

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs October 6, 2026

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Clerk of the
Appellate Courts

TONY MARKEE MOSLEY v. STATE OF TENNESSEE

Appeal from the Circuit Court for Obion County
No. 2024-CR-109 Jeff Parham, Judge

No. W2025-01842-CCA-R3-PC

The Petitioner, Tony Markee Mosley, appeals the denial of his petition for post-conviction relief from his conviction for second degree murder, arguing that he received ineffective assistance of counsel. Because we conclude that a self-represented criminal defendant has no constitutional right to the effective assistance of counsel from an attorney acting in a standby or advisory role, and because trial counsel provided effective assistance while actively representing the petitioner, we affirm the post-conviction court’s judgment.

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

STEVEN W. SWORD, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and MATTHEW J. WILSON, JJ., joined.

Beau E. Pemberton, Dresden, Tennessee, for the appellant, Tony Markee Mosley.

Jonathan Skrmetti, Attorney General and Reporter; Caroline Weldon, Assistant Attorney General; Colin Johnson, District Attorney General; and Jerald M. Campbell, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Petitioner was convicted by an Obion County jury of second degree murder following the 2019 homicide of the victim, Decora Alexander. *State v. Mosley*, No. W2022-01424-CCA-R3-CD, 2024 WL 1406156 at *1 (Tenn. Crim. App. April 2, 2024), *perm. app. denied* (Tenn. July 18, 2024). The Petitioner was initially represented by appointed counsel, then hired private counsel (hereafter “retained counsel”), then chose to

represent himself, and finally elected representation by appointed counsel at trial. This court affirmed his conviction on appeal. *Id.* at * 23. He filed a timely pro se petition for post-conviction relief on October 25, 2024. The post-conviction court appointed counsel who filed an amended petition on May 2, 2025. After a hearing, the post-conviction court denied the petition, and the Petitioner now appeals from that order.

I. FACTUAL AND PROCEDURAL HISTORY

A. PRETRIAL

The Petitioner was charged by warrant on May 24, 2019, with the offense of first degree murder. *Id.* at 1. The District Public Defender was appointed to represent the Petitioner in General Sessions Court on May 28, 2019.¹ An Obion County grand jury returned a two-count indictment against the Petitioner on October 1, 2019, charging him with the first degree murder of the victim, Decora Alexander, and the abuse of her corpse. *Id.* The Petitioner hired retained counsel, who entered a notice of appearance as counsel of record on February 18, 2020. *Id.* Numerous pretrial motions were filed and heard. *Id.* at *1-3. On December 6, 2021, the Petitioner signed a waiver of his right to be appointed counsel, stating “that he does not desire the appointment of counsel, expressly waives the same and desires to appear in all respects in his own behalf, which he understands he has the right to do.” On December 9, 2021, the trial court granted a motion from the office of retained counsel allowing it to withdraw from further representation of the Petitioner due to retained counsel’s death. *Id.* at *2. The trial court also permitted the Petitioner to proceed pro se and appointed the District Public Defender to act as “elbow counsel” to assist the Petitioner in self-representation. *Id.* Numerous other pretrial motions were filed and heard. *Id.* at *2-3. The trial court scheduled a jury trial for May 23, 2022. *Id.* at *3. On May 16, 2022, the Petitioner informed the court he no longer wished to represent himself. *Id.* The trial court reappointed the District Public Defender’s Office to represent the Petitioner, and the case proceeded to trial as scheduled seven days later. *Id.*

B. TRIAL

The proof at trial established that a friend dropped the victim off at the Petitioner’s residence on the morning of May 11, 2019. *Id.* at *3. On the same date, the Petitioner’s probation officer and a second probation officer arrived at the Petitioner’s residence to conduct a home visit. *Id.* After knocking, the probation officers heard a scream from inside the home, followed by a “thud.” *Id.* When no one answered, the officers called 911 for

¹ This court may take judicial notice of its own records. *See State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009); Tenn. R. App. P. 13(c). To assist in our resolution of this appeal, we take judicial notice of the record from the Petitioner’s direct appeal.

assistance to complete the home visit. *Id.* The probation officers left the home before the police arrived. *Id.* Obion County Sheriff's Department (OCSD) Deputy Christopher Cummings responded to the residence and requested dispatch to call the probation officers and ask them to return. *Id.* When they returned to the residence, they knocked on the door. *Id.* After receiving no response, the probation officers and police officers left the residence again. *Id.* Later, one of the probation officers received another call to return to the residence. *Id.* When she arrived, she observed multiple officers and ambulances at the scene. *Id.*

Deputy Cummings testified that when he first responded to the residence, he and the probation officers knocked on the doors and windows. *Id.* Receiving no response, they left the residence around 6:23 p.m. *Id.* Fourteen minutes later, Deputy Cummings returned to the home after multiple 911 calls reported a disturbance and the sound of a gunshot from the residence. *Id.* Deputy Cummings attempted to force the door open. *Id.* at *4. However, before he could enter, the Petitioner opened the door, covered "head to toe" in blood, with a wound to his throat. *Id.* The Petitioner told the police that he had killed "her," referring to the victim. *Id.* The Petitioner then asked Deputy Cummings to kill him. *Id.*

OCSD Deputy Cory Pinion arrived on the scene and witnessed the Petitioner insert his fingers inside the wound in his throat and attempt to "pull[] his trachea apart." *Id.* Police officers entered the home and discovered evidence of a struggle, blood on walls and the floor, bloody footprints leading to the front door from a bedroom, a bloody sofa, and the victim's body. *Id.*

OCSD Captain Scott Watkins interviewed the Petitioner at the hospital. *Id.* The Petitioner stated that he could not remember what happened to the victim, but that she had been holding a "hook pick." *Id.* He had planned to make a pornographic video with the victim. *Id.* at *5. He did not remember whether he killed the victim, but he knew that she was deceased. *Id.* Multiple knives and a razor blade were found near and under the victim's body. *Id.* The Petitioner never told Captain Watkins that the victim attacked him first or that he feared for his life because the victim had a knife. *Id.*

The medical examiner testified that the victim died from "multiple sharp force injuries." *Id.* He stated that the victim suffered forty wounds, some of which were defensive wounds, and some of which were created by a serrated edge. *Id.* A knife consistent with the serrated wounds was found near the victim's body. *Id.*

A forensic examiner investigated the contents of multiple cell phones. *Id.* The victim's cell phone contained internet searches ostensibly made by the Petitioner at 6:30 p.m., asking, "[w]here do you stab to die?" and "[h]ow can I stab myself to death quickly?"

Id. At 6:37 p.m., the Petitioner’s mother sent a text message to another individual stating that the Petitioner “had killed his girlfriend,” followed by another text message one minute later stating, “Sorry. Wrong person. But [the Petitioner] killed his girlfriend and tried to kill hi[m]self.” *Id.*

The Petitioner testified that he never planned to hurt the victim and that their pornographic business was about to be “pretty big.” *Id.* He stated that the victim told him she was going to cut him and started moving toward him with a knife. *Id.* He pushed the victim around the home and called for help. *Id.* He testified that the victim then went to the bedroom and attempted to retrieve knives that were kept in the nightstand. *Id.* at *6. They began to struggle. *Id.* He did not remember stabbing the victim more than once. *Id.* During the struggle, the victim released the knife and tried to grab it again. *Id.* The Petitioner said he remembered wanting to protect himself. *Id.* When asked why he did not tell the police about his self-defense claim, he stated that he was “kind of fearful speaking with them.” *Id.* The Petitioner testified that he had been told by his family that the police had collected his laptop and the cameras which recorded the incident. *Id.*

The trial court found that the proof did not fairly raise a self-defense claim and declined to give the jury a self-defense instruction. *Id.* at *7. The Petitioner was convicted of second degree murder as a lesser-included offense of first degree murder and acquitted of abuse of a corpse. *Id.*

On appeal, the Petitioner argued that 1) his right to a speedy trial was violated; 2) the evidence was insufficient to establish he knowingly killed the victim; 3) the trial court erred by refusing to instruct the jury on self-defense; 4) the trial court erred by allowing the probation officer to testify that she was present to conduct a home visit at the Petitioner’s residence; 5) the trial court erred by admitting certain unfairly prejudicial photographs; and 6) his sentence was excessive. *Id.* *1. This court affirmed the Petitioner’s conviction; although we concluded that the trial court erred in failing to instruct the jury on self-defense and in admitting a life-in-being photo into evidence, we determined that these errors were harmless. *Id.* at *15, *19. The Tennessee Supreme Court denied review of the Petitioner’s conviction.

C. POST-CONVICTION PROCEEDINGS

On October 25, 2024, the Petitioner filed a timely pro se petition for post-conviction relief, raising various claims of ineffective assistance of trial counsel. The post-conviction court appointed counsel on November 8, 2024. Through counsel, the Petitioner filed an amended petition for post-conviction relief on May 2, 2025, alleging, as relevant to this appeal, that trial counsel rendered ineffective assistance by failing to adequately prepare for trial and communicate with the Petitioner while he was designated as “elbow counsel.”

The post-conviction court conducted an evidentiary hearing on August 28, 2025. Trial counsel testified that he served as the Public Defender for the Twenty-Seventh Judicial District for thirty-two years. He stated that he could not recall the exact number of first degree and second degree murder cases that he had handled over the years but estimated that it was a “significant number . . . probably less than [fifty].” He further stated that he personally represented “the majority of murder cases” assigned to his office during his thirty-two years as the District Public Defender. He estimated that he served as lead counsel during a jury trial between seventy-five and 100 times. He also represented defendants on appeal, but he hesitated to estimate how many.

Trial counsel stated that his office was originally appointed to represent the Petitioner soon after the victim’s murder. The Petitioner later hired retained counsel, who passed away before trial. Trial counsel stated that the Petitioner represented himself for some time after retained counsel’s death, then trial counsel was appointed as “advisory counsel” or “elbow counsel from December [2021] until about a week before trial.” When asked to draw a distinction between serving as lead counsel and elbow or advisory counsel, trial counsel stated,

My understanding is that I was there to advise him. And I also helped him to achieve his goals. I was, you might say, a legal housekeeper in the sense that if he needed help with motions or – well, actually, I don’t know that I ever actually helped him with motions. He wrote his own motions. But I was there to help him procure witnesses. I helped him when he had trouble with the jail. He had trouble interviewing witnesses at the jail, and I helped him try to do that, and I coordinated with the jail to try to assist him in his own defense.

He further stated that he helped coordinate the Petitioner’s witness interviews at the jail. He said he was not present for these interviews because the Petitioner never asked him to be present.

Trial counsel reiterated that the Petitioner drafted his own motions and stated that trial counsel did not argue any of them before the trial court on the Petitioner’s behalf. He recalled speaking with the Assistant District Attorney General about some of the motions but could not recall the substance of those conversations.

Trial counsel stated that he assisted the Petitioner by attempting to locate “some kind of missing electronic evidence.” Before trial, the Petitioner told trial counsel that he believed some electronic evidence was missing from the crime scene. Trial counsel spoke with the Assistant District Attorney General, law enforcement personnel, and a cleaning

company to locate the evidence for the Petitioner. The defense obtained funds for an expert to review electronic evidence. However, trial counsel could not recall whether they ever discussed calling the expert as a witness at trial. When asked if he reviewed any electronic evidence prior to trial, trial counsel stated,

I was his advisory counsel. I was not his counsel. I don't recall [the Petitioner] asking me about this video evidence. I'm sure that whatever [the expert] did, the report was given to him[,] and I suspect that he reviewed it. But I don't know – I don't recall what [the expert] said[,] and I don't recall that [the Petitioner] ever mentioned to me what [the expert] did or said or reviewed or showed him.

Trial counsel stated that at some point after he ceased serving as advisory or elbow counsel and began actively representing the Petitioner, he and the Petitioner discussed self-defense. However, trial counsel decided not to pursue a self-defense strategy. He believed arguing self-defense would have harmed the defense because the jury would have been offended and he would have lost credibility. In his opinion, the jury would have been angered by suggesting, by implication, that the victim was to blame for her death. His strategy was to argue that the State failed to prove premeditation beyond a reasonable doubt. He discussed this strategy with the Petitioner before trial; however, he could not recall the details of the conversation.

Trial counsel stated that he had previously represented the Petitioner in a separate case and that the Petitioner had undergone a mental health evaluation in that case. He recalled that it concluded that the Petitioner was competent to stand trial. The defense retained funds for a mental health evaluation of the Petitioner during the Public Defender's initial representation in this case. This evaluation also concluded that the Petitioner was competent to stand trial and that the Petitioner was malingering during the evaluation.

When asked how many times trial counsel met with the Petitioner in preparing for trial or motions in the "roughly six to seven months" he represented the Petitioner, trial counsel responded, "Well, I was not representing him for six to seven months. I was representing him for seven days." He clarified that he served as advisory counsel for approximately six months and as legal counsel for seven days.

Trial counsel stated that he chose to meet with the Petitioner "face-to-face" in the jail library. He believed that the Petitioner was likely in shackles during these meetings. However, if the Petitioner had ever asked trial counsel to "pull things out of his folder," he would have done so.

Trial counsel stated that he had conferences with the Petitioner three times during the week before trial. He could not recall whether he gave the Petitioner a copy of the jury instructions prepared by the trial court. He did not recall the Petitioner ever asking him to submit any special instructions concerning first degree murder, second degree murder, or manslaughter. Trial counsel recalled the Petitioner making some requests regarding the instructions, and trial counsel discussed them with the trial court. Although the trial court instructed the jury to consider voluntary manslaughter as a lesser-included offense, trial counsel did not argue it to the jury because he did not believe it was fairly raised by the proof. Trial counsel also saw no reason to ask for further clarification on the presumption-of-innocence instruction.

Trial counsel testified that he did not ask the medical examiner any questions on cross-examination because he “did not want [the medical examiner] to remain on the witness stand one more second.” The medical examiner showed pictures of the victim’s stab wounds and discussed each wound in detail. The medical examiner failed to discuss any post-mortem wounds, which resulted in the acquittal of the Petitioner’s abuse of a corpse charge. Trial counsel opined that if he had asked the medical examiner questions during cross-examination, he may have alerted the State to its failure to elicit testimony about the post-mortem wounds.

Trial counsel stated he did not attempt to impeach Deputy Cummings because he believed his testimony assisted the defense’s claim that the Petitioner was attempting to commit suicide at the time of the offense. He also stated he did not believe he could effectively impeach Deputy Cummings.

When asked why he did not take sufficient steps to impeach Investigator Angie Taylor, who testified regarding the cell phones she examined in this case, trial counsel responded that she was his witness. He recalled that Investigator Taylor testified that the Petitioner had researched how to commit suicide only after the commission of the offense. Trial counsel opined that this supported the defense argument that the Petitioner was not attempting to commit a murder or suicide, as argued by the State, but rather only contemplated suicide afterward.

Trial counsel stated that he was “very cautious” about the questions he asked the Petitioner during his trial testimony because he believed the Petitioner “lack[ed] good judgment as far as his defense was concerned.” He recalled redirecting the Petitioner when he started to discuss the production of pornographic videos with the victim because the “jury would not appreciate that kind of discussion.” Trial counsel did not believe that discussion of the Petitioner’s relationship with the victim prior to the offense would be helpful to the defense, but the State delved into this topic during cross-examination.

Trial counsel stated that he was present in court during motion hearings while serving as elbow counsel. He suspected that he might be asked to step in as active counsel at some point, so he “mentally prepared” himself to defend the Petitioner. He was acquainted with the issues and the Petitioner and believed he had adequate time to prepare for the jury trial. Trial counsel stated that he believed he provided effective assistance to the Petitioner and could not think of any way he could have achieved a better result for the Petitioner than a single conviction for second degree murder as the lesser-included offense of first degree murder, and acquittal on the charge of abuse of a corpse.

Trial counsel stated that the evidence did not support a self-defense claim and that the Petitioner’s own testimony acknowledged that he used “totally unreasonable” force. He also stated that the evidence did not indicate provocation by the victim and that the Petitioner was larger and stronger than the victim. He testified that the Petitioner thought about “putting her out of the house” and could have done so rather than killing her. Trial counsel stated that his defense strategy was to show that the homicide was not premeditated.

Trial counsel testified that he read a transcript of a hearing from this case when the Petitioner was represented by retained counsel. Retained counsel stated that he did not know what defense to argue to the jury because the Petitioner would not speak with him about the facts of the case. Trial counsel met with his legal secretary, and they reviewed the case several days before trial and noted “several facts” that he believed gave rise to reasonable doubt that the Petitioner acted with premeditation. Trial counsel presented those facts to the jury and succeeded in obtaining an acquittal of first degree murder with this strategy.

The Petitioner testified that he chose to represent himself after retained counsel passed away because he wanted to get electronic evidence from his laptops to show he had an ongoing and lucrative pornography business. He claimed this would contradict the State’s claim that he acted with premeditation and that he did not have a monetary motive for killing the victim. The Petitioner also stated that he told trial counsel that he would not testify that he saw any knives in the victim’s hand but would be willing to “testify to what I felt in my body.” He said that he weighed significantly less at the time of the offense than he did at trial.

Although he was convicted of second degree murder, the Petitioner testified that trial counsel did not “fight hard enough for second degree murder.” He said that during the seven days trial counsel represented him, trial counsel did not “look[] into anything I was telling him” about. Specifically, he wanted to show trial counsel the broken glass under the victim depicted in images of the crime scene, which he claimed could have explained the serrated wounds and countered the State’s claim that he used multiple

weapons to kill the victim. However, he said trial counsel did not review the images with him. He also believed trial counsel should have asked the court to “specify second degree murder from voluntary manslaughter.”

During his mostly narrative testimony, the Petitioner said, “A person can start something and get defense wounds, right? You could start something with me right now and get defense wounds. That [does not] mean you didn’t start it.” Post-conviction counsel asked the Petitioner if he had anything further to discuss, and the Petitioner stated, “I don’t know what I’m supposed to do here today if I’m not supposed to talk about what’s in my petition. I really don’t know. I’m lost.” No further questions were asked on direct or cross-examination.

D. POST-CONVICTION ORDER

The post-conviction court entered a written order denying post-conviction relief on October 21, 2025, concluding that the Petitioner failed to establish by clear and convincing evidence that he received ineffective assistance of trial counsel. Specifically, the post-conviction court found that trial counsel was appointed as “standby counsel” when the Petitioner began representing himself. The post-conviction court also found that the Petitioner presented no evidence that trial counsel failed to investigate and present electronic evidence supporting his self-defense claim or that he requested to be unshackled while meeting with trial counsel to find relevant evidence. The post-conviction court accredited trial counsel’s testimony that the evidence did not support self-defense, leading him to choose a different defense strategy.

The post-conviction court presumptively accredited trial counsel’s strategic decision to not request an instruction on voluntary manslaughter and “to focus on premeditation.” The court also found that trial counsel interviewed Deputy Cummings before trial and believed his testimony assisted the defense. The court also presumptively accredited trial counsel’s strategic decision not to cross-examine the medical examiner to get him “off the witness stand as fast as possible.”

II. ANALYSIS

On appeal, the Petitioner claims the post-conviction court erred in denying his petition for post-conviction relief because trial counsel provided ineffective assistance by failing to prepare for trial and by failing to adequately communicate with the Petitioner on matters relevant to his case. He contends that trial counsel owed the Petitioner a constitutional duty of effective representation even while acting in a standby or advisory role. The State argues that the Petitioner cannot assert that he received the ineffective assistance of trial counsel during the period in which he was representing himself and that

trial counsel provided effective assistance during the brief time in which he acted as active counsel for the Petitioner.

A. STANDARD OF REVIEW

The Post-Conviction Procedure Act provides relief only when a petitioner’s “conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” Tenn. Code Ann. § 40-30-103. In a post-conviction proceeding, a petitioner has the burden of proving his allegations by clear and convincing evidence. *See id.* § 40-30-110(f); *see also* Tenn. S. Ct. R. 28, § 8(D)(1). “Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998) (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). The post-conviction court’s findings of fact are conclusive on appeal unless the evidence preponderates against them, *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015) (citations omitted), while its application of the law to those factual findings and the conclusions drawn therefrom are reviewed de novo with no presumption of correctness, *Holland v. State*, 610 S.W.3d 450, 455 (Tenn. 2020) (citations omitted).

B. CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Both the Constitution of the United States and the Constitution of Tennessee provide a criminal defendant with the right to the effective assistance of counsel. *See* U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”); Tenn. Const. art. 1, § 9 (“That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel”); *see also Davidson v. State*, 453 S.W.3d 386, 392-93 (Tenn. 2014). To succeed on a claim of ineffective assistance of counsel, a post-conviction petitioner must prove, and the record must affirmatively establish, both that counsel performed deficiently and that this deficient performance adversely impacted the petitioner’s defense. *Strickland v. Washington*, 466 U.S. 668, 693 (1984); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). “A court need not address both prongs if the petitioner fails to demonstrate either one of them.” *Davidson*, 453 S.W.3d at 393.

Regarding the first element, deficient performance is that which, in consideration of “all the circumstances” and the prevailing professional norms at the time of counsel’s representation, falls below an objective standard of reasonableness. *Kendrick*, 454 S.W.3d at 457 (quoting *Strickland*, 466 U.S. at 688). We defer to counsel’s strategic and tactical decisions, even if such decisions were unsuccessful or harmful to the defense, so long as they were “informed ones based upon adequate preparation.” *Moore v. State*, 485 S.W.3d

411, 419 (Tenn. 2016) (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). In other words, so long as counsel's decisions are made after adequate preparation, this court "will not grant the petitioner the benefit of hindsight, second-guess a reasonably based trial strategy, or provide relief on the basis of a sound, but unsuccessful, tactical decision made during the course of the proceedings." *Berry v. State*, 366 S.W.3d 160, 172-73 (Tenn. Crim. App. 2011). Thus, a petitioner who alleges ineffective assistance of counsel must, through clear and convincing evidence, overcome the strong presumption "that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (citation omitted).

Regarding the second element, a post-conviction petitioner must also prove that counsel's deficient performance affected the outcome of his or her trial; that is, there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is that which is "sufficient to undermine confidence in the outcome" of the trial. *Id.* Accordingly, "a petitioner must establish that counsel's deficient performance was of such a degree that it deprived him of a fair trial and called into question the reliability of the outcome." *Mobley v. State*, 397 S.W.3d 70, 81 (Tenn. 2013) (internal quotation marks omitted) (quoting *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008)).

C. CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION

As stated above, both the Constitution of the United States and the Constitution of Tennessee guarantee criminal defendants the right to counsel in prosecutions. *See* U.S. Const. amend. VI; Tenn. Const art. 1, § 9; *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (incorporating the Sixth Amendment right to counsel to the states via the Fourteenth Amendment); *see also State v. Willis*, 196 S.W.3d 653, 702-03 (Tenn. 2016) ("Tennessee courts have consistently interpreted the right to counsel under article I, section 9 of the Tennessee Constitution as identical to the Sixth Amendment right to counsel."). These concomitant rights also guarantee a criminal defendant's right to self-representation. *See Faretta v. California*, 422 U.S. 806, 821-22 (1975); *State v. Northington*, 667 S.W.2d 57, 60 (Tenn. 1984). A criminal defendant's right to the assistance of counsel and to self-representation are alternative rights; that is, "a criminal defendant cannot logically waive or assert both rights" because "waiver of one right constitutes a correlative assertion of the other." *State v. Burkhardt*, 541 S.W.2d 365, 368 (Tenn. 1976). In other words, a criminal defendant must waive his or her right to the assistance of counsel in order to assert the right to self-representation. *State v. Hester*, 324 S.W.3d 1, 30 (Tenn. 2010). There is no constitutional right to "hybrid" representation in which a criminal defendant participates with counsel in his or her defense, although a trial court may, under certain exceptional circumstances, permit such representation. *See State v. Berry*, 141 S.W.3d 549, 574 (Tenn. 2004).

The Petitioner does not contest that he executed a valid waiver of his right to counsel on December 6, 2021, and that he proceeded pro se between that date and May 16, 2022, when he decided to no longer represent himself, and trial counsel became his attorney. However, he argues that trial counsel should have prepared for trial and communicated with the Petitioner while acting in a standby role in anticipation of his becoming lead counsel. The Petitioner asserts that his failure to do so amounted to constitutionally ineffective assistance of counsel. To address this claim, we must examine the roles of standby counsel and advisory counsel in the context of the constitutional right to effective assistance of counsel.

D. ROLE OF STANDBY OR ADVISORY COUNSEL

We shall first discuss the use of the terms “elbow counsel,” “advisory counsel,” and “standby counsel.” Tennessee courts have historically used these three terms interchangeably. However, advisory counsel serves a different function than standby counsel, and “elbow counsel” is a generic term that fails to delineate either role. The term “elbow counsel” merely describes a physical position rather than a legal role. Advisory counsel is defined as “[a]n attorney retained merely to give advice on a particular matter, as distinguished from one (such as trial counsel) actively participating in a case.” *Advisory Counsel*, Black’s Law Dictionary (12th ed. 2024). Standby counsel is defined as

A lawyer appointed by the court to be prepared to represent a defendant who waives the right to counsel, so as to ensure both that the defendant receives a fair trial and that undue delays are avoided. . . . The counsel may also provide some advice and guidance to the defendant during the self-representation.

Standby Counsel, Black’s Law Dictionary (12th ed. 2024). Black’s Law Dictionary contains no definition for “elbow counsel.”

The trial court’s “Order Substituting Counsel” entered when the Petitioner elected to represent himself during the trial phase stated, “the [Petitioner] has requested the appointment of elbow counsel to assist him in his [p]ro [s]e representation. That request[] is hereby granted, and the Office of the [District] Public Defender is hereby appointed to serve in the capacity of elbow counsel.” Based on the context of the Petitioner’s request for legal assistance while acting pro se, the trial court appears to have intended to appoint advisory counsel, not standby counsel. Trial counsel’s testimony supports this interpretation: he was there to advise the Petitioner, help with motions, procure witnesses, and coordinate with the jail to assist the Petitioner in his own defense. However, the Petitioner testified that he discussed with trial counsel having trial counsel “eventually take

over” the case. He seemed to indicate that he entered into self-representation solely to examine electronic evidence that may counter the State’s premeditation argument.

Trial counsel’s assumption of legal representation a week before trial does not demonstrate that trial counsel had acted in a standby role up to that point. To determine the function of legal counsel in a matter of self-representation, we must look to the purpose the trial court designated at the time of the initial appointment. Here, the trial court stated that it appointed the public defender “to assist [the Petitioner] in his [p]ro [s]e representation.” This language clearly indicates that the appointment was to provide an attorney to serve as advisory counsel, not standby counsel.

The generic term “elbow counsel” makes it difficult for all parties to understand the role an attorney may perform when assigned to assist a self-represented client. Although both trial and appellate courts routinely refer to “elbow counsel,” we take this opportunity to encourage our courts to specify whether an attorney assisting a self-represented defendant is acting as advisory counsel or standby counsel and to forsake the term “elbow counsel.” Our supreme court addressed the use of these terms more than twenty-five years ago in *State v. Small*, 988 S.W.2d 671 (Tenn. 1999) thusly:

The parties use the term “elbow counsel.” We interpret “elbow counsel” to mean an attorney who functions in a purely advisory role, without actively participating in the trial. A pro se defendant who is permitted such counsel may consult counsel for guidance and advice, but otherwise handles the defense of the case on his or her own. Because we find the term “advisory counsel” to more accurately describe the role such an attorney plays, we will use that term in place of “elbow counsel.” Another term commonly used in other jurisdictions is “standby counsel.” We perceive “standby counsel” to mean counsel who is not actively participating in the trial but is available to step in and take over as counsel if called upon to do so by either the defendant or the trial court. We recognize that in the past, appellate courts have used the terms “elbow counsel,” “advisory counsel,” and “standby counsel” interchangeably. We now take the opportunity to clarify these terms for Tennessee.

Id. at 672 n.1.

Likewise, this court recently discussed the danger of confusion in referring to counsel as “elbow counsel.” In *State v. Smith*, we reiterated the significance of the distinction between advisory counsel and standby counsel: “The generic usage of ‘elbow counsel’ might cause an attorney to agree to serve in one role, only to find that he or she will actually be serving in another more-involved role at trial.” *State v. Smith*, No. E2024-

01711-CCA-R3-CD, 2026 WL 1506904, at *9 (Tenn. Crim. App. May 29, 2026), *no perm. app. filed*. We also noted that “[a]n attorney who is asked to serve as standby counsel, it seems, would require a much greater level of preparation and familiarity with the case than an attorney who is asked to serve merely as an advisory counsel.” *Id.* Nevertheless, we conclude that in the context of a constitutional ineffective assistance of counsel claim, it matters not whether an attorney acted as advisory counsel or standby counsel because, in either situation, the criminal defendant engaged in self-representation. He or she is responsible for all legal decisions and actions. As stated by our supreme court, a defendant “may conduct his own defense without benefit of counsel or with an attorney present in the capacity of ‘elbow counsel.’ The choice is his; he represents himself or he is represented—one or the other, but not both.” *Burkhart*, 541 S.W.2d at 371. Thus, a defendant who has validly waived his right to counsel may not complain that he received the ineffective assistance of counsel for actions occurring while representing himself.

Accordingly, because we conclude that the Petitioner was not constitutionally entitled to effective assistance of counsel while representing himself, we respectfully reject the Petitioner’s claim that trial counsel provided ineffective assistance of counsel while acting as advisory or standby counsel. However, we will consider the Petitioner’s claims regarding trial counsel’s performance during the period in which he actively represented the Petitioner.

E. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The Petitioner claims that after trial counsel began actively representing him, trial counsel rendered ineffective assistance by failing to 1) adequately prepare for trial; 2) communicate with the Petitioner regarding his self-defense claim; 3) provide a copy of the jury instructions to the Petitioner prior to or during trial; and 4) communicate with the Petitioner regarding “other relevant matters” pertaining to his defense. The post-conviction court found that the Petitioner failed to establish ineffective assistance in these areas. We agree.

The Petitioner’s primary complaint about trial counsel’s preparation centers on activities that occurred when trial counsel was serving in a merely advisory capacity. Even then, the record shows that trial counsel assisted the Petitioner greatly in preparing his own defense. During this time, trial counsel helped the Petitioner access electronic evidence, arranged witness meetings, communicated with jail personnel to help the Petitioner review evidence, searched for missing electronic evidence, obtained funds for an expert witness, and discussed the case with the Assistant District Attorney General.

Trial counsel owed the Petitioner a constitutional duty to prepare adequately for trial during the one week he served as his attorney. The record shows that during this brief

time, trial counsel diligently prepared for trial, met with the Petitioner, developed a sound trial strategy, and obtained witnesses. Perhaps he could have done more if he had taken over sooner, but the Petitioner's choice prevented that. Moreover, the Petitioner has not established any prejudice stemming from trial counsel's actions during this timeframe. He is not entitled to relief on this claim.

Contrary to the Petitioner's argument that trial counsel failed to communicate with him about self-defense and trial strategy, trial counsel testified that he met with the Petitioner three times in the week prior to trial and that they specifically discussed self-defense. Trial counsel provided a sound strategic reason for not pursuing a self-defense claim. We will not second-guess an attorney's strategic decisions so long as counsel's decisions are made after adequate preparation. *See Berry*, 366 S.W.3d at 172-173. After reviewing the evidence, trial counsel reasoned that it would not support a successful self-defense claim, so he chose a different strategy. The Petitioner has failed to show how further discussions with his attorney about self-defense would have affected the trial outcome in any way. He is not entitled to relief on this claim.

Trial counsel also testified that he may have provided the Petitioner with a copy of the jury instructions, but he could not recall. The Petitioner offered no proof or argument to the post-conviction court or this court that any specific jury instruction was not discussed with the Petitioner, or that the failure to provide the Petitioner with a copy of those instructions constitutes deficient performance or prejudice. Furthermore, although the Petitioner claims that trial counsel failed to communicate with him regarding "other relevant matters," he does not explain what these matters were or how trial counsel's failure constituted ineffective assistance of counsel. We will not endeavor to craft such an argument for him. The record supports the post-conviction court's finding that the Petitioner has failed to establish either deficient performance by trial counsel or prejudice.

III. CONCLUSION

Following our review of the record and based upon the foregoing analysis, we affirm the judgment of the post-conviction court.

s/ STEVEN W. SWORD

STEVEN W. SWORD, JUDGE