IN DIVISION V OF THE CRIMINAL COURT OF DAVIDSON COUNTY AT NASHVILLE, TENNESSEE

STATE OF TENNESSEE

Respondent,

vs. **Case No. 2011-A-779**

TIMOTHY GUILFOY

Petitioner.

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ATTESTED PETITION FOR WRIT OF ERROR CORAM NOBIS

COMES PETITIONER, Timothy Guilfoy, through his counsel of record, Samuel J. Muldavin, and pursuant to T.C.A. §40-26-105, respectfully petitions this Honorable Court for a Writ of Error *Coram Nobis*. In setting forth the substantive grounds and in order to satisfy the sufficiency requirements of a petition for a Writ of Error *Coram Nobis*, petitioner avers as follows.

(a) Newly discovered evidence unequivocally establishes that the jury that convicted petitioner in the above numbered and styled matter was exposed to prejudicial extraneous information.

(b) Such extraneous information consisted of forensic videos of interviews of the victims that had been conducted by a forensic interviewer in the spring of 2009, some two years prior to the trial.

(c) The newly discovered evidence unequivocally establishes that the forensic interviews were watched the by the jury in the jury room during the course of the jury's deliberations.

(d) The newly discovered evidence unequivocally establishes that the forensic videos were shown to the jury in the jury in the jury room during the course of deliberations at the request of the jury foreperson.

(e) As a matter of note, the forensic videos were ultimately determined by the Court of Criminal Appeals to have been erroneously admitted into evidence and were, as such, inadmissible.

(f) The forensic videos watched by the jury in the jury room were never played for the jury in the courtroom during the trial.

(g) Pretermitting the appellate court's finding that the forensic videos were inadmissible, it was only the actual disks *but not their content* that were admitted, albeit erroneously, evidence.

(h) Because the forensic videos were never played in the courtroom, the trial court the foreperson's request that they be shown to the jury should have been denied.

(i) Watching the forensic videos exposed the jury to extraneous information which it was forbidden to consider in its deliberations.

(j) Logic demands a strong presumption that in rendering its verdict, the jury, having requested and then watched the forensic videos, gave their content at least reasonable consideration.

(k) Logic further demands a strong presumption that the jury's exposure to the forensic videos *in addition to* the live testimony of the victims more likely than not affected the jury's assessment of the credibility of the victims. As such, the jury's exposure to the forensic videos *in addition to* the live testimony of the victims more likely than not affected its verdict, undermined the fairness of the trial and deprived petitioner of due process in its most

fundamental form.

(l) Petitioner is without fault in failing to present his newly discovered evidence "at the appropriate time."

(m) Upon his discovery that the jury had watched the forensic videos, petitioner made multiple attempts to bring matter to the attention of the both the trial court and the Court of Criminal Appeals.

(n) Petitioner's attempt to raise the issue of the forensic videos in his appeal of the verdict was summarily dismissed by the appellate court because the record contained no evidence that the jury had, in fact, watched the forensic evidence.

(o) The newly discovered evidence that the jury foreperson had requested the forensic videos, together with the absence of any mention of such request in the record can only suggest that the court chose to summarily dismiss petitioner's claim without calling into question the accuracy of the record.

(p) At his post-conviction hearing, the trial court expressly prohibited petitioner from presenting newly found evidence that the jury had watched the forensic videos when, on the grounds of the State's and the court's erroneous interpretation of T.R.E, 606b, the court refused to permit the jury foreperson to so testify.

(q) Petitioner's attempt to raise the issue of the forensic videos in his post-conviction appeal of the verdict was also summarily dismissed by the appellate court when it seemingly chose not to consider whether viewing the forensic videos in addition to hearing the trial testimony of the victims compromised or at least might have compromised the fairness of petitioner's trial.

(r) Instead, the court simply noted that the State provided an election of offenses and

that the details of each elected offense corresponded to incidents both J.A. and T.A. described in their trial testimony. On that basis alone, the court held that petitioner failed to prove a reasonable probability that the outcome of the trial would have been different had the forensic interviews not been introduced because the State's election of offenses trumped all other considerations.

A.

1. Petitioner, a person of the age of majority, is at present an inmate in the care and custody of the Tennessee Department of Corrections.

2. Petitioner, TOMIS No. 00499702, currently resides at the Northwest Correctional Complex located in Tiptonville, Tennessee where he is serving a forty (40) year sentence based upon his convictions in this cause.

3. On or about June 2009, petitioner was charged by indictment with three counts of aggravated sexual battery against J.A., a victim less than thirteen years old; two counts of aggravated sexual battery of T.A., a person less than thirteen years old; four counts of aggravated sexual battery of A.A., a person less than thirteen years old; and four counts of rape of a child, A.A.

4. On or about March 30, 2011, the State entered a nolle prosequi as to the above enumerated charges.

5. On or about that same day, petitioner was charged by indictment with four counts of aggravated sexual of J.A., a person less than thirteen years old (Counts One through Four); one count of aggravated sexual battery of T.A., a person less than thirteen years old (Count Five); and three counts of rape of a child, T.A. (Counts Six through Eight).

6. Petitioner was tried on or about July of 2011. The trial resulted in a hung jury.

7. Petitioner was again tried in the Criminal Court of Davidson County at Nashville on or about October 24 through October 28, 2011. During that trial, the State entered a nolle prosequi as to Count Five, aggravated sexual battery of T.A., a person less than thirteen years old.

8. On or about October 28, 2011, the jury returned guilty verdicts on Counts One through Four and Count Six through Eight, a nolle prosequi having been entered for Count Five.

9. Sentencing of petitioner was tentatively scheduled for December 1, 2011.

10. The sentencing hearing was actually held on January 13, 2012 at which time petitioner was sentenced to ten years for each of the four aggravated sexual battery convictions, twenty years for each of the convictions two rape of a child and six months for the assault conviction.

11. The trial court ordered partial consecutive service such that petitioner received an effective sentence of seventy years in the Tennessee Department of Correction

12. On appeal, the Court of Criminal Appeals held that the convictions of aggravated sexual battery (Counts One and Two) must be merged into a single conviction of aggravated sexual battery.

13. On appeal, the Court of Criminal Appeals further held that the conviction for assault (Count Four) must be merged into the conviction for aggravated sexual battery (Count Three).

14. Lastly, the Court of Criminal Appeals merged petitioner's two convictions of rape of a child (Counts Six and Seven) into a single conviction of rape of a child.

15. As a result of such alterations to petitioner's convictions, on remand, petitioner's sentence was reduced from seventy years to forty years.

B.

16. On or about October 25, 2011, the second day of the trial, victim J.A. testified on direct examination that she had had a conversation with forensic interviewer Anne Post (Ms. Anne).

17. In addition to testifying that she had told Ms. Anne the truth, J.A. confirmed that their conversation had been audio and videotaped, that she had recently viewed the videotape and that it seemed to be the actual tape of the interview.

18. J.A. was then shown a disk, stated that it was the disk that she watched when she viewed her interview, and identified her initials or her name on the disk.

19. J.A was not asked any more questions about the disk and did not offer any additional testimony regarding the disk, its contents or any details regarding the nature of the interview.

20. Neither counsel for the State nor petitioner's counsel asked that the disk be played in the courtroom for the jury.

21. J.A.'s disk never was played in the courtroom for the jury.

22. At the request of counsel for the State, the disk was marked as an exhibit to J.A.'s testimony but for identification only. Counsel for the State did not at that time request that the disk be admitted into evidence.

23. On the same day, October 25, 2011, victim T.A. also testified on direct examination that she had had a conversation with forensic interviewer Anne Post (Ms. Anne).

24. In addition to testifying that she had told Ms. Anne the truth, T.A. also confirmed that their conversation had been audio and videotaped, that she had recently viewed the videotape and that it seemed to be the actual tape of the interview.

25. Like J.A., T.A. was then shown a disk, stated that it was the disk that she watched when she viewed her interview, and identified her initials or her name on the disk.

26. Like J.A, T.A. was not asked any more questions about the disk and did not offer any additional testimony regarding the disk, its contents or any details regarding the nature of the interview.

27. Neither counsel for the State nor petitioner's counsel asked that T.A.'s disk be played in the courtroom for the jury.

28. T.A.'s disk never was played in the courtroom for the jury.

29. At the request of counsel for the State, T.A.'s disk was marked as an exhibit to her testimony but for identification only. Counsel for the State did not at that time request that the disk be admitted into evidence.

30. On the third day of trial, October 26, 2011, Ms. Anne Post was called upon to testify on behalf of the State.

31. During her testimony, she identified her job title as forensic interviewer and stated that her primary job responsibility was conducting interviews with alleged victims of sexual and other severe abuse.

32. Ms. Post testified that she interviewed T.A. and J.A. in the spring of 2009 and that she reviewed their interviews in preparation for her trial testimony.

33. Ms. Post was shown the disk that purportedly contained her interview of J.A. While testifying not that it *was* but that it *appeared to be* the disk that she had been asked to review, Ms. Post at the same time affirmatively stated that subject to some redactions, it accurately reflected the content of her interview with J.A.

34. Neither counsel for the State nor petitioner's counsel asked that the disk be played in the courtroom for the jury.

35. The disk never was played in the courtroom for the jury.

36. Following this testimony, counsel for the State asked that the disk, previously marked as an exhibit to J.A.'s testimony, be made an exhibit to Ms. Post's testimony.

37. Counsel for the State did not at that time request that the disk be admitted into evidence.

38. Following counsel's request that the disk, previously marked as an exhibit to J.A.'s testimony, simply be made an exhibit to Ms. Post's testimony and absent any request that the disk be admitted into evidence, the trial court, acting *sui sponte* and without explanation, went ahead and admitted the disk into evidence.

39. Ms. Post was shown the disk that purportedly contained her interview of T.A. While testifying not that it *was* but that it *appeared to be* the disk that she had been asked to review, Ms. Post at the same time affirmatively stated that subject to some redactions, it accurately reflected the content of her interview with T.A.

40. Neither counsel for the State nor petitioner's counsel asked that the disk be played in the courtroom for the jury.

41. The disk never was played in the courtroom for the jury.

42. Following this testimony, counsel for the State asked that the disk, previously marked as an exhibit to T.A.'s testimony, be made an exhibit to Ms. Post's testimony.

43. Counsel for the State did not at that time request that the disk be admitted into evidence.

44. Following counsel's request that the disk, previously marked as an exhibit to T.A.'s testimony, simply be made an exhibit to Ms. Post's testimony and absent any request that the disk be admitted into evidence, the trial court, acting *sui sponte* and without explanation, went ahead and admitted the disk into evidence.

45. During her examination of Ms. Post, counsel for the State asked for and obtained testimony regarding the witness' training and experience as a forensic interviewer.

46. At no time did counsel tender Ms. Post as an expert in the field of forensic interview.

47. At no time did the trial court accept Ms. Post as an expert in the field of forensic interview.

48. Having neither been tendered as an expert by the State nor accepted as an expert by the court, Ms. Post, at all material times, held the same status as that of a lay person and was, therefore, unqualified to have conducted the interviews of J.A. and T.A. that were memorialized in the videotapes that had been introduced into evidence by the trial court acting on its own and without authority and in the absence of any request by either of the parties.

49. During closing argument, counsel for the State informed the jury that everything that was introduced during the trial could be taken to jury room to be looked through.

50. During closing argument, counsel for the State made special mention of the forensic videos taking particular note of the fact that they had not been played in the courtroom because there was no technological capability to do so.

51. Counsel for the State then went on to inform the jury that v capability to video equipment could be brought into the jury room so that the jury could watch the forensic videos in jury room should it decide to do so.

C.

52. Not long after the conclusion of the trial and his resulting conviction, petitioner hired a private investigator to seek out the jurors in an attempt to gain some perspective regarding their decision to render a guilty verdict on all counts.

53. On or about November 30, 2011, the private investigator issued a written report in which he stated 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.

54. The private investigator's report was silent regarding the circumstances under which the jury viewed the forensic videos. Specifically, it did not say that the jurors had requested to see the forensic videos or that the forensic videos had been shown to the jurors in the absence any such request.

D.

55. Petitioner attempted to raise the issue of the jurors having watched the videos when he appealed his conviction at trial. (*State v. Guilfoy*, 2013 Tenn. Crim. App. LEXIS 400). Specifically, petitioner asserted that the forensic videos should never have been entered into evidence and that the trial court had committed plain error in doing so.

56. The Court of Criminal Appeals court readily declared that based upon the record, the trial court clearly erred in admitting the recordings of the interviews into evidence.

57. Ironically, having declared the forensic videos inadmissible, the Court dismissed the possibility that the jury may have watched the forensic videos by relying upon the wholly inappropriate closing argument by counsel for the State whereby he invited the jurors to review legally nonexistent evidence.

58. The trial court did so by first citing the State's wholly impermissible argument:

> 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

59. Based upon the foregoing, the Court reasoned as follows:

(a) In order to watch the recordings, the jury would have to request the appropriate equipment.

(b) The record contains no indication that the jury ever requested the equipment. Instead, the record is merely silent on the issue.

(c) As such, there is no evidence that the jury watched either or both of the videos.

(d) Therefore, the record offered no basis upon which the court could make a determination that the admission of the forensic videos constituted plain error.

60. Such reasoning effectively denied petitioner any opportunity by which to bring to the court's attention the newly discovered evidence that the jury had, in fact, watched the forensic videos.

E.

61. In the wake of the denial of his appeal, petitioner filed a Petition for Post-Conviction relief.

62. At his post-conviction hearing, held on June 18, 2014, petitioner attempted to introduce the newly discovered evidence that the jury had watched the forensic videos.

63. The evidence was to be presented in the form of the testimony of Ms. Hilary McCardy (now Hoffman), the foreperson of the jury, who had been subpoenaed by petitioner to appear at the post-conviction hearing.

64. The evidence was to be adduced by asking Ms. McCardy the following two questions and only the following two questions:

(a) Whether she had been a member of the jury that sat in judgment of petitioner and

(b) Whether the jury watched the forensic videos.

65. The evidence was to be adduced expressly to address the appellate court's contention that there was no evidence in the record that the jurors had watched the forensic videos.

66. Counsel for the State objected to permitting Ms. McCardy to testify in reliance upon T.R.E. 606(b) and his interpretation of the rule as providing, in counsel's words, that "a juror may not testify, period."

67. The trial judge, agreeing with counsel for the State, read from or paraphrased Rule 606(b) as follows:

> On inquiry 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 the juror's mind or emotions as influencing that jury, that juror.

68. Based upon the forgoing interpretation of the Rule, the trial court sustained the State's objection, prohibited petitioner from calling jury foreperson McCardy as a witness and instructed her that she was dismissed and free to leave the court.

69. While correctly reciting from Rule 606(b), the court only recited from the *first* part of the Rule.

70. Both counsel for the State and the trial judge himself seemingly missed or chose to ignore the *second* part of the Rule which states in relevant part:

> 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* . . .(emphasis added)

71. By sustaining the State's objection and refusing to permit jury foreperson

McCardy to testify, the trial court specifically prevented petitioner from presenting to the court the newly discovered evidence that the jury watched the forensic videos during deliberations.

72. The trial court's refusal to permit jury foreperson McCardy to testify that she had been a member of petitioner's jury and that the jury had watched the forensic interviews during deliberations was predicated on a clearly erroneous interpretation Rule 606(b).

73. The trial court's erroneous ruling was exacerbated by the fact that in reading or reciting the first part of the Rule, the court did not read or recite the second part of the Rule that clearly permits petitioner to have adduced Ms. McCardy's testimony that she was a juror at his trial and that the jury watched the forensic videos during deliberations.

74. At the conclusion of the hearing, the trial court denied petitioner's prayer for post-conviction relief and petitioner timely appealed.

75. In its opinion denying petitioner's appeal, *Guilfoy v. State*, 2015 Tenn. Crim. App. LEXIS 658, the court noted that when reviewing the trial court's findings of fact, it does not reweigh the evidence or substitute its own inferences for those drawn by the trial court.

76. More importantly to this case, the court held that factual issues raised by the evidence are to be resolved by the trial judge.

77. Nowhere in the opinion does the court address whether the trial court was correct in prohibiting the introduction of petitioner's newly discovered evidence on the grounds of a clearly erroneous interpretation of T.R.E. Rule 606(b).

78. Yet again, petitioner was thwarted in his attempt to bring attention to the fact that the jury watched the forensic videos during deliberations, extraneous information admitted into evidence by the trial court *sui sponte,* and later deemed inadmissible by the Court of Criminal Appeals.

F.

79. In late October or early to mid-November of 2016, petitioner's attorney made direct contact with jury foreperson Hilary Hoffman (Hilary McCardy at the time of petitioner's post-conviction hearing).

80. During that conversation, Ms. Hoffman reaffirmed her earlier statement that the jury watched the forensic videos during deliberation. In addition, during that conversation, Ms. Hoffman explained to petitioner's attorney that the jury was shown the forensic videos at her request.

81. Ms. Hoffman executed an affidavit, attached to this Petition, in which she states under oath the following:

(a) During the course of the trial, she heard mention or discussion regarding video tapes that appeared to have been related to the issues being presented to the jury.

(b) The video tapes were never played in the courtroom during the trial.

(c) After the jury retired to the jury room, she, as foreperson, decided that it was important that the jury view the video tapes as part of its deliberation.

(d) She informed an individual who she believed was a court officer that the jury wanted to view the video tapes.

(e) In response an individual, believed to be court offer wheeled into the jury room a television and a DVD player that were sitting on a rolling cart.

(f) The television and DVD player were set up by the person who brought them in, the DVDs were inserted and the jury, gathering around the television, watched them.

82. The conversation between Ms. Hoffman and petitioner's attorney was petitioner's

first notice that the jury had watched the forensic videos pursuant to its own request.

83. That the jury watched the forensic videos pursuant to its own request is the most recent item of newly discovered evidence.

G.

84. In dismissing petitioner's appeal in *State v. Guilfoy*, 2013 Tenn. Crim. App. LEXIS 400, the court refused to consider petitioner's position because the record did not establish that the jury had watched the forensic videos.

85. As noted by the court earlier in this Petition,

(a) In order to watch the recordings, the jury would have to request the appropriate equipment.

(b) The record contains no indication that the jury ever requested the equipment. Instead, the record is merely silent on the issue.

(c) As such, there is no evidence that the jury watched either or both of the videos.

(d) Therefore, the record offered no basis upon which the court could make a determination that the admission of the forensic videos constituted plain error.

86. Embracing the court's logic for purposes of addressing the information attested to by Ms. Hoffman under oath, the newly discovered evidence raises questions critical to the fundamental concept of due process.

(a) Why does the record not reflect that the jury did, in fact, ask to view the forensic videos?

(b) Why does the record not reflect whether the trial court was informed of such request?

(c) If the trial court was so informed, why does the record not reflect the court's refusal of the jury's request as it is well settled that audio or video recordings not played before the jury in open court cannot be played in the jury room?

(d) If the trial court was not so informed, why does the record not reflect who was so informed and under whose authority, if anyone's, the forensic videos played for the jury.

87. Petitioner urges that it is only by keeping of a complete and accurate record that the fairness of any legal proceeding can be monitored and the preservation of due process ensured.

88. Petitioner further urges that such was not the case in the matter of State of Tennessee v. Timothy Guilfoy, case number 2011-A-779 on the docket of Division V of the Criminal Court of Davidson County at Nashville, Tennessee.

89. The newly discovered evidence that the jury asked to see the forensic videos and that such request is not reflected in the record is symptomatic of the due process deficiencies that have plagued petitioner throughout the course of these proceedings.

90 The record in this cause does not reflect the adequacy with which petitioner's due process rights were protected. What it does reflect is the denial of due process instance after instance and proceeding after proceeding.

91. The record in this cause is clear evidence that petitioner was deprived of those basic protections afforded to all persons by the Constitutions of the United States and the State of Tennessee.

(a) The record reflects that the forensic videos were admitted into evidence erroneously and without legal basis.

(b) The record further reflects that the forensic videos were admitted into evidence by the trial court absent any request from the State or from petitioner.

(c) The record does not reflect that, as now established by petitioner's most newly discovered evidence, the jury requested to see the forensic videos.

(d) The record does not reflect that the trial court was informed of the jury's request to see the forensic videos.

(e) The record does not reflect that the trial court informed the jury that it could not watch the forensic videos because they had not been shown in the courtroom during the trial.

(f) Because the record reflects that the forensic videos were erroneously admitted into evidence by the trial court absent any request from the State or from petitioner, the record offers no reason to believe that the trial court would have correctly instructed the jury that it could not view the forensic videos in the jury room because the videos had not been shown in the courtroom.

92. It is well recognized that an in rendering a decision, an appellate court is generally constrained by the contents of the record of the proceeding or proceedings below.

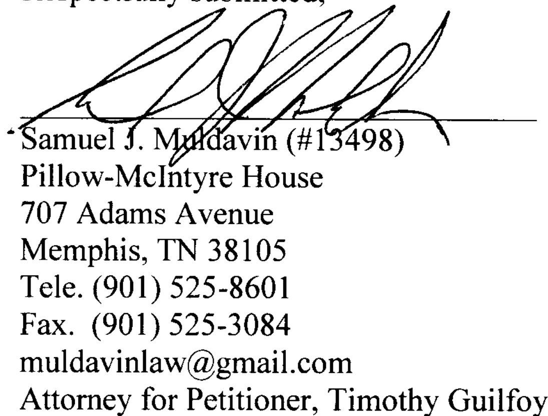
93. Due process supersedes any such constraints particularly when the record at issue testifies only to its absence in the legal proceeding at issue.

94. Petitioner has newly discovered evidence that mandates the overturning of his conviction and that a new trial be ordered as contemplated by the error *coram nobis* statute.

WHEREFORE, petitioner prays that this Petition for Writ of Error *Coram Nobis* be set for hearing and that after due proceedings, judgment be entered vacating petitioner's conviction and granting petitioner a new trial.

THIS IS PETITIONER'S FIRST PRAYER FOR EXTRAORDINARY RELIEF

Respectfully submitted,



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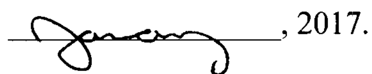
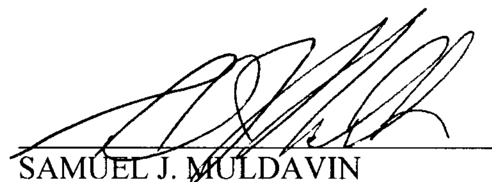
Attorney for Petitioner, Timothy Guilfoy

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Error *Coram Nobis* was served on the Office of the District Attorney General for Davidson County via U.S. Mail Washington Square, Suite 500, 222 2nd Avenue North Nashville, TN 37201, this 13th day of

, 2017.



SAMUEL J. MULDAVIN

OATH

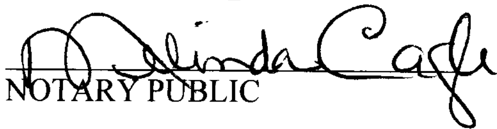
STATE OF TENNESSEE)

COUNTY OF LAKE)

BEFORE ME, the undersigned authority did appear TIMOTHY GUILFOY, a person of the age of majority, who did depose and state under oath as follows: I have reviewed the foregoing Petition for Writ of Error *Coram Nobis* and its contents are true and correct to the best of my knowledge, information and belief.

TIMOTHY GUILFOY

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 4 DAY OF
January, 2017



NOTARY PUBLIC

my commission expires:

9-05-2017

IN DIVISION V CRIMINAL COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

STATE OF TENNESSEE

vs. **CASE NO. 2011-A-779**

TIMOTHY GUILFOY

AFFIDAVIT OF HILLARY HOFFMAN

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.*

3. 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.

4. The video tapes were never played in the courtroom during the trial.

5. 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.

6. 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.

7. 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.

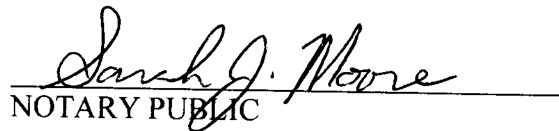
8. I cannot recall specifically who I informed that the jury wanted to view the videos.

9. 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.

10. 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.

HILLARY HOFFMAN

SWORN TO AND SUBSCRIBED BEFORE ME THIS 15th DAY OF December, 2016.



NOTARY PUBLIC

My commission expires;
1-6-2020