September 28, 2018

From:
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Subject: Complaint on Attorney James O. Martin III; BPR# 018104

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Dear Ms. Sharpe,

My name is Timothy Guilfoy. I am an inmate at Northwest Correctional Complex in Tiptonville, Tennessee. I was convicted in a jury trial in 2011 in Judge Monte Watkins' courtroom in Davidson County. I was denied relief in my direct appeal in 2013, post-conviction appeal in 2015, and recently the Criminal court of Appeals upheld the denial of my writ of *Error Coram Nobis* on July 17th, 2018. I am writing this letter to formally file a complaint on one of my previous appellate attorneys, James O. Martin III (BPR# 018104). Throughout this letter I will provide you with the necessary history of my case along with the relevant documentation to prove to you that Mr. Martin violated Rule 1.7 of the Rules of Professional Conduct by representing me while seeking employment with the opponent in my case, and in fact engaged in discussions and negotiations with that opponent in the midst of preparing a vital action in my case. I will

prove to you that he did not notify me of this conflict, and that I never gave any consent, written or verbal, to his ongoing representation of my case while this conflict existed. Most importantly, I will prove to you that Mr. Martin did in fact take actions in my case, while this conflict existed, that were fatally detrimental to my case and beneficial to my opponent. I will also prove to you that the actions that Mr. Martin took deprived me of the most basic rights that the United States Constitution protects.

I have provided copies of emails, court briefs, court decisions, and transcripts referred to throughout this complaint in an appendix attached to this complaint. In an effort to minimize the length of this complaint, many of the items in the appendix contain only the relevant portions of the documents. The full-length documents can be accessed through the clerks of the respective courts, and I have also asked my sister to create a private web page with links to the complete documents at www.freetimothyguilfoy.com/BPR.

Before I go further in my complaint I want to address a few important things. First, the rules of court do not give any instructions or format to file a complaint to this board. The legal library here at the prison only has the address to send the complaint to. If this complaint is in an unacceptable format, please notify me as to the correct format and I will be more than happy to re-submit this complaint. Second, I will be providing you with a brief history of my case in order to put into context Mr. Martin's violations. I will attempt to minimize irrelevant details of my case, however I am sure that you will find some of the details I address about my trials in this letter did not directly involve Mr. Martin. I will reference actions by, communications with, and even defects of my trial attorney Bernard McEvoy (BPR number unknown) and one of my other previous appellate attorneys Patrick McNally (B.P.R. #10046). I feel I must address issues involving these attorneys not only to add context to my complaint, but also to illustrate the uphill battle that I have been facing and the devastating significance of Mr. Martin's violations. I have also referenced many of the improper actions of the prosecutors in my case (Sharon Reddick BPR# 022984 and Roger Moore BPR# 005616), as well as Judge Monte Watkins. I welcome you to investigate the actions of these parties if you wish, but I want to make clear that this complaint is intended to focus on Mr. Martin specifically. Third, I want you to know that I am completely innocent of the charges that I am convicted of. I know that it is not your job to care, and that you probably don't believe me, but as you are reading this complaint I hope that you will keep in mind that the Rules of Professional Conduct exist as a cornerstone for the fair administration of justice. The result or outcome of the judicial process can only be trusted to the extent that the rules and procedures of the judicial process are followed. I hope that you have enough integrity to place yourself in my position and imagine what it would be like to experience the betrayal of the one person that is supposed to defend you, all for his own personal gain.

Section One: History of My Case

I was convicted by a jury in 2011 based off of prejudicial extraneous information that was not evidence in my case. This extraneous information was secretly shown to the jury by the court during deliberations in the deliberation room. After my conviction I hired Mr. Martin for $30,000 specifically to appeal this issue. Even though he told me he would appeal this issue, he did not. I have now been incarcerated for seven years, based off of a conviction that is based off of "evidence" that I have never seen to this day. The following is an abbreviated summation of the history of my case. I do not get to Mr.

Martin until page five, and I do not get to his violations until page eight. I feel I must provide you with this minimum history of my case because I assume that the person who is reading this complaint has never heard of me or my case. I am more than willing to provide you with more detail if needed.

Pre-trial and trials

The investigation in my case was minimal to non-existent. In March of 2009, a woman who rented a house from me called the police and told them that I had sexually abused all three of her minor daughters. The extent of the investigation by the police consisted of "forensic interviews" that were conducted with the three children at the local Child Advocacy Center. She told the police she was moving out of my rental house within a couple of days. These interviews were video-taped. Physical examinations were conducted more than a month later, and no physical evidence of abuse was found. The mother gave the police a handwritten list of nine groups of dates that she claimed were the supposed dates that the abuse occurred. I was charged with almost two dozen counts of sexual abuse involving all three of her children, including nine counts of rape of child with the oldest of the three children.

The recorded interviews were not included in the discovery packet. Prior to trial, my trial attorney (Bernard McEvoy) motioned the court to compel the State to disclose a copy of the forensic interviews to me. The State (prosecutors Sharon Reddick and Roger Moore) responded that I had no right to the disclosure of the videos because they were not going to use them in their "case in chief" (appendix A). This response, in effect, was a sworn statement filed with the court. I did not receive a copy of the videos prior to trial. Instead, the prosecutors offered to allow Mr. McEvoy and myself to view the recordings at the D.A.'s office. We took them up on that offer, but I only remember watching the recording of the oldest child's interview, but not either of the two younger children's interviews. In February 2010 the State was forced to dismiss all of my charges and to seek another indictment from the grand jury because the children had all changed their stories. The oldest child finally admitted that I never abused her, forcing the State to only seek indictments involving the new accusations of the two younger children.

My first trial took place in July of 2011. The State's witness' testimonies were vague, undetailed, inconsistent and uncorroborated. The two children testified that I "touched" them in the middle of the night when I was supposedly staying the night at their house. The mother testified to the dates that she furnished to the police, and swore under oath that she "positively remember[ed]" that I was at her house in Nashville abusing her daughters on these dates. She even went so far as to claim to remember what bed I slept in with what child and what clothing we were supposedly wearing. She admitted that she owed me back rent for multiple months at the time she called the police, that she was not working at the time, and that we had a significant argument regarding her delinquency in rent one week prior to her calling the police. She denied that I told her that she had to pay up or move out, but I produced witnesses that corroborated my claim that I was evicting her at the end of the month if she did not pay what she owed. She testified, just as she told the police, that she moved out of my rental house immediately after calling the police. During cross-examination, she was forced to admit that she and her family continued to live in my house, rent free, for more than two months after she called the police.

When it was time to present my case I produced two alibi witnesses. One witness was a coworker that testified that I was with him working on eight of the nine groups of dates that the mother claimed that I was abusing her daughters. Seven of these dates I was in other states entirely, and the one week that I was in Tennessee I stayed at a hotel with him every night in the same room. Another witness was a friend that testified that I was with him and his family on vacation in Colorado during the ninth group of dates that the mother testified to. Both of these witnesses had work schedules and credit card statements to corroborate their testimony.

The video-taped interviews were not used in this trial. This trial ended in a hung jury. Mr. McEvoy spoke with a few of the jurors after the trial and learned that they simply didn't believe the State's witnesses, mostly because their stories didn't make any sense and that I had alibis.

My second trial took place in October of 2011. This time, prosecutor Roger Moore asked the mother if she was a person that kept a diary or wrote down "everything that she does" or if there was "any way to pinpoint when that would have been?" She said "no" [pages 186 & 203, trial transcript]. The list of dates that she gave the police and testified to at the first trial was never brought up in the second trial. The State only gave the jury a three year period wherein they claimed these assaults occurred. This, in my opinion, was suborning perjury, considering that Mr. Moore not only knew of her notes that she gave the police, he personally entered them as "prior consistent statements" in the first trial before I was able to prove that I was not at her house on those dates. To my utter disbelief, my attorney, Mr. McEvoy, did not impeach her testimony with her statements from the first trial, and never called either of my alibi witnesses to prove that I was not staying at her house during any of the alleged dates that she gave the police.

The State then called the psychologist that conducted the forensic interviews with the children to the stand. She testified that children are unable to remember details of events in their lives, and that "trauma" exacerbates this supposed disability of children. The State cited this testimony during their closing argument as the reason that the children couldn't testify to any details beyond "he touched me". The Court of Appeals later found this testimony to be error. The State then asked her to identify two DVD's as containing the recorded interviews that she conducted with the children in 2009. She claimed that she watched them before the trial, and that they were an accurate representation of the interviews "subject to some redactions". The State entered the DVDs as exhibits, but did not play them or any of their contents during the trial.

This was confusing to me. First, the prosecutors told the court that they would not be using these videos in the trial as a reason that they would not disclose them to me prior to trial. Second, I did not understand how they were able to edit or "redact" the contents of the videos without permission from either myself or the court. Finally, the State did not follow any of the statutory procedures outlined in TCA §24-7-123 (statute allowing recorded forensic interviews as evidence). I immediately asked Mr. McEvoy to re-motion the court to force the prosecutors to furnish me with a copy of the DVDs now that they were using them in the trial. He told me that he "couldn't", because "the State was still not 'using' the videos because they have to be played during the trial to be considered evidence that the jury can use". He told me that the jury would never see them.

The very first thing that prosecutor Moore told the jury during his initial closing argument was:

> "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 videos. 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."

Again I immediately told Mr. McEvoy to get a copy of those videos since I had never been able to view them. I had no idea what was on them. On top of that, I did not have the ability to object to the contents of the videos because they were never played in open court. Mr. McEvoy again told me that the videos could not be watched by the jury because they were not played during the trial. He told me that if the jury requested viewing equipment, he would object and stop them from getting the equipment in the jury room like Mr. Moore suggested. I also asked Mr. McEvoy why the prosecutor couldn't bring the supposedly-available portable TV into the courtroom to play the videos in open court. He simply shrugged his shoulders and walked away without answering. There were no jury requests brought to my attention while they were deliberating. I assumed that the jury did not watch the videos since there was not a request for the TV. The jury found me guilty after only a few hours. I was sentenced to seventy years in prison, to be served at 100%, for crimes that I did not commit.

Motion for a new trial and direct appeal

I hired Mr. Martin as my appellate attorney within a couple of weeks of my trial. The very first action that he suggested we take was to hire a private investigator to track down the jurors and ask them why they found me guilty. Even without my alibi evidence, the evidence presented in court was far from compelling. The PI was successful in interviewing eight jurors. All of them said the same thing: they found me guilty because they watched the recordings of the forensic interviews. None of the jurors explained how they were able to watch the videos, only that they watched them in the jury room and based their verdicts on them. I have included five of the reports from the PI that Mr. Martin gave me in appendix B, pages 1-5. I have also included the report from the alternate juror who was dismissed immediately before the deliberations began (appendix B pages 6-7). You will notice that the only difference between the jurors that found me guilty and the alternate juror who was "astonished" that I was found guilty, is that the alternate juror never viewed the forensic interviews because he was not present during the deliberations.

Mr. Martin asked me what was on the videos. I told him "I don't know" because I had never seen them. Prosecutor Sharon Reddick filed a motion with the court prior to trial insisting that the recordings were not "discoverable" because, unlike recordings in other trials, the interviews related to my trial were not going to be used in their "case-in-chief" (appendix A). Considering that the prosecutors *did* use these videos in my trial, I don't understand how this was not perjury, obstruction of justice, or at least contempt of court. I was never given the chance to watch the DVDs that were given to the jury, before or even during my trial.

Mr. Martin then went to the courthouse to view the DVDs that were provided to the jury. Mr. Martin was also able to view the un-redacted, un-edited version of the

interviews that the jury *did not* see. Mr. Martin then reported to me that the "redacting" that apparently occurred rendered the version of the interviews that the jury watched extremely misleading. He told me that the prosecutors edited out many statements of the children that were beneficial to me. He also told me that there were accusations made by the children about alleged abuse that they claimed occurred in Montgomery County which were *not* redacted from the version of the interviews that the jury watched. He said that these "outside" accusations should have never been permitted to be exposed to the jury because of Rule of Evidence 404(b). More important than anything else, however, was that **the contents of the DVDs were not evidence in my trial** because they were not played during the trial (see *State v. Henry* 1997 WL 283735; appendix C). This meant that the jury was exposed to "extraneous information", and it was almost a guarantee that I would receive a new trial because this was a "constitutional error".

Excited and secure in my faith that Mr. Martin was going to fight for me, my family and I paid Mr. Martin $15,000 to represent me in my appeal, along with an additional $2,000 to cover the costs of the private investigator that tracked down the jurors and interviewed them. Mr. Martin filed my motion for a new trial. In it, he argued that the court erred in admitting the DVDs of the interviews into evidence, and that I was denied a public trial because the contents of the DVDs were first presented to the jury during deliberations, outside of my presence as well as the presence of anyone else other than the jurors themselves (see appendix O). Judge Watkins denied my motion the day after the hearing without explanation.

Mr. Martin appealed this denial to the Court of Criminal Appeals in my direct appeal. He argued not only did the court commit plain error when it entered the recordings into evidence; he also argued that the contents of the recordings were extremely prejudicial because the prosecution specifically told the jury during his closing argument that they could watch them during deliberations (appendix P). The State attorney fighting my appeal argued that the recordings were properly admitted, and that even if they were erroneously admitted, there was nothing on the record to suggest that the jury ever watched the videos (see appendix N pages 1-2).

The Court of Appeals denied my appeal in May of 2013. They agreed that the court erred in admitting the recordings, but declined to grant me a new trial:

> "Although the record clearly demonstrates that the trial court erred in admitting the recordings of the interviews into evidence, the record does *not* demonstrate that the jury ever watched the interviews [emphasis in the original opinion]. Indeed, during closing arguments, the prosecutor told the jury the following: "One thing I do want to mention is, remember the forensic interviews, those tapes, that we did not play those. For one thing, we're lucky to get these to work to play the ones that we did. But those are videos. 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."
>
> These comments indicate that, in order to watch the recordings, the jury would have to request the appropriate equipment. The record contains no indication, however, that the jury ever requested the equipment. Nor does the record contain any other indication that the jury watched the recordings. The record

> is simply silent on this point. The Defendant has failed to satisfy the first prerequisite of plain error review." *State v. Guilfoy* 2013 WL 1965996; (appendix D)

I had no idea how the jury watched the videos, I only knew that they did because that is what the jurors told the PI they based their verdict on. I thought maybe, unbeknownst to the prosecutor, there might have been viewing equipment already in the jury room, meaning that there would not have been a need for a request. Or, maybe there was a request that was simply not recorded. I found it to be entirely unfair that the Court of Appeals not only required me to know what was happening in the jury room considering that I was not allowed anywhere close to that room, but also that it was my responsibility to ensure the record accurately reflects what occurred in that room.

One positive thing to come out of the Appellate Court's decision was that they reduced my sentence from seventy years to forty years. This was because the amount of charges that the jury found me guilty on outnumbered the amount of accusations that the children actually made during their testimony. The court expressed confusion to this, but Mr. Martin and I knew that the reason for this was because the jurors based their verdicts on what they saw on the videos, not the trial testimonies. The prosecutors, through their "redacting" and editing, were able to create more accusations than were actually made.

Post- conviction petition and appeal

Mr. Martin also expressed his confusion as to how the viewing occurred. He assured me, though; this could be fixed at my post-conviction evidentiary hearing. After all, we knew that the jury watched the videos, that the contents of the videos were extraneous to the evidence in my case, and that I had a right to call a juror to the stand and have them establish the fact on the record that they viewed this extraneous information per rule of evidence 606(b). Mr. Martin strongly requested that I hire him again to represent me on my post-conviction (PC) petition (appendix F page 3). Although I was interviewing other attorneys for my post-conviction petition, I agreed to this plan-of-action, so my family and I paid Mr. Martin an additional $15,000 to represent me for my PC hearing and appeal if necessary.

Prior to my post-conviction hearing I asked Mr. Martin to try to get affidavits from the jurors to ensure that the fact that they viewed the videos could be added to the record in writing if the court did not allow them to testify. He told me that none of the jurors would sign an affidavit. He assured me though, the court would *have* to allow the testimony, and if he did not, he would appeal his denial.

The hearing for my post-conviction occurred on June 18, 2014. Mr. Martin subpoenaed the jury foreperson, Hilary Hoffman (formerly Hilary McCardy), to testify to the viewing of the recordings. I have included the first eight pages of the transcript of this hearing in appendix E. Prosecutor Moore immediately voiced an objection at the beginning of the hearing. He insisted that Rule of Evidence 606(b) *restricted* me from questioning the juror on the stand.

At first, prosecutor Moore and Judge Watkins seemed to opine that a juror may only testify about an "extraneous outside influence" [Appendix E, p. 4 lines 1-10]. Mr. Martin attempted to clarify what we were attempting to accomplish with the juror's testimony by citing the "silence" of the record that the Court of Criminal Appeals based their denial of my direct appeal on. He then specifically told the court that he only intended to ask the juror if the jury watched the videos during deliberations. [Appendix E

p.4 line 11 – p.5 line 4] Mr. Moore then argued that Rule 606(b) prohibited such testimony. Judge Watkins then agreed with Mr. Moore that the rule precludes *any* testimony about what happened behind the closed doors of the jury room. Judge Watkins then read *only the first half* of Rule 606(b), which does basically say that jurors may not testify in general [Appendix E p. 5 lines 5-15]. Curiously, Judge Watkins *did not* read aloud the second half of the rule that states that a juror may testify as to if they were exposed to extraneous information.

Mr. Martin then explained that it was the State Attorney General office that initiated the line of argument that the jury did not watch the videos, and then Mr. Martin requested that the court allow him to question her as an "offer of proof" [Appendix E p.5. line 16 – p.6 line 7]. Mr. Moore then objected again, claiming that "jurors may not testify" [Appendix E p. 6 line 10]. Judge Watkins agreed again, claiming "I just can't do it, under the rule" [Appendix E p.6 lines 18-19]. For a third time, Mr. Martin requested that he be able to question the juror as an offer of proof, even if the court was not going to consider the testimony in his ruling [Appendix E p.6 lines 20-23]. Mr. Moore then argued that the rule says "a juror may not testify, period" [p.7 lines 20-22]. Judge Watkins again agreed [Appendix E p.7 lines 23-25]. For a fourth time, Mr. Martin argued that the testimony was needed to "establish that a substantial right was affected", as the Appellate court ruled in my direct appeal [Appendix E p.8 lines 10-14]. Mr. Moore read part of the Appellate Court's ruling and argued that the ruling did "not [say] that we need to have more evidence on the record. They ruled on what was on the record [...] and that's just the state of the record" [Appendix E p.8 lines 1-9 & 15].

The final ruling by Judge Watkins is perhaps the most significant quote from the transcript. Immediately after Mr. More argued "that's just the state of the record", Judge Watkins said: "That may be another issue for appealing, appeal of whatever I may rule, but – well, I am ruling now. I can't allow it. So, that's an issue that can be taken up." [Appendix E p.8 lines 16-18].

The juror was excused from the courtroom. That was that. According to Judge Watkins, no juror could ever testify to viewing the extraneous information on the DVDs during deliberation. I had no other way to prove that the jury watched them. Later in the hearing, Mr. Martin questioned my sister, who testified that she remembered Mr. McEvoy (trial counsel) telling her she had time to go to lunch during deliberations because the jury was watching the videos. This double-hearsay testimony was contradicted by the testimony of Mr. McEvoy. He denied that he told her this, and then denied that he recalled being notified of a request from the jury for viewing equipment. No matter how erroneous the videos were, I was unable to establish the necessary underlying fact that the jury watched them. Mr. Martin *immediately* told my family after the hearing that he was going to appeal Judge Watkins' refusal to allow the juror's testimony. Two days after the hearing I had the opportunity to speak with my sister. I asked her to email Mr. Martin to set up a phone call with me to discuss appealing Judge Watkins denial of our attempt to question the juror on the stand (appendix F page 1). When I spoke to Mr. Martin, he agreed with me that this issue was, by far, the most obvious and important issue to appeal to the Appellate Court.

Up to this point, Mr. Martin was fighting diligently for me. As far as I understand with my limited legal knowledge, all of the unusual errors in my case up to this point were not his fault. Mr. Martin argued many other issues at the hearing, but it was clear that the constitutional error of juror exposure to extraneous evidence was much more

important than the other non-constitutional evidentiary errors that were brought up. He agreed with me that the prosecutors were in a very tough situation. Not only were they aware that they had given the jury extraneous "evidence", they were also aware that once I was able to establish on the record that they watched the videos they couldn't argue against the automatic presumption of prejudice that would arise (*Walsh v. State,* 166 S.W.3d 641, 647 (Tenn. 2005)). They would also have to explain why they felt they could edit a piece of evidence without the court's permission. He also agreed that they were aware that their objection to her testimony was erroneous and went directly in the face of rule 606(b). He assumed that they knew that Judge Watkins ruling would be reversed on appeal, that my case would be remanded back to the trial court, and that Judge Watkins would be forced to allow jurors to testify to the narrow question about their exposure to extraneous information. Almost two months later, Judge Watkins filed his ruling on my post-conviction petition on August 14, 2014. He denied relief by simply stating that I did not prove that any of the deficiencies of counsel, even if true, would have affected the verdict because I did not prove "prejudice". He made no mention of the juror, his refusal to allow her to testify, or if he accepted that the videos were watched in the jury deliberation room.

Over the course of the next few months, communication between Mr. Martin and myself was almost non-existent. I would call multiple times a week without an answer. My sister would email him, and receive back promises to answer his phone, but I still had trouble getting a hold of him. I didn't just want to talk. Mr. Martin knew that I was insistent on taking a very active roll in preparing the motions and briefs in my case, as I did on my direct appeal. I insisted on obtaining every piece of paper relating to my case for my own analysis. He would promise to get me this material, but then failed to send it to me. On October 13, 2014, I dictated an email to my sister to send to Mr. Martin (appendix F pages 2-3). You should read this email in the appendix; I think it speaks for itself. Mr. Martin replied to this email the next day (see appendix F pages 4-5), in which he suggested that I could seek other counsel if I was unhappy. This, of course, was *after* I paid him the additional $15,000 to represent me on my post-conviction. I replied the same day through another email (appendix F pages 6-7), in which I explained it was too late to get another lawyer, and I simply wanted him to do his job. Also, to prove to you that this unprofessional conduct was not just in my head, I have included an email from my father to Mr. Martin on October 17th in appendix F (pages 8-9). Mr. Martin reassured him that his "only concern in this case was to get Tim a new trial". Over the course of the next few months Mr. Martin started to communicate with me more, and to his credit he did eventually send me all of the documents that I requested. However, as you can glean from these emails, I felt that something was not right. As you will read in a moment, my instincts were correct.

Mr. Martin and I spoke many times on the phone in December 14' to prepare the brief for my appeal. The brief would contain many issues, but the main issue was Judge Watkins denial of our attempt to question the juror at the hearing (see email in appendix F pages 10-11; Mr. Martin states that the video issue was "by far" a good issue). Mr. Martin finally sent my sister a draft of the brief on January 15, 2015 (appendix F page 12). The draft he sent her, however, did not contain the main issue regarding the juror's testimony. He assured me that the final brief would contain this main argument, and that he did not send it to us because he was "still working on it". As you can read in this email, he told my sister that he had "additional argument" that was not included in the draft. I

made it clear to Mr. Martin that, while I was pleased with what he had sent my sister, the main argument about the juror was the most important part of what I wanted in the brief. He filed the final version of the brief on January 21, 2015 to the clerk of the Court of Appeals.

It is important to note that the uneasy feeling that I had towards Mr. Martin never subsided. To protect myself, I arranged to have many of our conversations recorded. I had already been betrayed by one attorney, and I resigned myself to the fact that I can't trust anyone outside of my immediate family, especially after Mr. Martin kept making promises to me that he didn't keep.

On February 15, 2015, a few weeks after he filed my brief, Mr. Martin sent an email to my sister asking her to have me call him the next day (appendix F page 13). On that phone call, Mr. Marin told me that he had been offered "another job". He ***did not*** tell me who offered him this job; I assumed that it was another private law firm. He told me that "they" had been offering this job for "several months" and that "if [he] didn't take the job now, the offer would go away". He explained to me that this was a "very good" position, and that he wanted to take the job. He offered to hire a replacement, Patrick T. McNally (B.P.R. #10046), to finish my appeal. I agreed. Mr. Martin did not notify me of any "conflict of interest", or anything related to any conflict whatsoever.

Soon after this conversation, I finally had the opportunity to read the entire brief that was submitted to the court by Mr. Martin. **THERE WAS NOT ONE MENTION OF JUDGE WATKINS' REFUSAL OF MY ATTEMPT TO QUESTION THE JUROR.** Throughout the brief, Mr. Martin never mentioned "606(b)", "extraneous", or even the word "juror". I was furious. I had my sister email Mr. Martin to set up a call as soon as possible (appendix F pages 14-16). On that call, Mr. Martin basically told me that I misunderstood the brief. He claimed that he brought up two issues about the videos, and even though he did not bring up a specific issue on the Judge's specific denial of the juror's testimony, the Appellate Court "would read the transcript and see what happened". This was unacceptable to me, but there was nothing that I could do, the brief was already filed.

Even though I did not know *why* Mr. Martin did this to me, I wanted to file a complaint with this board immediately. However, my new attorney, Mr. McNally, convinced me not to. He agreed with Mr. Martin that the appellate judges would read the transcript of the hearing, and that there was enough evidence on the record already to argue that the jury must have seen the videos at some point, because their verdicts matched the allegations on the video but not the trial testimony of the children.

At the end of March 2015 I received a notice from the court regarding Mr. Martin's withdrawal from my case (appendix G). In it, Mr. Martin explains that he had accepted a position at the Davidson County District Attorney's Office, and that his ongoing representation in my case would amount to a conflict of interest. This was my first notice that the "very good position" that Mr. Martin told me he was taking was in fact a position with the opponent in my case. I immediately remembered that Mr. Martin told me that he had been in discussions about his new job for "several months" during the conversation that we had on February 16th. This meant that Mr. Martin was actively in discussions about possible employment with the opponent in my case for at least a few months prior to him completing and filing the appellate brief in my case. I started to wonder if this had anything to do with the fact that Mr. Martin did not include the juror issue in the brief.

I again relayed my thoughts with my new attorney, Mr. McNally. He told me that Mr. Martin did not sabotage my case, and that this appeal was not the only opportunity that was available to me to argue this issue. He insisted that even if I loose my appeal, the issue is still not "dead". He suggested that I could get some other evidence to prove that the jury viewed the videos, and that I could use that new evidence to "get back into court". Mr. McNally did his best in the reply brief and oral argument to try to convince the appellate judges that the jury based their verdict on the videos. He did not succeed. The Court of Appeals denied me on 8-14-15. It was no surprise to me that the court's opinion did not mention the denied juror testimony *at all*. They identified many errors by my trial counsel, including the failure to object to the wrongful admission of the recordings. However, they cited the opinion from my direct appeal regarding the "silence" of the record of any evidence that the jury watched the recordings. In a footnote, they also apparently rejected the testimony of my sister that Mr. McEvoy told her that the jury was watching the videos during deliberation (appendix H pages 3-4).

Mr. McNally filed a petition to rehear, claiming that the court ignored evidence that the videos were watched by the jury. He argued that the proof of this is the fact that the jury's verdict mirrored the allegations on the video rather than the children's trial testimonies. The court again rejected this argument, stating that "The Petitioner has presented no proof, and we will not assume, that the jury's verdict was based on the forensic interview's summary statement as opposed to T.A.'s trial testimony." (appendix I page 4) Of course, the reason that I "did not present any proof" was because Judge Watkins did not allow the juror to testify. Without appealing this decision, Mr. Martin allowed the court to assume that no matter how erroneous the videos were, no prejudice could be proven because according to the record, the jurors never viewed them.

Error Coram Nobis and appeal

I then decided to take Mr. McNally's advice and try to "find new evidence". I found a new attorney in Memphis because I did not trust any attorney in Nashville at this point. I hired Samuel J. Muldavin (B.P.R. # 013498) soon after the Supreme Court denied my Rule 11 petition for my post-conviction. Through Mr. Muldavin, I hired yet another private investigator to track down the jurors from my case and attempt to speak to them again. Most of the jurors did not want to speak with the PI or Mr. Muldavin. With a little luck, the foreperson of the jury Hilary Hoffman agreed to speak with Mr. Muldavin in October 2016. She reaffirmed that the jury watched the videos and that they were integral to many (if not all) of the jurors' verdicts. Mr. Muldavin then asked her *how* it was that they were able to watch the DVDs. She remembered easily that it was through a granted request that was made to the court during deliberations for the video-viewing equipment. She remembered this so well because *she* was the person that made the request to a court officer. After explaining to her that the contents of the videos were not technically evidence in my case, she finally agreed to sign an affidavit describing the existence of the request on December 16, 2016 (appendix J).

Mr. Muldavin filed a *Writ of Error Coram Nobis* one month later on January 17, 2017 with the juror's affidavit attached. In it, he argued that the newly discovered evidence that we were presenting to the court proved the existence of a granted jury request to view extraneous evidence, that this request was not revealed to me by the court at the time it was made, that the request was never litigated in open court, and most importantly that the request was never adduced on the record by the court in any way,

shape, or form. My first notice of the request occurred five years after my trial when the jury foreperson revealed it to Mr. Muldavin in October 2016. He also argued that Judge Watkins added to this error when he denied my attempt to question the juror at my post-conviction hearing. Even though I was not certain of the existence of the request at that time, it's clear to see that the existence of the request would have been adduced during her testimony.

Prosecutor Roger Moore filed a motion to dismiss my writ because I was past the one year statute of limitations to file it. He argued that the statute of limitations should not be "tolled" because I did not present any new evidence and that I had no "due process" reason for tolling the one year limit. He also argued that this issue had already been litigated in my post-conviction petition and appeal. He attached the opinion from the Court of Appeals for my post-conviction with his motion. He did not point to anything in the opinion that spoke about extraneous evidence. He only insisted that I was attempting to "relitigate" this issue.

A hearing was held on March 22, 2017 on the State's motion to dismiss in Judge Watkins' courtroom. Mr. More began the oral argument by stating that this issue had already been argued on my post-conviction through the issue of ineffective assistance of counsel. He then addressed my claim of newly discovered evidence: "And that it is probably in the record that, at some point, the jury asked to have recording equipment to see the video or to do whatever they may have done. That's nothing new." (3-22-17 hearing, page 4 line 23 – p. 5 line 1; appendix R pages 1-2) I was astonished that he admitted that he had known of this request <u>throughout the entire history of my case</u> considering how fervent he was at the post-conviction hearing that not only was this request not on the record, but also that I did not have the right at that hearing to "have more evidence on the record". He also seemed to forget that the Appellate Court cited the *lack* of a request as the basis for denying my direct appeal. Had he simply admitted that he knew of the existence of the request at the PC hearing, I could have argued on my PC appeal that the jurors were exposed to the contents of the video. Mr. Moore now insisted that this was already litigated on my post-conviction appeal (3-22-17 hearing, p. 5 lines 22-24; appendix R page 2), even though he could not point to anything in the opinion that related to jury exposure to extraneous information.

Mr. Moore and Judge Watkins then exchanged the following dialogue:
<u>Mr. Moore</u>: "Now, to go beyond whether a juror could testify whether they watched it or not may be arguable.
<u>Judge Watkins</u>: "Well. Some case law says that they could say yes, we watched it, but they can't say what influence it had upon them."
<u>Mr. Moore</u>: "Exactly. Exactly. And that is where it would stop."
(3-22-17 hearing, p. 5 line 25 - p. 6 line 7; appendix R pages 2-3)

I was flabbergasted. They clearly understood that a juror *could* testify and answer the question "Did you watch the videos during deliberation?". It was like Mr. Moore and Judge Watkins forgot that they both wholly rejected my attempt to do this at the PC hearing, not once, not twice, but *four times*. Mr. Moore then went on to claim that we wanted to ask the juror if the videos influenced her verdict, even though our petition clearly stated that we had no intention to do that. Mr. Moore then capped off his argument by claiming that the videos were "a piece of evidence that was not extraneous", thereby disqualifying my ability to question a juror if they were exposed to its contents (3-22-17 hearing, p. 7 lines 11-14; appendix R page 4).

My attorney, Mr. Muldavin, first agreed with Mr. Moore that questioning a juror as to the affect that something had on their verdict is not possible, but made clear that we had no intention to do that (3-22-17 hearing, p. 10 line 17 – p. 11 line 3). Mr. Muldavin then explained how I was never able to question the juror at the post-conviction hearing because Judge Watkins and Mr. Moore refused to allow her to testify to *anything*, including watching the video (3-22-17 hearing, p. 11 line 13 – p. 12 line 23). He then explained that I was first notified in 2016 that the court *did*, in fact, grant a jury request to view the videos, thereby triggering my *error coram nobis* (3-22-17 hearing, p. 13 line 10 – p. 14 line 15). Mr. Muldavin then addressed Mr. Moore's insinuation that the videos were evidence in my trial. He cited *State v. Henry* (appendix C), where the Court of Appeals ruled that the contents of a physical recording **are not evidence** if they are not played into evidence during the trial (3-22-17 hearing, p. 14 line 16 – p. 18 line 17).

Mr. Moore responded to this by claiming that the judge in *Henry* "got it wrong" (3-22-17 hearing, p. 19 lines 8-11; appendix R page 5). Mr. Moore did not explain why the judge was wrong, and also did not explain why the Appellate and Supreme Courts affirmed that Judge's decision. Mr. Moore simply thinks that entering a DVD as an exhibit automatically enters its contents into evidence even if there is no presentation in open court and no discovery or evidentiary process to qualify the contents as evidence. Judge Watkins then said that he would take the matter under advisement and issue a ruling within two or three weeks.

Almost three months later Judge Watkins granted the State's motion to dismiss my writ. He gave no analysis past ruling that my issue was without merit and time barred. By dismissing my writ at this point, Judge Watkins effectively denied my attempt to call a juror to testify to the request and the viewing *for the second time,* even though he had opined at the hearing that a juror *could* testify to the viewing. So we were off to the Court of Appeals… again.

Mr. Muldavin filed my appellate brief in December of 2017. I will not review all of the contents of the brief, but I included the relevant portion of the argument in the appendix K. The substantive part of the brief is basically the argument that Mr. Martin *should* have made in the brief for my appeal of my post-conviction.

The State Attorney Office responded to our brief and argued that I should have appealed the judge's denial of my attempt to question the juror at my post-conviction hearing:

> "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. […] The petitioner did not appeal to this court that ruling of the post-conviction court. […] 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." (State's brief Page 14-15; appendix L pages 1-2)

Mr. Muldavin and I were hopeful that the Appellate Court would recognize the extreme burden that I was up against and consider the constitutional error that we were now able to prove occurred. Our optimism was short-lived. On July 17, 2018 the court denied my appeal, ruling:

"This is the Petitioner's third attempt to raise in this court the issue of the jury's viewing the videotaped forensic interviews during its deliberations. [...] The petitioner conceded in his error coram nobis petition that he attempted to raise this issue again in his post-conviction proceedings. The petitioner sought to have the jury foreperson testify at the post-conviction hearing that the jury had viewed the recordings of the forensic interviews during its deliberations, but the post-conviction court ruled her testimony inadmissible. [...] On appeal, the Petitioner did not raise the issue of the post-conviction court's having barred the jury foreperson's testimony. [...] The petitioner now raises this issue again in the context of the coram nobis court's denial of his petition for writ of error coram nobis. [...] Coram nobis relief is not available for matters which could have been raised in [] a petition for post-conviction relief. [...] As such, the petition failed to present any subsequent or newly discovered evidence that could not have been raised in an earlier proceeding. Much of the Petitioner's brief focused on the fact that the record was insufficient for this court to determine on direct appeal if the jury viewed the forensic interviews during its deliberations and the fact that the post-conviction court barred the foreperson of the jury from testifying at the post-conviction hearing. However, a petition for writ of error coram nobis is not the proper forum to address these issues. [...] Likewise, any challenge to the post-conviction court's ruling on the admissibility of the jury foreperson's testimony at the post-conviction hearing should have been raised on appeal from that court's denial of post-conviction relief." (*Guilfoy v. State*, 7-17-18, appendix M)

Simply put: Mr. Martin did not appeal Judge Watkins denial of the juror testimony, and furthermore, the appeal of the denial of my post-conviction petition **was the only opportunity** for me to do so. The Appellate Court did not mention anything regarding "extraneous information", "rule 606(b)", "request", or "constitutional error". They simply avoided all of this by ruling that I "should" have included this argument in my previous appeal.

Contemporaneously with the submission of this complaint, Mr. Muldavin is filing a rule 11 petition for review of the denial of my appeal of the dismissal of my writ of *error coram nobis* to the Tennessee Supreme Court.

Section two: requested investigation

I am alleging that Mr. Martin purposely omitted the most important issue on my appellate brief for the appeal of the denial of my post-conviction petition. The specific issue that I am alleging that he intentionally omitted was that the post-conviction court (Judge Watkins) improperly denied my attempt to question my jury foreperson as a witness at my post-conviction hearing. I am alleging that he omitted this issue in bad faith, for the intended benefit of the opponent in my case, the Davidson County District Attorney. I am also alleging that Mr. Martin committed this act for his own personal interest; that while he was compiling my brief he was actively in discussions concerning future employment with the Davidson County District Attorney office. I am alleging that Mr. Martin failed to notify me of this conflict in order to ensure that I would not remove him from my case and retain alternate counsel that *would* include this issue in my brief. I am also alleging that neither Mr. Martin nor any employees of the Davidson County District Attorney office ever implemented any "screening procedures" in order to ensure

that privileged information pertaining to Mr. Martin's representation of me was protected from dissemination to the prosecutors or state attorneys involved in my case.

This board, in my opinion, does not need to undertake much investigation to come to the conclusions above. Most of the evidence in support of my allegations already exists within publicly available briefs and court rulings. Furthermore, the emails that I have provided in the appendix of this complaint corroborate my allegation that Mr. Martin *intentionally* omitted the issue of juror testimony from my brief while he purported to feign loyalty only to me.

I do not know any of the members of this board personally, but I presume that they are all extremely knowledgeable and skillful at investigating my accusations. I would hope that it goes without saying that anyone involved in an investigation should have no current or previous personal or professional relationships with any of the parties mentioned in this complaint. Without intending to insult anyone's abilities, I suggest that this board investigate the following accusations:

1) Mr. Martin intentionally omitted the juror issue from my appellate brief

Like I stated above, most of the evidence needed to establish this claim already exists within this complaint. Perhaps the most direct way to find out why Mr. Martin did not include this issue in my post-conviction appellate brief is to simply ask him:

Why didn't you include this issue?

If Mr. Martin's answer is "oversight", you should consider that up until this point in my case (appeal of my post-conviction) Mr. Martin was aggressively pursuing this issue. I paid Mr. Martin thousands of dollars soon after my trial to hire a private investigator specifically to find out if the jury watched the videos. Mr. Martin obviously learned that they did, in fact, watch the videos from this PI. Mr. Martin alleged in my motion for a new trial that I was denied a "public trial" because the jury was presented with the contents of the videos outside of the courtroom for the first time (appendix O). Mr. Martin argued in my direct appellate brief that the jurors watched the videos (appendix P). Mr. Martin responded to the State Attorney's argument that the videos were not watched in their brief, by arguing that the jurors *did* watch the videos in his response brief (appendix Q). Once the court ruled that there was nothing on the record to prove that the juror's watched the videos, Mr. Martin subpoenaed the juror foreman to my post-conviction evidentiary hearing to establish that they *were* watched.

Also, if Mr. Martin's answer is "incompetence", you should consider the first eight pages of the transcript for my post-conviction hearing (appendix E). Any attorney (or even non-attorney) who reads these pages will understand that Mr. Martin was well aware of the importance of establishing that the jury watched the videos on the record (Appendix E page 8, lines 10-14), and possessed more than apt ability and legal knowledge to understand that Judge Watkins' refusal to allow her to testify was improper. Mr. Martin set forth a well-reasoned argument to Judge Watkins. When the court denied his attempt, Mr. Martin kept insisting that I had the right to question the juror. Even when the court denied him again, Mr. Martin asked the court to allow him to question her as an "offer of proof". Finally, after Judge Watkins denied his attempt for the fourth time, Judge Watkins specifically instructed Mr. Martin that he could appeal his decision.

It could be argued that this would be enough evidence to prove that Mr. Martin was well aware that he needed to appeal this denial and had the ability to argue the issue, even if his client did not specifically instruct him to. However, in my case I ***did*** just that. I had countless conversations with him wherein not only I expressed my wish that he appeal this issue, but also that he made me believe that he was intending to do so. In fact, he was aware of my intentions as soon as two days after the hearing (appendix F page 1). I have spent hundreds of nights lying awake in my prison bed trying to come up with an innocent explanation as to why he did not include this issue. I have been unsuccessful in imagining a single possible reason other than he purposely omitted the issue from my brief. If Mr. Martin can give you an innocent explanation, I would love to hear it.

The fact that Mr. Martin appealed the improper redactions of the videos on my PC appeal but did not appeal the denial of our attempt to prove that the videos were actually watched should illustrate how illogical and improper this omission was. The videos were already found to be inadmissible on my direct appeal. The direct appellate opinion made it clear that the only controlling issue was whether or not the jury viewed them.

It is important to note at this point, that Mr. Martin would have been successful in obtaining relief on this issue. The case law is clear: *Henry* states that the contents of physical recordings are not evidence in the trial if they are not played during the trial; if the contents are not evidence then they are "extraneous information"; rule 606(b) gives me the right to question a juror as to if they were exposed to extraneous information. Even Judge Watkins and Roger Moore admitted at the March 22, 2017 hearing that the juror should have been allowed to testify to whether or not the jury watched the videos. Also, the Court of Appeals ruled in my most recent appeal that this issue "should have been raised on appeal from that court's denial of post-conviction relief". There is simply no reason that Mr. Martin *should not have* or *could not have* appealed this issue.

2) Mr. Martin omitted this issue while a conflict of interest existed

Here is a simple timeline relevant to the conflict of interest:

6-18-2014: Post-Conviction hearing

6-20-2014: Email to Mr. Martin informing him I wanted to appeal the 606(b) denial

10-13-2014: First email to Mr. Martin expressing concern that Mr. Martin was not engaged in my case

1-15-2015: Mr. Martin sends my sister a draft of the post-conviction appellate brief, but says he will add "additional arguments", does not include juror issue

1-21-2015: Mr. Martin files appellate brief with the Appellate Court Clerk

2-16-2015: Mr. Martin tells me he is withdrawing from my case to accept a "great" job; he does not reveal any conflict; he does not tell me what the new job is; he tells me that he was offered this job "for the last several months"; this conversation was recorded.

3-4-2015: I realize that Mr. Martin did not include the juror issue in the brief

3-7-2015: Mr. Martin tells me he included "two issues about the videos"; denies omitting juror issue

3-15-2015: Mr. Martin files a motion to withdraw from my case with the Court citing a "conflict of interest"; I learn for the first time that the new job he was taking was with my opponent, the Davidson County DA office.

It is crystal clear that Mr. Martin was at least involved in discussions regarding future employment with the opponent in my case while he was still actively working on the brief for my appeal. It is also clear that Mr. Martin did not inform me of this conflict, before or after he filed my brief on January 21, 2015. I am accusing Mr. Martin of violating Rule of Professional Conduct 1.7(a)(2):

> "[...] A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if [...] there is a significant risk that the representation of one or more clients will be materially limited by [...] a personal interest of the lawyer."

The "advisory comments" in the rules of court further define "Personal Interest Conflicts" (#10):

> "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, [...] when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with the law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client."

Further, Rule 1.0(c) states:

> "'Firm' or 'law firm' denotes a lawyer or lawyers in a law partnership [...] or the legal department of a corporation, government agency, or other organization." [emphasis added]

Even if Mr. Martin believed that he could have still represented me while he was negotiating future employment with my opponent, the rules of professional conduct prescribe that he would have had to not only inform me of the conflict, but also that he would have also had to obtain written consent from me that I consented to his ongoing representation of me. Neither of these occurred.

I would like to make it clear that I would have **never, ever, ever, ever** allowed Mr. Martin, or anyone else for that matter, to continue to work on my brief if I was informed that he was even considering future employment with my opponent. I would have fired him on the spot, hired alternate counsel, and likely motioned the court for extra time if needed to bring the new lawyer up to speed on my case. I had minimal trust in the DA's office when I was first charged with crimes that I did not commit. By the time I had my post-conviction hearing, I had absolutely no trust in both the courts and the DA's office. I had witnessed prosecutors edit evidence, lie in court filings, suborn perjury, and repeatedly attempt to limit my right to defend myself. I had argued my case to a point where all I had to do was appeal Judge Watkins' obvious erroneous denial of the juror's testimony. The Appellate Court would have remanded my case back to the PC court with instructions to allow the juror to testify. Not only would I have been able to overturn my conviction, I would have also been able to expose the prosecutors for manipulating the videos without permission.

To suggest that I would have been comfortable with anyone attempting to gain employment with the DA's office to be in control of my brief is absurd. This would be like allowing the student to grade his own exam. This has to be the very definition of "conflict of interest". I don't think it is any coincidence that the *Rules of Court* cites this exact scenario as an example of a "personal interest conflict". Who would take an action that would harm an organization that they are attempting to gain employment with?

As for your investigation, I would suggest that you look into when and how Mr. Martin gained employment at the Davidson County District Attorney office. In the

conversation I had with him I mentioned earlier, Mr. Martin told me that the "great" job was offered to him multiple times in the previous several months. However, I now don't trust anything he ever said to me, so it may not be true that the DA office was pursuing him; it may have been Mr. Martin that sought employment. It wouldn't surprise me, though, if the DA was initiating the offer of employment, considering how much the DA had to loose if I was successful in my appeal. I suggest, before you approach Mr. Martin, this board inspects any personnel files related to his employment. I imagine that the DA conducted some sort of vetting prior to his employment; when did that initiate? I also imagine that there were recommendations submitted in support of Mr. Martin; who were those from and when did they occur? You might also want to interview employees at his old law office to find out when they remember him talking about new employment. I don't know if this board has the ability to inspect his email, but it would surprise me if it didn't reveal material information relating to the timing of discussions about employment.

It also may be relevant that this was all occurring around the election of Glenn Funk as District Attorney General for Davidson County. According to the *Tennessean*, over a third of the assistant D.A.'s either quit or were fired within a month of the 2016 election. There were clearly vacancies that needed to be filled. I'm sure that Mr. Martin's job offer was related to these vacancies. This board may want to speak with Mr. Funk.

You may also want to speak with Mr. McNally. I remember Mr. McNally telling me that my case was one of many that he took over for Mr. Martin. He may be able to shed light on when Mr. Martin first talked to him about taking over his cases. Anything that you find that suggests Mr. Martin was preparing for his new job prior to January 21, 2015 proves that he turned in my brief while he had a conflict of interest.

Mr. Martin notified me that he was taking a "new job" only a couple weeks after he filed my brief for my post-conviction appeal. It is clear from appendix G that Mr. Martin motioned the court requesting withdraw from my case because he had taken a job with my opponent on 2-28-15. This was one month after he filed my brief for my post-conviction appeal. It would strain credulity for him to claim that he received his first offer of employment without *any* previous discussions, was fully vetted, completed all of his work on his current cases or arranged for alternate counsel, and accepted his new position all within a month. I have evidence that he was in discussions with my opponent about future employment several months before he filed my brief, so I personally don't care what he claims.

3) Neither Mr. Martin nor the Davidson County DA office initiated "screening procedures"

Rules 1.10 and 1.11 of the rules of professional conduct describe "screening procedures" that "prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm". Rule 1.10(c)(4) also states that the lawyer should "advise the former client in writing of the circumstances that warranted the implementation of the screening procedures required by this Rule and of the actions that have been taken to comply with this Rule".

Simply stated, I have never received anything in writing (or verbally for that matter) regarding any actions that Mr. Martin or the Davidson County DA office have taken to comply with these rules. The first and only notice that there was ever any conflict was when I received the notice from the court that Mr. Martin was granted leave from my case.

The lack of screening procedures in and of itself may not seem malicious, but in the context of my accusation that Mr. Martin violated Rule 1.7 it is significant. I believe that it shows Mr. Martin's contempt for, and avoidance of, the rules of professional conduct.

Although I have provided some attorney-client work product and communications in the appendix, I do not wish to waive privilege on all communications and work product because I am still litigating my case. However, I DO waive privilege (for the purposes of this investigation) on any evidence Mr. Martin would be able to provide to you showing that: (1) he notified me of this conflict of interest prior to 1-21-15, (2) I gave written consent to his ongoing representation of me while this conflict of interest existed, or (3) he notified me of screening procedures that were initiated once he began employment with the Davidson County D.A. office. I am willing to waive privilege to these documents because they do not exist. They do not exist because he never notified me of anything other than he was leaving my case; and he didn't even notify me of this until *after* he filed my brief.

4) Judicial Review Board

As indicated by the top of this complaint, I am also sending a copy of this letter to members of the Tennessee Board of Judicial Conduct. Cannon 2(A) of the code of judicial conduct states that "a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The Tennessee Appellate Court in *State v. Jenkins* (845 S.W.2d 787 at *793) adopted ABA Standard 15-4.2 as law in its entirety. This standard states that when a judge receives a question or a request from a juror, he must inform the parties of the request in open court and on the record. Judge Watkins did not follow *any* of these procedures in my trial. These procedures allow for the parties to litigate the request and to object to whatever the judge decides to do in response to the request. Most importantly, this enshrines the request on the record for appellate purposes. As was illustrated in the Appellate Court's opinion in my direct and PC appeal, the existence of a request may be the difference between a life of freedom and a life of imprisonment for a defendant.

With the benefit of the juror's affidavit (appendix J pages 1-2), I can now list these demonstrable, inarguable facts:

10-28-2011: -Judge Watkins receives a request from the foreperson of my jury for video-viewing equipment in order to watch videos not played into evidence at my trial.
-Judge Watkins does not inform me or my attorney at the time of this request
-Judge Watkins grants this request
-Judge Watkins does not note the request or its granting on the record in any way
-The jury convicts me because of the viewing of the videos (appendix B pages 1-5)

05-12-2013: -The Court of Appeals denies my direct appeal because there is nothing on the record to indicate that the jury requested video-viewing equipment.

06-14-2014: -Judge Watkins is made aware at my post-conviction hearing that the Court of Appeals considered the existence of a jury request material to my appeal

-Judge Watkins does not take judicial notice of the request on the record at the hearing, even though he was apparently well aware that the request existed and that he granted the request

-Judge Watkins denies my attempt to question a juror as to if the jury viewed the videos during deliberation

03-22-2017:- Judge Watkins admits that a juror could testify as to the viewing of the videos

06-23-2017:-Judge Watkins dismisses my *error coram nobis* as time-barred; for a second time denies my attempt to question a juror

The history of Judge Watkins' improper actions in my case can be separated into two general violations. First, Judge Watkins granted a request from a jury without following the law or even recording the request on the record. Second, Judge Watkins abused his authority when he restricted my ability to learn that this request occurred or to adduce the existence of this request on the record. The fact that the consequence of the granted request resulted in the jury being exposed to extraneous information is almost a side point when considering the basic violations of Judge Watkins, but it should illustrate the importance of the rules and laws that he violated.

I believe Judge Watkins' actions show bias and malice. It could be argued that the granting of the request without following due process was a simple mistake during my trial. I understand that there is no such thing as a "perfect" trial. The argument that this mistake was made in good faith, however, is contradicted by Judge Watkins' actions after my trial. It is clear from the transcript of my post-conviction hearing that Judge Watkins was informed that the existence (or non-existence) of a request was the deciding point in my appeal of right. If the failure to record the request on the record was an innocent oversight, one would expect Judge Watkins to take judicial notice of the request immediately by saying something to the extent of: "Wait a minute, there *was* a request that I granted for viewing equipment. I don't know how this was not on the record, but I want to make clear that I did, in fact, receive and grant this request."

Not only did Judge Watkins fail to correct the record with what *did* occur at my trial, he then misquoted a rule of evidence to restrict me from learning of the request and establishing its existence on the record. After I learned for myself that this request did occur two years later, I entered the juror's affidavit in his court. He again, for a second time, denied my attempt to call a juror to the stand to testify to the existence of the request that *he* granted. I could go on and on about his bias against me, but I believe that Judge Watkins' actions have implications that go far beyond my case.

Through the Westlaw system at the prison, I have identified over ninety jury trials in Judge Watkins' courtroom in the last fifteen years that resulted in guilty verdicts. Most of the defendants from these trials are still in prison today, and dozens of them will never see freedom again. In how many of these trials did Judge Watkins grant a secret jury request? All of them? Half of them? I know the answer is not zero, considering what I am able to prove happened in my trial with the juror's affidavit. I am sure that Judge Watkins would answer that my trial was the only one, but how could anyone know for sure? It is possible that there are other innocent men and woman sitting in prison right this second that were convicted with evidence that was never presented during their trials and that they have never seen because of a granted jury request that they never knew occurred. The official record in these cases would be useless to prove or disprove the existence of

such a request considering what happened in my case. The only way to find out would be to do what I did: spend thousands of dollars to interview the individual jurors and ask them if they remember any requests not on the record. I can now see why Judge Watkins would not allow the juror to testify at my PC Hearing: it would have called into question every single other jury trial in his courtroom, as well as the verdicts and sentences they produced.

I believe that the Board of Judicial Conduct should initiate an investigation into Judge Watkins' actions in my case, as well as whether or not he has done this in other trials. I don't know if Judge Watkins is unaware of the basic functions and duties of a trial judge, or if he was well aware that his actions were unlawful and simply chose to do them anyway. In either scenario, the actions he took after my trial to cover up what he did should prove the bad faith in his violations.

Public Defender's Office

For the reasons stated above, I am also sending a copy of this letter to the director of the Davidson County Public Defender's Office. Although all of the attorneys in my case were privately hired, I am aware that most of the defendants that have litigated cases with the judge and prosecutors in my case were represented by a public defender. I would hope that the Public Defender's office would want to be aware that it is possible that secret unreported jury requests might have occurred in some of their client's trials. I would also hope that they would want to be aware that prosecutors Roger Moore and Sharon Reddick apparently believe that they can legally deny pre-trial discovery of evidence by claiming that they will not use it at trial, alter that evidence without the defendant's knowledge, and use it during trial anyway by telling the jury to view the evidence during deliberation.

Tennessee Bureau of Investigation

I am also sending a copy of this letter to the TBI. Beyond any violations of professional or judicial misconduct, I believe the actions taken in my case as a whole amount to criminal conduct.

Imagine the following hypothetical scenario: I, the defendant, record interviews of my witnesses prior to trial. The prosecutors motion the court to compel disclosure of these videos. I tell the court that I will not be using these videos in the trial and refuse to disclose them. I then redact and edit the content of the videos in order to remove any statements that are harmful to my case. I then give the jury DVDs containing these edited interviews and tell them that they can watch them during deliberation. Then, without the knowledge of the court or the prosecutors, I supply the jurors with video-viewing equipment to view the videos in the middle of deliberations.

If this scenario occurred, I'm positive that I would be charged with perjury, contempt of court, tampering with evidence, tampering with a jury, and obstruction of justice (among countless other charges). In reality, this is exactly what occurred in my trial. The only difference is that it was the prosecutors and court that committed these acts, not me.

If what the prosecutors did during my trial was not bad enough, the actions that they (along with the trial court and Mr. Martin) took after my trial could only be interpreted as a cover-up. The transcript of my post-conviction hearing shows that Roger Moore and Judge Watkins did everything that they could to keep secret the fact that there

was, in fact, a granted request to view the videos. As I explained in the rest of this complaint, all Mr. Martin had to do was to appeal Judge Watkins' denial of the juror testimony, and the actions of the prosecutors and judge would be exposed.

If nothing else, the criminal act that I am accusing Mr. Martin and the Davidson County D.A. office of is conspiracy to commit official oppression (§39-12-103 and §39-16-403). They are sworn court officers that intentionally prevented me from exercising my rights. I had a constitutional right to appeal Judge Watkins' denial. I have evidence that I told Mr. Martin that I wanted him to appeal this denial. Mr. Martin then did not appeal this denial. It appears from the evidence (along with common sense) that the Davidson County D.A. office offered Mr. Martin lucrative employment in exchange for sabotaging my only opportunity to appeal this decision. I also believe the actions above prove that Mr. Martin and the employees of the D.A. office amount to official misconduct since they clearly abused their positions of authority to restrict my ability to appeal the judge's denial.

The motive of the D.A. office is clear. The improper actions of the prosecutors and judge in my case are well covered in this letter. On top of avoiding embarrassment and possible sanctions for their actions, I am sure that the D.A. office was desperate to avoid another retrial in my case. My first trial was a hung jury with six jurors refusing to convict me of anything. Although this fact does not prove my innocence by itself, it does show that the State's case against me was very week. I know now from the juror interviews (appendix B pages 1-5) that the result of my second trial was either going to be not guilty, or at worst another hung jury if not for the viewing of the edited videos. Instead of reciting the proof that I am innocent of these charges, you can visit the website that my supporters have set up for me. If you are interested in my innocence you can read the specific page www.freetimothyguilfoy.com/questionsforjen to learn why the prosecutors do not want to try me again.

I am sure that Mr. Martin can not explain why he did not appeal this issue and why he did not inform me of the conflict of interest (offer of employment) that arose prior to filing my brief on 1-21-15. I am also sure that the Davidson County D.A. office cannot explain why they did not initiate "screening" procedures after Mr. Martin began employment with them. The failure to take these required steps shows consciousness of guilt at the very least. I know that "mistakes" or "professional oversights" are far from criminal actions in the view of the TBI, but purposeful actions taken to prevent a defendant from exercising his constitutional right to appeal a collateral attack on his incarceration is a crime, especially if there is evidence that Mr. Martin benefited from that obstruction.

I was convicted because two children said I "touched" them. No physical evidence, no confession, no witnesses and no corroboration. The State did not even say what year this happened in (after I provided alibis for their original dates). Juxtapose this with the mountain of evidence that I have presented to prove that Mr. Martin and the Davidson County D.A. office obstructed justice. If no action is taken from my accusations and evidence then there is no other explanation other than there is a separate set of laws for employees of the Tennessee judicial system. I would then wonder what amount of evidence it would take to investigate them or to actually charge one of them with a crime.

Governor

I am also sending a copy of this complaint to the two leading candidates running for governor of Tennessee. I want to make sure that they are aware of the fact that there is at least one person currently incarcerated in this state that was convicted using manipulated evidence that was secretly shown to the jury during deliberation. I want to make sure that they are aware of the judicial system that they may be inheriting, as well as the low standards of ethics and professionalism that are evidently present with state employees in my case.

Section three: my future actions

Back in 2016, around the time that Mr. Muldavin and I were preparing to hire the second P.I. to track down the jurors, I was contacted by an attorney in Chicago named Kathleen Zellner. Ms Zellner is recognized around the country as one of the nation's top appellate attorneys. She is well known for only accepting to represent clients that have been *truly* wrongfully convicted. If you don't know who she is, you should google her. She reviewed my case and offered to represent me on my Federal *Habeas Corpus* petition. I obviously accepted. She filed part of my *habeas* with the western district Federal Court of Tennessee back in January 2017, and was granted a stay in the proceedings while my *error coram nobis* was being litigated in the Tennessee State Courts.

Once the Tennessee Supreme Court denies my rule 11 petition (probably sometime in November of this year) my case will officially be upheld and approved-of by the Tennessee criminal justice system. Ms Zellner will then take her turn in Federal Court. I am very much looking forward to the State of Tennessee attempting to justify what happened in my case to a Federal judge.

The Tennessee State Attorney General will have a very difficult time attempting to explain why the secret presentation to the jury of evidence not disclosed to the defendant or presented during the trial does not violate every aspect of the sixth and fourteenth amendments to the U.S. constitution. The only possible argument that they could have would be "procedural default"; that I failed to appeal the court's denial of the juror testimony on my PC appeal. The problem is that I *did* tell Mr. Martin to appeal this, and he won't be able to explain why he did not. Ms. Zellner will be forced to show the Federal Court how the Davidson County District Attorney office itself tampered with the independence and loyalty of my attorney by offering future employment to Mr. Martin while he was writing my appellate brief.

Without revealing too much strategy, I can tell you that Mr. Martin should be prepared to be called to testify at the Western District Federal Court to explain why he did not appeal the juror issue, and why he did not inform me of the conflict of interest that arose while he was preparing my brief. Employees from the Davidson County D. A. office and even this board should also be prepared to testify to the conflict of interest and any investigation that might result from this complaint.

It is important to note that the emails that I have provided you attached to this complaint are only a sliver of the evidence that exists of communications between Mr. Martin and myself. Ms Zellner is in the possession of far more written and recorded communications that will be used as impeachment evidence if Mr. Martin attempts to perjure himself in front of a federal judge.

I have many other future plans outside of my *habeas* petition. Once I am out of the state court I will also be filing this complaint with the Federal Bureau of Investigation and the U.S. Justice Department's Civil Rights Division. I believe that they will be

interested in a state court securing convictions through the secret presentation of manipulated evidence to the jury during deliberations. I also believe that they will be interested in a D.A. office that bribes defense attorneys with a job to not appeal specific issues that would embarrass or hurt them.

I also have future plans outside of the judicial arena. In the past seven years, I have been in contact with a large number of journalists and judicial watch organizations. A few examples are Adam Tamburin from the Tennessean; Topher Sanders with ProPublicia; David M. Reutter and Matt Clarke from Criminal Legal News; Nasheia Conway, Program Director for Civil Rights for The Center for Prosecutorial Integrity; Ken Abraham, founder of Citizens for Criminal JUSTICE; Denise Lawrence with the Tennessee Association of Criminal Defense Lawyers; among many, many others.

Many have been interested in my case mostly because of the fact that my jury convicted me because of evidence that I've never seen. As astonishing as this fact is, most people assumed that my case would be overturned on appeal because of it. Every time I loose another appeal, the interest in my case deepens. Once I received the denial for my writ of *error coram nobis*, I was tempted to reach out and explain the conflict of interest that occurred with Mr. Martin to these parties. However, I realized that I needed to give the Tennessee Board of Professional Responsibility a chance to right this wrong before I should accuse the State of wrongdoing. This is far more equitable and fair than how this state has treated me and my family, but I do not define my own integrity through the low bar set by the actions of those that have no integrity. I almost look forward to the State Supreme Court's denial of my rule 11 petition. I will be free to honestly say that I have attempted to right this wrong through every avenue made available to me through the Tennessee judicial system.

Although I believe that I have made this clear throughout this complaint, I do not trust *anyone* involved with the Tennessee government or judicial system after what has been done to me and my family. Any honest person reading this complaint can understand why. The only actions that I expect in response to this complaint, if any, is someone warning Mr. Martin and the A.G.'s office that they need to delete emails and get their stories straight. I am so blatant in this statement because it does not matter if they delete every email and construct some half-believable explanation to the conflict of interest. I already have the evidence that I need to prove everything that I have accused Mr. Martin of, and I expect to be using it at the federal evidentiary hearing as well as presenting it to the parties mentioned above.

This complaint is simply this board's opportunity to exercise its purported oversight responsibility. Mr. Martin clearly violated multiple rules of professional conduct. Because of these violations, an innocent man will spend the next thirty years of his life in prison without the ability to view, object to, or even appeal the evidence that caused his conviction. I wonder if this board even cares that these rules were violated, or about the lives that Mr. Martin's actions helped tear apart.

I also expect retaliation from this complaint. I have experienced it many times from other attempts to defend myself. I expect that the members of this board will only attempt to protect Mr. Martin and the Davidson County D.A. office. I expect that once this board understands that I am telling the truth, there will be attempts at retribution against me or my family. You may think that this is a ridiculous fear, but I have learned through the last seven years that those involved with my case are petty, powerful, and emotionally reactive. I expect that the questions raised in this complaint will put many

Tennessee State employees in an awkward corner, and I have seen what they do when they feel under attack: they retaliate and do whatever they need to in order to get themselves out of trouble.

If you glean nothing else from this complaint, you should at least understand that I am not going away. I have a pen, plenty of paper, a bunch of stamps, and apparently thirty years with nothing better to do but write letters to anyone that will read them. I intend to ensure that every voting, tax-paying Tennessean understands what those in power in this state do with their vote and tax money. I will ensure that every past, present, and possible future defendant in this state understands how the Tennessee courts do business. I will make sure that every Tennessean knows that in this state, they can be charged with a crime that they did not commit, put on trial, that they will *not* be able to view the evidence against them, and that they will not have the right to have an appellate court review the evidence used against them.

No amount of retaliation will stop me from telling my story and exposing the actions of those outlined in this complaint. If anything, any additional retaliation will only serve as more evidence of the corruption that I have come to accept as inherent in the Tennessee justice system. Even if I were to die here in prison, my supporters and loved ones would only be more emboldened to continue my fight.

Conclusion

In the last seven years I have attempted to learn the law as best I can. I have learned enough to know that I am far from an attorney or legal scholar. However, I understand the basic principals behind what the constitution defines as a public and fair trial. The sixth amendment demands that everyone in the United States of America is guaranteed a trial in open court, with the evidence presented in full view of the judge, defendant, and the general public on the record (right to confrontation, right to a public trial, and a right to a jury that only considers the evidence presented in open court). After a conviction, the defendant has the right to have an appellate court review the trial procedures and evidence to ensure that the defendant's rights were not violated and the evidence that caused the defendant to lose his liberty was proper.

The antithesis of our judicial process is embodied in the judicial systems in countries like Iran, Russia, and North Korea. In countries like these, "judges" go into a secret room and consider secret evidence and then emerge from their secret room and declare that the defendant is guilty and announce the sentence. The defendant does not have the ability to view the evidence against him much less object to it. There is no review process by an appellate court, and the neither the defendant nor the public will ever know exactly what evidence caused his imprisonment.

As much as we look down on these "unenlightened" judicial systems, what happened in my trial with the secret presentation of evidence during deliberation renders my trial, in effect, more aligned with a trial in North Korea than America. I would love to hear an argument why it's not. I intend to force Judge Watkins, the D.A. office, and the State of Tennessee to stand by and defend my conviction. I want them to own what was done to me along with their inability or unwillingness to fix it. If the members of this Board do nothing to hold anyone accountable for their actions in my case, then I would have to assume that this standard of justice is acceptable to them as well.

The two questions that I am asked most about my case are: how could this have happened, and why hasn't the appellate court overturned your conviction yet? I am left

unable to give them an explanation which allows them to sleep well at night. Like I was before I was arrested, they truly believe that something like this could not occur in our country. Well, it did, and I have the evidence to prove it. All the rules of court and constitutional protections mean nothing if the judicial system simply allows them to be ignored. I am heartbroken when I am forced to tell them that our justice system seems to be no better than the justice system in North Korea.

I assume that the person reading this letter wants to dismiss my complaint as simply a desperate, rambling attempt by an inmate to get out of prison. This may be true, but it doesn't mean that I'm wrong, and it certainly doesn't mean that I'm guilty. It has taken me a long time to come to the conclusions that I have stated in this letter, and I don't take them lightly, and neither should you. If you were to talk to my friends, they would tell you that the last thing that they would call me is a conspiracy theorist. I am usually the person debunking crazy theories. However, some conspiracies are true. If my allegations are substantiated, every member of the Tennessee judicial system should be disgusted and demand justice and a restoration of the damage that the actions taken in my case have caused to the professed integrity of the Tennessee judicial system. As my evidence attached to this complaint shows, I am telling you the truth. I defy you to find one statement I have made as false. Facts may not matter to Judge Watkins or the employees at the D.A. office, but they do to me and many paying attention to my case.

One fact is that Mr. Martin cannot explain to you why he did not include the juror issue on my post-conviction appeal. He cannot explain to you why he did not inform me of his intentions to gain employment with my opponent immediately after he filed my brief.

Another fact is that Mr. Martin doomed me to thirty more years of a nightmare that I can not define to you in words. Maybe the daily torment I am experiencing is appropriate for someone that is guilty of my charges, but the fact is that I am being brutally punished for crimes that I did not commit. Doesn't anyone in the Tennessee government care? Also, my parents have mortgaged their house to the hilt, and have spent all of their retirement savings on trying to undo what Mr. Martin has done. Mr. Martin has ripped apart countless lives for decades to come, and we paid him $30,000 to do it. I hope Mr. Martin's promotion was worth all of this to him.

There is little doubt in my head that this letter seems angry. Well, there's good reason for that: I'm angry. I am sitting in prison right now writing this complaint, having never viewed the "evidence" that sent me here. You would be angry too. I bet you would be doing the same exact thing that I am doing right now.

I am also sure that I have shown a large amount of pessimism. Please do not mistake my doubt that this complaint will actually move this board to initiate an investigation as a lack of desire that it will. I have been waiting almost a decade for someone in the Tennessee judicial system that actually has some integrity to look at my case. Maybe the person reading this letter will give me a fair chance for once and look into my allegations. Maybe the person reading this will imagine what it's like having their life torn apart without ever having the opportunity to view the evidence that caused it. Maybe the person reading this will do their job without consideration of whether or not their investigation will jeopardize a fellow colleague's career. Maybe.

I am sure that Mr. Martin and the Davidson County D.A. office will act as if this is not a big deal. I'm sure that they will tell this board that I'm guilty, and rely on my conviction as proof, and pressure this board to look the other way. As the juror interviews

show, the reason I was convicted did not have anything to do with the evidence and testimony presented in the courtroom during my trial. They convicted me because of videos that I've never seen, the judge has never seen, and the public has never seen. There is no explanation or excuse that Mr. Martin or the D.A. office can give that will negate or change this fact. I would love someone to ask Mr. Martin or anyone else from the D.A. office if they would volunteer to be tried for a crime that they did not commit, and if it would be "no big deal" if the jury would be allowed to consider additional "evidence" that he is never allowed to see or appeal. I doubt that he would volunteer. I also doubt that this is the definition of "justice" that the D.A. would campaign on.

One thing that I am certain about is that *someone* will eventually require Mr. Martin and the D.A. office to explain what happened in my case. Whether it's the federal courts, the U.S. justice department, the media, or the Tennessee tax payers themselves, this is not going to simply go away.

Seven years ago I walked into Judge Watkins' courtroom believing that what would occur in that room would be a fair venue in which I would be able to show the truth, or at least be presented with whatever evidence the jury was going to consider. That's what I was raised to believe occurred in an American courtroom. To say that I was naïve would be the understatement of my life. Even though I expect little to come directly from this board, a part of me prays that this board will prove to me that the "justice" that I have received in the last seven years is an exception to how the Tennessee justice system works, not the rule.

Mr. Martin traded my life for a promotion. What is this board going to do about it?

Timothy P. Guilfoy, inmate # 499702