NO. _____

In the Supreme Court of the United States

TIMOTHY PATRICK GUILFOY,

Petitioner,

v.

BRANDON WATWOOD, WARDEN,
NORTHWEST CORRECTIONAL COMPLEX,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After a first trial resulted in a hung jury, Petitioner was retried and ultimately convicted of sexual assault. Suspecting foul play during trial, defense hired an investigator and learned that during deliberations, the jury had viewed video-recorded interviews of the alleged victims that were never shown during trial. The jury viewing these videos was not captured on the record. Petitioner has never viewed or heard the testimony recorded on these videos. During hearings on a Tennessee post-conviction petition, the trial judge refused to permit the jury foreman to testify about the jury viewing the videos, even as an offer-of-proof. Petitioner ultimately obtained a sworn affidavit confirming the viewing from the foreman, and filed a petition for *coram nobis* in Tennessee and a petition of Habeas Corpus in USDC Middle Tenn. In its denial, the district court repeated the state court conclusion that the videos were erroneously entered as exhibits, but held the error harmless, and satisfied the requirements of the Confrontation Clause. These proceedings give rise to the following Questions:

1. Whether a DVD recording containing testimonial evidence of the accusers, admitted as an exhibit, but never played during the trial, may be viewed by the jury during deliberations outside the presence of the defense or the judge?

2. Whether a criminal defendant's right to confront the evidence against him is violated when his jury is allowed to consider video-recorded testimony during deliberations which was never played during the trial and the defendant was never afforded an opportunity to observe or hear himself?

LIST OF PROCEEDINGS

Federal Courts:

Timothy Guilfoy v. Michael Parris, Warden, No. 3:18-cv-01371, Middle District of Tennessee Nashville Division (judgment March 22, 2023) (unpublished) (federal habeas petition) (App.9a)

Timothy Guilfoy v. Sharon N Rose, Warden, No. 23-5348, Sixth Circuit Court of Appeals (judgment December 18, 2023) (unpublished) (Denial of COA) (App.1a) (panel rehearing denial) (App.201a)

Timothy Guilfoy v. Sharon N Rose, Warden, No. 23-5348, Sixth Circuit Court of Appeals (judgment February 23, 2024) (unpublished) (En Banc denial) (App.203a)

State Courts:

State v. Guilfoy, Docket No. 2011-A-779, (Criminal Court for Davidson County, Tennessee, Division V) (Jury Trial) (Date of Conviction October 28, 2011)

State v. Guilfoy, No. M2012-00600-CCA-R3-CD, 2013 WL 1965996 (Tenn. Crim. App., Denied May 13, 2013) (State Direct Appeal) (App.136a)

State v. Guilfoy, No. M2012-00600-SC-R11-CD, (Tenn. Supreme Court, Denied November 5, 2013) (Petition for review of petitioner's denial on State Direct Appeal) (App.135a)

Guilfoy v. State, Docket No. 2011-A-779, (Criminal Court for Davidson County, Tennessee, Division V) (Post-conviction petition) (Denied August 13, 2014)

Guilfoy v. State, No. M2014-01619-CCA-R3-PC, 2015 WL 4880182 (Tenn. Crim. App., Denied Aug. 14, 2015) (appeal of post-conviction petition denial) (App.96a)

Guilfoy v. State, No. M2014-01619-CCA-R3-PC (Tenn. Crim. App., Denied Sept. 25, 2015) (rehearing denied) (App.193a) (Petition for review of petitioner's denial on Post-Conviction Appeal) (App.218a)

Guilfoy v. State, Docket No. 2011-A-779, (Criminal Court for Davidson County, Tennessee, Division V) (Error *Coram Nobis* petition) (Denied June 3, 2017)

State v. Guilfoy, No. M2017-01454-CCA-R3-ECN, 2018 WL 3459735 (Tenn. Crim. App., Denied July 17, 2018) (Appeal of Error *Coram Nobis* petition denial) (App.88a) (Motion for rehearing of Error *Coram Nobis* appeal denial) (App.85a)

State v. Guilfoy, No. M2017-01454-SC-R11-ECN, (Tenn. Supreme Court, Denied November 14, 2018) (Petition for review of petitioner's denial of Error *Coram Nobis* appeal denial) (App.84a)

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PETITION FOR A WRIT OF CERTIORARI

This case is exemplary of a frequent problem - prosecutors who lack confidence in their case slyly tip the jury by extrajudicial means off-the-record; then, after being caught, claim the error is harmless. Testimonial statements from the two primary state witnesses were video-recorded on two DVDs prior to trial. These DVDs were entered as exhibits at trial without objection from defense counsel. Neither of the DVDs were played during the trial. During the state's closing arguments, prosecutors invited the jury to watch the videos in the jury room during deliberation, which the jury did without notation on the trial record. Defense counsel inexplicably failed to object to this suggestion. The testimonial statements on the videos were therefore heard by the jury for the first time during deliberation, having never been presented in the courtroom during trial.

The Sixth Circuit in this case has effectively established a new precedent which does not require testimonial statements to be presented in the courtroom from the witness stand in order to be considered "admitted evidence" in a trial. According to the district and Circuit Court in this case, the simple act of admitting the physical DVDs containing these testimonial statements automatically enters the unplayed recorded testimony as evidence in the proceeding, meaning the jury is permitted to consider the recorded testimony during deliberation for the first time and without restriction.

The Sixth Circuit in this case has also effectively ruled that the defendant's opportunity to personally

observe (hear or view) testimonial evidence considered by his jury is not required to satisfy a defendant's Sixth Amendment's confrontation rights.

Respectfully, Petitioner requests this Court grant this petition and reverse.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit denying the motion for a Certificate of Appealability filed by Mr. Guilfoy under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b) was announced on December 18, 2023. *Guilfoy v Rose* No. 23-5348 (6th Cir.) (App.1a).

JURISDICTION

The Sixth Circuit en Banc final order/denial was filed on February 23, 2024. (App.201a). This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right [. . .] to be informed of the nature

> and cause of the accusation; [and] to be confronted with the witnesses against him[.]"

U.S. Constitution, Amendment XIV, § 1

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2254, as amended by the Antiterrorism and **Effective Death Penalty Act of 1996 (AEDPA)**, reads, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Trial: DVDs Containing Testimonial Statements Were Not Played During Trial, But Ultimately Given to the Jury During Deliberations

In 2009 Petitioner was charged with three counts of rape of child and five counts of aggravated sexual battery allegedly involving two minor sisters ("J.A." & "T.A.") after the mother of the alleged victims called 911 and reported the accusations. Petitioner pled not guilty, and has maintained his innocence throughout the history of this case. Prior to trial, Petitioner became aware of two video-recorded pre-trial interviews of the two alleged victims in the possession of the DA's office. These video-recordings consisted of each child individually speaking with a forensic interviewer about the allegations. Petitioner motioned the trial court to compel disclosure of these videos, as they were not included in Petitioner's discovery. Prosecutors responded to this motion by claiming the videos were not going to be used at trial, and therefore were not discoverable. Eventually, trial counsel was permitted to view and request redactions from the videos, but Petitioner was unable to view them before or during his trials. In July of 2011 Petitioner was first tried for these charges. Both alleged victims and their mother testified in open court. Their accusations were not corroborated by any third-party witnesses, physical evidence, or confession from defendant. Petitioner's first trial ended in a hung jury, as the jury was unable to reach a verdict on any charge, even after the court issued multiple instructions to continue deliberating.

A few months later, Petitioner was tried in front of a second jury, which convicted him on most counts as charged. During Petitioner's second trial-despite the prosecutor's pre-trial assertions-two DVDs containing the interviews were authenticated and entered as exhibits for identification during the direct examinations of the two minor witnesses. Later in the trial, "a forensic interviewer employed by the Montgomery County Child Advocacy Center, testified that she conducted forensic interviews of J.A. and T.A. These interviews were recorded and, without any contemporaneous objection from the Defendant, the recordings were admitted into evidence but were not played for the jury in open court." (App.109a).

At the onset of the state's initial closing argument, one of the prosecutors reminded the jury of the two DVDs that were never played during the trial, and slyly suggested they could watch the videos during deliberation if they requested to do so:

> One thing I do want to mention is, remember the forensic interviews, those tapes, that we did not play those. For one thing, we're lucky to get these to work to play the ones that we did. But those are video. And we don't have the capability out here. In the back, in the jury room, should you—obviously, it's your decision whether you want to watch them or not, but should you decide to, we have the capability, or the Court does, to get a TV and all that to play those, those forensic interviews, the girls by themselves, with the interviewer in March, April, 2009, when that occurred.

(App.165a).

Inexplicably, defense counsel failed to object to such obviously inadmissible media in the jury room. There was no jury request announced or recorded on the trial record. Petitioner was eventually sentenced to forty years in prison.

B. State Direct Appeal: Doomed by Lack of a Record on the Jury's Viewing of the DVDs

Because there was no objection to the introduction of the DVDs as exhibits or to the prosecutor's suggestion to the jury to watch them during deliberations, Mr. Guilfoy raised the issue of plain error regarding the introduction of the DVDs in his direct appeal to the Tennessee Court of Criminal Appeals ("TCCA"), which ruled:

> Although the record clearly demonstrates that the trial court erred in admitting the recordings of the interviews into evidence, the record does not demonstrate that the jury ever watched the interviews. [. . .] [The prosecutor's] comments indicate that, in order to watch the recordings, the jury would have to request the appropriate equipment. The record contains no indication, however, that the jury ever requested the equipment. Nor does the record contain any other indication that the jury watched the recordings. The record is simply silent on this point. Accordingly, the Defendant has failed to satisfy the first prerequisite of plain error review. Additionally, because the record contains no indication that the jury watched either of the recordings of the forensic interviews, the

> Defendant cannot demonstrate that the erroneous admission of this evidence adversely affected one of his substantial rights.

(App.165a).

C. State Post-Conviction: Judge Refuses to Allow Jury Foreman to Testify That They Had Viewed DVDs

At his post-conviction hearing, Mr. Guilfoy subpoenaed and attempted to call the jury foreman in an attempt to ask her if the jury had viewed the videos during deliberation. The state objected to the juror testifying, and the post-conviction court agreed; not even allowing the Petitioner to question her as an offer-of-proof. Without this testimony there was still nothing on the record to indicate that the jury watched the videos, and therefore no evidence to prove that the videos prejudiced him under *Strickland v Washington*. Mr. Guilfoy's petition was then denied. On the appeal of this denial, the TCCA also denied relief. The court discussed the admission of the DVD exhibits, but skirted the issue of whether they had been watched during deliberations:

> It is not clear from the record why T.A.'s forensic interview was introduced into evidence. Nevertheless, this court has previously determined that the trial court erred in admitting the recording. [] While the State argues in this appeal that the interview was properly admitted as a prior consistent statement, the State concedes that the trial court did not issue a proper limiting instruction. [. . .] However, despite trial counsel's failure to object to the introduction of the video

> or request a limiting instruction, the Petitioner has failed to demonstrate that he was prejudiced by its introduction as substantive evidence. As discussed above, the forensic interviewer's summary statement did not violate the Petitioner's right to a unanimous jury verdict because the State provided an election of offenses. The details of each elected offense corresponded to incidents both J.A. and T.A. described in their trial testimony. The Petitioner has failed to prove that there was a reasonable probability that the outcome of the trial would have been different had the forensic interview not been introduced as substantive evidence. Accordingly, the Petitioner is not entitled to relief.

(App.121a).

D. State Error *Coram Nobis*

About a year after Mr. Guilfoy was denied the ability to call the jury foreman as a witness at his post-conviction hearing, the same juror finally agreed to voluntarily sign an affidavit wherein she swore that not only did the jury watch these videos during deliberations, but also that the viewing was a result of a request she made to the bailiff. (App.215a). This request-unknown to the Petitioner until the jury foreman signed this affidavit-was evidently not recorded on the trial record during Petitioner's trial, and its existence was not known by Petitioner or appellate courts during the adjudication of Petitioner's direct appeal or post-conviction proceedings, although its absence from the record was relied upon by the state to defeat Petitioner on the issue of the erroneously entered videos and the question of prejudice of the same.

With this affidavit Mr. Guilfoy filed an error *coram nobis* in state court about a month after receiving the affidavit from the juror. Petitioner raised a new issue of jury exposure to extraneous information and argued his confrontation rights were violated by the jury viewing the contents of the videos during deliberations. Neither the *coram nobis* court or the TCCA reviewed the merits of the argument; both dismissed the petition for violating the one-year statute of limitations on filing new evidence[1]. Ironically, the TCCA noted that the Petitioner was aware shortly after the trial that the jury viewed the videos during deliberation when his investigator interviewed jurors and learned as much. (App.223a).[2] Neither court commented on the trial court's failure to record the jury request in the first place, its failure to allow Mr. Guilfoy to call the juror at his post-conviction hearing to testify about the viewing, or its failure to supplement the record with the existence of this request when it was made clear at that hearing the existence or non-existence of this request was dispositive to whether or not the erroneously admitted videos prejudiced the Petitioner in his direct appeal. Neither court

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[1] The one-year time limit impacts only the state *coram nobis* proceedings. The federal habeas filings are within statutory deadlines.

[2] As noted above, in 2015 the post-conviction court refused to allow petitioner to question a juror about the viewing of the videos at his PC hearing due to Tn. R. Ev. 606(b), which prohibits a jurors testimony about their deliberative process. The PC court also refused to allow petitioner to present an offer-of-proof to establish on the record that this viewing occurred. Petitioner had no ability to add this fact into the record until he received the affidavit from the juror in 2016.

recognized that Mr. Guilfoy's double-hearsay knowledge that the videos were watched could not be conflated with his inability to present the court with evidence of such (*i.e.*-a juror's testimony from the stand). Also, neither court commented on whether or not the contents of the unplayed videos were extraneous to the evidence in Petitioner's trail or if Petitioner's confrontation rights were violated.

E. Federal Habeas

Mr. Guilfoy timely filed his habeas petition in the district court. He raised two separate but related issues regarding the recordings of the forensic interviews; (1) Ineffective Assistance of Counsel (IAC) regarding Petitioner's trial counsel's failure to object to the introduction of the physical videos as trial exhibits and the prosecutor's cunning suggestion that the DVDs could be viewed during deliberations, and, (2) Jury Exposure to Extraneous Information regarding the jury's viewing of the contents of the videos during deliberation and the attendant violation of his confrontation rights by the jury's viewing of the videos. As to the IAC issue, the district court seemingly found that the jury's verdict of at least one charge was affected by the viewing of the video, but still denied relief:

> Accordingly, it is not at all clear that the forensic interviews bolstered the victims' trial testimony, as Petitioner argues they must have [. . .], or that such testimony would have been insufficient evidence upon which to convict in the absence of the videos. Indeed, insofar as the jury convicted Petitioner of a lesser included offense on one charge of child rape, it partially discredited T.A.'s trial

> testimony. As to whether there was a reasonable probability that the jury would have discredited other trial testimony related to other offenses of conviction but for counsel's failure to prevent the videos' admission, the instant record permits only conjecture and speculation.

(App.76a). [Emphasis added]

As to the Jury Exposure issue, the district court ruled that the videos and their contents were not separate entities, and since the physical recordings were entered into the trial as exhibits, both the physical videos and their contents were therefore not extraneous:

> The disks containing the forensic videos were formally admitted into evidence on the State's motion, after having previously been marked for identification only. The deliberating jury's examination of evidence admitted into evidence (erroneously or not) is different from its use of extraneous statements or materials in deliberations. *See United States v. Thomas*, 701 F. App'x 414, 421 (6th Cir. 2017) ("While the Constitution protects defendants from extraneous influences upon juries, jurors have free rein to examine the evidence admitted[.]").

(App.67a).

[. . .]

> [T]his Court [] conclude[s] that Ms. Post's recorded interviews with J.A. and T.A., though merely mentioned and not published

> to the jury prior to deliberations, were admitted evidence (albeit erroneously admitted evidence) in Petitioner's trial.

(App.72a).

As relating to Petitioner's claim that his right to confrontation was violated with respect to the testimonial statements recorded on the videos, the district court ruled:

> [T]he Supreme Court has unambiguously established that the Confrontation Clause of the Sixth Amendment—unlike the general rule against hearsay—"prohibits [only] the introduction of [prior] testimonial statements by a nontestifying witness." *Ohio v. Clark*, 576 U.S. 237, 243 (2015) (emphasis added) (citing *Crawford v. Washington*, 541 U.S. 36, 54 (2004)); *Crawford*, 541 U.S. at 59 n.9 ("Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. It is therefore irrelevant that the reliability of some out-of-court statements cannot be replicated, even if the declarant testifies to the same matters in court. The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.") (citations and internal quotation marks omitted). Thus, assuming arguendo that the statements recorded on the forensic interview videos were testimonial, the Confrontation Clause did not prohibit their introduction because J.A., T.A., and Ms. Post were all live

> witnesses who were, or who could have been, cross-examined during Petitioner's trial.
>
> Moreover, [. . .] the videos had been redacted at trial counsel's request, were properly authenticated, and were admitted without objection at Petitioner's trial" [emphasis added by district court]

(App.62a).

Without citing circuit or Supreme Court president, the district court noted that although "[u]nusual", it is permissible for "a criminal jury to be allowed to see video evidence for the first time during deliberations[.]" (App.74a). It then denied relief and denied a Certificate of Appealability (COA).

F. Circuit Court

Mr. Guilfoy applied for a COA from the Sixth Circuit Court of Appeals which was denied. In doing so, that court found the district court properly found no prejudice due to the jury's viewing of the videos because "the jury was provided with an election of offenses that detailed the dates of the charged abuse. [. . .] And, crucially, the jury convicted Guilfoy of charges less serious than what T.A. and J.A. testified to." (App.6a).

The circuit court did not specifically address Petitioner's argument or the district court's ruling on whether or not the contents of the videos were extraneous to the evidence in the trial, and therefore did not address whether the jury was exposed to extraneous information. The ruling is silent on this point. However, the court did note:

> Guilfoy argues that the trial court violated his Sixth Amendment rights when it permitted the jury to watch the videos for the first time during deliberation. He raised this claim in his *coram nobis* proceedings, and the TCCA denied that petition as untimely. The district court determined that this claim was procedurally defaulted because the deadline to petition for c*oram nobis* relief was an independent and adequate state procedural bar to his claim. *Guilfoy*, 2023 WL 2601925, at *17.
>
> [. . .]
>
> A federal court will not review a procedurally defaulted claim unless the petitioner can show either cause for the default and actual prejudice from the alleged constitutional violation or that failure to consider the claim would create a "fundamental miscarriage of justice," *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

(App.4a).

Likewise, the circuit court also did not specifically address Petitioner's argument about the violation of his confrontation rights, but the court's reference to the "Sixth Amendment rights" which he presented-along with its reference to the standard in *Coleman*-suggests the circuit court agreed with the district court that (1) the contents of the videos were not extraneous to the evidence admitted at trial, and (2) the Petitioner's confrontation rights were not violated because the witnesses testified and Petitioner's trial counsel reviewed the videos before trial. Neither the

district or circuit court addressed Petitioner's claim that he had never personally seen or heard any portion of the testimony on the videos.

Petitioner then timely filed a motion to rehear en Banc and for a panel rehearing, which were denied. (App.203a).

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit Decision Holding as Harmless the Jury Viewing Video-Recordings Not Played During Trial After Closing Arguments Runs in Direct Conflict with the Ninth Circuit Decision in *United States v. Noushfar*

A. The Ninth Circuit held, in *United States v. Noushfar*, that allowing the jury to hear recordings in deliberations that had never been published in a courtroom fundamentally deprives a defendant of a fair trial

In *United States v. Noushfar*, 78 F.3d 1442 (9th Cir. 1996) defendants were convicted of conspiring to smuggle Persian rugs into the United States. During the undercover investigation that led to the defendants' arrests, customs agents recorded many potentially incriminating conversations with the defendants. *Id.* at 1444. The trial court allowed the jury to take with them to the jury room fourteen tapes that had not been played during the defendants' trial. *Id.* The jurors subsequently requested and were provided with a tape recorder. *Id.* On appeal, in finding that the

trial court had erred, the Ninth Circuit stated, "this error undermines one of the most fundamental tenets of our justice system: that a defendant's conviction may be based only on the evidence presented during the trial. Sending the tapes to the jury room is akin to allowing a new witness to testify privately, without cross-examination, to the jury during its deliberations." *Id.* at 1445. The court reversed the defendants' convictions, describing the error as "structural." *Id.* "Sending unplayed tapes to the jury room is such a defect. It violates the basic framework of the trial system, which requires that evidence be presented and tested in front of the jury, judge and defendant." *Id.*

Likewise, the two videos in Mr. Guilfoy's case were not played in the courtroom during the trial.[3] The jury viewing the contents of the videos during deliberation was a "structural" constitutional violation because the contents of the videos were extraneous information as they were not evidence in the trial. At most, the physical DVDs in Mr. Guilfoy's case could be classified as admitted evidence because they were exhibits entered during the witnesses' testimonies, but the testimonial statements on the videos were not because they were not played or published in the courtroom at any point during the trial.

In refusing to grant a COA in the instant case, the Sixth Circuit affirmed the district court's ruling

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[3] In a footnote, the district court distinguished the instant case from *Noushfar* by pointing out the recordings in *Noushfar* were "allowed into the jury room over the defendant's [']vigorous objections[.']" (App.62a). However, *Infra*, the district court also found that petitioner was not prejudiced by his counsel's failure to object to the admission of the recordings.

that the contents of the recordings were not extraneous to the evidence in the trial. In doing so, the Sixth Circuit affirmed the district court's ruling that the physical DVDs entered as exhibits in Petitioner's trial and their contents (even testimonial statements) are also entered as evidence in that trial despite the fact that not even one second of either recording was played in the courtroom. To support this principle the district court cited multiple state cases (but no precedential cases) wherein only a portion of a recording was published in the courtroom during a trial, but the entire recordings (including portions not played in the courtroom) were made available for the jury during deliberations, including; *State v. Langlinais*, No. W2016-01686-CCA-R3-CD, 2018 WL 1151951, at *6 (Tenn. Crim. App. Mar. 2, 2018); *State v. Pollard*, No. W2016-01788-CCA-R3-CD, 2017 WL 4877458 (Tenn. Crim. App. Oct. 30, 2017); and *State v. Kennedy*, No. E2013-00260-CCA-R3CD, 2014 WL 3764178, at *59–60 (Tenn. Crim. App. July 30, 2014). (App.70a). However, the district court missed the point entirely with these cases. In all of these cases the substantive/prejudicial portions of the recordings were played for the jury in the courtroom during trial. All of the unplayed portions of the recordings made available to the jury during deliberations in these cases did not prejudice the defendant as the contents of these portions were either unintelligible, silent, or repetitive to portions played in the courtroom. This is not analogous to the unplayed recordings in the instant case. Even if any of these state cases made any comment about entirely unplayed recordings made available to the jury during deliberations (which they did not), none of these state cases could overrule this Court's holding that the U.S. Constitution requires that the evidence developed

against a defendant must come from the witness stand in a public courtroom. *Turner v. Louisiana*, 379 U.S. at 472–73 (1965).

The district and Circuit courts' decisions focus on whether the contents of these videos could have been admitted as evidence in Petitioner's trial, but the argument presented by Petitioner in his habeas petition was the that the contents of the videos in his trial were not evidence in his trial because they were never played/published in the courtroom during his trial. By focusing on the hypothetical admissibility of the contents of these videos, these courts completely sidestepped the threshold definition of "admitted evidence" established by this Court in *Turner* and the Ninth Circuit in *Noushfar* that the contents of entirely unplayed recordings—even if entered as exhibits—cannot be considered by the jury during deliberations specifically because they were not played during the trial.

The Ninth Circuit has found this scenario is "structural" constitutional error; the Sixth Circuit has effectively found this scenario is not error at all. Petitioner respectfully requests this Honorable Court to grant this petition to settle this fundamental constitutional dissonance between the circuits: is pre-recorded substantive testimony, entirely unpublished in the courtroom, "evidence" in a trial that can be considered by the jury during deliberation or not?

II. The Sixth Circuit Decision That the Confrontation Clause Is Satisfied When a Witness Provides Testimony on a Video Recording Outside of the Courtroom but Not Played During a Trial Is in Conflict with This Court's Decision in *Maryland v. Craig*

A. Per *Maryland v. Craig*, A Criminal Defendant Must Be Allowed to Actually "Observe" the Testimony Against Him

This Honorable Court, in *Maryland v. Craig*, 497 U.S. 836 (1990), unequivocally established that a defendant's right to confrontation includes his ability to observe the testimony against him, even when the testimony is on video:

> Since there is no dispute that, here, the children testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, admitting their testimony is consonant with the Confrontation Clause, provided that a proper necessity finding has been made.

Id. *838 [emphasis added]

Mr. Guilfoy's assertion in his federal habeas petition that his right to confrontation was violated was not based on the unavailability of the witnesses on the video, but rather his literal inability to view or observe these videos and hear the testimony within prior to the verdicts in his case.[4]

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[4] The recorded statements in Mr. Guilfoy's case were clearly testimonial, as they were not produced as part of an ongoing

The district court's conclusion that Petitioner's confrontation rights were not violated was based on two sets of factors; (1) the witnesses on the videos authenticated them while testifying at trial, and were available to be cross-examined about their statements on the videos, and (2) Petitioner's trial counsel reviewed the videos prior to the trial. However, these factors alone are not dispositive as to whether a defendant's confrontation rights were violated. Before either of these factors are considered, the courts should have first considered the most fundamental aspect of the right to confrontation; has the defendant been afforded an opportunity to personally observe/confront the testimony on the videos itself? Both courts offered a superficial analysis in consideration of whether Petitioner was denied his confrontation rights, as neither court's ruling addressed Petitioner's contention that the statements on the videos were not admitted evidence in the first place.

In Mr. Guilfoy's case, the district court's reliance on *Crawford v. Washington*, 541 U.S. 36 (2004) to establish the basis for his simple two-factor test is incorrect. Nowhere in *Crawford* did this Court rule that an extrinsic statement by a testifying witness need not be published in the courtroom in order to satisfy a defendant's confrontation rights as long as the witness testifies at trial and is subject to cross-

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emergency. The detective in his case testified that she scheduled the interviews almost a week after the allegations were first reported. *See Bobadilla v. Carlson* 575 F.3d 785, 791 (8th Cir 2009). Importantly, the state has never argued-and no court has ever found-that the contents of the videos in the instant case are non-testimonial.

examination. In fact, the recorded statement at issue in *Crawford* was played for the jury during that trial:

> The prosecution played the tape for the jury and relied on it in closing, arguing that it was "damning evidence" that "completely refutes [petitioner's] claim of self-defense."

Id. *40-41

B. Trial counsel's Pre-Trial Viewing Did Not Satisfy Petitioner's Confrontation Rights

The district and Circuit Court's reliance on the fact that Mr. Guilfoy's trial counsel redacted and reviewed the videos before the trial to satisfy his right to confront the testimony on the videos violates the core principles espoused in the Sixth Amendment, as established clearly by this Honorable Court in *Faretta v. California*, 422 U.S. 806, at *819 (1975):

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'

Id. [emphasis added]

C. A Defendant Cannot Assist in Cross-Examining a Witness About a Statement He Has Never Heard

Without the opportunity to personally hear the testimony on the videos, Petitioner was entirely unable to assist in cross-examining the witnesses about the testimonial statements on the videos. In *Maryland v. Craig*, this Court noted that during the courtroom viewing of the child's live video testimony "[t]he defendant remain[ed] in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom." *Id.* at 497 (*see also: Illinois v. Allen*, 397 U.S. 337, 344 (1970) ("[O]ne of the defendant's primary advantages of being present at the trial [is] his ability to communicate with his counsel")). Had Petitioner been offered the opportunity to hear the testimony on the videos, he would have directed his counsel to question the witnesses about specific comments they made on the videos or at least to raise objections. Petitioner was denied this opportunity guaranteed to him in the constitution. This point is made even more stark considering Petitioner's trial counsel did not ask even a single question regarding the videos or their contents during the cross-examination of the two witnesses on the videos.

D. Testimonial Witness Statements Only Made in a Jury Room, Outside the Trial, Are Not Available for Cross-Examination

Furthermore, the district court's emphasis on the qualifying word "nontestifying" in his reference to *Ohio v. Clark*, suggests that any statement by a

testifying witness considered by a jury during deliberations-even statements not published from the witness stand or known to the defendant-does not violate the defendant's confrontation right simply because the witness was available to be cross-examined. Just because a witness is subject to cross-examination at trial does not mean that any statement they have ever made can be considered by the jury during deliberations; the statement must have first come from the witness stand during the trial. This point is made clear by returning to *Turner v. Louisiana*. In *Turner*, two deputies were not only material witnesses for the state during the trial, but also custodians of the jurors "freely mingling and conversing with them throughout the trial period." *Id.* *466 Not only were these two deputies subject to cross-examination during their trial testimony, they were also directly questioned about their extraneous conversations with the jurors during a jury-out hearing. *Id.* *468 The fact that they testified and were subject to cross-examination did not automatically satisfy the defendant's right to confrontation with respect to their extraneous conversations with the jurors. This Court in *Turner* emphasized that a jury basing its verdict only on testimony presented in open court from the witness stand is crucial specifically for the purpose of preserving the defendant's right to confrontation:

> In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of

> confrontation, of cross-examination, and of counsel.

Id. *472-473 [citations removed]

A defendant's presence at every stage of a criminal trial is required by the Sixth and Fourteenth Amendments (*Illinois v. Allen*, *Id.* *338)[5], and this must logically include stages wherein material witness testimony is first published to a jury (*Faretta*, *Id.* *816). There is no substitute for defendant's personal observation of the publication of evidence. The fact that the two witnesses on the videos in Mr. Guilfoy's case were subject to cross-examination and the fact that his counsel had reviewed the videos before trial is not a substitute to his right to actually observe and confront the statements on the videos (*Maryland v. Craig*, *Id.*). Indeed, these two factors are among the necessary requirements to protect his sixth amendment rights, but to specifically satisfy his right to confrontation he must first be provided an opportunity to actually observe the testimony against him.

III. The Private Showing of the DVDs Tipped the Verdict of a Weak Prosecution's Case, Decisively Prejudicing the Outcome Under Both *Strickland* and *Remmer*

The prejudice suffered by Mr. Guilfoy from the jury viewing these videos is facially obvious and incalculable. The State's case was far from overwhelming. First, Petitioner's first trial ended in a hung

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[5] Per *Allen Id.*, the only exceptions to this rule involve voluntary absence or repetitive disruption by the defendant, neither of which occurred in the instant case.

jury.[6] Next, the only direct evidence of Petitioner's guilt presented by the state were the in-court accusations by the two alleged victims which were not corroborated by any third-party witnesses, physical evidence, or confession from defendant. The mother of the two alleged victims admitted in her testimony that she had fallen far behind in rent and owed Petitioner thousands of dollars at the time she reported these accusations, and also that she and her family continued to live in his rental house rent-free for months after reporting these accusations. In contrast to their in-court testimony, the girls' accusations on the videos contained far greater detail and added additional accusations of abuse not testified to at trial. During the states initial closing argument, the prosecutor specifically invited the jury to view the videos during deliberations; expressly suggesting that the girls' statements on the videos were more reliable than their in-court testimony because the recorded statements were made closer to the time of the alleged acts. (App.165a). Finally, the jury's only request during deliberation was to view the videos; and the jury foreman informed Petitioner's investigator post-trial that "the video of the girls was the one thing that made the decision and was a defining moment[.]" (App. 224a)

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[6] The closeness of the evidence is demonstrated by the fact that Petitioner's first trial resulted in a hung jury. *See United States v. Stevens*, 935 F.2d 1380, 1406 (3rd Cir. 1991); *United States v. Paguio*, 114 F.3d 928, 935 (9th Cir. 1997); *United States v. Beckman*, 222 F.3d 512, 526 (8th Cir. 2000).

A. Defense Counsel was Prejudicially Ineffective in Failing to Object to the Admission of the DVDs and Then for Failing to Object to Prosecutor's Invitation to View the DVDs in Deliberations After They Had Not Been Viewed During Trial (*Strickland v. Washington*, 466 U.S. at 668 (1984))

Petitioner raised an issue of Ineffective Assistance of Counsel in his habeas petition to the district court regarding his trial counsel's failure to object to the introduction of the videos. Under *Strickland*, a court assessing the prejudice from an attorney's deficient performance "must" consider the totality of the evidence to determine whether there is a reasonable probability that, absent counsel's errors, the factfinder would have had reasonable doubt respecting guilt. *Id.* *695-696 However, in the instant case the district and circuit court failed to consider even one of the factors in the preceding paragraph, and entirely failed to analyze or even comment on the strength or weakness of the state's case, much less how the improperly admitted recordings did (or could have) impacted it. The district court avoided consideration of any of these factors by simply ruling "whether there was a reasonable probability that the jury would have discredited other trial testimony related to other offenses of conviction but for counsel's failure to prevent the videos' admission, the instant record permits only conjecture and speculation." (App.77a). Ironically, the district court did find that the jury's viewing of the videos affected at least one of the verdicts, but confusingly did not factor this in to his decision that

counsel's failure to object to these improperly admitted videos did not affect the verdicts. (App.76a).

Ostensibly, the district and circuit courts' *Strickland* prejudice analysis consisted mostly of the reference to the fact that the state provided an election of offenses to the jury in this case, which corresponded to testimony the witnesses provided as part of their in-court testimony. (App.6a). However, just as both courts offered a superficial analysis in their consideration of the violation to Petitioner's confrontation rights, they also offered a superficial analysis in its *Strickland* prejudice analysis as neither court explained how the production of these election of offenses could have served to lessen (much less did lessen) the prejudicial impact of the jury's consideration of the contents of the videos. The elections are simply a list of the individual accusations the state identifies and corresponds to an enumerated charge in the indictment when there are multiple charges to similar alleged conduct. It is meant to ensure the jurors are deliberating on the same alleged act when deliberating or voting on a specific charge. Nowhere in the elections does it instruct the jurors which portion of the evidence to consider or ignore (either the witnesses' testimony in court or on the video recording).

Respectfully, the courts' reasoning is nonsensical, especially considering that the trial court gave no limiting instruction whatsoever regarding the videos or how the jury should consider them, meaning the jury was allowed to consider them as substantive evidence along with (or even in lieu of) the witnesses' in-court testimony. Again, the district court actually did find that the jury based at least one verdict on the contents of the videos, but confusingly seemed to

require Petitioner to somehow prove the verdicts of all the other charges were based on the videos as well before he would consider the possibility that the videos caused a "different" result as required by the *Strickland* standard of review. *Newmiller v. Raemisch*, 877 F.3d 1178, 1204 (10th Cir. 2017)

Both courts' rationale also made a reference in their conclusions to the fact that the witnesses' in-court testimony was legally sufficient to sustain the charges (App.76a), but the *Strickland* prejudice standard specifically dismisses this practice: "[T]he sufficiency of the "untainted" evidence should not be the focus of the prejudice inquiry." *Newmiller Id.* "The touchstone of the prejudice inquiry is the fairness of the trial and the reliability of the jury or judge's verdict in light of any errors made by counsel, not solely the outcome of the case." *Johnson v. Scott*, 68 F.3d 106, 109 (5th Cir. 1995) (citing *Strickland*, 466 U.S. at 696).

Even under the very high bar of *Strickland*, Petitioner has more than shown the prejudicial impact of his trial counsel's failure to object to the introduction of the videos. It is clear that the state's case was relatively weak and the statements on the videos were extremely relevant and damaging. Perhaps the strongest objective evidence that the videos affected the jury's verdicts beyond the points above is that the jury asked to watch them during deliberations before rendering its verdict. Multiple circuit courts (especially the Sixth Circuit) have found that a jury's request to review evidence is a "clear indication that one specific piece of evidence likely influenced the jury." *United States v. Craig*, 953 F.3d 898, 907 (6th Cir. 2020); *see also: Reiner v. Woods*, 955 F.3d 549, 557 (6th Cir. 2020)

(holding that jury's request to review certain evidence during deliberations indicated that the jurors thought the evidence "significant"); *Vasquez v. Jones*, 496 F.3d 564, 576 (6th Cir. 2007) (same); *Cathron v. Jones*, 77 F. App'x 835, 843–44 (6th Cir. 2003) (same); *United States v. Tarricone*, 996 F.2d 1414, 1420 (2nd Cir. 1993) (same).

B. The Jury's Private Viewing of Extraneous Information Constituted Structural Constitutional Error, Requiring Reversal under *Remmer v. United States*, 347 U.S. 227 (1954)

Separate from his IAC issue, Petitioner also raised an issue of jury exposure to extraneous information around his jurors viewing the contents of the videos during deliberation. (Section I & II, *Supra*). This Court, in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991), found "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." (citing *Sheppard v. Maxwell*, 384 U.S. 333, 350–51 (1965) In *Remmer*, This Court also found "[a] jury's consideration of extrinsic information raises a presumption of prejudice, and the government bears the burden of showing beyond a reasonable doubt that the extrinsic information did not contribute to the conviction." *Id.* at 229

The contents of the videos in this trial were extraneous to the evidence produced from the witness stand. As a threshold matter, both the district and Circuit courts disagreed. Apparently because they did not find the statements on the videos to be extraneous

(or that Petitioner's confrontation rights were violated), they did not consider prejudice under the *Remmer* standard at all. It is hard to conceive of an example of more prejudicial extraneous information than over an hour of additional testimony from the only two state witnesses whose courtroom testimony was the only direct evidence of guilt in the state's case. Their recorded statements were not only related to the subject-matter of the charges, they were even more detailed in their accusations of abuse than their in-court testimony, and the recording consisted of even more allegations than they testified to in court. The state did not respond to this *Remmer* prejudice argument with any explanation beyond their "election of offenses" argument (*Supra*), and is difficult to conceive of any they could have raised which could have overcome their very high burden to prove harmlessness beyond a reasonable doubt as prescribed by this Court. *Remmer Id.* The contention that the jury retired to deliberations, requested to watch the videos, then watched the videos, and did not consider any of the countless prejudicial testimonial statements on them requires an immense amount of conjecture and speculation.

IV. Petitioner Has Made a "Substantial Showing" That He Has Been Denied Fundamental Rights to Due Process and Confrontation of Witnesses

A. The Sixth Circuit Improperly Denied Petitioner a COA

A prisoner may appeal the denial of a petition for writ of habeas corpus only when either the district

court or the circuit court issues a certificate of appealability ("COA"). 28 U.S.C. § 2253(c); *Miller-El v. Cockrell*, 537 U.S. 322, 335–36. The standard used to determine whether a COA should issue is set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2241–66. The AEDPA requires that to receive a COA, the prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 335–36. This "substantial showing" includes a demonstration that reasonable jurists could disagree on whether the habeas petition should have been resolved differently or whether the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The COA determination under this standard is a threshold inquiry requiring "an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El*, 537 U.S. at 336. The inquiry does not require full consideration of the factual and legal bases for the claims. Moreover, the Supreme Court has cautioned that courts should not deny COAs based solely on a belief that the Petitioner's claim will ultimately fail on its merits. *Id*. at 336–37.

When a district court denies a habeas corpus petition on a procedural basis without reaching the underlying claim, a COA should only issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484

Petitioner has presented a "substantial showing" that he was denied his constitutional right to confrontation of the testimony on the videos, and "a COA should issue." *Johnson v. Vandergiff*, 143 S.Ct. 2551 (mem), 2554 The Circuit Court failed to even reference this specific right in its denial, much less Petitioner's argument about it. It simply stated "Guilfoy argues that the trial court violated his Sixth Amendment rights when it permitted the jury to watch the videos for the first time during deliberation." (App.4a). The Circuit court then only addressed aspects of Petitioner's procedural default and concluded that the default could not be excused. (App.5a).[7] The Circuit Court did not consider if the prisoner made a substantial showing of the denial of a constitutional right as this Court prescribed in *Miller-El* **Id.* 335-336. The Circuit Court did not claim that the Petitioner had not been denied his right to confrontation, it just rested its entire decision on the procedural default alone.[8]

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[7] The courts' conclusion that petitioner's default could not be excused did not include an analysis of the fact that the factual predicate underlying petitioner's constitutional claims (*i.e.*-the fact the jury viewed the videos) was not recorded on the record by the trial court during trial, and petitioner was not permitted to adduce such during his PC hearing. (§ 2254(e)(2)(A)(i):

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that [. . .] the claim relies on [. . .] a factual predicate that could not have been previously discovered through the exercise of due diligence")

[8] It is important to note the district and circuit court only denied an excusal for procedural default on petitioner's issue of jury

B. The Jury's Viewing of Testimony Not Published During Trial is an "Extreme Malfunction," and the State Court's Refusal to Reverse is "Objectively Unreasonable"

As This Honorable Court has explained, AEDPA's requirements reflect "the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)). A state court's legal decision is "contrary to" clearly established federal law under Section 2254(d)(1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). An "unreasonable application" under this subsection occurs when "the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413; *White v. Woodall*, 572 U.S. 415, 426. A state court decision is not unreasonable under this standard simply because the federal court, "in its independent judgment," finds it erroneous or incorrect. *Williams*, 529 U.S. at 411. Rather, to be actionable under Section 2254(d)(1), the state court's decision "'must be objectively unreasonable, not merely wrong; even clear error will not suffice.'" *Woods v. Donald*, 575 U.S. 312, 316 (quoting *Woodall*, 572 U.S.

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exposure/denial of confrontation rights. His IAC issue was deemed timely.

at 419). To be objectively unreasonable, the state court decision must be so unjustified that its erroneousness cannot be denied by fairminded jurists. This standard "was meant to be" a high hurdle for Petitioners, consistent with the principle that habeas corpus functions as a guard against only "extreme malfunctions" in the state's administration of criminal justice. *Harrington*, 562 U.S. at 102 (emphasis added); *see also Woods*, 575 U.S. at 316.

The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right [. . .] to be informed of the nature and cause of the accusation; [and] to be confronted with the witnesses against him[.]" The fourteenth amendment establishes that Petitioner cannot be denied these rights, even in a state proceeding. The Sixth Circuit has effectively established in the instant case that the defendant's right to confront the evidence against him does not include his ability to hear, see, or otherwise observe the testimony against him as long as the witness who developed that evidence testified and his lawyer observed the evidence outside of the courtroom. This ruling is not only contrary to the plain language of the sixth amendment, it is also directly contrary to this Court's ruling in *Maryland v. Craig* that a necessary component to a defendant's right to confrontation is his personal ability to actually observe the testimony against him.

The authors of the sixth amendment clearly intended for testimony against the accused to be presented in a public courtroom from the witness stand, and for the accused to be able to hear/observe such testimony. This Honorable Court has codified as much in its decisions in *Turner* and *Craig*. Obviously, the

original authors could not have foreseen either current technology or its use in modern courtrooms, however it is unconscionable that their original intent would allow for a witness against the accused to provide half of their testimony in open court in front of the defendant, electronically record an additional part of their testimony on a plastic disk prior to trial, introduce the plastic disk as an exhibit to their in-court testimony, and have the testimony on that disk be privately presented to the jury during deliberation without the defendant ever being afforded an opportunity to hear the additional testimony. This scenario clearly falls below the constitutionally mandated minimum guaranteed by the sixth amendment. The Sixth Circuit has effectively removed the requirement in the constitution that admitted testimony must be presented in open court from the witness stand and that the defendant be informed of the testimony against him and that he have the opportunity to cross-examine the witness on that testimony. The ruling from the Sixth Circuit in the instant case "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; [and] has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." (Sup. Ct. R. 10(a) & 10(c)) The district and Sixth Circuit courts' decisions have ignored the sixth amendment's text, intent, and history by effectively establishing a procedure in which admitted testimony need not be presented during trial and the defendant need not be confronted with the evidence (or a portion of the evi-

dence) against him at all. All future criminal defendants hold an interest in this Court overruling this extraordinary new precedent.

CONCLUSION

Petitioner is currently serving a forty-year sentence and has never been afforded an opportunity to view or hear over an hour's worth of substantive and extremely damaging testimony against him which was privately viewed by his jury immediately prior to convicting him. No fairminded jurist could possibly disagree that Petitioner was unable to confront this testimony against him-in the most literal sense. An off-the-record jury room presentation of testimony never published in the courtroom or seen by the defendant is no doubt extremely unusual and possibly unprecedented (as the jury-room consideration of the recordings in *Noushfar* was recorded on the trial record when it occurred), and this conviction should be reversed in the interest of justice so it does not set a dangerous new precedent. The jury viewing of this unpublished testimony was not just clear error (as established by the state appellate court in Petitioner's direct appeal), it was in fact precisely the "extreme malfunction" identified in the AEDPA statue as appropriate for relief. *Harrington Id.* Permitting the jury to consider testimonial statements during deliberation which were never presented to the defendant in the courtroom was "objectively unreasonable" as defined in *Woods*, as it is hard to imagine a more fundamental right than a defendant's ability to face his accuser and hear the accusations against him; even if such testimony is on video, as this

Honorable Court established in *Maryland v. Craig*. The district and Circuit Court's conclusions to the contrary begs the question: if a defendant does not have the constitutional right to personally hear the testimony against him in order to assist his counsel in cross-examination, why is his presence at his trial required at all?

Respectfully, there is a necessity that this Court at least evaluate the Sixth Circuit's new standard of review of an alleged confrontation violation wherein it does not consider the defendant's actual ability to observe testimony used against him as a requirement of the sixth amendment's right to confrontation.

For these reasons, Mr. Guilfoy requests that This Honorable Court grant certiorari to reestablish testimony must only come from the witness stand and that a criminal defendant has the right to literally view/hear/observe the testimony against him if that testimony is considered by the jury when deciding his fate. The confrontation rights of every future criminal defendant are at stake if this new standard by the Sixth Circuit is allowed to stand.

Respectfully submitted,

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May 21, 2024

APPENDIX TABLE OF CONTENTS

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REHEARING ORDERS

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ORDER DENYING CERTIFICATE OF APPEALABILITY, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (DECEMBER 18, 2023)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY GUILFOY,

Petitioner-Appellant,

v.

SHARON N. ROSE, Warden,

Respondent-Appellee.

No. 23-5348

Before: GRIFFIN, Circuit Judge.

Timothy Guilfoy, a Tennessee prisoner, appeals the district court's judgment denying his habeas corpus petition, filed under 28 U.S.C. § 2254. He applies for a certificate of appealability (COA). This court denies the application.

Guilfoy was charged with multiple crimes for sexually abusing two underage girls, J.A. and T.A., when the victims lived in Nashville, Tennessee. Guilfoy and the victims' mother were friends, and he would often stay with the family when he was in the area for work. When he stayed over, he shared a bed with one

of the victims, and it was in this situation where most of the abuse occurred. After J.A. and T.A. told their mother that Guilfoy sexually abused them, she called the police and made several recorded phone calls with Guilfoy to try to elicit incriminating admissions. A nurse practitioner examined both girls, at which time J.A. stated that Guilfoy touched her buttocks and the outside of her genitalia, and T.A. stated that Guilfoy touched the outside of her genitalia. J.A. and T.A. were then interviewed by Anne Post, a child advocacy center forensic interviewer. These interviews were video-recorded. The case against Guilfoy proceeded to trial, and J.A. and T.A. testified about their abuse. A hung jury resulted in a mistrial, so the State tried the case again.

During the second trial, T.A. testified that Guilfoy touched the "inside" of her genitalia three times and identified "the outer labia of the female genitalia" for the jury. J.A. testified that Guilfoy touched the "outside" of her genitalia three times. The nurse practitioner who examined the victims and Anne Post also testified. The prosecution moved to admit the videos of Post's interviews after she testified, which the trial court permitted. The jurors did not watch the videos during trial, but they requested and watched the interviews during deliberations.

Guilfoy was charged with three counts of rape and one count of aggravated sexual battery relating to his conduct with T.A. and four counts of aggravated sexual battery relating to his conduct with J.A. *See State v. Guilfoy*, No. M2012-00600-CCA-R3-CD, 2013 WL 1965996, at *1-2 (Tenn. Crim. App. May 13, 2013). The State did not submit the aggravated-sexual-battery count relating to T.A. to the jury, and the jury

convicted him of two counts of rape and one lesser-included count of aggravated sexual battery as to T.A. and three counts of aggravated sexual battery and one lesser-included count of assault as to J.A. *Id.* Guilfoy was initially sentenced to 70 years in prison, but the Tennessee Court of Criminal Appeals (TCCA) merged several convictions and remanded for resentencing while otherwise affirming the convictions. *Id.* at *23-24. He was sentenced to 40 years in prison on remand.

Guilfoy petitioned for state post-conviction relief, claiming that his trial counsel was ineffective for failing to object to the admission of the forensic interviews and Post's testimony. The trial court denied relief, and the TCCA affirmed, concluding that Guilfoy could not show prejudice on either claim. *See Guilfoy v. State*, No. M2014-01619-CCA-R3-PC, 2015 WL 4880182, at *11-12, *16 (Tenn. Crim. App. Aug. 14, 2015). In 2017, Guilfoy petitioned for a writ of error coram nobis, presenting an affidavit from the jury foreperson stating that jurors watched the videos during deliberations. The TCCA concluded that the petition was untimely and failed to state a cognizable claim for coram nobis relief. *Guilfoy v. State*, No. M2017-01454-CCA-R3-ECN, 2018 WL 3459735, at *2-3 (Tenn. Crim. App. June 20, 2018).

Guilfoy also petitioned for federal habeas relief under § 2254 in 2017, claiming that his Sixth Amendment rights were violated when the jury watched the videos and that he was deprived of the effective assistance of counsel when counsel did not object to the admission of the videos and Post's testimony. The district court held that his standalone Sixth Amendment claim was procedurally defaulted and that the state courts' rejection of his ineffective-assistance claims

was not unreasonable. *Guilfoy v. Parris*, No. 3:18-cv-01371, 2023 WL 2601925, at *17-28 (M.D. Tenn. Mar. 22, 2023). He now seeks a COA.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A district court shall not grant habeas relief on any claim that was adjudicated on the merits in state court unless the adjudication resulted in a decision that (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). When the district court denies relief on procedural grounds, the petitioner must demonstrate that reasonable jurists "would find it debatable whether the petition states a valid claim of the denial of a constitutional right and . . . would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Guilfoy argues that the trial court violated his Sixth Amendment rights when it permitted the jury to watch the videos for the first time during deliberation. He raised this claim in his coram nobis proceedings, and the TCCA denied that petition as untimely. The district court determined that this claim was procedurally defaulted because the deadline to petition

for coram nobis relief was an independent and adequate state procedural bar to his claim. *Guilfoy*, 2023 WL 2601925, at *17.

"A habeas petitioner procedurally defaults a claim when [8](1) [he] fails to comply with a state procedural rule; (2) the state courts enforce the rule; [and] (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim." *Theriot v. Vashaw*, 982 F.3d 999, 1003 (6th Cir. 2020) (alterations in original) (quoting *Wheeler v. Simpson*, 852 F.3d 509, 514 (6th Cir. 2017)). A federal court will not review a procedurally defaulted claim unless the petitioner can show either cause for the default and actual prejudice from the alleged constitutional violation or that failure to consider the claim would create a "fundamental miscarriage of justice," *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Guilfoy argues that the State prevented him from raising his claim until he secured the affidavit from the jury foreperson and that he received ineffective assistance of post-conviction counsel. But he knew that the jury requested the recordings in 2011 when he moved for a new trial, and he does not explain why he could not have obtained the affidavit from the foreperson earlier. And ineffective assistance of post-conviction counsel cannot qualify as cause for defaulting his trial-court-error claim. *See Davila v. Davis*, 582 U.S. 521, 524-25 (2017). Therefore, reasonable jurists would agree that Guilfoy procedurally defaulted this claim.

Guilfoy next claims that his counsel was ineffective for failing to prevent the jury from viewing the forensic interviews of the victims and for not objecting to Anne Post's testimony that trauma can disrupt a child-victim's memory of sexual abuse. To prove ineffective

assistance of counsel, a petitioner must show that his attorney's representation was objectively unreasonable and that he was prejudiced by his counsel's actions. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove prejudice, a petitioner must show a substantial likelihood of a different result had counsel acted differently. *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011). On habeas review of an ineffective-assistance claim, "[t]he petitioner must show that the state court's ruling was[8] so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement." *Mammone v. Jenkins*, 49 F.4th 1026, 1041 (6th Cir. 2022) (alteration in original) (quoting *Richter*, 562 U.S. at 103).

Guilfoy contends that counsel was ineffective for failing to object to the State's introduction of the videos, arguing that they bolstered the victims' testimony, contained information that the victims did not testify to during trial, and suggested that the victims discussed their abuse with each other before reporting it. The state court noted that the videos were improperly admitted but nevertheless held that Guilfoy had not shown prejudice because J.A. and T.A. testified to the details of each charged offense. *Guilfoy*, 2015 WL 4880182, at *12.

The videos were redacted to remove evidence of uncharged acts, although some of Post's summaries about uncharged abuse remained in the redacted version. In any event, the jury was provided with an election of offenses that detailed the dates of the charged abuse. At trial, T.A. testified to three instances of sexual abuse involving penetration, but in her interview she described only one relevant instance of sexual abuse involving penetration. *See id.* at *11.

Defense counsel cross-examined the victims about their testimony at the first trial, pointing out inconsistencies in T.A.'s description of the abuse, including whether the incidents involved penetration. Defense counsel also highlighted T.A.'s inconsistent statements in his closing argument, noting that she described the incidents of abuse differently in her recorded interview, at the first trial, and at the second trial. And, crucially, the jury convicted Guilfoy of charges less serious than what T.A. and J.A. testified to. On the record as a whole, reasonable jurists would agree that it was not unreasonable for the state court to conclude that Guilfoy has not shown a substantial likelihood of a different result had counsel objected to the admission of the videos.

Guilfoy also contends that counsel was ineffective for failing to object when forensic interviewer Anne Post, despite not being qualified as an expert witness, testified to her opinion that trauma can disrupt a child's memory of sexual abuse. Guilfoy argues that this undermined his defense at trial that the victims testified inconsistently. The state court assumed that counsel performed deficiently but held that Guilfoy had not shown prejudice, noting that Post did not testify about the inconsistencies of the victims' testimonies or the plausibility of their allegations. *Id.* at *16.

Guilfoy does not make a substantial showing that the trial court would have struck Post's statement rather than rule on her qualifications and admit her testimony. Furthermore, he only speculates that the jury used Post's testimony to resolve inconsistencies in T.A.'s and J.A.'s statements, and that is not enough to show prejudice. *See Kissner v. Palmer*, 826 F.3d 898, 903 (6th Cir. 2016). Therefore, reasonable jurists would

agree that the state court reasonably applied *Strickland* as to this claim.

For these reasons, the application for a COA is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Clerk

**MEMORANDUM OPINION,
U.S. DISTRICT COURT FOR THE
MIDDLE DISTRICT OF NASHVILLE
(MARCH 22, 2023)**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TIMOTHY GUILFOY,

Petitioner,

v.

MICHAEL PARRIS, Warden,

Respondent.

NO. 3:18-cv-01371

Before: Eli Richardson,
United States District Judge.

Petitioner Timothy Guilfoy filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 in the Western District of Tennessee (Doc. No. 1), challenging the legality of his 2011 conviction in Davidson County Criminal Court. (*Id.* at 1.) The Western District stayed and administratively closed the matter while Petitioner made a final attempt to win relief in state court. (Doc. No. 11.) After that attempt proved unsuccessful, the Western District lifted the stay, reopened proceedings in this federal habeas case, and transferred the matter

to this Court because Petitioner's conviction was obtained in a state court that lies within the Middle District of Tennessee. (Doc. No. 13.)

Petitioner subsequently filed an Amended Petition (Doc. No. 31), and Respondent filed the state-court record (Doc. Nos. 37, 38) and an Answer to the Amended Petition. (Doc. No. 39.) Petitioner filed a Reply to Respondent's Answer (Doc. No. 52), followed by a supplement to that Reply. (Doc. No. 55.)

This matter is ripe for the Court's review. Respondent does not dispute that the Petition in this case is timely, that this is Petitioner's first Section 2254 petition related to this judgment of conviction, or that he has no available state remedies left to pursue. (Doc. No. 39 at 1-2.) Having reviewed Petitioner's arguments and the underlying record, the Court finds that an evidentiary hearing is not required. As explained below, Petitioner is not entitled to relief under Section 2254, and his Petition will therefore be denied.

I. Procedural History

Petitioner was indicted in 2011 on four counts of aggravated sexual battery against a minor victim, referred to by the initials "J.A." to protect her privacy; one count of aggravated sexual battery against J.A.'s minor sister, T.A.; and three counts of rape of a child against T.A. (Doc. No. 37-1 at 41-48.) These charges came to trial in July 2011, resulting in a hung jury and declaration of mistrial. (Doc. No. 37-4 at 18.)

Petitioner was retried and convicted on all counts except the aggravated sexual battery of T.A, on which charge the State entered a nolle prosequi. (Doc. No. 37-4 at 26.) One of the four counts of aggravated

sexual battery against J.A. resulted in conviction on the lesser-included offense of assault, and one of the child rape charges against T.A. resulted in conviction on the lesser-included offense of aggravated sexual battery. (Doc. No. 37-8 at 147-48.) Petitioner received a total effective sentence of 70 years' incarceration. (Doc. No. 37-4 at 33.) He filed a motion for new trial, which was heard and denied by the trial court. (*Id.* at 85.)

On direct appeal, the Tennessee Court of Criminal Appeals (TCCA) affirmed Petitioner's convictions on one count of aggravated sexual battery against both J.A. and T.A. It then merged[1] two aggravated sexual battery convictions against J.A. (counts 1 and 2 of the indictment) into a single conviction, the two child rape convictions against T.A. (counts 6 and 7 of the indictment) into a single conviction, and the conviction for assault against J.A. (lesser included offense of count 4 of the indictment) into the remaining conviction for aggravated sexual battery against J.A. (count 3 of the indictment). The upshot of these mergers is that Petitioner was convicted of two counts of aggravated sexual battery of J.A., one count of aggravated sexual battery of T.A. (as a lesser included offense of child rape), and one count of child rape of T.A. (*See* Doc. No. 37-22 at 75.) The TCCA remanded the matter for

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[1] Merger is used to prevent or cure a double jeopardy violation that would result from a single wrongful act being elected by the State as the basis for more than one charge of conviction. *See State v. Elmore*, No. W2011-01109-CCA-R3CD, 2012 WL 6475554, at *14 (Tenn. Crim. App. Dec. 13, 2012) (remanding for merger because "both of the defendant's convictions arise from a single transaction—the defendant's assault on the victim on the morning of March 2, 2009," and he "was convicted for this assault twice . . . using two different theories of criminal liability").

resentencing in light of the mergers. *State v. Guilfoy*, No. M2012-00600-CCA-R3-CD, 2013 WL 1965996 (Tenn. Crim. App. May 13, 2013). Petitioner's application for permission to appeal to the Tennessee Supreme Court was denied. (Doc. No. 37-21.) On resentencing, the trial court imposed an effective sentence of 40 years. (Doc. No. 37-22 at 75.)

Petitioner filed a timely petition for post-conviction relief, which was supplemented twice by counsel. (Doc. No. 37-22 at 62-74, 76-83.) After holding an evidentiary hearing, (Doc. No. 37-23), the court denied post-conviction relief. (Doc. No. 37-22 at 84-88.) The TCCA affirmed, *Guilfoy v. State*, No. M2014-01619-CCA-R3-PC, 2015 WL 4880182 (Tenn. Crim. App. Aug. 14, 2015), and denied rehearing. (Doc. Nos. 37-35, 37-36.) The Tennessee Supreme Court denied permission to appeal. (Doc. No. 37-39.)

Petitioner filed a state-court petition for writ of error coram nobis on January 17, 2017 (Doc. No. 37-40 at 48-68) and, two weeks later, filed his original habeas petition in federal court. (Doc. No. 1.) On August 15, 2017, federal proceedings were stayed pending the outcome of coram nobis review. After coram nobis relief was denied in the state trial and appellate courts, *see Guilfoy v. State*, M2017-01454-CCA-R3-ECN, 2018 WL 3459735 (Crim. App. Tenn. July 17, 2018), Petitioner returned to federal court to resume his pursuit of relief under Section 2254. The Western District reopened these proceedings and transferred the case to this District on December 13, 2018. (Doc. No. 13.)

II. Review of the Record

A. Proceedings at Trial and on Direct Appeal

The TCCA summarized the facts of this case in its opinion on direct appeal. The parties do not dispute the following statement of facts in evidence at Petitioner's trial, as provided by the TCCA:

At the Defendant's second jury trial, the following proof was adduced:

> Jennifer A., the victims' mother ("Mother"), testified that, when she and her three daughters moved to Nashville from Indiana in 2005, they began living at the Biltmore Apartments. Her father, Brian Schiff ("Grandfather"), was living there at the time, and they moved in with him. It was a two-bedroom apartment, and she described the living conditions as "pretty crunched." After several months, Grandfather purchased a nearby house on Saturn Drive, and they all moved into the house. Mother stated that, when they moved into the house on Saturn Drive, it had an unfinished basement and an unfinished attic. She used the attic as her bedroom except in the summertime. The girls slept on the main floor but did not have their own separate bedroom. The girls' sleeping accommodations included a bunk bed, a futon, and a couch that pulled out to a bed. Usually, J.A. slept in the top bunk of the bunk bed.
>
> While they were still living in the apartment, Mother became acquainted with the Defendant. He and his roommate lived next door to

them. The Defendant came to visit Mother and her family in Mother's apartment. Mother and her family also visited the Defendant in his apartment. Mother described their relationship as "friends" and denied that there was ever any romantic interest on either her or the Defendant's part. She added that the Defendant was a "really good friend."

Not long after Mother and her family moved to the house on Saturn Drive, the Defendant moved out of his apartment to another location in Nashville. The Defendant visited them at their house on Saturn Drive. A few months later, the Defendant moved to Missouri. The Defendant continued to stay in touch through phone calls and visits.

Mother explained that the Defendant worked in marketing tours and would come to Nashville to participate in events such as the "CMA festival." He usually would drive to town in a tour vehicle, and he would stay with Mother and her family at the Saturn Drive house. In this way, he was able to keep the per diem he was paid for hotels. Mother stated that she and her daughters enjoyed having the Defendant stay with them.

Mother stated that it was not her intention that the Defendant spend the night sleeping in any of the girls' beds, but she knew that he did because she would find him in one of their beds in the morning. She remembered one particular occasion when she saw the Defendant in bed with J.A. in the top bunk of the bunk bed. At that time, the bunk bed

was in the dining room. She also recalled finding the Defendant in bed with T.A. on "[m]ultiple" occasions. She did not say anything to the Defendant about his presence in bed with her children.

In May of 2008, Mother, the girls, and the Defendant planned a camping trip to celebrate J.A. and Mother's birthdays, which were close together in time. Mother stated that they camped two nights, and everyone had a good time.

Mother decided that she wanted to leave Nashville and move to Clarksville. The Defendant had expressed an interest in real estate investment, specifically, purchasing a house and renting it out. When Mother told him she was interested in moving to Clarksville, he purchased a house there, and she rented it from him. She stated that the rent was $700 a month. She also testified that the Defendant told her that she "wouldn't ever have to worry about just being kicked out of the house." Mother testified that the Defendant realized that she "might not always be able to come up with seven hundred dollars." She also stated that the Defendant was welcome to spend the night there. She added that it "was supposed to be a permanent move."

One morning in Clarksville, after the girls had gotten on the bus to go to school, Mother spoke with Grandfather over the phone. Grandfather told her that J.A. had told him "what happened." After her conversation with Grandfather about what J.A. had told him,

Mother retrieved her daughters from school. Mother subsequently spoke with J.A. and T.A. and then she called 911. Two deputies from the Montgomery County Sheriff's Department responded and she relayed to them what J.A. and T.A. had told her. Mother testified that she called the police regarding the instant allegations on or about March 15th, 2009. The Defendant had been there three days previously.

In conjunction with the ensuing investigation, Mother made several recorded phone calls to the Defendant. She made these calls in March 2009. Mother and her family remained in the Defendant's house for about one more month. The Defendant did not serve her with an eviction notice.

On cross-examination, Mother admitted that she and the Defendant had a formal lease agreement regarding the house. She did not mail rent payments to the Defendant but deposited them twice a month into a bank account the Defendant had established. She also admitted that, whenever the Defendant came to visit, her daughters "rushed to the door and hugged him." She did not see either J.A. or T.A. acting frightened around the Defendant. She acknowledged that, when J.A. was six and seven years old, she was wetting the bed and wore pull-ups.

Mother testified that, when the Defendant was staying with them, she usually fell asleep before he did. She did not tell him where to sleep. While they were living on Saturn

Drive, the girls would fight over who got to sleep with the Defendant. She did not intervene in these discussions.

Mother acknowledged that she and her daughters moved to Clarksville in September 2008. She already had been attending a junior college in Clarksville during the summer months. She was not able to pay September's rent, so the Defendant told her that she could pay it later by increasing the rent due in subsequent months. In October, she dropped out of school. She paid part of her rent for the months of October and November. She got a job in December and was able to pay December and January rent. She was fired in February. She earlier had told the Defendant that she would file her federal income tax return early in order to get her refund and pay him some of the money she owed him. She, however, did not get a refund. Mother remained in the house through at least a portion of May.

Mother admitted that, in early March 2009, the Defendant told her that he was having a hard time making the mortgage payments on the house. She denied that he told her that, if she could not pay the rent, he would have to get a tenant who could.

J.A., born on May 22, 2000, and eleven years old at the time of trial, testified that she had two older sisters, T.A. and A.A. She began living in Nashville "quite a few years ago" in an apartment. She lived with her sisters, Mother, and Grandfather. The Defendant,

whom J.A. identified at trial, lived in the apartment next door.

J.A. and her family later moved into a nearby house. The house had a basement, attic, and main floor. Sometimes, Mother used the attic as her bedroom. Grandfather used the basement as his living area. Sometimes the girls used the dining room as their bedroom. They used a regular bed and a bunk bed. J.A. usually slept in the upper bunk bed.

Sometimes the Defendant would spend the night at the house. On some of these occasions, the Defendant would sleep in J.A.'s bunk bed with her. J.A. testified that, on one of these occasions, the Defendant touched her "private" with his hand. She stated that he touched her skin by putting his hand down the front of her pants. She also stated that his hand moved and that she got up and went to the bathroom. She then went to sleep with one of her sisters. J.A. testified that the Defendant touched her in this manner on more than one occasion. J.A. stated that, when the Defendant touched her while in bed with her, she was not sure if the Defendant was awake at the time the touchings occurred.

J.A. also testified that, at another time, she was sitting on the Defendant's lap on the couch. The Defendant put his hand down the back of her pants and then slid his hand under her legs. He touched her "private" on her skin. When shown a drawing of a girl's

body, J.A. identified the genital region as the area she referred to as her "private."

J.A. went camping with her family and the Defendant for J.A.'s eighth birthday. This trip occurred after the touchings about which J.A. testified. The Defendant did not touch her inappropriately on this trip.

After a while, J.A. decided to tell Grandfather what had happened. This was some time after she and her family left the house on Saturn Drive and moved into a house in Clarksville that the Defendant owned. Grandfather remained in the house on Saturn Drive. When she told Grandfather what the Defendant had done, he told her to tell Mother. She did not do so, however, because she did not think Mother would believe her. Some time later, Grandfather told Mother what J.A. had told him but did not identify the Defendant. J.A. then told Mother what had happened. According to J.A., Mother then told her boyfriend. J.A. and T.A. went to school, but Mother came and got them out of school a little later. She took them home and "called the cops." J.A. subsequently was interviewed by a woman named Anne. The interview was videotaped. J.A. also visited a doctor, who examined her. She did not remember what she told the doctor but testified that she would have told the truth.

On cross-examination, J.A. stated that the touching on the couch occurred while she was in second grade. At the time, her sisters were in the room with her. Also home at the

time were Grandfather, her grandmother, Mother, and Mother's boyfriend, "Bob-o." J.A. acknowledged that the Defendant's visits were sometimes short, and he did not spend the night. She and her sisters were glad to see the Defendant during his visits. She did not remember the Defendant taking her anywhere by herself. He never said anything to her that made her uncomfortable.

J.A. admitted that, at the time the touchings occurred, she wore a "pull-up" because she had a problem with bed-wetting. She stated that she did not know if she was wearing a pull-up when the Defendant touched her on the occasions she testified about. She also stated that the Defendant had been lying behind her and she was facing away from him. She did not know if he was awake or asleep when the touching occurred. She stated that she had watched the videotape of her interview [with Anne] twice.

On redirect examination, J.A. stated that the only thing about the Defendant she did not like was the touchings. She never got mad at him or fought with him. She never saw her sisters or Mother be mad at him. When asked how many times the Defendant touched her inappropriately, she responded, "Maybe three or four times."

T.A., born on February 26, 1999, and twelve years old at the time of trial, testified that she currently lived in Florida with her two sisters, her brother, her father, and her step-mother. She previously had lived in Nashville

with her two sisters, Mother, and Grandfather. She was the middle of three daughters.

T.A. identified the Defendant and stated that he lived next door to them while they lived in an apartment in Nashville. T.A. and her family later moved to a house on Saturn Drive. She stated that, while the family lived there, they frequently changed the furniture arrangements because the house was small. At one point, the family room was set up with a bunk bed and a futon. Another time, the bunk bed and a queen-size bed were in the dining room. Usually, T.A. and J.A. slept in the bunk bed, with T.A. on the bottom bunk. T.A.'s older sister, A.A., usually slept in the queen-size bed. Sometimes, T.A. would sleep on the futon in the family room to "get away from [her] sisters."

T.A. testified that the Defendant spent the night at the house on Saturn Drive "maybe three times." On these occasions, the Defendant slept in the family room or the dining room. On one particular occasion, the Defendant slept in T.A.'s bed. She testified: "I was about to go to bed. It was either on the futon or the bunk bed. I'm not too sure. He had climbed in the bed, and I was already laying down. And he rolled me over and put his hand down my pants." The Defendant touched her "private part" with his finger, on her skin. She added that the Defendant's finger "went inside [her] private part." She left her bed and got in bed with her big sister. She

added that she was "not too sure" if the Defendant was awake when this occurred.

T.A. testified that, on another occasion, she was laying on her bunk bed when the Defendant came in and started touching her. She tried to get up, but he held her down. He touched her private part with his finger again, and she "just started crying." She got up, telling him that she had to go to the bathroom. She left and stayed away. T.A. stated that the Defendant had touched her on "[t]he inside." She also stated that this episode caused her to "want to puke."

T.A. testified that, in response to the Defendant's actions, she started wearing khaki pants to bed because they did not have an elastic waistband. She stated that the Defendant touched her another time while she was wearing her khaki pants and that he unzipped and unbuttoned them. This happened on her bunk bed. She testified, "[h]e touched me with his finger on [her] private part on [her] skin on the inside."

T.A. testified that the Defendant touched her more than three times. The touchings were similar to one another. When asked to indicate on a drawing the parts of the body that the Defendant touched, T.A. indicated the female genitalia. When asked what she meant by "inside," she indicated, as reported by the prosecutor for the record, "[in between . . .] the outer labia of the female genitalia."

T.A. stated that the touchings occurred before the family camping trip that they took for J.A.'s eighth birthday. She stated that she never told anyone about the touchings. She recalled J.A. telling Grandfather, however, and she remembered when Mother spoke with them while they were waiting for the school bus. T.A. testified that J.A. told Mother what had happened and that Mother began to cry. Both the girls began to cry, too. Nevertheless, the girls got on the bus and went to school.

Mother picked them up from school early that day, and they went to the District Attorney's office. There, T.A. spoke with Anne Fisher. T.A. since had watched the videotape of her interview with Fisher. After the interview, T.A. was examined by a doctor.

T.A. testified that she liked the Defendant other than his touching her. She testified that her mother and the Defendant were good friends.

On cross-examination, T.A. acknowledged that, in July 2011 [(at Defendant's first trial)], she testified that the Defendant had not touched her in the same place that a tampon would go. Rather, she had earlier testified that he touched her "[l]ike on top of it," "[l]ike not literally on the outside, but like on the outside of it, yes, but like inside," and "[b]ut on the top, like where something else—like I don't know. Yeah. It wasn't like literally inside, inside, but it practically was. Yes." On cross-examination at trial, she testified that

the Defendant touched her inside, where a tampon goes.

T.A. admitted that the Defendant never had threatened her, never had told her that they had a secret, and never had promised her anything for her silence. He did not speak with her about sex or boyfriends, and he never said anything that made her uncomfortable. He never pressed his body against hers, never made her touch his "private part," and never showed his "private part" to her.

On redirect examination, T.A. explained that the Defendant had visited them in the house on Saturn Drive more than four times, but that he would not stay more than three days per visit.

Chris Gilmore testified that he was a school resource officer with the Cheatham County Sheriff's Department but previously had been employed as a police officer with the Clarksville Police Department. On March 18, 2009, he responded to Mother's address on an allegation of child rape. From Mother, he gathered basic information. He did not speak to any children. He notified the appropriate persons within the police department for follow-up.

Detective Ginger Fleischer of the Clarksville City Police Department testified that she was assigned to investigate the matter reported by Mother. Because the alleged criminal conduct had taken place in Nashville, she contacted

the appropriate Nashville authorities. Detective Fleischer and Detective Fleming of the Davidson County Police Department determined that a "controlled phone call" between Mother and the Defendant would be helpful to the investigation. She explained to Mother that the phone call would be monitored and recorded. The phone call was scheduled to take place on March 24, 2009, the day after the forensic interview of the children. On that day, Mother made three phone calls to the Defendant, and all three phone calls were recorded and transcribed. The recordings were admitted into evidence and played for the jury. A fourth recorded phone call was made by Mother to the Defendant on the next day. This recording also was admitted into evidence and played for the jury. Additionally, the transcripts of all the recorded phone calls were admitted.

Hollye Gallion, a pediatric nurse practitioner with the Our Kids Center in Nashville, testified that she performed medical examinations on J.A. and T.A. on April 21, 2009. In conjunction with performing the exams, she reviewed the medical history reports given by the children to a social worker. J.A. reported that "a guy named Tim" had touched the outside of her butt and the outside of her "tootie" with his hands, explaining that she "pee[d]" out of her "tootie." J.A. reported that the touching had occurred more than once. Asked if she remembered the first time, J.A.

reported, "It was in our old house in Nashville; I was around six or seven years old."

Gallion testified that J.A.'s physical examination was "normal." She did not find "any injuries or concerns of infection." She also stated that the results of the physical examination were consistent with the medical history that J.A. reported. Gallion added, "Touching typically doesn't leave any sort of evidence or injury."

Gallion testified that, in giving her medical history to the social worker, T.A. reported that the Defendant had touched the outside of her "too-too" with his hand, explaining that she "pee[d]" from her "too-too." T.A. reported that the touching had occurred more than once and that she was "around five or six" the first time. On conducting a physical exam, Gallion concluded that T.A.'s genital area and her "bottom" "looked completely healthy and normal." Gallion added that T.A.'s "physical exam was very consistent with what her history was."

Anne Fisher Post, a forensic interviewer employed by the Montgomery County Child Advocacy Center, testified that she conducted forensic interviews of J.A. and T.A. These interviews were recorded and, without any contemporaneous objection from the Defendant, the recordings were admitted into evidence but were not played for the jury in open court.

Guilfoy v. State, 2013 WL 1965996, at *2-8.

Ms. Post's testimony included the following exchange pertinent to the issues raised in the Amended Petition:

> Q: (By Assistant District Attorney General Sharon Reddick:) Now, I want to just ask you a little bit about what you can expect from a forensic interview.
>
> You have testified that you hope—they're designed to give the best and most accurate information possible.
>
> What is your experience in the area of interviewing children who have perhaps been subjected to a number of instances of abuse over a fairly lengthy period of time, beginning when they are very young?
>
> Is it realistic to expect that you'll get every detail from every incident?
>
> A: Certainly not. It depends, too, on the age of the child. Very little children, we expect to capture only very limited information about any event that happens in their lives. And there are lots of things that can disrupt a kid's memory of an abuse event. Trauma can disrupt memory, for example.
>
> And events that are very similar can be very hard to separate. I think we all know that [from] our own experience. If you have the same event over and over in your own life, it can be very difficult to provide a narrative detailed account of one specific incident of that same event.
>
> Q: They all blend together?

A: Yes.

Q: I want to show you what's previously been marked for identification as Exhibit No. 3.

Actually, I'll take it first because I want to ask you some more questions.

Ms. Post, did you interview two children in the Advocacy Center in the spring of 2009 named [J.A.] and [T.A.]?

A: I did.

Q: I want to hand you this item that's previously been marked for identification as No. 3, and ask if that appears to be the disk of the interview that I asked you to review?

(Item provided to the witness.)

A: It appears to be.

Q: Subject to some redactions, does that accurately reflect the content of your interview with [J.A.]?

A: It does.

MS. REDDICK: If that can be marked an exhibit to her testimony.

THE COURT: That was No. 3 that was previously marked for identification only.

MS. REDDICK: Thank you, Judge. Yes.

Now, if I can be handed No. 6? (Item provided to the witness.)

Q: (By Ms. Reddick:) Did I also ask you to review your interview with [T.A.]?

A: You did.

> Q: Again, subject to some – what does that appear to be?
>
> A: It appears to be that interview that I reviewed.
>
> Q: And subject to some redactions, does that appear to accurately reflect the content of your conversation with [T.A.]?
>
> A: It does.
>
> MS. REDDICK: Your Honor, I'd ask to make that an exhibit to her testimony.
>
> Those are my questions.
>
> THE COURT: All right. Which was also previously identified and admitted for identification purposes only. Now it is an exhibit.

(Doc. No. 37-8 at 68-71.)

Defense counsel did not object to the admission of these exhibits or cross-examine Ms. Post, and the State rested its case after she testified. The State then delivered an election of offenses[2] to the jury in which it specified the dates and particular misconduct by Petitioner that corresponded to counts one, two, three,

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[2] The election of offenses doctrine "refers to the prosecutor's duty in a case where evidence of multiple separate incidents is introduced to elect for each count charged the specific incident on which the jury should deliberate to determine the defendant's guilt." *State v. Qualls*, 482 S.W.3d 1, 9 (Tenn. 2016). It "serves to ensure that the jury understands its obligation to agree unanimously that the defendant committed the same criminal act before it may convict the defendant of a criminal offense." *Id.* at 10. The doctrine also, among other things, "assists the defendant in preparing for and defending against the specific charge [and] protects the defendant from double-jeopardy concerns." *Id.*

four, six, seven, and eight of the indictment, and withdrew count five of the indictment from the jury's consideration. (*Id.* at 71-75.)

The defense recalled Detective Fleisher to inquire into her level of involvement with the controlled calls Mother made to Petitioner in March 2009, and then called Petitioner's mother (Francene Guilfoy), brother (Tony Guilfoy), father (Patrick Guilfoy), and close friend (Matt Jaboor). The defense then rested. (*Id.* at 79-144.)

During closing argument, after noting that the jury had "heard the evidence, the testimony," the prosecutor remarked to the jury as follows:

> And yes, there are exhibits, things that you can take back into the jury room with you. Actually, everything that we have introduced can be taken back, looked through, so that's why I'm not going to put everything up and say, oh, look, remember this, we saw this.
>
> One thing I do want to mention is, remember the forensic interviews, those tapes, that we did not play those. For one thing, we're lucky to get these to work to play the ones that we did.[3] But those are video. And we don't have the capability out here.

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[3] In its opinion on direct appeal, the TCCA quoted this portion of the State's closing argument and inserted at this point the following, clarifying footnote: "The State had earlier experienced technical difficulties in playing the recordings of the phone calls between the Defendant and Mother." *State v. Guilfoy*, 2013 WL 1965996, at *14.

> In the back, in the jury room, should you – obviously, it's your decision whether you want to watch them or not, but should you decide to, we have the capability, or the Court does, to get a TV and all that to play those, those forensic interviews, the girls by themselves, with the interviewer in March, April, 2009, when that occurred.
>
> I just mention that sort of as, well, if you wonder why didn't we watch those or hear those, that's the reason.

(Doc. No. 37-9 at 3-4.)

As later noted by the TCCA, the trial court failed to provide a contemporaneous limiting instruction admonishing that the disks of the forensic interviews could not be used to prove Petitioner's guilt. *Guilfoy v. State*, 2015 WL 4880182, at *11. And though the trial court later "instructed the jury that prior inconsistent statements could be used only to determine a witness's credibility,"[4] it "did not provide a similar instruction for prior consistent statements." *Id.*

The trial transcript does not indicate in any way whether or not the jury watched the forensic interview recordings during its deliberations. On direct appeal, the TCCA found as follows:

> Although the record clearly demonstrates that the trial court erred in admitting the

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4 (*See* Doc. No. 37-2 at 22 (jury charge instructing that "proof of any prior different statement may be considered by you only for the purpose of determining if the witness is telling the truth at trial. The contents of the prior inconsistent statement are not to be considered as proof in the trial").)

> recordings of the interviews into evidence,[5] the record does not demonstrate that the jury ever watched the interviews. Indeed, during closing argument, the prosecutor told the jury . . . that, in order to watch the recordings, the jury would have to request the appropriate equipment. The record contains no indication, however, that the jury ever requested the equipment. Nor does the record contain any other indication that the jury watched the recordings. The record is simply silent on this point.

State v. Guilfoy, 2013 WL 1965996, at *14. The TCCA proceeded to merge various convictions as previously described, but otherwise affirmed the trial court and remanded for resentencing in light of the mergers. *Id.* at *1, 24; (Doc. No. 37-19). On remand, the trial court sentenced Petitioner to 40 years' imprisonment. (Doc. No. 37-22 at 75.)

B. Proceedings on Post-Conviction Review

The TCCA summarized the record developed at the evidentiary hearing in the post-conviction trial court, as follows:

> The Petitioner filed a petition for post-conviction relief alleging ineffective assistance of counsel. At the post-conviction hearing, trial counsel testified that he did not object to the

[5] It is unclear whether the TCCA found the admission erroneous because of the lack of a limiting instruction, because it was improper evidence of a prior consistent statement, or for another reason.

introduction of the recorded forensic interviews as substantive evidence at trial and that he did not request that a limiting instruction be given to the jury. Trial counsel recalled that he went through the forensic interviews and redacted any reference to incidents that happened outside of Davidson County or incidents that involved a third victim, A.A. He identified the portions of the interview that needed to be redacted by looking for references to A.A., to things "that 'happened at the new house,'" or to "things that 'happened where we live now.'" Trial counsel recalled that he redacted statements from T.A. regarding incidents that happened in Montgomery County. However, trial counsel admitted that the redacted version of the video included the following statement:

> Interviewer: Okay. So, you've told me about a time he put his hand in your pants and touched your private part and nothing went inside. And you told me about a couple of times when he touched your private part and his finger went inside.

Trial counsel confirmed that at least two of the three events included in the interviewer's summary occurred in Montgomery County.

Trial counsel explained that he did not object to the admission of the video-recorded forensic interview because he believed that, when a victim was impeached, the victim's prior consistent statements were admissible as to the subject of the victim's credibility. He expected

the trial court to give a limiting instruction to the jury and failed to notice that no limiting instruction was given.

Trial counsel also recalled that controlled phone calls between the Petitioner and the victims' mother were introduced into evidence. Trial counsel did not file any pretrial motions to suppress the introduction of the phone calls, but he did redact the phone calls because they contained references to incidents that happened in Montgomery County. In a portion of the recorded phone calls, the Petitioner stated, "[H]ad said it was me?" In the redacted version, a portion of what the victims' mother said to the Petitioner immediately before he made that statement was removed. Trial counsel agreed that, taken out of context, the Petitioner's statement could have been characterized as having a guilty mind. Trial counsel stated that his failure to redact that portion of the recorded phone call must have been an oversight.

Trial counsel also admitted that the unredacted phone calls included a statement from the Petitioner where he admits that he woke up one time to find T.A. on top of him. When he attempted to push her off of him, his fingers went inside her underwear. This incident occurred in Montgomery County. In the redacted version, the location of the incident was taken out, but the details of the incident remained.

Trial counsel explained that his theory of defense during the second trial was to demonstrate "the implausibility of the allegations" against the Petitioner. Trial counsel recalled that, during the first trial, he extensively cross-examined the victims' mother about the particular dates the incidents were alleged to have occurred. Trial counsel used a large poster board to create a diagram of the alleged dates and then, through other witnesses, demonstrated that the Petitioner was not in Nashville on the dates in question. However, trial counsel did not use the same technique during the second trial. He explained:

> My thinking was, the lack of specificity, with regard to dates, was a weakness in the State's case for the first trial. And in the second trial, obviously, they would fix that, they would be prepared for what I was doing. So, my thinking was, the second trial we would present our case differently, because if we tried the same case twice the State would be able to anticipate everything we did.

Trial counsel also recalled that the State's direct examination of the victims' mother was essentially the same in each trial. Trial counsel agreed that he could have addressed in the second trial the issue of dates in order to demonstrate the implausibility of the allegations against the Petitioner.

Trial counsel also confirmed that he did not object to the respective testimony of Ms. Gallion and Ms. Post. He agreed that their

> respective testimony could have bolstered the victim[s]' testimony.
>
> On cross-examination, trial counsel stated that he was one of about six attorneys who regularly represented clients charged with child sex abuse. He stated that it was common for there to be no unbiased adult eyewitnesses in such cases. Often, such cases turned on the victim's credibility. Trial counsel recalled that the State's general practice in such cases would be to have the nurse practitioner qualified as an expert witness, but he did not know whether the forensic interviewer was qualified as an expert. He also recalled that he met with the prosecutor about redacting statements from the recorded phone calls, and the prosecutor agreed to "redact everything we wanted redacted."
>
> Kathleen Byers, the Petitioner's sister, testified that she was present at both trials. After the jury was released to deliberate in the second trial, Ms. Byers asked trial counsel if she had time to get lunch before the jury returned. Trial counsel told her that she likely did because the jurors had requested that a TV and viewing equipment be brought into the jury room so they could "watch the video."

Guilfoy, 2015 WL 4880182, at *7-8.

In addition to Ms. Byers's testimony, "Petitioner sought to have the jury foreperson testify at the post-conviction hearing that the jury had viewed the

recordings of the forensic interviews during its deliberations, but the post-conviction court ruled her testimony inadmissible" and Petitioner did not appeal that ruling. *Guilfoy*, 2018 WL 3459735, at *2; (*see* Doc. No. 37-23 at 3-8).

C. Proceedings on Petition for Writ of Error Coram Nobis

On January 17, 2017, Petitioner filed his coram nobis petition based on what he described as "newly discovered evidence" in the form of the jury foreperson's December 15, 2016 affidavit, which (according to Petitioner) "unequivocally establishes that the forensic videos were shown to the jury in the jury . . . room during the course of deliberations at the request of the jury foreperson." (Doc. No. 37-40 at 49, 67-68.) Petitioner further alleged that he had hired a private investigator after he was convicted, and that the investigator had issued a written report on November 30, 2011 stating "that he had succeeded in speaking to several jurors and had ascertained that the jury had, in fact, watched the forensic videos during their deliberations." (*Id.* at 56-57.) The trial court granted the State's motion to dismiss the coram nobis petition based on the statute of limitations, finding that the petition was filed nearly five years after the limitations period expired, that there were no grounds for tolling, and that there were "no due process concerns which would entitle petitioner to relief." (*Id.* at 116-18.)

On appeal, the TCCA affirmed the dismissal of the petition, finding as follows:

> The State raised the statute of limitations as an affirmative defense in the coram nobis court, and the coram nobis court concluded

that the petition was time-barred. We agree with the coram nobis court's conclusion. The Petitioner's grounds for relief were not "later-arising." In fact, the Petitioner conceded in his petition that he was aware that the jury had viewed the forensic interviews during its deliberations as early as November 2011. Therefore, we conclude that due process does not require tolling of the statute of limitations.

Moreover, the petition for writ of error coram nobis failed to state a cognizable claim for relief. Coram nobis relief is not available for matters which could have been raised in a motion for new trial, on direct appeal, or in a petition for post-conviction relief. *Freshwater v. State*, 160 S.W.3d 548, 556 (Tenn. Crim. App. 2004). Here, the issue was raised in the Petitioner's motion for new trial, on direct appeal, at his post-conviction proceedings, and in an appeal of his post-conviction proceedings. As such, the petition failed to present any subsequent or newly discovered evidence that could not have been raised in an earlier proceeding.

Much of the Petitioner's brief is focused on the fact that the record was insufficient for this court to determine on direct appeal if the jury viewed the forensic interviews during its deliberations and the fact that the post-conviction court barred the foreperson of the jury from testifying at the post-conviction hearing. However, a petition for writ of error

> coram nobis is not the proper forum to address these issues.
>
> With respect to the record on direct appeal, it is the appellant's "duty to prepare a record which conveys a fair, accurate[,] and complete account of what transpired with respect to the issues forming the basis of the appeal." *State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993). To the extent that either trial or appellate counsel failed to adequately preserve the issue in the appellate record, a post-conviction claim of ineffective assistance of counsel would have been the proper avenue to address their deficiencies in compiling the appellate record. *See Laquan Napoleon Johnson v. State*, No. M2014-00976-CCA-R3-ECN, 2015 WL 1517795, at *4 (Tenn. Crim. App. Mar. 31, 2015) (noting that a claim of ineffective assistance of counsel "is not an appropriate ground for relief" in a coram nobis proceeding).
>
> Likewise, any challenge to the post-conviction court's ruling on the admissibility of the jury foreperson's testimony at the post-conviction hearing should have been raised on appeal from that court's denial of post-conviction relief. Accordingly, we conclude that the coram nobis court did not abuse its discretion in denying the petition for writ of error coram nobis as time-barred and for failing to state a cognizable claim for coram nobis relief.

Guilfoy v. State, 2018 WL 3459735, at *3.

III. Claims of the Amended Petition

The Amended Petition asserts the following three claims:

(1) Petitioner was deprived of his right to the effective assistance of trial counsel under the Sixth and Fourteenth Amendments when "his trial attorney failed to prevent the jury from viewing the out-of-court videotaped forensic interviews of the alleged victims," which "were never published in open court and not properly admitted into evidence," but were inadmissible under state law, were not produced to the defense prior to trial, and were "misleadingly and improperly redacted, and . . . improperly bolstered the alleged victims' accusations." (Doc. No. 31 at 7.)

(2) Petitioner was deprived of his Sixth and Fourteenth Amendment rights "to an impartial jury, confrontation, cross examination, and the assistance of counsel" when the trial court allowed the videos of J.A. and T.A.'s forensic interviews to be viewed in the jury room during deliberations. (*Id.* at 12.)

(3) Petitioner was deprived of his right to the effective assistance of trial counsel under the Sixth and Fourteenth Amendments when counsel failed to object to improper opinion testimony from non-expert Ann Post that "many things," including trauma, can disrupt a child's memory of "an abuse event," when that testimony "served to dispel any inconsistencies and improbabilities in [the] testimony" of J.A. and T.A., upon whose credibility the prosecution hinged. (*Id.* at 15-16.)

IV. Analysis

A. Legal Standard

The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). A federal court may grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Upon finding a constitutional error on habeas corpus review, a federal court may grant relief only if it finds that the error "had substantial and injurious effect or influence" upon the conviction. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *Peterson v. Warren*, 311 F. App'x 798, 803-04 (6th Cir. 2009).

AEDPA was enacted "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases . . . and 'to further the principles of comity, finality, and federalism.'" *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 436 (2000)). AEDPA's requirements "create an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551 U.S. 1, 10 (2007) (citations omitted). As the Supreme Court has explained, AEDPA's requirements reflect "the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)). Prior to the passage of AEDPA,

district courts applied de novo review to determine whether "the relevant state court had erred on a question of constitutional law or on a mixed constitutional question." *Williams v. Taylor*, 529 U.S. 362, 402 (2000) (O'Connor, J., concurring). But now, where state courts have ruled on the merits of a claim, AEDPA imposes "a substantially higher threshold" for obtaining relief than a de novo review of whether the state court's determination was incorrect. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (citing *Williams*, 529 U.S. at 410).

Specifically, a federal court may not grant habeas relief on a claim that was rejected on the merits in state court, unless the state decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). The Supreme Court has repeatedly held "that AEDPA, by setting forth [these] necessary predicates before state-court judgments may be set aside, 'erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.'" *White v. Wheeler*, 577 U.S. 73, 77 (2015) (quoting *Burt v. Titlow*, 571 U.S. 12, 19 (2013)).

A state court's legal decision is "contrary to" clearly established federal law under Section 2254(d)(1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistin-

guishable facts." *Williams*, 529 U.S. at 412-13. An "unreasonable application" under this subsection occurs when "the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413; *White v. Woodall*, 572 U.S. 415, 426 (2014). A state court decision is not unreasonable under this standard simply because the federal court, "in its independent judgment," finds it erroneous or incorrect. *Williams*, 529 U.S. at 411. Rather, to be actionable under Section 2254(d)(1), the state court's decision "'must be objectively unreasonable, not merely wrong; even clear error will not suffice.'" *Woods v. Donald*, 575 U.S. 312, 316 (2015) (quoting *Woodall*, 572 U.S. at 419). An objectively unreasonable decision is one "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.[6]

Similarly, a district court on habeas review may not find a state court factual determination to be unreasonable under Section 2254(d)(2) simply because it disagrees with the determination. *Young v. Hofbauer*, 52 F. App'x 234, 237 (6th Cir. 2002). Rather, the determination must be "objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). "If reasonable minds reviewing the record might disagree

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[6] The upshot appears to be that objectively unreasonable decisions necessarily include decisions that are clearly erroneous, but decisions that are not clearly erroneous are not necessarily unreasonable. To be objectively unreasonable, the state court decision must be *so* unjustified that its erroneousness cannot be denied by fairminded jurists.

about the finding in question, on habeas review that does not suffice to supersede the [state] court's . . . determination." *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)) (internal quotation marks omitted). Moreover, a state court's factual determinations "shall be presumed to be correct," and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Davis v. Ayala*, 576 U.S. 257, 271 (2015) ("State-court factual findings . . . are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'") (quoting *Rice v. Collins*, 546 U.S. 333, 338-39 (2006)). Finally, the petitioner may not prevail under Section 2254(d)(2) simply by showing that a fact was unreasonably determined; he "must show that the resulting state court decision was 'based on' that unreasonable determination." *Rice v. White*, 660 F.3d 242, 250 (6th Cir. 2011).

The standard set forth in 28 U.S.C. § 2254(d) for granting relief on a claim that was rejected on the merits by a state court "is a 'difficult to meet' and 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.'" *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Richter*, 562 U.S. at 102, and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). This standard "was meant to be" a high hurdle for petitioners, consistent with the principle that habeas corpus functions as a guard against only "extreme malfunctions" in the state's administration of criminal justice. *Harrington*, 562 U.S. at 102 (emphasis added); *see also Woods*, 575 U.S. at 316.

Review under AEDPA is not only demanding, but also ordinarily unavailable to state inmates who have not fully exhausted their remedies in the state court system. Title 28, United States Code, Sections 2254(b) and (c) provide that, subject to certain exceptions, a federal court may not grant a writ of habeas corpus on behalf of a state prisoner unless the prisoner has presented the same claim sought to be redressed in a federal habeas court to the state courts. *Pinholster*, 563 U.S. at 182; *Kelly v. Lazaroff*, 846 F.3d 819, 828 (6th Cir. 2017) (quoting *Wagner v. Smith*, 581 F.3d 410, 417 (6th Cir. 2009)) (federal claim is exhausted if it was presented "under the same theory" in state court). This rule has been interpreted by the Supreme Court as one of total exhaustion, *Rose v. Lundy*, 455 U.S. 509 (1982), meaning that, as of the time of the habeas petition's filing, there can no longer be any available state remedy for any of its claims; if a state remedy is available for any habeas claim, the entire petition must be dismissed. *Id.* at 522. A habeas petition is thus fully exhausted if (and only if) each and every claim was first fairly presented to the state appellate court[7] as a federal constitutional claim in substance, if not explicitly. *See Gray v. Netherland*, 518 U.S. 152, 162-63 (1996); *Pillette v. Foltz*, 824 F.2d 494, 496 (6th Cir. 1987) (requiring the presentation of "the legal and factual substance of every claim to all levels of state court review").

However, because the exhaustion requirement "refers only to remedies still available at the time of

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[7] In Tennessee, the Court of Criminal Appeals is the highest appellate court to which appeal must be taken in order to properly exhaust a claim. *See* Tenn. Sup. Ct. R. 39; *Adams v. Holland*, 330 F.3d 398, 402-03 (6th Cir. 2003).

the federal petition," it may also be "satisfied if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law." *Gray*, 518 U.S. at 161 (citations and internal quotation marks omitted). The doctrine of procedural default is thus a corollary to the rule of exhaustion, one which ordinarily bars habeas review of claims that were not "fairly presented" for merits review in state court, either because they were presented in a way that failed to comport with state procedural rules or because they were not presented at all and no longer can be presented under state law. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) (acknowledging "the interplay of these two doctrines" and stating that, to avoid an end-run around the exhaustion requirement and "the values that it serves," "we ask not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts.") (emphasis in original; internal citations and quotation marks omitted). If the state court decides a claim on "adequate and independent state grounds"—typically a procedural rule prohibiting the state court from reaching the merits of the constitutional claim—the claim will ordinarily be barred from federal habeas review based on procedural default. *Wainwright v. Sykes*, 433 U.S. 72, 81-82 (1977*); see also Walker v. Martin*, 562 U.S. 307, 315 (2011) ("A federal habeas court will not review a claim rejected by a state court if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment."); *Coleman v. Thompson*, 501 U.S. 722 (1991) (same). Likewise, if a claim has never been presented to the state courts, but a state court remedy is no longer available (*e.g.*, when

an applicable statute of limitations bars a claim or state law deems the claim waived),[8] then the claim is technically (though not properly) exhausted but barred by procedural default. *Coleman*, 501 U.S. at 731-32.

If a claim is procedurally defaulted, "federal habeas review of the claim is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 750. The burden of showing cause and prejudice to excuse defaulted claims is on the habeas petitioner. *Lucas v. O'Dea*, 179 F.3d 412, 418 (6th Cir. 1999) (citing *Coleman*, 501 U.S. at 754). "'[C]ause' under the cause and prejudice test must be something external to the petitioner, something that cannot fairly be attributed to him[,] . . . some objective factor external to the defense [that] impeded . . . efforts to comply with the State's procedural rule." *Coleman*, 501 U.S. at 753 (emphasis in original). Examples of cause include the unavailability of the factual or legal basis for a claim or interference by officials that makes compliance "impracticable." *Id.* To establish prejudice, a petitioner

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[8] The Tennessee Post-Conviction Procedure Act provides that "[i]n no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment," and establishes a one-year limitations period for filing that one petition. Tenn. Code Ann. § 40-30-102(a) and (c). The Act further provides that "[a] ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented," unless that ground could not be presented due to unconstitutional state action, or is based on a new and retroactive constitutional right that was not recognized at the time of trial. *Id.* § 40-30-106(g).

must demonstrate that the constitutional error asserted in his defaulted claim "worked to his actual and substantial disadvantage." *Perkins v. LeCureux*, 58 F.3d 214, 219 (6th Cir. 1995) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)); *see also Ambrose v. Booker*, 684 F.3d 638, 649 (6th Cir. 2012) (finding that "having shown cause, petitioners must show actual prejudice to excuse their default"). "When a petitioner fails to establish cause to excuse a procedural default, a court does not need to address the issue of prejudice." *Simpson v. Jones*, 238 F.3d 399, 409 (6th Cir. 2000). Likewise, if a petitioner cannot establish prejudice, the question of cause need not be addressed.

Because the "cause and prejudice" standard is not a perfect safeguard against fundamental miscarriages of justice, the United States Supreme Court has recognized a "narrow exception" to the bar of an unexcused default, one that applies in (and only in) a case where a constitutional violation has "probably resulted" in the conviction of one who is "actually innocent" of the substantive offense. *Dretke v. Haley*, 541 U.S. 386, 392-93 (2004) (citing *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986)); *accord Lundgren v. Mitchell*, 440 F.3d 754, 764 (6th Cir. 2006). To obtain habeas review under this narrow exception to the procedural-default rule, a petitioner must demonstrate his factual innocence, not the mere legal insufficiency of the State's proof; a miscarriage-of-justice claim is not supported by an assertion of mere legal innocence.[9] *Lee v.*

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[9] The distinction here is between the defendant not actually having committed the crime as defined by all of its elements (*i.e.*, not all acts necessary to committing the crime having actually occurred, and/or not all circumstances necessary to make these acts a crime having actually existed) and the defendant not

Brunsman, 474 F. App'x 439, 442 (6th Cir. 2012) (citing *Bousley v. United States*, 523 U.S. 614, 623 (1998), and *Calderon v. Thompson*, 523 U.S. 538, 559 (1998)).

B. Petitioner's Claims

As recited above, the Amended Petition presents two claims of ineffective assistance of counsel (Claims 1 and 3) and one claim of trial court error (Claim 2). Respondent concedes that the ineffective-assistance claims were fully exhausted in state court (*see* Doc. No. 39 at 18, 33) and defends their state-court, on-the-merits resolution against Petitioner under AEDPA's standards applicable to such resolutions. Respondent raises procedural defenses to Petitioner's claim of trial court error (*id.* at 29-32), arguing on that basis that the Court should not reach its merits. The Court begins with an analysis of Claim 2's procedural viability.

1. Claim 2 – Trial Court Error

As noted above, Petitioner asserts that the trial court's permitting the jury to view the forensic interview videos violated his rights "to an impartial jury, confrontation, cross examination, and the assistance of counsel." (Doc. No. 31 at 12.)[10] Respondent argues

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having been proven in all respects to have committed the crime (*i.e.*, the Government not having established the occurrence of all acts necessary to committing the crime and all circumstances necessary to make those acts a crime).

[10] The Court construes the portion of this claim asserting rights to "confrontation, cross examination, *and the assistance of counsel*" as seeking to vindicate Petitioner's right, through counsel, to confront and cross-examine the witnesses against him. Neither the Amended Petition (Doc. No. 31 at 12-14) nor the supporting Memorandum (Doc. No. 32 at 44-52) develop the factual basis for any other argument that allowing the videos

that this claim was not, and no longer properly can be, presented in state court and therefore is technically exhausted but procedurally defaulted. Respondent asserts that Petitioner's coram nobis proceedings do not preclude a finding of default of the impartial-jury component of the claim, because coram nobis proceedings are "not a means for exhausting a federal claim." (Doc. No. 39 at 29.) He further asserts that Petitioner failed entirely to present in state court his claim that he was deprived of his right to have counsel confront and cross-examine the victims regarding their statements in the recorded interviews.

a. Claim to Denial of Impartial Jury: Presented in State Court but Procedurally Barred

"The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a trial 'by an impartial jury.'" *Smith v. Nagy*, 962 F.3d 192, 199 (6th Cir.), *reh'g denied* (July 1, 2020), *cert. denied*, 141 S. Ct. 634 (2020) (quoting U.S. Const.

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into the jury room deprived Petitioner of the assistance of counsel, outside of counsel's role in confronting and cross-examining adverse witnesses. *See* Rule 2(c), Rules Gov'g § 2254 Cases (requiring that a petition must "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground"). The invocation of the Sixth Amendment right to assistance of counsel therefore does not add anything substantively to this claim. Accordingly, the Court here does not separately consider here any argument concerning the denial of counsel's assistance, although the Court does acknowledge that the actual claim here—an alleged violation of Petitioner's right to confront and cross-examine witnesses against him—does encompass some notion that his counsel was prevented from being effective in the confrontation and cross-examination that Petitioner says was wrongfully denied to him.

amend. VI). "This guarantee requires a jury to arrive at its verdict 'based upon the evidence developed at the trial.'" *Id.* (quoting *Turner v. Louisiana*, 379 U.S. 466, 472 (1965)). Accordingly, in cases where "an extraneous or external influence on the jury" is alleged, post-verdict proceedings may be required to protect the defendant's constitutional rights. *Id.* at 200-01.

Petitioner's claim that the jury's exposure to allegedly extraneous information (*i.e.*, information not brought to light in the courtroom during the trial) in the forensic interview videos violated his federal rights was first raised by him during state coram nobis proceedings.[11] In his coram nobis petition, Petitioner

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[11] Although Petitioner also argued in his brief on direct appeal to the TCCA that his trial was "fundamentally unfair" because of the admission in evidence of the video interviews, in violation of his "state and federal constitutional right to the due process of law and to a fair trial," citing, *inter alia*, the "5th, 6th and 14th Amendments to the United States . . . Constitution" (Doc. No. 37-15 at 60), he does not claim to have exhausted any of his federal habeas claims on direct appeal. Nor would this mere mention of the Sixth Amendment and fundamental fairness suffice to fairly present his impartial-jury claim, as Petitioner's principal argument on direct appeal was that the recorded statements were inadmissible hearsay under the Tennessee Rules of Evidence, and his reference to the Federal Constitution was made in support of an alternative argument—necessitated by trial counsel's failure to object to the videos' admission—that the standard for plain-error review of the evidentiary issue was met. (*See id.* at 54-58.) A finding that the standard for plain-error review is not met, as made by the TCCA in Petitioner's direct appeal, is itself an independent and adequate state ground for declining to reach the merits of a federal claim, sufficient to preclude habeas review. *See Beverly v. Macauley*, No. 20-1384, 2022 WL 842301, at *5 (6th Cir. Mar. 22, 2022); *Morgan v. Pierce*, 83 F. Supp. 3d 563, 569 (D. Del. 2015).

claimed that the jury's exposure to "prejudicial extraneous information" in the videos undermined the fairness of his trial (*see* Doc. No. 37-40 at 48-50, 63-64), and on appeal from the denial of that petition, he argued that his right to a fair trial by an impartial jury was compromised by the jury's exposure to those videos. (*See* Doc. No. 37-43 at 21-22.) Although Respondent asserts that a federal habeas claim may not be exhausted in state coram nobis proceedings, he does not cite any authority for that proposition, nor is the Court aware of any. It thus appears, and the Court finds, that Petitioner fairly presented to the state courts the component of Claim 2 that asserts the denial of his right to an impartial jury when the trial court allowed the previously unpublished videos to be viewed during deliberations.

However, the state courts at both the trial and appellate levels rejected Petitioner's coram nobis petition as untimely under the applicable state statute of limitations. (*See* Doc. No. 37-40 at 116-18) (applying Tenn. Code Ann. § 27-7-103); *Guilfoy*, 2018 WL 3459735, at *2 (same). Thus, although the impartial-jury claim was presented to the state courts, its merits were avoided due to "the application of the statutory coram nobis limitations period[,] [which] is an adequate and independent state ground for rejection of a claim" that renders the claim "procedurally defaulted and not subject to federal habeas review" unless the default can be excused. *Carson v. Genovese*, No. 3:15-CV-01121, 2021 WL 1564764, at *16 (M.D. Tenn. Apr. 21, 2021).

Petitioner has offered no viable grounds for excusing the default of this claim, which was raised too late in coram nobis and, as pointed out by the

TCCA on coram nobis appeal, was based on juror testimony that could have been offered prior to post-conviction proceedings or pursued on appeal from the post-conviction court's order disallowing it. *Guilfoy*, 2018 WL 3459735, at *3 (finding that "Petitioner's grounds for relief were not 'later-arising'" and could not toll running of limitations period, as he purportedly "was aware that the jury had viewed the forensic interviews during its deliberations as early as November 2011" and could have appealed the post-conviction court's refusal to allow juror to testify at evidentiary hearing). Petitioner does not identify any "objective factor external to the defense" that obstructed these routes toward exhausting a claim that the jury had, in fact, viewed the videos and was thereby prejudiced against him. *Coleman*, 501 U.S. at 753. While he argues that his post-conviction attorney's ineffectiveness may suffice as cause to excuse the default of this claim, even though the claim itself is not an ineffective-assistance-of-trial-counsel claim (*see* Doc. No. 52 at 19-23 (citing "the legal principles underpinning the decision" in *Martinez v. Ryan*, 566 U.S. 1 (2012)[12]), this

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12 The Supreme Court previously held, in *Coleman v. Thompson* that, because there is no constitutional right to counsel in state post-conviction proceedings, any attorney error at that stage that leads to the waiver of claims in state court "cannot constitute cause to excuse the default in federal habeas." 501 U.S. at 752, 757. However, in *Martinez v. Ryan*, the Supreme Court modified "the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default," "by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. This exception stems from the recognition, "as an equitable matter, that the initial-review collateral proceeding, if

argument was squarely rejected by the U.S. Supreme Court in *Davila v. Davis*, 137 S. Ct. 2058 (2017). In *Davila*, the Supreme Court first observed that "[i]t has long been the rule that attorney error is an objective external factor providing cause for excusing a procedural default only if that error amounted to a deprivation of the constitutional right to counsel." 137 S. Ct. at 2065. It then held that "*Martinez*'s highly circumscribed, equitable exception" to that rule in cases where counsel on post-conviction review (where there is no constitutional right to counsel) ineffectively failed to present a claim of ineffective assistance of trial counsel could not be expanded, based on the "underlying rationale of *Martinez*," to apply to defaulted claims that are not ineffective-assistance-of-trial-counsel claims. *Id.* at 2065-66. Here, Petitioner seeks just such

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undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim" of trial counsel's ineffectiveness, when that claim could not have been raised on direct appeal because of state procedural rules. *Id.* at 13. In *Trevino v. Thaler*, 569 U.S. 413 (2013), the Supreme Court extended the applicability of the *Martinez* exception to states with procedural frameworks that do not preclude an ineffective-assistance claim on direct appeal, but make it unlikely that the opportunity to raise that claim at that time will be a meaningful one. *Id.* at 429. The Sixth Circuit held in *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014), that under Tennessee's procedural scheme, the initial post-conviction proceeding is the first meaningful opportunity to raise a claim of ineffective assistance of trial counsel. *Id.* at 795-96. Thus, for each defaulted claim of ineffective assistance at trial, a Tennessee petitioner may overcome the default under *Martinez* if he can show that the default resulted from his initial post-conviction counsel's ineffectiveness under *Strickland*'s standards, and that the underlying claim of trial counsel's ineffectiveness is a "substantial one, which is to say that . . . the claim has some merit." *Martinez*, 566 U.S. at 13-14.

an expansion by appealing to "the legal principles underpinning" *Martinez*, so that the default of his impartial-jury claim may be excused based on post-conviction counsel's ineffectiveness. *Davila* forecloses this attempt to demonstrate cause.

Petitioner has thus failed to demonstrate cause excusing the procedural default of his impartial-jury claim. Moreover, as discussed below, Petitioner misses the mark with his contention that the State may be judicially estopped from asserting this procedural defense in the first place. Habeas review of the impartial-jury claim is thus barred.

b. Claim to Denial of Right to Have Counsel Confront and Cross-Examine Witnesses: Technically Exhausted but Denied on Adequate and Independent State Grounds

The Sixth Amendment's Confrontation Clause establishes the right of criminal defendants to cross-examine and "impeach, *i.e.*, discredit, the [state's] witness[es]." *Blackston v. Rapelje*, 780 F.3d 340, 348-49 (6th Cir. 2015) (quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974)). Petitioner claims that permitting the jury to view the forensic interview videos for the first time in deliberations deprived him of this right. Respondent argues that this claim was not raised before the State courts and was therefore defaulted, and that Petitioner has failed to demonstrate cause for the default. In reply, Petitioner argues that Respondent should be estopped from relying on this procedural defense due to the State's opposition to Petitioner's efforts in state court to introduce evidence that the jury

had in fact viewed the videos, as required to support any state-court claim he might have made with respect to confrontation and cross-examination. Alternatively, Petitioner argues that cause for the default may be found in both the State's efforts to block development of the record and his post-conviction attorney's ineffectiveness in failing to raise the claim.

Judicial estoppel "forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by that same party in an earlier proceeding." *McMeans v. Brigano*, 228 F.3d 674, 686 (6th Cir. 2000) (citation omitted). "The purpose of the doctrine is to protect the integrity of the judiciary by preventing a party from convincing two different courts of contradictory positions, which would mean that one of those two courts was deceived." *Audio Technica U.S., Inc. v. United States*, 963 F.3d 569, 575 (6th Cir. 2020). But judicial estoppel is to be "applied with caution . . . because the doctrine precludes a contradictory position without examining the truth of either statement." *Teledyne Indus., Inc. v. N.L.R.B.*, 911 F.2d 1214, 1218 (6th Cir. 1990).

Petitioner cites a Ninth Circuit case, *Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990), for the proposition that judicial estoppel may be used to overcome the State's assertion of procedural default in habeas proceedings. (Doc. No. 82 at 17.) However, the Sixth Circuit in *McMeans*, 228 F.3d at 686, declared that it was not "inclined to follow the Ninth Circuit's methodology in *Russell*," and found the case before it otherwise distinguishable. In *Russell*, the state won dismissal of Russell's first federal habeas petition by asserting that he had an available state remedy to pursue, which "was tantamount to advising the federal

district court that Russell would be given a hearing in state court on the merits of his claims." *Russell*, 893 F.3d at 1037-38. But when Russell returned to state court, "the state disregarded its previous representation in federal court and argued the petition was procedurally barred because Russell had raised the same issues on direct appeal," and his state petition was dismissed. *Id.* at 1037. Russell then filed a second federal habeas petition, and the state argued that his claims were barred by procedural default given the dismissal it had just won in state court. *See id.* at 1037-38. But because "[t]he state prevailed by telling the state court the opposite of what it told the federal court," the Ninth Circuit found that the state should be estopped from asserting procedural default in response to the petitioner's second habeas filing. *Id.* at 1038-39. In *McMeans*, by contrast, the state's attorney "did not make any misrepresentation that the Ohio courts could or would consider the juror-bias claim in a state postconviction proceeding," so no inconsistency arose when he later asserted that the juror-bias claim had been defaulted. 228 F.3d at 686.

Here, as in *McMeans*, the State's current assertion of procedural default is not inconsistent with its earlier positions that Petitioner was not entitled to a copy of the videos in pretrial discovery, that the proffered juror testimony was inadmissible at the post-conviction evidentiary hearing, or that the juror's affidavit was unreviewable on timeliness grounds in coram nobis proceedings. Courts asked to apply judicial estoppel must consider whether the party's prior and current positions are "clearly inconsistent." *Shufeldt v. Baker, Donelson, Bearman, Caldwell & Berkowitz, PC*, 855 F. App'x 239, 243 (6th Cir.), *cert. denied sub*

nom. Baker v. Shufeldt, 142 S. Ct. 347 (2021) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)) (finding clear inconsistencies between prior argument that claims were timely and later argument that "the statutes of limitations on [those] claims . . . [had] expired"). Here, the State's position in state court was, in effect, that Petitioner could not succeed in asserting any claims—including a Confrontation Clause claim—related to the jury's viewing of the videos (because, according to the State, Petitioner could not lay a foundation for any such claims); by contrast, the State's position in this Court is that Petitioner ultimately did not succeed in asserting his Confrontation Clause claim in state court and therefore defaulted that claim. The difference between these two stances is more temporal than positional; they are certainly not diametrically opposed. In other words, the State has not attempted to "convince[e] two different courts of contradictory positions." *Audio Technica*, 963 F.3d at 575. Because there is no prior "inconsistent position to which the respondent must now adhere," *McMeans*, 228 F.3d at 686, judicial estoppel is inappropriate.

Petitioner's other cause grounds fare no better. Petitioner argues that the default was caused by the trial court's failure to preserve a record of the jury's request for equipment to view the interviews, but that assertion assumes (based on after-acquired testimonial evidence) that the jury actually made that request. That assumption is problematic in the context of analyzing procedural default because the requesting juror's affidavit testimony was never properly introduced in state court, which had a silent record from which it was invited to presume that the recordings were

played in the jury room. The TCCA has declined to make such a presumption in this and other cases.[13] *See State v. Overholt*, No. E2003-01881-CCA-R3-CD, 2005 WL 123483, at *4 (Tenn. Crim. App. Jan. 21, 2005) (denying relief to defendant who inferred that "the jury requested audiotape playing equipment" during deliberations and "listened to the tapes," when "[t]he record reveal[ed] no request by the jury for audiotape playing equipment"). Moreover, Petitioner's assertion of cause here amounts to the non-sensical proposition that the state-court record's failure to reflect any request by the jury to view the videos caused his failure to present his claim in state court, even though he supposedly had independent knowledge that the jury made the request that the state court failed to record—in which case he would not have needed to have relied on any state-court record to inform him that grounds existed to file such a claim. His default cannot be excused on this basis.

Even if the juror affidavit had been properly introduced in state court, it does not reflect that the juror made a written request to the court for video playback equipment; rather, it describes a brief, verbal request to "an individual who [the juror] believe[d]

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[13] The TCCA on direct appeal rejected the invitation to presume that the jury viewed the videos and to treat such a presumption "as an adequate means of satisfying the first prerequisite of plain error review," *i.e.*, that "the record clearly establishes what occurred in the trial court." *State v. Guilfoy*, 2013 WL 1965996, at *13, 14 n.5. On post-conviction appeal, the court appears to have indulged this presumption for purposes of analyzing trial counsel's effectiveness. *Guilfoy v. State*, 2015 WL 4880182, at *11-12 & n.4 (noting "the post-conviction testimony of Ms. Byers that trial counsel told her she had time to get lunch because the jury had requested equipment to view the video").

was a court officer." (Doc. No. 37-40 at 68.) The fact that neither the court officer nor the trial court itself noted for the record that such equipment had been requested in this way would not amount to external "interference by officials" that prevented Petitioner from raising his constitutional claims, *see Coleman*, 501 U.S. at 753 (stating that "cause" may be found in "some objective factor external to the defense," such as when "interference by officials . . . made compliance 'impracticable'") (citations omitted), particularly as Petitioner's counsel would have been complicit in the record's silence by not objecting when the videos were admitted into evidence or when the prosecutor, during closing argument, invited the jury to request that viewing equipment be brought to the jury room during deliberations.[14]

Petitioner additionally asserts that cause for the default may be found in the State's objection to the juror testimony proffered at the post-conviction evidentiary hearing. But that objection was sustained under state law (*see* Doc. No. 37-23 at 3-8) and Petitioner did not challenge that ruling on appeal. The post-conviction trial court agreed with the State that

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[14] Petitioner separately claims that trial counsel was constitutionally ineffective in failing to object, but he does not assert this alleged ineffectiveness as cause excusing the default of Claim 2. Even if he had made this assertion, for trial counsel's ineffective assistance to qualify as cause excusing another claim's procedural default, "the assistance must have been so ineffective as to violate the Federal Constitution." *Edwards*, 529 U.S. at 451. As discussed later in this Memorandum Opinion, Petitioner has failed to establish the merit of his claim that trial counsel was constitutionally ineffective.

Tennessee Rule of Evidence 606(b)[15] barred the juror's testimony—even as an offer of proof for purposes of appeal. (*See id.* at 6-7.) That ruling (one involving merely an application of state rules of evidence) is not fairly characterized as State conduct that impeded post-conviction counsel's access to the factual basis for making a Sixth Amendment claim, and thus cannot establish cause for the default. *Cf. Strickler v. Greene*, 527 U.S. 263, 283 (1999) (finding that type of impediment to factual development that would ordinarily establish cause for procedural default existed where prosecutor failed to disclose *Brady* material, while offering "open file" discovery that "did not include all it was purported to contain"). Nor can post-conviction counsel's alleged ineffectiveness excuse the failure to exhaust these claims of trial-court error, as discussed above. Habeas

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[15] That rule provides as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Tenn. R. Evid. 606(b).

review of the confrontation and cross-examination claims is thus barred.

In sum, because of its unexcused procedural default, Claim 2 of the Amended Petition is not subject to further review.

Alternatively, even if Claim 2 had been properly exhausted, and even though Respondent did not argue its merits, the Supreme Court has unambiguously established that the Confrontation Clause of the Sixth Amendment—unlike the general rule against hearsay—"prohibits [only] the introduction of [prior] testimonial statements by a nontestifying witness." *Ohio v. Clark*, 576 U.S. 237, 243 (2015) (emphasis added) (citing *Crawford v. Washington*, 541 U.S. 36, 54 (2004)); *Crawford*, 541 U.S. at 59 n.9 ("Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. It is therefore irrelevant that the reliability of some out-of-court statements cannot be replicated, even if the declarant testifies to the same matters in court. The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.") (citations and internal quotation marks omitted). Thus, assuming *arguendo* that the statements recorded on the forensic interview videos were testimonial, the Confrontation Clause did not prohibit their introduction because J.A., T.A., and Ms. Post were all live witnesses who were, or who could have been, cross-examined during Petitioner's trial.

Moreover, as discussed in further detail below with regard to Petitioner's non-defaulted claims, the videos had been redacted at trial counsel's request, were properly authenticated, and were admitted without

objection at Petitioner's trial,[16] during which the interviews were briefly referred to in questions to the victims (both of whom affirmed the truth of their statements to the interviewer, Ms. Post). (Doc. No. 37-6 at 39-41, 78, 116-18; Doc. No. 37-7 at 14.) The videos were not extraneous to the record and thus did not compromise the jury's impartiality when mentioned during trial, or if viewed during deliberations. Accordingly, even were it not defaulted, Claim 2 would be subject to dismissal on its merits.

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[16] This case is thus distinguishable from the cases cited in Petitioner's supporting Memorandum, which involved the inspection of audio tapes or other items in the jury room despite the fact that they had not been offered or admitted as evidence in the case, leading to a finding of "structural error" in *United States v. Noushfar*, 78 F.3d 1442, 1445-46 (9th Cir. 1996), and "clear error" in *United States v. Hans*, 738 F.2d 88, 92-93 (3d Cir. 1984). In *Noushfar*, the district court had allowed the jury to take to the jury room fourteen audio tapes, recorded by government agents, that had not been played in the courtroom. These tapes were allowed into the jury room over the defendant's "vigorous objections," as they contained incriminating statements made to government agents by the defendants themselves; their consideration by the deliberating jury was found to violate Federal Rule of Criminal Procedure 43 "and, possibly, the Confrontation Clause." 78 F.3d at 1444-45. In *Hans*, the items allowed into the jury room had been ruled admissible in a pretrial hearing and marked for identification at trial, but were "never actually introduced into evidence." 738 F.3d at 92. The district court nonetheless granted the jury's request to have them brought to the jury room over Hans's "strenuous objections," which were understandable given that his lawyer had foregone the chance to elicit testimony which would have cast doubt upon the weight due such items in reliance on the prosecution's failure to move them into evidence. *Id.* The Court finds that both *Noushfar* and *Hans* are sufficiently distinguishable from Petitioner's case to be inapposite here.

2. Claims 1 and 3 – Ineffective Assistance of Trial Counsel

Petitioner asserts that he received ineffective assistance when "his trial attorney failed to prevent the jury from viewing the out-of-court videotaped forensic interviews of the alleged victims," which "were never published in open court and not properly admitted into evidence," but were inadmissible under state law, were not produced to the defense prior to trial, and were "misleadingly and improperly redacted, and . . . improperly bolstered the alleged victims' accusations." (Doc. No. 31 at 7.) Petitioner also asserts that counsel rendered ineffective assistance in failing to object to improper opinion testimony from non-expert Ann Post that "many things," including trauma, can disrupt a child's memory of "an abuse event," when that testimony "served to dispel any inconsistencies and improbabilities in [the] testimony" of J.A. and T.A., upon whose credibility the prosecution hinged. (*Id.* at 15-16.) Respondent acknowledges that these claims were exhausted in state court.

Claims of ineffective assistance of counsel are subject to the two-prong standard of *Strickland v. Washington*, 466 U.S. 668 (1984), which asks: (1) whether counsel was deficient in representing Petitioner; and (2) whether counsel's alleged deficiency prejudiced the defense so as to deprive Petitioner of a fair trial. *Id.* at 687. To meet the first prong, Petitioner must establish that his attorney's representation "fell below an objective standard of reasonableness," and must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, [he] must overcome the presumption that . . . the challenged action 'might be considered

sound trial strategy.'" *Id.* at 688-89 (quoting *Michel v. State of La.*, 350 U.S. 91, 101 (1955)). The "prejudice" component of the claim "focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). It requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

When an exhausted claim of ineffective assistance of counsel is raised in a federal habeas petition, review under AEDPA is "doubly deferential," *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009), in that "*Strickland* requires deference to counsel and AEDPA requires deference to the state court." *Moody v. Parris*, No. 20-5299, 2022 WL 3788503, at *4 (6th Cir. Aug. 30, 2022). The question then is not whether the petitioner's counsel was ineffective; rather, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. at 101. As the Supreme Court clarified in *Harrington*,

> This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise

> that the two questions are different. For purposes of § 2254(d)(1), an unreasonable application of federal law is different from an incorrect application of federal law. A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

Id. (internal quotation marks and citation omitted). The TCCA correctly identified and summarized the *Strickland* standard applicable to Petitioner's claims of ineffective assistance. *Guilfoy v. State*, 2015 WL 4880182, at *9. Accordingly, the critical question is whether the TCCA applied *Strickland* reasonably in reaching its conclusions on each ground raised by Petitioner.

a. Claim 1 – Failure to Prevent Jury from Watching Forensic Interviews

It is undisputed that the forensic interview videos were not properly admitted into evidence at trial under state law. *See State v. Guilfoy*, 2013 WL 1965996, at *14 (stating that "the record clearly demonstrates that the trial court erred in admitting the recordings of the interviews into evidence"). Petitioner, however, makes a preliminary argument that the interviews were not admitted into evidence *at all*, because they "were never played in open court." (Doc. No. 32 at 28 (citing *State v. Henry*, No. 02C01-9611-CC-00382, 1997 WL 283735, at *4 (Tenn. Crim. App. May 29, 1997)).) Instead, Petitioner claims, the interviews were entirely extraneous or external to the trial

and therefore impermissibly tainted the jury's deliberations. (*Id.* at 28-29 (citing *Turner v. Louisiana*, 379 U.S. 466, 473 (1965) (holding that testifying officers' continuous and intimate association with jurors outside of the courtroom violated defendant's constitutional rights)).) Regardless of any procedural defects in this argument,[17] it does not withstand scrutiny.

The disks containing the forensic videos were formally admitted into evidence on the State's motion, after having previously been marked for identification only. The deliberating jury's examination of evidence

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[17] Petitioner did not argue this theory when he presented his ineffective-assistance claims to the TCCA. Instead, he argued (1) that the two videos were inadmissible both as substantive evidence and as impeaching evidence (*i.e.*, as bearing on witness credibility) since they were prior (consistent) statements that were not excepted from the hearsay rule (Doc. No. 37-30 at 38-47), and (2) that the video of T.A.'s interview was prejudicial because it compromised "his right to a unanimous verdict and his protections against double jeopardy." (*Id.* at 34-36, 48-49.) Though it thus does not appear that Petitioner exhausted the specific claim that counsel was ineffective in allowing the jury to view supposedly unadmitted (as opposed to inadmissible) evidence, Respondent waived any exhaustion defense when he cited the portions of Petitioner's filings where this claim was made and stated that the claim was exhausted in state court and "properly before this Court on habeas review." (Doc. No. 39 at 18); *see D'Ambrosio v. Bagley*, 527 F.3d 489, 497 (6th Cir. 2008) (stating that "[t]he touchstone for determining whether a waiver is express is the clarity of the intent to waive," and finding that the state clearly intended to waive exhaustion defense despite not using some form of the word "waive"; "AEDPA requires that the waiver be express, not expressed in a certain manner."). Although "[a] federal court may choose, in its sound discretion, to reject a state's waiver of either nonexhaustion or procedural default," *Pike v. Guarino*, 492 F.3d 61, 74 (1st Cir. 2007) (citing, *e.g.*, *Granberry v. Greer*, 481 U.S. 129, 134 (1987)), the Court does not find it appropriate here to disregard the State's waiver.

admitted into evidence (erroneously or not) is different from its use of extraneous statements or materials in deliberations. *See United States v. Thomas*, 701 F. App'x 414, 421 (6th Cir. 2017) ("While the Constitution protects defendants from extraneous influences upon juries, jurors have free rein to examine the evidence admitted[.]"). In his supplemental notice of additional authority (Doc. No. 55), Petitioner analogizes to *United States v. Craig*, 953 F.3d 898 (6th Cir. 2020), in which the Sixth Circuit on direct appeal reversed the appellant's conviction because the government showed an unauthenticated social-media video to the jury during cross-examination of the appellant, without requesting an instruction that it be considered only for impeachment purposes and without seeking to introduce the video into evidence—only to have the jury request to see the unadmitted video again during deliberations before convicting the appellant. However, the court's decision in *Craig* that the government cannot "publish[] for the jury an unadmitted exhibit under the guise of impeachment," *id.* at 899, is inapposite in this case, where the videos were authenticated (properly) and admitted as exhibits (improperly) during the trial. (*See* Doc. No. 37-8 at 69-71.)

Petitioner's remaining arguments to the contrary are not persuasive. Although he points to an unpublished 1997 decision of the TCCA involving audio recordings of a drug transaction, where the court distinguished between the admission of a recording and the admission of the contents of that recording, *see Henry*, 1997 WL 283735, at *4, Petitioner does not offer any reason to believe that such a distinction is

universally or even often applied.[18] And *Henry* itself is distinguishable on its facts from the case at bar. In *Henry*, the TCCA considered tapes to which a police detective referred in his testimony but which "were not understandable" and for that reason were only marked for identification, without being published to the jury. *Id.* When the jury requested to review the tapes during deliberations, the trial court denied the request because the tapes had been "made exhibits for identification purposes only," and in any event, the contents of the tapes had not been presented as evidence. *Id.* at *3. The TCCA upheld this ruling because, regardless of "whether the tapes themselves were entered into evidence or were made exhibits for the purpose of identification only," *id.* at *4, their contents were not played for the jury or properly regarded as evidence helpful to either party:

> Evidence is "any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties . . . for the purpose of inducing belief in the minds of the court or jury as to their contention." Black's Law Dictionary 498 (5th ed.1979) (citation to cases omitted). Evidence includes "whatever is submitted to a judge or jury to elucidate an issue, to prove a case, or to establish or disprove a fact in issue." *State v. Harris*, 839

[18] Moreover, it strikes the Court that to the extent that such a distinction could ever be cognizable, such distinction would have to be manifested at the time a recording were admitted into evidence, as for example via the Court providing a limiting instruction to the effect that an exhibit was being admitted as evidence of "the recording" but somehow not as evidence of the contents of the recording.

> S.W.2d 54, 79 (Tenn.1992), *cert. denied*, 507 U.S. 954, 113 S. Ct. 1368, 122 L.Ed.2d 746 (1992) (Reid, J., dissenting) (citations to other cases omitted). In this instance, the contents of the tapes were not in evidence. Neither the state nor the defense requested that the tapes or any portion thereof be played for the jury. The trial court properly denied the jury's request to review the tapes in the jury room.

Id.

Since its (non-precedential) decision in *Henry*,[19] the TCCA has more recently analyzed the admissibility

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[19] The Court regards the decisions of an intermediate state-court with due deference under the following standard: "[W]hen 'an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'" *Church Joint Venture, L.P. v. Blasingame*, 947 F.3d 925, 932 (6th Cir. 2020) (quoting *West v. AT&T*, 311 U.S. 223, 237 (1940)). This rule applies irrespective of whether the intermediate appellate state court decision is published or unpublished. *See Lukas v. McPeak*, 730 F.3d 635, 638 (6th Cir. 2013) ("Where no on-point precedent from the Tennessee Supreme Court is available, this Court must consider any available precedent from the state appellate courts, whether published or unpublished[.]").As the Sixth Circuit has noted more specifically in the federal habeas context, where necessary the court "may consider and follow an unpublished state-court decision on state law, absent a contrary published decision[.]" *Werth v. Bell*, 692 F.3d 486, 497 (6th Cir. 2012) (considering but ultimately declining to follow "unpublished, non-precedential" opinion of Michigan Court of Appeals on petitioner's ability under state law to challenge denial of right to self-representation after guilty plea). Whether the Court "must"

of a compact disc containing the unclear recording of a police interview without drawing any distinction between the medium of the recording and its message. *State v. Langlinais*, No. W2016-01686-CCA-R3-CD, 2018 WL 1151951, at *6 (Tenn. Crim. App. Mar. 2, 2018). It has also recognized on more than one occasion that the evidence in a criminal case includes video that was admitted on the State's motion, even if most of the contents of the video were not published to the jury in open court. In *State v. Pollard*, No. W2016-01788-CCA-R3-CD, 2017 WL 4877458 (Tenn. Crim. App. Oct. 30, 2017), an hour-and-a-half long video was entered into evidence without objection at trial, but the State only played eleven minutes of it for the jury. *Id.* at *2. In analyzing the sufficiency of the evidence on direct appeal, the TCCA found that, because "the entire recording was entered as an exhibit," it (meaning the disk or drive containing the video) could be taken to the jury room for examination under Tennessee Rule of Criminal Procedure 30.1 and "considered . . . in its entirety" during deliberations. *Id.* at *5. The TCCA also found that it could consider the entire recording, not just the parts that were played in open court, in examining the sufficiency of the convicting evidence, "[s]ince the jury could have properly considered the recording in its entirety in determining the Defendant's guilt." *Id.* (citing Tenn. R. Crim. P. 30.1 (allowing a jury to take to the jury room for examination during

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(per *Lukas*) or "may" (per *Werth*) at least consider the unpublished opinions of the Tennessee Court of Criminal Appeals, the Court here *does* consider them—considers them, as noted above, "as datum for ascertaining state law[.]" *Church Joint Venture, L.P.*, 947 F.3d at 932 (internal quotation marks omitted)

deliberations all exhibits and writings, except depositions) and *State v. Kennedy*, No. E2013-00260-CCA-R3CD, 2014 WL 3764178, at *59-60 (Tenn. Crim. App. July 30, 2014) (finding that trial court did not abuse its discretion by permitting only 36 minutes of three-hour video to be played before jury, because entire recording "was received as an exhibit and not excluded as evidence," so "was readily available for the jury to view during its deliberations had it chosen to view it")).

Moreover, as Petitioner points out (*see* Doc. No. 31 at 7; Doc. No. 32 at 29), the handling of the particular videos in this case elided the requirements of Tennessee Code Annotated Section 24-7-123, entitled "Interview of child by forensic interviewer; sexual contact; video recording." Whatever the substance of Tennessee law governing admission without publication of other kinds of recordings, Section 24-7-123 defines the conditions for admission of the particular (kind of) recordings at issue in Petitioner's case—and in so doing, it does not draw any distinction between a "video recording" and the particular medium of that recording. The statute governs the admissibility of "a video recording of an interview of a child by a forensic interviewer containing a statement made by the child under thirteen (13) years of age describing any act of sexual [abuse] . . . for its bearing on any matter to which it is relevant in evidence[.]" Tenn. Code Ann. § 24-7-123(a). The statute further "provide[s] that the video recording must be shown to the trial court in a hearing, conducted pre-trial, and [must] possess 'particularized guarantees of trustworthiness,' which is to be determined by the trial court" upon consideration of a host of factors, and upon confirmation that the forensic interviewer met particular educational and professional

qualifications at the time of the recording. *State v. Franklin*, 585 S.W.3d 431, 448 (Tenn. Crim. App. 2019) (citing § 24-7-123(b)(2)-(3)). Even though it does not appear that any of these statutory requirements were met in Petitioner's case, consideration of state law as defined in the statute and cases cited above leads this Court to conclude that Ms. Post's recorded interviews with J.A. and T.A., though merely mentioned and not published to the jury prior to deliberations, were admitted evidence (albeit erroneously admitted evidence) in Petitioner's trial.

Having established that the forensic interviews were admitted as evidence, the Court turns to trial counsel's failure to object when the videos were admitted and when the State invited the jury to watch them in the jury room if they chose to do so during closing arguments. The TCCA did not make an explicit deficiency-of-performance ruling,[20] instead proceeding to the following analysis of prejudice under *Strickland*:

> As a preliminary matter, we note that the Petitioner has not identified any prejudice he suffered as a result of the admission of J.A.'s forensic interview. As such, we will limit our analysis to the admission of T.A.'s forensic

[20] The TCCA prefaced its analysis of Petitioner's ineffective-assistance claims by noting the following: "The post-conviction [trial] court denied relief, noting that trial counsel admitted that his failure to object to improperly admitted evidence was not meant to further a defensive strategy and that 'several other instances of alleged deficient performance' were due to oversights on the part of trial counsel. However, the post-conviction court held that, even if the Petitioner's allegations were true, trial counsel's deficiencies did not result in prejudice." *Guilfoy v. State*, 2015 WL 4880182, at *8.

> interview, which included the forensic interviewer's summary statement of events that happened in both Davidson and Montgomery Counties. *See Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004) ("Failure to establish either prong [of the *Strickland* test] provides a sufficient basis to deny relief."). . . .
>
> However, despite trial counsel's failure to object to the introduction of the video or request a limiting instruction, the Petitioner has failed to demonstrate that he was prejudiced by its introduction as substantive evidence. As discussed above, the forensic interviewer's summary statement did not violate the Petitioner's right to a unanimous jury verdict because the State provided an election of offenses. The details of each elected offense corresponded to incidents both J.A. and T.A. described in their trial testimony. The Petitioner has failed to prove that there was a reasonable probability that the outcome of the trial would have been different had the forensic interview not been introduced as substantive evidence. Accordingly, the Petitioner is not entitled to relief.

Guilfoy v. State, 2015 WL 4880182, at *11-12.

Unusual though it may be for a criminal jury to be allowed to see video evidence for the first time during deliberations,[21] the TCCA's prejudice analysis

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[21] *But see Nelson v. Kansas*, No. 10-3135-RDR, 2011 WL 2462495, at *13 (D. Kan. June 17, 2011) ("[C]ourts have held that trial courts have the discretion to permit [audiotape] exhibits to

is (properly) focused not on such unusualness *per se*, but rather on whether counsel's failure to object harmed the defense to the extent that an objection would have had a "substantial, not just conceivable" likelihood of changing the outcome. *Harrington*, 562 U.S at 112. While Petitioner asserts that access to the videos likely affected the outcome in his "close" trial that "hinged on credibility" (Doc. No. 32 at 43-44),[22] in this context prejudice cannot be presumed but rather must be "affirmatively prove[n]." *Strickland*, 466 U.S. at 692-93.

It was not unreasonable for the TCCA, applying *Strickland*, to conclude that Petitioner did not prove prejudice as a result of counsel's failure to keep the jury from viewing the forensic videos. Importantly, counsel confirmed that he received transcripts of the videos prior to trial, reviewed them, and moved for portions of them to be redacted (*see* Doc. No. 37-23 at 11-15; Doc. No. 37-1 at 38), and that the State was agreeable to his redaction requests. (Doc. No. 37-23 at 42; *see* Doc. No. 37-24 at 3-88 (unredacted and redacted transcripts of T.A.'s interview introduced at post-conviction evidentiary hearing)). He also alerted the jury to the fact that T.A. had made statements outside of the courtroom that "differed in very significant respects"

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go into the jury room for deliberations even if the recordings have not been played in open court.") (citing cases).

[22] Petitioner asserts that the TCCA's "determination of the facts, *i.e.*, that the videotaped interviews played no role in the verdict, is also unreasonable." (Doc. No. 32 at 41.) However, it does not appear that the TCCA made a factual determination that the videos played "no role"; rather, the court made a legal determination that Petitioner had not carried his burden of demonstrating prejudice.

from her trial testimony. (Doc. No. 37-9 at 22-26.) T.A.'s inconsistencies were noted by the TCCA, including that "[i]n the redacted copy of the forensic interview" available to the jury, "T.A. described only one incident of misconduct happening in Davidson County, and it did not include penetration," whereas "[a]t trial, she described three instances that occurred in Davidson County, all three of which included penetration." *Guilfoy v. State*, 2015 WL 4880182, at *11. Of the State's elected offenses involving T.A., all of which charged Petitioner with penetration, the jury returned guilty verdicts on all three but found penetration only as to two of the charges (which were subsequently merged by the TCCA into a single child-rape conviction).[23] Accordingly, it is not at all clear that the

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[23] As recounted by the TCCA in its order denying rehearing of Petitioner's post-conviction appeal:

> T.A. testified about three instances where the Petitioner touched her—once when she left and got into bed with her sister; once when she started crying, went to the bathroom, and wanted to "puke"; and once when she was wearing khakis. . . . The State's election for the three offenses involving T.A. included the following facts: two counts where the Petitioner touched the inside of T.A.'s genitals while in bed and she started crying, wanted to puke, and got into bed with her sister; and one count where the Petitioner touched the inside [of] T.A.'s genitals while in bed and while she was wearing khaki pants.

(Doc. No. 37-36 at 2.) The TCCA found that "[t]he facts included in the State's election corresponded with the facts presented in the victims' trial testimony," but "did not correspond at all with the forensic interviewer's summary statement in T.A.'s interview." (*Id.* at 3.)

forensic interviews bolstered the victims' trial testimony,[24] as Petitioner argues they must have (Doc. No. 32 at 32), or that such testimony would have been insufficient evidence upon which to convict in the absence of the videos.[25] Indeed, insofar as the jury convicted Petitioner of a lesser included offense on one charge of child rape, it partially discredited T.A.'s trial testimony. As to whether there was a reasonable probability that the jury would have discredited other trial testimony related to other offenses of conviction but for counsel's failure to prevent the videos' admission, the instant record permits only conjecture and speculation. Regardless of how this Court would decide that issue in the first instance, the TCCA did not unreasonably apply *Strickland* in resolving it

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[24] Petitioner objects to the TCCA's limiting its prejudice analysis to the admission of T.A.'s interview, arguing that he "clearly challenged the prejudicial effect of both videos." (Doc. No. 32 at 40.) But the focus of his prejudice argument was clearly T.A.'s interview (*see* Doc. No. 37-30 at 34-36, 48-49) and, in any event, the focus of review under AEDPA is "on the ultimate legal conclusion that the state court reached and not whether the state court considered and discussed every angle of the evidence." *Holder v. Palmer*, 588 F.3d 328, 341 (6th Cir. 2009) (quoting *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir.2002) (en banc)).

[25] The Court notes that the prosecutor in closing argument posited Petitioner's statements and conduct during recorded phone calls as a significant factor in assessing the credibility of the girls' testimony, versus the defense's claim that their stories were implausible. (*See* Doc. No. 37-9 at 11-12, 46-48, 52-56.) For his part, trial counsel in his closing described Petitioner's words and behavior during the controlled calls as "[a] subject I suspect I have to address," an "unusual" response by Petitioner in which he "did not do very well for himself at all" by giving answers that "are not what we would want them to be," and a display of "poor judgment." (*Id.* at 33-36, 39.)

against Petitioner, and AEDPA therefore requires that the TCCA's resolution not be disturbed. *See Woods*, 575 U.S. at 316; *Williams*, 529 U.S. at 411.

b. Claim 3 – Failure to Object to Improper Opinion Testimony from Anne Post

Finally, Petitioner asserts that trial counsel rendered ineffective assistance when he failed to object to the improper testimony of the forensic examiner, Anne Post, a non-expert who nonetheless testified to her opinion that "'many things,' including trauma, can disrupt a child's memory of 'an abuse event.'" (Doc. No. 31 at 15-16.) Claim 3 was exhausted before the TCCA, which rejected it based on the following analysis:

The Petitioner argues that trial counsel should have objected to the following testimony:

> [The State]: What is your experience in the area of interviewing children who have perhaps been subjected to a number of instances of abuse over a fairly lengthy period of time, beginning when they are very young? Is it realistic to expect that you'll get every detail from every incident?
>
> [Ms. Post]: Certainly not. It depends, too, on the age of the child. Very little children, we expect to capture only very limited information about any event that happens in their lives. And there are lots of things that can disrupt a kid's memory of an abuse event. Trauma can disrupt memory, for example.

The Petitioner contends that Ms. Post's testimony constitutes improper expert testimony because Ms. Post was not offered as an expert witness. Additionally, the Petitioner argues that the State offered this evidence to support the victims' credibility by explaining why they could not provide any details of when the abuse occurred.

The Tennessee Supreme Court addressed this issue in a similar case, *State v. Bolin*, 922 S.W.2d 870 (Tenn. 1996). In that case, the social worker who performed the forensic interview testified that children who had been abused over a long period of time often had trouble remembering the details of when and how each event took place. *Id.* at 872-73. Our supreme court held that the social worker's testimony constituted expert proof and that its admission through a non-expert witness was error. *Id.* at 874. However, the court also found that any error was harmless. *Id.* Specifically, the court stated:

> The testimony essentially consists of an explanation of a narrow issue—why K.N. could not assign reasonably specific time or dates to any of the alleged events of sexual abuse. Therefore, the testimony does not, unlike the testimony in *Ballard*, purport to completely vouch for the overall credibility of the victim, and thus it cannot be said to have "explained away" the inconsistencies and recantations—the heart of the defense theory. Hence, the damaging effect of the testimony is minimal.[26]

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[26] At this point in its analysis, the TCCA inserted the following explanation in a footnote: "In *State v. Ballard*, 855 S.W.2d 557

Id.

Similarly, the admission of Ms. Post's testimony was error. She did not testify as an expert witness but offered testimony that was "specialized knowledge" she gathered from her experience as a forensic interviewer. *See id.* Moreover, we note there is nothing in the post-conviction record to indicate that trial counsel did not object for strategic reasons. Even if this were deficient performance on the part of trial counsel, the Petitioner has failed to establish any resulting prejudice. Like the social worker in *Bolin*, Ms. Post's testimony addressed the narrow issue of why the victims could not provide details of when the events occurred. It did not address inconsistencies in the victims' descriptions of what occurred during the abuse or address the "implausibility" of their allegations, the core of the Petitioner's defense theory during the second trial. Admittedly, there was no conclusive medical evidence that either victim had been sexually abused, but the medical evidence did not rule out the possibility of abuse. Further, the victims told several people about the abuse—their grandfather, their mother, Ms. Post, and Ms. Gallion—

(Tenn. 1993), the expert witness testified that the victims exhibited 'symptom constellations' consistent with being sexually abused. *Ballard*, 855 S.W.2d at 561. The supreme court concluded that because the behavior profile was consistent with a number of psychological stressors, including sexual abuse, the list of symptoms was too generic to be probative. *Id.* at 562. Therefore, the admission of expert testimony was reversible error. *Id.* at 563." *Guilfoy v. State*, 2015 WL 4880182, at *16 n.6.

> over a period of several weeks. Also, they testified about the abuse during the first trial. Trial counsel specifically addressed the inconsistencies between their testimonies at both trials during cross-examination. Accordingly, the Petitioner has failed to demonstrate that he was prejudiced by trial counsel's failure to object to Ms. Post's testimony and is not entitled to relief.

Guilfoy v. State, 2015 WL 4880182, at *15-16 & n.6.

As with Claim 1, the TCCA's analysis of Claim 3 identifies attorney error and proceeds under the assumption that the error constitutes deficient performance, but ultimately finds that the lack of resulting prejudice means that counsel's assistance was not constitutionally ineffective. The record supports this analysis. Ms. Post's brief testimony (*see* Doc. No. 37-8 at 63-71) was comprised almost entirely of background information concerning the field of child forensic examination generally—its methodology, underlying principles, connection with law enforcement, etc.—as well as her training and experience in that field, including her experience interviewing children who are very young when they are exposed to trauma. She referred to the specific interviews of J.A. and T.A. only when she was asked to authenticate the disks containing the videos of those interviews (*id.* at 69-70), and did so without commenting on the plausibility or credibility of either child's statements to her in the interviews. To the extent that her testimony may support the inference that the victims in this case fit the general description of young children with a less-than-accurate grasp of the details of past events, such an inference does not bolster the victims' particular testimony as

much as it acknowledges the widely recognized "problem of unreliable, induced, and even imagined" testimony by victims in child rape cases. *Kennedy v. Louisiana*, 554 U.S. 407, 443 (2008). Accordingly, the TCCA reasonably found that counsel's erroneous failure to object to Ms. Post's testimony did not result in the admission of evidence that undercut "the core of the Petitioner's defense theory" or otherwise affected the outcome of the proceeding. *See Brodit v. Cambra*, 350 F.3d 985, 991 (9th Cir. 2003) (rejecting argument that testimony on common reactions of children to sexual abuse "improperly bolsters the credibility of child witnesses and precludes effective challenges to the truthfulness of their testimony," where it does not focus on particular child's candor but "concerns general characteristics of victims"); *Gallardo v. Ndoh*, No. 18-CV-01683-CRB, 2019 WL 802949, at *11-12 (N.D. Cal. Feb. 21, 2019) (finding that such testimony was unlikely "to lead the jury to make impermissible inferences" because it was "sufficiently general" and "not used to opine that a specific child [was] telling the truth").

Because the TCCA reasonably applied *Strickland* to find a lack of prejudice from counsel's failure to object to Ms. Post's testimony, Claim 3 is without merit.

V. Conclusion

The Court does not write on a clear slate in adjudicating the instant Amended Petition. It does not resolve the Amended Petition by deciding, for example, whether Petitioner was in fact guilty (and if so, of what), whether Petitioner should have been convicted by the jury (and if so, of what), or even whether

it personally believes in the first instance that Petitioner's claims are meritorious. Instead, in the manner discussed herein in detail, it applies established principles to determine the extent to which it can review Petitioner's claims at all, and, for those claims that it determines it can review, it applies the demanding standards of AEDPA.

Applying this framework, the Court concludes for the reasons discussed above that Petitioner is not entitled to relief under Section 2254. Accordingly, the Amended Petition will be DENIED, and this action will be DISMISSED with prejudice.

The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a Section 2254 petitioner. Rule 11, Rules Gov'g § 2254 Cases. A petitioner may not take an appeal unless a district or circuit judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1). A COA may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2). A "substantial showing" is made when the petitioner demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations and internal quotation marks omitted). "[A] COA does not require a showing that the appeal will succeed," but courts should not issue a COA as a matter of course. *Id.* at 337.

Because reasonable jurists could not debate whether Petitioner's claims should have been resolved

differently or are deserving of encouragement to proceed further, the Court will DENY a COA. Petitioner may seek a COA directly from the Sixth Circuit Court of Appeals. Rule 11(a), Rules Gov'g § 2254 Cases.

An appropriate Order is filed herewith.

/s/ Eli Richardson
United States District Judge

**PER CURIAM ORDER,
SUPREME COURT OF TENNESSEE
(NOVEMBER 14, 2018)**

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

TIMOTHY P. GUILFOY

v.

STATE OF TENNESSEE

No. M2017-01454-SC-R11-ECN

Criminal Court for Davidson County
No. 2011-A-779

ORDER

Upon consideration of the application for permission to appeal of Timothy P. Guilfoy and the record before us, the application is denied.

PER CURIAM

ORDER, COURT OF CRIMINAL APPEALS OF TENNESSEE DENYING PETITION FOR REHEARING (AUGUST 1, 2018)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE

TIMOTHY P. GUILFOY

v.

STATE OF TENNESSEE

No. M2017-01454-CCA-R3-ECN

Criminal Court for Davidson County
No. 2011-A-779

Before: THOMAS, J., HOLLOWAY, J., and EASTER, J.

ORDER DENYING PETITION TO REHEAR

Pursuant to Rule 39 of the Tennessee Rules of Appellate Procedure, the Petitioner has filed a pro se petition for rehearing of this court's opinion in *Timothy P. Guilfoy v. State of Tennessee*, No. M2017-01454-CCA-R3-ECN, 2018 WL 3459735 (Tenn. Crim. App. July 17, 2018). In our opinion, we affirmed the coram nobis court's denial of the Petitioner's petition for writ of error coram nobis on the grounds that the petition was time-barred and failed to state a cognizable claim for coram nobis relief. *Id*. at *1.

Examples of when a rehearing may be granted include, but are not limited to, the following: (1) when "the court's opinion incorrectly states the material facts established by the evidence and set forth in the record"; (2) when "the court's opinion is in conflict with a statute, prior decision, or other principle of law"; (3) when "the court's opinion overlooks or misapprehends a material fact or proposition of law"; and (4) when "the court's opinion relies upon matters of fact or law upon which the parties have not been heard and that are open to reasonable dispute." Tenn. R. App. P. 39(a). "A rehearing will not be granted to permit reargument of matters fully argued." *Id*.

The Petitioner contends that this court's opinion was "flawed from the first paragraph." The Petitioner alleges numerous instances where he believes that this court's opinion incorrectly states material facts; is in conflict with a statute, prior decision, or other principle of law; and overlooks or misapprehends material facts and propositions of law. However, all of the Petitioner's contentions in the petition for rehearing are merely attempts to reargue matters that have been fully argued. Furthermore, it has long been the rule that an appellant may not be represented by counsel and simultaneously proceed pro se. *See State v. Parsons*, 437 S.W.3d 457, 478 (Tenn. Crim. App. 2011) (citing *State v. Burkhart*, 541 S.W.2d 365, 371 (Tenn. 1976)).

Based upon the foregoing and having reviewed our opinion and the Petitioner's petition, we conclude that the Petitioner's contentions are not well-taken. It is, therefore, ordered that the petition to rehear is DENIED.

PER CURIAM

(Thomas, J., Holloway, J., and Easter, J.)

OPINION, COURT OF CRIMINAL APPEALS OF TENNESSEE (JULY 17, 2018)

COURT OF CRIMINAL APPEALS OF TENNESSEE, AT NASHVILLE

TIMOTHY P. GUILFOY

v.

STATE OF TENNESSEE

No. M2017-01454-CCA-R3-ECN

Appeal from the Criminal Court for Davidson County, No. 2011-A-779, Monte D. Watkins, Judge

Before: D. Kelly Thomas, JR., J., Robert L. HOLLOWAY, JR., and Timothy L. EASTER, JJ.

OPINION

*1 The Petitioner, Timothy P. Guilfoy, appeals from the Davidson County Criminal Court's denial of his petition for a writ of error coram nobis. The Petitioner contends that the coram nobis court erred in denying his petition because he presented newly discovered evidence in the form of an affidavit from the jury foreperson stating that the jury viewed videotaped forensic interviews of the victims during its deliberations. Discerning no error, we affirm the judgment of the coram nobis court.

The Petitioner is serving a total effective sentence of forty years for his October 2011 convictions for three counts of aggravated sexual battery and one count of rape of a child. On January 17, 2017, the Petitioner filed the instant petition for writ of error coram nobis. Attached to his petition was an affidavit from the jury foreperson stating that videotaped forensic interviews of the victims were admitted into evidence at trial but not played in the courtroom during the trial, that she requested that the jury be allowed to view the interviews in the jury room during its deliberations, and that the jury had viewed them. The State responded to the petition by arguing that it was barred by the statute of limitations. On June 23, 2017, the coram nobis court entered a written order denying the petition on the grounds that it was time-barred and failed to state a cognizable claim for coram nobis relief. The Petitioner now appeals to this court.

This is the Petitioner's third attempt to raise in this court the issue of the jury's viewing the videotaped forensic interviews during its deliberations. *See Timothy Guilfoy v. State (Guilfoy II)*, No. M2014-01619-CCA-R3-PC, 2015 WL 4880182, at *11-12 (Tenn. Crim. App. Aug. 14, 2015), *perm. app. denied* (Tenn. Feb. 18, 2016); *State v. Timothy P. Guilfoy (Guilfoy I)*, No. M2012-00600-CCA-R3-CD, 2013 WL 1965996, at *14-15 (Tenn. Crim. App. May 13, 2013). During the Petitioner's trial, "the trial court admitted as substantive evidence the recorded forensic interviews" of the victims "[w]ithout objection" from trial counsel. *Guilfoy I*, 2013 WL 1965996, at *14. "[T]he interviews were not played in open court," but "they were made available to the jury during the jury's deliberations." *Id.*

The Petitioner conceded in his error coram nobis petition that he had retained a private investigator "who issued a written report" in November 2011 stating "that he had succeeded in speaking to several jurors and had ascertained that the jury had in fact, watched the forensic [interviews] during their deliberations." Included in the Petitioner's motion for new trial was the issue of the jury's having viewed the forensic interviews during its deliberations despite the fact that they were not played during the trial. On direct appeal, appellate counsel framed the issue as an objection to the admission of the forensic interviews "as substantive evidence." *Guilfoy I*, 2013 WL 1965996, at *1.

A panel of this court concluded on direct appeal that the Petitioner had waived plenary appellate review of the issue by failing to make a contemporaneous objection to the admission of the forensic interviews. *Guilfoy I*, 2013 WL 1965996, at *14. The panel determined that "the trial court erred in admitting the recordings of the interviews into evidence," but that the Petitioner had "failed to establish the prerequisites for plain error relief" because the appellate record did not "demonstrate that the jury ever watched the interviews." *Id.* The panel stated that the record was "simply silent" on whether the jury had viewed the recordings during its deliberations. *Id.*

*2 The Petitioner conceded in his error coram nobis petition that he attempted to raise this issue again in his post-conviction proceedings. The Petitioner sought to have the jury foreperson testify at the post-conviction hearing that the jury had viewed the recordings of the forensic interviews during its delib-

erations, but the post-conviction court ruled her testimony inadmissible. Nonetheless, the Petitioner presented the testimony of his sister that she had asked trial counsel while the jury was deliberating "if she had time to get lunch before the jury returned" and that trial counsel responded that "she likely did because the jurors had requested that a TV and viewing equipment be brought into the jury room so they could 'watch the video.'" *Guilfoy II*, 2015 WL 4880182, at *8.

The Petitioner appealed the post-conviction court's denial of his post-conviction petition to this court. On appeal, the Petitioner did not raise the issue of the post-conviction court's having barred the jury foreperson's testimony. However, the Petitioner did allege on appeal that trial counsel was ineffective for failing "to object to the introduction of the videos of the victims' forensic interviews as substantive evidence." *Guilfoy II*, 2015 WL 4880182, at *11. A panel of this court concluded that the Petitioner had "failed to prove that there was a reasonable probability that the outcome of the trial would have been different had the forensic interview[s] not been introduced as substantive evidence." *Id.* at *12.

The Petitioner now raises this issue again in the context of the coram nobis court's denial of his petition for writ of error coram nobis. A writ of error coram nobis is an extraordinary remedy available only under very narrow and limited circumstances. *State v. Mixon*, 983 S.W.2d 661, 666 (Tenn. 1999). A writ of error coram nobis lies "for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial." Tenn. Code Ann.

§ 40-26-105; *see also State v. Hart*, 911 S.W.2d 371, 374 (Tenn. Crim. App. 1995). The purpose of a writ of error coram nobis is to bring to the court's attention a previously unknown fact that, had it been known, may have resulted in a different judgment. *State v. Vasques*, 221 S.W.3d 514, 526-27 (Tenn. 2007).

The decision to grant or deny the writ rests within the discretion of the coram nobis court. *Teague v. State*, 772 S.W.2d 915, 921 (Tenn. Crim. App. 1988). "A court abuses its discretion when it applies an incorrect legal standard or its decision is illogical or unreasonable, is based on a clearly erroneous assessment of the evidence, or utilizes reasoning that results in an injustice to the complaining party." *State v. Wilson*, 367 S.W.3d 229, 235 (Tenn. 2012).

A petition for writ of error coram nobis must be filed within one year of the date the judgment of the trial court became final. *See* Tenn. Code Ann. §§ 27-7-103, 40-26-105; *Mixon*, 983 S.W.2d at 671. For coram nobis purposes, a trial court's judgment becomes final "either thirty days after its entry in the trial court if no post-trial motions are filed or upon entry of an order disposing of a timely filed, post-trial motion." *Harris v. State*, 301 S.W.3d 141, 144 (Tenn. 2010). "The State bears the burden of raising the bar of the statute of limitations as an affirmative defense." *Id.*

The one-year limitations period may be tolled only when required by due process concerns. *See Workman v. State*, 41 S.W.3d 100, 103 (Tenn. 2001). Courts must "balance the petitioner's interest in having a hearing with the interest of the State in preventing a claim that is stale and groundless" in determining whether due process tolls the statute of

limitations. *Wilson*, 367 S.W.3d at 234. To do so, courts perform the following steps:

> *3 (1) determine when the limitations period would normally have begun to run; (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are "later-arising," determine if, under the facts of the case a strict applications of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim.

Id. (quoting *Sands v. State*, 903 S.W.2d 297, 301 (Tenn. 1995)).

The Petitioner's motion for new trial was denied on March 13, 2012; therefore, the trial court's judgments became final on April 12, 2012. The Petitioner had until April 12, 2013, to file a petition for writ of error coram nobis. The instant petition was not filed until January 17, 2017, well outside the one-year statute of limitations. The State raised the statute of limitations as an affirmative defense in the coram nobis court, and the coram nobis court concluded that the petition was time-barred. We agree with the coram nobis court's conclusion. The Petitioner's grounds for relief were not "later-arising." In fact, the Petitioner conceded in his petition that he was aware that the jury had viewed the forensic interviews during its deliberations as early as November 2011. Therefore, we conclude that due process does not require tolling of the statute of limitations.

Moreover, the petition for writ of error coram nobis failed to state a cognizable claim for relief.

Coram nobis relief is not available for matters which could have been raised in a motion for new trial, on direct appeal, or in a petition for post-conviction relief. *Freshwater v. State*, 160 S.W.3d 548, 556 (Tenn. Crim. App. 2004). Here, the issue was raised in the Petitioner's motion for new trial, on direct appeal, at his post-conviction proceedings, and in an appeal of his post-conviction proceedings. As such, the petition failed to present any subsequent or newly discovered evidence that could not have been raised in an earlier proceeding.

Much of the Petitioner's brief is focused on the fact that the record was insufficient for this court to determine on direct appeal if the jury viewed the forensic interviews during its deliberations and the fact that the post-conviction court barred the foreperson of the jury from testifying at the post-conviction hearing. However, a petition for writ of error coram nobis is not the proper forum to address these issues.

With respect to the record on direct appeal, it is the appellant's "duty to prepare a record which conveys a fair, accurate[,] and complete account of what transpired with respect to the issues forming the basis of the appeal." *State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993). To the extent that either trial or appellate counsel failed to adequately preserve the issue in the appellate record, a post-conviction claim of ineffective assistance of counsel would have been the proper avenue to address their deficiencies in compiling the appellate record. *See Laquan Napoleon Johnson v. State*, No. M2014-00976-CCA-R3-ECN, 2015 WL 1517795, at *4 (Tenn. Crim. App. Mar. 31, 2015) (noting that a claim of ineffective assistance of counsel "is not

an appropriate ground for relief" in a coram nobis proceeding).

Likewise, any challenge to the post-conviction court's ruling on the admissibility of the jury foreperson's testimony at the post-conviction hearing should have been raised on appeal from that court's denial of post-conviction relief. Accordingly, we conclude that the coram nobis court did not abuse its discretion in denying the petition for writ of error coram nobis as time-barred and for failing to state a cognizable claim for coram nobis relief.

*4 Upon the foregoing and the record as a whole, the judgment of the coram nobis court is affirmed.

OPINION, COURT OF CRIMINAL APPEALS OF TENNESSEE (AUGUST 14, 2015)

COURT OF CRIMINAL APPEALS OF TENNESSEE, AT NASHVILLE

TIMOTHY P. GUILFOY

v.

STATE OF TENNESSEE

No. M2014–01619–CCA–R3–PC

Appeal from the Criminal Court for Davidson County, No. 2011-A-779, Monte Watkins, Judge

Before: Robert L. HOLLOWAY, JR., J., James Curwood WITT, JR., and Robert H. MONTGOMERY, JR., JJ.

OPINION

ROBERT L. HOLLOWAY, JR., J.

*1 The Petitioner, Timothy Guilfoy, appeals from the denial of his petition for post-conviction relief. On appeal, the Petitioner argues that he received ineffective assistance of counsel. Upon review, we affirm the judgment of the post-conviction court.

Trial

On direct appeal, this court summarized the procedural history of the case and the facts at trial as follows:[1]

> In June 2009, [the Petitioner] was charged with three counts of aggravated sexual battery against J.A.,[2] a victim less than thirteen years old; two counts of aggravated sexual battery against T.A., a victim less than thirteen years old; four counts of aggravated sexual battery against A.A., a victim less than thirteen years old; and four counts of rape of a child against A.A. All of the aggravated sexual battery offenses were alleged to have taken place "on a date between October 1, 2005 and September 20, 2008." All of the rape of a child offenses were alleged to have taken place "on a date between July 1, 2007 and September 30, 2008." On March 30, 2011, the State entered a nolle prosequi as to these charges.

On March 11, 2011, [the Petitioner] was charged with four counts of aggravated sexual battery against J.A., a victim less than thirteen years old (Counts One through Four); one count of aggravated sexual battery against T. A., a victim less than thirteen years old

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[1] To assist in the resolution of this proceeding, we take judicial notice of the record from the Petitioner«s# direct appeal. *See* Tenn. R. App. P. 13(c); *State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009); *State ex rel Wilkerson v. Bomar*, 376 S.W.2d 451, 453 (Tenn. 1964).

[2] As is the policy of this court, minor victims are identified by their initials.

(Count 5); and three counts of rape of a child against T.A. (Counts Six through Eight). All of these offenses but the one alleged in Count Eight were alleged to have taken place "on a date between October 1, 2005 and September 30, 2008." The offense alleged in Count Eight was alleged to have occurred "on a date between July 1, 2007 and September 30, 2008."

[The Petitioner] initially was tried before a jury in July 2011, and a hung jury resulted. [The Petitioner] was retried before a jury in October 2011, during which the State nolled Count Five. At [the Petitioner]'s second jury trial, the following proof was adduced:

Jennifer A., the victims' mother ("Mother"), testified that, when she and her three daughters moved to Nashville from Indiana in 2005, they began living at the Biltmore Apartments. Her father, Brian Schiff ("Grandfather"), was living there at the time, and they moved in with him. It was a two-bedroom apartment, and she described the living conditions as "pretty crunched." After several months, Grandfather purchased a nearby house on Saturn Drive, and they all moved into the house. Mother stated that, when they moved into the house on Saturn Drive, it had an unfinished basement and an unfinished attic. She used the attic as her bedroom except in the summertime. The girls slept on the main floor but did not have their own separate bedroom. The girls' sleeping accommodations included a bunk bed, a futon, and a couch that pulled out to a bed. Usually, J.A. slept in the top bunk of the bunk bed.

While they were still living in the apartment, Mother became acquainted with [the Petitioner]. He and his roommate lived next door to them. [The Petitioner] came to visit Mother and her family in

Mother's apartment. Mother and her family also visited [the Petitioner] in his apartment. Mother described their relationship as "friends" and denied that there was ever any romantic interest on either her or [the Petitioner]'s part. She added that [the Petitioner] was a "really good friend."

*2 Not long after Mother and her family moved to the house on Saturn Drive, [the Petitioner] moved out of his apartment to another location in Nashville. [The Petitioner] visited them at their house on Saturn Drive. A few months later, [the Petitioner] moved to Missouri. [The Petitioner] continued to stay in touch through phone calls and visits.

Mother explained that [the Petitioner] worked in marketing tours and would come to Nashville to participate in events such as the "CMA festival." He usually would drive to town in a tour vehicle, and he would stay with Mother and her family at the Saturn Drive house. In this way, he was able to keep the per diem he was paid for hotels. Mother stated that she and her daughters enjoyed having [the Petitioner] stay with them.

Mother stated that it was not her intention that [the Petitioner] spend the night sleeping in any of the girls' beds, but she knew that he did because she would find him in one of their beds in the morning. She remembered one particular occasion when she saw [the Petitioner] in bed with J.A. in the top bunk of the bunk bed. At that time, the bunk bed was in the dining room. She also recalled finding [the Petitioner] in bed with T.A. on "[m]ultiple" occasions. She did not say anything to [the Petitioner] about his presence in bed with her children.

In May of 2008, Mother, the girls, and [the Petitioner] planned a camping trip to celebrate J.A. and Mother's birthdays, which were close together in time. Mother stated that they camped two nights, and everyone had a good time.

Mother decided that she wanted to leave Nashville and move to Clarksville. [The Petitioner] had expressed an interest in real estate investment, specifically, purchasing a house and renting it out. When Mother told him she was interested in moving to Clarksville, he purchased a house there, and she rented it from him. She stated that the rent was $700 a month. She also testified that [the Petitioner] told her that she "wouldn't ever have to worry about just being kicked out of the house." Mother testified that [the Petitioner] realized that she "might not always be able to come up with seven hundred dollars." She also stated that [the Petitioner] was welcome to spend the night there. She added that it "was supposed to be a permanent move."

One morning in Clarksville, after the girls had gotten on the bus to go to school, Mother spoke with Grandfather over the phone. Grandfather told her that J.A. had told him "what happened." After her conversation with Grandfather about what J.A. had told him, Mother retrieved her daughters from school. Mother subsequently spoke with J.A. and T.A. and then she called 911. Two deputies from the Montgomery County Sheriff's Department responded and she relayed to them what J.A. and T.A. had told her. Mother testified that she called the police regarding the instant allegations on or about March 15th, 2009. [The Petitioner] had been there three days previously.

In conjunction with the ensuing investigation, Mother made several recorded phone calls to [the

Petitioner]. She made these calls in March 2009. Mother and her family remained in [the Petitioner]'s house for about one more month. [The Petitioner] did not serve her with an eviction notice.

On cross-examination, Mother admitted that she and [the Petitioner] had a formal lease agreement regarding the house. She did not mail rent payments to [the Petitioner] but deposited them twice a month into a bank account [the Petitioner] had established. She also admitted that, whenever [the Petitioner] came to visit, her daughters "rushed to the door and hugged him." She did not see either J.A. or T.A. acting frightened around [the Petitioner]. She acknowledged that, when J.A. was six and seven years old, she was wetting the bed and wore pull-ups.

*3 Mother testified that, when [the Petitioner] was staying with them, she usually fell asleep before he did. She did not tell him where to sleep. While they were living on Saturn Drive, the girls would fight over who got to sleep with [the Petitioner]. She did not intervene in these discussions.

Mother acknowledged that she and her daughters moved to Clarksville in September 2008. She already had been attending a junior college in Clarksville during the summer months. She was not able to pay September's rent, so [the Petitioner] told her that she could pay it later by increasing the rent due in subsequent months. In October, she dropped out of school. She paid part of her rent for the months of October and November. She got a job in December and was able to pay December and January rent. She was fired in February. She earlier had told [the Petitioner] that she would file her federal income tax return early in order to get her refund and pay him some of the

money she owed him. She, however, did not get a refund. Mother remained in the house through at least a portion of May.

Mother admitted that, in early March 2009, [the Petitioner] told her that he was having a hard time making the mortgage payments on the house. She denied that he told her that, if she could not pay the rent, he would have to get a tenant who could.

J.A., born on May 22, 2000, and eleven years old at the time of trial, testified that she had two older sisters, T.A. and A.A. She began living in Nashville "quite a few years ago" in an apartment. She lived with her sisters, Mother, and Grandfather. [The Petitioner], whom J.A. identified at trial, lived in the apartment next door.

J.A. and her family later moved into a nearby house. The house had a basement, attic, and main floor. Sometimes, Mother used the attic as her bedroom. Grandfather used the basement as his living area. Sometimes the girls used the dining room as their bedroom. They used a regular bed and a bunk bed. J.A. usually slept in the upper bunk bed.

Sometimes [the Petitioner] would spend the night at the house. On some of these occasions, [the Petitioner] would sleep in J.A.'s bunk bed with her. J.A. testified that, on one of these occasions, [the Petitioner] touched her "private" with his hand. She stated that he touched her skin by putting his hand down the front of her pants. She also stated that his hand moved and that she got up and went to the bathroom. She then went to sleep with one of her sisters. J.A. testified that [the Petitioner] touched her in this manner on more than one occasion. J.A. stated that, when [the Petitioner]

touched her while in bed with her, she was not sure if [the Petitioner] was awake at the time the touchings occurred.

J.A. also testified that, at another time, she was sitting on [the Petitioner]'s lap on the couch. [The Petitioner] put his hand down the back of her pants and then slid his hand under her legs. He touched her "private" on her skin. When shown a drawing of a girl's body, J.A. identified the genital region as the area she referred to as her "private."

J.A. went camping with her family and [the Petitioner] for J.A.'s eighth birthday. This trip occurred after the touchings about which J.A. testified. [The Petitioner] did not touch her inappropriately on this trip.

*4 After a while, J.A. decided to tell Grandfather what had happened. This was some time after she and her family left the house on Saturn Drive and moved into a house in Clarksville that [the Petitioner] owned. Grandfather remained in the house on Saturn Drive. When she told Grandfather what [the Petitioner] had done, he told her to tell Mother. She did not do so, however, because she did not think Mother would believe her. Some time later, Grandfather told Mother what J.A. had told him but did not identify [the Petitioner]. J.A. then told Mother what had happened. According to J.A., Mother then told her boyfriend. J.A. and T.A. went to school, but Mother came and got them out of school a little later. She took them home and "called the cops." J.A. subsequently was interviewed by a woman named Anne. The interview was videotaped. J.A. also visited a doctor, who examined her. She did not remember what she told the doctor but testified that she would have told the truth.

On cross-examination, J.A. stated that the touching on the couch occurred while she was in second grade. At the time, her sisters were in the room with her. Also home at the time were Grandfather, her grandmother, Mother, and Mother's boyfriend, "Bobo." J.A. acknowledged that [the Petitioner]'s visits were sometimes short, and he did not spend the night. She and her sisters were glad to see [the Petitioner] during his visits. She did not remember [the Petitioner's] taking her anywhere by herself. He never said anything to her that made her uncomfortable.

J.A. admitted that, at the time the touchings occurred, she wore a "pull-up" because she had a problem with bed-wetting. She stated that she did not know if she was wearing a pull-up when [the Petitioner] touched her on the occasions she testified about. She also stated that [the Petitioner] had been lying behind her and she was facing away from him. She did not know if he was awake or asleep when the touching occurred. She stated that she had watched the videotape of her interview twice.

On redirect examination, J.A. stated that the only thing about [the Petitioner] she did not like was the touchings. She never got mad at him or fought with him. She never saw her sisters or Mother be mad at him. When asked how many times [the Petitioner] touched her inappropriately, she responded, "Maybe three or four times."

T.A., born on February 26, 1999, and twelve years old at the time of trial, testified that she currently lived in Florida with her two sisters, her brother, her father, and her stepmother. She previously had lived in Nashville with her two sisters, Mother, and Grandfather. She was the middle of three daughters.

T.A. identified [the Petitioner] and stated that he lived next door to them while they lived in an apartment in Nashville. T.A. and her family later moved to a house on Saturn Drive. She stated that, while the family lived there, they frequently changed the furniture arrangements because the house was small. At one point, the family room was set up with a bunk bed and a futon. Another time, the bunk bed and a queen-size bed were in the dining room. Usually, T.A. and J.A. slept in the bunk bed, with T.A. on the bottom bunk. T.A.'s older sister, A.A., usually slept in the queen-size bed. Sometimes, T.A. would sleep on the futon in the family room to "get away from [her] sisters."

T.A. testified that [the Petitioner] spent the night at the house on Saturn Drive "maybe three times." On these occasions, [the Petitioner] slept in the family room or the dining room. On one particular occasion, [the Petitioner] slept in T.A.'s bed. She testified: "I was about to go to bed. It was either on the futon or the bunk bed. I'm not too sure. He had climbed in the bed, and I was already laying down. And he rolled me over and put his hand down my pants." [The Petitioner] touched her "private part" with his finger, on her skin. She added that [the Petitioner]'s finger "went inside [her] private part." She left her bed and got in bed with her big sister. She added that she was "not too sure" if [the Petitioner] was awake when this occurred.

*5 T.A. testified that, on another occasion, she was laying on her bunk bed when [the Petitioner] came in and started touching her. She tried to get up, but he held her down. He touched her private part with his finger again, and she "just started crying." She got up, telling him that she had to go to the

bathroom. She left and stayed away. T.A. stated that [the Petitioner] had touched her on "[t]he inside." She also stated that this episode caused her to "want to puke."

T.A. testified that, in response to [the Petitioner]'s actions, she started wearing khaki pants to bed because they did not have an elastic waistband. She stated that [the Petitioner] touched her another time while she was wearing her khaki pants and that he unzipped and unbuttoned them. This happened on her bunk bed. She testified, "[h]e touched me with his finger on [her] private part on [her] skin on the inside."

T.A. testified that the Defendant touched her more than three times. The touchings were similar to one another. When asked to indicate on a drawing the parts of the body that the Defendant touched, T.A. indicated the female genitalia. When asked what she meant by "inside," she indicated, as reported by the prosecutor for the record, "the outer labia of the female genitalia."

T.A. stated that the touchings occurred before the family camping trip that they took for J.A.'s eighth birthday. She stated that she never told anyone about the touchings. She recalled J.A. telling Grandfather, however, and she remembered when Mother spoke with them while they were waiting for the school bus. T.A. testified that J.A. told Mother what had happened and that Mother began to cry. Both the girls began to cry, too. Nevertheless, the girls got on the bus and went to school.

Mother picked them up from school early that day, and they went to the District Attorney's office.

There, T.A. spoke with Anne Fisher. T.A. since had watched the videotape of her interview with Fisher. After the interview, T.A. was examined by a doctor.

T.A. testified that she liked [the Petitioner] other than his touching her. She testified that her mother and [the Petitioner] were good friends.

On cross-examination, T.A. acknowledged that, in July 2011, she testified that [the Petitioner] had not touched her in the same place that a tampon would go. Rather, she had earlier testified that he touched her "[l]ike on top of it," "[l]ike not literally on the outside, but like on the outside of it, yes, but like inside," and "[b]ut on the top, like where something else—like I don't know. Yeah. It wasn't like literally inside, inside, but it practically was. Yes." On cross-examination at trial, she testified that [the Petitioner] touched her inside, where a tampon goes.

T.A. admitted that [the Petitioner] never had threatened her, never had told her that they had a secret, and never had promised her anything for her silence. He did not speak with her about sex or boyfriends, and he never said anything that made her uncomfortable. He never pressed his body against hers, never made her touch his "private part," and never showed his "private part" to her.

On redirect examination, T.A. explained that [the Petitioner] had visited them in the house on Saturn Drive more than four times, but that he would not stay more than three days per visit.

Chris Gilmore testified that he was a school resource officer with the Cheatham County Sheriff's Department but previously had been employed as a police officer with the Clarksville Police Department.

On March 18, 2009, he responded to Mother's address on an allegation of child rape. From Mother, he gathered basic information. He did not speak to any children. He notified the appropriate persons within the police department for follow-up.

*6 Detective Ginger Fleischer of the Clarksville City Police Department testified that she was assigned to investigate the matter reported by Mother. Because the alleged criminal conduct had taken place in Nashville, she contacted the appropriate Nashville authorities. Detective Fleischer and Detective Fleming of the Davidson County Police Department determined that a "controlled phone call" between Mother and [the Petitioner] would be helpful to the investigation. She explained to Mother that the phone call would be monitored and recorded. The phone call was scheduled to take place on March 24, 2009, the day after the forensic interview of the children. On that day, Mother made three phone calls to [the Petitioner], and all three phone calls were recorded and transcribed. The recordings were admitted into evidence and played for the jury. A fourth recorded phone call was made by Mother to [the Petitioner] on the next day. This recording also was admitted into evidence and played for the jury. Additionally, the transcripts of all the recorded phone calls were admitted.

Hollye Gallion, a pediatric nurse practitioner with the Our Kids Center in Nashville, testified that she performed medical examinations on J.A. and T.A. on April 21, 2009. In conjunction with performing the exams, she reviewed the medical history reports given by the children to a social worker. J.A. reported that "a guy named Tim" had touched the outside of her butt and the outside of her "tootie" with his hands, explaining

that she "pee[d]" out of her "tootie." J.A. reported that the touching had occurred more than once. Asked if she remembered the first time, J.A. reported, "It was in our old house in Nashville; I was around six or seven years old."

Gallion testified that J.A.'s physical examination was "normal." She did not find "any injuries or concerns of infection." She also stated that the results of the physical examination were consistent with the medical history that J.A. reported. Gallion added, "Touching typically doesn't leave any sort of evidence or injury."

Gallion testified that, in giving her medical history to the social worker, T.A. reported that [the Petitioner] had touched the outside of her "too-too" with his hand, explaining that she "pee[d]" from her "too-too." T.A. reported that the touching had occurred more than once and that she was "around five or six" the first time. On conducting a physical exam, Gallion concluded that T.A.'s genital area and her "bottom" "looked completely healthy and normal." Gallion added that T.A.'s "physical exam was very consistent with what her history was."

> Anne Fisher Post, a forensic interviewer employed by the Montgomery County Child Advocacy Center, testified that she conducted forensic interviews of J.A. and T.A. These interviews were recorded and, without any contemporaneous objection from [the Petitioner], the recordings were admitted into evidence but were not played for the jury in open court.

State v. Timothy P. Guilfoy, M2012–00600-CCA-R3-CD, 2013 WL 1965996, *1-8 (Tenn.Crim.App. May 13, 2013). At the close of its case-in-chief, the State delivered an election of offenses which corresponded with details from each victim's testimony. *Id.* at *8-9.

On direct appeal, this court merged two of the Petitioner's convictions for aggravated sexual battery against J.A. and two of the Petitioner's convictions for rape of a child against T.A. *Id.* at *18, *21. Additionally, this court concluded that challenges to the testimonies of Hollye Gallion and Anne Fisher Post, as well as the admission of the recorded phone calls and forensic interviews, were waived by trial counsel's failure to contemporaneously object and that the Petitioner was not entitled to plain error relief. *Id.* at *12-14.

Post–Conviction Proceedings

*7 The Petitioner filed a petition for post-conviction relief alleging ineffective assistance of counsel. At the post-conviction hearing, trial counsel testified that he did not object to the introduction of the recorded forensic interviews as substantive evidence at trial and that he did not request that a limiting instruction be given to the jury. Trial counsel recalled that he went through the forensic interviews and redacted any reference to incidents that happened outside of Davidson County or incidents that involved a third victim, A.A. He identified the portions of the interview that needed to be redacted by looking for references to A.A., to things "that 'happened at the new house,'" or to "things that 'happened where we live now.'" Trial counsel recalled that he redacted statements from T.A. regarding incidents that happened in Montgomery

County. However, trial counsel admitted that the redacted version of the video included the following statement:

> Interviewer: Okay. So, you've told me about a time he put his hand in your pants and touched your private part and nothing went inside. And you told me about a couple of times when he touched your private part and his finger went inside.

Trial counsel confirmed that at least two of the three events included in the interviewer's summary occurred in Montgomery County.

Trial counsel explained that he did not object to the admission of the video-recorded forensic interview because he believed that, when a victim was impeached, the victim's prior consistent statements were admissible as to the subject of the victim's credibility. He expected the trial court to give a limiting instruction to the jury and failed to notice that no limiting instruction was given.

Trial counsel also recalled that controlled phone calls between the Petitioner and the victims' mother were introduced into evidence. Trial counsel did not file any pretrial motions to suppress the introduction of the phone calls, but he did redact the phone calls because they contained references to incidents that happened in Montgomery County. In a portion of the recorded phone calls, the Petitioner stated, "[H]ad said it was me?" In the redacted version, a portion of what the victims' mother said to the Petitioner immediately before he made that statement was removed. Trial counsel agreed that, taken out of context, the Petitioner's statement could have been characterized

as having a guilty mind. Trial counsel stated that his failure to redact that portion of the recorded phone call must have been an oversight.

Trial counsel also admitted that the unredacted phone calls included a statement from the Petitioner where he admits that he woke up one time to find T.A. on top of him. When he attempted to push her off of him, his fingers went inside her underwear. This incident occurred in Montgomery County. In the redacted version, the location of the incident was taken out, but the details of the incident remained.

Trial counsel explained that his theory of defense during the second trial was to demonstrate "the implausibility of the allegations" against the Petitioner. Trial counsel recalled that, during the first trial, he extensively cross-examined the victims' mother about the particular dates the incidents were alleged to have occurred. Trial counsel used a large poster board to create a diagram of the alleged dates and then, through other witnesses, demonstrated that the Petitioner was not in Nashville on the dates in question. However, trial counsel did not use the same technique during the second trial. He explained:

> My thinking was, the lack of specificity, with regard to dates, was a weakness in the State's case for the first trial. And in the second trial, obviously, they would fix that, they would be prepared for what I was doing. So, my thinking was, the second trial we would present our case differently, because if we tried the same case twice the State would be able to anticipate everything we did.

*8 Trial counsel also recalled that the State's direct examination of the victims' mother was essentially the same in each trial. Trial counsel agreed that he could have addressed in the second trial the issue of dates in order to demonstrate the implausibility of the allegations against the Petitioner.

Trial counsel also confirmed that he did not object to the respective testimony of Ms. Gallion and Ms. Post. He agreed that their respective testimony could have bolstered the victims' testimony.

On cross-examination, trial counsel stated that he was one of about six attorneys who regularly represented clients charged with child sex abuse. He stated that it was common for there to be no unbiased adult eyewitnesses in such cases. Often, such cases turned on the victim's credibility. Trial counsel recalled that the State's general practice in such cases would be to have the nurse practitioner qualified as an expert witness, but he did not know whether the forensic interviewer was qualified as an expert. He also recalled that he met with the prosecutor about redacting statements from the recorded phone calls, and the prosecutor agreed to "redact everything we wanted redacted."

Kathleen Byers, the Petitioner's sister, testified that she was present at both trials. After the jury was released to deliberate in the second trial, Ms. Byers asked trial counsel if she had time to get lunch before the jury returned. Trial counsel told her that she likely did because the jurors had requested that a TV and viewing equipment be brought into the jury room so they could "watch the video."

The post-conviction court denied relief, noting that trial counsel admitted that his failure to object to improperly admitted evidence was not meant to further a defensive strategy and that "several other instances of alleged deficient performance" were due to oversights on the part of trial counsel. However, the post-conviction court held that, even if the Petitioner's allegations were true, trial counsel's deficiencies did not result in prejudice. This timely appeal followed.

Analysis

On appeal, the Petitioner contends that trial counsel was ineffective for failing to: (1) properly redact the video of T.A.'s forensic interview; (2) object to the admission of the forensic interviews as substantive evidence; (3) properly redact the recordings of the controlled phone calls; (4) present an alibi defense; (5) object to Ms. Gallion's testimony regarding the results of T.A.'s medical exam; and (6) object to Ms. Post's testimony that victims could not realistically be expected to remember details of events.

In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn.2003). Post-conviction relief cases often present mixed questions of law and fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn.2001). As such, we review a trial court's findings of fact under a *de novo* standard with a presumption that those findings are correct unless otherwise proven by a preponderance of the evidence. *Id.* (citing Tenn. R. App. P. 13(d); *Henley v. State*, 960 S.W.2d 572, 578 (Tenn.1997)). The trial court's conclusions of law are reviewed

"under a purely *de novo* standard, with no presumption of correctness. . . . " *Id.*

*9 When reviewing the trial court's findings of fact, this court does not reweigh the evidence or "substitute [its] own inferences for those drawn by the trial court." *Id.* at 456. Additionally, "questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge." *Id.* (citing *Henley*, 960 S.W.2d at 579).

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove two factors: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn.Crim.App.1997) (stating that the same standard for ineffective assistance of counsel applies in both federal and Tennessee cases). Both factors must be proven in order for the court to grant post-conviction relief. *Strickland*, 466 U.S. at 687; *Henley*, 960 S.W.2d at 580; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn.1996). Additionally, review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Henley*, 960 S.W.2d at 579. We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision.

Granderson v. State, 197 S.W.3d 782, 790 (Tenn. Crim.App.2006).

As to the first prong of the *Strickland* analysis, "counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases." *Henley*, 960 S.W.2d at 579 (citing *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn.1975)); *see also Goad*, 938 S.W.2d at 369. In order to prove that counsel was deficient, the petitioner must demonstrate "that the counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688); *see also Baxter*, 523 S.W.2d at 936.

Even if counsel's performance is deficient, the deficiency must have resulted in prejudice to the defense. *Goad*, 938 S.W.2d at 370. Therefore, under the second prong of the *Strickland* analysis, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

Failure to Properly Redact T.A.'s Forensic Interview

The Petitioner argues that he was prejudiced by trial counsel's failure to properly redact T.A.'s forensic interview because it violated his right to a unanimous jury verdict. He claims that it allowed the jury to find the Defendant guilty for the counts involving T.A.

based on the interviewer's summary of T.A.'s statements during the forensic interview, which included references to incidents alleged to have occurred in Montgomery County.

*10 In the unredacted copy of her forensic interview, T.A. described several incidents where the Petitioner touched her "private part." She described two incidents that happened in Montgomery County, including one incident where the Petitioner's finger "went inside [her] private part." T.A. also described an incident that took place in Davidson County which did not involve penetration. The details of both incidents from Montgomery County were redacted from the forensic interview before the interview was presented to the jury. However, trial counsel failed to redact the interviewer's comment where she said:

> Okay. So you've told me about a time that [the Petitioner] put his hand in your pants and touched your private part and nothing went inside. And you told me about a couple of times when he touched your private part and his finger went inside.

At trial, T.A. gave detailed descriptions of three instances that occurred in Davidson County where the Petitioner's finger went inside her "private part." After resting its case-in-chief, the State delivered an election of offenses for each count of rape of a child against T.A. The details of each elected offense corresponded with two of the events T.A. described during her testimony at trial.[3] At the same time, the State

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[3] On direct appeal, this court merged two of the Petitioner's convictions for rape of a child against T.A. because the State elected the same incident for those two counts. *Timothy P. Guilfoy* 2013

dismissed the single count of aggravated sexual battery against T.A.

Trial courts may admit evidence of other sexual crimes when an indictment charges a number of sexual offenses but does not allege the specific date such offenses occurred. *State v. Rickman*, 876 S.W.2d 824, 828 (Tenn.1994). However, in such cases, the state is required "to elect the particular offenses for which convictions are sought." *State v. Shelton*, 851 S.W.2d 134, 137 (Tenn.1993); *State v. Burlison*, 501 S.W.2d 801, 803 (Tenn.1973). Requiring the state to make an election serves three purposes:

> First, to enable the defendant to prepare for and make his defense to the specific charge; second, to protect him from double jeopardy by individualization of the issue, and third, so that the jury's verdict may not be a matter of choice between offenses, some jurors convicting on one offense and others, another.

Burlison, 501 S.W.2d at 803. In short, such practice allows the State latitude when prosecuting criminal acts against young children while simultaneously preserving a criminal defendant's right to a unanimous jury verdict. *Rickman*, 876 S.W.2d at 828; *see also Shelton*, 851 S.W.2d at 137 (stating, "A defendant's right to a unanimous jury before conviction requires the trial court to take precautions to ensure that the jury deliberates over the particular charged offense, instead of creating a 'patchwork verdict' based on

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WL 1965996, at *20. However, this court noted that T.A.'s testimony described three separate instances and that the record failed to reveal why the State did not elect the third incident as the basis for the third count of rape of a child. *Id.* at *20 n.8.

different offenses in evidence" (citing *State v. Brown*, 823 S.W.2d 576, 583 (Tenn.Crim.App.1991)).

In this case, T.A. testified at trial about three different instances where the Petitioner penetrated her "private part" with his finger. After the close of its case-in-chief, the State delivered an election of offenses to the jury, which contained facts that clearly corresponded to T.A.'s trial testimony. The Petitioner's right to a unanimous verdict was protected when the State satisfied the election requirement.

*11 Further, the Petitioner has failed to prove that he was prejudiced by trial counsel's failure to redact the forensic interviewer's statement from the video. As noted above, the State's election of offenses protected the Petitioner's right to a unanimous jury verdict. In the redacted copy of the forensic interview, T.A. described only one incident of misconduct happening in Davidson County, and it did not include penetration. At trial, she described three instances that occurred in Davidson County, all three of which included penetration. Accordingly, we do not believe that, had trial counsel redacted the interviewer's comment, there was a reasonable probability that the outcome of the trial would have been different. *See Strickland*, 466 U.S. at 694. The Petitioner is not entitled to relief.

Admission of Forensic Interview Videos as Substantive Evidence

The Petitioner argues that trial counsel was deficient when he failed to object to the introduction of the videos of the victims' forensic interviews as substantive evidence or request that a limiting instruction be given to the jury. The Petitioner claims that the

videos could have only been introduced as prior consistent statements and, consequently, their introduction as substantive evidence was unlawful. The Petitioner contends that he was prejudiced because the admission of the videos as substantive evidence violated his right to a unanimous jury verdict and his protection against double jeopardy. Specifically, the Petitioner argues that the jury's verdicts were based on the forensic interviewer's summary comment in T.A.'s interview as opposed to the evidence presented at trial.

As a preliminary matter, we note that the Petitioner has not identified any prejudice he suffered as a result of the admission of J.A.'s forensic interview. As such, we will limit our analysis to the admission of T.A.'s forensic interview, which included the forensic interviewer's summary statement of events that happened in both Davidson and Montgomery Counties. *See Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn.2004) ("Failure to establish either prong [of the *Strickland* test] provides a sufficient basis to deny relief.")

At trial, T.A. was asked to identify a copy of her forensic interview. Then, during the testimony of Ms. Post, the forensic interviewer, the State introduced a copy of T.A.'s forensic interview into evidence without any argument as to its admissibility or explanation as to why it was admitted. Trial counsel made no objection, and the trial court provided no contemporaneous limiting instruction. During the jury charge, the trial court instructed the jury that prior inconsistent statements could be used only to determine a witness's credibility. However, the trial court did not provide a similar instruction for prior consistent statements.

On direct appeal, this court stated, "Although the record clearly demonstrates that the trial court erred

in admitting the recordings of the interviews into evidence, the record does not demonstrate that the jury ever watched the interviews." *Timothy P. Guilfoy*, 2013 WL 1965996, at *14 (emphasis in original). As such, this court concluded that the Petitioner had failed to satisfy the first requirement of plain error review—that the record clearly established what happened at trial. *Id.* at *14.[4]

It is not clear from the record why T.A.'s forensic interview was introduced into evidence. Nevertheless, this court has previously determined that the trial court erred in admitting the recording. *Id.* While the State argues in this appeal that the interview was properly admitted as a prior consistent statement, the State concedes that the trial court did not issue a proper limiting instruction. *See State v. Braggs*, 604 S.W.2d 883, 885 (Tenn.Crim.App.1980) (when prior consistent statements are admitted to rehabilitate a witness, the trial court should instruct the jury that the statement cannot be considered for the truth of the matter asserted).

*12 However, despite trial counsel's failure to object to the introduction of the video or request a limiting instruction, the Petitioner has failed to demonstrate that he was prejudiced by its introduction as substantive evidence. As discussed above, the forensic interviewer's summary statement did not violate the Petitioner's right to a unanimous jury verdict because the State provided an election of offenses. The details

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[4] The Petitioner attempted to correct this gap in the record through the post-conviction testimony of Ms. Byers that trial counsel told her she had time to get lunch because the jury had requested equipment to view the video.

of each elected offense corresponded to incidents both J.A. and T.A. described in their trial testimony. The Petitioner has failed to prove that there was a reasonable probability that the outcome of the trial would have been different had the forensic interview not been introduced as substantive evidence. Accordingly, the Petitioner is not entitled to relief.

Failure to Properly Redact Recordings of Controlled Phone Calls

The Petitioner claims that trial counsel was ineffective for failing to properly redact two statements from the controlled phone calls—one where the Petitioner described an incident which occurred in Montgomery County and one where the Petitioner asked the victims' mother, "Had said it was me?" We will address each in turn.

a. Incident in Montgomery County

The Petitioner claims trial counsel was ineffective for failing to redact a portion of the controlled phone calls where the Petitioner described an incident that happened in Montgomery County when he woke up to find T.A. asleep on top of him. Trial counsel filed a pretrial motion to have this portion of the recorded telephone call redacted, which the trial court granted. However, instead of redacting the entire incident, trial counsel only redacted some details where the Petitioner stated he may have placed his hand under T.A.'s underwear when he pushed her off him. Trial counsel also redacted the Petitioner's statement establishing that this incident happened in Montgomery County. Consequently, the following redacted version of the phone call was submitted at trial:

[Mother]: Look, I asked you to call me back to call me and be truthful.

[The Petitioner]: I know, I'm trying to be truthful. [Mother]: (Inaudible)

[The Petitioner]: Okay, okay, okay, okay, this is the one thing, the only f* * *ing thing, the only time, and what I'm scared about, I'm scared that you're going to take something one time and go to sleep tonight and wake up tomorrow and say, oh well, if it's one time, it must have been every time, because I—I swear, I'm not lying to you about the fact that I don't remember doing anything except one time, that's it, and—and the reason I didn't want to bring it up is because it sounds like I'm blaming someone else.

[Mother]: Right.

[The Petitioner]: But it happened.

[Mother]: If it was once, go ahead, go ahead.

[The Petitioner]: It happened, and I'm not going to say it's not my fault, it's just, I woke up—I woke up and I was—I was in my—I was in my shorts, whatever, I just sleep in my shorts all the time, and [T.A.] was on top of me.

[Mother]: Okay.

[The Petitioner]: And I kind of pushed her off, not violently, kind of like understanding, pushed her off,

[The Petitioner]: And, and, and I pushed her off as soon as I figured out what was going

> on, I did. I'm not—I mean, I was just f* * *ing terrified. And you know what, I did go back to sleep, I went back to sleep so I wouldn't have to f* * *ing deal with it, and I—the next morning I was going to say something to you, but you weren't there and I would have had to call you and—
>
> [The Petitioner]: I tried to, I tried—I tried to talk to [T.A.] about it.

Trial counsel generally addressed the controlled phone calls during closing argument, contending that they were designed to elicit an admission from the Petitioner but that the Petitioner did not admit to any sexual contact. During rebuttal argument, the State argued, "[The Petitioner] had the time. He had the opportunity. He had the place. That corroborates [the victim's] version of what happened. [The Petitioner] himself provides a great deal of corroboration." Later, the State referenced the Petitioner's statement that "there was this one time that [T.A.] was on me" in order to illustrate the Petitioner was attempting to shift the blame to someone else.

*13 The Petitioner argues that trial counsel was deficient for failing to redact the entire exchange about the Petitioner waking up with T.A. on top of him. Further, the Petitioner contends that he was prejudiced "in the same way the Defendant was prejudiced in *State v. Danny Ray Smith*." However, we find no support in the case for the Petitioner's argument in that case.

In *State v. Danny Ray Smith*, No. E2012-02587-CCA-R3-CD, 2014 WL 3940134 (Tenn.Crim.App. Aug. 13, 2014), *no. perm. app. filed*, the defendant proceeded

to trial on one count of rape of a child. *Danny Ray Smith*, 2014 WL 3940134, at *10. The trial court allowed the State to admit evidence of other sexual offenses under the "special rule admitting evidence of other sexual crimes when an indictment charges a number of sexual offenses, but alleges no specific date upon which they occurred." *Id.* at *10, *12 (citing *Rickman*, 876 S.W.2d at 828). Consequently, the victim's testimony detailed instances where the defendant penetrated her vagina and her "bottom" with his finger, penetrated her vagina with "his mouth," and one instance where the defendant placed his "private part" on the victim's "private part" and "stuff" came out of the defendant's private part and "went onto [the victim's] private part." *Id.* at *2. The State also introduced the defendant's statement wherein he admitted to several instances of sexual abuse—one where he "rubbed" the victim's vagina while she "rubbed" his penis, one where he penetrated the victim's vagina with the tip of his little finger, one where he performed oral sex on the victim and penetrated her vagina with his tongue, and one where he ejaculated onto the victim's abdomen. *Id.* at *3.

This court held that it was reversible error to admit evidence of other sexual acts because the State knew in advance the offense for which it sought a conviction. *Id.* at *13. Because evidence of other sexual acts was inadmissible under *Rickman*, the defendant's statement to investigators should have been redacted to exclude acts other than the act for which the State sought a conviction—his penetrating the victim's vagina with his pinky finger.

Id.

In this case, unlike the defendant in *Danny Ray Smith*, the Petitioner does not contest the State's admission of other instances of sexual misconduct under *Rickman*. He simply contests the introduction of any reference to instances that occurred in Montgomery County. We note that trial counsel failed to redact a portion of the incident that happened in Montgomery County from the phone calls. However, we do not believe trial counsel's failure resulted in prejudice. The portion of the recorded phone call that the Petitioner claims should have been redacted does not contain any reference to sexually illicit conduct. Instead, the Petitioner simply states that he woke up one night to find T.A. on top of him and he pushed her off gently. Additionally, T.A. did not testify to a similar incident at trial. Therefore, the recorded phone call was not used to corroborate her testimony. As to the State's argument during closing that "[the Petitioner] himself provides a great deal of corroboration," it is clear from the transcript that the State was not referencing the incident described during the phone call. Instead, the State was highlighting the fact that the Petitioner did not deny that he had time and opportunity to commit the acts.

*14 We note that the State did reference the incident during its closing argument to illustrate that the Petitioner was trying to shift the blame to someone else. However, we do not believe that the reference makes the redacted statement prejudicial, especially when it is considered in the greater context of the recorded phone calls. As we noted on direct appeal, the recorded phone calls "are replete with the [Petitioner's] repeated denials that he remembered ever touching the victims inappropriately." *Timothy*

P. Guilfoy, 2013 WL 1965996, at *14. Both the State and the Petitioner made the same observation during closing arguments. Accordingly, the Petitioner has failed to prove that there was a reasonable probability that the outcome of the trial would have been different had trial counsel redacted the entire description of the incident from Montgomery County. The Petitioner is not entitled to relief.

b. "Had said it was me?" Statement

The Petitioner claims counsel was ineffective for failing to properly redact the following portion of the controlled phone call:[5]

> [Mother]: Well, I needed to talk to you about something kind of serious.
>
> [The Petitioner]: Yeah?
>
> [Mother]: Yeah. I um—I got a phone call today from [J.A.'s] guidance counselor?
>
> [The Petitioner]: Oh yeah? the jury.
>
> [Mother]: And she kind of insinuated to her that—that somebody was touching her in the wrong ways.
>
> [The Petitioner]: Really? [Mother]: Yeah.
>
> [The Petitioner]: Oh man.
>
> [Mother]: And uh, I mean obviously I went and picked them up.

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[5] Portions in italics were redacted from the phone calls before the recordings were presented to

> [The Petitioner]: Sure, sure . . . man, that's, that's, man, that's . . . f* * * ing puke.
>
> [Mother]: Yeah. Well uh . . . they didn't really [say] anything about who it was, and I'm trying to figure out y'know . . .
>
> [The Petitioner]: Yeah. I, I mean anybody . . .
>
> [Mother]: Well, yeah, and well when I talked to [T.A.] and [A.A.] about it cause apparently they said it was her sisters too, they were, they were um . . . [A.A.] said it was you.
>
> [The Petitioner]: Had said it was me?

The Petitioner argues that this "confusing edit" allowed the State to argue in its closing that the Petition had a guilty mind. To support his argument, the Petitioner points to a section of the State's closing where the prosecutor argued:

> I am not going to go through [the phone calls] line by line, but I just want you to think about the way he answered the phone. The fact that [Mother] said to him, pretty much right off, "The girls are saying someone touched them." [] Does he say who? No, because he knows.

First, we note that trial counsel testified at the post-conviction hearing that he redacted anything in the phone calls which referenced A.A., a third, unindicted victim. The portion that was redacted clearly shows that A.A. identified the Petitioner as the suspect. As such, we cannot say that trial counsel was deficient in redacting this portion of the recorded phone calls.

Additionally, we are unable to determine that the Petitioner was prejudiced by trial counsel's failure to redact the comment, "Had said it was me?" It appears that the Petitioner was confirming that someone had accused him of the alleged conduct, a fact the jury would clearly know since the victims' mother made the police controlled calls to the Petitioner and the Petitioner is on trial for the offenses. Moreover, the prosecutor's comment is not referring to this lone statement or question—it is referring to the Petitioner's failure to ask the mother who the girls said touched them. Further, as noted above, the remainder of the phone calls is "replete with the [Petitioner's] repeated denials that he remembered ever touching the victims inappropriately." *See Timothy P. Guilfoy*, 2013 WL 1965996, at *14. Therefore, the Petitioner has failed to show that he was prejudiced by the way this particular portion of the controlled phone calls was redacted. The Petitioner is not entitled to relief.

Failure to Present an Alibi Defense

*15 The Petitioner argues that trial counsel was ineffective because he failed to present an alibi defense similar to the defense that was presented in the Petitioner's first trial. Through the victims' mother and other witnesses during the first trial, trial counsel was able to demonstrate that the Petitioner was not at the victims' home on the dates their mother alleged the abuse occurred. However, trial counsel did not employ a similar technique during the second trial. During the second trial, the Petitioner's theory of defense was to show the implausibility of the victims' allegations. At the post-conviction hearing, trial counsel explained that he chose not to present the same defense because he anticipated that the State would

have solidified the dates on which the abuse was alleged to have occurred. Additionally, trial counsel stated that he changed his defense strategy because "if we tried the same case twice the State would be able to anticipate everything we did." We will not second-guess a reasoned, yet ultimately unsuccessful, trial strategy. *See Granderson*, 197 S.W.3d at 790. Accordingly, the Petitioner is not entitled to relief.

Failure to Object to Ms. Gallion's Testimony

The Petitioner contends that trial counsel should have objected when Ms. Gallion testified that T.A.'s medical exam, which showed no injury, was consistent with both penetration and no penetration. Specifically, the Petitioner claims trial counsel should have objected to the following testimony:

> [The State]: Let me ask you this, put your expert hat on and ask you hypothetically: If [T.A.] [had] said to [the intake interviewer] that she was touched by an adult male's hand on the inside of her genitals, would there have been anything inconsistent about the medical exam, with that history given?
>
> [Ms. Gallion]: No. Again, the majority of children we see actually describe some type of penetration. That's one of the reasons that we often see children. Penetration with a hand, a finger, penetration with a penis. Typically those children also have completely normal exams.

The Petitioner contends that Ms. Gallion's comment did not "substantially assist the trier of fact to understand the evidence or to determine a fact at

issue. . . . " Tenn. R. Evid. 702. Additionally, the Petitioner asserts that Ms. Gallion's comment was offered simply to bolster T.A.'s testimony and that its "extremely prejudicial" nature outweighed its probative value.

At trial, both parties stipulated to Ms. Gallion's qualification as an expert. As an expert witness, she was allowed to offer her opinion. Tenn. R. Evid. 702. When an expert's opinion is otherwise admissible, it "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Tenn. R. Evid. 704.

Whether the Petitioner penetrated T.A. with his finger was a question of fact for the jury to resolve. Ms. Gallion's testimony about the results of T.A.'s medical examination and whether those results were or were not consistent with penetration substantially assisted the jury in evaluating T.A.'s medical report, which showed no injury to T.A. Additionally, we do not believe that Ms. Gallion's testimony was so prejudicial as to outweigh its probative value. Accordingly, trial counsel was not deficient for failing to object to this portion of Ms. Gallion's testimony. The Petitioner is not entitled to relief.

Failure to Object to Ms. Post's Testimony

The Petitioner argues that trial counsel should have objected to the following testimony:

> [The State]: What is your experience in the area of interviewing children who have perhaps been subjected to a number of instances of abuse over a fairly lengthy period of time, beginning when they are very

> young? Is it realistic to expect that you'll get every detail from every incident?
>
> [Ms. Post]: Certainly not. It depends, too, on the age of the child. Very little children, we expect to capture only very limited information about any event that happens in their lives. And there are lots of things that can disrupt a kid's memory of an abuse event. Trauma can disrupt memory, for example.

*16 The Petitioner contends that Ms. Post's testimony constitutes improper expert testimony because Ms. Post was not offered as an expert witness. Additionally, the Petitioner argues that the State offered this evidence to support the victims' credibility by explaining why they could not provide any details of when the abuse occurred.

The Tennessee Supreme Court addressed this issue in a similar case, *State v. Bolin*, 922 S.W.2d 870 (Tenn.1996). In that case, the social worker who performed the forensic interview testified that children who had been abused over a long period of time often had trouble remembering the details of when and how each event took place. *Id.* at 872-73. Our supreme court held that the social worker's testimony constituted expert proof and that its admission through a non-expert witness was error. *Id.* at 874. However, the court also found that any error was harmless. *Id.* Specifically, the court stated:

> The testimony essentially consists of an explanation of a narrow issue—why K.N. could not assign reasonably specific time or dates to any of the alleged events of sexual abuse. Therefore, the testimony does not,

> unlike the testimony in *Ballard*, purport to completely vouch for the overall credibility of the victim, and thus it cannot be said to have "explained away" the inconsistencies and recantations—the heart of the defense theory. Hence, the damaging effect of the testimony is minimal.[6]

Id.

Similarly, the admission of Ms. Post's testimony was error. She did not testify as an expert witness but offered testimony that was "specialized knowledge" she gathered from her experience as a forensic interviewer. *See id.* Moreover, we note there is nothing in the post-conviction record to indicate that trial counsel did not object for strategic reasons. Even if this were deficient performance on the part of trial counsel, the Petitioner has failed to establish any resulting prejudice. Like the social worker in *Bolin*, Ms. Post's testimony addressed the narrow issue of why the victims could not provide details of when the events occurred. It did not address inconsistencies in the victims' descriptions of what occurred during the abuse or address the "implausibility" of their allegations, the core of the Petitioner's defense theory during the second trial. Admittedly, there was no conclusive medical evidence that either victim had been sexually

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[6] In *State v. Ballard*, 855 S.W.2d 557 (Tenn.1993), the expert witness testified that the victims exhibited "symptom constellations" consistent with being sexually abused. *Ballard*, 855 S.W.2d at 561. The supreme court concluded that because the behavior profile was consistent with a number of psychological stressors, including sexual abuse, the list of symptoms was too generic to be probative. *Id.* at 562. Therefore, the admission of expert testimony was reversible error. *Id.* at 563.

abused, but the medical evidence did not rule out the possibility of abuse. Further, the victims told several people about the abuse—their grandfather, their mother, Ms. Post, and Ms. Gallion—over a period of several weeks. Also, they testified about the abuse during the first trial. Trial counsel specifically addressed the inconsistencies between their testimonies at both trials during cross-examination. Accordingly, the Petitioner has failed to demonstrate that he was prejudiced by trial counsel's failure to object to Ms. Post's testimony and is not entitled to relief.

Conclusion

*17 The judgment of the post-conviction court is affirmed.

**PER CURIAM ORDER,
SUPREME COURT OF TENNESSEE
(NOVEMBER 5, 2013)**

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE

v.

TIMOTHY P. GUILFOY

No. M2012-00600-SC-R11-CD

Criminal Court for Davidson County
No. 2011-A-779

ORDER

Upon consideration of Timothy P. Guilfoy's application for permission to appeal and the record before us, the application is denied.

PER CURIAM

OPINION, COURT OF CRIMINAL APPEALS OF TENNESSEE (MAY 13, 2013)

COURT OF CRIMINAL APPEALS OF TENNESSEE, AT NASHVILLE

STATE OF TENNESSEE

v.

TIMOTHY P. GUILFOY

No. M2012-00600-CCA-R3-CD

Appeal from the Criminal Court of Davidson County, No.2011-A-779; Monte Watkins, Judge.

Before: Jeffrey S. BIVINS, J., Jerry L. SMITH, and Robert W. WEDEMEYER, JJ.

OPINION

JEFFREY S. BIVINS, J.

*1 Timothy P. Guilfoy ("the Defendant") was convicted by a jury of two counts of rape of a child, four counts of aggravated sexual battery, and one count of assault. After a hearing, the trial court sentenced the Defendant to twenty years for each of the rapes, ten years for each of the aggravated sexual batteries, and six months for the assault. The trial court ordered partial consecutive service, resulting in an effective sentence of seventy years to be served in the Tennessee Department of Correction. In this direct appeal, the

Defendant contends as follows: (1) the trial court erred in allowing the State to ask leading questions of one of the victims; (2) the trial court erred in admitting two expert opinions; (3) the trial court erred in admitting recordings of phone calls between the Defendant and the victims' mother; (4) the trial court erred in admitting the videotaped forensic interviews of the victims as substantive evidence; (5) the State's election of offenses was ineffective; (6) the evidence is not sufficient to support his convictions; (7) cumulative errors entitle him to a new trial; and (8) his sentence is excessive. Upon our thorough review of the record and applicable law, we merge the Defendant's two convictions of aggravated sexual battery entered on Counts One and Two into a single conviction of aggravated sexual battery. We also merge the Defendant's two convictions of rape of a child into a single conviction of rape of a child. Finally, we merge the Defendant's conviction of assault into his conviction of aggravated sexual battery entered on Count Three. In light of our holdings, we remand this matter for a new sentencing hearing. The Defendant's convictions are otherwise affirmed.

Factual and Procedural Background

In June 2009, the Defendant was charged with three counts of aggravated sexual battery against J.A., a victim less than thirteen years old; two counts of aggravated sexual battery against T.A., a victim less than thirteen years old; four counts of aggravated sexual battery against A. A., a victim less than thirteen years old; and four counts of rape of a child

against A. A.[1] All of the aggravated sexual battery offenses were alleged to have taken place "on a date between October 1, 2005 and September 20, 2008." All of the rape of a child offenses were alleged to have taken place "on a date between July 1, 2007 and September 30, 2008." On March 30, 2011, the State entered a nolle prosequi as to these charges.

On March 11, 2011, the Defendant was charged with four counts of aggravated sexual battery against J.A., a victim less than thirteen years old (Counts One through Four); one count of aggravated sexual battery against T. A., a victim less than thirteen years old (Count 5); and three counts of rape of a child against T.A. (Counts Six through Eight). All of these offenses but the one alleged in Count Eight were alleged to have taken place "on a date between October 1, 2005 and September 30, 2008." The offense alleged in Count Eight was alleged to have occurred "on a date between July 1, 2007 and September 30, 2008."

*2 The Defendant initially was tried before a jury in July 2011, and a hung jury resulted. The Defendant was retried before a jury in October 2011, during which the State nolled Count Five. At the Defendant's second jury trial, the following proof was adduced:

Jennifer A., the victims' mother ("Mother"), testified that, when she and her three daughters moved to Nashville from Indiana in 2005, they began living at the Biltmore Apartments. Her father, Brian Schiff ("Grandfather"), was living there at the time, and they moved in with him. It was a two-bedroom apartment, and she described the living conditions as "pretty

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[1] It is this Court's policy to identify the victims of sexual crimes only by their initials.

crunched." After several months, Grandfather purchased a nearby house on Saturn Drive, and they all moved into the house. Mother stated that, when they moved into the house on Saturn Drive, it had an unfinished basement and an unfinished attic. She used the attic as her bedroom except in the summertime. The girls slept on the main floor but did not have their own separate bedroom. The girls' sleeping accommodations included a bunk bed, a futon, and a couch that pulled out to a bed. Usually, J.A. slept in the top bunk of the bunk bed.

While they were still living in the apartment, Mother became acquainted with the Defendant. He and his roommate lived next door to them. The Defendant came to visit Mother and her family in Mother's apartment. Mother and her family also visited the Defendant in his apartment. Mother described their relationship as "friends" and denied that there was ever any romantic interest on either her or the Defendant's part. She added that the Defendant was a "really good friend."

Not long after Mother and her family moved to the house on Saturn Drive, the Defendant moved out of his apartment to another location in Nashville. The Defendant visited them at their house on Saturn Drive. A few months later, the Defendant moved to Missouri. The Defendant continued to stay in touch through phone calls and visits.

Mother explained that the Defendant worked in marketing tours and would come to Nashville to participate in events such as the "CMA festival." He usually would drive to town in a tour vehicle, and he would stay with Mother and her family at the Saturn Drive house. In this way, he was able to keep the per

diem he was paid for hotels. Mother stated that she and her daughters enjoyed having the Defendant stay with them.

Mother stated that it was not her intention that the Defendant spend the night sleeping in any of the girls' beds, but she knew that he did because she would find him in one of their beds in the morning. She remembered one particular occasion when she saw the Defendant in bed with J.A. in the top bunk of the bunk bed. At that time, the bunk bed was in the dining room. She also recalled finding the Defendant in bed with T.A. on "[m]ultiple" occasions. She did not say anything to the Defendant about his presence in bed with her children.

In May of 2008, Mother, the girls, and the Defendant planned a camping trip to celebrate J.A. and Mother's birthdays, which were close together in time. Mother stated that they camped two nights, and everyone had a good time.

*3 Mother decided that she wanted to leave Nashville and move to Clarksville. The Defendant had expressed an interest in real estate investment, specifically, purchasing a house and renting it out. When Mother told him she was interested in moving to Clarksville, he purchased a house there, and she rented it from him. She stated that the rent was $700 a month. She also testified that the Defendant told her that she "wouldn't ever have to worry about just being kicked out of the house." Mother testified that the Defendant realized that she "might not always be able to come up with seven hundred dollars." She also stated that the Defendant was welcome to spend the night there. She added that it "was supposed to be a permanent move."

One morning in Clarksville, after the girls had gotten on the bus to go to school, Mother spoke with Grandfather over the phone. Grandfather told her that J.A. had told him "what happened." After her conversation with Grandfather about what J.A. had told him, Mother retrieved her daughters from school. Mother subsequently spoke with J.A. and T.A. and then she called 911. Two deputies from the Montgomery County Sheriff's Department responded and she relayed to them what J.A. and T.A. had told her. Mother testified that she called the police regarding the instant allegations on or about March 15th, 2009. The Defendant had been there three days previously.

In conjunction with the ensuing investigation, Mother made several recorded phone calls to the Defendant. She made these calls in March 2009. Mother and her family remained in the Defendant's house for about one more month. The Defendant did not serve her with an eviction notice.

On cross-examination, Mother admitted that she and the Defendant had a formal lease agreement regarding the house. She did not mail rent payments to the Defendant but deposited them twice a month into a bank account the Defendant had established. She also admitted that, whenever the Defendant came to visit, her daughters "rushed to the door and hugged him." She did not see either J.A. or T.A. acting frightened around the Defendant. She acknowledged that, when J.A. was six and seven years old, she was wetting the bed and wore pull-ups.

Mother testified that, when the Defendant was staying with them, she usually fell asleep before he did. She did not tell him where to sleep. While they were living on Saturn Drive, the girls would fight over

who got to sleep with the Defendant. She did not intervene in these discussions.

Mother acknowledged that she and her daughters moved to Clarksville in September 2008. She already had been attending a junior college in Clarksville during the summer months. She was not able to pay September's rent, so the Defendant told her that she could pay it later by increasing the rent due in subsequent months. In October, she dropped out of school. She paid part of her rent for the months of October and November. She got a job in December and was able to pay December and January rent. She was fired in February. She earlier had told the Defendant that she would file her federal income tax return early in order to get her refund and pay him some of the money she owed him. She, however, did not get a refund. Mother remained in the house through at least a portion of May.

*4 Mother admitted that, in early March 2009, the Defendant told her that he was having a hard time making the mortgage payments on the house. She denied that he told her that, if she could not pay the rent, he would have to get a tenant who could.

J.A., born on May 22, 2000, and eleven years old at the time of trial, testified that she had two older sisters, T.A. and A.A. She began living in Nashville "quite a few years ago" in an apartment. She lived with her sisters, Mother, and Grandfather. The Defendant, whom J.A. identified at trial, lived in the apartment next door.

J.A. and her family later moved into a nearby house. The house had a basement, attic, and main floor. Sometimes, Mother used the attic as her bedroom.

Grandfather used the basement as his living area. Sometimes the girls used the dining room as their bedroom. They used a regular bed and a bunk bed. J.A. usually slept in the upper bunk bed.

Sometimes the Defendant would spend the night at the house. On some of these occasions, the Defendant would sleep in J.A.'s bunk bed with her. J.A. testified that, on one of these occasions, the Defendant touched her "private" with his hand. She stated that he touched her skin by putting his hand down the front of her pants. She also stated that his hand moved and that she got up and went to the bathroom. She then went to sleep with one of her sisters. J.A. testified that the Defendant touched her in this manner on more than one occasion. J.A. stated that, when the Defendant touched her while in bed with her, she was not sure if the Defendant was awake at the time the touchings occurred.

J.A. also testified that, at another time, she was sitting on the Defendant's lap on the couch. The Defendant put his hand down the back of her pants and then slid his hand under her legs. He touched her "private" on her skin. When shown a drawing of a girl's body, J.A. identified the genital region as the area she referred to as her "private."

J.A. went camping with her family and the Defendant for J.A.'s eighth birthday. This trip occurred after the touchings about which J.A. testified. The Defendant did not touch her inappropriately on this trip.

After a while, J.A. decided to tell Grandfather what had happened. This was some time after she and her family left the house on Saturn Drive and moved

into a house in Clarksville that the Defendant owned. Grandfather remained in the house on Saturn Drive. When she told Grandfather what the Defendant had done, he told her to tell Mother. She did not do so, however, because she did not think Mother would believe her. Some time later, Grandfather told Mother what J.A. had told him but did not identify the Defendant. J .A. then told Mother what had happened. According to J.A., Mother then told her boyfriend. J.A. and T.A. went to school, but Mother came and got them out of school a little later. She took them home and "called the cops." J.A. subsequently was interviewed by a woman named Anne. The interview was videotaped. J.A. also visited a doctor, who examined her. She did not remember what she told the doctor but testified that she would have told the truth.

*5 On cross-examination, J.A. stated that the touching on the couch occurred while she was in second grade. At the time, her sisters were in the room with her. Also home at the time were Grandfather, her grandmother, Mother, and Mother's boyfriend, "Bobo." J.A. acknowledged that the Defendant's visits were sometimes short, and he did not spend the night. She and her sisters were glad to see the Defendant during his visits. She did not remember the Defendant taking her anywhere by herself. He never said anything to her that made her uncomfortable.

J.A. admitted that, at the time the touchings occurred, she wore a "pull-up" because she had a problem with bed-wetting. She stated that she did not know if she was wearing a pull-up when the Defendant touched her on the occasions she testified about. She also stated that the Defendant had been lying behind her and she was facing away from him. She did

not know if he was awake or asleep when the touching occurred. She stated that she had watched the videotape of her interview twice.

On redirect examination, J.A. stated that the only thing about the Defendant she did not like was the touchings. She never got mad at him or fought with him. She never saw her sisters or Mother be mad at him. When asked how many times the Defendant touched her inappropriately, she responded, "Maybe three or four times."

T.A., born on February 26, 1999, and twelve years old at the time of trial, testified that she currently lived in Florida with her two sisters, her brother, her father, and her stepmother. She previously had lived in Nashville with her two sisters, Mother, and Grandfather. She was the middle of three daughters.

T.A. identified the Defendant and stated that he lived next door to them while they lived in an apartment in Nashville. T.A. and her family later moved to a house on Saturn Drive. She stated that, while the family lived there, they frequently changed the furniture arrangements because the house was small. At one point, the family room was set up with a bunk bed and a futon. Another time, the bunk bed and a queen-size bed were in the dining room. Usually, T.A. and J.A. slept in the bunk bed, with T.A. on the bottom bunk. T.A.'s older sister, A. A., usually slept in the queen-size bed. Sometimes, T.A. would sleep on the futon in the family room to "get away from [her] sisters."

T.A. testified that the Defendant spent the night at the house on Saturn Drive "maybe three times." On these occasions, the Defendant slept in the family

room or the dining room. On one particular occasion, the Defendant slept in T.A.'s bed. She testified: "I was about to go to bed. It was either on the futon or the bunk bed. I'm not too sure. He had climbed in the bed, and I was already laying down. And he rolled me over and put his hand down my pants." The Defendant touched her "private part" with his finger, on her skin. She added that the Defendant's finger "went inside [her] private part." She left her bed and got in bed with her big sister. She added that she was "not too sure" if the Defendant was awake when this occurred.

*6 T.A. testified that, on another occasion, she was laying on her bunk bed when the Defendant came in and started touching her. She tried to get up, but he held her down. He touched her private part with his finger again, and she "just started crying." She got up, telling him that she had to go to the bathroom. She left and stayed away. T.A. stated that the Defendant had touched her on "[t]he inside." She also stated that this episode caused her to "want to puke."

T.A. testified that, in response to the Defendant's actions, she started wearing khaki pants to bed because they did not have an elastic waistband. She stated that the Defendant touched her another time while she was wearing her khaki pants and that he unzipped and unbuttoned them. This happened on her bunk bed. She testified, "[h]e touched me with his finger on [her] private part on [her] skin on the inside."

T.A. testified that the Defendant touched her more than three times. The touchings were similar to one another. When asked to indicate on a drawing the parts of the body that the Defendant touched, T.A. indicated the female genitalia. When asked what she

meant by "inside," she indicated, as reported by the prosecutor for the record, "the outer labia of the female genitalia."

T.A. stated that the touchings occurred before the family camping trip that they took for J.A.'s eighth birthday. She stated that she never told anyone about the touchings. She recalled J.A. telling Grandfather, however, and she remembered when Mother spoke with them while they were waiting for the school bus. T.A. testified that J.A. told Mother what had happened and that Mother began to cry. Both the girls began to cry, too. Nevertheless, the girls got on the bus and went to school.

Mother picked them up from school early that day, and they went to the District Attorney's office. There, T.A. spoke with Anne Fisher. T.A. since had watched the videotape of her interview with Fisher. After the interview, T.A. was examined by a doctor.

T.A. testified that she liked the Defendant other than his touching her. She testified that her mother and the Defendant were good friends.

On cross-examination, T.A. acknowledged that, in July 2011, she testified that the Defendant had not touched her in the same place that a tampon would go. Rather, she had earlier testified that he touched her "[l]ike on top of it," "[l]ike not literally on the outside, but like on the outside of it, yes, but like inside," and "[b]ut on the top, like where something else—like I don't know. Yeah. It wasn't like literally inside, inside, but it practically was. Yes." On cross-examination at trial, she testified that the Defendant touched her inside, where a tampon goes.

T.A. admitted that the Defendant never had threatened her, never had told her that they had a secret, and never had promised her anything for her silence. He did not speak with her about sex or boyfriends, and he never said anything that made her uncomfortable. He never pressed his body against hers, never made her touch his "private part," and never showed his "private part" to her.

*7 On redirect examination, T.A. explained that the Defendant had visited them in the house on Saturn Drive more than four times, but that he would not stay more than three days per visit.

Chris Gilmore testified that he was a school resource officer with the Cheatham County Sheriff's Department but previously had been employed as a police officer with the Clarksville Police Department. On March 18, 2009, he responded to Mother's address on an allegation of child rape. From Mother, he gathered basic information. He did not speak to any children. He notified the appropriate persons within the police department for follow-up.

Detective Ginger Fleischer of the Clarksville City Police Department testified that she was assigned to investigate the matter reported by Mother. Because the alleged criminal conduct had taken place in Nashville, she contacted the appropriate Nashville authorities. Detective Fleischer and Detective Fleming of the Davidson County Police Department determined that a "controlled phone call" between Mother and the Defendant would be helpful to the investigation. She explained to Mother that the phone call would be monitored and recorded. The phone call was scheduled to take place on March 24, 2009, the day after the forensic interview of the children. On that day, Mother

made three phone calls to the Defendant, and all three phone calls were recorded and transcribed. The recordings were admitted into evidence and played for the jury. A fourth recorded phone call was made by Mother to the Defendant on the next day. This recording also was admitted into evidence and played for the jury. Additionally, the transcripts of all the recorded phone calls were admitted.

Hollye Gallion, a pediatric nurse practitioner with the Our Kids Center in Nashville, testified that she performed medical examinations on J.A. and T.A. on April 21, 2009. In conjunction with performing the exams, she reviewed the medical history reports given by the children to a social worker. J.A. reported that "a guy named Tim" had touched the outside of her butt and the outside of her "tootie" with his hands, explaining that she "pee[d]" out of her "tootie." J.A. reported that the touching had occurred more than once. Asked if she remembered the first time, J.A. reported, "It was in our old house in Nashville; I was around six or seven years old."

Gallion testified that J.A.'s physical examination was "normal." She did not find "any injuries or concerns of infection." She also stated that the results of the physical examination were consistent with the medical history that J.A. reported. Gallion added, "Touching typically doesn't leave any sort of evidence or injury."

Gallion testified that, in giving her medical history to the social worker, T.A. reported that the Defendant had touched the outside of her "too-too" with his hand, explaining that she "pee[d]" from her "too-too." T.A. reported that the touching had occurred more than once and that she was "around five or six"

the first time. On conducting a physical exam, Gallion concluded that T.A.'s genital area and her "bottom" "looked completely healthy and normal." Gallion added that T.A.'s "physical exam was very consistent with what her history was."

*8 Anne Fisher Post, a forensic interviewer employed by the Montgomery County Child Advocacy Center, testified that she conducted forensic interviews of J.A. and T.A. These interviews were recorded and, without any contemporaneous objection from the Defendant, the recordings were admitted into evidence but were not played for the jury in open court.

The State rested its case after Post's testimony and then delivered to the jury the following election of offenses:

> Count one of the indictment alleges an act of aggravated sexual battery against J[.] A[.], date of birth 5-22-2000, and refers to the following conduct:
>
> The defendant touched J[.] A[.] on the outside of her genitals on the skin, when he put his hand down the front of her sleeping pants. The incident occurred on the top bunk of the bunk beds in the dining room, and the incident concluded when J[.] got up and went to the bathroom.
>
> Count two of the indictment alleges an act of aggravated sexual battery against J[.] A[.], date of birth 5-22-2000, and refers to the following conduct:
>
> The defendant touched J[.] A[.] on the outside of her genitals, on the skin, when he put

his hand down the front of her sleeping pants. The incident occurred on the top bunk of the bunk beds in the dining room, and the incident concluded when J[.] got up and moved to her sister's bed.

Count three of the indictment alleges an act of aggravated sexual battery against J[.] A[.], date of birth 5-22-2000, and refers to the following conduct:

The defendant touched J[.] A[.]'s buttocks on the skin when he put his hand down the back of her pants as she sat on his lap in the living room.

Count four of the indictment alleges an act of aggravated sexual battery against J[.] A[.], date of birth 5-22-2000, and refers to the following conduct:

The defendant touched J[.] A[.]'s genitals on the skin when he put his hand down the back of her pants and moved his hand under her buttocks to touch her genitals as she sat on his lap in the living room.

Count five of the indictment is withdrawn from consideration.

Count six of the indictment alleges an act of rape of a child against T[.] A [.], date of birth 2-26-99, and refers to the following conduct:

The defendant touched T[.] A[.] on the inside of her genitals after she tried to get up from her bed, and he held her down by putting his arm across her torso. The defendant put his hand down the front of her sleeping pants

> and moved it around, and she started to cry. This incident occurred on the bottom bunk of the bunk beds.
>
> Count seven of the indictment alleges an act of rape of a child against T [.] A[.], date of birth 2-26-99, and refers to the following conduct:
>
> The defendant touched T[.] A[.] on the inside of her genitals, when he put his hand down the front of her sleep pants and moved it around. This incident concluded when she felt like she was going to, quote, puke, and she got up and went to the bathroom.
>
> *9 Count eight of the indictment alleges an act of rape of a child against T[.]A[.], date of birth 2-26-99, and refers to the following conduct:
>
> The defendant touched T[.] A[.] on the inside of her genitals after he unbuttoned and unzipped her, quote, uniform pants and put his hand down the front of her pants.

The defense called Francene Guilfoy, the Defendant's mother. She testified that the Defendant moved to Nashville in August or September 2005 for an internship at Sony Records. When the internship concluded in January 2006, he returned home to his parents' house in Kirkwood, Missouri, a suburb of St. Louis. The Defendant worked at a number of part-time jobs until he was hired in May 2007 by Kerry Group, a marketing firm. His job was "mobile marketing," which required him to drive a tractor-trailer and attend public events such as county fairs and football games, where he would market a client's product. Between the time that

the Defendant returned home and May 2007, he travelled to Nashville "[p]eriodically."

Francene[2] testified that, in 2008, the Defendant became interested in purchasing a rental property. He looked at several properties located near St. Louis as well as some in Tennessee. Eventually, he purchased a rental property in Tennessee.

The Defendant was unemployed during the period December 2008 to March 2009. He was living with Francene and her husband, the Defendant's father, and actively seeking work. Francene described the Defendant's state of mind during this period as "depressed." She added, "It bothered him a lot that he didn't have a job and couldn't pay his bills." The Defendant argued with his brother, who also was living in the parental home, about money that his brother owed him. This argument occurred in mid-March 2009. Francene described the argument as "very heated" and "loud and mean."

Francene testified that the Defendant had visited Tennessee earlier in March 2009 but returned home on March 11. The next day, the family, including the Defendant, his parents, and his brother and sister, went to dinner to celebrate the Defendant's father's birthday. The Defendant told her that his trip to Tennessee was "to confront his tenant about the rent situation." She knew that his tenant was Mother.

On cross-examination, Francene acknowledged that, during his internship, the Defendant lived in an

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[2] Because several witnesses with the surname Guilfoy testified, we refer to each by his or her first name to avoid confusion. We intend no disrespect.

apartment building. She visited him there but did not remember the name of the apartments. She did not meet Mother while she was there. She was aware that, after the Defendant left Nashville, sometimes he would stay with Mother on return trips. She also was aware that the Defendant was sleeping with T.A. and J.A. She testified, "He told me it was uncomfortable. He didn't like it. And he told [Mother] to stop it."

Matt Jaboor testified that he lived in St. Louis and was "[v]ery good friends" with the Defendant. In January 2009, he went with the Defendant to Clarksville to help him do some work on the rental house. J.A. and T.A. were excited to see the Defendant and gave him a hug. Throughout the three days that he and the Defendant spent at the house, the girls constantly were trying to help and "to be around" them. While they were there, Jaboor stayed in a room in the basement by himself. The Defendant slept upstairs. One night, Jaboor went upstairs to use the bathroom, and he observed the Defendant sleeping on the couch by himself.

*10 Tony Guilfoy, the Defendant's older brother, testified that he had met Mother on three occasions. On one of these occasions, the children were present and very excited to see the Defendant, who was also present. Tony testified that he had held a job similar to the Defendant's for Kerry Group. When he travelled for that job, he was paid a per diem for housing and food. If he spent his nights with a friend instead of at a hotel, he was allowed to keep the per diem. He stated that the per diem was about eighty-five dollars a day.

Tony also testified that he accompanied the Defendant to look at some of the rental properties the Defendant was considering. He told the Defendant that

he thought it would be a good idea to purchase a rental home near a military base.

In late 2008 and early 2009, he and the Defendant were both living at home with their parents. The Defendant was not working at this time and, as a result, was "very depressed." The Defendant spoke with Tony about Mother not paying her rent. On March 24, 2009, before the Defendant got a phone call from Mother, Tony and the Defendant had their "worst argument ever" over money.

Patrick Guilfoy, the Defendant's father, testified that the Defendant was living at home and out of work in late 2008 and early 2009. The Defendant actively was looking for a job because he "wanted to work." Patrick was aware of the Defendant's rental property in Clarksville, Tennessee, and that, starting in December 2008, the Defendant was not being paid the rent. Shortly before March 12, 2009, the Defendant travelled to Clarksville to see about the house. Patrick testified that he told the Defendant that he should evict the tenant because she was not paying rent and that he should get rid of the house. Patrick testified that the Defendant responded, "I know. I just—I know I got to do this. But she's my friend."

The defense rested after Patrick's testimony. The jury retired to deliberate and subsequently found the Defendant guilty of aggravated sexual battery on Count One; aggravated sexual battery on Count Two; aggravated sexual battery on Count Three; assault on Count Four; rape of a child on Count Six; rape of a child on Count Seven; and aggravated sexual battery on Count Eight. The trial court later sentenced the Defendant to ten years on each of the aggravated sexual battery convictions; twenty years on each of the

rape of a child convictions; and to six months on the assault conviction. The trial court ordered partial consecutive service for an effective sentence of seventy years in the Tennessee Department of Correction. The trial court denied the Defendant's motion for new trial, and this appeal followed.

The Defendant raises the following issues: (1) the trial court erred in allowing the State to ask leading questions of J.A.; (2) the trial court erred in admitting two expert opinions; (3) the trial court erred in admitting the recordings of the phone calls between the Defendant and Mother; (4) the trial court erred in admitting the videotaped forensic interviews of the victims as substantive evidence; (5) the State's election of offenses was ineffective; (6) the evidence was not sufficient to support his convictions; (7) cumulative errors entitle him to a new trial; and (8) his sentence is excessive. We will address each of these contentions in turn.

Analysis

Leading Questions

*11 After the prosecutor elicited J.A.'s testimony about the Defendant touching her while they were both in the top bunk, after which she got up and went to the bathroom, the prosecutor engaged in the following colloquy with J. A.:

> Q. Do you remember a time when that happened that you did something else after it happened?
>
> A. No.

Q. It has been about four years ago that this happened, right, or three—almost three to four years ago. Right?

A. Yes.

Q. Right after it happened, you talked to a lady named Anne?

A. Yes.

Q. Or a lot sooner or a lot closer to the time?

A. Yes.

Q. And you've also talked to me about it before, a long time ago. Right?

A. Yes.

Q. Do you remember telling Anne or telling me about a time—

At this point, defense counsel objected on the basis that the State was asking leading questions. The trial court responded, "Well, she has to lead somewhat because of the age of the child. But try to limit as much as you can." The prosecutor then asked J .A., "Do you remember telling Anne or telling me about a time that he did that, and you got up and went and got in your sister's bed?" J.A. responded, "Yes. But I am not quite sure like what happened." The following colloquy ensued:

Q. What do you remember about getting out of your bed and going and getting in your sister's bed?

A. I'm not really sure what happened.

Q. Was [the Defendant] in your bed?

A. Yes.

Q. And had he touched your private?

A. Yes.

Q. And do you remember what he touched your private with?

A. His hand.

Q. And did his hand touch your private on the skin or over your clothes?

A. Skin.

Q. How was it that he was able to touch your private on the skin that time?

A. He put his hand in the front of my pants.

Q. Did his hand move or stay still or something else?

A. No.

Q. Now, when you got up and got in bed with your sister, which sister are you talking about?

A. I think it was A[].

The Defendant complains that the State's leading questions were the foundation for its election of offenses as to Counts One and Two and contends that "the only distinction offered to the jury between [these] offenses is the testimony of the attorney for the State and not [his] accuser."

As recognized by the Defendant in his opening brief, our rules of evidence provide that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the

witness's testimony." Tenn. R. Evid. 611(c)(1) (emphasis added). This Court reviews a trial court's decision to allow leading questions on direct examination for an abuse of discretion. *See State v. Caughron*, 855 S.W.2d 526, 540 (Tenn.1993).

In this case, the witness, J.A., was eleven years old at the time of trial. The events about which she was testifying had occurred before her eighth birthday. Thus, a significant period of time had elapsed between the events at issue and the trial. Moreover, this Court frequently has recognized the propriety of leading questions during the direct examination of a child victim of sex abuse. *See, e.g., Swafford v. State*, 529 S.W.2d 748, 749 (Tenn.Crim.App.1975); *State v. Jonathan Ray Swanner*, No. E2010-00956-CCA-R3-CD, 2011 WL 5560637, at *6 (Tenn.Crim.App. Nov. 14, 2011), *perm. app. denied* (Tenn. Mar. 7, 2012); *State v. Lee Lance*, No. 03C01-9804-CR-00136, 1999 WL 301457, at *4 (Tenn.Crim.App. May 14, 1999), *perm. app. denied* (Tenn. Nov. 22, 1999); *State v. Tom Harris*, C.C.A. 86-273-III, 1988 WL 63535, at *2 (Tenn.Crim.App. Jun. 23, 1988), *perm. app. denied* (Tenn. Nov. 7, 1988). We also note that defense counsel lodged only a single objection to the form of the State's questions during its direct examination of J.A. Under the facts and circumstances of this case, we hold that the trial court did not abuse its discretion in overruling the Defendant's objection. Accordingly, the Defendant is entitled to no relief on this basis.

Expert Opinions

Hollye Gallion

*12 During her direct examination of Gallion, the prosecutor asked,

> Let me ask you this, put your expert hat on and ask you hypothetically: If [T.A.] [had] said to [the woman taking her medical history] that she was touched by an adult male's hand on the inside of her genitals, would there have been anything inconsistent about the medical exam, with that history given?

Gallion responded, "No. Again, the majority of children we see actually describe some type of penetration. That's one of the reasons that we often see children. Penetration with a hand, a finger, penetration with a penis. Typically those children also have completely normal exams." The Defendant now contends that Gallion's testimony "can be summarized as an opinion that no physical findings could be indicative of anything or nothing at all" and that, accordingly, her opinion was not of assistance to the jury in understanding the evidence or in determining a fact in issue. *Cf.* Tenn. R. Evid. 702 ("If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise."). He also argues that Gallion's opinion "offered to bolster the credibility of T.A. was probative of nothing but extremely prejudicial to [him]."

We agree with the State that this issue has been waived because the defense lodged no contemporaneous objection during this colloquy. *See* Tenn. R.App. P. 36(a); *State v. Killebrew*, 760 S.W.2d 228, 231 n. 7 (Tenn.Crim.App.1988). Moreover, the Defendant does not argue that the alleged error in the admission of this testimony constituted plain error. *See State v. Adkisson*, 899 S.W.2d 626, 636-42 (Tenn.Crim.App. 1994) (recognizing that, when an issue is otherwise waived, relief may nevertheless be granted on a determination that plain error was committed). Accordingly, we hold that the Defendant is entitled to no relief on this basis.

Anne Fisher Post

Post conducted the forensic interviews of the victims. During her direct examination of Post, the prosecutor asked the following:

> Now, I want to just ask you a little bit about what you can expect from a forensic interview.
>
> You have testified that you hope—they're designed to give the best and most accurate information possible.
>
> What is your experience in the area of interviewing children who have perhaps been subjected to a number of instances of abuse over a fairly lengthy period of time, beginning when they are very young?
>
> Is it realistic to expect that you'll get every detail from every incident?

Post responded as follows:

> Certainly not. It depends, too, on the age of the child. Very little children, we expect to capture only very limited information about any event that happens in their lives. And there are lots of things that can disrupt a kid's memory of an abuse event. Trauma can disrupt memory, for example.
>
> *13 And events that are very similar can be very hard to separate. I think we all know that for [sic] our own experience. If you have the same event over and over in your own life, it can be very difficult to provide a narrative detailed account of one specific incident of that same event.

The Defendant argues that the trial court's admission of this testimony violated his constitutional rights because Post "was not competent to offer such testimony." He also contends that the admission of this testimony violated

Tennessee Rules of Evidence 701-706 and decisions by the Tennessee Supreme Court and this Court.

As with witness Gallion, however, the defense lodged no contemporaneous objection to the admission of this testimony. Accordingly, this issue has been waived. *See* Tenn. R.App. P. 36(a); *Killebrew*, 760 S.W.2d at 231 n. 7. Moreover, the Defendant does not argue that he is entitled to plain error relief on the basis of this alleged evidentiary error. *See Adkisson*, 899 S.W.2d at 636-42 (recognizing that, when an issue is otherwise waived, relief may nevertheless be granted on a determination that plain error was committed). Therefore, we hold that the Defendant is not entitled to relief on this basis.

Admission of Recorded Phone Calls

At the urging of law enforcement, Mother engaged in four recorded phone conversations with the Defendant with the aim of eliciting incriminating evidence. Because the phone calls referred to events that occurred outside of Davidson County, the defense filed a motion to redact the recordings and the transcripts thereof to remove references to out-of-venue events. The trial court granted this motion.

The Defendant now contends that the admission of the redacted phone calls violated his rights against self-incrimination because Mother was acting as a state agent under the direction of Detective Fleischer. The Defendant acknowledges that he filed no pre-trial motion to suppress the phone calls and that, therefore, he is entitled to relief only if he demonstrates that the admission of this proof constituted plain error.

As indicated above, when an issue is waived on appeal, this Court nevertheless may grant relief on a determination that plain error was committed. *See* Tenn. R.App. P. 36(b); *Adkisson*, 899 S.W.2d at 636-42. However, we will grant relief for plain error only when five prerequisites are satisfied:

> (1) the record clearly establishes what occurred in the trial court, (2) a clear and unequivocal rule of law was breached, (3) a substantial right of the accused was adversely affected, (4) the accused did not waive the issue for tactical reasons, and (5) consideration of the error is necessary to do substantial justice.

State v. Banks, 271 S.W.3d 90, 119-20 (Tenn.2008); *see also Adkisson*, 899 S.W.2d at 641-42. The Defendant

bears the burden of demonstrating plain error, and this Court need not consider all five factors "when it is clear from the record that at least one of them cannot be satisfied." *State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn.2007).

*14 We hold that the Defendant has not established that he is entitled to plain error relief on this issue because the record supports the inference that his decision not to file a motion to suppress was a tactical decision. This Court has reviewed the transcripts of the phone calls. We note that they are replete with the Defendant's repeated denials that he remembered ever touching the victims inappropriately. The Defendant repeatedly expressed his concern for the children, his agreement with Mother that she should not tell them that she thought they were lying, and his horror at the allegations. He surmised that, since he did not want to think the children were lying, perhaps he had touched them in some manner while he was asleep.[3] He, however, repeatedly and adamantly refused to admit to the alleged touchings. He repeatedly told Mother that, if he did as she asked and just admitted to the allegations, he would be lying. In short, despite four lengthy and vigorous attempts by Mother to have the Defendant admit to the alleged touchings, he steadfastly refused to do so. It is entirely reasonable, therefore, to infer that the Defendant wanted the jury to hear the phone calls. Accordingly, because the Defendant has not overcome the inference that he made a tactical decision not to seek suppression of the

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[3] We note that our supreme court has considered at least one case in which the defendant accused of sexual offenses raised a defense of sleep parasomnia. *See State v. Scott*, 275 S.W.3d 395, 399 (Tenn.2009).

phone calls, the Defendant has failed to establish that he is entitled to plain error relief on this basis.

Admission of Forensic Interviews

Without objection, the trial court admitted as substantive evidence the recorded forensic interviews of J.A. and T.A. However, the interviews were not played in open court. Rather, they were made available to the jury during the jury's deliberations. The Defendant contends that the trial court's admission of these interviews constituted plain error entitling him to a new trial.

Once again, however, the Defendant has failed to establish the prerequisites for plain error relief. Although the record clearly demonstrates that the trial court erred in admitting the recordings of the interviews into evidence, the record does not demonstrate that the jury ever watched the interviews. Indeed, during closing argument, the prosecutor told the jury the following:

> One thing I do want to mention is, remember the forensic interviews, those tapes, that we did not play those. For one thing, we're lucky to get these to work to play the ones that we did.[4] But those are video. And we don't have the capability out here.
>
> In the back, in the jury room, should you—obviously, it's your decision whether you want to watch them or not, but should you

[4] The State had earlier experienced technical difficulties in playing the recordings of the phone calls between the Defendant and Mother.

> decide to, we have the capability, or the Court does, to get a TV and all that to play those, those forensic interviews, the girls by themselves, with the interviewer in March, April, 2009, when that occurred.
>
> I just mention that sort of as, well, if you wonder why didn't we watch those or hear those, that's the reason.

These comments indicate that, in order to watch the recordings, the jury would have to request the appropriate equipment. The record contains no indication, however, that the jury ever requested the equipment. Nor does the record contain any other indication that the jury watched the recordings. The record is simply silent on this point. Accordingly, the Defendant has failed to satisfy the first prerequisite of plain error review.[5]

*15 Additionally, because the record contains no indication that the jury watched either of the recordings of the forensic interviews, the Defendant cannot demonstrate that the erroneous admission of this evidence adversely affected one of his substantial rights. Accordingly, the Defendant has failed to satisfy at least two of the prerequisites for plain error relief. Therefore, we hold that the Defendant is not entitled to plain error relief on this basis.

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[5] The Defendant contends in his reply brief that "[t]he jury is presumed to have considered all the evidence." The Defendant cites to no authority for this contention. We decline to adopt this alleged presumption as an adequate means of satisfying the first prerequisite of plain error review.

Election and Merger of Offenses

The Defendant also contends that his convictions of Counts One, Two, Six, and Seven must be vacated and these charges remanded for a new trial because the State's election of offenses as to these crimes was inadequate.[6] The State disagrees.

When the State adduces proof of multiple instances of conduct that match the allegations contained in a charging instrument, the State must "elect" the distinct offense about which the jury is to deliberate in returning its verdict as to each specific count. *See State v. Adams*, 24 S.W.3d 289, 294 (Tenn.2000); *State v. Brown*, 992 S.W.2d 389, 391 (Tenn.1999); *State v. Walton*, 958 S .W.2d 724, 727 (Tenn.1997); *State v. Shelton*, 851 S.W.2d 134, 136-37 (Tenn.1993); *Burlison v. State*, 501 S.W.2d 801, 803-04 (Tenn.1973). As our supreme court has explained,

> This election requirement serves several purposes. First, it ensures that a defendant is able to prepare for and make a defense for a specific charge. Second, election protects a defendant against double jeopardy by prohibiting retrial on the same specific charge. Third, it enables the trial court and the appellate courts to review the legal sufficiency of the evidence. The most important

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[6] In the heading of his argument on this issue, the Defendant alleges that the State's election as to Count Eight was also ineffective. Later in his brief, however, the Defendant concedes that the State's election as to Count Eight rendered it "distinguishable from the other allegations." Upon our review of the record, we agree. Accordingly, the Defendant is entitled to no relief from his conviction of Count Eight on the basis of the State's election of offenses.

> reason for the election requirement, however, is that it ensures that the jurors deliberate over and render a verdict on the same offense.

Adams, 24 S.W.3d at 294. Thus, the primary purpose for the election requirement is to ensure that the jury is deliberating about a single instance of alleged criminal conduct so that the jury may reach a unanimous verdict. *See Shelton*, 851 S.W.2d at 137. Indeed, our supreme court has characterized this right to a unanimous verdict as "fundamental, immediately touching on the constitutional rights of an accused." *Burlison*, 501 S.W.2d at 804.

In this case, Counts One and Two charged the Defendant with the aggravated sexual battery of J.A.J.A.'s testimony about these allegations consisted of the following:

> Q. Now, when [the Defendant] spent the night in your house, did he ever sleep in the top bunk with you?
>
> A. Sometimes.
>
> Q. Did something happen when he would sleep in the top bunk with you that caused you to have to come to Nashville today, or this week, and be in court today?
>
> A. Yes.
>
> Q. Can you tell us what happened?
>
> A. [The Defendant] touched me.
>
> Q. Now, when you say he touched you, where did he touch you?
>
> A. My private.

Q. What did he touch you with?

*16 A. His hand.

Q. Now, can you remember, tell us about a time when that happened, what were you doing and what happened? Can you describe it for us?

A. Laying in bed at night.

Q. Had you already gone to bed?

A. I was halfway asleep.

Q. So you had gotten in your bed, and you were halfway asleep?

A. (Witness nods in the affirmative).

Q. And then what happened?

A. He hung out with my mom for a while, and then he would come in my sister ['s] and my bed.

Q. I want you to tell us about when he got in your bed, okay, what you can remember about that.

A. Like what?

Q. You said he had hung out with your mom and then he came in your room—assume he came in the room where you were?

A. Yeah. After a while.

Q. And what room was that?

A. It was in the dining room, I think.

Q. Had you already gone to bed?

A. Yes. I was in my bed.

Q. You were on the top bunk?

A. Yes.

Q. Then what happened?

A. Then he came in my bed.

Q. And then what happened?

A. He touched me.

Q. And when you say he touched you, where did he touch you?

A. My private.

Q. Did he touch your private over your clothes or on the skin or something else?

A. On the skin.

Q. What were you wearing when you went to bed? Do you remember?

A. No. Sometimes I wear pajamas, and sometimes I just sleep in my regular clothes.

Q. Do you remember a time when [the Defendant] got in your bed when you were wearing pajamas?

A. I am not really sure.

Q. Well, what did you usually wear to bed? A. Just like some shorts or something.

Q. And what do you mean by "shorts"? Can you describe what kind of shorts?

A. Not like jean shorts, but just like comfortable shorts and comfortable shirt or something.

Q. By comfortable shorts, like what kind of waistband did it have?

A. Like stretchy or something.

Q. So when you went to bed at night, you would either wear pajama pants or comfortable shorts. Is that right?

A. Yes.

Q. When [the Defendant] got in your bed with you, do you remember if you specifically had on pajamas or specifically had on comfortable shorts?

A. I don't really remember.

Q. Did the pajamas pants and the shorts pants have the same kind of waistband, basically?

A. Yes.

Q. You have already told us that you remember him getting in bed with you and touching you on your private on the skin. How was it that he was—if you had shorts on, how was it that he was able to touch you on your private on the skin with his hand?

A. He put his hand in my pants.

Q. Do you remember, when he was in the bed with you, if he put his hand down the front of your pants, the side, back, or something else?

A. The front.

Q. Then what did his hand do when he put it down the front of your pants?

A. Just put it on my private.

Q. When he put it on your private, did it move or stay still or something else?

*17 A. Move.

Q. And what did you do when that happened?

A. I got up and went to the bathroom one time.

Q. So you could remember a time that you got up and went to the bathroom?

A. Yes.

Q. What did you do after you went to the bathroom?

A. I went to sleep with my sister.

Q. When you got up, did [the Defendant] say anything to you?

A. I don't remember.

Q. Did you say anything to him?

A. I am pretty sure I said, I am going to the bathroom.

Q. When [the Defendant's] hand was touching you on your private, was it touching on the inside of your private or the outside of your private?

A. Outside.

Q. Can you remember, J[.], that time that you got up and went to the bathroom, before you got up, can you remember how you were laying and how [the Defendant] was laying,

or how your body was and how [the Defendant's] body was?

A. I don't know, but I think either I was laying on my side or my back.

Q. So either on your side or your back?

A. Yeah.

Q. Where was [the Defendant]?

A. Next to me.

Q. Was your bed pushed up against a wall, or was it out in the middle of the room?

A. It was pushed against the wall.

Q. Were you laying closer to the wall or was [the Defendant] laying closer to the wall?

A. I think [the Defendant] was laying closer to the wall.

Q. So you told us about a time that you can remember when he got in bed with you, and you had on some kind of stretchy waistband, and he did that, and you got up and went to the bathroom.

Can you tell us about another time that it happened?

A. Where?

Q. That happened in Nashville, at [Grandfather's] house.

A. In my bed or—

Q. Well, let me ask you this first: You described him coming and getting on the top bunk with you and touching your private.

Did that happen that one time that you told us about, or did that happen some other times at [Grandfather's] house in Nashville?

A. It happened some other times, too.

Q. You told us about a time that you remember saying you had to go to the bathroom and getting up and going to the bathroom.

Do you remember a time when that happened that you did something else after it happened?

A. No.

Q. It has been about four years ago that his happened, right, or three—almost three to four years ago. Right?

A. Yes.

Q. Right after it happened, you talked to a lady named Anne?

A. Yes.

Q. Or a lot sooner or a lot closer to the time?
A. Yes.

Q. And you've talked to me about it before, a long time ago. Right?

A. Yes.

. . . .

Q. Do you remember telling Anne or telling me about a time that he did that, and you got up and went and got in your sister's bed?

A. Yes. But I am not quite sure like what happened.

Q. What do you remember about getting out of your bed and going and getting in your sister's bed?

A. I'm not really sure what happened.

Q. Was [the Defendant] in your bed?

A. Yes.

*18 Q. And had he touched your private?

A. Yes.

Q. And do you remember what he touched your private with?

A. His hand.

Q. And did his hand touch your private on the skin or over your clothes?

A. Skin.

Q. How was it that he was able to touch your private on the skin that time?

A. He put his hand in the front of my pants.

Q. Did his hand move or stay still or something else?

A. No.

Q. Now, when you got up and got in bed with your sister, which sister are you talking about?

A. I think it was A[].

J.A. then testified about one occasion during which she sat on the Defendant's lap and he reached into her pants and touched her buttocks and genital area. Later, J.A.'s

colloquy with the prosecutor continued as follows:

> Q. Did it happen—you said—you told us about two times that he got in bed with you and touched your private. Did it happen more times than that?
>
> A. I am pretty sure it happened more, but I don't know like a time like.
>
> Q. You don't know a specific number of times?
>
> A. Yeah.
>
> Q. Did it happen pretty much the same way every time?
>
> A. Yeah.
>
> Q. He would do basically the same thing each time?
>
> A. Yes.
>
> Q. And you remember a specific time when you got up and went to the bathroom?
>
> A. Yes.
>
> Q. And another specific time when you got up and went to your sister's bed?
>
> A. Yes.

On the basis of this testimony, the State elected its offense for Count One as follows:

> The defendant touched J[.] A[.] on the outside of her genitals on the skin, when he put his hand down the front of her sleeping pants. The incident occurred on the top bunk

> of the bunk beds in the dining room, and the incident concluded when J[.] got up and went to the bathroom.

As to Count Two, the State elected its offense as follows:

> The defendant touched J[.] A[.] on the outside of her genitals, on the skin, when he put his hand down the front of her sleeping pants. The incident occurred on the top bunk of the bunk beds in the dining room, and the incident concluded when J[.] got up and moved to her sister's bed.

As a close review of the testimony set forth above makes clear, J .A. testified that the Defendant touched her genital region with his hand while they were together in bed on more than one occasion. Despite the State's frequent attempts to characterize her testimony to the contrary, her description of discrete, identifiable events was very limited. Indeed, the only specific incident about which J.A. testified with particularity included both her getting out of bed and going to the bathroom and then getting into bed with her sister. Moreover, when the prosecutor asked J.A. if she remembered a time when she did something other than go to the bathroom immediately after the Defendant touched her, she said, "No." Thus, based on the actual proof, as opposed to the prosecutor's characterization of that proof, our reading of J.A.'s testimony indicates only a single incident of particular criminal conduct. The prosecutor's suggestive phrasing and leading questions did not cure this lack of specificity in the proof. *See State v. Evajean Brown*, C.C.A. No. 1167, 1988 WL 136600, at *6 (Tenn.Crim.App. Dec. 20, 1988) (recognizing that an attorney's questions

are not evidence), *perm. app. denied* (Tenn. May 8, 1989). Accordingly, we hold that the State's election of offenses for Counts One and Two was ineffective insofar as describing two discrete instances of criminal conduct. Rather, the State's election was an attempt to split a single instance of criminal conduct into two separate instances of criminal conduct.

*19 While such an "election" does not technically violate the election of offenses doctrine, it does violate the Defendant's constitutional rights against double jeopardy.[7] *See* U.S. Const. Amend. V; Tenn. Const. art. I, § 10; *State v. Phillips*, 924 S.W.2d 662, 665 (Tenn.1996) (recognizing that, under the prohibitions against double jeopardy, "[a] single offense may not be divided into separate parts; generally, a single wrongful act may not furnish the basis for more than one criminal prosecution"); *see also State v. Ashunti Elmore*, No. W2011-01109-CCA-R3-CD, 2012 WL

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[7] When the State splits a single offense into several offenses at the commencement of its prosecution by charging the same offense in more than one count, it has engaged in the improper practice of "multiplicity." *See State v. Desirey*, 909 S.W.2d 20, 27 (Tenn .Crim.App.1995). As this Court recognized in *Desirey*, this practice presents two "evils":

> First, as to the trial itself, multiplicity may carry the potential of unfair prejudice, such as suggesting to the jury that a defendant is a multiple offender or falsely bolstering the prosecution's proof on such issues as the defendant's motive or knowledge of wrongdoing. Second, it can lead to multiple convictions and punishment for only one offense. That is, a multiplicitous indictment may lead to a violation of the Double Jeopardy Clause if it results in the imposition of cumulative punishments for only one offense.

Id. (citations omitted).

6475554, at *14 (Tenn.Crim.App. Dec. 13, 2012) (recognizing that "[c]onvicting an individual twice under the same statute for the same act so fundamentally violates federal and state double jeopardy principles that extended analysis . . . is not required"). Accordingly, the Defendant's convictions on these two offenses must be merged into a single conviction of aggravated sexual battery. *See Ashunti Elmore*, 2012 WL 6475554, at * 14 (curing double jeopardy violation by remanding case to trial court for merger of two convictions).

The Defendant also complains that the State's election of offenses as to Counts Six and Seven, crimes alleged to have been committed against T.A., was ineffective. T.A. testified as follows about these offenses:

> Q. Were there times that [the Defendant] would sleep in the bed with you?
>
> A. Yes.
>
> Q. Did anything ever happen on some of those nights that cause us to have to be in court here today?
>
> A. Yes.
>
> Q. Can you tell us, did anything happen that caused us to have to be in court today, did it happen more than one time?
>
> A. Yes.
>
> Q. Did it happen quite a few times?
>
> A. Yes.. . . .
>
> Q. Can you remember and tell us about another specific time that happened?

A. I was laying on my bunk bed. And he came in and he started touching me. And I tried to get up, but his hand just went over me and like held me so I couldn't get up.

Q. Then what happened?

A. He just started doing it again. And I just started crying.

Q. When you say he started doing it again, what do you mean?

A. Touching me again.

Q. Where was he touching you?

A. On my private part.

Q. What was he touching you with?

A. His finger.

Q. Was he touching your private on the skin or over your clothes?

A. Skin.

Q. How was it that he was able to touch—what were you wearing? How was it that he was able to do that?

A. Same. Elastic band pants, pajama pants.

Q. Did he put his hand down inside your pants?

A. Yes.

Q. Through the waistband?

A. Yes.

Q. Do you remember how that ended?

A. He just stopped, I guess, or I went to bed.

Q. Was there—this sounds like a weird question, I know. But when he was doing that, how did that make you feel?

A. Felt like—made me want to puke.

Q. Was there a time when you actually did do that?

*20 A. No.

Q. Do you remember a time that you said something about having to puke or throw up?

A. I got up and said I had to go to the bathroom and left and stayed away.

Q. What had happened before you got up and said you had to go to the bathroom?

A. Are you asking if he said anything to me?

Q. No. I mean, you told us just now that you felt like you were going to puke and you got up and said you had to go to the bathroom?

A. (Witness nods in the affirmative.)

Q. What had happened right before you did that, before you got up and said you had to go to the bathroom?

A. He was touching me.

Q. Was that another time that you can remember him doing that?

A. Yes.

Q. Can you remember, where was he touching you that time?

A. Private part, on the skin, with his finger.

Q. Was his finger touching you on the inside or the outside?

A. The inside.

. . . .

Q. If you can say, how many times did that happen at your grandfather's house in Nashville?

A. I don't know how many times.

. . . .

Q. You said it happened many times, or several times, more than once?

A. Yes.

Q. More than twice?

A. Yes.

Q. More than three times?

A. Yes.

Q. What he did to you, was it similar in time?

A. Yes.

Q. Was there ever a time that he touched you on the outside of your private?

A. No.

On the basis of this testimony, the State made the following election for Count Six:

> The defendant touched T[.] A[.] on the inside of her genitals after she tried to get up from her bed, and he held her down by putting his arm across her torso. The defendant put his hand down the front of her sleeping pants and moved it around, and she started to cry. This incident occurred on the bottom bunk of the bunk beds.

As to Count Seven, the State elected the following incident:

> The defendant touched T[.] A[.] on the inside of her genitals, when he put his hand down the front of her sleep pants and moved it around. This incident concluded when she felt like she was going to, quote, puke, and she got up and went to the bathroom.

Similarly to J.A.'s testimony, a close review of T.A.'s testimony recited above indicates that she was testifying about a single incident that was later described by the State in its election as to both Counts Six and Seven: the occasion when the Defendant joined her on the bunk bed and, when she tried to get up, he held her down and touched her "private part" with his hand, causing her to feel like she was going to "puke" and ending when she got up saying she had to go to the bathroom. Thus, the State once again split a single episode of criminal conduct into two offenses.[8] As set forth above, the Defendant's constitutional rights

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[8] Prior to testifying about the single episode of touching that caused T.A. to both cry and feel like she was going to "puke," she testified about a separate incident. The record does not reveal why the State did not base one of its counts of rape of a child on this separate incident.

against double jeopardy protect him from dual convictions for the same offense. Accordingly, for the reasons set forth earlier in this opinion, the Defendant's convictions on these two offenses must be merged into a single conviction of rape of a child.

*21 Finally, although the Defendant has not challenged the State's election of offenses as to Counts Three and Four, we also are constrained to merge the Defendant's conviction of assault on Count Four with the Defendant's conviction of aggravated sexual battery on Count Three. Both of these counts were based on the single episode of touching that occurred while J.A. was sitting on the Defendant's lap and he put his hand down the back of her pants. As to Count Three, the State elected "the following conduct: The defendant touched J[.] A [.]'s buttocks on the skin when he put his hand down the back of her pants as she sat on his lap in the living room." As to Count Four, the State elected "the following conduct: The defendant touched J[.] A[.]'s genitals on the skin when he put his hand down the back of her pants and moved his hand under her buttocks to touch her genitals as she sat on his lap in the living room." The proof in support of these counts consisted of J. A.'s testimony that, on one occasion, while she was sitting on the Defendant's lap on the couch, he put his hand down the back of her pants. Touching her skin, he first touched her buttocks and then slid his hand further forward to touch her "private." Our supreme court has made clear that only one aggravated sexual battery is committed when two prohibited touchings occur in short succession during a single episode. *See State v. Johnson*, 53 S.W.3d 628, 633 (Tenn.2001) (holding that, "[i]f the entire instance

of sexual contact occurs quickly and virtually simultaneously, then only one offense has occurred, even if more than one touching has occurred").

As it did with its election of offenses as to Counts One and Two and Six and Seven, the State again "elected" to split a single criminal episode into two crimes. The State may not violate a defendant's protections against double jeopardy in this manner. Accordingly, we must merge the Defendant's convictions of aggravated sexual battery and assault under Counts Three and Four into a single conviction of aggravated sexual battery.

Sufficiency of the Evidence

The Defendant contends that the evidence is not sufficient to support any of his convictions. The State disagrees.

Our standard of review regarding sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also* Tenn. R.App. P. 13(e). After a jury finds a defendant guilty, the presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn.1992). Consequently, the defendant has the burden on appeal of demonstrating why the evidence was insufficient to support the jury's verdict. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The appellate court does not weigh the evidence anew; rather, "a jury verdict, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts" in the testimony and

all reasonably drawn inferences in favor of the State. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn.1992). Thus, "the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom." *Id.* (citation omitted). This standard of review applies to guilty verdicts based upon direct or circumstantial evidence. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn.2011) (citing *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn.2009)). In *Dorantes*, our Supreme Court adopted the United States Supreme Court standard that "direct and circumstantial evidence should be treated the same when weighing the sufficiency of such evidence." *Id.* at 381. Accordingly, the evidence need not exclude every other reasonable hypothesis except that of the defendant's guilt, provided the defendant's guilt is established beyond a reasonable doubt. *Id.*

*22 The Defendant was convicted of three counts of aggravated sexual battery and one count of assault (on Count Four) as to J.A. We have determined that the State's "election of offenses" as to Counts One, Two, Three and Four violated the Defendant's double jeopardy protections. Therefore, we have merged the Defendant's convictions of Counts One and Two into a single conviction of aggravated sexual battery. We also have merged the Defendant's conviction of assault on Count Four into his conviction of aggravated sexual battery on Count Three. Accordingly, we will consider the sufficiency of the evidence as to the Defendant's two convictions of aggravated sexual battery against J.A.

Aggravated sexual battery is defined as "unlawful sexual contact with a victim by the defendant" when the victim is less than thirteen years old. Tenn.Code

Ann. § 39-13-504(a)(4) (2006). Unlawful sexual contact, in turn, is defined as including "the intentional touching of the victim's . . . intimate parts . . . if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." *Id.* § 39-13-501(6) (2006). A victim's intimate parts are defined as including "the primary genital area, groin, inner thigh, buttock or breast of a human being." *Id.* § 39-13-501(2).

As to Counts One and Two, as merged, the Defendant was convicted of touching J.A.'s genital area with his hand while they lay in bed together, after which she got up, went to the bathroom, and got into bed with one of her sisters. J.A. testified to this occurrence, and the proof established that she was less than thirteen years old at the time. We hold that the proof is sufficient to support the Defendant's conviction of aggravated sexual battery.

As to Counts Three and Four, the Defendant was convicted of touching J. A.'s genitals and buttocks on the skin "when he put his hand down the back of her pants as she sat on his lap in the living room." The proof established that J.A. was less than thirteen years old at the time of this touching. She testified that, on one occasion, while she was sitting on the Defendant's lap on the couch, he put his hand down the back of her pants. Touching her skin, he first touched her buttocks and then slid his hand further forward to touch her "private." We hold that this proof is sufficient to support the Defendant's conviction of aggravated sexual battery.

The jury also convicted the Defendant of two counts of rape of a child on Counts Six and Seven. For the reasons set forth above, we have merged the Defendant's convictions on these counts into a single

conviction of rape of a child. Rape of a child is defined as the "unlawful sexual penetration of a victim by the defendant . . . if the victim is more than three (3) years of age but less than thirteen (13) years of age." Tenn.Code Ann. § 39-13-522(a) (2006). Sexual penetration includes "any . . . intrusion, however slight, of any part of a person's body . . . into the genital . . . openings of the victim's . . . body[.]" *Id.* § 39-13-501(7). As set forth above, T.A. testified that, while they were in bed together, the Defendant placed his finger inside her genital region. When asked to indicate on a picture precisely where the Defendant's finger had gone, T.A. indicated, in the prosecutor's words, "the outer labia of the female genitalia." Our supreme court has made clear that "the entering of the vulva or labia is sufficient" to satisfy the element of sexual penetration. *State v. Bowles*, 52 S.W.3d 69, 74 (Tenn.2001) (quoting *Hart v. State*, 21 S.W.3d 901, 905 (Tenn.2000)). Accordingly, we hold that the proof is sufficient to support a conviction of rape of a child.

*23 On Count Eight, which charged rape of a child, the jury convicted the Defendant of the lesser-included offense of aggravated sexual battery of T.A. The State described this offense as follows: "The defendant touched T[.] A [.] on the inside of her genitals after he unbuttoned and unzipped her, quote, uniform pants and put his hand down the front of her pants." The State's proof of this offense consisted of the following colloquy between T.A. and the prosecutor:

> Q. At some point, did you start wearing a different kind of pants to bed when [the Defendant] came over?
>
> A. Yes.

Q. What did you do? What was the change you made?

A. We have to wear uniforms, so I started wearing my khaki pants.

Q. Started wearing them when?

A. When I went to bed.

Q. What was different about the khaki pants than what you ordinarily wore to bed?

A. They don't have the elastic and they are buttoned up and zipped up.

Q. Why did you start doing that?

A. I didn't want it to happen again.

Q. So you started wearing these kind of pants when [the Defendant] visited, is that correct, to bed?

A. Yes.

Q. Did it happen again after you started wearing those kind of pants?

A. Yes.

Q. Can you tell us about that?

A. Same thing. Just he unzipped my pants and unbuttoned them.

Q. Where were you when that happened?

A. I was on the bunk bed.

Q. What did he do after he unbuttoned your pants and unzipped them?

A. He touched me with his finger on my private part on my skin on the inside.

We hold that T.A.'s testimony constituted sufficient proof to support the offense of aggravated sexual battery arising from the Defendant's touching her genital region while she was wearing khaki pants. The Defendant is entitled to no relief as to this conviction.

Cumulative Error

The Defendant asserts that the cumulative errors committed during his trial entitle him to a new trial on all charges. As set forth above, we have found errors in conjunction with the State's election of offenses. We have addressed those errors specifically and granted appropriate relief. While we have concluded that the trial court committed an evidentiary error regarding the videotapes of the forensic interviews, the record does not establish that the Defendant thereby suffered any prejudice. We have not found error arising from the other issues identified by the Defendant. Accordingly, we hold that the Defendant is not entitled to relief on the basis of cumulative error.

Sentencing

Following a sentencing hearing, the trial court sentenced the Defendant to ten years for each of the four aggravated sexual battery convictions and to twenty years for each of the two rape of a child convictions. The trial court also sentenced the Defendant to six months for the assault conviction. The trial court ordered partial consecutive service such that the Defendant received an effective sentence of seventy years in the Tennessee Department of Correction. The Defendant contends that the trial court erred in its

imposition of consecutive service so as to result in an effective sentence of seventy years.

*24 As set forth above, the Defendant's convictions of aggravated sexual battery on Counts One and Two must be merged into a single conviction of aggravated sexual battery. Also, the Defendant's conviction of assault on Count Four must be merged into the Defendant's conviction of aggravated sexual battery on Count Three. Additionally, we have merged the Defendant's two convictions of rape of a child on Counts Six and Seven into a single conviction of rape of a child. In light of these significant alterations to the Defendant's convictions, we conclude that we must remand this case for a new sentencing hearing. *See, e.g., State v. Kenneth Lee Herring*, No. M1999-00776CCAR3CD, 2000 WL 1208311, at *9 (Tenn.Crim. App. Aug. 24, 2000), *perm. app. denied* (Tenn. Feb. 20, 2001). Accordingly, we decline to address the Defendant's contention that the trial court erred in imposing partial consecutive service.

Conclusion

The Defendant's convictions of aggravated sexual battery entered on Counts Three and Eight are affirmed. The Defendant's convictions of aggravated sexual battery entered on Counts One and Two are merged into a single conviction of aggravated sexual battery. The Defendant's conviction of assault on Count Four is merged into the Defendant's conviction of aggravated sexual battery on Count Three. The Defendant's two convictions of rape of a child on Counts Six and Seven are merged into a single conviction of rape of a child. This matter is remanded to the trial court for further proceedings consistent with this opinion, including

amendment of the judgment orders entered on Counts One, Two, Three, Four, Six and Seven to reflect the mergers noted herein and a new sentencing hearing.

ORDER DENYING PETITION FOR REHEARING, COURT OF CRIMINAL APPEALS OF TENNESSEE (SEPTEMBER 25, 2015)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE

TIMOTHY P. GUILFOY

v.

STATE OF TENNESSEE

No. M2014-01619-CCA-R3-PC

Appeal from the Criminal Court for Davidson County
No. 2011-A-779 Monte Watkins, Judge

Before: James Curwood WITT, JR., Robert L. HOLLOWAY, JR., and Robert H. MONTGOMERY, JR., Judges.

ORDER DENYING PETITION FOR REHEARING

The Petitioner, by and through counsel, has filed a Petition for Rehearing pursuant to Rule 39 of the Tennessee Rules of Appellate Procedure, asking this court to reconsider its August 14, 2015, opinion in this case. The Petitioner contends that the opinion conflicts with a statute, prior decision, or other principle of law; overlooks or misapprehends a material fact; and relied

upon matters of fact or law upon which the parties have not been heard and that are open to reasonable dispute. Tenn. R. App. P. 39(a)(2)-(4).

Conflicts with Prior Statute, Decision, or Other Principle of Law

First, the Petitioner argues that our conclusion that "[t]he Petitioner's right to a unanimous verdict [and prohibition of double jeopardy] was protected when the State satisfied the election requirement" conflicts with this court's opinion on the Petitioner's direct appeal. *Timothy Guilfoy v. State*, No. M2014-01619-CCA-R3-PC, 2015 WL 4880182, at *10 (Tenn. Crim. App. Aug. 14, 2015) (alteration added by the Petitioner). The Petitioner correctly notes that on direct appeal this court held that the State's election of offenses violated the Petitioner's constitutional rights against double jeopardy. *State v. Timothy P. Guilfoy*, No. M2012-00600-CCA-R3-CD, 2013 WL 1965996, at *19 (Tenn. Crim. App. May 13, 2013). However, that does not mean that our opinion is in conflict with this court's prior opinion on direct appeal, as the Petitioner claims. As this court noted in the direct appeal, while the State's election of offenses violated the prohibition against double jeopardy, "such an 'election' does not technically violate the election of offenses doctrine . . . ." *Id.* at *18-19. To be clear, our opinion in the post-conviction appeal does not suggest that the State's election protected the Petitioner's rights against double jeopardy for the charges against him in this case. On the contrary, it simply says that his right to a unanimous jury verdict was protected when the State delivered an election of offenses which corresponded to facts that were included in the victims' trial testimony. "The election requirement safeguards the

defendant's state constitutional right to a unanimous jury verdict by ensuring that the jurors deliberate and render a verdict based on the same evidence." *State v. Johnson*, 53 S.W.3d 628, 631 (Tenn. 2001) (emphasis added). To the extent that the election requirement protects defendants against double jeopardy, it does so by "prohibiting retrial on the same specific charge." *State v. Adams*, 24 S.W.3d 289, 294 (Tenn. 2000). The Petitioner's right to a unanimous verdict was protected when the State gave its election of offenses, even if that election violated the Petitioner's rights against double jeopardy in this case. *See Johnson*, 53 S.W.3d at 631; *Timothy P. Guilfoy*, 2013 WL 1965996, at *19. Our opinion does not conflict with this court's opinion on direct appeal.

Overlooks or Misapprehends a Material Fact

a. Election of Offenses Did not Correspond with Victims' Testimony

Second, the Petitioner claims that this court overlooked or misapprehended a material fact when we stated that the Petitioner's right to a unanimous verdict was protected because "the State delivered an election of offenses to the jury, which contained facts that clearly corresponded with T.A.'s trial testimony." *Timothy Guilfoy*, 2015 WL 4880182, at *10. The Petitioner submits that the State's election for Counts 1, 2, 6, and 7 did not correspond to J.A. and T.A.'s trial testimony because the State improperly split single instances of conduct into two counts.

At trial, J.A. described two instances where the Petitioner touched her—once when she got up, went to the bathroom, and got into bed with her sister; and

once when she was sitting on the Petitioner's lap on the couch. Similarly, TA. testified about three instances where the Petitioner touched her—once when she left and got into bed with her sister; once when she started crying, went to the bathroom, and wanted to "puke"; and once when she was wearing khakis. The State's election of offenses for the four charges involving J.A. included the following facts: two counts where the Petitioner touched J.A. on the outside of her genitals and the incident concluded when she went to the bathroom and got into bed with her sister; and two counts where the Petitioner touched J.A.'s bottom and genitals while she was sitting on the Petitioner's lap on the couch. The State's election for the three offenses involving TA. included the following facts: two counts where the Petitioner touched the inside of T.A.'s genitals while in bed and she started crying, wanted to puke, and got into bed with her sister; and one count where the Petitioner touched the inside T.A.'s genitals while in bed and while she was wearing khaki pants. The facts included in the State's election corresponded with the facts presented in the victims' trial testimony, even if the election improperly split some of the instances into two counts of criminal conduct. The facts in the election of offenses did not correspond at all with the forensic interviewer's summary statement in T.A.'s interview. The Petitioner is not entitled to rehearing on this issue.

b. Jury's Verdict Mirrored Forensic Interview as Opposed to Trial Testimony

The Petitioner also claims that this court overlooked or misapprehended the material fact that the jury's verdict on the charges involving T.A. mirrored the forensic interviewer's summary statement instead of

T.A.'s trial testimony. The Petitioner notes that T.A.'s testimony only described instances of conduct that involved penetration. The Petitioner asserts that, because the jury convicted the Petitioner of two counts of rape of a child and one count of aggravated sexual battery against T.A., the jury necessarily based its verdict on the forensic interviewer's summary statement in T.A.'s interview instead of T.A.'s trial testimony, and therefore, the introduction of the summary statement as substantive evidence was not harmless. Additionally, the Petitioner contends that the State's election of offenses, which improperly split one instance of illegal touching against T.A. into two offenses, confused the jury, and the two convictions of rape of a child "can only be reconciled with the accounts provided in the [forensic interviewer's summary statement]."

The Petitioner cites *State v. Benjamin Foust*, No. E2014-00277-CCA-R.3-CD, 2015 WL 5256422 (Tenn. Crim. App. Apr. 28, 2015), *perm. app. filed*, to support his claim that the introduction of the forensic interviewer's summary statement as substantive evidence was not harmless. In that case, the defendant was indicted along with two co-defendants, Ashlie Tanner and Teddie Jones, for the murder to two people. *Id.* at *1. At trial, both Ms. Tanner and Mr. Jones testified that *Mr. Jones* committed the murders while the defendant waited in the car. *Id.* at *5-6, *8-9, *15. However, during the cross-examination of Mr. Jones, the State admitted into evidence a recording of Mr. Jones's statement to police, in which he gave a detailed description of the defendant's murdering the two victims while Mr. Jones watched. *Id.* at *11-12. In that same interview, Mr. Jones stated that the defendant was a member of the Aryan Circle and had

threatened to have Mr. Jones killed. *Id.* at *12. This court held that Mr. Jones's statement to police should not have been entered as substantive evidence because it did not meet the requirements for admission under Tennessee Rules of Evidence 613(b) and 803(26). *Id.* at *14. Further, this court concluded that the error was not harmless because the case hinged on the credibility of Mr. Jones and Ms. Tanner and because the State had relied heavily on Mr. Jones's statement to police in its closing argument when it told the jury that the whole statement was evidence it could consider in its deliberations and argued that Mr. Jones had lied during his testimony because he was "terrified" of the defendant. *Id.* at *15.

The Petitioner's claim that the jury based its verdict on the interviewer's summary statement is without merit. First, this case is distinguishable from *Benjamin Foust* because the State did not rely at all upon the forensic interviewer's summary statement. Instead, the State specifically elected offenses underlying each count of the indictment which included facts that corresponded with the T.A.'s description of the event at trial. Such election ensured that the jury was deliberating on the same evidence, not on extraneous evidence admitted at trial. *See Johnson*, 53 S.W.3d at 631. Further, this court will not engage in speculation as to the jury's reasoning when rendering a verdict. *State v. Cynthia J. Finch*, ___ S.W.3d ___, No. E2011-02544-CCA-R3-CD, 2013 WL 6174832, at *13 (Tenn. Crim. App. Nov. 22, 2013). This court has already held that the evidence was sufficient to uphold each of the Petitioner's convictions, as merged on direct appeal, for conduct against T.A. *Timothy P. Guilfoy*, 2013 WL 1965996, at *22, *23. The Petitioner has presented no

proof, and we will not assume, that the jury's verdict was based on the forensic interview's summary statement as opposed to T.A.'s trial testimony. The Petitioner is not entitled to a rehearing on this issue.

Opinion Relies upon Matters of Fact upon Which the Parties Have Not Been Heard and are Open to Reasonable Dispute

Finally, the Petitioner argues that our opinion relied upon matters of fact upon which the Petitioner has not been heard and are open to reasonable dispute. Specifically, the Petitioner claims that our opinion is based on the erroneous conclusion that the State's election of offenses corresponded with J.A. and T.A.'s trial testimony and asserts that "[t]he State and the [Petitioner] have not addressed the defective nature of the election of the offenses in their respective briefs or during oral argument."

First, we note that the Petitioner argued in his brief that the admission of the improper redaction of T.A.'s forensic interview and its admission into evidence caused the Petitioner to be "denied the right to a unanimous verdict." In order to determine whether a defendant was denied the right to a unanimous verdict in cases where the evidence showed that the defendant committed multiple offenses against the victim, this court must determine whether the State satisfied the election requirement. *Johnson*, 53 S.W.3d at 630-31. Accordingly, the Petitioner had the opportunity to address his claim that the State's election was improper, and he chose not to do so.

Further, whether the State's election corresponded to J.A. and T.A.'s testimony is not open to reasonable dispute. As noted above, the specific facts from both

victims' trial testimony were included in the State's election of offenses. Moreover, this court held on direct appeal that, even though the election of offenses violated the Petitioner's rights against double jeopardy, the State's election did not violate the election of offenses doctrine. *Timothy P. Guilfoy*, 2013 WL 1965996, at *19. Accordingly, the Petitioner is not entitled to a rehearing on this issue.

For the reasons set forth above, the Petition for Rehearing is hereby DENIED.

PER CURIAM

ROBERT L. HOLLOWAY, JR., JUDGE

JAMES CUR WOOD WITT, JR., JUDGE

ROBERT II. MONTGOMERY, JR., JUDGE

ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (FEBRUARY 8, 2024)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY GUILFOY,

Petitioner-Appellant,

v.

SHARON N. ROSE, Warden,

Respondent-Appellee.

No. 23-5348

Before: LARSEN, NALBANDIAN, and READLER, Circuit Judges.

Timothy Guilfoy, a Tennessee prisoner, petitions this court for en banc rehearing of its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Clerk

ORDER DENYING PETITION FOR REHEARING EN BANC, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (FEBRUARY 23, 2024)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY GUILFOY,

Petitioner-Appellant,

v.

SHARON N. ROSE, Warden,

Respondent-Appellee.

No. 23-5348

Before: LARSEN, NALBANDIAN, and READLER, Circuit Judges.

Timothy Guilfoy petitions for rehearing en banc of this court's order entered on December 18, 2023, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom

requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Clerk

AFFIDAVIT OF TIMOTHY GUILFOY
(MAY 21, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

United States of America ex rel.
TIMOTHY GUILFOY, TOMIS ID 00499702,

Petitioner,

v.

MICHAEL PARRIS, Warden, Northwestern Correctional Complex,

Respondent.

Case No. 18-cv-1371

Before: Honorable Eli J. RICHARDSON, Honorable Magistrate Barbara D. HOLMES, Judges.

Timothy Guilfoy, having been duly sworn, hereby deposes and states as follows:

1. My name is Timothy Guilfoy. I am the Petitioner in the above-captioned matter. I am incarcerated at the Northwest Correctional Complex. My TOMIS ID is 00499702.

2. The statements in this affidavit are truthful and based on my personal and direct knowledge.

3. Through a superseding indictment, I was charged with four counts of aggravated sexual battery against J.A., three counts of rape of a child against T.A., and one count of aggravated battery against T.A.

4. I was represented by Bernard McEvoy at both my first trial, which ended in a hung jury, and at my second trial, which resulted in convictions on some of the charges.

5. Through the course of preparing for trial with Mr. McEvoy, I learned that "forensic interviews" of J.A. and T.A. were conducted at the local Child Advocacy Center, and that the interviews were videotaped.

6. The recorded interviews were not produced to Mr. McEvoy during discovery.

7. Mr. McEvoy filed a motion to compel the State to disclose a copy of the recorded interviews. The State objected to disclosing the videos because it claimed it would not use the recorded interviews during its case in chief. Based on the State's representation, the trial court denied Mr. McEvoy's motion to compel.

8. During my first trial, the State, through J.A. and T.A.'s mother, testified to specific range of dates on which I allegedly committed the abuse at their residence. I presented alibi witnesses and other corroborative evidence—including work schedules and credit card statements—to show that I was working and/or not even in the same state as J.A. and T.A. on virtually every date the mother claimed that I was present at their residence when the abuse allegedly occurred. The recorded interviews were not used at trial. As mentioned above, the result of the first trial was a hung jury.

During my second trial, the State, again through J.A. and T.A.'s mother, generally alleged that the abuse I allegedly committed occurred during a three-year period. The State also called the psychologist—Anne Fisher Post—who conducted the recorded forensic interviews. The State had Ms. Post identify two DVDs as containing the recorded interviews she conducted of J.A. and T.A. Ms. Post claimed that the she had watched the recorded interviews and that they were an accurate representation of the interviews "subject to some redactions." The State asked that the DVDs be marked as exhibits to Ms. Post's testimony. However, it did not ask the trial court to publish the recorded interviews to the jury.

10. I was surprised and confused by the State's reference to the recorded interviews during Ms. Post's testimony, because my understanding was that the State would not—and could not—present the recorded interviews during its case in chief based on its pretrial representations and its refusal to disclose the interviews to me *(i.e.,* my attorney).

11. I told my attorney, Mr. McEvoy, that I thought he should renew his motion to compel a copy of the recorded interviews because the State referenced them in front of the jury. Mr. McEvoy told me he could not do so because the State was not "using" the recorded interviews by playing them for the jury and the interviews were therefore not evidence.

12. During his closing argument, the prosecutor referenced the recorded interviews and told the jury that it could watch the interviews during deliberations if it chose to do so.

13. Based on the State's argument, I again told Mr. McEvoy that we needed a copy of the recorded interviews, especially because I had no memory of seeing them and I know for certain that I had never seen the "redacted" versions which the State was presumably referencing. Mr. McEvoy again assured me that the jury would not be able to view the recorded interviews because they were not played at trial and, if the jury requested viewing equipment during deliberations, he would object.

14. No one informed me prior to the jury's verdict that it had requested equipment to watch the recorded interviews during deliberations, and no such request was ever made on the record.

15. The jury subsequently found me guilty.

16. A few weeks after I was convicted, I hired James O. Martin III to represent me on appeal. Mr. Martin suggested that I hire a private investigator to interview the jurors to ask them why they found me guilty. An investigator was able to track down several of the jurors, who told him that they found me guilty based on the recorded interviews.

17. The jurors did not explain how they were able to watch the recorded interviews, only that they did so in the jury room.

18. Mr. Martin then went to the courthouse to watch the recorded interviews, both unredacted and redacted. He subsequently reported to me that, in his opinion, the recorded interviews watched by the jury were misleadingly redacted.

19. Mr. Martin also told me that the recorded interviews, *i.e.,* the content of the DVDs, were not evidence in my case because they were not played during my trial. He told me this meant that by watching the recorded interviews, the jury was exposed to "extraneous information" which amounted to constitutional error. He expressed to me that he thought I would receive a new trial based on this error.

20. Mr. Martin filed a motion for new trial in which he argued that the court erred in admitting the recorded interviews, and that I was denied a public trial because the interviews were not played in open court and were only watched by the jury during deliberations.

21. The trial court denied my motion for a new trial.

22. On appeal, Mr. Martin argued that the trial court committed plain error when it admitted the recorded interviews into evidence, and that the error was prejudicial because the State invited the jury to watch the interviews during closing argument.

23. The State responded by arguing, in part, that I could not show prejudice because there was nothing on the record to suggest that the jury ever watched the recorded interviews.

24. The Court of Appeals agreed that the trial court erred by admitting the recordings, but that I could not show prejudice because the record did not establish that the jury watched them. In particular, the Court of Appeals noted that based on the prosecutor's closing argument, the jury would have had to

have requested equipment to watch the recorded interviews, and no such request was in the record. The court therefore denied me relief.

25. I hired Mr. Martin to represent me in my post-conviction proceedings.

26. I asked Mr. Martin to try to get affidavits from the jurors as evidence that they had watched the recorded interviews. Mr. Martin told me that none of the jurors would sign an affidavit. However, he told me that he would call at least one of the jurors to testify at my post-conviction hearing to establish that they had watched the videos.

27. Mr. Martin thereafter subpoenaed the jury foreperson, Hilary Hoffman, to testify at my post-conviction hearing. Mr. Martin told me the purpose of Ms. Hoffman's testimony was to establish the necessary fact that the jury was exposed to extraneous information in order to raise an additional issue of jury exposure to extraneous evidence.

28. Mrs. Hoffman was present at the hearing pursuant to the subpoena. However, the prosecutor objected to her testimony based on Tennessee Rule of Evidence 606(b). Mr. Martin argued that he only intended to ask Mrs. Hoffman whether the jury watched the recorded interviews. The post-conviction judge sustained the State's objection and would not even allow Mrs. Hoffman to testify as an offer of proof that the videos were watched.

29. After the hearing, Mr. Martin immediately told my family that he would appeal the court's refusal to allow Mrs. Hoffman's testimony. When I spoke with him three days later, Mr. Martin again told me that he was going to appeal the court's refusal to allow Mrs.

Hoffman to testify, and that it was by far the most obvious and important issue to appeal.

30. Over the following months, I had very little contact with Mr. Martin. I called multiple times per week without any answer. It was only after my family and I emailed him on multiple occasions expressing frustration and the need for a sense of urgency that Mr. Martin became responsive to my attempts at communication.

31. I spoke with Mr. Martin by phone on many occasions in December of 2014 about the brief in my post-conviction appeal. Mr. Martin again assured me that he would raise as an issue in the appeal the court's refusal to allow Mrs. Hoffman to testify about the jury watching the recorded interviews.

32. On January 15, 2015, Mr. Martin emailed a draft of the brief to my sister, Katie. The draft did not include an argument that the post-conviction court erred by refusing to allow Mrs. Hoffman to testify. However, Mr. Martin indicated in the email that he had additional argument to include in the brief. In a subsequent phone call, Mr. Martin specified that the additional argument to be added to the brief was the issue of the judge's failure to allow the jury testimony.

33. On January 21, 2015, Mr. Martin filed my brief. I did not have the opportunity to read the finalized brief before it was filed.

34. On February 15, 2015, Mr. Martin sent an email to my sister asking her to have me call him the following day.

35. I called Mr. Martin on February 16, 2015. During the phone call, Mr. Martin told me had been

offered another job. He did not tell me for whom he would be working, only that "they" had been offering him the job for several months and that if he did not accept it, the offer would go away. He also told me that he was going to accept the position.

36. Mr. Martin offered to hire an attorney, Patrick T. McNally, to finish the appeal. I agreed to let Mr. McNally continue with the representation based on Mr. Martin's recommendation.

37. Mr. Martin never informed me about any conflict of interest based on his job offer and new position.

38. After my phone call with Mr. Martin, I received a copy of the brief Mr. Martin filed in my appeal. To my astonishment, the brief did not raise as an issue the court's refusal to allow Mrs. Hoffman to testify during my post-conviction hearing.

39. I was furious about the failure to include the issue regarding the juror in my appeal.

40. I had my sister email Mr. Martin to set up a call as soon as possible.

41. When I spoke with Mr. Martin, I confronted him about the failure to raise the juror issue in the appeal. He told me that I had misunderstood the brief; he claimed to have raised two issues concerning the video, and that he did not need to raise the juror issue because the Court of Appeals "would read the transcript and see what happened."

42. At the end of March of 2015, I received a notice from the Court of Appeals regarding Mr. Martin's withdrawal from my case. In the notice, Mr. Martin explained that he had accepted a position with

the Davidson County District Attorney's Office and that his ongoing representation of me would amount to a conflict of interest.

43. Reading the notice was the first time I was notified that the position Mr. Martin had been offered—and was considering for months prior to his filing my brief—was with the very same office that prosecuted me and which was my opponent in the appeal for which he had just filed the primary brief.

44. Had I known that Mr. Martin was considering an offer of employment with the Davidson County District Attorney's Office, I would not have allowed him to draft and file a brief on my behalf in my post-conviction appeal.

45. On September 28, 2018, I submitted a written complaint to the Tennessee Board of Professional Responsibility, detailing the reasons for my belief that Mr. Martin was laboring under a conflict of interest at the time he was representing me. I also alleged Mr. Martin did not notify me of this conflict before filing my brief. A true and correct copy of that letter is attached to this Affidavit as Exhibit 1.

46. Mr. Martin responded to my complaint. In his response, Mr. Martin admitted he was offered a position with the Davidson County District Attorney's Office—the opposing party—before he filed my brief. Mr. Martin did not deny his failure to notify me that this conflict existed at any time before he filed my brief.

47. The statements made in Exhibit 1 are accurate and truthful to the best of my knowledge and belief, and I would testify to them under oath if called upon to do so.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Timothy Guilfoy

Sworn to and Subscribed before me this 21 day of May, 2019.

/s/ Patricia Scott
Notary Public
State of Tennessee
County of Lake
My commission expires:
3-28-2023

AFFIDAVIT OF HILLARY HOFFMAN
(DECEMBER 15, 2016)

IN DIVISION V CRIMINAL COURT OF
DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

STATE OF TENNESSEE

v.

TIMOTHY GUILFOY

Case No. 2011-A-779

STATE OF TENNESSEE
COUNTY OF RUTHERFORD

BEFORE ME, the undersigned authority, did appear HILLARY HOFFMAN who did depose and state under oath the following.

1. My name is Hillary Hoffman.

2. I am a person of the age of majority and a resident of Rutherford County, State of Tennessee.

3. On or about October of 2011, I was the foreperson of the jury sitting in the matter of State of Tennessee v. Timothy Guilfoy.

4. Sitting in the courtroom during the course of the trial, I heard mention or discussion regarding video tapes that appeared to have been some related to the issues being presented to the jury.

5. The video tapes were never played in the courtroom during the trial.

6. After the jury retired to the jury room, I decided that it was important that the jury view the video tapes as part of our deliberation. Simply stated, I sincerely believed that the jurors had to examine absolutely every item of available information about the case in order to enable us to render a verdict that was true and fair.

7. Having decided that viewing the video tapes was necessary, I informed an individual who I believe was a court officer that the jury wanted to view the video tapes.

8. In response to my request, an individual who I believe was a court offer wheeled into the jury room a television and a DVD player that were sitting on a rolling cart.

9. I cannot recall specifically who I informed that the jury wanted to view the videos.

10. I cannot specifically recall if the individual who I spoke to about wanting to view the videos was the same individual who brought the television and the DVD player into the jury room.

11. After the television and DVD player into the jury room, they were set up by the person who brought them in, the DVDs were inserted and the jury, gathering around the television, watched them.

/s/ Hillary Hoffman

SWORN TO AND SUBSCRIBED BEFORE ME THIS 15th DAY OF December, 2016

/s/ Sarah J. Moore
Notary Public
State of Tennessee
Davidson County
My commission expires:
1-6-2020

TENNESSEE SUPREME COURT, DISCRETIONARY APPEALS GRANTS & DENIALS LIST FEBRUARY 15, 2016 - FEBRUARY 19, 2016

TENNESSEE SUPREME COURT

Grants

Nashville

M2014-00566-SC-R11-CD

Style/Appeal Number	STATE OF TENNESSEE v. JERRY LEWIS TUTTLE
County/Trial Judge/ Trial Court No.	Maury County Circuit Court Stella L. Hargrove21695, 22091
Appellate Judge/Judgment	McMullen, Camille R.: Affirmed in Part, Reversed in Part Page, Roger A.: Concur in Part/Dissent in Part
Nature Of Appeal	TRAP 11
Action	Granted: Application of the State of Tennessee Order filed 2-18-16

M2014-01591-SC-R11-CV

Style/Appeal Number	JOSEPH BRENNAN, ET AL. v. BOARD OF PAROLE FOR THE STATE OF TENNESSEE
County/Trial Judge/ Trial Court No.	Davidson County Chancery Court Carol L. McCoy131171II
Appellate Judge/Judgment	Goldin, Arnold B.: Vacated
Nature Of Appeal	TRAP 11
Action	Granted: Application of Tennessee Board of Parole Order filed 2-18-16

M2013-02167-SC-R11-CD

Style/Appeal Number	STATE OF TENNESSEE v. DENNIS ALLEN RAYFIELD
County/Trial Judge/ Trial Court No.	Wayne County Circuit Court Jim T. Hamilton15198
Appellate Judge/Judgment	Montgomery Jr., Robert H.: Affirmed
Nature Of Appeal	TRAP 11

Action	Denied: Application of Dennis Allen Rayfield Order filed 2-18-16

M2014-00905-SC-R11-CV

Style/Appeal Number	ANGELI CHAN SELITSCH v. MICHAEL JOHN SELITSCH
County/Trial Judge/ Trial Court No.	Rutherford County Chancery Court Robert E. Corlew, III 12CV1621
Appellate Judge/Judgment	Clement Jr., Frank G.: Affirmed
Nature Of Appeal	TRAP 11
Action	Denied: Application of Michael John Selitsch Order filed 2-17-16

M2014-01483-SC-R11-CD

Style/Appeal Number	STATE OF TENNESSEE v. JEFFERY D. AARON
County/Trial Judge/ Trial Court No.	Williamson County Circuit Court Michael Binkley ICR017709
Appellate Judge/Judgment	Woodall, Thomas T.: Reversed
Nature Of Appeal	TRAP 11

Action	Denied: Application of Jeffery D. Aaron Order filed 2-19-16

M2014-01619-SC-R11-PC

Style/Appeal Number	TIMOTHY GUILFOY v. STATE OF TENNESSEE
County/Trial Judge/ Trial Court No.	Davidson County Criminal Court Monte Watkins 2011A779
Appellate Judge/Judgment	Holloway Jr., Robert L.: Affirmed
Nature Of Appeal	TRAP 11
Action	Denied: Application of Timothy Patrick Guilfoy Order filed 2-18-16

FOREPERSON RESPONSE TO JUROR QUESTIONNAIRE WHEREIN SHE STATES THE VIDEO WAS THE MAIN REASON PETITIONER WAS CONVICTED (NOVEMBER 16, 2011)

Questionnaire for Jurors in Timothy Guilfoy trial Jury Foreman Hillary Smith Hoffman

Hello my name is Charles Blackwood

I am a licensed Private Investigator, who has been hired by an independent attorney to conduct a very brief, pole or survey relating to the trial of Timothy Guilfoy.

If you consent to answer a few question, no personal information such as phone numbers or addresses will be disclosed.

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{ These are the answers of Jury Foreman Hillary Smith Hoffman }

There are 6 general questions and 5 yes and no questions.

1. Wants was your general impressions or thoughts about the case?

> [Answer] She felt like the prosecution made an excellent case. Both the defense and prosecution did a good job in presenting the case and the judge was very fair

2. What conflicts in the testimony may have lead (you or the group) to the decision reached.

> [Answer] Did not understand the question, then said that when the prosecution made a point or a witness made a statement that she felt that the defendant was a guilty bastard. Then when the defense made a point she could see it as it was her brother and there was doubt that he had committed the offense.

3. Did you watched the video of the girls statements during your deliberations? Y N Did it make a difference in the opinion of the group?

> [Answer] Yes they watched the video and it was the main reason they found him guilty. She stated again that the defense had done a great job.

4. Did anything said by the attorneys in the closing arguments persuade (you or the group) to find him guilty

> [Answer] No, there was nothing specific that swayed them other than the girls testimony
>
> If yes - Did it relate to the Defendant's statements on the recorded phone call? N/A

5. Was there anything specific that persuaded (you or the group) in your decision.

> [Answer] Yes the video of the girls was the one thing that made the decision and was a defining moment, the girls were very creditable.

6. Was there anything that you would have wanted to know that would have helped you make your decision?

> [Answer] They wanted to hear from the Grandfather and the older sister and they were troubled by this that they had not heard from them.