IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

TIMOTHY P. GUILFOY, Appellant, v. STATE OF TENNESSEE, Appellee.	)	DAVIDSON COUNTY No. M2017-01454-CCA-R3-ECN

ON APPEAL AS OF RIGHT FROM THE JUDGMENT
OF THE DAVIDSON COUNTY CRIMINAL COURT

BRIEF OF THE STATE OF TENNESSEE

HERBERT H. SLATERY III
Attorney General & Reporter

JEFFREY D. ZENTNER
Assistant Attorney General
Criminal Appeals Division
P.O. Box 20207
Nashville, Tennessee 37202
B.P.R. No. 29931
jeff.zentner@ag.tn.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITY

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

A petition for a writ of error coram nobis must be filed within one year of the judgment's becoming final in the trial court. Issues litigated in post-conviction are not appropriate for coram nobis relief. Here, the petitioner filed a coram nobis petition almost five years after his judgment became final and almost a year after he litigated his newly discovered evidence in a post-conviction proceeding. Did the coram nobis court properly dismiss the petition?

STATEMENT OF THE CASE

On March 8, 2011, the Davidson County Grand Jury returned an indictment charging the petitioner, Timothy P. Guilfoy, with five counts of aggravated sexual battery and three counts of rape of a child. (I, 1-9.) On October 28, 2011, the petitioner was convicted by a jury of two counts of rape of a child, four counts of aggravated sexual battery, and one count of assault. *State v. Guilfoy*, No. M2012-00600-CCA-R3-CD, 2013 WL 1965996, at *1 (Tenn. Crim. App. May 13, 2013); (I, 10-17, 114). The State dismissed Count Five. (I, 14.) The trial court sentenced the petitioner to twenty years for each of the rapes, ten years for each of the aggravated sexual batteries, and six months for the assault. *Id.* at *2; (I, 10-17). The trial court ordered partial consecutive service, resulting in an effective sentence of seventy years to be served in the Tennessee Department of Correction. *Id.*; (I, 10-17). On March 13, 2012, the trial court denied the petitioner's motion for new trial. (I, 114.) On April 13, 2012, the judgment became final. (I, 114.)

The petitioner filed a direct appeal, complaining, among other things, that the trial court improperly admitted forensic interviews of the victims. *Guilfoy*, 2013 WL 1965996, at *11-24. As to the claim regarding the improper admission of the forensic interviews of the victims, this Court held that, "[a]lthough 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." *Id.* at *14. This Court declined to find plain error in the admission of the forensic interviews (defense counsel did not object to their admission). *Id.* at *14-15.

This Court merged the petitioner's convictions of aggravated sexual battery on Counts One and Two into a single conviction of aggravated sexual battery; merged the petitioner's conviction of assault on Count Four into the conviction of aggravated sexual battery on Count Three; merged

the two convictions of rape of a child on Counts Six and Seven into a single conviction of rape of a child; and remanded for resentencing. *Id.* at *24. The petitioner was resentenced to an effective sentence of forty years. (I, 50.)

The petitioner filed a petition for post-conviction relief, alleging, among other things, that defense counsel was ineffective for failing to: (1) properly redact the video of T.A.'s forensic interview and (2) object to the admission of the forensic interviews as substantive evidence. *Guilfoy v. State*, No. M2014-01619-CCA-R3-PC, 2015 WL 4880182, at *8 (Tenn. Crim. App. Aug. 14, 2015), *perm. app. denied* (Tenn. Feb. 18, 2016). 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. *Id.* However, the post-conviction court held that, even if the petitioner's allegations were true, trial counsel's deficiencies did not result in prejudice. *Id.* This Court affirmed the judgment of the post-conviction court. *Id.* at *17.

On January 17, 2017, the petitioner filed a petition for writ of error coram nobis, alleging that he had newly discovered evidence that unequivocally established that the jury had watched the forensic interviews during its deliberations. (I, 46-63.) He attached an affidavit from Hilary Hoffman, the jury foreperson in his trial. (I, 65-66.) In this affidavit, Ms. Hoffman said that the forensic interview videos were not played in the courtroom during trial, but that the jury viewed them during deliberation. (I, 65-66.) The State filed a motion to dismiss, raising the statute of limitations as a defense. (I, 67-69.) The petitioner filed a response, acknowledging that his petition was filed well outside of the statute of limitations, but claiming that he was entitled to due-process tolling. (I, 97-112.)

On June 23, 2017, the coram nobis court, with the Honorable Monte D. Watkins presiding, entered an order dismissing the petition, ruling that it was meritless and time-barred. (I, 114-16.) On July 19, 2017, the petitioner filed a timely notice of appeal. (I, 117.)

STATEMENT OF THE FACTS

Evidence at Trial[1]

Mr. Guilfoy became acquainted with the mother of the victims, T.A. and J.A., and would stay the night at their house occasionally. *Guilfoy*, 2013 WL 1965996, at *2. Both J.A. and T.A. were under thirteen. *Id.* at *1. Mr. Guilfoy would sleep in J.A. and T.A.'s beds. *Id.* at *2. J.A. testified that, on one of these occasions, Mr. Guilfoy touched her "private" with his hand. *Id.* at *4. She stated that he touched her skin by putting his hand down the front of her pants. *Id.* She also stated that his hand moved and that she got up and went to the bathroom. *Id.* She then went to sleep with one of her sisters. *Id.* J.A. testified that Mr. Guilfoy touched her in this manner on more than one occasion. *Id.* J.A. also testified that, at another time, she was sitting on Mr. Guilfoy's lap on the couch. *Id.* He put his hand down the back of her pants and then slid his hand under her legs. *Id.* He touched her "private" on her skin. *Id.*

T.A. testified that on one occasion, Mr. Guilfoy slept in her bed, and that he rolled her over, put his hand down her pants, and touched her "private part" with his finger, on her skin. *Id.* at *6. She said that Mr. Guilfoy's finger "went inside [her] private part." *Id.* T.A. testified that, on another occasion, she was laying on her bunk bed when Mr. Guilfoy came in and started touching her. *Id.* He touched her private part with his finger again, on "[t]he inside." *Id.* She testified that she started wearing khaki pants to bed because they did not have an elastic waistband. *Id.* She stated that Mr. Guilfoy touched her on the inside of her private parts another time while she was wearing her khaki pants. *Id.* T.A. testified that the Defendant touched her more than three times. *Id.* The touchings were similar to one another. *Id.* When asked to indicate on a drawing the parts

[1] The underlying facts were set forth in this Court's opinion on direct appeal. *Guilfoy*, 2013 WL 1965996, at *2-10. Because of the length of the statement of facts, only those facts directly relevant to the claims at issue will be summarized here.

of the body that Mr. Guilfoy touched, T.A. indicated the female genitalia. *Id.* When asked what she meant by "inside," she indicated, as reported by the prosecutor for the record, "the outer labia of the female genitalia." *Id.*

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. *Id.* at *8. These interviews were recorded. *Id.* At trial, T.A. was asked to identify a copy of her forensic interview. *Guilfoy*, 2015 WL 4880182, at *11. Then, during the testimony of Ms. Post, the forensic interviewer, the State introduced a copy of T.A.'s forensic interview into evidence. *Id.* Trial counsel made no objection, and the trial court provided no contemporaneous limiting instruction. *Id.* The recordings, while admitted into evidence, were not played for the jury in open court. *Guilfoy*, 2013 WL 1965996, at *8.

Post-Conviction

At the post-conviction hearing, Mr. Guilfoy attempted to prove that the jury watched the forensic interviews by presenting the testimony of Kathleen Byers, the petitioner's sister, who said that after the jury was released to deliberate she asked trial counsel if she had time to get lunch before the jury returned. *Guilfoy*, 2015 WL 4880182, at *8. She said that 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." *Id.*

This Court held that Mr. Guilfoy 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.

Id. at *11. The interviewer's statement was: "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." *Id.* at *10. As for trial counsel's failure to object to the admission of the forensic interviews as substantive evidence, this Court held:

> 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.

Id. at *12.[2]

Coram Nobis Hearing

Mr. Guilfoy attached to his coram nobis petition an affidavit from Hilary Hoffman, the jury foreperson in his case. (I, 65.) In the affidavit, she said that she heard mention of the forensic interview videotapes during trial but that these tapes were not played in the courtroom during trial. (I, 65.) She said that during deliberation, the jury watched the tapes. (I, 66.)

At the hearing on the coram nobis petition, the State argued that the judgment in this case became final on April 13, 2012, and that the coram nobis petition was filed nearly five years after that. (III, 3-4.) The State observed that the evidence upon which the coram nobis petition was premised had been litigated, most recently during the post-conviction proceeding. (III, 4.) The

---

[2] Because Mr. Guilfoy did not identify any prejudice he suffered from the admission of J.A.'s forensic interview, this Court limited its 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. *Id.* at *11.

State asserted that a juror could not appropriately testify about a piece of evidence that had been introduced at trial, because it would not be "extraneous" within the contemplation of Rule of Evidence 606(b). (III, 5.)

The defense pointed out that it had attempted to litigate the issue of the videos at the post-conviction hearing but had been barred by doing so by Rule 606(b) of the Rules of Evidence. (III, 9.) Defense counsel noted that he had tried to present the jury foreperson at the post-conviction hearing to testify to nothing more than that she was a member of the jury and whether she watched the forensic interview video. (III, 10.) He conceded that asking her if she had been swayed by the video would have been impermissible. (III, 11.) Defense counsel admitted that he was aware, prior to the running of the coram nobis statute of limitations, that jurors had viewed the video. (III, 11.)

The State argued that Rule 30.1 of the Rules of Criminal Procedure allowed the jury to take to the jury room, for examination during deliberation, all exhibits and writings, except depositions, that have been received into evidence. (III, 19.)

ARGUMENT

THE TRIAL COURT PROPERLY DENIED THE PETITION.

The petitioner contends that the trial court erroneously denied his petition. (Pet'r Br. 8-10.) But the trial court properly dismissed the petition because the petition was time-barred, the "newly discovered evidence" was previously litigated in post-conviction, the newly discovered evidence was not admissible at trial, and the newly discovered evidence would not have changed the outcome.

Tennessee Code Annotated § 40-26-105(b) requires that a petition for writ of error coram nobis be based on "subsequently or newly discovered evidence." The writ of error coram nobis is an "extraordinary procedural remedy," filling only a "slight gap into which few cases fall." *State v. Mixon*, 983 S.W.2d 661, 672 (Tenn. 1999). It is "known more for its denial than its approval." *State v. Vasques,* 221 S.W.3d 514, 524 (Tenn. 2007) (quoting *Mixon,* 983 S.W.2d at 666). The decision to grant or deny a petition for writ of error coram nobis rests within the sound discretion of the trial court. *See State v. Hart*, 911 S.W.2d 371, 375 (Tenn. Crim. App. 1995); Tenn. Code Ann. § 40-26-105.

A petition for writ of error coram nobis must relate: (1) the grounds and the nature of the newly discovered evidence; (2) why the admissibility of the newly discovered evidence may have resulted in a different judgment had the evidence been admitted at the previous trial; (3) that the petitioner was without fault in failing to present the newly discovered evidence at the appropriate time; and (4) the relief sought by the petitioner. *See Freshwater v. State*, 160 S.W.3d 548, 553 (Tenn. Crim. App. 2004). The Tennessee Supreme Court has held that to be successful on a petition for a writ of error coram nobis, "the standard to be applied is whether the new evidence, if presented to the jury, may have resulted in a different outcome . . . ." *Vasques*, 221 S.W.3d at

526. Newly discovered evidence is evidence that was unknown to the defendant at the time of the proceedings which are the subject of the coram nobis claim. *Wlodarz v. State,* 361 S.W.3d 490, 506 (Tenn. 2012), *abrogated on other grounds by Frazier v. State*, 495 S.W.3d 246, 247 (Tenn. 2016), *cert. denied*, No. 16-8364, 2017 WL 2216967 (U.S. May 22, 2017). When examining a petition for writ of error coram nobis, a trial court is to:

> first consider the newly discovered evidence and be "reasonably well satisfied" with its veracity. If the defendant is "without fault" in the sense that the exercise of reasonable diligence would not have led to a timely discovery of the new information, the trial judge must then consider both the evidence at trial and that offered at the coram nobis proceeding in order to determine whether the new evidence may have led to a different result.

Vasques, 221 S.W.3d at 527.

A. The Petition is Time-Barred.

At the outset, the petitioner faces the insurmountable hurdle that his petition is time-barred and due-process tolling cannot save it. This Court's analysis need not proceed past this issue to the numerous other reasons why this coram nobis claim must fail.

A petition for a writ of error coram nobis must be filed within one year of the judgment's becoming final in the trial court. Tenn. Code Ann. § 27-7-103. This statute of limitations "is computed from the date the judgment of the trial court 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); *see Mixon*, 983 S.W.2d at 670 ("[W]e reject the contention . . . that the statute does not begin to run until the conclusion of the appeal as of right proceedings."). The one-year statute of limitations for a petition for writ of error coram nobis may be tolled on due process grounds if a petition seeks relief based upon newly discovered evidence of actual innocence. *Harris*, 301 S.W.3d at 145. In determining whether the statute should be tolled, the court must balance the petitioner's interest in

having a hearing with the State's interest in preventing a claim that is stale and groundless. *Id.* Generally, "before a state may terminate a claim for failure to comply with . . . 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 *Burford* rule requires three steps:

> (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.

Sands v. State, 903 S.W.2d 299, 301 (Tenn. 1995). As a general rule, 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). Discovery of or ignorance to the existence of a claim does not create a "later-arising" claim. *See Brown v. State*, 928 S.W.2d 453, 456 (Tenn. Crim. App. 1996); *Passarella v. State*, 891 S.W.2d 619, 635 (Tenn. Crim. App. 1994).

The State bears the burden of raising the bar of the statute of limitations as an affirmative defense. *Harris*, 102 S.W.3d at 593. This Court has stated that "the statute of limitations is an affirmative defense which must be specifically pled or it is deemed waived." *Newsome v. State*, 995 S.W.2d 129, 133 n.5 (Tenn. Crim. App. 1998).

The judgment in this case became final on April 13, 2012. (I, 114.) That means that the petitioner had until April 13, 2013, to file his petition. Instead, he filed it on January 17, 2017—almost five years late. (I, 46.) He is well outside the statute of limitations, something he admits. (I, 100.) Nor is he entitled to due-process tolling.

The petitioner admits that he was aware of his claim during the coram nobis statute of limitations period. (III, 11; Pet'r Br. 29.) Indeed, it would be strange for the petitioner to have

been aware that the forensic interview video had been admitted as substantive evidence at trial and still claim that he had no idea or reason to inquire into whether jurors actually watched the video. The State even made reference at trial during its closing argument to the jury's prerogative to watch the videos. *Guilfoy*, 2013 WL 1965996, at *14. It would be stranger still for the petitioner to have challenged the admission of the video on direct appeal if he did not have some suspicion that the jurors actually viewed the video. There would be little point in that.

Nevertheless, the petitioner was unquestionably aware by the time of his post-conviction proceeding that the jurors had watched the video, because he attempted to have Ms. Hoffman, the jury foreperson, testify at his post-conviction hearing, only to run into the bar of Rule 606(b) of the Rules of Evidence. (III, 9-10.) Even then, the petitioner failed to file his coram nobis petition until almost a year after the Tennessee Supreme Court denied his application for permission to appeal in the post-conviction proceeding on February 18, 2016. It appears that he did not even seek an affidavit from Ms. Hoffman until December 2016. (Pet'r Br. 29.)

While the petitioner complains that the post-conviction court prevented him from presenting this evidence at the post-conviction hearing (Pet'r Br. 31), he fails to explain why he did not obtain an affidavit from Ms. Hoffman and file for coram nobis relief before even getting to post-conviction procedure. Nor does he offer any reason for why, after the post-conviction court denied him the opportunity to present this proof, he still waited over a year to file for coram nobis relief. There is no requirement that the petitioner exhaust post-conviction procedure before pressing a coram nobis claim. To the contrary, as will be discussed in a moment, litigating something in post-conviction forecloses it as a basis for coram nobis relief.

Finally, the evidence at issue here, at best for the petitioner, establishes that the jury was subject to an improper influence in the form of viewing the forensic interview video, which should

not have been admitted. This is not evidence of the petitioner's actual innocence—any more than improperly admitted hearsay or improperly admitted expert testimony would be. Due-process tolling applies if a petition seeks relief based upon newly discovered evidence of *actual innocence*. *Harris*, 301 S.W.3d at 145. Nowhere does the petitioner claim—nor can he—that the jury's viewing the forensic interview videos makes him actually innocent. *Cf. Freshwater*, 160 S.W.3d at 556 (allegations of juror misconduct do not amount to new evidence of innocence which would have resulted in a different judgment had it been presented at trial).

The petitioner fails at every turn to show himself entitled to due-process tolling and thus fails to salvage his claim.

B. This is Not a Cognizable Coram Nobis Claim.

If the petitioner's claim should somehow survive the statute of limitations problem, the next insurmountable barrier it faces is that this is simply not a cognizable coram nobis claim. The petitioner's "newly discovered evidence" is something the jury actually saw. The coram nobis standard is "whether the new evidence, *if presented to the jury*, may have resulted in a different outcome." *Vasques,* 221 S.W.3d at 526 (emphasis added). If the jury in this case had been presented with newly discovered evidence that it had viewed the forensic interview video, it would have made no difference—this would not have been news to the jury.

In essence, the petitioner's claim is that the jury heard evidence it should not have heard. By analogy, this is little different from a petitioner's trying to use a coram nobis proceeding to litigate the admissibility of incriminating statements. Yet this Court has held that a petitioner may not litigate such matters in coram nobis. *Jefferson v. State*, No. M2011-01653-CCA-R3-CO, 2012 WL 1951094, at *2 (Tenn. Crim. App. May 31, 2012), *perm. app. denied* (Tenn. Aug. 16, 2012).

C. This Issue Was Litigated in Post-Conviction and is Therefore Now Foreclosed.

The next insurmountable barrier the petitioner faces is that this newly discovered evidence was litigated in post-conviction.

The remedy of coram nobis is not available on matters that were or could have been litigated in a post-conviction proceeding. *State v. Yarbrough,* No. 01C01-9001-CC-00012, 1990 WL 109107, at *2 (Tenn. Crim. App. Aug. 3, 1990), *perm. app. denied* (Tenn. Oct. 29, 1990). In *Tankesly v. State*, Tankesly claimed that he was entitled to coram nobis relief because he had discovered that a juror in his trial had learned during the course of the trial that he was incarcerated for a similar offense and that she had relayed that information to her fellow jurors. No. M2004-01440-CCA-R3-CO, 2005 WL 2008203, at *1 (Tenn. Crim. App. Aug. 19, 2005), *perm. app. denied* (Tenn. Feb. 6, 2006). This Court noted, in upholding denial of the coram nobis claim, that the petitioner had discovered this proof in sufficient time to litigate it in post-conviction:

> The record in this case reveals that the petitioner first learned of the alleged juror misconduct sometime in the year 2000, while his case was still pending in this court on direct appeal. He could, therefore, have raised the claim of having been denied his constitutional right to a fair and impartial jury, as well as the claim that trial counsel was ineffective for failing to take any action in pursuit of that claim, in a petition for post-conviction relief.

Id. at *7.

Here, the petitioner definitely knew about the evidence at issue by the time of post-conviction because he tried to have Ms. Hoffman testify at his post-conviction hearing, but the post-conviction court prevented him from doing so. (Pet'r Br. 15-16, 23-24, 31.) The petitioner did not appeal to this Court that ruling of the post-conviction court. *Guilfoy*, 2015 WL 4880182, at *1-17. The petitioner has already litigated this issue on post-conviction and only halfway at that. The time to air his grievances about the post-conviction court's refusal to allow Ms. Hoffman

to testify would have been before this Court on post-conviction appeal—not now. Coram nobis is not a second-order post-conviction proceeding.[3]

D. This Proof Was Not Admissible at Trial.

The petitioner cannot show that his newly discovered evidence would be admissible at trial. This is yet another failing of his coram nobis claim.

Newly discovered evidence supporting a petition for a writ of error coram nobis must be admissible at trial. *See State v. Hart*, 911 S.W.2d 371, 375 (Tenn. Crim. App. 1995) ("This rule presupposes that the evidence (a) would be admissible pursuant to the applicable rules of evidence."). Rule 606(b) of the Rules of Evidence severely limits the extent to which a juror may testify about deliberations:

> 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, [and] whether any outside influence was improperly brought to bear upon any juror . . . .

Extraneous prejudicial information has been broadly defined as information "coming from without." *State v. Coker,* 746 S.W.2d 167, 171 (Tenn. 1987) (internal quotation marks omitted). 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. *State v. Adams*, 405 S.W.3d 641, 650 (Tenn. 2013) (citations omitted). An improper outside influence is any unauthorized "private communication, contact, or tampering directly or indirectly,

[3] This Court should not construe this coram nobis petition as a petition to reopen post-conviction proceedings. This claim meets none of the three criteria in Tenn. Code Ann. § 40-30-117(a)(1-3).

with a juror during a trial about the matter pending before the jury." *Id.* at 651 (quoting *Remmer v. United States,* 347 U.S. 227, 229 (1954)).

The petitioner cites several cases in seeking to establish that the jury should not have been permitted to view the forensic interview video during deliberation when it did not view it during trial. (Pet'r Br. 17-21.)[4] Even assuming the forensic interview video should not have been admitted into evidence and the jury should not have been allowed to view it, that does not make it "extraneous prejudicial information." None of the cases the petitioner cites hold that such improperly admitted evidence constitutes "extraneous prejudicial information" within the meaning of Rule 606(b). If improperly admitted evidence constituted "extraneous prejudicial information," in every case involving improperly admitted evidence, defense counsel would have jurors testify that "extraneous prejudicial information" was improperly brought to their attention, thus effectively shifting the burden of proving harmless error from the defendant to the State. *Id.* at 651 ("As indicated, once the challenging party has made the initial showing that the jury was exposed to extraneous prejudicial information or an improper outside influence, a rebuttable presumption of prejudice arises and the burden shifts to the State to introduce admissible evidence to explain the conduct or demonstrate that it was harmless."); *cf. State v. Rodriguez*, 254 S.W.3d 361, 372-75 (Tenn. 2008) (stating that errors in admission of evidence are generally non-constitutional and thus the defendant has the burden to show prejudice).

Rightly or wrongly, the forensic interview video was admitted into evidence, without objection, as substantive evidence. Rule 30.1 of the Rules of Criminal Procedure allowed the jury to examine during deliberation, all exhibits and writings, except depositions, that had been received into evidence. Evidence admitted without objection is "rightly to be considered as

[4] None of the five cases the petitioner cites were coram nobis cases. Given the extremely limited nature of coram nobis relief, this makes their applicability to this case minimal. (Pet'r Br. 17-21.)

evidence in the case and is to be given such weight as the jury think[s is] proper." *State v. Kinsler*, No. E2012-01895-CCA-R3-CD, 2013 WL 5873075, at *7 (Tenn. Crim. App. Oct. 30, 2013) (quoting *State v. Bennett,* 549 S.W.2d 949, 950 (Tenn. 1977)), *perm. app. denied* (Tenn. Apr. 11, 2014).

The forensic interview video is unlike the evidence in *Tankesly*, where a juror allegedly exposed other jurors to information she learned outside of trial. 2005 WL 2008203, at *1. It does not qualify as extraneous evidence under Rule 606(b). *Adams*, 405 S.W.3d at 650. Thus, testimony from a juror about the jury viewing it during deliberation would not have been admissible at trial and is therefore not a proper basis for coram nobis relief.

E. This Proof Would Not Have Resulted in a Different Outcome.

The final way in which the petitioner comes up empty is in demonstrating any likelihood of a different outcome with this newly discovered evidence.

The Tennessee Supreme Court has held that to be successful on a petition for a writ of error coram nobis, "the standard to be applied is whether the new evidence, if presented to the jury, may have resulted in a different outcome . . . ." *Vasques*, 221 S.W.3d at 526.

This Court need not speculate now about whether evidence that the jury viewed the forensic video may have produced a different outcome. It has already decided in the post-conviction proceeding that the petitioner 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.

Guilfoy, 2015 WL 4880182, at *11. The interviewer's statement was: "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." *Id.* at *10. This Court then held that even if the forensic interview video had not been admitted as substantive evidence, the outcome would have been the same:

> 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.

Guilfoy, 2015 WL 4880182, at *12. The petitioner may now protest that this Court did not have before it evidence in post-conviction that the jury *actually* viewed the forensic interview video. But that is hairsplitting. As shown above, this Court did not find a lack of prejudice based on absence of proof that the jury actually viewed the video. This Court acknowledged that the petitioner had put on proof at the post-conviction hearing that the jury had requested viewing equipment. *Id.* at *11 n.4. This Court was clearly working under the assumption that the forensic interview video was not only admitted as substantive evidence but that the jury viewed its contents, or else this Court would not have analyzed the effect of the forensic interviewer's summary statement in the video. *Guilfoy*, 2015 WL 4880182, at *12. Even if the State had the burden of showing a lack of prejudice from the jury's viewing extraneous prejudicial evidence, this Court's analysis shows that it could easily have done so.

Also, that the jury viewed the forensic interview video during deliberation has no standalone significance independent of the content of the video itself. At no point does the

petitioner identify what element of the video is so prejudicial as to make meaningful his newly discovered evidence that the jury actually viewed it during deliberation. Ms. Hoffman's affidavit is silent on this. (I, 65-66.)[5] If the forensic interview video merely depicts the victims telling their story in a different venue with slightly different words than they used at trial, it is cumulative. If the video departs from the victims' trial testimony, it only contradicts or impeaches. As a general rule, newly discovered evidence which is merely cumulative or "serves no other purpose than to contradict or impeach" does not warrant coram nobis relief. *State v. Hart,* 911 S.W.2d 371, 375 (Tenn. Crim. App. 1995).

If there is some other issue with the forensic interview video, the petitioner does not say. The petitioner seems to assume that merely showing that the jury was exposed to extraneous information is sufficient to trigger the relief he seeks. But even if the video qualifies as extraneous information, he would have to show that it is extraneous *prejudicial* information for it to be admissible at trial. Tenn. R. Evid. 606(b). He fails to do this.

---

[5] The forensic interview video is not part of the record on appeal in this proceeding. This Court may take judicial notice of the record in the appeal of the petitioner's conviction. *See State ex rel. Wilkerson v. Bomar,* 376 S.W.2d 451, 453 (Tenn. 1964). However, if this Court should elect not to do that (or for some reason be unable to do that), then the consequences fall upon the petitioner. The duty to prepare an adequate appellate record falls on the appellant. *See State v. Ballard,* 855 S.W.2d 557, 560 (Tenn. 1993). In the absence of an adequate record on appeal, this Court should presume that the trial court's ruling was correct. *See Smith v. State,* 584 S.W.2d 811, 812 (Tenn. Crim. App. 1979); *see also Baker v. State,* No. M2015-02152-CCA-R3-PC, 2017 WL 283477, at *6 (Tenn. Crim. App. Jan. 23, 2017) ("In the absence of an adequate record on appeal, this Court must presume that the post-conviction court's summary of . . . testimony contained in the order denying relief is accurate.").

CONCLUSION

This Court should affirm the judgment of the coram nobis court.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General & Reporter

JEFFREY D. ZENTNER
Assistant Attorney General
Criminal Appeals Division
P. O. Box 20207
Nashville, Tennessee 37202
(615) 741-2850
jeff.zentner@ag.tn.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent by first-class mail, postage prepaid to: Samuel J. Muldavin, Pillow-McIntyre House, 707 Adams Ave., Memphis, TN 38105, on this the 8th day of January, 2018.

JEFFREY D. ZENTNER
Assistant Attorney General