

ARGUMENT

In its response to appellant's brief in support of his appeal of right, the State asserts that the trial court correctly denied appellant's Petition for Writ of Error Coram Nobis on the following grounds:

- (a) the Petition was time-barred;
- (b) appellant has failed to present a cognizable error coram nobis claim
- (c) the "newly discovered evidence" was previously litigated at appellant's post-conviction hearing
- (d) the "newly discovered evidence" was not admissible at trial; and
- (e) the "newly discovered evidence" would not have changed the outcome.

Each of the State's positions is incorrect in and of itself. More to the point, the State utterly ignores the seminal point made in appellant's original brief, which was as follows.

At appellant's post-conviction hearing, the trial court refused to permit juror testimony because it was unable to correctly interpret the clear and simple language of T.R.E. 606(b). As such, logic mandates the conclusion that the court would not have correctly read and understood how to correctly rule pursuant to Rule 606(b) at any time during any of these proceedings. Therefore, there was never a time that appellant could bring newly discovered evidence at the proper time as contemplated by the error coram nobis statute, T.C.A. §40-26-105(b), and there was never a time that due process considerations could be brought to the attention of this honorable Court.

A. The Petition was Time-Barred.

The State correctly notes that "before a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitations, due process requires that potential

litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner.” *Burford v. State*, 845 S.W.2d 204, 208 (Tenn. 1992).

The State, albeit failing to make mention of the last sentence regarding liberty interests versus stale or fraudulent claims, correctly notes further.

In applying the *Burford* rule to specific factual situations, courts should utilize a three-step process: (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 application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim. In making this final determination, courts should carefully weigh the petitioner's liberty interest in "collaterally attacking constitutional violations occurring during the conviction process," *Burford*, 845 S.W.2d at 207, against the State's interest in preventing the litigation of "stale and fraudulent claims. 845 S.W.2d at 208.

Sands v. State, 903 S.W.2d 299, 301 (Tenn. 1995) and that “the claim at issue must not have existed during the limitations period to trigger due process consideration.” *Seals v. State*, 23 S.W.3d 272 (Tenn. 2000).

But *Seals* also states:

Due process is flexible and calls for such procedural protections as the particular situation demands." *Phillips v. State Bd. of Regents*, 863 S.W.2d 45, 50 (Tenn. 1993) (citation omitted). The flexible nature of procedural due process requires an imprecise definition because due process embodies the concept of fundamental fairness. *State v. Barnett*, 909 S.W.2d 423, 426 (Tenn. 1995); *State v. Hale*, 840 S.W.2d 307, 313 (Tenn. 1992). In determining what procedural protections a particular situation demands, three factors must be considered: (1) the private interest at stake; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute safeguards; and finally, (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976)

As noted above, “the flexible nature of due process requires an imprecise definition because due process embodies the concept of fundamental fairness.” Applying this principle of due process flexibility to this case, appellant asserts that the State’s statute of limitations claim is without merit. The claim is based up the position that jury viewed the forensic videos during deliberations was well know even as of the time of the deliberations. Such is not the case. It is also not the case that the claim at issue existed during the limitations period and the *Sands* requirement is not contravened.

Instead, it was the finding of this court in *State v. Guilfooy*, 2013 Tenn. Crim. App. LEXIS 400, reiterated in *Guilfooy v. State*, 2015 Tenn. Crim. App. LEXIS 658, that the absence of a record of the jurors had having watched the forensic videos prohibited any assertion appellant that they had, in fact, done so.

. . . 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 [*40] 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.

State v. Guilfooy, 2013 Tenn. Crim. App. LEXIS 400 at *39-*40.

Consistent with this honorable Court’s findings, therefore such assertion only became available only when the affidavit of the jury foreperson that that the jury watched the forensic videos was entered into the record as an exhibit to appellant’s Petition for Writ of Error Coram Nobis, filed on January 17, 2017.

Of equal importance is the reason why the record was silent prior to the filing of the Petition for Writ of Error Coram Nobis. In his original brief, appellant cited five cases in support of his argument that the jurors should not have been permitted to view the videos during deliberations because they had not been shown in the courtroom. The cited cases were *State v. Henry*, 1997 Tenn. Crim. App. LEXIS 506, *State v. Long*, 45 S.W. 3d 611 (Tenn. Crim. App. 2000), *State v. Moore*, 2017 Crim. App. LEXIS 567, *State vs. White*, 2002 Tenn. Crim. App. LEXIS 519 and *State v. Mays*, 677 S.W. 2d. 476 (Tenn. Crim. App. 1984).

In a footnote, the State points out that none were error coram nobis cases, presumably suggesting that they, therefore, contribute nothing to the discussion. While the State is correct that none are error coram nobis cases, any suggestion of irrelevance is entirely misplaced. In fact, these cases go directly to the heart of the matter that is before this honorable Court or if the Court will excuse the hyperbole, to the belly of the beast that has devoured appellant's right to be tried by a jury untainted by exposure to extraneous prejudicial evidence.

State v. Henry concerns the trial court's refusal to allow the jury to listen to audio tapes that were not played in the courtroom during the trial. Conversely, in *State v. Long*, concerns the trial court's refusal to allow the jury to listen to audio tapes that had been played in the courtroom.

State v. Moore dealt with the impropriety of permitting the jury to view the defendant's eyes in close proximity after the case had been submitted for deliberations. In *State v. White*, the court instructed the defendant that only the jury could request that video tapes shown at the trial be brought to the jury room for review during deliberations. Finally, in *State v. Moore*, this honorable Court addressed the proper means of communication between judge and jury after deliberations have begun. Although quoted in the original brief, it is worth quoting again as it testifies to appellant's dilemma and how it could have so easily been avoided.

Trial judges would be well advised to discontinue the practice of communicating with deliberating juries by passing notes. The proper method of fielding questions propounded by the jury during deliberations is to recall the jury, counsel, the defendant(s), and the court reporter back into open court and to take the matter up on the record. ABA Standards Relating to Trial by Jury §5.3(a), ABA Standards Relating to the Function of the Trial Judge §§5.11(b), 5.12(a).

State v. Mays, 677 S.W.2d at 479 (emphasis added).

What all of these cases share in common is a record of the proceedings as they pertained to videos, audios, and other matters related to the jury proceedings. The ABA Standards Relating to Trial by Jury §5.3(a), ABA Standards Relating to the Function of the Trial Judge §§5.11(b), 5.12(a) had meaning and were applied in those cases which is why the Courts, in their opinions, were able to describe with accuracy and detail the facts to which they applied the law.

The jury foreperson's affidavit, entered into the record as an exhibit to appellant's Petition tells us that she asked a court officer for video equipment to be brought to the jury room in order to allow the jurors to watch the forensic videos, that her request was granted and that the jurors watched them. Whether the court officer first obtained the trial judge's permission to provide the video equipment, we cannot say. However, guided by the facts of *Henry*, *Long*, *Moore*, *White*, and *Mays*, we can reasonably infer the following.

- a. The trial court did not, on the record, cause the jury, counsel, appellant and the court reporter to return to open court.
- b. The trial court did not, on the record, discuss with the jury or with counsel for the parties the jury's request to view the forensic videos during deliberations.
- c. The trial court did not, on the record, take note that the forensic videos had not been shown in the courtroom during the trial.
- d. The trial court did not, on the record, invite input from counsel for the parties

regarding the propriety of the jury's request.

e. The trial court most certainly did not, on or off the record, deny the jury's request to see the forensic videos explaining that because they had not been shown in the courtroom during the trial, they were not evidence and could not, therefore, be viewed during deliberations.

As related in appellant's original brief, a private investigator hired by appellant issued a written report in which he stated that he spoken to several jurors and had ascertained that during their deliberations, the jury watched the forensic videos and had done so during deliberations. Consistent with this honorable Court's analysis in *State v. Guilfoxy*, the investigator's report is meaningless because the trial court failed to make a record of the video equipment being brought to the jury room so that the jurors could watch the forensic videos during or as a part of their deliberations. Consequently, appellant's attempt to challenge the jury's viewing of the forensic videos during deliberations was doomed from the beginning because, per *State v. Guilfoxy*, appellant had no factual basis for his challenge.

As also related in appellant's original brief, at his post-conviction hearing, appellant attempted to introduce the testimony of the jury foreperson that the jury had viewed the videos during deliberations. In deference to *State v. Guilfoxy*, such attempt was necessitated by the trial court's mishandling or, perhaps, non-handling of the jury's and the request to view the forensic videos and the resulting failure by the trial court to make a record.

Finally, as well documented in the original brief, the trial court, ignoring or unable to understand the plain and simple language of T.R.E. 606(b) that permitted the jury foreperson to testify, refused to permit her to do so. The record's silence remained unchanged.

The error coram nobis statute, T.C.A. §40-26-105(b), in describing the conditions precedent for obtaining writ of error coram nobis, provides in pertinent part as follows.

Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie 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.

Reflected in appellant's error coram nobis pleadings are his unrelenting attempts to establish that during deliberations, the jury watched forensic videos, videos that had not been shown in the courtroom and were, therefore, not evidence but extraneous prejudicial information of the kind that the courts have held give rise to a presumption of prejudice. Looking again to this honorable Court's discussion in *State v. Guilfoxy* regarding the absence of any record that the jurors watched the videos, what has become painfully clear is as follows.

Exposure of the jury to extraneous prejudicial information in the form of the forensic videos not shown in court during the trial is entirely the fault of the trial court which failed to protect appellant's constitutional rights in three ways.

First, the trial permitted the jury to view the forensic videos notwithstanding the well settled principle that if information has not been adduced in the courtroom, it is not evidence and cannot be considered by the jury during its deliberations. This certainly holds true for video or audio recordings, which must be shown or listened to in the courtroom if the jury is to be allowed to view and consider them during deliberations.

Second, the trial court exacerbated the foregoing violation by its failure to address in the proper manner the jury's request to view the forensic videos. The consequence has been to deny this honorable Court the opportunity to remedy the trial court's wrong ironically because based on the record, there is no evidence that the jurors ever watched the forensic videos in the first place.

Third and most egregious of all, the trial court, by its inability to properly follow a simple and unambiguous rule of evidence, expressly prevented appellant from making the record that the

trial court should have made when the juror's asked to watch the forensic videos during deliberations. In so doing, the trial court not only perpetuated the sin of silence that began with the jury deliberations but expressly deprived appellant of the opportunity to mount a constitutional challenge based in fact.

B. Appellant has Failed to Present a Cognizable Error Coram Nobis Claim

It is the State's position that appellant has failed to present a cognizable error coram nobis claim. In support of this position, the State cites *State v. Vasquez*, 221 S.W.2d 514 (Tenn. 2007) as standing for the proposition that error coram nobis relief must be predicated on newly discovered evidence that was not presented to the jury and that may have resulted in a different outcome had it been presented at trial.

Such an assertion only serves to underscore the uniqueness of appellant's situation. Unlike the defendants in *Vasquez* and every other error coram nobis case of which appellant is aware, he has been prejudiced by the jury's having been exposed to extraneous prejudicial information, that is, "evidence" that it *should not have seen*. Appellant's case, as such, represents the converse of all of the cases in which newly discovered evidence, real or alleged, consisted of information that *should have been but was not* presented to the jury.

That the language of the error coram nobis statute speaks in terms of evidence that was not but should have been presented at trial does not mean to say information that was but should not have been presented at trial (or in the instant case, post-trial during jury deliberations) is not applicable to its precept or consistent with its intent. The error coram nobis statute is on its face, clearly intended to protect a defendant's due process right to a fair trial by ensuring that evidence that may have altered the result of the trial is ultimately factored into any final adjudication.

Such intent cannot be meant to distinguish between evidence that was not but should have

been presented at trial and extraneous prejudicial information that was but should not have been considered by the jury. This is particularly so in a case such as this where appellant was convicted by a jury that tainted by its exposure to extraneous prejudicial information so as to render its verdict suspect as a matter of law.

C. The “Newly Discovered Evidence” was Previously Litigated in Post-Conviction

Appellant expressly denies that the newly discovered evidence that the jurors had watched the forensic videos during deliberations was litigated at his post-conviction hearing. The basis for such denial, as does appellant’s statute of limitations argument set forth above, comes directly from this honorable court’s holding in *State v. Guilfoxy*, as cited above

. . . 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 [*40] 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.

State v. Guilfoxy, 2013 Tenn. Crim. App. LEXIS 400 at *39-*40.

In *State v. Guilfoxy*, this honorable Court found that appellant failed to demonstrate that he was prejudiced by the introduction of the forensic videos based upon the absence of proof that the jury ever watched the videos. In order to raise an issue of any kind, a factual basis for that issue must first be found in the record. The record’s silence regarding the jury’s viewing of the forensic videos precluded appellant from raising it as an issue because there was nothing in the record to support it. The State’s claim regarding the relitigation of an issue that has already been decided,

therefore, rings false because it is contrary to the holding of *State v. Guilfoxy*. Litigation must have a factual basis. Because of the silence of the record as of the day jury requested to view the forensic videos, appellant entered the post-conviction hearing without a factual basis for challenging the jury's exposure to the extraneous prejudicial evidence. His attempt to create a record through testimony of the jury foreperson being unsuccessful, the silence of the record remained unchanged. That being said, one cannot relitigate that which has never been litigated and one cannot litigate any issue absent the existence of an underlying factual basis. Per *State v. Guilfoxy*, the silence of the record eliminates the possibility of a fact-based issue. Without a fact-based issue, there can be nothing about which to litigate. And without litigation, there can be no relitigation. Neither appellant's newly discovered evidence nor anything else was or could have been litigated at his post-conviction hearing.

But the issue of appellant's inherent inability to litigate the issue of the forensic videos at his post-conviction hearing goes beyond the hearing itself, traveling back to the day the jurors watched the forensic videos while the trial court seemingly permitted them to do so, certainly without making a record. Although it has been fully addressed earlier in this reply, it is worth remembering that there is no record because (as it would appear given the absence of a record) the trial court utterly mishandled the jury foreperson's request.

It was on this day that the impossibility of litigating the issue of the forensic videos at the post-litigation hearing was born. Embracing this honorable Court's holding that a court cannot rule in the absence of a record, appellant's attempt to solicit the jury foreperson's testimony and the trial court's incomprehensible failure to correctly read T.R.E. 606(b) never occurred as a matter of law. Simply stated, one cannot relitigate that which has never been and therefore could never have been litigated in the first place.

D. The “Newly Discovered Evidence” was not Admissible at Trial

By “admissibility,” appellant assumes that the State is referring to the testimony of the jury foreperson that the jury watched the forensic videos during deliberations, and that any attempt to solicit such testimony would only be thwarted because appellant would “run into the bar of Rule 606(b)”. State’s Response, page 12. The State’s position is flawed in two ways.

(1) This is not correct as the second half of the sentence upon which the State relies states, “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 . . .T.R.E. 606(b) (emphasis added). Simply put, testimony by a juror regarding exposure to extraneous prejudicial evidence is admissible.

(2). Discussion of the admissibility of such evidence makes little sense. What does make sense is the fact that the newly evidence could not have been *introduced* at trial because it did not come into existence until after the trial, that is, after the case had been submitted to the jury and deliberations had begun.

E. The “Newly Discovered Evidence” Would not Have Changed the Outcome.

When it has been shown that a juror was exposed to extraneous prejudicial information or subjected to improper influence, “a rebuttable presumption of prejudice arises, and the burden shifts to the State to explain the conduct or demonstrate that it was harmless” (emphasis added). *Walsh v. State*, 166 S.W.3d 641, 647 (Tenn. 2005). Moreover, in order to demonstrate that the exposure to the extraneous prejudicial information was harmless the State must show “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained”(emphasis added). *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008).

What the *Walsh* and *Rodriguez* courts make critically clear is that the State’s assertion is not well taken under the facts of this case. By declaring the exposure of the jury to extraneous

prejudicial information gives rise to a presumption of prejudice, the courts have unhesitatingly stated that as unpredictable as any jury verdict may be under normal circumstances, a jury that has been exposed to extraneous prejudicial information is presumed to have been tainted by such exposure and that its verdict, therefore, is suspect.

The courts having declared that in order to demonstrate that the exposure to the extraneous prejudicial information was harmless the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," the State has it backwards when it contends that appellant must prove the extraneous information to be prejudicial. In law and in fact, the burden is on the State to prove that it is not.

The State's position in this case is without merit because the issue in a case such as this is not whether the revelation that the jury watched the forensic videos during deliberations would have change the outcome of the case. Instead, the issue is whether the jury's viewing of the videos, which is the error as contemplated by the *Walsh* and *Rodriguez* courts contributed to the verdict.

Ironically, since all of the *Walsh* factors for determining of the State has successfully rebutted the presumption of prejudice:

- (1) the nature and content of the information or influence, including whether the content was cumulative of other evidence adduced at trial;
- (2) the number of jurors exposed to the information or influence;
- (3) the manner and timing of the exposure to the juror(s); and
- (4) the weight of the evidence adduced at trial.

so heavily weigh in appellants favor all (*original brief*, pages 25-26), it would appear that the kind juror testimony expressly prohibited by T.R.E. 606(b) could be the State's only means of rebuttal. "Running into 606(b)" can be difficult at times.

Some Final Thoughts

Earlier in this reply, appellant asserts that the State's claim regarding the relitigation of an issue that has already been decided rings false as there was, per the record and despite appellant's best efforts at the post-conviction hearing, no issue to be litigated or decided. Nevertheless, the record does reflect appellant's attempt to solicit testimony from the jury foreperson and the trial court's inexplicable inability to correctly apply T.R. E. 606(b).

Earlier in this reply, appellant further asserts that his inherent inability to litigate the issue of the forensic videos at his post-conviction hearing goes beyond the hearing itself, traveling back to the day the jurors watched the forensic videos because the trial court permitted the viewing to occur off the record. In order to calculate the extent of the prejudice suffered by appellant, application of the appropriate law to both of the trial court's errors is necessary in order to fully recognize to the gravity of each.

Beginning with the trial court's misreading of T.R.E. 606(b), "when reviewing a trial court's decision to admit evidence based upon its evidentiary relevance, we will not reverse that decision unless the trial court has abused its discretion. See *State v. DuBose*, 953 S.W.2d 649, 652-53 (Tenn. 1997); *Dockery v. Board of Professional Responsibility*, 937 S.W.2d 863, 866 (Tenn. 1996)." *State v. Gilliland*, 22 S.W.3d 266, 270 (Tenn. 2000).

"Because the term 'discretion' essentially 'denotes the absence of a hard and fast rule,' we will reverse a decision to admit evidence "only when the 'court applied an incorrect legal standard or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). See also *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997). Similarly, under the abuse of discretion standard, a trial court's ruling will be upheld so long as reasonable minds can disagree as to propriety of the decision made.

State v. Scott, 33 S.W.3d 746, 752 (Tenn. 2000)

As noted more than once between appellant's original brief and his reply, T.R.E. 606(b) expressly states in pertinent part as follows:

(b) Inquiry into Validity of Verdict or Indictment. 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 ... except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention . . .

At the post-conviction hearing, appellant attempted to solicit testimony from the jury foreperson not about the effect of anything upon the juror's mind processes which is expressly prohibited by the Rule but testimony regarding exposure to extraneous prejudicial information which is expressly permitted by the rule.

By its ruling, the trial court got it simply, incredibly and inarguably wrong. Paraphrasing *State v. Scott*, not a ruling upon which reasonable minds could agree. And considering the trial court's similar mishandling of the jury foreperson's request for the forensic videos, it is sufficient a pattern of inexplicable, inappropriate, reversible activity on the trial court's part has emerged that goes so far negate the validity of all that has occurred in this case up to this moment. Stated differently, the trial court has applied "an incorrect legal standard or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d at 247. Reasonable minds, therefore can only conclude that appellant deserves and is entitled to error coram nobis relief.

Conclusion

Having said what has said, appellant suggests that it is only appropriate to conclude his reply with the first words articulated in these error coram nobis proceedings, that is from his

response the State's Motion to Dismiss Petition for Writ of Error Coram Nobis.

"Every criminal defendant has a constitutional right to a trial 'by an impartial jury.' Jurors must render their verdict based only upon the evidence introduced at trial, weighing the evidence in light of their own experience and knowledge. When a jury has been subjected to either extraneous prejudicial information or an improper outside influence, the validity of the verdict is questionable. Extraneous prejudicial information has been broadly defined as information 'coming from without.' More specifically, extraneous prejudicial information is information in the form of either fact or opinion that was not admitted into evidence but nevertheless bears on a fact at issue in the case. An improper outside influence is any unauthorized 'private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury.'" *State vs. Adams*, 405 S.W.3d 641, 650-651 (Tenn. 2013) (internal citations omitted).

The forensic videos watched by the jury during deliberations conform to the foregoing description of extraneous prejudicial information. The watching of the videos has given rise to a presumption of prejudice. Appellant's newly discovered evidence was filed timely because the absence of a record in this cause has, in essence, for purposes of error coram nobis, rendered the case timeless and the writ still alive and viable.

Although the Constitution of our state and of the United States guarantees criminal defendants the right to a fair trial, neither guarantees criminal defendants the right to a perfect trial. See, e.g., *State v. Smith*, 755 S.W.2d 757, 765 (Tenn. 1988). No judgment of conviction, therefore, will be reversed unless the errors complained of "affirmatively appear to have affected the result of the trial on its merits." See Tenn. R. Crim. P. 52(a); see also *State v. Neal*, 810 S.W.2d 131, 139 (Tenn. 1991) (stating that "in a criminal case non-constitutional error must be shown by the defendant to have probably affected the judgment before reversal is appropriate"). As we have stated many times before, the line between harmless and prejudicial error is in direct proportion to the degree of the margin by which the proof exceeds the standard required to convict beyond a reasonable doubt." See,

e.g., *State v. Carter*, 714 S.W.2d 241, 248 (Tenn. 1986)

State v. Gilliland, 22 S.W.3d 266, 273-274 (Tenn. 2000).

In the instant case, appellant was convicted by a jury tainted by its exposure to extraneous prejudicial evidence but whose verdict is protected because the trial court failed to maintain and protect the record. The verdict has created a presumption of prejudice that the State is obligated to prove harmless beyond a reasonable doubt but whose obligation is protected because the trial court failed to maintain and protect the record. Finally, because the trial court failed to maintain and protect the record, the procedural aspects of error coram nobis have at best become confused beyond understanding and at worst, negated entirely.

As stated in *State v. Gilliland*, "in a criminal case non-constitutional error must be shown by the defendant to have probably affected the judgment before reversal is appropriate". Were appellant's claim based upon non-constitutional error, it is urged that conviction by a jury tainted by its exposure to extraneous prejudicial evidence would be sufficient to afford relief.

However, in the instant case structural constitutional errors are at issue and are sufficiently critical that, while addressed in the original brief, are worth revisiting here.

Structural constitutional errors are errors that compromise the integrity of the judicial process itself. They involve defects in the trial mechanism. These errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no [such] criminal punishment may be regarded as fundamentally fair." Examples of structural constitutional errors include the complete denial of the right to counsel, racial discrimination in the selection of a grand jury, denial of the right of self-representation at trial, and denial of the right to a trial by jury. Structural constitutional errors are not amenable to harmless error review, and therefore, they require automatic reversal when they occur.

On the other hand, non-structural constitutional errors do not require

State v. Rodriguez, 254 S.W.3d 361, 371 (Tenn. 2008) (internal citations omitted).

Per *Rodriguez*, structural constitutional errors deprive defendants of 'basic protections' without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. Structural constitutional errors, therefore, are errors that inherently call into question whether the defendant has been afforded the protection of a fair trial, e.g. a trial 'by an impartial jury. As in appellant's case, a verdict rendered unreliable by the jury's exposure to extraneous prejudicial information is not verdict rendered by an impartial jury and appellant has been denied his right to a trial by jury. Such denial is a structural constitutional error, which, per *Rodriguez*, requires automatic reversal of appellant's conviction.

Per the requisites of the error coram nobis statute, appellant has been without fault in presenting his newly discovered evidence in a timely manner and in fact did so when he attached the jury foreperson's affidavit to his Petition for Writ of Error Coram Nobis and caused the Petition to be filed on January 17, 2017. Arguably, it was only then that the issue of the jury and the forensic videos into existence and was for the very first time, subject to litigation.

For all of the reasons stated in appellants original brief and this reply, he is entitled to error coram nobis relief. However, regrettably, the history of this case makes it clear that remand for a hearing on his Petition would more likely than not be meaningless. For that reason, appellant prays for relief in the form of remand for a new trial.

Respectfully submitted,

Samuel J. Muldavin BPR# 13498
Pillow-McIntyre House
707 Adams Avenue
Memphis, Tennessee 38105
Tele. (901) 525-8601
Fax. (901) 525-3084
muldavinlaw@gmail.com
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply has been served upon the Office of the Attorney General and Recorder and on the Office of the District Attorney General of Davidson County via U.S. Mail, postage pre-paid this _____ of _____, 2018

SAMUEL J.MULDAVIN