

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 19, 2026 Session

FILED

08/25/2026

Clerk of the
Appellate Courts

RAYMOND D. ARWOOD v. STATE OF TENNESSEE

Appeal from the Circuit Court for Hamblen County
No. 2024-CR-665 Alex Pearson, Judge

No. E2025-00943-CCA-R3-PC

A Hamblen County jury convicted the Petitioner, Raymond D. Arwood, of sexual exploitation that involved more than fifty images of child pornography, and the trial court sentenced the Petitioner, a past sex offender, as a Range II offender to ten years of incarceration. The Petitioner filed a timely petition for post-conviction relief in which he alleged that he was denied representation by his choice of counsel, that his trial and appellate counsel were ineffective, that the evidence is insufficient to sustain his conviction, and cumulative error. After a hearing, the post-conviction court denied the petition. We conclude that no error exists in the post-conviction court's judgment, so we affirm.

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

ROBERT W. WEDEMEYER, P.J., delivered the opinion of the Court, in which JILL BARTEE AYERS and MATTHEW J. WILSON, JJ., joined.

Benjamin A. Hodges, Morristown, Tennessee, for the appellant, Raymond D. Arwood.

Jonathan Skrmetti, Attorney General and Reporter; Caroline Weldon, Assistant Attorney General; Dan E. Armstrong, District Attorney General; Kimberly Morrison and Connie Trobaugh, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Facts

A. Trial Facts

This case arises from the Petitioner's possession of child pornography. In our decision on his direct appeal from his conviction, we recognized that the record did not contain the trial transcripts, but we summarized the facts gleaned from the pretrial hearings

and presentence report as follows:

On December 4, 2018, Detective Joshua Akard of the Morristown Police Department (“MPD”), who had been working with the Internet Crimes Against Children Task Force, used investigative software that uses BitTorrent, a peer-to-peer file-sharing website, to directly connect to a device with an IP address in Morristown. He made “single source downloads” from the IP address and reviewed a “downloaded incomplete file and confirmed that it [was] child pornography and [he] conducted a query on the IP address which came back to Charter.” Detective Akard obtained a subpoena for information concerning the IP address and served it on Charter Communications. He learned that the address was connected to an active account in [the Petitioner’s] wife’s name, and it listed their home address.

Detective Akard made additional “single source downloads” of child pornography from the IP address on June 24 and 25, 2019, and on July 4, 5, 7, and 23, 2019. There were a total of 111 files downloaded from the IP address. Detective Akard submitted a criminal history request for background information concerning [the Petitioner] and his wife, and he learned that [the Petitioner] was a registered sex offender. [The Petitioner] had applied for termination from the sex offender program in 2015, and his request was granted by the Tennessee Bureau of Investigation.

A search warrant was executed at [the Petitioner’s] residence on August 2, 2019. Several items, including seven laptops, three external hard drives, and a desktop computer were taken into evidence. [The Petitioner] and his wife were both interviewed at the scene, and [the Petitioner] indicated that he was familiar with the BitTorrent file sharing network and that he used it to download movies and music. The electronic devices recovered from the residence were taken to the MPD for forensic examination. The pre-examination revealed that child pornography was stored on a Toshiba laptop. A “forensic image” was made of the hard drive, and seventy-five images of child pornography were discovered along with photos of [the Petitioner’s] business cards. [The Petitioner] was interviewed at the police department on October 10, 2019. He said that he was unsure how images of child pornography came to be on his laptop, but he had seen what he believed to be child pornography on his laptop in the past.

Pretrial Hearing

[The Petitioner] filed a “Motion to Suppress Pictures Which Do Not Show Sexual Activity or Simulated Sexual Activity,” arguing that the majority of the pictures in this case did not show “sexual activity or simulated

sexual activity and should not be shown to the jury.” He further requested that the trial court review the photographs “as the gatekeeper of the evidence in the criminal trial.”

At the hearing, the trial court noted that it had reviewed [the Petitioner’s] motion and the “70-some photographs,” and it divided the photographs into three categories. The first category depicted young girls, some of whom were bound, gagged, and lying on a bed, being penetrated orally, vaginally, and anally. The trial court said that there was “no dispute” that the ten to fifteen photographs “obviously” involved sexual activity. [The Petitioner] agreed that ten or eleven of the photographs showed sexual activity or simulated sexual activity. The second category consisted of photographs of nude young girls near a body of water, hot tub, or swimming pool. Several of those images showed the young girls walking “through the water or just outside the water.” The photographs focused almost entirely on the child’s exposed vagina, buttocks, and breasts. The child’s face and head were cut off in many of the photographs, but in the remaining images, the child is posed in a suggestive manner and staring directly at the camera.

The trial court found that the third category of photographs consisted of “images of similar-aged young girls in various attire such as either swimsuits or lingerie, for a lack of a better term, and those appear to be taken on a photo set[.]” There were also various “props” lying around the set. As pointed out by the State, these images depict children posed in a sexual manner with their legs spread and staring straight at the camera. In some of the photographs, the child is on a bed. The focal point of the images appear[s] to be the child’s vagina or buttocks, and they are clothed in lingerie or very short skirts. None of them are wearing pants.

State v. Arwood, No. E2022-01292-CCA-R3-CD, 2023 WL 6060573, at *1-2 (Tenn. Crim. App. Sept. 18, 2023), *perm. app. denied* (Tenn. Feb. 12, 2024). The trial court granted the Petitioner’s motion as to five of the photographs because they did not meet the statutory definition of sexual activity or simulated sexual activity, and excluded them from trial. *Id.* at *2. It determined the remaining images were admissible. *Id.* The Petitioner has supplied the trial transcript on appeal, and it comports with our previous summary of the facts. It further reflects that the trial court sentenced him as a Range II offender to ten years of incarceration.

The Petitioner appealed his conviction to this court contending that the trial court abused its discretion by denying his motion to suppress certain photographs and that the evidence was insufficient to support his conviction. As to the photographs, we concluded that:

[T]he trial court properly denied [the Petitioner's] motion to exclude the remaining photographs because the motion requested the court to make a pretrial determination as to the sufficiency of the State's evidence to support a conviction which would be "akin to summary judgment for adjudicating questions of fact involving the general issue of guilt or innocence." [*State v. Goodman*, 90 S.W.3d 557, 561 (Tenn. Crim. App. 2002)]. This procedure does not exist in criminal cases. *Id.* The question of whether the photographs depict minors involved sexual activity or simulated sexual activity was for the jury to decide. Defendant is not entitled to relief on this issue.

Id. at *4. As to the sufficiency of the evidence, we held that the Petitioner's failure to include the trial transcript in the record waived the issue. *Id.* at *5.

B. Post-Conviction Facts¹

On December 20, 2024, the Petitioner filed a petition for post-conviction relief, which appointed counsel amended and filed on March 13, 2025. The Petitioner testified that there was "structural error" in his first trial because he was not given his counsel of choice. He explained that on January 16, 2020, he contacted his trial counsel ("Counsel") and asked for a recommendation of a good bondsman. The Petitioner said that the following day, Counsel contacted him via Facebook message to say Counsel had some paperwork from the State for the Petitioner and that the two needed to meet. The Petitioner said that they met the next morning at a restaurant, and Counsel had a copy of the indictment and the search warrant. Counsel told the Petitioner that the Petitioner would have to appear in court on March 6, 2020. The Petitioner said the two never discussed fees, and that he had not hired Counsel at that time to represent him.

Two weeks later, Counsel sent the Petitioner another message saying that he had more information and asked to meet in a parking lot. Counsel gave him a list of the downloads that Officer Akard alleged he tracked to the Petitioner's IP address. Counsel said he would arrange to view the images. The Petitioner gave Counsel a case, *State v. Whited*, which he claimed clarified that simple nudity was not enough to meet the standard required for exploitation. 506 S.W.3d 416, 431 (Tenn. 2016). He informed Counsel that the only images the officer had shown him were of a girl in a bikini and did not depict nudity or sexual activity. Counsel agreed that *Whited* was important to the Petitioner's case. During this meeting, Counsel informed the Petitioner that his fee would be \$5,000. The Petitioner agreed to this fee and paid Counsel a deposit with cash from his wallet.

The Petitioner said that he did not meet with Counsel again before the March 6,

¹ The Petitioner's testimony references issues he has not maintained on appeal, so we will summarize only the facts presented relevant to the issues before us. He also cites a voluminous amount of case law, summarizing holdings from cases. We will address all relevant case law in our analysis of his issues on appeal.

2020 court date. At the hearing, when the trial judge called the Petitioner's name, he was not arraigned but rather informed that his case was being transferred to another trial judge, and that the case was rescheduled for June 1, 2020.

On May 21, 2020, Counsel contacted the Petitioner and told him that his case was rescheduled to October 1, 2020. The Petitioner informed Counsel he had more money for him and had some questions. The two met in a fitness center lobby. There, the Petitioner asked Counsel where the State alleged that image files were located on his computer. Counsel said he did not know but would ask. The two discussed getting an expert witness to testify, and Counsel informed him that the expert would cost another \$5,000. The Petitioner said he wanted the expert at that price. The Petitioner gave Counsel \$1,500 toward his Counsel's fee. In July 2020, Counsel still had not hired an expert but explained to Petitioner that the courts were backlogged because of COVID restrictions so there was no hurry.

Because of COVID, the Petitioner's case was delayed until February 1, 2021. In January 2021, the Petitioner and Counsel met about the images. Counsel opined that there were only ten images that depicted sexual activity and said he was going to file a motion to have the rest "throw[n] out." The two again discussed the importance of finding out from the State where the images were allegedly found on the computer. In February, the case was reset for June 2021.

During the course of Counsel's representation, Counsel asked the Petitioner on multiple occasions to perform electrical work for him. In July 2021, Counsel again told Petitioner there was no hurry to get an expert because there was still a backlog of cases due to COVID. In October 2021, Counsel informed him that he was filing a motion to have a majority of the images suppressed and a motion for a Bill of Particulars to learn where the images were found on the computer. The Petitioner sent an email regarding the importance of routers to a case like his, and Counsel had trouble opening his own email. Counsel also said he did not know what a router or a modem were, which caused the Petitioner concern because this was a computer case.

Also in October, on his hearing date, the Petitioner informed Counsel that he had found and paid an employee from Liam's Computer Repair to educate Counsel about computer issues relevant to his case. The Petitioner provided Counsel with the educator's contact information, but Counsel did not follow up with the educator.

In November 2021, the trial court held a hearing on the admissibility of the majority of the images. The Petitioner and Counsel rode to the hearing together, and on the drive the two discussed the importance of asking Officer Akard where the files were saved on the computer, if the files were previously deleted, whether the files were hidden, and how the officer determined the IP address.

The Petitioner was allowed to attend this hearing, and he noted that Counsel “seemed to fumble about like he was lost.” When he cross-examined the officer, he never asked the “vital” questions the two had discussed an hour earlier. The Petitioner asked Counsel why he did not ask the officer the questions, and he said, “Oh, yeah, I forgot to ask that.”

Counsel told the Petitioner not to worry because he was going to submit an interlocutory appeal and another “continuance” for time to raise funds for a computer expert. It was at this point that the Petitioner learned that Counsel had previously sought a continuance to raise funds for an expert. The Petitioner was previously unaware that Counsel had made this request since he could not attend most of the hearings because of COVID protocols. The Petitioner reminded Counsel that he had funds set aside for the expert since the two first discussed hiring one.

At this time, the Petitioner decided that Counsel was neither prepared nor competent to handle his case. The Petitioner met with Counsel to inform him that he was terminated. Counsel said he would inform the judge. The Petitioner found another attorney, Mr. Cave, who was familiar with computer-based crimes like the one for which he was charged. He contacted Mr. Cave, who agreed to take his case. The Petitioner said Mr. Cave told him that, to be prepared to go to trial on November 23, 2021, he would need to work all weekend and Monday, so the fee on such short notice would be \$10,000. The Petitioner agreed to this fee and told Mr. Cave he was prepared to pay him right then to take over the case. According to the Petitioner, Mr. Cave said he had to make a call first and ensure he was allowed to take the case. Mr. Cave then called the Petitioner back and said that the trial judge was not going to allow Counsel to be replaced. The Petitioner said that, when he spoke with Counsel later that afternoon, Counsel said that the judge decided that the Petitioner had to go to trial on November 23, 2021, with Counsel as his attorney or the trial court was going to put him in jail. The Petitioner “felt like [he] didn’t have a choice.”

The Petitioner met with Counsel the Saturday before trial. Counsel said he had a headache and asked the Petitioner to write out questions for him to ask at trial and to come back Saturday evening with those questions. At the Saturday evening meeting, Counsel said they did not have an expert and asked the Petitioner’s wife to create a demonstration about hidden files.

The Petitioner and his wife met with Counsel on Sunday evening. They reviewed the Petitioner’s wife’s demonstration and the remaining questions that the Petitioner had written for Counsel.

The Petitioner returned home that evening and reviewed the paperwork provided by the State. He noted that the serial numbers of the laptop upon which the State alleged it found the images did not match in the paperwork. He and his wife were shocked that Counsel had missed this “glaring discrepancy.” They again contacted Mr. Cave, updated

him about the situation, and asked him to at least be co-counsel on the case. Mr. Cave agreed and said he would call the judge. After speaking with the judge, Mr. Cave called the Petitioner and said that the judge was “mad enough to yell at him” and that the judge said that Mr. Cave could not be co-counsel as no co-counsel was necessary.

The Petitioner said that the trial court never asked the Petitioner his reasons for wanting to terminate Counsel and have him replaced by Mr. Cave. Further, because COVID protocols barred the Petitioner from attending the pretrial hearings, he did not see Counsel’s effectiveness in representing him until the November 2021 hearing. The Petitioner asserted that he was denied his right to representation.

The post-conviction court interjected to add that it had been a party to the conversations with Mr. Cave, and said Mr. Cave asked if the court would continue the case so Mr. Cave could represent him. The court said that it would but because of the numerous delays, he would not allow the Petitioner to remain on bond. If, however, Mr. Cave could be ready by the trial date, the trial court would allow Mr. Cave to represent the Petitioner. Alternatively, the trial court would grant a continuance, but the Petitioner would need to be incarcerated pending trial and could not remain on bond.

The post-conviction court said that there was a second conversation about Mr. Cave serving as “elbow counsel,” and the court agreed that this was fine. The court said that there was no yelling or hostility. The court said it was unconcerned if any defendant hired multiple attorneys, and he relayed as much to Mr. Cave. The court acknowledged that it was unsure what Mr. Cave told the Petitioner, but it firmly stated that any suggestion that he would be upset if Mr. Cave represented the Petitioner was “blatantly false.”

The post-conviction court continued that it told Counsel the same thing: that Mr. Cave could represent the Petitioner if he could be ready for trial or the Petitioner could have a continuance, but he would await trial in jail. Further, it told Counsel that Mr. Cave could serve as co-counsel.

The Petitioner informed the post-conviction court that it should have asked the Petitioner why he wanted his counsel replaced. The court informed the Petitioner that he did not appoint Counsel to the Petitioner’s case, and the Petitioner could have fired Counsel at any time. The only stipulation that the court required was that, if the case was continued, the Petitioner could not remain on bond because there had already been so many continuances and delays in his case.

The Petitioner contended that the evidence was insufficient to sustain his conviction. He noted that the state seized multiple computers and external drives but only found child pornography on one laptop. He asserted there was no testimony that the images were in allocated space accessible to him or if they were in unallocated space only accessible with special forensic software. The State, he asserted did not adequately show he knowingly

possessed the images. He further contended that the State was required to prove that the images were downloaded and accessible to him during the dates on the indictment, and the State did not prove this.

The Petitioner contended that his appellate counsel (“Appellate Counsel”) was ineffective on appeal. He asserted that she failed to include the trial transcript on appeal and failed to make a statement of the evidence. The Petitioner said that, because of Appellate Counsel’s errors, he was not granted a new trial, and he wanted the post-conviction court to grant him a new trial.

The Petitioner said he filed a complaint against Appellate Counsel with the Board of Professional Responsibility, which found that Appellate Counsel violated the Rules of Professional Conduct and imposed disciplinary action against her.

The Petitioner said that Counsel was ineffective during the trial. He asserted he failed to object numerous times to the State’s witnesses referring to the computer as “his computer,” when there was no proof that it was his. He further contended that Counsel required him to write the questions that Counsel should ask and required the Petitioner’s wife to create a demonstration on hidden files.

During cross-examination, the Petitioner agreed that he had known Counsel for years before hiring him. He said he did not know that Counsel was asking for continuances in his case as he was not allowed in the courtroom because of COVID protocols. Also, he did not know Counsel was incompetent to handle his case until the eve of trial.

The Petitioner acknowledged that Counsel presented theories of defense, which included that the computer was bought used, so the images could have been on it already when it was purchased. The defense also posited that hackers could have planted the images on the computer.

The Petitioner identified a letter that he wrote to Counsel terminating him. He said he attempted to terminate him before trial, but Counsel told him that he had to go to trial with Counsel representing him or go to jail.

During redirect examination, the Petitioner clarified that he wrote the termination letter because he did not want Counsel representing him on his motion for new trial.

Counsel testified that the Petitioner originally contacted him and retained him. The two communicated well until ten days before the trial, and they never had any dispute about the fee. The two discussed hiring an expert, but Counsel said that the Petitioner did not have the money to pay for an expert. He further did not think that an expert would help eliminate the photographs from being admitted.

Counsel said that he believed delaying the trial was generally good for the defense, and he requested several continuances, none of which the Petitioner objected to.

Counsel said, during the trial, the Petitioner handed him notes with questions to ask. Counsel had some concerns about the questions, but he did ask most of them.

During cross-examination, Counsel did not recall how much the Petitioner paid him to represent him. He did, however, recall that the Petitioner paid him partially in cash and also in services, by doing electrical work for both Counsel and his secretary. Counsel did not recall whether he and the Petitioner discussed a Bill of Particulars. He did not recall discussing with the Petitioner the necessity of asking the officer where on the laptop the images were found.

Counsel did not recall the details of many of the allegations made by the Petitioner. He could neither confirm nor deny those allegations. Counsel believed that he spoke with a computer expert, but he could not provide the expert's name. He said he could locate that information and agreed to submit the expert's name after the hearing. Counsel maintained, however, that he did not hire a computer expert because he did not think that the Petitioner had the funds and, strategically, did not think that the expert would be helpful.

Counsel read from a transcript of a telephone conference between the judge, the State's attorney, and Counsel wherein he expressed the Petitioner's desire to have Counsel withdraw and proceed with a different attorney. The court stated that it felt that this was a delay tactic by the Petitioner, so he would not allow Counsel to withdraw unless there was a *capias* issued for the Petitioner's arrest.

Counsel said that he was ready for the trial, but he did not recall specifics. Counsel did not recall what officers he spoke with regarding the case. He did not recall whether he looked into the officer's qualifications to review a computer. He did not recall whether he contacted the Petitioner's internet service provider to determine if he had either static or dynamic internet. Counsel said he had worked for the public defender's office for more than thirty years before going into private practice, and in that time, he did not do his own typing or computer research. There was a "computer expert" there that he knew, but he did not recall consulting with the expert for the Petitioner's case.

Counsel said he did not recall whether the Petitioner made arrangements for him to consult with Liam's Computer Repair to be tutored on computers in preparation for the case. He did not recall contacting Liam's Computer Repair.

The Petitioner's post-conviction counsel then asked Counsel several computer-related questions that he said were "directly relevant" to the Petitioner's case. Counsel did not understand or could not explain any of the technical issues, i.e. allocated or unallocated

space on a hard drive, GUID², or peer-to-peer sharing software. Despite this, Counsel felt his representation was effective.

The parties submitted a transcript of the teleconference during which Counsel relayed the Petitioner's request for a new attorney. Counsel told the trial court Petitioner wanted a new attorney. The State argued that it felt this was a delay tactic and that, if he wanted to substitute counsel, then the trial needed to go forward on the trial date with the new counsel. Alternatively, if the Petitioner wanted a trial the following term, he needed to wait in jail. The trial court then found:

I think both positions are understandable and both positions are, quite frankly, reasonable under the circumstances of what we're dealing with, but here's what the Court's position is.

The Court is moving forward with the trial on Tuesday. If [the Petitioner] insists on seeking other counsel or whatever it is, then . . . the court can't directly control what [the Petitioner] is going to do. However, at this point in time, [Counsel's] motion to withdraw is denied. [The Petitioner] hired [Counsel], he selected [Counsel]. [Counsel] has been working on this case, he's filed numerous motions on behalf of [the Petitioner]. And so I will say this, [Counsel]. If he insists on wanting to terminate you and hire other counsel, then the Court would be willing to accommodate that but it would be under the situation that [the State] just said.

During the teleconference, the trial court expressed that Counsel had filed multiple motions, including contesting many of the photographs, some of which the trial court excluded. The court reiterated that the Petitioner could move forward with new counsel if either the new counsel could be ready to try the case as scheduled or, if the Petitioner wanted a delay, then he needed to be incarcerated in jail pending the trial. The trial court expressed concern that the Petitioner was using this as a delay tactic.

Counsel informed the trial court that he was unsure which choice the Petitioner would make, and he asked for time to communicate with the Petitioner and relay that decision to the trial court. The trial court said that Counsel had until 5:00 p.m. that day, and if he did not hear from Counsel by 5:00 p.m., he would assume the Petitioner chose to delay his trial and the trial court would issue a *capias* for the Petitioner's arrest. No *capias* was issued, and the trial moved forward as scheduled with Counsel representing the Petitioner.

The Petitioner's Appellate Counsel testified that the Petitioner contacted her to represent him shortly after his trial. Appellate Counsel filed a motion for new trial, which she later amended when she received the trial transcript. The judge held a hearing, and

² "GUID" stands for Globally Unique Identifier.

denied the motion for new a trial.

Appellate Counsel also represented the Petitioner at his sentencing hearing and on appeal. On appeal, she raised as issues that the trial court erred when it denied the Petitioner's motion to suppress some of the photographs and the Petitioner's insufficiency of the evidence argument. Appellate Counsel said she did not have the original trial transcript but had a stamped copy. She said she asked the Hamblen County court clerk's office if she was responsible for filing the technical record, and they told her they would do that. She received two notices from the appellate court about issues with the record, as did all the attorneys on the case, but neither of those pertained to a missing trial transcript.

Appellate Counsel said she called the court clerk's office and asked if all of the issues had been fixed, and a female in the office said that everything was done and all set. Appellate Counsel said she asked, "Does that mean that the trial transcripts are also . . . there?" The female responded "yes." Appellate Counsel said she also contacted the Court of Criminal Appeals clerk and asked if they had received the trial transcripts in this case, and she was informed that they had in fact received them.

Appellate Counsel said that the Petitioner filed a complaint against her with the Board of Professional Responsibility ("the Board"). In it, he alleged that he had given her \$2,000 to put in trust for filing fees, etc. He complained that she was not going to reimburse him that amount. Appellate Counsel said she sent the receipts to the Board but did not hear back so she reimbursed the Petitioner the full \$2,000 and paid for the fees associated with his case from her own funds.

The Petitioner also complained to the Board that Appellate Counsel did not file the trial transcripts at the appellate level, as was noted in this court's opinion on his appeal. The Board filed an "informal admonition" because Appellate Counsel should have ensured the trial transcript was filed in the appellate court and had violated Rule 1.3 on Diligence by not so doing. Appellate Counsel read the letter into evidence, and it stated:

You received written notice from the Court about the defect in the record and you did not confirm that the transcript was submitted thereafter. Even though the Court of Appeals docket is confusing because it notices the defect is cured and you were incorrectly told by the trial court clerk that the matter had been fixed, you should have discovered the omission of the transcript upon receipt of the state's brief in June 2023, which would have provided you a short window to move to supplement the record in the time. Your conduct resulted in potential hard[ship] to your client. Tennessee Supreme Court Rule 8 is mandatory and prescribes a minimum level of conduct. Any violation adversely reflects upon the professionalism and reputation of all members of the bar.

During cross-examination, Appellate Counsel testified that, at the sentencing hearing, the judge stated, “[A]ll I can tell you is your defense didn’t make any sense realistically in the trial, quite frankly, I mean, and the jury obviously didn’t think so either.”

Appellate Counsel acknowledged that the Petitioner’s appeal of the sufficiency of the evidence was dismissed because there was no trial transcript in the record. She opined, however, that, even if it were included in the record, his conviction would have been affirmed. She explained that the other issue decided by the Court of Criminal Appeals was whether the trial court properly denied the Petitioner’s motion to suppress multiple pornographic images, and the appellate court had the transcript from the suppression hearing. The appellate court found that the trial court had properly denied that motion, so the images were properly admitted. Appellate Counsel said that, because of this, she found it likely that the Petitioner’s conviction would have been affirmed even if the trial transcript were in evidence.

At the conclusion of the hearing, and before filing a written order, the trial court added some “generalized comments”:

The Court remembers that the [Petitioner] offered three competing strategies. The Court also remembers the [Petitioner’s] wife coming up there to demonstrate hidden files with notes written out on how to do it because she didn’t know how to do it. The Court remembers the . . . argument of viewing the images. And it is correct that we had the State versus Whited case out of Knox County. That was at issue in here. The Court excluded some images that the Court felt like needed to be excluded under that theory.

And so ultimately, the questions that are asked and it comes down to this and what we have to boil down to, under the post-conviction analysis for ineffective assistance, you have two different strategies. Number one, you have the first and the burden is on the defendant at this stage. Presumption of innocence is gone. [The Petitioner] is convicted, is incarcerated. So the [Petitioner] has to present evidence, number one, that his trial counsel was ineffective.

But not only that, it goes to a second prong, which is called the prejudice prong. And so you can have ineffective assistance of counsel, but if there’s no prejudice associated with it, the conviction is still affirmed.

The post-conviction court went on to note that the Petitioner had made some demonstrably false allegations. It further noted that, anytime there was a ruling adverse to the Petitioner, he assumed “there’s some conspiracy against him.” He had made allegations against the trial judge that the post-conviction court did not find credible. The court stated this was

worth noting because:

[T]he Court has to make credibility determinations on who is telling the truth. And when the Court has seen evidence of assertions of involvement that are just not true, that does cause the Court concern with respect to other testimony that might be offered by the individual offering it because all we can do is assess a witness and their credibility and that's one of the things the Court does.

The court then issued a written order in which it found that the Petitioner had presented insufficient proof that Counsel or Appellate Counsel were ineffective. The court found that Counsel's representation of the Petitioner fell within the applicable objective standard of reasonableness under the prevailing professional norms. It further found that the Petitioner could not show he was prejudiced by Appellate Counsel's failure to include the trial transcripts in the appellate record. It noted that there was "no denying child pornography was located on a computer in [the Petitioner's] house, and [Counsel] raised multiple possible explanations as to how it got there not involving [the Petitioner] and the jury simply rejected those explanations."

It is from this judgment that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner contends that the post-conviction court erred in denying his petition for post-conviction relief because the trial court improperly restricted his ability to hire new counsel, forcing him to proceed with an attorney that he had sought to discharge, which was a constitutional violation of his Sixth Amendment rights. He further contends that he is entitled to post-conviction relief on the grounds of ineffective assistance of counsel because Counsel was unprepared for the technical aspects of his case, failed to retain an expert, and neglected to object to improper lay testimony on forensic matters, all of which prejudiced him. He also asserts that he is entitled to post-conviction relief based on ineffective assistance of appellate counsel because Appellate Counsel failed to ensure the trial transcript was included in the record, which resulted in the waiver of his sufficiency of the evidence issue. Lastly, he posits that the cumulative effect of these errors entitles him to a new trial or, at a minimum, a new direct appeal.

A. Sixth Amendment Right to Representation

The Petitioner contends that, four days before trial, he became aware of Counsel's unfamiliarity with the issues presented, explaining that he was excluded from the courtroom for many of the hearings because of COVID protocols. He asserts that Mr. Cave agreed to represent him, and the trial court flatly denied this request and forced the Petitioner to move forward with Counsel with no other options. The State counters that

the Petitioner did not raise this issue on direct appeal, so it is waived. The State further argues that the Petitioner cannot show that a denial of his rights occurred and that the trial court's ruling was well within its discretion.

About this issue, the post-conviction court found:

[The Petitioner] claims the Court denied him counsel of his choice thereby effectively depriving him of his constitutional right to an attorney. The Court finds that [the Petitioner] hired [Counsel], an experienced licensed attorney, and had him in place on the case for almost two years. On the eve of trial, [the Petitioner] engaged in discussions with [Mr. Cave], another experienced licensed attorney, about either representing him or serving in a co-counsel role. [Mr. Cave] contacted the Court about such discussions, and the Court informed [Mr. Cave] that the Court had previously reset the case on more than one occasion most recently to allow [the Petitioner] to retain an expert which had not occurred. The Court further informed [Mr. Cave] that he was welcome to represent [the Petitioner] either solely or as co-counsel; however, the Court would not reset the case and leave [the Petitioner] on bond given the proximity to trial less than a week away and the number of prior resets. The Court finds [the Petitioner's] assertions that the Court yelled at [Mr. Cave] and would not let him represent [the Petitioner] to be entirely false. The Court further notes that [the Petitioner] appears to adopt the position that a Judge is biased against him if he does not prevail. [The Petitioner] previously claimed in the sentencing hearing that General Sessions Judge [] stated in court that she could not be fair to him but would do the case anyway, which the Court does not accredit. [The Petitioner's] assertions concerning the details and tone of the conversation between [Mr. Cave] and the Court is factually inaccurate. The simple fact of the matter is that [Mr. Cave] declined to represent [the Petitioner] under the circumstances and that does not translate into the Court denying [the Petitioner] the counsel of his choice. The case was reset multiple times from the service of the Presentment to the ultimate trial, and [the Petitioner] was free at any time to retain new or additional counsel.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the assistance of counsel. *See also Sprunger v. State*, No. E2016-01096-CCA-R3-PC, 2017 WL 2929507, at *9 (Tenn. Crim. App. July 10, 2017), *no perm. app. filed*. Although “the right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate . . . rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.” *Wheat v. United States*, 486 U.S. 153, 159 (1988); *see State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003). Therefore, a defendant who “desires and is financially able to retain his own

counsel “should be afforded a fair opportunity to secure counsel of his own choice,” but the right to have counsel of choice “must be balanced against the requirements of the fair trial and proper administration of justice.” *Sprunger*, 2017 WL 2929507, at *9 (first citing *State v. Huskey*, 82 S.W.3d 297, 305 (Tenn. Crim. App. 2002) (quoting *Powell v. Alabama*, 287 U.S. 45, 53 (1932); and then *United States v. Micke*, 859 F.2d 473, 480 (7th Cir. 1988)). “Although [a] choice-of-counsel violation occurs whenever the defendant’s choice is wrongfully denied and is structural error, the right to counsel of choice is not unlimited. *Id.* at *10 (citing *United States v. Gonzales–Lopez*, 548 U.S. 140, 148-150 (2006)).

In this case, as the State argues, the record reflects that the Petitioner did not raise this issue when appealing his conviction. Tennessee Code Annotated section 40-30-106(g) states the following:

(g) A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:

- (1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or
- (2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

In *State v. Townes*, this court stated the following:

The opportunity to raise the issue during a direct appeal of the conviction, coupled with a failure to pursue that appeal or a failure to raise the issue during that appeal, constitutes a waiver of the issue pursuant to [Tennessee] Code [Annotated] section 40-30-206(g) for purposes of a post-conviction relief proceeding.

56 S.W.3d 30, 35-36 (Tenn. Crim. App. 2000).

We conclude that the Petitioner’s claim that his Sixth Amendment right to the counsel of his choice was waived because the Petitioner failed to present this claim on direct appeal pursuant to Tennessee Code Annotated section, 40-30-106(g). We also conclude that neither of the exceptions in section 40-30-106(g) applies here. The Petitioner’s claim is not “based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right” and the Petitioner’s failure to present this issue to a court of competent jurisdiction was not “the result of state action in violation of the federal or state constitution.” T.C.A. § 40-30-106(g)(1)-(2).

At oral argument, the Petitioner's attorney acknowledged that the waiver issue existed and asked this court to consider this issue in light of his claim that Appellate Counsel was ineffective. Therefore, below, we will address this issue as it relates to whether Appellate Counsel was ineffective. Here, however, we conclude that the Petitioner has waived our review of this issue by failing to present it on direct appeal and is not entitled to relief.

B. Ineffective Assistance of Counsel

The Petitioner contends that he is entitled to post-conviction relief on the grounds of ineffective assistance of counsel because Counsel was unprepared for the technical aspects of his case, failed to retain an expert, and neglected to object to improper lay testimony on forensic matters, all of which prejudiced him. He also asserts that he is entitled to post-conviction relief based on ineffective assistance of appellate counsel because Appellate Counsel failed to ensure the trial transcript was included in the record, which resulted in the waiver of his sufficiency of the evidence issue. Lastly, he posits that the cumulative effect of these errors entitles him to a new trial or, at a minimum, a new direct appeal. The State counters that the post-conviction court properly denied the Petitioner post-conviction relief.

To obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2018). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2018). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999) (citing *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997)). A post-conviction court's factual findings are subject to a *de novo* review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely *de novo* review by this Court, with no presumption of correctness. *Id.* at 457.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

First, the [petitioner] 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 [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, “a petitioner must show that counsel’s representation fell below an objective standard of reasonableness” *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney’s performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland*, 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court should avoid the “distorting effects of hindsight” and “judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466 U.S. at 689-90. In doing so, the reviewing court must be highly deferential and “should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case “is not entitled to perfect representation, only constitutionally adequate representation.” *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, “in considering claims of ineffective assistance of counsel, ‘we address not what is prudent or appropriate, but only what is constitutionally compelled.’” *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronin*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). “‘The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation.’” *House*, 44 S.W.3d at 515 (quoting *Goad*, 938 S.W.2d at 369).

If the petitioner shows that counsel’s representation fell below a reasonable

standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating “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; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

1. Ineffective Assistance of Trial Counsel

The Petitioner contends Counsel was ineffective for: (1) failing to prepare and investigate by not hiring an expert, forgetting to ask important questions, and not presenting a good theory of defense; and (2) failing to make evidentiary objections to improper lay testimony on forensic matters. The State counters that the evidence supports the post-conviction court’s findings.

About this issue, the post-conviction court found:

The Court finds that [Counsel] was an experienced trial attorney having handled countless serious criminal matters stretching years before [the Petitioner’s] case. The Court finds that [Counsel] employed a reasonable strategy that the State could not prove beyond a reasonable doubt that [the Petitioner] was the one responsible for the images being on the computer. [The Petitioner] wants to spend considerable time talking about needing an expert to defend this case; however, [Counsel] chose the strategy of forcing the State to prove [the Petitioner’s] culpability. It is indisputable that law enforcement found child pornographic images on a computer in [the Petitioner’s] home. [Counsel] chose the trial strategy of pointing out that there were various different explanations of how the images could have arrived on the computer without [the Petitioner] being responsible thereby attempting to establish reasonable doubt. The Court does not have a crystal ball to determine if another trial strategy would be more successful; however the Court cannot find that forcing the State to prove their case and attempting to establish reasonable doubt is a deficient trial strategy under the facts before the Court.

The court found that Counsel’s conduct fell within the range of competence demanded of attorneys in criminal cases. The court further found that, even if Counsel rendered ineffective assistance, the Petitioner was not prejudiced. It found:

[E]ven if [Counsel] was ineffective based on the alleged cumulative total of mistakes or errors that the results of the case would be the same. The State’s evidence against [the Petitioner] clearly established to the jury that child pornography was located on a computer in his house. [The Petitioner’s] wife

clearly knew virtually nothing about computers and had to take written notes with her to the witness stand to attempt to explain her testimony concerning computers. Conversely, the evidence demonstrated that [the Petitioner] is computer savvy and intelligent and uses computers frequently and extensively. The Court finds that the overall proof in the underlying trial coupled with the proof offered in the post-conviction hearing leads to the conclusion that [the Petitioner] was not prejudiced by any ineffectiveness of [Counsel]. The State had all the necessary evidence to convict [the Petitioner]. Furthermore, the Court notes that [the Petitioner] has previously been convicted of a felony sex crime and was required to register as a sex offender for a period of time, which does not tend to weigh in favor of [the Petitioner's] claims of innocence.

As previously stated, the Petitioner must show both that Counsel's performance was deficient and that he was prejudiced by that performance. Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland*, 466 U.S. at 687. In this case, the Petitioner cannot show that Counsel's representation prejudiced him.

a. Failure to Prepare and Investigate

The Petitioner contends that Counsel failed to prepare and investigate by hiring an expert. During the evidentiary hearing, the Petitioner failed to present an expert witness who could have testified concerning any computer issues that might have persuaded the jury to acquit. The Petitioner noted that Counsel was unfamiliar with several computer issues, but he did not present any evidence or testimony that would explain how a better understanding of those issues would have persuaded the jury that the pornographic pictures were on the Petitioner's computer without his knowledge. Ultimately, the Petitioner failed to establish that, if an expert testified, it would have made a difference in the ultimate verdict reached by the jury.

Failure to present evidence concerning an allegation made in the request for relief, other than the mere speculation of the Petitioner, results in a waiver of that issue. *Montreal Lyons v. State*, No. W2010-00798-CCA-R3-PC, 2011 WL 3630330 (Tenn. Crim. App. Aug. 18, 2011). When ineffective assistance is based upon the failure to produce a potential witness, the petitioner is required to (1) present the desired witness at the post-conviction hearing; (2) provide proof at the hearing that trial counsel could have located such a witness; and (3) present favorable testimony and material testimony from the desired witness. *Denton*, 945 S.W.2d at 802-03. Because the Petitioner here did not present any evidence at the post-conviction hearing to substantiate his claim, he cannot prove his claim. *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Accordingly, the Petitioner is not entitled to relief on this issue.

Similarly, the Petitioner is not entitled to relief for Counsel's failure to ask "vital questions" about the forensic integrity of the evidence during the suppression hearing. The Petitioner offered no proof demonstrating what evidence would have resulted from answers to the "vital questions." A bare allegation that Counsel failed to ask questions of the officer, without proof of how the answers to those questions would have aided the defense, is not sufficient proof to sustain a claim for post-conviction relief. *See Black*, 794 S.W.3d at 757.

The Petitioner also did not prove that Counsel failed to present a viable theory of defense. The post-conviction court found Counsel employed a "reasonable strategy" by pointing out that there were various explanations as to how the images could have arrived on the computer without the Petitioner being responsible, thereby attempting to establish reasonable doubt. The court found that Counsel's performance was not deficient because he attempted to force the State to prove its case and to establish reasonable doubt. We conclude that the evidence does not preponderate against the post-conviction court's findings. The Petitioner is not entitled to relief on this issue.

b. Failure to Make Evidentiary Objections

The Petitioner next contends that Counsel was ineffective because he failed to make evidentiary objections. He asserts that Counsel failed to object to unqualified expert testimony because Officer Akard testified about topics including "static IP addresses," Wi-Fi range, and BitTorrent software despite not being an expert. He also asserts that Counsel failed to object to the prosecutor and Officer Akard referring to the laptop as "Mr. Arwood's computer," implying ownership or knowledge.

After review of the record, including the trial transcript, which is included in the record on appeal, we conclude that the Petitioner has not proven that Counsel's representation was deficient in this regard. First, a review of the transcript indicates that the State was not offering Detective Akard's testimony as expert testimony, and the record evinces that his testimony did not constitute expert testimony. Further, Counsel objected at the beginning of the trial stating: "I am going to object to [Detective Akard] referring to that as Mr. Arwood's computer rather than the number of that computer." The trial court ruled "Well, it was the computer that you obtained as a result of the search warrant at the shared residence of Mr. and Mrs. Arwood, is that correct?" After the detective said that it was, the trial court told him to "[g]o ahead." Clearly, Counsel made the objection, and the trial court overruled his objection and any insinuation by the Petitioner otherwise is disingenuous. Further, the Petitioner agreed that the laptop was found in his home and did not belong to his wife. At trial, on appeal, and during post-conviction, his defense has been that the pictures got onto his computer without his knowledge. He is not then, or now, contesting ownership of the computer. Accordingly, the State referencing the computer as "Mr. Arwood's computer" was not inappropriate.

2. Ineffective Assistance of Appellate Counsel

As noted above, we will address here the Petitioner's contention that his Appellate Counsel was ineffective for failing to appeal the issue of the trial court improperly denying his Sixth Amendment right to the counsel of his choice. He further contends that Appellate Counsel was ineffective for failing to include the transcript on appeal, which precluded this court from evaluating the sufficiency of the evidence.

To determine whether appellate counsel was constitutionally ineffective, we use the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) – the same test that is applied to claims of ineffective assistance of trial counsel asserted under the Sixth Amendment to the United States Constitution. *Porterfield v. State*, 897 S.W.2d 672, 678 (Tenn. 1995); *see also Smith v. Murray*, 477 U.S. 527, 535-36, (1986) (applying *Strickland* to a claim of attorney error on appeal). Under *Strickland*, we must determine: (1) whether counsel's performance was deficient; and (2) whether the defense was prejudiced by the alleged deficiency. 466 U.S. at 687. The petitioner bears the burden of establishing both prongs of this test. *Id.* at 690-94. Failure to establish either prong provides a sufficient basis to deny relief. *Id.* at 697. Accordingly, a court need not address both prongs if the petitioner makes an insufficient showing of one component. *Id.*

Appellate counsel are not constitutionally required to raise every conceivable issue on appeal. *Carpenter v. State*, 126 S.W.3d 879, 887 (Tenn. 2004) (citing *King v. State*, 989 S.W.2d 319, 334 (Tenn. 1999); *Campbell v. State*, 904 S.W.2d 594, 596-97 (Tenn. 1995)). “Indeed, experienced advocates have long ‘emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most a few key issues.’” *Id.* (citations omitted). It is within appellate counsel's sound discretion which issues to raise on appeal. *Id.* (citations omitted). “Therefore, appellate counsel's professional judgment with regard to which issues will best serve the appellant on appeal should be given considerable deference. We should not second-guess such decisions, and every effort must be made to eliminate the distorting effects of hindsight.” *Id.* (citations omitted). The *Carpenter* court instructs us that “[d]eference to counsel's tactical choices, however, applies only if such choices are within the range of competence required of attorneys in criminal cases.” *Id.* (citation omitted).

The *Carpenter* court further stated:

If a claim of ineffective assistance of counsel is based on the failure to raise a particular issue, as it is in this case, then the reviewing court must determine the merits of the issue. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986). Obviously, if an issue has no merit or is weak, then appellate counsel's performance will not be deficient if counsel fails to raise it. Likewise, unless the omitted issue has some merit, the petitioner suffers no prejudice from appellate counsel's failure to raise the issue on appeal. When an omitted issue is without merit, the petitioner

cannot prevail on an ineffective assistance of counsel claim. *See United States v. Dixon*, 1 F.3d 1080, 1083 (10th Cir. 1993).

Id. at 887-88.

a. Right to Counsel of Choice

The Petitioner asks us to consider whether Appellate Counsel was ineffective for failing to appeal whether he was denied his Sixth Amendment right to the counsel of his choice. To be entitled to post-conviction relief, the Petitioner must prove that he was prejudiced by Appellate Counsel's failure to appeal this issue. *Id.* at 887-88. This would require a showing that this court would have concluded that he was denied his Sixth Amendment right to the counsel of his choice.

Before his trial, the Petitioner hired Counsel to represent him and, because of COVID protocols, was not in the courtroom for many of the pretrial hearings. He, however, had concerns about Counsel's ability to understand the relevant computer issues after discussing the issues with Counsel, and he became concerned enough to fire Counsel after he attended a November 2021 hearing. The Petitioner said he contacted Mr. Cave, who he said was more adept at understanding the issues, and expressed his desire to have Mr. Cave represent him. The Petitioner said Mr. Cave told him he could be ready by the trial date but would charge \$10,000. Counsel had a teleconference with the trial court, which was transcribed, and during which Counsel relayed the Petitioner's desire for new counsel. The trial court agreed that the Petitioner could have new counsel but said that new counsel needed to be ready by the Tuesday trial date or the trial court would issue a *capias* for the Petitioner's arrest and continue the trial until the next term.

The Petitioner testified that Counsel informed him that the trial court refused to allow Counsel to withdraw and stated that the Petitioner was forced to move forward on the trial date with Counsel as his attorney. Counsel did not recall what transpired during this conversation. The Petitioner further stated that Mr. Cave told him that the trial judge "yell[ed]" at Mr. Cave and told Mr. Cave that Counsel did not need a second chair. Mr. Cave further indicated that the trial court was not going to allow Mr. Cave to represent the Petitioner.

The post-conviction court interjected during the post-conviction testimony because it recalled the conversation about Mr. Cave serving as "elbow counsel," and the court agreed that this was fine. The court said that there was no yelling or hostility. The court said it was unconcerned if any defendant hired multiple attorneys, and he relayed as much to Mr. Cave.

Regarding the right to counsel of choice, this court has previously stated:

[t]he Sixth Amendment provides, in pertinent part, that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI. This right to counsel is “so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment.” *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (quoting *Betts v. Brady*, 316 U.S. 455, 465 (1942)). A criminal defendant who is financially able to retain counsel “should be afforded a fair opportunity to secure counsel of his own choice.” *State v. Huskey*, 82 S.W.3d 297, 304 (Tenn. Crim. App. 2002) (quoting *Powell v. Alabama*, 287 U.S. 45, 53 (1932)). That said, “[t]he right to be represented by counsel of one’s choice is qualified and ‘must be balanced against the requirements of the fair and proper administration of justice.’” *Id.* at 305 (quoting *United States v. Micke*, 859 F.2d 473, 480 (7th Cir. 1988)). Denial of the Sixth Amendment right to counsel of choice is structural error, which requires automatic reversal. *United States v. Gonzales-Lopez*, 548 U.S. 140, 148-150 (2006); *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008).

State v. Johnson, No. W2024-00747-CCA-R3-CD, 2026 WL 407006, at *28 (Tenn. Crim. App. Feb. 12, 2026), *no perm. app. filed*.

The Petitioner’s first contention is that he felt he had no choice but to move forward with Counsel because the trial court threatened to revoke his bond. In *Burgins*, our supreme court held that the right to pretrial bail was not absolute and may be forfeited under certain circumstances provided in Tennessee Code Annotated section 40-11-141(b). *State v. Burgins*, 464 S.W.3d 298, 306 (Tenn. 2015). A trial court’s revocation of pretrial bail, however, must comport with due process. *Id.* at 310. Those requirements were clearly not satisfied here. *See Id.* at 310-11.

That said, the trial court in this case never revoked the Petitioner’s bond. The trial court gave the Petitioner his options, and the Petitioner chose to move forward to trial with Counsel as scheduled. It is unclear whether the trial court would have held a *Burgins* hearing before revoking the bond, if the Petitioner had chosen the option of continuing his trial and having Mr. Cave represent him.

While the Petitioner felt his due process rights were threatened and that he had no choice but to move forward, he has not proven why he did not choose to move forward with Mr. Cave. The Petitioner did not present the testimony of Mr. Cave. We recognize that this witness’ proposed testimony should be produced at the post-conviction hearing under the general rule announced in *Black v. State*, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). We cannot speculate what Mr. Cave’s testimony would have been, and it is totally unclear whether Mr. Cave declined to represent the Petitioner for personal reasons or if he had even agreed to represent the Petitioner. The Petitioner testified that Mr. Cave

said that he could be ready for the originally scheduled trial date, at a rate of \$10,000, and the Petitioner said he was willing to pay this amount. The Petitioner also said that he understood the choice presented to him by the trial court was that he could move forward with the scheduled trial date (and if his testimony is to be believed, Mr. Cave could have been ready by this date) or having his bond revoked. He then said that he understood Counsel to say that he was not allowed to hire Mr. Cave, who could be ready on the trial date, but that he had to move forward on the trial date with Counsel only. The teleconference transcript between Counsel and the trial court contradicts the Petitioner's testimony, and Counsel does not recall his subsequent conversation with the Petitioner.

On appeal, the post-conviction court's factual findings are binding on this Court unless the evidence preponderates otherwise. *Vaughn v. State*, 202 S.W.3d 106, 115 (Tenn. 2006). For this reason, questions of witness credibility, the weight of the evidence, and the factual issues raised by the evidence are properly resolved by the post-conviction court, and this Court will not substitute its own inferences for those of the post-conviction court. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001). The post-conviction court specifically found the Petitioner's testimony not credible. It did not accredit the Petitioner's assertion that neither Mr. Cave, who did not testify, nor Counsel informed him of the choice that he could move forward with Mr. Cave as his attorney with the trial as scheduled. The court was a party to conversations with both Counsel and Mr. Cave, and it recalled them vastly differently from what the Petitioner said he was told by both Counsel and Mr. Cave. Again, the Petitioner did not present Mr. Cave as a witness, and we cannot speculate what his testimony would have been.

We conclude that the Petitioner has not shown that he was denied his right to the representation of his choice. Therefore, he cannot prove he was prejudiced by Appellate Counsel's failure to appeal this issue. Accordingly, we conclude that the Petitioner is not entitled to relief on this issue.

b. Trial Transcript

The Petitioner contends that Appellate Counsel was ineffective for failing to ensure that the trial transcript was included in the record, which resulted in this Court finding waiver of the sufficiency of the evidence issue on direct appeal. He now contends on appeal that the evidence is insufficient to sustain his conviction, so, had the transcript been included, this court would have reversed his conviction on direct appeal. He specifically contends that the State did not prove that he "knowingly" possessed the images of child pornography that were on his computer. After reviewing the record and appellate opinion, the post-conviction court found that the Petitioner was not prejudiced by Appellate Counsel's failure to include the trial transcript on appeal because he would not have been successful on appeal.

After our own review of the record, including the trial transcript that has since been

included in the record, we conclude that the evidence does not preponderate against the post-conviction court's findings. To be entitled to post-conviction relief, the Petitioner must prove that he was prejudiced by Appellate Counsel's failure to include the trial transcript. *Carpenter*, 126 S.W.3d at 887-88. This would require a showing that the evidence at trial, as detailed in the trial transcript, was insufficient to sustain his conviction. The Tennessee Protection of Children Against Sexual Exploitation Act of 1990 "criminalizes, among other things, the possession, distribution, and production of child pornography." *State v. Whited*, 506 S.W.3d 416, 427 (Tenn. 2016) (citing T.C.A. §§ 39-17-1001 to -1008). "Basic possession [of child pornography] is charged as 'sexual exploitation . . .'" *Id.* Tennessee Code Annotated section 39-17-1003(a) defines "sexual exploitation of a minor" as knowingly possessing material that includes a minor engaged in sexual activity or simulated activity that is patently offensive. At the time of Petitioner's offense, Tennessee Code Annotated section 39-17-1002(2) defined "material" as "[a]ny picture, drawing, photograph, undeveloped film or film negative, motion picture film, videocassette tape or other pictorial representation[.]" Ordinarily, sexual exploitation of a minor is a Class D felony. T.C.A. § 39-17-1003(d). If the number of individual images exceeds fifty, though, the offense is a Class C felony. T.C.A. § 39-17-1003(d).

The evidence at trial, viewed in the light most favorable to the State, proved that MPD Detective Akard used investigative software that notified him that an IP address in Hamblen County was downloading child pornography. Based upon this information, the detective completed a subpoena with that IP address for the judge to review, and he submitted it to Charter Communications. While awaiting the subpoena response, which took approximately a month, the detective continued his investigation.

Detective Akard made seven downloads from the IP address. He then learned that the IP address was registered to the Petitioner's wife. He determined that the Petitioner and his wife both lived at that address. He obtained a search warrant for the house, which he executed. The detective read both the Petitioner and the Petitioner's wife their rights. At the time, the Petitioner said he was familiar with the software the detective used to download the images but said he used it to download videos and music. The detective confiscated multiple laptops, and he found pornographic images on one of the hard drives of one of the laptops. The State offered seventy photographs it asserted were child pornography.

Detective Akard noted the metadata of the photographs. He also noted that there was another picture that had a similar file path as the other images, and it showed the Petitioner's home electric service business, A1 Electric Service. The file was created on the laptop on December 4, 2017, and many of the images were downloaded between September 2017 and March 2018. The detective clarified that he found the images on a laptop that was in the Petitioner's possession. The detective further clarified that he determined that the Petitioner's Wi-Fi was a secure connection and password protected. The Petitioner said he had not given the password to anyone.

When evaluating the sufficiency of the evidence on appeal, the relevant question is whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Wagner*, 382 S.W.3d 289, 297 (Tenn. 2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see* Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence presented at trial and to all reasonable and legitimate inferences that may be drawn from the evidence. *State v. Gibson*, 506 S.W.3d 450, 458 (Tenn. 2016). The evidence in this case is sufficient to sustain the jury’s conviction of one count of possession of child pornography involving more than fifty images. Accordingly, the Petitioner cannot prove that Appellate Counsel’s failure to include the trial transcript in his appeal prejudiced him. He is not entitled to relief on this issue.

3. Cumulative Effect of Any Error

Finally, the Petitioner asserts that he is entitled to relief under the cumulative error doctrine. The cumulative error doctrine recognizes that there may be many errors that are harmless in isolation, but “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 (Tenn. 2010). To warrant relief under the cumulative error doctrine, there must have been more than one actual error committed during the trial proceedings. *Id.* at 77.

Here, the post-conviction court found, and we affirm, that Counsel was not deficient and that while Appellate Counsel failed to include the trial transcript on appeal, that the deficiency did not prejudice the Petitioner. We have also concluded that the Petitioner failed to prove his due process rights were violated. No other deficiencies or constitutional errors have been found. Because the Petitioner has not established multiple errors, the cumulative-error doctrine does not apply. The Petitioner is not entitled to relief.

III. Conclusion

After a thorough review of the record and relevant authorities, we affirm the post-conviction court’s judgment.

S/ ROBERT W. WEDEMEYER
ROBERT W. WEDEMEYER, PRESIDING JUDGE