

THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
July 26, 2022 Session

**FILED**  
02/03/2023  
Clerk of the  
Appellate Courts

**EDWIN ORLANDO MILLAN v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Bradley County  
No. 19-CR-364 Andrew Freiberg, Judge**

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**No. E2021-00366-CCA-R3-PC**

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The Petitioner, Edwin Orlando Millan, appeals from the Bradley County Criminal Court’s denial of his petition for post-conviction relief from his filing a false police report and tampering with evidence convictions. The post-conviction court granted relief in connection with the filing a fraudulent insurance claim conviction after determining that the Petitioner received the ineffective assistance of trial counsel. On appeal, the Petitioner contends that the court erred by denying relief on his remaining convictions because (1) he received the ineffective assistance of counsel, (2) the State elicited false trial testimony in violation of his due process rights, (3) the State failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 376 U.S. 83 (1986), and (4) he is entitled to relief pursuant to the cumulative error doctrine. We affirm the judgment of the post-conviction court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER and J. ROSS DYER, JJ., joined.

Megan A. Swain (on appeal) and Luke Shipley (on appeal), Knoxville, Tennessee; and Stephen M. Hatchett (at hearing), Athens, Tennessee, for the appellant, Edwin Orlando Millan.

Jonathan Skrmetti, Attorney General and Reporter; Samantha L. Simpson and Edwin Alan Groves, Jr., Assistant Attorneys General; and Stephen D. Crump, District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The Petitioner’s convictions relate to his participation in an agreement with Steven Crisp to stage the theft of Mr. Crisp’s motorcycle in an effort to obtain fraudulent insurance proceeds. The Petitioner was initially charged with alternative counts of official

misconduct, conspiracy to file a false or fraudulent insurance claim, filing a false insurance claim, initiating a false police report, and tampering with evidence. The trial court *sua sponte* dismissed the official misconduct and conspiracy charges as time-barred by the statute of limitations. At the trial, the Petitioner was convicted of filing a false insurance claim, filing a false police report, and tampering with evidence, for which he received concurrent three-year sentences to serve. The facts of the case were summarized by this court in the Petitioner's previous appeal:

At the defendant's October [2016] trial, Mr. Crisp testified that he met the defendant in 2011 when he and the defendant both purchased the same model 2011 Yamaha Stryker motorcycle at a Yamaha motorcycle dealer. He said that he and the defendant "pretty much became friends after that" and that they played golf, worked out, and rode motorcycles together.

Mr. Crisp testified that he purchased the Yamaha motorcycle, trading in a used motorcycle he owned and financing the net purchase price through Superior Financial Company. Mr. Crisp said that he made timely monthly payments on the Yamaha motorcycle until he went through a divorce. Following the divorce, he became delinquent on his payments. At that point, Mr. Crisp tried to sell the motorcycle on Craigslist, but he "owed more than it was actually worth at the time." Mr. Crisp said that he discussed his inability to sell the motorcycle with the defendant, and the defendant "said, well don't sell it, and we can take care of it and make it disappear and you won't owe anything."

Mr. Crisp testified that the defendant, who was at that time a Cleveland Police Department ("CPD") Officer, told Mr. Crisp to bring the motorcycle to Marco's Auto Concepts ("the shop") in Cleveland, which Mr. Crisp believed was owned by the defendant's "friend," on a day when the defendant was on duty. The defendant directed Mr. Crisp to "bring it to his shop and drop it off. And then go get something to eat. And then report it stolen. And he would get the call. And he would make it disappear." Mr. Crisp said that on August 2, 2013, he rode the motorcycle to the shop and that, when he arrived, the defendant was the only person there. Mr. Crisp's fiancée picked him up from the shop, and they drove to a nearby restaurant. After they finished eating, Mr. Crisp telephoned 9-1-1 and reported that the motorcycle had been stolen. A recording of Mr. Crisp's 9-1-1 call was played for the jury.

After the call was made, the defendant, who was on duty with the CPD that day, arrived to take a report of the offense. Mr. Crisp testified that the defendant told Mr. Crisp “that he’d put the report in somebody else’s name since me and him were friends.”

Mr. Crisp said that, after making the theft report and at the defendant’s suggestion, he filed a claim for the loss of the motorcycle with GEICO insurance company. He said that GEICO made a payment to Superior Financial but that the payment “didn’t pay [the motorcycle] completely off.”

Mr. Crisp acknowledged that he was granted immunity by the district attorney general in exchange for his testimony against the defendant.

Christina Hernandez testified that she “worked for” the defendant as “the supervisor” at the shop . . . from August 2014 until the shop closed. Ms. Hernandez recalled that in August 2015, the defendant asked her “to get rid of” a motorcycle frame that had been “at the body shop at the top” “since . . . before [she] started working there.” She testified that the defendant said that “[h]e didn’t care where it went or what happened, just get rid of it.” She said that the defendant brought the motorcycle down the stairs and “scratch[ed] the VIN off of it” using “a raz[o]r blade that we use for the body work.”

Approximately two days later, Ms. Hernandez returned to the shop at night, retrieved the motorcycle frame, placed it into her truck, and drove to a mountainside in Polk County, where she “threw it off the side.” Afterwards, she telephoned the defendant and “told him that everything was done.” The defendant told her she had done a “good job” and promised to call her later.

Ms. Hernandez said that after she “had gotten some threats that [she] was going to be framed for the robbery of this,” she contacted Bill Cherry via “the drug task force line” to report what she had done at the defendant’s direction. Ms. Hernandez acknowledged that she had been offered immunity from prosecution in exchange for her truthful testimony at the defendant’s trial.

During cross-examination, Ms. Hernandez testified that the shop belonged to the defendant and a man named Marco Molina. She agreed that Mr. Molina was responsible for the day to day operations of the body shop as well as performing the work. She acknowledged having told defense counsel that she was afraid of Mr. Molina because she “had gotten threats” from Mr. Molina’s associates. She described having received threats, having

been attacked by someone wielding a baseball bat, having her car damaged, and having her apartment set afire as methods of intimidating her. She said that she “didn’t know whose side” the threats “would have c[o]me from,” but she reiterated that she was afraid of Mr. Molina and “his people.” She acknowledged that she had telephoned the defendant to report the threats and intimidation.

At some point prior to August 2015, Ms. Hernandez reported to the defendant after Mr. Molina accused her of the thefts, that Mr. Molina was stealing money from the business. She said that, ultimately, the defendant and Mr. Molina “[s]plit” due to “[m]oney and the differences.” She recalled that Mr. Molina was not “a good boss” and that he sold vehicles that belonged to the shop but told her “not to put it on the paperwork.” Ms. Hernandez said that she told the defendant about Mr. Molina’s activities “because that was [her] job.”

Ms. Hernandez testified that when the defendant asked her to get rid of the motorcycle frame, he told her that “there was something wrong with it,” which she interpreted to mean “that it was hot.” Ms. Hernandez said that the motorcycle engine was in the back of the shop on a table. She said that she was asked to dispose of the engine as well as the frame but that she “didn’t know they went together” “[b]ecause there was parts all over the body shop” during the entire time she worked there. Ms. Hernandez testified that she did not know Mr. Crisp.

Ms. Hernandez recalled that after the shop closed, she and another employee helped the defendant clean the shop and that, during the cleaning process, they “loaded a lot of stuff up.” Afterward, Mr. Molina asked her what had happened to the motor and the frame. She hypothesized that Mr. Molina’s sudden concern was triggered when “the police came looking for the stuff” because he knew that it was stolen.

On redirect examination, Ms. Hernandez recounted a time when the defendant came to her apartment to ask why she had not responded to his text messages. She said that the defendant claimed that he was worried about her and “showed [her] a gun that he had. . . . And he said that he had the protection.” On another occasion, the defendant came to Ms. Hernandez’s place of work and asked her if she “was okay” and if she “had talked to anybody” or “heard anything.”

Tennessee Highway Patrol (“THP”) Sergeant Thomas Clower testified that he began an investigation into the disappearance of a Yamaha Stryker motorcycle in 2015 after an investigator from the District Attorney’s Office . . . provided him with information that led him to go “to Polk County up on Chilhowee Mountain” to look for a motorcycle frame and an engine. Upon following the directions provided, he located a motorcycle frame “off a really steep embankment.” Sergeant Clower said that the frame “had nothing left on it, except for the full 17 digit” vehicle identification number, or VIN. He recalled that “there was some little bit [of] alteration, it looked like, just some scratches,” but that, otherwise, the VIN was readable.

Sergeant Clower relayed the VIN to a THP dispatcher, who, in turn, checked the number in the National Crime Information Center database. The database indicated that the vehicle had been reported stolen, and Sergeant Clower retrieved the police report of the theft from the CPD. The report listed Officer Scott Criddle as the reporting officer. Sergeant Clower spoke with Officer Criddle and then listened to the recording of the 9-1-1 call reporting the theft. He said that, upon listening to the recording, “it appeared that that wasn’t Scott Criddle’s voice on the radio answering the call” but was instead the defendant’s. After listening to the recording, Sergeant Clower obtained the “CAD” report, which he described as “an automated dispatch log” of the 9-1-1 call that “tells the time it was . . . received, dispatched,” as well as the name of the officer who responded and the time of the officer’s arrival at the scene. The CAD report identified the defendant by his car number, 3355, and indicated that he had responded to the call.

Because of the discrepancies between the 9-1-1 recording, the CAD report, and the theft report, Sergeant Clower obtained the hourly time sheets for Officer Criddle and the defendant from the CPD. Those records indicated that the defendant was on duty from 6:00 a.m. until 4:00 p.m. on August 2, 2013, and that Officer Criddle was off duty that day.

At that point, Sergeant Clower interviewed Mr. Crisp. Based upon the information he received during that interview, Sergeant Clower contacted GEICO Insurance Company to obtain any records related to the theft of Mr. Crisp’s Yamaha.

During cross-examination, Sergeant Clower reiterated that he did not find a motorcycle engine.

CPD Officer Scott Criddle testified that he was not on duty on August 2, 2013, that he did not investigate a motorcycle theft on August 2, 2013, and

that he did not prepare a police report for a theft occurring on August 2, 2013. He said that in 2013, his radio number was 3363 and that the defendant's was 3355.

James Bowers, a representative of GEICO Insurance Company testified that Mr. Crisp filed a claim for the loss of his motorcycle on August 2, 2013. He said that, following an investigation, the company paid Superior Financial Services \$8,275.67, which Mr. Bowers said was the fair market value of the motorcycle as determined by a valuation company minus Mr. Crisp's deductible. He said that the valuation company "determined the actual cash value of the motorcycle" to be \$8,581.

During cross-examination, Mr. Bowers identified a "loss history" report generated by the GEICO claims department and indicated that "this loss history is usually a standard report that's run to determine does this create a red flag for further investigation."

The defendant testified that he was hired by the CPD following his honorable discharge from the Navy in 2008. He said that in 2011 or 2012, he was approached by Mr. Molina, who was "into the paint business" with another individual that "he didn't trust" and who wanted the defendant to "help [him] get this business legitimate, to get him out of a two-car garage and into an actual building and have everything done properly." The defendant agreed to go into business with Mr. Molina, and the two men named their resulting business Marco's Auto Concepts because Mr. Molina "was the actual talent." He said that Mr. Molina was the operations manager and that they hired Ms. Hernandez in 2014. The defendant testified that the primary business of Marco's Auto Concepts was "auto body collision repair" but that the shop also provided tire service and the painting of items other than automobiles. He said, "We painted pretty much anything that we could paint, we would paint for money." He described his role as a silent partner and said that his association with the shop "was more of an investment thing for" him. He recalled that he only came to the shop occasionally because he "worked on an average of 60 to 70 hours a week at the police department."

The defendant said that he met Mr. Crisp at a local motorcycle shop when the two purchased the same type of motorcycle. He said that, after they met, he and Mr. Crisp went to the gym occasionally. The defendant recalled having seen Mr. Crisp at the shop after he asked the defendant about having some work done. The defendant said that he directed Mr. Crisp to Mr. Molina and that, on several occasions thereafter, he drove by the shop while on duty and saw both Mr. Crisp and Mr. Crisp's girlfriend there at the shop.

The defendant testified that in its first year, the shop “did moderately well” financially but that “after that it started to dwindle.” In addition, the defendant began to observe accounting discrepancies at the business. The defendant said that he eventually severed his business relationship with Mr. Molina and that, afterwards, he was forced to close the location because the building’s owner increased the rent. He testified that, in the process of cleaning out the building, the loft was emptied of its contents. He said that “everything was placed in a big pile in the middle of the bay” and then “loaded into a trailer and taken to the city dump.” The defendant insisted that he told everyone working for him “that all these items needed to be taken . . . to the dump and disposed of.”

The defendant recalled having seen the Yamaha motorcycle frame when he removed items from the loft area. He said that, at the time, he did not realize that the motorcycle frame had belonged to Mr. Crisp. He denied asking Ms. Hernandez to make the frame disappear, saying, “What I advised Ms. Hernandez was, is to have the entire place cleaned up, placed in the trailer that we provided, and take it to the dump.” He said that Ms. Hernandez did not comply with his request and that “[t]he only two items that were removed were a motor and that frame.”

The defendant acknowledged that he was the first officer to respond to Mr. Crisp’s 9-1-1 call reporting the theft of the motorcycle but said that “midway through the call, Officer Criddle showed up on scene” in his patrol car. At that point, he said, he “turned over all information that [he] had gathered over to Officer Criddle.” The defendant adamantly denied having prepared or submitted the report of the theft of Mr. Crisp’s motorcycle and said that he had not even seen the report until charges were levied against him in this case. He insisted that he could not have generated a report using Officer Criddle’s name because two unique passwords were required to generate a report, and he did not know Officer Criddle’s passwords. The defendant said that he did not “believe that you can put another officer’s name on your report, unless you are adding him as a secondary unit to that report.”

The defendant denied telling Mr. Crisp that he could make the motorcycle disappear, assisting Mr. Crisp in making a false insurance claim, making a report on the theft, directing the disposal of the motorcycle, or even knowing that Mr. Crisp’s motorcycle was stolen prior to the issuance of the present indictment.

In rebuttal, Sergeant Clower testified that he asked the CPD to provide him with a copy of every CAD report from August 2, 2013, that involved Officer Criddle and that he had received none. Sergeant Clower, an officer with more than 27 years' law enforcement experience, testified that it was not common for police officers to exit their vehicles on a dispatch call without informing the dispatcher. He said that the dispatcher needs to know "who's taking the call," "who is in charge of the call," "who was going to be making the report," and "when [an officer] finished with a call . . . and [is] available for other calls." He said that all of that information is then recorded into the CAD report and that, had Officer Criddle radioed in that he had completed the call and would be preparing the report, the information would have been included in the CAD report.

Based upon this proof, the jury convicted the defendant of filing a false or fraudulent insurance claim for property valued at more than \$1,000 but less than \$10,000; initiating a false police report; and evidence tampering. Following a sentencing hearing, the trial court imposed concurrent sentences of three years for each of the convictions.

*See State v. Edwin Millan*, No. E2017-01053-CCA-R3-CD, 2018 WL 5752204, at \*1-5 (Tenn. Crim. App. Nov. 1, 2018), *no perm. app. filed*.

On August 23, 2019, the Petitioner filed a timely petition for post-conviction relief, alleging that the State (1) failed to provide favorable evidence contained in a voluminous investigative file, which had been lost or destroyed by the District Attorney's Office, (2) failed to disclose that Steven Crisp had committed perjury, wire fraud, and bankruptcy fraud, (3) failed to disclose that it declined to refer Mr. Crisp to federal authorities for prosecution, (4) failed to provide documents related to a search of Marco's Auto Concepts body shop, (5) failed to disclose evidence regarding Christina Hernandez's immunity agreement, and (6) failed to provide reports related to the investigating officers' in-car police computers. The Petitioner also raised multiple allegations of ineffective assistance of trial counsel.

After a lengthy discovery process and procedural history, which included multiple motions to compel the State to produce evidence and a deposition of the assistant district attorney who prosecuted this case in the trial court, the Petitioner filed an amended petition for post-conviction relief on February 28, 2020, based upon newly obtained evidence. The Petitioner incorporated the allegations contained in the original petition for relief and alleged in addition as follows: (1) that the State failed to disclose exculpatory or potentially exculpatory evidence regarding Ms. Hernandez's being an informant for the Drug Task Force, (2) that the State failed to disclose exculpatory or potentially exculpatory evidence in the form of an investigative report generated by Drug Task Force Director Bill Cherry,



(3) that the State failed to disclose exculpatory or potentially exculpatory evidence in the form of text messages exchanged between Director Cherry and Ms. Hernandez and to disclose that Director Cherry deleted the messages, (4) that the State failed to disclose exculpatory or potentially exculpatory evidence in the form of surveillance photographs depicting the Petitioner and Ms. Hernandez and that law enforcement officers destroyed the photographs, (5) that the State failed to disclose exculpatory or potentially exculpatory evidence in the form of statements provided by Ms. Hernandez to Sergeant Thomas Clower and Calvin Rockholt, an investigator with the District Attorney's Office, (6) that the State failed to disclose exculpatory or potentially exculpatory evidence in the form of Sergeant Buddy Mitchell's investigative file, (7) that the State failed to disclose exculpatory or potentially exculpatory evidence in the form of a search warrant affidavit that was initially sealed at the State's request, (8) that the State failed to disclose exculpatory or potentially exculpatory evidence regarding a search conducted pursuant to consent at the body shop, photographs taken during the search, and the officers' observations during the search, (12) that the State failed to disclose exculpatory or potentially exculpatory evidence by "allowing" Mr. Crisp to "breach the immunity agreement and not presenting that proof to the jury," (13) that the State failed to correct knowingly false testimony from Mr. Crisp, and (14) that the State violated the Petitioner's due process and Sixth Amendment rights by not disclosing that Ms. Hernandez was an informant because Ms. Hernandez met with trial counsel during trial preparation. The Petitioner likewise raised additional ineffective assistance claims related to the additional allegations against the State. The evidentiary hearing was held on February 28, 2020.

At the post-conviction hearing, Bradley County Sheriff Steve Lawson testified that in 2015, he was the captain who supervised the criminal investigation division at the sheriff's department. He agreed that he was "listed" as an officer who participated in the surveillance of the Petitioner and Ms. Hernandez at O'Reilly Auto Parts (O'Reilly) on September 18, 2015. Sheriff Lawson said that he neither observed any criminal activity, a confrontation, an assault, nor threatening behavior between the Petitioner and Ms. Hernandez. Sheriff Lawson recalled that he was at O'Reilly for a short time and that he had been with Investigator Calvin Rockholt. Sheriff Lawson said that he did not know anything about photographs being taken during the surveillance and later destroyed. On cross-examination, Sheriff Lawson stated that surveillance was conducted routinely during investigations in which an alleged threat might be perceived against a cooperating witness.

Bradley County Sheriff's Detective Marshal Hicks testified that he observed the Petitioner and Ms. Hernandez in the parking lot at O'Reilly. Although a report created by Drug Task Force Director Bill Cherry indicated that Detective Hicks took photographs of the Petitioner and Ms. Hernandez, Detective Hicks did not recall taking photographs. He did not recall telling anyone in the District Attorney's Office that photographs had been destroyed.

Detective Hicks testified that the Petitioner and Ms. Hernandez met in the O'Reilly parking lot and that he did not know the substance of their conversation. He did not recall any violence or threatening gestures by anyone during the meeting. He did not recall how long he was there to observe the Petitioner and Ms. Hernandez.

Drug Task Force Director Bill Cherry testified that Ms. Hernandez worked as a confidential informant with the Drug Task Force. He identified records, which were received as an exhibit and which reflected Ms. Hernandez's work and payment as a confidential informant. The records reflect, in relevant part, that Ms. Hernandez was paid \$100, \$150, \$160, and \$200 on each of four occasions in 2010. After having reviewed Ms. Hernandez's file, Director Cherry stated that it did not appear Ms. Hernandez "worked any charges off" because she was a paid informant. Director Cherry said he had been Director of the Drug Task Force for five years and that he had not been the director when Ms. Hernandez worked as an informant.

Director Cherry testified that he was involved "early on" with Ms. Hernandez's contact with the Petitioner. Director Cherry said that, at an unspecified time, Ms. Hernandez called the Drug Task Force and spoke to Lieutenant Matt Bales. Director Cherry said that he interviewed Ms. Hernandez on September 17, 2015, and that at this time, he was not aware of any criminal investigations involving Marco Molina and the Petitioner. Director Cherry said that he gave the report of his interview of Ms. Hernandez to Sergeant Thomas Clower or Investigator Rockholt. The report reflects that Ms. Hernandez sent text messages to Director Cherry's police-issued cell phone on September 17 and 18 relative to a meeting at O'Reilly. When asked why the messages were not preserved, Director Cherry said that he documented the messages in his report and that the messages did not have "any evidentiary value other than what [was] documented in the report." He said that he decided not to preserve the messages but that the messages stated that the Petitioner was at O'Reilly, that Director Cherry went to O'Reilly, and that Director Cherry asked other officers to assist in ensuring Ms. Hernandez's safety. Director Cherry agreed that he did not observe anything indicating Ms. Hernandez was unsafe.

Director Cherry testified that he did not destroy the text messages intentionally. He explained that he received a new cell phone and that he did not transfer the messages to the new phone. He recalled that in a text message, Ms. Hernandez stated that she received a telephone call from "some Hispanic male," who told her to "keep her mouth shut." When asked if the body shop was investigated by the Drug Task Force, Director Cherry said that he was unsure if any investigation was related specifically to the body shop but recalled that a Drug Task Force agent was involved in an investigation in which cocaine was sold at or near the body shop. Director Cherry did not recall if Mr. Molina was involved in a cocaine transaction with the agent. Director Cherry did not recall Ms. Hernandez stating that drug sales occurred at the body shop.

Director Cherry testified that he informed Investigator Rockholt that a “past informant” had contacted him and that the informant gave “us this information.” Director Cherry said that he did not consider Ms. Hernandez an informant any longer because her file had been “put in storage and been inactivated.” Director Cherry stated that although his report reflected Ms. Hernandez stated that police officers came to “the shop looking for the stolen motor and frame,” he did not attempt to determine the officers’ identities.

On cross-examination, Director Cherry testified that his office worked with an informant in one of three ways. He said that a person could provide information for nothing in exchange, that a person could be paid to provide information, or that a person could provide information in exchange for lowering potential criminal charges or in exchange for not having criminal charges filed. Director Cherry said that regardless of the manner of contact with an informant, the police were required to verify all information provided. He said that Ms. Hernandez was a paid informant for a short time and that she was not a paid informant in connection with the Petitioner’s case. Director Cherry said that Ms. Hernandez requested nothing and was given nothing for the information she provided in the Petitioner’s case. Director Cherry said his file reflected that Ms. Hernandez’s unlawful conduct was limited to her “dumping that frame,” which she admitted when she contacted the Drug Task Force.

Director Cherry testified that he “clean[ed] out” his cell phone regularly and that the guidance from the State was that he did not have to preserve his text messages. He said that the operation at O’Reilly, which was Ms. Hernandez’s workplace, was not conducted by the Drug Task Force and that he assisted “another agency.” Director Cherry explained that Ms. Hernandez contacted the Drug Task Force, that Ms. Hernandez expressed her fear, that he contacted Investigator Rockholt, and that he “assisted them” to ensure Ms. Hernandez’s safety. Director Cherry said that his only reason for observing the Petitioner and Ms. Hernandez was to ensure her safety, that he did not observe any criminal activity, and that he did not open an investigative file based upon his observations. He said that he did not “report this incident” at O’Reilly because he did not think there had been an “incident” to report.

On redirect examination, Director Cherry testified that Ms. Hernandez contacted the Drug Task Force because she had a “professional relationship” with and trusted the Drug Task Force members. Director Cherry was unaware that Mr. Molina told the police about the motorcycle in this case before Ms. Hernandez contacted the Drug Task Force. Director Cherry was also unaware that Ms. Hernandez’s cell phone number was in Mr. “Molina’s search warrant records for his . . . cell phone.”

A discovery receipt from the District Attorney General’s Office was received as an exhibit and reflects that thirty-four pages of discovery were given to trial counsel on December 23, 2015. The documents included the “CAD” report, case cover sheet, case

summary, criminal and driving histories of the Petitioner, an incident report, the indictment, an investigative report, a *Miranda* waiver, six pages of photographs, a property receipt, an “RMS search,” a witness list, and compact discs containing witness interviews, the 9-1-1 call, insurance documents, NCIC confirmation, and police timesheets of the Petitioner and Officer Scott Criddle.

Bradley County Sheriff’s Detective Zech Pike testified that he obtained a search warrant for the body shop. The affidavit submitted by Detective Pike was received as an exhibit. The affidavit reflects, in relevant part, that on September 14, 2015, Mr. Molina told Detective Pike and Sergeant Clower during an interview in connection with an unrelated insurance fraud matter that Mr. Molina had information about “another theft and possible fraud involving a motorcycle.” Mr. Molina stated that the Petitioner, Mr. Molina’s former business partner, brought a motorcycle to the body shop, which they co-owned, two years previously. Mr. Molina stated that the motorcycle was reported stolen and that the Petitioner had disassembled it but left the frame and engine inside the body shop. The affidavit reflects that Mr. Molina previously consented to a search of the body shop. While searching for parts belonging to a stolen motorcycle, Mr. Molina stated that the engine and frame had been removed from the body shop. Mr. Molina showed the officers where he had last seen the engine, which had been on a table in the back of the shop, and the frame, which had been upstairs. The officers saw pieces of a motorcycle inside a box, which contained a speedometer reflecting “Stryker.” The officers did not consider the speedometer “significant” at the time of the consent search because the officers did not know the “specific kind of stolen motorcycle” without the VIN number on the frame or an identifying number on the engine.

The affidavit reflects that on September 17, 2015, Ms. Hernandez contacted Director Cherry to provide information. Ms. Hernandez reported that the Petitioner contacted her three weeks previously, that he told her to “get rid” of the engine and the frame belonging to the motorcycle that had been disassembled, and that the Petitioner believed Mr. Molina had told the police during another investigation that the motorcycle had been stolen. Ms. Hernandez stated that the Petitioner wanted the engine and frame removed from the body shop to prevent it from being found. Ms. Hernandez stated that she loaded the engine and frame into a truck and that she threw both items over the side a mountain near the Chilhowee Camp Ground in Polk County. Director Cherry and Sergeant Clower later found the frame at the location described by Ms. Hernandez, and the frame reflected the VIN number. Upon investigation with the National Insurance Crime Bureau (NICB), Detective Pike obtained records reflecting that the frame belonged to a 2011 Yamaha Stryker that was reported stolen from Cleveland, Tennessee, on August 2, 2013. Detective Pike obtained the police report and the insurance claim related to the motorcycle. The police report stated that Officer Scott Criddle was the responding officer, but the computer aided dispatch (CAD) report and the recording from “police radio traffic” during the August 2, 2013 9-1-1 call showed that the Petitioner responded to the call in which

Steven Crisp reported the motorcycle stolen. Further investigation showed that Officer Criddle had not been on duty when the motorcycle was reported stolen but that the Petitioner had been on duty. Officer Criddle reported that he had been to the body shop multiple times while the business was open, that he and the Petitioner were friends, that he and the Petitioner worked the same shift at the Cleveland Police Department, and that he saw a motorcycle engine, which had been at the body shop for a couple of years, on a table in the back of the body shop.

The affidavit reflects that the pieces belonging to a motorcycle seen by the officers during the consent search were believed to be inside the closed body shop and were believed to have belonged to the motorcycle reported stolen by Mr. Crisp.

Detective Pike testified that although he and Sergeant Clower spoke to Officer Criddle during the investigation, the interview was not recorded. Detective Pike stated that although Officer Criddle recalled seeing a motorcycle engine inside the body shop, Detective Pike did not think the engine was related to this case because of the passage of time. Detective Pike said that he never personally spoke to Ms. Hernandez but that his interview of Mr. Molina on September 4, 2015, was recorded if it occurred at the justice center. Detective Pike thought, however, that the September 4 interview was in-person at Mr. Molina's "new body shop."

Detective Pike testified that on August 20, 2015, he interviewed Mr. Molina about an unrelated matter, that the interview was recorded, that Mr. Molina did not mention Mr. Crisp's motorcycle during the interview, and that Mr. Molina's statement was not the basis for the search warrant obtained by Detective Pike. Detective Pike agreed that the affidavit in support of the search warrant was sealed by the trial court on September 21, 2015, and stated that he submitted the request to seal to the trial court when he submitted the affidavit and warrant request. Detective Pike said that nobody from the District Attorney's Office authorized the request to seal the affidavit but thought he discussed obtaining a "sealing order" with an unidentified person with the District Attorney's Office.

Detective Pike testified that on September 4, 2015, at the time Mr. Molina consented to a search of the body shop, Sergeant Clower was present but that he could not recall if anyone from the District Attorney's Office was present. Detective Pike recalled, though, that Assistant District Attorney Dallas Scott was present when the search warrant was executed. Detective Pike could not identify a second person from the District Attorney's Office who was present.

Detective Pike testified that he obtained Mr. Molina's cell phone records in connection with an unrelated case and that the records showed Mr. Molina was in close proximity to the Petitioner's car when the car caught fire in Georgia.<sup>1</sup> Mr. Molina's phone records were received as an exhibit. Detective Pike stated that he did not attempt to determine if Ms. Hernandez spoke with Mr. Molina "around the time he was burning [the Petitioner's] car."

Detective Pike testified that he took photographs when the search warrant was executed at the body shop. When asked why the photographs were not provided to the District Attorney's Office, Detective Pike said, "What I thought was gonna be there, there was nothing there, so I'll take the blame for not turning them over." He said that he took less than ten photographs, and the record reflects that a disc containing fourteen photographs was provided to post-conviction counsel before the evidentiary hearing.<sup>2</sup> Detective Pike did not take photographs during the consent search.

On cross-examination, Detective Pike testified that he investigated two cases involving the Petitioner. Detective Pike stated that he investigated an alleged theft and arson of the Petitioner's Chrysler 300 at the request of the Cleveland Police Department. Detective Pike said that although he knew the Petitioner was connected to the body shop, he did not know any details about the business. Detective Pike said that he reviewed the recording of the 9-1-1 call, obtained cell phone records in connection with an unidentified person, and went to the body shop to speak with Mr. Molina. Detective Pike said that he never entered the body shop on this occasion and that he returned to the body shop when Mr. Molina consented to a search on September 4, 2015. Detective Pike said that during the consent search, he looked for evidence related to the theft and arson of the Chrysler 300. He said that at the time of the consent search, he was unaware of Mr. Crisp's motorcycle and that to his knowledge the police were not aware of any crime related to a motorcycle. He said that he did not find any evidence related to the Chrysler 300 during the consent search and that if he had known about the motorcycle in this case, he would have been interested in the pieces related to a Stryker motorcycle, which was the same type of motorcycle owned by Mr. Crisp.

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<sup>1</sup> We glean from the record that at an unspecified time, the Petitioner was charged in Tennessee with various offenses in connection with the Petitioner's car but that the case was ultimately dismissed because an alleged arson of the car occurred in Georgia. After the dismissal of the Tennessee charges, criminal proceedings were initiated in Georgia against the Petitioner and Mr. Molina.

<sup>2</sup> The photographs were received as an exhibit. Post-conviction counsel said that the photographs did not reflect anything of probative value, that the photographs existed at the time of the trial, and that they were not provided to the defense.

Detective Pike testified that when the search warrant was executed, Detective Rob Wilson, Assistant District Attorney Scott, and an unidentified person were present. He said that before the warrant was obtained, Director Cherry told him that Ms. Hernandez claimed to have disposed of the motorcycle frame. Detective Pike said that he did not find any evidence contradicting Ms. Hernandez's statement but that the search confirmed Ms. Hernandez's statement that the motorcycle parts had been removed from the body shop.

Tammy Watkins, Bradley County 9-1-1 Custodian of Records, testified that she searched records to determine if any police officers were at the body shop in 2015 in connection with a search warrant. She said that she did not find any records related to the body shop from September 2015.

Steven Crisp testified that in 2013, he filed a petition for bankruptcy but that he did not recall stating in the petition that his Yamaha Stryker motorcycle was stolen. He did not recall attending a "debtors meeting" in connection with the bankruptcy proceeding. He did not recall how many theft reports he had filed "over the years" but stated he reported a motorcycle stolen before this case. When asked about documents he submitted to GEICO Insurance Company in connection with the motorcycle, he stated that he did not recall if he spoke to Officer Criddle by telephone. Mr. Crisp did not recall if he called the Cleveland Police Department at the time the initial police report was made in order to provide the motorcycle VIN number. He did not recall how the VIN number was provided to the police.

Mr. Crisp testified that his then-fiancée and wife at the time of the evidentiary hearing was Stephanie Gentry. He said that he and Ms. Gentry were not interviewed by the Petitioner's defense counsel. He did not recall if he spoke to anyone around the time he filed the police report but did not dispute records showing he had spoken to other people.

Mr. Crisp testified that in 2015, he spoke to a Cleveland Police Department officer whose name he did not recall. He said that he was told "there would be no . . . criminal charges against" him "of any kind." He did not recall if he told police officers in 2015 that he had filed a bankruptcy petition in which he claimed the motorcycle in this case had been stolen. A Government Employees Insurance Companies' Motorcycle Theft Questionnaire completed and signed by Mr. Crisp was received as an exhibit. The document reflects, in relevant part, that Mr. Crisp reported the theft to Cleveland Police Officer Scott Criddle by telephone at 2:30 p.m., on August 3, 2013.

On cross-examination, Mr. Crisp testified that his involvement in the present case was that he lied about the theft of the motorcycle. He agreed he admitted during his trial testimony that he had lied about the motorcycle and that he had lied to the investigating police officer who contacted him about the motorcycle. Mr. Crisp agreed the District Attorney General told him that he would not be prosecuted for his criminal conduct.

On redirect examination, Mr. Crisp testified that he did not recall if he testified at the Petitioner's trial that he was contacted by a police officer to whom Mr. Crisp lied about the motorcycle having been stolen.

Marco Molina asserted his Fifth Amendment privilege against self-incrimination regarding all questions related to the motorcycle belonging to Mr. Crisp.

Cleveland Police Chief Mark Gibson testified that in August 2013, he was the "lieutenant over patrol." He stated that in 2013, patrol cars contained password-protected computers and that an officer filed a police report by completing and submitting a form on the computer. Chief Gibson said that a submitted report was sent to "an electronic location," from which a lieutenant or sergeant could retrieve the report and approve it. He thought all police officers had city-issued cell phones in 2013. He could not think of any reason Officer Criddle would not have had a cell phone in 2013.

Chief Gibson testified that when an open-records request was submitted, the request was sent to his office if the requested records were in his office's possession. Chief Gibson did not receive any open-records request relative to the Petitioner. Chief Gibson said that he did not require the District Attorney's Office to file an official open-records request. He said that the police department's records division would have been responsible for compiling records. He said that he did not know if any records requests were submitted for Officer Criddle's city-issued cell phone. Chief Gibson said, though, that documentation of any request from defense counsel would exist if counsel had submitted a request. Chief Gibson said that if an officer needed to modify a timesheet to correct an error, the officer would speak with the secretary and budget officer, Susan Jerfie, if the timesheet had already been submitted. He said that if a timesheet had not been submitted, the officer could modify it. He said, though, that if a correction were needed after the officer had been paid, the department of human resources had to correct the error. Chief Gibson stated that Officer Criddle's personnel records reflected that he was on vacation at the time Mr. Crisp's motorcycle was reported stolen. Chief Gibson did not recall if anyone requested Sergeant Buddy Mitchell's case file before post-conviction counsel's open-records request.

Chief Gibson testified that the Cleveland Police Department contacted the District Attorney's Office and that everyone decided that the Bradley County Sheriff's Department would investigate this case.

Cleveland Police Lieutenant Andy Ratliff testified that in 2013, he was the Petitioner's and Officer Criddle's Shift Sergeant. Lieutenant Ratliff agreed that he was not involved in the investigation of the motorcycle. He identified his timesheet for the week ending on August 4, 2013, and he agreed that the timesheet had been "changed." He explained that he worked six hours on Friday but that he incorrectly wrote four hours. He



said the timesheet was corrected because he had “shorted myself two hours.” He said he “would about guess” that Ms. Jerfie corrected his timesheet.

Cleveland Police Officer Scott Criddle testified that in August 2013, he was a patrol officer, that his name appeared on a police report connected to this case, and that Sergeant Clower and Detective Pike interviewed him relative to the report. Officer Criddle said that he told them that he needed to review his timesheets to determine if he worked on the day Mr. Crisp’s motorcycle was reported stolen.

Officer Criddle testified that he had been to the body shop “a few times” and that he told Sergeant Clower and Detective Pike that he had seen an “engine on a back table” in the shop. Officer Criddle said that the engine was in plain view and that nobody at the body shop attempted to restrict his access. He had been at the body shop when he wore his police uniform and “a time or two” when he wore civilian clothes. He did not recall if he had a police-issued cell phone in August 2013.

Officer Criddle testified that he did not recall if Mr. Crisp contacted him to provide the motorcycle’s VIN number after the initial police report was completed. Officer Criddle stated that neither defense counsel nor the defense investigator contacted him about the Petitioner’s case.

Cleveland Police Sergeant Walter “Buddy” Mitchell testified that he did not recall his investigation in this case. After reviewing his “case summary,” he stated he still did not recall his investigation and said that he did not understand “why there was [sic] two case summaries there.” He did not recall speaking with Mr. Crisp but did not dispute the summary reflected that he spoke to Mr. Crisp and that Mr. Crisp did not provide any information about the motorcycle. Sergeant Mitchell stated that the summary reflected his handwriting, although he had no recollection of his investigation, and that it was his work product. Sergeant Mitchell’s case summary, along with the police report reflecting Officer Criddle’s name, were received as an exhibit.

The police report reflects that on August 2, 2013, Mr. Crisp reported the motorcycle had been stolen while parked at “2nd STREET AND OAK STREET.” The report reflects the motorcycle’s VIN number and license plate number. Sergeant Mitchell’s case summary reflects that he attempted to contact Mr. Crisp on three occasions in 2013, that Sergeant Mitchell left two voicemail messages, that Sergeant Mitchell spoke once to Mr. Crisp, and that Mr. Crisp “had no information on the theft.” The summary also reflects that in May 2015, this case was transferred to the Tennessee Highway Patrol. Attached to the summary was a September 17, 2015 email from “Brady Flynn” to multiple recipients, including Sergeant Mitchell, stating that the stolen motorcycle had been found in Polk County and had been “stripped down to the frame.” Sergeant Mitchell testified that if an

alleged theft victim had confessed to lying about the theft, Sergeant Mitchell would have documented the statement in his reports and summaries.

Tennessee Highway Patrol Sergeant Thomas Clower identified a memorandum from his case file and testified that he created the memorandum, that portions of it had been redacted, that he did not redact it, and that he did know who did. Sergeant Clower identified his case file, the contents of which were received as an exhibit. He said he provided his case file to the District Attorney's Office. Although he recalled the consent search and the execution of the search warrant at the body shop, he did not recall why the searches were not mentioned in his investigative file. When asked why photographs taken during the execution of the search warrant were not contained in the case file, he said that he did not know the reason and that he had not taken any photographs.

Sergeant Clower testified that he and Detective Pike investigated this case. Sergeant Clower did not recall if anyone from the District Attorney's Office was present during the consent search at the body shop. He thought that Assistant District Attorney Scott was present during the execution of the search warrant. Sergeant Clower said that during the consent search, he saw many parts lying around in the body shop and recalled seeing motorcycle parts in the "loft." He said that although parts were inside the body shop, he was not looking for motorcycle parts because he learned about the motorcycle in this case later. He did not recall what Mr. Molina said to Detective Pike about the motorcycle. Sergeant Clower denied having any knowledge about the order sealing the search warrant affidavit.

Sergeant Clower testified that he spoke with Ms. Hernandez multiple times during his investigation of this case. When asked why her police interviews were not recorded, he stated that no reason existed to record them and noted that "we met" at the District Attorney's Office. Sergeant Clower said that the Tennessee Highway Patrol was not required to record interviews. General Order 1205 of the Tennessee Department of Safety and Homeland Security, dated March 15, 2014, was received as an exhibit. The Order reflects, in part, that the procedure for investigative reports required a record of an interview by either a written statement, an audio recording, or a video recording. Sergeant Clower said that this procedural requirement did not apply to his office because another policy, which he could not identify, permitted his office to conduct interviews without documentation and "go under recollection."

Sergeant Clower testified that he was unaware that the Petitioner and Ms. Hernandez had exchanged text messages, which included her telling the Petitioner that he had not done anything wrong and that she wanted to talk to the Petitioner. Sergeant Clower recalled that Ms. Hernandez made statements that she feared the Petitioner. Sergeant Clower said that there was an attempt to limit Ms. Hernandez's name in this case "just for her own safety." He thought the discussion about limiting her name was with someone in the District

Attorney's Office but was uncertain. Sergeant Clower stated that his and Detective Pike's conversation about the stolen motorcycle with Mr. Molina was not recorded. Sergeant Clower stated that the only documentation reflecting that Mr. Molina told him and Detective Pike about the motorcycle was in Detective Pike's search warrant affidavit. After reviewing photographs from the body shop, Sergeant Clower could not state with certainty that the photographs were consistent with what he had seen during the consent search. He said that he remembered motorcycle parts being there. He did recall, however, seeing Yamaha Stryker parts inside the body shop during the consent search.

Sergeant Clower testified that he did not recall if he or Detective Pike "call[ed] into dispatch" at the time of the consent search and the execution of the search warrant. Although he did not dispute Ms. Watkins's testimony that she did not receive any communications regarding any search at the body shop, he said that her office was "not our dispatch" and that he would not have contacted her office. Sergeant Clower agreed, though, that Ms. Watkins's office was Detective Pike's dispatch office. Sergeant Clower said that Ms. Hernandez was present during the consent search but that he did not recall if he or Detective Pike asked Ms. Hernandez at the time of the search what happened to the motorcycle parts.

Sergeant Clower testified that he did not recall to whom he first spoke regarding the motorcycle because the present case and the case related to the Petitioner's vehicle "kind of run together." He said, though, that anytime he spoke to Ms. Hernandez and Mr. Molina about the motorcycle, they each characterized the case as a stolen motorcycle, not fraud. Sergeant Clower was not present for the meeting at O'Reilly and said he learned of the surveillance afterward. Sergeant Clower said he reviewed the GEICO records submitted by Mr. Crisp and acknowledged that the records reflected that Mr. Crisp contacted Officer Criddle by telephone. Sergeant Clower said he did not obtain Officer Criddle's police-issued cell phone records. Sergeant Clower said that although he and Detective Pike interviewed Officer Criddle, Sergeant Clower did not recall Officer Criddle's stating that Officer Criddle saw a motorcycle engine in the back of the body shop, although this statement appeared in the search warrant affidavit.

Sergeant Clower testified that he did not ask Cleveland Police Sergeant Buddy Mitchell about Sergeant Mitchell's initial investigation of Mr. Crisp's motorcycle. Sergeant Clower said that he learned of Mr. Crisp's bankruptcy petition during his investigation and thought that the petition appeared on a background check. Sergeant Clower did not recall if he knew at the time of the Petitioner's trial that Mr. Crisp reported in his bankruptcy petition that the motorcycle had been stolen.

Sergeant Clower testified that Ms. Hernandez knew that the Petitioner had "taken in" a stolen motorcycle and "stripped it" and that the Petitioner had asked Ms. Hernandez to help get "rid of the parts." Sergeant Clower said that he recovered the motorcycle frame

from Polk County and that the frame was clean and without rust. He said that he did not attempt to verify Ms. Hernandez's statement about when she took the frame to Polk County. He was unaware that Ms. Hernandez was at Parksville Lake, near where the frame was found, the day before she reported information about the motorcycle to the Drug Task Force. Sergeant Clower said that neither defense counsel nor the defense investigator contacted him before the trial.

On cross-examination, Sergeant Clower testified that he did not find any evidence connecting the Petitioner to a crime during the searches of the body shop. Sergeant Clower said that he did not record "what every witness" said to him. He said that he would document any inconsistent statements from a witness and that he did not have any inconsistent statements to note in this case.

Jason Sullivan testified that in September 2015, he worked at O'Reilly and that he knew Ms. Hernandez and the Petitioner. Mr. Sullivan said that he and Ms. Hernandez worked together at O'Reilly in 2015. He said that he had never seen an altercation involving the Petitioner and Ms. Hernandez and that he never saw any threatening behavior between them.

Shibu Joseph testified that he assisted the Petitioner and Mr. Molina with configuring Quick Books for their body shop and with filing a business tax return. Mr. Joseph said that in 2015, he told Mr. Molina that he would no longer prepare the tax return because he noticed "[i]rregularities." Mr. Joseph said that although Mr. Molina had receipts for cash expenses, no sales were recorded. Mr. Joseph said that at one time, \$18,000 to \$20,000 existed with no corresponding recording of sales, along with "receipts for expenses paid by business income." Mr. Joseph said that he attributed his financial concerns to Mr. Molina and that he advised the Petitioner of his concerns.

Trial counsel testified that he had practiced law for thirty-nine years. Counsel testified that he did not receive the affidavit to the search warrant during his representation of the Petitioner. After reviewing the affidavit, counsel stated he had not known Mr. Molina told law enforcement that a stolen motorcycle was inside the body shop owned by the Petitioner and Mr. Molina, although this information was contained in the affidavit. Counsel said although the affidavit reflected that Officer Criddle stated he had been inside the body shop multiple times and that he had seen a motorcycle engine on a table in the back of the shop, counsel had never heard this information. Counsel said, though, he was uncertain that he would have questioned Officer Criddle about this information because, depending upon the context, it might have been evidence that the Petitioner had "taken apart a motorcycle engine in his shop." Counsel said that the defense filed a motion to receive discovery and that the defense and the prosecution "participated in a lot of exchanges of discovery." When told that the affidavit was placed under seal, which was

lifted as a result of the post-conviction proceedings, counsel stated he first learned of the sealing order when he read the post-conviction petition.

Trial counsel testified that he was unsure if he knew Ms. Hernandez had previously worked as a paid informant for the Drug Task Force. Counsel recalled, though, that the Petitioner thought that she “was working both sides of the deal” and was a “snitch.” Counsel recalled that she came to counsel’s office not long after counsel began his representation and that co-counsel spoke to Ms. Hernandez privately. Counsel said that closer to trial, co-counsel attempted to speak with her again but that she did not want to speak with him, which confirmed for counsel that she was “talking.” Counsel did not think he knew she had been a paid informant in previous Drug Task Force cases but said he would have questioned her on cross-examination if he had known she had been paid.

Trial counsel testified that the defense received a redacted copy of Sergeant Clower’s memorandum during discovery and that the defense filed a motion to unredact it about six days before the trial. Counsel thought the defense ultimately received an unredacted version because he would not have “stopped till I got it or somebody told me to stop.” Counsel did not recall if the defense received Director Cherry’s report, which was contained in Sergeant Clower’s investigative file, and did not recall receiving information that the Petitioner had been under surveillance when he and Ms. Hernandez met at O’Reilly. Counsel, likewise, was unaware that surveillance photographs taken during the meeting had been destroyed. He said that he would have investigated the “missing” photographs if he had known about them because it was “a red flag” and that he would have considered filing a *Ferguson* motion. When told that Director Cherry’s report reflected that text messages were exchanged between Ms. Hernandez and Director Cherry, counsel stated that he did not recall being aware of the messages, that he did not recall attempting to obtain the messages, and that he would have made a “pretty strong effort” to obtain them if he had known about them.

Trial counsel testified that he knew Mr. Crisp filed a bankruptcy petition in December 2013 but that he did not recall reviewing the petition. Counsel said that if he had known Mr. Crisp reported his motorcycle stolen in the bankruptcy petition, he could have cross-examined Mr. Crisp about it. Regarding the defense’s attempt to present trial evidence of Mr. Crisp’s previous insurance claims, counsel said that the State objected and that the trial court prohibited the defense from questioning the GEICO insurance adjuster about those claims.

Trial counsel testified that the defense investigator obtained text messages exchanged between the Petitioner and Ms. Hernandez. Although counsel initially did not recall anything of value contained in the messages, counsel said he would have expected Ms. Hernandez to be cross-examined about a message in which she stated to the Petitioner, “I know you didn’t do anything wrong.” Counsel recalled that the prosecutor filed a motion

to “basically keep [the Petitioner] away from” Ms. Hernandez and said that the prosecutor believed the substance of the messages exchanged between the Petitioner and Ms. Hernandez indicated the Petitioner was “pressuring her or something like that.” The messages were received as an exhibit, and counsel stated that he received at least some of them before the trial. Counsel recalled the messages related to Ms. Hernandez’s stating she and her car were attacked by someone wielding a baseball bat and said the defense believed Ms. Hernandez had been threatened by “the other guy.” Counsel conceded, though, that the defense had the messages if they were obtained by the investigator. Counsel said the messages showed that the Petitioner and Ms. Hernandez were communicating with each other. Counsel did not recall how the “narrative” that the Petitioner had threatened Ms. Hernandez arose pretrial. Counsel said he did not review Ms. Hernandez’s social media accounts and phone records. He said that Ms. Hernandez refused to speak with the defense investigator, that he did not cross-examine Ms. Hernandez about her refusal, and that he did not recall why he did not question Ms. Hernandez about it.

Trial counsel testified that the defense did not file a Rule 26.2 request because the defense believed it had received notice of all of the witness statements. Counsel said, though, that he did not ask for *Jencks* material during the trial. Counsel conceded that if he had requested *Jencks* material, he would have received the search warrant affidavit and Sergeant Clower’s investigative file, if they contained witness statements.

Trial counsel testified that he and the prosecutor exchanged emails, in which the prosecutor invited him to her office to review the case file, and that he reviewed her case file. Counsel said later, though, that he could have been “confused” about reviewing her file and that it was possible he spoke to the prosecutor by telephone about the case. He recalled, though, that he and the prosecutor had at least one “extensive” conversation about this case.

Trial counsel testified that the Petitioner told him about the consent search at the body shop. Counsel said that the officers did not find any inculpatory evidence during the consent search and that if the police had “seen any motorcycle parts really that were unexplained, certainly Strykers, no way I’d bring it up.” Counsel did not recall if he attempted to obtain the in-car police computer records related to this case but recalled “one event involving some computer records.” Counsel recalled that, during the trial, the Petitioner told counsel and co-counsel “there’s a computer, there’s some computer records that . . . should exist and we haven’t been given.” Counsel said that he and co-counsel called District Attorney General Crump about these records, that General Crump investigated, and that General Crump reported “those kind of records don’t exist or that kind of computer system, something.” Counsel said he did not investigate independently to determine whether the records existed.

Trial counsel testified that he did not know eviction proceedings were underway regarding the body shop at the time the police searched the shop. Counsel recalled, though, that the Petitioner was “under a time line” to “get everything cleaned out of the shop.” Counsel said the Petitioner told counsel and co-counsel that the Petitioner “directed and expected Ms. Hernandez to get some of it out too” because “they” were asked to leave. When asked why he did not obtain Sergeant Clower’s investigative file, counsel responded that he did not know why and that he did not “recall anything about it.” Counsel said that although he did not remember the investigative file, he and co-counsel believed at the time that discovery had been provided in good faith because there had been an open file policy. Counsel said that although he did not recall Sergeant Mitchell’s summary, which reflected that Mr. Crisp said, “Yeah, my motorcycle was stolen,” counsel had other investigative reports showing that Mr. Crisp made this statement. Counsel said he cross-examined Mr. Crisp about the statement because counsel considered it a credibility issue. Counsel said that he “put every event” in which Mr. Crisp said the motorcycle was stolen before the jury. Counsel conceded, though, that he did not present evidence relative to the bankruptcy petition, in which Mr. Crisp reported the motorcycle stolen. Counsel said that a bankruptcy petition was signed under oath and that Mr. Crisp made a false statement at the Petitioner’s trial when Mr. Crisp testified that he had never “sworn falsely.”

Trial counsel testified that he raised the issue of Mr. Molina’s being the “bad actor” in this case “every chance I could get.” When asked why he did not present Mr. Joseph at the trial to testify about the “bookkeeping irregularities” and missing money from the body shop, counsel said that the Petitioner thought Mr. Joseph could have been a significant witness. Counsel said that he spoke with Mr. Joseph, that Mr. Joseph was uncooperative and unhelpful, that Mr. Joseph did not want to be involved, and that counsel decided not to present Mr. Joseph as a witness.

Trial counsel testified that he did not recall why he did not call Alejandro Colon, the Petitioner’s brother, as a witness in order to present evidence about the body shop operations and about Mr. Molina’s behavior.

Upon examination by the post-conviction court, trial counsel testified that although he knew Ms. Hernandez had been a police informant, he did not recall that she had been paid for her work. Upon request by the court, counsel explained that if he had known Ms. Hernandez had previously been paid, he would have argued that her receiving payment was relevant to her credibility because it showed she had a relationship with the investigating officers in this case and had “the habit of cooperating” with the police. Counsel said that he would have asked her on cross-examination, “[D]o you expect to be paid for your testimony here today?” Counsel believed he adequately impeached Mr. Crisp’s credibility at the trial and presented evidence that Mr. Crisp was involved in this case but would escape punishment because he had an agreement with the prosecution. Counsel agreed that evidence of Mr. Crisp’s statements in the bankruptcy petition

regarding the motorcycle was cumulative evidence because counsel questioned Mr. Crisp about his false statement that the motorcycle had been stolen.

On cross-examination, trial counsel testified that Ms. Hernandez stated during her trial testimony that the Petitioner came to her home with a gun, which culminated in an argument about the events at O'Reilly. Counsel said that he would not have wanted Ms. Hernandez to testify that she feared the Petitioner was coming to O'Reilly to hurt her. Counsel said that the meeting at O'Reilly was "really a nothing" because nothing occurred. Counsel said that the lack of photographs and a statement in connection with the O'Reilly meeting did not affect his chosen defense but noted that the police had a duty to "make a statement."

Trial counsel testified that Mr. Crisp was candid during the trial that he lied about the motorcycle being stolen, which was effective in hurting the defense. Counsel agreed that the Petitioner would have possessed the text messages exchanged between the Petitioner and Ms. Hernandez. Counsel agreed that the Petitioner could have addressed the messages during his trial testimony but said that knowing what questions to ask was one of the purposes of hiring an attorney.

On redirect examination, trial counsel testified that Mr. Crisp committed a federal offense when he lied in the bankruptcy petition and that the jury was not presented evidence that Mr. Crisp committed a federal crime. Counsel said that federal authorities were never told that Mr. Crisp had lied in his petition. Counsel stated that he met with all of the officers, including Detective Pike, at an unspecified time before the trial.

Ronald Chris Miller testified he worked in the Information Technology Department for the City of Cleveland. He said that in 2013, the Cleveland Police Department had in-car police computers that were password protected. He stated individual officers were required to log into their computers to file reports. He said that if someone had asked him in 2015 to retrieve in-car computer records from 2013, he was unsure he could have retrieved the records. He did not recall receiving a request for Officer Criddle's computer records. Mr. Miller agreed that in 2013, the computers had unique IP addresses and that it would have been possible to obtain the computer records in 2013 to determine if a report submitted by a particular officer was in fact submitted with the officer's computer. Mr. Miller said that the Cleveland Police Department changed computer systems about five years before the post-conviction hearing and that the change could have occurred 2015 or 2016. Mr. Miller agreed that he could not obtain the 2013 computer records but said that he did not know of any reason he could not have obtained the 2013 computer records if he had received a request in 2015. However, when questioned by the post-conviction court, Mr. Miller stated that he was unsure he would have been able to obtain the records in 2015.



Co-counsel testified that the Petitioner paid \$26,500 toward a retainer fee, which included the cost for the defense investigator. Co-counsel stated that, for his portion of the representation, he gathered information and worked with the investigator. He said that trial counsel dealt with the initial court appearances, initial motions, and pretrial issues and that they met regularly to update their litigation plan. Co-counsel said that his focus was the “external investigation” and that trial counsel’s focus was court appearances, pleadings, and discovery until the defense moved closer to trial preparation. Co-counsel said that when trial preparation began, he reviewed the discovery materials and used those materials “to develop . . . how we pursue[d] our investigation.”

Co-counsel testified that he was aware at the time of the evidentiary hearing that the defense investigator obtained Mr. Crisp’s bankruptcy petition but that he did not recall if he was aware of the petition earlier. Co-counsel said that he did not recall having any information related to the bankruptcy proceedings. He said that he was not saying that he did not look at the petition but that he did not have a copy of it in his case file when he reviewed it for the evidentiary hearing. He agreed that Mr. Crisp’s stating in the petition that his motorcycle had been stolen was important to the Petitioner’s case but said that he might not have used the petition at the trial. Co-counsel said that Mr. Crisp admitted during the trial that he had submitted a false insurance claim by stating that the motorcycle was stolen. Although co-counsel acknowledged that filing a false insurance claim and lying under oath in federal court were different offenses, co-counsel said that he chose to present the jury with “the best pieces of information” without getting “bogged down.” He said that he asked Mr. Crisp about submitting false claims and that Mr. Crisp admitted to it on cross-examination. When asked if he was certain if he cross-examined Mr. Crisp, co-counsel said yes. However, he did not dispute the transcript if it reflected trial counsel cross-examined Mr. Crisp.

Co-counsel reviewed Mr. Crisp’s bankruptcy petition and stated that assuming Mr. Crisp’s trial testimony was truthful, Mr. Crisp committed bankruptcy fraud and perjury in his petition and could have committed wire fraud because the petition was filed electronically. Co-counsel agreed Mr. Crisp’s trial testimony that he had never sworn falsely under oath prior to his testimony was a lie. Co-counsel agreed that presenting this evidence to the jury sounded “like a good trial tactic . . . strategy to have that ready.” He was unaware of any agreement between Mr. Crisp and federal prosecutors, and he did not know Mr. Crisp was not prosecuted in federal court.

Co-counsel testified that he knew Ms. Hernandez had been a police informant previously but that he was unsure if he knew she had been paid. Co-counsel said that the Petitioner brought Ms. Hernandez to counsel’s office, that co-counsel met privately with her, and that after the meeting, co-counsel told the Petitioner “[t]here’s something wrong with her, she’s working for the State, she’s doing something.” Co-counsel said that Ms. Hernandez had been vague and evasive, that she could not confirm any of the facts the

Petitioner expected her to confirm, and that co-counsel found her untruthful. Co-counsel could not determine why she “was afraid of another person,” who co-counsel referred to as an unindicted co-conspirator. Co-counsel said that he learned later she would testify.

Co-counsel testified that although he received documents during discovery related to Director Cherry’s report, he was uncertain if he had received documents related to Ms. Hernandez’s involvement with the Drug Task Force. Co-counsel said that the document reflecting Ms. Hernandez’s payments looked familiar but that the report referred to information about O’Reilly, about which co-counsel did not know until the Petitioner filed his post-conviction petition. Although co-counsel did not dispute that an objection was lodged when testimony was given about the incident at O’Reilly, he did not know the significance of the incident at the time of the trial. Co-counsel recalled that the defense received an unredacted copy of Sergeant Clower’s memorandum, which was contained in his investigative file. Relative to Director Cherry’s report, which was also contained in Sergeant Clower’s investigative file, co-counsel said that he considered the information about O’Reilly important because it related to the Petitioner and one of the Petitioner’s cases. Co-counsel said, though, he was “still not sure that I didn’t have this document.” He said that if he had the information, he might have interviewed additional people and asked different questions and that he was unsure what issue the information related to Ms. Hernandez’s trial testimony. Co-counsel said that he did not know about the O’Reilly incident before the trial and that he still did not know what the incident had to do with the Petitioner’s cases.

Upon questioning by the post-conviction court, co-counsel testified that he reviewed his case file about one week before the evidentiary hearing.

Co-counsel acknowledged a discovery receipt reflecting that the defense received thirty-four pages of discovery materials and that Sergeant Clower’s investigative file was more than thirty-four pages. Co-counsel said that he had a couple of theories about Ms. Hernandez’s behavior. He said one theory was that she and the Petitioner were involved romantically and that, as a result, she was “uncomfortable.” Co-counsel said that he also suspected that she had stolen from the business and that she had attempted to “put that off on someone else.” He said, though, the defense was unable to obtain proof of either theory. After reviewing Director Cherry’s report, which reflected in relevant part that Ms. Hernandez was in a romantic relationship with Arturo Contreras, co-counsel said he did not know this at the time of the trial. When asked if he would have used this information to impeach Ms. Hernandez’s credibility, co-counsel said possibly, if the defense could show the information motivated her to lie. He said that the defense believed she lied and that he wanted to show the jury why she lied, but he was uncertain how the relationship would have motivated her to lie in this case. He agreed that Mr. Contreras was charged in Georgia with burning the Petitioner’s car and said that the Petitioner was charged in

Tennessee in connection with the incident. Co-counsel did not represent the Petitioner in the arson case but was aware of it.

Co-counsel testified that he was unaware a search warrant was executed at the body shop and that he had not seen the warrant's affidavit. After reviewing the affidavit, co-counsel said he never received it during discovery. He said he was aware that Mr. Molina was "a prominent party" in this case, that Mr. Molina stole money from the body shop, that Mr. Molina worked on motorcycles, and that motorcycle parts were inside the body shop. Co-counsel knew about the consent search at the body shop, but he said that he did not know about the search warrant. Co-counsel reviewed a portion of the search warrant, which reflected that

Sgt. Clower and [Detective Pike] both observed other pieces of a motorcycle in the upstairs portion of the business where the frame was once kept, according to Molina. Although it was neither the engine nor the frame, we did find a speedometer, trim pieces, a tire on a rim and wiring harnesses in a box which looked as if they were worn and had been taken off of a motorcycle. The speedometer said "Stryker," but this was not significant at the time of the consent search as we did not know what specific kind of stolen motorcycle we were looking for without the VIN number on the frame or an identifying number on the engine.

Co-counsel stated that he was not aware of these facts at the time of the trial. He said that if he had known the facts contained in the affidavit, he would have elicited evidence at the trial that Ms. Hernandez and Mr. Molina had knowledge of the motorcycle. Co-counsel said that he did not attempt to obtain Ms. Hernandez's social media posts and was unsure if the defense investigator attempted to obtain them. He said that his case file did not contain social media information, which led him to conclude that either the information was not sought or was sought unsuccessfully.

Co-counsel testified that the in-car police computers were mentioned during the first day of the trial and that he and trial counsel requested from District Attorney General Crump "information about these computers." Co-counsel said that General Crump investigated the computers and reported, "We've looked and don't have it." Co-counsel said he understood that "a diligent search was made and nothing was found." He said the defense requested information about "who could have signed a police report . . . . Was it Officer Criddle or could it have been [the Petitioner]." Co-counsel said that the State's theory was the Petitioner signed the report and that the defense wanted to refute this theory.

Co-counsel testified that he did not know why the defense did not request *Jencks* material after each of the State's witnesses testified on direct examination. He said, though, that at the time of the trial, he believed the defense had received everything to which it was

entitled. Co-counsel recalled trial testimony that an officer notified dispatch when the officer left a police car but stated that he did not know dispatch logs were not created at the time of the consent search and when the search warrant was executed. When asked if he would have used the dispatch call logs to challenge Sergeant Clower's testimony, co-counsel said that he was uncertain if an officer contacted dispatch at the time of a consent search and that he did know about the search warrant at the time of the trial.

Co-counsel testified that he did not recall meeting with the assistant district attorney who prosecuted this case to review discovery but that trial counsel could have met with the prosecutor. Co-counsel recalled receiving from the defense investigator the video recordings and photographs the Petitioner provided to the defense investigator. Co-counsel recalled that the recordings were surveillance videos and that the defense attempted to determine if the recordings were related to the motorcycle in this case or to the arson of the Petitioner's car. Co-counsel said he did not find anything helpful to the defense in the recordings. He did not recall a video recording made by the Petitioner of the body shop showing it had been emptied and had not been damaged near the time of eviction.

On cross-examination, co-counsel testified that a jury-out hearing was held at the trial and that an offer of proof was presented regarding threats Ms. Hernandez had received. Co-counsel did not recall that Ms. Hernandez stated during the proffer that she worked at O'Reilly but that he would not dispute the transcript. He recalled, though, that Ms. Hernandez testified that the Petitioner came to her workplace three times to discuss this case and "the other case." Co-counsel agreed that his trial strategy was to prevent the admission of evidence about the threats and that he did not want to open the door to evidence that the police conducted surveillance of one of these meetings to prevent any harm to Ms. Hernandez. He agreed that the threats would have been damaging to the defense and that photograph evidence showing the police were concerned enough to protect Ms. Hernandez would have likewise damaged the defense.

Co-counsel testified that Mr. Crisp testified candidly about his fabricating the motorcycle theft, that Mr. Crisp was questioned about prior insurance claims, and that Mr. Crisp "admitted to things on the claims report that seemed like he was fudging on." Co-counsel agreed that eliciting testimony that Ms. Hernandez had been a paid informant, rather than a criminal who "was flipping," could have bolstered her credibility. Co-counsel agreed that evidence of Stryker motorcycle parts being in plain view during the consent search but no longer inside the body shop at the time the search warrant was executed could have damaged the defense but said that the timing of when Ms. Hernandez was told to remove the parts and when she removed the parts was critical.

Co-counsel testified that evidence Ms. Hernandez had worked previously as a paid police informant was relevant to her bias because of her relationship with the police. Co-counsel agreed, though, that her receiving payment could have shown that she was truthful

in the previous cases, which could have undermined the defense that she lied about the Petitioner's involvement in this case.

Co-counsel testified that the Petitioner provided the defense with photographs of text messages exchanged between the Petitioner and Ms. Hernandez. Co-counsel said he reviewed the messages. He said that although the Petitioner was an active participant in the defense, co-counsel did not recall the Petitioner's asking co-counsel to introduce the messages, or any specific piece of information.

Upon examination by the post-conviction court, co-counsel testified that, in hindsight, he would have investigated the in-car police computers and attempted to learn more about the computer system. He said that he could have hired an information technology expert to investigate the computer system.

The defense investigator testified that she was hired to collect evidence and, at times, provided her assessment of particular evidence. She provided post-conviction counsel with various documents and photographs she accumulated during her investigation. Upon reviewing photographs of text messages exchanged between Ms. Hernandez and the Petitioner, the defense investigator agreed that she would have sent them to defense counsel if she obtained them. After reviewing her invoice, she stated that it did not mention text messages but agreed that it mentioned photographs. She said she obtained a background report for Mr. Crisp, which was received as an exhibit. She said, though, she did not know if she provided the report to defense counsel. She explained that unless an attorney asked for the report or the report was relevant to something she had been asked to do, she did not usually provide the report to the attorney. She recalled that when she told trial counsel that she was ready to locate and interview Mr. Crisp, trial counsel told her to "hold off" because the case might be resolved. She said that she would have reviewed the background report and would have noticed Mr. Crisp's December 2013 bankruptcy petition. When asked if she knew Mr. Crisp stated in his petition that the motorcycle at issue in this case had been stolen, she said that someone told her about the statement in the petition but that she could not recall if the information came from trial counsel or the Petitioner. She said she did not interview Mr. Crisp.

The defense investigator reviewed photographs reflecting various motorcycle parts that she sent to post-conviction counsel before the evidentiary hearing. She did not recall ever having seen the photographs and stated that she did not know how she obtained them and if she provided them to defense counsel. She said that she and trial counsel discussed at least some of the evidence in this case but that she did not recall the substance of those conversations.

The defense investigator testified that she attempted to interview Ms. Hernandez but that Ms. Hernandez refused. The defense investigator agreed that her invoice referred to a case in the Bradley County General Sessions Court but said that she did not recall if the case was related to the eviction proceedings associated with the body shop. A copy of the detainer warrant against the body shop was received as an exhibit and reflected that it was filed on September 17, 2015. She agreed that she submitted an invoice to the defense in the amount of \$3,013.77.

Christina Hernandez testified that in 2015, she worked at the body shop owned by the Petitioner and Mr. Molina and that her employment lasted for about one and one-half years. She said she and the Petitioner exchanged text messages regularly after the Petitioner's arrest. She agreed that in one message, she told the Petitioner that she wanted to speak with him. She denied, though, that in one message she stated that she knew the Petitioner had done nothing wrong. She recalled telling the Petitioner that she was being threatened by Mr. Contreras and Mr. Contreras's brothers. When asked why she did not testify at the trial that Mr. Contreras and his brothers were threatening her, she stated, "Cause you all hadn't gotten him yet and they didn't ask me." She did not recall anyone asking her at the trial about Mr. Contreras. She said that she told an unidentified man and woman from the District Attorney's Office that Mr. Contreras had threatened her and that other people, whom she did not know, were also threatening her.

Ms. Hernandez reviewed the photographs of the text messages exchanged between her and the Petitioner and testified that the messages were her and the Petitioner's communications. She denied that she stated in the messages that she knew the Petitioner did not do anything wrong but said that she merely agreed with the Petitioner when he stated he did not do anything wrong. She acknowledged that she responded, "I know, I'm sorry," when the Petitioner stated that he had never done anything illegal, that he had always attempted to help everyone, that he had lost more than \$60,000, and that he was not worried because "we have an ace." She said she did not want to talk about this case anymore. She admitted that she continued sending messages to the Petitioner and that she continued to see and to talk to Mr. Contreras and to Mr. Molina at the time of the evidentiary hearing. She stated she was never asked to provide a police statement implicating Mr. Molina. When asked if Mr. Molina was involved in this case, she said she did not remember. She stated that when she began working at the body shop, "all that stuff" had been done and that the only time she saw the motorcycle frame was when the shop was closing and "they" were emptying the shop. She said that she had been aware of the eviction proceedings and that, as a result, the shop had to be emptied.

Ms. Hernandez testified that she "had gotten rid of" the motorcycle engine for the Petitioner when the shop was being emptied. She recalled that the Petitioner and her former boyfriend, whose legal name she did not recall, helped her load the engine into her truck. She initially denied testifying at the trial that she alone loaded the engine into her truck but

stated that she told someone in the District Attorney's Office that she had assistance loading it. However, she did not dispute her trial testimony that she alone loaded the motorcycle frame into her truck after the Petitioner brought the frame downstairs. She said, though, that her former boyfriend stood close by while she loaded the frame into the truck, which she stated belonged to her former boyfriend. She said that before the trial, she told someone in the District Attorney's Office that the truck belonged to her former boyfriend. She said she did not know to whom she spoke in the District Attorney's Office but said she spoke to a short, Caucasian man and a skinny woman. Ms. Hernandez said that she went alone to Polk County to throw away the frame and engine and that she kicked them out of the truck bed without difficulty. She agreed that she had knee surgery to insert a prosthetic meniscus and a prosthetic ACL about one year before she disposed of the parts and later stated that she sat in the truck bed and pushed the parts out of the truck.

Ms. Hernandez identified photographs taken on September 16, 2015, depicting her and her children. She said the photograph of herself was taken near the location where she disposed of the motorcycle frame and engine. She did not recall if the photograph was taken one day before she contacted the Drug Task Force, but she did not dispute other evidence showing that she contacted the Drug Task Force on September 17, 2015. She agreed that she had previously worked as a confidential informant for the Drug Task Force but denied that she had "ever worked charges off" by being an informant. She said that Marvin Parker was her brother and that she could not recall the reason she stated in her Drug Task Force paperwork that she did not have a brother. She agreed that she began working as an informant in May 2010 and that in April 2010, Mr. Parker was charged and later indicted for initiating the process to manufacture methamphetamine. The general sessions warrant and the indictment were received as an exhibit. Ms. Hernandez said that the methamphetamine at issue in Mr. Parker's case was for Ugo Alanza, who was her former boyfriend, and that the Drug Task Force talked to her about whether she was interested in being an informant in Mr. Parker's case and in other cases. She agreed her relationship with the Drug Task Force had been lengthy. Although she denied having ever been charged with a federal offense, she admitted she posted on social media that she had been arrested by federal agents. She explained that she had been joking about "immigration and ICE." She said that law enforcement officers did not approach her about drug sales at the body shop.

Ms. Hernandez testified that she was unaware that her cell phone number "show[ed] up" in Mr. Molina's cell phone records at the time Mr. Molina was "down there burning" the Petitioner's car. She was likewise unaware that phone records showed that she and Mr. Molina spoke on the phone the morning after the Petitioner's car was burned.

Ms. Hernandez testified that she told Director Cherry that she and Mr. Contreras had been in a romantic relationship at the time she contacted the Drug Task Force. When asked if she provided information related to Mr. Contreras's involvement in this case, she

said she did not learn until afterward that he had been involved. She did not know why Mr. Molina called her after she disposed of the motorcycle parts but said Mr. Molina had been her supervisor at the body shop. She did not know Mr. Molina had been stealing money from the body shop. She said that she would have told the Petitioner if she had suspected Mr. Molina had been a thief.

Ms. Hernandez testified that she contacted the Drug Task Force because “a lot of things” started to scare her. She recalled that the Petitioner came to her workplace at O’Reilly when he was released from jail and that “everyone” told her she would be blamed for any wrongdoing because she managed the body shop. She said that, as a result, she contacted the Drug Task Force because she trusted Sean Fairbanks, although she did not work with him in this case.

Ms. Hernandez testified that she told Director Cherry that the Petitioner took her cell phone during their meeting at O’Reilly but that she was not asked about this at the trial. She acknowledged that in January or February 2016, she told someone in the District Attorney’s Office that the Petitioner was harassing her. She did not remember, though, why she continued to send the Petitioner text messages after she reported the harassment. She said that she and Jason Sullivan worked together at O’Reilly at the time she and the Petitioner met in the parking lot and that Mr. Sullivan would not have been able to view the parking lot if Mr. Sullivan were assisting customers.

Ms. Hernandez testified that after the body shop had been emptied and the business had closed, Mr. Molina told her there had been a stolen motorcycle. She said Mr. Molina did not tell her that he reported a stolen motorcycle to the police. She said that when the body shop was being emptied, she saw a trailer being loaded with automotive parts, that she told a law enforcement officer about what she had seen, and that she could not recall the officer’s name or when she reported the information. She said that law enforcement officers interviewed her several times in connection with this case and that she was not advised of her *Miranda* rights during these interviews. She was uncertain whether the interviews were recorded.

Ms. Hernandez testified, in relation to the text messages she and the Petitioner exchanged, that she told the Petitioner that she knew the people who threatened and assaulted her. She described an incident in which she had been at a restaurant and that “they” hit her and her car with a baseball bat. She likewise stated that “people” came to her home, that they knocked on the door, and that they were gone when she opened the door. She said that “they” fired gunshots through the windows of her home and that her apartment unit caught fire the week she moved. Ms. Hernandez said she did not tell the Petitioner about the fire but that she told him about the baseball bat incident. She did not know why she told the Petitioner about the baseball bat incident. She said that she told law enforcement she continued to send messages to the Petitioner, that the officers told her it



“was fine” for her to continue to send the Petitioner messages, and that the officers wanted to know what was said. She agreed that she told the officers that she met with defense counsel before the trial but that she did not recall the substance of her conversations.

Ms. Hernandez testified that law enforcement officers frequented the body shop when she worked there and that the officers were not prohibited from entering any portion of the body shop. She denied knowing that Mr. Crisp’s name was connected to this case. She said she told Director Cherry that she believed the motorcycle was stolen because she saw the Petitioner scratch, or at least attempt to scratch, the “metal stamped” VIN number with a razor blade.

On cross-examination, Ms. Hernandez testified that she contacted the Drug Task Force because she was afraid of the Petitioner. She said that she did not want any trouble and that she wanted the matter to be done. She said that she agreed with the Petitioner in the text messages that he had not done anything wrong and that she wanted the “subject to be dropped.” She thought her former boyfriend’s name was “Renobato Arranda” and said Mr. Arranda did not know she intended to use his truck for unlawful activity.

Ms. Hernandez testified that in 2010, the Drug Task Force contacted her about working as an informant after she worked with officers during a drug-related investigation involving her then-boyfriend, whose nickname was “Apache.” She said that officers interviewed her in connection with the investigation and that she knew her then-boyfriend was involved in “drug trafficking.” She said that the officers wanted to catch “him in action,” that he brought drugs to their home, that she sent text messages to the officers about the drugs, and that the police “came and busted him.” She said that after her then-boyfriend’s arrest, she agreed to work as a paid informant for the Drug Task Force. She said that she worked as a paid informant for two years but that she was not paid for her testimony or for her cooperation in the Petitioner’s case.

On redirect examination, Ms. Hernandez did not recall if the Petitioner gave her children Christmas gifts in 2015. She agreed that she and the Petitioner spoke about her purchasing a motorcycle in November 2015 but said that their relationship “slowly just started getting really awkward and weird.” She said she began to feel as though the Petitioner was “keeping . . . a constant eye” on her. She said she provided all of her text messages to the Drug Task Force.

Alejandro Colon, the Petitioner’s brother, testified that he worked at the body shop for about two years, which included 2015. He said that he expected to be called as a trial witness, that he was at the courthouse during the trial, that he sat with Mr. Joseph at the courthouse, and that he did not know why he was not called as a witness. He said that during his employment, he learned that Mr. Molina took money paid by customers and did not place the money in the cash register, which prevented the creation of a receipt. When

asked if he knew why Mr. Joseph was not called as a trial witness, Mr. Colon said that Mr. Joseph stated Mr. Joseph was told not to come to the courthouse because he would not be called as a witness. Mr. Colon recalled that Mr. Joseph reported discrepancies in the financial reports, which were attributed to Mr. Molina.

Mr. Colon testified that while he worked at the body shop, police officers frequented the business. Mr. Colon said that it was common knowledge that the Petitioner, who was a police officer, partially owned the body shop, that officers came to the body shop to socialize, and that officers used the body shop's services. Mr. Colon recalled that the officers who came to the shop sometimes, but not always, wore their police uniforms. Mr. Colon said that he never heard or saw anyone tell the officers who frequented the body shop that the officers could not enter certain areas. Mr. Colon said that he was present when the body shop was emptied due to the eviction proceedings. He recalled that the body shop had shelving for "random parts" and said that he had no idea from where the parts came or "what they were to" because the shop did not have an identification system. Mr. Colon reviewed photographs of various motorcycle parts that were previously received as an exhibit and said the parts depicted in the photographs were items that were inside the body shop as he and the Petitioner emptied it in 2015.

Mr. Colon testified that he never heard the Petitioner tell Ms. Hernandez to dispose of any parts in a manner that was inconsistent with how parts were disposed of generally. Mr. Colon said that materials were disposed of by placing parts onto a trailer and taking them to "the dump." Mr. Colon said that he was not interviewed by the police before the Petitioner's trial but that the defense investigator interviewed him. He said he told the defense investigator all of the information contained in his testimony.

Mr. Colon reviewed two video recordings taken during the cleanout process at the body shop. The recordings were received as an exhibit. The video recordings related to the cleanout of the body shop and reflect a video inventory of the items contained in the shop at the time of the recording. The items included motorcycle and automobile parts. In the second recording, a male voice states that it was "twelve daylight, Monday afternoon," that "we're moving these items as specified by the landlord," and that the recording served as documentation of the items inside the body shop. A woman is seen standing inside the shop.

Mr. Colon testified that Ms. Hernandez was depicted in one of the recordings and that Ms. Hernandez was present when the shop was emptied. He said that he did not hear her express any fear of the Petitioner and that she assisted with the cleanout process. He said that he did not see anything unusual or suspicious during the cleanout but said that he and the Petitioner could not identify some of the parts. Regarding trial testimony that an engine had sat on a table at the back of the body shop, Mr. Colon said that he did not recall

ever having seen an engine there. Mr. Colon said that the body shop was emptied because of the eviction notice, not to hide evidence.

The deposition of the prosecutor who tried the Petitioner's case with District Attorney General Crump was received as an exhibit. The record reflects, in part, that the prosecutor obtained her law license in 2013 and began working as an assistant district attorney on September 1, 2014, which was about two years before the Petitioner's trial. She recalled sending trial counsel an email related to the Petitioner's case but that she did not recall the specific details. After reviewing counsel's motions to disclose the redacted portion of Sergeant Clower's memorandum and to compel the disclosure of the identity of the confidential informant, the prosecutor stated that she did not recall the motion in connection with the memorandum but that she recalled the motion to compel. She said, though, she did not recall the "back and forth" with counsel about the informant's identity. When asked if she redacted Sergeant Clower's memorandum contained in the discovery materials, the prosecutor stated that she did not recall redacting it but had "no reason to dispute it if someone" said she did. She did not recall how she responded to the defense's motion to unredact the memorandum.

The prosecutor stated that she was unsure if she knew before the trial that Ms. Hernandez had previously been a paid informant for the Drug Task Force. The prosecutor recalled that she spoke to Director Cherry about Ms. Hernandez but that she did not recall the specific cases in which Ms. Hernandez had been a paid informant. The prosecutor did not recall discussing Ms. Hernandez's being a previous paid informant with defense counsel but that it would have been her practice.

The prosecutor identified the discovery receipt, which reflected that trial counsel received thirty-four pages of paper and which reflected her handwriting. When post-conviction counsel noted that Sergeant Clower's investigative file was seventy-two pages, which had been provided during post-conviction discovery, and asked why seventy-two pages were not provided in the discovery package, the prosecutor responded that "[t]here are often multiple releases of discovery" and that these documents would have accompanied Sergeant Clower's investigative file. The prosecutor agreed that the discovery receipt did not mention a search warrant and said that she did recall a search warrant being executed in this case and that the search would have occurred before the return of the indictment, at which time she was assigned to the Petitioner's case. She was aware, though, that Sergeant Clower went to the body shop. When post-conviction counsel noted that the search warrant affidavit was sealed by the trial court, the prosecutor said she did not recall requesting the order.

The prosecutor reviewed the portion of Director Cherry's report related to Ms. Hernandez, which was contained in Sergeant Clower's investigative file. The prosecutor said Director Cherry's report looked familiar. She recalled that in 2015 or 2016, she and

Director Cherry discussed his conversation with Ms. Hernandez. The prosecutor said that during the discussion, Director Cherry expressed concern for Ms. Hernandez's safety and that, afterward, the prosecutor and her supervisors decided to redact Ms. Hernandez's name from Director Cherry's report and to provide the redacted version to the defense. She did not recall if the report was provided to the defense before the trial. When asked if Ms. Hernandez reported that the Petitioner or another person threatened Ms. Hernandez, the prosecutor stated that "there were multiple sources throughout the pendency of the case that caused us to have concern for her safety." The prosecutor could not recall the basis for her "February 9 motion to add to the conditions of bond" but "guess[ed]" information that formed the basis of the request came from Sergeant Clower. When asked if Ms. Hernandez told her that Ms. Hernandez was being threatened or intimidated, the prosecutor stated that it might have "come up in witness prep" for the trial or for the motion hearing related to the Petitioner's bond conditions but that she did not recall a specific incident. The prosecutor said that cause for concern about Ms. Hernandez's safety, at least in part, was the contact between Ms. Hernandez and the Petitioner. The prosecutor knew Ms. Hernandez initiated contact with the Petitioner.

The prosecutor did not recall if Ms. Hernandez told her that Ms. Hernandez had met with defense counsel and the defense investigator. When informed that Ms. Hernandez spoke to defense counsel a few days before the trial, the prosecutor said she did not recall "having a ton of time with" Ms. Hernandez. The prosecutor said that she did not recall Ms. Hernandez's telling her the Petitioner's chosen defense.

The prosecutor did not recall having seen the search warrant affidavit and stated that the affidavit did not look familiar, although the "events all sound[ed] familiar." She was surprised that Sergeant Clower's seventy-two-page investigative file did not mention the consent search and the execution of the search warrant. Post-conviction counsel noted that although the search warrant affidavit reflected that Mr. Molina was the first person who mentioned a stolen motorcycle, Mr. Molina's recorded police interview did not include a statement about a stolen motorcycle. The prosecutor stated that without comparing the affidavit and the interview, she could not "speak to that."

The prosecutor reviewed photographs taken during the execution of the search warrant. She did not recall having six pages of photographs taken from inside the body shop, although photographs were listed on the discovery receipt. The prosecutor was unaware at the time of the trial that text messages exchanged between Director Cherry and Ms. Hernandez had been destroyed and that photographs taken outside O'Reilly of the Petitioner and Ms. Hernandez had been destroyed. Relative to a jury-out hearing at the trial regarding Ms. Hernandez, the prosecutor did not recall the specifics of the hearing. She said, though, that it was possibly related to threats against Ms. Hernandez. The prosecutor did not recall if information related to the Petitioner's and other unidentified

persons' visiting Ms. Hernandez's workplace came from Ms. Hernandez or from law enforcement.

The prosecutor testified that during the trial, evidence was presented regarding Mr. Crisp's prior insurance claims. She was unaware that Mr. Crisp filed a bankruptcy petition in which he stated that the motorcycle had been stolen. The prosecutor did not recall any discussions with defense counsel relative to counsel's belief that the State had not provided all of the discovery materials. She recalled that her relationship with defense counsel was cordial.

On cross-examination, the prosecutor testified that Sergeant Clower was the lead investigator in this case, although he worked with Bradley County Sheriff Detective Zech Pike. She recalled that the arson-related case against the Petitioner was dismissed in Tennessee and prosecuted in Georgia. She did not know which law enforcement agency in Tennessee initially investigated the arson case. The prosecutor stated that she did not intentionally or knowingly withhold any document from the defense.

Upon this evidence, the post-conviction court granted relief in part and denied relief in part. The court determined that the Petitioner received the ineffective assistance of counsel in connection with the filing a false insurance claim conviction, vacated the conviction, and granted a new trial. On appeal, the State does not challenge the court's ruling in this regard. The court, though, denied post-conviction relief for the filing a false police report and the tampering with evidence convictions, from which the Petitioner now appeals.

### **I. Ineffective Assistance of Counsel**

The Petitioner contends that the post-conviction court erred by denying relief on his ineffective assistance allegations. The State responds that the post-conviction court did not err by denying relief because the Petitioner failed to establish his claims by clear and convincing evidence. We agree with the State.

Post-conviction relief is available "when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103 (2018). A petitioner has the burden of proving his factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f) (2018). A post-conviction court's findings of fact are binding on appeal, and this court must defer to them "unless the evidence in the record preponderates against those findings." *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *see Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's application of law to its factual findings is subject to a de novo standard of review without a presumption of correctness. *Fields*, 40 S.W.3d at 457-58.

To establish a post-conviction claim of the ineffective assistance of counsel in violation of the Sixth Amendment, a petitioner has the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see *Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). The Tennessee Supreme Court has applied the *Strickland* standard to an accused's right to counsel under article I, section 9 of the Tennessee Constitution. See *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner must satisfy both prongs of the *Strickland* test in order to prevail in an ineffective assistance of counsel claim. *Henley*, 960 S.W.2d at 580. "[F]ailure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." *Goard v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). To establish the performance prong, a petitioner must show that "the advice given, or the services rendered . . . are [not] within the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); see *Strickland*, 466 U.S. at 690. The post-conviction court must determine if these acts or omissions, viewed in light of all of the circumstances, fell "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. A petitioner "is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision." *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); see *Pylant v. State*, 263 S.W.3d 854, 874 (Tenn. 2008). This deference, however, only applies "if the choices are informed . . . based upon adequate preparation." *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). To establish the prejudice prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Generally, the post-conviction court determined that trial counsel and co-counsel "effectively represented" the Petitioner in many ways. The court found that counsel hired a private investigator and that a review of the trial transcript showed that defense counsel presented "an effective denial defense" of any involvement in criminal conduct. The court found that the defense was a reasonable tactical decision because most of the evidence was based upon testimony from Mr. Crisp and Ms. Hernandez, both of whom admitted to criminal conduct, and because the defense was consistent with the Petitioner's trial testimony. The court found that defense counsel made a tactical decision to deny all evidence against the Petitioner. The court, likewise, determined that defense counsel's strategy to impeach the credibility of Ms. Hernandez and Mr. Crisp was reasonable. The court found, after reviewing the trial transcript, that counsel "engaged in effective" cross-examination of the State's witnesses.

The post-conviction court determined that the Petitioner had established his ineffective assistance of trial counsel in connection with the filing a false insurance claim conviction based upon defense counsel's failure to present evidence of Mr. Crisp's previous "false insurance claim" and false statements in the bankruptcy petition and to request *Jencks* material at the trial. The court determined that although the record contained "substantial evidence" that implicated the Petitioner in the "criminal scheme," Mr. Crisp was the only witness who implicated the Petitioner as the "mastermind." The court determined that but for counsel's deficient performance, the Petitioner might have been convicted of a lesser included offense, including facilitation and accessory after the fact, relative to the filing a false insurance claim conviction.

However, the post-conviction court determined that the Petitioner failed to establish his ineffective assistance of counsel allegations in connection with the filing a false police report and the tampering with evidence convictions. The court found that the evidence related to these two convictions was overwhelming. The court found that the trial evidence showed that the Petitioner responded to the 9-1-1 call reporting the fraudulent theft, that the Petitioner and Mr. Crisp were friends, that the Petitioner and Officer Criddle were friends and colleagues, that Officer Criddle did not work on the day the theft was reported, and that the Petitioner had the means and opportunity to file the false police report under Officer Criddle's name. The court found that defense counsel attempted to show that no direct evidence showed the Petitioner submitted the false report. The court likewise found that Ms. Hernandez's testimony established that the Petitioner was a principal in the disposal of the motorcycle engine and frame and that defense counsel presented evidence impeaching her credibility. As a result, the court determined that the Petitioner failed to establish his claims by clear and convincing evidence in connection with the false police report and the tampering with evidence convictions.

#### **A. Failure to Request Witness Statements**

The Petitioner argues, generally, that defense counsel failed to request witness statements pursuant to *Jencks v. United States*, 353 U.S. 657 (1957), at the trial and that this failure constituted ineffective assistance. Although he does not point to any specific witness statement that defense counsel should have requested at the trial, the Petitioner states in his appellate brief that "the withheld evidence would have provided impeachment material for both lay witnesses and . . . officers." We glean from the record that the Petitioner refers to the statements made by Ms. Hernandez, Mr. Crisp, and Officer Criddle, all of whom testified at the trial and were mentioned in the search warrant affidavit and in the multiple police investigative reports. We limit our review accordingly.

Tennessee Criminal Procedure Rule 26.1(a), generally known as the rule governing *Jencks* material, states that

[a]fter a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

A witness statement is defined as a "written statement that the witness makes and signs, or otherwise adopts or approves" or a "substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in a stenographic, mechanical, electrical, or other recording or a transcription of such as statement." Tenn. R. Crim. P. 26(f)(1), (2). However, if evidence does not satisfy the definition of a "statement" as defined by Rule 26.2, the State is not obligated to produce the evidence. *State v. Biggs*, 218 S.W.3d 643, 662 (Tenn. 2006) (concluding that a summary of a child forensic interview was not a statement as defined by Rule 26.2 because it was not signed or adopted by the victim and was not a verbatim recording of the victim's statements and that, as a result, the State was not obligated to produce the summary); *see Claude Francis Garrett v. State*, No. M1999-00786-CCA-R3-PC, 2001 WL 280145, at \*11 (Tenn. Crim. App. Mar. 22, 2001) (concluding that when a defendant failed to show that *Jencks* material existed, the post-conviction court did not err by concluding that trial counsel did not provide ineffective assistance of counsel based upon the failure to make a *Jencks* request).

As a preliminary matter, trial counsel and co-counsel admitted that they did not request *Jencks* material during the trial because they believed they received all of the witness statements to which the defense was entitled during the discovery process.

## **1. Ms. Hernandez's Statements to Director Cherry**

The record reflects that Ms. Hernandez spoke to Director Cherry about her disposing of the motorcycle engine and frame at the Petitioner's request because the Petitioner feared Mr. Molina had told the police the motorcycle had been stolen. The post-conviction court determined that the statements were subject to disclosure pursuant to Tennessee Criminal Procedure Rule 26.2 upon request by the defense after Ms. Hernandez testified at the trial but that defense counsel did not request any of her previous statements. The court found that although her testimony contained minor discrepancies about how she loaded the frame and engine into the vehicle, this was not material to any issue that was in dispute at the trial. The court found that although the inconsistencies could have been exculpatory and used for impeachment evidence, Ms. Hernandez's description of how the items were loaded mattered little. The court found that the material issues at the trial were whether the Petitioner instructed her to "make the items vanish" because he feared the police were investigating the motorcycle and whether she followed his instructions. The court



determined that defense counsel's failure to request *Jencks* material was deficient performance but that the Petitioner failed to establish prejudice.

The record reflects that after Ms. Hernandez disposed of the motorcycle frame and engine at the Petitioner's request, she contacted the Drug Task Force to disclose the circumstances surrounding her unlawful conduct. After her initial contact with Lieutenant Bales with the Drug Task Force, Director Cherry interviewed Ms. Hernandez informally. Although the interview was not recorded or transcribed, Director Cherry completed a report of the interview and provided the report to Sergeant Clower or to Investigator Rockholt. The report reflected that on September 17, 2015, Ms. Hernandez contacted Director Cherry to provide information. Ms. Hernandez reported that in August 2015, the Petitioner told her to "get rid" of the motorcycle engine and frame belonging to a disassembled motorcycle and that the Petitioner believed Mr. Molina had told the police during an unrelated investigation that the motorcycle had been stolen. Ms. Hernandez stated that the Petitioner wanted the engine and frame removed from the body shop to prevent them from being found, that she loaded the engine and frame into a truck, and that she pushed both items over the side of a mountain in Polk County.

Although the post-conviction court determined that Ms. Hernandez's statements would have been disclosed to the defense if counsel had requested *Jencks* material, we conclude that the information she provided to Director Cherry was not a statement as defined by Tennessee Criminal Procedure Rule 26.2(f). The record does not reflect that Ms. Hernandez signed or adopted a written statement, and none is contained in the record. The record likewise does not reflect that a verbatim, contemporaneous recording was made of her statement to Director Cherry. *See* Tenn. R. Crim. P. 26.2; *Biggs*, 218 S.W.3d at 662. Rather, the record reflects that Director Cherry spoke with Ms. Hernandez and summarized the interview in a report, which was forwarded to other law enforcement officers investigating the Petitioner and which was later utilized, at least in part, to obtain a search warrant for the body shop. As a result, the record does not support the post-conviction court's determination that defense counsel performed deficiently. Rather, the record shows that the statement was not subject to disclosure pursuant to Rule 26.2. *See Claude Francis Garrett*, 2001 WL 280145, at \*11. The Petitioner is not entitled to relief on this basis.

## **2. Mr. Crisp's Statements to Sergeant Mitchell**

The post-conviction court credited Sergeant Mitchell's testimony and found that Sergeant Mitchell initially investigated Mr. Crisp's August 2, 2013 stolen motorcycle report and that Sergeant Mitchell's case summary reflected that Mr. Crisp told Sergeant Mitchell that Mr. Crisp "had no information on the theft." The post-conviction court determined that Mr. Crisp's statement was subject to disclosure pursuant to Tennessee Criminal Procedure Rule 26.2 upon request by the defense after Mr. Crisp testified at the trial but that defense counsel did not request any previous statements. The court found that

if counsel had requested the materials related to Mr. Crisp, the defense would have learned of Mr. Crisp's statement to Sergeant Mitchell about the motorcycle and that the statement "at minimum, contained yet another lie." The court determined that defense counsel's failure to request *Jencks* material was deficient performance.

The record reflects that Sergeant Mitchell's summary, which was received as an exhibit, showed that he spoke to Mr. Crisp on the telephone and that Mr. Crisp did not provide any information. The case summary also reflected that Sergeant Mitchell attempted to contact Mr. Crisp on three occasions in 2013, that Sergeant Mitchell left two voicemail messages, and that Sergeant Mitchell spoke once to Mr. Crisp, who said he "had no information on the theft."

Although the post-conviction court determined that Mr. Crisp's statement to Sergeant Mitchell would have been disclosed to the defense if counsel had requested *Jencks* material and that the failure to request the material constituted deficient performance, we conclude that Mr. Crisp's statement was not a statement as defined by Tennessee Criminal Procedure Rule 26.2(f). The record does not reflect that Mr. Crisp signed or adopted a written statement when he spoke to Sergeant Mitchell. The record likewise does not reflect that a verbatim, contemporaneous recording was made of his statement to Sergeant Mitchell. *See* Tenn. R. Crim. P. 26.2; *Biggs*, 218 S.W.3d at 662. Rather, the record reflects that Sergeant Mitchell spoke on the telephone with Mr. Crisp, who reported having no information about the motorcycle theft, and Sergeant Mitchell memorialized the discussion in a summary, which was later forwarded to other law enforcement officers investigating the Petitioner. As a result, the record does not support the post-conviction court's determination that defense counsel performed deficiently. Rather, the record shows that the statement was not subject to disclosure pursuant to Rule 26.2. *See Claude Francis Garrett*, 2001 WL 280145, at \*11. The Petitioner is not entitled to relief on this basis.

### **3. Officer Criddle's Statement to Law Enforcement**

The post-conviction court determined that the search warrant affidavit referred to Sergeant Clower and Detective Pike's interview of Officer Criddle. The court found that during the September 21, 2015 interview, Officer Criddle stated that he did not remember "taking the initial report," that he was on vacation on the day of the reported theft, and that he had previously seen a motorcycle engine, which had been inside the body shop for a couple of years, on a table in the rear of the body shop. The court found that the affidavit, likewise, reflected that timesheet records showed Officer Criddle was not working on August 2, 2012, when the police report was submitted. The court found that Officer Criddle's statements were inculpatory and were subject to disclosure pursuant to Tennessee Criminal Procedure Rule 26.2 upon request by the defense after he testified at the trial but that defense counsel did not request any previous statements by Officer Criddle. The court

determined that defense counsel's failure to request *Jencks* material was deficient performance.

The record reflects that Detective Pike and Sergeant Clower interviewed Officer Criddle about the motorcycle theft police report. Detective Pike testified at the evidentiary hearing that the interview was not recorded, which would have precluded a determination that the interview was a statement as defined by Tennessee Criminal Procedure Rule 26.2(f). However, Sergeant Clower's investigative file contained what appears to be a verbatim recitation of the interview, at the end of which states "End of Tape." The file likewise reflects a two-page coversheet, the first of which states general information about Officer Criddle and the location, date, time of the interview. The second page states "Statement of: Recorded Interview." Although the post-conviction court credited Detective Pike's testimony, Sergeant Clower's investigative file calls into doubt any finding by clear and convincing evidence that the interview was not recorded. The discrepancy between the file and Detective Pike's testimony was not explored at the evidentiary hearing, and the record contains no information explaining the discrepancy. In any event, the record supports the post-conviction court's determination that the Petitioner failed to establish prejudice for defense counsel's failure to request *Jencks* material related to Officer Criddle.

The investigative file reflects that during the interview, Officer Criddle did not recall responding to the theft report and did not recall any information about the motorcycle. When asked if a police report reflecting an officer's badge number could be generated by another officer, he said that at the bottom of a report, an officer had "to pick your badge number to identify who's actually taking the report and when you hit that drop down box it pulls up every city officer employee and retired." Officer Criddle agreed his badge number and car number appeared on the police report but identified the Petitioner's car number in the dispatch records as the responding police officer to the 9-1-1 call. Officer Criddle agreed that the dispatch records showed that the Petitioner's car number responded to the 9-1-1 call. Officer Criddle did not recall submitting the report. He said that the Petitioner had never asked him to complete a police report for the Petitioner and that it was not common for an officer to put another officer's name on a police report. Officer Criddle was not asked about his frequenting the body shop or about what he might have seen there.

In any event, the extent of Officer Criddle's trial testimony was that he did not investigate the theft report on August 2, 2013, that he did not complete a police report, and that he was off duty at the time of the report. He stated that he did not consent to anyone completing a report in his name, that his police car or radio number was 3363, and that the Petitioner's was 3355. On cross-examination, trial counsel elicited testimony from Officer Criddle that the in-car police computers were password protected and that he did not provide his password to the Petitioner. Furthermore, Officer Criddle testified that if he were not working on a day when his timesheet was due, "a friend or supervisor or

somebody” could fill in the timesheet and submit it. After reviewing his timesheet, he agreed that it was unsigned, even though he worked on Saturday, August 3, 2013, when the timesheet was due.

The record reflects that Officer Criddle’s trial testimony was largely consistent with the interview contained in Sergeant Clower’s investigative file. However, Officer Criddle’s statement about how another officer could submit a police report in another officer’s name was not presented to the jury, which would have been damning evidence contradicting the Petitioner’s trial testimony. The Petitioner testified that he could not have generated the report using Officer Criddle’s name because two unique passwords were required to generate a report and because he did not know Officer Criddle’s passwords. The Petitioner, likewise, testified that he did not believe an officer could have placed another officer’s name on a report, unless the officer added the other officer’s name as a “secondary unit to that record.” In any event, trial counsel elicited favorable evidence that the in-car computers were password protected, that Officer Criddle did not provide his password to the Petitioner, and that a timesheet could be completed by another officer. As a result, we conclude that the record supports the post-conviction court’s determination that the Petitioner failed to establish his ineffective assistance claim by clear and convincing evidence. The Petitioner is not entitled to relief on this basis.

## **B. Failure to Investigate**

The Petitioner argues that although defense counsel hired an investigator, counsel failed to pursue an independent investigation and relied on the State to provide all relevant information. The State responds that defense counsel reasonably investigated and that any “shortcomings were not prejudicial.”

### **1. Officer Criddle**

The Petitioner argues that defense counsel failed to investigate the in-car police computer records, Officer Criddle’s timesheet, and dispatch records in an effort to refute the State’s theory that Officer Criddle did not respond to Mr. Crisp’s 9-1-1 call.

#### **(a) In-Car Police Computer Records**

The Petitioner argues that trial counsel had a duty to investigate the in-car police computer records to refute the State’s theory that Officer Criddle did not respond to the 9-1-1 call and submit the theft report.

The post-conviction court found that the in-car police records would have existed at the time of the indictment, which the record reflects was October 2015, but that they no longer existed at the time of the evidentiary hearing. The court found that defense counsel

pursued the computer records and relied upon the information provided by District Attorney General Crump. The court, after reviewing the trial transcript, found that defense counsel effectively cross-examined Officer Criddle to show that his memory of August 2, 2013 was poor and that defense counsel were able to cast doubt about who might have authored the police report. The court found that although the evidence could have been used to rebut the State's evidence that the Petitioner had used Officer Criddle's name to falsify a police report, the Petitioner failed to show a reasonable probability that the jury's verdict would have been different in connection with the filing a false police report conviction.

The record reflects that Cleveland Police Chief Gibson testified that in 2013, patrol cars contained password-protected computers, which were used to submit police reports, and that the reports were sent to "an electronic location" and later retrieved and approved by the commanding officers. Trial counsel recalled that the Petitioner told him and co-counsel that "there's a computer, there's some computer records that . . . should exist and we haven't been given." Co-counsel recalled that the records were first mentioned on the first day of the trial. Trial counsel and co-counsel requested the records from District Attorney General Crump, who later reported "We've looked and don't have it." Co-counsel understood that "a diligent search was made and nothing was found" and said that the defense requested information about "who could have signed a police report . . . . Was it Officer Criddle or could it have been [the Petitioner]" in order to refute the State's theory that the Petitioner signed and submitted the police report.

However, Ronald Miller, who worked in the Information Technology Department for the Cleveland Police Department, was uncertain if the 2013 records from Officer Criddle's in-car computer system could have been retrieved in 2015. Although he stated that the 2013 records could have been obtained in 2013, the police department changed computer systems in 2015 or 2016. Mr. Miller initially said that he did not know of any reason he could not have obtained the relevant records if he had received a request in 2015, but later stated, when questioned by the post-conviction court, that he was unsure he would have been able to obtain the records in 2015.

The trial began in October 2016, one year after the return of the indictment. Defense counsel first learned of the in-car police computers on the first day of the trial when the Petitioner mentioned the computers to defense counsel. Counsel investigated the records by contacting District Attorney General Crump, who reported that the records did not exist. Although the post-conviction court found that the records existed at the time of the return of the indictment, Mr. Miller was uncertain the records could have been obtained in 2015. We note that the Petitioner was a Cleveland Police Officer at the time of the offenses and would have been familiar with the processes and equipment used to submit a police report. Counsel did not learn of the computers until the first day of the trial, but trial counsel was able to elicit testimony from Officer Criddle that the in-car computers were password

protected and that Officer Criddle did not provide his password to the Petitioner, all of which supported the Petitioner's testimony that he did not know the passwords to Officer Criddle's in-car computer. Officer Criddle also testified about his lack of memory of August 2, 2013, when the motorcycle was reported stolen. As a result, the record supports the post-conviction court's determination that the Petitioner failed to establish his ineffective assistance claim by clear and convincing evidence. The Petitioner is not entitled to relief on this basis.

**(b) Officer Criddle's Timesheet**

The Petitioner argues that defense counsel had a duty to investigate Officer Criddle's timesheet to refute the State's theory that Officer Criddle did not respond to Mr. Crisp's 9-1-1 call.

The record reflects that Chief Gibson explained that if an officer's timesheet needed to be modified to correct an error, the officer contacted the administrative staff if the timesheet had been submitted. However, if the officer had received payment, the department of human resources had to correct the error. Chief Gibson testified that Officer Criddle's personnel records reflected that he was on vacation at the time Mr. Crisp reported the motorcycle stolen. The discovery receipt received as an exhibit reflects that Officer Criddle's and the Petitioner's timesheets were provided to the defense during discovery. The Petitioner did not present any evidence at the evidentiary hearing to refute that Officer Criddle was off duty at the time the police report was submitted. Mere evidence that an officer, administrative staff, and human resources staff could modify a timesheet does not, without more, establish that Officer Criddle's timesheet was modified at the time the police report in this case was submitted. In fact, such evidence was speculative, at best. As a result, the record supports the post-conviction court's determination that the Petitioner failed to establish his ineffective assistance claim by clear and convincing evidence. He is not entitled to relief on this basis.

**(c) Police Dispatch Records**

The Petitioner argues that defense counsel had a duty to investigate the dispatch records to refute the State's theory that Officer Criddle did not respond to Mr. Crisp's 9-1-1 call. He asserts that dispatch records and the 9-1-1 records "were in dispute" and that counsel failed to obtain records to counter the State's theory that the Petitioner responded to the 9-1-1 call.

The record reflects that Ms. Watkins, Bradley County 9-1-1 Custodian of Records, searched for records related to officers responding to the body shop in 2015 and that she found none. Sergeant Clower, who was employed by the Tennessee Highway Patrol, did not recall if he "call[ed] into dispatch" at the time of the consent search and when the search

warrant was executed, and he did not report to Ms. Watkins's agency. Bradley County Sheriff's Detective Pike did not report to dispatch. The Petitioner asserts that the lack of dispatch records in connection with the searches might establish the possibility that Officer Criddle responded to the theft report without reporting or communicating with dispatch.

However, trial counsel was not questioned about the dispatch records at the post-conviction hearing. Co-counsel recalled trial testimony relative to an officer's notification to dispatch when the officer left a police car but that co-counsel did not know if dispatch logs were created at the time of a search, regardless of whether it was pursuant to consent or a warrant. The Petitioner did not present any evidence that dispatch records were created by an officer when conducting a search. In any event, the Petitioner failed to establish any deficient performance resulted in prejudice.

The discovery receipt reflects that the dispatch records were provided to the defense during discovery. At the trial, Sergeant Clower testified that he listened to the dispatch call after speaking with Officer Criddle and concluded that Officer Criddle's voice was not the officer who answered the call in the dispatch record. In fact, Sergeant Clower determined that the Petitioner's voice was heard in the recording. Sergeant Clower investigated the matter further and learned that the Petitioner's police car, which was number 3355, responded to the 9-1-1 call. The investigation further showed that the Petitioner was on duty at the time of the call and that Officer Criddle was off duty. As a result, the record supports the post-conviction court's determination that the Petitioner failed to establish his ineffective assistance claim by clear and convincing evidence. The Petitioner is not entitled to relief on this basis.

#### **(d) Cell Phone Records**

The Petitioner argues that defense counsel failed to obtain cell phone records in an effort to confirm whether Mr. Crisp contacted Officer Criddle about the motorcycle theft as reflected in the GEICO insurance records. The Petitioner offers no additional argument in this regard other than counsel should have obtained the phone records. However, the record reflects that trial counsel and co-counsel were not questioned about any such phone records, and the Petitioner presented none at the evidentiary hearing. Neither this court nor a post-conviction court may speculate about the substance of the records or the substance of any witness testimony which is not introduced at the evidentiary hearing. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). The Petitioner is not entitled to relief on this basis.

## **2. Mr. Crisp's Insurance Claims**

The Petitioner argues that defense counsel failed to seek police reports and any other records related to Mr. Crisp's previous insurance claims, which could have been used for impeachment.

The post-conviction court determined that before the trial, defense counsel possessed information that Mr. Crisp "had previously filed another fraudulent insurance claim separate from the matter at bar" but that counsel did not initially question Mr. Crisp about the previous claims. The court found, based upon the trial transcript, that counsel later attempted to present this evidence during the testimony of the insurance adjuster but that the trial court determined the evidence was inadmissible. The post-conviction court determined that counsel provided deficient performance in this regard because Mr. Crisp's credibility was central to the fraudulent insurance claim conviction but not to the Petitioner's remaining convictions.

The trial transcript reflects that on cross-examination, trial counsel asked Mr. Crisp if he had "made other insurance claims on property that had been stolen" and that Mr. Crisp replied that he had never filed any previous claims with GEICO but that he "did have a truck stolen." Mr. Crisp testified that the truck was returned to him, and when asked if he filed an insurance claim in connection with the truck, Mr. Crisp said, "Not that I know of, no, sir." Mr. Crisp stated that he might have told the insurance company about the truck having been stolen but that he "did get it back. So there was no. . ." However, co-counsel attempted to ask James Bowers, the GEICO insurance adjuster, on cross-examination about Mr. Crisp's previous theft-related claims. Mr. Bowers testified that "[a]t times," GEICO investigated the loss history of a claimant. After co-counsel asked if a loss history report was generated for Mr. Crisp in connection with this case, Mr. Bowers identified an "ISO ClaimSearch Match Report Summary" related to Mr. Crisp's previous claims. Mr. Bowers testified that the summary was a loss history report that the claims department "would have run" in order to determine if any red flags existed to indicate possible fraud. When co-counsel asked Mr. Bowers to review the summary, the prosecutor objected.

At the bench conference, the prosecutor's objection was inaudible at times for the court reporter, but we glean from the record that the prosecutor argued that whether Mr. Crisp had filed previous insurance claims should have been addressed during Mr. Crisp's cross-examination. Co-counsel responded that he was entitled to explore the claim investigative process because the State questioned Mr. Bowers about the process on direct examination and that co-counsel was not limited to asking Mr. Crisp questions about previous claims. Co-counsel argued that Mr. Crisp had testified that he had filed a previous insurance claim in connection with a stolen truck but that the summary showed Mr. Crisp had two additional theft-related insurance claims "that same year." The trial court determined according to the rules of evidence that although the summary was relevant to Mr. Crisp's credibility, Mr. Crisp needed to be afforded the opportunity to affirm or deny whether he had filed previous theft-related insurance claims. The court found that Mr.



Crisp was not afforded the opportunity to testify about any the previous claims, other than the truck. The court allowed Mr. Bowers to testify about the report only in connection with the reported stolen truck. Co-counsel clarified for the trial court that the summary was not being used to impeach Mr. Crisp's credibility but was being offered to show Mr. Bowers's investigation into the insurance claim, but the trial court found that what Mr. Crisp did or did not do was not relevant to a material issue related to the present case.

The trial court allowed the defense to make an offer of proof, during which Mr. Bowers testified that the summary reflected that Mr. Crisp had filed three previous theft-related insurance claims. On May 17, 2012, a claim was filed for the theft of a vehicle insured by GEICO. On May 17, 2012, a claim was filed for the theft of personal property insured by American Family Home Insurance. On October 26, 2012, a theft-related claim was filed for property insured by America Banker's Insurance. Mr. Bower testified that the summary was included in GEICO's claim's file, which was provided to the prosecution. The report was received as an exhibit for identification purposes.

However, as this court previously determined, the "ISO ClaimSearch Match Report Summary" was "[a]t most, . . . proof that Mr. Crisp filed additional [theft-related] insurance claims, contrary to his testimony that he had filed one previous claim." *Edwin Millan*, 2018 WL 5752204, at \*6. The report does not reflect that GEICO concluded that the previous claims were fraudulent as the post-conviction court found. In any event, defense counsel did not question Mr. Crisp about the previous theft-related claims detailed in the report. However, defense counsel asked Mr. Crisp if he had filed any previous theft-related claims, and evidence that Mr. Crisp had submitted a previous claim for a stolen vehicle was presented to the jury, although counsel did not question Mr. Crisp about all of the claims reflected in the report. Mr. Crisp was not asked at the post-conviction hearing if the three previous theft-related claims were fraudulent, and the record does not contain evidence that the previous claims were fraudulent.

Mr. Crisp was questioned extensively at the trial about filing a false insurance claim in this case, and Mr. Crisp testified candidly about his fabricating the motorcycle theft. As the post-conviction court found, Mr. Crisp "explicitly and repeatedly" admitted on cross-examination that he had lied about the motorcycle and false insurance claim in this case and that co-counsel "exposed" Mr. Crisp as the person who "exclusively" benefited from the criminal scheme. The court found that counsel "effectively highlighted the lack of eye witness testimony and direct evidence indicating" the Petitioner was involved in the offenses. Mr. Crisp testified at the evidentiary hearing that he admitted during the trial that he had lied about the motorcycle having been stolen and that he had lied to the investigating officer who contacted him about the motorcycle. Other evidence showed that Sergeant Mitchell contacted Mr. Crisp about the theft in 2013. In any event, the Petitioner failed to present any additional records, police reports or otherwise, in connection with any previous

insurance claims. This court will not speculate. *See Black*, 794 S.W.2d at 757. The Petitioner is not entitled to relief on this basis.

### **3. Discovery from Mr. Molina's Unrelated Criminal Case**

The Petitioner argues that “[k]nowing that the defense would seek to prove Mr. Molina as the alternative perpetrator,” defense counsel did not attempt to file a motion requesting discovery related to Mr. Molina. Although the Petitioner does not elaborate, we glean from the record that the Petitioner asserts that defense counsel should have obtained discovery materials from the unrelated arson case involving Mr. Molina and the Petitioner. The Petitioner argues that the discovery materials could have provided insight and motive in the present case.

The primary evidence contained in the record related to Mr. Molina and to the arson and insurance fraud of the Petitioner's car consisted of Mr. Molina's cell phone records and Mr. Molina's recorded police interview, both of which were received as exhibits at the evidentiary hearing. We limit our review accordingly.

In connection with Mr. Molina's recorded interview, the post-conviction court found that the Petitioner did not present evidence showing that the recording was not provided to the defense. The court found that defense counsel were not questioned at the evidentiary hearing about whether the recording was included in the discovery materials provided by the State in the present case. In any event, the court reviewed the recording and found that the September 20, 2015 interview was related to the “automobile arson and insurance fraud” charges, which were from a separate criminal episode and were unrelated to the present case. The court found that during the interview, Mr. Molina discussed his and the Petitioner's involvement in the arson and fraud and that, afterward, the Petitioner and Mr. Molina were indicted for their alleged conduct. The court found that Mr. Molina made no admissions related to Mr. Crisp's motorcycle. The court found that the lack of any admission by Mr. Molina could have been an inconsistent statement because the affidavit to the search warrant reflected that on September 4, 2015, Mr. Molina told officers that a stolen motorcycle frame and engine had once been inside the body shop.

In connection with Mr. Molina's cell phone records, the post-conviction court found that the Petitioner did not present evidence showing that the phone records were not provided to the defense. The court determined that the Petitioner failed to establish the relevance of the phone records because the records related to May 16-17, 2015. The offenses for which the Petitioner was convicted occurred in August 2013, which included filing a false police report and insurance fraud, and August 2015, which included tampering with evidence. The court determined that Mr. Molina had been under investigation in the separate arson and insurance fraud case and that the State would not have been required to disclose the phone records because they were not related to the present case.

The record reflects that the Petitioner and Mr. Molina were indicted for their conduct in the arson-related case and that, as a result, the Petitioner would have been entitled to all of the discovery. In fact, the record is absent any evidence relative to whether discovery had been provided to the Petitioner in the arson case involving Mr. Molina or to defense counsel in this case. Trial counsel, co-counsel, and the defense investigator were not questioned at the evidentiary hearing about Mr. Molina's phone records. In any event, Detective Pike testified that he obtained Mr. Molina's records for May 2015, but the Petitioner's conviction offenses occurred in August 2013 and 2015. The record supports the post-conviction court's determination that the Petitioner failed to establish his ineffective assistance claim. The Petitioner is not entitled to relief on this basis.

#### **4. Failure to Interview**

The Petitioner argues, generally and without explanation, that defense counsel failed to interview witnesses. The Petitioner's primary focus is the failure to interview Mr. Molina, Mr. Crisp, and Ms. Crisp.

##### **(a) Mr. Molina**

The record reflects that defense counsel were not asked at the evidentiary hearing if Mr. Molina was interviewed before the Petitioner's trial. However, trial counsel testified that Mr. Molina was the "bad actor" in the present case, and co-counsel knew that Mr. Molina was a "prominent party," who stole money from the body shop and worked on motorcycles at the body shop. The chosen defense was that the Petitioner was not involved in the offenses and that Mr. Crisp and Ms. Hernandez lied about the Petitioner's involvement in filing a false insurance claim, in filing a false police report, and in tampering with evidence. Mr. Molina did not testify at the Petitioner's trial, and when called to testify at the evidentiary hearing, Mr. Molina invoked his privilege against self-incrimination. Neither this court nor the post-conviction court may speculate about the substance of the substance of Mr. Molina's knowledge or involvement in this case. *See Black*, 794 S.W.2d at 757. As a result, the record supports the post-conviction court's determination that the Petitioner failed to establish his ineffective assistance of counsel claim. He is not entitled to relief on this basis.

##### **(b) Mr. Crisp and Ms. Crisp**

The post-conviction court found, in relevant part, that defense counsel's preparation for the cross-examination of Mr. Crisp was "lacking in many respects." The court found that Mr. Crisp "appeared to be the type of individual for whom the details, information, and stories would vary the more times he was interviewed or the longer you keep him talking" but that counsel failed to interview Mr. Crisp before the trial. The court credited testimony from defense counsel and the defense investigator that Mr. Crisp was not

interviewed before the trial. The court noted that the Petitioner's conviction for filing a false insurance claim was based entirely upon Mr. Crisp's trial testimony. The court found that whether the Petitioner acted as a principal in the offense or merely assisted Mr. Crisp with the "cover-up" was an issue only resolved by Mr. Crisp, rendering his credibility "paramount" overall and specifically to the insurance fraud conviction. The court found that whether the Petitioner acted as an accessory after the fact for a friend or whether he was criminally responsible for Mr. Crisp's conduct was a "genuine issue in this case." The court determined that although defense counsel's chosen defense of impeaching the credibility of the State's witnesses was sound, effective impeachment of Mr. Crisp was critical and that, as a result, the failure to interview Mr. Crisp before the trial was deficient performance. Although the court granted relief in connection with his filing a false insurance conviction, the court declined to conclude that the Petitioner had established prejudice in connection with his tampering with evidence and filing a false police report convictions.

The record reflects that at the evidentiary hearing, Mr. Crisp and the defense investigator each testified that Mr. Crisp was not interviewed before the trial. The defense investigator recalled that although she was ready to interview Mr. Crisp, trial counsel told her to "hold off" because the case might be resolved. The case was not resolved, and Mr. Crisp was not interviewed before the trial.

The trial transcript reflects Mr. Crisp's testimony that after having difficulty selling the motorcycle, the Petitioner said, "[W]ell don't sell it, and we can take care of it and make it disappear[.]" According to Mr. Crisp, the Petitioner told him to drop off the motorcycle at the body shop on a day when the Petitioner was on duty with the Cleveland Police Department, get something to eat, and, afterward, report the motorcycle stolen. Mr. Crisp testified that the Petitioner told Mr. Crisp that "he would get the call" and "make it disappear." Mr. Crisp testified that on August 2, 2013, Mr. Crisp dropped off the motorcycle at the shop and that the Petitioner was the only person there. Mr. Crisp's then-fiancée picked him up, and they went to a restaurant. After eating, Mr. Crisp called 9-1-1 to report the motorcycle stolen, and the Petitioner arrived at the scene to "take a report." While at the scene, the Petitioner told Mr. Crisp "that he'd put the report in somebody's else's name since [Mr. Crisp] and [the Petitioner] were friends." Mr. Crisp testified that at the Petitioner's direction, he filed an insurance claim for the motorcycle and that the insurance company issued a payment to the finance company.

The record supports the post-conviction court's determination that Mr. Crisp's credibility was central to this case, at least in part. Mr. Crisp's testimony alone was the basis for the filing a false insurance claim conviction as the post-conviction court determined. However, Mr. Crisp's testimony was also relevant to the Petitioner's conviction for filing a false police report. Mr. Crisp testified that after the Petitioner responded to the scene of the reported theft, the Petitioner stated he would place another

police officer's name on the police report. Whether the Petitioner placed Officer Criddle's name on the police report was a material and disputed issue in connection with the filing a false police report conviction. As a result, we conclude that the record supports the post-conviction court's determination that defense counsel's failure to interview Mr. Crisp was deficient performance in connection with the filing a false police report conviction.

However, the evidence supporting the Petitioner's conviction for filing a false police report was not limited to Mr. Crisp's trial testimony. Sergeant Clower testified at the trial that the Petitioner's voice, not Officer Criddle's voice, was heard on the police radio answering the August 3, 2013 9-1-1 call and that the dispatch log showed the Petitioner's police car, not Officer Criddle's police car, responded to the scene. Sergeant Clower, likewise, obtained Officer Criddle's and the Petitioner's timesheets, which indicated that the Petitioner was on duty and that Officer Criddle was on vacation. The Petitioner's and Officer Criddle's timesheets for the relevant time period were received as a trial exhibit and were consistent with Sergeant Clower's testimony. Further, Officer Criddle testified that he was not on duty at the time of the reported theft and that he did not investigate this case. As a result, the record supports the post-conviction court's determination that the Petitioner failed to establish his ineffective assistance claim in connection with the filing a false police report conviction. The Petitioner is not entitled to relief on this basis.

Although Mr. Crisp testified at the trial that the Petitioner would make the motorcycle disappear, the Petitioner's tampering with evidence conviction was based, in large part, upon Ms. Hernandez's testimony and upon the police investigation leading to the recovery of the frame. As a result, the record supports the post-conviction court's determination that the Petitioner failed to establish his ineffective assistance claim in connection with the tampering with evidence conviction.

Relative to Ms. Crisp, the record reflects that Mr. Crisp's then-fiancée did not testify at the Petitioner's trial. Furthermore, defense counsel and the defense investigator were not asked at the evidentiary hearing about whether anyone interviewed Ms. Crisp. In any event, Ms. Crisp did not testify at the evidentiary hearing, and neither this court nor the post-conviction court may speculate about the substance of her knowledge of this case. *See Black*, 794 S.W.2d at 757. The Petitioner is not entitled to relief on this basis.

## **5. Ms. Hernandez's Social Media Information**

The Petitioner asserts that defense counsel failed to obtain social media account information about the State's witnesses. The Petitioner focuses upon Ms. Hernandez. He argues that the photograph of Ms. Hernandez that was posted to her social media account one day before she contacted the Drug Task Force about her involvement in this case provided a basis to question her "timeline" of when she disposed of the frame and engine.

The post-conviction court determined that defense counsel did not attempt to investigate Ms. Hernandez's social media accounts. The court determined that even if the failure to investigate her social media accounts constituted deficient performance, the Petitioner failed to establish prejudice.

The record reflects that Ms. Hernandez posted a photograph to her Facebook account the day before she contacted the Drug Task Force to discuss the motorcycle engine and frame. The photograph depicted Ms. Hernandez in the general area where she reported disposing of the engine and frame, the latter of which was found by investigators based upon information she provided. Co-counsel did not attempt to obtain Ms. Hernandez's social media information, and he was unsure if the defense investigator attempted to obtain the information. Co-counsel's case file did not include any social media information, which led co-counsel to conclude that the information was not sought or was sought unsuccessfully.

We conclude that the record supports the post-conviction court's determination that the Petitioner failed to establish any deficient performance resulted in prejudice for the failure to obtain and present evidence that Ms. Hernandez might have frequented the area at which she disposed of the motorcycle engine and frame and that she was in the area the day before she contacted the Drug Task Force. The Petitioner is not entitled to relief on this basis.

### **C. Failure to Present Favorable Evidence**

The Petitioner argues that defense counsel failed to present favorable evidence in their possession. The Petitioner focuses on evidence related to Mr. Crisp, to text messages exchanged between the Petitioner and Ms. Hernandez, to the eviction proceedings against the body shop, and to a fingerprint analysis report in connection with the motorcycle frame. The Petitioner, likewise, asserts that defense counsel failed to present favorable defense witnesses.

#### **1. Mr. Crisp**

##### **(a) Previous Insurance Claims**

The Petitioner asserts that defense counsel failed to cross-examine Mr. Crisp effectively regarding his previous insurance claims.

As we have discussed previously, the post-conviction court determined that before the trial, defense counsel possessed information reflecting that Mr. Crisp had "previously filed another fraudulent insurance claim separate from the matter at bar" but that counsel did not ask Mr. Crisp about "this separate, prior insurance fraud." The court found, based

upon the trial transcript, that counsel later attempted to present this information at the trial but that the trial court determined the evidence was inadmissible. The court determined that counsel provided deficient performance in this regard because Mr. Crisp's credibility was central to the filing a fraudulent insurance claim conviction but not to the Petitioner's remaining convictions.

However, as this court previously stated, the "ISO ClaimSearch Match Report Summary" was "[a]t most, . . . proof that Mr. Crisp filed additional [theft-related] insurance claims, contrary to his testimony that he had filed one previous claim." *Edwin Millan*, 2018 WL 5752204, at \*6. The report does not reflect that GEICO concluded that the previous claims were fraudulent. In any event, defense counsel did not question Mr. Crisp about the previous theft-related claims detailed in the report. However, defense counsel asked Mr. Crisp if he had filed any previous theft-related claims, and Mr. Crisp admitted a truck was stolen and later returned.

The trial transcript reflects that on cross-examination, trial counsel asked Mr. Crisp if he had "made other insurance claims on property that had been stolen" and that Mr. Crisp replied that he had never filed any previous claims with GEICO but that he "did have a truck stolen." Mr. Crisp testified that he had filed one previous claim related to a stolen truck, which was ultimately returned. Evidence that Mr. Crisp had submitted a previous claim for a stolen vehicle was presented to the jury, although counsel did not question Mr. Crisp about all of the claims reflected in the report. Mr. Crisp was not asked at the post-conviction hearing if the three previous theft-related claims were fraudulent, and the record does not contain evidence that the previous claims were fraudulent.

However, the evidence supporting the Petitioner's conviction for filing a false police report was not limited to Mr. Crisp's trial testimony. Sergeant Clower testified at the trial that the Petitioner's voice, not Officer Criddle's voice, was heard on the police radio answering the August 2, 2013 9-1-1 call and that the dispatch log showed that the Petitioner's police car, not Officer Criddle's police car, responded to the scene. Sergeant Clower, likewise, obtained Officer Criddle's and the Petitioner's timesheets, which indicated that the Petitioner was on duty and that Officer Criddle was on vacation. The Petitioner's and Officer Criddle's timesheets corroborated Sergeant Clower's testimony. Further, Officer Criddle testified that he was not on duty at the time of the reported theft and that he did not investigate this case. As a result, the record supports the post-conviction court's determination that the Petitioner failed to establish his ineffective assistance claim in connection with the filing a false police report conviction. The Petitioner is not entitled to relief on this basis.

Although Mr. Crisp testified at the trial that the Petitioner would make the motorcycle disappear, the Petitioner's tampering with evidence conviction was based, in large part, upon Ms. Hernandez's testimony and the police investigation leading to the

recovery of the frame. As a result, the record supports the post-conviction court's determination that the Petitioner failed to establish his ineffective assistance claim in connection with the tampering with evidence conviction. The Petitioner is not entitled to relief on this basis.

**(b) Bankruptcy Petition**

The Petitioner argues that defense counsel failed to cross-examine Mr. Crisp effectively about his bankruptcy petition.

The post-conviction court found that defense counsel failed to utilize all available information to impeach Mr. Crisp. The court noted that the background check report, which counsel received before the trial, showed that Mr. Crisp filed a bankruptcy petition, in which he reported the motorcycle stolen. The court found that Mr. Crisp lied in his petition and that the lies "may have allowed" counsel to question Mr. Crisp about perjury and filing false reports in violation of federal law. The court credited the testimony from trial counsel and co-counsel that they would have "absolutely pursued such means of impeachment" if they had been aware of the bankruptcy petition before the trial. The court found that reasonable diligence would have led defense counsel to uncovering this impeachment material. The court likewise found that the impeachment material could have exposed Mr. Crisp to federal prosecution, as Mr. Crisp testified at the trial that he did not have an immunity agreement with federal authorities. The court found that the jury might have assessed Mr. Crisp's credibility differently had it been presented evidence that Mr. Crisp was "potentially in trouble with both state and federal authorities." The court determined that defense counsel were "duty bound to more thoroughly pursue these means of impeachment" and that counsel's failure constituted deficient performance. Although the court granted relief in connection with the filing a false insurance claim conviction, the court declined to grant relief in connection with the filing a false police report and tampering with evidence convictions.

The record reflects that the defense investigator obtained a background report in connection with Mr. Crisp, that she would have reviewed the report and noticed the bankruptcy petition, and that she would have provided it to defense counsel. Mr. Crisp testified that although he filed a bankruptcy petition in 2013, he did not recall stating in the petition that his motorcycle had been stolen. Mr. Crisp's bankruptcy records were received as an exhibit and reflect that he reported the motorcycle had been stolen.

Trial counsel knew Mr. Crisp filed a bankruptcy petition in December 2013 but did not recall reviewing the petition. Trial counsel said that if he had known that Mr. Crisp reported the motorcycle stolen in the bankruptcy petition, he could have cross-examined Mr. Crisp about it. Trial counsel believed that Mr. Crisp committed a federal offense when he lied in the bankruptcy petition and conceded this evidence was not presented to the jury.



However, trial counsel believed that evidence of Mr. Crisp's statement in the bankruptcy petition regarding the motorcycle was cumulative evidence because Mr. Crisp was cross-examined extensively about his false statement that the motorcycle had been stolen. Trial counsel possessed multiple investigative reports showing that Mr. Crisp had falsely reported his motorcycle stolen. Trial counsel "put every event" in which Mr. Crisp said the motorcycle was stolen before the jury. Trial counsel conceded, though, that he did not present evidence relative to the bankruptcy petition. Trial counsel said that a bankruptcy petition was signed under oath and that Mr. Crisp made a false statement at the Petitioner's trial when Mr. Crisp testified that he had never "sworn falsely."

Co-counsel testified that he was aware at the time of the post-conviction evidentiary hearing that the defense investigator had obtained the bankruptcy petition but that he did not recall if he had been aware of the petition earlier. He did not recall having any information related to the bankruptcy proceedings. He agreed that Mr. Crisp's stating in the petition that his motorcycle had been stolen was important to the Petitioner's case but said that he might not have used the petition at the trial. Co-counsel said that Mr. Crisp admitted during the trial that he had submitted a false insurance claim by stating that the motorcycle had been stolen. Although co-counsel acknowledged that filing a false insurance claim and lying under oath in federal court were different offenses, co-counsel said that he chose to present the jury with "the best pieces of information" without getting "bogged down."

However, after reviewing the bankruptcy petition, co-counsel concluded that Mr. Crisp committed bankruptcy fraud and perjury and potentially committed wire fraud because the petition was filed electronically. Co-counsel agreed that Mr. Crisp's trial testimony that he had never sworn falsely under oath prior to his testimony was false and that presenting this evidence to the jury sounded "like a good trial tactic . . . strategy to have that ready."

The record supports the post-conviction court's determination that defense counsel provided deficient performance by failing to review the bankruptcy petition and to present evidence that Mr. Crisp had provided a false statement in the petition related to the motorcycle in this case. The record, likewise, supports the court's determination that the Petitioner failed to establish prejudice in connection with his filing a false police report and tampering with evidence convictions. As we have previously stated, Mr. Crisp testified that he lied to the police. Further, the evidence supporting the Petitioner's conviction for filing a false police report was not limited to Mr. Crisp's trial testimony. Witness testimony, including that of Sergeant Clower and Officer Criddle, the recording of the 9-1-1 call, the dispatch logs, and the Petitioner's and Officer Criddle's timesheets provided overwhelming evidence supporting the Petitioner's conviction for filing a false police report. Furthermore, although Mr. Crisp testified at the trial that the Petitioner would make the motorcycle disappear, the Petitioner's conviction for tampering with evidence was

based, in large part, upon Ms. Hernandez's testimony and the police investigation leading to the recovery of the frame. The Petitioner is not entitled to relief on this basis.

## **2. Text Messages Exchanged between the Petitioner and Ms. Hernandez**

The Petitioner asserts that defense counsel should have presented evidence of the text messages exchanged between the Petitioner and Ms. Hernandez in an effort to show that the Petitioner did not do anything wrong. The Petitioner focuses on the messages in which Ms. Hernandez responded, "I know, I'm sorry," when the Petitioner stated that he had never done anything illegal, that he had always attempted to help everyone, that he had lost more than \$60,000, and that he was not worried because "we have an ace."

The post-conviction court credited co-counsel's testimony that he reviewed the exchange of text messages between the Petitioner and Ms. Hernandez and that co-counsel chose not to present the messages at the trial. The court found, based upon co-counsel's credited testimony, that the messages could have contradicted the Petitioner's position that he had no involvement in the destruction of evidence and could have bolstered Ms. Hernandez's testimony.

The record reflects that the defense investigator obtained photographs of text messages exchanged between the Petitioner and Ms. Hernandez. Trial counsel did not recall anything of value in the messages. Co-counsel reviewed the messages, but he was not asked at the evidentiary hearing why the defense did not introduce the messages. Co-counsel thought the messages could have bolstered Ms. Hernandez's testimony, and Ms. Hernandez testified at the evidentiary hearing that she merely agreed with the Petitioner because she did not want to talk about this case anymore and wanted the "subject to be dropped." Co-counsel knew of the messages and had reviewed them before the trial. However, neither this court nor the post-conviction court may speculate about why defense counsel chose not to introduce the text messages. *See Black*, 794 S.W.2d at 757. As a result, the record supports the post-conviction court's determination that the Petitioner failed to establish his ineffective assistance claim. He is not entitled to relief on this basis.

## **3. Eviction Proceedings**

The Petitioner argues that defense counsel failed to utilize the Petitioner's video recordings that showed the cleanout process of the body shop in connection with the eviction proceedings in order to refute Ms. Hernandez's testimony that she disposed of the motorcycle engine and frame at the Petitioner's request in order to conceal evidence of a crime.

The post-conviction court found that defense counsel were aware, in relevant part, before the trial of evidence related to the eviction proceedings, the cleanout of the body

shop, and the destruction of the body shop property in connection with the eviction proceedings. The court found that counsel reviewed this evidence, interviewed individuals, and “vetted . . . alternative means of defense.” The court found that counsel made an informed and reasonable decision to present the chosen defense to minimize the Petitioner’s interactions with the State’s witnesses and to maintain the Petitioner did not have knowledge of Mr. Crisp’s and Ms. Hernandez’s actions.

The post-conviction court found, relative to the video recordings that showed the Petitioner’s emptying the body shop as a result of the eviction proceedings, that defense counsel knew of the evidence before the trial and that defense counsel made a strategic decision not to present the evidence at the trial. The court credited trial counsel’s testimony that his position was Ms. Hernandez lied and that attempting to present alternative explanations for Ms. Hernandez’s disposal of the frame and engine could have corroborated, in part, Ms. Hernandez’s testimony.

The record reflects that pursuant to the detainer warrant that was served on September 18, 2015, the Petitioner was required to vacate the premises of the body shop. Generally, the video recordings made during the cleanout process reflected an inventory of the items contained in the body shop, including motorcycle and automobile parts. In the second recording, a male voice states that it was “twelve daylight, Monday afternoon,” that “we’re moving these items as specified by the landlord,” and that the recording served as documentation of the items inside the body shop. In the recording, a woman is seen inside the body shop. Mr. Colon testified that he assisted with the cleanout and that the woman depicted in the recording was Ms. Hernandez.

Trial counsel did not know eviction proceedings were underway at the time the police searched the body shop. Trial counsel recalled, though, that the Petitioner was “under a time line” to “get everything cleaned out of the shop.” Trial counsel said the Petitioner told trial counsel and co-counsel that the Petitioner “directed and expected Ms. Hernandez to get some of it out too” because “they” were asked to leave. Co-counsel did not recall a video recording made by the Petitioner of the body shop showing that it had been emptied and had not been damaged near the time of eviction.

Ms. Hernandez testified that the only time she saw the motorcycle frame was when the shop was closing and “they” were emptying the shop. She had been aware of the eviction proceedings and said that, as a result, the body shop had to be emptied.

The trial transcript reflects that Ms. Hernandez testified that after the body shop closed, she and other persons assisted the Petitioner cleanout the body shop and that they “loaded a lot of stuff up” and hauled it away. Other evidence showed that Mr. Colon was present during the cleanout process. The video recording received as an exhibit at the evidentiary hearing is consistent with Ms. Hernandez’s testimony. Ms. Hernandez also

testified at the trial that after the cleanout was complete, Mr. Molina asked about the motorcycle engine and frame and that she thought Mr. Molina became concerned about the parts when “the police came looking for the stuff.”

The trial transcript likewise reflects that evidence of the eviction proceedings and the cleanout was presented to the jury through the Petitioner’s testimony. He testified that he severed his business relations with Mr. Molina and that the body shop was forced to close because the building owner increased the rent. The Petitioner stated that the body shop was emptied, including the upstairs area, that all of the items inside the shop were “placed in a big pile in the middle of the bay” and “loaded into a trailer and taken to the city dump.” The Petitioner’s testimony in this regard is consistent with the recordings received as an exhibit at the evidentiary hearing that items were piled up and placed onto a trailer. The Petitioner testified that the motorcycle frame had been in the shop at the time of the cleanout and that he “advised” Ms. Hernandez “to have the entire place cleaned up, placed on the trailer that we provided, and take it to the dump.” As a result, evidence of the cleanout process in connection with the eviction proceedings was presented to the jury. The recordings were additional evidence of the cleanout process, which was not in dispute. The factual issue in dispute was whether the Petitioner told Ms. Hernandez to dispose of the motorcycle frame and engine in order to conceal evidence of a crime. We note that Ms. Hernandez disposed of the engine and frame in August 2015 and that the eviction proceedings occurred in September 2015. The consent search occurred on September 4, 2015, and the search warrant was issued on September 21, 2015. Evidence related to this case was not recovered during either search. The jury heard the evidence and credited Ms. Hernandez’s testimony over that of the Petitioner. As a result, the record supports the post-conviction court’s determination that the Petitioner failed to establish his ineffective assistance claim. The Petitioner is not entitled to relief on this basis.

#### **4. Fingerprint Analysis Report**

The Petitioner argues that defense counsel failed to request, at any time, the fingerprint analysis performed by the Bradley County Sheriff’s Department on the motorcycle frame. He argues that the report reflected that no fingerprints were found on the frame and that the defense failed to present this evidence to establish that the Petitioner’s fingerprints should or could have been on the frame if Ms. Hernandez testified truthfully that the Petitioner brought the frame down from the upstairs area of the shop at the time she disposed of it.

The record reflects that the Petitioner failed to address the fingerprint analysis in the post-conviction proceedings, and, as a result, the issue is subject to waiver. *See* Tenn. R. App. P. 36(a) (“Nothing in this rule shall be construed as requiring relief to be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.”); *State v.*

*Maddin*, 192 S.W.3d 558, 561 (Tenn. Crim. App. 2005) (“When an issue is raised for the first time on appeal, it is typically waived.”). In any event, evidence that the frame was absent any fingerprints was presented to the jury because Sergeant Clower testified that “no fingerprints at all [were] recovered” from the frame. The redacted memorandum and the unredacted memorandum, which was received by the defense before the trial, reflects that the frame underwent a fingerprint analysis. The Petitioner is not entitled to relief on this basis.

## **5. Defense Witnesses**

### **(a) Shibu Joseph**

The Petitioner argues that counsel failed to present Mr. Joseph as a witness and that Mr. Joseph could have provided evidence of the “troubled relationship” between Mr. Molina and the Petitioner and provided a basis for identifying Mr. Molina as an “alternative perpetrator.”

The post-conviction court credited Mr. Joseph’s testimony regarding his discovery of financial irregularities attributed to Mr. Molina but credited trial counsel’s testimony that he spoke to Mr. Joseph, whom counsel deemed unhelpful and uncooperative.

The record reflects that Mr. Joseph provided financial accounting services to the body shop but terminated his services after discovering financial irregularities he attributed to Mr. Molina. Although Mr. Molina provided Mr. Joseph receipts for cash expenses, Mr. Molina had not recorded sales. Mr. Joseph did not testify at the trial.

Trial counsel interviewed Mr. Joseph after the Petitioner identified Mr. Joseph as a potential witness. The Petitioner thought Mr. Joseph could have been a significant defense witness. After interviewing Mr. Joseph, counsel determined that Mr. Joseph was uncooperative and unhelpful because Mr. Joseph did not want to be involved in this case. As a result, counsel decided not to present Mr. Joseph as a defense witness. Counsel made a reasonable tactical decision not to present an uncooperative witness. *See Adkins*, 911 S.W.2d at 347; *Pylant*, 263 S.W.3d at 874. Furthermore, Ms. Hernandez testified at the trial that she reported to the Petitioner that Mr. Molina stole money from the body shop. Evidence of Mr. Molina’s conduct in this regard was before the jury. Thus, the record supports the post-conviction court’s determination that the Petitioner failed to establish his ineffective assistance claim. The Petitioner is not entitled to relief on this basis.

### **(b) Alejandro Colon**

The Petitioner argues that defense counsel failed to present Mr. Colon as a witness and that Mr. Colon could have provided evidence of the “troubled relationship” between

Mr. Molina and the Petitioner and a basis for identifying Mr. Molina as an “alternative perpetrator.”

The record reflects that Mr. Colon worked at the body shop for about two years, which included 2015, and he anticipated being a defense witness. He said that during his employment, he learned that Mr. Molina took money paid by customers and did not place the money in the cash register, which prevented the creation of a receipt. Mr. Colon recalled that Mr. Joseph reported discrepancies in the financial reports that were attributed to Mr. Molina. Although Mr. Colon testified that the defense investigator interviewed him before the trial, trial counsel did not recall why he did not present Mr. Colon, the Petitioner’s brother, in order to present evidence about the body shop operations and about Mr. Molina’s behavior. Co-counsel was not questioned about Mr. Colon, and neither this court nor a post-conviction court may speculate. *See Black*, 794 S.W.2d at 757.

The chosen defense was an outright denial of any wrongdoing and to minimize the Petitioner’s interactions with Mr. Crisp and Ms. Hernandez. The defense presented evidence that Mr. Molina was the “bad actor.” Ms. Hernandez testified that Mr. Molina stole money from the body shop. As a result, evidence of Mr. Molina’s conduct in this regard was before the jury. The record supports the post-conviction court’s determination that the Petitioner failed to establish his ineffective assistance claim. The Petitioner is not entitled to relief on this basis.

**(c) Larry Spence, Dan Bowels, and Gaige Floid**

The Petitioner argues that at the trial, defense counsel identified these individuals as potential defense witnesses but that defense counsel failed to present them as witnesses. However, the record reflects that trial counsel and co-counsel were not questioned about these potential witnesses. Further, none of these potential witnesses testified at the post-conviction hearing, and neither this court nor a post-conviction court may speculate about the substance of their proposed testimony. *See id.* The Petitioner is not entitled to relief on this basis.

**(d) Lieutenant Andy Ratliff**

The Petitioner argues that defense counsel failed to present Lieutenant Ratliff as a defense witness. The Petitioner asserts that Lieutenant Ratliff approved Officer Criddle’s and the Petitioner’s timesheets and the August 2, 2013 police report, that Lieutenant Ratliff could have provided evidence of how easy it was to modify timesheets, and that Lieutenant Ratliff could have provided evidence to show that the Petitioner’s timesheet reflected the Petitioner’s signature but that Officer Criddle’s was unsigned.

The record reflects that in 2013, Lieutenant Ratliff was the Petitioner's and Officer Criddle's shift sergeant. Referring to one of Lieutenant Ratliff's timesheets, he noted that it had been corrected to reflect six hours, not the four hours he initially wrote, and that the administrative staff most likely corrected the timesheet. Lieutenant Ratliff was not involved in the investigation of the motorcycle. However, trial counsel and co-counsel were not asked about this potential evidence. In any event, the record does not contain any evidence that the Petitioner's and Officer Criddle's timesheets were modified for the relevant time period. The evidence that a timesheet could be modified, if necessary, would have been speculative, at best, to show that Officer Criddle's timesheet could have been altered. Likewise, the record does not contain evidence reflecting that the police report was modified. Therefore, the record supports the post-conviction court's determination that the Petitioner failed to establish his ineffective assistance claim. He is not entitled to relief on this basis.

**(e) Sergeant Clower**

The Petitioner asserts that the defense counsel failed to cross-examine Sergeant Clower properly because the defense did not ask questions "about the investigation or question credibility in any way" during cross-examination and when Sergeant Clower testified on rebuttal about the police dispatch procedures. Again, the record reflects that trial counsel and co-counsel were not questioned about their decisions about how to approach cross-examining Sergeant Clower. Neither this court nor a post-conviction court may speculate. *See id.* As a result, the record supports the post-conviction court's determination that the Petitioner failed to establish his ineffective assistance claim. He is not entitled to relief on this basis.

**D. Failure of Counsel to Abide by the Rules of Criminal Procedure and General Standards of Practice**

The Petitioner argues that defense counsel filed few pretrial motions and that none were litigated. The Petitioner asserts that counsel never raised an issue related to the Petitioner's history as a law enforcement officer and to his previous interactions with the trial judge and with the District Attorney General. The Petitioner argues that defense counsel should have requested a special prosecutor in this case, and he points to the suppression of evidence by law enforcement officers "done in consultation with the elected District Attorney" as evidence in support. The Petitioner argues, as well, that counsel should have requested the trial judge recuse himself from this case, and the Petitioner points to his lengthy sentence for a first-time, non-violent offender as evidence in support. The Petitioner also argues that counsel were ineffective during the appellate process because appellate review of all but three of the issues was waived by this court.

The record reflects that the Petitioner's grievances were not litigated in the post-conviction proceedings. The Petitioner is prohibited from raising these issues for the first time on appeal. As a result, appellate consideration of these issues is waived. *See* Tenn. R. App. P. 36(a); *Maddin*, 192 S.W.3d at 561. The Petitioner is not entitled to relief on this basis.

## II. Due Process Violation

The Petitioner asserts that the post-conviction court erred by denying relief on the basis that the State failed to correct testimony it knew or should have known was false from Mr. Crisp and Ms. Hernandez. He argues that the false testimony rendered the verdict fundamentally unfair, violating principles of due process.

### A. Mr. Crisp

The Petitioner argues that Mr. Crisp lied when he testified at the trial that he had never lied under oath previously and that he had never filed other insurance claims on property reported as stolen, except for "a returned truck." The Petitioner points to the loss history report that was contained in the State's case file and that the defense attempted to introduce at the trial. The Petitioner argues that rather than attempt to correct Mr. Crisp's false testimony, the State objected to the admission of the report, preventing the jury from receiving evidence of Mr. Crisp's previous theft-related insurance claims.

However, the Petitioner contended in his previous appeal from the conviction proceedings that he was entitled to a new trial because the State permitted Mr. Crisp to "give false testimony with regard to the number of prior insurance claims he had filed and compounded the error by objecting to the . . . attempt to challenge the false testimony, thereby violating principles of due process." *Edwin Millan*, 2018 WL 5752204, at \*7. This court determined that plenary review was waived for the failure to include the issue in the Petitioner's motion for a new trial. *Id.*; *see* T.R.A.P. 3(e). This court, likewise, declined to review the issue for plain error because the record did not contain evidence that the State "intentionally suborned perjured testimony" and because "nothing suggests" that the issue was not "waive[d] for tactical reasons, choosing to forego a relatively weak issue in favor of other issues in his motion for a new trial." *Edwin Millan*, 2018 WL 5752204, at \*7. This court likewise determined that "Mr. Crisp's testimony about filing other [theft-related] insurance claims was not so vital to the case as to implicate principles of substantial justice." *Id.*

[U]nder the law of the case doctrine, an appellate court's decision on an issue of law is binding in later trials and appeals of the same case if the facts on the second trial or appeal are substantially the same as the facts in the first trial or appeal. The doctrine applies to issues that were actually



before the appellate court in the first appeal and to issues that were necessarily decided by implication. The doctrine does not apply to dicta.

*Joseph B. Thompson v. Tony Parker, Warden*, No. W2008-02399-CCA-R3-HC, 2009 WL 4723404, at \*4 (Tenn. Crim. App. Dec. 9, 2009) (internal quotation marks omitted); see *Memphis Publ'g Co. v. Tenn. Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn.1998); see also *Mack Transou v. Jerry Lester, Warden*, No. W2013-00293-CCA-R3-HC, 2013 WL 5745704, at \*5 (Tenn. Crim. App. Oct. 21, 2013) (stating the law of the case doctrine “bars a petitioner from raising the issue anew in a denial of habeas corpus relief”), *perm. app. denied* (Tenn. Jan. 14, 2014); *Myers v. State*, 462 S.W.2d 265, 269 (Tenn. Crim. App.1970) (holding that a petitioner may not relitigate questions previously determined adversely to him in two separate habeas corpus cases by courts of competent jurisdiction); see also T.C.A. § 40-30-106(g) (2018) (Generally, “[a] ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceedings before a court of competent jurisdiction[.]”); *George A. Johnson v. State*, No. E2007-00920-CCA-R3-PC, 2008 WL 3066575, at \*6 (Tenn. Crim. App. Aug. 4, 2008) (An issue waived in the direct appeal from the conviction proceedings “remains waived in the post-conviction appeal.”), *perm. app. denied* (Tenn. Feb. 17, 2019). The Petitioner is not entitled to relief on this basis.

## **B. Ms. Hernandez**

### **1. Loading and Disposing of the Engine and Frame**

The Petitioner argues that Ms. Hernandez testified falsely at the trial that she alone loaded and disposed of the motorcycle frame and engine but that she testified at the post-conviction hearing that she told an unidentified man and woman, both of whom worked at the District Attorney’s Office, that she had assistance loading the parts into her then-boyfriend’s truck. The Petitioner asserts that the State failed to correct Ms. Hernandez’s trial testimony.

The record reflects that at the trial, Ms. Hernandez testified that the Petitioner told her to get rid of the motorcycle frame and that the Petitioner did not care what she did with it. She stated that the Petitioner retrieved the frame from the attic area of the body shop and carried it downstairs and that she placed it in her truck. She clarified on cross-examination that she also placed the engine in the truck. We note that co-counsel successfully pointed out that the items might have been too heavy for her to lift alone. She testified, as well, that the truck she used to dispose of the parts did not belong to her but rather belonged to her “ex,” although she denied the former boyfriend was present.

However, at the post-conviction hearing, she testified that the Petitioner and her former boyfriend, whose legal name she did not recall, assisted her with loading the engine and frame into her truck. She initially denied testifying at the trial that she alone loaded the parts into her truck but did not dispute the transcript reflected otherwise. She stated that she told a man and a woman in the District Attorney's Office that she had assistance loading the parts and that her former boyfriend stood close by while she loaded the frame into the former boyfriend's truck. She did not know to whom she spoke in the District Attorney's Office, but she provided a physical description.

The post-conviction court found that Ms. Hernandez's trial testimony contained discrepancies regarding how she loaded the engine and frame and disposed of them. The court found, though, that the discrepancies were minor and were not "material to any issue that was in dispute" at the trial. The court noted that while impeachment evidence related to inconsistent statements could be exculpatory, her description of how the frame and engine were loaded mattered little. The court found that the material issues were whether the Petitioner instructed her to "make the items vanish" because he feared the police were investigating the motorcycle and whether she followed the Petitioner's instructions. The court's determinations are supported by the record. Furthermore, the record does not contain evidence showing that the State suborned perjured testimony. The Petitioner is not entitled to relief on this basis.

## **2. Threats**

The Petitioner, likewise, asserts that Ms. Hernandez testified falsely at the trial that the Petitioner had threatened her and that she and the Petitioner had two meetings, which the State characterized as threats. The Petitioner points to Director Cherry's report reflecting that three other men threatened Ms. Hernandez. The Petitioner argues that the State knew Ms. Hernandez's testimony was false and failed to correct it.

The record reflects that Ms. Hernandez testified at the trial that she contacted the Drug Task Force about this case. Although the prosecutor asked how she initially contacted Director Cherry, Ms. Hernandez testified that she "had gotten some threats that I was going to be framed for the robbery of this." The record does not reflect that she identified the Petitioner as the person who threatened her. The prosecutor redirected Ms. Hernandez and did not question her about any threats. On cross-examination, Ms. Hernandez stated that she feared Mr. Molina because she "had gotten threats" from "Arturo,"<sup>3</sup> that she had been attacked by an unknown person wielding a baseball bat, that she told the Petitioner about the bat incident, and that her "apartment was burned."

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<sup>3</sup> Other evidence showed that this was Arturo Contreras, with whom Ms. Hernandez had been romantically involved.

However, the State requested a jury-out hearing to determine whether Ms. Hernandez would be permitted to testify on redirect examination about the alleged threats and the Petitioner's "other case." Co-counsel objected on the basis of relevance. The State argued that the defense had implied that Ms. Hernandez was threatened in connection with this case but that the threats were in reality the result of the Petitioner's case related to the arson of the Petitioner's car, which occurred first. Trial counsel disagreed and argued that the threats "have everything to do with this case."

The offer of proof that followed established that Ms. Hernandez began receiving threats "[s]hortly after August." She did not specify the year but described the threats as "messages, calls, people coming to my house, to my work threatening me." Ms. Hernandez was also a witness in the arson case, which involved Mr. Molina. She said that the baseball bat incident occurred "last year" and involved two unknown assailants. She said that people began coming to her home at the end of August through October. She said that when she worked at O'Reilly, the Petitioner came to her workplace "about three times" to discuss whether she had "talked to anybody," including Mr. Molina, and whether she knew anything the Petitioner did not. She said, as well, that the Petitioner came to her home in August 2015, that he displayed a gun, and that he expressed concern for her because she had not responded to his text messages. She said the Petitioner asked if she had spoken to anyone and showed her the gun while stating "he had the protection." She said that the incident made her "[a] little wary" because the Petitioner did not "just show up."

The trial court excluded any evidence related to the arson-related case pursuant to Tennessee Rules of Evidence 403 and 404(b). However, the court permitted Ms. Hernandez to testify about the incident in which the Petitioner came to her home and to her workplace on the basis that it showed the Petitioner's intent. The court excluded the remainder of the proposed testimony. When the trial resumed, Ms. Hernandez testified consistent with the offer of proof regarding the Petitioner's coming to her workplace and to her home, at which time he possessed a gun.

The record does not reflect that Ms. Hernandez testified that the Petitioner threatened her, although she testified that the Petitioner's appearing at her home and work gave her an uneasy feeling because the Petitioner had not previously come to those places uninvited. Furthermore, the record does not contain evidence showing that the State suborned perjured testimony. The Petitioner is not entitled to relief on this basis.

### **III. *Brady* Violations**

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and article I, section 8 of the Tennessee Constitution afford every criminal defendant the right to a fair trial. *See Johnson v. State*, 38 S.W.3d 52, 55 (Tenn. 2001). As a result, the State has a constitutional duty to furnish a defendant with exculpatory evidence

pertaining to his guilt or to the potential punishment faced by a defendant. *See Brady v. Maryland*, 373 U.S. 83, 87 (1986).

In order to show a due process violation pursuant to *Brady*, the defendant must prove by a preponderance of the evidence that (1) he requested the information, unless it is obviously exculpatory, (2) the State must have suppressed the information, (3) the information must be favorable to the accused, and (4) the information must be material. *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995). Favorable evidence includes that which “challenges the credibility of a key prosecution witness.” *Johnson*, 38 S.W.3d at 56–57 (internal quotation marks and citation omitted). Evidence is material when “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 58 (quoting *Edgin*, 902 S.W.2d at 390).

Evidence that provides value for impeachment of a State’s witness is within the purview of *Brady*. *State v. Jackson*, 444 S.W.3d 554 (Tenn. 2014); *see also United States v. Bagley*, 473 U.S. 667, 767 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972).

The critical inquiry remains, though, whether the evidence was material. In this regard, the inquiry is whether a reasonable probability exists that “had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *see Edgin*, 902 S.W.2d at 391 (op. on pet. for reh’g).

In *Kyles*, the Supreme Court observed:

[The] touchstone of materiality is a “reasonable probability” of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government’s evidentiary suppression “undermines confidence in the outcome of the trial.”

*Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678); *see Jackson*, 444 S.W.3d at 595.

The record supports the post-conviction court’s finding that trial counsel filed a five-page request for discovery before the trial and that counsel requested all favorable evidence to the defense. *See Edgin*, 902 S.W.2d at 389 (stating that a defendant must request the information, absent its obvious exculpatory character). The court credited the deposition testimony of the prosecutor and the evidentiary hearing testimony of Sergeant Clower, trial counsel, and co-counsel and found that “not all evidence in this matter was conveyed to the Petitioner” before the trial. The court found that “multiple pieces of evidence” were in

the State's possession but were not provided to the defense before the trial. The parties do not dispute that evidence was not disclosed before the trial.

#### **A. Search Warrant and Sergeant Clower's Investigative File**

As a preliminary matter, The post-conviction court found that Sergeant Clower's extensive, seventy-two-page investigative file was in the State's possession before the trial and that it was not disclosed to the defense. The court credited Sergeant Clower's testimony that he did not provide his full investigative report to the District Attorney's Office. The record reflects that although the search warrant affidavit was not contained in the file, much of the information contained in the file was utilized to obtain the warrant. The court found, based upon the discovery receipt, that the defense was only provided thirty-four pages of discovery. The court likewise found based upon Sergeant Clower's testimony that information related to the September 4, 2015 consensual search of the body shop, the September 21, 2015 search warrant, and recorded interview statements were not provided to the District Attorney's Office. The court credited Sergeant Clower's testimony that "nothing of evidentiary value" was found during the consent search and when the search warrant was executed and that "there were no inconsistent statements . . . to rise to the level of material, exculpatory evidence."

The Petitioner argues that the failure to disclose multiple pieces of evidence, which were referred to in the search warrant affidavit and in Sergeant Clower's seventy-two-page investigative file, violated *Brady* and that he is entitled to a new trial in connection with his filing a false report and tampering with evidence convictions.

##### **(1) Director Cherry's Report**

The record reflects that Director Cherry completed a report regarding his communications with Ms. Hernandez and his involvement in this case and that his report was contained in Sergeant Clower's investigative file. The information contained in Director Cherry's report, at least in part, was used to obtain a search warrant for the body shop. The search yielded no evidence related to this case.

##### **(a) The Surveillance Operation/Photographs at O'Reilly**

The Petitioner states that the report contained information about the surveillance of the Petitioner and Ms. Hernandez's O'Reilly meeting and about surveillance photographs, which were later destroyed, that were taken during the surveillance at O'Reilly. The Petitioner argues that the evidence could have rebutted Ms. Hernandez's description of the meeting as threatening and showed they merely had "a conversation."

The post-conviction court found that the investigative file also contained a narrative about Ms. Hernandez's telling law enforcement that she feared the Petitioner. The court found that the narrative noted that on September 18, 2015, the police conducted surveillance of a meeting between the Petitioner and Ms. Hernandez outside of her workplace at O'Reilly, during which police officers saw nothing threatening or criminal, although photographs of the meeting were taken. The court determined that the photographs taken during surveillance were tangible evidence which should have been disclosed to the Petitioner before the trial. The court determined, though, that the evidence of the meeting and the photographs was not favorable and material to the defense.

The post-conviction court credited the testimony of trial counsel and co-counsel in that the defense did not want to elicit testimony of an "allegedly hostile meeting" and that the photographs were "a non-issue." The court noted that during the trial, the defense objected to the admission of any evidence related to the meeting and that co-counsel testified at the evidentiary hearing that he would not have wanted to open the door to any surveillance evidence related to the meeting. The court determined that such evidence would have led to the inference that the Petitioner "was dangerous and was attempting to silence a witness to conceal guilt." The court determined, as well, that the evidence, although discoverable and suppressed by the State, was not relevant to any issue in dispute at the trial. The court found that the destruction of the photographs was "irrelevant" because "the proof itself was not substantively favorable, exculpatory, or material" to the Petitioner. The court determined that the State did not violate its duty relative to the destroyed photographs.

Director Cherry's report reflects, in relevant part, that on September 16, 2015,

Arturo Contreras called [Ms. Hernandez] from a private phone number. Contreras told her that he knew that she knows everything that went on at the shop and to "keep your f----- mouth shut."

On September 18, 2015 at approximately 7:18 AM Hernandez contacted Director Cherry via text message and told him that Chepo<sup>4</sup> came to her house. He got in her face and told her in Spanish to maintain a closed mouth and then left without saying anything else. Chepo was driving a black dodge truck.

On September 18, 2015 at approximately 12:23 PM Hernandez contacted Director Cherry via text message and told him that [the Petitioner] was at her work. [The Petitioner] was driving a red and gray Mini Cooper and had come

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<sup>4</sup> The report reflects that Ms. Hernandez identified Chepo as one of Mr. Molina's brothers.

there to talk to her. Director Cherry told her to record everything. Director Cherry called Investigator Calvin Rockholt and told him about the situation. Captain Steve Lawson and Investigator Rockholt went to [O'Reilly] to observe and to ensure that Hernandez was safe. Director Cherry, Lt. Bales, Agent Jerry Rogers, and Agent Marshall Hicks also responded to set up surveillance to ensure her safety and document the meeting. While heading to O'Reilly[] Director Cherry kept in contact with Hernandez via text message. She reported that [the Petitioner] was acting different but was not threatening her. [The Petitioner] had grabbed her and checked her for a "wire" and told her to put her phone down so she was unable to record the conversation.

Captain Lawson and Inv. Rockholt arrived first and set up surveillance. They reported that [the Petitioner] and Hernandez walked outside. Hernandez was sitting on her vehicle, a black Ford Mustang, and [the Petitioner] was standing in front of her talking on a cell phone. Lt. Cherry and Agent Bales arrived a short time later. When Agent Hicks and Agent Rogers arrived surveillance was turned over to them and everyone else stayed in the area.

Agent Hicks observed [the Petitioner] talking to Hernandez and was able to take some photographs. At approximately 1:11 PM [the Petitioner] left in a red and gray Mini Cooper. . . .

. . . .

On September 18, 2015 at approximately 8:08 PM Hernandez contacted Director Cherry via text message and advised that she received a call from a private number. A Hispanic male that she did not recognize but knew her nickname told her that she has a long tongue, for her to stay silent, and that they were watching her.

On September 19, 2015 at approximately 5:09 PM Hernandez contacted Director Cherry via text message. She said that [the Petitioner] had texted her and asked if she was ok and how she was. He then asked if she needed anything and she did not answer. [The Petitioner] showed up at her house. He told her that if she needed anything to call him first. He also showed her a gun and said look what I got. She said he did not threaten her in any way just showed her the gun.

However, the trial record does not reflect that Ms. Hernandez testified that the Petitioner threatened her. As we have previously stated, the trial court permitted Ms. Hernandez to testify that the Petitioner came to her workplace to discuss if she had spoken

to anyone about the case. The court likewise permitted her to testify that the Petitioner came to her home uninvited when she did not respond to his text messages, that he expressed concern for her because she had not responded to his messages, that he displayed a gun while stating “he had the protection,” and that he asked if she had spoken to anyone. Although she said she was “wary,” she did not testify that the Petitioner threatened her. The record reflects, though, that defense counsel elicited testimony at the trial that Ms. Hernandez feared Mr. Molina because she “had gotten threats” from Mr. Contreras, that she had been attacked by someone wielding a baseball bat, and that her “apartment was burned.”

Director Cherry’s report reflects that Detective Hicks took surveillance photographs of the Petitioner and Ms. Hernandez outside O’Reilly. However, multiple officers testified at the evidentiary hearing that they did not observe any threatening behavior by the Petitioner or Ms. Hernandez. Detective Hicks testified that although the report reflected he took photographs, he did not recall taking them. He stated, though, that he did not observe any violence or threatening gestures. The trial transcript reflects that defense counsel objected to any mention of the O’Reilly meeting, and co-counsel testified that the defense strategy was to prevent the admission of evidence about any threats from the Petitioner and that co-counsel did not want to open the door to evidence that the police had conducted surveillance of one of these meetings to prevent any harm to Ms. Hernandez. Co-counsel stated that evidence of any threats would have been damaging to the defense and that photograph evidence of the meeting could have implied the police were concerned enough about her safety to observe the meeting. The evidence was not favorable to the defense. As a result, the record supports the post-conviction court’s determination that no *Brady* violation occurred.

**(b) Destroyed Text Messages between Ms. Hernandez and Director Cherry**

The Petitioner argues that the text messages should have been disclosed to the defense. The State responds that the messages were documented in Director Cherry’s report and were not favorable to the defense.

The post-conviction court found that the investigative file contained information related to the exchange of text messages between Ms. Hernandez and Director Cherry in connection with her disposal of the frame and engine and with her fear of the Petitioner and other individuals. The court credited Director Cherry’s evidentiary hearing testimony that the messages no longer existed because he had since changed police-issued cell phones and that he preserved the substance of the messages in his report, which was included in Sergeant Clower’s investigative file. The court determined that the substance of the messages was not substantively favorable, exculpatory, or material to the Petitioner and that, as a result, it was irrelevant that the messages had been destroyed. The court likewise determined that because the messages were not favorable to the Petitioner, the messages



were not discoverable before the trial and would have only been discoverable pursuant to Rule 26.2 when Ms. Hernandez testified at the trial. Therefore, the court determined that the State did not violate its duty in connection with the messages.

As we have previously discussed, the substance of the destroyed text messages was contained in Director Cherry's report, which was included in Sergeant Clower's investigative file. Director Cherry testified that although the messages were not preserved, the substance of the messages was preserved in his report and that the messages' evidentiary value was documented in his report. This testimony is supported by the record. Further, Director Cherry denied destroying the messages intentionally and stated that the messages were not retained when he was issued another cell phone. The text messages, which are detailed above, related to Ms. Hernandez's fear of the Petitioner and other men connected to Mr. Molina and the Petitioner. The messages do not contain favorable evidence, and as co-counsel testified at the evidentiary hearing, evidence of the messages could have damaged the defense and implied that the Petitioner was involved in the offenses that Ms. Hernandez had discussed with law enforcement. The record supports the post-conviction court's determination that no *Brady* violation occurred.

**(c) Ms. Hernandez's Statement to Director Cherry about Disposal of the Motorcycle Parts**

The Petitioner argues that Director Cherry's report contained discrepancies in connection with the manner in which Ms. Hernandez told Director Cherry she disposed of the motorcycle engine and frame. The State responds that the minor discrepancies did not have any impeachment value.

The post-conviction court found that the investigative file contained a narrative of Ms. Hernandez's statements to Director Cherry and that the statements were "virtually identical" to the statements contained in the search warrant affidavit. The court found that Ms. Hernandez's statements implicated the Petitioner in the tampering with evidence charge and that the State did not violate its duty relative to her statements contained in Sergeant Clower's narrative.

The post-conviction court noted that Ms. Hernandez's testimony contained discrepancies with what she reported to Director Cherry regarding how she loaded the engine and frame and disposed of them. The court found, though, that the discrepancies were minor and were not "material to any issue that was in dispute" at the trial. The court noted that while impeachment evidence related to inconsistent statements could be exculpatory, her description of how the frame and engine were loaded mattered little. The court found that the material issues were whether the Petitioner instructed her to "make the items vanish" because he feared the police were investigating the motorcycle and whether

she followed the Petitioner's instructions. The court determined that the State did not violate *Brady* with regard to Ms. Hernandez's statements to Director Cherry.

Director Cherry's report reflects that on September 17, 2015, at 1:15 p.m., he spoke to Ms. Hernandez, after she contacted the Drug Task Force. The report reflects that Ms. Hernandez stated, in relevant part, as follows:

Hernandez worked for Marcos Auto Concepts in Cleveland TN until it closed down. She had been working there for over a year. Marcos Molina and [the Petitioner] own the shop and she worked for them. Molina did most of the work because [the Petitioner] had a full time job as a police officer but they were partners. She speaks both English and Spanish fluently.

....

Approximately three weeks ago [the Petitioner] asked Hernandez to get rid of a motorcycle frame and motor that was at the shop. The frame and motor had been at the shop the entire time that she had worked there. [The Petitioner] told her that Molina was telling the police that he had brought it to the shop and he needed to get rid of it. She agreed to get rid of the motor and frame. [The Petitioner] carried the frame from upstairs and placed it by the door. The motor was on a table in the shop.

Later that evening Hernandez borrowed a truck from a friend and went back to the shop in the evening while it was still daylight. No one was at the shop except for her. She loaded the frame and motor into the back of the truck. She could pick up the frame but the motor was too heavy. She backed the truck up to the table and placed wooden boards from the table to the truck. She was able to push/roll the motor down the boards and into the truck. She drove from the shop to Hwy 64 "where the lake and river is" and turned left and went up the mountain on a paved road. She drove to the first overlook area past a gazebo and backed the truck as close to the edge as possible. She then dropped the motorcycle frame down the bank and pushed the motor off the truck. The frame went down the bank but the motor "did not make it very far". She said that you could still see the motor and frame. She drove back to Cleveland and it was dark when she left the mountain. Hernandez called [the Petitioner] when she got cell phone service and told him what she had done. Hernandez offered to take Director Cherry to the location to recover the motor and frame.

Sometime later the police came to the shop and looked for the stolen motor and frame but she had already gotten rid of it. She cannot remember the exact date that law enforcement came looking for the frame.

The search warrant affidavit reflects nearly identical information regarding Ms. Hernandez's discussion with Director Cherry about her disposing of the motorcycle frame and engine at the Petitioner's direction.

At the trial, Ms. Hernandez testified that the Petitioner told her to get rid of the motorcycle frame and that the Petitioner did not care what she did with it. She stated that the Petitioner retrieved the frame from the attic area of the body shop and carried it downstairs and that she placed it in her truck. She clarified on cross-examination that she likewise placed the engine in the truck. We note that co-counsel successfully pointed out that the items might have been too heavy for her to lift alone. She testified, as well, that the truck she used to dispose of the parts did not belong to her but rather, belonged to her "ex," although she denied the former boyfriend was present. Regarding the disposal of the engine and frame, Ms. Hernandez testified that she "threw it off the side" of the mountain. She stated that she pushed the items out of the truck with her feet and that it rolled down the mountain.

However, at the evidentiary hearing, she testified that the Petitioner and her former boyfriend, whose legal name she did not recall, assisted her with loading the engine and frame into the truck. She initially denied testifying at the trial that she alone loaded the parts into the truck but did not dispute the transcript reflecting otherwise. She also testified that she kicked the items out of the truck when she disposed of them but later stated that she sat in the back of the truck and pushed the parts out, after she agreed she had knee surgery about one year before she disposed of the engine and frame.

Ms. Hernandez gave inconsistent statements and testimony regarding how the frame and engine were loaded in to the truck and about how she moved the items out of the truck and off the side of a mountain, which minimally provided an avenue to impeach her credibility. Impeachment evidence rendered the inconsistent statements favorable to the defense, and we note that Ms. Hernandez provided evidence of the Petitioner's intent in connection with the tampering with evidence conviction. However, the inconsistencies were not material to the case. The manner in which Ms. Hernandez disposed of the frame and engine were immaterial to the Petitioner's conviction. The critical inquiry was whether the Petitioner directed Ms. Hernandez to dispose of the items because he feared the police were investigating the motorcycle and whether she followed the Petitioner's instructions. Ms. Hernandez's testimony on both points inculpated the Petitioner. As a result, the record supports the post-conviction court's determination that no *Brady* violation occurred.

**(2) Mr. Molina's Statement Contained in the Search Warrant Affidavit**

The post-conviction court found that the search warrant affidavit stated, in relevant part, that Mr. Molina told law enforcement officers during a September 4, 2015 interview, which was unrelated to this case, that the Petitioner brought a motorcycle to the body shop “under suspicious circumstances” two years before the interview, that the motorcycle was reported stolen and stripped, and that the frame and motor to the motorcycle were “left inside the building.” The court found that the affidavit also reflected that Detective Pike and Sergeant Clower searched the body shop on September 4, pursuant to consent, that the frame and engine were not found inside the body shop during the search, and that Mr. Molina told the officers that both items had been removed from the body shop. The court determined that the State did not violate *Brady* with regard to Mr. Molina’s statements contained in the search warrant affidavit.

The record reflects that on September 14, 2015, Detective Pike and Sergeant Clower spoke to Mr. Molina about an unrelated case. During the discussion, which the record does not reflect was recorded, Mr. Molina stated that the Petitioner brought a motorcycle to the body shop two years previously, that it had been reported stolen, and that the Petitioner disassembled it but left the frame and engine inside the shop for an extended period of time. Mr. Molina consented to a search of the body shop, and he reported that the engine and frame had been removed from the body shop. Mr. Molina showed the officers the table in the back of the body shop where he had last seen the engine and the upstairs areas where he had last seen the frame.

Evidence of Mr. Molina’s statement in the affidavit was not favorable to the defense. The evidence was inculpatory to the extent that it implicated the Petitioner in the case involving Mr. Crisp’s motorcycle. In fact, the statement is corroborative of Ms. Hernandez’s statements and testimony that the Petitioner told her to dispose of the frame and engine in August 2015 because the Petitioner feared Mr. Molina had spoken to the police about the motorcycle.

In any event, Sergeant Clower’s memorandum, which was unredacted and provided to the defense before the trial, reflects that Ms. Hernandez reported that the Petitioner was concerned Mr. Molina “was telling police he had brought it to the shop and needed to get rid of it.” As a result, the defense possessed information that Mr. Molina first told the police about Mr. Crisp’s motorcycle. Trial counsel and co-counsel knew Mr. Molina was a “bad actor” in this case, and trial counsel presented evidence of the same “every chance I could get.” The evidence of the same statements contained in the affidavit was cumulative to other evidence provided to the defense before the trial and would not have appreciably aided the defense. Additionally, the evidence had no impeachment value because Mr. Molina did not testify at the trial, and he invoked his privilege against self-incrimination at the evidentiary hearing. The record supports the post-conviction court’s determination that no *Brady* violation occurred.

### **(3) Officer Criddle's Statement**

The post-conviction court determined that the search warrant affidavit referred to Officer Criddle's interview by Sergeant Clower and Detective Pike. The court found that during the September 21, 2015 interview, Officer Criddle stated that he did not remember "taking the initial report," that he was on vacation on the day of the reported theft, and that he had previously seen a motorcycle engine, which had been inside the body shop for a couple of years, on a table in the rear of the body shop. The court found that the affidavit, likewise, reflected that timesheet records showed Officer Criddle was not working on August 2, 2012, when the police report was submitted. The court found that Officer Criddle's statements were inculpatory and not favorable to the defense.

The post-conviction court rejected the Petitioner's argument that Officer Criddle's statements absolved the Petitioner of having a criminal motive or intent. The court found that Officer Criddle's statement placed the motorcycle in the Petitioner's "possession to later direct its disposal by instruction to employee Ms. Hernandez." The court found that the motorcycle frame and engine became a liability when "suspicions started to arise in the Fall of 2015." The court found that Officer Criddle's statements were inculpatory and not material. The court credited trial counsel's testimony that the defense strategy and tactic were to "minimize" the Petitioner's connection to the frame and engine and that he would not have elicited testimony establishing that the Petitioner knew the frame and engine were inside the shop.

The record reflects that Detective Pike and Sergeant Clower interviewed Officer Criddle about the motorcycle theft police report. The investigative file reflects that during the interview, Officer Criddle did not recall responding to the theft report and did not recall any information about the motorcycle. When asked if a police report reflecting an officer's badge number could be generated by another officer, he said that at the bottom of a report, an officer had "to pick your badge number to identify who's actually taking the report and when you hit that drop down box it pulls up every city officer employee and retired." Officer Criddle agreed his badge number and car number appeared on the police report but identified the Petitioner's car number in the dispatch records as the responding police officer. Officer Criddle agreed that the dispatch records showed that the Petitioner's car number responded to the 9-1-1 call. Officer Criddle did not recall submitting the report. He said that the Petitioner had never asked him to complete a police report for the Petitioner and that it was not common for an officer to put another officer's name on a police report. The investigative file does not reflect that Officer Criddle was asked about his time spent at the body shop or any motorcycle parts he may have observed, which is inconsistent with the search warrant affidavit.

In any event, the extent of Officer Criddle's trial testimony was that he did not investigate the theft report on August 2, 2013, that he did not complete a police report, and that he was off duty at the time of the report. He stated that he did not consent to anyone completing a report in his name, that his police car or radio number was 3363, and that the Petitioner's was 3355. On cross-examination, trial counsel elicited testimony from Officer Criddle that the in-car police computers were password protected and that he did not provide his password to the Petitioner, which was consistent with the Petitioner's trial testimony. Furthermore, Officer Criddle testified that if he were not working on a day when his timesheet was due, "a friend or supervisor or somebody" could fill in the timesheet and submit it. After reviewing his timesheet, he agreed that it was unsigned, even though he worked on Saturday, August 3, 2013, when the timesheet was due.

The record reflects that Officer Criddle's trial testimony was largely consistent with the interview contained in Sergeant Clower's investigative file, which implicated the Petitioner in the filing a false police report allegations. However, Officer Criddle did not state during his police interview that he had been to the body shop and seen an engine on a table inside the shop for a couple of years, although the affidavit reflects otherwise. The discrepancy between the search warrant affidavit and Officer Criddle's police interview notwithstanding, Officer Criddle testified at the evidentiary hearing that he had been to the body shop "a few times" and that he told Sergeant Clower and Detective Pike that he had seen an "engine on the back table" in plain view inside the body shop. Officer Criddle's access inside the body shop had never been restricted.

Although the Petitioner characterizes Officer Criddle's testimony at the evidentiary hearing that he had seen an engine on a back table as favorable, the evidence was inculpatory and corroborated other witness testimony. The fraudulent theft was reported on August 2, 2013. Ms. Hernandez testified that the motorcycle frame and engine she disposed of at the Petitioner's request had been inside the shop since she began working there in August 2014. Other evidence showed that after the frame was found by investigating officers where Ms. Hernandez reported disposing of the frame and the engine, the VIN number on the frame belonged to the motorcycle owned by Mr. Crisp. Officer Criddle's statement, like Ms. Hernandez's, placed the motorcycle parts in the Petitioner's possession to direct their disposal later when the police began investigating the motorcycle. Trial counsel agreed and noted that he would not have wanted to elicit testimony that the Petitioner knew the engine and frame had been inside the body shop. In any event, Officer Criddle testified at the trial that he had seen a motorcycle engine in the back of the body shop. As a result, we conclude that the record supports the post-conviction court's determination that no *Brady* violation occurred.

## **B. Photographs from the Execution of the September 2015 Search Warrant**

The Petitioner argues that the photographs were favorable to the defense because they could have been used to impeach witnesses and could have been used to show that the body shop was emptied as a result of the eviction proceedings.

The post-conviction court found that fourteen photographs were taken during the execution of the September 21, 2015 search warrant at the body shop but that the photographs were not provided to the defense based upon credited testimony of Detective Pike and the prosecutor who tried the Petitioner's case. The court determined that the photographs were subject to discovery disclosure but that the photographs did not "depict anything of evidentiary significance." The court found that the photographs showed "a mostly emptied shop," which the court determined possessed little favorability or exculpatory value because the State's theory was that Ms. Hernandez disposed of the motorcycle frame and engine in August 2015. Although the court acknowledged that the photographs showed the absence of contraband and were minimally favorable to the defense, the photographs were not material and could not have undermined the jury's verdicts.

The record reflects that at the evidentiary hearing, fourteen photographs taken during the September 21, 2015 execution of the search warrant were received as an exhibit. The photographs reflect a largely empty body shop, although tables, various license plates, a Mercedes sports utility vehicle, and a partial truck frame are visible inside the body shop. Detective Pike admitted that the photographs were not provided to the District Attorney's Office but said "there was nothing there." Post-conviction counsel did not dispute that the photographs did not reflect anything of probative value but stated that the photographs existed and were not provided to the defense before the trial.

The photographs were minimally favorable to the defense in that they were potential evidence that the Petitioner emptied the body shop because of the eviction proceedings, not because he directed Ms. Hernandez to dispose of evidence of a crime. However, the evidence reflects that Ms. Hernandez was directed to dispose of the motorcycle frame and engine in August 2015. On September 14, 2015, Sergeant Clower and Detective Pike spoke to Mr. Molina, at which time he mentioned that the Petitioner brought a motorcycle to the body shop, that the motorcycle was reported stolen, and that the Petitioner disassembled it but left the frame and engine inside the shop two years previously. Mr. Molina likewise consented to a search of the body shop, and he showed the officers where the engine had been on a table in the back of the body shop and where the frame had been in the upstairs area. The items were no longer inside the shop at the time of the consent search. Ms. Hernandez contacted the Drug Task Force on September 17, 2015, reporting her role in disposing of the frame and engine at the Petitioner's direction because the Petitioner feared Mr. Molina had told the police about Mr. Crisp's motorcycle.

The detainer warrant against the body shop, which was received as an exhibit at the evidentiary hearing, was filed on September 17, 2015 and served the next day on September 18, 2015. The video recordings made during the cleanout process reflect an inventory of the items contained inside the shop, which included motorcycle and automobile parts. However, Ms. Hernandez testified that she disposed of the engine and frame in August 2015, which was before the consent search and before the execution of the search warrant. Further, the search warrant affidavit reflects that law enforcement was aware of the eviction proceedings. Although the photographs show that the engine and frame were not inside the body shop at the time of the search, the photographs were not exculpatory and had no impeachment value based upon the timeline, which co-counsel noted was critical in this case. The record supports the post-conviction court's determination that no *Brady* violation occurred.

### **C. Ms. Hernandez's Previous Work as a Paid Informant**

The Petitioner argues that the Drug Task Force file related to Ms. Hernandez was favorable to the defense because it reflected her status as a previous paid informant in unrelated cases and that this information could have been used to impeach her credibility.

The post-conviction court determined, based upon testimony from Director Cherry, the prosecutor, and defense counsel, that although the State possessed information regarding Ms. Hernandez's previous work as a paid confidential informant for the Drug Task Force, this information was not provided to the defense. The court found, based upon the Drug Task Force documentation, that Ms. Hernandez worked as a paid informant in 2010, that she participated in four controlled drug purchases, and that at least two persons were prosecuted as a result of her work. The court found that she received a total payment of \$610. Although the court acknowledged that *Brady* could require the disclosure of impeachment evidence, it determined that Ms. Hernandez's prior work in 2010 was irrelevant and immaterial to her disclosure of the Petitioner's tampering with evidence in 2015. The court found that the record was absent any evidence to show that her work had any bearing on the Petitioner's case and that she expected payment from law enforcement. The court determined that the evidence was inadmissible impeachment evidence. As a result, the court determined that the State did not violate its duty in connection with her previous informant work.

The record reflects that Ms. Hernandez became a paid confidential informant for the Drug Task Force in May 2010. She was paid for her work on four occasions, and the payments totaled \$610. Director Cherry testified at the evidentiary hearing that Ms. Hernandez did not work as an informant in order to "work[] off" any potential criminal charges because she was paid for her work. Director Cherry stated that Ms. Hernandez no longer worked as an informant because her file had been "put in storage and been inactivated" and that she was not a paid informant in the Petitioner's case. Director Cherry



stated that Ms. Hernandez did not request anything in exchange for the information she provided in this case and that she contacted the Drug Task Force about the motorcycle because she had a previous “professional relationship” with its members.

Likewise, Ms. Hernandez testified at the evidentiary hearing that the Drug Task Force first contacted her about working as an informant after she worked with officers during a drug-related investigation involving her then-boyfriend. She worked with officers to build a criminal case against her boyfriend, and after his arrest, she agreed to work as a paid informant for the Drug Task Force. She worked as a paid informant for two years but was not paid for her testimony or her cooperation in the Petitioner’s case in 2015.

In *Robert William Ward*, a panel of this court considered whether similar evidence was admissible as impeachment evidence. *State v. Robert William Ward*, No. M2017-02269-CCA-R3-CD, 2019 WL 1436151, at \*26 (Tenn. Crim. App. Apr. 1, 2019), *perm. app. denied* (Tenn. July 18, 2019). The defendant sought to cross-examine a witness about her previous work as a paid confidential informant for a specified detective in a different county by participating in controlled drug purchases. She was paid \$100 per transaction and participated in two transactions. She did not have pending criminal charges when she worked as an informant, and she approached the detective one year before the defendant’s trial. She wanted to work as a paid informant because her husband had previously worked as a paid informant for the same detective and because she needed income for housing and food for her children. Her work was unrelated to the defendant’s case, which involved attempted first degree murder and a firearm violation. The trial court determined that evidence of her previous work as a paid informant was irrelevant and inadmissible. On appeal, this court determined that “[p]ermitt[ing] cross-examination about her prior work as an informant for a different law enforcement agency in unrelated cases would have invited speculation which lacked any factual basis relative to any purported motive to implicate the Defendant in the present case in exchange for money or some other benefit.” *Id.*

Ms. Hernandez’s previous paid informant work for the Drug Task Force was unrelated to the Petitioner’s case and occurred five years before the tampering with evidence offense and three years before the filing a false police report and filing a false insurance claim offenses. Any cross-examination about her previous work would have invited speculation which without any factual basis for her to have had any motive to implicate the Petitioner. We note that Ms. Hernandez testified at the evidentiary hearing that she contacted the Drug Task Force because she trusted its members and that she feared the Petitioner, as well as others. The record supports the post-conviction court’s determination that the evidence did not have impeachment value and would have been inadmissible. The evidence was not favorable or material to the defense, and the record likewise supports the court’s determination that no *Brady* violation occurred.

#### **D. Sergeant Mitchell's 2013 Case Investigation Summary**

The Petitioner argues that the summary was favorable to the defense and points to the portion reflecting that Sergeant Mitchell "called Mr. Crisp" on August 20, 2013, and that Mr. Crisp "had no information on the theft." The Petitioner argues that this statement did not implicate the Petitioner in the theft and that the report could have been used to further impeach Mr. Crisp's credibility.

The post-conviction court credited Sergeant Mitchell's testimony at the evidentiary hearing. The court found that Sergeant Mitchell initially investigated Mr. Crisp's stolen motorcycle theft report on August 2, 2013, that Sergeant Mitchell and Mr. Crisp spoke by telephone on August 20, 2013, and that the case summary received as an exhibit reflected that Mr. Crisp "had no information on the theft." The court found that this information was not provided to the defense. The court determined that Mr. Crisp's statement was exculpatory to the extent that it indicated the Petitioner "played no role in the crimes" and that the State had an obligation to provide it to the defense before the trial. The court found that the evidence was favorable to the defense because it called into question the Petitioner's involvement in the offenses and because it was impeachment evidence.

The post-conviction court determined that although Mr. Crisp's statement was favorable and exculpatory, the statement was hearsay and likely inadmissible without Mr. Crisp's admitting he made the statement during his trial testimony. The court found that Mr. Crisp admitted at the trial that he filed a false police report and insurance claim and that the jury heard extensive evidence about Mr. Crisp's character as an "admitted liar." The court determined that Mr. Crisp's statement to Sergeant Mitchell did not create a reasonable probability that the outcome of the trial would have been different if the statement had been provided to the defense. The record supports these determinations.

The record reflects that Sergeant Mitchell's summary, which was received as an exhibit, showed that he spoke to Mr. Crisp by telephone and that Mr. Crisp did not provide any information about the theft. The case summary also reflected that Sergeant Mitchell attempted to contact Mr. Crisp three times in 2013, that Sergeant Mitchell left two voicemail messages, and that Sergeant Mitchell spoke once to Mr. Crisp, at which time Mr. Crisp said he "had no information on the theft."

The trial transcript reflects that Mr. Crisp admitted on direct examination that he lied when he reported the motorcycle stolen in 2013, which was when Mr. Crisp spoke to Sergeant Mitchell by telephone. Likewise, trial counsel cross-examined Mr. Crisp at the trial about his lying to the police when he reported the motorcycle stolen and when he submitted the insurance claim. Mr. Crisp admitted he lied in both instances. Further, Mr. Crisp admitted at the trial that he lied multiple times, including lying about the location where the theft occurred. He likewise agreed that although he swore by signing the

insurance claim that the information contained in it was true, the information was false. Mr. Crisp acknowledged that only he benefited from the false insurance claim and that the Petitioner received no benefit. The transcript is consistent with trial counsel's testimony at the evidentiary hearing that the defense possessed other investigative reports reflecting that Mr. Crisp initially reported his motorcycle stolen, that he lied about the theft, and that he filed a fraudulent insurance claim. The statement in Sergeant Mitchell's report was cumulative, at best. Mr. Crisp was cross-examined extensively about his falsehoods, and trial counsel impeached Mr. Crisp's credibility. We conclude that the record supports the post-conviction court's determination that no *Brady* violation occurred.

#### **E. Forensic Report of Motorcycle Frame**

The record reflects that the Petitioner failed to address the fingerprint analysis in the post-conviction proceedings, and, as a result, the issue is subject to waiver. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief to be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."); *Maddin*, 192 S.W.3d at 561 ("When an issue is raised for the first time on appeal, it is typically waived."). Trial counsel and co-counsel were not questioned about the fingerprint analysis at the evidentiary hearing. Neither this court nor the post-conviction court may speculate. *See Black*, 794 S.W.2d at 757. In any event, evidence that the frame had no fingerprints was presented to the jury at the trial. Sergeant Clower testified at the trial that "no fingerprints at all [were] recovered" from the frame. Likewise, Sergeant Clower's redacted and unredacted memorandum, both of which defense counsel received before the trial, referred to the fingerprint analysis. As a result, the Petitioner is not entitled to relief on this basis.

#### **F. Mr. Crisp's Bankruptcy Petition**

Although the Petitioner refers to Mr. Crisp's bankruptcy petition as a basis to support a *Brady* violation, the record does not reflect that the State suppressed the bankruptcy petition. The record reflects that the defense investigator obtained a background report in connection with Mr. Crisp and that the report noted the bankruptcy petition. "The prosecution is not required to disclose information that the accused already possesses or is able to obtain." *State v. Marshall*, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992).

Further, the prosecutor testified during her deposition that she did not recall having any information related to Mr. Crisp's bankruptcy proceedings. Although Sergeant Clower testified that he learned of Mr. Crisp's bankruptcy petition during his investigation, he did not recall if he knew at the time of the Petitioner's trial that Mr. Crisp had reported in his bankruptcy petition that the motorcycle had been stolen. Therefore, the record supports

the post-conviction court's determination that no *Brady* violation occurred. The Petitioner is not entitled to relief on this basis.

#### IV. Cumulative Error

The Petitioner argues that he is entitled to relief based upon the cumulative effect of defense counsel's multiple instances of deficient performance. He argues that he was prejudiced by the cumulative effect of counsel's multiple performance deficiencies.

The cumulative error doctrine requires relief when "multiple errors [are] committed in the trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76–77 (Tenn. 2010) (internal citations omitted); see *State v. Jordan*, 325 S.W.3d 1, 79 (Tenn. 2010) ("[T]he combination of multiple errors may necessitate . . . reversal . . . even if individual errors do not require relief.") (quoting *State v. Cribbs*, 967 S.W.2d 773, 789 (Tenn. 1998)).

"[W]hen an attorney has made a series of errors that prevents the proper presentation of a defense, it is appropriate to consider the cumulative impact of the errors in assessing prejudice" of an ineffective assistance of counsel allegation. *Timothy Terrell McKinney v. State*, No. W2006-02132-CCA-R3-PD, 2010 WL 796939, at \*37 (Tenn. Crim. App. Mar. 9, 2010), *perm. app. denied* (Tenn. Aug. 25, 2010). More than one instance of deficient performance, when considered collectively, can result in a sufficient showing of prejudice pursuant to *Strickland*. *Id.* The question is whether counsel's deficiencies "cumulatively prejudiced . . . the right to a fair proceeding and undermined confidence in the outcome of the trial." *Id.* Counsel's failure to conduct adequate pretrial preparation and investigation may establish prejudice pursuant to *Strickland*. *Id.*

The record reflects that defense counsel's deficiencies were limited to the Petitioner's filing a false police report conviction. Defense counsel provided deficient performance by failing to interview Mr. Crisp before the trial and failing to review Mr. Crisp's bankruptcy petition in which he falsely stated that the motorcycle had been stolen. As we have stated, Mr. Crisp's credibility was critical to support the Petitioner's conviction for filing a false insurance claim, and the record supports the post-conviction court's grant of relief for this conviction. However, Mr. Crisp testified at the trial that he lied about his motorcycle having been stolen, and defense counsel elicited testimony about the frequency of Mr. Crisp's falsehoods. Further, Mr. Crisp's testimony was not the sole basis for the filing a false police report conviction. Although Mr. Crisp testified that the Petitioner said he would place another officer's name on the police report, other evidence presented at the trial established the Petitioner's efforts to file a fraudulent police report in another officer's name. Defense counsel's remaining deficiency was the failure to request

*Jencks* material after Officer Criddle testified at the trial. However, Officer Criddle's testimony was largely consistent with his recorded police interview and was supported by other evidence obtained during Sergeant Clower's investigation.

Overwhelming evidence supported the Petitioner's filing a false police report conviction. The evidence was likewise sufficient to support the tampering with evidence conviction based upon Ms. Hernandez's testimony, and none of defense counsel's deficiencies related to the tampering with evidence conviction. The Petitioner has not established that the evidence preponderates against the post-conviction court's determinations. The Petitioner "was not deprived of a meaningful defense, and he has not shown that the reliability of the verdict is in question." *See State v. Taylor*, 968 S.W.2d 900, 912 (Tenn. Crim. App. 1997).

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

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ROBERT H. MONTGOMERY, JR., JUDGE