

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

ERIC SIMS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 14-00672 Carlyn L. Addison, Judge

No. W2025-01964-CCA-R3-PC

The Petitioner, Eric Sims, appeals from the Shelby County Criminal Court's denial of his petition for post-conviction relief, in which he alleged ineffective assistance of trial counsel. The Petitioner claims on appeal that the post-conviction court erred by denying his petition in that he established ineffective assistance of counsel because trial counsel 1) stipulated to the Petitioner's gang affiliation; 2) failed to file a motion to suppress an unduly suggestive photographic lineup; and 3) failed to adequately cross-examine and impeach three of the State's witnesses. He also argues that he is entitled to post-conviction relief under the cumulative error doctrine. Following our review, we affirm the post-conviction court's judgment but remand for entry of corrected judgments of conviction.

Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Criminal Court Affirmed;
Remanded for Entry of Corrected Judgments

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

Donald S. Hackett, III, Memphis, Tennessee, for the appellant, Eric Sims.

Jonathan Skrmetti, Attorney General and Reporter; Kelly M. Telfeyan, Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Monica A. Timmerman and Alicia Walton, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

A. TRIAL

This case arises from the August 2, 2013 murder of Montarius Pigrum and attempted murders of Kaylin Brown, Addrinne Odom, Michael Tate, Cedric Ford,¹ Demetrius Ford,² and Tyrone White. On February 6, 2014, a Shelby County grand jury returned a fourteen-count indictment charging the Petitioner and two codefendants, Jerome Jackson and Darius Buckner, with one count of first degree murder, seven counts of employment of a firearm during the commission of a dangerous felony, and six counts of attempted first degree murder.³ The codefendants' charges were ultimately severed from the Petitioner's charges, and Mr. Jackson testified at the Petitioner's trial.

The evidence adduced at the Petitioner's trial established that he was a high-ranking member of the Piru street gang, an affiliate of the Bloods gang. *State v. Sims*, No. W2016-02049-CCA-R3-CD, 2017 WL 3895010, at *1 (Tenn. Crim. App. Sept. 5, 2017), *no perm. app. filed*. At approximately 10:00 p.m. on August 2, 2013, Ronald Singleton, also a member of the Piru gang, fought Tradarius Jones,⁴ a member of the Crips gang. *Id.* Afterward, Mr. Singleton went to a nearby home and met with the Petitioner and several other Piru members to inform them of the altercation. *Id.* The Petitioner and his fellow gang members, including Mr. Jackson and Mr. Buckner, left the home to find Mr. Jones. *Id.* They found Mr. Jones at the intersection of Bishops Bridge Road and Beauchamp Street and began fighting him. *Id.*

Meanwhile, the seven victims approached the intersection on foot and saw “several men fighting Mr. Jones.” *Id.* One of the men “said something like ‘you all want some of this?’ and ‘this Piru stuff.’” *Id.* The victims noticed that the Petitioner and another man were armed and ran away from the intersection, and the men began shooting at them as they fled. *Id.* At trial, the witnesses offered varying identifications of the shooter: Mr. Odom was unable to identify the shooter but noted that the shooter wore “dreads”; Mr.

¹ This court's opinion from the Petitioner's direct appeal alternatively spells Cedric Ford's first name as “Cedric” and “Cedrick.” This appears to be a typographical error; the Petitioner's indictment spells this victim's name as “Cedric,” and for consistency, we adopt that spelling in this opinion.

² Because Cedric Ford and Demetrius Ford share a surname, we will hereafter refer to them by their first names only. We intend no disrespect.

³ To assist in our resolution of this proceeding, we take judicial notice of the appellate record from the Petitioner's direct appeal. *See* Tenn. R. App. P. 13(c); *Harris v. State*, 301 S.W.3d 141, 147 n.4 (Tenn. 2010).

⁴ The transcript in this case and the Petitioner's appellate brief spell Tradarius Jones's first name as “Truderias.” This appears to be a typographical error; Mr. Jones testified at the Petitioner's trial and spelled his first name for the record as “Tradarius,” and for consistency, we adopt that spelling in this opinion.

White identified Mr. Buckner, who did not wear dreadlocks, as the shooter; Cedric identified Mr. Smith as the shooter; and Mr. Tate, Mr. Jackson, and Demetrius identified the Petitioner, who wore dreadlocks, as the shooter. *Id.*

As the victims fled, Mr. Pigrum, Mr. White, and Cedric ran towards nearby Bertram Cove. *Id.* at *2. Mr. White and Cedric took shelter in the backyard of a nearby home while Mr. Pigrum ran towards Christopher Gainer's home. *Id.* Mr. Gainer spoke with Mr. Pigrum outside his home, and during their conversation, a dark-colored vehicle drove along Bertram Cove. *Id.* The Petitioner exited the passenger side of the vehicle, began arguing with Mr. Pigrum, shot him, and then returned to the vehicle. *Id.* Mr. Pigrum died, and a subsequent autopsy determined his cause of death to be from a gunshot wound to the neck. *Id.* at *3.

Upon this proof, the jury convicted the Petitioner of one count of first degree murder, six counts of employment of a firearm during the commission of a dangerous felony, and six counts of attempted first degree murder.⁵ *Id.* at *4. At the Petitioner's sentencing hearing, the trial court imposed a sentence of life incarceration for the Petitioner's conviction of first degree murder; six years' incarceration for each of the Petitioner's convictions of employment of a firearm during the commission of a dangerous felony; and twenty-five years' incarceration for each of the Petitioner's convictions of attempted first degree murder. *Id.* The trial court aligned these sentences consecutively, yielding an effective sentence of life incarceration plus 186 years.⁶ *Id.* at *4, *9-10.

The Petitioner timely appealed to this court, challenging the sufficiency of the convicting evidence, the admission of evidence of his gang affiliation, the length of his sentence, and the imposition of consecutive sentences. *Id.* at *4. This court affirmed the trial court's judgments in all respects, and the Petitioner did not seek permission to appeal to the Tennessee Supreme Court. *Id.* at *1, *10.

B. POST-CONVICTION PROCEEDINGS

On January 11, 2018, the Petitioner filed a pro se petition for post-conviction relief alleging, among other claims, that he received the ineffective assistance of counsel due to trial counsel's failure to object to the admission of "gang evidence" and to challenge his

⁵ At the close of proof, the State agreed to dismiss Count 2 of the Petitioner's indictment, which charged him with employment of a firearm during the commission of a dangerous felony, via *nolle prosequi*.

⁶ We note that page four of this court's opinion from the Petitioner's direct appeal incorrectly states that the trial court "ordered the sentences run concurrently." *Sims*, 2017 WL 3895010, at *4. This is a typographical error which had no impact on our analysis. The Petitioner challenged the trial court's imposition of consecutive sentences on direct appeal, and this court affirmed. *Id.* at *9-10.

pretrial identification in a photographic lineup. The post-conviction court appointed counsel on February 16, 2018, and the Petitioner filed an amended petition on January 25, 2019. Post-conviction counsel withdrew on April 15, 2019, and the post-conviction court appointed substitute counsel that same day.

On May 25, 2023, the Petitioner filed another amended petition for post-conviction relief, alleging, among other claims, that he received the ineffective assistance of counsel because trial counsel 1) stipulated to his gang affiliation; 2) failed to file a motion to suppress an unduly suggestive photographic lineup; and 3) failed to adequately cross-examine and impeach the State's witnesses, including Mr. Jones, Mr. White, and Sergeant Fausto Frias. The Petitioner filed another amended petition raising the same claims on September 12, 2023. The State filed a motion opposing post-conviction relief on July 25, 2024, and the post-conviction court held an evidentiary hearing on May 9, 2025.⁷

Memphis Police Department Sergeant Fausto Frias testified he served as a detective and investigated the Petitioner's case. He stated that he routinely used photographic lineups in the course of his work and typically created them using an individual's mugshot photographs or driver's license photographs. He stated that he preferred to use a computer program that used mugshot photographs to create photographic lineups because it was "a lot quicker." He stated that he would input a description of a suspect's physical characteristics into the computer program, and the program would, in turn, generate photographs of individuals with matching characteristics. He stated that he was limited to photographs taken from a suspect's mugshot or driver's license in preparing a photographic lineup. Sergeant Frias attempted to use photographs that resembled how the individual looked at the time of the offenses.

Sergeant Frias testified that he was trained to ensure the photographic lineups he created were not "too suggestive." He stated he did not generally consider whether a suspect was wearing "gang colors" when creating a photographic lineup. He agreed that the Piru street gang was affiliated with the Bloods gang and that its members typically wore red clothing to identify themselves to other members.

⁷ The record is unclear as to the reason for the more-than-seven-year delay between this case's initiation in January 2018 and the evidentiary hearing in May 2025. Although not pertinent to our holding in this case, we note that Tennessee Code Annotated section 40-30-108(a) requires that the State file an answer to an amended petition for post-conviction relief within thirty days of its filing, unless that timeframe is "extended for good cause." Further, Code section 40-30-109(a) requires that the post-conviction court schedule and enter a prehearing order within thirty days of the State's answer and schedule an evidentiary hearing within four months of the entry of the prehearing order. *See* Tenn. Code Ann. §§ 40-30-108(a), -109(a).

Sergeant Frias initially stated he did not recall whether he interviewed or presented any witnesses with photographic lineups in this case; he later agreed that he presented photographic lineups to Mr. White, Cedric, and Demetrius. Sergeant Frias agreed that on August 4, 2013, he presented a photographic lineup to Cedric, and Cedric identified an individual from the lineup who was not the Petitioner. That same day, Sergeant Frias presented the same photographic lineup to Demetrius, and Demetrius identified two individuals as being present during the offenses; Sergeant Frias testified he did not know whether either individual Demetrius identified was the Petitioner. Sergeant Frias agreed that he presented Mr. White with “essentially the same” photographic lineup on August 22, 2013, and that Mr. White was unable to identify a suspect from the lineup.

Sergeant Frias agreed that he presented another photographic lineup to Cedric and Demetrius on September 2, 2013. This photographic lineup included a photograph of the Petitioner. Cedric identified the Petitioner as the shooter who “chase[d] us onto the [C]ove and got out [of] the car firing,” and Demetrius identified the Petitioner as “the one who fire[d] shots at the victims,” noting that he saw the Petitioner “standing outside the passenger side of the black car in front of the white house on Beauchamp.”

Sergeant Frias testified that he did not recall how he prepared the photographic lineups in this case or how the Petitioner was developed as a suspect. He stated that the photograph of the Petitioner included in the September 2, 2013 photographic lineup depicted the Petitioner wearing black and white clothing. He averred that, although he had difficulty seeing at nighttime, he had no vision impairments.

Trial counsel testified that he was licensed to practice law in 2008 and had worked exclusively in criminal defense since then. Trial counsel noted that “a high percentage” of his practice involved murder cases and that he had represented many defendants affiliated with gangs. Trial counsel stated he was unsure how long he represented the Petitioner prior to his trial; however, he averred that he had “plenty of time” to prepare for trial and that he met with the Petitioner to discuss trial strategy, met with the prosecutors, reviewed discovery, prepared an alibi defense, and interviewed witnesses.

Trial counsel described the Petitioner’s case as “an identity case” involving two groups of individuals. The first group included the victims, who did not know the Petitioner prior to the offenses; accordingly, trial counsel described their identifications of the shooter as “kind of suspect and kind of all over the place,” an issue he stated he raised at trial. He noted that some of the victims described the shooter as wearing dreadlocks, while others described him as having a “low haircut.” The second group was comprised of the Petitioner’s “associates,” which included his fellow gang members and codefendants, who identified the Petitioner as the shooter. Because these witnesses positively identified the Petitioner as the shooter, trial counsel devised a strategy to

impeach their credibility. He stated that he argued the Petitioner's fellow gang members sought to ensure the Petitioner was convicted by falsely identifying him as the shooter in order to "advance themselves within the organization." Trial counsel testified that he had to stipulate that the Petitioner was a member of a gang to pursue this trial strategy. He stated that he did not always stipulate to a defendant's gang affiliation when it was pertinent to a case, but he felt it was necessary here because the Petitioner's gang affiliation provided "the entire context of the case." Trial counsel opined that without proof of the Petitioner's gang affiliation, his defense would "lose a little bit of a reason about why his compatriots would be lying." He also noted that "almost everybody" who testified at trial was affiliated with a gang, and he believed that, accordingly, proof of the Petitioner's own gang affiliation was not as prejudicial as it might have been in a different case. Trial counsel testified that the Petitioner agreed to stipulate that he was a member of a gang after they discussed trial strategy.

Trial counsel testified that he cross-examined the Petitioner's fellow gang members by eliciting proof of their own gang affiliation and asking questions "that revealed their biases without directly asking them about their biases." Trial counsel stated that he would not have asked these witnesses directly whether they would be "moving up" in the gang if the Petitioner was convicted, but would rather have left it open to the jury's interpretation. He also stated he "probably" cross-examined them with proof of their criminal records, and he conceded he could have assailed their credibility with this proof alone without stipulating to the Petitioner's gang affiliation.

Trial counsel testified that the photograph of the Petitioner included in the September 2, 2013 photographic lineup depicted the Petitioner wearing mostly black clothing with some white and "a little bit of a red collar up on his shirt, around his neck area." He described the red and white portion of the Petitioner's clothing as "sort of like small stripes." He agreed that the photographs of the other individuals included in the photographic lineup did not depict them wearing any red clothing. Trial counsel stated he had not noticed the red portion of the Petitioner's clothing until post-conviction counsel called it to his attention.

Trial counsel stated he did not consider filing a motion to suppress the September 2, 2013 photographic lineup on the grounds that it was unduly suggestive. He stated that the red stripe on the Petitioner's clothing could be suggestive and that he "probably" would have filed a motion to suppress if he had noticed it. He stated that he did not know whether such a motion would have been successful but that he would have done "anything" to challenge the witnesses' identifications of the Petitioner at trial.

Trial counsel recalled that Mr. Jones testified as part of the State's case-in-chief. He agreed that Mr. Jones was affiliated with the Crips, that other individuals involved in the

case were affiliated with the Bloods, and that the two gangs had “some sort of argument.” Trial counsel stated he “probably would have” asked Mr. Jones about his gang affiliation at trial. He agreed he had reviewed a police supplement summarizing Mr. Jones’s statement to law enforcement when reviewing discovery materials, and he stated he would not have been able to impeach Mr. Jones with those statements because Mr. Jones neither signed nor adopted the statements. He stated he likely refrained from questioning Mr. Jones about “the stuff that was shouted out at him” because he felt he did not have a “strong impeachment basis.”

Trial counsel also recalled that Mr. White testified as part of the State’s case-in-chief. Trial counsel stated he reviewed Mr. White’s signed statement to law enforcement prior to the Petitioner’s trial. In his signed statement, Mr. White identified Mr. Jones as a member of the Crips and noted that he often wore blue clothing. Trial counsel agreed that he could have impeached Mr. White with this statement if he contradicted it on the stand, but he was unsure whether Mr. White did. He also noted that Mr. White failed to identify any individual as the shooter when presented with a photographic lineup on August 22, 2013.

Trial counsel recalled that Cedric and Demetrius testified about their pretrial identifications from the photographic lineups they were shown, but he did not recall whether he or the State elicited that testimony. He was unsure whether he asked either Cedric or Demetrius about the time between the offenses and their pretrial identifications, their degree of attention during the offenses, or their ability to see the offenses. He agreed he did not cross-examine Cedric about the red stripe on the Petitioner’s clothing. Trial counsel described his cross-examination strategy as depending on the information the State had already elicited; he stated he did not like to “waste questions” by asking questions that had already been answered unless he “really need[ed] to hit it home for some reason.”

On cross-examination, the State refreshed trial counsel’s recollection by presenting him with a copy of the transcript of the Petitioner’s trial. Trial counsel agreed that he asked Mr. White whether he was affiliated with a gang; although Mr. White denied he was, he noted that Mr. Jones was affiliated with the Crips and often wore blue clothing. Trial counsel also elicited proof that Mr. White could not identify either of the two individuals he saw exit a vehicle during the offenses. Trial counsel also cross-examined Demetrius about his initial failure to identify a suspect in the August 4, 2013 photographic lineup and asked questions “surrounding gang affiliation,” his observations on the night of the offenses, and his statements to law enforcement.

Trial counsel testified that he reviewed discovery and discussed the inconsistencies in the witnesses’ identifications with the Petitioner before trial. During these discussions, he informed the Petitioner that evidence of his gang affiliation might be presented at trial

and that it was a “bad fact[]” he would need to confront. Trial counsel described the Petitioner as holding a “very high” rank in his gang. He stated he developed a trial strategy to argue that the State’s witnesses who positively identified the Petitioner and were also affiliated with the Petitioner’s gang would “move up” in the gang’s rankings by testifying against the Petitioner. Trial counsel stated that he discussed this strategy with the Petitioner, as well as stipulating to his gang affiliation, and that the Petitioner “always agreed” such proof was necessary to his defense.

Trial counsel stated that although the photograph of the Petitioner included in the September 2, 2013 photographic lineup depicted a portion of the Petitioner’s clothing as red, it also depicted him wearing black and white clothing. He further stated that the photographic lineup depicted other individuals wearing “multi-colored, different outfits” with colors affiliated with other gangs. He also noted that members of the Bloods sometimes got specific tattoos to identify themselves to other members and that the photograph did not depict the Petitioner with any tattoos.

On redirect examination, trial counsel conceded that an individual affiliated with a gang may have noticed the red portion of the Petitioner’s clothing as shown in the September 2, 2013 photographic lineup. He also recalled an issue with another photographic lineup Sergeant Frias prepared in this case, which he described as suggestive because it included a “line pointing to” an individual. He described this photographic lineup as the worst he had ever seen and noted that he used it to impeach Sergeant Frias’s credibility during cross-examination. He agreed that proof of “two suggestive lineups would have been bad.” He said he did not know whether the jury’s verdict would have differed if he had cross-examined Sergeant Frias with proof of the September 2, 2013 photographic lineup, but he felt confident in his trial strategy during the trial.

Trial counsel testified he had filed approximately twenty motions to suppress in his career, with the understanding that some motions would be unsuccessful. He conceded that, in hindsight, he would “be comfortable” with filing a motion to suppress the September 2, 2013 photographic lineup if he could try the case again.

The Petitioner testified that he was not aware the parties could elicit proof of his gang affiliation unless he testified and that he elected not to testify to prevent the State from eliciting proof of his gang affiliation and prior criminal record. He recalled that he discussed the admissibility of proof of his gang affiliation with trial counsel prior to trial and that trial counsel discussed stipulating to his gang affiliation on the first day of his trial.

The Petitioner stated he received and reviewed discovery, including the victims’ and witnesses’ statements to law enforcement, with trial counsel before trial. The Petitioner recalled that neither Mr. Jones nor Mr. Odom correctly described him; that Mr. White

described someone who looked similar to him; that either Mr. Tate or Mr. White, but not both, correctly identified him; and that Cedric and Demetrius correctly identified him. He agreed that the witnesses' pretrial identification from photographic lineups was an issue at trial. He averred that no witness identified him in the first set of photographic lineups and that every witness presented with a second lineup identified him.

The Petitioner recalled that two of his "associates" identified him as the shooter; he stated they may have falsely identified him because "they wanted to get out of trouble." He also explained that he stepped down from his position in his gang one year before the offenses and that, afterward, he was permitted to "leave a rank" to his associates. He stated that his associates were dissatisfied with the rank they received and that this, too, may have motivated them to testify against him. He opined that he would have testified in his defense if he had known that proof of his gang affiliation would be presented at trial. He stated he understood trial counsel's strategy to be a challenge to the witnesses' ability to identify him as the shooter and to argue the witnesses were testifying against him to "get off on what they already had going on."

On cross-examination, the Petitioner testified that trial counsel extensively reviewed discovery with him prior to his trial and that he received discovery materials approximately six months before trial. He stated he did not inform trial counsel that the September 2, 2013 photographic lineup depicted a portion of his clothing as red until "the appeal process." He agreed that trial counsel was "very vigorous" in cross-examining the State's witnesses. He stated he and trial counsel discussed trial strategy prior to trial.

On redirect examination, the Petitioner recalled stating he would not testify in his defense "in the middle of his trial," before trial counsel began calling witnesses. He agreed that proof of his gang affiliation had already been adduced at that point, but he maintained that he elected not to testify to prevent the State from eliciting proof of his prior criminal record. The Petitioner testified that trial counsel did not show him a color version of the September 2, 2013 photographic lineup and that he did not receive a copy of the lineup until he was represented by new counsel following his conviction.

Following closing arguments, the post-conviction court denied relief. The post-conviction court found that trial counsel strategically chose not to file a "frivolous" motion to suppress the September 2, 2013 photographic lineup and that the lineup was not unduly suggestive, noting that the photograph of the Petitioner depicted him wearing "a sliver of red" and "more black than red" clothing. The post-conviction court further found that trial counsel did not render ineffective assistance by stipulating to the Petitioner's gang affiliation, noting that the parties agreed to the evidence's admissibility during a pretrial evidentiary hearing. The post-conviction court also found that the Petitioner's arguments about the witnesses' identifications and testimony turned on his disagreement with their

credibility, an issue reserved for and resolved by the jury. The post-conviction court entered an order recording its findings on November 12, 2025, and this timely appeal followed.

II. ANALYSIS

On appeal, the Petitioner maintains he received the ineffective assistance of counsel because trial counsel 1) stipulated to his gang affiliation; 2) failed to file a motion to suppress the September 2, 2013 photographic lineup as unduly suggestive; and 3) failed to adequately cross-examine and impeach Mr. Jones, Mr. White, and Sergeant Frias. He also argues he is entitled to post-conviction relief pursuant to the cumulative error doctrine. The State responds that the post-conviction court appropriately denied each claim for relief. We will address these claims in turn.

A. STANDARD OF REVIEW AND BURDEN OF PROOF

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).

Both the Constitution of the United States and the Constitution of Tennessee provide a criminal defendant 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. Each element of the *Strickland* analysis of an ineffective assistance of counsel claim is a mixed question of law and fact that this court reviews de novo. *Phillips v. State*, 647 S.W.3d 389, 400 (Tenn. 2022) (citing *Dellinger v. State*, 279 S.W.3d 282, 294 (Tenn. 2009)); *Kendrick*, 454 S.W.3d at 457.

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)).

B. STIPULATION TO GANG AFFILIATION

The Petitioner first argues that trial counsel rendered ineffective assistance by stipulating that he was affiliated with a gang. He contends that this decision required his approval and that he was not fully advised regarding the stipulation’s consequences. He argues that the entry of the stipulation prejudiced his defense by making him appear “more culpable as someone [who] would be interested in carrying out the incident.” The State responds, and we agree, that the post-conviction court appropriately denied relief.

A stipulation serves to obviate the need for evidence regarding the stipulated matter. *Overstreet v. Shoney's Inc.*, 4 S.W.3d 694, 701 (Tenn. Ct. App. 1999). “A stipulation is an agreement between counsel regarding business before the court . . . which is entered into mutually and voluntarily by the parties.” *Id.* (first citing *State v. Ford*, 725 S.W.2d 689, 691 (Tenn. Crim. App. 1986); and then citing *State v. Morris*, 641 S.W.2d 883, 889 (Tenn. 1982)). Thus, by definition, a stipulation to the admissibility of evidence requires an affirmative agreement between the parties, and to be binding, the record must clearly indicate that the parties agreed to enter into such a stipulation. *See State v. Hurn*, No. E2022-01192-CCA-R3-CD, 2023 WL 7001621, at *3 (Tenn. Crim. App. Oct. 24, 2023), *perm. app. denied* (Tenn. Apr. 11, 2024).

In denying relief, the post-conviction court accredited trial counsel’s testimony, and the record does not preponderate against this finding. At the post-conviction evidentiary hearing, trial counsel described the Petitioner’s case as involving two groups of witnesses: the victims, who did not know the Petitioner and whose identifications of him as the shooter were inconsistent; and the Petitioner’s fellow gang members, who knew the Petitioner and identified him as the shooter. Trial counsel developed a strategy to assail the latter group’s credibility by arguing they falsely identified the Petitioner in order to advance their own position in the gang. Trial counsel testified that stipulating to the Petitioner’s gang affiliation provided important context to his trial strategy and that, after he discussed the issue with the Petitioner, the Petitioner agreed to enter the stipulation and approved the trial strategy. Thus, inasmuch as the Petitioner claims that he did not agree to stipulate that he was affiliated with a gang, he is not entitled to relief.

Moreover, the record establishes that proof of the Petitioner’s gang affiliation was crucial to trial counsel’s trial strategy. As the Petitioner concedes, this case involved a conflict between members of two rival gangs, and as trial counsel noted, nearly every witness who testified was affiliated with a gang. In light of these facts, trial counsel devised a strategy to challenge the credibility of the State’s strongest witnesses by using evidence of their motive to falsely identify the Petitioner to increase their own standing in the gang. The post-conviction court accredited trial counsel’s testimony and found that the Petitioner agreed to this strategy. Even if it was unsuccessful, this trial strategy was reasonable and developed after adequate preparation, so it is entitled to deference. *See Berry*, 366 S.W.3d at 172-73. The Petitioner is not entitled to relief on this basis.

C. MOTION TO SUPPRESS

The Petitioner also asserts that trial counsel rendered ineffective assistance by failing to file a motion to suppress the September 2, 2013 photographic lineup. He contends that the photographic lineup was unduly suggestive because it depicted the Petitioner as the only individual wearing red clothing, and he argues that a motion to

suppress on this basis would have been meritorious. He contends that the admission of the photographic lineup and of the witnesses' pretrial identifications therefrom was prejudicial because identity was a crucial issue at his trial. The State responds, and we agree, that the post-conviction court appropriately denied relief.

A post-conviction petitioner asserting he or she received ineffective assistance of counsel based upon counsel's failure to file a motion to suppress must prove, by clear and convincing evidence, that "(1) a suppression motion would have been meritorious; (2) counsel's failure to file such motion was objectively unreasonable; and (3) but for counsel's objectively unreasonable omission, there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Phillips*, 647 S.W.3d at 404. To meet this burden, a petitioner must, essentially, "incorporate a motion to suppress within the proof presented at the post-conviction hearing." *Cecil v. State*, No. M2009-00671-CCA-R3-PC, 2011 WL 4012436, at *8 (Tenn. Crim. App. Sept. 12, 2011), *no perm. app. filed*.

A conviction based upon an eyewitness's identification of a defendant at trial following a pretrial identification from a photograph "will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968); *see also State v. Martin*, 505 S.W.3d 492, 500 (Tenn. 2016). "To be admissible as evidence, an identification must not have been conducted in such an impermissibly suggestive manner as to create a substantial likelihood of irreparable misidentification." *State v. Cribbs*, 967 S.W.2d 773, 794 (Tenn. 1998). In determining a pretrial identification's validity, a trial court must first determine where the identification was unduly suggestive; if so, then the trial court must determine whether, under the totality of the circumstances, the identification was nevertheless reliable. *See Neil v. Biggers*, 409 U.S. 188, 198-99 (1972); *see also State v. Scarborough*, 300 S.W.3d 717, 729 (Tenn. Crim. App. 2009). As we have previously held, "a lineup would be considered unduly suggestive only when the other participants were grossly dissimilar." *State v. Edwards*, 868 S.W.2d 682, 694 (Tenn. Crim. App. 1993); *see also Scarborough*, 300 S.W.3d at 729-30. If the pretrial identification is not unduly suggestive, then it is unnecessary to determine whether, under the totality of the circumstances, it was nevertheless reliable. *State v. Butler*, 795 S.W.2d 680, 686 (Tenn. Crim. App. 1990).

In consideration of this claim, the post-conviction court found that the September 2, 2013 photographic lineup depicted the Petitioner wearing only "a sliver of red" and "more black than red" clothing. The post-conviction court reasoned that the photographic lineup was not unduly suggestive and that trial counsel's decision not to file a "frivolous" motion challenging its admission on that basis was reasonable. Having reviewed the photographic lineup, we agree. The photograph of the Petitioner depicted him wearing only a very small portion of red clothing; the majority of the Petitioner's visible clothing was black and

white. Trial counsel testified that gang members may signal their gang affiliation by wearing clothing in a variety of colors, including red, blue, black, and white, and the other individuals depicted in the photographic lineup were shown wearing those colors. Even though, to be sure, a small portion of red in the Petitioner's clothing was visible in the photographic lineup, it was negligible; indeed, trial counsel testified that he did not notice the red portion of the Petitioner's clothing until post-conviction counsel called it to his attention, and Sergeant Frias did not notice the red portion at all. Because the photograph of the Petitioner was not grossly dissimilar from the photographs of the other individuals included in the photographic lineup, the lineup was not unduly suggestive. Accordingly, a motion to suppress the photographic lineup on this basis would not have been meritorious. The Petitioner is not entitled to relief on this basis.

D. CROSS-EXAMINATION AND IMPEACHMENT

The Petitioner also argues that trial counsel rendered ineffective assistance by failing to adequately cross-examine and impeach 1) Mr. Jones regarding his gang affiliation; 2) Mr. White regarding Mr. Jones's gang affiliation and the photographic lineups Mr. White was presented; and 3) Sergeant Frias regarding the September 2, 2013 photographic lineup. The State responds that the post-conviction court appropriately denied relief on each claim. We will consider these issues in turn.

1. Mr. Jones and Mr. White

The Petitioner contends that trial counsel rendered ineffective assistance by failing to question Mr. Jones regarding his gang affiliation to impeach his credibility. He concedes that the jury learned Mr. Jones was a member of the Crips gang; however, he posits that trial counsel should nevertheless have "contextualized" this information by explaining that Mr. Jones had an interest in the Petitioner's being convicted because he was in a rival gang. The Petitioner also contends that trial counsel rendered ineffective assistance by failing to cross-examine Mr. White regarding Mr. Jones's gang affiliation and the photographic lineups Mr. White was presented. He challenges the post-conviction court's exclusion of Mr. White's statement to law enforcement from evidence at the post-conviction evidentiary hearing, contending that it was relevant to establish trial counsel's knowledge of pertinent impeachment material. The Petitioner contends that a more thorough cross-examination of Mr. White would have successfully impeached his credibility and led the jury to render a different verdict.

When a petitioner claims that trial counsel performed deficiently by failing to adequately cross-examine a witness, he or she must "present that witness at the post-conviction evidentiary hearing to show how the witness would have responded to trial counsel's questioning." *Keene v. State*, No. E2022-01410-CCA-R3-PC, 2023 WL

5978223, at *5 (Tenn. Crim. App. Sept. 14, 2023), *perm. app. denied* (Tenn. Feb. 13, 2024). A petitioner should also provide “‘specifics regarding what questions trial counsel should have asked’ the witness.” *Id.* (quoting *McDonald v. State*, No. E2016-02565-CCA-R3-PC, 2017 WL 4349453, at *4 (Tenn. Crim. App. Sept. 29, 2017), *no perm. app. filed*).

The Petitioner has failed to establish prejudice regarding either witness. The Petitioner did not call either Mr. Jones or Mr. White to testify in this case, so we are unable to discern how either witness would have testified in response to his preferred lines of questioning. As we have previously held, we will refuse to speculate as to the nature of evidence and its potential prejudicial impact in the absence of that evidence in the context of a post-conviction proceeding. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) (“It is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of . . . what a witness’s testimony might have been if introduced by defense counsel.”). Simply put, we are unable to determine whether the omission of certain testimony inured prejudice to a petitioner’s defense in the absence of any evidence of that testimony’s contents. *Id.* Because the Petitioner has failed to establish any prejudice stemming from trial counsel’s cross-examination of Mr. White, it is unnecessary for us to determine whether the post-conviction court erred by excluding his statement to law enforcement from evidence during the post-conviction evidentiary hearing.

Regardless, both the Petitioner’s claims regarding trial counsel’s cross-examination of Mr. Jones and Mr. White center on a disagreement with trial counsel’s trial strategies, which, as previously noted, were reasonable and based upon adequate preparation and are, therefore, entitled to deference. *See Moore*, 485 S.W.3d at 419; *Berry*, 366 S.W.3d at 172-73. The Petitioner is not entitled to relief on this basis.

2. Sergeant Frias

The Petitioner also contends that trial counsel rendered ineffective assistance by failing to adequately cross-examine Sergeant Frias regarding the photographic lineups. Specifically, the Petitioner contends that trial counsel should have asked Sergeant Frias about the procedures he followed when creating photographic lineups, “the negative identification that was done first,” and the fact that the September 2, 2013 photographic lineup was unduly suggestive because it depicted the Petitioner wearing red clothing.

The Petitioner has failed to establish prejudice. Firstly, it is unclear that any additional testimony from Sergeant Frias regarding his general procedures for creating photographic lineups would have aided in the Petitioner’s defense. At the post-conviction evidentiary hearing, Sergeant Frias testified that he used a computer program to generate photographic lineups based upon a description of a suspect’s physical characteristics, that he had been trained to ensure the photographic lineups he presented to witnesses were not

“too suggestive,” and that he did not recall how the Petitioner was developed as a suspect in this case. In the absence of any proof that Sergeant Frias departed from these general procedures when creating the September 2, 2013 photographic lineup, this testimony would not have served to detract from his credibility.

Additionally, although identity was a central issue at trial and several witnesses presented inconsistent identifications of the Petitioner as the shooter both pretrial and at trial, there was sufficient evidence of the Petitioner’s identification from other witnesses. As we noted in the Petitioner’s direct appeal, the witnesses offered inconsistent identifications of the Petitioner as the shooter, but victims and an accomplice identified the Petitioner as the shooter based upon their respective observations of the Petitioner’s physical characteristics and their familiarity with the Petitioner. *See Sims*, 2017 WL 3895010, at *1, *6. Thus, there was independent evidence of the Petitioner’s identity, apart from the photographic lineups, which was sufficient to sustain his convictions. In that respect, the Petitioner has not carried his burden of establishing a reasonable probability that the jury would have reached a different verdict if it heard additional proof of the witnesses’ inconsistent identifications.

Having already concluded that the September 2, 2013 photographic lineup was not unduly suggestive, we cannot agree that trial counsel’s failure to cross-examine Sergeant Frias on that basis was prejudicial. We also note that trial counsel testified he cross-examined Sergeant Frias regarding a different photographic lineup in this case which depicted a line pointing towards an individual’s photograph. This line of questioning called Sergeant Frias’s credibility into question, and it is not clear that calling the jury’s attention to a nonsuggestive photographic lineup would have further called his credibility into question such that the jury would have reached a different verdict. The Petitioner is not entitled to relief on this basis.

E. CUMULATIVE ERROR

Lastly, the Petitioner contends that the cumulative effect of trial counsel’s multiple performance deficiencies entitles him to relief pursuant to the cumulative error doctrine.⁸

⁸ The record includes the Petitioner’s January 11, 2018 pro se petition for post-conviction relief and his subsequent amendments thereto, filed through counsel on January 25, 2019; May 25, 2023; and September 12, 2023. None of these filings includes a claim for cumulative error. However, at the post-conviction evidentiary hearing, the post-conviction court described the Petitioner’s “most recent” filing, filed on February 20, 2024, as including a claim for post-conviction relief based upon the cumulative error doctrine. The record does not include any such filing. We reiterate that an appealing party bears the burden of preparing “a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal” and which includes, subject to certain exceptions, “all papers filed in the trial court,” in order to facilitate appellate review and avoid waiver. *See Tenn. R. App. P. 24(a)*. Nevertheless, we conclude that the record is adequate for appellate review of this claim: it appears that the claim was timely

“The cumulative error doctrine exists to protect a criminal defendant’s state and federal constitutional right to a fair trial.” *State v. Herron*, 461 S.W.3d 890, 909 (Tenn. 2015) (citing *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010)). The cumulative error doctrine provides relief when there are multiple errors committed during the trial, “each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant’s right to a fair trial.” *Hester*, 324 S.W.3d at 76. When a petitioner seeking post-conviction relief alleges that he or she is entitled to relief based upon the cumulative effect of trial counsel’s errors, we review “the prejudicial effect of multiple instances of deficient performance.” *Harris v. State*, No. E2022-00446-CCA-R3-PC, 2022 WL 17729352, at *9 (Tenn. Crim. App. Dec. 16, 2022), *perm. app. denied* (Tenn. Apr. 18, 2023) (internal citations omitted). A post-conviction claim of cumulative error based upon allegations of ineffective assistance of counsel is unavailing when a petitioner fails to establish any instance of deficient performance. *Martin v. State*, No. E2022-00688-CCA-R3-PC, 2023 WL 3361543, at *5 (Tenn. Crim. App. May 11, 2023), *perm. app. denied* (Tenn. Sept. 11, 2023). Having concluded that the Petitioner has failed to establish any instance of deficient performance or prejudice, we hold that he is not entitled to relief pursuant to the cumulative error doctrine.

III. CLERICAL ERRORS

Although not raised by either of the partes, we note, upon our review of the record, certain clerical errors in the Petitioner’s judgments of conviction. As noted above, the Petitioner was initially charged in a fourteen-count indictment with one count of first degree murder, seven counts of employment of a firearm during the commission of a dangerous felony, and six counts of attempted first degree murder. The record from the Petitioner’s direct appeal indicates that at trial, the State agreed to dismiss via *nolle prosequi* Count 2 of the indictment, which charged the Petitioner with employment of a firearm during the commission of a dangerous felony. The jury convicted the Petitioner otherwise as charged.

The Petitioner’s judgments of conviction were entered on January 8, 2016, and were included in the record on direct appeal and as attachments to his January 11, 2018, pro se petition for post-conviction relief. The judgment of conviction for Count 2 does not reflect that this count was dismissed via *nolle prosequi*; instead, it reflects that the Petitioner was found guilty of employment of a firearm during the commission of a dangerous felony and received a sentence of six years’ incarceration.

raised and the basis for both the claim and the trial court’s denial thereof is apparent from the record. Accordingly, we will review this claim on its merits.

This is a clerical error. At the Petitioner's sentencing hearing, the trial court, after noting that the Petitioner received a sentence of life incarceration for his conviction of first degree murder, appropriately found that the Petitioner had been convicted of six counts of employment of a firearm during the commission of a dangerous felony and six counts of attempted first degree murder. After considering the applicable enhancement and mitigating factors and whether consecutive sentencing was appropriate, the trial court imposed six-year sentences for each of the Petitioner's six convictions of employment of a firearm during the commission of a dangerous felony and twenty-five-year sentences for each of the Petitioner's six convictions of attempted first degree murder. The trial court found that consecutive sentencing was warranted and announced the Petitioner's effective sentence: "So, therefore, the life plus six counts at twenty-five years (25), what is that, that's one-hundred and fifty (150), plus six times six is thirty-six (36), is one hundred and eighty-six (186), consecutive." Thus, entry of the judgment of conviction in Count 2 finding the Petitioner guilty of employment of a firearm during the commission of a dangerous felony did not alter his overall sentence and was the result of oversight or omission. *See State v. Porterfield*, No. W2006-00169-CCA-R3-CD, 2007 WL 3005349, at *13 (Tenn. Crim. App. Oct. 15, 2007) ("[W]hen there is a discrepancy between what is reflected in the sentencing hearing transcript and what is on the judgment form, the transcript controls."), *no perm. app. filed*; *see also State v. Moore*, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991).

Additionally, we note that the February 6, 2014 indictment charged the Petitioner with first degree murder in Count 1; employment of a firearm during the commission of a dangerous felony in Counts 2, 4, 6, 8, 10, 12, and 14; and attempted first degree murder in Counts 3, 5, 7, 9, 11, and 13. The transcript of the Petitioner's trial reflects that the jury was charged to consider these counts (with the exception of the dismissed Count 2) in that order, and the jury convicted the Petitioner as charged. However, the January 8, 2016 judgments of conviction incorrectly reflect that the Petitioner was convicted of employment of a firearm during the commission of a dangerous felony in Counts 5, 7, and 9; and attempted first degree murder in Counts 4, 6, 8, and 10. These inconsistencies appear to be due to a handwritten correction to the printed count number on the judgments of conviction.

Pursuant to Tennessee Rule of Criminal Procedure 36, this court may "at any time correct clerical mistakes in judgments . . . arising from oversight or omission." Accordingly, we remand this case for the entry of corrected judgments of conviction. These corrected judgments shall reflect that Count 2 of the indictment charging the Petitioner with employment of a firearm during the commission of a dangerous felony was dismissed. The Petitioner's judgments of conviction shall also be renumbered to correspond with the order in which they were charged in the indictment.

IV. CONCLUSION

Following our review of the record and based upon the foregoing analysis, we affirm the judgment of the post-conviction court but remand for entry of corrected judgments of conviction consistent with this opinion.

s/ *Steven W. Sword*

STEVEN W. SWORD, JUDGE