify at trial. The post-conviction court found that both Mr. Harris and his counsel maintained that Mr. Harris would assert his right against self-incrimination if called to testify at the Petitioner's trial. While the Petitioner presented Mr. Harris as a witness at the post-conviction hearing, Mr. Harris did not state during the hearing that he would have testified on the Petitioner's behalf if trial counsel had called him as a witness at the Petitioner's trial. Accordingly, the Petitioner has failed to present clear and convincing evidence that trial counsel was deficient.

C. Non-Disclosure of Information on the Homicide Investigation

The Petitioner maintains that the State's failure to disclose the information obtained from the investigation into Mr. Antonio Hawkins's homicide prior to the Petitioner's trial violated *Brady v. Maryland*, 373 U.S. 83 (1963). The Petitioner argues that the information showed that Mr. Antonio Hawkins was killed because of his relationship with another man's girlfriend rather than to prevent him from testifying at the Petitioner's trial. He also argues that the suppressed information would have demonstrated that the forfeiture by wrongdoing hearsay exception did not apply and that, therefore, Mr. Antonio Hawkins's statements were improperly admitted at trial. The State responds that the Petitioner's stand-alone claim could have been presented on direct appeal and that as a result, the issue is waived.

Trial counsel requested the information from the State prior to trial as *Jencks* material, and the trial court denied the request. On direct appeal, the Petitioner argued

that the State withheld the information in violation of *Brady*, and this court concluded that the Petitioner waived the issue by failing to raise it in his motion for new trial. See *Tyrone Bohanna*, 2013 WL 2393050, at *12. However, it does not appear that trial counsel had the information with which to properly raise a *Brady* claim in a motion for new trial or on direct appeal. The State had not disclosed the results of the investigation into the homicide, and trial counsel, having no basis for asserting that the investigation was exculpatory, merely speculated that information might have been withheld in violation of *Brady*. We observe that the Petitioner asserts not only that his due process rights were violated by the failure to disclose the results of the investigation but also that trial counsel was ineffective for failing to properly raise or preserve the issue. We conclude that, because the Petitioner cannot establish the materiality of the evidence, he would not be entitled to relief under either analysis.

“[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady*, 373 U.S. at 87. In order to establish a violation based on the withholding of favorable evidence, the defendant must demonstrate that: (1) the defendant requested the evidence or that it was obviously exculpatory; (2) the State suppressed evidence in its possession; (3) the evidence that was suppressed was favorable to the accused; and (4) the evidence meets the standard of materiality. *State v. Jackson*, 444 S.W.3d 554, 594 (Tenn. 2014). Whether a defendant is entitled to a new trial based upon a *Brady* violation “presents a mixed question of law and fact.” *Cauthern v. State*, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004).

The duty to disclose extends to all “favorable information” regardless of whether the evidence is admissible at trial. *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001). The prosecutor also “is responsible for ‘any favorable evidence known to the others acting on the government’s behalf in the case, including the police.’” *Strickler v. Greene*, 527 U.S. 263, 275 n.12 (1999) (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). “Information that is favorable to the accused may consist of evidence that ‘could exonerate the accused, corroborate[] the accused’s position in asserting his innocence, or [contain] favorable information that would have enabled defense counsel to conduct further and possibly fruitful investigation regarding’” a potential defense. *Johnson*, 38 S.W.3d at 56 (quoting *State v. Marshall*, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992)). Evidence which permits the defense to impugn the reliability of the State’s investigation, impeach the credibility of witnesses, or bolster the defense’s position amounts to favorable evidence. *Jordan v. State*, 343 S.W.3d 84, 96 (Tenn. Crim. App. 2011).

The post-conviction court found and the record reflects that trial counsel requested the information regarding the investigation into Mr. Antonio Hawkins’s murder from the

State. Although trial counsel cited to *Jencks* rather than *Brady* in making the request, trial counsel argued that the information was necessary to challenge the State's claim that the Petitioner was involved in or responsible for Mr. Antonio Hawkins's death. The trial court declined to order the State to provide the information to trial counsel. The prosecutor acknowledged that she did not provide the information to trial counsel and only performed a cursory review of the information during the beginning stages of the investigation before deciding to seek admission of Mr. Antonio Hawkins's statements under the forfeiture by wrongdoing hearsay exception. The prosecutor was aware prior to the hearing that Mr. Antonio Hawkins was "laid up" in a hotel room with the girlfriend of Mr. Townsend or Mr. Lay shortly before the homicide. Thus, the first two requirements to establish a *Brady* violation have been met. See *Jackson*, 44 S.W.3d at 594.

In determining whether the suppressed evidence was favorable to the Petitioner, we must examine the requirements of the forfeiture by wrongdoing hearsay exception. Pursuant to Tennessee Rule of Evidence 806(b)(6), a statement of an unavailable declarant is not excluded as hearsay if the statement was "offered against a party that has engaged in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness." This rule "does not limit the subject matter of the statements" and "is not limited to statements made when a formal charge or judicial proceeding is pending against the defendant." *State v. Brooks*, 249 S.W.3d 323, 328 (Tenn. 2008) (citing *State v. Ivy*, 188 S.W.3d 132, 147 (Tenn. 2006)). Before admitting statements pursuant to Rule 806(b)(6), the trial court must hold a hearing outside the jury's presence. *Id.*; *Ivy*, 188 S.W.3d at 147. The trial court must find by a preponderance of the evidence that "the defendant was involved in or responsible for procuring the unavailability of the declarant" and that the "defendant's actions were intended, at least in part, to procure the absence of the declarant." *Brooks*, 249 S.W.3d at 328 (quoting *Ivy*, 188 S.W.3d at 147).

We note that Tennessee Rule of Evidence 804(b)(6) applies to statements offered against a party who "engaged" in wrongdoing, while Federal Rule of Evidence 804(b)(6) applies to statements offered against a party who either "wrongfully caused" or "acquiesced in wrongfully causing" the unavailability of the declarant as a witness. As a result, "the Tennessee rule appear to require active rather than passive wrongdoing. It also appears not to cover wrongdoing by a party's friends and others acting without any involvement of the party." Neil P. Cohen et al, *Tennessee Law of Evidence* § 8.39[2][b] (6th Ed. LexisNexis Matthew Bender).

To fall within the forfeiture by wrongdoing hearsay exception, the State was required to establish by a preponderance of the evidence that the Petitioner was involved in or was responsible for Mr. Antonio Hawkins's death and that the Petitioner's actions were intended, in part, to procure Mr. Antonio Hawkins's absence from trial. Prior to the

forfeiture by wrongdoing hearing and the Petitioner's trial, the State had in its possession statements from various witnesses about the homicide; Mr. Lay had been indicted for premeditated first degree murder; and blood at the scene was determined to belong to Mr. Townsend. Although the Petitioner urges this court to also consider the transcript of Mr. Townsend's guilty plea hearing, Mr. Townsend was not indicted until after the Petitioner's trial and did not plead guilty to charges related to the homicide until approximately two years after the Petitioner's trial. Nevertheless, the information from the investigation into the homicide that was available at the time of the Petitioner's trial indicated that Mr. Lay and Mr. Townsend shot Mr. Antonio Hawkins and that a possible motive was his relationship with Mr. Lay's girlfriend. Had the State provided this information to trial counsel, he could have used it to challenge the State's claim that the Petitioner was involved in or responsible for Mr. Antonio Hawkins's death and, thus, counter the State's efforts to establish the forfeiture by wrongdoing hearsay exception. Accordingly, this information was "favorable" to the defense. *See Jackson*, 444 S.W.3d at 594.

The prosecutor testified that shortly after Mr. Antonio Hawkins's death, she briefly reviewed information gathered by officers in investigating the homicide and that she was unable to connect any of those named in the investigation with the Petitioner. The prosecutor also testified that she did not further review the State's file regarding the homicide investigation because she was ethically prohibited from becoming involved in the investigation. However, the prosecutor made the decision to seek to introduce Mr. Antonio Hawkins's statements pursuant to the forfeiture by wrongdoing hearsay exception by claiming that the Petitioner was involved in or responsible for the homicide and that Mr. Antonio Hawkins was killed, in part, to prevent him from testifying at the Petitioner's trial. We know of no ethical rule that excuses a prosecutor's obligations under *Brady* to provide favorable evidence to the defense that can be used to challenge a theory that the prosecutor herself chose to pursue in the trial court. The prosecutor cannot claim that the Petitioner was responsible for or involved in Mr. Antonio Hawkins's death and then turn a blind eye or claim ignorance of evidence uncovered by law enforcement in investigating the homicide. Furthermore, the prosecutor acknowledged that she was aware of statements that Mr. Antonio Hawkins was killed due to his involvement with the shooter's girlfriend. Once the prosecutor made the decision to seek to admit Mr. Antonio Hawkins's statements under the forfeiture by wrongdoing hearsay exception, she was required under *Brady* to disclose any "favorable" evidence that the Petitioner could use in challenging the application of this hearsay exception. The prosecutor failed to do so.

The post-conviction court stated that the trial court declined to require the State to disclose the information from the homicide investigation because the investigation was ongoing and the disclosure could compromise the safety and security of witnesses based

upon the Petitioner's prior efforts to threaten and intimidate witnesses. However, during the forfeiture by wrongdoing hearing, the trial court stated that at one point that the court was unaware of whether the homicide investigation was ongoing and whether the disclosure of the information would compromise the safety and security of others. Rather, the trial court found that the information from the homicide investigation was not relevant because at that point in the hearing, the State had yet to develop a theory that Mr. Antonio Hawkins was unavailable due to the Petitioner's actions. However, once the prosecutor decided to seek admission of Mr. Antonio Hawkins's statements pursuant to the forfeiture by wrongdoing hearsay exception, law enforcement's investigation of the homicide became relevant, and the State was required to disclose favorable evidence from the investigation to the defense.

On appeal, the State seems to suggest that trial counsel had access to the information from the homicide investigation notwithstanding the State's failure to disclose it. *See, e.g. State v. Marshall*, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992) (noting that the State is not required to "disclose information that the accused already possesses or is able to obtain"). However, no evidence was introduced during the post-conviction hearing establishing that trial counsel possessed or was able to obtain the information set forth in witnesses' statements that were in the State's exclusive control.

Although we have concluded that the prosecutor failed to disclose favorable evidence, a defendant is not entitled to relief pursuant to *Brady* unless the suppressed evidence was material. *See Jackson*, 444 S.W.3d at 594. Evidence is considered material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). The defendant need not establish that the disclosure of the evidence would have resulted in an acquittal. *See Kyles*, 514 U.S. at 434. "Nor is the test of materiality equivalent to that of evidentiary sufficiency, such that we may affirm a conviction or sentence when 'after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions.'" *Johnson*, 38 S.W.3d at 58 (quoting *Strickler*, 527 U.S. at 275). Instead, courts must determine whether in the absence of the evidence, the defendant received a fair trial, which is "understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. The defendant must establish that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." *Irick v. State*, 973 S.W.2d 643, 657 (Tenn. Crim. App. 1998) (quoting *Edgin*, 902 S.W.2d at 390). Courts should evaluate the evidence "in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense' been made aware of the favorable information." *State v. Spurlock*, 874 S.W.2d 602, 619 (Tenn. Crim. App. 1993) (quoting *Bagley*, 473 U.S. at 683).

We note that the issue of the Petitioner's involvement in Mr. Antonio Hawkins's death was not litigated at trial but was addressed during a pretrial hearing for the purpose of determining the admissibility of Mr. Antonio Hawkins's statements at trial. Even if trial counsel had been able to utilize the evidence from the State's investigation into the homicide to successfully negate the State's efforts to admit Mr. Antonio Hawkins's statements pursuant to the forfeiture by wrongdoing hearsay exception, the trial court admitted Mr. Antonio Hawkins's testimony during the Petitioner's preliminary hearing based upon the hearsay exception for former testimony of an unavailable witness pursuant to Tennessee Rule of Evidence 804(b)(1). Mr. Antonio Hawkins testified under oath at the preliminary hearing, identified the Petitioner as the perpetrator who pointed the gun in his face, and offered testimony about the robbery and shooting of his brother that was consistent with his statements to others, as well as the trial testimony of the other occupants of the house. The State introduced recordings of telephone calls made by the Petitioner from jail during which he discussed a gun and the need to discard it, as well as plans to bribe, threaten, and otherwise coerce witnesses to either refuse to testify or offer favorable testimony. Therefore, we conclude that the evidence from the investigation of the homicide was not material in that the evidence would not have cast "the whole case in such a different light as to undermine confidence in the verdict." *Irick*, 973 S.W.2d at 657(quoting *Edgin*, 902 S.W.2d at 390).

Accordingly, the Petitioner failed to establish that he is entitled to relief pursuant to *Brady* as a stand-alone claim. He likewise failed to establish that trial counsel's failure to raise a *Brady* claim in the motion for new trial constituted ineffective assistance of counsel. Trial counsel cannot be faulted for failing to raise a *Brady* claim upon which the Petitioner would not have prevailed. Any deficiency in trial counsel's failure to raise the claim did not result in prejudice.

Finally, the Petitioner asserts that trial counsel was ineffective in failing to object to the State's nondisclosure of the evidence based upon *Giglio v. United States*, 405 U.S. 150 (1972), and in failing to raise the issue in the motion for new trial. However, the Petitioner waived this issue by failing to provide any argument or cite to any authority to support his claim. See Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."); see also Tenn. R. App. P. 27(a)(7) (A brief shall contain "[a]n argument ... setting forth ... the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate reference to the record."). The Petitioner also argues as stand-alone claims that the prosecutor had a duty under *Giglio* and *Jencks* to provide the statements of the witnesses to trial counsel. These stand-alone claims are not appropriate in this appeal because they could have been raised

on direct appeal, and the Petitioner also waived the issues by failing to support his claim with argument or citations to any authority. *See* T.C.A. § 40-30-106(g); Tenn. Ct. Crim. App. R. 10(b).

CONCLUSION

Upon reviewing the record, the parties' briefs, and the applicable law, we affirm the judgment of the post-conviction court.

JOHN EVERETT WILLIAMS, PRESIDING JUDGE