IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 26, 2008

BYRON A. LOOPER v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Cumberland County
No. 5346 J.S. Daniel, Judge

No. E2005-01918-CCA-R3-PC - Filed June 2, 2008

The petitioner, Byron A. Looper, was convicted for the murder of Tennessee Senator Tommy Burks and sentenced to life imprisonment without the possibility of parole, and his conviction and sentence were affirmed by this court. State v. Looper, 118 S.W.3d 386 (Tenn. Crim. App. 2003). Subsequently, he filed a petition for post-conviction relief consisting of approximately 700 pages and raising a large number of claims. Later, he filed amendments to his petition and documents to supplement it, which added an additional 1400 pages. After an evidentiary hearing at which the petitioner represented himself, the post-conviction court determined that he had failed to prove his claims, resulting in this appeal. On appeal, he has raised the following issues: (1) the post-conviction judge was biased against him; (2) trial and appellate counsel were ineffective; (3) the evidence was insufficient to sustain his conviction; (4) his right to counsel at trial was violated; (5) he was prejudiced by post-trial errors, actions, and inactions by the trial court and his trial counsel; (6) the prosecutors committed misconduct during closing arguments; (7) the trial court erred in its instructions to the jury; and (8) a number of trial errors resulted in his trial being unfair. Following our review, we affirm the post-conviction court's denial of the petition.

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

ALAN E. GLENN, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. MCLIN, JJ., joined.

Byron A. Looper, Petros, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; William Gibson, District Attorney General; and David Patterson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

In the direct appeal, this court set out the facts surrounding the petitioner's convictions:

STATE'S PROOF

The victim, Tommy Burks, had lived in Cumberland County with his wife Charlotte for approximately thirty years. He first had been a state representative and then a state senator, being in the latter position for approximately twenty years prior to his death on October 19, 1998. The defendant, Byron Looper, was the Putnam County Tax Assessor at the time.

Sergeant Joseph H. Bond, a Marine recruiter residing in Hot Springs, Arkansas, testified that he had known the defendant since they were about 14 years old and in the ninth grade. They did not see each other "for quite a while" after high school, Bond joining the Marines and the defendant entering the United States Military Academy. He next saw the defendant around Christmas of 1985, two years after they had graduated from high school, and, following that, in 1986, when the defendant enrolled at the University of Georgia. He did not see the defendant again until approximately ten years later. The defendant called him in May or June 1998 and said that he wanted to stay in touch with Bond, and, about three weeks later, again telephoned Bond, asking if he could visit him in Arkansas. Bond agreed, and the defendant came to Hot Springs shortly after that, visiting in June 1998. Together they went to a bar and drank throughout the night. During this evening, the defendant said that he was "either a senator or a congressman," in Tennessee and, accordingly, Bond introduced him as "Senator Looper." Either later that night or the next morning, the defendant admitted to Bond that he was "actually just running for office."

During this weekend visit to Hot Springs, the defendant spoke of his interest in firearms, saying that he had "been thinking about getting one." He questioned Bond about the specifics of firearms, "different calibers, how accurate they were, the ranges on them, and asked . . . about silencers," as well as "[c]oncealibility, what would be concealable in a crowd." Later during the visit, speaking of the election, the defendant said that "he had thought about killing [his opponent]." Additionally, he said that "if there were only two people on the ballot, if one of them died 30 days before the election, that he would automatically win."

The defendant then came unannounced to Bond's apartment in July or August 1998, where he stayed for "a couple of days." During this visit, the defendant "was more intent on getting a weapon," saying that "since the election was coming up, he needed one quick." Although he had no intention of doing so, Bond agreed to obtain a pistol for the defendant. Bond said he thought "the election would go ahead and happen, and that would be it, and I wouldn't hear anything else about it." After his departure, the defendant telephoned Bond "about every day, sometimes two, three,

four times a day," wanting "to know if [Bond] had got him a pistol yet." Bond made excuses for not doing so, and did not obtain a pistol for the defendant. The defendant sent Bond a money order for $150. The telephone calls from the defendant continued "[i]nside of a week of him leaving."

William Lindsay Adams, Jr., testified that he resided in Baton Rouge, Louisiana, and periodically worked "as a staff person for political campaigns around the country and in [his] own state." He would become affiliated with candidates by word of mouth or through trade publications. In the July 1998 edition of Campaigns and Elections, he had seen a notice seeking "a campaign staff or manager for a first tier campaign." The advertisement provided a facsimile number to which to respond but not the name or other information about the candidate. About three days after he had faxed his résumé to the number, Adams received a telephone call from a person identifying himself as "Byron Looper," who said that he "had changed his name to Low Tax Looper." Adams told of his "credentials," which included working "for a conservative governor who had just recently passed some laws in Louisiana that [the caller] seemed interested in." The caller asked about "[c]oncealed weapons laws" and the "details of the law, and how it was passed, and what was [Adams'] role in the legislation, or the campaign to get this law elected." The caller said that he was a candidate for the state senate; and, Adams "wanted to know how much he thought it would take to run a race" to find out "if he was serious or not." The caller said that the race would cost "[t]hirty-five cents," but Adams did not ask for an explanation because the conversation was "very awkward" with "[a] lot of pauses." Adams testified how the caller said that he would win the race: "He had several ideas, but he suggested that maybe if a candidate wasn't in the race at the end, if something happened to the candidate, that the race wouldn't cost that much to run, which was my concern, the money." Adams decided against going to work for the caller.

Russell Duke testified that he had been a friend of Russell Looper, the defendant's brother, for "[a]t least five, six, seven, eight years." Duke said that he resided in Oakwood, Georgia, which was located in the northeast part of the state, "[a]bout [a] four-and-a-half, five hours" drive from Crossville, Tennessee. He testified that he and Russell Looper had planned to go out with some friends on October 17, 1998; but, because Looper "had something that he had to do" with his girlfriend in Atlanta, Duke then agreed to "run some errands for Byron," at Looper's request. Prior to that, he had met the defendant on two occasions. Duke and the defendant were to meet at the Flowery Branch, Georgia, home of the defendant's mother, which was "[w]ithin five to seven miles" of Duke's residence. Duke arrived there at about 7:30 p.m. and allowed the defendant to use his cell phone to make two or three calls about car advertisements he had seen in an Auto Trader magazine. The defendant owned a Beretta automobile which he left at his mother's residence as Duke drove him to look at cars for sale. With the defendant driving, they took one of the cars for sale, a black, four-door "older body-styled Audi," on a test drive. The

defendant purchased the Audi for "somewhere like twelve ($1200) or twelve, fifty ($1250)." In his own vehicle, Duke followed the defendant, driving the Audi, back toward the home of the defendant's mother. Five or ten miles before his mother's house, the defendant and Duke stopped at a car wash, where the defendant said that "he wanted to find somewhere that was well lit to leave the car." It was then parked at a shopping mall about ten miles from the house of the defendant's mother, with Duke returning the defendant to her residence. The defendant explained that he wanted to park the car at a place other than his mother's house "because cars had been following [him] since he had came [sic] from here down to his mother's." Duke had not spoken with the defendant since that night. However, he later identified to Tennessee Bureau of Investigation ("TBI") agents the seller of the Audi.

On cross-examination, Duke said that it had taken "[a]pproximately four-and-a-half to five hours" to drive from his home in Georgia to Crossville, where the trial was being conducted. He agreed that to drive from his residence in Georgia to Crossville by the expressway, it would be necessary to go south to Atlanta. To avoid this, a driver would have to take "[c]ountry back roads." Regardless of which route was taken, the drive from his residence to Chattanooga would take "probably two and a half hours." Duke said that the tires on the Audi, when it was purchased by the defendant, were "pretty worn."

Michael R. Levy testified that in October 1998, he had been living in Lilburn, Georgia, and had advertised a 1987 Audi 4000-S in the Auto Trader for sale. He said that the defendant responded to the advertisement on October 17, arriving with a friend at Levy's residence about 6:00 p.m. The defendant told Levy that he bought cars, repaired them, and then sold them. Levy received $1200 in cash from the defendant for the vehicle, giving him the title and a bill of sale. Identifying his receipt for a tire purchase, Levy said that he had fourteen-inch NTW Viper tires put on the vehicle on October 19, 1996, and had driven the car 30,000 miles since installing the tires, which "were in good condition, though." He said that the car had ignition problems and would not start all of the time.

On the morning of Monday, October 19, 1998, the victim and his wife slept later than usual; and the victim did not go to a local Hardee's restaurant for biscuits for himself and his grandson, as was his custom. A group of children were coming to the pumpkin patch on their farm between 9:00 and 9:30 a.m. that morning. As the victim was preparing to leave for the pumpkin patch, his daughter telephoned, and, after they talked, his wife spoke with their daughter, who was celebrating her birthday that day. The victim left for the pumpkin patch, and his wife left to join him at about 8:30 a.m.

As the victim's wife was on her way to meet her husband, she saw their farm hand, Wesley Rex, as he drove "real fast" out of the farm road. She jumped out of

her car to meet him as he pulled over. He jumped out of his truck and said, "Something's bad wrong with [the victim]. He's got blood coming out of his ear." She instructed him to telephone 9-1-1 and then proceeded down the farm road to her husband. She saw his truck and got out and touched him. She explained that, "I didn't really realize what – I didn't know what had happened to him until I – I was holding him, and I felt the back of his head, and he had a big knot on the back of his head, and I looked at his face, and I could see the hole."

The victim's daughter, Kim, and emergency medical workers soon arrived at the scene. Detective Gary Roach, of the Putnam County Sheriff's Department, followed by Chief Detective David Andrews, arrived at about 9:00 a.m. A number of other law enforcement officers subsequently arrived. Roach went to the victim's truck, seeing that the driver's side door was open and that the victim's body was inside. Wesley Rex said he had seen a black car coming down the farm road, away from the victim's truck, before Rex had found the victim's body. After Rex had shown Roach the place where the black car had turned around, officers secured the area and covered the tire tracks with tarpaulins to preserve the evidence. Photographs and a videotape were made of the crime scene. The following morning, Detective Roach was informed that someone at the victim's farm wanted to speak with him, and, upon his arrival, learned that it was Wesley Rex. He met Rex at the hog barn where Rex said that he had seen on television the person who had been driving the black car, and that his name was Byron Looper.

Wesley Rex testified that he was 24 years old and had lived on the Burks' farm since he was three. He had graduated from high school in Cookeville, where he had attended special education classes and received a special education diploma. He said that he had trouble in school with "my reading, writing, and my math." He had no trouble with his vision. He described his duties at the farm as "tak[ing] care of the animals, and feeding the cows, and just different stuff." On the morning of October 19, 1998, he had gone to the Hardee's restaurant in Monterey for breakfast, and then returned to the barn to feed the animals and prepare for a group of children coming that day for a hayride to the pumpkin patch. As he was on the farm road, he "saw a black car come in, so [he] pulled over, and [he] seen [the victim] coming in behind it." He described the single occupant of the black automobile as "a white male, had glasses on, had a black jacket on with a pair of gloves on." The vehicle proceeded down the road and then turned around. The victim stopped his truck beside Rex and asked "who was in the black car." Rex replied that he did not know who the occupant was. As Rex drove off, he looked back and saw the black car pull alongside the victim's gray Dodge pickup truck. Rex continued and when he had gone about 100 yards, going to the hay trailer, he heard a "pop," and thought he had run over gravel or had a blowout. As he looked in the mirror, he saw "the black car coming in behind" him "pretty fast." The black car turned on Highway 70 toward Monterey. Not realizing that anything was wrong, Rex fixed the hay wagon before

returning to the barn. About five minutes later, he passed the victim's truck, and it appeared that the victim "was reading something in his lap." Returning on the tractor, Rex again came beside the victim's truck:

> And, so, I went on through and got the tractor. I come back out the same road on the tractor, and I got up there to [the victim's] truck, and I seen that there was some blood on his ear, and I thought there was something wrong, so I got off the tractor and checked him. I sort of touched him, and I noticed – I said, "Well, I need to go tell Kim."

He then went to the victim's daughter's house located at the end of the road and told her to call 9-1-1. Next, he found the victim's wife and told her that "there was something wrong with [the victim]," and asked an acquaintance who worked at the fire department come to the scene.

Rex testified that, before that day, he had never seen the defendant. He later told the police that the black car "looked like a Toyota," but he was not certain that this was the case. Looking at a photograph of a black Audi automobile, he said that it appeared to be of "the car that was on the farm that morning," recognizing it partly because of "the circles on it . . . the seat covers, the top of the seats." Later that morning, Rex assisted a police officer in preparing a computer sketch of the man he had seen driving the black car. The following morning, he went to the residence of Moe, a fellow farm worker, to see if he was going to work that day and sat with him to watch the news. As he watched a morning newscast, he was "[a] hundred percent" certain that a photograph of the defendant being shown was the man he had seen driving the black car on the farm road the morning of the killing. Rex then went to Mrs. Burks' house and told the two deputies there that he "needed to get a hold of Gary Roach," who was the only investigator he remembered from the previous day. He told Roach that he had recognized the man, although he could not remember the man's name. Rex then identified in court the defendant as being the man driving the black car he had seen that morning on the farm road.

At the crime scene, TBI Agent Don Carman observed the victim's body and took inventory of the contents of the victim's pockets. Inside the victim's pockets were $43, a white handkerchief, a brown wallet containing a driver's license, a pocketknife, two sets of keys, and some change. Carman inspected the victim's truck but did not find any fired bullets or cartridge cases. The driver's side window of the victim's truck had been rolled down and was not broken.

Agent Carman, who was qualified as a firearms identification expert at trial, testified that he examined the bullet recovered from the victim's body and determined it to be a nine-millimeter class jacketed bullet. Carman also received a

Smith and Wesson Sigma Series Model SW9V nine-millimeter pistol, as well as a Smith and Wesson nine-millimeter magazine, for examination. After examining test-fired bullets from the pistol and comparing them with the bullet recovered from the victim, he determined that the bullet was fired from the barrel of the pistol. He testified that the magazine was restricted for law enforcement use and was banned for normal practice.

Dr. Sullivan Smith, an emergency physician at the Cookeville Regional Medical Center and the Putnam County Medical Examiner, testified that he arrived at the crime scene at approximately 9:30 a.m. The victim's body was still in his truck, and Dr. Smith observed that he had a bleeding wound from his face. Later, he signed the death certificate, which listed the cause of death as a gunshot wound to the head.

Dr. Charles Harlan testified that he performed the autopsy on the victim's body on October 19, 1998. The cause of the victim's death was a gunshot wound to the head. Dr. Harlan stated that the bullet entered the victim's body "at the junction of the left side of the bridge of the nose and the left eyebrow . . . and then traveled through the brain and was recovered in the posterior right calvarium." The victim's wound was a "distant gunshot wound," meaning that the barrel of the weapon was at least twenty-four inches from the victim's body when it was fired.

The morning that the victim was killed, Jenny Conley, the manager at the Hardee's restaurant in Monterey, was working at the drive-through window where her first customer that morning "seemed like he was in a hurry and nervous, upset that he had to wait for the correct food." As she corrected his order, he "slapped the money on the counter," from where the wind blew it into the store. She described the customer, who was wearing a white Oxford shirt and black, wire-rimmed glasses, as "[k]ind of slender, average height . . . [d]ark hair that's kind of feathered on the side." The customer was driving a black, four-door car with gray interior. Ms. Conley later identified the defendant from a photographic lineup as this customer.

The defendant appeared, again unannounced, at Sergeant Bond's apartment between 11 p.m. and 1 a.m. the night of October 19, 1998. After being admitted into the apartment, the defendant's first words were, "I did it, man, I did it." When questioned by Bond, the defendant said, "I killed that dude. . . . That guy I was running against. . . . I busted a cap in that dude's head." The defendant was "[n]ervous, fidgety, pacing all over [Bond's] livingroom [sic], pacing behind the couch, couldn't be still." The defendant said that he had used a nine-millimeter pistol he had gotten from "a guy he knew that either had a business or went to police auctions, went to gun shows, things like that." He said that, after he shot the victim, "he drove for about 10 or 15 minutes and threw [the pistol] out the window." Disclosing the details of the killing, the defendant said that it had been "kind of

foggy" that morning and he had gone to the victim's house and shot him. Concerned that he had left tire tracks at the scene, he asked if Bond "knew a place where he could get . . . new tires." He said that, at the shooting, "he passed a guy on the road that either knew him or might have known him, and – but he didn't know whether he saw him or not, or could tell who he was." The defendant questioned Bond, "You'll cover my ass on this, won't you?" Bond replied that he would provide an alibi for the defendant, who then said, "If you walked in in your dress blues with all of those medals you've got, that would be the best alibi I could ever have."

The defendant left Bond's apartment the following morning, exchanging suitcases with Bond because "he didn't want anything on his suitcase." As the defendant went to leave, his "car wouldn't crank," so Bond pushed the defendant's car with his own. Bond identified a photograph of an Audi 4000-S as being the vehicle the defendant was driving. The defendant left Bond's apartment on Tuesday, and Bond's brother telephoned the following Friday or Saturday to inform him that the defendant's opponent had been killed. Concerned about what might happen to him, and after advice from others in this regard, Bond telephoned the district attorney's office where the killing had occurred.

Gerhard Noll testified that he owned and operated an auto repair shop in Tucker, Georgia. He said that "[s]omewhere between the 11th to 20th" of October 1998, a man brought a black, four-door Audi 4000-S to his shop, complaining of several problems with the vehicle. The repair order for this vehicle, which had been partially filled out by the customer, bore the name and signature of "Anthony Looper" and the address "Creek Stone Court" in Stone Mountain, Georgia. The charge for the repairs was $575. The repairs did not include replacing the tires. The customer, whom Noll said he could no longer identify, told him that he was going to be out of town and leave the car for "a couple of weeks." However, the vehicle remained there for several months. After receiving a telephone call notifying him that the person who had left the car no longer wanted it, Noll utilized the vehicle's paperwork, which he found in the glove compartment, and sold it. The title named "Michael Levy" as the seller and "Joann Milligan," to whom Noll sold the vehicle, as the buyer. Milligan testified that she had purchased the vehicle from Noll for $1,700. Because the tags on the car had not expired, she did not change them, and, subsequently, was met by police officers as she was about to get into the vehicle. She had not replaced the tires after purchasing it from Noll.

Robert J. Muehlberger, the manager of the forensic laboratory of the United States Postal Inspection Service and a forensic document examiner, testified that he had examined the signature "Anthony Looper" on the original Gerhard Auto House form and on a quitclaim deed and two campaign financial disclosure statements bearing the signature "Byron A. Looper," as well as an appointment of political

treasurer form also bearing the signature "Byron A. Looper." He testified that, in his opinion, the same person had signed each of these documents.

Nancy Bowman, the administrator of elections for Putnam County, testified that the candidates for the 1998 election for the Fifteenth Senatorial District were Tommy Burks, the Democratic nominee, and Byron Looper, the Republican nominee. Because Senator Burks died fifteen days prior to the election, his name was covered over on the voting machines and marked out on the paper ballots, in accord with Bowman's interpretation of the election law. She said that the defendant had signed his qualifying petition as "Byron Low Tax Looper." Since Senator Burks died less than forty days prior to the election, only the defendant's name appeared on the ballot. However, Charlotte Burks, the victim's widow, won the election, as a write-in candidate, in each of the eight counties in the district.

TBI Agent Larry O'Rear testified that he participated in the execution of a search warrant at the residence of the defendant. He identified a shoulder holster which was found hanging on a coat rack in one of the bedrooms; however, no pistol or other type of firearm was found in the residence. He did not have an opinion as to whether the holster was designed for a particular type of pistol, revolver, or semiautomatic. During his testimony, he placed, alternately, in the holster, a .45 automatic and a nine-millimeter Smith and Wesson.

Jimmy Hamlet testified that in March 1999, while employed by Meadows Construction, he was working with a crew "picking up litter along the interstate and the exits." On March 1, they had started at Monterey on I-40 West and were working toward Cookeville. He testified that while "walking up the exit ramp" at Exit 288, he found a nine-millimeter Smith and Wesson pistol. Hamlet subsequently gave the pistol to Randy Maynard of the Tennessee Highway Patrol.

James Sparkman, an employee of Averitt Express, testified that the weekend following Thanksgiving 1998, he was "four-wheeling" near his grandparents' property by the Calfkiller River and came "across something shiny in the road." He said that the object, which was a gun magazine, "had mud on it" and was on the river bank between two bridges. Later, his mother telephoned the White County Sheriff's Department, informing them of the clip, and was told it would be picked up. However, this did not occur and Sparkman then telephoned the Cumberland County Sheriff's Department because of his concern in having the clip upon which was imprinted "law enforcement use only." Subsequently, he gave the clip to a TBI agent. He said that he found the clip "approximately 20 to 25 miles" south of the intersection of Highway 111 and I-40.

John Kenneth Stansell, Jr., the general manager for G.T. Distributors in Rossville, Georgia, testified that his company, located ninety-six miles from Crossville, Tennessee, sold law enforcement equipment. He said that on March 7,

1997, he sold two Smith and Wesson SW9V nine-millimeter pistols, bearing serial numbers PAM8264 and PAM7629, to Officer Tim Murphy of the Monterey Police Department, after Murphy had presented him with a letter from the City of Monterey authorizing Murphy to make the purchase.

Officer Tim Murphy of the Monterey Police Department testified that on March 7, 1997, he met with John Bowden, Mayor of Monterey, at City Hall where Bowden gave him $700 in cash to purchase two Smith and Wesson Sigma nine-millimeter pistols for him. That day, Murphy and Officer Bruce Cantrell drove to G.T. Distributors in Rossville, Georgia, where Murphy purchased the pistols Bowden had requested, as well as two .40 caliber pistols, while Cantrell purchased a .45 caliber pistol. Upon their return to Monterey, Murphy delivered Bowden's pistols to him at his office, where the pistols were passed around and "dry-fir[ed]" by Bowden, Murphy, City Council Member Walt Phillips, and Assistant Chief of Police Terry Rizor. When Murphy left Bowden's office that day, both nine-millimeter pistols were in Bowden's possession. However, he later learned that Walt Phillips was the recipient of one of the pistols and assumed that Bowden had kept the other one.

Subsequently, in March 1999, after the murder weapon had been found and associated with the victim's death, Murphy was twice interviewed by TBI Agent Bob Krofssik about his purchase of the nine-millimeter pistols. Murphy admitted that he lied about "[a] lot of things" in the first interview, specifically that he originally bought the pistols for himself, not disclosing that he had in fact purchased them for Bowden. He said that he lied during the interviews because of fear that he had used his position as a police officer "for something other than it was meant to be." Murphy admitted that he had untruthfully completed the Federal Firearms Transaction Form on March 7, 1997, by answering "yes" to the question: "I am the actual buyer of the firearm indicated below. I understand that if I answer no to this question, the dealer cannot transfer the firearm to me."

Sheila Johnson, a secretary in the Putnam County Tax Assessor's office who also had done housecleaning for the defendant at his residence, testified that the defendant did not come to the office during October 19-22, 1998. She said that John Bowden also worked in the assessor's office and was there on October 19, 1998. She noticed that the defendant "seem[ed] a little more quiet" than usual during the three weeks preceding the victim's death.

While cleaning the defendant's residence about a month to a month and a half before the victim's murder, Ms. Johnson saw a handgun under a cushion on the couch. She was contacted by law enforcement officials on October 21, 1998, and gave a statement to TBI Agent David Emerin about the handgun which she said had a "two-tone to it . . . darker on the bottom and lighter on top." After she was shown an array of gun illustrations in an effort to identify the type of handgun she had seen,

Ms. Johnson initialed the illustration of a Model SW9V pistol. However, she felt she had been "[s]omewhat" directed to certain types of guns to identify.

On cross-examination, Ms. Johnson testified that she "felt intimidated . . . like I was the one being tried for this" when she gave her statement. She was not allowed to write her statement, and, to her knowledge, her statement was neither tape-recorded nor videotaped. She said that she told the assistant district attorney before trial that the gun illustration she had initialed was not the gun she had seen at the defendant's house.

TBI Agent David Emerin testified that the victim's farm employee, Wesley Rex, came to the Putnam County Justice Center on October 20, 1998, and said that he had seen the man he saw the morning the victim was killed on television in a political advertisement. The defendant became a suspect and, the next day, October 21, 1998, the TBI called the Putnam County Tax Assessor's Office and asked employees to come to the justice center three at a time for interviews. During Emerin's interview with Sheila Johnson, she told him that once when she was cleaning the defendant's house, she saw the handle area of a gun which was "a gray on the upper top area, and . . . darker on the bottom lower area." He showed Johnson two gun catalogs which she reviewed thoroughly, immediately discounting the revolvers and any type of rifle or shotgun as the gun she had seen at the defendant's house. After Johnson was unable to identify any weapon in the catalogs, Emerin contacted Tommy Hefland, a senior forensic scientist with the TBI Laboratory, Identification Division for Firearms, and gave him Johnson's description of the gun: "different colored material on it, the ridges on the slide were from the center of it, all the way back." Hefland told him that the description sounded like "something from the Sigma series" and faxed him a photocopy which he showed to Johnson. Johnson identified the gun on the photocopy as the type she had seen at the defendant's house. At the time of Johnson's interview, Emerin did not know what the murder weapon looked like; he only knew that it was a nine-millimeter because that was the type of bullet recovered from the victim. He reduced Johnson's statement to writing, and the two of them went over the statement "line by line, period to period," with Johnson initialing all corrections and the top and bottom of each page for authentication purposes and also signing an affidavit.

Agent Emerin was contacted by Joe Bond who expressed a desire to come forward with the information he had. Subsequently, on November 3, 1998, Agent Emerin met with Bond in Georgia where Bond gave him the defendant's bag which had a Delta Airlines identification tag bearing the defendant's name. Two days later, he met with Bond again, this time at Bond's apartment in Hot Springs, Arkansas. There, Bond gave him another bag, containing numerous items of clothing and personal items, that belonged to the defendant. Agent Emerin individually bagged the contents of the bag and took photographs of the bag, Bond's vehicle, and Bond.

At that time, he also interviewed Candace Hill in the presence of her parents because she was a minor.

Georgia State Representative Michelle Henson testified that the defendant, a friend of hers and her ex-husband, came to her home on Creek Stone Court in Stone Mountain, Georgia, on October 21, 1998, after 10:00 p.m. The defendant was driving a dark-colored Audi automobile. The defendant told her that his opponent had been shot, but she did not ask him for details and he gave none. At her invitation because of the lateness of the hour, the defendant spent the night at her home. The defendant asked to use her telephone and said he wanted to use a secure phone as opposed to a cordless phone but did not say why. The following morning, October 22, 1998, she read a newspaper article about the victim's murder which stated that the authorities wanted to talk to the defendant. She spoke to her ex-husband and expressed concern about the defendant's being at her residence. She asked the defendant where he was the day of the murder, to which the defendant replied "down south." The defendant told her "[s]omething to [the] effect" that she did not "need to know anymore information." After the defendant spoke to her ex-husband on the telephone, she loaned the defendant some money which was later reimbursed by her ex-husband. She described the defendant's demeanor when he was at her home as "nervous . . . not being calm and just sitting there calmly[.]"

Douglas Henson testified that he was formerly married to Representative Michelle Henson. He said he had been acquainted with the defendant, whom he described as somewhat "quirky" and known to exaggerate situations at times, for over ten years. On October 22, 1998, Representative Henson telephoned him while he was reading a newspaper article about the victim's murder. He also spoke to the defendant who was at Representative Henson's home. The defendant asked him if he could borrow $200 to $300, which Representative Henson gave to the defendant, Henson later reimbursing her. Henson asked the defendant if he was in town at the time of the murder, and the defendant said he was not. When Henson asked the defendant where he was, the defendant said "[s]outh." Henson asked, "South where?" and the defendant said, "[T]hat's facts, and we're not going to talk about the facts."

Randall Kirk Nelson, an employee of the TBI Crime Laboratory assigned to the trace evidence section, identified a series of photographs which he had taken and castings he had made of the tire tracks at the scene. Two of the tracks he identified as having been made by a farm tractor located near the victim's truck and a pickup truck driven by Wesley Rex. He said that he found an unidentified track on the road near the victim's vehicle and at a nearby turnaround area. Castings were made of the unidentified tracks, and he turned over these, as well as the photographs of the tire tracks, to Sandy Evans, the tire track examiner at the TBI Laboratory. He said that he had not taken any measurements to determine the stance or wheel base of the vehicle which had left the tracks because the tracks did not provide him with the

information he needed to make those measurements. He defined "stance" as "a measurement of the center of a passenger side tire to the center of a driver's side tire, the front, and also in the back" and "wheel base" as "a measurement of the center of the back tire to the center of the front tire."

TBI Special Agent Sandra Evans, assigned to the microanalysis section of the crime laboratory, testified that she compared the tire track photographs and castings with those in The Tread Design Guide and utilized Tread-Assist Software to try to identify the type of tire which left the tracks. Her conclusion was that the tracks were consistent with a 1997 National Tire and Warehouse "Viper-TR Passenger Tire," a 1998 National Tire and Battery "Viper Radial-T Passenger Tire," and a 1998 Sears "Viper-T Passenger Tire," which are manufactured by the Cooper Tire and Rubber Company. Upon cross-examination, Evans testified that she had examined the defendant's Audi automobile on July 1, 1999, and, based upon that examination, concluded that the tires then on the Audi had not left the impressions at the crime scene. She said that she had examined the Beretta automobile on November 4, 1998, and that the tires from the Beretta, likewise, were inconsistent with the tire tracks at the crime scene. After Cooper Viper-TR tires were mounted on the Audi, it produced a "track similar to" that left at the scene of the homicide.

Bruce Currie testified that he was manager of technical standards for the Cooper Tire Company and was accepted as an "expert in his field as a tire engineer." Based upon his examination of the tire castings from the crime scene, he determined that "the measurements from the three tire castings [were] consistent with the dimensions of a P19560R14 Viper-TR Radial GT tire manufactured by Cooper Tire & Rubber Company." He said that between the introduction of this tire in 1996 and the time of the homicide, approximately 15,000 of these tires were manufactured out of the 105,000,000 tires his company manufactured during that period.

Dorothy Henry testified that she had been employed in the Putnam County Tax Assessor's Office from approximately two weeks after the defendant began his term as tax assessor in 1996 and worked there until his successor had taken office after the defendant's arrest. The defendant did not come to the office much, "maybe once or twice a week a couple of hours, or something like that," and employee turnover was high. John Bowden came to work in the assessor's office in 1998 and was a friend of the defendant. She said that, although Bowden was supposed to perform field work, "he didn't know anything about field work." She knew no function that he performed. On the day that the victim was killed, Bowden was in the office, but the defendant was not. Another former employee of the Putnam County Tax Assessor's Office, Robert Michael Nail, said that the defendant had hired him in 1997, and he had worked there for fifty weeks. He said that John Bowden "handed out work assignments" and "was about first in command." Bowden "might work . . . about ten hours out of the week, but most of the time, he sat there and was on the computer playing solitary [sic]." Bowden was paid $19,000 per year. On

cross-examination, Nail said that he had filed a $1.2 million wrongful termination lawsuit against the defendant after he was terminated. Because of Nail's duties in "the field," he was in the office "maybe an hour a day."

DEFENSE PROOF

Virginia Hill, the mother-in-law of State's witness Joe Bond, testified that she was present in November 1998 when TBI Agent David Emerin interviewed her daughter, Candace Hill Bond, who was a minor at the time. Her daughter told Emerin that she had been molested that summer by the defendant at Bond's apartment. Virginia Hill asked Emerin to omit this information from his report because her "daughter was already traumatized," and Hill "did not want it drug through the courts, and for the defense to make [her daughter] look bad." The next day, she asked Bond if he knew about the incident. He replied that the day his wife told him that the defendant made her "feel uncomfortable," he had asked the defendant to leave. When told of the matter, Virginia Hill's husband became more angry than had Bond, and, further, had become angry at Bond for not doing more about the incident.

Elizabeth Howard, an emergency medical technician with the Putnam County Ambulance Service, testified that she had been called to the crime scene the morning of October 19, 1998, and saw a man, whom she later learned was Wesley Rex, talking with a police officer. Rex told the officer that the black vehicle at the scene "could have been possibly a Toyota" and that Rex did not know who had been driving.

The former mayor of Monterey, Tennessee, John Henry Bowden, testified that the defendant had hired him to work for the Putnam County Tax Assessor's office. He said that his initial statement was untruthful that he had purchased a Smith and Wesson nine-millimeter pistol from a flea market. In fact, he had obtained two Smith and Wesson Sigma nine-millimeter pistols in March 1997, while mayor, through a purchase he had authorized for the Monterey Police Department. He kept one pistol for himself and gave the other one to Walter Phillips. After keeping the pistol for "around two or three months," he sold it at a Crossville flea market to a man, whom he did not know, of "medium build." However, during cross-examination, Bowden acknowledged that he had been in possession of the pistol when he was arrested in December 1997, and that he had owned the weapon until "[s]ometime after the first of the year" of 1998.

Bruce Cantrell testified that, as a Monterey police officer in March 1997, he had gone with Officer Tim Murphy to G.T. Distributors in northwest Georgia to purchase handguns. He purchased a Colt .45 but did not know what weapons Murphy had bought or what he did with them.

Bruce Buckner, who lived approximately two miles from the victim's farm, testified that he had purchased in May 1998, a nine-millimeter pistol from Walter Phillips. Buckner said that his pistol was "on the end table by the bed at [his] home" the day that the victim was killed. Sometime after that, his pistol was stolen from his truck.

Angela Clark Harris said that she had been working at the Hardee's restaurant in Monterey on the morning of the shooting and had talked with Jenny Conley about the behavior of a customer at the drive-through window.

Walter Phillips, the vice-mayor of Monterey when John Bowden was the mayor, testified that in March 1997 he purchased a Sigma nine-millimeter pistol through Bowden's arrangement with Officer Tim Murphy. He said that he had sold the pistol, which came with a plastic carrying case, to Bruce Buckner about two months after he had purchased it but kept the case. The serial number on the case, PAM8264, was the same serial number on the murder weapon.

During cross-examination, Phillips said that when the pistols were delivered by Officer Murphy, he was one of the five people at Monterey City Hall who were passing the guns around, and there was a "very good chance" that he did not leave with the case the pistol had come in. He did not later compare the serial number of the pistol he had with that on the case and did not record the serial number of the pistol when he sold it to Buckner.

Reba Looper, the defendant's mother, testified that the defendant arrived at her home in Flowery Branch, Georgia, on Wednesday, October 14, 1998, and that she had last seen him there "[p]robably Sunday afternoon." After he had left, she discovered in her bathroom that "[t]owels were on the floor, the shower was in disarray, so I could immediately tell Byron had been there and taken a shower." This would have occurred during the day on October 19, 1998, while she was at work. Georgia Bureau of Identification Agent Loggins contacted Reba Looper to ascertain the whereabouts of her son. She said that she had not known where the defendant was at the time that Agent Loggins was looking for him or for two days thereafter.

John Dillon, who was qualified as an expert witness in firearms identification, testified that, in his opinion, the bullet recovered from the victim had been fired from the Smith and Wesson nine-millimeter pistol found at Interstate 40, Exit 288. He said that three bullets recovered from the backyard of the home of Walter Phillips had class characteristics consistent with the barrel of the same pistol used to kill the victim, but he could not say for certain that this was the case.

John Riley, an expert witness in gunshot residue analysis, testified that he reviewed TBI laboratory results of the gunshot residue examinations conducted on

the 1989 Chevrolet Beretta. According to those examinations, gunshot residue was found on the interior and exterior of the Beretta.

Frank Sorrells, a resident of Bonnerdale, Arkansas, whose son had been recruited for the Marines by State's witness Joe Bond, testified, as to the reputation of Bond for truthfulness and veracity, that "[w]ith the people I knew, it wasn't very good."

Amy Orr testified that she had a relationship with Joe Bond, beginning in May 1997. Bond instructed her not to reveal their relationship to anyone, threatening her family if she did so. However, she said she did not actually feel threatened and did not take the threat seriously.

Tony Richards, the maintenance supervisor at the apartment complex where Joe Bond lived in 1998, testified that Bond had teenagers in and out of his apartment. He saw two rifles in Bond's apartment but no handguns. Bond once told him that he had some automatic weapons for sale.

Lieutenant Mark Webb of the Cookeville Police Department testified that, after learning on October 23, 1998, the defendant had returned to his house in Cookeville, he went to the residence and spoke with the defendant, who was calm but "a little bit nervous, too." The defendant did not allow Webb to enter his residence but agreed to remain visible through the windows.

Brilla Garrett, who had been hired by the defendant and had been the office manager of the Putnam County Property Assessor's office, said that she "hardly ever saw [the defendant] in the office." She said that she sent and received political faxes for his campaign against the victim. The defendant referred to the sheriff's department and the district attorney's office as the "good old boys' system." She said that she had told the defendant that he could not win the election against the victim, and he responded, "You think, you think."

Peter McDonald, testifying as an expert witness regarding treadprint identification, said that the tire tracks at the crime scene did not match the tires on the defendant's Audi. During cross-examination, he said that he had not considered that the tire prints at the crime scene were made by an automobile moving in reverse. He utilized "stance measurements," although TBI agents testified that such measurements could not be made from the tire tracks at the crime scene.

PROOF AT THE SENTENCING PHASE

Two witnesses were presented by the State. Horace Burks, the brother of the victim, testified that the victim always had been the "leader" in the family, looked to for "advice" and "help." He said that his son, who was "really close" to the victim,

> had undergone counseling because of the victim's death. Kim Blaylock, the oldest of the victim's three daughters, said that, when she arrived at the crime scene, her mother was at the victim's truck, holding him. She said that the killing had occurred on the birthday of the victim's middle daughter. The victim's youngest daughter had anxiety attacks as the result of her father's death. Her own daughter had trouble sleeping because of the death of her grandfather. She said that, in taking her father's life, the defendant "took my grandma and my mama. Because my grandma, it's just – it took everything out of her. My mama has lost 40 pounds."
>
> Testifying on behalf of the defendant were his cousin, Carolyn Wilson, and his mother. Wilson said that after the defendant's parents had divorced when he was a teenager, his father had begun drinking, which troubled the defendant. She said the defendant had called her "many times," saying that "he was afraid for his life." He said, "They're all . . . out to get me, all the people in Cookeville." She believed the defendant was paranoid and in need of treatment.
>
> The defendant's mother, Reba Looper, said that he had become distraught after she and his father were divorced. The defendant felt that "everybody was following him, and . . . hated him." She said that the defendant was "really nervous."

State v. Looper, 118 S.W.3d 386, 388-401 (Tenn. Crim. App. 2003).

In 2004 the petitioner filed a petition for post-conviction relief which was, as we have said, approximately 700 pages long. In its subsequent order dismissing the petition, the post-conviction court set out the background of the filing of the petition and the evidentiary hearing:

> On July 2004, the petitioner filed a voluminous *pro se* document which he titled "Petition for Post-Conviction Relief." However, because the document did not contain a factual basis for asserting a claim for post-conviction relief, the Court ordered petitioner to amend the petition. On November 22, 2004, petitioner filed another voluminous document entitled "First Amended Petition for Post-Conviction Relief." This "First Amended Petition" was ultimately amended again by filings dated December 15, 2004 and denominated as "Second Amended Complaint."
>
> Although petitioner failed, in any of these amendments, to comply with the Court's earlier order to file a clear and specific statement of his grounds for relief and their factual bases in accordance with Tenn. Code Ann. § 40-30-106(d), the Court gleaned from a reading of all the filings that petitioner had made out a colorable claim of ineffective assistance of counsel. On January 14, 2005, the State filed a response and answer along with a motion to dismiss the petition based on petitioner's failure to state a factual basis for his claims pursuant to Tenn. Code Ann. § 40-30-104(e) and 40-30-106(d).

The Court convened in Crossville, Tennessee, on multiple occasions to explain to petitioner the parameters and constraints of a Post-Conviction Relief Petition. On each occasion, the Court also advised petitioner of his right to appointed counsel to assist him in the preparation of an amended petition and in the advancement of his post-conviction claims. The Court further advised petitioner of the requisite standard of proof necessary to prevail in a Post-Conviction Relief Petition enumerated in Tenn. Code Ann. § 40-30-110(f). Despite these admonitions by the Court, petitioner repeatedly refused to hire an attorney or to allow the Court to appoint counsel for him.

On February 11, 2005, the Court conducted a scheduling/status hearing. At the hearing the petitioner was informed that he had made a colorable claim for ineffective assistance of trial and appellate counsel. However, the Court again advised petitioner that he had failed to state a factual basis for any other type of claim. Therefore, the Court ordered petitioner to file an amendment to the petition(s) setting out a factual basis for any of the additional claims (asserted in his original and amended petitions) within fifteen days of the Court's February 14 written order. Petitioner was told his failure to do so would result in dismissal of those factually unsupported claims. Because petitioner filed no response at all, those additional unsupported claims were dismissed.

At the February 11, 2005 hearing, the petitioner was also advised that the post-conviction hearing would begin approximately five (5) months later on July 7, 2005 and that he would have July 7th and July 8th to present his claims (including presentation of any desired witness). The State was advised that any respondent proof would be presented on July 14th and July 15th.

On July 7, 2005, the Court convened to conduct petitioner's post-conviction evidentiary hearing.

Additionally, in the dismissal order, the post-conviction court set out the events occurring in the period prior to the evidentiary hearing:

Within one week of the hearing, petitioner initiated a series of subpoenas duce[s] tecum to various officials requiring them to attend the proceedings to testify and to bring all records in their possession concerning petitioner. None of the subpoenas contained an identification of the specific item or record petitioner sought from the respective person. Many of these officials moved to quash their subpoena.

First, the Tennessee Bureau of Investigation filed a Motion to Quash as to its Director; however, they produced their entire file and the agents who had participated in the subject homicide investigation. Next, Frankie Holt, Chief Deputy Clerk of the Tennessee Supreme Court, Court of Criminal Appeals and Court of Appeals, Eastern Section, received a subpoena duces tecum. Even though her Motion to Quash was granted, [the] Presiding Judge of the Court of Criminal Appeals ordered the transfer

> of petitioner's direct appeal record to the court for the proceedings. A Motion to Quash was granted as to Cumberland County Sheriff, Butch Burgess, who had been subpoen[a]ed for his records and his testimony. Burgess' counsel indicated Burgess had no information concerning the issues before the post-conviction court but did present minimal records held by the sheriff's office concerning petitioner's case. Finally, Randall Boston moved to quash his subpoena. Boston . . . was a law student at the time of the trial and served as a law clerk to Mr. Larry Warner. Mr. Warner had been court appointed to represent petitioner prior to petitioner replacing him with retained counsel, Mr. McCracken Poston and Mr. Ron Cordova. Mr. Boston indicated that he was not licensed to practice law at the time of petitioner's trial and was not knowledgeable of either trial or appellate representation. Boston's Motion to Quash was granted for those reasons.
>
> After the Court addressed the Motions to Quash, the Court summarized the issues to be presented at the post-conviction proceeding. Petitioner had been represented by at least seven (7) different attorneys during the pendency of the underlying first degree murder charges. This Court dea[lt] with five (5) separate attorneys during the period of time it presided over the trial and motion for new trial states. However, the Court advised petitioner that it had reviewed the pleadings and had concluded that the claims of ineffective assistance of counsel were not directed at every attorney who had been involved in the case. Instead, the Court found that the ineffective assistance of counsel claims were directed at (1) Mr. McCracken Poston and Mr. Ron Cordova – retained counsel who represented petitioner at trial and (2) Mr. John Herbison – retained counsel who represented petitioner during the direct appeal. Petitioner agreed with the Court's summary of the colorable claims of ineffective assistance of counsel.
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> Prior to the presentation of evidence, the Court again advised the petitioner of the standards applicable to a post-conviction proceeding and the burden petitioner bore in proving the claims enumerated in the post-conviction petition(s). Further, because petitioner insisted on proceeding *pro se*, petitioner was advised that he would be held to the standard of the ordinary practitioner advancing a post-conviction claim. Petitioner indicated he would be representing himself.

At the hearing, Charlotte Burks, the victim's widow, testified that trial counsel did not interview her or any of her family members before the trial. On cross-examination, she said that she "probably" would not have spoken with trial counsel:

> [Counsel for the State]: If [trial counsel] had come to your house and asked to interview you would you have spoken to him?
>
> [The Witness]: Yes, I would. Well, I don't know. That is hard. I can't tell you whether I would or would not.
>
> [Counsel for the State]: The defense attorneys.

> [The Witness]: I probably would not have. And I'm not sure that any of my family would. That's really hard.

Kim Blaylock, the victim's daughter, testified that trial counsel did not contact her prior to trial and that she would not have spoken to them if they had done so.

John Herbison, the attorney who began representing the petitioner while his motion for a new trial was pending, testified that he was concerned with the motion for new trial because he did not believe trial counsel had adequately preserved for appellate review some of the issues raised in the motion. Without specifying which issues trial counsel did not adequately preserve, he testified that, "[a]s to some issues attempted to be raised," the motion for new trial was below the standard of care for effective assistance of counsel.

Herbison testified that trial counsel should have responded to the State's Rule 12.1 request for notice of alibi defense by stating the place where the petitioner claimed to be during the offense and listing the witnesses who would testify regarding his whereabouts. He said that if trial counsel had responded properly, "the case would have been in a very different posture." On cross-examination, Herbison acknowledged that he did not know whether trial counsel's response to the State's request for notice of alibi defense was an omission or a tactical decision.

Herbison stated that trial counsel appeared to have been prepared for trial because they extensively cross-examined witnesses, participated fully in jury *voir dire*, and had a good grasp of the factual and legal issues, with the exception of the alibi notice problem. He testified that trial counsel should have made "[a]t least an attempt to interview" the victim's widow, but stated that "[o]f course, it would have been up to her on whether to consent or not to consent to the interview."

Herbison opined that the State improperly vouched for the character of a witness and commented on the role of defense counsel during closing arguments. He stated that trial counsel did not properly preserve this issue for appellate review, which foreclosed plenary consideration of this claim and required the petitioner to satisfy the more exacting standard for plain error review.

Regarding his own representation, Herbison testified that he thoroughly familiarized himself with the trial record, performed appropriate legal research, and "presented an arguable chance for reversal."

District Attorney General William A. Gibson testified on cross-examination that he would characterize trial counsel's defense as aggressive: "They were constantly on the offensive. They were attacking everything to a much greater extent than we are normally used to in these types of cases. The cross examinations were lengthy. There was a team effort. Both attorneys were active." He said, "I saw no aspect of this trial where [trial counsel] were anything less than wholeheartedly involved and competent, and it seemed at time that their very lives were on the line in the defense of this case. They pursued strategies. It was certainly not a common homicide defense at all."

Gibson testified that he was personally familiar with trial counsel's decision not to answer the State's request for notice of alibi defense. He opined that this was part of a strategic attempt to argue that the testimony regarding the petitioner's location on the afternoon of the offense was not alibi testimony. This would allow trial counsel to introduce the testimony without giving the State time to prepare adequately for cross-examination of the witnesses. He testified that this strategy was creative and had merit, but the trial court disallowed it.

Assistant District Attorney David Patterson testified that trial counsel conducted a "very vigorous" defense, including a thorough investigation. He said, "I've not been involved with a better, more vigorous defense team than what [the petitioner] had."

The testimony of two Tennessee Bureau of Investigation agents called to testify by the petitioner at the evidentiary hearing does not appear to be relevant to his claims. Agent Robert Kroffssik testified, generally, as to his role in the investigation, beginning the day of the crime. Agent Russ Winkler testified that he, also, became involved in the investigation on the day of the crime and was present when a search warrant was executed at the petitioner's residence.

Notably, the petitioner did not testify at the evidentiary hearing or call trial counsel as witnesses.[1] At the conclusion of the petitioner's proof, the State moved for dismissal of the petition. The post-conviction court granted the State's motion and entered a written order finding that:

> [P]etitioner presented virtually no factual basis for any assertion of ineffective assistance of counsel.
>
> For example, appellate counsel . . . testified for over seven (7) hours on a limited number of claims made against him. However, much of petitioner's questioning appeared to be petitioner's desire to obtain legal advice from [appellate counsel]. Numerous questions were asked of [appellate counsel] as to various lines of cases dealing with preservation of Federal rights, how to proceed on a Federal habeas corpus and how best petitioner should proceed on other post-conviction claims relating to trial counsel. Petitioner then submitted various hypothetical claims which could have been pursued. On almost every hypothetical occasion, [appellate counsel] responded that the particular issue was not within the realm of this record and that no facts were present here to validly or credibly pursue any such claims.
>
> None of [appellate counsel's] testimony supported petitioner's claim that [appellate counsel] had been ineffective in any way. In fact, [appellate counsel's] knowledge of the record and the law (State and Federal) was impressive in its applicability or inapplicability to the instant case. The Court cannot conclude that any of [appellate counsel's] actions fell below the standard [for effective assistance of counsel].

[1] The transcript of the evidentiary hearing reflects that the petitioner did not subpoena either attorney who assisted him at trial.

Perhaps the only testimony relating to any ineffective assistance claim that can be gleaned from [appellate counsel's] testimony was his opinion testimony about trial counsel's performance. When questioned extensively about [trial counsel], [appellate counsel] said they did an amazingly good job overall in the representation of petitioner. He said the cross-examinations of state witnesses were effective and well planned. He could find no issue with their preparation of the case.

[Appellate counsel] did testify that he fel[t] [trial counsel's] representation of petitioner fell below the applicable standard in two respects: (1) their failure to discover and properly respond to the State's [Tenn. R. Crim. P.] 12.1(a) Notice of Alibi; and (2) their failure to adequately preserve the issues in the motion for new trial.

First, as to the alibi notice response, [appellate counsel] admitted that this could have been a tactical decision on the part of trial counsel based on the quality of the witnesses petitioner intended to call in support of the alibi and the surprise associated with presenting alibi as a circumstantial evidentiary issue. In other words, counsel could have strategically failed to put the state on notice of these "alibi" witnesses and called them without the state having the opportunity to prepare for effective cross-examination of three witnesses characterized by the State as questionable. Further, the testimony of these witnesses did not place the [petitioner] at a particular place at a particular time but instead supported the circumstantial impossibility that if petitioner was in another state at a given time he would not (circumstantially) have been at the scene of the crime.

Nonetheless, [appellate counsel] pursued this entire issue (in two different contexts) in the direct appeal. The Court of Criminal Appeals concluded that such a tactic violated the spirit and intent of Rule 12.1. [citation omitted] Because the Court did not hear from trial counsel, petitioner has failed to present any additional evidence on the reasoning behind counsel's decisions.

Next, [appellate counsel] stated that trial counsel should have more effectively preserved the issues in the motion for new trial for the direct appeal. He said the [sic] what was described as "bullet point" issues did not adequately meet the requirements to preserve those issues.

The record contains the motion for new trial filed by trial counsel which contained numerous issues, some of them "bullet points" with little or no explanation and others with a factual basis or reasoning to support them. This motion was initially filed apparently in an attempt to preserve the time frame for filing such motions. At the new trial hearing, trial counsel proceeded on those issues it sought to preserve.

On cross-examination, [appellate counsel] conceded that he did not know which issues were actually new trial issues or which bullet points had been added in

> a catchall fashion to protect the motion for new trial filing deadline. [Appellate counsel] also acknowledged that at the time of the motion for new trial, he had not reviewed the record. He added that trial counsel would be the one to ask about which issues they chose to bring and why. [Appellate counsel] concluded that had he pursued the motion for new trial he would have included additional issues. Nothing in this testimony gives the Court a basis to find that trial counsel was ineffective in this regard. [Appellate counsel] was actually just giving opinion testimony about trial counsel's performance without having heard their testimony on each claim.
>
> Finally, [appellate counsel] testified that trial counsel should have objected to certain portions of the State's closing argument which disparaged counsel. However, [appellate counsel] again agreed on cross-examination that the timing and frequency of objections can be a tactical decision.
>
> None of the other testimony remotely related to the issues remaining in this post-conviction proceeding. The Court notes the loosely related testimony of Ms. Burks and Ms. Blaylock as to whether counsel interviewed them and the scant testimony of the TBI officials and their respective investigations. Finally, the Court recalls the testimony of the DA's office relating to counsel's contact with them.
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> Petitioner was repeatedly admonished by the Court to present facts relating to his claims of ineffective trial and appellate counsel. On more than one occasion, the Court advised petitioner that his obstructionist and delay tactics (without eliciting testimony relating to the petition) could result in dismissal of the petition. Ultimately, petitioner closed his proof without taking the stand to testify in support of his claims and without calling trial counsel . . . . His failure to subpoena the necessary witnesses for the post-conviction hearing set some five (5) months in advance of the last status conference was at his peril.
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> Viewing the record as a whole, including the petitions for relief and the testimony at the hearing, the Court finds that the evidence presented fell woefully short of proving by clear and convincing evidence the ineffective assistance of trial or appellate counsel.

ANALYSIS

I. Post-Conviction Standard of Review

Post-conviction relief "shall be granted 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." Tenn. Code Ann. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f) (2006). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See Wiley v. State, 183 S.W.3d 317, 325 (Tenn. 2006). When reviewing factual issues, the appellate

court will not reweigh the evidence and will instead defer to the trial court's findings as to the credibility of witnesses or the weight of their testimony. Id. However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998).

Initially, we note that the basic problem with the petitioner's claims is that, even though it was his burden to do so, he presented virtually no relevant proof at the evidentiary hearing. Rather, he has relied on detailed and lengthy pre-hearing pleadings and appellate briefs, which cannot substitute for proof.

On appeal, as we have set out, the petitioner presents eight issues, some with numerous subparts. Issue I claims that the judge who presided both at the trial and the post-conviction hearing was prejudiced against him. Since no proof was presented as to this claim, it fails. Issue II, claiming that trial and appellate counsel were ineffective and as to which proof arguably was presented at the hearing, will be discussed at length. As Issue III, the petitioner claims that the proof was insufficient to sustain his conviction. However, this court already has concluded that the proof was sufficient, and this claim cannot be relitigated. Miller v. State, 54 S.W.3d 743, 747-48 (Tenn. 2001). As Issue IV, the petitioner claims that the post-conviction court denied him the right to counsel. He presented no proof as to this claim. As Issue V, he claims innumerable trial errors. He presented no proof as to these claims. As Issue VII, he claims that the trial court erred in certain of its instructions to the jury. He neither presented any proof as to this claim nor explained why it was not raised in his direct appeal. As Issue VIII, he raises a number of claims as to how he has, in his view, been treated unconstitutionally. However, he presented no proof as to any of these claims. Accordingly, since the petitioner presented no proof as to Issues I, III, IV, V, VII, and VIII at the evidentiary hearing, each claim must fail.

We now will review Issue II, that trial and appellate counsel were ineffective, and Issue VI, that the State made prejudicial statements during the closing arguments.

II. Ineffective Assistance of Counsel

The claims pursued by the petitioner at the evidentiary hearing and set out as Issue II on appeal were that he received the ineffective assistance of counsel at trial and on appeal and that the State made prejudicial statements during the closing arguments.

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. See U.S. Const. Amend. VI; Tenn. Const. Art. I, § 9. In order to determine the competence of counsel, Tennessee courts have applied standards developed in federal case law. See State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The United States Supreme Court articulated the standard in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), which is widely accepted as the appropriate standard for all claims of a convicted petitioner that counsel's assistance was defective. The standard is firmly grounded in the belief that counsel plays a role that is "critical to the ability of the

adversarial system to produce just results." Id. at 685, 104 S. Ct. at 2063. The Strickland standard is a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S. Ct. at 2064. The Strickland Court further explained the meaning of "deficient performance" in the first prong of the test in the following way:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Id. at 688-89, 104 S. Ct. at 2065. The petitioner must establish "that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (citing Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996)).

As for the prejudice prong of the test, the Strickland Court stated: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068; see also Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994) (concluding that petitioner failed to establish that "there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different").

The issues of deficient performance of counsel and possible prejudice to the defense are mixed questions of law and fact and, thus, subject to *de novo* review by the appellate court. See Wiley, 183 S.W.3d at 325; State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). The reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, see Strickland, 466 U.S. at 690, 104 S. Ct. at 2066, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. See Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). The fact that a strategy or tactic failed or hurt the defense does not alone support the claim of ineffective assistance of counsel. See Thompson v. State, 958 S.W.2d 156, 165 (Tenn. Crim. App. 1997). Finally, a person charged with a criminal offense is not entitled to perfect representation. See Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). As explained in Burns, 6 S.W.3d at 462, "[c]onduct that is unreasonable under the facts of one case may be perfectly reasonable under the facts of another."

The petitioner presented testimony suggesting that trial counsel were ineffective for (1) not interviewing the victim's family members, (2) responding inadequately to the State's request for notice of alibi defense, (3) not properly preserving for appellate review certain issues raised in the motion for new trial, and (4) not objecting to improper remarks by the State during its closing argument. However, as we will explain, he has not carried his burden of proving that trial counsel were constitutionally ineffective in any of these areas.

A. Failure to Interview Witnesses

The petitioner's first claim was that trial counsel was ineffective for not interviewing the victim's family members. A petitioner who alleges that trial counsel was deficient for failing to interview a witness must present the favorable testimony of that witness at the post-conviction evidentiary hearing in order to establish prejudice. See Black v. State, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). Although the petitioner elicited testimony from the victim's widow and daughter that trial counsel did not contact them, he did not show that either witness would have provided information helpful or even material to his defense. In fact, the victim's widow testified that she was unsure whether she would have spoken to trial counsel, and the victim's daughter unequivocally stated that she would not have done so. Accordingly, the record supports the determination of the post-conviction court that this claim is without merit.

B. Failure to Timely Respond to Request for Notice of Alibi

The petitioner alleges that trial counsel were ineffective because they did not respond adequately to the State's request for notice of alibi defense. We note that the inadequate response was filed by a previous counsel of the petitioner, and not by those who represented him at the trial, as we will explain. See Looper, 118 S.W.3d at 402-03.

In the direct appeal of this matter, we noted that the alibi demand was received by one of the first of the several lawyers who had represented the petitioner and that several other lawyers came and went before his trial counsel were retained, and we set out the history of the State's requested information as to the petitioner's alibi:

> To conclude our consideration of this issue, we will trace the manner in which evidence of alibi was sought by the prosecution and later presented at trial. The State filed its alibi demand on February 17, 1999; and on March 8, 1999, the defendant asked that he have until June 23, 1999, to respond, because "[s]ince the Defendant has been incarcerated, it makes it difficult to fully comply with the notice as to exact times and witnesses who are available." The State opposed this request and alleged that the defense was attempting to obtain "false testimony." On March 19, 1999, denying this allegation, the defendant again asked for an extension to time to file his alibi response, explaining that the defendant was having a difficult time investigating his alibi because he had "very limited resources," because he was incarcerated, and explaining that "[t]he only time a person would remember exactly where they were is if they were committing a crime. When someone is at a place different than where a crime was committed, it takes some time to investigate witnesses who can recall

having knowledge of the Defendant's presence at some place other than the scene of the crime." The attorney who filed this response was replaced by two other attorneys who, themselves, were replaced by counsel who represented the defendant at the trial. This changing of counsel was recounted by the trial court in the order denying the motion for new trial:

> Mr. Looper has been represented by five different attorneys during this Court's effort to get this case tried. These five attorneys are in addition to different attorneys that represented him in the General Sessions Court. Every time the case appeared to be nearing a trial, Mr. Looper would become dissatisfied with his attorneys and would seek to replace them. In one instance the attorney found it necessary to withdraw from representation of Mr. Looper because of ethical reasons. After that withdrawal this Court appointed experienced trial attorneys to try the case. Those attorneys worked diligently in the preparation of the case and identified numerous experts and made a thorough investigation. As the trial date neared, Mr. Looper refused to cooperate with those attorneys and ultimately hired his current attorneys insisting that Mr. Poston and Mr. Cordova were attorneys with which he could cooperate. The Court allowed the dismissal of the appointed attorneys and permitted their replacement by the current retained attorneys three months prior to the trial of this case in August of 2000, at Mr. Looper's insistence.

Id. at 434-35.

We concluded in the direct appeal of this conviction that, as a trial tactic, trial counsel had waited until the trial to "spring" the alibi witnesses on the State: "We conclude that the manner in which the defense sprung the alibi witnesses evinces an effort to gain a tactical advantage, the circumstances and timing effectively inoculating them from a complete or thorough cross-examination." Id. at 436. There is no basis for us to reconsider our previous determination that, as a trial tactic, trial counsel decided they would not give prior notice of the alibi witnesses but would, instead, spring them on the State during the trial, claiming they were not alibi witnesses and, thus, not subject to the disclosure requirements. Id. at 421-22.

C. Failure to Preserve Appellate Issues/Attack Improper Argument

Because the petitioner's latter two issues are closely related, we will address them concurrently. The petitioner argues that trial counsel were ineffective in failing to properly preserve for appellate review certain issues raised in the motion for new trial. However, with the exception of the claim regarding improper argument by the State, he has not specified which issues that, in his view, trial counsel failed to preserve. Therefore, we are able to analyze only the assertion that counsel should have preserved and raised on appeal the claim of improper argument.

If a claim of ineffective assistance of counsel is based on the failure to raise a particular issue, the reviewing court must determine the merits of the issue. Carpenter v. State, 126 S.W.3d 879, 887 (Tenn. 2004). If an issue has no merit or is weak, counsel's performance will not be deficient for failure to raise it, and the petitioner will have suffered no prejudice. Id. Appellate counsel are not constitutionally required to raise every conceivable issue on appeal, and the determination of which issues to raise is generally within appellate counsel's sound discretion. Id. "[A reviewing court] should not second-guess such decisions, and every effort must be made to eliminate the distorting effects of hindsight. Deference to counsel's tactical choices, however, applies only if such choices are within the range of competence required of attorneys in criminal cases." Id. (citations omitted).

In this case, then, we must determine whether the allegedly improper remarks by the prosecutors were so prejudicial that they constitute reversible error. In State v. Thornton, 10 S.W.3d 229, 234-35 (Tenn. Crim. App. 1999), this court discussed the limits upon a prosecutor's final argument:

> In general, closing argument is subject to the trial court's discretion. Counsel for both the prosecution and the defense should be permitted wide latitude in arguing their cases to the jury. State v. Bigbee, 885 S.W.2d 797, 809 (Tenn. 1994). Arguments must be temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or law. State v. Middlebrooks, 995 S.W.2d 550 (Tenn. 1999).

In assessing whether alleged misconduct constitutes reversible error, the court must determine whether the conduct had a prejudicial effect upon the verdict, considering the following factors:

> "(1) the conduct complained of viewed in context and in light of the facts and circumstances of the case;
>
> (2) the curative measures undertaken by the Court and the prosecution;
>
> (3) the intent of the prosecutor in making the improper statement;
>
> (4) the cumulative effect of the improper conduct and any other errors in the record; and
>
> (5) the relative strength or weakness of the case."

State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984) (quoting Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976).

At the evidentiary hearing, the petitioner questioned appellate counsel about the State's closing arguments:

[The Petitioner]: I am going to quote the trial transcript in the D.A.'s closing. I believe this was Patterson. Looper trial transcript, Volume 8, Page 2431. "The question you must ask yourself at some point is why would the defense attorneys risk showing you that Byron Looper may be a sexual molester? That he may have attempted to rape a sixteen year old girl? The answer to that is desperate times call for desperate measures. Ladies and gentlemen, the strength of Joe Bond's testimony has caused Mr. Looper's defense team to paint their client as a molester so that he might not be convicted as a murderer." There was no objection, and the trial judge did not intervene.

[Appellate Counsel]: Your question?

[The Petitioner]: The question is, you don't believe there was a constitutional error there?

[Appellate Counsel]: I believe that was objectionable. It should have been objected to. I don't think it is a constitutional error, and I don't think it constitutes plain error for purposes of what I was doing.

[The Petitioner]: Did you see that as a denigration of Looper's counsel?

[Appellate Counsel]: Yes, sir.

. . . .

[The Petitioner]: I understand, sir. Also in regard to the fact that Mr. Patterson was arguing as fact or as truth that Mr. Looper was a child molester, and we're talking about Looper trial transcript Volume 8, page 2430, Mr. Patterson stated, "The attorneys," excuse me, "the lawyers have told you that Joe Bond's powerful and compelling and unwavering testimony is false. The reason they give you is that Mr. Bond knew their client, Byron Looper, was molesting Bond's minor girlfriend, and so Bond manufactured a story to seek revenge. There is two big problems with this attempt to discredit Mr. Bond's testimony." And then he goes on, a couple of lines down, "The second problem . . . is . . . if he, Bond, were upset over Mr. Looper molesting his young girlfriend," and then he goes on to argue what Mr. Bond may have done. In that particular scenario, [appellate counsel], did you see that to be error?

[Appellate Counsel]: There was some objectionable aspects of that argument. There was improper vouching for Mr. Bond's credibility. There was arguably improper comment about the role of defense counsel. But, again, the issue was not properly preserved for me to raise it as an appellate advocate.

[The Petitioner]: Basically it would be denigrating Mr. Looper's attorneys as well?

[Appellate Counsel]: To some extent, yes.

. . . .

[The Petitioner]: How about this example, [appellate counsel]. Looper trial transcript, Volume 8, Pages 2423, 2425, all of which is relevant herein. Specifically at 2425, he said, "The defendant's attorneys would argue to you that they did not believe the composite drawing is a good likeness of their client. If they really believed that, that the composite picture does not look like Looper, why did they take so much time to show that the weather was foggy? Why did they ask Wesley [Rex] questions to try to shorten the amount of time that Wesley had to study the face? The defendant's attorney knows that there is a remarkable likeness and that Wesley had seen and testified well." [Appellate counsel], do you not think that this would meet the standard of what is described at striking at the heart of defendant's defense of guilt and what constitutes a pro se [sic] reversible error?

[Appellate Counsel]: The references to counsel were objectionable. It should have been objected to. It should have been preserved in the motion for new trial. In the context of the entire proceeding I don't think it arose to plain error. It is highly improper for prosecutors to suggest that defense counsel do not believe their client, or don't believe in their client's innocence. That is not a matter where a jury should be considering counsel's opinion either for the state or for the defendant.

. . . .

[The Petitioner]: Let me quote four more lines in this. [Trial counsel], in this instance, and I'm sorry, I just saw this, it says, "Forgive me, Mr. Patterson, that is improper argument to argue to the jury what counsel knows and is attempting to mislead. I would object." Looper trial transcript, Volume 8, Page 2425. The Court: "Well, I overrule." I didn't mean to mislead you, but obviously that was an example that was. . . .

[Appellate Counsel]: (Interposing) O.K. There was some objection there. It was not preserved with specificity in the motion for new trial. So that omission still would have triggered plain error analysis.

After reviewing the transcript of the State's lengthy closing arguments, we conclude, as did the post-conviction court, that trial counsel were not ineffective in not objecting to the few comments which the petitioner claims were improper.

Although the petitioner introduced appellate counsel's testimony that trial counsel should have objected to the comments attacking Bond's credibility and implying that trial counsel was

attempting to mislead the jury, he did not ask trial counsel *why* they did not object to these remarks.[2] Therefore, he has not proven that trial counsel's performance fell below the standard of a reasonably competent attorney. In fact, the record belies such an assertion. Trial counsel objected seven times during the closing argument, including, as the petitioner noted, after the prosecutor suggested that trial counsel was misleading the jury regarding the similarity between the composite drawing and the petitioner. The petitioner has not established that he was prejudiced by these remarks. The proof of his guilt was ample. The post-conviction court determined that the petitioner failed to prove by clear and convincing evidence that his trial counsel rendered ineffective assistance. The record supports this determination.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the post-conviction court's denial of the petition.

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ALAN E. GLENN, JUDGE

[2] As we have noted, the petitioner did not subpoena trial counsel.