

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

Assigned on Briefs September 10, 2013

**LOUIS MAYES v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Shelby County**  
**No. 0604104 James M. Lammey, Jr., Judge**

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**No. W2012-01470-CCA-R3-PC - Filed December 18, 2013**

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The Petitioner, Louis Mayes,<sup>1</sup> contends that both his transfer counsel and his trial/appellate counsel rendered the ineffective assistance of counsel in the juvenile and trial courts, respectively, and that the post-conviction court erred in denying post-conviction relief. Specifically, he alleges that transfer counsel failed to properly prepare for the transfer hearing and that his trial/appellate counsel failed to include a key witness at the suppression hearing and was deficient on appeal for failing to challenge the trial court's denial of his suppression motion. Upon consideration of the relevant authorities and the record, we affirm the judgment of the post-conviction court.

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

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

Reginald E. Shelton, Memphis, Tennessee, for the appellant, Louis Mayes.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Senior Counsel; Amy P. Weirich, District Attorney General; and Glen Baity, Assistant District Attorney General; for the appellee, State of Tennessee.

**OPINION**  
**FACTUAL BACKGROUND**

The record reflects that on May 4, 2006, the Petitioner was indicted for the first degree premeditated murder of Christopher Wallace. After a jury trial, the Petitioner was convicted as charged and was ultimately sentenced to life in prison, without parole. A full recitation

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<sup>1</sup> The Petitioner is also referred to as "Louis Mays" in the record.

of the underlying facts of this case can be found in the Petitioner's direct appeal. See State v. Louis Mayes, No. W2007-02483-CCA-R3-CD, 2009 WL 1312629, at \*1-4 (Tenn. Crim. App. May, 11, 2009), perm. app. denied, (Tenn. Oct. 19, 2009); see also Louis Mayes v. State, No. W2013-00614-CCA-MR3-CO, 2013 WL 6164467 (Tenn. Crim. App. Nov. 21, 2013). On April 27, 2010, the Petitioner filed a timely petition for post-conviction relief from his convictions, and post-conviction counsel subsequently filed an amended petition clarifying the grounds for relief. An evidentiary hearing on the merits of those consolidated petitions was conducted on February 24, 2012; March 7, 2012; and concluded on April 11, 2012. The following evidence, as relevant to this appeal, was adduced at those hearings.<sup>2</sup>

Transfer counsel testified that he had no independent recollection of the facts involving this case and that he also did not have any notes to reference during the hearing. However, he testified that, when he conducted the Petitioner's transfer hearing, he had been a public defender for twenty-two years and had been doing transfer hearings in juvenile court for approximately one year. Transfer counsel also testified that he normally informed the client that it was their decision whether to testify and that he would also explain the risks and benefits involved in that decision. According to transfer counsel, he would typically contact family members to inquire whether a client had any history of mental illness prior to a hearing, and he explained that he would have pursued such an avenue if he "knew that there was a problem."

Transfer counsel testified that it was his common practice not to call any witnesses at transfer hearings due to time constraints and heavy case loads, instead electing to focus on cross-examining the State's witnesses. Transfer counsel explained that he conducted several transfer hearings a day when working in the juvenile court, that he often only had a few days' notice before a scheduled hearing date, and that "normally it was either have the hearing or let it be bound over." Further, transfer counsel stated that he generally did not conduct any investigation or look into any issues involving arrest or custodial interrogation prior to transfer hearings because his focus was on keeping the Petitioner in juvenile court. He further testified that his amount of preparation depended largely on "whether there was enough evidence there for the referee to decide to keep [the client] in juvenile court[.]" In response to questions from the court, transfer counsel testified that he believed it was likely, given that the Petitioner had over sixteen "contacts" with the juvenile court, that the Petitioner would have gotten transferred to criminal court. Transfer counsel explained that "contacts" with the juvenile court are not limited to delinquent acts and encompass issues such as truancy, runaways, and family-related conflicts. The Petitioner's juvenile record was presented, and the post-conviction court took notice of its contents.

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<sup>2</sup> Only the relevant testimony from transfer counsel and the Petitioner at the evidentiary hearing is provided below. Several other witnesses testified at the hearing, but their testimony is not relevant to the disposition of this appeal.

The Petitioner testified that he did not feel that he was properly represented in juvenile court. The Petitioner further testified that he only met with transfer counsel for approximately three minutes prior to his transfer hearing and that he was not informed of any right to appeal the juvenile court's decision. The Petitioner also testified that he was not informed of any right to, nor did transfer counsel seek, a continuance to give them a chance to prepare for the transfer hearing. He explained that he had no opportunity to do any investigation or discuss any legal issues involving his case prior to the hearing, that he was unaware of any right to discovery materials, and that he had no opportunity to develop a strategy to utilize at the transfer hearing. The Petitioner admitted on cross-examination that his interaction with the juvenile court included approximately thirty family complaints, that sixteen of those "contacts" with the juvenile court involved him specifically, that the sixteen involved delinquent acts such as disorderly conduct, and that he had previously been sent to a juvenile detention facility.

After taking the matter under advisement, the post-conviction court denied relief and issued the following findings, as relevant to this appeal:

Petitioner fails to demonstrate with clear and convincing evidence that transfer counsel failed to effectively represent the Petitioner. Transfer hearings are numerous; transfer counsel normally do not put on any proof and rarely have more than a day or two to prepare for each client's hearing. Transfer Counsel testified he lacked a file from this case; but that he always informs his client of their right to take the witness stand.

Because there is no evidence transfer counsel failed to inform Petitioner of this right, that claim is meritless. Also, because the record demonstrates that first degree murder charges are always transferred to adult court—except where exceptional circumstances exist like the individual is rather young—and because there is no evidence that transfer counsel should have obtained a mental evaluation, Petitioner fails to meet the clear and convincing burden and this claim is without merit.

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Petitioner argues that Trial Counsel rendered ineffective assistance for failing to object to the testimony of Vivian Massey who testified in detail as to Petitioner's gang affiliation and rank. Petitioner argues that Trial Counsel's failure to object to the State's introduction of this evidence, after the State already closed its case-in-chief, prejudiced Petitioner. This claim is without merit, however, because Petitioner fails to meet the first Strickland prong: a

failure that renders this issue moot.

Trial Counsel testified that he did, in fact, object to the State's introduction of Vivian Massey's testimony, but that the trial court overruled the objection. Further, Trial Counsel testified he raised this issue in the motion for new trial and subsequently did not bring it up on appeal because, . . . [he] felt that that was not a viable appeal issue." Because, Trial Counsel's "tactical and strategic choices" will not be second guessed by the court, See Campbell[v. State,] 904 S.W.2d [594,] 596[(Tenn. 1995)], and because Trial Counsel did, indeed, object to the lay witness testimony; the issue is without merit.

This appeal follows.

### ANALYSIS

The Petitioner contends that he received the ineffective assistance of transfer counsel at his juvenile court transfer hearing, alleging that transfer counsel failed to thoroughly investigate the facts of the case, properly prepare for the transfer hearing, and adequately represent the Petitioner. He also contends that his trial/appellate counsel also rendered ineffective assistance at trial and on direct appeal: counsel (1) failed to object to Correctional Officer Vivian Massey's testimony regarding the Petitioner's alleged gang affiliation at trial and (2) failed to raise on direct appeal an issue challenging the trial court's denial of his motion to suppress statements the Petitioner made to Sergeant Caroline Mason about his gang affiliations. The State responds that the Petitioner has waived review of the issue involving Officer Massey and, alternatively, that the post-conviction court properly denied relief because the Petitioner failed to show that either transfer counsel's or trial/appellate counsel's performance was deficient or prejudicial.

Petitions for post-conviction relief are governed by the Post-Conviction Procedure Act. Tenn. Code Ann. §§ 40-30-101 to -122. To obtain relief, the petitioner must show that his conviction or sentence is void or voidable because of the abridgement of a constitutional right. Tenn. Code Ann. § 40-30-103. The petitioner must prove his factual allegations supporting the grounds for relief contained in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(2)(f); see Dellinger v. State, 279 S.W.3d 282, 293-94 (Tenn. 2009). Evidence is clear and convincing when there is no substantial doubt about the accuracy of the conclusions drawn from the evidence. Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

The post-conviction court's findings of fact are conclusive on appeal unless the evidence in the record preponderates against them. See Nichols v. State, 90 S.W.3d 576, 586 (Tenn. 2002) (citing State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999)); see also Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). The petitioner has the burden of establishing that the evidence preponderates against the post-conviction court's findings. Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). This court may not re-weigh or reevaluate the evidence or substitute its inferences for those drawn by the post-conviction court. Nichols, 90 S.W.3d at 586. Furthermore, the credibility of the witnesses and the weight and value to be afforded their testimony are questions to be resolved by the post-conviction court. Bates v. State, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997).

### *I. Ineffective Assistance of Counsel*

Ineffective assistance of counsel claims are regarded as mixed questions of law and fact. State v. Honeycutt, 54 S.W.3d 762, 766-67 (Tenn. 2001). Thus, the trial court's findings of fact underlying a claim of ineffective assistance of counsel are reviewed under a de novo standard, accompanied with a presumption that the findings are correct unless the preponderance of the evidence is otherwise. Fields, 40 S.W.3d at 458 (citing Tenn. R. App. P. 13(d)). The trial court's conclusions of law are reviewed under a de novo standard with no presumption of correctness. Id.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the defendant to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockart v. Fretwell, 506 U.S. 364, 368-72 (1993). A defendant will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley, 960 S.W.2d at 580. The performance prong requires a defendant raising a claim of ineffectiveness to show that counsel's representation was deficient, thus fell below an objective standard of reasonableness or was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The prejudice prong requires a defendant to demonstrate that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." Id. Failure to satisfy either prong results in the denial of relief. Id. at 697. The Strickland standard has also been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

Both the United States Supreme Court and the Tennessee Supreme Court have

recognized that the right to such representation includes the right to “reasonably effective” assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland, 466 U.S. at 687 (1984); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). In reviewing counsel’s conduct, a “fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland, 466 U.S. at 689. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). “Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance.” Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

#### *A. Transfer Counsel*

The Petitioner contends that transfer counsel was ineffective for (1) failing to file appropriate motions, thereby precluding the Petitioner from several possible defenses; and (2) failing to sufficiently investigate and analyze the nature of Petitioner’s arrest, custodial interrogation, and investigative witness statements possessed by the State regarding the Petitioner’s first degree murder charge. The Petitioner asserts that these failures “essentially left [him] with no viable option other than to ‘be indicted and transferred to criminal court.’” The State responds that the Petitioner has failed to show that any deficiency by transfer counsel resulted in prejudice to the Petitioner. We agree with the State.

The juvenile court has original jurisdiction over children who are alleged to be delinquent. Howell v. State, 185 S.W.3d 319, 326 (Tenn. 2006); State v. Hale, 833 S.W.2d 65, 66 (Tenn. 1992); see Tenn. Code Ann. § 37-1-134(a) (2003). Section 37-1-134(a) (1)-(4) provides the circumstances in which a juvenile court “shall” transfer a juvenile accused of conduct that constitutes a criminal offense to the criminal court to be tried as an adult. Howell, 185 S.W.3d at 329. The juvenile must be at least sixteen years old at the time of the offense or, if under sixteen, be charged with certain enumerated offenses, as relevant here first degree murder, and be provided with notice and a hearing. Tenn. Code Ann. § 37-1-134(a) (1)-(3). During the hearing, the juvenile court must find “reasonable grounds to believe” that the juvenile committed the delinquent act as alleged, that the juvenile “is not committable to an institution for the mentally retarded or mentally ill,” and that the community’s interests require legal restraint or discipline of the juvenile. Id. at (a) (4)(A)-(C). Thus, a transfer hearing involves three inquiries: (1) whether probable cause exists; (2) whether the juvenile is mentally disturbed; and (3) whether the juvenile is amenable to juvenile discipline. See id. Unless these grounds are found by the juvenile court, transfer from juvenile court to criminal court is subject to the juvenile court’s discretion. Id.; Howell, 185 S.W.3d at 329. In making its determination, the juvenile court must consider, but is not

limited to, the following:

- (1) The extent and nature of the child's prior delinquency records;
- (2) The nature of past treatment efforts and the nature of the child's response thereto;
- (3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
- (4) Whether the offense was committed in an aggressive and premeditated manner;
- (5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and
- (6) Whether the child's conduct would be a criminal gang offense, as defined in § 40-35-121, if committed by an adult.

Tenn. Code Ann. § 37-1-134(b).

At the post-conviction hearing, transfer counsel readily admitted that he had no time to investigate cases assigned to him prior to the transfer hearing. Rather, he focused on cross-examining the State's witnesses to accomplish his stated goal of keeping his client in juvenile court. According to the post-conviction court, such is "the nature of the beast" regarding transfer hearings in the Shelby County Juvenile Court. However, it is well-settled that "counsel has a duty to make reasonable investigations or to make a reasonable decision that [render]s particular investigations unnecessary." Strickland, 466 U.S. 691. Transfer counsel had no independent recollection of the facts involving this case and did not have any notes he could reference to shed any light on why he failed to conduct any investigation in this particular case. Our review of the record reveals that transfer counsel's lack of investigation was not the result of a professionally reasonable decision but, rather, a product of the procedures and common practices in the Shelby County juvenile court. As such, we conclude that transfer counsel's representation fell below the reasonable standard of competence and was, therefore, deficient. Transfer counsel's assertion that it was his common practice not to call any witnesses at transfer hearings due to time constraints and heavy case loads does not alleviate his duties under Strickland. Taking time to properly investigate and prepare a case is the foundation of effective legal representation, and we are unaware of a "heavy docket" exception to the right to counsel.

Despite our conclusion that transfer counsel's representation fell below an objective standard of reasonableness, the Petitioner cannot prevail because he has failed to demonstrate that this deficient performance prejudiced him.<sup>3</sup> See Strickland, 466 U.S. at 687; Cooper, 849 S.W.2d at 747. Transfer counsel testified that almost all first-degree murder cases were transferred to the criminal court, save a few exceptional cases where the defendant was very young or exhibited an extreme mental disturbance. The Petitioner does not contend that he has any mental illness nor does he present any circumstance that might be considered "exceptional" that could have persuaded the juvenile court to retain jurisdiction over his case.<sup>4</sup> Regarding the Petitioner's allegation that transfer counsel was deficient for failing to "file any motions that would have presented Petitioner with reasonable options in light of the immediate implications of the first degree murder charge[,]" the Petitioner has failed to identify what motions he believed should have been filed and has presented no evidence that filing any such motion would have prevented his case from being transferred to the criminal court.

The record reflects that the Petitioner had over sixteen "contacts" with the juvenile court prior to the instant case; that this case involved an aggressive, premeditated offense against a person; and that the offense was gang-related. We, therefore, conclude that the juvenile court properly considered the factors enumerated in Tennessee Code Annotated section 37-1-134, finding that the Petitioner met the requirements for transfer to criminal court, and that it was reasonable for the juvenile court to believe that the Petitioner committed the crimes for which he was charged and that the interests of the community required that the child be put under legal restraint or discipline. Because the Petitioner met the criteria set out in Tennessee Code Annotated section 37-1-134(a), the juvenile court was required to transfer his case to the criminal court. See Tenn. Code Ann. § 37-1-134(a) (stating that the disposition of the child shall be as if the child were an adult if the statutory requirements listed therein are met). The Petitioner has failed to show how any investigation, additional preparation, or other action by transfer counsel would have resulted in the juvenile court's retaining jurisdiction over his case. Therefore, he has failed to demonstrate prejudice

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<sup>3</sup> Because transfer counsel did cross-examine the State's witnesses, his representation did not rise to the level of deficiency in which prejudice is presumed. See State v. Cronin, 466 U.S. 648, 659, n.25 (Tenn. 1984) (concluding that "a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Further, the court notes that the United States Supreme "Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.").

<sup>4</sup>The Petitioner did allege in his petition for post-conviction relief that transfer counsel was deficient for failing to request a mental evaluation on the Petitioner's behalf. However, this issue appears to be abandoned on appeal and, to the extent that it is not, has nevertheless been waived for failure to present an expert witness attesting to the Petitioner having some mental incapacity. See Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990).



and is not entitled to relief on this issue.

*B. Trial/Appellate Counsel<sup>5</sup>*

The Petitioner contends (1) that trial counsel was ineffective on appeal for failing to raise as error the trial court's denial of the motion to suppress his statement given during the interview with Sergeant Mason because his Miranda waiver was not knowing and voluntary. Also, the Petitioner contends (2) that his trial counsel was ineffective at trial for failing to call Officer Massey to testify at the suppression hearing and challenge the Petitioner's statements to her on Miranda grounds. We discern that the Petitioner is essentially alleging that trial counsel was ineffective for failing to include the Petitioner's statements to Officer Massey in the suppression motion. The State responds, first, that the issue involving trial counsel's alleged failure to raise the trial court's denial of the suppression issue on appeal was waived for failing to argue it on post-conviction and that, waiver notwithstanding, the Petitioner has failed to show any deficiency by trial counsel nor any resulting prejudice regarding either issue.

After a thorough review of the record, we conclude that these issues have been waived for failure to raise them in the petition for post-conviction relief. Tennessee Code Annotated section 40-30-104, of the Post-Conviction Procedures Act, states in relevant part,

(d) The petitioner shall include all claims known to the petitioner for granting post-conviction relief and shall verify under oath that all the claims are included.

(e) The petitioner shall include allegations of fact supporting each claim for relief set forth in the petition and allegations of fact explaining why each ground for relief was not previously presented in any earlier proceeding. The petition and any amended petition shall be verified under oath. Affidavits, records or other evidence available to the petitioner supporting the allegations of the petition may be attached to it.

Tenn. Code Ann. § 40-30-104(d), (e).

Further, section 40-30-106 of the Post-Conviction Procedure Act provides guidance for when a claim is not included:

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<sup>5</sup>The Petitioner was represented by the same attorney both at trial and on appeal. For the sake of uniformity, trial/appellate counsel will hereinafter be referred to as trial counsel.

(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 unless:

(1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or

(2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

Id. at § 40-30-106(g) (1), (2).

The record reflects that the Petitioner cited, in his petition for post-conviction relief, trial counsel's failure to object to the admission of Officer Massey's testimony at trial in that she was not qualified as a gang expert; this is the only time Officer Massey is mentioned in the petition. Nothing in the record demonstrates that the Petitioner ever cited trial counsel's failure to raise, on appeal, the trial court's denial of his suppression motion as a ground supporting his claim of ineffective assistance. In fact, the only grounds raised in the Petitioner's consolidated petitions relating to suppression were as follows: (1) trial counsel was ineffective for failing to raise a Fourth Amendment illegal arrest violation during the suppression hearing,<sup>6</sup> and (2) trial counsel was ineffective for failing to have evidence suppressed based on unreliable and unconstitutional affidavits of complaint. At the hearing, the post-conviction court addressed the Petitioner's allegation that trial counsel was ineffective for failing to object to Officer Massey's testimony and found that it was moot because trial counsel did in fact object to this testimony and even raised it in the motion for a new trial. However, because the Petitioner did not raise the grounds that he now presents on appeal in his petition for post-conviction relief, the post conviction court did not have an opportunity to rule on the merits of those issues.

The Petitioner now implores this court to conclude that trial counsel was ineffective

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<sup>6</sup> We have concluded that this issue was not properly raised on appeal. On page 18 of his brief, the Petitioner does briefly state, in the middle of his argument regarding trial counsel's failure to raise the trial court's denial of his suppression motion, "Petitioner submits that the post-conviction court erred in concluding that appellate [trial] counsel addressed any issues surrounding the illegal arrest at the suppression hearing." However, this statement is only mentioned in passing; all previous and subsequent statements address the stated issue regarding the trial court's denial of his suppression motion. Further, to the extent that this extraneous comment could be liberally construed as fairly raising the issue, we decline to address it on appeal because the Petitioner has failed to cite to the record, include references to appropriate authorities, or support this issue with argument. See Tenn. Ct. Crim. App. R. 10(b).

for failing to call Officer Massey to testify at the suppression hearing regarding her interview with the Petitioner and for failing to challenge the trial court's denial of his suppression motion on direct appeal. However, as evidenced by the record, the Petitioner has raised these particular issues involving the suppression hearing for the first time on appeal; it is well-settled in this court that issues raised for the first time on appeal will be treated as waived. State v. Johnson, 970 S.W.2d 500, 508 (Tenn. Crim. App. 1996); see Patrick Thurmond v. State, No. M2005-00214-CCA-R3-PC, 2006 WL 680924, at \*7 (Tenn. Crim. App. Mar. 15, 2006) ("A post-conviction petitioner may not raise grounds on appeal that were not alleged in the petition for post-conviction relief."). As there is no evidence that he meets any exception to this established law, the Petitioner is not entitled to relief on this issue.<sup>7</sup>

### CONCLUSION

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

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D. KELLY THOMAS, JR., JUDGE

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<sup>7</sup> We note that despite the State's waiver argument in its brief, the Petitioner filed a mislabeled reply brief in which he still failed to address the State's contention that his failure to raise one of the issues now presented for review in his post-conviction petition precluded our review on appeal nor did he proffer any argument that he met one of the exceptions to the general rule outlined in Tennessee Code Annotated section 40-30-106(g).