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Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 21, 2026 Session

BRANDON D. MIDDLEBROOK v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 121007 Hector I. Sanchez, Judge

No. E2025-01342-CCA-R3-PC

The Petitioner, Brandon Middlebrook, appeals from the Knox County Criminal Court's denial of his petition for post-conviction relief from his convictions for aggravated burglary, attempted first degree murder, aggravated assault, employing a firearm during the commission of a dangerous felony, and unlawful possession of a firearm by a convicted felon. He contends that the post-conviction court erred in denying relief on his claims that (1) he was denied due process in the conviction proceedings because the State failed to preserve evidence, (2) he received the ineffective assistance of trial counsel because counsel failed to make a motion pursuant to *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999), related to the missing evidence, and (3) he received the ineffective assistance of trial counsel because counsel was not adequately prepared for the trial. We affirm the judgment of the post-conviction court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and STACY L. STREET, JJ., joined.

Joshua D. Hedrick, Knoxville, Tennessee, for the appellant, Brandon D. Middlebrook.

Jonathan Skrmetti, Attorney General and Reporter; Katherine C. Redding, Assistant Attorney General; Gary R. Dunn (on brief), *pro hac vice*, Acting Assistant Attorney General; Cody N. Brandon, Deputy Attorney General; Charme P. Allen, District Attorney General; and Ta Kisha M. Fitzgerald, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Petitioner's convictions relate to an apartment invasion and robbery, in which Aundre Buford and Macee Peterkin were shot. Both victims survived and testified at the Petitioner's trial. John McCamy, who was with the Petitioner and codefendant Joshua Williams during the crimes but claimed his presence was under duress,¹ was not indicted with the Petitioner and the codefendant. Mr. McCamy testified for the State at the trial. The statement of the non-testifying codefendant, Mr. Williams, was used as impeachment evidence during cross-examination of the Petitioner during the trial. The Petitioner testified and disputed the State's theory that the incident at victim Buford's apartment had been a setup for a robbery in which Mr. McCamy had been an unwilling participant. The Petitioner said that he had been in Mr. McCamy's truck with codefendant Williams and Mr. McCamy and that they went to various locations, where Mr. McCamy sold drugs to unidentified individuals. The Petitioner claimed that Mr. McCamy wanted to go to victim Buford's apartment to trade a gun that Mr. McCamy had stolen from his grandmother for marijuana. The Petitioner claimed that he would have preferred not to go to the apartment because of a prior misunderstanding he had with victim Buford. The Petitioner said that, inside the apartment, Mr. McCamy reached for the gun he intended to trade for drugs and that victim Buford opened fire. By his own admission, the Petitioner returned fire. *See State v. Brandon D. Middlebrook*, No. E2019-01503-CCA-R3-CD, 2021 WL 28582 (Tenn. Crim. App. Jan. 5, 2021), *perm. app. denied* (Tenn. May 12, 2021). Codefendant Williams was tried separately. *See State v. Joshua Williams*, No. E2019-01995-CCA-R3-CD, 2021 WL 2454439 (Tenn. Crim. App. June 16, 2021), *perm. app. denied* (Tenn. Nov. 17, 2021).

The Petitioner's post-conviction claims relate to data from victim Buford's cell phone, which the Petitioner claims the State had a duty to preserve and to provide to him, to trial counsel's failure to raise a *Ferguson* issue when the cell phone data was not preserved, and to counsel's preparations for the trial after having been appointed less than one month earlier.

At the post-conviction hearing, trial counsel testified that prior counsel was relieved and that trial counsel assumed representation of the Petitioner on February 3, 2015. The trial began on February 23, 2015. Counsel thought that he met with the Petitioner in late January 2015, before the substitution of counsel. Counsel agreed that, "as best [he] recall[ed]," the Petitioner's prior counsel withdrew "to make way for retained counsel."

Trial counsel testified that he filed a motion to continue in which he stated that, "despite diligent effort[, he] would be unable to effectively prepare for trial by the 23 of

¹ The Petitioner was convicted of aggravated assault with a deadly weapon of Mr. McCamy.

February, 2015.” Counsel was unsure, but he thought he had withdrawn the motion in exchange for stipulations from the State as to the admissibility of certain cell phone records, which included GPS location data, and the use of the “KGIS coordinates system.” When asked if he withdrew the motion because he thought he had had adequate time to prepare for the trial, counsel said, “When the offer to stipulate it was made, I had to weigh in my mind the risk that my motion might be denied, and I would not get those things and have to do a trial without them.” He explained that, although he thought he needed more time to prepare, the risk of having the trial without the stipulated evidence was not worth taking because the outcome without the evidence would be “cataclysmic.” Counsel agreed that codefendant Williams had been tried one or two weeks before the Petitioner and that, if the motion to continue had been granted, the transcripts for codefendant Williams’s trial might have been available within a few months.

Trial counsel testified he had been unable to file the motion to continue before February 20, 2015, due to inclement weather. Counsel said the basis for the motion was, in part, that he wanted to review data contained on victim Buford’s iPad, which data the State had not been able to access and which counsel believed would contain exculpatory information. Specifically, counsel believed, based upon the investigation of the case, that victim Buford’s iPad contained data related to communications between victim Buford and Mr. McCamy. Counsel said he had learned on February 13 that the iPad was locked and that the State “would not make attempts to retrieve the pass code prior to their witness arriving in Knoxville.” Counsel said that, on February 13, he received recordings of about twenty hours of jail telephone calls. Counsel said he also wanted additional time to investigate the potential testimony of a prospective State’s witness, Travis Mack. Counsel said that, at the time, he was concerned about Mr. Mack’s reputation for testifying falsely that a defendant had confessed to him, based upon events which transpired in another case, but that counsel no longer had this concern at the time of the post-conviction hearing.

Trial counsel testified that the court clerk’s office had been closed some days in the week before the trial, which had delayed his ability to obtain the jury pool information and to issue subpoenas “for a necessary witness from KGIS.” Counsel explained that this witness was necessary “to plot points from the record on a screen and show it to the jury.” Counsel said this information was needed to bolster the Petitioner’s credibility and to discredit Mr. McCamy’s anticipated testimony because the location data from Mr. McCamy’s cell phone was inconsistent with Mr. McCamy’s prior statement relative to his movements on the date of the offenses and “matched up a lot more closely with [the Petitioner’s] version of events than it did with [Mr. McCamy’s anticipated testimony].” Counsel explained that Mr. McCamy had not been present for some of the relevant events and that bolstering the Petitioner’s credibility related to the location data might also lend credibility to the Petitioner’s testimony when it varied from the anticipated testimony of

victim Buford. Counsel acknowledged that he had been able to “plot the [location] points on the screen in front of the jury” by using the cell phone records. Counsel did not recall whether he had impeached Mr. McCamy with his prior inconsistent statements or whether counsel had played recordings of Mr. McCamy’s prior statements. Counsel said the cell phone records had been his primary source for impeaching Mr. McCamy. Counsel could not recall specifically but thought he probably asked Mr. McCamy about his “cleaning up the car” after the crimes. Counsel said, “I thought Mr. McCamy was a liar, and I probably treated him like a liar.” Counsel acknowledged, however, that the “jury probably disagreed with” him.

Trial counsel testified that he received information about Investigator Lee’s having taken possession of victim Buford’s cell phone, having examined it, and having returned the phone to victim Buford because Investigator Lee “saw nothing that concerned him or that he thought . . . was important.” Counsel was unsure, due to the passage of time, but he thought Investigator Lee had not collected any evidence from the cell phone. Counsel explained that, after determining that he would be unable to obtain any evidence from victim Buford’s cell phone, he had tried to obtain information from victim Buford’s iPad, which counsel thought might contain the same information if the devices had “synced up.” Counsel said that when he followed up with the State after his initial attempt to obtain the iPad on February 13, 2015, he was informed that victim Buford had forgotten the password. Counsel thought he asked victim Buford for the passcode when victim Buford was under oath. Counsel said he “never received the pass code.”

Trial counsel testified that, due to the short period of time between his appearance in the case and the trial, he had been unable to investigate, prepare for the trial, “practice” with the Petitioner, investigate the jury pool, and complete “all of the things that needed to be done for the trial” to the extent that he would have liked. He acknowledged that the Petitioner’s prior attorney “sat by [the Petitioner] for the whole trial,” although trial counsel did not know whether the attorney “technically . . . was of record.” Counsel agreed that the prior attorney had done “a substantial amount of work,” which included reviewing discovery and arranging for an expert witness. Counsel said that he and the prior attorney discussed the prior attorney’s theories, strengths, and weaknesses of the case. Counsel said he had received the recorded statements of the Petitioner, Mr. McCamy, and Janae Walker but did not recall whether he had a recorded statement of codefendant Williams.

Trial counsel testified that the case was difficult for the defense. He agreed that three or four people had been involved and that the Petitioner had not worn a mask. Counsel said that victim Buford had testified to the Petitioner’s identity and that the Petitioner had displayed a weapon and made statements which indicated he was there to rob victim Buford. Counsel said that a gun was fired and that victim Buford had testified

that he thought the Petitioner had fired it, based upon “where [the Petitioner] had gone.” Counsel said victim Peterkin’s testimony was similar to that of victim Buford. Counsel said Ms. Walker, who had been in the kitchen when the robbery and shootings occurred, testified that she “heard the same statement as [the victims], and she heard the gunshots.”

Trial counsel testified that the Petitioner took the stand at the trial. Counsel said the Petitioner’s testimony was consistent with the Petitioner’s pretrial statement, to the extent that the Petitioner claimed that he had not intended to commit a crime and that he had not gone to victim Buford’s apartment to rob or hurt anyone.

Trial counsel testified that, based upon victim Peterkin’s medical records, he presented the defense theory that the bullets that hit her came from victim Buford’s gun. Counsel said he called the defense pathology expert to testify about “wound tracks and things of that nature.” Counsel said he “was not entirely successful” in presenting his theory regarding victim Buford’s shooting victim Peterkin because the defense expert “hypothesized on the stand that there was at least one scenario in which one of the wound tracks could have been caused by a different gun.” Counsel said that, based upon previous conversations with the defense expert, counsel had not expected the expert to testify as he did. Counsel conceded, “I should have been much more meticulous and aggressive in nailing down exactly what his thoughts were and exactly to what degree he was going to espouse or believed [sic] what I believed.” Counsel said he was surprised by the expert’s testimony. Counsel said that, had he known the expert would testify in this manner, he would have discussed the opinion with the expert to “see if I could explain to him my way of thinking to see if my way of thinking was factually correct.” Counsel said he probably still would have called the expert as a witness because the testimony was “that the vast majority of these wounds came from [victim] Buford,” and he would have had a different approach in his opening statement and in his cross-examination of some of the State’s witnesses, whom he did not identify.

Trial counsel testified that “it was probably a mistake” not to file a *Ferguson* motion relative to victim Buford’s cell phone. Counsel said that, in retrospect, he wished he had filed the motion but explained, “I was seeking to do a lot of things at once[.]”

Trial counsel testified that the plea offer that the Petitioner wanted “was an impossibility” and that “the only way to get the result that [the Petitioner] wanted was going to be through trial.” Counsel said the Petitioner “expressed” his belief that the witnesses would not appear for the trial “because that [sic] was a quote-unquote ‘drug dealer.’”

The hearing was continued on the post-conviction counsel's motion. Counsel had requested the continuance on the basis of trial counsel's testimony that the Petitioner's prior counsel had been involved in the defense after having been granted permission to withdraw from the case.

When the hearing was reconvened, trial counsel was recalled and testified that, at the time the police obtained Mr. McCamy's cell phone, Mr. McCamy "had wiped it clean." Counsel said he had hoped that victim Buford's cell phone would contain the data related to communications with Mr. McCamy. Counsel agreed that Investigator Lee testified at the trial about having obtained victim Buford's phone, having "glanced at it," and having returned it to victim Buford, rather than collecting it as evidence. Counsel did not recall if this had been mentioned in codefendant Williams's trial, which counsel said he "sat through." Counsel said that if this information was not mentioned during codefendant Williams's trial, he first learned of it during the Petitioner's trial. He did not recall seeing this information in the discovery. Counsel said that, if he first learned of this information during codefendant Williams's trial, he "did not file a motion between the two [trials of codefendant Williams and the Petitioner]." Counsel said that, when the issue was raised in the Petitioner's trial, he did not think he had "raised either [a] *Ferguson* or *Merriman* motion." Counsel agreed that he heard the testimony of victim Buford, the "two female witnesses," the law enforcement officers, and the forensics witnesses. Counsel agreed that he received "early *Jencks*" materials, some of the officers' statements, Mr. McCamy's statement, and Mr. McCamy's GPS data from the cell phone records. Counsel thought that prior counsel had prepared most of the location data by plotting the GPS coordinates before the trial. Counsel said prior counsel had "lined up" the defense forensic expert and had filed unspecified pretrial motions.

Trial counsel thought that he and an investigator went to the crime scene. Counsel said he did not know the contents of victim Buford's cell phone, other than to the extent that the trial testimony showed that communications occurred between victim Buford and Mr. McCamy. Counsel agreed that he had believed at the time of the trial that evidence of the text messages between victim Buford and Mr. McCamy "would have gone a long way in challenging [Mr. McCamy's] testimony that implicated [the Petitioner]." Counsel explained that, because Investigator Lee had not collected victim Buford's cell phone as evidence, preserved the passcode, and had the cell phone's data extracted, counsel had wanted to get the passcode to victim Buford's iPad, "but the pass code was claimed to have been forgotten and no one got it, and I didn't have a way to get it, was my recollection." Counsel acknowledged that the iPad was in the State's possession, although the State did not have the passcode information. Counsel thought the iPad might contain evidence of communications between victim Buford and Mr. McCamy.

The Petitioner's prior counsel, who represented him in criminal court until prior counsel was allowed to withdraw and trial counsel was allowed to assume duties as counsel of record, testified that he did not recall the specifics of the transition from his representation to trial counsel's representation of the Petitioner. Prior counsel said his ordinary practice in such a scenario was to discuss the case with the newly retained attorney and to provide the physical file, which might include some electronic media. Prior counsel stated that he had obtained funding for a defense expert, a pathologist with a "niche expertise in gunshot wounds." Prior counsel recalled discussing this expert with trial counsel. Prior counsel said he would have advised trial counsel of the involvement of a defense investigator. Prior counsel did not remember if he filed a motion to suppress the Petitioner's pretrial statement.

After reviewing the trial transcript, prior counsel testified that he saw his name in the transcript and "(complied with the request of counsel)," indicating that he had been involved in demonstrating the GPS coordinates that showed Mr. McCamy's travel from the crime scene, to a home in Oak Ridge, and to Mr. McCamy's home in Farragut. Counsel did not recall whether he had been present at the trial on February 23, 24, and 25, 2015, but agreed that he had been present if the transcript reflected his presence.

The Petitioner testified that he was in pretrial custody when trial counsel entered the case as counsel of record on February 3, 2015. The Petitioner said that he met with trial counsel twice before the trial, one time being on the weekend before the trial began on Monday. The Petitioner agreed that he had spoken with trial counsel on the Friday before the trial began when they were in court for the hearing on the motion to continue. The Petitioner said that neither trial counsel nor prior counsel met with him at the jail in the evenings during the trial. The Petitioner said that, in the weeks leading to the trial, the weather had been snowy.

When asked whether he had said in jail telephone calls that he thought victim Buford would not come to court for the preliminary hearing, the Petitioner said, "Well, I mean, I can't . . . say if he's going to show up or not."

The Petitioner thought he had spoken to the defense investigator at the jail about victim Buford's statement. The Petitioner thought he might have also spoken to prior counsel at the jail about victim Buford's statement. The Petitioner did not think he and the investigator "discussed too much about" victim Peterkin's statement. The Petitioner did not think he spoke with the investigator, prior counsel, or trial counsel about Ms. Walker's statement. The Petitioner said he had not known about Ms. Walker until the trial. The Petitioner thought he spoke with prior counsel about Mr. McCamy's statement but did not recall whether he did so with the investigator. The Petitioner said he and prior counsel

discussed the need to get the GPS data from Mr. McCamy's cell phone records for impeachment evidence. The Petitioner stated that Mr. McCamy said in his pretrial statement that he had been forced at gunpoint to participate in the offenses, which the Petitioner said was untrue.

The Petitioner acknowledged that he had given a pretrial statement in which he admitted that he had been at victim Buford's apartment but had said he did not have a firearm and did not take anything from the apartment.

The post-conviction court took the matter under advisement and later issued an order denying relief. This appeal followed.

Post-conviction relief is available "when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103 (2025). A petitioner has the burden of proving his factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f) (2025). A post-conviction court's findings of fact are binding on appeal, and this court must defer to them "unless the evidence in the record preponderates against those findings." *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *see Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's application of law to its factual findings is subject to a de novo standard of review without a presumption of correctness. *Fields*, 40 S.W.3d at 457-58.

I

Denial of Due Process Based on the State's Failure to Preserve Evidence

The Petitioner contends that the post-conviction court erred in denying relief on his claim that he was denied due process in the conviction proceedings because the State failed to preserve victim Buford's cell phone as evidence. The record reflects that Investigator Lee viewed the contents of victim Buford's cell phone, determined that it did not contain relevant evidence, and returned the cell phone to victim Buford without obtaining a copy of the data in the cell phone. The Petitioner argues that the cell phone contained evidence of communications between victim Buford and Mr. McCamy. The Petitioner argues that the missing evidence was "key to determining whether Mr. McCamy was telling the truth . . . or whether [the Petitioner] was telling the truth" about the relevant facts of the crimes. The State responds that this issue is waived as a free-standing claim of constitutional error because it was not raised in the conviction proceedings. The State contends, alternatively, that the post-conviction court did not err in denying relief because the Petitioner failed to prove that his trial was fundamentally unfair due to the missing evidence. The Petitioner

has not filed a reply brief in response to the State's waiver argument. We conclude that the issue is waived.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and article I, section 8 of the Tennessee Constitution afford every criminal defendant the right to a fair trial. *See Johnson v. State*, 38 S.W.3d 52, 55 (Tenn. 2001). As a result, the State has a constitutional duty to furnish a defendant with exculpatory evidence pertaining to his guilt, or lack thereof, or to the potential punishment faced by a defendant. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Our supreme court has held that the State has a duty to preserve discoverable evidence when the evidence

might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

State v. Ferguson, 2 S.W.3d 912, 917 (Tenn. 1999) (quoting *California v. Trombetta*, 467 U.S. 479, 488-89 (1984)); *see* Tenn. R. Crim. P. 16 (discoverable evidence); *see also State v. Merriman*, 410 S.W.3d 779, 785 (Tenn. 2013).

A *Ferguson* claim regarding the fundamental fairness of a trial is waived when it is raised, for the first time, as a free-standing claim of constitutional error in the post-conviction proceedings. *See* T.C.A. § 40-30-106(g) (stating that a claim for post-conviction 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 the claim is based upon a newly recognized constitutional right or the failure to present the claim earlier was due to unconstitutional State action); *Aaron Malone v. State*, No. W2016-00666-CCA-R3-PC, 2017 WL 1404374, at *15 (Tenn. Crim. App. Apr. 18, 2017), *perm. app. denied* (Tenn. Aug. 21, 2017). At this juncture, this issue has been waived as a free-standing claim of a constitutional defect, as it was not raised in the conviction proceedings and cannot be raised for the first time in a post-conviction action. *See Tevin Dominique Lumpkin v. State*, No. W2022-00747-CCA-R3-PC, 2023 WL 2987672, at *17 (Tenn. Crim. App. Apr. 18, 2023).

The Petitioner is not entitled to relief on this basis.

II

Ineffective Assistance of Counsel

The Petitioner contends that the post-conviction court erred in denying relief on his ineffective assistance of counsel claims related to trial counsel's failure to make a *Ferguson* motion related to the missing cell phone evidence and because counsel was not adequately prepared for the trial. The State responds that, because the Petitioner failed to prove his claims by clear and convincing evidence, the court did not err in denying relief.

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

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

A. Failure to file a *Ferguson* motion

The Petitioner argues that the post-conviction court erred in denying relief on his claim that trial counsel provided ineffective assistance by failing to file a *Ferguson* motion seeking an appropriate remedy to preserve the Petitioner's right to a fundamentally fair trial based on the State's failure to preserve victim Buford's cell phone and its data. The Petitioner claims that the evidence of communications between victim Buford and Mr. McCamy was "key to determine whether Mr. McCamy was telling the truth that [the Petitioner] and [codefendant] Williams set up a robbery [of victim Buford] or whether [the Petitioner] was telling the truth that McCamy was the one who made the design to go to Buford's house armed." The record reflects that the messages were not available from Mr. McCamy's cell phone because he had "wiped" them by the time the State obtained his cell phone. The record also reflects that the State had victim Buford's iPad in its possession but that its data was inaccessible because it was protected by a passcode. When trial counsel learned that Investigator Lee had not preserved victim Buford's cell phone as evidence, counsel attempted unsuccessfully to obtain the messages from victim Buford's iPad. Counsel testified at the post-conviction hearing that the State did not have the iPad's passcode and that victim Buford claimed not to recall his passcode when counsel inquired on cross-examination.

In questioning trial counsel at the post-conviction hearing about the extent of his efforts to gain impeachment evidence to use in cross-examination of Mr. McCamy, post-conviction counsel questioned trial counsel about his efforts to obtain information about the contents of victim Buford's cell phone and iPad. In this context, post-conviction counsel asked trial counsel if a *Ferguson* motion was filed when trial counsel was unable to obtain the contents of the cell phone and, in order to access any duplicative information that might be on the iPad, the iPad's passcode. Trial counsel testified that no *Ferguson* motion was filed and opined that he probably made a mistake by not filing a *Ferguson* motion. He rationalized that he "was seeking to do a lot of things at once." In context, this was a brief inquiry. Post-conviction counsel asked numerous other questions related to this aspect of trial counsel's preparation for and performance in cross-examination of Mr. McCamy.

The issue of ineffective assistance of counsel for failing to raise a *Ferguson* motion was not raised in the post-conviction petition or the amended petition. Although post-conviction counsel elicited testimony from trial counsel about having not made a *Ferguson* motion, the record does not reflect that post-conviction counsel made an oral motion to amend the petition to include failure to make a *Ferguson* motion as an additional ineffective assistance of counsel claim. At the conclusion of the hearing, post-conviction counsel asked for permission to submit a brief containing his written arguments, and the

post-conviction court set a filing date for briefs. The record does not contain any briefs which may have been filed after the hearing, and we decline to speculate as to any arguments made and any motions to add additional claims that any such briefs may have contained. In its written order denying relief on the Petitioner's ineffective assistance of counsel claims, the post-conviction court made general findings that the Petitioner had failed to prove by clear and convincing evidence that trial counsel performed deficiently and that the Petitioner had been prejudiced by counsel's performance and made specific findings of fact about trial counsel's trial preparation.² The court did not make any findings addressing counsel's failure to make a *Ferguson* motion. The court later filed a supplemental order adjudicating additional issues raised in the petition and denied relief on each. Again, the court did not address an ineffective assistance of counsel claim related to the failure to make a *Ferguson* motion. The only issue addressed in the supplemental order which is tangentially related was the Petitioner's claim that the State violated various constitutional rights "by withholding *Brady* materials and willfully destroying evidence," consisting of "the unknown potential of exculpatory evidence" on victim Buford's iPad.

"[I]ssues not addressed in the post-conviction court will generally not be addressed on appeal." *Lane v. State*, 316 S.W.3d 555, 561-62 (Tenn. 2010) (quoting *Walsh v. State*, 166 S.W.3d 641, 645-46 (Tenn. 2005)). The post-conviction statute permits amendment of a petition within thirty days of its filing or upon a showing of good cause. T.C.A. § 40-30-107(b)(2) (2025). The Tennessee Supreme Court Rule related to post-conviction hearings provides, "The hearing shall be limited to issues raised in the petition," but amendment of a petition may occur in the following circumstance:

If evidence is objected to on the basis that it concerns issues not raised in the petition or answer, the court may allow amendments and shall do so freely when the presentation of the merits of the cause will otherwise be subserved. The court shall liberally allow a continuance in the event an amendment is allowed to enable the objecting party to meet the evidence.

Tenn. Sup. Ct. R. 28, § 8(D)(4), (5). On appeal, this court is limited to review of post-conviction issues which were "formally raised in the post-conviction petition or an amendment; or . . . argued at the evidentiary hearing and . . . decided by the post-conviction court without objection by the State." *Lowe v. State*, 703 S.W.3d 319, 335 (Tenn. 2024); see *Holland v. State*, 610 S.W.3d 450, 458 (Tenn. 2020). As our supreme court noted in *State v. Bristol*, 654 S.W.3d 917, 925-26 (Tenn. 2022), rules regarding issue preservation

² The pro se petition contained eighteen allegations of ineffective assistance of counsel. The amended petition filed by post-conviction counsel contained seven ineffective assistance of counsel allegations.

“promote fairness, accuracy, and finality” and “help trial and appellate courts maintain their distinct roles and avoid lengthy and costly remands and subsequent appeals.”

Because the issue of whether trial counsel provided ineffective assistance by failing to make a *Ferguson* motion was not raised in the petition or the amended petition, and because the record before us does not reflect that it was raised thereafter by motion to amend and was ruled upon by the post-conviction court, this court is without authority to consider it now. Appellate consideration of this issue is waived.

The Petitioner is not entitled to relief on this basis.

B. Inadequate Trial Preparation

The Petitioner contends that the post-conviction court erred in denying relief on his claim that trial counsel provided ineffective assistance because he was not adequately prepared for the trial. The State responds that the court did not err. We agree with the State.

At the hearing, trial counsel testified about the facts upon which he based the motion to continue the trial and the difficulties that arose due to inclement weather in the days leading up to the trial. He testified about the things he would have liked to have had more time to do and the efforts he, the investigator, and prior counsel made to prepare for the trial. Counsel testified that he withdrew the motion to continue after receiving an essential concession from the State in the form of an agreement to stipulate to the admissibility of cell phone location data evidence, which counsel testified was important defense proof. The Petitioner did not offer any evidence to show any additional evidence or theories that could have been developed had counsel pursued additional avenues of investigation or preparation and had additional time to do so.

The post-conviction court made the following findings and conclusions in denying relief on this claim:

In considering whether the Petitioner’s attorneys performed deficiently, and that the deficient performance prejudiced the Petitioner, the Court finds that the necessary prongs by clear and convincing evidence have not been established. In fact, in considering the proof in toto, [trial counsel] was effective in his preparation of this case for trial. [Trial counsel] obtained the help of [prior counsel] and an investigator who was on the case since the case[’]s inception at the General Sessions court level. The Petitioner effectively had an investigator who was familiar with the case from its

inception, [prior counsel] who came in after the preliminary hearing, who was in the process of preparing for trial, and then [trial counsel] who was retained, all preparing for the Petitioner's trial. Further, this Court heard proof in the form of testimony at the post-conviction hearing that [trial counsel] visited the crime scene, met with the Petitioner on numerous occasions, met with the previous attorney who assisted at trial, met with his investigator, as well as the expert witness who was used at trial as a defense expert. [Trial counsel] examined cellular data and presented it at trial to impeach the testimony of Mr. McCamy. In sum, the evidence in this case was overwhelming as to the Petitioner's guilt. The Petitioner clearly knew that the witnesses were key and therefore gambled that they would not show up for the trial because of their drug involvement. Unfortunately for the Petitioner, that strategy did not pay off. As outlined above, this Court finds [that trial counsel's] representation was in fact effective and that the Petitioner has failed to make a showing by clear and convincing evidence of deficient performance and prejudice pursuant to *Strickland*.

Upon review, we conclude that the record does not preponderate against the post-conviction court's findings that trial counsel's performance was not deficient and that the Petitioner was not prejudiced by counsel's performance. The court's findings support its determination that the Petitioner failed to prove that trial counsel provided ineffective assistance in his trial preparations.

The Petitioner is not entitled to relief on this basis.

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

s/ Robert H. Montgomery, Jr.
ROBERT H. MONTGOMERY, JR., JUDGE