James O. Martin, III
Assistant Federal Public Defender – Capital Habeas Unit
Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203

December 3, 2018

Beverly P. Sharpe, Counsel
10 Cadillac Drive, Suite 220
Brentwood, TN 37027

Dear Ms. Sharpe,

I am writing in response to Complaint Number 58648c-5 filed by Complainant, Timothy Guilfoy. In his complaint, Mr. Guilfoy alleges that I intentionally and in bad faith omitted an issue from the brief I submitted to the Tennessee Court of Criminal Appeals in the appeal of his State Post-Conviction Petition. Furthermore, he alleges that my reason for intentionally omitting the issue was due to a conflict of interest caused by my negotiations for employment with the Davidson County District Attorney's office – the office that prosecuted him at trial and which had defended the post-conviction petition. In response I would initially and simply state that nothing could be further from the truth.

The reason for not including the issue he complains of is that I could find no legal support for a good faith argument that we should have been allowed to examine a former juror, under oath, regarding what weight they gave to evidence that had been admitted at trial. (See Tenn. R. Evid. 606(b), ". . .a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror . .").

In his complaint, Mr. Guilfoy cites to *State v Henry*, 1997 WL 283735 (Tenn. Crim. App., 1997). However, that case would not support the argument Mr. Guilfoy complains of. To the contrary, the *Henry* Court noted, among other things, that, "As the contents of the tapes *were not placed in evidence* by either party, the trial judge did not err by refusing to allow the jurors to hear the tapes once deliberations began." *Id.* Here, the recordings at issue *were* admitted as substantive evidence at trial. As such, the unreported *Henry* decision is not on point and does not help his case. Moreover, the fact that the recordings were admitted as evidence was error that we raised in his direct appeal. The frustrating ruling of the Court of Criminal Appeals however was that they could not determine reversible error where the record did not demonstrate whether the jury actually watched the recordings which had been erroneously admitted as substantive evidence – a ruling that I still believe to be wrong.

On post-conviction, we again attacked the issue of the admission of the recordings – this time raising the issue of the ineffective assistance of trial counsel for failing to object to their admission

as substantive evidence. In an attempt to prove the extreme prejudice of the wrongfully admitted recordings I subpoenaed and attempted (in response to the challenge of the Court of Criminal Appeals that the record did not demonstrate whether the jury actually watched the recordings) to call a juror to testify at the post-conviction hearing that they had, in fact, watched the recordings and, in addition, the recordings carried much weight in their verdict of guilt – facts of which we were aware from interviewing this and other jurors. Unfortunately, but correctly, the State objected to the juror testifying pursuant to Tenn. R. Evid. 606(b) and the trial court sustained the objection. As noted by Mr. Guilfoy in his complaint, I continued to argue to the trial court the necessity, based on the previous ruling of the Court of Criminal Appeal, of the juror's testimony to demonstrate the prejudice of the erroneous admission of the recordings as well as the prejudice from his trial counsel's failure to object to their admission. I am certain I intended to appeal this ruling but, as noted above, after much research, could find no authority supporting a diversion from Tenn R. Evid. 606(b).

Finally, regarding my subsequent employment with the District Attorney's Office, I had initially been offered a position there in the fall of 2014 – shortly after Glenn Funk (a friend and colleague with whom I had collaborated on cases from time to time when he was also in private practice as a criminal defense lawyer) was elected District Attorney. Mr. Funk was the only person in the DA's office with whom I had any discussions regarding employment and we never discussed Mr. Guilfoy's case or any other of my clients. It is very safe to assume that Mr. Funk did not know anything of Mr. Guilfoy's case – it having proceeded all the way through post-conviction proceedings and on to the appellate level (where it would be handled, not by the DA's office but, rather, by the office of Attorney General) before he ever took office. I did not start employment there until after the filing of Mr. Guilfoy's brief and nothing about the prospect of my employment there detracted from the work I did on Mr. Guilfoy's case. I continued to work diligently and zealously for all of my clients up until the time I actually started work in the DA's office on March 2, 2015.

In sum, there was no conflict of interest during my representation of Mr. Guilfoy. Moreover, the decision to not include the issue of which he complains was based on there not being any authority for a good faith argument in support of it. I still believe that Mr. Guilfoy should have been granted a new trial and I also believe that I did all I could to get that result.

If there other questions that I can answer or any other way I can be of assistance please let me know. Thank you.

Sincerely,

James O. Martin, III

cc: Timothy Patrick Guilfoy – 499702
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